TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-22-00518-CR

Ruben Alonzo, Appellant

v.

The State of Texas, Appellee

FROM THE 331ST DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-DC-20-300050, THE HONORABLE CHANTAL ELDRIDGE, JUDGE PRESIDING

MEMORANDUM OPINION

A jury found Ruben Alonzo guilty of "assault family violence." *See* Tex. Penal Code § 22.01(a). The trial court imposed a two-year term of community supervision conditioned on service of thirty days in jail. Alonzo complains that he was not indicted for the misdemeanor assault for which he was convicted and that the court erred by overruling his objection to the submission of a jury charge on that offense. He also contends that prosecution for the misdemeanor assault offense was barred by limitations. We will affirm the judgment.

BACKGROUND AND APPLICABLE LAW

The grand jury indicted Alonzo on May 4, 2021, for felony assault with family violence by impeding the normal breathing and circulation of blood by applying pressure to the victim's throat or neck or by blocking her nose or mouth. The grand jury also indicted Alonzo for a misdemeanor assault. At trial, the court instructed the jury to determine Alonzo's guilt for

"Assault Family Violence Strangulation" and, over Alonzo's objection, for "the lesser included offense of Assault Family Violence." The jury found Alonzo guilty of the lesser offense.

Alonzo appealed, representing himself pro se. Although we construe pro se briefs liberally, we hold pro se litigants to the same standards as licensed attorneys and require them to comply with applicable rules of procedure. *Griffis v. State*, 441 S.W.3d 599, 612 (Tex. App.—San Antonio 2014, pet. ref'd); *Kindley v. State*, 879 S.W.2d 261, 264 (Tex. App.—Houston [14th Dist.] 1994, no pet.); *see* Tex. R. App. P. 38.9. Generally, to preserve error for appeal, a defendant must make a timely, specific objection, request, or motion to the trial court stating the specific grounds for the ruling sought by the complaining party, unless the specific grounds were apparent from the context. Tex. R. App. P. 33.1(a); *Burg v. State*, 592 S.W.3d 444, 448–49 (Tex. Crim. App. 2020). An appellant requesting a partial reporter's record must include in the request a statement of the points or issues to be presented on appeal. Tex. R. App. 34.6(c)(1). Appellant's brief must state concisely all issues or points presented for review and set forth clear and concise arguments with appropriate citations to authorities and the record. *Id.*. R. 38.1(f), (i); *see Wolfe v. State*, 509 S.W.3d 325, 343 (Tex. Crim. App. 2017) (discussing appellate briefing requirements).

DISCUSSION

Alonzo raises eight issues. He generally does not cite to the record and discusses and cites authorities for only the issues concerning the jury charge on the "lesser included" offense of assault family violence.

Three issues are waived for failure to supply appropriate citations to authority and to the record. *See* Tex. R. App. P. 38.1(i); *Cardenas v. State*, 30 S.W.3d 384, 393 (Tex. Crim.

App. 2000). Further, even if we assume these issues were preserved, they fail on their merits. Alonzo complains of the court's grant of the State's motion in limine as somehow violating his right to self-representation because he did not participate in the discovery process. Alonzo does not demonstrate the connection between the grant of the motion in limine and his participation in the discovery process or his right to self-representation. The grant of a motion in limine is not ordinarily sufficient to preserve for appellate review a complaint regarding the exclusion of evidence because there is no adverse ruling on the admissibility of such evidence until it is tendered and an objection interposed. *Armitage v. State*, 637 S.W.2d 936, 938 (Tex. Crim. App. 1982). Alonzo does not explain why or persuade us that his complaint is an exception to this general rule. Alonzo complains further that he did not sign "the certificate of compliance." He does not explain what this certificate is or why the absence of his signature from the certificate demonstrates reversible error by the trial court. He also complains that the prosecutor offered to dismiss the lesser-included offense a month and a half after he was found guilty, but Alonzo declined because, he says, accepting the dismissal deal would save the prosecutor from legal error. This complaint is not supported by the record before us. Further, Alonzo does not explain how a post-trial offer to dismiss that he declined—leaving the judgment unchanged—shows reversible error by the trial court. We resolve all three issues in favor of the judgment.

Three issues relate to the jury charge. Alonzo contends that he objected to inclusion of the instruction on the lesser-included offense. He also complains that he was not indicted or reindicted for that offense and that, therefore, the State violated his due-process right to know what charges have been brought against him and the nature of those charges. We review asserted jury-charge error in two steps: first, we determine whether error exists; if it does, we then evaluate whether sufficient harm resulted from the error to require reversal. *See Alcoser*

v. State, 663 S.W.3d 160, 165 (Tex. Crim. App. 2022) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)). The standard of review for jury-charge error depends on whether the error was preserved. *Jordan v. State*, 593 S.W.3d 340, 346 (Tex. Crim. App. 2020) (citing *Almanza*, 686 S.W.2d at 171). If error was preserved with a timely objection, then such error is reversible if it caused "some harm." *Almanza*, 686 S.W.2d at 171. When the appellant complains of jury-charge error on appeal to which he did not object at trial, we must determine whether the error caused the appellant "egregious harm." *Id*. Under both standards, appellant must have suffered some actual—rather than merely theoretical—harm. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005).

Alonzo made an unspecified objection to the inclusion of the lesser-included offense in the jury charge. Alonzo did not cite to a written objection in the clerk's record. In the one-page excerpt from the discussion of the jury charge requested by the State, the trial court stated to Alonzo, "You have one objection because you did not want the lesser included, assault family violence, included in the instructions. The State has requested it, and I am granting it." This excerpt does not reveal the basis of Alonzo's objection other than that he did not want the court to give the instruction on the misdemeanor offense. In order to preserve error on appeal, a party must specifically object and obtain a ruling from the trial court, or object to the trial court's refusal to rule. Tex. R. App. P. 33.1. *But see Mendez v. State*, 545 S.W.3d 548, 552 (Tex. Crim. App. 2018) (trial judge ultimately responsible for accuracy of jury charge and accompanying instructions, so "[a] consequence of this sua sponte duty is that, even if the defendant 'fails to object' to some error in the court's charge on the 'law applicable to the case,' the resulting claim of jury-charge error is not necessarily forfeited on appeal."). Errors that are presented at trial and preserved are reviewed under the "some harm" standard, while errors that are not presented at

trial are reviewed under the "egregious harm" standard. *Mendez*, 545 S.W.3d at 552 (citing *Almanza*, 686 S.W.2d at 171).

Even if we assume that Alonzo's objection at trial fully preserved his appellate complaints that the inclusion of the misdemeanor assault charge was error because it was not properly included in the indictment, those complaints do not show error in the record presented. Trial courts may instruct a jury on a lesser-included offense on the State's request if there is sufficient evidence to support a conviction on a lesser-included offense, even where the defendant did not request the charge and even over the defendant's objection. *Grey v. State*, 298 S.W.3d 644, 651 (Tex. Crim. App. 2009); *Humphries v. State*, 615 S.W.2d 737, 738 (Tex. Crim. App. [Panel Op.] 1981); *Gordy v. State*, No. 05-19-00444-CR, 2022 WL 632169, at *9 (Tex. App.—Dallas Mar. 4, 2022, pet. ref'd) (mem. op.). When the defense requests instruction on a lesser-included offense, courts assess two issues: (1) Are the elements of the lesser-included offense included within the proof necessary to establish the elements of the charged offense? (2) Is there evidence in the record that could allow a jury to find the defendant guilty of only the lesser-included offense? *See Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993). However, when the State requests the instruction, the second prong is inapplicable. *Grey*, 298 S.W.3d at 645, 649-51.

The Court of Criminal Appeals has held that

> An offense is a lesser-included offense of another offense, under Article 37.09(1) of the Code of Criminal Procedure, if the indictment for the greater-inclusive offense either: 1) alleges all of the elements of the lesser-included offense, or 2) alleges elements plus facts (including descriptive averments, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all of the elements of the lesser-included offense may be deduced.

Ex parte Watson, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009) (op. on reh'g) (citations omitted). The elements of the lesser-included offense do not have to be pleaded in the indictment if they can be deduced from facts alleged in the indictment. *State v. Meru*, 414 S.W.3d 159, 162 (Tex. Crim. App. 2013). Thus, Alonzo's appellate contentions that the judgment must be reversed because the lesser-included offense was not in the indictment, because he was not reindicted for a misdemeanor, and because instructing the jury on an offense for which he was not indicted violated his due-process rights all fail if misdemeanor assault is included within the felony assault charge.[1]

While we ordinarily do not look at evidence to consider whether an offense is a lesser-included offense, *Ex parte Watson*, 306 S.W.3d 259, 263 (Tex. Crim. App. 2009), the Court of Criminal Appeals has held that a misdemeanor assault can be a lesser-included offense of the indicted felony offense of assault family violence by impeding breathing if the nature of the relationship is the disputed element. *Ortiz v. State*, 623 S.W.3d 804, 808 (Tex. Crim. App. 2021). In order to make that assessment, of course, we must look at the record. *See id.* Alonzo asserted in his opening statement at trial that he was not in a dating relationship with the

[1] On appeal, Alonzo filed a motion for sanctions, contending that the State's brief wrongly states that Alonzo was indicted under Texas Penal Code subsections 22.01(a)(1) and 22.01(b)(2)(B). Alonzo argues that the State's brief is dishonest and a commission of suborned perjury. The indictment has in its heading "ASSAULT FAM/HOUSE MEM IMPEDE BREATH/CIRCULAT – PC 22.01(B)(2)(b) – F3." Alonzo intimates that the heading sets out the only statute under which he was indicted. He does not cite authority requiring that an indictment cite every statute under which the accused is charged. Citation to the statute the accused is charged with violating is not among the statutory requisites of an indictment. *See* Tex. Code Crim. Proc. art. 21.02. Further, Texas Penal Code subsection 22.01(b)(2)(B) sets out a means by which an assault under Texas Penal Code subsection 22.01(a)(1) can be charged as a felony, so the elements of subsection 22.01(a)(1) are necessarily part of an offense under subsection 22.01(b)(2)(b). We are not persuaded that the prosecutor was dishonest or committed perjury in stating that Alonzo was charged under both Texas Penal Code subsections 22.01(a)(1) and 22.01(b)(2)(B). We deny Alonzo's motion for sanctions.

complaining witness when the indictment alleged the assault occurred, and the record contained conflicting evidence on whether the relationship between Alonzo and the complaining witness satisfied the statutory definition of "family" including a dating relationship. The record supported instructing the jury on a lesser-included assault. We resolve Alonzo's challenges to the jury charge in favor of the judgment.[2]

Alonzo contends further that prosecution of the misdemeanor offense was barred by limitations. He argues that his June 2022 trial was too late because the offense occurred in November 2019. The limitations period concerns the time during which indictment must be brought, not when the trial must occur. *See* Tex. Code Crim. Proc. art 12.02(a). The misdemeanor assault charge is subject to a two-year limitations period. *See id*. (limitations for Class A misdemeanors); Tex. Penal Code § 22.01(a), (b) (assault is Class A misdemeanor). The May 2021 indictment containing the misdemeanor assault charge was brought within two years of the November 2019 commission of the offense. The indictment was timely. We resolve this issue in favor of the judgment.

Alonzo argues finally that the evidence is insufficient to support a finding that he and the victim lived together. The record does not support his contention. We note first that Alonzo does not cite us to a finding by the jury or the court that Alonzo and the complainant

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[2] The State notes potential issues with the jury charge on misdemeanor assault that Alonzo did not present on appeal. *See* Tex. R. App. P. 38.1(f),(i). These issues do not require us to reverse on the record and issues presented by Alonzo. The record contains evidence supporting the occlusion assault and evidence disputing whether the parties had the relationship needed to support the felony occlusion offense, thus supporting an instruction and a conviction on a lesser-included misdemeanor assault. The issues presented by Alonzo differ from those raised in *McCall v. State* and thus distinguish our review from the resolution in that case. 635 S.W.3d 261 (Tex. App.—Austin 2021, pet. ref'd.) (op. on reh'g.). Alonzo's issues on appeal do not point us to error or harm from the court giving a jury charge on a lesser-included misdemeanor assault offense.

lived together except as that might be part of the "dating relationship" included in the indictment and the jury charge. Nevertheless, the complainant testified the reporter's record excerpt that she and Alonzo were living together at the time of the assault, which the factfinder could credit. *See Jackson v. Virginia*, 443 U.S. 307, 313-14 (1979); *Lang v. State*, 561 S.W.3d 174, 179 (Tex. Crim. App. 2018) ("[W]e consider all the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt."); *Zuniga v. State*, 551 S.W.3d 729, 733 (Tex. Crim. App. 2018) ("The trier of fact is the sole judge of the weight and credibility of the evidence."). Further, Alonzo did not request the full record be prepared, so we must presume that the portions of the record he opted not to request support the judgment. *See Zavala v. State*, 498 S.W.3d 641, 642 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Applying this presumption and reviewing the record before us, we cannot conclude that the evidence in the record was insufficient to support a finding that Alonzo lived with the victim. We resolve this issue in favor of the judgment.

CONCLUSION

We affirm the judgment of conviction.

Darlene Byrne, Chief Justice

Before Chief Justice Byrne, Justices Baker and Triana

Affirmed

Filed: August 30, 2023

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