

1 **CPJC 25.1 Violation of Protective Order or Bond Condition Generally**

2
3 **General Commentary on Statutory Framework.** Section 25.07 of the Texas Penal Code is broken
4 up into two parts: (1) the orders that the defendant is alleged to have violated and (2) the conduct that the
5 defendant is alleged to have engaged in to violate such orders. The orders that provide the basis for a charge
6 under section 25.07 are—

- 7 • a condition of bond, which (1) was set in a family violence, sexual assault or abuse, indecent assault,
8 stalking, or trafficking case, and (2) is related to the safety of a victim or the community;
- 9 • an order issued under article 17.292 of the Texas Code of Criminal Procedure (magistrate’s order of
10 emergency protection);
- 11 • an order issued under section 6.504 of the Texas Family Code (dissolution of marriage);
- 12 • a temporary ex parte order issued under chapter 83 of the Texas Family Code if it has been served on
13 the defendant;
- 14 • an order issued under chapter 85 of the Texas Family Code;
- 15 • an order issued by another jurisdiction as provided by chapter 88 of the Texas Family Code;
- 16 • an order issued under chapter 7A of the Code of Criminal Procedure (for conduct occurring before
17 January 1, 2021); or
- 18 • an order issued under chapter 7B, subchapter A, of the Code of Criminal Procedure (for conduct occur-
19 ring on or after January 1, 2021).

20 In order to be covered by section 25.07, the violation of one of these orders must be the knowing or inten-
21 tional—

- 22 • commission of family violence as defined by section 71.004 of the Texas Family Code;
- 23 • commission of an act in furtherance of a Texas Penal Code offense under sections 20A.02 (human traf-
24 ficking), 22.011 (sexual assault), 22.012 (indecent assault), 22.021 (aggravated sexual assault), or
25 42.072 (stalking);
- 26 • direct communication with a protected individual or a member of the family or household in a threaten-
27 ing or harassing manner;

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- 28 • communication of a threat through any person to a protected individual or a member of the family or
29 household;
- 30 • communication in any manner with the protected individual or a member of the family or household,
31 except through the defendant’s attorney or a person appointed by the court, if the violated order prohib-
32 ited any communication with a protected individual or a member of the family or household;
- 33 • act of going to or near particular places specifically described in the violated order;
- 34 • possession of a firearm;
- 35 • harming or threatening of an animal possessed or constructively possessed by the protected individual;
36 or
- 37 • removal or tampering with the functioning of a global positioning monitoring system.

38 *See* Tex. Penal Code § 25.07(a). As should be apparent, a large number of jury instructions could be devel-
39 oped from these provisions. The Committee has chosen to prepare instructions for the following conduct:
40 (1) commission of an act of family violence (CPJC 25.2); (2) prohibited communication (CPJC 25.3); (3)
41 going to or near a particular place (CPJC 25.4); and (4) repeated violation of a protective order under Tex.
42 Penal Code § 25.072 (CPJC 25.9).

43 **Degree of Offense.** The offense under section 25.07 is generally a class A misdemeanor, but there are
44 several exceptions. Tex. Penal Code § 25.07(g). It is a third-degree felony if the defendant violated the
45 order by committing a family violence assault or the offense of stalking or if the defendant has two prior
46 convictions for this offense or an offense under section 25.072. Tex. Penal Code § 25.07(g)(2)(A),
47 (g)(2)(B). The Committee has prepared a court instruction for the third-degree felony offense of violation
48 of a protective order by committing a family violence assault (CPJC 86.2).

49 The offense under section 25.07 is a state-jail felony if the defendant violated an order based on an
50 application filed under Texas Code of Criminal Procedure Subchapter A, Chapter 7B (for applications filed
51 after Sept. 1, 2021), or under Article 7A.01(a-1) (for applications filed before), which deals with a prose-
52 cutor’s filing of a mandatory protective order after the defendant’s conviction of certain offenses. Tex.
53 Penal Code § 25.07(g)(1); *See* Acts 2021, 87th Leg., R.S., ch. 787 (H.B. 39), eff. Sept. 1, 2021. The offense
54 under section 25.072 is a third-degree felony. Tex. Penal Code § 25.072(e).

55 **Culpable Mental State—Conduct.** In the context of the prohibition on a defendant’s communication
56 “with a protected individual or a member of the family or household in a threatening or harassing manner,”
57 Tex. Penal Code § 25.07(a)(2)(A), the court of criminal appeals has held that the culpable mental state of

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58 “knowingly or intentionally” applies to the entire phrase “communicates directly with a protected individual
59 or a member of the family or household in a threatening or harassing manner.” That is, the statute requires
60 proof of a defendant’s knowledge or intent as to each element, including (1) that he communicated, (2)
61 directly, (3) with a protected individual or a member of the family or household, (4) in a threatening or
62 harassing manner. *Wagner v. State*, 539 S.W.3d 298, 308 (Tex. Crim. App. 2018) (citing Tex. Penal Code
63 § 25.07(a)(2)(A)). In *Wagner*, the court of criminal appeals was dealing with a challenge to the constitu-
64 tionality of the statute and did not, therefore, discuss the contents of the jury charge. One would assume
65 that the court would similarly apply the culpable mental state to all conduct listed in section 25.07(a). In
66 *Wesley v. State*, 605 S.W.3d 909, 918 (Tex. App.—Houston [14th Dist.] 2020, no pet.), the court of appeals
67 held that repeated violation of protective order by going to or near a protected person’s home or place of
68 employment was a nature-of-conduct, not result-of-conduct, offense, and thus it was error to include the
69 result-of-conduct portions of the culpable mental state definitions.

70 **Culpable Mental State—the Order or Bond Condition.** In *Harvey v. State*, 78 S.W.3d 368 (Tex.
71 Crim. App. 2002), the court of criminal appeals held that an additional mental state focused on the order
72 and its contents is required. The form that mental state should take is not clear.

73 In *Harvey*, the court held the plain language of section 25.07(a) reveals that the culpable mental states
74 “intentionally or knowingly” in the statute apply to the performance of the acts described in the subsections
75 that follow those words, not to the preceding language, “in violation of an order.” *Id.* at 371. However, it
76 “read Section 25.07(a) to prescribe a culpable mental state for the element ‘in violation of an order,’ because
77 the meaning of that term necessarily includes certain knowledge that amounts to a mental state.” *Id.* This
78 is because the statutory sources of the orders listed in the offense each contain notice and/or service provi-
79 sions:

- 80
- 81 • An order issued under article 17.292 of the Texas Code of Criminal Procedure, a magistrate’s order of
82 emergency protection, is issued at the time of the defendant’s appearance before the magistrate (*see* Tex.
83 Code Crim. Proc. art. 17.292(a), (b)), and the order must be served on the defendant (*see* Tex. Code
84 Crim. Proc. art. 17.292(j)).
 - 85 • A protective order issued under section 6.504 of the Texas Family Code or chapter 85 of the Texas
86 Family Code is controlled by title 4, subtitle B, of the Texas Family Code, where service of the notice
87 of the application for the order is required (*see* Tex. Fam. Code § 82.043), a required hearing on the

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88 application cannot be held without sufficient service (*see* Tex. Fam. Code §§ 84.003, 84.004), and the
89 resulting order must be served on the defendant (*see* Tex. Fam. Code § 85.041).

- 90 • A temporary *ex parte* order issued under chapter 83 of the Texas Family Code must be served on the
91 defendant (*see* Tex. Penal Code § 25.07(a)).
- 92 • An order issued by another jurisdiction as provided by chapter 88 of the Texas Family Code should
93 require the defendant’s knowledge of the order; otherwise, evidence in support of the prosecution would
94 be insufficient (*see Harvey*, 78 S.W.3d at 373).
- 95 • An order issued under chapter 7A of the Texas Code of Criminal Procedure is controlled by title 4 of
96 the Texas Family Code (*see* Tex. Code Crim. Proc. art. 7A.04).
- 97 • An order issued under chapter 7B, subchapter A, of the Texas Code of Criminal Procedure is controlled
98 by title 4 of the Texas Family Code (*see* Tex. Code Crim. Proc. art. 7B.008).

99 These provisions ensure the defendant in a VPO case “has knowledge of the order, or at the very least
100 such knowledge of the application for a protective order that he would be reckless to proceed without
101 knowing the terms of the order,” *Harvey*, 78 S.W.3d at 371 (generally), “ha[s] (or at least will have been
102 given) notice of its terms,” *id.* (Art. 17.292 order), or “would know the terms of the order or would know
103 that he was subject to the issuance of such an order.” *Id.* at 373 (generally). Because of this, the court
104 concluded the term “in violation of an order issued under [named statutes] . . . means ‘in violation of an
105 order that was issued under one of those statutes at a proceeding that the defendant attended or at a hearing
106 held after the defendant received service of the application for a protective order and notice of the hearing.’”
107 *Id.* [Similarly, courts of appeals have held that the defendant’s knowledge of the protective order is an
108 essential element of the offense of violating a protective order. *Dunn v. State*, 497 S.W.3d 113, 115 (Tex.
109 App.—Houston [14th Dist.] 2016, pet. ref’d); *Ex parte Pool*, 71 S.W.3d 462, 467 (Tex. App.—Tyler 2002,
110 no pet.) (citing *Small v. State*, 809 S.W.2d 253, 255–56 (Tex. App.—San Antonio 1991, pet. ref’d)).]

111 The above formulation appears to peg the abstract validity of the order at issue to compliance with the
112 relevant notice requirement(s). Besides inviting impermissible collateral attacks on the order, discussed
113 below, that interpretation would be inconsistent with the court’s repeated claim that it was defining some-
114 thing that “amounts to a mental state,” *id.* at 371, or “is in effect a requirement of a culpable mental state
115 for that element.” *Id.* at 373. And, despite the specific formulation above, the court quickly qualified that
116 the jury charge “should include a definition of the term . . . that is *similar* to the construction we have given
117 it.” *Id.* It approved of the instruction in that case, which said, “A person commits the offense of violation

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118 of a protective order if, in violation of a protective order *issued after notice and hearing*, the person know-
119 ingly or intentionally commits family violence.” *Id.* (emphasis in original). The court summarized its point
120 thus:

121 [W]e find no such requirement [for knowledge of the order’s provisions] in the procedures
122 for protective orders. The requirements are only that the respondent be given the resources
123 to learn the provisions; that is, that he be given a copy of the order, or notice that an order
124 has been applied for and that a hearing will be held to decide whether it will be issued. The
125 order is nonetheless binding on the [defendant] who chooses not to read the order, or who
126 chooses not to read the notice and the application and not to attend the hearing.

127 *Id.* Although the court suggested a defendant “might be entitled to a fuller exposition of the [statutory]
128 requirements . . . upon special request,” it also suggested that compliance with statutory notice requirements
129 was not the point. For example, when discussing prosecutions for violations of extrajurisdictional orders,
130 the court seemed to say that this effective mental state could be proved by either notice by service or actual
131 notice. *Id.*

132 In *Villarreal v. State*, the court of criminal appeals provided additional guidance by setting forth the
133 hypothetically correct jury charge in a prosecution for violation of a protective order by committing assault
134 (family violence):

135 The hypothetically correct jury charge for this case would state the elements of the charged
136 offense as follows: (1) [the defendant] (2) in violation of an order issued on [a particular date],
137 by the [particular court] under [the particular statute] (3) *at a proceeding that [the defendant]*
138 *attended* (4) knowingly or intentionally (5) caused bodily injury to [the victim] by [manner and
139 means] (6) and said act was intended to result in physical harm, bodily injury, or assault.

140 286 S.W.3d 321, 327 (Tex. Crim. App. 2009) (emphasis added). It is unclear from this opinion whether
141 attendance was alleged in the charging instrument and deemed material, or simply the only theory of
142 knowledge raised by the evidence.

143 The court of criminal appeals brought some clarity to this element when it briefly revisited *Harvey* in
144 *Hammack v. State*, 622 S.W.3d 910 (Tex. Crim. App. 2021). The court used *Harvey* to disclaim the re-
145 quirement of proof of service to satisfy a knowledge requirement. “We used the statutory requirements for
146 the orders themselves to explain why a showing of knowledge was required, not to proscribe a particular
147 way in which the State must prove that knowledge.” *Id.* at 916. “Notably, we left open the possibility in

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148 *Harvey* that, even if an out-of-state order was issued without notice, a defendant’s ‘actual notice’ of such
149 an order may be sufficient to prove violation-of-protective-order offense.” *Id.* at 916 n.29.

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151 In light of these cases, the committee decided to focus on the defendant’s knowledge or opportunity to
152 know from whatever source it comes as raised by the evidence. Therefore, the committee recommends
153 against providing *Harvey*’s definition as a standalone instruction like this:

154 *In Violation of a Protective Order*

155 “In violation of a protective order” means in violation of an order that was issued
156 under [*specify source of authority, e.g., article 17.292 of the Texas Code of Criminal*
157 *Procedure*] [at a proceeding that the defendant attended/at a hearing held after the de-
158 fendant received service of the application for a protective order and notice of the hear-
159 ing/and that the defendant received or was served with a copy].

160 *Protective Order*

161 “Protective order” means an order that was issued under [*specify source of authority,*
162 *e.g., article 17.292 of the Texas Code of Criminal Procedure*] [and that the defendant
163 received/and a copy of which was served on the defendant/at a hearing attended by the
164 defendant/at a hearing of which the defendant had notice].

165 The committee also recommends against even more specific language than is found in *Harvey* or *Villarreal*,
166 even upon “special request.” The specific language of the definitions and charges, real or hypothetical, in
167 those cases will match the evidence in most cases but should not be considered a requirement in all cases.
168 Arguably, the more general requirement of “knowledge” of the order (or at least the proceedings leading to
169 it) serves as an appropriate catch-all for whatever form the circumstantial proof takes without risking a
170 potential comment or reduction of the element to specific types of evidence.

171 Default protective orders under Family Code Chapter 85, for instance, have additional requirements.
172 When the defendant does not attend the hearing, proof of service of the application and notice of the hearing
173 must be filed with the court before the hearing in order for the court to issue a default order. Tex. Fam.
174 Code § 85.006. In *Bell v. State*, 656 S.W.3d 163 (Tex. App.—Ft. Worth 2022, no pet. h.), the court of

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175 appeals held that the jury charge should not include a Ch. 85 requirement that the clerk send a child-care
176 facility or school a copy of the protective order and that such an instruction could be an improper comment.
177 No other appellate court decision has yet dealt with the potential “fuller exposition” of protective order
178 requirements *Harvey* referred to, and the Committee has neither attempted to comprehensively address
179 whether such a “fuller exposition” is required nor attempted to provide such an instruction. However, the
180 above provisions should provide a good foundation for such a jury instruction.

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184 **Statutory Basis for the Order.** It should be noted that Tex. Penal Code § 25.07(a) specifically lists
185 the statutory provisions on which the various protective orders are based. The legislature has made the
186 underlying statutory provision an element of the offense. Thus, the jury charge should include, and the state
187 is required to prove, the statutory provision from section 25.07(a) that the defendant was alleged to have
188 violated. *Hoopes v. State*, 438 S.W.3d 93, 95–96 (Tex. App.—Amarillo 2014, pet. ref’d).

189 **Committing the Offense by Means of Committing Family-Violence Assault.**

190 Violation of a protective order or bond condition is a third-degree felony offense if the defendant violates
191 the order or condition by committing an assault. *See* Tex. Penal Code § 25.07(g)(2)(B). This is not a stand-
192 alone offense. The state must prove a violation of the protective order or bond condition by committing an
193 assault *and* one of the means of committing the offense under section 25.07(a). Possibly the only means,
194 but certainly the most likely, is by committing family violence. Tex. Penal Code § 25.07(a)(1) (“A person
195 commits an offense if, in violation of a condition of bond [or a protective order], the person knowingly or
196 intentionally . . . commits family violence . . .”). Combining the requirements of assault and the commission
197 of the offense by family violence is somewhat complex. Section 25.07(b)(1) expressly adopts the Texas
198 Family Code definition of “family violence,” which can be proven multiple ways, one of which includes a
199 culpable mental state:

200 (1) an act by a member of a family or household against another member of the family or
201 household *that is intended to result in physical harm, bodily injury, assault, or sexual assault* or
202 that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury,
203 assault, or sexual assault, but does not include defensive measures to protect oneself;

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204 (2) abuse, as that term is defined by Sections 261.001(1)(C), (E), (G), (H), (I), (J), (K), and
205 (M), by a member of a family or household toward a child of the family or household; or

206 (3) dating violence, as that term is defined by Section 71.0021.

207 Tex. Fam. Code § 71.004 (emphasis added). *See also* Tex. Fam. Code § 71.0021(a)(2) (“dating violence”
208 means an act that “is intended to result in physical harm, bodily injury, assault, or sexual assault or that is
209 a threat that reasonably places the victim or applicant in fear of imminent physical harm, bodily injury,
210 assault, or sexual assault”). Assault is defined as (1) intentionally, knowingly, or recklessly causing bodily
211 injury to another; (2) intentionally or knowingly threatening another with imminent bodily injury; or (3)
212 intentionally or knowingly causing physical contact with another when the person knows or should reason-
213 ably believe that the other will regard the contact as offensive or provocative. *See* Tex. Penal Code §
214 22.01(a)(1–3).

215 Combining these statutes together to form the third-degree felony enhancement, there appear to be three
216 required culpable mental states: (1) knowingly or intentionally committing an act (required by Tex. Penal
217 Code § 25.07(a)(1) and the definition of family violence); (2) intending that physical harm, bodily injury,
218 assault, or sexual assault result (required for one form of family violence); and (3) intent, knowledge, or
219 sometimes recklessness as to causing injury, threat, or offensive contact (for assault). Of course, sometimes
220 all three mental states occur simultaneously. When the state wishes to prove this offense through bodily-
221 injury assault, the state can fulfill the requirement of family violence by proving that the defendant com-
222 mitted an act that was “intended to result in physical harm, bodily injury, assault . . .” *See* Tex. Fam. Code
223 §§ 71.004, 71.0021(a)(2). Often the easiest way to meet the family violence definition’s intentional mental
224 state is to prove an intentional assault. If the state anticipates its evidence will clearly show an intentional
225 assault, it may plead this and simplify those elements to the following:

226 1. the defendant intentionally caused bodily injury to another;

227 However, the state need not prove an intentional assault to prove an “act . . . intended to result in . . .
228 bodily injury [or] assault” for family violence. *See* Tex. Fam. Code § 71.004. In *Villarreal*, the court of
229 criminal appeals implicitly acknowledged that as long as the jury charge required an intent to result in
230 physical harm, bodily injury, or assault, a knowing assault could lead to a conviction. It set forth the hypo-
231 thetically correct jury charge in a prosecution for violation of a protective order by committing assault
232 (family violence):

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233 The hypothetically correct jury charge for this case would state the elements of the charged
234 offense as follows: (1) [the defendant] (2) in violation of an order issued on [a particular date],
235 by the [particular court] under [the particular statute] (3) at a proceeding that [the defendant]
236 attended (4) *knowingly* or intentionally (5) caused bodily injury to [the victim] by [manner and
237 means] (6) and *said act was intended to result in physical harm, bodily injury, or assault.*

238 *Villarreal*, 286 S.W.3d at 327 (emphasis added). In *Morgan*, the court of appeals held that in a prosecution
239 for violation of a protective order by committing family violence, the jury charge was erroneous because it
240 did not require the jury to find that the defendant committed an act that was “intended to result in physical
241 harm, bodily injury, or assault.” *Morgan*, 2011 WL 4837721, at *3. *See also Ramirez v. State*, No. 08-07-
242 00207-CR, 2008 WL 3522369, at *2 n.1 (Tex. App.—El Paso Aug. 14, 2008, no pet.) (not designated for
243 publication) (application paragraph required jury to find that defendant’s assaultive conduct “was intended
244 to result in physical harm, bodily injury or assault or that was a threat that reasonably placed [the victim]
245 in fear of imminent physical harm, bodily injury or assault”); *Owens v. State*, No. 02-05-00145-CR, 2006
246 WL 1791690, at *1 (Tex. App.—Fort Worth June 29, 2006, no pet.) (not designated for publication) (in-
247 dictment properly alleged third-degree felony under section 25.07(g) when it alleged that the defendant
248 committed an act of family violence by striking a family member and that this conduct was intended to
249 result in physical harm, bodily injury, or assault).

250 To date, courts have not comprehensively addressed the differing culpable mental states for assault and
251 family violence. *Cf. Wingfield v. State*, 481 S.W.3d 376, 381 n.9 (Tex. App.—Amarillo 2015, pet. ref’d)
252 (trial court’s negative finding as to family violence in assault case was not incompatible with assault con-
253 viction because defendant could have knowingly or recklessly caused bodily injury in order to commit
254 assault and was not required to commit an act that was intended to result in physical harm, bodily injury,
255 or assault); *Wang v. State*, No. 09-17-00462-CR, 2019 WL 5057206, at *4 (Tex. App.—Beaumont Oct. 9,
256 2019, pet. ref’d) (not designated for publication) (in prosecution for assault, jury is not required to make a
257 determination of the defendant’s culpable mental state for the trial court to make an affirmative finding on
258 family violence, and the trial court’s determination of family violence is not contingent on the jury’s ver-
259 dict); *Zavala v. State*, No. 03-05-00051-CR, 2007 WL 135979, at *3 (Tex. App.—Austin Jan. 22, 2007, no
260 pet.) (not designated for publication) (court not addressing the higher culpable mental issue that allegedly
261 arises in a felony assault case because there was no family violence finding made).

262 What is clear is that, in a prosecution for violation of a protective order by committing family violence
263 assault, the state is required to prove an assault and that the defendant committed an act (1) that was intended

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264 to result in physical harm, bodily injury, assault, or sexual assault or (2) that was a threat that reasonably
265 placed the victim in fear of imminent physical harm, bodily injury, assault, or sexual assault.

266 The assault or intended assault could be an offensive touching under Tex. Penal Code § 22.01(a)(3). In
267 *Blevins v. State*, the court of appeals held that the evidence was sufficient to support the defendant’s con-
268 viction for violation of a protective order by committing family violence, even though the victim testified
269 that she did not feel any pain when the defendant shoved her. The court of appeals held that the evidence
270 was sufficient to show that the defendant’s conduct was intended to result in intentional or knowing offen-
271 sive physical contact, regardless of whether the victim felt any pain. *Blevins v. State*, No. 02-09-00237-CR,
272 2010 WL 5395836, at *3 (Tex. App.—Fort Worth Dec. 30, 2010, pet. ref’d) (not designated for publica-
273 tion). Given this permutation, it is possible to imagine how a reckless assault might still meet the “intending
274 to result in . . . assault” element of family violence. *See* Tex. Fam. Code § 71.004. Take, for instance, a
275 defendant who sees his ex-girlfriend, who has a protective order against him, practicing yoga. If he intends
276 to touch her offensively but his touch also knocks her off balance, causing her injury, and he was reckless
277 in disregarding the risk that would occur, he has committed a third-degree felony.

278 It also appears that if a defendant commits an act against a family member *intending* to result in injury,
279 it may not be necessary for injury to actually result to meet the “intending to result in . . . injury [or] assault”
280 standard. *See* Tex. Fam. Code § 71.004(1). In most cases, such an act would likely also be threatening, but
281 perhaps not necessarily so. In that case, other forms of reckless assaults may still constitute intending-to-
282 result family violence. For example, a defendant might take a swing at his wife, intending to hurt her, and
283 miss, all while disregarding the risk that she will, in avoiding the punch, be injured when she drops a pan
284 of scalding water she is carrying and she is, in fact, injured by the scalding water. The law of transferred
285 intent, Tex. Penal Code § 6.04(b)(1), might arguably enable the state to prove an intentional assault (if that
286 is all the state alleged), even without proof the defendant intended her to be burned or injured (because he
287 intended only an offensive touching). But particularly if the indictment merely tracks the statutory language
288 of Tex. Penal Code § 25.07(a)(1) and (g)(2)(B), the use of transferred intent is not necessary for the state
289 to meet its burden.

290 To accommodate these and numerous other possible variations in which the state may prove family
291 violence and assault, the Committee’s relevant elements as listed below are broader than *Villarreal*’s hy-
292 pothetically correct charge:

293 *[Select one of the following.]*

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294 1. the defendant intentionally or knowingly committed an act against another that
295 the defendant intended to result in bodily injury [or physical harm] to that person;

296 *[or]*

297 1. the defendant intentionally or knowingly committed an act against another that
298 the defendant intended to result in physical contact with that person that the defendant
299 knew or should reasonably have believed the other person would regard as offensive or
300 provocative;

301 *[Select one of the following.]*

302 2. by that act the defendant intentionally, knowingly, or recklessly caused bodily
303 injury to that person;

304 *[or]*

305 2. by that act the defendant intentionally or knowingly caused physical contact with
306 that person that the defendant knew or should reasonably have believed the other person
307 would regard as offensive or provocative;

308 3. the other person was then a member of the defendant's family or household;

309 4. the defendant knew the other person was a member of his family or household;

310 As with any other instruction, these elements should be tailored to the indictment and the evidence. So,
311 for example, if there is no evidence that the defendant recklessly caused injury, it should not be submitted
312 to the jury.

313 *Definitions of "Family Violence" and "Assault."* The Committee recognizes that its approach to the
314 elements, while similar to *Villarreal's* hypothetically correct charge, differs from that of traditional jury
315 instructions. Traditional instructions usually define the offense as intentionally or knowingly committing
316 "family violence" and committing an "assault" and then provide complete abstract definitions of those
317 terms. The Committee determined that it would aid both practitioners and juries to accurately incorporate
318 the requirements of both these terms into the list of elements, rather than leaving the parties or jury the task
319 of determining what is redundant or inapplicable. Neither "family violence" nor "assault" is separately

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320 defined in the instruction since both terms are already made an integral part of the elements, just as the
321 court of criminal appeals did in its hypothetical charge in *Villarreal. Villarreal*, 286 S.W.3d at 327. Never-
322 theless, if a judge wanted to include such definitions (tailored to the case), they might be sensibly incorpor-
323 ated into the relevant statutes unit of the charge, following a revised statement of the offense using the
324 statutory terms.

325 *Physical Harm.* Another way the defendant may commit family violence is through an act against a
326 family or household member that is intended to result in “physical harm.” Tex. Fam. Code § 71.004(1).
327 That term is undefined in the Texas Family Code, and there appear to be no cases construing it. Presumably,
328 it was included in the definition of family violence alongside intent to result in “bodily injury” because it
329 meant something other than “bodily injury.” However, it may be narrower, not broader. *See, e.g.*, Restate-
330 ment (Second) of Torts § 7 cmt. b (1965) (“‘Harm’ implies a loss or detriment to a person. . . . In so far as
331 physical changes have a detrimental effect on a person, that person suffers harm.”); *Sondag v. Pneumo Abex*
332 *Corp.*, 55 N.E.3d 1259, 1265 (Ill. App. Ct. 2016) (describing plaintiff in asbestos litigation as having ab-
333 normal lung X-rays but no clinical symptoms, and thus no “physical harm” despite an impairment of phys-
334 ical condition). In most situations, it will likely have the same meaning as bodily injury. Because it is part
335 of the definition of “family violence,” it has been included in the instruction, although it should not be
336 defined. Neither should the definition of “harm” from Tex. Penal Code § 1.07 be included in the instruction;
337 it is far too broad to be applicable in this context.

338 *Family Violence by Threat.* Where a threat is involved, the definition of family violence does not re-
339 quire either that the defendant actually cause injury or intend to cause injury. *Boyd v. Palmore*, 425 S.W.3d
340 425, 430 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Clements v. Haskovec*, 251 S.W.3d 79, 85 (Tex.
341 App.—Corpus Christi—Edinburg 2008, no pet.). As the Committee saw it, the only potential difference
342 between an assault by threat and an act of family violence by threat is that the latter spells out the require-
343 ment that the threat must “reasonably place the [family/household] member in fear of imminent . . . bodily
344 injury.” Tex. Fam. Code § 71.004(1). Consequently, the relevant elements of that manner and means are
345 simpler:

- 346 1. the defendant intentionally or knowingly threatened another with imminent bodily
347 injury;
- 348 2. that person was then a member of the defendant’s family or household;
- 349 3. the defendant knew the other person was a member of his family or household;

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350 4. the threat reasonably placed the family or household member in fear of imminent
351 bodily injury;

352 More complex versions could be imagined by pairing an intentional or knowing commission of family
353 violence by threat and a reckless assault by causing bodily injury, but these seemed less likely and so are
354 not provided for in the instructions.

355 **Status of “Defensive Measures to Protect Oneself” and “Except [Communication] through the**
356 **Family or Household Member’s Attorney or Person Appointed by the Court.”** Two of the means of
357 violating a protective order, Tex. Penal Code § 25.07(a)(1) and (a)(2)(C), include qualifying language that,
358 in isolation, might suggest it is an exception the state would have to negate (as an element) or a defense.
359 The first—violating a protective order by committing family violence—incorporates the Family Code def-
360 inition of “family violence,” which excludes “defensive measures to protect oneself.” Tex. Fam. Code
361 § 71.004 (“‘Family violence’ means [certain acts against family or household members] . . . but does not
362 include defensive measures to protect oneself.”).

363 Some courts have assumed that “defensive measures to protect oneself” is a reference to self-defense.
364 *See Poteet v. Sullivan*, 218 S.W.3d 780, 794 (Tex. App.—Fort Worth 2007, pet. denied) (lawsuit against
365 police department performing a family violence civil standby); *see also Carson v. Carson*, No. 07-16-
366 00311-CV, 2017 WL 4341456, at *3 (Tex. App.—Amarillo Sept. 29, 2017, no pet.) (not designated for
367 publication) (rejecting challenge to sufficiency of evidence to support issuance of protective order in part
368 because of some evidence a rational fact finder could reject self-defense). The phrase is not used elsewhere
369 in Texas statutes outside the context of family violence. *See* Tex. Fam. Code § 71.0021 (excluding “a de-
370 fensive measure to protect oneself” from definition of “dating violence”).

371 The second use of qualifying language is in section 25.07(a)(2)(C), communication by any means, which
372 excepts communication through the protected person’s (or family member’s) attorney or a person appointed
373 by the court. Tex. Penal Code § 25.07(a)(2)(C) (an offense is committed if “the person knowingly or inten-
374 tionally . . . communicates . . . in any manner . . . except through the person’s attorney or a person appointed
375 by the court”). It is extremely rare in the Texas Penal Code for the section of a statute setting out the
376 elements of the offense to include a phrase beginning with “except.” The only other instance the Committee
377 is aware of (outside of definitions such as “motor vehicle” in Tex. Penal Code § 32.34) is in “Prohibited
378 Substances and Items in Correctional or Civil Commitment Facility.” *See* Tex. Penal Code § 38.11(a)(1),
379 (a)(5). In section 25.07, it appears to function like an exception. *See Black’s Law Dictionary* (11th ed. 2019)

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380 (defining “exception” to include “a provision in a statute exempting certain persons or conduct from the
381 statute’s operation”).

382 Nevertheless, based on statute and case law, both qualifiers in section 25.07 must be defenses and not
383 exceptions. Under Tex. Penal Code § 2.02(a), exceptions are expressly labeled, except for some statutes
384 enacted prior to the 1974 Penal Code, which does not apply to the Code’s section on violation of a protective
385 order. *See* Tex. Penal Code § 2.02(a); *Baumgart v. State*, 512 S.W.3d 335, 343 (Tex. Crim. App. 2017). As
386 the court of criminal appeals explained in *Baumgart*, “[I]f a defensive matter does not use the exact wording
387 outlined in § 2.02(a) [‘It is an exception to the application of . . . ’] (or the exact wording outlined in §
388 2.04(a) [‘It is an affirmative defense to prosecution . . . ’]), then it is not an exception (or affirmative defense)
389 but is a defense that is governed by § 2.03.” *Baumgart*, 512 S.W.3d at 344 (holding that the phrase “does
390 not apply to” in the Private Security Act set out a defense and not an exception). Thus, the jury should not
391 be instructed on these matters unless raised by the evidence. For family violence allegations raising an issue
392 of self-defense, a jury charge on self-defense should be included. The defense of communication through
393 an attorney or court-appointed person is included in CPJC 86.3.

394 **Going to or Near a Particular Place—Description of Place.** Section 25.07(a)(3) makes it an offense
395 to intentionally or knowingly go to or near, for example, a protected person’s residence or business “as
396 specifically described in the order or condition of bond.” Tex. Penal Code § 25.07(a)(3). It is not certain
397 whether this last phrase creates an additional requirement (i.e., prohibiting going to or near a residence that
398 is specifically described in the order or bond condition) or is merely descriptive (i.e., prohibiting going to
399 or near a residence consistent with how it is specifically described in the order or bond condition). At least
400 one court of appeals has held the former. *Dukes v. State*, 239 S.W.3d 444, 449 (Tex. App.—Dallas 2007,
401 pet. ref’d) (citing Tex. Fam. Code § 85.022(c); Tex. Code Crim. Proc. art. 17.292(e)); *see also Dunn v.*
402 *State*, 497 S.W.3d 113, 115 (Tex. App.—Houston [14th Dist.] 2016, pet. ref’d) (setting out elements as:
403 “the person knowingly or intentionally goes to or near the residence of a protected individual or a member
404 of the family or household and that residence is specifically described in the order”). The Committee de-
405 termined to track the language of the statute instead of requiring separate elements that the place be specif-
406 ically described. Tex. Penal Code § 25.07(f) does not imply that a level of specificity is an element of the
407 offense.

408 Section 85.007 allows for the textual exclusion from the order of a protected person’s residential address
409 and telephone number, as well as those of her place of employment or business or a child care facility or
410 school where a protected child attends or resides. Tex. Fam. Code § 85.007. Article 17.292(e) allows the

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411 magistrate to avoid specifically describing the prohibited locations and minimum distances to maintain if
412 “the magistrate determines for the safety of the person or persons protected by the order that specific de-
413 scriptions of the locations should be omitted.” Tex. Code Crim. Proc. art. 17.292(e). Tex. Penal Code
414 § 25.07(f) provides that it is not a defense to prosecution under this section that certain information has
415 been excluded, as provided by section 85.007 of the Family Code or article 17.292 of the Code of Criminal
416 Procedure. This makes sense as the focus of the statutory provisions is not the protection of a location’s
417 land and fixtures; the focus is the protection of the property’s use as the residence of a protected person.
418 *Dukes*, 239 S.W.3d at 449. *Cf. Patton v. State*, 835 S.W.2d 684, 688–89 (Tex. App.—Dallas 1992, no pet.)
419 (protective order was not invalid because it did not specifically describe protected individual’s place of
420 employment nor state that the address was omitted pursuant to statutory requirement). Because the defend-
421 ant is required to know the status of the place he visits (i.e., it is the protected individual’s residence or
422 place of employment), this alleviates the due process and fairness concerns, even if he was not put on notice
423 of the particular address from which he must stay away.

424 No published decision has dealt with whether (or how) a trial court should charge the jury regarding the
425 non-defense set forth in Tex. Penal Code § 25.07(f). It is similar to the statute providing it is no defense to
426 an attempted crime that the crime was actually completed. *See* Tex. Penal Code § 15.01(c). Like the Com-
427 mittee’s instruction for attempt, discussed at CPJC 52.3 in *Texas Criminal Pattern Jury Charges: Intoxica-*
428 *tion, Controlled Substance and Public Order Offenses*, an instruction under section 25.07(f) should not be
429 given unless it is raised by the evidence.

430 Section 25.07(f), however, appears to be qualified. It seems to require that exclusion of a specific
431 description be “as provided” by the relevant statutes. An omission due to oversight (rather than because a
432 magistrate made a legal determination under one of the statutes) would presumably not be enough to warrant
433 the instruction. However, it is not clear who has the burden of production on this issue. The Committee
434 concluded that since the existence of a specific description appears to be an element of the offense anyway
435 and the state is the beneficiary of the non-defense under Tex. Penal Code § 25.07(f), it should be up to the
436 state to point to evidence that Tex. Fam. Code § 85.007 or Tex. Code Crim. Proc. art. 17.292 is the reason
437 for the exclusion of information. This should not be an onerous burden, as the state frequently calls
438 witnesses to testify about issuance of the order to prove the defendant’s knowledge of its existence.
439 Sometimes recitals in the order itself (such as a finding that the exclusions are made for safety of the victim)
440 may explain why such descriptions are absent. At the same time, the defendant should not be permitted to
441 collaterally challenge the propriety of the magistrate’s decision to exclude such information under those
442 provisions. In most circumstances, a collateral attack on a protective order is not permitted. *See, e.g., Rogers*

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443 v. *State*, No. 09-15-00270-CR, 2017 WL 2698038, at *3 (Tex. App.-Beaumont June 21, 2017, no
444 pet.)(holding defendant “cannot collaterally attack the validity of the protective order on an appeal for his
445 conviction for violating it.”); *Torres v. State*, No. 08-19-00209-CR, 2021 WL 3400598, at *4 (Tex. App.—
446 El Paso Aug. 4, 2021, no pet.)(holding “that *even if* the Order was not justified for any one of the reasons
447 Torres now complains of, in any case, such error would have made the Order voidable—not void—and
448 Torres’ remedy was a direct challenge of the Order, in accordance with the appropriate procedures and
449 deadlines at the time of the Order’s issuance.”); *see also Nielsen*, 2020 WL 1808574, at *5; *Hoopes v. State*,
450 No. 03-16-00258-CR, 2018 WL 1977121, at *2 n.15 (Tex. App.—Austin Apr. 27, 2018, pet. ref’d) (not
451 designated for publication); *Rogers v. State*, No. 09-15-00270-CR, 2017 WL 2698038, at *3 (Tex. App.—
452 Beaumont Mar. 23, 2017, no pet.) (not designated for publication); *Perez v. State*, No. 08-15-00253-CR,
453 2017 WL 1955338, at *3 (Tex. App.—El Paso May 11, 2017, pet. ref’d) (not designated for publication).;
454 *cf. Ex parte Jimenez*, 361 S.W.3d 679, 683-84 (Tex. Crim. App. 2012) (holding, in unlawful-possession
455 context that “the State must prove a defendant’s felony status at the time of the possession of the firearm”
456 and “[t]herefore, if the defendant had the status of a felon at the time he possessed the firearm, a conviction
457 for unlawful possession of a firearm by a felon is not void if the predicate felony conviction is subsequently
458 set aside”, citing *Mason v. State*, 980 S.W.2d 635, 641 (Tex. Crim. App. 1998)).

459 The following recommended instruction has been included in the instruction on going to or near a par-
460 ticular location based on Tex. Penal Code § 25.07(a)(3):

461 *[Include the following if the evidence shows a magistrate, pursuant to Texas Family*
462 *Code section 85.007 or Texas Code of Criminal Procedure article 17.292, excluded a*
463 *description of the location from the order.]*

464 If these elements are proven, the defendant is guilty of the offense even if the protec-
465 tive order that was issued excluded the address or a specific description of the [protected
466 individual’s residence/protected individual’s place of employment/protected individ-
467 ual’s place of business/the child care facility or school where a protected child attends
468 or resides].

469 **Proof of Violation of the Order—Analogy to Contempt.** In order to sentence an individual to con-
470 finement for contempt of a prior court order, the order must be “unequivocal to be sufficient.” *Lee v. State*,
471 799 S.W.2d 750, 752 (Tex. Crim. App. 1990) (citing *Ex parte Taylor*, 777 S.W.2d 98, 101 (Tex. Crim. App.

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472 1989); *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967)). A court cannot punish someone for contempt of an
473 order that did not command him to do or not to do some specific act. *Lee*, 799 S.W.2d at 752. The question,
474 therefore, arose whether the jurisprudence regarding contempt should be applied to prosecutions for viola-
475 tion of a protective order. However, the court of criminal appeals has held that Tex. Penal Code § 25.07 is
476 directed toward the misconduct proscribed, rather than the court’s authority to enforce its own order. As
477 such, section 25.07 represents a separate and distinct offense enacted to provide an alternative or additional
478 method of enforcing the protective orders themselves. *Lee*, 799 S.W.2d at 753.

479 Consequently, “it is not necessary that the underlying protective order be specific enough to support a
480 judgment of contempt; it is only necessary that it be specific enough to meet the normal requirements of
481 specificity that attach to allegations of culpable conduct.” *Collins v. State*, 955 S.W.2d 464, 467 (Tex.
482 App.—Fort Worth 1997, no pet.) (citing *Lee*, 799 S.W.2d at 752–54).

483 **Repeated Violation of Protective Order or Condition of Bond—Separate Offense.** Section 25.072
484 sets forth an offense that is relatively straightforward: “A person commits an offense if, during a period that
485 is 12 months or less in duration, the person two or more times engages in conduct that constitutes an offense
486 under Section 25.07.” Tex. Penal Code § 25.072(a). It is the apparent intent of the legislature that an indict-
487 ment under section 25.072 should encompass all of the conduct that could be the subject of the indictment.
488 The statute provides that a defendant may not be convicted in the same criminal action of another offense,
489 an element of which is any conduct that is alleged as an element of the offense, subject to some exceptions.
490 Tex. Penal Code § 25.072(c). The statute also provides that a defendant may not be charged with more than
491 one count for the offense if all of the specific conduct that is alleged to have been engaged in is alleged to
492 have been committed in violation of a single court order or single setting of bond. Tex. Penal Code
493 § 25.072(d). *See State v. Maldonado*, 523 S.W.3d 769, 775–76 (Tex. App.—Corpus Christi–Edinburg 2017,
494 no pet.) (drawing analogy from continuous sexual abuse and continuous family violence offenses).

495 **Repeated Violation of Protective Order or Condition of Bond—Unanimity.** In a prosecution under
496 section 25.072, the trier of fact must agree unanimously that the defendant, during a period that was twelve
497 months or less in duration, two or more times engaged in conduct that constituted an offense under section
498 25.07. Tex. Penal Code § 25.072(b). However, courts have analogized to previous holdings regarding the
499 offense of continuous sexual abuse in holding that jurors do not need to be unanimous as to the specific
500 acts that constitute the offense. They only need to be unanimous that two or more of those acts were com-
501 mitted during a time period that was twelve months or less. *Diaz v. State*, 549 S.W.3d 896, 897–900 (Tex.

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502 App.—Amarillo 2018, no pet.) (trial court instructed jurors that they were not required to agree unani-
503 mously on which specific acts were committed by the defendant or the exact date when those acts were
504 committed, but that they were required to agree unanimously that the defendant, during a period of time
505 that was twelve months or less in duration, violated a court order two or more times under section 25.07).

506

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507

508 CPJC 25. **Instruction—Repeated Violation of Protective Order by Com-**
509 **municating or Going To or Near**

510

511 **INSTRUCTIONS SPECIFIC TO THIS CASE**

512 **Accusation**

513 The state accuses the defendant of having committed the offense of repeated violation
514 of a protective order.

515 **Relevant Statutes**

516 A person commits an offense if a protective order was issued under [*specify authority,*
517 *e.g., Chapter 85, Texas Family Code*] following a hearing that the person attended or
518 that was held after the person received notice or service of an application for a protective
519 order and notice of the hearing, and thereafter at least twice during a period of twelve
520 months or less, the person intentionally or knowingly either—

521 (1) communicates with [*insert specifics, e.g., an individual protected by the*
522 *protective order / a family or household member of an individual protected*
523 *by the protective order*] when the protective order prohibits any
524 communication with such an individual, or

525 (2) goes to or near a protected individual’s [*insert particulars: place of*
526 *employment*], as specifically described and prohibited in the protective order.

527 **Definitions**

528 *Intentionally Communicates with Another*

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529 A person intentionally communicates with another when it is his conscious objective or
530 desire to communicate with another.

531

532 *Knowingly Communicates with Another*

533 A person knowingly communicates with another when he is aware that his conduct
534 constitutes communication with another.

535

536 *Knows that Another is a Member of the Protected Person's Family or Household*

537 A person knows that another is a member of the protected person's family or household
538 when he is aware that the person is a member of the protected person's family or
539 household.

540

541 *Intentionally Go To or Near A Location*

542 A person intentionally goes to or near a location when it is his conscious objective or
543 desire to go to or near that location.

544

545 *Knowingly Go To or Near A Location*

546 A person knowingly goes to or near a location when he is aware that he is going to or
547 near that location.

548

549 *Knowing A Location Was the Protected Person's [Insert Specifics: Place of Employ-*
550 *ment]*

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551 A person knows a location is the protected person’s [*insert specifics*: place of
552 employment] when he is aware that the location is the protected person’s [*insert*
553 *specifics*: place of employment].

554

555 *Family*

556 A “family” includes individuals related by consanguinity or affinity, former spouses of
557 each other, individuals who are the parents of the same child, and foster child and
558 parent.

559

560 *Related by Consanguinity*

561 Two individuals are “related to each other by consanguinity” if one is a descendant of
562 [or shares a common ancestor with] the other.

563

564 *Related by Affinity*

565 Two individuals are “related to each other by affinity” if one is married to the other or
566 the person’s spouse is related by consanguinity to the other individual. [A marriage’s
567 end by divorce or a spouse’s death ends relationships by affinity that the marriage
568 created unless a child of that marriage is living, in which case the marriage is considered
569 to continue as long as a child of that marriage lives.]

570

571 *Household*

572 A “household” means a unit composed of persons living together in the same dwelling,
573 without regard to whether they are related to each other.

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574

[Include where raised by the evidence]

575

576 *Member of a Household*

577 A “member of a household” or “household member” includes a person who previously
578 lived in a household.

579

580 **Application of Law to Facts**

581 You must determine whether the state has proved, beyond a reasonable doubt, five
582 elements. The elements are that—

583 1. A protective order was issued by *[name of issuing judge]* of the *[name and number*
584 *of court]* of *[county]* County, Texas on *[date]* under authority of *[specify authority,*
585 *e.g., Chapter 85, Texas Family Code]* and named *[protected person’s name]* as a
586 protected individual;

587

588 2. The defendant *[had knowledge of the protective order, attended the hearing in*
589 *which the order was issued, had notice of that hearing/ was otherwise aware of the*
590 *proceedings against him]*;

591 3. The defendant, in *[county]* County, Texas, engaged in two or more of the
592 following—

593 a. on or about *[date]*:

594 i. the defendant intentionally or knowingly communicated with *[name]*
595 *[insert specific manner alleged: by calling and texting [name]]*;

596 ii. *[Name]* was a member of *[protected person’s name]*’s family or
597 household;

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621 *[Include only if submitting more than two allegations/instances of conduct under*
622 *element 3]*

623 With regard to element 3, you do not need to all agree on which specific conduct was
624 committed by the defendant, if any, or the exact date when each instance of conduct
625 occurred. You must all agree, however, that the defendant committed two or more
626 instances of conduct alleged in element 3.

627 *[Continue with the following.]*

628 You must all agree that at least two proven instances of conduct from element 3
629 occurred during a period of twelve months or less in duration.

630

631 If you all agree the state has failed to prove, beyond a reasonable doubt, any of the
632 elements listed above, you must find the defendant “not guilty.”

633

634 If you all agree the state has proved, beyond a reasonable doubt, each of the four
635 elements listed above, you must find the defendant “guilty.”

636

637 *[Insert any other instructions raised by the evidence, including the defense of*
638 *communicating through an attorney or court-appointed person as set out in CPJC 25.3.*

639 *Then continue with the verdict form found in CPJC 2.1, the general charge.]*

640

641 **COMMENT**

642 Repeated violation of protective order is prohibited in Tex. Penal Code § 25.072. The
643 definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The

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644 definition of “family,” “household,” “member of household,” “consanguinity,” and
645 “affinity” come from Tex. Fam. Code §§ 71.003, 71.005, 71.006, and Tex. Gov’t Code
646 §§ 573.022, 573.024, respectively.

647

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