COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

MICHAEL MOGUSU OMBUI,	§	
		No. 08-14-00029-CR
Appellant,	§	
		Appeal from the
v.	§	
		296th District Court
THE STATE OF TEXAS,	§	
		of Collin County, Texas
Appellee.	§	
		(TC# 296-80230-2013)
	§	

O P I N I O N

Appellant, Michael Mogusu Ombui, appeals his conviction for violation of a protective order by committing family violence against Shawnda Higgins, contending that the trial court improperly included the theory of assault by threat in the jury charge which was not pled in the indictment, and thereby denied his right to a fair trial. We affirm.[1]

BACKGROUND

Factual History

Dallas police officers arrived at the marital home of Michael Ombui and Shawnda Higgins on October 29, 2012, in response to a disturbance. For reasons not explained in the record, Ombui was arrested and taken to jail. Officer Spiotta testified that after the arrest he applied for a

[1] This appeal was transferred from the Dallas Court of Appeals pursuant to a docket equalization order issued by the Texas Supreme Court. We apply the precedent of that court to the extent required by TEX.R.APP.P. 41.3.

protective order because he felt that there was a potential for future family violence. The protective order was issued by Magistrate Terry Landwehr and was presented to Ombui. The order prohibited Ombui from, among other things, going within 500 feet of Higgins's residence or committing family violence as defined in Section 71.004 of the Family Code. Ombui moved out of their apartment.

On November 10, Ombui drove to Higgins's apartment to confront her about the rent payment. Higgins testified they argued, Ombui grabbed her car keys and ran towards the door. Higgins blocked his exit, Ombui pushed her in the stomach, hit her on the arm, and then left. She was three months pregnant. Higgins was frightened when he placed his hands on her and felt pain from the assault. Officer Swan, who responded to the call, testified that Higgins was visibly frightened and complained of pain on her stomach and arms. Officer Swan stated she observed redness on Higgins's arms.

Procedural History

Ombui was indicted with violation of a protective order by committing family violence by pushing and striking Higgins. Appellant objected to the jury-charge definition of assault, which allowed the jury to find that Ombui committed assault by causing bodily injury or by threat. Ombui objected that the evidence did not support the inclusion of the assault-by-threat charge-language. The State responded that the jury-charge definition tracked the statutory definition of assault and that pushing and striking Higgins could be regarded as threatening her with imminent bodily injury. Ombui's objection was overruled and the definition was included in the jury charge. Ombui was found guilty. This appeal followed.

DISCUSSION

In his sole issue on appeal, Ombui contends he is entitled to a new trial because of a jury-charge error. He maintains that the jury-charge definition of assault included assault by threat—which was not pled in the indictment. We disagree.

Standard of Review

An appellate court reviews a claim of jury-charge error by first determining whether an error exists in the charge. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex.Crim.App. 2005). If the reviewing court finds error in the charge, it then analyzes that error for harm. *Middleton v. State*, 125 S.W.3d 450, 453 (Tex.Crim.App. 2003). The level of harm required for reversal depends on whether the defendant objected to the error at trial. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1985)(opn. on reh'g). If the defendant timely objected to the error, the error is analyzed under the "some harm" standard; the standard being that the judgment may not be reversed unless the error was calculated to injure the rights of the defendant. *Id*. In deciding whether some harm occurred, the court reviews "the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." *Id.* at 171.

Applicable Law

As noted above, a court reviewing jury-charge error must first determine if the charge is erroneous. *Ngo,* 175 S.W.3d at 743. The duty of the trial court in charging the jury is to communicate to the jury each statutory definition that affects the meaning of an element of an offense. TEX.CODE CRIM.PROC.ANN. art 36.14 (West 2007); *see also Villarreal v. State*, 286 S.W.3d 321, 329 (Tex.Crim.App. 2009); *Vasquez v. State*, 389 S.W.3d 361, 366 (Tex.Crim.App.

2012)("The purpose of the trial court's jury charge is to instruct the jurors on all of the law that is applicable to the case."). The application paragraph of the jury charge applies the relevant penal law, abstract definitions, and general legal principles to the facts of the case and the indictment allegations. *Vasquez*, 389 S.W.3d at 366. When the application paragraph of a jury charge incorrectly applies the relevant penal law to the facts of a given case, it is erroneous. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex.Crim.App. 2015). "[T]erms which have a technical legal meaning may need to be defined . . . particularly . . . when there is a risk that the jurors may arbitrarily apply their own personal definitions of the term or where a definition of the term is required to assure a fair understanding of the evidence." *Middleton*, 125 S.W.3d at 454.

Article 21.21 sets out what facts must be included in an indictment and states that "the offense [must] be set forth in plain and intelligible words[.]" TEX.CODE CRIM.PROC.ANN. art. 21.21(7)(West 2009); *State v. Barbernell*, 257 S.W.3d 248, 251 (Tex.Crim.App. 2008). If the offense is statutorily defined "to include more than one manner or means of commission, the State must, upon timely request, allege the particular manner or means it seeks to establish." *Barbernell*, 257 S.W.3d at 251, *citing Saathoff v. State*, 891 S.W.2d 264, 266 (Tex.Crim.App. 1994).

The manner and means of an indictment describes how the defendant committed the specific statutory criminal act. *Ngo*, 175 S.W.3d at 745. The offense of violation of a protective order is defined in the penal code as follows:

> (a) A person commits an offense if, in violation of . . . an order issued under Article 17.292, Code of Criminal Procedure . . . the person knowingly or intentionally: (1) commits family violence or an act in furtherance of an offense under Section 20A.02, 22.011, 22.021, or 42.072 [.]

TEX.PENAL CODE ANN. § 25.07(a)(West Supp. 2016). "Family violence" is defined in Section 71.004, Family Code, as:

> (1) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself . . . (3) dating violence, as that term is defined by Section 71.0021.

TEX.FAM.CODE ANN. § 71.004 (West Supp. 2016).

"Dating violence" is defined in Texas Family Code Section 71.0021:

> (a) 'Dating violence' means an act, other than a defensive measure to protect oneself, by an actor that:
>
> (1) is committed against a victim or applicant for a protective order:
>
> (A) with whom the actor has or has had a dating relationship; or
>
> (B) because of the victim's or applicant's marriage to or dating relationship with an individual with whom the actor is or has been in a dating relationship or marriage; and
>
> (2) is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the victim or applicant in fear of imminent physical harm, bodily injury, assault, or sexual assault.

TEX.FAM.CODE ANN. § 71.0021 (West Supp. 2016).

Violation of a protective order is typically a class A misdemeanor; it is a third-degree felony, however, when the defendant (1) has previously been convicted two or more times of violating a protective order, (2) violates the protective order by committing an assault, or (3) violates the protective order by committing the offense of stalking. TEX.PENAL CODE ANN. § 25.07(g)(West Supp. 2016).

"Assault" is defined in the Texas Penal Code as follows:

> (a) A person commits an offense if the person:
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> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
>
> (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
>
> (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

TEX.PENAL CODE ANN. § 22.01(a)(West Supp. 2016). Assault by threat can be committed by action or conduct, not solely by threating words. *Olivas v. State*, 203 S.W.3d 341, 345 (Tex.Crim.App. 2006); *Horn v. State,* 647 S.W.2d 283, 285 (Tex.Crim.App. 1983)(holding that appellant committed assault by threat when he stabbed complainant multiple times, even though he did not speak before or during the attack); *Gafford v. State*, No. 05-14-00917-CR, 2015 WL 4641693, *2 (Tex.App.--Dallas Aug. 5, 2015, dism'd untimely filed)(mem. opn., not designated for publication)(holding that swerving his vehicle at the complainant's vehicle multiple times on the highway was sufficient to uphold aggravated assault by threat).

In *Olivas*, an assault by threat conviction was upheld where the complainant did not perceive that she was being shot at by the defendant but merely saw him drive up next to her vehicle and heard a succession of popping noises. *Olivas*, 203 S.W.3d at 343. Before this incident, Olivas had been stalking the complainant and had left her several threatening voice messages. *Id.* at 342. When he shot at her, the complainant thought he may have been throwing rocks at her truck, but later found bullet holes in her vehicle when she had reached her destination and Olivas had already driven off. *Id.* at 343. She testified that when she discovered the bullet

holes, it made her feel "shocked, upset, and scared," and that she thought that his intent had been to harm her. *Olivas*, 203 S.W.3d at 343.

A jury convicted Olivas and sentenced him to 35 years in prison. *Id*. He appealed, arguing that because the complainant did not realize that he was shooting at her car while he was committing the act, she had not been "threatened" as required under Texas Penal Code Section 22.01(a)(2). *Olivas*, 203 S.W.3d at 343. On review, the Texas Court of Criminal Appeals held that the appellant's prior actions—which the complainant testified made her feel threatened—affected her state of mind and showed that she could perceive the threat without knowing that he was shooting at her. *Id.* at 350. The fact that the complainant perceived some threat of imminent bodily injury, coupled with Olivas's actions, was sufficient to sustain the conviction. *Id*. at 351.

Analysis

Ombui argues that the jury charge impermissibly expanded the theory of liability beyond the indictment which may have led to a nonunanimous jury verdict. He asserts the indictment charged him with violation of a protective order by assault causing bodily injury, however he alleges the jury charge allowed a conviction if he committed assault by causing bodily injury or by threat. Ombui objected to the assault definition at the charge conference and the trial court overruled his objection.

The indictment charged that on November 10, 2012, Ombui:

> [I]ntentionally or knowingly violate[d] the terms of an order issued by Judge Terry Landwehr, Magistrate for City of Dallas Municipal Court, Collin County, Texas, on October 30, 2012 under the authority of Article 17.292 Code of Criminal Procedure, by intentionally or knowingly committing family violence against Shawnda Higgins, to-wit: by pushing Shawnda Higgins in the stomach with defendant's hand and by striking Shawnda Higgins on the arms with defendant's hand[.]

The charge of the court tracked the indictment. It further provided that:

> Violation of a Protective order is a felony if the person violated the order by committing an assault.
>
> Our law also provides that a person commits the offense of Assault if he intentionally or knowingly causes bodily injury to another or intentionally or knowingly threatens with imminent bodily injury.
>
> . . .
>
> 'Family violence' as used herein means an act by a member of a family or household against another member of the family or household or someone in a dating relationship that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself or dating violence.

These definitions provided by the trial court accurately reflect the statutory offenses. *See* TEX.PENAL CODE ANN. § 25.07; TEX.FAM.CODE ANN. § 71.004; TEX.FAM.CODE ANN. § 71.0021; TEX.PENAL CODE ANN. § 22.01.

The issue turns on whether the manner and means of violating the protective order by committing family violence as alleged in the indictment—pushing Higgins in the stomach and striking her on the arms—limited the State to proving violation of a protective order only by assault causing bodily injury. Ombui concedes that assault by threat is one way to commit family violence in a properly pled violation of a protective order indictment, but argues that it was not pled by the State and therefore its inclusion in the definitions section of the jury charge introduced a theory of liability not pled in the indictment. Given his concession, the question becomes whether the trial court erred in providing the statutory definition of assault in the jury charge, not whether the charge misstated the law. The State responds the indictment did not limit it to proving assault only by causing bodily injury but could also prove a violation of the protective order by assault by threat.

The State correctly points out assault by threat can be committed by actions or conduct which may convey the threat of imminent bodily injury to the complainant. As the court in *Olivas* held, assault by threat can be committed when the complainant perceives some threat of imminent bodily injury coupled with the defendant's actions. *Olivas*, 203 S.W.3d at 350. Here, Ombui pushed Higgins in the stomach and struck her arm during an altercation, and she testified that she was frightened. The indictment charged Obmui with violating a protective order by pushing Higgins in the stomach and striking her on the arm. The indictment's recitation of Ombui's actions gave notice of the assault by threat and the evidence is sufficient to support the trial court's decision to include it in the jury charge.

Further, Ombui was not charged with the offense of assault—he was charged with violation of a protective order. The State correctly points out that it can prove violation of a protective order by one of five manner and means, one of which is committing family violence as that term is defined in Section 71.004 of the Family Code. TEX.PENAL CODE ANN. § 25.07(a)(1-5). Family violence is defined in the Code as including an act by one family member against another that is intended to result in physical harm, bodily injury, assault, or sexual assault, or that is a threat that reasonably places the other family member in fear of imminent physical harm, bodily injury, assault, or sexual assault. TEX.FAM.CODE ANN. § 71.004. The definition of family violence encompasses both assault by threat and assault causing bodily injury in describing it as including physical harm, bodily injury, or the threat of either. TEX.FAM.CODE ANN. § 71.004.

"The jury must unanimously agree about the occurrence of a single criminal offense, but they need not be unanimous about the specific manner and means of how that offense was committed." *Young v. State*, 341 S.W.3d 417, 422 (Tex.Crim.App. 2011); *see also Landrian v.*

State, 268 S.W.3d 532, 535 (Tex.Crim.App. 2008); *Ngo*, 175 S.W.3d at 745. The State was free to prove any of the available manner and means of assault included in the statutory definition of family violence, the trial court was correct to define those terms in the charge, and the jury was authorized to determine whether the evidence presented constituted an assault. Because Obmui was charged with violating a protective order by committing family violence, defined to include assault by threat as well as assault by causing bodily injury, it was not error for the trial court to define those terms in the jury charge.

Harm Analysis

Even if the jury charge erroneously defined the offense, Ombui cannot establish "some harm" as required under *Almanza*. As noted above, the test for harm for objected-to error is whether the error was calculated to injure the rights of the defendant in light of the entire jury charge, the evidence, the arguments of counsel, and the record as a whole. *Almanza*, 686 S.W.2d at 171-174. The harm must be actual and not just theoretical. *Id*. at 174. As evidence of harm, Ombui points to "the minimal (or virtually lack of) evidence at trial regarding assault by threat, and to the prosecutor's closing arguments in which he points out that assault by threat is another ground for conviction."

But the record shows multiple instances throughout the trial of the State discussing assault by threat and presenting evidence which would support such a theory. During voir dire, the prosecutor told the jury that:

> You need to know what an assault is. Well, an assault, you intentionally, knowingly or recklessly cause bodily injury to another or intentionally or knowingly threaten another with imminent bodily injury, okay? So it basically says the same thing. I mean, there is not much of a difference there between what the definition of family violence is and what the definition of assault is.
>
> You can commit an assault either by actually physically harming someone

> or you can commit an assault by threatening someone with imminent bodily injury. The definition of bodily injury is physical pain, illness or any impairment of the physical condition.
>
> So again, what that means is there may not be any injuries at all; you may not have that. It may just be a threat of injury, if there are injuries, there may not be visible injuries.

He then asked each member of the venire one at a time if they were comfortable returning a verdict of guilty if the State proved threat instead of bodily injury. In the State's opening statement, the prosecutor told the jury that the evidence would show that Higgins "was concerned for her safety." Appellant did not object. Higgins testified she was scared at the time of the argument. Officer Swan testified that Higgins was scared and crying. In the State's closing argument, the prosecutor stated:

> Whether or not an assault occurred, there is [sic] a few different ways that you can commit an assault, and it is listed out in your Charge. You can intentionally or knowingly cause bodily injury to another or intentionally or knowingly threaten another with imminent bodily injury. So there does not even have to be actually any bodily injury.

In light of the record as a whole, the evidence presented, the nature of the testimony supporting the verdict, the lengthy discussion of assault by threat during voir dire, the prosecutor's explanation of assault by threat during opening statements and during closing arguments, Ombui suffered no harm calculated to injure his rights by including the definition of assault by threat in the jury charge.

CONCLUSION

Finding no error, Appellant's sole issue is overruled. The judgment of the trial court is affirmed.

September 27, 2017

YVONNE T. RODRIGUEZ, Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., Not Participating

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