NUMBER 13-15-00427-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JAMES OWEN SHULTZ, Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the County Court at Law No. 1 of Cameron County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Hinojosa
Memorandum Opinion by Justice Hinojosa

Appellant James Owen Schultz appeals from a judgment convicting him of assault by bodily injury, a class A misdemeanor, *see* TEX. PENAL CODE ANN. § 22.01(a)(1) (West, Westlaw through 2015 R.S.), and making an affirmative finding that the offense involved family violence. *See* TEX. CODE CRIM. PROC. ANN. art. 42.013 (West, Westlaw through 2015 R.S.). The trial court assessed punishment at twelve months in jail, but it

suspended the sentence and placed appellant on community supervision for eighteen months.

In seven issues, appellant argues that: (1) statements made by the State during closing argument were improper and require a new trial; (2) the trial court erred in denying a mistrial after a witness introduced extraneous offenses; (3) the State failed to prove the element of bodily injury; (4-5) the trial court erred in denying appellant's request for a jury instruction on the "lesser included" offenses of assault by threat and offensive contact; (6) the trial court erred in denying appellant's motion to quash the complaint and information on technical grounds; and (7) the trial court erred in submitting the definition of "reckless" in the jury instructions. We affirm.

I. BACKGROUND[1]

By information, appellant was charged with intentionally, knowingly, or recklessly causing bodily injury to Soledad Saldivar, a family or household member with whom defendant had a dating relationship, by "pushing and/or grabbing" Saldivar. At trial, the jury heard from: (a) appellant; (b) Saldivar, appellant's ex-girlfriend; (c) A.S.,[2] Saldivar's minor son; and (d) Joel Luis Gallegos, an investigator with the Cameron County Sheriff's Department.

A. Appellant

Appellant testified that he and Saldivar met in 2009. Saldivar and A.S. moved into

[1] Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* TEX. R. APP. P. 47.4.

[2] We will reference Soledad Saldivar's minor son by A.S., his initials.

appellant's apartment in 2010, and they left in 2012. Saldivar ended her relationship with appellant when her ex-husband became seriously ill. At that time, she and A.S. moved into a trailer house owned by Saldivar's ex-husband.

On the day of the incident, appellant went to Saldivar's house to pick up his coffee pot. Appellant claimed to have previously worked on the plumbing in Saldivar's house for two days. Appellant explained that upon entering Saldivar's house:

> That's when I saw my coffee pot, and I tried to take it home with me. I didn't appreciate the fact that she was giving coffee to her new boyfriend when we had just broken up. I was jealous. So I attempted to take my coffee pot, and she said no, that's mine; you can't have it. So that's when I broke it on the floor.[3] And then as soon as I broke it on the floor, she said (witness speaking Spanish). She was yelling to [A.S.] call 911. Then she said [A.S.], (witness speaking Spanish). Get other [sic] on the other side of the door and hold it shut don't let Jim escape. So I presume that she was saying that she was trying to hold me there until the Sheriff's Department got there so they could arrest me.
>
> I was terrified. I thought I don't want to go to jail, you know. He did a good job of holding the door shut on the other side. Finally[,] I was able to get it open, and Mrs. Saldivar she was wrestling with me trying to keep me from leaving. That's how she [wound] up with a bruise[.]

Appellant further testified that Saldivar was able to rip the side of his pants because "[s]he's very strong from making tortillas." Appellant later elaborated that Saldivar is "very strong from making lots of tortillas. She used to work at Stripes and she made thousands of tortillas over her lifetime. Her hands have an extraordinary amount of strength."

B. Saldivar

Saldivar testified that she and appellant first met when she was a "provider" for

[3] At another point, appellant specifically testified, "So I thought well, if I can't have it, nobody is going to have it and I broke it on the floor."

appellant's mother. The two dated for several months before Saldivar moved into appellant's house. Less than a year after cohabitating, Saldivar ended the relationship because appellant was "very aggressive." Saldivar then moved into a house of her own.

On the day of the incident, appellant knocked on the door several times, but Saldivar did not answer it. Appellant moved to a window, and he broke the window. Appellant finally gained entry into Saldivar's house by forcing a door open. Once inside, appellant broke a coffee pot that appellant had given Saldivar when they lived together. He then grabbed Saldivar by her arm and pulled her out of the house and onto a "little porch." A.S. and Saldivar's grandson grabbed onto Saldivar, and they tried to pull her away from appellant. Saldivar claimed that when appellant grabbed her it hurt, it continued to hurt for over a week, and it left a bruise. After the incident, Saldivar went to the Harlingen Police Department and pictures of her were taken. Saldivar authenticated those pictures, and they were admitted into evidence.

In cross-examining Saldivar, appellant posited that she tore off appellant's pants during the incident so that he would remain at her house and be arrested when the police arrived. Saldivar denied appellant's contention. She specifically denied instructing A.S. to close the door in an attempt to keep appellant from leaving. Saldivar also specifically denied that appellant ever fixed anything at her house, including the plumbing. She claimed that a tenant who resided near her house helped with plumbing.

C. A.S.

A.S. was eleven or twelve years old at the time of the incident. He recalled a loud bang at the door and seeing appellant through the window. The next thing A.S.

remembered was that appellant entered the house, got the coffee pot, and threw it on the floor. A.S. went into the kitchen and saw appellant going toward his mother. A.S. got in between his mother and appellant, but appellant threw A.S. to the floor. Appellant then pulled Saldivar outside by her arm. On cross-examination, A.S. denied tearing appellant's pants.

D. Gallegos

On the day of the incident, Investigator Gallegos was dispatched to Saldivar's house on a call regarding an assault. When he arrived, Investigator Gallegos encountered Saldivar and A.S. Saldivar looked as if she had just finished crying, and A.S. seemed upset. Investigator Gallegos testified that he noticed an abrasion and redness on Saldivar's upper right arm.

E. Closing Arguments

From the arguments of counsel for the State and counsel for appellant we glean that the jury charge included an instruction regarding self-defense.[4]

1. State's Closing

The State argued in closing:

> Now, these are the elements that we mentioned to you in the beginning of the trial that we have to prove: On or about February 25th, 2012, in Cameron County, Texas, the defendant, James Owen Schultz, intentionally, knowingly or recklessly caused bodily injury to a person: Namely, Soledad Saldivar, and that person is a member of the [sic] his family or a household member, or a someone with whom he had had a dating relationship with by grabbing and/or pushing the victim. Check, check, check, check, check, check, check.
>
> They have proved all those for us by saying yeah that happened.

[4] The jury charge is not included in the clerk's record.

2. Appellant's Closing

In appellant's closing argument, he argued, among other things:

What actually happened was there was a domestic dispute. People that lived together and had a long relationship, police officers came out and did an investigation, and they didn't arrest anybody. That's what happened. Later, on the cold documents that were submitted to the District Attorney's office for review, somebody decided, however this [sic] may have read those documents, well, this looks like an offense, and I suggest maybe it's because right now this is sort of the offense de jour. It's something that— and I'm not criticizing it.

I'm glad that the politicians can make an issue of these areas. It's better than a lot of other things that they could be talking about. Domestic violence is something that has to be brought—has to be looked at carefully. But the problem is it makes it, if that's what your emphasis is, it makes it hard to get rid of cases, just because the evidence is in conflict. The police didn't want to arrest, and they had the conflicting testimony, and then somebody from the cold record goes back and makes a decision—reads it and says all right, we're going to charge him with this.

3. State's Rebuttal

The State's rebuttal argument included:

State: Thank you. Ladies and gentlemen of the jury, we just heard [one of appellant's attorneys] say that domestic violence is a serious issue, and I'm the domestic violence prosecutor at the DA's office, so this is literally all that we do is just prosecute domestic violence cases. So I see everything from a push—

Appellant: We'll object to that form of argument as personal testimony, Judge. It's irrelevant that it's a special group. It's part of the problem. We'd ask that she not be—

State: I didn't—

Court: Go right ahead. Overruled.

State: All the way to getting beat up to pass out. We wouldn't be here today if we didn't think that we could present all the evidence necessary to prove beyond a reasonable doubt—

Appellant: I'll object to that. It's vouching by this lawyer as to her belief—personal belief in the case, and she's giving personal testimony.

Court: Overruled. The jury, they heard the evidence. They just listened to five witnesses or four witnesses testify. I'm sure they know what they're doing. Argument is argument. Testimony is testimony. They understand. Go ahead.

State: Thank you, Judge. So Mr. Elizondo, my co-counsel, went over all the elements with you, and we believe through the testimony of the victim and her son and the officer as well as the pictures—

Appellant: I'll object. It's improper for her to state that she believes any particular witness, Judge.

Court: Overruled.

State: Proves that we have proven this offense, in particular, beyond a reasonable doubt.

The jury found appellant guilty of assault by causing bodily injury. The trial court assessed punishment at twelve months in jail, but it suspended the sentence and placed appellant on community supervision for eighteen months. This appeal followed.

II. DISCUSSION

A. Closing Argument

In appellant's first issue, he argues that the State made three improper statements during closing arguments, those being: (1) "We wouldn't be here today if we didn't think that we could present all the evidence necessary to prove beyond a reasonable doubt;" (2) "So Mr. Elizondo, my co-counsel, went over all the elements with you, and we believe through the testimony of the victim and her son and the officer as well as the pictures . . ." proves this case beyond a reasonable doubt; and (3) "He has no remorse, which tells us

that if he gets away with this, he'll just keep doing it again."

1. Standard of Review and Applicable Law

We review a trial court's ruling on an objection asserting improper jury argument for an abuse of discretion. *Whitney v. State*, 396 S.W.3d 696, 703–04 (Tex. App.—Fort Worth, pet. ref'd). The Texas Court of Criminal Appeals has identified four general areas of approved closing argument: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) answer to the arguments of opposing counsel; and (4) plea for law enforcement. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). Argument outside of these general areas is not reversible error unless, in light of the record as a whole, the argument is "extreme or manifestly improper, violative of a mandatory statute, or injects new facts harmful to the accused into the trial proceeding." *Id*. We will not reverse unless the remarks were part of a "willful and calculated" effort by the State to deprive appellant of a fair trial. *Id*.

2. Analysis

Appellant relies on *Clayton v. State*, 502 S.W.2d 755, 756 (Tex. Crim. App. 1973), in support of his improper jury-argument contentions. *Clayton* recognizes the third area in *Wesbrook*, when it writes, "[i]t would never be appropriate to make such argument unless it is clearly invited." *Clayton*, 502 S.W.2d at 756; *compare id. with Wesbrook*, 29 S.W.3d at 115.

The statements faulted by appellant were made in rebuttal, after appellant had presented his closing argument. The State may have read appellant's closing argument as belittling the charge on the ground that it was filed "on the cold documents that were

submitted to the District Attorney's office for review" and by labeling it "sort of the offense de jour." Appellant also questioned the State's motivation by arguing "I'm glad that the politicians can make an issue of these areas" and contrasting that motivation with the contention that "[t]he police didn't want to arrest." Appellant then wrapped his criticism of the State's motivation back to the "record"—"somebody from the cold record goes back and makes a decision."

In essence, the trial court may have concluded that appellant attempted to distract the jury from the facts of the case with his take on how domestic violence cases are processed by police officers and prosecutors. We note that appellant's reference to "the politicians" was vague enough to encompass an elected district attorney. The trial court may have concluded that the State's rebuttal arguments answered arguments made by appellant. *See Wesbrook*, 29 S.W.3d at 115. Accordingly, we find no abuse of discretion in the trial court's overruling of appellant's objections to the State's rebuttal arguments. *See id*.

Appellant's first issue is overruled.

B. Extraneous Offenses

In appellant's second issue, he complains that the trial court erred by failing to grant his motion for mistrial after the "introduction of extraneous offenses by the prosecution." Specifically, appellant complains about two sets of statements—one made by the State and the other made by Saldivar.

1. Standard of Review and Applicable Law

When the trial court sustains an objection and instructs the jury to disregard but

denies a defendant's motion for a mistrial, the issue is whether the trial court abused its discretion by denying the mistrial. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). Only in extreme circumstances, when the prejudice caused by the improper argument is incurable, that is, "so prejudicial that expenditure of further time and expense would be wasteful and futile," will a mistrial be required. *Id*.; *see also Simpson v. State*, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003). In determining whether the trial court abused its discretion in denying the mistrial, we balance three factors: (1) the severity of the misconduct or prejudicial effect, (2) curative measures, and (3) the certainty of conviction absent the misconduct. *Hawkins*, 135 S.W.3d at 77; *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g).

2. Analysis

The first set of statements appellant complains about are questions raised by the State during its examination of Saldivar:

State: Why did you separate from Mr. Schultz?

Saldivar: He's very aggressive.

State: Very aggressive? Where did you go live, after you went to—after you separated from Mr. Schultz?

Saldivar: I went back to my home.

State: So you left because he was aggressive. What do you mean by aggressive?

Appellant: I'll object to that. That's a 404[(b)] motion that's already been heard.

Court: Rephrase your question.

. . . .

State: So after you guys separated and moved to the house in La Feria, did he leave you alone?

Appellant: I'll object to attempt to elicit any 404[(b)] material.

State: It's not a crime to know what the relationship was.

Court: Rephrase your question.

State: Did you all continue to see each other after you moved to your house in La Feria?

Saldivar: I separated from him. I told him that I didn't want to see him, but he kept bothering me.

The State argues that appellant's complaint regarding these statements fails on the ground that the questions asked by the State are not evidence.

Assuming, without deciding, that the trial court's instruction to the State to "rephrase your question" was tantamount to an adverse ruling and that the same preservation rules apply to *questions* as they do to *answers*, appellant's complaint to us—that the trial court erred by not granting a motion for mistrial—was not timely lodged in the trial court regarding the first set of statements. *See* TEX. R. APP. P. 33.1(a) (generally providing that as a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion); *Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007) ("In accordance with Rule 33.1, a motion for mistrial must be both timely and specific."). Appellant did not seek a mistrial regarding the first set of statements made by the State during its direct examination of Saldivar. Appellant moved for a mistrial only when the second set of statements was made, which occurred during his cross-examination of Saldivar.

Accordingly, appellant's complaint regarding the first set of statements fails.

The second set of statements appellant complains about are statements that he elicited from Saldivar. The exchange provides:

> Appellant: But the only thing you told the police on that day about what he had said, was that would you go outside with him because he wanted to talk; isn't that right?
>
> Saldivar: I don't recall. Like I said, there were so many times.
>
> Appellant: All right.
>
> Saldivar: I made reports about five or six times.
>
> Appellant: Judge, I'll ask that that be stricken, and I'll urge that it's in violation of the Motion in Limine.
>
> Court: I'm in agreement. That will be disregarded the last statement.
>
> Appellant: I'd move for a mistrial.
>
> Court: Denied.
>
> Appellant: I'd ask that the witness be admonished not to volunteer information that's contrary to law.
>
> Court: Taking a break.
>
> (Jury out)
>
> Court: Talk to your client. We're going to be in recess for the rest of the day. I'll see you guys at 10 o'clock in the morning.

The State argues that appellant waived his complaint on account of a prior statement by Saldivar. Earlier in appellant's examination of Saldivar and before the second set of statements were made, the following was exchanged:

Appellant: You never said that before, did you, Ms. Saldivar? You gave a statement in Spanish in writing on February 11, 2012 in which you described what happened there, didn't you do that?

Saldivar: There were so many reports, like five or six.

Appellant: Okay. Well, are you saying that you can't remember what you said in the different reports?

Saldivar: From that time, no, because it's been almost two years.

Inadmissible evidence can be rendered harmless if other evidence at trial is admitted without objection and it proves the same fact that the inadmissible evidence sought to prove. *Anderson v. State*, 717 S.W.2d 622, 628 (Tex. Crim. App. 1986). The testimony appellant complains about—"I made reports about five or six times"—is substantially similar to the testimony that was previously admitted without objection—"There were so many reports, like five or six." We conclude that if the trial court erred in denying appellant's motion for mistrial, such error was harmless. *See id*.

Appellant's second issue is overruled.

C. The Element of Bodily Injury

In appellant's third issue, he argues that the evidence is legally insufficient to support the element of bodily injury. *See* TEX. PENAL CODE ANN. § 22.01(a)(1). Appellant points to notations in Investigator Gallegos's written report that Saldivar's left, rather than right, arm was injured; that Saldivar was calm, rather than upset, when Investigator Gallegos arrived at the scene; and that Saldivar's wound was an "abrasion," presumably rather than a bruise. According to appellant, these discrepancies between Investigator Gallegos's report and the testimony presented to the jury render the evidence legally insufficient to support the bodily injury element.

1. Applicable Law and Standard of Review

A person commits the offense of assault by bodily injury if the person intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse. *See id*. The Texas Penal Code defines "bodily injury" as "physical pain, illness, or any impairment of physical condition." *Id*. § 1.07(a)(8) (West, Westlaw through 2015 R.S.).

Under a legal-sufficiency standard of review, we view the evidence in the light most favorable to the verdict and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). When performing this review, we bear in mind that it is the factfinder's duty to weigh the evidence, to resolve conflicts in the testimony, and to make reasonable inferences "from basic facts to ultimate facts." *Id*. Moreover, we must "determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007). Furthermore, we presume that conflicting inferences were resolved in favor of the conviction and defer to that resolution. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

2. Analysis

The State responds to appellant's third issue by arguing that the testimony of Saldivar and Investigator Gallegos provide legally sufficient evidence to support the element of bodily injury. We agree. Saldivar testified that when appellant grabbed her: it hurt, it continued to hurt for over a week, and it left a bruise. Investigator Gallegos testified that on the day of the incident, Saldivar's right arm had an abrasion and was red.

Appellant's complaint that a photograph of Saldivar's arm "showed no discernible injury" does not negate the testimony of Saldivar and Investigator Gallegos. It was within the jury's discretion to resolve the discrepancies between Investigator Gallegos's report and his testimony and to weigh the testimony of the witnesses against the photographs. Accordingly, there was legally sufficient evidence to support the bodily injury element.

Appellant's third issue is overruled.

D. Jury Charge and Lesser-Included Offenses

In appellant's fourth and fifth issues, he argues that the trial court erred in denying his request for the offenses of assault by threat and assault by physical contact to be included in the jury charge on the ground that those two offenses should be categorized as lesser-included offenses of assault by bodily injury.

1. Applicable Law and Standard of Review

Appellant references *Wortham*,[5] *Goad*,[6] and *Flores*[7] for general legal rules in support of his fourth and fifth issues. Meanwhile, the State's analysis is similar to the one employed in the unpublished opinion of *Perry v. State*. No. 06-13-00051-CR, 2014 WL 3973929 (Tex. App.—Texarkana Aug. 15, 2014, pet. ref'd) (mem. op., not designated for publication). Though it has no precedential value, *see* TEX. R. APP. P. 47.7(a), we find the analysis in *Perry* instructive.

[5] *Wortham v. State*, 412 S.W.3d 552 (Tex. Crim. App. 2013).

[6] *Goad v. State*, 354 S.W.3d 443 (Tex. Crim. App. 2011).

[7] *Flores v. State*, 224 S.W.3d 212 (Tex. Crim. App. 2012).

Our review of alleged jury-charge error involves a two-step process. *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994); *see Sakil v. State*, 287 S.W.3d 23, 25–26 (Tex. Crim. App. 2009); *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). Initially, we determine whether an error occurred, and then "determine whether sufficient harm resulted from the error to require reversal." *Abdnor*, 871 S.W.2d at 731–32; *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g), *reaff'd by Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003).

The assault statute sets out three separate and distinct assaultive crimes: bodily-injury assault, assault by threat, and offensive-contact assault. *See* TEX. PENAL CODE ANN. § 22.01(a)(1)–(3); *Landrian v. State*, 268 S.W.3d 532, 536, 540 (Tex. Crim. App. 2008). An offense is a lesser-included offense if:

> (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
>
> (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
>
> (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

TEX. CODE CRIM. PROC. ANN. art. 37.09 (West, Westlaw through 2015 R.S.). "[T]he pleadings approach is the sole test for determining in the first step whether a party may be entitled to a lesser-included-offense instruction." *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007). Thus, the first step involves a question of law that does not depend on the evidence to be produced at trial. *Id*. at 535–36. We look to the

allegations in the indictment or information to ascertain whether appellant was entitled to the requested lesser-included offenses. *Id*. The second step in the analysis should ask whether there is evidence that supports giving the instruction to the jury. *Id*. at 536.

2. Analysis

During the charge conference, appellant, like the defendant in *Perry*, asked that the court include, as lesser-included offenses, assault by threat and offensive-contact assault. *See* TEX. PENAL CODE ANN. § 22.01(a)(2)–(3). Appellant argues that the trial court's failure to include these lesser-included offenses was erroneous. We begin our analysis with the trial court's refusal to submit assault by offensive contact. Offensive-contact assault requires a finding that a person "intentionally or knowingly caused physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative." *Id*. § 22.01(a)(3). The information alleged that appellant "intentionally, knowingly or recklessly cause bodily injury to another, namely, Soledad Saldivar, a family or a household member or a person whom the defendant has or has had a dating relationship, by pushing and/or grabbing the victim[.]"

In proving this count, the State was not required to prove that appellant knew or should have reasonably believed that Saldivar would regard the action as offensive or provocative. *See McKithan v. State*, 324 S.W.3d 582, 591 (Tex. Crim. App. 2010); *see also Perry*, 2014 WL 3973929 at *8 (concluding that assault by offensive contact is not a lesser-include offense of assault by bodily injury). Therefore, offensive-contact assault would not be established by proof of the same or less than all the facts required to

establish the commission of the offense charged. *See McKithan*, 324 S.W.3d at 591 (concluding that offensive-contact assault was not a lesser-included offense of bodily-injury assault); *see also Perry*, 2014 WL 3973929 at 8 (same). Accordingly, we conclude that offensive-contact assault was not a lesser-included offense of the offense in the information, and the trial court was not required to submit an offensive-contact assault charge. *See McKithan*, 324 S.W.3d at 591 (holding interpretation that offensive-contact assault was lesser-included offense of bodily-injury assault would undermine Legislature's intent to place three distinct criminal offenses in Section 22.01(a)).

Appellant also requested submission of assault by threat as a lesser-included offense. *See* TEX. PENAL CODE ANN. § 22.01(a)(3). In *Hall*, 225 S.W.3d at 536, the Texas Court of Criminal Appeals found that aggravated assault by threat was not a lesser-included offense of murder because murder required an act that caused death, while an aggravated assault charge required evidence of a threat of imminent bodily injury to another. As stated by *McKithan*, "*Hall*, therefore, decided that shooting and killing a person with a gun is not, in a step-one lesser-included-offense analysis, functionally equivalent to threatening that person with imminent bodily injury by displaying a gun." *McKithan*, 432 S.W.3d at 593 n. 26. The State was not required to prove, in *Hall*, that imminent bodily injury was threatened even though the State's evidence may have shown assault by threat. *Id*. By analogy, assault by threat required proof that appellant threatened Saldivar with imminent bodily injury, whereas assault causing bodily injury does not have elements of either a "threat" or "imminent bodily injury." *See id*. Therefore, assault by threat was not a lesser-included charge because it required proof

of more facts not the same or fewer. *See id*. Accordingly, the trial court did not error in denying appellant's request for assault by threat.

Appellant's fourth and fifth issues are overruled.

E. Complaint and Information

In appellant's sixth issue, he complains that the trial court erred in overruling his motion to quash the complaint and information on the grounds that (1) the information fails to meet article 21.21; (2) the information and complaint may not be in one document; (3) an information must be dated after the compliant; (4) "there is no showing that Sherrell Vasquez [the affiant who signed the complaint] has any personal knowledge of this matter;" (5) the information and complaint failed to "allege acts which support the alleged culpable mental state of recklessness."

Appellant does not explain how the information fails to meet article 21.21 of the Texas Code of Criminal Procedure. *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). Our review of the compliant shows that it comports with article 21.21. *See* TEX. CODE CRIM. PROC. ANN. art. 21.21 (West, Westlaw through 2015 R.S.).[8]

[8] Article 21.21 provides:

> An information is sufficient if it has the following requisites: 1. It shall commence, "In the name and by authority of the State of Texas"; 2. That it appear to have been presented in a court having jurisdiction of the offense set forth; 3. That it appear to have been presented by the proper officer; 4. That it contain the name of the accused, or state that his name is unknown and give a reasonably accurate description of him; 5. It must appear that the place where the offense is charged to have been committed is within the jurisdiction of the court where the information is filed; 6. That the time mentioned be some date anterior to the filing of the information, and that the offense does not appear to be barred by limitation; 7. That the offense be set forth in plain and intelligible words; 8. That it conclude, "Against the peace and dignity of the State"; and 9. It must be signed by the district or county

As for appellant's second argument, after his brief was filed, the Texas Court of Criminal Appeal decided *State v. Drummond*. 501 S.W.3d 78, 83 (Tex. Crim. App. 2016). The court held that "a single document can serve as an information and the complaint supporting that information so long as the statutory requirements for both are met, and the accuser is not the same person as the prosecutor who brought the charges." *Id*. Here, the accuser is Sherrell Vasquez and the prosecutor is Laura M. Garcia. The single document comports with *Drummond's* requirement that the accuser and prosecutor be different individuals. *Id*. at 83. Appellant's second argument fails under *Drummond*. *Id*.

In support of appellant's third argument, he acknowledges that "[b]oth the information and complaint against [a]ppellant are dated October 31, 2012." For his contention that an information must be dated after the complaint, appellant relies on *Marlar v. State*. 364 S.W.2d 384, 384 (Tex. Crim. App. 1963). *Marlar*, in its entirety, provides:

> The offense is driving while intoxicated; the punishment, 20 days in jail and a fine of $250.00.
>
> The State confesses error, and we agree. The information in the case was filed July 7, 1962, while the complaint was not sworn to until July 9.
>
> Motions to quash and in arrest of judgment were overruled.
>
> It has long been the rule that a complaint sworn to after the information has been presented will not support a conviction. *Wormack v. State*, 162 Tex. Cr. R. 435, 286 S.W.2d 140, and cases there cited.

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attorney, officially.

TEX. CODE CRIM. PROC. ANN. art. 21.21 (West, Westlaw through 2015 R.S.).

The judgment is reversed and the prosecution ordered dismissed.

Id. at 384. Appellant's reliance on *Marlar* is misplaced. It provides that an information must be preceded by a complaint; it does not prohibit them from sharing the same date so long as the complaint is executed before the information. *Id*. Appellant fails to reference any evidence that the sequence did not comport with the Texas Code of Criminal Procedure. Accordingly, appellant's third argument fails.

Appellant's fourth argument—that "there is no showing that Sherrell Vasquez [the affiant who signed the complaint] has any personal knowledge of this matter"—fails to reference any legal authority. *See* TEX. R. APP. P. 38.1(i). Accordingly, this argument offers no support for this issue.

In appellant's fifth argument, he complains that the information fails to "allege acts which support the alleged culpable mental state of recklessness." The challenged information charged that appellant intentionally, knowingly, or recklessly caused bodily injury to Saldivar, a family or household member with whom appellant had a dating relationship by "pushing and/or grabbing" Saldivar. Appellant references *Smith v. State*, 309 S.W.3d 10, 18 (Tex. Crim. App. 2010), for the proposition that the alleged error "is a 'substance defect' and must be remanded for a harm analysis." Assuming, without deciding, that the phrase "pushing and/or grabbing" fails to meet the requirements of article 21.15, *see* TEX. CODE CRIM. PROC. art. 21.15 (West, Westlaw through 2015 R.S.),[9]

[9] Article 21.15 provides:

> Whenever recklessness or criminal negligence enters into or is a part or element of any offense, or it is charged that the accused acted recklessly or with criminal negligence in the commission of an offense, the complaint, information, or indictment in order to be sufficient in any such case must allege, with reasonable certainty, the act or acts relied upon to constitute recklessness or criminal negligence, and in no event shall it be sufficient

we still must conduct the harm analysis prescribed by Texas Rule of Appellate Procedure 44.2(b).[10] *See Mercier v. State*, 322 S.W.3d 258, 263 (Tex. Crim. App. 2010) (noting that it is answering the question that was not addressed in *Smith* and recognizing that such harm is to be analyzed under rule 44.2(b)); *see also Smith v. State*, No. 01–07–00860–CR, 2011 WL 5116458 at *2 (Tex. App.—Houston [1st Dist.] Oct. 27, 2011, no pet.) (mem. op. on remand, not designated for publication) (recognizing *Mercier* and applying rule 44.2(b) harm analysis to the erroneous denial of a motion to quash for failure to specify the reckless act). Appellant's brief fails to provide any analysis, record citations, and authority regarding the prescribed harm analysis. Accordingly, appellant's fifth argument is not persuasive.

Appellant's sixth issue is overruled.

F. Jury Charge

In his seventh issue, appellant complains that the trial court erred "in submitting a culpable mental state and definition of 'reckless' in the jury instructions." We note that the jury charge is in neither the clerk's record nor the supplemental clerk's record. Even if we looked to the reporter's record for guidance as to how the term "reckless" was defined in the jury charge, the reporter's record only contains, "(Court's Charge read to the jury by the court.)." The burden lies with the appellant to provide us with an appellate record sufficient to resolve the issue he presents. *See Guajardo v. State*, 109 S.W.3d

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> to allege merely that the accused, in committing the offense, acted recklessly or with criminal negligence.

TEX. CODE CRIM. PROC. art. 21.15 (West, Westlaw through 2015 R.S.).

[10] "Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b).

456, 462 n. 17 (Tex. Crim. App. 2003). We cannot address appellant's jury charge issue because we do not have the jury charge before us. *Id*.

Lastly, appellant argues, "that 'recklessness' is not a sufficient culpable mental state to sustain a criminal conviction," *citing Elonis v. United States*, 135 S.Ct. 2001 (2015). The State responds that "*Elonis* does not address the issue of the legality of 'recklessness' as a culpable mental state," and therefore, appellant's reliance on it is misplaced. We agree. In *Elonis*, the U.S. Supreme Court wrote, "In response to a question at oral argument, Elonis stated that a finding of recklessness would not be sufficient. Neither Elonis nor the Government has briefed or argued that point, and we accordingly decline to address it." *Elonis v. U.S.*, 135 S.Ct. 2001, 2013 (2015) (internal citations omitted). As the defendant in *Elonis*, appellant has failed to brief how "recklessness" is an insufficient mental state to sustain a criminal conviction.

Appellant's seventh issue is overruled.

III. CONCLUSION

The judgment of the trial court is affirmed.

LETICIA HINOJOSA
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
25th day of May, 2017.