Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00358-CR

Scott E. **COALWELL**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 144th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR10786
Honorable Lorina I. Rummel, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: September 13, 2017

AFFIRMED

A jury found appellant, Scott Eldred Coalwell, guilty of stalking and assessed punishment at six years' confinement. In two issues on appeal, appellant asserts (1) the trial court erred by denying him an instruction on the lesser-included offense of harassment and (2) trial counsel rendered ineffective assistance of counsel. We affirm.

BACKGROUND

The jury was instructed it could find appellant guilty of the offense of stalking if it found beyond a reasonable doubt that appellant knowingly engaged in the following conduct directed towards the complainant, Alexander Ratliff:

> (1) on or about September 3, 2014, appellant sent an electronic communication to Ratliff, stating in part, "You will never be safe from me"; and, pursuant to the same scheme or course of conduct;
> (2) on or about December 12, 2014, appellant sent an electronic communication to Ratliff, stating in part, "you die before I die"; and, pursuant to the same scheme or course of conduct;
> (3) on or about January 3, 2015, appellant sent an electronic communication to Ratliff, stating in part, "rage will be my ally, See you in hell Fucker! Words can't explain how much I hate you or the degrees I will go to make you feel pain . . . ."

At trial, there was no dispute that appellant and Ratliff had been friends for many years, appellant asked to store some of his belongings with Ratliff while appellant pursued an overseas job opportunity, when appellant later returned to San Antonio he asked for the return of some of his property, and Ratliff refused to return the property appellant wanted back. In August 2014, Ratliff told appellant he no longer wanted to be friends, and he wanted no further contact with appellant. Appellant did not contact Ratliff for a few days, but then he began to send emails to Ratliff. Ratliff testified the first emails showed appellant was upset Ratliff no longer wished to speak with him, but over time, the communications "became threatening and very specific as to those threats." Ratliff said he believed appellant was "capable of anything," and Ratliff was afraid appellant might, one night, attempt to climb into Ratliff's children's bedroom window and "exact his revenge for whatever he believes I did to him."

According to Ratliff, he received emails from appellant beginning in August 2014 and continuing through January or February 2015. He said the emails began when he told appellant to leave him alone, but the emails stopped when appellant was arrested in another county for stalking

Ratliff. Appellant was released on bond conditioned on him not contacting Ratliff, but the emails resumed when the charges were dropped. Ratliff said the emails made him afraid.

Although the State introduced into evidence almost forty emails sent from appellant to Ratliff over several months, the emails on the following three dates formed the basis of the indictment:

On September 3, 2014, between the hours of 9:03 p.m. and 11:36 p.m., appellant sent Ratliff eight emails that stated, among other things,

> The gloves are off and I will get restitution for all that you cost me, and the value of things you retain. You only had my things, because you WERE a friend, and now you are not. You won't get any benefit from anything I paid for. You will soon know, what a friend that betrayed and fucked me over, feels like. I guarantee, you won't like it. I will make sure your commander and first sergeant are in the loop too, so it effects you NCOER and your future. If I see you again in person, you will feel my rage. Fuck you too. You will get fucked the hardest!
>
> Enjoy the life your [sic] about to earn.
>
> I truly hate you, for how you have treated me, and abused my natural caring.
>
> You had the police break down my door, and point a gun in my face. We will never be friends again, and I will enjoy making you and yours feel the burn. I ALWAYS, burn more than burned. I can't believe, I let a shitty person, such as yourself in my life as long as I did. Payback is a bitch.
>
> Hurting you now as much or more than you hurt me, is now my focus.
>
> I am coming for everything! The thought of you benefitting from anything of mine eats at me! The Remington Shotgun, registered in my name will be mine again too! You are such a piece of shit, I fight the urge to vomit thinking about you!
>
> We have nothing to discuss anymore, your actions, dictate mine. Enemies, get no mercy.
>
> You had you[r] choice to talk or not. You chose not. You had the police break down my door. You will never again, be safe from me. I have no limits. Get a restraining order, if it makes you feel fruity.

Ratliff said the email telling him he would never be safe again made him feel that no matter what he did or said, "a deadly confrontation would eventually ensue."

On December 12, 2014, between the hours of 11:56 a.m. and 9:29 p.m., appellant sent Ratliff six emails that stated, among other things,

> . . . now I have to sue you, to try to get justice. If that doesn't work, you don't want to know what is within my limits.
>
> I really wish I didn't have the urges to message you, your [sic] like an ex girlfriend! I, to a fault, think the relationship is worth saving. Just like everyone else, you end up being not worth the time. Damn! I doubt I will change, but I would, if I could.
>
> I am on my last job for this area, after getting arrested for emailing you, lost me the previous one. Am saving up cash and bought a 45 today. Just in case this ends up being another hit on me. This is my last attempt for the area, dunno if I will keep trying if this goes south. Like you care anyhow, you just want my property.
>
> I can't express how you make me feel, but promise, I will do my best to make you suffer. There are so many worse places or options, than death. You deserve to suffer, and live a[n] extra long life! . . . You die before I die! My only promise to you now!
>
> So I have to crush what you have. You will be the end of me, and me you. I am preparing for it.
>
> You ever step up and act like a man, you will understand my hatred of how you make me feel. You will never win, I have no limits, a point I wish I never felt.
>
> You continue to be terrified to reply. I am not that aggressive but can be nudged there. You surprise me on how you make me feel.

Ratliff said the words "You die before I die" sounded like appellant was planning a murder/suicide, and he was afraid appellant would kill him.

On January 3, 2015, between the hours of 5:55 p.m. and 7:50 p.m., appellant sent Ratliff five emails that stated, among other things,

> My only goal in life, now, is ruining yours, and making you feel 1% of the pain I have. Don't EVER come around me, because I won't stop the beating, once it starts.
>
> I wouldn't ever offer you or yours anything. I would shoot them over a can of beans. You are such a shitty person, the law enforcement that represented you, will feel ashamed. If you ever have the courage to face me, you better be packing, because anything less than a shot in a vital organ won't stop me, rage will be my ally. Suck a fat babies dick, you worthless piece of shit! Just the thought of calling you friend, actually makes me vomit!! See you in hell, fucker! You earned a ticket, and I will

> sell my soul to let you feel 1% of the pain I ever felt before you! The only chance you have at redemption is return ALL of my property, AND pay me for the bike you fucked me over AND, my shit you sold or gave away! You took advantage of a better person than you, and you will pay for that insult! Words can't express how much I hate you, or the degrees I will go to make you feel pain!
>
> Thinking that I will telegraph my movements? Trust me ass clown. If things go dark, the first thing I lose is technology. You couldn't see me coming, or control the degree of rage I come with. I only asked for my tools, with us parting, but after being arrested. You will never be free from my wrath, unless you return ALL OF MY SHIT! I will waste my life over you retaining a spoon of mine.

Ratliff testified these emails made him believe appellant hated him enough to injure or kill him.

Detective Sergeant Kevin McGuire testified he opened a stalking file in December 2014 to investigate Ratliff's allegations against appellant. As part of his investigation, he gathered the emails and spoke to both Ratliff and appellant. Sergeant McGuire said he found the emails "disturbing." On January 10, 2015, Sergeant McGuire spoke to appellant and told him it would be acceptable to contact Ratliff if the only reason for the contact was to retrieve appellant's property. Appellant said he would no longer contact Ratliff. Three hours later, appellant emailed Ratliff. Appellant sent another email to Ratliff on January 10, 2015. Because appellant continued to email Ratliff, Sergeant McGuire applied for an arrest warrant, and appellant was later arrested for felony stalking.

Appellant admitted he sent the emails, and he testified he did so out of unresolved frustration. He explained he still has a grudge against Ratliff, and he often said things that he should not say, but he would later apologize. When asked if he agreed some of the emails were "over the top," appellant replied, "Yeah. That's the unfiltered part. I have a good imagination." He agreed Ratliff might have found some of the emails threatening, but he was only trying to invoke a response from Ratliff who was not responding to his emails. Appellant said he sent the emails because he wanted his belongings returned. Appellant understood his conversation with

Sergeant McGuire to mean that if he intended to contact Ratliff, any contact had to concern only the return of his property, which is why he thought it appropriate to send the two emails after his conversation with Sergeant McGuire.

The following exchange occurred on cross-examination by the State:

> Q. You would agree that nowhere in these emails do you apologize, do you say that you don't mean it, they are — you would agree that they are consistent —
> A. I told him —
> Q. in their threats?
> A. — to give me my stuff back and he wouldn't ever hear from me again.
> Q. That's not the question I asked, sir. I asked if there's anywhere in these emails where you indicate that you don't intend to come to San Antonio, break into [Ratliff's] house, and cause him and his family harm; is that correct?
> A. Ten years of knowing me.
> Q. That — sir, that's not the answer to my question.
> A. It's my answer.
> Q. Well, the only thing [Ratliff] knows is what you wrote in these emails, right?
> A. And the ten years of experience he has with me.
>
> . . .
>
> Q. You told him you would do your best to make him suffer; is that right?
> A. There is [sic] multiple meanings to that.
>
> . . .
>
> Q. You would agree that saying, "You will never be safe from me" would cause [Ratliff] to fear bodily injury or harm, wouldn't you?
> A. It could be a lawsuit. I could take his house from him. I could call CPS on his kids.
> Q. I — okay. You would agree that saying that, "You die before I die" has nothing to do with property and would cause [Ratliff] to fear bodily injury or death, wouldn't you?
> A. Maybe he — maybe I had — or he died before I actually die of natural causes.
>
> . . .
>
> Q. And if someone sent you 40-plus emails threatening to kill you, threatening to come to your home, stating they had bought weapons, you would fear bodily injury or death from that person, wouldn't you?
> A. I think I'd need to talk to them.

On re-direct, appellant clarified why he had no reason to believe Ratliff would feel threatened: "If anybody knew me, I figured he'd actually know me. . . . Ten years of being around each other, talking about everything. It's like a — I've never been hostile towards him. I have no history of hostility other than defending myself." Appellant thought Ratliff was being "overly

dramatic" when he said he believed his life was in danger. Appellant described some of his emails as mere "taunts" trying to evoke a response from Ratliff.

LESSER-INCLUDED OFFENSE INSTRUCTION

In his first issue, appellant asserts the trial court erred by denying his request for a jury charge on harassment. The two-step test for determining whether a trial court is required to give a requested instruction on a lesser-included offense is well established. We discuss that law in the context of appellant's charged offense of stalking and his request for a lesser-included-offense instruction on harassment.

The first step is to determine whether the requested instruction pertains to an offense that is a lesser-included offense of the charged offense, which is a question of law. *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007). Under this first step, an offense is a lesser-included offense if it is within the proof necessary to establish the charged offense. *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011); *see also* TEX. CODE CRIM. PROC. art. 37.09(1) (West 2006). Here, both parties correctly agree harassment is a lesser-included offense of stalking. A person commits the offense of stalking "if the person, on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct that constitutes harassment under Section 42.07, causes the other person to be placed in fear of bodily injury or death, and would cause a reasonable person to fear bodily injury or death for himself. TEX. PEN. CODE ANN. § 42.072(a) (West 2016). As applicable to this case, a person commits the offense of harassment "if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the [defendant] . . . threatens, in a manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the person or to commit a felony against the person[, or] sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." *Id.* § 42.07(a)(2), (7). We agree harassment

is within the proof necessary to establish stalking. We, therefore, proceed to the second step of the test.

The second step in the analysis asks whether there is evidence in the record that supports giving the instruction to the jury. *Sweed*, 351 S.W.3d at 68. Under this second step, a defendant is entitled to an instruction on a lesser-included offense when there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense. *Rice v. State*, 333 S.W.3d 140, 145 (Tex. Crim. App. 2011) (citations omitted). The evidence must establish the lesser-included offense is a valid, rational alternative to the charged offense. *Id.* "Meeting this threshold requires more than mere speculation—it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012).

More particularly, the second step requires examining all the evidence admitted at trial, not just the evidence presented by the defendant. *Goad v. State*, 354 S.W.3d 443, 446 (Tex. Crim. App. 2011). The entire record is considered; a statement made by the defendant cannot be pulled from the record and examined in a vacuum. *Enriquez v. State*, 21 S.W.3d 277, 278 (Tex. Crim. App. 2000). Anything more than a scintilla of evidence is adequate to entitle a defendant to a lesser charge. *Sweed*, 351 S.W.3d at 68. Although this threshold showing is low, it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted. *Id.* "However, we may not consider the credibility of the evidence and whether it conflicts with other evidence or is controverted." *Goad*, 354 S.W.3d at 446-47. Accordingly, the standard may be satisfied if some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations. *Sweed*, 351 S.W.3d at 68.

On appeal, appellant argues more than a scintilla of evidence supports a jury finding that he committed only the offense of harassment. First, appellant contends that because stalking requires more than one act, if the jury believed only one act of harassment occurred—as opposed to three—then the only offense on which the jury could convict would be harassment. Second, he testified that, due to their past friendship, Ratliff had no legitimate basis to fear appellant. Thus, according to appellant, his testimony rebuts an essential element of stalking.

It is not enough to claim a jury could have disbelieved some evidence in order to be entitled to a lesser-included instruction. *Sweed*, 351 S.W.3d at 68. Instead, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider. *Id.* Mere speculation is not sufficient. *Cavazos*, 382 S.W.3d at 385. Here, the State introduced all the emails into evidence and appellant admitted he sent all the emails. That the jury *might* have believed only a single incident of harassment occurred is not affirmative evidence that the harassing emails were sent, not on multiple dates, but on only one date. Appellant has failed to establish what evidence the jury could have relied on to conclude he was not acting in the same scheme or course of conduct. Also, appellant's statement that he and Ratliff had known each other for ten years is insufficient to rebut the element that Ratliff was placed in fear of bodily injury or death, or that a reasonable person would fear bodily injury or death for himself. We conclude the facts did not raise harassment as a valid, rational alternative to the charged offense; therefore, appellant was not entitled to the requested jury instruction.

INEFFECTIVE ASSISTANCE OF COUNSEL

During direct examination, defense counsel asked appellant if he tried to file theft charges against Ratliff. Appellant responded as follows:

> Yeah. I've been trying for a long time and it's like they [the police] — they told me that they're basically not interested in that. It's a civil dispute, even though I'm — I've come up with like dollar amounts. I've looked up the penal codes. I'm

> trying to like buff up on legal stuff. I've never been in a legal dispute before. *I've never even been like even arrested before. It's like 20 years ago, I got a speeding ticket.* [Emphasis added.]

The next day, outside the jury's presence and before cross-examination, the State informed the trial court it intended to go into the fact that appellant was currently incarcerated for online solicitation of a minor. Defense counsel objected, and also argued the State should not be allowed to elicit evidence of the solicitation arrest as such would be more prejudicial than probative. In addition, counsel argued, in the alternative, that

> if the Court finds that [appellant] opened the door, I would ask that the offense be omitted and that the jury only be instructed that he has been arrested before in McLennan County and he was placed on deferred adjudication and allow no further inquiries.
>
> And I will instruct [appellant] that I would recommend that he answer "yes" to that on the stand provided that the State doesn't go into it any further. I think that will correct the impression to the jury and we can move on.

The trial court overruled counsel's objections and his alternative suggestion, and allowed the State "to get in that [appellant] was arrested on a particular date in McLennan County for a particular offense. I don't want the State to get into the status of that offense." With the jury in the courtroom, appellant answered affirmatively to the State's questions that he was arrested on February 27, 2015, in McLennan County, for online solicitation of a minor with the intent that the minor engage in sexual contact, intercourse, or deviate sexual intercourse, and he had been continually detained since that date.

On appeal, appellant asserts counsel was ineffective for not objecting to the State's questions in the jury's presence. Appellant argues that because trial counsel did not object, he lost his right to appellate review of the trial court's ruling. We review an appellant's claim of ineffective assistance of counsel under the well-established standard of review. *See Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim.

App. 1999). The appellant must first show counsel's performance was deficient, and second, assuming appellant has demonstrated deficient performance, appellant must affirmatively prove prejudice. *Thompson*, 9 S.W.3d at 812. Generally, the trial record will not suffice to establish an ineffective assistance of counsel claim.[1] *Thompson*, 9 S.W.3d at 813-1.

Here, trial counsel objected outside the jury's presence when the State first indicated it believed appellant had "opened the door" to questions about his arrest for online solicitation. This objection preserved any complaint about the trial court's ruling for later appellate review. *See* TEX. R. EVID. 103(b) ("When the court hears a party's objections outside the presence of the jury and rules that evidence is admissible, a party need not renew an objection to preserve a claim of error for appeal."). Therefore, appellant's complaint that counsel should have objected again in the jury's presence does not demonstrate ineffective assistance of counsel. *See Thel Chok Ngung v. State*, 07-13-00315-CR, 2014 WL 2191999, at *4 (Tex. App.—Amarillo May 23, 2014, pet. ref'd) (requiring counsel to re-urge the same motion that was, moments earlier, denied, "would be to require trial counsel to do a useless thing"); *Randle v. State*, A14-90-01129-CR, 1993 WL 74742, at *2 (Tex. App.—Houston [14th Dist.] Mar. 18, 1993, no pet.) (appellant did not receive ineffective assistance of counsel because of trial counsel's failure to reurge motion to suppress or failure to object to admission of evidence seized).

We conclude appellant did not satisfy the first prong of the *Strickland* test because the appellate record does not affirmatively demonstrate the alleged ineffective assistance of counsel. For this reason, we do not address whether he satisfied the second prong of the *Strickland* test.

[1] Appellant filed a motion for new trial arguing only that the trial court "misdirected the jury about the law or the court committed a material error likely to injure [appellant's] rights." No new trial hearing was held.

CONCLUSION

We overrule appellant's issues on appeal and affirm the trial court's judgment.

Sandee Bryan Marion, Chief Justice

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