Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00412-CR

Alex **DIAZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 187th Judicial District Court, Bexar County, Texas
Trial Court No. 2016CR11550
Honorable Steve Hilbig, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Marialyn Barnard, Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

Delivered and Filed: August 29, 2018

AFFIRMED

A jury found appellant Alex Diaz guilty of violating a protective order. After finding Diaz had previously been convicted of two prior offenses, the trial court sentenced Diaz to thirty-one years' confinement and assessed a $2,000.00 fine. On appeal, Diaz contends: (1) the evidence is legally insufficient to support his conviction because there is no evidence he knew of the existence of the protective order; and (2) the trial court erred by refusing his request to include an instruction on a lesser included offense — assault-bodily injury — in the jury charge. We affirm the trial court's judgment.

BACKGROUND

On July 26, 2016, the State, on behalf of Tiffany Castro, filed an application for protective order pursuant to the Texas Family Code in the 408th Civil District Court, Bexar County, Texas. In the application, the State alleged Diaz committed "an act or acts of family or dating violence" against Castro. According to the application, Diaz was Castro's ex-boyfriend. The application sought to enjoin Diaz from: (1) committing family violence against Castro or her family; (2) communicating with Castro or her family in a threatening or harassing manner; (3) communicating with Castro or her family except through her attorney; (4) coming within two hundred yards of Castro's residence, place of employment, or the residences, school, and childcare facility of Castro's children; (5) engaging in conduct directed toward Castro or her family that is likely to harass, annoy, alarm, abuse, torment, or embarrass that person; (6) possessing a firearm; and (7) removing, harming, threatening, or interfering with the care, custody, or control of a pet possessed by Castro or her family. On July 26, 2016, the judge of the presiding court signed a "Temporary Ex Parte Protective Order and Show Cause Order," prohibiting Diaz from engaging in the conduct as set out in the application. The temporary order required Diaz to appear in presiding court on August 16, 2016, at 10:00 a.m. to show cause why he should not be prohibited from engaging in the conduct set out in the application and temporary order. The record includes returns from the Bexar County Sheriff's Office showing that on August 1, 2016, Diaz was served with a "Notice of an Application for a Protective Order" and a "Temporary Protective Order." The notice of application advised Diaz that an application for protective order had been filed on behalf of Castro alleging he committed family violence. It further notified him that he was to appear in presiding court on August 16 , 2016, at 10:00 a.m. The temporary protective order advised Diaz that the court had rendered a temporary order prohibiting Diaz from engaging in the conduct set out in the application, which was attached. It too advised Diaz that he was required to appear in presiding

court on August 16, 2016, at 10:00 a.m. and show cause why a protective order should not be granted.

A hearing was set for August 16, 2016, as stated in the notice and temporary order. Diaz appeared. However, the hearing was reset to September 6, 2016. Diaz signed an "Agreed Reset and Order Extending Temporary Protective Order" in which he agreed the matter would be reset to September 6, 2016. The reason given for the reset was "further investigation." Diaz did not appear for the September 6, 2016 hearing. The hearing was again reset because Diaz "was given conflicting information for current setting date." The second reset order, which was signed September 6th, set the hearing for September 22, 2016. Diaz did not appear and a "Default Protective Order," was rendered that same day. The default order prohibited Diaz from engaging in the conduct described in the original application for two years from the date of the order. However, Diaz was permitted contacted with the children he shared with Castro.

In December 2016, Diaz was indicted for violating the original, temporary protective order of July 26, 2016. More specifically, it was alleged that on September 10, 2016, Diaz violated the order "dated the 26th day of July, 2016 … by intentionally or knowingly committing an assault against TIFFANY CASTRO, by PULLING THE HAIR OF COMPLAINANT WITH THE HAND AND FINGERS OF DEFENDANT, GRABBING THE COMPLAINANT WITH THE HAND OF THE DEFENDANT and SCRATCHING THE COMPLAINANT WITH THE HAND OF THE DEFENDANT[.]" A jury convicted Diaz of the charged offense, and the trial court sentenced him to confinement for thirty-one years and assessed a $2,000.00 fine. Thereafter, Diaz perfected this appeal.

ANALYSIS

As noted above, Diaz raises two issues on appeal. First, he contends the evidence is legally insufficient to support his conviction because there is no evidence "showing [Diaz] knew of the

existence of the protective order." Second, he claims the trial court erred in denying his request for an instruction on the lesser-included offense of assault-bodily injury.

Legal Sufficiency

Diaz contends his conviction should be reversed because there is no evidence he knew about the protective order. More specifically, he argues there is nothing in the record to show he had knowledge the temporary order of protection signed July 26, 2016, was still in effect at the time of the September 10, 2016 assault.

Standard of Review

To determine whether the evidence is legally sufficient to support a conviction, we must examine all of the evidence in the light most favorable to the verdict to determine whether, based on that evidence and reasonable inferences therefrom, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Cary v. State*, 507 S.W.3d 761, 766 (Tex. Crim. App. 2016) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Harris v. State*, 532 S.W.3d 524, 527 (Tex. App.—San Antonio 2017, no pet.). The essential elements of the offense are based on a hypothetically correct jury charge. *Ramjattansingh v. State*, 548 S.W.3d 540, 546 (Tex. Crim. App. 2018); *Ramos v. State*, 407 S.W.3d 265, 269 (Tex. Crim. App. 2013). A hypothetically correct jury charge accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict its theories of liability, and adequately describes the particular offense for which the defendant was tried. *Ramjattansingh*, 548 S.W.3d at 546; *Ramos*, 407 S.W.3d at 269.

In a sufficiency review, direct and circumstantial evidence are equally probative. *Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016); *Harris*, 532 S.W.3d at 527. Circumstantial evidence, even in the absence of direct evidence, may be sufficient to uphold a conviction as long as the cumulative force of the evidence is sufficient to support the conviction. *Ramsey v. State*,

473 S.W.3d 805, 809–10 (Tex. Crim. App. 2015); *Harris*, 532 S.W.3d at 527. Additionally, under the legal sufficiency standard, we must assume the jury resolved any apparent inconsistencies in order to render its verdict, and we defer to its resolution of such inconsistencies. *Cary*, 507 S.W.3d at 757. Moreover, jurors may draw multiple reasonable inferences from the facts as long as the evidence supports each inference. *Tate*, 500 S.W.3d at 413; *Harris*, 532 S.W.3d at 528.

Application

Diaz was charged with violating a protective order. The hypothetically correct jury charge in this case would have stated the elements as: (1) Diaz, (2) intentionally or knowingly, (3) violated the 408th District Court's temporary order of protection dated July 26, 2016, issued pursuant to Chapter 85 of the Texas Family Code, (4) after Diaz received service of the application and notice of the hearing, (4) by intentionally or knowingly, (5) committing an assault against Castro. *See* TEX. PENAL CODE ANN. § 25.07(a) (West Supp. 2017); *see also Villarreal v. State*, 286 S.W.3d 321 327 (Tex. Crim. App. 2009); *Harvey v. State*, 78 S.W.3d 368, 371–74 (Tex. Crim. App. 2002). Diaz contends that because he failed to appear at the September 6, 2016 hearing due to having received "conflicting information" about the setting, he had no notice that the prior temporary protective order had been extended to September 22, 2016, and was still in effect at the time of the September 10, 2016 assault on Castro.

We begin by noting the record shows Diaz personally signed the reset order, resetting the hearing for September 6, 2016, but failed to appear. This document was admitted into evidence as part of a State's exhibit. On the 6th, and despite Diaz's signature on the reset order, the court again reset the hearing based on Diaz receiving "conflicting information for current setting date." However, as for the September 22, 2016 hearing, Castro testified that although she did not personally inform Diaz about the new hearing date, she was informed by the prosecutor handling the protection matter that Diaz was contacted by phone and informed about the September 22,

2016 hearing. Moreover, the default protective order issued on September 22, 2016, specifically stated, with regard to notice, "although duly and properly cited with notice of the hearing, [Diaz] did not answer or appear and wholly made default." The default order of protection — with the language reciting notice to Diaz — was admitted into evidence.

Viewing this evidence in the light most favorable to the jury's verdict of guilt, we hold there was sufficient evidence from which the jury could have reasonably inferred Diaz had notice of the September 22, 2016 hearing. *See Cary*, 507 S.W.3d at 766. Jurors could have resolved any conflicts in the evidence with regard to notice in favor of guilt. *See id.* at 757. Moreover, Diaz's knowledge that the temporary order was extended is irrelevant. *See Harvey*, 78 S.W.3d at 373.

In *Harvey*, the Texas Court of Criminal Appeals specifically held that with regard to notice, "[t]he requirements are only that the respondent be given the resources to learn the provisions [of the protective order]; that is, that he be given a copy of the order, or notice that an order has been applied for and that a hearing will be held to decide whether it will be issued." *Id.* According to the court, the order is binding on the respondent even if he chooses not to read the order or chooses not to read the notice and the application and not to attend the hearing. *Id.* Thus, as the State contends, under *Harvey*, it is only necessary that a respondent like Diaz receive service of the protective order application and notice of each hearing. *See id.* As set out in the background portion of this opinion, the record shows that on August 1, 2016, Diaz was served with a "Notice of an Application for a Protective Order" and a "Temporary Protective Order." The notice of application advised Diaz he was to appear in presiding court on August 16, 2016, at 10:00 a.m., which he did. The evidence shows Diaz signed the reset order, resetting the matter to September 6, 2016, so he had knowledge of the September 6th setting. Finally, as noted above, the default order of protection recited Diaz had notice of the September 22, 2016 hearing, and Castro testified

the State contacted Diaz about the new setting. Thus, the evidence is such that the jury could have concluded Diaz received notice of every setting, which is all *Harvey* requires. *See id.*

In any event, Diaz is hard pressed to contend he was unaware the terms of the temporary order of protection were no longer in effect. The temporary order itself, which Diaz received, states that it would continue "in full force and effect until the hearing set herein, or until further order of this Court, or until said Order expires by operation of law." No hearing was held until September 22, 2016, based on the resets, and the court never withdrew or rescinded the temporary order until it rendered the default order of protection. Given the resets, the order never expired, i.e., a new order was not issued at each hearing; rather, the same order was merely extended. *See* TEX. FAM. CODE ANN. § 83.002(a), (b) (West 2014) (stating temporary ex parte orders are valid for period stated in order, not to exceed twenty days, but on applicant's request or court's own motion, order may be extended for additional twenty-day periods).

Accordingly, we overrule Diaz's contention that the evidence was insufficient to support his conviction based on an absence of notice.

Jury Charge

Diaz next contends the trial court erred when it refused his request for a jury instruction on the lesser-included offense of assault-bodily injury. Diaz contends there was some evidence in the record from which a jury could have rationally concluded that if he was guilty, he was guilty only of assault-bodily injury.

Standard of Review

We engage in a two-step analysis in determining whether a trial court was required to give a requested instruction on a lesser-included offense. *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016); *Sweed v. State*, 351 S.W.3d 63, 67 (Tex. Crim. App. 2011). First, we determine whether the requested instruction "pertains to an offense that is a lesser-included offense of the

charged offense, which is a question of law." *Bullock*, 509 S.W.3d at 924. Because it is a question of law, we conduct a de novo review. *Rice v. State*, 333 S.W.3d 140, 144 (Tex. Crim. App. 2011). An offense is a lesser-included offense of the charged offense if it is within the proof necessary to establish the offense charged. *Bullock*, 509 S.W.3d at 924; *see* TEX. CODE CRIM. PROC. ANN. art. 37.09 (West 2006).

Second, we determine whether the evidence warrants an instruction on the lesser-included offense. *Bullock*, 509 S.W.3d at 924–25. This inquiry also requires a de novo review because it is a mixed question of law and fact that does not turn on credibility or demeanor. *See Hall v. State*, 158 S.W.3d 470, 473 (Tex. Crim. App. 2005) (holding that in reviewing entire record to determine whether defendant is entitled to lesser-included offense instruction, appellate court cannot consider "whether the evidence is credible, controverted, or in conflict with other evidence."); *see also, e.g.*, *State v. Bolles*, 541 S.W.3d 128, 134 (Tex. Crim. App. 2017) (holding that appellate court conducts de novo review of mixed questions of law and fact that do not depend on credibility or demeanor of witnesses); *Furr v. State*, 499 S.W.3d 872, 886 (Tex. Crim. App. 2016) (same).

This second step requires us to determine whether there is evidence in the record that supports submission of the lesser-included-offense instruction to the jury. *Bullock*, 509 S.W.3d at 924–25. A defendant is entitled to a lesser-included-offense instruction "when there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense." *Id.* at 925. In other words, the evidence must establish the lesser-included offense "is a valid, rational alternative to the charged offense." *Bullock*, 509 S.W.3d at 925. The strength or weakness of the evidence is irrelevant; rather, the question is whether any evidence raises the issue that the defendant was guilty only of the lesser offense. *Cavazos v. State*, 382 S.W.3d 377, 384–85 (Tex. Crim. App. 2012).

There are two ways that evidence may indicate that a defendant is guilty of only the lesser offense: (1) evidence is presented that negates other evidence establishing the greater offense; or (2) evidence is presented showing the defendant's awareness of the risk is subject to two different interpretations. *Id.* at 385. However, the reviewing court must examine all of the admitted evidence, not just that presented by the defendant; particular pieces of the record "cannot be plucked out of the record and examined in a vacuum." *Bullock*, 509 S.W.3d at 925. Anything more than a scintilla of evidence is sufficient; however, "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather there must be some evidence directly germane to the lesser-included offense" for the fact finder to consider before a lesser-included-offense instruction is warranted. *Id.* We may not consider the credibility of the evidence or whether it conflicts with other evidence, but the evidence must still be directly germane to the lesser-included offense and must rise to a level that a rational jury could find that if the defendant is guilty, he is guilty only of the lesser-included offense. *Id.*; *Cavazos*, 382 S.W.3d at 385. "Meeting this threshold requires more than mere speculation—it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Cavazos*, 382 S.W.3d at 385.

Application

Diaz argued below, and now argues on appeal, that there was evidence from which the jury could have rationally concluded that he lacked actual knowledge that the temporary protective order was still in place on September 10, 2016, the date of the assault. According to Diaz, his lack of knowledge negated an element of the greater offense — intentional or knowing violation of the temporary protective order — thereby entitling him to an instruction on the lesser-included offense of assault-bodily injury. *See id.* Assuming without deciding that assault-bodily injury is a lesser-

included offense of violation of a protective order, we hold the record does not contain evidence from which a jury could rationally conclude Diaz is guilty only of the lesser-included offense.

The evidence shows the temporary protective order, which was served on Diaz, specifically states that it continued "in full force and effect until the hearing set herein, or until further order of this Court, or until said Order expires by operation of law." Thus, to be entitled to a lesser-included offense instruction on assault-bodily injury — based on his lack of knowledge that the temporary protective order was still in effect — the record would have to include some evidence that Diaz had reason to believe: (1) a hearing on the matter was actually held before the September 10, 2016 assault, (2) the court rendered an order before September 10, 2016, rescinding or otherwise terminating (as opposed to merely extending) the temporary order, or (3) the temporary order expired by operation of law (which we know it did not because it was extended). In support of his contention, Diaz relies on the following evidence: (1) his absence from the September 6th hearing, (2) his failure to sign the September 6th reset order; (3) the "conflicting information" allegedly provided to him about the September 6th hearing, (4) Castro's testimony verifying his absence from the September 6th hearing; (5) Castro's admission that she did not advise him that the temporary order had been extended; and (6) Castro's admission that, other than what she was told, she did not personally know whether anyone from the State contacted Diaz about the September 6th reset and extension. We hold, however, the evidence relied upon by Diaz is relevant to the issue of whether Diaz had *notice* of the September 6th hearing and the reset that arose from that hearing, not whether he had *knowledge* the temporary order of protection was still in effect (or had reason to believe it had expired). There is no evidence from any source that would have allowed Diaz to believe or assume the temporary order was no longer in effect. The only evidence in the record with regard to the effective dates or expiration of the temporary order of protection is found in the order itself. Diaz's lack of *notice* of a hearing and a subsequent reset arising from that

hearing did not alter his *knowledge* of the temporary protective order and the limited terms upon which its effect would cease. Accordingly, we hold there is no evidence in the record from any source to show that if Diaz is guilty, he is guilty only of the offense of assault-bodily injury.

CONCLUSION

Based on the analysis set out above, we overrule Diaz's appellate complaints. Accordingly, we affirm the trial court's judgment.

Marialyn Barnard, Justice

Do Not Publish