Affirmed and Memorandum Opinion filed February 1, 2011

In The

Fourteenth Court of Appeals

NO. 14-10-00020-CR

DAVID DARELL GLANDON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 13
Harris County, Texas
Trial Court Cause No. 1616925

MEMORANDUM OPINION

A jury convicted appellant David Darell Glandon of violating a protective order and assessed punishment at 100 days in jail. In six issues, appellant challenges his conviction. We affirm.

BACKGROUND

The complainant, Sheri Glandon, was married to appellant from 1998 to 2007. She obtained a protective order against appellant on April 9, 2008, from the 310th District Court of Harris County pursuant to the Chapter 85 of the Texas Family Code.[1]

[1] *See* TEX. FAM. CODE ANN. §§ 85.001–.065 (West 2008 & Supp. 2009).

The protective order prohibited appellant from engaging in the following conduct: committing family violence against Sheri; communicating directly with Sheri in a threatening or harassing manner; communicating a threat through any person to Sheri; and "[e]ngaging in conduct directed specifically toward Sheri, including following Sheri, that is likely to harass, annoy, alarm, abuse, torment, or embarrass" Sheri.

On July 29, 2009, appellant was charged by information with violating the April 9, 2008 protective order under Section 25.07 of the Texas Penal Code by "intentionally and knowingly" communicating with the complainant on March 7, 2009, in a "threatening and harassing manner" (1) "BY CALLING THE COMPLAINANT ON THE TELEPHONE AND LEAVING VOICE MESSAGES ON THE COMPLAINANT'S TELEPHONE THAT THREATENED HARM TO THE COMPLAINANT"; (2) "BY LEAVING REPEATED VOICE MESSAGES ON THE COMPLAINANT'S TELEPHONE"; and (3) "BY CALLING THE COMPLAINANT ON THE TELEPHONE AND LEAVING VOICE MESSAGES ON THE COMPLAINANT'S TELEPHONE WITH VULGAR AND ABUSIVE LANGUAGE." *See* TEX. PENAL CODE ANN. § 25.07 (West Supp. 2009). The State alleged one prior felony for the offense of robbery for enhancement of punishment.

At trial, Sheri testified that she called the police on March 7, 2009, because appellant had called her "a bunch of times threatening [her] about [her] son." The trial court admitted State's Exhibit No. 2, a CD containing the recorded voice mail messages appellant had left on Sheri's cell phone on March 7, 2009. The State played five messages for the jury. Sheri testified that the messages were vulgar, threatening, abusive, and harassing. Sheri further testified that "[she] thought he was going to hurt [her]. . . . Any way he could. Physically." Sheri "was scared. [She] knew that he could get around [her] property and damage anything or damage [her] or hurt [her]." She also felt "intense fear and threat with these messages."

The jury found appellant guilty of violating the April 9, 2008 protective order, found appellant was a repeat offender, and assessed punishment at confinement in jail for 100 days. In this appeal, appellant contends that the trial court erred by (1) overruling his motion to quash the information, (2) overruling his objections to defects in the form and substance of the information, (3) admitting the recorded voice mails into evidence, and (4) granting judgment against him on the jury's guilty verdict.

ANALYSIS

Defects in Information

In his first, second, and third issues, appellant contends that the trial court abused its discretion by overruling his motion to quash the criminal information. Appellant argues that the information does not provide sufficient notice of the charges against him because (1) it does not describe the type of "harm" allegedly inflicted on Sheri, i.e., physical, financial, psychological, or legal; (2) the phrase "repeated voice messages" is vague because it fails to identify the number of messages which constitute "repeated" messages; (3) the alleged offense is overly broad because it fails to state how the repeated voice messages are threatening and harassing; (4) the phrase "vulgar and abusive" is vague because it did not apprise him of the specific abusive and vulgar language against which he would prepare his defense; and (5) it does not describe how the "vulgar and abusive language" is threatening and harassing.

Under the United States and Texas Constitutions, a criminal defendant has the right to notice of the nature and cause of action against him. U.S. CONST. amend. VI; TEX. CONST. art I, § 10. To satisfy this notice requirement, the information must be "'specific enough to inform the accused of the nature of the accusation against him so that he may prepare a defense.'" *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007) (quoting *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004)). A motion to quash should be granted only where the language concerning the defendant's

conduct is so vague or indefinite as to deny the defendant effective notice of the acts he allegedly committed. *DeVaughn v. State*, 749 S.W.2d 62, 67 (Tex. Crim. App. 1988).

A ground for an exception to the form of an information exists if the information fails to allege facts sufficient to give the defendant notice of the precise offense with which he is charged. *Sanchez v. State*, 120 S.W.2d 359, 367 (Tex. Crim. App. 2003); *Adams v. State*, 707 S.W.2d 900, 901 (Tex. Crim. App. 1986). A defect in form does not render an information insufficient unless the form defect "prejudice[s] the substantial rights of the defendant." TEX. CODE CRIM. PROC. ANN. art. 21.19 (West 2009); *Olurebi v. State*, 870 S.W.2d 58, 61 (Tex. Crim. App. 1994). The failure to provide proper notice in a charging instrument is not reversible error unless the error affects the defendant's ability to prepare a defense. *Chambers v. State*, 866 S.W.2d 9, 17 (Tex. Crim. App. 1993). In making this determination, we consider the complete record. *Flores v. State*, 33 S.W.3d 907, 919 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (op. on reh'g). We review a trial court's decision to deny a motion to quash an information under a de novo standard of review. *Lawrence*, 240 S.W.3d at 915.

Assuming, without deciding that the information failed to give appellant notice and the trial court erred by denying appellant's motion to quash, we conclude that any error was harmless. Appellant filed a partial reporter's record in this appeal. Under Rule 34.6(c) of the Texas Rules of Appellate Procedure, a party who properly designates certain portions of the reporter's record may appeal without a complete record, and the appellate court must presume the incomplete record is complete for purposes of the appeal. TEX. R. APP. P. 34.6(c)(4). However, appellant has not followed the steps set forth for an appeal based on a partial reporter's record to be entitled to rely on the presumption that the partial reporter's record constitutes the entire record for purposes of this appeal. The record does not reflect that appellant filed a statement of the points or issues to be presented on appeal as required by Rule 34.6(c)(1). *See* TEX. R. APP. P. 34.6(c)(1). We are required to review the "complete record" in determining whether any

error affected appellant's ability to prepare a defense. *See Flores*, 33 S.W.3d at 919. Because appellant failed to comply with the requirements of Rule 34.6(c), the State correctly argues that we must presume the omitted portions of the reporter's record are relevant and support the trial court's decision to overrule appellant's motion to quash. *See In re J.S.P.*, 278 S.W.3d 414, 418 (Tex. App.—San Antonio 2008, no pet.) ("When an appellant fails to file the statement of appellate points or issues, we presume that the material missing from the reporter's record is relevant and supports the trial court's judgment."). Appellant's first, second, and third issues are overruled.

In his fourth issue, appellant contends that the trial court erred in overruling his objections to defects in the form and substance of the information. Appellant complains that the State alleged in the information that the conduct was committed "knowingly *and* intentionally" instead of "knowingly *or* intentionally," and in a "threatening *and* harassing" manner instead of a "threatening *or* harassing" manner as used in the statute. *See* TEX. PENAL. CODE ANN. § 25.07(a). Appellant argues that this lowered the State's burden of proof and he was required to prepare his defense against overly broad and vague charges.

At the pretrial hearing, the State responded that it "is permitted to plead in the conjunctive and prove in the disjunctive." The trial court ruled that "[t]he charge will be or" and overruled appellant's objections. Although the information may allege the differing methods of committing the offense in the conjunctive, it is proper for the jury to be charged in the disjunctive. *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991). The State may allege a defendant's mental state in the conjunctive and submit it to the jury in the disjunctive. *Rogers v. State*, 774 S.W.2d 247, 251 (Tex. Crim. App. 1989), *overruled on other grounds by Peek v. State*, 106 S.W.3d 72, 79 (Tex. Crim. App. 2003); *Zanghetti v. State*, 618 S.W.2d 383, 387–88 (Tex. Crim. App. 1981). While the trial court submitted the terms "intentionally *or* knowingly" to the jury in the disjunctive, it submitted the terms "threatening *and* harassing" in the conjunctive.

Appellant does not specify whether this is a defect in form or substance, but this does not matter because he must still show harm in the case of either type of defect. Again, assuming without deciding that the information contains a defect in form or substance, appellant cannot show that his substantial rights were affected. As addressed above, we are required to review the entire record in conducting a harm analysis regarding any alleged trial court error in failing to dismiss an indictment that contains a defect in form. *See Flores*, 33 S.W.3d at 919. Appellant's failure to file a statement of points and issues to be considered on appeal with the partial reporter's record requires this court to presume that the omitted portions of the reporter's record are relevant and support the trial court's decision. *See In re J.S.P.*, 278 S.W.3d at 418.

With respect to alleged error regarding a defect in substance, the Texas Court of Criminal Appeals recently held that trial court error in failing to dismiss an indictment that contains a defect in substance is subject to a harm analysis under Rule 44.2(b) of the Texas Rules of Appellate Procedure. *Mercier v. State*, 322 S.W.3d 258, 264 (Tex. Crim. App. 2010). Under Rule 44.2(b), any error that does not affect substantial rights must be disregarded. TEX. R. APP. P. 44.2(b). Appellate courts should not overturn a criminal conviction for non-constitutional error if the court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but slight effect. *Jabari v. State*, 273 S.W.3d 745, 754 (Tex. Crim. App. 2008). Thus, we are required to review the entire record in conducting a harm analysis under Rule 44.2(b). Because appellant filed only a partial reporter's record without a statement of points or issues to be presented on appeal as required, we must presume the omitted portions of the reporter's record are relevant and support the trial court's ruling on appellant's overruling his objections to defects in the form and substance of the information. *See In re J.S.P.*, 278 S.W.3d at 418. Appellant's fourth issue is overruled.

Admission of the Voice Mail Recordings

In his fifth issue, appellant asserts that the trial court erred in overruling his objection to the admission of voice mail recordings into evidence because the State failed to establish a proper foundation for their admission. The State contends that appellant waived this issue on appeal. Appellant states that he objected to the admission of the voice mail recordings in his "Motion in Limine-Extraneous Matters" and "Brief for Motion in Limine-Extraneous Matters and in the Alternative Motion to Exclude Voice Mail Recordings from Evidence on Grounds of No Foundation" and during trial.

In his motion in limine, appellant requested that the trial court instruct the State not to mention, allude, or refer in any manner to any voice mail, tape recordings, or other electronic recordings alleged to be appellant, in the presence of the jury, until a hearing has been held outside the presence of the jury to determine whether such voice mail or tape recordings were admissible. In his supporting brief, appellant argued that the voice mail recordings should be excluded from evidence because the State failed to establish the proper foundation pursuant to the seven factors set forth in *Edwards v. State*, 551 S.W.2d 731 (Tex. Crim. App. 1977).

At the pretrial hearing, the following took place with regard to the voice mail recordings:

> [THE STATE]: Judge, I think Defense counsel also had some issues in terms of the voice recordings. I don't know if you want to pick the jury first and then the Court would like to hear the rest of Counsel's motions in terms of his objections because there's going to be a few recordings that might — to expedite the trial for the Court to hear them and rule on all the recordings first before to try to enter them one by one by one and Counsel objects during trial.
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> Would you like to do that after we pick the jury?
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> THE COURT: I can't tell either one of you how to try your case.

[APPELLANT'S COUNSEL]: My concern about my objections to the voice recordings is should my objections be sustained and they are not admitted, they really shouldn't be talked about in the jury selection process.

[THE STATE]: I understand.

And we also have some motions in limine; and I think Counsel has those, too, Judge.

THE COURT: Are you asking me to have a hearing as to whether they are admissible or not admissible? Is that what you are asking me?

[THE STATE]: Yes, Judge. We discussed prior and Counsel said he was going to object to each of them as they were being entered. I just thought it might be expedient if the Court just ruled on that beforehand so that way, you know, each time it comes in, we don't —

THE COURT: All right. I'll do that in a few minutes.

To preserve error for appellate review, an appellant must make a timely, specific objection and obtain an adverse ruling. TEX. R. APP. P. 33.1(a); *Geuder v. State*, 115 S.W.3d 11, 13 (Tex. Crim. App. 2003). The trial court did not hear any specific argument at the pretrial hearing on the admissibility of the recordings. Although appellant asserts that the trial court overruled his objections, he never obtained a ruling from the trial court during the hearing on the admissibility of the recordings.[2] An appellant must obtain an adverse ruling to preserve error in the admission of evidence. *See Moff v. State*, 131 S.W.3d 485, 489 (Tex. Crim. App. 2004) ("[T]he complaining party must have obtained an adverse ruling from the trial judge, or objected to the judge's refusal to rule, to preserve error in the admission of the evidence."). Even if appellant had obtained a ruling on his motion in limine, he would not have adequately preserved the error he complains of here. A grant or denial of a motion in limine is a preliminary ruling only and preserves nothing for appellate review. *Geuder*, 115 S.W.3d at 14–15.

[2] We further observe that appellant failed to provide a citation to the record demonstrating any trial court ruling on his objections. *See* TEX. R. APP. P. 38.1.

At trial, appellant made the following objection when the State sought to introduce the voice mail recordings into evidence:

> [APPELLANT'S COUNSEL]: And the Defendant objects on the grounds that Officer Jack has already testified that these messages were dated March 7th. The last officer that just testified testified [sic] there was no dates [sic] on them. A copy of the messages I was provided have no dates on them.
>
> My objection is on the grounds that these messages are undated hearsay. We don't know when they occurred, and we've got conflicting testimony from Officer Jack as to what the dates are. He says they are dated March 7th. I've got a copy of them, and there's absolutely no dates on them, which is consistent –
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> THE COURT: You can't testify.
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> [APPELLANT'S COUNSEL]: What I'm saying is –
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> THE COURT: Your objection is overruled. They will be admitted into evidence.
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> [APPELLANT'S COUNSEL]: It's hearsay.

Appellant objected on the basis of hearsay during trial, not on the failure to establish the proper foundation for the admission of the recordings. Because appellant's objection on appeal does not comport with his objection at trial, he has waived any error on appeal. *See Banargent v. State*, 228 S.W.3d 393, 400 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd).

Even if appellant had not waived his complaint on appeal, he cannot show that any error in the admission of the voice mail recordings affected his substantial rights. In determining whether error, if any, in the admission of the voice mail recordings affected appellant's substantial rights, we must review the entire record. *See Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002) ("[S]ubstantial rights are not affected by the erroneous admission of evidence 'if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight

effect.'" (quoting *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001))). Because appellant only requested a partial reporter's record and did not comply with Rule 34.6(c) by filing a statement of points or issues to be considered on appeal, we must presume the omitted portions of the record support the judgment. *See In re J.S.P.*, 278 S.W.3d at 418. Appellant's fifth issue is overruled.

Collateral Attack

In his sixth issue, appellant contends that the trial court erred in granting judgment against him on the jury's guilty verdict because the protective order on which his prosecution was based was void for lack of jurisdiction. Appellant asserts that it was error for the 310th District Court to enter a default protective order against him because there was no evidence on the face of the court's file of proof of service to enable the court to exercise personal jurisdiction over him.

Prior to the State's filing the complaint and the information, appellant filed a motion to dismiss the cause against him. However, there is nothing in the record to show that appellant's motion to dismiss or jurisdictional arguments were presented to the trial court or ruled on by the trial court. *See Geuder*, 115 S.W.3d at 13 (preserving error for appellate review under Rule 33.1 requires that "the trial judge either ruled on the request, objection, or motion (expressly or implicitly), or he refused to rule and the complaining party objected to that refusal"). Even assuming that appellant has not waived this issue, appellant may not collaterally attack the protective order in this criminal proceeding.

A collateral attack is an attempt to avoid the effect of a judgment in a proceeding brought for some other purpose. *Adams v. State*, 222 S.W.3d 37, 57 (Tex. App.—Austin 2005, pet. ref'd). Here, appellant challenges the civil protective order in this collateral criminal proceeding. Appellant cites no cases authorizing such collateral attack, and this court finds none. Two unpublished decisions have addressed this issue, applying the traditional collateral attack analysis applicable to civil judgments. *See Dillard v. State*, No. 05-00-01745-CR, 2002 WL 31845796, at *4 (Tex. App.—Dallas Dec. 20, 2002, no

pet.) (not designated for publication) ("Because the protective order is essentially a civil judgment, we apply civil rules to decide this collateral attack."); *see also Ramirez v. State*, No. 08-07-00207-CR, 2008 WL 3522369, at *4 (Tex. App.—El Paso Aug. 14, 2008, no pet.) (mem. op., not designated for publication). However, courts reviewing collateral attacks on criminal judgment apply a parallel analysis. *Nix v. State*, 65 S.W.3d 664, 668 (Tex. Crim. App. 2001).

Only a void judgment may be collaterally attacked. *Browning v. Prostock*, 165 S.W.3d 336, 346 (Tex. 2005). A judgment is void only when it is apparent that the court rendering judgment "'had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act.'" *Id.* (quoting *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985)).

If a court having potential jurisdiction renders a judgment when the potential jurisdiction has not been invoked, and the defect is apparent on the face of the judgment, then the judgment is void and subject to either direct or collateral attack. *Graham v. Graham*, 733 S.W.2d 374, 377 (Tex. App.—Amarillo 1987, writ ref'd) (citing *Fulton v. Finch*, 162 Tex. 351, 355, 346 S.W.2d 823, 827 (1961)). If the court having potential jurisdiction renders a judgment regular on its face that has been activated, then the judgment is voidable, not void, and may be set aside only by direct attack. *Akers v. Simpson*, 445 S.W.2d 957, 959 (Tex. 1969). "It is the firmly established rule in Texas that a defendant who is not served and who does not appear may not, as a matter of public policy, attack the verity of a judgment in a collateral proceeding; the jurisdictional recitals import absolute verity." *Id.*

We "must indulge every presumption in favor of the regularity of the proceedings and documents" in the trial court. *McCloud v. State*, 527 S.W.2d 885, 887 (Tex. Crim. App. 1975). This presumption of regularity means "recitations in the records of the trial court, such as a formal judgment, are binding in the absence of direct proof of their falsity." *Breazeale v. State*, 683 S.W.2d 446, 450 (Tex. Crim. App. 1984) (op. on reh'g).

The protective order recited that the trial court found "[appellant] having been duly and properly cited, and having been duly and properly served with the application and notice of hearing: . . . did not appear and wholly made default." The trial court further found "that all necessary prerequisites of the law have been satisfied and that this Court has jurisdiction over the parties and subject matter of this cause." The recital of jurisdiction over the parties in the protective order is entitled to "absolute verity" in this collateral attack. *See Akers*, 445 S.W.2d at 959. Therefore, the protective order remained presumptively valid. Appellant may not collaterally attack the April 9, 2008 protective order in this appeal from his conviction for violating that order. *See Ramirez*, 2008 WL 3522369, at *4 (holding appellant could not collaterally attack validity of protective order in appeal from conviction for violating it); *Dillard*, 2002 WL 31845796, at *5–6 (holding recital of jurisdiction over parties in protective order was entitled to "absolute veracity" in collateral attack, and appellant could not collaterally attack validity of protective order in appeal from criminal conviction for violating order). Appellant's sixth issue is overruled.

Having overruled all of appellant's issues, we affirm the trial court's judgment.

/s/ Sharon McCally
Justice

Panel consists of Justices Anderson, Seymore, and McCally.
Do Not Publish — TEX. R. APP. P. 47.2(b).