Affirmed and Opinion filed June 16, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00205-CR

FRED BOAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 3
Galveston County, Texas
Trial Court Cause No. MD-0377095

M A J O R I T Y O P I N I O N

Appellant Fred Boas appeals his conviction for assault, a class A misdemeanor. *See* Tex. Penal Code § 22.01(a)(1). The trial court found that the assault offense involved family violence. *See* Tex. Code Crim. Proc. art. 42.013. Appellant raises two issues.

In his first issue, appellant contends that the State was required to prove intentional conduct to secure a conviction for assault in a case involving family violence, but the trial court erroneously permitted the State to prove mere knowing

or reckless conduct. We reject this issue because appellant has not shown that the court improperly instructed the jury on the required elements of the charged offense.

In his second issue, appellant challenges the constitutionality of Penal Code section 46.04(b), which makes it unlawful for a person convicted of class A misdemeanor assault involving a member of the person's family or household to possess a firearm for five years. According to appellant, section 46.04(b) violates the United States constitutional right to keep and bear arms.[1] In his brief, appellant challenges section 46.04(b) as it applies to him in this particular case, and his arguments might be construed as asserting a facial challenge as well. We reject his second issue because: (1) appellant's "as-applied" constitutional challenge is not ripe for review; and (2) to the extent he argues that section 46.04(b) violates the Second Amendment in all applications, he lacks standing.[2]

We affirm the judgment.

Background

Appellant, at the time a Galveston County Sheriff's Department deputy, was involved in a dating relationship with the complainant. During their relationship, appellant was married to another woman, but he and his wife were separated and eventually divorced. Appellant and the complainant were sexually intimate, though their relationship was described as "on and off." They lived together at one point but were no longer cohabitating when the incident at issue occurred.

Appellant and the complainant frequently discussed appellant's relationship with his ex-wife, as well as their own future as a couple. Sometimes the discussions

[1] *See* U.S. Const. amend. II.

[2] Chief Justice Frost construes appellant's brief as not asserting a facial challenge to the constitutionality of Penal Code section 46.04(b), so she does not join section B.2 of this opinion or the court's analysis regarding a facial challenge. Chief Justice Frost joins the rest of the opinion.

devolved into arguments. On one such occasion, the complainant came to appellant's apartment to discuss their relationship. They agree they ended up arguing, but their depictions of the encounter vary. In their respective versions, each was calm while the other was angry. Their voices increased in volume, and appellant walked into the bedroom. As the complainant followed him, appellant shut the bedroom door, injuring the complainant's arm. Appellant testified that he did not realize the complainant was following him.

The argument continued in the bedroom, where the complainant was now crying because her arm hurt. The two were in "each other's faces," arguing almost "chest to chest." Appellant's body language became more aggressive, but the complainant refused to back away. According to the complainant, appellant pushed her "very hard" with his hands, and she fell onto the corner of the bed, causing a large bruise on the back of her left thigh. Appellant, for his part, claimed that the complainant charged at him like she was going to "bash" or "body check" him, so he put up his arm in a "football move" to push the complainant away; the complainant then stumbled backwards onto the corner of the bed. After the complainant fell onto the bed, appellant attempted to help her up by grabbing her wrist. She pulled her wrist out of his hand, which resulted in a bruised wrist. The complainant then left the apartment.

The next night, the complainant reported the incident to the Galveston Police Department. The Galveston County Criminal District Attorney's Office charged appellant by information with misdemeanor assault involving family violence. A jury found appellant guilty as charged. The trial court assessed punishment at 180 days in the Galveston County Jail, suspended his sentence, and placed him on community supervision for twelve months. Additionally, the trial court found that

the offense involved family violence and notified appellant that it was unlawful for him to possess or transfer firearms or ammunition.

Appellant timely appealed.

Analysis

A. Culpable Mental State

In his first issue, appellant contends that the State was required to prove an "intentional" culpable mental state because that is the standard for a family violence finding under the Family Code. The trial court erred, appellant says, by instructing the jury, thus allowing conviction, on lesser mental states of "knowing" or "reckless." We construe appellant's first issue as an argument that the trial court did not correctly charge the jury on the required elements of the offense. He does not challenge the sufficiency of the evidence to support either the jury's affirmative assault finding or the court's family-violence finding.

1. *Standard of review*

We use a two-step process in reviewing alleged jury-charge error. *See Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex. Crim. App. 2005); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). First, we determine whether there was error in the charge. *See Ngo*, 175 S.W.3d at 743. Second, if error occurred we examine whether the appellant was harmed. *See id*. The level of harm required for reversal depends on whether the appellant preserved the error by objecting at the trial-court level. *Id*. at 743-44; *Ferreira v. State*, 514 S.W.3d 297, 300 (Tex. App.—Houston [14th Dist.] 2016, no pet.). If the appellant objected to the charge, we will reverse if we find "some harm[.]" *See Ngo*, 175 S.W.3d at 743-44. But if the appellant failed to object to the charge, we will not reverse unless egregious harm is

established by the record. *See id*. Because we conclude the trial court did not err, we do not reach the question of harm.

2. *Application*

A person commits the offense of class A misdemeanor assault if the person "intentionally, knowingly, or recklessly causes bodily injury to another. . . ." Tex. Penal Code § 22.01(a). Consistent with the Penal Code, the information alleged that appellant "intentionally, knowingly, or recklessly caused bodily injury to [the complainant] by striking and/or pushing [her] causing [her] leg to strike a bed." The State further alleged "that the aforesaid offense involved family violence as defined in Chapter 71, of the Texas Family Code." In cases involving offenses against the person, such as assault, if the trial court determines that the offense involved family violence, as defined by Family Code section 71.004, it must include an affirmative finding of that fact in the judgment. Tex. Code Crim. Proc. art. 42.013.

Family Code section 71.004 defines "family violence" as:

> (1) an act by a member of a family or household against another member of the family or household that is *intended* to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself; [or] . . .
>
> (3) dating violence, as that term is defined by Section 71.0021.

Tex. Fam. Code § 71.004(1), (3) (emphasis added). Section 71.0021 defines "dating violence" as:

> an act, other than a defensive measure to protect oneself by an actor that . . . is committed against a victim . . . with whom the actor has or has had a dating relationship . . . [and] is *intended* to result in physical harm, bodily injury, [or] assault . . . .

Id. § 71.0021 (emphasis added).

Citing the Family Code's definitions of "family violence" and "dating violence," appellant argues that his assault conviction cannot stand based on a finding of mere reckless or knowing conduct. We disagree.

The charge authorized the jury to find appellant guilty if it found:

> from the evidence beyond a reasonable doubt that on or about the 20th day of August, 2017, in Galveston County, Texas, the defendant FRED BOAS, did then and there intentionally, knowingly, or recklessly cause bodily injury to [the complainant], a member of the defendant's family and/or a member of the defendant's household and/or a person whom the defendant has or has had a dating relationship, by striking and/or pushing [the complainant] causing [her] leg to strike a bed . . . .

The jury charge comports with the statutory requirements and includes reference to all elements of the offense. Tex. Penal Code § 22.01(a). The jury was permitted to find appellant guilty if it found beyond a reasonable doubt that appellant committed the offense as charged and acted intentionally, knowingly, or recklessly.

Appellant's complaint is based on the definitions contained in the Family Code. These are not elements of the charged assault offense and are not matters for the jury to decide. The family violence finding is the trial court's responsibility; it is not part of the offense and need not be submitted to the jury. Tex. Code Crim. Proc. art. 42.013; *see Butler v. State*, 189 S.W.3d 299, 302-03 (Tex. Crim. App. 2006). The trial court is permitted to make such a finding if it—not the jury—determines that the offense involved family violence. *See Butler*, 189 S.W.3d at 302.

The jury charge properly defined the offense based on the statutory elements and was not erroneous. Because the jury is not allowed to make a decision regarding family violence, any language included in the jury charge about that issue is unnecessary because the family violence finding is exclusively the judge's

determination. The trial court did not err in allowing a conviction based on a "reckless" or "knowing" culpable mental state.

We overrule appellant's first issue.

B. Constitutional Challenge

Penal Code section 46.04(b) makes it an offense for a person convicted of assault, punishable as a class A misdemeanor and involving a member of the person's family or household, to possess a firearm for five years from the date the person is released from confinement or community supervision. *See* Tex. Penal Code § 46.04(b).

In his second issue, appellant contends that section 46.04(b) became "automatically effective" upon his assault conviction and violates his Second Amendment right to keep and bear arms. *See* U.S. Const. amend. II. There are two types of challenges to the constitutionality of a statute: as-applied or facial. *State v. Rosseau*, 396 S.W.3d 550, 555 (Tex. Crim. App. 2013). In either instance, a person challenging a statute as constitutionally infirm bears the burden of establishing the statute's unconstitutionality. *See id.* at 557; *see also Peraza v. State*, 467 S.W.3d 508, 514 (Tex. Crim. App. 2015).

1. *An as-applied constitutional challenge is not ripe.*

Construing appellant's argument as an as-applied challenge, we conclude that his constitutional attack is not ripe for review. For an as-applied constitutional challenge to be ripe for review, a record of the particular facts and circumstances of the case must be developed to determine whether the statute has been applied to the defendant in an unconstitutional manner. *See State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011); *Ex parte Smith*, 185 S.W.3d 887, 893 (Tex. Crim. App. 2006); *Ex parte Gonzalez*, 525 S.W.3d 342, 348 (Tex. App.—Houston [14th

Dist.] 2017, no pet.); *Ex parte Tamez*, 4 S.W.3d 366, 367-68 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Thus, a criminal defendant must bring an as-applied challenge to the constitutionality of a statute during or after a trial on the merits under that statute, for it is only then that the trial judge and reviewing courts have a record of the particular facts and circumstances needed to adjudicate the constitutional challenge. *Fine*, 330 S.W.3d at 910.

Appellant has not shown that he has been charged with an offense under Texas Penal Code section 46.04(b). Thus, appellant's as-applied challenge is not ripe for review, and he cannot yet assert this challenge to section 46.04(b) under the Second Amendment. *See Fine*, 330 S.W.3d at 910; *Ex parte Smith*, 185 S.W.3d at 893; *Ex parte Gonzalez*, 525 S.W.3d at 348; *Ex parte Tamez*, 4 S.W.3d at 367-68.

2. *Appellant lacks standing to assert a facial challenge*.

Appellant's brief does not distinguish between facial and as-applied constitutional challenges. Portions of appellant's second issue might be construed liberally as asserting a facial challenge to section 46.06(b). For example, he urges that a distinction exists between "keeping" arms and "bearing" arms, arguing that "[a] statute which restricts the 'bearing' of a firearm as a legal consequence of some conduct or condition, but does not restrict 'keeping' or owning a gun, would be significantly less intrusive than the broadly sweeping ban found in Texas law." In a facial challenge, the party attacking the statute's constitutionality must demonstrate that it operates unconstitutionally in every instance. *See Rosseau*, 396 S.W.3d at 557. We address the issue to the extent that appellant challenges the statute in all of its applications.

A defendant ordinarily lacks standing to challenge a statute on the ground that it may be unconstitutionally applied to the conduct of others. *State v. Johnson*, 475 S.W.3d 860, 864 (Tex. Crim. App. 2015). To attack the facial constitutionality of a

penal statute, the defendant must show that the challenged statute is "being invoked against him," *Ex parte Ingram*, 533 S.W.3d 887, 892 (Tex. Crim. App. 2017), which generally means that the challenger "was convicted or charged under that portion of the statute the constitutionality of which he questions." *Fine*, 330 S.W.3d at 909; *see Ex parte Usener*, 391 S.W.2d 735, 736 (Tex. Crim. App. 1965); *see also Karenev v. State*, 281 S.W.3d 428, 435 (Tex. Crim. App. 2009) (Cochran, J., concurring) ("The defendants did not need any evidence other than the fact of their prosecution to give them standing to challenge the constitutionality of the penal statute under which they were convicted.").

Appellant has not shown that section 46.04(b) has been invoked against him. The only mention of the issue occurred when the trial court, following appellant's conviction, provided appellant with written notice that it was unlawful for him to possess or transfer firearms or ammunition. This notice is mandated by article 42.0131 of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 42.0131 (stating that "[i]f a person is convicted of a misdemeanor involving family violence, as defined by Section 71.004, Family Code, the court shall notify the person of the fact that it is unlawful for the person to possess or transfer a firearm or ammunition"). Appellant, however, has not been charged with violating section 46.04(b), nor does the record indicate that he has been threatened with prosecution or enforcement of that statute. Although the trial court notified appellant that it was unlawful for him to possess or transfer firearms, the court has signed no order requiring appellant to surrender any firearms he may possess. The trial court's notice is akin to warning someone that it is unlawful to commit an offense, and such a notice does not constitute an invocation of section 46.04(b) against appellant sufficient to confer standing to present a facial constitutional challenge. *See Ex parte Gonzalez*, 525 S.W.3d at 348 (explaining that the defendant lacked standing to challenge

regulations she was not charged with violating); *Cook v. State*, 256 S.W.3d 846, 850 (Tex. App.—Texarkana 2008, no pet.) (defendant lacked standing to raise constitutional challenge because he was not convicted of violating challenged statute); *see also Riggle v. State*, 778 S.W.2d 127, 130 (Tex. App.—Texarkana 1989, no pet.) (defendant who was not required to pay court fee lacked standing to challenge constitutionality of statute imposing fee).

The First Court of Appeals recently held that a defendant had standing to challenge section 46.04(b) even though he, too, had not been charged with or convicted of an offense under that statute. *See Arnett v. State*, No. 01-18-00859-CR, 2019 WL 6755503, at *3 (Tex. App.—Houston [1st Dist.] Dec. 12, 2019, pet. ref'd) (mem. op., not designated for publication). Not only does *Arnett* lack precedential value because it is not designated for publication,[3] it is also distinguishable because, at a minimum, the defendant in that case was ordered to surrender all guns and ammunition to the sheriff within 72 hours of his release on an appeal bond. *See id.* at *3. There is no such compelled action at issue here.

* * *

Because the record does not show that section 46.04(b) has been invoked against appellant, we conclude that appellant's as-applied constitutional challenge is not ripe for review and that he lacks standing to challenge its facial constitutionality in this criminal appeal. Accordingly, we overrule his second issue.

[3] *See* Tex. R. App. P. 47.7(a) ("Opinions and memorandum opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notion, '(not designated for publication).'").

Conclusion

Having overruled appellant's two issues, we affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Chief Justice Frost and Justices Jewell and Spain. (Frost, C.J., joins the opinion except as to section B.2. because she does not construe appellant's brief as asserting a facial challenge.)

Publish — Tex. R. App. P. 47.2(b).