**In The**

***Court of Appeals***

***Ninth District of Texas at Beaumont***

**NO. 09-15-00270-CR**

**DANIEL LAMAR ROGERS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

**On Appeal from the 258th District Court**
**Polk County, Texas**
**Trial Cause No. 23679**

## MEMORANDUM OPINION

A jury convicted appellant Daniel Lamar Rogers (Rogers or Appellant) of repeated violations of a protective order. *See* Tex. Penal Code Ann. § 25.072 (West Supp. 2016).[1] The trial court sentenced Rogers to twelve years in prison. On appeal, Rogers argues that the evidence is legally insufficient to support the jury's finding

[1] Although the Legislature amended this section after the offense at issue, we cite to the current version of the statute because subsequent amendments do not affect the outcome of this appeal.

of guilt because the underlying protective order Rogers allegedly violated is invalid and void, section 25.072 of the Texas Penal Code is unconstitutional on its face and as applied to him, and he was denied effective assistance of counsel under the federal and state constitutions. We affirm the trial court's judgment.

## BACKGROUND

After a hearing on J.M.'s Application for Protective Order, the trial court signed a Protective Order on January 2, 2014.[2] Among other things, the Protective Order prohibited Rogers from communicating in any manner with J.M. and ordered that the Protective Order be personally served on Rogers. According to a Sheriff's Return in the appellate record, Rogers was personally served with the Protective Order at the Polk County Jail on January 2, 2014.

On October 16, 2014, the State filed an indictment by the grand jury alleging that Rogers

> did then and there intentionally, during a continuous period that was twelve months or less in duration, namely, from on or about January 1, 2014 through July 30, 2014, engage in conduct two or more times that constituted an offense under Section 25.07 of the Texas Penal Code, namely,
>
> On or about the 14th day of February, 2014, in the County of Polk and the State of Texas, Daniel Lamar Rogers, defendant, did then

[2] We use initials to refer to the alleged victim. *See* Tex. Const. art. I, § 30(a)(1) (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

and there intentionally or knowingly, in violation of an order issued by Judge Stephen Phillips of the County Court at Law of Polk County, Texas, issued on January 2, 2014 in Cause Number CIV28134 under authority of Chapter 85 of the Texas Family Code, by intentionally or knowingly communicating in any manner with [J.M.] and not through an attorney or person appointed by the County Court at Law of Polk County, Texas, to wit: by sending [J.M.] a text message or leaving a voicemail or sending [J.M.] a letter or card,

And on or about the 28th of July, 2014 in the County of Polk and the State of Texas, Daniel Lamar Rogers, defendant, did then and there intentionally or knowingly, in violation of an order issued by Judge Stephen Phillips of the County Court at Law of Polk County, Texas, issued on January 2, 2014 in Cause Number CIV28134 under authority of the Texas Family Code, by intentionally or knowingly communicating in any manner with [J.M.], a protected individual or member of defendant's family or household and not through an attorney or person appointed by the County Court at Law of Polk County, Texas, to wit: by leaving a voicemail other than the voicemail alleged above,

And on or about the 28th of July, 2014 in the County of Polk and the State of Texas, Daniel Lamar Rogers, defendant, did then and there intentionally or knowingly, in violation of an order issued by Judge Stephen Phillips of the County Court at Law of Polk County, Texas, issued on January 2, 2014 in Cause Number CIV28134 under authority of the Texas Family Code, by intentionally or knowingly communicating in any manner with [J.M.], a protected individual or member of defendant's family or household and not through an attorney or person appointed by the County Court at Law of Polk County, Texas, to wit: by leaving a voicemail other than the voicemails alleged above,

REPEAT OFFENDER NOTICE:

And it is further presented to said court that prior to the commission of the offense or offenses set out above, the defendant was finally convicted of the felony offense of Assault Family/Household Member with Previous Conviction in the 258th District Court of Polk

> County, Texas, in Cause Number 21,487, on the 14th day of February, 2012[.]

## APPLICABLE LAW

Under the Texas Family Code, "[a] court shall render a protective order as provided by Section 85.001(b) if the court finds that family violence has occurred and is likely to occur in the future." Tex. Fam. Code Ann. § 81.001 (West 2014). A protective order proceeding begins with the filing of an application. *Id.* § 82.001 (West 2014). Thereafter, the court must set an expedited hearing. *Id.* § 84.001 (West 2014). At the close of the hearing, the court "shall find" whether family violence has occurred and is likely to occur in the future. *Id.* § 85.001(a)(1)-(2) (West 2014). "If the court finds that family violence has occurred and that family violence is likely to occur in the future, the court . . . shall render a protective order as provided by Section 85.022" as against the person found to have committed family violence. *Id.* § 85.001(b)(1). Assuming the trial court finds good cause, a protective order under section 85.022 can, among other things, prohibit a "person found to have committed family violence" from communicating "in any manner with a person protected by an order or a member of the family or household of a person protected by an order, except through the party's attorney or a person appointed by the court[.]" *Id.* § 85.022(b)(2)(C) (West Supp. 2016).

Section 25.072(a) of the Penal Code provides that "[a] person commits an offense if, during a period that is 12 months or less in duration, the person two or more times engages in conduct that constitutes an offense under Section 25.07[,]" and the offense is a third degree felony. *See* Tex. Penal Code Ann. § 25.072(a), (e). Section 25.07 provides, in relevant part, that a person commits an offense if, in violation of Chapter 85 of the Family Code, the person knowingly or intentionally communicates

> in any manner with the protected individual or a member of the family or household except through the person's attorney or a person appointed by the court, if the violation is of an order described by this subsection and the order prohibits any communication with a protected individual or a member of the family or household[.]

*See* Tex. Penal Code Ann. § 25.07(a)(2)(C) (West Supp. 2016).

## LEGAL SUFFICIENCY CHALLENGE

In Appellant's first issue, he argues that the evidence is legally insufficient to prove that he committed the offense of violation of a protective order because "the evidence adduced at trial and at the protective order itself establishes that the underlying protective order which Rogers allegedly violated is invalid and void." According to Rogers, the underlying protective order is invalid and void because the Polk County Court at Law issued it without notice to Appellant and after Appellant was denied his ability to be present at the hearing. He also argues that, because there

was no testimony or evidence presented at the hearing on the Application for Protective Order, the trial court had no basis for making the requisite findings under the Texas Family Code that Rogers has actually committed an act of family violence against another and that an act of future violence was likely to occur in the future.

The appellate record does not demonstrate that Appellant presented this argument to the trial court in his criminal proceeding, and therefore the argument has been waived. *See* Tex. R. App. P. 33.1; *Yazdchi v. State*, 428 S.W.3d 831, 844 (Tex. Crim. App. 2014). Nevertheless, even assuming Rogers has not waived the issue, we conclude that Rogers may not collaterally attack the protective order in this criminal proceeding.

"A collateral attack occurs if it must in some fashion overrule a previous judgment." *See Ramirez v. State*, No. 08-07-00207-CR, 2008 Tex. App. LEXIS 6195, at *10 (Tex. App.—El Paso Aug. 14, 2008, no pet.) (not designated for publication) (citing *Browning v. Prostok*, 165 S.W.3d 336, 345 (Tex. 2005)). Appellant cites no cases authorizing such collateral attack, and this Court is not aware of any such authority.

Several of our sister courts have addressed in unpublished decisions collateral attacks in criminal appeals regarding prior civil judgments and have applied the traditional collateral attack analysis applicable to civil judgments. *See Perez v. State*,

No. 08-15-00253-CR, 2017 Tex. App. LEXIS 4368, at *8 n.1 (Tex. App.—El Paso May 11, 2017, no pet. hist.) (not designated for publication); *Glandon v. State*, No. 14-10-00020-CR, 2011 Tex. App. LEXIS 700, at **16-17 (Tex. App.—Houston [14th Dist.] Feb. 1, 2011, no pet.) (mem. op., not designated for publication); *Dillard v. State*, No. 05-00-01745-CR, 2002 Tex. App. LEXIS 9151, at *10 (Tex. App.—Dallas Dec. 20, 2002, no pet.) (not designated for publication).[3]

Our appellate record includes a Sheriff's Return noting that Rogers was served the Protective Order on the same day it was entered. The Protective Order, which was admitted into evidence without objection, contains recitations that the trial court found that Rogers "having been duly and properly cited, and after having been properly served with the application and notice of the hearing . . . did not appear and wholly made default[,]" that Rogers and J.M. are members of the same family or household, and that family violence (as defined by section 71.004 of the Texas Family Code) has occurred and is likely to occur in the future.

Rogers could have challenged the validity of the Protective Order in the County Court at Law that issued the order by filing a motion for new trial or a bill of review, or by appeal. *See* Tex. Fam. Code Ann. § 81.009 (West 2014) (providing

[3] We note that courts reviewing collateral attacks on criminal judgments apply a parallel analysis. *See Nix v. State*, 65 S.W.3d 664, 668 (Tex. Crim. App. 2001).

for appeal of protective order); *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 925 (Tex. 2009) (explaining the requirements for a motion for new trial that seeks to set aside a default judgment); *Caldwell v. Barnes*, 975 S.W.2d 535, 537-38 (Tex. 1998) (explaining that a party may challenge a default judgment by bill of review where the prior judgment is no longer subject to challenge by a motion for new trial or by appeal). Rogers, however, cannot collaterally attack the validity of the protective order on an appeal for his conviction for violating it. *See, e.g.*, *Glandon*, 2011 Tex. App. LEXIS 700, at *19 ("Appellant may not collaterally attack the [prior] protective order in this appeal from his conviction for violating that order."); *Ramirez*, 2008 Tex. App. LEXIS 6195, at **10-11 ("Appellant cannot collaterally attack the validity of the protective order for lack of notice on an appeal for his conviction for violating it."); *Dillard*, 2002 Tex. App. LEXIS 9151, at **12-14 (The recital of jurisdiction over parties in a protective order was entitled to "absolute verity" in collateral attack, and appellant could not attack the validity of the protective order in appeal from criminal conviction for violating the protective order.). Issue one is overruled.

## CONSTITUTIONAL CHALLENGE

In his second issue, Rogers argues that his conviction should be vacated because section 25.07(a)(2)(A) of the Texas Penal Code is unconstitutional on its

face and as applied to him. Appellant contends that he was "convicted of a crime which violates the First Amendment, i.e. communicating directly with a protected individual or a member of the family or household in a harassing manner, as proscribed by Texas Penal Code § 25.07(a)(2)(A)." However, the indictment and conviction did not address conduct under section 25.07(a)(2)(A). Rather, Rogers was indicted and convicted under section 25.07(a)(2)(C).

The indictment alleged that Rogers committed the offense of repeated violation of a protective order by "intentionally, during a continuous period that was twelve months or less in duration, namely, from on or about January 1, 2014 through July 30, 2014, engage in conduct two or more times that constituted an offense under Section 25.07 of the Texas Penal Code[.]" The indictment then alleged three different dates within the alleged time frame when Rogers violated the Protective Order issued in Cause Number CIV28134 by the Polk County Court at Law "by intentionally or knowingly communicating in any manner with [J.M.]" and not through an attorney or person appointed by the Polk County Court at Law. These allegations track the language of offenses under section 25.07(a)(2)(C), which in pertinent part provides that a person commits an offense if, in violation of an order issued under Chapter 85 of the Family Code, the person knowingly or intentionally communicates "in any manner with the protected individual or a member of the

family or household except through the person's attorney or a person appointed by the court, if the violation is of an order described by this subsection and the order prohibits any communication with a protected individual or a member of the family or household[.]" *See* Tex. Penal Code Ann. § 25.07(a)(2)(C).

The jury charge includes the same allegations as in the indictment, and the verdict form states the jury found Rogers "[g]uilty of the offense of Repeated Violation of a Protective Order, as charged in the indictment." Although there may have been evidence presented at trial that Rogers communicated directly with J.M. or a member of the family or household in a threatening or harassing manner, the indictment and the charge do not include allegations that Rogers committed an offense under section 25.07(a)(2)(A). Therefore, we need not determine whether section 25.07(a)(2)(A) is unconstitutional on its face or as applied to Rogers because he was not convicted under that section of the statute.[4] Issue two is overruled.

[4] We note that other courts have rejected similar constitutional arguments to section 25.07(a)(2)(A). *See, e.g.*, *Perez v. State*, No. 08-15-00253-CR, 2017 Tex. App. LEXIS 4368, at **12-23 (Tex. App.—El Paso May 11, 2017, no pet. hist.) (mem. op., not designated for publication); *Wagner v. State*, No. 05-13-01329-CR, 2015 Tex. App. LEXIS 4568, at **7-13 (Tex. App.—Dallas May 5, 2015, pet. granted) (mem. op., not designated for publication); *Garcia v. State*, 212 S.W.3d 877, 886 (Tex. App.—Austin 2006, no pet.).

## INEFFECTIVE ASSISTANCE OF COUNSEL

In his third issue, Rogers asserts he was denied the effective assistance of counsel under the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, section 10 of the Texas Constitution. According to Rogers, there is a reasonable probability that, but for his trial counsel's "failure to properly present the case and defenses, and failure to attack the protective order underlying this conviction," the results of the trial would have been different.

To prevail on a claim of ineffective assistance of counsel, an appellant must satisfy a two-pronged test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986). An appellant must demonstrate a reasonable probability that but for his counsel's errors, the outcome would have been different. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). "Appellate review of defense counsel's representation is highly deferential and presumes that

counsel's actions fell within the wide range of reasonable and professional assistance." *Id.*

Rogers must prove that there was no plausible professional reason for specific acts or omissions of his counsel. *See id.* at 836. In addition, "[a]ny allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *overruled on other grounds by Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998)). The bare record on direct appeal is usually insufficient to demonstrate that "counsel's representation was so deficient and so lacking in tactical or strategic decision making as to overcome the presumption that counsel's conduct was reasonable and professional." *Bone*, 77 S.W.3d at 833 (citation omitted).

As explained above, we have rejected Rogers's collateral attack on the protective order. As to Rogers's general complaint that his trial counsel failed "to properly present the case and defenses," Rogers did not file a motion for new trial, and the record does not demonstrate that defense counsel's performance was the product of an unreasoned or unreasonable trial strategy, or that counsel's performance led to an unreliable verdict or punishment. *See id.* at 833-34.

Furthermore, our review of the record does not indicate that, but for the complained-of errors, the result of Rogers's trial would have been different. *See id.* at 833. Accordingly, we overrule issue three. We affirm the trial court's judgment.

AFFIRMED.

LEANNE JOHNSON
Justice

Submitted on March 23, 2017
Opinion Delivered June 21, 2017
Do Not Publish

Before Kreger, Horton, and Johnson, JJ.