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IN THE COURT OF APPEALS
FOR THE NINTH DISTRICT OF TEXAS
AT BEAUMONT

NATHANIEL ALLAN JOHNSON,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

Appeal from Cause Number 18-10-14374-CR
9th District Court of Montgomery County, Texas
Honorable Phil Grant, Judge Presiding

APPELLANT'S BRIEF

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2. The evidence is insufficient to support the conviction.

3. The trial court erred in overruling Appellant's motion for a directed verdict.

4. The trial court erred in overruling Appellant's objections to the Texas Penal Code § 22.01(b)(2)(A) jury charge.

Group Two:

5. The trial court erred in denying Appellant's request for a lesser included offense of misdemeanor assault in the jury charge.

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NO. 09-19-00097-CR

IN THE COURT OF APPEALS
FOR THE NINTH DISTRICT OF TEXAS
AT BEAUMONT

NATHANIEL ALLAN JOHNSON,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

TO THE HONORABLE NINTH COURT OF APPEALS:

Appellant Nathaniel Allan Johnson files this his Appellant's Brief under the Texas Rules of Appellate Procedure and respectfully shows the following.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction entered March 21, 2019 for the offense of felony assault against a family member, enhanced by two prior

convictions. 4 R.R. 5–56; 81; 84–85. Punishment was assessed at life incarceration. 4 R.R. 81; 84–85. The trial court certified Appellant's right to appeal, C.R. 31, and Appellant gave timely notice of appeal on March 21, 2019. 4 R.R. 85. The instant Brief of Appellant is timely filed, subject to a three-day motion for extension of time for a short delay caused by Tropical Storm Imelda in Houston, Texas.

ISSUES PRESENTED

Group One:

1. The State failed to meet its burden of proof under Texas Penal Code § 22.01(b)(2)(A).

2. The evidence is insufficient to support the conviction.

3. The trial court erred in overruling Appellant's motion for a directed verdict.

4. The trial court erred in overruling Appellant's objections to the Texas Penal Code § 22.01(b)(2)(A) jury charge.

Group Two:

5. The trial court erred in denying Appellant's request for a lesser included offense of misdemeanor assault in the jury charge.

STATEMENT OF THE FACTS

Complainant Ronica Steen resided at a house in Conroe, Montgomery County, Texas, with her three-year-old son Nick and twelve-year-old daughter Ashlynn. Appellant, Nathaniel Johnson, was Nick's father and often visited at the house. 2 R.R. 126–27. Steen and Appellant had a seven-year-long relationship and she considered him her common law spouse. *Id.* 128–29. However, Appellant had not been living at the house on May 27, 2018. *Id.* 49.

On that day, Appellant was visiting with the family at the house and had been there for several hours. *Id.* 29, 131, 133. Ashlynn's school friend, Emily Tucker, was also visiting at the house. *Id.* 131. Steen and Appellant had erupted into several arguments throughout the day over family pets and money, and Steen eventually retired to her room in the late afternoon to sleep before leaving for her night job. *Id.* 55, 133, 232. Steen had assumed Appellant would watch the kids so she could sleep, but Nick and Appellant kept entering the room, disrupting Steen's sleep. *Id.* 54–55, 134. Steen yelled at Appellant to stay out of the room so she could sleep, and she and Appellant erupted into another argument mid afternoon. *Id.* 133–34, 136.

Ashlynn and Emily, playing in the living room, heard Steen scream and they ran to the room. *Id.* 263. Emily testified to seeing Appellant on top of Steen, with

Steen yelling for help and for them to get Nick out of the room. Emily stated Ashlynn grabbed a nearby blue bowl and began hitting Appellant with it, and that Appellant grabbed his keys and left the house. *Id.* 264–66.

Conroe police officers, responding to 911 calls placed from the house, arrived at the house a while later. Both Ashlynn and Appellant had placed 911 calls. *Id.* 121, 123. One of the police officers saw Appellant driving down the road in his truck and stopped him. *Id.* 125. Appellant told the officers that he left the house because he and Steen were fighting. *Id.* 74, 88. Other officers arrived at the house and took statements from Steen, Ashlynn, and Emily. *Id.* 91. Steen declined transport to a hospital for examination, but she later went on her own. *Id.* 30. X-rays were taken, and all were reported normal. *Id.* 207. She was given an anti-inflammatory injection and told to take over-the-counter Motrin and Tylenol if needed. *Id.* 209–210.

The officers testified that Steen told them Appellant had thrown her to floor then pushed her face down into a pillow on the bed, leaving her unable to breathe. *Id.* 30. Ashlynn and Emily reported to the officers that they had called 911 and that Appellant had attacked Steen and pushed her face into a pillow. Appellant was arrested and charged with felony assault against a family member, with a jurisdictional paragraph alleging a prior conviction for assault of a family member.

At trial, Steen testified that she had been angry at Appellant for starting to drink again and had fabricated the incident to cause him trouble. *Id.*, 135. She admitted that they had been fighting and yelling, but denied that Appellant had attacked her or pushed her face into a pillow. *Id.*, 136, 138, 139–41, 143. Ashlynn testified that she, too, had fabricated the incident because she was mad at Appellant and was afraid at one point that he might hit her mother. *Id.* 249–50. She stated that her mother and Appellant had been arguing about things various throughout the day, and that the yelling became so loud late in the afternoon that she called 911. *Id.* 238. Ashlynn testified that Appellant eventually left the house. *Id.* 232–35.

During the guilt-innocence phase of trial, the State attempted to introduce evidence showing that Appellant had been convicted in 2009 in Arkansas for "an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Penal Code, against a person whose relationship to or association with the defendant is described by Section 71.003, 71.005, or 71.0021 (b) of the Family Code." Appellant objected on grounds that the "proof" was a docket sheet, not a judgment of conviction, and that it did not meet the State's burden of proof as to the jurisdictional paragraph. The parties' legal arguments and objections took

place at various points during trial. The trial court ultimately overruled Appellant's objections and allowed the docket sheet into evidence.

The jury found Appellant guilty of third-degree felony assault. Appellant pleaded "true" to two enhancement paragraphs during the punishment phase of trial, and Appellant was sentenced to life imprisonment. 4 R.R. 5–6; 81.

SUMMARY OF THE ARGUMENTS

Group One

1. Proof of a qualifying prior conviction for purposes of Texas Penal Code Section 22.01(b)(2)(A) was an element of the charged offense in the indictment. The State had the burden to prove beyond a reasonable doubt that Appellant had a prior conviction for an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Texas Penal Code against a person whose relationship to or association with him is described by Section 71.003, 71.005, or 71.0021 (b) of the Texas Family Code.

2. The State failed to present legally sufficient evidence of the required prior conviction for purposes of Section 22.01(b)(2)(A). The State introduced no evidence that Appellant had a prior conviction for an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Texas Penal Code

against a person whose relationship to or association with him is described by Section 71.003, 71.005, or 71.0021 (b) of the Texas Family Code.

3. The State failed to present legally sufficient evidence that Appellant's purported 2009 Arkansas conviction was statutorily equivalent to a conviction for an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Texas Penal Code against a person whose relationship to or association with him is described by Section 71.003, 71.005, or 71.0021 (b) of the Texas Family Code.

Group Two

1. Misdemeanor assault is a lesser included offense to third-degree felony assault involving family violence.

2. The evidence entitled Appellant to a lesser included jury charge for misdemeanor assault. A witness testified to seeing Appellant on top of Steen while Steen was yelling. The witness did not testify that Appellant was impeding Steen's breathing during the incident. Moreover, because there was no evidence of a qualifying prior conviction for purposes of section 22.01(b)(2)(A), the State proved, at most, a misdemeanor assault offense.

ARGUMENTS

GROUP ONE:

1.

The State Failed to Meet its Burden of Proof Under Texas Penal Code § 22.01(b)(2)(A)

Appellant was charged with a third-degree felony assault involving family violence with a prior conviction for family violence under the following indictment:

> [T]hat Nathaniel Allan Johnson on or about May 27th, 2018 . . . did intentionally, knowingly, or recklessly cause bodily injury to Ronica Steen, a member of the defendant's family or a family of the defendant's household or a person with whom the defendant has or has had a dating relationship as described by Section 71.003, 71.005, or 71.0021 (b) Family Code, by intentionally, knowingly, or recklessly impeding the normal breath or circulation of the blood of Ronica Steen by blocking Ronica Steen's nose or mouth.
>
> And it is further presented in and to said Court that before the commission of the offense alleged above, the defendant had previously been convicted of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Penal Code, against a person whose relationship to or association with the defendant is described by Section 71.003, 71.005, or 71.0021 (b) of the Family Code.

2 R.R. 10–11 (in relevant part).

The prior conviction alleged in the second paragraph of the indictment (the "jurisdictional paragraph") was an element of the third-degree felony offense

charged, and not an enhancement paragraph. *See Calton v. State*, 176 S.W.3d 231, 233–34 (Tex. Crim. App. 2005) (holding proof of prior conviction for evading arrest is an element of third-degree felony evading arrest and must be proven at guilt phase of trial). Consequently, the State was required to prove beyond a reasonable doubt with legally sufficient evidence during the guilt-innocence phase of trial that (1) a qualifying prior conviction existed, and (2) Appellant was the individual convicted. *See Flowers v. State*, 220 S.W.3d 919, 921–22 (Tex. Crim. App. 2007); *Babb v. State*, 2009 WL 4062299, at *6 (Tex. App. – Beaumont 2009, no writ). The State acknowledged during trial in Appellant's case that the prior conviction was part of the actual felony offense itself, which the State was required to prove beyond a reasonable doubt. 3 R.R. 168.

Thus, it was the State's burden during the guilt-innocence phase in this case to prove beyond a reasonable doubt (1) that Appellant committed the underlying assault offense by impeding Steen's normal breathing, and (2) that Appellant was previously convicted of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Penal Code, against a person whose relationship to or association with the defendant is described by Section 71.003, 71.005, or 71.0021 (b) of the Family Code.

The State presented no proof whatsoever that Appellant has been previously convicted of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Penal Code, against a person whose relationship to or association with the defendant is described by Section 71.003, 71.005, or 71.0021 (b) of the Family Code. Although the State may argue that the prior conviction need not be a *Texas* conviction, the plain language of the statute holds to the contrary. Had the legislature intended that out-of-state convictions could be used, it would have so stated, as it has done so in other Texas statutory schemes. For instance, Texas DWI laws explicitly state that non-Texas convictions can be used to raise an offense to a higher offense level:

In Texas Penal Code Section 49.09, "Enhanced Offenses and Penalties," the statute expressly allows for use of non-Texas convictions:

> (b) An offense under Section 49.04, 49.045, 49.05, 49.06, or 49.065 is a felony of the third degree if it is shown on the trial of the offense that the person has previously been convicted:
>
> (1) one time of an offense under Section 49.08 *or an offense under the laws of another state if the offense contains elements that are substantially similar to the elements of an offense under Section 49.08*[.]

TEX. PENAL CODE § 49.09(b)(1), emphasis added. Thus, the plain language of Texas Penal Code 22.01(b)(2)(A) requires that the prior conviction for jurisdictional purposes must be a *Texas* conviction meeting the specifications of

that statutory provision. The State entirely failed to comply with this statutory provision.

Even assuming the statute would allow proof of non-Texas convictions for purposes of section 22.01(b)(2)(A), the State failed to meet its burden of proof as to the jurisdictional paragraph of the indictment. During the guilt-innocence phase of trial, the State introduced into evidence State's Exhibit #11, which the State represented to the trial court as a "self-authenticating, certified judgment" from the state of Arkansas against Appellant for third-degree domestic battery in 2009. 2 R.R. 280–01. The trial court itself was hesitant, and noted on the record that the exhibit "looks like a docket sheet, not a judgment." *Id.*

In attempting to prove up the jurisdictional paragraph, the State presented Randal Gilbert from the Union County Sheriff's Department in Arkansas, who testified to his involvement in investigating the 2009 Arkansas incident. However, under cross-examination by defense counsel, Gilbert testified that State's Exhibit #11 was the case docket sheet, and *not* a judgment. *Id.* at 283. Indeed, the witness reiterated that fact:

> Q. But you're sure this is just a docket sheet, it's not an actual judgment?
>
> A. That's a docket sheet showing the final disposition of the case.
>
> Q. But it's not a judgment, correct?

A. Correct.

Id. at 285. The trial court nevertheless allow the exhibit into evidence. *Id.* at 284.

Moreover, Gilbert had no working knowledge or familiarity with the Texas Penal Code or Texas Family Code for purposes of meeting the requirements of Section 22.01(b)(2)(A):

> Q. Okay. And are you familiar with the Texas law penal code regarding domestic violence?
>
> A. No, I am not.
>
> Q. Are you familiar with the family code Section 21.11, 20.04, 20.03, and Chapter 22 and Chapter 19 of the Texas Penal Code is?
>
> A. No, I'm not.
>
> Q. Do you have any idea what the requirements of that are?
>
> A. No, I have no clue.

Id. at 286. The trial court expressed its understanding of counsel's objections, but stated it would re-address the issue when counsel made a motion for directed verdict. *Id.* at 287.

At most, Gilbert established that he investigated and made an arrest in 2009 in an Arkansas domestic violence case involving a Nathaniel Johnson. 2 R.R. 276. The trial judge noted that the document read "found guilty of battery in third-degree domestic." 2 R.R. 281. Neither Gilbert nor any other witness

provided legally sufficient evidence to prove that Appellant was "previously convicted of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Penal Code, against a person whose relationship to or association with the defendant is described by Section 71.003, 71.005, or 71.0021 (b) of the Family Code."

Even assuming State's Exhibit #11 were to suffice as a judgment of conviction, the State did not establish that the Arkansas criminal offense met the requirements for a qualifying Texas conviction under section 22.01(b)(2)(A). Putting Appellant's argument as succinctly as possible: The jury had absolutely no evidence before it as to whether the Arkansas "battery in third-degree domestic" was the equivalent of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Texas Penal Code against a person whose relationship to or association with the defendant is described by Section 71.003, 71.005, or 71.0021 (b) of the Texas Family Code.

Following Gilbert's testimony, the trial court expressed on the record its dissatisfaction with the State's questionable attempts to prove up the prior conviction. The trial court addressed its concerns directly to the State's counsel:

> THE COURT: The defendant is present, along with his counsel and counsel for the State. We're outside the presence of the jury.
>
> A couple things: I am concerned about the level of proof that you provided on the jurisdictional paragraph.
>
> * * * *
>
> I specifically asked you if there was enough – you had the proof to prove that up. And I'm a little unhappy with the candor to the Court, frankly, on what I think you've provided.
>
> * * * *
>
> I mean, your own witness said that wasn't a judgment. You represented to the Court that it was.

3 R.R. 5–6. Although the trial court also expressed concern that defense counsel had not raised the issue sooner, it took note of the fact that defense counsel could not have objected to the inadequacy of the State's alleged proof until the proof had been presented:

> Now that I know the level of proof that they had to bring – or the quality of proof that they had to bring in that Arkansas case, I may have disallowed them going into that. But unfortunately at this point I've let them go into it. I've let her arraign this jury on that jurisdictional paragraph, so now that bell has been rung that he's got a prior conviction.

Id. at 7. Ultimately, however, the trial court was of the opinion that the State had "provided *a scintilla* of evidence" and allowed the trial to go forward. *Id.* at 117 (emphasis added).

However, as next shown, a *scintilla* of evidence is not legally sufficient evidence.

2.

The Evidence is Insufficient to Support the Conviction

Appellant restates and incorporates the facts and arguments presented under Issue 1, above.

The State wholly failed to establish that Appellant had previously been convicted of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Penal Code, against a person whose relationship to or association with the defendant is described by Section 71.003, 71.005, or 71.0021 (b) of the Family Code. Because this exact language was alleged in the indictment, the State was required to prove Appellant had a prior conviction meeting those specifications. The State did not. Accordingly, the evidence is insufficient – indeed, there is *no* evidence – to support Appellant's conviction under Texas Penal Code Section 22.01(b)(2)(A), and the conviction must be set aside.

Even assuming the statute allowed the prior conviction to be a non-Texas conviction (which it does not), the evidence presented by the State was legally insufficient under *Jackson v. Virginia* and its progeny. Appellant again emphasizes that the jury had absolutely no evidence before it as to whether the

Arkansas "battery in third-degree domestic" was the equivalent of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Texas Penal Code. As a result, there is no evidence in the record supporting the jury's implied finding that the Arkansas "battery in third-degree domestic" was a conviction for an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Texas Penal Code against a person whose relationship to or association with the defendant is described by Section 71.003, 71.005, or 71.0021 (b) of the Texas Family Code.

When considering whether the evidence was sufficient to support a conviction under *Jackson v. Virginia*, the court considers all of the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. 443 U.S. 307, 319 (1979); *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017).

It is beyond cavil that a mere scintilla or modicum of evidence is insufficient to support a conviction. The Texas Court of Criminal Appeals makes clear that evidence is insufficient to support the conviction when the record contains (1) no evidence of an essential element, (2) merely a modicum of evidence of one

element, or (3) if it conclusively establishes a reasonable doubt. *Queeman*, 520 S.W.3d at 622.

In the instant case, even the trial court acknowledged that the State presented only *a scintilla* of evidence as to the prior conviction alleged in the jurisdictional paragraph of the indictment. 2 R.R. 117. Although a scintilla or modicum may suffice as a proper metric for admissibility of evidence or allowing a case to go forward, it falls well beyond the requirement for legally sufficient evidence in support of a conviction.

Appellant has mentioned, but is not relying on, the trial court's comment regarding the iota of evidence presented by the State. To the contrary, a review of the record under the *Jackson* and *Queeman* standards shows that the State did not present legally sufficient evidence of the jurisdictional paragraph and, as a result, failed to support the conviction with sufficient evidence under those standards. The State's Exhibit #11 may have been a self-proving certified copy of a document, but the document itself does *not* identify itself as a judgment of conviction, nor did any witness testify that the document was a judgment of conviction. The State did nothing more than introduce a self-proving, certified copy of a generic document, most likely a docket sheet.

Not only did the State fail to prove that the document was a judgment of conviction, it failed to prove that whatever judgment it evinced was a prior conviction meeting the requirements of section 22.01(b)(2)(A).

For all these reasons, Appellant's conviction is unsupported by legally sufficient evidence and must be set aside.

3.

The Trial Court Erred in Overruling Appellant's Motion for a Directed Verdict

Appellant restates and incorporates the facts and arguments presented under Issues 1 and 2, above.

Defense counsel re-urged his objections to the State's evidence in a subsequent motion for directed verdict at the close of the State's evidence:

> [W]e would make a motion for a directed verdict based on the Paragraph 2 that states, "And it is further presented in and to this said Court that before the commission of the offense alleged above, the defendant had previously been convicted of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04, or Section 21.11 of the Penal Code, against a person whose relationship or association with the defendant is described in by Section 71.003 and 71.005 or 71.0021 section B of the Family Code." That paragraph right there, there's no evidence that's been presented by the State regarding any commission of any violation of the Penal Code in Texas under those sections or the Family Code under those sections. The only thing that the State has brought forward is a docket sheet/entry sheet of Mr. Nathaniel Johnson . . . it's not a judgment. *And so there's no evidence of a conviction under the Texas Penal Code or the Texas Family Law Code. And we don't even believe that there's evidence of a conviction*

> *under the Arkansas Penal Codes, and whether they relate to the same sections in the Family Code.* And, therefore, they are insufficient, and the State hasn't proven or the Court doesn't have jurisdiction over that particular offense or the State hasn't proven anything by any of the evidence that they've submitted, whether it was the docket entry sheet or the testimony of Belinda Williams, I think it was, who was not qualified to tell whether there was a conviction. I don't even believe she indicated that there was a conviction. So we would ask that the Court grant that motion regarding that.

3 R.R. 165–66 (emphasis added). The motion was denied. *Id.* at 166.

In making this motion, Appellant clearly pointed out to the Court that the State had failed to show that he had previously been convicted of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Texas Penal Code, against a person whose relationship to or association with the defendant is described by Section 71.003, 71.005, or 71.0021 (b) of the Texas Family Code.

Even assuming the State were allowed to meet its burden of proof through proof of a prior non-Texas conviction, Appellant's motion clearly brought to the trial court's attention the fact that the State had not shown that Appellant had a prior Arkansas conviction and that the prior conviction met the requirements of section 22.01(b)(2)(A).

A directed verdict at the close of the State's case challenges the sufficiency of the State's evidence to prove its case. Appellant has shown through prior arguments, *supra*, that the State failed to meet its burden of proving he had a prior conviction meeting the specifications of section 22.01(b)(2)(A). Consequently, the State did not prove Appellant had committed felony assault family violence, and Appellant's motion for a directed verdict of not guilty should have been granted.

4.

The Trial Court Erred in Overruling Appellant's Objections to a Texas Penal Code § 22.01(b)(2)(A) Jury Charge

Appellant restates and incorporates the facts and arguments presented under Issues 1 and 2, above.

Defense counsel objected to and requested deletion of that portion of the jury charge, as follows:

> [W]e have an objection and request for exclusion from the Court's charge the following: We request that you exclude from Paragraph 1 or Roman numeral one and Roman numeral four, the part that says, "And the defendant has previously been convicted of the offense under Chapter 22, 19, or section 20.03, 20.04 or the 21.11 against a person whose relationship to or association with the defendant is described in Section 71.0021 (b), 71.003, or 71.005 Family Code." *We're requesting that that be excluded because, again, we don't believe the evidence that the, quote, docket entry sheet is evidence of a conviction. And as required under the statute for a judgment, there's no judgment in evidence in this case against him that he committed a prior offense under these sections.* It is . . . a violation of some law

> maybe in Arkansas, but we're not sure of that because it's just a docket entry sheet and not a judgment.

Id. at 173–74. The motion was overruled. *Id.* at 174.

Appellant relies on the same arguments and sufficiency challenges raised in his earlier issues, *supra*. The State was not entitled to a jury charge regarding an alleged offense under section 22.01(b)(2)(A) because it failed to prove that Appellant had a prior conviction meeting the specifications of section 22.01(b)(2)(A). Consequently, the State did not present evidence warranting a jury charge for felony assault family violence, and Appellant's objection to the jury charge should have been granted.

GROUP TWO:

5.

The Trial Court Erred in Denying Appellant's Request for a Lesser Included Offense of Misdemeanor Assault in the Jury Charge

Texas Penal Code § 22.01, "Assault," provides in relevant part:

> (a) A person commits an offense if the person:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
>
> * * * *

(b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

* * * *

(2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if:

* * * *

(A) it is shown on the trial of the offense that the defendant has been previously convicted of an offense under this chapter, Chapter 19, or Section 20.03 , 20.04 , 21.11 , or 25.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003 , or 71.005, Family Code[.]

TEX. PENAL CODE § 22.01 (West 2011).

Defense counsel requested the following lesser-included jury charge:

> We're requesting a charge on assault, lesser included. A person commits an offense if, one, intentionally, knowingly, or recklessly causing bodily injury to another, including a person's spouse or personal relationship to or association of the defendant as described by Section 71.0021 (b), 71.003, or 71.005 of the Family Code.
>
> We're requesting that be included in the Court's charge. We believe if there is any evidence, [that it's] only evidence of an assault.

3 R.R. 174. The trial court denied the requested charge. *Id.*

In Texas, courts "use a two-step analysis to determine if a defendant is entitled to a lesser-offense instruction." *Ritcherson v. State*, 568 S.W.3d 667, 670

(Tex. Crim. App. 2018). First, the court is to compare the statutory elements and the facts of the offense as alleged in the indictment with the statutory elements of the requested lesser-included offense to determine whether the lesser-included offense is included within the proof necessary to establish the charged offense. *See id.* at 670-71. "Second, there must be evidence from which a rational jury could find the defendant guilty of only the lesser offense." *Id.* at 671. "[The second] requirement is met if there is (1) evidence that directly refutes or negates other evidence establishing the greater offense and raises the lesser-included offense or (2) evidence that is susceptible to different interpretations, one of which refutes or negates an element of the greater offense and raises the lesser offense." *Id.* "The evidence raising the lesser offense must be affirmatively in the record." *Id.* "We consider all admitted evidence without regard to the evidence's credibility or potential contradictions or conflicts." *Roy v. State*, 509 S.W.3d 315, 317 (Tex. Crim. App. 2017).

The record supports two independent grounds for Appellant's entitlement to the less-included offense charge:

First, throughout the trial in this case, Appellant continuously and strenuously challenged the State's purported evidence of a prior conviction it used to raise the misdemeanor assault charge to a felony assault charge. Through cross-

examination of the State's witnesses, Appellant showed that the State had not proven that he had a prior conviction meeting the specifications of section 22.01(b)(2)(A). If the prior conviction were discounted by the jury, then the only evidence of an offense would be the misdemeanor assault family violence.[1] This situation falls squarely into the Texas Court of Criminal Appeals' recent decision in *Ritcherson*: "[I]f there is more than a scintilla of evidence raising the lesser offense and negating or rebutting an element of the greater offense, the defendant is entitled to a lesser-charge instruction." 568 S.W.3d at 671. Appellant was entitled to the lesser-included assault charge under these circumstances, and the trial court erred in denying him the lesser included charge.

Second, there is evidence in the record supporting an argument that Appellant is guilty only of misdemeanor assault in absence of the prior conviction. The State's witness, Emily Tucker, was an eyewitness to the incident. Emily had been at Steen's house with her friend, Steen's daughter, and overheard Steen and Appellant arguing and yelling in Steen's room. When they heard Steen scream at

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[1]The State cannot argue that the first paragraph of the indictment set forth a felony assault family violence offense independent of the jurisdictional paragraph, as the jurisdictional paragraph only comes into play if misdemeanor assault family violence is first alleged. The State charged Appellant with misdemeanor assault family violence in the first paragraph of the indictment.

one point, they ran to Steen's room to investigate. Emily testified that she saw the following:

> A. I remember seeing [Steen] on the bed face down and [Appellant] on top of her.
>
> Q. Okay. And what was going on? What was [Appellant] doing?
>
> A. He was pulling her head into a pillow.

2 R.R. 264.

> Q. Okay. What was [Steen] doing?
>
> A. She was trying to get her head up because she was yelling to, like, take [her son] out of the room.
>
> Q. Okay. Was she yelling for help?
>
> A. Yes, ma'am.

Id. at 265.

> Q. Okay. So [Steen's daughter] started hitting [Appellant] with the blue dog bowl. And [Steen] was face down, and they were on the bed and [Appellant] was on top of her.
>
> Did you see what happened next between [them]?
>
> A. [Appellant] got up afterwards, and he grabbed his keys and cigarettes and left.

Id. at 267.

Emily clearly testified that Appellant was on top of Steen, and that Steen was yelling for help and to get her son out of the room. She did not testify that Steen's face had been pushed into a pillow and that she was unable to breathe. To

the contrary, Steen was yelling and telling them to get Nick out of the room while Appellant was on top of her. Emily stated that Ashlynn began hitting Appellant with the blue bowl, and that Appellant then got up and left the house. Consequently, Emily's testimony stands as evidence that Appellant did not impede Steen's breathing, and under *Ortiz*, the trial court reversibly erred in denying Appellant the requested lesser included charge for misdemeanor family assault.

The San Antonio Court of Appeals recently reversed a jury conviction of felony assault involving family violence by impeding breathing (occlusion) because the trial court denied the defendant a lesser included jury charge for misdemeanor family assault. In a case substantially similar to the instant appeal, the court in *Ortiz v. State*, 2019 WL 4280074 (Tex. App. – San Antonio, Sept. 11, 2019, no writ), held that misdemeanor assault under section 22.01 was a lesser included offense to felony family assault by impeding breathing under section 22.01(b)(2)(B):

> "Section 22.01 of the Texas Penal Code describes assault family violence by occlusion as assault with two additional requirements—that it be committed against a family member and be committed by occlusion." *Hardeman v. State*, 556 S.W.3d 916, 921 (Tex. App.—Eastland 2018, pet. ref'd); *see also* TEX. PENAL CODE ANN. § 22.01(b)(2)(B). "Accordingly, simple assault is a lesser included offense because it is included within the proof necessary to establish assault family violence by strangulation." *Hardeman*, 556 S.W.3d 921.

Ortiz, at *3 (footnotes omitted).[2] The San Antonio court noted that the jury could have found that the defendant caused bodily injury to the complainant, but did not choke her, by believing portions of the testimony presented at trial while disbelieving other portions. The court concluded that there was evidence from which a rational jury could find the defendant guilty of only the lesser offense. *See Hardeman v. State*, 556 S.W.3d 916, 922–23 (Tex. App.—Eastland 2018, pet. ref'd) (holding trial court erred in denying lesser offense of assault where the jury could have rationally believed testimony that the defendant did not choke the victim but also believed he caused bodily injury to the victim through testimony establishing he grabbed her in some manner during an argument).]

Appellant anticipates that the State might attempt to argue that Appellant was not entitled to the lesser included charge pursuant to *Johnson v. State*, No. 04-17-00398-CR, 2018 WL 3260921 (Tex. App.—San Antonio July 5, 2018, pet. ref'd) (mem. op., not designated for publication). However, as the *Ortiz* decision itself noted, *Johnson* was not controlling:

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[2]Although *Ortiz* is an unpublished case and has no direct precedential effect, this Court may take guidance from it "as an aid in developing reasoning that may be employed." *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd).

> Ortiz's testimony that he did not choke Gomez makes this case factually distinguishable from our unpublished opinion in *Johnson*, which the State cites in its brief. In *Johnson*, the record did not contain any "affirmative evidence to negate the evidence that the victim was choked."

Id., at *3 n.3 (citation omitted). In the instant case, Emily's testimony presented affirmative evidence that Appellant had been on top of Steen but had not been impeding her breathing.

The trial court's error in refusing the requested lesser-included charge constitutes reversible error under Texas Court of Appeals' precedent. If, as here, the absence of a charge on the lesser included offense left the jury with the sole option either to convict the defendant of the greater offense or to acquit him, some harm exists. *Saunders v. State*, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995). If "some harm" exists, then the error requires reversal of the conviction. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); *Braughton v. State*, 569 S.W.3d 592, 613 (Tex. Crim. App. 2018).

Because the trial court's erroneous denial of Appellant's requested lesser-included offense charge caused him some harm, the judgment of conviction must be set aside.

PRAYER FOR RELIEF

Appellant Nathaniel Allan Johnson prays that the Court reverse his conviction and enter an order of acquittal. In the alternative, Appellant prays that the Court remand the case for new trial or order such relief as the Court may deem proper.

Respectfully submitted,

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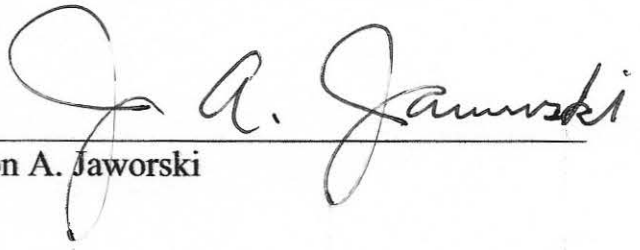
CERTIFICATE OF COMPLIANCE

Pursuant to TRAP Rule 9, I hereby certify that this document has been prepared using WordPerfect X3, and that the sections covered by TRAP 9.4(1)(l) contain 6,300 words or less according to the program's word-count function.



Jon A. Jaworski

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of APPELLANT'S BRIEF has been served upon counsel of record in accordance with the Texas Rules of Appellate Procedure on September 17, 2019, via certified mail, return receipt requested:

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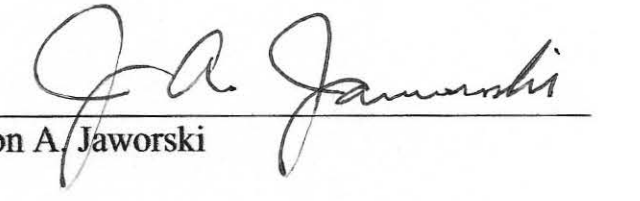

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