NO. 01-24-00852-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

LEONARDO JULIAN
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 2510407
From Harris Criminal County Court at Law Number 7, Harris County, Texas

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BRIEF FOR APPELLANT

Oral Argument Requested

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Judge	Presiding Judge Andrew Wright (trial) Judge David Singer, (jury selection) County Court at Law 7 Harris County, Texas Houston, Texas 77002
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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases:

Constitution, statute, and rules

STATEMENT OF THE CASE

Nature of the Case: This is an appeal of a conviction for the offense of violation of a protective order. [CR 89, 97]. The State of Texas charged the defendant, Leonardo Julian, did then and there, with knowledge of the issuance of a family violence protective order issued under Chapter 85 of the Family Code, violate said order by intentionally and knowingly going to or near a place specifically described in the order, to wit: the residence of a protected individual, namely, 1605 Huge Oaks St., a location in Houston, TX. [CR 16].

Trial Court: County Court at Law Number Seven, Harris County, Texas, the Honorable Andrew Wright presiding. The guilt/innocence portion of the trial was heard by the jury and the trial court sentenced Mr. Julian.

Trial Court's Disposition: Mr. Julian entered a plea of not guilty. A jury heard evidence and convicted Mr. Julian of violation of a protective order as charged in the information. [CR 89]. The trial court sentenced Mr. Julian to 300 days in the Harris County Jail. [CR 97].

Jurisdiction: The trial court granted Mr. Julian the right to appeal. [CR 96]. Mr. Julian timely filed notice of appeal from his conviction and sentence. [C.R. 110-11]. *See* TEX. R. APP. P. 26.2 (1)(A).

ISSUES PRESENTED

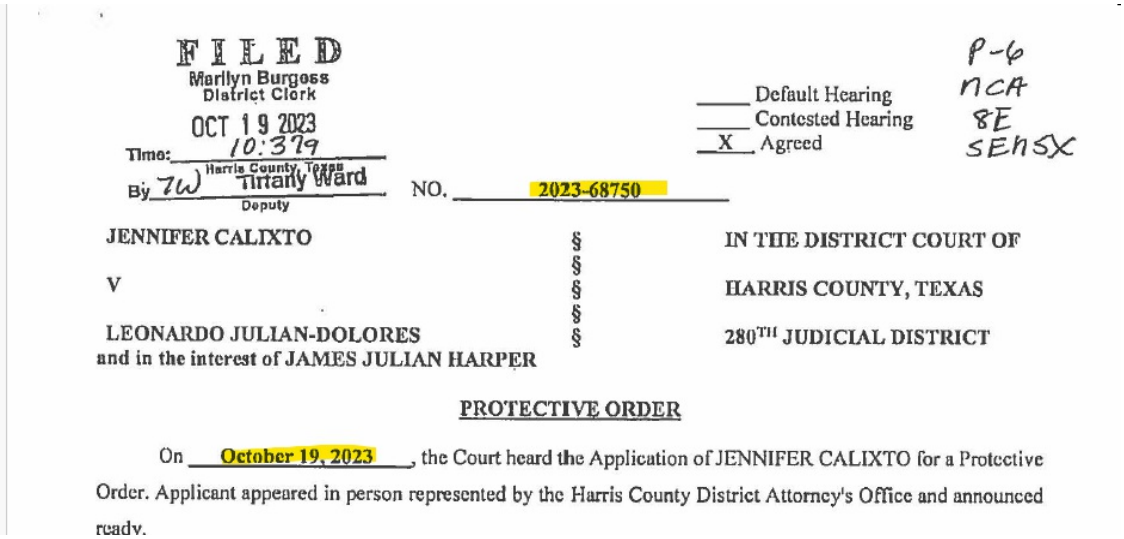
Issue One: Every element must be proven beyond a reasonable doubt. The State failed to prove that Mr. Julian was aware of the updated address on the protective order. Should this Court reverse and render an acquittal?

Issue Two: The trial court is required to instruct the jury on the law applicable to the case. The jury charge failed to instruct on notice and knowledge of the issuance of the change of address.

Issue Three: Mr. Julian received ineffective assistance of counsel when his attorney failed to object to the jury charge.

STATEMENT OF FACTS

A protective order was issued on October 19, 2023. [SX-1]. The complainant was Jennifer Calixto. [SX-1]. The addresses where Mr. Julian was precluded from going near were 9595 Westview Drive, #703, Houston, TX 77055 or The Forum at Memorial Woods, 777 North Post Oak Road, Houston, TX 77024. [SX-1]. The cause number was 2023-68750. [SX-1].



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District Clerk
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Time: 10:37a
Harris County, Texas
By TW Tiffany Ward
Deputy

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____ Default Hearing
____ Contested Hearing
__X__ Agreed

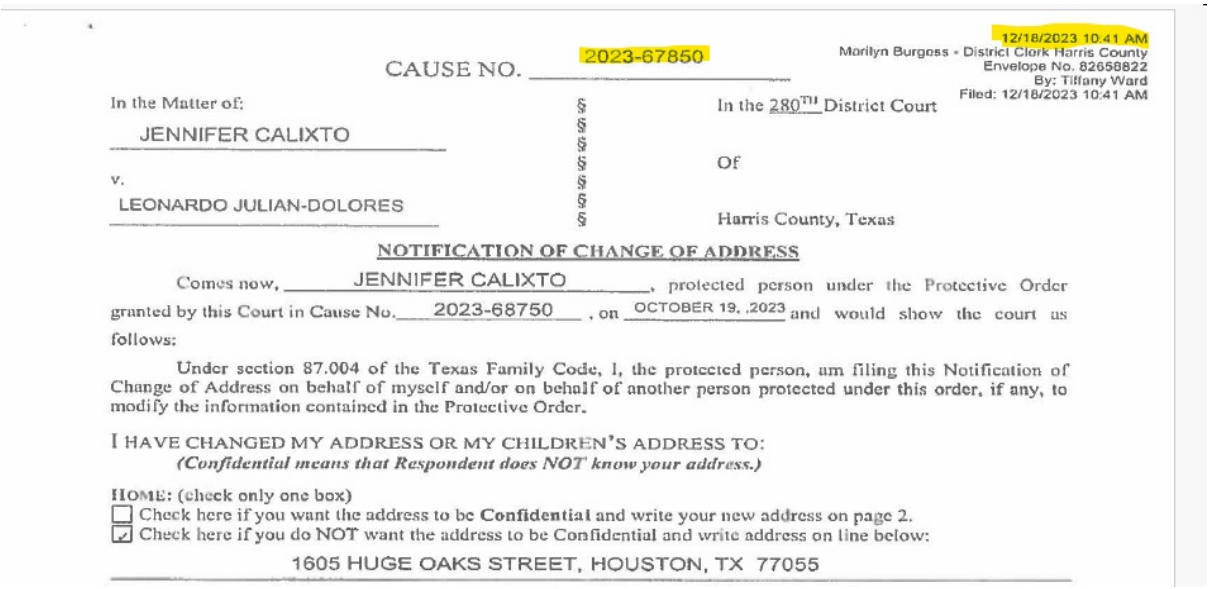
NO. 2023-68750

JENNIFER CALIXTO § IN THE DISTRICT COURT OF
§
V § HARRIS COUNTY, TEXAS
§
LEONARDO JULIAN-DOLORES § 280TH JUDICIAL DISTRICT
and in the interest of JAMES JULIAN HARPER

PROTECTIVE ORDER

On October 19, 2023, the Court heard the Application of JENNIFER CALIXTO for a Protective Order. Applicant appeared in person represented by the Harris County District Attorney's Office and announced ready.

On December 18, 2023, the address for Jennifer Calixto was changed to 1605 Huge Oaks Street, Houston, TX 77055. [SX-1]. The cause number listed as 2023-67850.



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CAUSE NO. 2023-67850

In the Matter of:
JENNIFER CALIXTO
v.
LEONARDO JULIAN-DOLORES

§ In the 280TH District Court
§ Of
§ Harris County, Texas

NOTIFICATION OF CHANGE OF ADDRESS

Comes now, JENNIFER CALIXTO, protected person under the Protective Order granted by this Court in Cause No. 2023-68750, on OCTOBER 19, 2023 and would show the court as follows:

Under section 87.004 of the Texas Family Code, I, the protected person, am filing this Notification of Change of Address on behalf of myself and/or on behalf of another person protected under this order, if any, to modify the information contained in the Protective Order.

I HAVE CHANGED MY ADDRESS OR MY CHILDREN'S ADDRESS TO:
(Confidential means that Respondent does NOT know your address.)

HOME: (check only one box)
☐ Check here if you want the address to be **Confidential** and write your new address on page 2.
☑ Check here if you do NOT want the address to be Confidential and write address on line below:
1605 HUGE OAKS STREET, HOUSTON, TX 77055

Ms. Calixto testified that she and Mr. Julian are the parents of a 15-year-old son. [2RR 17-18]. When they were together, they lived at 1605 Huge Oaks Drive, as well as other addresses. [2RR 18]. Mr. Julian had introduced Ms. Calixto to the elderly couple that lived in that house in 2008. [2CR 19]. Mr. Julian had not lived at the Huge Oaks home since 2016, but he had been there many times before. [2CR 20; 53].

Ms. Calixto explained that she went to court and on October 19, 2023, she got a protective order; Mr. Julian attended that hearing by Zoom. [2CR 21-22]. In that protective order, the addresses where Mr. Julian was precluded from going near were 9595 Westview Drive, #703, Houston, TX 77055 or The Forum at Memorial Woods, 777 North Post Oak Road, Houston, TX 77024. [SX-1]. Mr. Julian was an active participant in the hearing on October 19, 2023, according to Ms. Calixto. [2RR 22-23].

After the conclusion of the hearing, a four-year protective order was put in place. [2RR 23-24]. The order was signed and it was filed with the district clerk. [2RR 24].

Later Ms. Calixto filed a form to change her address. [2RR 25; SX-1]. The address was changed to 1605 Huge Oaks Street on December 18, 2023. [2RR 29-30]. The cause number was different in the change of address than it was in the original protective order. [2RR 52].

On March 31, 2024, Ms. Calixto was at the 1605 Huge Oaks Street home. [2RR 32]. While at the house, after midnight, Ms. Calixto heard loud music and revving. [2RR 32]. She saw him walk near her car and near the tires. [2RR 23]. She thought he was going to puncture her tires and she called the police. [2RR 34]. She also feared he would come in the house and hit her. [2RR 35].

The videos provided by Ms. Calixto and admitted into evidence show two instances. State Exhibit 5 is two videos that show a car driving by the house - which Ms. Calixto testifies is Mr. Julian's car. [SX-5; 2RR 38]. She also states she knew it was Mr. Julian because of his short neck and the way he holds himself. [2RR 45]. State Exhibit 6 shows the same car driving by playing a Spanish love song about feelings and missing her that Ms. Calixto stated Mr. Julian was known to listen to. [SX-6; 2RR 39-43]. State Exhibit 7 is 41 seconds and shows Mr. Julian drive up to the driveway, playing his love song, getting out and looking at the tires on her car. [SX-7; 2RR 43-44]. State Exhibit 8 is a video from a *different* day (September 8, 2023)[1] that Ms.

[1] That date precedes the protective order.

Calixto took where she stated she saw Mr. Julian driving a truck and he was near the Huge Oaks address. [SX-8; 2RR 46-47].

A time line of events

9/8/2023	10/19/2023	12/18/2023	3/24/2024
Mr. Julian is at 1605 Huge Oaks	Calixto files P.O.	Calixto files address change	Mr. Julian is at 1605 Huge Oaks
video of Mr. Julian's truck near 1605 Huge Oaks [SX-8]	addresses where Mr. Julian is not allowed are: 9595 Westview 777 N. Post Oak [SX-1]	new address where Mr. Julian is not allowed: 1605 Huge Oaks Street [SX-1]	video of him playing loud Spanish love song and looking at her car - less than 40 seconds at the scene [SX-5, 6, 7]

Verdict

The defense argued for a directed verdict because there was no evidence Mr. Julian had been apprised of the changed address for the protective order. [2RR 57-58]. The State argued that the order stated it was an agreed order. [2RR 59]. The protective order before the changed address did state it was agreed. [SX-1]. There is no such statement on the change of address. [SX-1].

The jury returned with a guilty verdict. [2RR 73]. The trial court sentenced Mr. Julian to 300 days in jail. [2RR 82].

SUMMARY OF THE ARGUMENT

> "Someone must have slandered Josef K., for one morning, without having done anything truly wrong, he was arrested."
>
> — Franz Kafka, The Trial

The complainant changed the address on the protective order three months after the original order. There is a statutory process for serving that change of address form. Yet, the State chose to not offer any evidence that the process had been attempted or completed. This was not a random address - Mr. Julian knew the couple that lived there before the complainant knew them. This was an address known to Mr. Julian - but not known to him as the address of the complainant.

Without notice of the new address, Mr. Julian drove by the house playing a Spanish love song loudly. He exited his vehicle and approached the complainant's car. He then left. He drove away. He was there less than 30 seconds.

The State failed to prove Mr. Julian had knowledge of the changed address. The jury charge was erroneous and failed to give the jury an instruction that the State needed to prove notice and knowledge. And finally, the trial attorney should have objected to the erroneous charge.

ARGUMENT

Issue One: Every element must be proven beyond a reasonable doubt. The State failed to prove that Mr. Julian was aware of the updated address on the protective order. Should this Court reverse and render an acquittal?

The State alleged the following in its information:

> Comes now the undersigned Assistant District Attorney of Harris County, Texas, on behalf of the State of Texas, and presents in and to the Harris County Criminal Court at Law No. ____ of Harris County, that in Harris County, Texas, Leonardo Julia, hereafter styled the Defendant, heretofore on or about March 21 2024, did then and there unlawfully, with knowledge of the issuance of a family violence protective order issued under Chapter 85 of the Family Code, a copy of which is attached as Exhibit A, violate said order by intentionally and knowingly going to or near a place specifically described in the order, to-wit: the residence of a protected individual, namely, 1605 Huge Oaks St., a location in Harris County, Texas. [CR 16].

While the information included the 1605 Huge Oaks Street address, the attached Exhibit A did not. [CR 17-23]. Exhibit A was dated October 19, 2023. [CR 17].

The jury instructions included the following application paragraph:

> Now, therefore, if you believe from the evidence beyond a reasonable doubt that on or about March 21, 2024, in Harris County, Texas, the Defendant, Leonardo Julian, did then and there unlawfully, with knowledge of the issuance of a family violence protective order issued under Chapter 85 of the Family Code, intentionally, violate said order by intentionally or knowingly go to or near a place specifically described in the order: to wit: the residence of a protected individual, namely 1605 Huge Oaks St Houston, Texas, then you will find the defendant "guilty" of violating a protective order as charged in the indictment. [CR 88].

Ms. Calixto testified she filed a change of address to the 1605 Huge Oaks Street address on December 18, 2023. [2RR 25; SX-1]. The statute that governs the changing of an address for a protective order under Tex. Family Code Ch. 85 is the following:

> (a) If a protective order contains the address or telephone number of a person protected by the order, of the place of employment or business of the person, or of the child-care facility or school of a child protected by the order and that information is not confidential under Section 85.007, the person protected by the order may file a notification of change of address or telephone number with the court that rendered the order to modify the information contained in the order.
>
> (b) The clerk of the court shall attach the notification of change to the protective order and shall deliver a copy of the notification to:
>
> (1) the respondent by registered or certified mail as provided by Rule 21a, Texas Rules of Civil Procedure; and
>
> (2) any other person entitled to a copy of the order under Section 85.042.
>
> (c) The filing of a notification of change of address or telephone number and the attachment of the notification to a protective order does not affect the validity of the order.

TEX. FAM. CODE ANN. § 87.004.

1. Standard of review for sufficiency of the evidence

The trial judge erroneously denied Mr. Julian's motion for a directed verdict. In Texas, appellate review of denied motions for a directed verdict are resolved by applying the *Jackson* test for insufficient evidence established by the United States Supreme Court in *Jackson v. Virginia*. *Canales v. State*, 98 S.W.3d 690, 693 (Tex. Crim.

App. 2003). *Jackson* requires the reviewing court to determine if, in the light most favorable to the verdict, "there was sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 312-13 (U.S. 1979). Further, due process requires the state to prove each element of the offence beyond a reasonable doubt. *Id.* at 315 (*citing In re Winship*, 397 U.S. 358, 364 (1970)). Bound by *Jackson* and *Winship*, the Texas Court of Criminal Appeals demands that a reviewing court insure the evidence was "sufficient in character, weight and amount to justify a factfinder in concluding that every element of the offense has been proven beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 917 (Tex. Crim. App. 2010). Based upon the evidence admitted at the time of Mr. Julian's motion for a directed verdict, a rational factfinder could not have reasonably believed that the state had successfully proved its case against Mr. Julian.

In *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007), the Court of Criminal Appeals set forth the general legal sufficiency standard required by the Due Process Clause of the Fourteenth Amendment:

> In assessing the legal sufficiency of the evidence to support a criminal conviction, we consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. (Citations omitted). The reviewing court must give deference to 'the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' *Jackson*, 443 U.S. at 318-19, 99 S.Ct. 2781. In reviewing the sufficiency of the evidence, we should look at 'events occurring before, during and after the commission of the offense and may rely on actions of the defendant which show an understanding and common design to do the prohibited act.' *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App.1985). Each fact need not point directly and independently to the

> guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *See Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App.1993) ... Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. (Citation omitted). On appeal, the same standard of review is used for both circumstantial and direct evidence cases. *Id.*

In conducting a legal sufficiency of the evidence review, there is, however, no presumption that a jury acted reasonably merely because the trial court properly instructed them; rather the evidence must be tested "to see if it is at least conclusive enough for a reasonable factfinder to believe based on the evidence" that all elements have been established beyond a reasonable doubt. *Jackson*, 443 U.S. at 318, 99 S.Ct. at 2788, 61 L.Ed.2d at 573; *Blankenship v. State*, 780 S.W.2d 198, 207 (Tex. Crim. App. 1988).[2]

Proof that amounts to a strong suspicion of guilt or a probability of guilt falls short of the legally sufficient evidence mark. *Winfrey v. State*, 393 S.W.3d 763, 769 (Tex. Crim. App. 2013). Although a Court does "not lightly overturn a jury's finding, [it] must not hesitate to overturn a jury's verdict when it is necessary to 'guard against dilution of the principle that guilt is to be established by probative evidence beyond a reasonable doubt'." *United States v. Jackson*, 700 F.2d 181, 185 (5th Cir. 1983), *citing Estelle v. Williams*, 425 U.S. 501, 503 (1976). In assessing whether the evidence is legally sufficient, courts look not to "mere quantity" but to the "adequacy" and "quality" of the evidence and the level of certainty it engenders in the factfinder's mind. *Brooks v. State*, supra, at 917-918. (Concurring opinion J. Cochran). In assessing

[2] In Issue Two, Mr. Julian contends the jury was not even instructed properly.

legal sufficiency, this Court must review evidence "using a magnifying glass that incorporates the reasonable-doubt burden of proof." *Redwine v. State*, 305 S.W.3d 360, 366, n. 12 (Tex. App. Houston [14th Dist.] 2016).

2. There was no evidence Mr. Julian was aware of the change of address.

The State proffered zero evidence that Mr. Julian had been served with the change of address. Indeed, even if Mr. Julian somehow was able to review the clerk's website, the cause number for the address change was different from the cause number for the original protective order. [SX-1]. In a case where the conviction was reversed because of the State's failure of proof on the culpable mental state, the Court of Appeals explained:

> Although the law is clear that a defendant is presumed to know statutory law, the State cannot convincingly argue that a defendant is presumed to know what every court order ever issued prohibits. **The State did not satisfy its obligation, as alleged, by simply establishing that the appellant knowingly and intentionally went near and to the household prohibited by the order, with or without knowledge of the existence of the order in question**. For the appellant to have knowingly and intentionally violated the order, it was necessary for the appellant to have been aware of the order, and since the burden is upon the State to establish its charge, the State was required to furnish this evidence. (Emphasis added).

Small v. State, 809 S.W.2d 253, 256 (Tex. App.—San Antonio 1991, pet. ref'd). The State did not satisfy its obligation, as alleged, by simply establishing that Mr. Julian knowingly and intentionally went near and to the property prohibited by the change of address order. It is not as if that address was wholly unfamiliar to Mr. Julian - he had lived there previously. [2RR 18]. In fact, he had more of a relationship to that house

than did Ms. Calixto - he introduced her to the owners of the home. [2RR 18-20; 53]. There is no question that the State proved that Mr. Julian had knowledge of the *original* protective order with the original addresses. Evidence is sufficient to prove service when the State offered proof the defendant had knowledge of the existence of the court order because he had been served while in custody. *Ramos v. State*, 923 S.W.2d 196, 197-98 (Tex. App. – Austin 1996, no pet.). The original protective order stated that Mr. Julian had attended by zoom and was present. [SX-1]. There was no notation at all regarding the change of address.

The videos also show that if Mr. Julian did recognize her car, he left the street in less than 60 seconds from arrival. [SX-4, 5, 6].

In another protective order violation case, the issue was jury charge error - but instructive was the Fourteenth Court of Appeals' discussion of the proof offered at trial:

> The State offered, and the trial court admitted, State's Exhibit 2, which was a copy of the January 23, 2017 protective order. The order included language indicating that appellant "appeared pro se and announced ready." The trial court also admitted State's Exhibit 3, which was a copy of the return of service indicating that appellant had been served with a copy of the protective order. **The Assistant County Attorney who applied for the protective order testified that appellant was present at the January 23, 2017 hearing. In other words, there was no dispute that appellant attended the hearing and received service of the protective order.** (Emphasis added).

Wesley v. State, 605 S.W.3d 909, 921 (Tex. App.—Houston [14th Dist.] 2020, no pet.). The State could easily have called a clerk to the stand to testify that the notice had been sent, a return receipt card was received, or the letter had never been returned. Something could have been offered by the State to prove that Mr. Julian had notice of

which address he was precluded from being near. In another case, the evidence was that the defendant admitted he had received it. *See Dillard v. State*, No. 05-00-01745-CR, 2002 WL 31845796, at *3 (Tex. App.—Dallas Dec. 20, 2002, no pet.)(not designated for publication)(appellant admitted the protective order was served on him, it was in effect at the time of the assault, he had notice of the order and it prohibited family violence against Burgan.). There is no such admission in this case.

The Court of Criminal Appeals has held that the requirements for knowledge of a protective order "are only that the respondent be given the resources to learn the provisions; that is, that he be given a copy of the order, or notice that an order has been applied for and that a hearing will be held to decide whether it will be issued." *Harvey v. State*, 78 S.W.3d 368, 373 (Tex. Crim. App. 2002). In this case, Mr. Julian could never have found the change of address even with the cause number of his protective order - because the address change had an incorrect cause number. [SX-1].

3. The State is required to follow the statute.

The change of address for the protective order required service upon Mr. Julian:

> (b) The clerk of the court shall attach the notification of change to the protective order and shall deliver a copy of the notification to:
>
> (1) the respondent by registered or certified mail as provided by Rule 21a, Texas Rules of Civil Procedure; and

> (2) any other person entitled to a copy of the order under Section 85.042.
>
> (c) The filing of a notification of change of address or telephone number and the attachment of the notification to a protective order does not affect the validity of the order.

TEX. FAM. CODE ANN. § 87.004. There was absolutely no evidence such as a return receipt or postal receipt that the change of address had been mailed according to the statute.

A. There are statutory requirements for proof of service under 21a.

Proof of service under Tex. R. Civ. P. 21a is as follows:

> (e) Proof of Service. The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the document was not received, or, if service was by mail, that the document was not received within three days from the date that it was deposited in the mail, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just.

TEX. R. CIV. P. 21a (e).

The State offered zero proof that Mr. Julian was ever served. In a case regarding a default judgment, service that was not according to the statute did not convey jurisdiction to the trial court:

> Further, although Verlander admitted receiving Graham's petition in its motion for new trial, which appears in this record, **actual notice to a defendant, without proper service, is not sufficient to convey upon the court jurisdiction to render a default judgment against the defendant.** *Wilson*, 800 S.W.2d at 836–37. While we recognize that the strict rules applied to defaults on writ of error sometimes lead the courts to rather weird conclusions, preventing us from making even the most

> obvious and rational inferences, we believe good public policy favors the standard. The end effect of our application of the strict compliance standard is an increased opportunity for trial on the merits. We believe this policy justifies what may at first blush seem a hyper-technical rule. Whiskeman, 847 S.W.2d at 329 n. 1.

Verlander Enterprises, Inc. v. Graham, 932 S.W.2d 259, 261–62 (Tex. App.—El Paso 1996, no writ). The Court of Appeals acknowledged it was a hyper-technical interpretation - but nevertheless necessary for public policy. In a criminal case, where a defendant's *liberty* is at stake, due process applies. TEX PENAL CODE § 2.05(a).

The Supreme Court of Texas held that in determining proof of service under 21a, when service is challenged, it must be proven according to the rule:

> "A certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service." *Id.* Here, the record contains no certificate of service, no return receipt from certified or registered mail, and no affidavit certifying service. Instead, the only evidence of service in the record was the oral assurance of counsel. As the rule's requirements are neither vague nor onerous, we decline to expand them this far. **As none of the prerequisites for prima facie proof of service were met, the court of appeals was incorrect in indulging a presumption that Mathis received the notice Lockwood's counsel sent**.

Mathis v. Lockwood, 166 S.W.3d 743, 745 (Tex. 2005). The presumption of service was incorrect without proof.

Here, the defense challenged notice in the record:

> There's been no evidence presented that would show that he even had been served or any notice of the original order or the Notice of Change of address. For that reason, I am entitled to a directed verdict. [2RR 58].

And while there are presumptions that Mr. Julian was served - the State offered zero evidence that it had ever been sent to Mr. Julian. Rule 21a therefore sets up a

presumption that a document properly addressed and placed in the mail was received by the recipient in a timely manner. *See Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987). But in a criminal case, a presumption does not vitiate the State's burden of proof beyond a reasonable doubt that Mr. Julian had knowledge of the change of address.

B. In a criminal case, the presumption of service violates due process.

There are no mandatory presumptions in criminal cases:

> (a) Except as provided by Subsection (b), when this code or another penal law establishes a presumption with respect to any fact, it has the following consequences:
>
> > (1) if there is sufficient evidence of the facts that give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact;

TEX. PEN. CODE § 2.05.

As the Court of Criminal Appeals explained: "To correctly apply the *Jackson* standard, it is vital that courts of appeal understand the difference between a reasonable inference supported by the evidence at trial, speculation, and a presumption. A presumption is a legal inference that a fact exists if the facts giving rise to the presumption are proven beyond a reasonable doubt." *Hooper*, 214 S.W.3d at 15-16. Mandatory presumptions are unconstitutional because they relieve the State of the burden to prove every element of the offense beyond a reasonable doubt. *Garrett v. State*, 220 S.W.3d 926, 930 (Tex. Crim. App. 2007). The State had the

burden to prove beyond a reasonable doubt that Mr. Julian had received notice of the change of address. The State failed in that proof.

4. The State failed to prove Mr. Julian had knowledge of the change of address.

The State's only witness had no knowledge whether Mr. Julian had been given notice of the new prohibited address. The State was required to prove that knowledge:

> The term "in violation of an order issued under Section 6.504 or Chapter 85, Family Code [or] under Article 17.292, Code of Criminal Procedure," must be construed in light of these procedural requirements. So construed, the term means "in violation of an order that was issued under one of those statutes at a proceeding that the defendant attended or at a hearing held after the defendant received service of the application for a protective order and notice of the hearing."

Harvey v. State, 78 S.W.3d at 373. There is no evidence Mr. Julian ever received service of the updated address. The State is not required to "prove the defendant knowingly or intentionally violated the order, but that he knowingly or intentionally engaged in the prohibited conduct." *Mavero v. State*, No. 05-14-01097-CR, 2016 WL 4051898, at *3 (Tex. App.—Dallas July 26, 2016, no pet.)(not designated for publication). The prohibited conduct was coming within 200 feet of certain addresses. The State was required to prove that he had knowledge of the prohibited address.

In a case where a protective order was modified to include an additional 20 years, the Fort Worth Court of Appeals held that the evidence was sufficient because there was proof *in the record* that the defendant had been given notice of the modification hearing:

> . . . the State needed only to show that the modified protective order was issued at a hearing held after Nielsen received service of the application for the modified protective order and notice of the hearing.
>
> And there is sufficient evidence of that here. The trial court admitted the modified protective order as an exhibit, and it recites (1) that the order was issued after a hearing; (2) that Nielsen "although duly and properly cited with notice, did not answer or appear and wholly made default"; and (3) that Nielsen had "received actual and reasonable notice of the hearing."

Nielsen v. State, No. 02-19-00157-CR, 2020 WL 1808574, at *4 (Tex. App.—Fort Worth Apr. 9, 2020, pet. ref'd)(not designated for publication).

The record is devoid of evidence that Mr. Julian knew he should not drive by his old house at 1605 Huge Oaks Street. There was evidence he knew he needed to stay away from Houston addresses 9595 Westview Drive #703 and 777 North Post Oak Road. [SX-1]. And there is no evidence he ever went to those addresses. There is equally no evidence that he had knowledge of the new address. Nor did he commit a crime when he was at the new address for less than 60 seconds. He played a loud Spanish love song and looked at Ms. Calixto's car. For this - he was given 300 days of incarceration. The State failed to prove he had knowledge of the changed address.

5. "[T]he statute requires some knowledge of the protective order." ***Harvey v. State*****, 78 S.W.3d 368, 373 (Tex. Crim. App. 2002).**

If the State's theory is that knowledge of the original protective order is sufficient as to knowledge of a change made months later, that theory fails. In *Harvey,* the Court of Criminal Appeals discussed knowledge and notice:

> Therefore, proof that an act was "in violation of an order issued under Section 6.504 or Chapter 85, Family Code, [or] under Article 17.292, Code of Criminal Procedure," as Penal Code 25.07(a) requires, **must be proof of either an order that was issued after service of a copy of the application and notice under the Family Code, or an order that was issued by a magistrate who warned the defendant of his rights after arrest and a copy of which was given the defendant in open court**. In all these cases a person would know the terms of the order or would know that he was subject to the issuance of such an order. (Emphasis added).

Harvey v. State, 78 S.W.3d 368, 372–73 (Tex. Crim. App. 2002).

The State failed to provide any evidence of service of the change of address. During closing argument, the State argued that the filing of the change of address with the district clerk was the only requirement necessary - and they are "good to go":

> Then we went down to Section 87.004, where it talks about the change of address. Once it's filed with the District Clerk, that address is good to go. Then, we have here, the new address. This is at 1605 Huge Oaks Street, the address filed with the Change of Address Division. Everything's in this. [2RR 66].

The State never mentions the statutory requirement that Mr. Julian had to receive notice of the new address. But knowledge is key:

> The term "in violation of an order issued under Section 6.504 or Chapter 85, Family Code [or] under Article 17.292, Code of Criminal Procedure," must be construed in light of these procedural requirements. So construed, the term means "in violation of an order that was issued under one of those statutes at a proceeding that the defendant attended or at a hearing held after the defendant received service of the application for a protective order and notice of the hearing."

Harvey, 78 S.W.3d at 373. The Court explained, "The State does not argue that the appellant could be held liable without having some such knowledge of the order." *Harvey*, 78 S.W.3d at 373. Additionally, "[w]hile proof of service may provide direct evidence of knowledge of the order's terms, the statute does not preclude

circumstantial evidence establishing that knowledge." *Hammack v. State*, 622 S.W.3d 910, 916 (Tex. Crim. App. 2021). The State presented no circumstantial evidence that he knew of the changed address. They did offer and admit SX-8, which was a video of Mr. Julian at the address several months before the address change. That is not evidence that he knew on March 21, 2024, that he was not to be near 1605 Huge Paks Street.

The case should be reversed and an acquittal entered.

Issue Two: The trial court is required to instruct the jury on the law applicable to the case. The jury charge failed to instruct on notice and knowledge of the issuance of the change of address.

1. Standard of Review

In analyzing a jury charge issue, an appellate court's first duty is to decide whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If error exists, the court then analyzes that error for harm. *Id.* If the appellant did not object to the charge, the appeals courts examine the record for egregious harm. *Id.* Errors that result in egregious harm are those that affect "the very basis of the case," "deprive the defendant of a valuable right," or "vitally affect a defensive theory." *Id.* at 750.

2. The trial court must instruct the jury properly.

"The purpose of the trial judge's jury charge is to instruct the jurors on all of the law that is applicable to the case." *Vasquez v. State*, 389 S.W.3d 361, 366 (Tex. Crim. App. 2012), *citing Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App.1994).

A. Precedent from the Court of Criminal Appeals establishes this charge was incorrect.

In *Harvey,* the issue was whether the jury charge was correct or not in a violation of a protective order case. The Court explained what is the appropriate charge:

> The charge in this case correctly told the jury, "A person commits the offense of violation of a protective order if, in violation of a protective order issued **after notice and hearing**, the person knowingly or

> intentionally commits family violence." This was the essence of the construction we have given Section 25.07(a) of the Penal Code for orders issued under Chapter 85 of the Family Code.
>
> **A party might be entitled to a fuller exposition of the requirements of the Family Code upon special request**.

Harvey, 78 S.W.3d at 373.

The charge given on the law in this case was:

> Accusation:
>
> The State accuses the defendant of having committed the offense of violating a protective order. Specifically, the accusation is that the defendant Leonardo Julian, did unlawfully, with knowledge of the issuance of a protective order, violate said order by intentionally or knowingly going to or near the residence of the protected individual, 1605 Huge Oaks St, in violation of the order expressly prohibiting such.
>
> Relevant Statutes for Violating a Protective Order
>
> A person commits an offense if, in violation of an order issued under Chapter 85 of the Family Code, the person knowingly or intentionally commits family violence or goes to the following places as specifically described in the order: (A) the residence or place of employment or business of a protected individual or member of the family or household; or (B) any child care facility, residence, or school where a child protected by the order normally resides or attends. [CR 87].

The charge did not require Mr. Julian to have ever been served or given notice of the changed address, as contemplated by the holding in *Harvey*.

As detailed above, there is zero evidence that Mr. Julian had notice of the changed address. A fuller exposition of the notice and hearing requirements should have been supplied to the jury. The charge given did not provide the requisite hearing and notice provision as required by the Court of Criminal Appeals. In considering *Harvey*, the Fourteenth Court of Appeals explained, "[t]he court in *Harvey* held that the

State had to prove the defendant had "certain knowledge" of the protective order because the term "in violation of an order" in section 25.07(a) "necessarily includ[ed] certain knowledge that amount[ed] to a mental state." *Wesley v. State*, 605 S.W.3d 909, 919 (Tex. App.—Houston [14th Dist.] 2020, no pet.), *citing Harvey*, 78 S.W.3d at 371. There was no evidence of this "certain knowledge" of the changed address.

B. Additionally, the charge given resulted in an unconstitutional presumption.

Under the Rules of Civil Procedure, there is a presumption that Mr. Julian was given notice of the change of address on the violation of the protective order. The change of address for the protective order required service upon Mr. Julian:

> (b) The clerk of the court shall attach the notification of change to the protective order and shall deliver a copy of the notification to:
>
> (1) the respondent by registered or certified mail as provided by Rule 21a, Texas Rules of Civil Procedure; and
>
> (2) any other person entitled to a copy of the order under Section 85.042.
>
> (c) The filing of a notification of change of address or telephone number and the attachment of the notification to a protective order does not affect the validity of the order.

TEX. FAM. CODE ANN. § 87.004.

(1) There are statutory requirements for proof of service under 21a.

Proof of service under Tex. R. Civ. P. 21a is as follows:

> (e) Proof of Service. The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the

> return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the document was not received, or, if service was by mail, that the document was not received within three days from the date that it was deposited in the mail, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just.

TEX. R. CIV. P. 21a (e). Rule 21a has a presumption that a document properly addressed and placed in the mail was received by the recipient in a timely manner. *See Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987).

(2) The State determined it could rely upon the presumption and not present evidence.

Indeed, the State offered no evidence that Mr. Julian had been served with the change of address, seemingly relying upon the presumption. In reply to the defense argument at the motion for a directed verdict that there had been no evidence Mr. Julian was aware of the change of address, [2RR 58], the State offered:

> This is all evidence that he was present at this hearing and had knowledge of the Protective Order. I believe, in addition, the Violation of a Protective Order statute requires only constructive knowledge of the Protective Order. If, in fact, the defendant was served with notice of the hearing and did not appear -- which is not the case here; he did appear -- that that would provide constructive knowledge as well.
> While we haven't presented evidence that, you know, someone was there and said that he knew what was going on, but there is still sufficient evidence to give this case to the jury. [2RR 59].

What the trial court allowed was for there to be a presumption Mr. Julian had been served with the new address. It was error to not instruct the jury either correctly under *Harvey* or as contemplated in the law on presumptions.

(3) The trial court needed to instruct the jury on the law of presumptions.

Mandatory presumptions violate due process. The legislature has enacted a statute with a required instruction when there is a presumption issue:

> (2) if the existence of the presumed fact is submitted to the jury, the court shall charge the jury, in terms of the presumption and the specific element to which it applies, as follows:
>
> (A) that the facts giving rise to the presumption must be proven beyond a reasonable doubt;
>
> (B) that if such facts are proven beyond a reasonable doubt the jury may find that the element of the offense sought to be presumed exists, but it is not bound to so find;
>
> (C) that even though the jury may find the existence of such element, the state must prove beyond a reasonable doubt each of the other elements of the offense charged; and
>
> (D) if the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose.

TEX. PEN. CODE § 2.05 (a)(2).

(4) Unlike other offenses where the mandatory presumption was put in the statute, this one is hidden - but exists nonetheless.

Mandatory presumptions are unconstitutional because they relieve the State of its constitutionally-required burden of proving guilt beyond a reasonable doubt. *Francis v. Franklin*, 471 U.S. 307, 317 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *Willis v. State*, 790 S.W.2d 307, 309 (Tex. Crim. App.1990).

This offense does not overtly contain a statutory mandatory presumption like the fraudulent possession statute. *See* TEX. PEN. CODE § 32.51(b-1)("For the purposes of Subsection (b), the actor is presumed to have the intent to harm or defraud another..."). But instead the instruction on "knowingly" left out that he had to "know" the address where he was not supposed to be. Here, the trial court's instruction on knowingly has nothing to do with the knowledge of the address:

> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. [CR 88].

In the accusation paragraph, the jury was instructed that he had to have knowledge of a protective order - but nowhere in there is that he had to have knowledge of the changed order which made it a violation to go near an entirely different address:

> The State accuses the defendant of having committed the offense of violating a protective order. Specifically, the accusation is that the defendant Leonardo Julian, did unlawfully, with knowledge of the issuance of a protective order, violate said order by intentionally or knowingly going to or near the residence of the protected individual, 1605 Huge Oaks St, in violation of the order expressly prohibiting such.

In the application paragraph, the jury was instructed:

> Now, therefore, if you believe from the evidence beyond a reasonable doubt that on or about March 21, 2024, in Harris County, Texas, the Defendant, Leonardo Julian, did then and there unlawfully, with knowledge of the issuance of a family violence protective order issued under Chapter 85 of the Family Code, intentionally, violate said order by intentionally or knowingly go to or near a place specifically described in the order, to wit: the residence of a protected individual, namely 15605

> Huge Oaks St Houston, Texas, then you will find the defendant "guilty" of violating a protective order as charged in the indictment. [CR 88].

By not including an instruction that the presumption whether he knew of the changed address, the court relieved the State of the burden to prove every element beyond a reasonable doubt. "Failure to include a section 2.05(a)(2) instruction along with an instruction on a presumed fact thus gives rise to both statutory and constitutional error." *Ross v. State*, 594 S.W.3d 566, 569–70 (Tex. App.—Amarillo 2019, no pet.). TEX. PENAL CODE § 2.05(a)(2). "When these instructions are included in the jury charge, an otherwise mandatory and unconstitutional presumption will be treated as a permissive presumption that is constitutionally acceptable." *Ramirez-Memije v. State*, 466 S.W.3d 894, 897 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

3. Mr. Julian was egregiously harmed by the failure to give the instruction detailed in *Harvey* as well as the failure to instruct on the presumption.

Because trial counsel did not object to the charge, this Court is to review the error under the "egregious harm" standard of *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984). Egregious harm consists of those errors that affect the very basis of the case, deprive the defendant of a valuable right, vitally affect a defensive theory, or make the case for conviction clearly and significantly more persuasive. *Taylor v. State*, 332 S.W.3d 483, 490 (Tex. Crim. App. 2011). In determining the degree of harm, the court "should consider the entire jury charge, the state of the evidence, the arguments of counsel and any other relevant information revealed by the record of the

trial as a whole." *Zamora v. State*, 432 S.W.3d 919, 924 (Tex. App. - Houston, [14th Dist.] 2014, no pet).

A. The entire charge.

First, the relevant statute does not include the language about notice and a hearing. *Harvey*, 78 S.W.3d at 373. Instead, it was silent, merely stating "with knowledge of the issuance of a protective order." [CR 87]. It did not tailor the accusation or instruction to knowledge of the change of address.

Another problem with the jury charge is that is failed to instruct the jury that there was no presumption Mr. Julian knew of the changed address. [CR 83-88]. The charge does state that "The state must prove, beyond a reasonable doubt, the accusation of violating a protective order." [CR 87]. But there is no instruction that requires the jury to find beyond a reasonable doubt the he knew of the changed address.

B. The state of the evidence.

The State chose to only call the complainant. The State chose to not call a clerk or offer evidence that somehow Mr. Julian was given notice of the changed address. Additionally, the changed address was filed under a different cause number. There was no proof - direct or circumstantial - that Mr. Julian had knowledge of the changed address.

C. The arguments of counsel.

The State relied on the fact that they did not have to prove notice or a hearing in regards to the change of address. They could rely on the fact that a protective order had been issued and the presumption that the change of address was a part of the original order - with no mention of Mr. Julian receiving any notice:

> "The defendant, Julian–" we'll get to that in a minute. And then "with knowledge of the issuance of a Family Violence Protective Order issued under Chapter 85 of the Texas Family Code." We talked about that during voir dire. We went over the elements. We broke up how a family court makes a finding and that after it makes that finding, it "shall" make a Protective Order. Then we went down to Section 87.004, where it talks about the change of address. Once it's filed with the District Clerk, that address is good to go. Then, we have here, the new address. This is at 1605 Huge Oaks Street, the address filed with the Change of Address Division. Everything's in this. [2RR 66].

Once the change of address was filed, the State argued "that address is good to go." [2RR 66]. That is a misstatement of the law and demonstrates the inherent problem with this jury charge.

(1) The State argued that his knowledge of the new address did not need to be proven.

The State also argued that the law did not require Mr. Julian to have knowledge of the new address:

> But you'll notice here, in the jury charge, that it says "with the knowledge of the issuance of a Family Violence Protective Order, issued under Chapter 85 of the Texas Family Code." Not with knowledge of the actual address, but with knowledge of its issuance. [2RR 69-70].

The State further acknowledged that there was a different address but that "[i]t doesn't change the validity of the Protective Order one bit." [2RR 71].

(2) The defense argued there was no knowledge of the changed address.

The defense specifically argued that there was no evidence he knew of the changed address:

> The other issue, when you look at that Protective Order, it has a different address. The state says she went and filed this Notification of Change of Address. If you look at the cause number, it is not the same cause number. When we file things, they get rejected. How's he supposed to find this document if it's filed under the wrong case number? **They didn't put on any evidence that he had any knowledge of this new address.** On the contrary, you heard from her that they had lived at this address prior. This wasn't some random place. But there was zero evidence that he had knowledge of the Protective Order. So, at the end of the day, they have to prove every element beyond a reasonable doubt. If they don't have one of the elements, the only proper verdict is "not guilty." And that's what I'm asking you to return. [2RR 68-69].

The defense pointed out that the State could have brought evidence he had been served with the change of address form. But the State chose to not do that.

D. Any other relevant information revealed by the record.

Mr. Julian knew the people at 1605 Huge Oaks St. [2RR 19]. He knew the people who lived there before Ms. Calixto did. [2RR 19]. The state's video that he was there before the protective order is direct evidence that Mr. Julian had a belief it was acceptable to go to an address where he used to live. [2RR 20, 53; SX-8].

The State chose to not call any witness who could establish any link at all that Mr. Julian knew of the changed address. It would have been incredibly simple to call a clerk and offer proof of service. Maybe there is a reason the State did not call a clerk to establish that proof - because perhaps it did not exist?

Issue Three: Mr. Julian received ineffective assistance of counsel when his attorney failed to object to the jury charge.

The jury charge was erroneous, as outlined in Issue Two. It allowed the State to convict without proving that Mr. Julian had actual notice of the changed address. During the jury charge conference, the defense attorney made no substantive objections to the jury charge. [2RR 61-62].

1. Standard of review.

The Sixth Amendment of the United States Constitution protects each defendant's constitutional right to have effective counsel prepare and present a meaningful defense. Presenting meritorious claims is fundamental to a meaningful defense. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

The Supreme Court has set out a two-prong test for determining whether a defendant's constitutional right to effective assistance of counsel has been violated. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *See Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986) (adopting *the Strickland* standard). A defendant must establish 1) "that counsel's performance was deficient[,]" and 2) "that the deficient performance prejudiced the defense." *Strickland*, 466 US at 687. A single error can result in a finding of ineffective assistance of counsel:

> However, while this Court has been hesitant to "designate any error as per se ineffective assistance of counsel as a matter of law," it is possible that a single egregious error of omission or commission by appellant's counsel constitutes ineffective assistance. *Jackson v. State*, 766 S.W.2d 504, 508 (Tex. Crim. App.1985) (failure of trial counsel to advise appellant that judge should assess punishment amounted to ineffective assistance of counsel) (modified on other grounds on remand from U.S. Supreme

> Court, *Jackson v. State*, 766 S.W.2d 518 (Tex. Crim. App.1988)). *See also Ex parte Felton*, 815 S.W.2d at 735 (failure to challenge a void prior conviction used to enhance punishment rendered counsel ineffective). This position finds support in opinions of the United States Supreme Court, which has also held that a single egregious error can sufficiently demonstrate ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986).

Thompson v. State, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). The "evaluation of trial counsel's performance 'includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time.' " *Lampkin v. State,* 470 S.W.3d 876, 912 (Tex. App.—Texarkana 2015, pet. ref'd)(internal citations omitted).

"A number of errors, even if harmless when separately considered, may be harmful in their cumulative effect." *Linney v. State*, 401 S.W.3d 764, 782 (Tex. App. – Houston [14th Dist.] 2013, pet. ref'd). This doctrine provides relief when the cumulative effect rendered the phase of the trial fundamentally unfair. *See Estrada v. State*, 313 S.W.3d 274, 311 (Tex. Crim. App. 2010).

Furthermore, error in a criminal trial does not always exist in isolation, it can be found harmful in its cumulative effect, and thereby taint the outcome of the trial. *Chamberlain v. State,* 998 S.W.2d 230 (Tex. Crim. App. 1999); *Stahl v. State,* 749 S.W.2d 826, 831 (Tex. Crim. App. 1988).

2. The jury charge provided no way for the jury to acquit even if they believed the State had failed in its proof.

The jury charge was erroneous. It did not follow *Harvey*. The defense could have asked for an instruction as *Harvey* described:

> The charge in this case correctly told the jury, "A person commits the offense of violation of a protective order if, in violation of a protective order issued **after notice and hearing**, the person knowingly or intentionally commits family violence." This was the essence of the construction we have given Section 25.07(a) of the Penal Code for orders issued under Chapter 85 of the Family Code.
>
> **A party might be entitled to a fuller exposition of the requirements of the Family Code upon special request**.

Harvey, 78 S.W.3d at 373. The defense could have asked for an instruction on presumptions under TEX. PENAL CODE § 2.05(a). Instead the defense made no objection to the charge. [2RR 61-62].

3. It is ineffective assistance of counsel for counsel to not request an appropriate jury charge.

In *Vasquez v. State*, 830 S.W.2d 948 (Tex. Crim. App. 1992), the defense was "necessity" (for the offense of possession of a firearm by a felon). However, the defendant's trial counsel did not request a special instruction on necessity, nor did he object to the court's charge. There was a conviction and an appeal on ineffectiveness of counsel. The Court of Criminal Appeals agreed this was fatal ineffectiveness and reversed.

> Since the necessity defense is specifically recognized by the legislature in the Penal Code, we find that counsel's performance did not satisfy the objective standard of reasonableness under prevailing professional norms…..
>
> Counsel should have recognized the appellant's testimony was sufficient to raise the defense, and that appellant had nothing to lose by requesting a defensive instruction. Without giving the jury an opportunity to consider a defense, conviction was … a foregone conclusion…

> That in itself undermines our confidence in the conviction sufficiently to convince us that the result of the trial might have been different had the instruction been requested and given.

Vasquez, 830 S.W.2d at 951 (citations omitted). The Court concluded in reversing the conviction that "Counsel's performance in not seeking the instruction was clearly deficient." *Vasquez*, 830 S.W.2d at 951.

4. There was no strategy in not requesting a jury charge that reflected the law.

Strategic choices are entitled to deference only to the extent they are based on informed decisions. *Strickland*, 466 U.S. at 688. A reviewing court's "principal concern" is not whether as counsel may claim, his conduct was strategic, "but rather whether the investigation supporting counsel's decision was itself reasonable." *Id.* In applying this test, an appellate court should not try to second guess trial counsel's tactical decisions which do not fall below the objective standard of reasonableness. *Young v. State*, 991 S.W.2d 835, 837 (Tex. Crim. App. 1999).

In a kidnapping case, where the defense failed to ask for an instruction on mitigation of punishment for voluntary release in a safe place, the Court of Appeals reversed for ineffective assistance of counsel. *Storr v. State*, 126 S.W.3d 647, 652 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). In explaining why the failure to ask for the instruction was ineffective, the Court acknowledged, "This case is unique because the evidence conclusively establishes that appellant voluntarily released the complainant in a safe place." *Storr*, 126 S.W.3d at 652. In reversing, the Court held this was "a rare instance when there is no trial strategy that can explain the failure of

appellant's trial counsel to request a safe release instruction [and . . . we cannot possibly imagine a strategic motivation for the failure of appellant's counsel to secure a jury instruction on mitigation for voluntary release of the complainant in a safe place." *Storr*, 126 S.W.3d at 653.

The Eastland Court of Appeals reversed a case on direct appeal for ineffective assistance of counsel when the defense failed to seek an instruction on the medical-care defense. *Villa v. State*, 370 S.W.3d 787, 795-97 (Tex. App.—Eastland 2012), *aff'd*, 417 S.W.3d 455 (Tex. Crim. App. 2013). The Court noted that "Appellant's sole defense in this case revolved around the medical-care defense" and "the jury was precluded from giving effect to that defense." *Villa*, 370 S.W.3d at 796-97. In affirming the Eastland Court of Appeals, the Court of Criminal Appeals held: "Because the evidence raised the sole defense of medical care, and because Appellant's counsel failed to request a jury instruction on the issue, our confidence in the outcome of this trial is undermined, and both prongs of the *Strickland* test have been satisfied." *Villa v. State,* 417 S.W.3d 455, 464 (Tex. Crim. App. 2013).

Mr. Julian's sole defense was that he had no notice of the changed address. Yet, the jury charge given to the jury could not give effect to that defense. Both prongs of *Strickland* have been satisfied.

5. The record is not actually silent.

The Court of Criminal Appeals has often repeated the refrain that, in the absence of a record explaining why trial counsel took or failed to take certain actions,

reviewing courts most likely cannot conclude that an appellant has established his or her trial counsel's performance fell below an objective standard of reasonableness. *See, e.g., Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App.2003); *see also Bone v. State*, 77 S.W.3d 828, 830 (Tex. Crim. App.2003). The defense was Mr. Julian never received notice of the change of address. The defense attorney's theme was lack of knowledge:

- He argued for a directed verdict that the State had not proven Mr. Julian had been served with the change of address. [2RR 58].
- In closing argument, defense counsel argued that the State failed to provide "any evidence that he had any knowledge of this new address." [2RR 68-69].

By failing to object to the jury charge, he gave the jurors no way to find that notice of the change of address was a requisite element. And since the State offered no evidence that Mr. Julian did have knowledge, with a proper jury charge, Mr. Julian would have been acquitted.

PRAYER

Mr. Julian prays that this Court reverse and render a judgment of acquittal, or in the alternative reverse and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. Proc. 9.5, this certifies that on March 31, 2025, a copy of the foregoing was emailed to counsel for the state (through texfile.com) at the following address:

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CERTIFICATE OF COMPLIANCE

Pursuant to proposed Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of TEX. R. APP. PROC. 9.4(e)(i).

1. Exclusive of the portions exempted by TEX. R. APP. PROC. 9.4 (i)(1), this brief contains 11,516 words printed in a proportionally spaced typeface.

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3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in TEX. R. APP. PROC. 9.4(J), may result in The Court's striking this brief and imposing sanctions against the person who signed it.

/s/ Jani J Maselli Wood

JANI J. MASELLI WOOD

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