In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-22-00285-CR

JOHN GARDNER, Appellant

V.

THE STATE OF TEXAS

On Appeal from County Criminal Court No. 1
Denton County, Texas
Trial Court No. CR-2020-01974-A

Before Kerr, Bassel, and Wallach, JJ.
Memorandum Opinion by Justice Kerr

MEMORANDUM OPINION

Former Pilot Point Police Officer John Gardner appeals his conviction for Class A misdemeanor "assault family violence." *See* Tex. Penal Code Ann. § 22.01(a)(1). Before trial, the detective assigned to the case shredded the case's paper file without ensuring that the entire file—specifically, an affidavit of nonprosecution signed by the alleged victim (Gardner's wife) and a *Miranda* rights waiver signed by Gardner—had been electronically preserved. At trial, neither Gardner's wife nor the Gardners' neighbors, with whom the Gardners had socialized the evening of the assault and to whose house his wife fled after the assault, testified. In three issues, Gardner argues that (1) the trial court erred by failing to find that the State had acted in bad faith when it destroyed potentially useful evidence; (2) the trial court abused its discretion by denying Gardner's requested spoliation jury instructions; and (3) the evidence was insufficient to support Gardner's assault conviction. We will affirm.

I. Background

On the evening of February 25, 2020, Gardner, his wife ("Stacy," an alias), and their two neighbors went out drinking. The quartet returned to the neighbors' house along with a woman they had met at a bar. Stacy and the woman left the neighbors' house and went to the Gardners' house. When Gardner returned home later that night, he found Stacy and the woman engaged in sexual activity. Gardner became angry, and he and Stacy started to argue, which caused the other woman to leave. The Gardners argued some more and then went to bed.

Gardner woke up a few hours later. His wife still asleep, Gardner decided to go through her cell phone to see if she and the other woman had been communicating. When he couldn't access Stacy's phone because she had changed the password, he became upset and woke her up, yelling at her to give him the password and threatening to break her phone if she refused. Stacy threw or hit Gardner in the head with a marble coaster, causing a laceration above his left eye and prompting Gardner to respond by striking her face. She suffered a cut to the inside of her lip as a result. Stacy then ran to the neighbors' house, and one of the neighbors called 911 just before 5:30 a.m.

City of Denton Police Officers Caleb Jonas and Trevor Dahlke responded to the call. After they arrived at the neighbors' house, the officers spoke with Stacy, who was intoxicated. She had been crying and was upset and shaking. She seemed scared, spoke in a soft, timid voice, avoided eye contact, and was evasive when questioned about what had happened. The officers saw that she had a cut on the inside of her lip and learned that she had been in an altercation with Gardner.

Because Gardner was a police officer, standard department procedures required a higher-ranking officer to be called to the scene. Shortly after 6:00 a.m., Sergeant Donny Carr with the City of Denton Police Department arrived at the scene. Officers Jonas and Dahlke briefed him on the investigation, and Sergeant Carr observed them interviewing Stacy.

After speaking with Stacy, the three officers spoke with Gardner—who was also intoxicated—in the Gardners' home. The officers saw the laceration above Gardner's left eye. Gardner admitted to the officers what had happened and walked through the scene with them. The officers saw a stone coaster on the Gardners' bedroom floor with drops of blood on the floor around it. According to the officers, Gardner was cooperative and forthcoming but was defensive.

The officers returned to the neighbors' house to talk with Stacy about Gardner's injury and the events leading up to it. She seemed confused when Officer Jonas mentioned the coaster. In contrast to Gardner, she was not forthcoming, which, according to the officers, is common for family-violence-assault victims. The officers surmised that she was trying to protect Gardner and his law-enforcement career.

The officers feared for Stacy's safety. The officers did not believe that Gardner had acted reasonably, did not think his story made sense, and did not find him credible. Although they believed that Gardner was probably the aggressor, they could not determine at that time who was actually the aggressor because Stacy was uncooperative and both parties were injured. The officers thus left without making an arrest.

The following day, the case was assigned to Denton Police Department Detective Mike Mayfield. During his investigation, Detective Mayfield reviewed the officers' reports and photographs taken at the scene, watched body-camera video footage, and spoke with the neighbors. His conversation with one of the neighbors

left Detective Mayfield also concerned for Stacy's safety. After he talked with the neighbors, Detective Mayfield determined that Gardner was the primary aggressor and obtained a warrant for his arrest.

Detective Mayfield contacted Gardner and asked him to come to the police station, where Detective Mayfield arrested him. Detective Mayfield read Gardner his *Miranda* warnings, and Gardner signed a written *Miranda* rights waiver. During his custodial interview with Detective Mayfield, Gardner admitted to drinking heavily the night before. He also admitted to the events leading up to the altercation and the altercation itself but insisted that he had tapped his wife gently on the shoulder to wake her up, that she had woken up argumentative and hit him with a coaster, and that "he [had] responded by swinging or pushing in some manner with his arms, and he wasn't exactly sure but [his hand] somehow came in contact with [Stacy's] face." Gardner claimed that Stacy was "lying and trying to gain sympathy from others," was "basically overreacting," and was "trying to get people to take her side." Gardner admitted that he and Stacy had been involved in other domestic-violence incidents to which police had responded but that did not result in arrests.

Later that day, Detective Mayfield spoke to Stacy, who was upset that Gardner had been arrested, did not want to be interviewed, and minimized what had happened. Detective Mayfield did not believe that she was being truthful with him and thought that she and Gardner had "lined up" their stories. Detective Mayfield also spoke with Pilot Point Police Officer Justin Stamps, who was Gardner's

officemate. Officer Stamps told Detective Mayfield that the day after the incident, Gardner had called Officer Stamps to tell him what had happened and admitted to punching his wife in the face.

At the end of his investigation, Detective Mayfield believed that Gardner was the primary aggressor and that Stacy was acting in self-defense:

> By -- from what I had gathered, John had woke[n] her up aggressively because he couldn't get into her phone; that she responded to this aggressiveness by either swinging at him or tossing or however it happened with this coaster or object that struck him in the head.
>
> *Q.* And you learned that she had been asleep when [Gardner] confronted her about the phone, correct?
>
> *A.* Correct.
>
> *Q.* And do you think someone would be fearful to have someone standing over them, you know, aggressively demanding information from them?
>
> *A.* I would think so.
>
> *Q.* Do you believe that her reaction was reasonable?
>
> *A.* I do.
>
> *Q.* Do you still hold that same belief today?
>
> *A.* I do.

Still concerned for Stacy, Detective Mayfield sought and obtained an emergency protective order against Gardner. The same day the protective order was issued, Stacy executed an affidavit of nonprosecution (ANP). Despite the ANP, in May 2020 the State charged Gardner by information with assault.

At some point, Detective Mayfield electronically uploaded what he believed to be the entire case file and shredded the case's paper file. Unfortunately, the ANP and Gardner's *Miranda* rights waiver were not in the electronic case file, and Detective Mayfield could not find the original documents. Gardner moved to dismiss the information based on Detective Mayfield's destruction of the documents. The trial court concluded that Detective Mayfield did not act in bad faith and thus denied the motions.

The case then proceeded to trial. The jury heard testimony from, among others, Officer Jonas, Officer Dahlke, Sergeant Carr, Detective Mayfield, and Officer Stamps. Stacy and the neighbors evaded the State's multiple attempts to subpoena them to testify at trial and did not testify.

Officer Jonas, Officer Dahlke, and Sergeant Carr testified about their on-scene investigation, and Detective Mayfield testified about his investigation and his inadvertent destruction of the ANP and the *Miranda* rights waiver. Officer Stamps recounted his telephone conversation with Gardner the day after the assault:

> [Gardner] stated -- he began the conversation something along the lines of, I fucked up last night.
>
> . . . He said that he -- him and his wife had been bar-hopping in Denton. They had gotten kicked out of a few bars. There was something in there about getting kicked out of an Uber, possibly. And that they had gone back to their house and continued heavily drinking and had possibly -- either at his house or at the neighbors' house, they'd been drinking. And there was a third person involved somehow. [Stacy] and that person had been involved, I guess, in some kind of sexual relationship, sexual activity.

Then later on in the night, John went to try to go look through her phone. She had changed the pass code on her phone. He tried to get into the phone. He forcefully woke her up, is what he told me. And whenever she woke up, she hit him in the head with a --

. . . .

Q. (BY [THE STATE]) What did she hit you in the head -- or I'm sorry. What did she hit him in the head with?

A. He told me it was a marble coaster.

Q. And what was his response to that?

A. That he got really pissed and punched her in the face.

. . . .

Q. Did he tell you if [Stacy] -- what had [Stacy] done after he punched her in the face?

A. He said that she had r[u]n to the neighbors' house.

Q. I believe you said that he was forcefully -- that he told you he was forcefully shaking her, correct?

A. To wake her up, yes.

Q. And if someone is forcefully shaking someone, is it fair to say they would have to grab on their body?

A. Yes.

. . . .

Q. Did he tell you anything else in relation to the injuries that [Stacy] had, that he caused?

A. Not specifically. The one comment he did make was something along the lines of, I fucked her up good.

> *Q.* Do you know if [Stacy] has ever gone to the neighbors' house before?
>
> *A.* Yes, he had mentioned before that they had gotten into a physical altercation and she had r[u]n to the neighbors' house a few months prior to that.

The trial court denied Gardner's request for spoliation jury instructions on the State's loss or destruction of the ANP and the *Miranda* rights waiver. The jury found Gardner guilty of assault as alleged in the information. The trial court assessed his punishment at 365 days in county jail probated for 24 months, with ten days' confinement in jail as a probation condition. The trial court also made an affirmative family-violence finding. *See* Tex. Code Crim. Proc. Ann. art. 42.013.

Gardner has appealed, raising three issues. The first two relate to the destroyed ANP and *Miranda* rights waiver. The third challenges the sufficiency of the evidence supporting Gardner's conviction. We address each issue in turn.

II. Motion to Dismiss

In Gardner's first issue, he contends that the State acted in bad faith by destroying potentially useful evidence—specifically, the ANP and the *Miranda* rights waiver—and thus violated his due-process rights. Gardner argues that because the evidence suffices to support a bad-faith finding, the trial court erred by failing to make such a finding and by failing to dismiss the charges against him.

A. Standard of Review

When reviewing a trial court's ruling on a motion to dismiss a charging instrument, we apply a bifurcated standard, giving almost total deference to the trial court's fact-findings that are supported by the record, as well as any mixed questions of law and fact that rely upon witness credibility. *See State v. Krizan-Wilson*, 354 S.W.3d 808, 815 (Tex. Crim. App. 2011). For purely legal questions or mixed questions that do not depend on credibility determinations, our review is de novo. *See id.*

B. Applicable Law

In addressing the failure to preserve evidence in a criminal trial, there is a distinction between "material exculpatory evidence" and "potentially useful evidence." *Arizona v. Youngblood*, 488 U.S. 51, 57–58, 109 S. Ct. 333, 337 (1988); *Ex parte Napper*, 322 S.W.3d 202, 229 (Tex. Crim. App. 2010). That difference informs our analysis when deciding whether the State's failure to disclose or preserve evidence violates a defendant's guarantee of due process of law. *See Illinois v. Fisher*, 540 U.S. 544, 547–48, 124 S. Ct. 1200, 1201–02 (2004).

If the State withholds material exculpatory evidence, a federal due-process violation occurs regardless of whether the State acted in bad faith. *Id.* at 547, 124 S. Ct. at 1202. Such a claim—a so-called *Brady* claim—thus requires proof that the sought-after evidence was both material and favorable to the defendant such that there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *Pena v. State*, 353 S.W.3d 797, 809 (Tex. Crim.

App. 2011); *see also Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963) (dealing with the due-process violation that occurs whenever the State suppresses or fails to disclose material exculpatory evidence).

To prove a federal due-process violation based on the State's destruction of merely "potentially useful evidence," a defendant must show that the State acted in bad faith in destroying the evidence. *Fisher*, 540 U.S. at 547–48, 124 S. Ct. at 1202; *Youngblood*, 488 U.S. at 57–58, 109 S. Ct. at 337. *Youngblood* described potentially useful evidence as "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." 488 U.S. at 57, 109 S. Ct. at 337. "Although courts occasionally blur the distinction between *Youngblood* and *Brady*, *Youngblood* is properly applied to cases in which the government no longer possesses the disputed evidence, whereas *Brady* is properly applied to cases in which exculpatory evidence remains in the government's possession." *Moody v. State*, 551 S.W.3d 167, 170 (Tex. App.—Fort Worth 2017, no pet.) (mem. op.) (footnote omitted) (citing *Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999)).

Here, Gardner agrees that because the State does not possess the *Miranda* rights waiver and the ANP, the evidence is characterized as potentially useful, and the *Youngblood* analysis thus applies. *See id.*; *Rodriguez v. State*, 491 S.W.3d 18, 31 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (treating a *Brady* claim about a lost surveillance video as a *Youngblood* claim); *see also Youngblood*, 488 U.S. at 58, 109 S. Ct. at

337–38 (holding that the police's failure to preserve potentially useful evidence was not a denial of due process absent the defendant's showing of bad faith on the part of the police). Such a claim requires a showing of bad faith. *Fisher*, 540 U.S. at 547–48, 124 S. Ct. at 1202. Bad faith, as the Texas Court of Criminal Appeals has explained, is

> more than simply being aware that one's action or inaction could result in the loss of something that is recognized to be evidence. . . . [B]ad faith entails some sort of improper motive, such as personal animus against the defendant or a desire to prevent the defendant from obtaining evidence that might be useful. Bad faith cannot be established by showing simply that the [person] destroyed the evidence without thought, or did so because that was the common practice, or did so because the [person] believed unreasonably that he was following the proper procedure.

Napper, 322 S.W.3d at 238. Negligently failing to preserve evidence "does not rise to the level of a due[-]process violation." *Guzman v. State*, 539 S.W.3d 394, 402 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (citing *Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337).

C. Analysis

At the dismissal-motion hearing immediately before Gardner's November 2022 trial, Detective Mayfield explained that he had been assigned to investigate the case in February 2020 and was the person primarily responsible for the case file. He testified that after he arrested Gardner, he read Gardner the *Miranda* warnings and

had him sign a *Miranda* rights waiver form before interviewing him.[1] Detective Mayfield had the waiver in his possession the day that Gardner had signed it and was not sure whether he put the waiver in the case file. Detective Mayfield did not know what happened to the waiver.

During Stacy's interview, she indicated to Detective Mayfield that she did not want Gardner to be prosecuted and did not want a protective order against him. Consistent with her statements during her interview, Stacy went to the Denton Police Department on February 28, 2020, and signed an ANP and left it at the front desk for Detective Mayfield. According to Detective Mayfield's notes, he put the ANP in the case file. But the ANP wasn't there, and he didn't know where it was.

Detective Mayfield explained that since his office had moved to a paperless system, documents were scanned and stored electronically on the "T-drive." According to Detective Mayfield, the "T-drive is notorious for running out of room, and IT will clear some space out. So [he couldn't] tell you if [he] didn't put something in there or if it's been purged. [He didn't] know."

Although the case files were electronic, Detective Mayfield's practice had been to keep paper copies of the files for four years before shredding them. But because of

[1]Gardner's interview, along with Detective Mayfield's reading the *Miranda* warnings and Gardner's signing the *Miranda* rights waiver, was video recorded. The video was not offered into evidence.

construction, he had moved into a smaller office, which resulted in less storage space and his shredding the 2020 case files before four years had elapsed:

> *Q.* So you -- prior to the construction starting at Denton PD, you had preserved four years' worth of case files?
>
> *A.* Yeah, I would rotate four years so that the oldest of the four -- whenever a new year would start, I would shred those and just a continuous cycle.
>
> *Q.* And so because of the construction, your office got smaller, and so you shredded more years of case files than previous?
>
> *A.* Correct. I went from a large filing cabinet to a small plastic box.
>
> *Q.* And one of those case files that you shredded was John Gardner?
>
> *A.* Yes.
>
> . . . .
>
> *Q.* And so you did not double-check to confirm that these 2020 cases that you shredded, all the relevant information, material information, Brady information, was on the T-drive?
>
> *A.* Apparently, I did not.

Detective Mayfield "probably" shredded Gardner's paper case file in January 2021. At that time, he had believed that all the documents in Gardner's paper case file had been scanned and saved in the electronic file. He explained that he had "purged" case files in early January "to make room for [his] cycle":

> *Q.* When did you shred your case files?

A. Exactly when, I could not tell you. The way I normally do it, whether it's the large filing cabinet or the small plastic box, is whenever New Year's hits, sometime that week or two -- first week or two in January, I usually purge that stuff to make room for my cycle.

Q. So was this January 2021 or January of 2022?

. . . .

A. Probably 2021, because I'm going on a two-year box.

Q. So you shredded a case that was less than a year old?

A. Then, yes, because I didn't have room for it. And I assumed everything was in there.

Q. And you did not double-check it?

A. I did not double-check it. That was a mistake on my part.

Detective Mayfield couldn't remember when he received his "first routing in [the] case to tell [him] to come to court for trial." In his experience, a routing sheet usually asked him to bring to court any evidence related to the case. When asked whether he considered an ANP to be evidence, he responded that he did not because in his mind, an ANP is "paperwork involved with the case that is supposed to be e-filed already. When [he] think[s] of evidence, [he] think[s] of stuff [they] actually have retained in a room, like in bags, sealed up." Mayfield also characterized the *Miranda* waiver as paperwork that should be e-filed.

Detective Mayfield testified that when he uploaded his electronic file and provided it to the State, he thought that "everything was in there." When the State notified him the week before trial that the ANP and the *Miranda* rights waiver were

missing from the electronic file, he started looking for the documents. He looked through "everything" several times but was unable to find the documents:

> Between my system I explained -- I even checked my recycle bin on my computer, hoping to get lucky, and realized that next month we switched [to] laptops so my tower computer is gone, thanks to IT. . . . Now I've got a laptop. So I tried everything I could. I even tore apart my desk several times to see if I stuck it in a drawer.

Gardner contends that the evidence supports a bad-faith finding because (1) Detective Mayfield shredded the paper file outside his normal routine and without ensuring that all documents had been preserved in the electronic file and (2) Detective Mayfield had personal animus against him. We disagree.

First, as noted, bad faith is "more than simply being aware that one's action or inaction could result in the loss of something that is recognized to be evidence." *Napper*, 322 S.W.3d at 238. It requires more than a person's destroying evidence without thought or "because the [person] believed unreasonably that he was following the proper procedure." *Id.* "When conduct can, at worst, be described as negligent, the failure to preserve evidence does not rise to the level of a due[-]process violation." *Guzman*, 539 S.W.3d at 402 (citing *Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337).

At worst, Detective Mayfield was negligent. As set out above, he thought that he had scanned and electronically stored the ANP and the *Miranda* rights waiver but failed to ensure that those two documents were in the electronic case file before he shredded the paper copies. And to the extent that Detective Mayfield's shredding the

documents in January 2021 rather than retaining them for four years could be construed as unreasonably believing that he was following the proper procedure, that would still be insufficient to establish bad faith.

Second, while personal animus against a defendant can establish bad faith, *see Napper*, 322 S.W.3d at 238, the evidence here does not suffice to prove that Detective Mayfield had any animus toward Gardner. Gardner points to Detective Mayfield's testimony during the dismissal hearing regarding Gardner's fitness to be a police officer: based on Detective Mayfield's investigation into Gardner's employment history, which indicated that Gardner "had some issues with employment in the past," Detective Mayfield opined that Gardner did not have a "good character for a police officer" and would not "want him carrying on as a police officer." Detective Mayfield also sought a protective order against Gardner partly because Gardner "was a police officer [with] access to firearms." Without more, Detective Mayfield's forming these beliefs based on his investigation is not evidence of personal animus toward Gardner.

Deferring to the trial court's credibility determinations, we conclude that Gardner has failed to show that Detective Mayfield acted in bad faith in failing to preserve the ANP and *Miranda* rights waiver. We thus overrule Gardner's first issue.

III. Spoliation Instruction

Gardner argues in his second issue that the trial court abused its discretion by denying Gardner's requested spoliation jury instructions on the State's loss or destruction of the ANP and the *Miranda* rights waiver.

A. Standard of review

We must review "all alleged jury-charge error . . . regardless of preservation in the trial court." *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). In reviewing a jury charge, we first determine whether error occurred; if not, our analysis ends. *Id.* We review a trial court's decision not to submit an instruction in the charge for an abuse of discretion. *Guzman*, 539 S.W.3d at 400.

Spoliation concerns the loss or destruction of evidence. *Id.* at 401. A spoliation instruction is an adverse-inference instruction that allows the jury to infer that the missing evidence would have favored the defendant. *Jones v. State*, 531 S.W.3d 309, 321 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). A spoliation adverse-inference instruction is a defensive issue. *Hennings v. State*, 343 S.W.3d 433, 438 (Tex. App.—El Paso 2010, no pet.); *Carroll v. State*, 266 S.W.3d 1, 3–4 (Tex. App.—Waco 2008, pet. ref'd); *see Rodriguez v. State*, No. 02-18-00436-CR, 2019 WL 4866298, at *10 (Tex. App.—Fort Worth Oct. 3, 2019, no pet.) (mem. op., not designated for publication).

"A defendant is entitled to an instruction on any defensive issue raised by the evidence, whether that evidence is weak or strong, unimpeached or uncontradicted, and regardless of how the trial court views the credibility of the defense." *Celis v. State*, 416 S.W.3d 419, 430 (Tex. Crim. App. 2013) (citing *Allen v. State*, 253 S.W.3d 260, 267 (Tex. Crim. App. 2008)). The defendant "'bears the burden of production' with respect to a defense," *Shaw v. State*, 243 S.W.3d 647, 657 (Tex. Crim. App. 2007)

(quoting *Zuliani v. State*, 97 S.W.3d 589, 594) (Tex. Crim. App. 2003)), and "[t]he issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense," *Kuhn v. State*, 393 S.W.3d 519, 532 (Tex. App.—Austin 2013, pet. ref'd) (quoting Tex. Penal Code Ann. § 2.03(c)). "[A] defense is supported (or raised) by the evidence if there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that that element is true." *Shaw*, 243 S.W.3d at 657–58; *see Juarez v. State*, 308 S.W.3d 398, 404 (Tex. Crim. App. 2010) ("The defendant bears the burden of showing that each element of the defense has been satisfied."). In determining whether the evidence supports a defense, a trial court relies on "its own judgment, formed in the light of its own common sense and experience, as to the limits of rational inference from the facts proven." *Shaw*, 243 S.W.3d at 658. In our review, we view the evidence in the light most favorable to the defendant's requested jury instruction. *Jordan v. State*, 593 S.W.3d 340, 343 (Tex. Crim. App. 2020).

B. Analysis

There must be a showing of bad faith on the State's part to warrant a spoliation instruction. *See, e.g.*, *Moody*, 551 S.W.3d at 172; *Snell v. State*, 324 S.W.3d 682, 684 (Tex. App.—Fort Worth 2010, no pet.); *White v. State*, 125 S.W.3d 41, 44 (Tex. App.—Houston [14th Dist.] 2003), *pet. ref'd*, 149 S.W.3d 159 (Tex. Crim. App. 2004). The same definition of bad faith applies here as in our analysis of Gardner's first issue. *See Guzman*, 539 S.W.3d at 402; *see also Greco v. State*, No. 02-19-00383-CR,

2021 WL 3557041, at *7 (Tex. App.—Fort Worth Aug. 12, 2021, no pet.) (mem. op., not designated for publication).

In addition to his testimony during the dismissal-motion hearing, Detective Mayfield explained at trial that during trial preparation with the District Attorney, he learned that the *Miranda* rights waiver and the ANP were not in the electronic case file, even though the two documents had been in the paper case file. Regarding the *Miranda* rights waiver, Detective Mayfield explained, "I don't remember if I failed to put it in there or if it was somehow purged. Since IT there at Denton PD is notorious for cleaning up this drive that we put the things in, on old cases, so I don't know." On cross-examination, he admitted that he had shredded the paper copies of those two documents and that they "were never preserved and uploaded into the case file."

Viewing the evidence in the light most favorable to the submission of Gardner's requested spoliation instruction, we conclude that Gardner did not present any evidence that would support a rational inference that Detective Mayfield acted in bad faith. We thus conclude that the trial court did not abuse its discretion by refusing to submit Gardner's requested spoliation instruction. We overrule his second issue.

IV. Evidentiary Sufficiency

In Gardner's third and final issue, he argues that the evidence is insufficient to support his assault conviction because no reasonable factfinder could have found beyond a reasonable doubt that he had assaulted his wife.

A. Standard of Review

In our evidentiary-sufficiency review, we view all the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the crime's essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017). This standard gives full play to the factfinder's responsibility to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Harrell v. State*, 620 S.W.3d 910, 914 (Tex. Crim. App. 2021).

The factfinder alone judges the evidence's weight and credibility. *See* Tex. Code Crim. Proc. Ann. art. 38.04; *Martin v. State*, 635 S.W.3d 672, 679 (Tex. Crim. App. 2021). We may not re-evaluate the evidence's weight and credibility and substitute our judgment for the factfinder's. *Queeman*, 520 S.W.3d at 622. Instead, we determine whether the necessary inferences are reasonable based on the evidence's cumulative force when viewed in the light most favorable to the verdict. *Braughton v. State*, 569 S.W.3d 592, 608 (Tex. Crim. App. 2018); *see Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017) ("The court conducting a sufficiency review must not engage in a 'divide and conquer' strategy but must consider the cumulative force of all the evidence."). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict, and we must defer to that resolution. *Braughton*, 569 S.W.3d at 608.

To determine whether the State has met its burden to prove a defendant's guilt beyond a reasonable doubt, we compare the crime's elements as defined by a hypothetically correct jury charge to the evidence adduced at trial. *Hammack v. State*, 622 S.W.3d 910, 914 (Tex. Crim. App. 2021); *see also Febus v. State*, 542 S.W.3d 568, 572 (Tex. Crim. App. 2018) ("The essential elements of an offense are determined by state law."). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Hammack*, 622 S.W.3d at 914. The law as authorized by the indictment means the statutory elements of the offense as modified by the charging instrument's allegations. *Curlee v. State*, 620 S.W.3d 767, 778 (Tex. Crim. App. 2021); *see Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014) ("When the State pleads a specific element of a penal offense that has statutory alternatives for that element, the sufficiency of the evidence will be measured by the element that was actually pleaded, and not any alternative statutory elements.").

B. Analysis

Gardner does not point to a particular element that is unsupported by the evidence. He notes that he does not deny that he struck his wife and contends that "the issue is whether [he] reacted in self-defense when he struck [Stacy]." He also complains that "based upon the inconsistent, unreliable, and biased testimony of the

officer(s) in this case, a rational factfinder could not have found that the State proved each of the elements of the offense under a hypothetically correct jury charge."

Gardner was convicted of Class A misdemeanor assault under Texas Penal Code Section 22.01(a)(1). Under the hypothetically correct jury charge authorized by the information, the State was required to prove that Gardner intentionally, knowingly, or recklessly caused bodily injury to his wife. *See id.*; *Bin Fang v. State*, 544 S.W.3d 923, 927 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *see also Babineaux v. State*, No. 02-21-00085-CR, 2023 WL 164089, at *3 (Tex. App.—Fort Worth Jan. 12, 2023, pet. ref'd) (mem. op., not designated for publication). A hypothetically correct jury charge includes only the defensive issues applicable to the case that the defendant timely requests or objects to their omission from the jury charge. *Tolbert v. State*, 306 S.W.3d 776, 780 (Tex. Crim. App. 2010); *Posey v. State*, 966 S.W.2d 57, 61–62 (Tex. Crim. App. 1998). Gardner did not ask that a self-defense instruction be included in the jury charge, nor did he object to its omission. We thus do not consider self-defense in our evaluation of the sufficiency of the evidence supporting Gardner's assault conviction. *See Raza v. State*, No. 05-17-00066-CR, 2018 WL 1062451, at *4 (Tex. App.—Dallas Feb. 27, 2018, no pet.) (mem. op., not designated for publication); *Pruiett v. State*, No. 05-12-00131-CR, 2013 WL 1277861, at *2 (Tex. App.—Dallas Feb. 25, 2013, pet. ref'd) (mem. op., not designated for publication).

Although neither Stacy nor the neighbors testified, a rational factfinder could have found the essential elements of assault beyond a reasonable doubt. Regarding the officers' testimonies in this case, the jury is the sole judge of the witnesses' credibility and the weight to be given their testimonies, and we cannot "usurp this role by substituting [our] own judgment for that of the jury." *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). As detailed above, the testimonies from the on-scene officers, Detective Mayfield, and Officer Stamps sufficed to establish beyond a reasonable doubt that Gardner intentionally, knowingly, or recklessly struck his wife causing her bodily injury. *See* Tex. Penal Code Ann. § 1.07(a)(8) (defining "bodily injury" to include physical pain and any impairment of physical condition), § 6.03(a)–(c) (defining "intentionally," "knowingly," and "recklessly"); *Bin Fang*, 544 S.W.3d at 928 (explaining that because a jury may infer whether a person felt physical pain, "[e]vidence of a cut or bruise is sufficient to show bodily injury" and stating that "'[a]ssault by causing bodily injury is a result-oriented offense'" that requires the State to prove that the defendant "caused the result of bodily injury with the requisite culpable mental state" (quoting *Darkins v. State*, 430 S.W.3d 556, 565 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd)).

After reviewing all the evidence in the light most favorable to the jury's verdict, we conclude that a rational factfinder could have found all the essential elements of

assault beyond a reasonable doubt.[2] *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Queeman*, 520 S.W.3d at 622. We overrule Gardner's third issue.

V. Conclusion

Having overruled Gardner's three issues, we affirm the trial court's judgment.

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[2]As a general proposition, the State is not required to prove the manner and means of the assault as alleged in the information, here "by pushing or striking or grabbing or throwing [Stacy] with [his] hand." *Bin Fang*, 544 S.W.3d at 929; *see also Babineaux*, 2023 WL 164089, at *4. But even if such proof was necessary, the evidence established that Gardner struck his wife with his hand.

Additionally, although the information charged that Stacy was "a member of [Gardner]'s family or a member of [Gardner]'s household . . . as described by" Sections 71.003 and 71.005 of the Texas Family Code, neither a familial relationship nor household membership is an element of Class A misdemeanor assault, and they are thus not part of a hypothetically correct jury charge. *See* Tex. Penal Code Ann. § 22.02(a)(1); *Bin Fang*, 544 S.W.3d at 929–30; *see also Babineaux*, 2023 WL 164089, at *5. The trial court's family-violence finding in the judgment was made in accordance with Article 42.013 of the Texas Code of Criminal Procedure, which provides that "[i]n the trial of an offense under Title 5, Penal Code, [which includes assault under Section 22.02,] if the court determines that the offense involved family violence, as defined by Section 71.004, Family Code, the court shall make an affirmative finding of that fact and enter the affirmative finding in the judgment of the case." Tex. Code Crim. Proc. Ann. art. 42.013 (footnote omitted); *see* Tex. Fam. Code Ann. § 71.004 (defining "family violence"). Gardner does not challenge the trial court's family-violence finding, but if he had, the evidence establishes that Stacy was both a member of Gardner's family and a member of his household. *See* Tex. Fam. Code Ann. § 71.004(1) (defining "family violence" to include "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 . . . but does not include defensive measures to protect oneself").

/s/ Elizabeth Kerr
Elizabeth Kerr
Justice

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