NOS. 14-24-00016-CR
14-24-00018-CR

IN THE COURT OF APPEALS

FOR THE FOURTEENTH DISTRICT OF TEXAS

AT HOUSTON

RICKY ELIDAN EVERETT, Appellant

V.

THE STATE OF TEXAS, Appellee

FROM THE 21ST DISTRICT COURT OF WASHINGTON COUNTY;
NOS. 19,804 & 19,805; HON. REVA L. TOWSLEE CORBETT, JUDGE

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

Appellant Ricky Elidan Everett was charged in two separate indictments. The first indictment alleged that appellant had assaulted a family member by biting her, and this charge was enhanced to a third-degree felony with the allegation of a prior family violence conviction, and further enhanced to a second-degree felony based on a prior felony conviction. The second indictment contained two counts with the first alleging a family violence assault by impeding breath / circulation enhanced to a second-degree felony based on a previous conviction and further enhanced to a first-degree felony with a prior felony conviction. The second count alleged a family violence assault by biting, similarly enhanced as in the first indictment.

Upon pleas of not guilty to all three charges, appellant was found guilty of the two charges of family violence assault by a jury. The jury acquitted appellant of the first-degree felony allegation. Finding the enhancement allegation to be true, the jury assessed appellant's punishment at eighteen (18) years confinement in the Texas Department of Criminal Justice – Institutional Division, with the sentences to run concurrently. Appellant presents three issues wherein he complains the sufficiency of the evidence, the denial of his constitutional right to confrontation, and the ineffective assistance of counsel.

ISSUES PRESENTED

1. **The trial court abused its discretion in denying appellant's motion for directed verdict – a legal sufficiency of the evidence challenge.**

2. **The trial court abused its discretion in denying appellant's motion for directed verdict – a violation of the right to confrontation.**

3. **Appellant received ineffective assistance of counsel because trial counsel failed to submit an offer of proof.**

STATEMENT OF FACTS

Deputies from the Washington County Sheriff's Office were dispatched to the recreational vehicle residence of Sheila Everett and her husband, appellant Ricky Elidan Everett, on six separate occasions between October 23, 2022, and December 9, 2022. Appellant was indicted for the third-degree felony family violence assault with previous conviction, enhanced to a second-degree felony due to a prior felony conviction, for an offense alleged to have occurred on November 16, 2022. (14-24-00016-CR - C.R. pp.13-14). Appellant was also indicted for allegations arising from December 9, 2022. (14-24-00018-CR – C.R. pp. 13-14). Prior to trial, appellant refused the State's offer an eight (8) year prison sentence for the third-degree assault impeding breath charge, "time served" for a class A misdemeanor charge of family violence assault with the other family violence assault charge being considered in assessing appellant's punishment under section 12.45 of the Texas Penal Code. (R.R. Vol. 2, pp. 12-23).

On October 23, 2022, Deputy Adam Zavala was dispatched to the residence where Sheila Everett "explicitly stated she didn't want to file any charges or complete any reports or anything like that." (R.R. Vol. 4, p. 66).

Deputy Delilah Pena responded to a call on November 6, 2022, where again Sheila Everett indicated that she did not desire to go forward with an investigation. (R.R. Vol. 3, p. 67). Deputy Pena responded to another call at the residence on November 14, 2022, and Sheila Everett again refused to cooperate with any investigation. (R.R. Vol. 3, p. 72). Two days later on November 16, 2022, Deputy Pena responded to another call to the residence. Id. Deputy Pena responded yet again on November 29, 2022. (R.R. Vol. 3, p. 73).

Corporal Albert Vasquez responded to a call at the residence on December 9, 2022. Upon responding, Corporal Vasquez immediately found appellant in his vehicle and detained him based on information he had received from dispatch. (R.R. Vol. 4, p. 88). Appellant was "completely cooperative" with Corporal Vasquez who ultimately arrested appellant. (R.R. Vol. 4, pp. 93-94). Office Adrian Pena also responded on this occasion and took pictures of Sheila depicting her "injuries." (R.R. Vol. 4, pp. 116-18). Officer Pena did not, however, take any pictures of appellant's injury. (R.R. Vol. 4, p. 122).

EMS was dispatched that night also and Sheila Everett "refused transport against medical advice." (R.R.Vol. 7, St. Exh. 1). In the EMS report, notation was made that "patient states the cause of the pain was from being kicked several times but doesn't recall the specifics of the incident." Id.

Although duly subpoenaed for appellant's trial, Sheila Everett failed to appear at trial and provided no testimony. (R.R. Vol. 5, pp. 6-14).

After the State rested, appellant made a motion for directed verdict for each count. (R.R. Vol. 5, pp. 14-25). In making this motion, trial counsel for appellant argued there was "no credible evidence that a juror could use to find appellant guilty" for any of the charges against him. Id. Trial counsel also argued that appellant had been denied his constitutional right to confront the witness against him because Sheila Everett did not appear at trial. Id. In making this argument, trial counsel also stated that he would make an offer of proof concerning a video that he intended to use in questioning Sheila Everett. (R.R. Vol. 5, pp. 18-19). Trial counsel never made such proffer of this video evidence and it is not included in the record of this case. The trial court

ultimately denied appellant's motions for directed verdicts. (R.R. Vol. 5, p. 25).

The jury acquitted appellant of the allegation of assault impeding breath. (14-24-00018-CR – C.R. pp. 77, 85). The jury, however, found appellant guilty of the other two allegations concerning family violence assault with a previous conviction. (14-24-00016-CR - C.R. p. 82; 14-24-00018-CR – C.R. p. 78).

After a punishment hearing, the jury found the enhancement paragraph in the indictment to be "true" and assessed appellant's punishment at eighteen (18) years confinement in the Texas Department of Criminal Justice – Institutional Division, for each of the two charges. (14-24-00016-CR - C.R. p. 90; 14-24-00018-CR – C.R. p. 82). The trial court sentenced appellant accordingly and allowed the sentences to run concurrently. (R.R. Vol. 6, pp. 73-75).

SUMMARY OF THE ARGUMENT

The trial court abused its discretion is denying appellant's motions for directed verdicts due to legally insufficient evidence and the denial of the constitutional right to confrontation. Appellant also received ineffective assistance of counsel due to trial counsel's failure to make an offer of proof.

ARGUMENT

1. The trial court abused its discretion in denying appellant's motion for directed verdict – a legal sufficiency of the evidence challenge.

A challenge to a trial court's denial of a motion for directed or instructed verdict is a challenge to the legal sufficiency of the evidence. Warren v. State, 614 S.W.3d 441, 445 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd).

The appellate court's review is limited to applying the legal sufficiency standard discussed in Jackson v. Virginia, 443 U.S. 307 (1979). See Temple v. State, 390 S.W.3d 341, 360 (Tex.Crim.App. 2013)(citing Brooks v. State, 323 S.W.3d 893 (Tex.Crim.App. 2010)(plurality opinion)). In evaluating a legal insufficiency claim attacking a jury's finding of guilt, the appellate court reviews all the evidence in the light most favorable to the verdict. Burton v. State, 230 S.W.3d 846, 852 (Tex.App.–Houston [14th Dist.] 2007, no pet.)(citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Under the *Jackson* standard, evidence is insufficient to support a conviction if when considering all the record evidence in the light most favorable to the verdict, no rational fact finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. See Jackson, 443 U.S. at 317, 318-319; Laster v. State, 275 S.W.3d 512, 517 (Tex.Crim.App.

2009). Legal "sufficiency of the evidence is measured by the elements of the offense as defined by the hypothetically correct jury charge for the case." Malik v. State, 953 S.W.2d 234, 240 (Tex.Crim.App. 1997). If an appellate court finds the evidence insufficient under this standard, it must reverse the judgment and enter an order of acquittal. Tibbs v. Florida, 457 U.S. 31 (1982).

Texas Penal Code section 22.01(a)(1) provides that a person commits assault if he intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse. Tex. Penal Code § 22.01. An offense under Subsection (b)(2)(A) is a felony of the third degree if the offense is committed against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if it is shown on the trial of the offense that the defendant has been previously convicted of a family violence offense. Id.

A person acts intentionally with respect to a result of his conduct when it is his conscious objective or desire to engage in the conduct or to cause the result. Tex. Penal Code § 6.03(a). A person acts knowingly with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result. Id. § 6.03(b). A jury may infer intent or knowledge from a defendant's acts, words, and conduct; from the method of committing the crime; and from the nature of the wounds inflicted on the victim. Hart v. State, 89 S.W.3d 61, 64 (Tex.Crim.App. 2002); see McGee v. State, 923 S.W.2d 605, 608 (Tex. App. –Houston [1st Dist.] 1995, no pet.). Bodily injury means physical pain, illness, or other impairments of physical condition. Tex. Penal Code § 1.07(a)(8).

In the present case, the prosecution's evidence is insufficient to support a conviction for assault. The alleged victim, Sheila Everett, the primary

witness to the alleged assaults, did not testify and failed to appear at trial even though she had been duly served with a subpoena commanding her appearance. Without the victim's testimony, the prosecution cannot establish beyond a reasonable doubt that the defendant intentionally, knowingly, or recklessly caused bodily injury to another, including the person's spouse, as required under the Texas Penal Code.

The only evidence submitted at trial consisted of testimony from law enforcement that had been dispatched, 911 recordings, photographic evidence of alleged injuries, and medical records where the alleged victim either refused treatment or was being treated for an unrelated, self-imposed injury.

No evidence was presented to show that appellant was a perpetrator of these alleged offenses. Without testimonial evidence from the alleged victim, there is only mere supposition that any crime had occurred. There is no evidence as to how or when any alleged injury occurred, or if appellant had caused such alleged injury. As such, the trial court abused its discretion in denying appellant's motion for a directed verdict and the evidence is legally insufficient to support the trial court's judgment in these causes. The judgments of the trial court should be reversed and a judgment of acquittal entered for both cases being considered in this appeal.

2. The trial court abused its discretion in denying appellant's motion for directed verdict – a violation of the right to confrontation.

The right to confront one's accuser under our Constitution includes the right to cross-examine that accuser. U.S. Const. amend. VI. As articulated by the United States Supreme Court in *Davis v. Alaska*:

> The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.
>
> Davis v. Alaska, 415 U.S. 308, 315-316 (1974).

"Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: **confrontation**." Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ..." U.S. Const. amend. VI; Tex. Const. art. I, § 10. Under these provisions, the defendant has the right to "physically confront those who testify against him." Haggard v. State, 612 S.W.3d 318, 324 (Tex.Crim.App. 2020). The main purpose of these provisions is to ensure that the defendant has the chance to cross-examine witnesses because cross-examination is the principal means of testing their credibility and veracity. Johnson v. State, 490 S.W.3d 895, 909 (Tex.Crim.App. 2016). Thus, the right of confrontation includes not only the right to compel a witness to take the stand at trial, but also the opportunity to conduct a meaningful and effective cross-examination. Coronado v. State, 351 S.W.3d 315, 325 (Tex.Crim.App. 2011).

"The admission of a hearsay statement made by a non-testifying declarant violates the Sixth Amendment if the statement was testimonial, and the defendant lacked a prior opportunity for cross-examination." Wall v. State,

184 S.W.3d 730, 734 (Tex.Crim.App. 2006) (citing Crawford v. Washington, 541 U.S. 36, 68 (2004)).

"The most important instances in which the Confrontation Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." Michigan v. Bryant, 562 U.S. 344, 358 (2011). Once a defendant raises a Confrontation Clause objection, the burden shifts to the State to prove either (1) that the proposed statement does not contain testimonial hearsay and thus does not implicate the Confrontation Clause or (2) that the statement does contain testimonial hearsay but is nevertheless admissible. See De La Paz v. State, 273 S.W.3d 671, 680–81 (Tex.Crim.App. 2008) (citing *Crawford*, 541 U.S. at 68).

Statements are **nontestimonial** when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet **an ongoing emergency**. They are **testimonial** when the circumstances objectively indicate that there is **no such ongoing emergency** and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Davis v. Washington *and* Hammon v. Indiana, 547 U.S. 813, 822 (2006). A court considers the totality of the circumstances in determining whether a statement is testimonial. Clark v. State, 282 S.W.3d 924, 931 (Tex. App.—Beaumont 2009, pet. ref'd).

Here, it is undisputed that the alleged victim, Sheila Everett, completely ignored the subpoena served upon her by the State to appear and provide testimony in these cases. It is also undisputed that certain statements made by Sheila Everett were admitted into evidence over appellant's objections. Those

statements are contained in the 911 recordings, the EMS report wherein Sheila Everett refused treatment, and testimony from the responding law enforcement officers.

It is further undisputed that Sheila Everett called 911 on no less than six occasions where law enforcement responded to a call. And on each occasion, by the time law enforcement responded, there was no ongoing emergency by the fact that either appellant was not present at the scene or if he was, he was in his truck. In fact, Sheila Everett refused to pursue charges against appellant on each occasion. Appellant was only on trial for charges stemming from two of those occasions – the November 16 and December 9 calls. While law enforcement may have observed and taken pictures of alleged injuries sustained by Sheila Everett, there is no evidence as to how, or who, or when the injuries were sustained but for any statement made by Sheila Everett.

In his trial, appellant was never able to confront Sheila Everett about the allegations she had made because she did not appear for trial. Had she appeared, appellant could have confirmed through cross-examination that he did not cause her injuries, or that the reason for the 911 calls were for an oral argument only, or possibly even that she was the aggressor and appellant had only justifiably defended himself. All of these are mere speculation. But the fact remains that appellant had no opportunity to exercise his constitutional right to confrontation. As such, appellant's convictions should be reversed.

3. Appellant received ineffective assistance of counsel because trial counsel failed to submit an offer of proof.

The Sixth Amendment of the United States Constitution guarantees the right to effective assistance of counsel in criminal prosecutions. Strickland v.

Washington, 466 U.S. 668, 686 (1984). This right is not limited to mere presence of counsel, but extends to the quality of representation. The *Strickland* standard, adopted by Texas courts, requires a defendant to show that counsel's performance was deficient and that the deficient performance prejudiced the defense. Ex parte Gonzales, 945 S.W.2d 830, 835 (Tex.Crim.App. 1997).

A failure to submit an offer of proof constitutes deficient performance. An offer of proof is a critical procedural step that preserves a record of excluded evidence for appellate review. Tex. R. Evid. 103(a)(2). By failing to submit an offer of proof, counsel neglects to preserve potentially exculpatory evidence, thereby depriving the appellate court of the opportunity to review the trial court's exclusion of this evidence. This failure falls below the standard of reasonably effective assistance. *Strickland*, 466 U.S. at 687.

Here, trial counsel for appellant argued that he was going to make an offer of proof regarding video evidence showing appellant's injuries caused by Sheila Everett. (R.R. Vol. 5, pp. 18-19). Trial counsel never actually made such proffer and this video evidence is excluded from the appellate record.

Moreover, trial counsel's failure to submit this offer of proof prejudiced the defense. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Here, the excluded evidence could have significantly impacted the outcome of the trial by showing that appellant was justifiably defending himself due to the injuries he sustained. Without an offer of proof, however, the appellate court is left to speculate about the potential impact of the excluded evidence. This uncertainty undermines confidence in the outcome of the trial and

satisfies the *Strickland* prejudice prong. Ex parte Briggs, 187 S.W.3d 458, 467 (Tex.Crim.App. 2005).

In conclusion, counsel's failure to submit an offer of proof constitutes ineffective assistance of counsel under the *Strickland* standard. This Court should therefore grant relief to rectify this constitutional violation.

As such, appellant’s conviction should be reversed and remanded for a new trial.

PRAYER

Accordingly, appellant respectfully prays that this Court reverse the judgment of the trial court, enter a judgment of acquittal, or remand for a new trial, and for such other relief to which he may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Appellant Ricky Elidan Everetts's Brief on Appeal has been served on Julie Renken, Washington County District Attorney, on the 22nd day of April 2024 via email to daoffice@washingtoncountytx.gov.

/s/ Chris M. Dillon
Chris M. Dillon

CERTIFICATE OF COMPLIANCE

I certify that this document contains 3,719 words in its entirety relying on the word count feature of Microsoft Word.

/s/ Chris M. Dillon
Chris M. Dillon