No. 01-24-00983-CR

In the First Court of Appeals
Houston, Texas

YOLANDA INEZ JINEZ,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

On Appeal from the County Criminal Court at Law No. 7
Harris County, Texas
Hon. Andrew A. Wright, Judge Presiding
Trial Cause No. 2513246

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

TREATISES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

On June 3, 2024, Ms. Jinez was charged with the misdemeanor offense of terroristic threat with the intent to place another in fear of imminent serious bodily injury. TEX. PENAL CODE § 22.07(a)(2); C.R.6–7. Ms. Jinez pleaded not guilty and proceeded to a trial. The jury found her guilty, and the trial court assessed punishment at 180 days' confinement, probated to 15 months of community supervision. C.R.69, 77–81. No motion for new trial was filed.

STATEMENT REGARDING ORAL ARGUMENT

Ms. Jinez does not request oral argument. However, should the state or the Court request oral argument, Ms. Jinez requests the opportunity to participate.

ISSUE PRESENTED

> Was the evidence insufficient to show a threat with intent to place another in fear of imminent serious bodily injury, where the pleadings and the proof at trial materially varied, and the pleadings only referred to a threat of remote harm?

STATEMENT OF FACTS

Appellant Yolanda Inez Jinez and her boyfriend were previously employed by the complainant, James Patterson. C.R.7; R.R.89. Ms. Jinez believed Patterson was exploiting her boyfriend based on his undocumented status, and she confronted Patterson about this on various occasions—all of which came to a head in a CVS parking lot on May 20, 2024. C.R.7; R.R.90–91. Before trial, Ms. Jinez only had notice of a portion of what Patterson claimed happened that day.

A. The Complaint and Information

On June 3, 2024, the state presented a complaint against Ms. Jinez based on the statement that Patterson had relayed to the police. C.R.7. It alleged that Ms. Jinez and Patterson ran into each other in the CVS parking lot while both were in their cars. C.R.7. Ms. Jinez reportedly "blocked [Patterson] in," got out of her car, and exclaimed, "You thought I wasn't going to find you." C.R.7.

Patterson then saw Ms. Jinez reach under the floorboard of her car, which "appeared to him as if she was reaching for a firearm," so he took out a gun and placed it on his passenger seat. C.R.7. Patterson asked Ms. Jinez to leave, to which she allegedly responded, "I can't wait until my brother gets

out of prison in December, so he can fucking kill you." C.R.7. Patterson did not report this threat of "imminent" harm from Ms. Jinez's brother until the next evening. C.R.7.

Based on this complaint, the state filed a boilerplate information alleging that "on or about May 20, 2024, [Ms. Jinez] did then and there unlawfully, threaten to commit an offense involving violence, namely a Murder upon James Patterson . . . with the intent to place the Complainant in fear of imminent serious bodily injury." C.R.6. Two days later, a magistrate judge signed the detailed complaint to issue a capias. C.R. 17–18.

After evaluating these allegations, Ms. Jinez opted to go to trial.

B. The Evidence at Trial

At trial, Patterson was the state's sole witness; after seven months his story had changed. The leadup was at least the same: Patterson saw Ms. Jinez at CVS (he had no reason to believe he was followed), she blocked him in with her car, and he grabbed his pistol because he believed she *might* have a gun. R.R.88–93, 93 ("Q. And did you know whether or not she did, in fact, have a gun? A. I did not.").

But Patterson's testimony veered off from the complaint when he claimed that Ms. Jinez proceeded to ask, "well, just because you think you

have a gun that I don't have a gun?" R.R.92. Ms. Jinez admittedly "didn't threaten [his] life at that time." R.R.108. However, he added that Ms. Jinez then made a dual-pronged threat: "I am going to kill you, Motherfucker, *and if I don't*, I am going to get my brother to kill you." R.R.95 (all emphasis added unless otherwise indicated); *see also* R.R.109 ("She said, 'I will kill you.'"). This made Patterson afraid of "[e]ither her or her brother" killing him. R.R.96.

C. The Jury Charge and Verdict

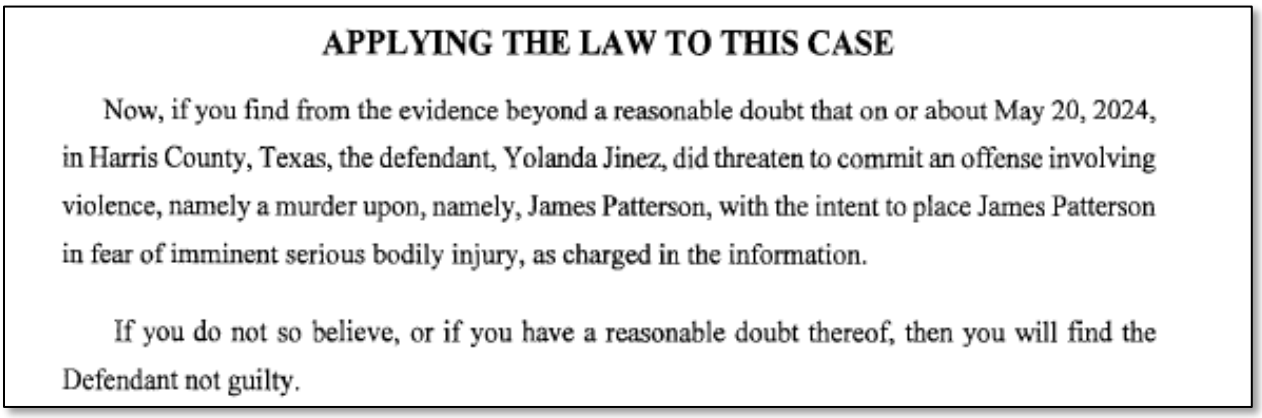
After the state rested its case in chief, defense counsel objected to the jury charge on account of the state offering new evidence that Ms. Jinez threatened to kill Patterson herself:

> The Information contained in the To-Be Warrant -- *the threat was just the, "I can't wait until my brother gets out of prison in December so he can fucking kill you*." And we would ask that there'll be a limiting instruction or clarification to the jury that *the threat was that statement*, not the gun or any other statement.

R.R.116. The state argued that the information only identified a generic threat of murder, while defense counsel pointed out that the information was based on the allegations in the complaint—the only conduct that counsel was

"prepared for and on notice for." R.R.118.[1] Nevertheless, the trial court denied the request for clarification or limitation, having adopted the state's position that the information gave the "formal notice of the charges" and thus controlled over the more detailed complaint. R.R.119.

Defense counsel did not put forth any evidence or witnesses, and the trial court then read the jury charge, which did not reference a specific offense. R.R.122; C.R.68–69.



APPLYING THE LAW TO THIS CASE

Now, if you find from the evidence beyond a reasonable doubt that on or about May 20, 2024, in Harris County, Texas, the defendant, Yolanda Jinez, did threaten to commit an offense involving violence, namely a murder upon, namely, James Patterson, with the intent to place James Patterson in fear of imminent serious bodily injury, as charged in the information.

If you do not so believe, or if you have a reasonable doubt thereof, then you will find the Defendant not guilty.

During closing, the state did not state the specific threat upon which it sought to convict Ms. Jinez. R.R.123–25. The jury found Ms. Jinez guilty, and the trial court assessed punishment at 180 days' confinement (the maximum

[1] There was no mention of this additional threat in the pretrial filings. *See generally* C.R. 1–75. Notably, during the pre-trial hearing, defense counsel noted their understanding that the statement regarding Ms. Jinez's brother is "what made [the complainant] afraid." R.R.75. The prosecution cryptically added, "[i]n addition to the surrounding circumstances," without mentioning any other threats. R.R.75.

for a Class B misdemeanor), probated to 15 months of community supervision. TEX. PENAL CODE § 12.22; C.R.69, 77–81.

SUMMARY OF THE ARGUMENT

The state charged Ms. Jinez with making a terroristic threat of "imminent" injury. The only notice it gave of such a threat was an allegation in the complaint that she warned the complainant of harm to come in seven months. At trial, however, the state introduced evidence of an additional, distinct, and truly immediate threat. Ms. Jinez was demonstrably surprised by this new allegation, which materially changed the nature of the case and her defenses. Because there was insufficient evidence to support the remote threat specified in the allegations, this Court should enter a judgment of acquittal.

ARGUMENT

I. The evidence was insufficient to support a conviction for the charged offense.

Applicable Law

In all criminal prosecutions an accused is guaranteed the right to demand the nature and cause of the action against him, and to have a copy thereof. TEX. CONST. art. I, § 10. "This constitutional mandate requires that the charging instrument itself convey adequate notice from which the accused may prepare his defense, and the adequacy of the State's allegation must be

tested by its own terms." *DeVaughn v. State*, 749 S.W.2d 62, 67 (Tex. Crim. App. 1988).

A "variance" occurs where there is a "discrepancy between the allegations in the charging instrument and the proof at trial." *Gollihar v. State*, 46 S.W.3d 243, 246 (Tex. Crim. App. 2001). In such instances, the state may have proven the defendant guilty of *a* crime, but not the one alleged in the charging instrument, creating a potential sufficiency of the evidence problem. *Id.* Only material variances—*i.e.*, those that prejudice a defendant's substantial rights—can render evidence insufficient. *See Ramjattansingh v. State*, 548 S.W.3d 540, 547 (Tex. Crim. App. 2018).[2] Material variances occur when the charging instrument either fails to adequately inform the defendant of the charge against her or subjects her to the risk of being prosecuted later for the same crime. *Id.*; *Gollihar*, 46 S.W.3d at 258.

Discussion

The state charged Ms. Jinez with issuing *one* terroristic threat and gave her notice that this alleged threat was that Jinez's brother would kill Patterson

[2] For example, slight discrepancies concerning a complainant's name are unlikely to cause prejudice. *See, e.g.*, *Fuller v. State*, 73 S.W.3d 250, 254 (Tex. Crim. App. 2002) (finding no material variance where indictment alleged injury to "Olen M. Fuller" while evidence showed injury to a "Mr. Fuller").

in seven months, yet at trial the state offered proof of a different threat altogether—that Ms. Jinez had a gun and would kill Patterson in the near future. This variance was material and prejudicial to Ms. Jinez, as she never received adequate notice of the charges against her and thus lacked time to prepare an effective defense. As a result, only the charged offense should be considered in this Court's sufficiency review, and no reasonable jury could find that warning of speculative harm, seven months out, established intent to instill fear of *imminent* serious bodily injury. Accordingly, Ms. Jinez is entitled to a judgment of acquittal on this misdemeanor conviction.[3]

A. There was a material variance between the allegations and the proof offered at trial.

1. The complaint should be considered as part of the charging instrument.

Variances typically arise out of language in the formal charging instrument against which the jury charge is compared—an indictment or information. *See, e.g.*, *Gollihar*, 46 S.W.3d at 255, 258 (indictment); *Byrd v.*

[3] This issue is fully preserved. TEX. R. APP. P. 33.1. At the close of the state's case in chief, Ms. Jinez asked the trial court to require the state to clarify that it was only seeking a conviction on the threat identified in the complaint. R.R.116–19. The trial court denied that request. R.R.119. The sufficiency of the evidence component of this issue did not require a trial court objection. *See Prichard v. State*, 533 S.W.3d 315, 320 (Tex. Crim. App. 2017).

State, 336 S.W.3d 242, 244 (Tex. Crim. App. 2011) (information). Here, the complaint was the source of the disconnect, C.R.7–8, leading the trial court to overrule Ms. Jinez's objection to the variance on the ground that the information was the "formal notice" of the charges. R.R.119 ("We're going off this Information . . . ."). The problem with the court's ruling is that the formal/informal notice distinction is arbitrary based on the facts of this case.

Starting with first principles, when a misdemeanor prosecution is based on an information, "an underlying complaint is also required." *State v. McField*, 649 S.W.3d 721, 725 (Tex. App.—Houston [1st Dist.] 2022, pet. ref'd). Specifically, the complaint is the "prerequisite" to a valid information and thus serves as the "basis for a criminal prosecution" in such cases. *State v. Caves*, 496 S.W.3d 153, 156 (Tex. App.—San Antonio 2016, pet. ref'd); TEX. CODE CRIM. PRO. art. 21.22. Accordingly, while the complaint is not itself a charging instrument, it has been referred to as a "component of the [charging] instrument," *Nam Hoai Le v. State*, 963 S.W.2d 838, 843 (Tex. App.—Corpus Christi–Edinburg 1998, pet. ref'd), or a "quasi-charging instrument." 41 TEX. PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 24:3 (3d ed.).

Consistent with these principles, the dividing line between a complaint and an information is paper thin. For one, because the complaint and information are interrelated, "there should be substantial conformity in their allegations descriptive of the offense." *Holland v. State*, 623 S.W.2d 651, 652 (Tex. Crim. App. 1981). The Court of Criminal Appeals has even held that "a single document can serve as an information and the complaint supporting that information," so long as the same person does not serve as both accuser and prosecutor in a single case and the statutory requirements are otherwise satisfied. *State v. Drummond*, 501 S.W.3d 78, 83 (Tex. Crim. App. 2016).

The most important of the similarities is that the complaint has the same notice-serving function as an information or indictment. *See Borsari v. State*, 919 S.W.2d 913, 918 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (complaint must "be sufficient for appellant to ascertain with what he is being charged so that he can properly prepare a defense"); *McField*, 649 S.W.3d at 726 ("The purpose of the complaint is to inform the defendant of the facts surrounding the charged offense to permit him to prepare a defense to the charge."); *Rose v. State*, 799 S.W.2d 381, 384 (Tex. App.—Dallas 1990, no pet.) (same); *Chapa v. State*, 420 S.W.2d 943, 944 (Tex. Crim. App. 1967) (same); *Vallejo v. State*, 408 S.W.2d 113, 114 (Tex. Crim. App. 1966)

("Appellant, from reading the complaint, could ascertain with reasonable certainty with what he was being charged so as to properly prepare a defense."); *c.f. Riney v. State*, 28 S.W.3d 561, 565 (Tex. Crim. App. 2000) ("[A]n indictment provides a defendant notice of the offense charged so that he may prepare, in advance of trial, an informed and effective defense."). This matters because proper notice and the chance to prepare a meaningful defense are likewise at the heart of the variance doctrine. *See Gollihar*, 46 S.W.3d at 256–58 (for variances, central question is whether charging instrument "inform[ed] appellant of the charge against him sufficiently to allow him to *prepare an adequate defense* at trial"); *Byrd*, 336 S.W.3d at 248 (affirming that "a conviction that contains a material variance that fails to give the defendant sufficient notice . . . requires reversal").

It follows that a complaint authorizing a misdemeanor prosecution should be considered in this variance analysis where its noticed allegations cause a defendant to be "surprised" or "misled" at trial. *Gollihar*, 46 S.W.3d at 249, 258. Simply put, when a complaint serves as a "quasi-charging instrument," it should be treated as such. 41 TEX. PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 24:3 (3d ed.). This approach protects against a bait-and-switch, whereby the state includes descriptive facts in the complaint—thereby

informing someone of the key allegations against which to prepare a defense—but then shifts or expands theories at trial to the defendant's prejudice.

Such an approach is particularly apt where, as here, the complaint and information are intertwined. That is, both documents were prepared on the same day, were signed by the same assistant district attorney, and contain the same recitation of the elements of the terroristic threat offense. C.R.6–8. Practically, it is as if they are a single instrument. *See Drummond*, 501 S.W.3d at 83. This Court should therefore reject the trial court's form-over-substance ruling and instead compare the allegations in the complaint against the proof at trial to determine whether there has been a material variance.[4]

2. A materiality inquiry is necessary because the prosecution offered proof of a distinct, unpled statutory violation at trial.

As noted, only material variances will render evidence insufficient to support a conviction. *See Ramjattansingh*, 548 S.W.3d at 547. In general,

[4] Such a holding would likely have minimal impact because, as a baseline, an information or indictment is required to have *more* information than a complaint. *See Kindley v. State*, 879 S.W.2d 261, 263 (Tex. App.—Houston [14th Dist.] 1994, no pet.) ("The particularity in pleading that is required for an indictment or an information is not required for a complaint."); 41 TEX. PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 24:3 (3d ed.) (similar).

there are two kinds of material variances between the pleading and proof: (1) those involving the statutory language that defines an offense; or (2) those involving a non-statutory allegation that is descriptive of an offense in some way. *Johnson v. State*, 364 S.W.3d 292, 294 (Tex. Crim. App. 2012). This case involves the second category as the variance concerns the particular threat issued: a relevant non-statutory fact. *See* TEX. PENAL CODE § 22.07; *Fuller*, 73 S.W.3d at 256 (Keller, P.J, concurring) (examples of the second category include the "identity of the victim in a murder case, a description of the items taken in a theft case, or the type of weapon used in an assault case").[5]

Within this category, an inquiry into the materiality of a variance is only "sometimes" necessary; the allowable unit of prosecution is the key to this analysis. *Id.* at 295, 299. A unit of prosecution is a "distinguishable discrete act that is a separate violation of [a] statute." *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011) (quoting *Ex parte Hawkins*, 6 S.W.3d 554, 556 (Tex. Crim. App. 1999)). Delineating among offenses is crucial because a

[5] For the terroristic threat statute, an example of the first kind of variance might be charging a defendant with attempting to influence the conduct of the government yet offering evidence of the defendant trying to instill fear in members of the public. *See* TEX. PENAL CODE § 22.07(a)(4), (6).

material variance can occur when a charging instrument sets out one statutory violation, but the state offers proof of a different, discrete violation at trial. *See Johnson*, 364 S.W.3d at 295 (confirming it is "essential" that the proof at trial not "'show[] an entirely different offense' than what was alleged in the charging instrument").

Marra v. State is illustrative. 399 S.W.3d 664 (Tex. App.—Corpus Christi–Edinburg 2013, no pet.). Marra was charged with violating a provision of the Local Government Code which requires certain public officials with a substantial interest in a business entity or real property to file an affidavit stating their interest and abstain from participating in matters involving that entity. *Id.* at 670. The state alleged Marra's offenses were in connection with the entity "2405 and 2407 TREASURE HILLS COURT, L.L.C.," but at trial, it relied on evidence regarding "Taubert–Marra, LLC." *Id.* at 672.

The Thirteenth Court of Appeals held that this was a material variance requiring acquittal. *Id.* at 673. It explained that materiality was an issue because the identity of the business entity was a "non-statutory fact that embodie[d] the allowable unit of prosecution for the offense." *Id.* at 672. For instance, the state could theoretically prosecute Marra for separate offenses

for each business entity. *Id.* at 672–73. And because there was no evidence to support the Treasure Hills Court LLC offense alleged in the information, the evidence was insufficient to support the conviction. *Id.*

So too here. The unit of prosecution varies depending on whether the gravamen of the offense is (1) the result of the conduct, (2) the nature of the conduct, or the (3) circumstances surrounding the conduct. *See Loving v. State*, 401 S.W.3d 642, 647 (Tex. Crim. App. 2013). As two courts of appeals have recognized, terroristic threat is a nature of conduct offense, which is complete as soon as a threat—accompanied by the proscribed mens rea—is issued. *See Gillette v. State*, 444 S.W.3d 713, 729–30 (Tex. App.—Corpus Christi–Edinburg 2014, no pet.) ("The statute's focus on separately-punishable intents rather than circumstances or results shows the offense is conduct-oriented.") (internal citations omitted); *Johnson v. State*, 710 S.W.3d 447, 455 (Tex. App.—Austin 2025, no pet. h.) (same). As a result, the allowable unit of prosecution must be the *specific threat*, coupled with the culpable mental state. *Gillette*, 444 S.W.3d at 729–30; *cf. Brooks v. State*, 604 S.W.3d 239, 247 (Tex. App.—Austin 2020), *rev'd on other grounds*, 634 S.W.3d 745 (Tex. Crim. App. 2021) (agreeing that because assault-by-threat offense is conduct-oriented, "each act is a *separate and distinct act of*

threatening" and a defendant "could be charged with as many instances . . . as there were types of threats made"); *Harris*, 359 S.W.3d at 630 (for indecency with a child by exposure offense, the "act of exposure is the focus of the offense and, thus, the unit of prosecution is each exposure").

With this framework in place, it becomes clear that at trial the state presented evidence of two separately chargeable offenses: (1) the alleged threat that Ms. Jinez's brother would kill Patterson in December; and (2) the alleged threat that Ms. Jinez had a gun and would kill Patterson in the CVS parking lot. The state's pleadings, however, referenced only the former, necessitating a materiality inquiry. *See Johnson*, 364 S.W.3d at 295; *Lemus v. State*, 2020 WL 4521124, at *5 (Tex. App.—Houston [14th Dist.] Aug. 6, 2020, pet. ref'd) ("Because the variance in this type of case is sometimes material, we must assess whether the indictment, as written, informed the defendant of the charge against him sufficiently to allow him to prepare an adequate defense at trial.").

3. Defense counsel's surprise at trial demonstrates that the variance was material and prejudicial.

That defense counsel lacked sufficient notice of the alleged offenses confirms that the variance was material—and thus prejudicial. As discussed, whether a defendant is surprised at trial by a variance is one test for

materiality. *See Gollihar*, 46 S.W.3d at 258 (asking whether allegations "inform[ed] appellant of the charge against him sufficiently to allow him to prepare an adequate defense at trial"); *Santana v. State*, 59 S.W.3d 187, 194–95 (Tex. Crim. App. 2001) (similar). A defendant has the burden of demonstrating lack of notice or surprise. *Id.* Notice must be examined for the perspective of the innocent defendant—"it is not sufficient to say that [a defendant] knew what [s]he was charged with." *Delarosa v. State*, 677 S.W.3d 668, 678 (Tex. Crim. App. 2023), *reh'g denied* (Dec. 20, 2023) (internal quotations omitted); *DeVaughn*, 749 S.W.2d at 68.

Here, the notice defects are apparent on the face of the record. None of the pretrial filings mentioned Ms. Jinez's alleged threat to personally kill Patterson. *See generally* C.R.1–59. Consistent with a lack of notice, when discussing motions in limine defense counsel announced that "the statement that was charged was . . . 'I can't wait for my brother to get out of prison and he's going to come kill you.'" R.R.75. After the state finished questioning Patterson—and the second offense had been unearthed—counsel repeated that they were only "prepared for and notice for" the "statement that 'I can't wait until my brother gets out of prison in December.'" R.R.118. Citing their surprise, counsel unsuccessfully asked the court for a "limiting instruction or

clarification that the threat was *that statement*, not the gun or any other statement." R.R.116.

Materiality is further shown by the fact that the defenses to these discrete offenses were not the same. *Contra Flenteroy v. State*, 187 S.W.3d 406, 407, 411 (Tex. Crim. App. 2005) (deeming variance regarding type of weapon used in robbery immaterial because defendant denied using *any* weapon); *Gollihar*, 46 S.W.3d at 258 (deeming variance regarding model number of stolen go-kart immaterial in part because defendant admitted to taking the go-kart). For instance, during voir dire—when counsel knew only about the threat of future harm—the imminence issue was front and center:

> If I say, "I am going to come beat you up next Tuesday," is that imminent? . . .
>
> [I]f I call you and say, "I am going to come to your house," is that imminent? . . . .
>
> So if I say next week; is that imminent?

R.R.44.[6]

[6] It is difficult to glean counsel's strategy from the opening statement because the trial court decided that Ms. Jinez's first chair attorney could not deliver her prepared remarks because co-counsel had objected during the state's opening. C.R.82 ("Since I objected to the opening statement, only one attorney from one side gets to talk to you, so it is me instead of Ms. Eady."). This arbitrary rule resulted in a stream-of-consciousness argument from Ms. Jinez's unprepared counsel. *E.g.*, C.R.82–84 ("Nathaniel Munier, Anna Eady, both defense lawyers. Okay? What you

Once the state introduced the evidence of an additional terroristic threat, counsel had to pivot. Now, the argument was that Patterson was lying about the second threat, and that he would have shot Ms. Jinez had she actually threatened to kill him. *See* R.R.109 ("Q. Would it surprise you to know that the only quote that they put in the police report was, 'I can't wait until my brother gets out of prison in December so he can fucking kill you? A. [T]hat would surprise me . . . ."); R.R.109 ("Q. If you were afraid, why didn't you shoot her?); R.R.111–12 (same).

Eliminating any doubt about the prejudicial effect of the variance, the defense's closing argument showcases the dual arguments:

> Mr. Patterson was not in fear of imminent serious bodily injury. He had a gun. He pulled it out. He didn't use it. He didn't show it to her. He continued to argue with her.
>
> *Then he said she made another statement* about how I can't wait until my brother gets out of prison. Who knows when her brother is getting out of prison? That could be six or seven months from now.

R.R.125–26. Because counsel's surprise is clear from the record and because the defense arguments were tuned to the specific allegations, Ms. Jinez has

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are here for today is a Terroristic Threat. A terroristic threat is a case of a threat. Okay?").

met her burden of showing that the variance surprised and prejudiced her at trial.

B. The evidence was insufficient to support the charged offense under the hypothetically correct jury charge.

Because the state did introduce *some* evidence of both violations, this case requires one last step: assessing whether the evidence was sufficient to support a conviction with respect to the specific pled offense. *Contra Marra*, 399 S.W.3d at 672 (state did not dispute that it had produced "no evidence" of charged offense).

1. Evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *Ervin v. State*, 331 S.W.3d 49, 54 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). In conducting a sufficiency review, appeals courts compare the elements of the crime as defined by the hypothetically correct jury charge for the case to the evidence offered at trial. *See Root v. State*, 615 S.W.3d 920, 927 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd) (rendering acquittal due to material variance). The hypothetically correct charge *must* include allegations that give rise to material variances. *Gollihar*, 46 S.W.3d at 256–57 ("[T]he hypothetically

correct charge would include an indictment allegation which is necessary to give the defendant adequate notice of the charge against him so as to meaningfully defend himself."); *see also Roy v. State*, 76 S.W.3d 87, 101 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (vacating conviction in part because material variance created sufficiency issue).

As explained above, the specific terroristic threat identified in the complaint gave rise to a material variance, meaning that the hypothetically correct jury charge includes, in sum or substance, the alleged threat of "I can't wait until my brother gets out of prison in December, so he can fucking kill you." C.R.7; R.R.110–11. Accordingly, the sufficiency question is whether a rational factfinder could conclude beyond a reasonable doubt that telling someone in *May* that a family member will kill them in *December* evinces an "intent to place [that person] in fear of "*imminent* serious bodily injury." TEX. PENAL CODE § 22.07(a)(2). The answer is no. Harm that might occur in seven months isn't imminent. And the threat here was particularly speculative because it was conditioned on Ms. Jinez's brother getting out of prison (which was in Chicago). C.R.17, R.R.95.

This commonsense understanding is borne out in the caselaw. The Court of Criminal Appeals has defined imminent to mean "ready to take place,

near at hand, impending, hanging threateningly over one's head, *menacingly near*." *Garcia v. State*, 367 S.W.3d 683, 689 (Tex. Crim. App. 2012) (affirming judgment of insufficiency); *see also Henley v. State*, 493 S.W.3d 77, 89 (Tex. Crim. App. 2016) (imminent harm "is coming in the *very near future*"). Courts have applied this and similar definitions to reverse convictions for lack of imminence.

In *Bryant v. State*, for example, the defendant made a threat along the lines of, "either you blade my road or I am 'going to kick [your] god damn ass,'" yet this was not enough to establish a terroristic threat. 905 S.W.2d 457, 460 (Tex. App.—Waco 1995, pet. ref'd). As the appeals court reasoned in granting an acquittal, "[t]here is simply no evidence from which the jury could rationally infer that Bryant . . . intended to place Raulston in fear of serious bodily injury that was in close proximity to their confrontation" because nothing suggested Bryant would follow through "*at the scene of their confrontation*." *Id.*; *see also Parnell v. State*, 2010 WL 2638064, at *4 (Tex. App.—Tyler June 30, 2010, no pet.) (evidence was insufficient to support terroristic threat conviction where threat of future harm was paired with an "invitation to meet in the future"). Similarly, in *Devine v. State*, the Court of Criminal Appeals reviewed a record in a robbery case containing "myriad

instances of threats" yet reasoned that "[t]hreatening to kill [someone] at some time in the future" was insufficient to meet the statute's imminent harm requirement. 786 S.W.2d 268, 270–71 (Tex. Crim. App. 1989) (citing TEX. PENAL CODE § 29.02(a)(2)). The alleged threat here is even less imminent than those discussed in *Bryant* and *Devine* because it was anchored to a *specific time* in the future (December 2024) that could not possibly have been near at hand. R.R.110–11.

True, the complaint and proof at trial also suggested that it "appeared to [Patterson] as if [Ms. Jinez] was reaching for a firearm" during the incident, C.R.7; R.R.92–93, 105, but this does not salvage the conviction. Outside of the statements constituting the unpled offense, there was no evidence that Ms. Jinez even had a gun—let alone threatened Patterson with one. R.R.93 ("Q. And did you know whether or not she did, in fact, have a gun? A. I did not."); R.R.108 ("*She didn't threaten my life at that time* whenever she went for her weapon.").

Moreover, while the reaction to an alleged threat is not an element of the offense, it can shed light on the actor's intent. *See Gillette*, 444 S.W.3d at 722 (collecting cases). Here, Patterson "waited almost 24 hours to call the police," cementing that there was no imminent harm, and that Ms. Jinez did

not intend to place Patterson in fear of imminent harm. R.R.107. Even in the light most favorable to the verdict, Ms. Jinez merely bending over in her car did not transform a remote threat into an immediate one. *Accord Devine*, 786 S.W.2d at 269 ("At no time during the encounter did appellant take any overt action, such as displaying a weapon.").[7]

2. All in all, no reasonable jury could have found Ms. Jinez's verbal or non-verbal conduct to be sufficient to establish the requisite intent for the pled offense. Rather, the only evidence that arguably could support a terroristic threat conviction was another freestanding yet unpled offense.

Given the material variance and the insufficient evidence, "the *only remedy* is to render an acquittal." *Root*, 615 S.W.3d at 928. *Byrd v. State* provides an example, where the state alleged the defendant shoplifted from a "Mike Morales," but all evidence at trial pointed to someone stealing from Wal-Mart. 336 S.W.3d at 244–45. Due to this "failure of proof" with respect to "specific offense charged" (*i.e.*, stealing from Morales), the Court of Criminal Appeals concluded that the defendant was entitled to a judgment of

[7] Stated differently, if Patterson had shot Ms. Jinez then and there based on these alleged acts, would his conduct be justified as necessary to thwart imminent harm? TEX. PENAL CODE § 9.22; *Henley*, 493 S.W.3d at 89–90. Surely not.

acquittal. *Id.* at 257–58; *see also Marra*, 399 S.W.3d at 673. Here too, the material variance between the complaint and the proof renders the evidence insufficient and the conviction infirm.

CONCLUSION AND PRAYER

For the foregoing reasons, this Court should reverse and render a judgment of acquittal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Texas Rule of Appellate Procedure 9.4. It contains 5,163 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

Dated: June 18, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2025, a true and correct copy of this document was served on Jessica Caird, attorney for the State of Texas, by electronic service to caird_jessica@dao.hctx.net.

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