CPJC 25.1 Violation of Protective Order or Bond Condition Generally

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

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

In order to be covered by section 25.07, the violation of one of these orders must be the knowing or intentional—

- commission of family violence as defined by section 71.004 of the Texas Family Code;
- commission of an act in furtherance of a Texas Penal Code offense under sections 20A.02 (human trafficking), 22.011 (sexual assault), 22.012 (indecent assault), 22.021 (aggravated sexual assault), or 42.072 (stalking);
- direct communication with a protected individual or a member of the family or household in a threatening or harassing manner;
- communication of a threat through any person to a protected individual or a member of the family or household;

- communication in any manner with the protected individual or a member of the family or household, except through the defendant's attorney or a person appointed by the court, if the violated order prohibited any communication with a protected individual or a member of the family or household;
- act of going to or near particular places specifically described in the violated order;
- possession of a firearm;
- harming or threatening of an animal possessed or constructively possessed by the protected individual; or
- removal or tampering with the functioning of a global positioning monitoring system.

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

Degree of Offense. The offense under section 25.07 is generally a class A misdemeanor, but there are several exceptions. Tex. Penal Code § 25.07(g). It is a third-degree felony if the defendant violated the order by committing a family violence assault or the offense of stalking or if the defendant has two prior convictions for this offense or an offense under section 25.072. Tex. Penal Code § 25.07(g)(2)(A), (g)(2)(B). The Committee has prepared a court instruction for the third-degree felony offense of violation of a protective order by committing a family violence assault (CPJC 25.2).

The offense under section 25.07 is a state-jail felony if the defendant violated an order based on an application filed under Texas Code of Criminal Procedure subchapter A, chapter 7B (for applications filed after September 1, 2021), or under article 7A.01(a–1) (for applications filed before), which deals with a prosecutor's filing of a mandatory protective order after the defendant's conviction of certain offenses. Tex. Penal Code § 25.07(g)(1); *see* Acts 2021, 87th Leg., R.S., ch. 787 (H.B. 39), eff. Sept. 1, 2021. The offense under section 25.072 is a third-degree felony. Tex. Penal Code § 25.072(e).

Culpable Mental State—Conduct. In the context of the prohibition on a defendant's communication "with a protected individual or a member of the family or household in a threatening or harassing manner," Tex. Penal Code § 25.07(a)(2)(A), the court of criminal appeals has held that the culpable mental state of "knowingly or intentionally" applies to the entire phrase "communicates directly with a protected individual or a member of the family or household in a threatening or harassing manner." That is, the statute requires proof of a defendant's knowledge or intent as to each element, including (1) that he communicated, (2) directly, (3) with a protected individual or a member of the family or household, (4) in a threatening or

harassing manner. *Wagner v. State*, 539 S.W.3d 298, 308 (Tex. Crim. App. 2018) (citing Tex. Penal Code § 25.07(a)(2)(A)). In *Wagner*, the court of criminal appeals was dealing with a challenge to the constitutionality of the statute and did not, therefore, discuss the contents of the jury charge. One would assume that the court would similarly apply the culpable mental state to all conduct listed in section 25.07(a). In *Wesley v. State*, 605 S.W.3d 909, 918 (Tex. App.—Houston [14th Dist.] 2020, no pet.), the court of appeals held that repeated violation of a protective order by going to or near a protected person's home or place of employment was a nature-of-conduct, not result-of-conduct, offense, and thus it was error to include the result-of-conduct portions of the culpable mental state definitions.

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

In *Harvey*, the court held the plain language of section 25.07(a) reveals that the culpable mental states "intentionally or knowingly" in the statute apply to the performance of the acts described in the subsections that follow those words, not to the preceding language, "in violation of an order." *Harvey*, 78 S.W.3d at 371. However, it "read Section 25.07(a) to prescribe a culpable mental state for the element 'in violation of an order,' because the meaning of that term necessarily includes certain knowledge that amounts to a mental state." *Harvey*, 78 S.W.3d at 371. This is because the statutory sources of the orders listed in the offense each contain notice and/or service provisions:

- An order issued under article 17.292 of the Texas Code of Criminal Procedure, a magistrate's order of emergency protection, is issued at the time of the defendant's appearance before the magistrate (*see* Tex. Code Crim. Proc. art. 17.292(a), (b)), and the order must be served on the defendant (*see* Tex. Code Crim. Proc. art. 17.292(j)).
- A protective order issued under section 6.504 of the Texas Family Code or chapter 85 of the Texas Family Code is controlled by title 4, subtitle B, of the Texas Family Code, where service of the notice of the application for the order is required (*see* Tex. Fam. Code § 82.043), a required hearing on the application cannot be held without sufficient service (*see* Tex. Fam. Code §§ 84.003, 84.004), and the resulting order must be served on the defendant (*see* Tex. Fam. Code § 85.041).
- A temporary ex parte order issued under chapter 83 of the Texas Family Code must be served on the defendant (*see* Tex. Penal Code § 25.07(a)).

- An order issued by another jurisdiction as provided by chapter 88 of the Texas Family Code should require the defendant's knowledge of the order; otherwise, evidence in support of the prosecution would be insufficient (*see Harvey*, 78 S.W.3d at 373).
- An order issued under chapter 7A of the Texas Code of Criminal Procedure is controlled by title 4 of the Texas Family Code (*see* Tex. Code Crim. Proc. art. 7A.04).
- An order issued under chapter 7B, subchapter A, of the Texas Code of Criminal Procedure is controlled by title 4 of the Texas Family Code (*see* Tex. Code Crim. Proc. art. 7B.008).

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

The above formulation appears to peg the abstract validity of the order at issue to compliance with the relevant notice requirement(s). Besides inviting impermissible collateral attacks on the order, discussed below, that interpretation would be inconsistent with the court's repeated claim that it was defining something that "amounts to a mental state," *Harvey*, 78 S.W.3d at 371, or "is in effect a requirement of a culpable mental state for that element." *Harvey*, 78 S.W.3d at 373. And, despite the specific formulation above, the court quickly qualified that the jury charge "should include a definition of the term . . . that is *similar* to the construction we have given it." *Harvey*, 78 S.W.3d at 373. It approved of the instruction in that case, which said, "A person commits the offense of violation of a protective order if, in violation of a protective order *issued after notice and hearing*, the person knowingly or intentionally commits family violence." *Harvey*, 78 S.W.3d at 373. The court summarized its point thus:

> [W]e find no such requirement [for knowledge of the order's provisions] in the procedures for protective orders. The requirements are only that the respondent be given the resources to learn the provisions; that is, that he be given a copy of the order, or notice that an order

> has been applied for and that a hearing will be held to decide whether it will be issued. The order is nonetheless binding on the [defendant] who chooses not to read the order, or who chooses not to read the notice and the application and not to attend the hearing.

Harvey, 78 S.W.3d at 373. Although the court suggested a defendant "might be entitled to a fuller exposition of the [statutory] requirements . . . upon special request," it also suggested that compliance with statutory notice requirements was not the point. For example, when discussing prosecutions for violations of extrajurisdictional orders, the court seemed to say that this effective mental state could be proved by either notice by service or actual notice. *Harvey*, 78 S.W.3d at 373.

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

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

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

The court of criminal appeals brought some clarity to this element when it briefly revisited *Harvey* in *Hammack v. State*, 622 S.W.3d 910 (Tex. Crim. App. 2021). The court used *Harvey* to disclaim the requirement of proof of service to satisfy a knowledge requirement. "We used the statutory requirements for the orders themselves to explain why a showing of knowledge was required, not to proscribe a particular way in which the State must prove that knowledge." *Hammack*, 622 S.W.3d at 916. "Notably, we left open the possibility in *Harvey* that, even if an out-of-state order was issued without notice, a defendant's 'actual notice' of such an order may be sufficient to prove violation-of-protective-order offense." *Hammack*, 622 S.W.3d at 916 n.29.

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

In Violation of a Protective Order

"In violation of a protective order" means in violation of an order that was issued under [*specify source of authority*, *e.g.*, article 17.292 of the Texas Code of Criminal Procedure] [at a proceeding that the defendant attended/at a hearing held after the defendant received service of the application for a protective order and notice of the hearing/and that the defendant received or was served with a copy].

Protective Order

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

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

Default protective orders under Family Code chapter 85, for instance, have additional requirements. When the defendant does not attend the hearing, proof of service of the application and notice of the hearing must be filed with the court before the hearing in order for the court to issue a default order. Tex. Fam. Code § 85.006. In *Bell v. State*, 656 S.W.3d 163 (Tex. App.—Fort Worth 2022, no pet. h.), the court of appeals held that the jury charge should not include a chapter 85 requirement that the clerk send a child-care facility or school a copy of the protective order and that such an instruction could be an improper comment. No other appellate court decision has yet dealt with the potential "fuller exposition" of protective order requirements *Harvey* referred to, and the Committee has neither attempted to comprehensively address whether such a "fuller exposition" is required nor attempted to provide such an instruction. However, the above provisions should provide a good foundation for such a jury instruction.

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

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

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

> (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;
>
> (2) abuse, as that term is defined by Sections 261.001(1)(C), (E), (G), (H), (I), (J), (K), and (M), by a member of a family or household toward a child of the family or household; or
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> (3) dating violence, as that term is defined by Section 71.0021.

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

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

1. the defendant intentionally caused bodily injury to another;

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

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

Villarreal, 286 S.W.3d at 327 (emphasis added). In *Morgan*, the court of appeals held that in a prosecution for violation of a protective order by committing family violence, the jury charge was erroneous because it did not require the jury to find that the defendant committed an act that was "intended to result in physical harm, bodily injury, or assault." *Morgan v. State*, No. 10-10-00367-CR, 2011 WL 4837721, at *3 (Tex. App.—Waco Oct. 12, 2011, no pet.) (mem. op.). *See also Ramirez v. State*, No. 08-07-00207-CR, 2008 WL 3522369, at *2 n.1 (Tex. App.—El Paso Aug. 14, 2008, no pet.) (not designated for publication) (application paragraph required jury to find that defendant's assaultive conduct "was intended to result in physical harm, bodily injury or assault or that was a threat that reasonably placed [the victim] in fear of imminent physical harm, bodily injury or assault"); *Owens v. State*, No. 02-05-00145-CR, 2006 WL 1791690, at *1

(Tex. App.—Fort Worth June 29, 2006, no pet.) (not designated for publication) (indictment properly alleged third-degree felony under section 25.07(g) when it alleged that the defendant committed an act of family violence by striking a family member and that this conduct was intended to result in physical harm, bodily injury, or assault).

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

What is clear is that, in a prosecution for violation of a protective order by committing family violence assault, the state is required to prove an assault and that the defendant committed an act (1) that was intended to result in physical harm, bodily injury, assault, or sexual assault or (2) that was a threat that reasonably placed the victim in fear of imminent physical harm, bodily injury, assault, or sexual assault.

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

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

To accommodate these and numerous other possible variations in which the state may prove family violence and assault, the Committee's relevant elements as listed below are broader than *Villarreal*'s hypothetically correct charge:

[Select one of the following.]

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

[or]

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

[Select one of the following.]

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

[or]

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

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

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

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

Definitions of "Family Violence" and "Assault." The Committee recognizes that its approach to the elements, while similar to *Villarreal*'s hypothetically correct charge, differs from that of traditional jury instructions. Traditional instructions usually define the offense as intentionally or knowingly committing "family violence" and committing an "assault" and then provide complete abstract definitions of those terms. The Committee determined that it would aid both practitioners and juries to accurately incorporate the requirements of both these terms into the list of elements, rather than leaving the parties or jury the task of determining what is redundant or inapplicable. Neither "family violence" nor "assault" is separately defined in the instruction since both terms are already made an integral part of the elements, just as the court of criminal appeals did in its hypothetical charge in *Villarreal*. *Villarreal*, 286 S.W.3d at 327. Nevertheless, if a judge wanted to include such definitions (tailored to the case), they might be sensibly incorporated into the relevant statutes unit of the charge, following a revised statement of the offense using the statutory terms.

Physical Harm. Another way the defendant may commit family violence is through an act against a family or household member that is intended to result in "physical harm." Tex. Fam. Code § 71.004(1). That term is undefined in the Texas Family Code, and there appear to be no cases construing it. Presumably, it was included in the definition of family violence alongside intent to result in "bodily injury" because it meant something other than "bodily injury." However, it may be narrower, not broader. *See, e.g.*, Restatement (Second) of Torts § 7 cmt. B (1965) ("'Harm' implies a loss or detriment to a person. . . . In so far as physical changes have a detrimental effect on a person, that person suffers harm."); *Sondag v. Pneumo Abex Corp.*, 55 N.E.3d 1259, 1265 (Ill. App. Ct. 2016) (describing plaintiff in asbestos litigation as having abnormal lung X-rays but no clinical symptoms, and thus no "physical harm" despite an impairment of physical condition). In most situations, it will likely have the same meaning as bodily injury. Because it is part of the definition of "family violence," it has been included in the instruction, although it should not be

defined. Neither should the definition of "harm" from Tex. Penal Code § 1.07 be included in the instruction; it is far too broad to be applicable in this context.

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

1. the defendant intentionally or knowingly threatened another with imminent bodily injury;

2. that person was then a member of the defendant's family or household;

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

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

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

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

Some courts have assumed that "defensive measures to protect oneself" is a reference to self-defense. *See Poteet v. Sullivan*, 218 S.W.3d 780, 794 (Tex. App.—Fort Worth 2007, pet. denied) (lawsuit against police department performing a family violence civil standby); *see also Carson v. Carson*, No. 07-16-00311-CV, 2017 WL 4341456, at *3 (Tex. App.—Amarillo Sept. 29, 2017, no pet.) (not designated for

publication) (rejecting challenge to sufficiency of evidence to support issuance of protective order in part because of some evidence a rational fact finder could reject self-defense). The phrase is not used elsewhere in Texas statutes outside the context of family violence. *See* Tex. Fam. Code § 71.0021 (excluding "a defensive measure to protect oneself" from definition of "dating violence").

The second use of qualifying language is in section 25.07(a)(2)(C), communication by any means, which excepts communication through the protected person's (or family member's) attorney or a person appointed by the court. Tex. Penal Code § 25.07(a)(2)(C) (an offense is committed if "the person knowingly or intentionally . . . communicates . . . in any manner . . . except through the person's attorney or a person appointed by the court"). It is extremely rare in the Texas Penal Code for the section of a statute setting out the elements of the offense to include a phrase beginning with "except." The only other instance the Committee is aware of (outside of definitions such as "motor vehicle" in Tex. Penal Code § 32.34) is in "Prohibited Substances and Items in Correctional or Civil Commitment Facility." *See* Tex. Penal Code § 38.11(a)(1), (a)(5). In section 25.07, it appears to function like an exception. *See Black's Law Dictionary* (11th ed. 2019) (defining "exception" to include "a provision in a statute exempting certain persons or conduct from the statute's operation").

Nevertheless, based on statute and case law, both qualifiers in section 25.07 must be defenses and not exceptions. Under Tex. Penal Code § 2.02(a), exceptions are expressly labeled, except for some statutes enacted prior to the 1974 Penal Code, which does not apply to the Code's section on violation of a protective order. *See* Tex. Penal Code § 2.02(a); *Baumgart v. State*, 512 S.W.3d 335, 343 (Tex. Crim. App. 2017). As the court of criminal appeals explained in *Baumgart*, "[I]f a defensive matter does not use the exact wording outlined in § 2.02(a) ['It is an exception to the application of . . . '] (or the exact wording outlined in § 2.04(a) ['It is an affirmative defense to prosecution . . . ']), then it is not an exception (or affirmative defense) but is a defense that is governed by § 2.03." *Baumgart*, 512 S.W.3d at 344 (holding that the phrase "does not apply to" in the Private Security Act set out a defense and not an exception). Thus, the jury should not be instructed on these matters unless raised by the evidence. For family violence allegations raising an issue of self-defense, a jury charge on self-defense should be included. The defense of communication through an attorney or court-appointed person is included in CPJC 25.3.

Going to or Near a Particular Place—Description of Place. Section 25.07(a)(3) makes it an offense to intentionally or knowingly go to or near, for example, a protected person's residence or business "as specifically described in the order or condition of bond." Tex. Penal Code § 25.07(a)(3). It is not certain whether this last phrase creates an additional requirement (i.e., prohibiting going to or near a residence that is specifically described in the order or bond condition) or is merely descriptive (i.e., prohibiting going to or near a residence consistent with how it is specifically described in the order or bond condition). At least

one court of appeals has held the former. *Dukes v. State*, 239 S.W.3d 444, 449 (Tex. App.—Dallas 2007, pet. ref'd) (citing Tex. Fam. Code § 85.022(c); Tex. Code Crim. Proc. art. 17.292(c)); *see also Dunn v. State*, 497 S.W.3d 113, 115 (Tex. App.—Houston [1]4th Dist.] 2016, pet. ref'd) (setting out elements as: "the person knowingly or intentionally goes to or near the residence of a protected individual or a member of the family or household and that residence is specifically described in the order"). The Committee determined to track the language of the statute instead of requiring separate elements that the place be specifically described. Tex. Penal Code § 25.07(f) does not imply that a level of specificity is an element of the offense.

Section 85.007 allows for the textual exclusion from the order of a protected person's residential address and telephone number, as well as those of her place of employment or business or a child-care facility or school where a protected child attends or resides. Tex. Fam. Code § 85.007. Article 17.292(e) allows the magistrate to avoid specifically describing the prohibited locations and minimum distances to maintain if "the magistrate determines for the safety of the person or persons protected by the order that specific descriptions of the locations should be omitted." Tex. Code Crim. Proc. art. 17.292(e). Tex. Penal Code § 25.07(f) provides that it is not a defense to prosecution under this section that certain information has been excluded, as provided by section 85.007 of the Family Code or article 17.292 of the Code of Criminal Procedure. This makes sense as the focus of the statutory provisions is not the protection of a location's land and fixtures; the focus is the protection of the property's use as the residence of a protected person. *Dukes*, 239 S.W.3d at 449. *Cf. Patton v. State*, 835 S.W.2d 684, 688–89 (Tex. App.—Dallas 1992, no pet.) (protective order was not invalid because it did not specifically describe protected individual's place of employment nor state that the address was omitted pursuant to statutory requirement). Because the defendant is required to know the status of the place he visits (i.e., it is the protected individual's residence or place of employment), this alleviates the due process and fairness concerns, even if he was not put on notice of the particular address from which he must stay away.

No published decision has dealt with whether (or how) a trial court should charge the jury regarding the non-defense set forth in Tex. Penal Code § 25.07(f). It is similar to the statute providing it is no defense to an attempted crime that the crime was actually completed. *See* Tex. Penal Code § 15.01(c). Like the Committee's instruction for attempt, discussed at CPJC 15.3 , an instruction under section 25.07(f) should not be given unless it is raised by the evidence.

Section 25.07(f), however, appears to be qualified. It seems to require that exclusion of a specific description be "as provided" by the relevant statutes. An omission due to oversight (rather than because a magistrate made a legal determination under one of the statutes) would presumably not be enough to warrant the instruction. However, it is not clear who has the burden of production on this issue. The Committee concluded that since the existence of a specific description appears to be an element of the offense anyway

and the state is the beneficiary of the non-defense under Tex. Penal Code § 25.07(f), it should be up to the state to point to evidence that Tex. Fam. Code § 85.007 or Tex. Code Crim. Proc. art. 17.292 is the reason for the exclusion of information. This should not be an onerous burden, as the state frequently calls witnesses to testify about issuance of the order to prove the defendant's knowledge of its existence. Sometimes recitals in the order itself (such as a finding that the exclusions are made for safety of the victim) may explain why such descriptions are absent. At the same time, the defendant should not be permitted to collaterally challenge the propriety of the magistrate's decision to exclude such information under those provisions. In most circumstances, a collateral attack on a protective order is not permitted. *See, e.g., Rogers v. State*, No. 09-15-00270-CR, 2017 WL 2698038, at *3 (Tex. App.—Beaumont June 21, 2017, no pet.) (holding defendant "cannot collaterally attack the validity of the protective order on an appeal for his conviction for violating it"); *Torres v. State*, No. 08-19-00209-CR, 2021 WL 3400598, at *4 (Tex. App.—El Paso Aug. 4, 2021, no pet.) (holding "that *even if* the Order was not justified for any one of the reasons Torres now complains of, in any case, such error would have made the Order voidable—not void—and Torres' remedy was a direct challenge of the Order, in accordance with the appropriate procedures and deadlines at the time of the Order's issuance"); *see also Nielsen v. State*, No. 02-19-00157, 2020 WL 1808574, at *5 (Tex. App.—Fort Worth Apr. 9, 2020, pet. ref'd) (mem. op.); *Hoopes v. State*, No. 03-16-00258-CR, 2018 WL 1977121, at *2 n.15 (Tex. App.—Austin Apr. 27, 2018, pet. ref'd) (not designated for publication); *Perez v. State*, No. 08-15-00253-CR, 2017 WL 1955338, at *3 (Tex. App.—El Paso May 11, 2017, pet. ref'd) (not designated for publication).; *cf. Ex parte Jimenez*, 361 S.W.3d 679, 683-84 (Tex. Crim. App. 2012) (holding, in unlawful-possession context, that "the State must prove a defendant's felony status at the time of the possession of the firearm" and "[t]herefore, if the defendant had the status of a felon at the time he possessed the firearm, a conviction for unlawful possession of a firearm by a felon is not void if the predicate felony conviction is subsequently set aside," citing *Mason v. State*, 980 S.W.2d 635, 641 (Tex. Crim. App. 1998)).

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

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

If these elements are proven, the defendant is guilty of the offense even if the protective order that was issued excluded the address or a specific description of the [protected

individual's residence/protected individual's place of employment/protected individual's place of business/the child care facility or school where a protected child attends or resides].

Proof of Violation of the Order—Analogy to Contempt. In order to sentence an individual to confinement for contempt of a prior court order, the order must be "unequivocal to be sufficient." *Lee v. State*, 799 S.W.2d 750, 752 (Tex. Crim. App. 1990) (citing *Ex parte Taylor*, 777 S.W.2d 98, 101 (Tex. Crim. App. 1989); *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967)). A court cannot punish someone for contempt of an order that did not command him to do or not to do some specific act. *Lee*, 799 S.W.2d at 752. The question, therefore, arose whether the jurisprudence regarding contempt should be applied to prosecutions for violation of a protective order. However, the court of criminal appeals has held that Tex. Penal Code § 25.07 is directed toward the misconduct proscribed, rather than the court's authority to enforce its own order. As such, section 25.07 represents a separate and distinct offense enacted to provide an alternative or additional method of enforcing the protective orders themselves. *Lee*, 799 S.W.2d at 753.

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

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

Repeated Violation of Protective Order or Condition of Bond—Unanimity. In a prosecution under section 25.072, the trier of fact must agree unanimously that the defendant, during a period that was twelve months or less in duration, two or more times engaged in conduct that constituted an offense under section 25.07. Tex. Penal Code § 25.072(b). However, courts have analogized to previous holdings regarding the

offense of continuous sexual abuse in holding that jurors do not need to be unanimous as to the specific acts that constitute the offense. They only need to be unanimous that two or more of those acts were committed during a time period that was twelve months or less. *Diaz v. State*, 549 S.W.3d 896, 897–900 (Tex. App.—Amarillo 2018, no pet.) (trial court instructed jurors that they were not required to agree unanimously on which specific acts were committed by the defendant or the exact date when those acts were committed, but that they were required to agree unanimously that the defendant, during a period of time that was twelve months or less in duration, violated a court order two or more times under section 25.07).

NEW CPJC 25.9 Instruction—Repeated Violation of Protective Order by Communicating or Going to or Near

LAW SPECIFIC TO THIS CASE

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

Relevant Statutes

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

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

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

Definitions

Intentionally Communicates with Another

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

Knowingly Communicates with Another

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

Knows that Another Is a Member of the Protected Person's Family or Household

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

Intentionally Go to or Near a Location

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

Knowingly Go to or Near a Location

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

Knowing a Location Was the Protected Person's [insert specifics, e.g., *Place of Employment*]

A person knows a location is the protected person's [*insert specifics, e.g.*, place of employment] when he is aware that the location is the protected person's [*insert specifics, e.g.*, place of employment].

Family

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

Related by Consanguinity

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

Related by Affinity

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

Household

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

[Include where raised by the evidence.]

Member of a Household

A "member of a household" or "household member" includes a person who previously lived in a household.

Application of Law to Facts

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

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

2. the defendant had knowledge of the protective order, attended the hearing in which the order was issued, had notice of that hearing, or was otherwise aware of the proceedings against him;

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

    a. on or about [*date*]:

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

        ii. [*name*] was a member of [*protected person's name*]'s family or household;

        iii. the defendant knew that [*name*] was a member of [*protected person's name*]'s family or household; and

        iv. the defendant's communication was in violation of the protective order; or

    b. on or about [*date*]:

        i. the defendant intentionally or knowingly went to or near [*specify location, e.g.*, 123 Riverside Drive, Austin, TX 78701] [*insert specifics, e.g.,* by going within 200 feet of that location];

ii. [*specify location*, *e.g.*, 123 Riverside Drive, Austin, TX 78701] was then [*insert specifics, e.g.*, the place of employment] of [*name*];

iii. the defendant knew it was [*name*]'s [*insert particulars, e.g.*, place of employment]; and

iv. the protective order prohibited the defendant from going to or near [*insert specifics, e.g.,* the protected person's place of employment] as specifically described in the order;

[*Add additional allegations under this element as appropriate if they provide a basis for the defendant's commission of the offense.*]

4. the defendant engaged in two or more of the instances set forth in element 3 during a period that was twelve months or less in duration.

You must all agree on elements 1, 2, 3, and 4 listed above.

[Include only if submitting more than two allegations or instances of conduct under element 3.]

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

[Continue with the following.]

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

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

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

[Insert any other instructions raised by the evidence, including the defense of communicating through an attorney or court-appointed person as set out in CPJC 25.3. Then continue with the verdict form found in CPJC 2.1, the general charge.]

COMMENT

Repeated violation of a protective order is prohibited in Tex. Penal Code § 25.072. The definitions of culpable mental states are derived from Tex. Penal Code § 6.03. The definitions of "family," "household," "member of household," "consanguinity," and "affinity" come from Tex. Fam. Code §§ 71.003, 71.005, 71.006, and Tex. Gov't Code §§ 573.022, 573.024, respectively.