APPENDIX

In the Court of Criminal Appeals of Texas

No. PD-0514-24

MICHAEL DONELL GLOVER, *Appellant*

v.

THE STATE OF TEXAS

On State's Petition for Discretionary Review
From the Fifth Court of Appeals
Kaufman County

YEARY, J., delivered the opinion of the Court in which SCHENCK, P.J., and WALKER, FINLEY, and PARKER, JJ., joined. WALKER, J., filed a concurring opinion in which SCHENCK, P.J., and FINLEY and PARKER, JJ., joined. RICHARDSON and NEWELL, JJ., concurred in the result. KEEL and MCCLURE, JJ., dissented.

Can a pocketknife be a deadly weapon? For present purpose, a "deadly weapon" is "anything that in the manner of its use or intended

use is capable of causing death or serious bodily injury." TEX. PENAL CODE § 1.07(a)(17)(B). The court of appeals in this case found that, "[e]ven when viewed in the light most favorable to the verdict, nothing in the State's evidence sufficiently support[ed] either a direct or inferential conclusion that the manner of [Appellant's] use or intended use of the pocketknife made it capable of causing death or serious bodily injury." *Glover v. State*, No. 05-23-00571-CR, 2024 WL 2763658, at *3 (Tex. App.—Dallas May 30, 2024) (mem. op., not designated for publication); *see* TEX. PENAL CODE § 29.03(a)(3) (providing that "[a] person commits an offense if he commits robbery . . ., and he . . . uses or exhibits a deadly weapon"). We disagree and will reverse.

I. FACTS AND PROCEDURAL POSTURE

At about 6:00 a.m. on January 10, 2022, Appellant was observed in a Buc-ee's convenience store, in Terrell, completely filling up a Buc-ee's soft-side cooler with, among other things, dozens of cigarette packs. When he left the store without paying for either the cigarettes and other items, or for the cooler, an employee, Delbert DeWayne Parks, followed him outside and requested that he return the merchandise. Appellant replied, "Just let me go." Parks testified that "it came to a point where we both stopped[.]"

At this point, Parks "grabbed" what he called "the duffel bag" and tried to wrest it from Appellant. Again, he urged Appellant to relinquish control of the cooler, but Appellant replied, "Let me have it." At about this same time, as they struggled for the cooler, Appellant reached for his pocket.

Uncertain of what Appellant might retrieve, Parks said, "Don't do

that, dude." And when Parks could tell that Appellant had pulled a knife from his pocket, he told Appellant, "Dude, I'll fuck you up." Notwithstanding this bravado, once Appellant had "brandished the weapon[,]" Parks became fearful that Appellant would "cut" him. But Appellant instead began to cut the nylon strap to the soft-side cooler, keeping the knife "close to him" as he did so. As they continued to struggle for possession of the cooler, and as Appellant continued cutting the strap, Appellant apparently noticed Parks' name tag, and he said, "Come on, DeWayne." At this point, fearful of the knife, Parks let go of the cooler and backed away.

On cross-examination, Parks could not describe the knife in any detail, but he had "no doubt" it was a knife. He knew it was sharp enough to successfully cut through the nylon strap. Parks confirmed that Appellant did not at any time swing the knife at him or point it at him. Nor did Appellant pursue Parks once Parks had relinquished possession of the cooler.

When Appellant was arrested a short time after the robbery, police recovered a folding knife from his back pocket. The knife had a blade that was "roughly two, maybe three inches long[.]" Such a knife, one of the arresting officers opined, could "kill somebody[.]" The other arresting officer described the knife as "pretty sharp" and "very pointed," and he also opined that such a knife could be a deadly weapon. The knife itself was introduced into evidence.

The jury convicted Appellant of aggravated robbery as charged in the indictment—that is, the use or exhibition of a deadly weapon, to wit: a knife, while committing robbery by intentionally or knowingly

threatening or placing Parks in fear of imminent bodily injury or death. TEX. PENAL CODE §§ 29.03(a)(2), 29.02(a)(2). Appellant pled "true" to two enhancement counts, and the trial court sentenced him to life imprisonment. He appealed.

Appellant's single point of error on appeal was a challenge to the legal sufficiency of the State's evidence to prove the aggravating element of use or exhibition of the knife as a deadly weapon. The court of appeals sustained this point of error. *Glover*, 2024 WL 2763658, at *3–4. It concluded that:

> nothing in [A]ppellant's words or actions would permit a jury to rationally infer that he had any intention of using the pocketknife to inflict death or serious bodily injury. Given the absence of evidence rationally supporting the jury's finding that [A]ppellant's use or intended use of the pocketknife to cut the cooler's straps could cause death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ, we conclude the evidence is legally insufficient to support the aggravating element of [A]ppellant's conviction.

Id. at *3. Accordingly, the court of appeals reformed Appellant's judgment to reflect conviction for the lesser-included offense of robbery, reversed his life sentence, and remanded the case to the trial court for resentencing. *Id.* at *4.

II. THE APPLICABLE STATUTES

As alleged in this case, a person commits robbery "if, in the course of committing theft as defined in Chapter 31 [of the Texas Penal Code] and with intent to obtain or maintain control of the property, he . . . intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." TEX. PENAL CODE § 29.02(a)(2). The

robbery offense is "aggravated," and thus boosted from a second-degree felony to a first-degree felony, "if [the person] commits robbery as defined in Section 29.02, and he . . . uses or exhibits a deadly weapon[.]" TEX. PENAL CODE § 29.03(a)(2). "[D]eadly weapon" is defined in the Penal Code as, among other possible options, "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE § 1.07(a)(17). "Serious bodily injury[,]" in turn, "means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." TEX. PENAL CODE § 1.07(a)(46).

The question in this case is whether the evidence was sufficient to prove that Appellant used or exhibited a deadly weapon in the course of intentionally or knowingly threatening or placing Parks in fear of imminent bodily injury or death. The Court has often said that "[a] knife is not a deadly weapon per se." *E.g.*, *Brown v. State*, 716 S.W.2d 939, 946 (Tex. Crim. App. 1986) (citing *Blain v. State*, 647 S.W.2d 293, 294 (Tex. Crim. App. 1983)). What the Court has meant by this is that implements such as utility knives, straight razors, pocketknives, and even butcher knives, which are *not* manifestly *designed* or even, of themselves, *adapted* for the purpose of causing death or serious bodily injury to persons, "do not qualify as deadly weapons" under Section 1.07(a)(17)(A) of the Penal Code. *See McCain v. State*, 22 S.W.3d 497, 502–03 (Tex. Crim. App. 2000) (citing *Thomas v. State*, 821 S.W.2d 616, 619–20 (Tex. Crim. App. 1991)) ("Apparently, what we now sometimes mean by the expression ['deadly weapon per se'] is any object meeting the definition

set out in" what is now Section 1.07(a)(17)(A) of the Penal Code).

Thus, the court of appeals did not err to examine the evidence presented here to determine whether it was legally sufficient to establish that the pocketknife in this case constituted a deadly weapon under the *alternative* definition found in Section 1.07(a)(17)(B): whether, in the manner of its use or intended use, it was capable of causing death or serious bodily injury. *Glover*, 2024 WL 2763658 at *2. But in asking itself whether the evidence was sufficient to satisfy this alternative definition, the court of appeals focused almost exclusively on evidence relating to the most obvious aspect of Appellant's use of the pocketknife when he wielded it, namely, to cut the cooler strap.

In our view, however, under the circumstances of this case, a rational jury could find that cutting the cooler strap was not the *only* use or intended use to which Appellant put the knife.[1] The jury in this case could also have rationally concluded that Appellant used and/or exhibited the pocketknife with the additional intent to persuade Parks that, if he did not let go of the cooler, Appellant might use it against him in a way that was capable of causing serious bodily injury, if not death. And that, we conclude, is sufficient.

III. Analysis

In *McCain v. State*, 22 S.W.3d 497, 502–03 (Tex. Crim. App. 2000), this Court identified a "two-step process" that reviewing courts

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[1] "When reviewing the record for legal sufficiency, we consider the combined and cumulative force of all admitted evidence and reasonable inferences therefrom in the light most favorable to the verdict to determine whether a jury was rationally justified in finding guilt beyond a reasonable doubt." *Johnson v. State*, 509 S.W.3d 320, 322 (Tex. Crim. App. 2017) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)).

should use to analyze whether a knife (or any other object) has been shown to be a deadly weapon. The Court explained there that, "the question first arises: Could the object [here, a pocketknife] be a deadly weapon under the facts of the case? If that question is answered in the affirmative, then we would have occasion to ascertain whether that object was used or exhibited during the offense." *Id.* at 502. We shall conduct these inquiries in turn.

A. Could the Pocketknife Be a Deadly Weapon under the Facts of this Case?

In answering this first question, we do not ask whether the implement, in the manner of its use or intended use during the robbery, *actually* caused death or serious bodily injury. *Id.* at 503. Instead, "[t]he placement of the word "capable" in [Section 1.07(a)(17)(B)] enables the statute to cover conduct that threatens deadly force, even if the actor has no intention of actually using deadly force." *Id.* (citing *Tisdale v. State*, 686 S.W.2d 110, 114–15 (Tex. Crim. App. 1985) (op. on reh'g)). Indeed, "the defendant need not have actually inflicted harm on the victim." *Johnson v. State*, 509 S.W.3d 320, 323 (Tex. Crim. App. 2017).

Instead, in deciding whether the knife in question was *capable* of causing death or serious bodily injury, this Court has said:

> we consider words and other threatening actions by the defendant, including the defendant's proximity to the victim; the weapon's ability to inflict serious bodily injury or death, including the size, shape, and sharpness of the weapon; and the manner in which the defendant used the weapon. * * * These, however, are just factors to guide a court's sufficiency analysis; they are not inexorable commands.

Id. Moreover, in determining whether a knife is a deadly weapon under

the facts of a given case, the Court has said, "a factfinder should consider its *intended* use from the attitude indicated by the perpetrator." *Tisdale*, 686 S.W.2d at 117 (Clinton, J., concurring on reh'g):

> When a suspect acts in a way that shows his purpose is to convey to his victim that he will thwart resistance to a taking by using the knife to harm the person of the victim, he *intends* for the victim to believe that the knife is capable of producing serious bodily injury or death to obtain the money, and the factfinder is warranted in concluding that the knife is capable of causing death or serious bodily injury.

Id. (Clinton, J., concurring on reh'g) (internal brackets, quotation marks and citations omitted).

In *McCain* itself, the near-unanimous Court determined that, under the particular circumstances of that case, "the mere carrying of a butcher knife" that was plainly visible in, but never removed from, the defendant's back pocket as he violently assaulted the victim "was legally sufficient for a factfinder to conclude that the 'intended use' for the knife was that it be capable of causing death or serious bodily injury." 22 S.W.3d at 503. "In other words," as we described *McCain*'s analysis in *Flores v. State*:

> it was reasonable for the factfinder to conclude that the only reason McCain carried a butcher knife in his back pocket during his violent attack on the victim was that he intended to use the knife to stab the victim if he needed to do so to facilitate his crime.

620 S.W.3d 154, 159 (Tex. Crim. App. 2021). Indeed, it did not even matter to our bottom line in *McCain*, we also observed in *Flores*, that "the defendant never made any verbal threat to use the knife." *Id.*

In the instant case, several police officers testified that the pocketknife Appellant produced in this case was both "sharp" and "pointed," and, at least hypothetically, capable of causing death or serious bodily injury. Of course, "under the first step in *McCain*, the question is not whether the object 'could' possibly be a deadly weapon under a hypothetical scenario. Instead, it is whether the object 'could be a deadly weapon *under the facts of the case.*'" *Id.* at 158 (quoting *McCain*, 22 S.W.3d at 502).

Here, the pocketknife was before the jury, and the jurors could see for themselves that it had a blade of between two and three inches long. A knife blade of this length has been found by this Court to be a deadly weapon under certain circumstances. *See Tisdale*, 686 S.W.2d at 111 (op. on orig. subm.) (observing that the knife in issue "was shown to have a blade length of two and one-fourth inches"). And Appellant pulled out the pocketknife while he was struggling with Parks for possession of the soft-side cooler.

Given their close quarters, the potential threat to Parks was not diminished by the fact that evidence showed that Appellant kept the knife close to his own body. Also, although Appellant made no overt threat or gesture to actually use the pocketknife to cut Parks, the jury could rationally have found that a threat to do so was at least implicit in Appellant's repeated entreaties for Parks to, *e.g.*, "Just let me go," and "Let me have it," before pulling out the pocketknife, together with his statement, "Come on, DeWayne," once the pocketknife was out and visible. The jury could readily have concluded that Appellant's intention was to convey to Parks a willingness, however reluctantly, to use the

pocketknife "if he needed to do so to facilitate his crime." *Flores*, 620 S.W.3d at 159.

Nor does the fact that Appellant in fact used the pocketknife for the non-deadly purpose of cutting the nylon strap of the soft-side cooler necessarily mean that this was his only intended use for it, as the court of appeals seems to have believed. *Glover*, 2024 WL 2763658, at *3. A rational jury might readily have found that an intent to use the pocketknife to intimidate Parks into releasing the cooler could coexist with an intent to cut the strap. Indeed, the fact that the pocketknife proved sharp enough to cut through the strap likely contributed to a jury finding that it was dangerous enough, in the course of the scrum, to cause Parks actual, not just hypothetical, serious bodily injury. We cannot say that such a finding would have lacked rational evidentiary support under the circumstances.

B. Did Appellant "Use or Exhibit" the Pocketknife?

Having determined that the evidence was legally sufficient to support a jury finding that the pocketknife was, in the manner of its use or intended use, a deadly weapon, we turn to the second step of the *McCain* analysis: whether Appellant "used or exhibited" the pocketknife during the robbery. *McCain*, 22 S.W.3d at 503. We said in *McCain* that "a person 'uses or exhibits a deadly weapon' under the aggravated robbery statute if he employs the weapon in any manner that 'facilitates the associated felony.'" *Id.* at 502 (quoting *Patterson v. State*, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989)). "Had the knife been completely concealed by [McCain's] clothing," we observed, "additional facts would have been needed to establish that the butcher knife was used." *Id.* at

503.

> But the knife was partially exposed, and from that exposure, the factfinder could rationally conclude that the knife was exhibited during the criminal transaction, or at least, that its presence was used by [McCain] to instill in the complainant apprehension, reducing the likelihood of resistance during the encounter.

Id. Thus, McCain "used" the butcher knife inasmuch as its use, even if only to intimidate the victim, "facilitate[d] his commission of the robbery. *Id.*

Likewise, the jury in this case could rationally have concluded that Appellant's display of the pocketknife—regardless of whether he actually "brandished" it, as Parks asserted at one point—constituted a "use or exhibition" of it "to instill in the complainant apprehension, reducing the likelihood of resistance" to his escaping with the stolen merchandise. And once again, the fact that Appellant actually employed the pocketknife to sever the nylon strap of the soft-side cooler does not detract from the rationality of a jury finding that he also "used or exhibited" it for the purpose of convincing Parks that it was in his best interest to abandon the cooler and let Appellant escape with it.

IV. Conclusion

The court of appeals erred to conclude that the evidence was insufficient to prove the aggravating element of Appellant's conviction for aggravated robbery. We reverse the court of appeals' judgment and reinstate the judgment of the trial court.

DELIVERED: April 16, 2025
PUBLISH

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0514-24

MICHAEL DONELL GLOVER, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIFTH COURT OF APPEALS KAUFMAN COUNTY

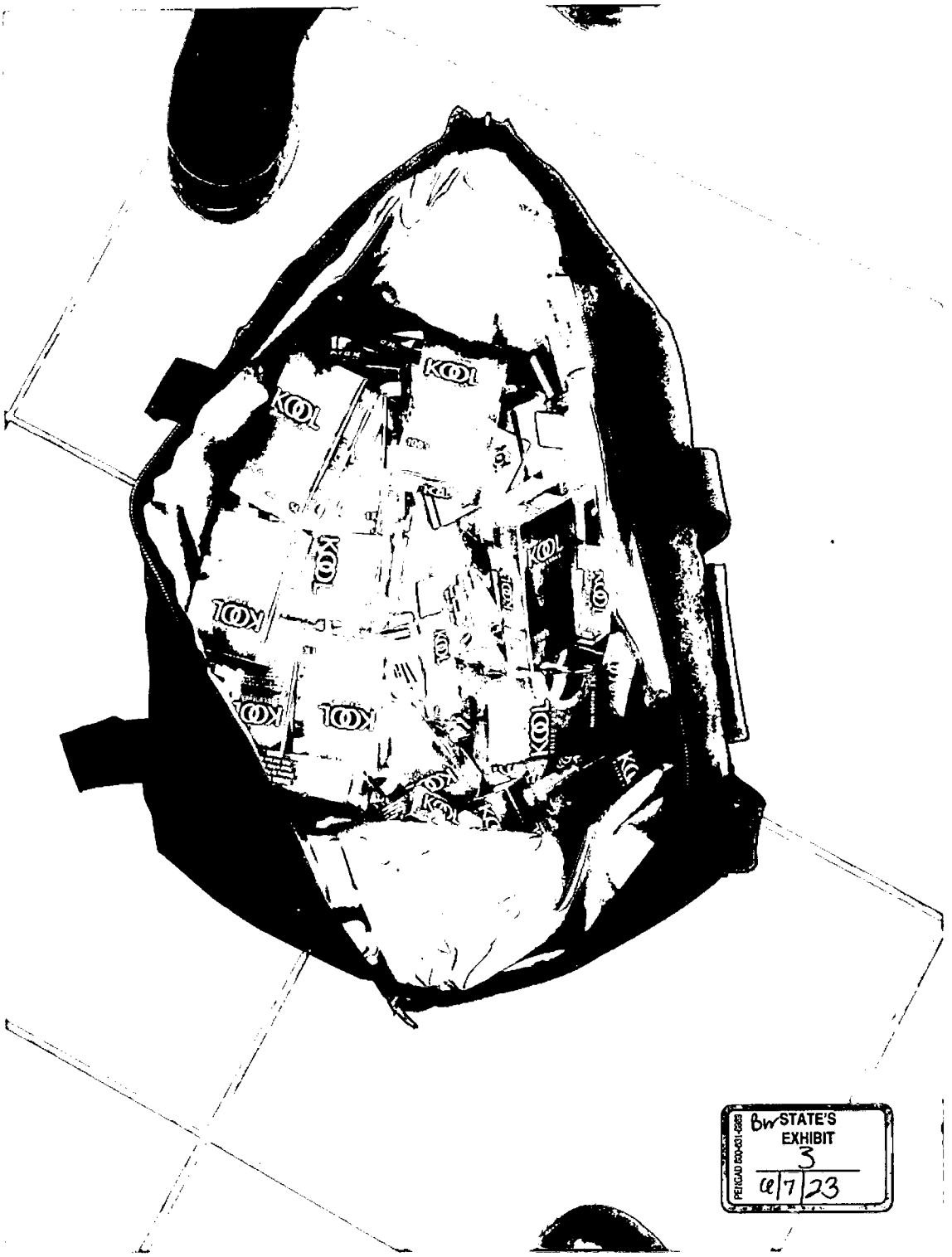
WALKER, J., filed a concurring opinion, in which SCHENCK, P.J., and FINLEY and PARKER, JJ., joined.

CONCURRING OPINION

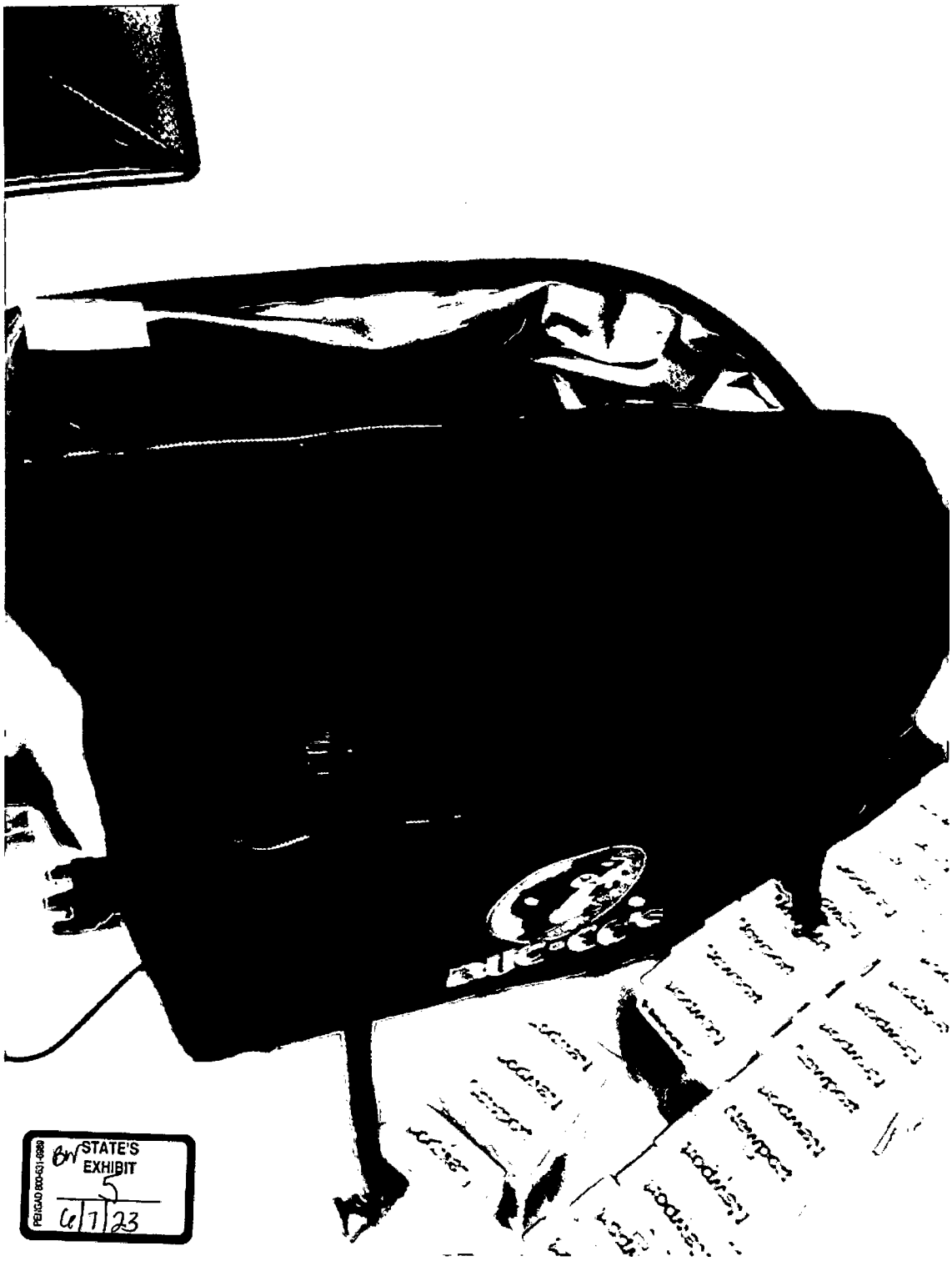
I agree with the Court that the evidence was sufficient to support Appellant Michael Donell Glover's conviction for aggravated robbery with a deadly weapon, namely, his pocket knife. A pocket knife, although not "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury," can be something "that in the manner of its use or intended use is capable of causing death or serious bodily injury." *See* TEX. PENAL CODE Ann. § 1.07(a)(17).

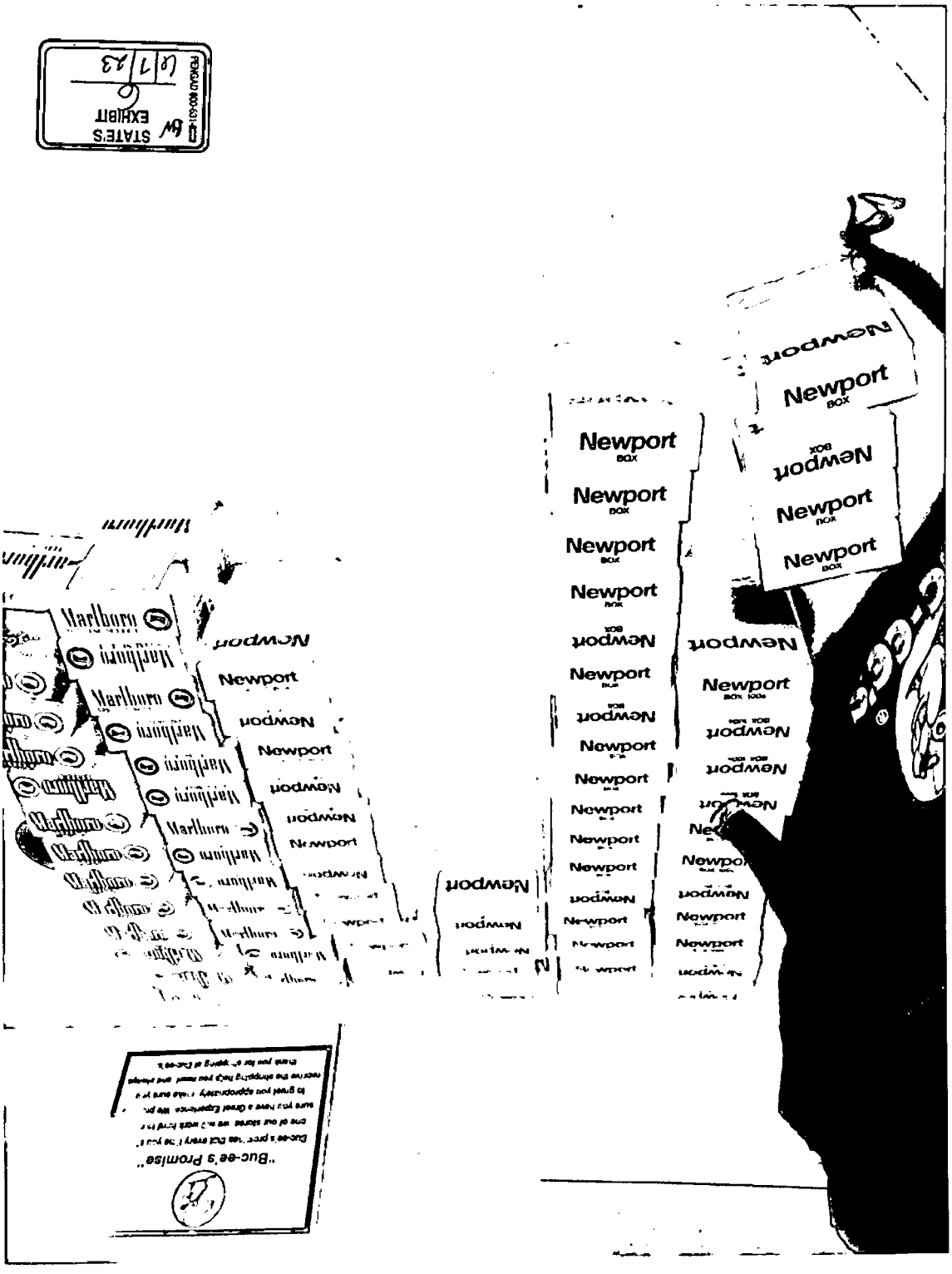
I write separately because Appellant's "use" of the knife is somewhat confusing. Rather than point the knife at the complainant Parks and directly threaten him to let Appellant go with the stolen Buc-ee's bag, Appellant used his knife to cut the strap of the bag. Indeed, Parks testified that Appellant did not point his knife at him or swing the knife at him. But Parks's testimony is unclear about what Appellant did with the knife aside from cut the strap. There was no explanation how cutting the strap would have helped Appellant steal the bag, nor is there an explanation about how the cutting was done. How close were Appellant and Parks while Appellant was cutting the bag? Was Appellant carefully cutting the strap with the tip and blade pointed at himself? Or was he cutting the strap with the blade towards Parks? How close did the knife get to Parks? These questions are important because how the knife was used could make a difference in whether his pocket knife was, "in the manner of its use or intended use . . . capable of causing . . . serious bodily injury."

The Buc-ee's surveillance footage does not shed light on the answer. Although the video clearly captured Appellant arriving at the Buc-ee's, the theft inside of the store, his leaving the store and Parks's pursuit, and Appellant's eventual return to his car, the video unfortunately does not capture the encounter between Appellant and Parks. But it can be pieced together from the photographs of the bag. State's Exhibits 3, 4, 5, 6, and 8 show the Buc-ee's bag and the cut strap:



STATE'S EXHIBIT 4 6/7/23


STATE'S
EXHIBIT
5
6/7/23


Newport
Marlboro
"Buc-ee's Promise"


OVOL
OVOL
OVOL
STATE'S EXHIBIT
8
6/7/23

From the photographs of the Buc-ee's bag, the strap that was cut is not a longer shoulder strap; instead, the strap that is cut is one of two hand straps on each side of the bag. The hand strap is not very large, only running across a portion of the side of the bag. Although Parks did not explain specifically how Appellant used the knife, if Appellant and Parks were each holding one of the straps, then Appellant's act of cutting the hand strap held by Parks would have necessarily put Appellant's knife close to Parks's hand.

What if Appellant and Parks were each holding separate straps, and Appellant cut the strap that *he* was holding? Cutting the strap that he was holding would have been counter-productive towards facilitating the theft of the bag because it would have given Parks an intact strap to hold and left Appellant with a damaged strap. And if Appellant and Parks were holding on to the same strap of the bag, the knife would have been in even closer proximity to Parks's hand. It may have been one thing if the strap Appellant used his knife to cut was a long shoulder strap on the end closest to himself. But Appellant cut a hand strap towards the middle of the strap close to where Parks's hand must have been. Certainly, if the knife was capable of cutting a nylon strap, it was capable of cutting Parks's hand.

I believe the evidence is therefore sufficient to show a deadly weapon from the knife's "manner of use," even if Appellant's only intended use of the knife was to cut the strap. Assuming that the "intended use" was solely to cut the strap and not to threaten Parks, cutting the strap right next to Parks's hand was certainly "capable of causing . . . serious bodily injury."

With these thoughts, I join the opinion of the Court.

Filed: April 16, 2025
Publish

COURT OF APPEALS JUDGMENT

Reversed in part, modified in part, affirmed as modified, and remanded and Opinion Filed May 30, 2024

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-00571-CR

MICHAEL DONELL GLOVER, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 86th Judicial District Court
Kaufman County, Texas
Trial Court Cause No. 22-50009-86-F

MEMORANDUM OPINION

Before Justices Partida-Kipness, Reichek, and Carlyle
Opinion by Justice Carlyle

A jury convicted appellant Michael Donnell Glover of aggravated robbery and the court sentenced him to life in prison. In a single issue, appellant argues the evidence is legally insufficient to support the jury's finding that he displayed or used his pocketknife in a manner that established his intent to use it to cause death or serious bodily injury. We reverse in part, modify in part, affirm the trial court's judgment as modified, and remand for further proceedings consistent with this opinion.

The indictment alleged appellant committed aggravated robbery and that he, "while in the course of committing theft of property and with intent to obtain or maintain control of said property, intentionally and knowingly place[d] Delbert Dewayne Parks in fear of imminent bodily injury or death, and the defendant did then and there use or exhibit a deadly weapon, to-wit: a knife." *See* TEX. PENAL CODE § 29.03(a). "'Deadly weapon' means . . . anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE § 1.07(a)(17)(B). Serious bodily injury "means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." TEX. PENAL CODE § 1.07(a)(46).

The evidence presented at trial shows appellant walked into a Buc-ee's store in Terrell, Texas with empty hands on January 10, 2022, appellant hid behind a counter while placing various items into a soft-sided cooler, appellant walked out of the store carrying a soft-sided cooler, the cooler and the items inside were worth $728.91, and appellant did not pay for the cooler or the items inside. A store associate named Delbert Dewayne Parks followed appellant out of the store and requested the return of the store's property; in response, appellant said, "Just let me go." Parks then grabbed the cooler and instructed appellant to return the store's property; in response, appellant said, "Let me have it."

During the struggle over the cooler, appellant produced a pocketknife. Parks testified that he thought appellant might cut him, that he did not know what was going to happen next, and that he told appellant, "Dude, I'll fuck you up." Despite this threat, appellant did not swing the knife or point it at Parks; instead, he kept the knife close to his own body and simply said, "Come on, Dewayne" as he used the knife to cut the strap on the cooler. Parks then released the cooler and returned to the store empty handed.

We review evidentiary sufficiency under the *Jackson v. Virginia* standard. *See Brooks v. State*, 323 S.W.3d 893, 894, 901–02 (Tex. Crim. App. 2010). We review all the evidence and reasonable inferences therefrom in the light most favorable to the verdict to determine whether a jury could rationally find guilt beyond a reasonable doubt. *See Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013).

When addressing a challenge to the sufficiency of the evidence, we consider whether, after viewing all the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Zuniga v. State*, 551 S.W.3d 729, 732 (Tex. Crim. App. 2018). We examine each case on its own facts to determine whether a rational trier of fact could have concluded from the surrounding circumstances that appellant used an instrument as a deadly weapon. *Johnson v. State*, No. 05-21-00363-CR, 2022 WL 2865876, at *3 (Tex. App.—Dallas July 21, 2022, no pet.) (mem. op.).

Appellant's pocketknife was not a deadly weapon per se. *See Thomas v. State*, 821 S.W.2d 616, 619 (Tex. Crim. App. 1991). Where, as here, the evidence does not show that a knife caused death or serious bodily injury, the State must produce evidence that the knife: (1) is capable of causing serious bodily injury; and (2) was displayed or used in a manner that establishes the intent to use it to cause death or serious bodily injury. *See Johnson*, 2022 WL 2865876, at *3. To determine whether a knife is a deadly weapon in the manner of its use or intended use, we consider "words and other threatening actions by the defendant, including the defendant's proximity to the victim; the weapon's ability to inflict serious bodily injury or death, including the size, shape, and sharpness of the weapon; and the manner in which the defendant used the weapon." *Johnson v. State*, 509 S.W.3d 320, 323 (Tex. Crim. App. 2017); *see also Thomas*, 821 S.W.2d at 619 (also examining the nature of wounds the knife inflicted).

Evidence at trial conclusively shows appellant carried a common pocketknife with a blade that is approximately two or three inches long, "very pointed," sharper than a butter knife, and sharp enough to cut a soft-sided cooler's nylon straps. The State also introduced testimony that appellant could have used his pocketknife as a deadly weapon, especially if he had attacked complainant's eyes or throat. We agree. Further, the evidence shows appellant and Parks were close enough to one another that they could both hold onto the cooler and struggle for control over it, that appellant did not threaten the complainant with words or conduct, that appellant

caused no wounds to complainant, and that appellant caused no wounds to anyone with the pocketknife. Instead, appellant used the knife to cut the strap on the cooler.

This Court has previously held a defendant did not display a knife or use it in a manner that established an intent to cause death or serious bodily injury under comparable circumstances. *See Lockett v. State*, 874 S.W.2d 810, 813 (Tex. App.—Dallas 1994, pet. ref'd) (op. on reh'g) (defendant robbed complainant, used a knife to cut complainant's purse strap, and cut complainant's fingers in the process). There, we held that "the evidence must show some assertive conduct demonstrating an intent to inflict serious bodily injury or death" and observed (1) appellant made no verbal threats; (2) nothing indicated appellant slashed at complainant or brandished the knife to threaten complainant; and (3) the only evidence of appellant's intent was the complainant's testimony that he intended to rob her. *Id.* at 815–16. As a result, we held the surrounding circumstances did not support an inference that appellant intended to use the knife to inflict serious bodily injury or death and that no reasonable fact finder could have found beyond a reasonable doubt that appellant used or exhibited a deadly weapon as alleged in the indictment. *Id.* at 816.

Similarly, we conclude the State failed to present sufficient evidence that appellant intended a violent use of the pocketknife—one that would be at least capable of causing death or serious bodily injury. *See Flores v. State*, 620 S.W.3d 154, 160 (Tex. Crim. App. 2021) (although an officer testified that the drill at issue

"could theoretically be used to bludgeon someone, nothing in Appellant's words or actions would permit a jury to rationally infer that he had any intention of using the drill in that manner."). Specifically, there is no evidence appellant hurt anyone, threatened anyone, slashed at anyone, or brandished his pocketknife in a threatening manner towards anyone. *See Lockett*, 874 S.W.2d at 813. Instead, appellant kept the knife close to himself, cut the strap on a cooler so that Parks could no longer hold onto it, and, simply said: (1) "Just let me go"; (2) "Let me have it"; and (3) "Come on, Dewayne."

Further, the only evidence of appellant's alleged intent is Parks' uncorroborated testimony. *Lockett*, 874 S.W.2d at 816. Parks followed appellant out of the store and into the field. There, as the two were "tuggling" over the bag, Parks warned appellant "Don't do it" as he reached in his pocket and pulled out a knife, and then once the knife was out, it was Parks who said, "Dude, I'll fuck you up." Parks said he "thought [appellant] was gonna cut me or something. I didn't know . . . . I didn't know what he was gonna do." He agreed with the prosecutor's leading question, "you were fearful that [appellant] was gonna cut you," responding, "Yes, when I seen that he had a weapon." Parks said appellant "just wanted to – me to leave him alone." Parks further tried to explain on recross: "Well, I'm assuming when he pulled the knife out, that was threatening. I don't pull knives out on people. So I saw that as threatening, but other than that, yeah."

COA

Parks recounted: "he said, 'Come on, Dewayne' as he was cutting the strap" and explained that appellant kept the knife close to himself while he was "cutting me away from it basically so he can take possession of it." Parks concluded, explaining that he heard his manager calling him back, and stating "I was in danger. So I just backed away from him." Parks said appellant "did not swing the knife," never pointed it at him "in any way, no," and that Parks backed away once appellant cut the strap. Appellant never pursued Parks.

Even when viewed in the light most favorable to the verdict, nothing in the States' evidence sufficiently supports either a direct or inferential conclusion that "the manner of [appellant's] use or intended use" of the pocketknife made it capable of causing death or serious bodily injury. *See Blain v. State*, 647 S.W.2d 293, 294 (Tex. Crim. App. 1983) (evidence insufficient to support a deadly weapon finding where appellant displayed "something like a kitchen knife" that was about six inches long during a robbery, the complainant was afraid appellant was going to stab her, and appellant did not attempt to stab the complainant); *Flores*, 620 S.W.3d at 160 (where appellant "neither threatened nor took any action to hurt anyone with the drill."). Further, nothing in appellant's words or actions would permit a jury to rationally infer that he had any intention of using the pocketknife to inflict death or serious bodily injury. Given the absence of evidence rationally supporting the jury's finding that appellant's use or intended use of the pocketknife to cut the cooler's straps could cause death, serious permanent disfigurement, or protracted loss or

impairment of the function of any bodily member or organ, we conclude the evidence is legally insufficient to support the aggravating element of appellant's conviction. *See* TEX. PENAL CODE § 1.07(a)(46); *Blain*, 647 S.W.2d at 294. Thus, we sustain appellant's sole point on appeal.

Under the circumstances, we conclude outright acquittal is improper because other than the aggravating element, the State has proved the essential elements of robbery beyond a reasonable doubt. *See Flores*, 620 S.W.3d at 161; TEX. PENAL CODE § 29.02(a)(2), (b). Appellant does not contend otherwise. Accordingly, we reform the judgment to a conviction for the second-degree felony offense of robbery, reverse appellant's life sentence, affirm the trial court's judgment as modified, and remand for further proceedings consistent with this opinion, including re-sentencing.

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)
230571F.U05

TEXAS COURT OF CRIMINAL APPEALS OPINION

STATE PDR

Cause No. 05-23-00571-CR

To the Court of Criminal Appeals
Of the State of Texas

Michael Donnell Glover,
Appellant

v.

The State of Texas,
Appellee

Appeal from Kaufman County, Texas

The State's Petition for Discretionary Review

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Attorney for the State
State of Texas

IDENTITY OF JUDGE, PARTIES, & COUNSEL

- The parties to the trial court's judgment are the State of Texas and Appellant, Michael Donnell Glover.
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- Trial counsel for Appellant was Michael Ray Harris, 6060 N. Central Expressway, Suite 500, Dallas, Texas 75206.
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MICHAEL DONNELL GLOVER,

APPELLANT

V.

THE STATE OF TEXAS,

APPELLEE

Appeal from Kaufman County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Kaufman County District Attorney, Erleigh Wiley respectfully urges this Court to grant discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument.

STATEMENT OF THE CASE

A jury convicted Appellant of aggravated robbery[1] using a pocket knife. The jury found both enhancement paragraphs true, and sentenced Appellant to Life and

[1] In this case, the State had to prove that Appellant, while in the course of committing theft, intentionally or knowingly threaten or place another in fear of imminent bodily injury or death and use a deadly weapon. TEX. PENAL CODE §§ 29.01(a)(2), 29.03(a)(2).

no fine. The court of appeals found insufficient evidence that the pocketknife was a deadly weapon.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals reversed the aggravated element of Appellant's robbery conviction, reformed the judgment to reflect a conviction for the lesser-included offense of second-degree robbery, and remanded the case to the trial court for further proceedings. *Glover v. State*, No. 05–23–00571–CR, 2024 WL 2763658 (Tex. App.—Dallas May, 30, 2024) (not designated for publication). The State did not seek a rehearing.

STATEMENT OF FACTS

Offense

In January of 2022, Appellant entered the Terrell Buc-ee's, grabbed a soft-sided cooler from the shelf, and filled it with cigarettes and rolls of pennies before leaving the store. R.R. 7:7, 19–22; State's Ex. 1. Lead Supervisor Delbert Dewayne Parks was alerted to the theft and followed Appellant outside, while the store manager called 911. R.R. 7:9, 22–23, 32–33; State's Ex. 1 at 5:58:00–59:33.

As Appellant walked away from the store, Parks repeatedly asked him to return the store's items and told Appellant he could leave if he did so. R.R. 7:34–35. Appellant replied, "Just let me go," and continued walking away. R.R. 7:35.

Appellant and Parks eventually stopped in the middle of an empty field, with Parks standing close to Appellant. R.R. 7:10, 23, 35–37, 41. Appellant was still carrying the bag and Parks attempted to take it from him while saying, "Just give me the stuff. That's all I want. You can go." R.R. 7:36.

While Appellant and Parks were both holding the bag, "kind of tuggling with" it, Appellant put his hand in his pocket. R.R. 7:36–37. Parks believed that Appellant was going to pull something out of his pocket, and he told Appellant, "Don't do that, dude." R.R. 7:36. However, Appellant continued reaching in his pocket and pulled out a pocketknife. R.R. 7:37–38, 42–43.

When Parks saw the knife, he was afraid that Appellant was going to cut him. R.R. 7:37, 47. Although Appellant did not swing or point the knife at him, Parks felt threatened. R.R. 7:45. Both Appellant and Parks were holding on to the bag strap when Appellant cut it. R.R. 7:38, 43, 46. As Appellant cut the strap, he looked Parks in the eye and said, "Come on, Dewayne. Just let me go." R.R. 7:38, 43. Parks still held part of the bag after Appellant sliced the strap. R.R. 7:38. Appellant continued holding the knife, causing Parks to believe he was in danger, so he let go and backed away from Appellant. R.R. 7:39–40, 43.

When Appellant was arrested at the scene, Officers retrieved a pocketknife from his back pocket. R.R. 7:66–67; R.R. 8:14, 34; State's Ex. 2 at 2:05–15. The State introduced the knife at trial. R.R. 8:31; State's Ex. 10. The knife blade was

two to three inches long. R.R. 8:37; State's Ex. 10. Parks and two police officers testified that a two- to three- inch knife blade could cause serious bodily injury. R.R. 7:37, 63, 67–68; R.R. 8:23. One officer testified he believed the pocketknife was a deadly weapon in this case. R.R. 8:23.

Court of Appeals

The court of appeals held the evidence was legally insufficient to support the jury's finding that Appellant displayed or used his pocketknife in a manner that established his intent to use it to cause death or serious bodily injury. *Glover*, 2024 WL 2763658. The court determined that the State failed to establish evidence that Appellant intended a violent use of the pocketknife because "there is no evidence appellant hurt anyone, threatened anyone, slashed at anyone, or brandished his pocketknife in a threatening manner towards anyone." *Id.* at *3 (citing *Lockett v. State*, 874 S.W.2d 810, 813 (Tex. App.—Dallas 1994, pet. ref'd)). Further, the court observed the only evidence of Appellant's intent was the "Parks' uncorroborated testimony." *Id.* at *3. The court reformed Appellant's conviction to robbery, affirmed the judgment as modified, and remanded to the trial court for further proceedings. *Id.* at *4.

GROUND FOR REVIEW

Is the evidence sufficient to support a jury's finding that a two- to three-inch pocketknife is a deadly weapon when it can rationally be determined that it was

capable of causing death or serious bodily injury because Appellant used it to slice through the nylon strap of a bag within inches of Parks' hand?

ARGUMENT

Standard of Review

When reviewing the sufficiency of the evidence to support a conviction, reviewing courts consider the evidence in the light most favorable to the verdict. *Edward v. State*, 635 S.W.3d 649, 655 (Tex. Crim. App. 2021). The verdict will be upheld if any rational trier of fact could have found all the essential elements of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Edward*, 635 S.W.3d at 655. As factfinder, the jury resolves conflicts in testimony, weighs the evidence, and draws reasonable inferences therefrom. *Jackson*, 443 U.S. at 319. Appellate courts defer to the jury's credibility and weight determinations as well as their conflict resolutions. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Reviewing courts determine whether the jury's inferences are reasonable based on the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Sorrells v. State*, 343 S.W.3d 152, 155 (Tex. Crim. App. 2011).

Deadly Weapon Sufficiency Standard

A deadly weapon by "usage" is "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. TEX. PENAL CODE § 1.07(a)(17)(B). The capability requirement is satisfied if the actor intends to use the object in a manner in which it would be capable of causing death or serious bodily injury; conduct that threatens deadly force is sufficient even if the actor does not actually intend to use deadly force. *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000).

Knife as a Deadly Weapon

A knife of any variety is not a deadly weapon *per se*. *Johnson v. State*, 509 S.W.3d 320, 323 (Tex. Crim. App. 2017); *Robertson v. State*, 163 S.W.3d 730, 732 (Tex. Crim. App. 2005); *Denham v. State*, 574 S.W.2d 129, 130 (Tex. Crim. App. 1978). However, a knife can be shown to be deadly through "the manner of its use, its shape and capacity to produce death or serious bodily injury." *Denham*, 574 S.W.2d at 130. A knife's character may be determined from the defendant's words or actions in using or exhibiting a knife. *Herring v. State*, 202 S.W.3d 764, 766 (Tex. Crim. App. 2006); *English v. State*, 647 S.W.2d 667, 669 (Tex. Crim. App. 1983). "[T]he physical proximity of the parties is a factor in determining whether a knife is a deadly weapon." *Brown v. State*, 716 S.W.2d 939, 946 (Tex. Crim. App. 1986). A knife is a deadly weapon when a person uses or exhibits it during a robbery

to threaten or place another in fear of death or imminent bodily injury. *Tisdale v. State*, 686 S.W.2d 110, 114 (Tex. Crim. App. 1985). A knife is not required to wound someone to be considered a deadly weapon. *Denham*, 574 S.W.2d at 130. Nor is expert testimony needed to establish a knife as a deadly weapon. *English*, 647 S.W.2d at 669.

Courts look to the following nonexclusive factors when determining whether a knife is a deadly weapon:

> [W]ords and other threatening actions by the defendant, including the defendant's proximity to the victim; the weapon's ability to inflict serious bodily injury or death, including the size, shape, and sharpness of the weapon; and the manner in which the defendant used the weapon.

Johnson v. State, 509 S.W.3d 320, 323 (Tex. Crim. App. 2017) (citations omitted).

ANALYSIS

Appellant's Manner of Use or Intended Use of Pocketknife

In this case, the court of appeals erred by failing to properly consider Appellant's manner of use of the pocketknife. The evidence shows Appellant used the pocketknife in such a manner that it would be capable of causing death or serious bodily injury. To effectuate the robbery, Appellant used the pocketknife within inches of Parks' hand to slash the stolen bag handle. R.R. 7:36–38, 42, 43, 46, 47. Two police officers testified that a knife could be a deadly weapon, and one of them testified the pocketknife was a deadly weapon in this case. R.R. 7:63; R.R. 8:23.

Parks testified that he and Appellant both held the bag. R.R. 7:37. The record does not reflect where each party held the bag or how close the knife was to Parks' hand. *See generally* R.R. 7. Visual inspection of the recovered bag shows that the sliced strap was akin to a handle or over-the-shoulder-purse strap, rather than a long, cross-body strap. State's Ex. 5. The strap was not sliced close to the body of the bag, but several inches away. State's Ex. 5. Viewing the evidence in the light most favorable to the verdict, a jury could have reasonably inferred that Appellant swung the knife within inches of Parks' hand, and thus the pocketknife was used in a manner capable of causing serious bodily injury.

The court of appeals hyper focuses on Appellant's actual intent (or "intended use", i.e. cutting the strap) when using the pocketknife—to the exclusion of how Appellant actually used the pocketknife ("manner of its use", i.e. swinging the knife within inches of Parks' hand). Simply because Appellant only used the pocketknife to cut the bag strap, does not mean that Appellant did not use it in manner capable of causing death or serious bodily injury.

Instead of examining the evidence introduced at trial, the appellate court focused on testimony that showed that Appellant *could have used* the pocketknife in a more deadly fashion. *Glover*, 2024 WL 2763658 at *2 (relying on testimony that

the pocketknife could have been a deadly weapon if Appellant had attacked Parks' eyes or throat[2]).

Further, the court of appeals condensed Parks' testimony, overlooking the fact that, even after slicing the strap, when Appellant saw that Parks kept hold of part of the bag, Appellant kept the knife out and said, "Come on, Dewayne." R.R. 7:39. At that point, Parks recognized he was not a police officer, was in danger, let go of the bag, and backed away. R.R. 7:39. Appellant's willingness to swing the knife within inches of Parks' hand and his continued "brandish[ing]" of the knife, accompanied with his statement for Parks to "Come on," demonstrates Appellant's intent to use the pocketknife as threat to finally obtain possession of his stolen merchandise. R.R. 7:39.

The court of appeals largely relied on *Lockett v. State*, where the Dallas Court found a pocketknife was not a deadly weapon when the appellant cut the victim's purse strap. *Glover*, 2024 WL 2763658, at *2 (citing *Lockett*, 874 S.W.2d at 813). However, the victim[3] in *Lockett* only saw the knife after the appellant already had possession of her purse and was fleeing with it. *Lockett*, 874 S.W.2d at 816. In the present case, not only was Parks aware that Appellant was reaching for a weapon,

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[2] The court incorrectly attributed this to the State. *Id.* at *2. However, it was Appellant's trial attorney who elicited an officer's agreement that the pocketknife could have been a deadly weapon if "jam[med...] in the throat or eye[.]" R.R. 7:65.

[3] The *Lockett* victim was injured, but this occurred when she "'reached around, and tried to grab [her] purse. When she reached for her purse, '[she] was cut on [her] fingers[.]'" *Lockett*, 874 S.W.2d at 815.

Parks testified that he was in fear for his safety, watched Appellant swing the knife within inches of his hand, and continue to wield it after Appellant cut the strap. Viewing this in the light most favorable to the verdict, a reasonable jury could have found the pocketknife was a deadly weapon beyond a reasonable doubt.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this Petition for Discretionary Review, reverse the decision of the court of appeals, and reinstate Appellant's conviction for aggravated robbery and the sentence assessed by the jury.

Respectfully Submitted,

Erleigh Wiley
Criminal District Attorney
Kaufman County, Texas

By: /s/ Jennifer Ponder
Jennifer Ponder
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CERTIFICATE OF COMPLIANCE

I, the undersigned, certify that this document was produced on a computer using Microsoft Word and contains 2,789 words as determined by the computer

software's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Jennifer Ponder
Jennifer Ponder

CERTIFICATE OF SERVICE

I, the undersigned, certify that on July 1, 2024, I served a copy of the State's Petition for Discretionary Review on the parties listed below by electronic service

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STATE BRIEF ON THE MERITS

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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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Cause No. PD–0514–24

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State's Brief on the Merits

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Appeal from Kaufman County

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STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Kaufman County District Attorney, Erleigh Wiley respectfully urges this Court to grant discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument.

STATEMENT OF THE CASE

A jury convicted Appellant of aggravated robbery[1] using a pocket knife. The jury found both enhancement paragraphs true, and sentenced Appellant to Life and no fine. The court of appeals found insufficient evidence that the pocketknife was a deadly weapon.

ISSUE PRESENTED

Is the evidence sufficient to support a jury's finding that a two- to three-inch pocketknife is a deadly weapon when it can rationally be determined that it was capable of causing death or serious bodily injury because Appellant used it to slice through the nylon strap of a bag within inches of Parks' hand?

SUMMARY OF THE ARGUMENT

The court of appeals erred by concluding that the evidence was legally insufficient to support a deadly weapon finding in an aggravated robbery. The jury found that Appellant used a pocketknife in a manner capable of causing death or serious bodily injury when he used the knife to cut the strap of a bag both he and a salesperson held because the knife sliced the strap within inches of the salesperson's hand and Appellant continued to keep the knife out after cutting the strap. The court

[1] In this case, the State had to prove that Appellant, while in the course of committing theft, intentionally or knowingly threaten or place another in fear of imminent bodily injury or death and use a deadly weapon. TEX. PENAL CODE §§ 29.01(a)(2), 29.03(a)(2).

of appeals decision reforming the judgment to robbery should be reversed, and Appellant's conviction for aggravated robbery should be affirmed.

STATEMENT OF FACTS

Offense

In January of 2022, Appellant entered the Terrell Buc-ee's, grabbed a soft-sided cooler from the shelf, and filled it with cigarettes and rolls of pennies before leaving the store. R.R. 7:7, 19–22; State's Ex. 1. Lead Supervisor, Delbert Dewayne Parks, was alerted to the theft and followed Appellant outside, while the store manager called 911. R.R. 7:9, 22–23, 32–33; State's Ex. 1 at 5:58:00–59:33.

As Appellant walked away from the store, Parks repeatedly asked him to return the store's items and told Appellant he could leave if he did so. R.R. 7:34–35. Appellant replied, "Just let me go," and continued walking away. R.R. 7:35.

Appellant and Parks eventually stopped in the middle of an empty field, with Parks standing close to Appellant. R.R. 7:10, 23, 35–37, 41. Appellant was still carrying the bag and Parks attempted to take it from him while saying, "Just give me the stuff. That's all I want. You can go." R.R. 7:36.

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When Parks saw the knife, he was afraid that Appellant was going to cut him. R.R. 7:37, 47. Although Appellant did not swing or point the knife at him, Parks felt threatened. R.R. 7:45. Both Appellant and Parks held the bag strap when Appellant cut it. R.R. 7:38, 43, 46. As Appellant cut the strap, he looked Parks in the eye and said, "Come on, Dewayne. Just let me go." R.R. 7:38, 43. Parks still gripped part of the bag after Appellant sliced the strap. R.R. 7:38. Appellant kept the knife out, causing Parks to believe he was in danger, so he let go and backed away from Appellant. R.R. 7:39–40, 43.

When Appellant was arrested at the scene, Officers retrieved a pocketknife from his back pocket. R.R. 7:66–67; R.R. 8:14, 34; State's Ex. 2 at 2:05–15. The State introduced the knife at trial. R.R. 8:31; State's Ex. 10. The knife blade was two to three inches long. R.R. 8:37; State's Ex. 10. Parks and two police officers testified that a two- to three- inch knife blade could cause serious bodily injury. R.R. 7:37, 63, 67–68; R.R. 8:23. One officer testified he believed the pocketknife was a deadly weapon in this case. R.R. 8:23.

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established his intent to use it to cause death or serious bodily injury. *Glover*, 2024 WL 2763658. The court determined that the State failed to establish evidence that Appellant intended a violent use of the pocketknife because "there is no evidence appellant hurt anyone, threatened anyone, slashed at anyone, or brandished his pocketknife in a threatening manner towards anyone." *Id.* at *3 (citing *Lockett v. State*, 874 S.W.2d 810, 813 (Tex. App.—Dallas 1994, pet. ref'd)). Further, the court observed the only evidence of Appellant's intent was the "Parks' uncorroborated testimony." *Id.* at *3. The court reformed Appellant's conviction to robbery, affirmed the judgment as modified, and remanded to the trial court for further proceedings. *Id.* at *4.

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A knife of any variety is not a deadly weapon *per se*. *Johnson v. State*, 509 S.W.3d 320, 323 (Tex. Crim. App. 2017); *Robertson v. State*, 163 S.W.3d 730, 732 (Tex. Crim. App. 2005); *Denham v. State*, 574 S.W.2d 129, 130 (Tex. Crim. App. 1978). However, a knife can be shown to be deadly through "the manner of its use, its shape and capacity to produce death or serious bodily injury." *Denham*, 574

S.W.2d at 130. A knife's character may be determined from the defendant's words or actions in using or exhibiting a knife. *Herring v. State*, 202 S.W.3d 764, 766 (Tex. Crim. App. 2006); *English v. State*, 647 S.W.2d 667, 669 (Tex. Crim. App. 1983). A knife is a deadly weapon when a person uses or exhibits it during a robbery to threaten or place another in fear of death or imminent bodily injury. *Tisdale v. State*, 686 S.W.2d 110, 114 (Tex. Crim. App. 1985). A knife is not required to wound someone to be considered a deadly weapon. *Denham*, 574 S.W.2d at 130. Nor is expert testimony needed to establish a knife as a deadly weapon. *English*, 647 S.W.2d at 669. "[T]he physical proximity of the parties is a factor in determining whether a knife is a deadly weapon." *Brown v. State*, 716 S.W.2d 939, 946 (Tex. Crim. App. 1986).

Courts look to the following nonexclusive factors when determining whether a knife is a deadly weapon:

> [W]ords and other threatening actions by the defendant, including the defendant's proximity to the victim; the weapon's ability to inflict serious bodily injury or death, including the size, shape, and sharpness of the weapon; and the manner in which the defendant used the weapon.

Johnson v. State, 509 S.W.3d 320, 323 (Tex. Crim. App. 2017) (citations omitted).

ANALYSIS

Appellant's Manner of Use or Intended Use of Pocketknife

In this case, the court of appeals erred by failing to properly consider Appellant's manner of use of the pocketknife. The evidence shows Appellant used

the pocketknife in such a manner that it would be capable of causing death or serious bodily injury. To effectuate the robbery, Appellant used the pocketknife within inches of Parks' hand to slash the stolen bag handle and kept it out. R.R. 7:36–38, 42, 43, 46, 47. Two police officers testified that a knife could be a deadly weapon, and one of them testified the pocketknife was a deadly weapon in this case. R.R. 7:63; R.R. 8:23.

Both Parks and Appellant held the bag. R.R. 7:37. However, the record does not indicate where each party held the bag or how close the knife was to Parks' hand. *See generally* R.R. 7. The knife was sharp enough to slice through the bag handle without sawing. Visual inspection of the recovered bag shows that the sliced strap was akin to a handle or over-the-shoulder-purse strap, rather than a long, cross-body strap. State's Ex. 5. The strap was not sliced close to the body of the bag, but several inches away. State's Ex. 5. Thus, Parks and Appellant were well within arm's reach of each other. Viewing the evidence in the light most favorable to the verdict, a jury could have reasonably inferred that Appellant swung the knife within inches of Parks' hand and kept it out, and thus the pocketknife was used in a manner capable of causing serious bodily injury.

The court of appeals hyper focuses on Appellant's actual intent (or "intended use", i.e. cutting the strap) when using the pocketknife—to the exclusion of how Appellant actually used the pocketknife ("manner of its use", i.e. swinging the knife

within inches of Parks' hand). Simply because Appellant used the pocketknife to cut the bag strap, does not prevent a rational jury from finding Appellant used the knife in manner capable of causing death or serious bodily injury. Reasoning otherwise would lead to an absurd result—a defendant who swung a knife in the air intending to kill a fly but injuring a bystander, would not have used a deadly weapon.

Instead of examining the evidence introduced at trial, the appellate court focused on testimony that showed that Appellant *could have used* the pocketknife in a deadlier fashion. *Glover*, 2024 WL 2763658 at *2 (relying on testimony that the pocketknife could have been a deadly weapon if Appellant had attacked Parks' eyes or throat[2]).

Further, the court of appeals condensed Parks' testimony, overlooking the fact that **after** he sliced the strap, when Appellant saw that Parks kept ahold of the bag, Appellant continued brandishing the knife and said, "Come on, Dewayne." R.R. 7:39. At that point, Parks recognized he was still in danger, let go of the bag, and backed away. R.R. 7:39. A rational jury could have found Appellant intended to use his pocketknife as a threat so he could finally obtain possession of the stolen merchandise because: Appellant was willing to swing the knife within inches of

[2] The court incorrectly attributed this to the State. *Id.* at *2. However, it was Appellant's trial attorney who elicited an officer's agreement that the pocketknife could have been a deadly weapon if "jam[med...] in the throat or eye[.]" R.R. 7:65.

Parks' hand, and Appellant continued "brandish[ing]" the knife after he cut the bagstrap while telling Parks to "Come on, Dewaye. Just let me go." R.R. 7:39, 43.

The court of appeals largely relied on *Lockett v. State*, where the Dallas Court found a pocketknife was not a deadly weapon when the appellant cut the victim's purse strap. *Glover*, 2024 WL 2763658, at *2 (citing *Lockett*, 874 S.W.2d at 813). However, the victim[3] in *Lockett* only saw the knife after the appellant already had possession of her purse and was fleeing with it. *Lockett*, 874 S.W.2d at 816. In the present case, not only was Parks aware that Appellant was reaching for a weapon, Parks testified: (1) he was in fear for his safety, (2) watched Appellant swing the knife within inches of his hand, and (3) observed Appellant continue to wield it after Appellant cut the strap.

Viewing this in the light most favorable to the verdict, a reasonable jury could have found Appellant used or intended to use the pocketknife in a manner capable of causing death or serious bodily injury.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reverse the decision of the court of appeals, affirm the deadly weapon element, and reinstate Appellant's conviction for aggravated robbery and the sentence assessed by the jury.

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[3] The *Lockett* victim was injured, but this occurred when she "'reached around, and tried to grab [her] purse. When she reached for her purse, '[she] was cut on [her] fingers[.]'" *Lockett*, 874 S.W.2d at 815.

Respectfully Submitted,

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I, the undersigned, certify that this document was produced on a computer using Microsoft Word and contains 1,963 words as determined by the computer software's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Jennifer Ponder
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CERTIFICATE OF SERVICE

I, the undersigned, certify that on October 11, 2024, I served a copy of the State's Brief on the Merits on the parties listed below by electronic service and that the electronic transmission was reported as complete. My e-mail address is jennifer.ponder@kaufmancounty.net.

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APPELLANT REPLY BRIEF

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CAUSE NO. PD-0514-24

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

MICHAEL DONNELL GLOVER,
Appellant

V.

THE STATE OF TEXAS,
Appellee

APPEAL FROM KAUFMAN COUNTY, TEXAS

APPELLANT'S REPLY BRIEF

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The Appellant Does Not Request Oral Argument

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SUMMARY OF THE ARGUMENT

The evidence was legally insufficient to support the jury's finding that a deadly weapon was used in the commission of a robbery. The Court of Appeals decision to reform the judgment to a conviction for robbery and reverse the Appellant's Life sentence should be affirmed.

STATEMENT OF FACTS

On January 10, 2022, the Appellant entered the Buc-ee's store located in Terrell, Texas. (RR7: 7-8) . He took a soft-side cooler that had the Buc-ee's emblem on it. (RR7: 19-20) (State's Exhibit No. 4). The Appellant then proceeded to go into an area of the store that was closed off. (RR7: 19-20).

The Appellant was observed taking rolls of pennies and different brands of cigarettes and putting them in the Buc-ee's cooler. (RR7: 20-22). He left the store without paying for the soft-side cooler or the items he put in it. (RR7: 22). An employee, Delbert Parks ("Dewayne"), followed the Appellant. (RR7: 22). The night manager, Kayla Liston, called 911 and remained on the line with the police while she walked outside the store. (RR7: 22-23). She watched Dewayne and the

Appellant walk to the street and cross over to the Clearwater Car Wash. (RR7: 23).

When he followed the Appellant out of the store, Dewayne asked the Appellant to "give us our stuff back." (RR7: 34). The Appellant responded, "just let me go." (RR7: 35). Dewayne continued to ask the Appellant for the "stuff back" and the Appellant responded again with "just let me go." (RR7: 35). Dewayne followed the Appellant into a field. When the Appellant stopped, Dewayne grabbed the "duffel bag and tried to get it from him." (RR7: 36). The Appellant refused to let the bag go. (RR7: 36).

While the two were "tuggling" on the bag, the Appellant reached into his pocket. (RR7: 36). Dewayne told the Appellant, "Don't do that, dude. Don't do it." (RR7: 36-37). Dewayne could see that the Appellant was pulling out a knife. (RR7: 37). At this point, both the Appellant and Dewayne were holding onto the duffel bag. (RR7: 37). Dewayne continued to tell the Appellant, "Don't do it." (RR7: 38). The Appellant responded with, "Come on Dewayne" as he started to cut the strap of the duffel bag. (RR7: 38). Dewayne stated that the Appellant kept the knife "close to him" (the Appellant) while he was cutting the strap. (RR7: 38).

Dewayne heard his manager screaming his name and the realization of what was going on caused him to let go of the bag. (RR7: 39). The Appellant was still trying to cut the strap when Dewayne backed away. (RR7: 43). Dewayne stated that the Appellant never swung the knife at him nor pointed the knife at him. (RR7: 43). The Appellant was eventually arrested in the field and a pocketknife was found in his back pocket. (RR8:14) (State's Exhibit No. 10).

The knife was introduced at trial. (RR8: 31). The knife blade was two to three inches long. (RR8: 37). Officer Bridges, the initial officer at the scene, was asked by the State, " Can a knife be a deadly weapon?" He answered, "Yes" (RR7: 63), however, Officer Bridges did not testify to whether the knife found in the Appellant's back pocket was a deadly weapon. (RR7: 63-67). Officer Bridges was not shown the knife nor was he able to describe it. The officer who did find the knife on the Appellant did testify that the knife looked sharp and that it could cause serious bodily injury. (RR8: 32-33).

Court of Appeals

The Court of Appeals held that the evidence was insufficient to support the jury's findings that the Appellant displayed or used the

knife in a manner to show his intent to use it to cause serious bodily injury or death. *Glover*, 2024 WL 2763658. The Court determined the evidence did not support a direct or inferential conclusion that "the manner of [appellant's] use or intended use" of the knife made it capable of causing death or serious bodily injury. *Id.* at *7. The Court further held that "nothing in the Appellant's words or actions would permit a jury to rationally infer that Appellant had any intention of using the pocketknife to inflict death or serious bodily injury." *Id.* at *7. The Court reformed Appellant's conviction to robbery, affirmed the judgement as modified, and remanded to the trial court for further proceedings. *Id* at *8.

ARGUMENT

RESPONSE

The Appellant did not use a pocketknife in a manner capable of causing death or serious bodily injury. The Appellant never verbally threatened the Complainant nor did he point, swing, brandish or wield the knife at the Complainant. The Court of Appeals decision to reform the judgment to robbery should be affirmed.

ANALYSIS

The State's argument that the court of appeals erred by failing to properly consider Appellant's manner of use of the pocketknife in this case is incorrect. The court of appeals did properly consider the Appellant's manner of use of the pocketknife and concluded that it was not used in a manner that was capable of causing death or serious bodily injury.

When the Appellant and Dewayne were in the field "tuggling" over the Bucc-ee's bag, the Appellant reached into his pocket and pulled out a pocketknife. (RR7: 37-38). The Appellant did not point the pocketknife at Dewayne nor threaten him with it. (RR7: 43, 46). The record is clear that the Appellant never swung the knife at the Appellant (RR 7: 43) nor did Dewayne use the words " swung or swinging" to describe the Appellant's actions out in the field that morning. (RR7: 31-47). The State's use of that word in their analysis to describe what happened between the Appellant and Dewayne is misleading.

The State also argues that the Appellant used the pocketknife "within inches of the Complainant's hand to slash" the handle of the

bag[1] and that it could be inferred that the Appellant "swung the knife within inches of Complainant's hand and kept it out."[2] The record is silent as to where each party held the bag, however, Dewayne did testify that the knife was closer to the Appellant (RR7: 38). At no point did Dewayne state that the knife was near him or any part of his body. Furthermore, the Complaint's testimony indicates that the Appellant was still cutting the strap of the bag when Dewayne let go of the bag and walked away. (RR7: 43). There was no "brandishing" of the knife nor "swinging of the knife within inches of the Complainant's hand."[3]

In general, knives, do not qualify as a deadly weapon per se. *McCain v. State*, 22 S.W.3d 497, 502-03 (Tex. Crim. App. 2000); see also *Tucker v. State*, 274 S.W.3d. 688, 691 (Tex. Crim. App. 2008). In determining whether a weapon is deadly, the Courts consider words and other threatening actions by the defendant, including the defendant's proximity to the victim; the weapon's ability to inflict serious bodily injury or death, including the size, shape, and sharpness of the weapon; and the manner in which the defendant used the weapon. *Johnson v.*

[1] State's Brief on the Merits pg. 12
[2] State's Brief on the Merits pg. 12
[3] State's Brief on the Merits pg. 13-14

State, 509 S.W.3d 320, 323 (Tex. Crim. App. 2017).

The State argues that the Court of Appeals "hyper focused" on Appellant's actual use of the pocketknife i.e. cutting the strap than "how the Appellant actually used the pocketknife i.e. swinging the knife within inches of Complainant's hand."[4] As stated before, there is no evidence to support any other manner in which the Appellant used the pocketknife other than to cut the strap of the bag.

The Appellant never threatened Dewayne verbally or made any gestures that would indicate the Appellant intended to harm Dewayne. The only words spoken by the Appellant from the moment he left the store to when Dewayne left him in the field were "Just let me go" and "Come on, Dewayne." (RR7: 35, 38). When the Appellant pulled the pocketknife out, he never pointed it at Dewayne or made any threatening gesture(s) with it. (RR7: 43). In *Tisdale v. State*, the Texas Court of Criminal Appeals found the evidence insufficient to show the Appellant used or exhibited a deadly weapon (knife) when he robbed a convenience store. See *Tisdale*, 686 S.W.2d 110 at 111. When the Appellant in *Tisdal*e walked up to the counter and the cashier opened

[4] State's Brief on the Merits pg. 12-13

up the register, the Appellant placed his left hand over the cash tray. The clerk grabbed his hand and said "no." The Appellant replied "yes" and "in his right hand he had a knife." The clerk backed up and the appellant removed the money from the register. The cashier in *Tisdale* testified that she felt threatened and when questioned as to whether she was in fear of death or serious bodily injury, the cashier replied, "Yeah, I figured he could have-as a matter of fact, I thought he would have." The knife utilized was introduced into evidence and was shown to have a blade length of two and one-fourth inches. *Id.* at 111

The Court in *Tisdale* determined that the evidence was legally insufficient to show that the Appellant used or exhibited a deadly weapon when no threat of serious bodily injury, express or implied, was made by the appellant and the appellant made no gesture with the knife which would indicate that he was about to use it in a manner capable of causing death or serious bodily injury. *Id.* at 112.

As in *Tisdale*, the Appellant in this case never threatened the Complainant with serious bodily injury nor made any gesture with the pocketknife indicating he was about to use it in a manner capable of causing death or serious bodily injury. Even when viewed in the light

most favorable to the verdict, the evidence does not support that the Appellant's use or intended use of the pocketknife made it capable of causing death or serious bodily injury. *See Blain v. State*, 647 S.W.2d 293 (Tex. Crim. App. 1983) (evidence insufficient to support a deadly weapon finding where appellant displayed a kitchen knife that was about six inches long during a robbery); *See Lockett v. State*, 874 S.W. 2d 810 (Tex. App-Dallas 1994, pet ref'd) (evidence insufficient to support a deadly weapon finding when appellant used a pocketknife to cut a purse strap and injured complainant's fingers); *See Alvarez v. State*, 566 S.W.2d 612 (Tex. Crim. App. 1978) (evidence insufficient to support a deadly weapon finding when appellant swung a knife at a police officer from a distance of three or four feet and continued to advance toward the officer after the appellant missed). Based on the lack of evidence to support the aggravating element of the Appellant's conviction, the Court of Appeals decision to reform the judgment to a conviction for robbery, reverse the appellant's life sentence and remand for further proceedings should be affirmed.

CONCLUSION AND PRAYER

The Appellant prays that this Honorable Court affirm the court of appeals' decision as modified and remand this case for further proceedings.

Respectfully submitted,

/s/ Livia Liu Francis

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is 2,234 words in length, according to Microsoft Word, which was used to prepare the brief, and that the foregoing complies with the word-count, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1), and it complies with the typeface conventions required by the Texas Rules of Appellate Procedure.

/s/ Livia Liu Francis

Livia Liu Francis

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's brief has been served to Erleigh Norville Wiley, District Attorney of Kaufman County, Texas, erleigh.wiley@kaufmancounty.net and assistant district attorney, Jennifer Ponder, Jennifer.ponder@kaufmancounty.net . via e-file/electronic service on November 14, 2024.

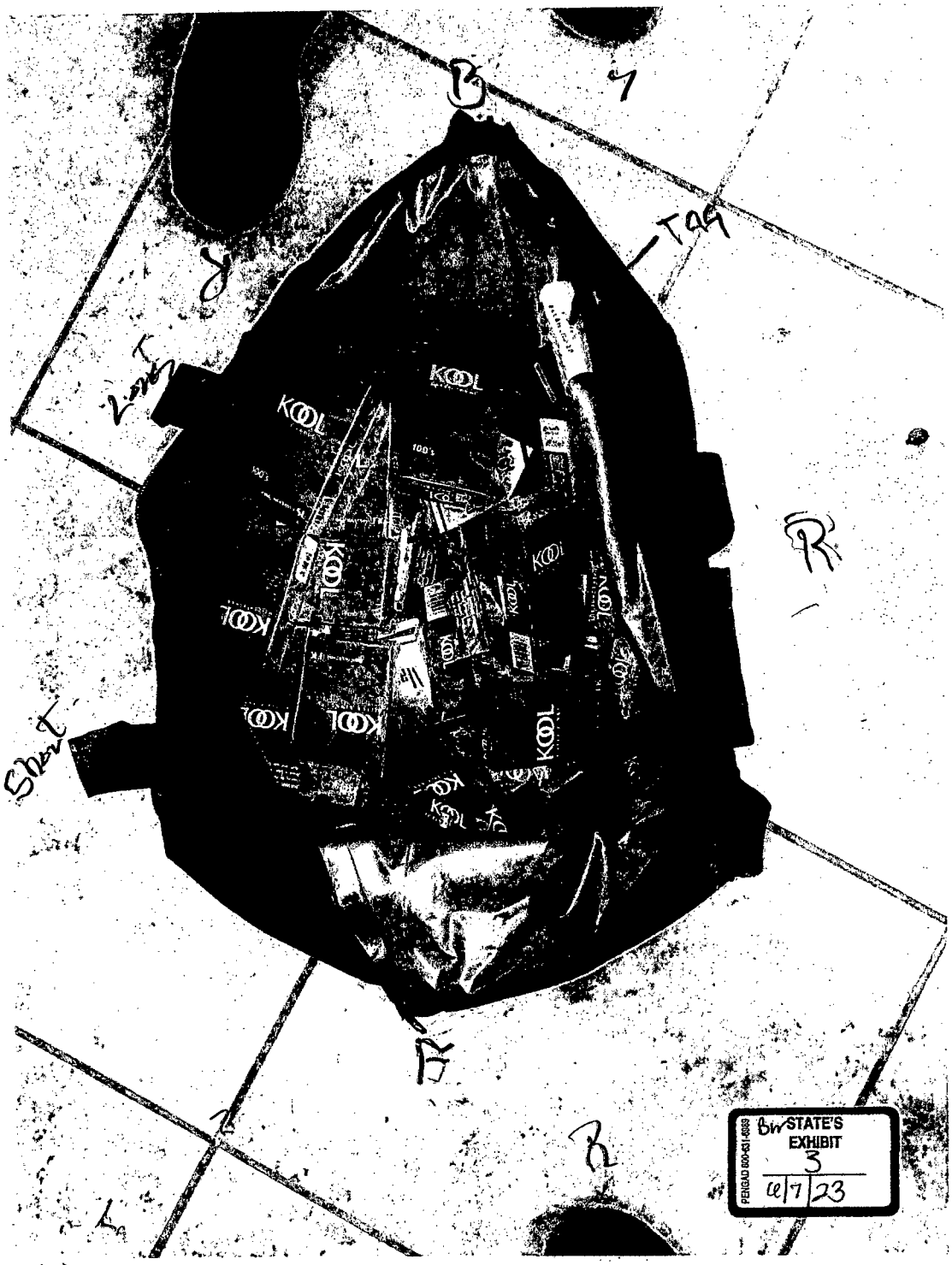
/s/ Livia Liu Francis

Livia Liu Francis
Attorney for Appellant

EXHIBITS

STATE'S EXHIBITS: 3,4,5,6 and 8

Top



1. F = Front
2. B = Back
3. L = Left
4. R = Right
5. Short cut strap
6. Long cut strap
7. Tag

Bottom

6.2

Project →


Top
Front
Framed
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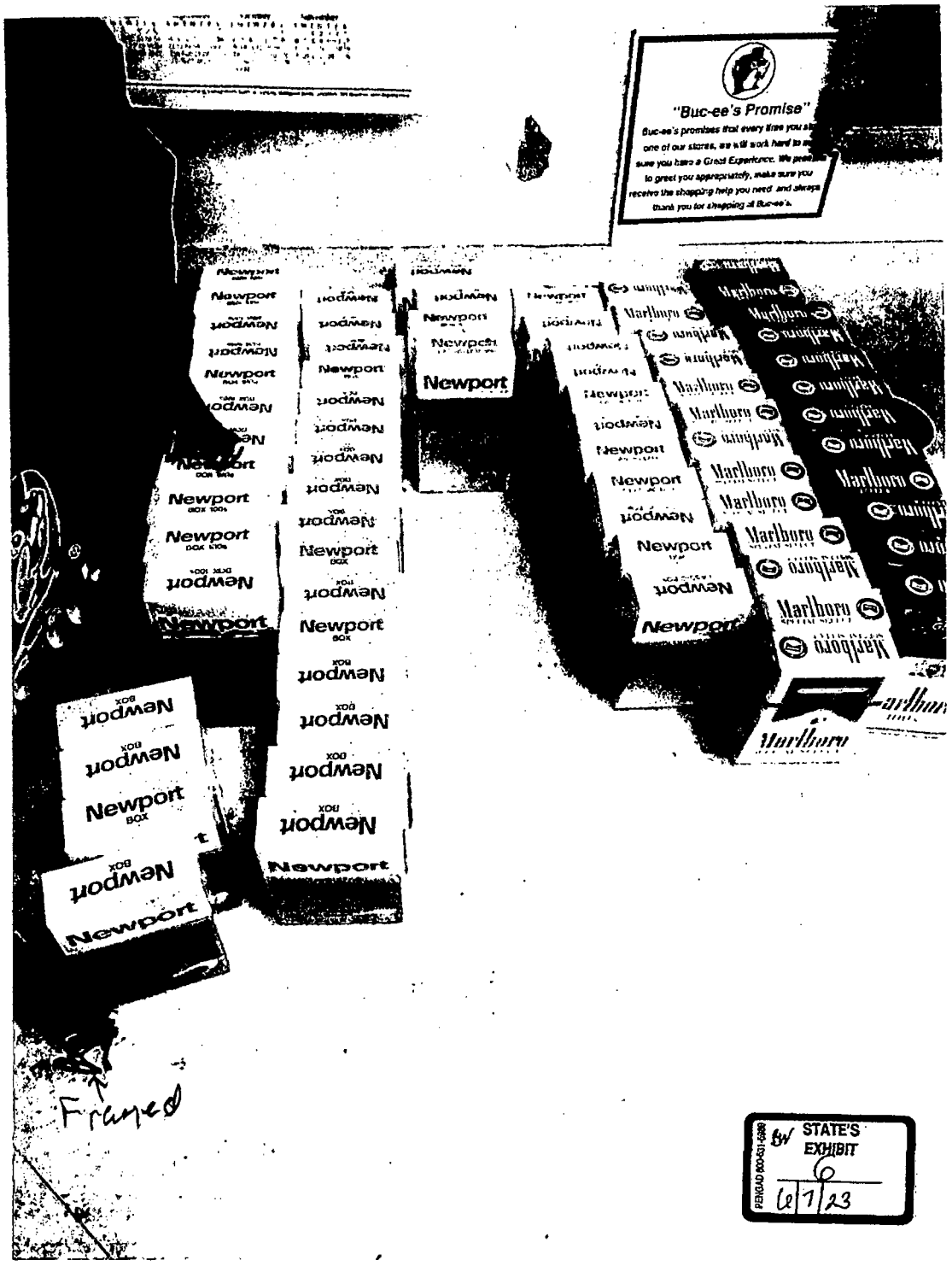
6/1/23



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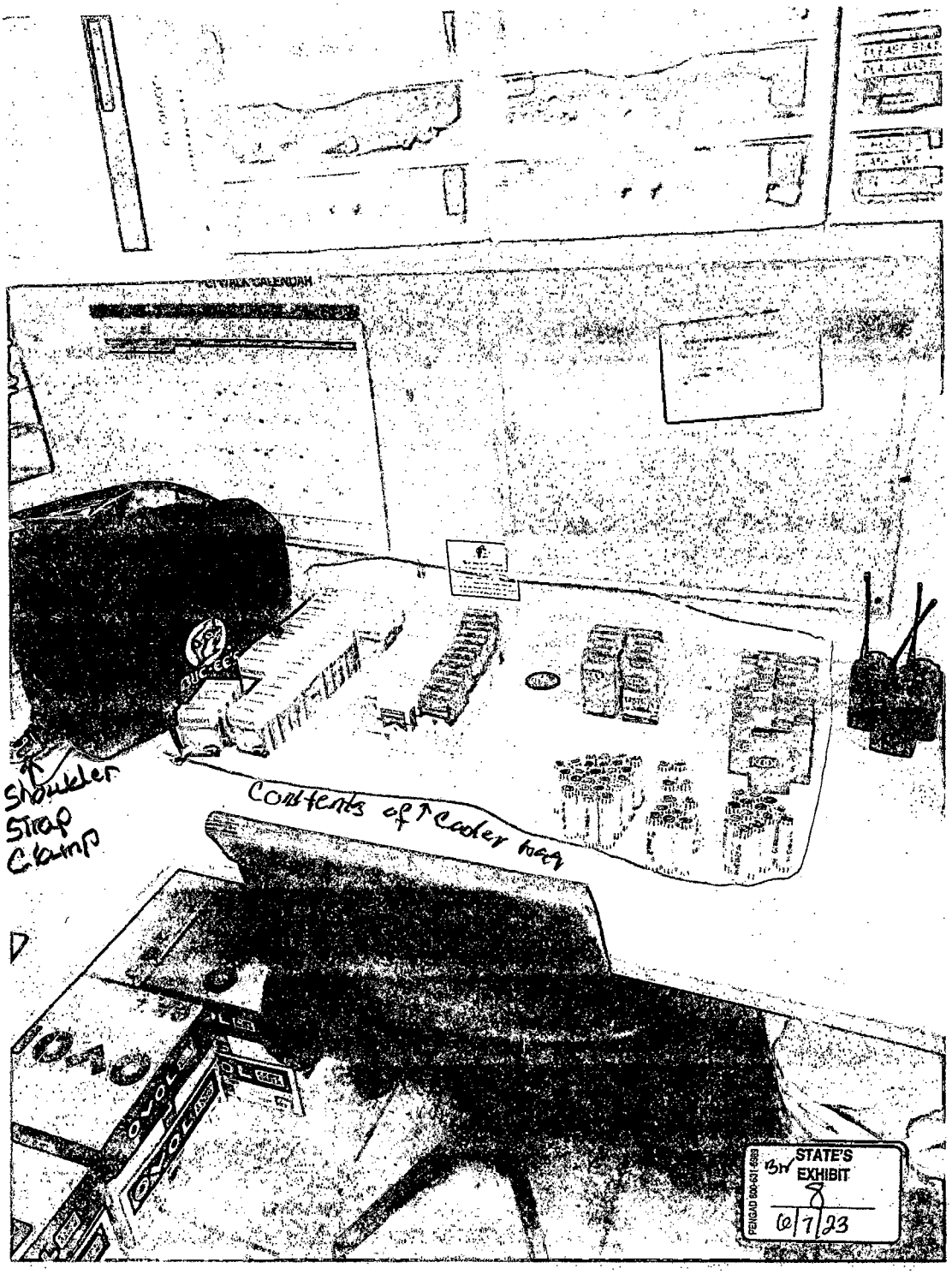
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Strap
Clamp
Contents of Cooler bag
STATE'S
EXHIBIT
8
6/7/23

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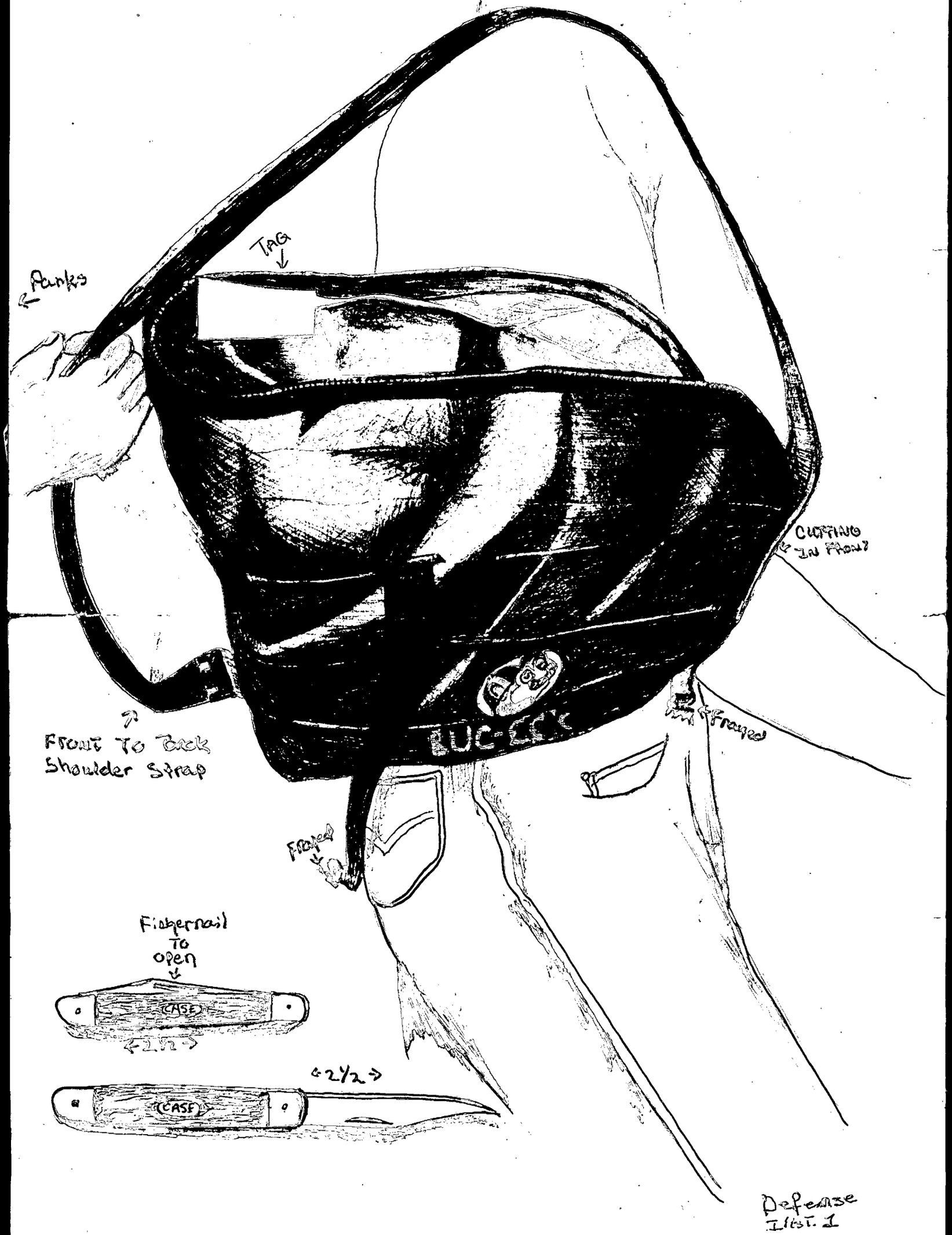

Defense
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