NUMBER 13-22-00424-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

LUCAS NIETO, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 36th District Court of San Patricio County, Texas.

MEMORANDUM OPINION

Before Justices Tijerina, Silva, and Peña
Memorandum Opinion by Justice Peña

Appellant Lucas Nieto appeals his conviction for assault family violence with a previous assault family violence conviction, a third-degree felony. *See* TEX. PENAL CODE ANN. § 22.01(a), (b)(2)(A). A jury found Nieto guilty and assessed punishment at five

years' imprisonment. In one issue, Nieto argues there is legally insufficient evidence supporting his conviction. We affirm.

I. BACKGROUND

Nieto resided in a home in Mathis, Texas with his brother, sister-in-law, and father. Nieto's niece and nephew, Crystal and Hector,[1] arrived one evening to visit their mother. The two observed Nieto in front of the house with a suitcase and a box of papers. Nieto appeared angry, and he was throwing various papers into the yard. Crystal confronted Nieto, asking him to pick up the papers. Nieto laughed in response. He then asked about his father. Crystal informed him that Nieto's father—her grandfather—was in the hospital. According to Crystal, Nieto responded that "he [would] rather see his dad die in the hospital bed." Crystal and Hector told Nieto to leave or they would call the police. Nieto then approached Hector and started yelling in his face. Nieto yelled that they did not belong there and that it was their fault that his father was dying. Next, Crystal got between the two, and Nieto elbowed Crystal on her chin, which according to Crystal was intentional. Crystal walked away from Nieto and called the police. Nieto proceeded to leave the residence on foot.

Crystal testified that Nieto has a history of drug abuse, and that he had a white powdery substance under his nose that evening, which she believed was cocaine. Crystal felt pain on her chin throughout the night, and a bruise emerged the next day. Hector testified that he observed bruising to Crystal's chin.

Officer Jeremy Wendt with the Mathis Police Department responded to the scene.

[1] We refer to these witnesses by their first name to avoid confusion as they share a surname with appellant.

He observed no visible injuries on Crystal, but she advised him she was suffering from pain and discomfort. Officer Wendt later apprehended Nieto and placed him under arrest. While Nieto was seated in the patrol vehicle, Officer Wendt observed "two glass smoking pipes" on the floorboard near his feet. From jail, Nieto wrote a letter to Crystal apologizing for being "a real pain in the butt" and requesting that Crystal "sign papers at the district attorney's office so [she] can drop the charge of family violence[.]" The trial court admitted a 2018 judgment and sentence showing that Nieto was previously convicted of assault causing bodily injury against a family member.

Nieto testified that he was upset that evening because his father's health was "diminishing." He claimed that he was leaving the house to visit his father in the hospital. When Nieto asked Crystal how his father was doing, he stated that she would not reply. Nieto admitted that things got heated and that he used profanity. Nieto denied striking Crystal with his elbow. He stated that Crystal was being confrontational and that she tried to prevent him from leaving. The jury found Nieto guilty. This appeal followed.

II. STANDARD OF REVIEW & APPLICABLE LAW

"Under the Due Process Clause, a criminal conviction must be based on legally sufficient evidence." *Harrell v. State*, 620 S.W.3d 910, 913 (Tex. Crim. App. 2021) (citing *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015)). Evidence is legally sufficient if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Joe v. State*, 663 S.W.3d 728, 731–732 (Tex. Crim. App. 2022) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under a legal sufficiency review, we view the evidence in the light most favorable to the verdict, while recognizing

that "[t]he trier of fact is responsible for resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from basic facts to ultimate facts." *Id.* at 732. We presume that the jury resolved conflicts in the evidence in favor of its verdict. *Dunham v. State*, 666 S.W.3d 477, 482 (Tex. Crim. App. 2023) (citing *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014)). "'Direct evidence and circumstantial evidence are treated equally' and 'circumstantial evidence alone can be sufficient to establish guilt.'" *Id.* (quoting *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)).

We measure the evidence produced at trial against the essential elements of the offense as defined by a hypothetically correct jury charge. *David v. State*, 663 S.W.3d 673, 678 (Tex. Crim. App. 2022) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). "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 unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.'" *Id.* (quoting *Malik*, 953 S.W.2d at 240).

It is generally a Class A misdemeanor when a person "intentionally, knowingly, or recklessly causes bodily injury to another[.]" TEX. PENAL CODE ANN. § 22.01 (a)(1), (b). However, the offense is a third-degree felony if a person: (1) assaults a family member, a member of the person's household, or someone in a dating relationship with the person; and (2) has a previous conviction for assault family violence. *Id*. § 22.01(b)(2)(A); *see* TEX. FAM. CODE ANN. §§ 71.0021(b), 71.003, 71.005. Thus, under a hypothetically correct

jury charge in this case, the State was required to prove beyond a reasonable doubt that: (1) Nieto (2) intentionally, knowingly, or recklessly (3) caused bodily injury (4) to a family member, (5) while having a previous conviction for assault family violence. *See Holoman v. State*, 620 S.W.3d 141, 146–47 (Tex. Crim. App. 2021) (holding that § 22.01(b)(2)(A)'s "prior-assault-on-a-family-member-conviction" provision "establishes an element of an aggravated crime and not, alternatively, a punishment enhancement").

III. DISCUSSION

In support of his legal insufficiency argument, Nieto notes that Officer Wendt did not observe any visible injuries and that there were no photographs of the injuries admitted at trial. Nieto also states that Crystal was inconsistent in describing the location of the injury, alternatively stating that she was struck on her jaw or her chin, and that Hector said the injury was located on a different part of the chin. Nieto argues that Crystal's testimony that she felt pain was "incredulous," given the "insignificant" contact described. We construe Nieto's various arguments as challenging the "bodily injury" element of the offense, and more generally, whether there was sufficient evidence that Nieto ever struck Crystal with his elbow.

"'Bodily injury' means physical pain, illness, or any impairment of physical condition." TEX. PENAL CODE ANN. § 1.07(a)(8). "Bodily injury 'encompasses even relatively minor physical contact if it constitutes more than offensive touching.'" *Smith v. State*, 587 S.W.3d 413, 420 (Tex. App.—San Antonio 2019, no pet.) (quoting *Laster v. State*, 275 S.W.3d 512, 524 (Tex. Crim. App. 2009)). "Any physical pain, however minor, will suffice to establish bodily injury." *Garcia v. State*, 367 S.W.3d 683, 688 (Tex. Crim.

App. 2012). A complainant's testimony that she suffered pain constitutes direct evidence of bodily injury. *Laster*, 275 S.W.3d at 524; *see also Jimenez v. State*, No. 08-20-00003-CR, 2022 WL 484548, at *3 (Tex. App.—El Paso Feb. 17, 2022, no pet.) (mem. op., not designated for publication) (explaining that "[p]hysical pain is inherently subjective" and that "a [complainant's] testimony—if believed by the jury—that she felt pain is sufficient to establish the element of bodily injury").

Further, evidence of an injury that in common experience would be painful suffices to establish bodily injury. *See Bin Fang v. State*, 544 S.W.3d 923, 928 (Tex. App.—Houston [14th Dist.] 2018, no pet.) ("Evidence of a cut or bruise is sufficient to show bodily injury."); *Shah v. State*, 403 S.W.3d 29, 34–35 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (explaining that a jury could reasonably infer that a lesion on the bridge of nose would cause physical pain); *Arzaga v. State*, 86 S.W.3d 767, 778 (Tex. App.—El Paso 2002, no pet.) (noting that the "existence of a cut, bruise, or scrape on the body is sufficient evidence of physical pain").

Crystal testified that she felt pain throughout the night following the incident and that she had a bruise to her chin the next day. She similarly told Officer Wendt on the evening in question that she felt pain and discomfort. Crystal's testimony was corroborated by Hector, who also observed a bruise on Crystal's chin. We conclude that any rational factfinder could conclude from this evidence that Crystal suffered bodily injury. *See Laster*, 275 S.W.3d at 524 (holding that complainant's testimony that she felt pain was sufficient to establish bodily injury); *Bin Fang*, 544 S.W.3d at 928 (holding that evidence of scratches, a bruise, and fresh blood were sufficient to establish bodily injury).

Nieto cites no authority requiring photographic evidence to establish the bodily injury element of assault, and the authority cited above clearly provides otherwise.

Nieto's remaining arguments challenge the credibility of Crystal and Hector's testimony. Were we to entertain these arguments, we would be reweighing the evidence and sitting as a thirteenth juror, a role we are prohibited from taking. *See Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010) (explaining that an appellate court's role "is not to become a thirteenth juror[,]" and it "may not re-evaluate the weight and credibility of the record evidence"). We presume the jury found Crystal and Hector's testimony credible and that it resolved any alleged inconsistency regarding the location of Crystal's injury in favor of its verdict. *See Dunham*, 666 S.W.3d at 482; *Joe*, 663 S.W.3d at 731–32. Specifically, in assessing the witnesses' credibility, the jury could have determined that Nieto's letter to Crystal apologizing for his behavior and requesting her to drop the criminal charges was evidence of a consciousness of guilt. *See Wilson v. State*, 7 S.W.3d 136, 141 (Tex. Crim. App. 1999) (explaining that an attempt to tamper with a witness is evidence of a consciousness of guilt); *see also Pizano v. State*, No. 01-12-00994-CR, 2013 WL 3155954, at *1 (Tex. App.—Houston [1st Dist.] June 20, 2013, no pet.) (mem. op., not designated for publication) ("A defendant's apology to the victim, even if vague, is also a circumstance indicating guilt."). We overrule Nieto's sole issue.

IV. CONCLUSION

We affirm the trial court's judgment.

L. ARON PEÑA JR.
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed on the
3rd day of August, 2023.