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COURT OF CRIMINAL APPEALS
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Texas Court of Criminal Appeals

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PD-0636-19

Michael Anthony Hammack, Appellant v.

State of Texas, Appellee

On Discretionary Review from the Sixth Court of Appeals
No. 06-18-00212

On Appeal from the 354th Judicial District Court, Hunt County
No. 32355CR

Petition for Discretionary Review

Jessica McDonald
PO Box 9318
Greenville, Texas 75404
Phone: 903-458-9108
Fax: 903-200-1359
jessica@jessicamcdonaldlaw.com
Texas Bar No. 24000994
Attorney for Appellant

If the Petition is granted, oral argument is requested.

I. Identity of Parties, Counsel, and Judges

Michael Anthony Hammack, Appellant

Jessica McDonald, attorney for Appellant on appeal and discretionary review

Toby Wilkinson, attorney for Appellant at trial

State of Texas, Appellee

Nobie Walker, Hunt County District Attorney

Hon. Keli M. Aiken. Presiding Judge, 354th Judicial District Court of Hunt County

Hon. C.J.. Morriss, III, Sixth Court of Appeals

Hon. J.J. Stevens, Sixth Court of Appeals

Hon. Ralph K. Burgess, Sixth Court of Appeals

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IV. Statement Regarding Oral Argument

Should the Court grant this petition, Appellant requests oral argument. See Tex. Rule App. Proc. 68.4(c) (2017). This case represents a unique situation involving legal sufficiency and the necessity for this Court to correct a terrible injustice. Additionally, this case raises an issue of importance and constitutional magnitude to every person charged with a criminal offense in the State of Texas. Therefore, should this Court determine that its decisional process will be significantly aided by oral argument, Appellant will be honored to present such.

To the Honorable Judges of the Texas Court of Criminal Appeals:

Appellant Michael Anthony Hammack respectfully submits this petition for discretionary review:

V. Statement of the Case and Procedural History

This petition requests that this Court review the Opinion and Judgment of the Sixth Court of Appeals in Hammack v. State, No. 06-18-00212-CR, 2016, (*Hammack v. State*, 06-18-00212-CR, 2019 WL 2292334 (Tex. App.—Texarkana May 30, 2019, no pet. h.) in which the Court of Appeals affirmed a conviction and sentence in the 354th Judicial District Court of Hunt County under Cause Number 32355CR for interfering with child custody, for which Appellant was sentenced to two years in a state jail facility and a fine of $10,000.00. Appellant's jail time was

probated for a period of five years with 180 days in county jail as a condition of probation. (CR 112)

On August 17, 2018, a grand jury indicted Appellant, alleging that on or about the 5th day of March 2018, Appellant did "intentionally or knowingly take or retain Daphney Hammack, a child younger than 18 years of age, when Appellant knew that said taking or retention violated the express terms of a judgment or order of a court disposing of the child's custody, to wit: Order for Protection of a Child in an Emergency, signed by the judge of the 354th District Court of Hunt County, Texas, on or about February 27, 2018." (CR 5).

On December 5, 2018, after a trial by jury, Appellant was convicted of the offense as alleged in the indictment. (CR. 97). On May 30, 2019 the Court of Appeals affirmed the conviction in *Hammack v. State,* No. 06-18-00212-CR.

This petition for discretionary review follows.

VI. Grounds for Review

1. **The Court of Appeals erred by finding that the evidence was legally sufficient to find Appellant guilty of interfering with child custody because the State failed to prove beyond a reasonable doubt that Appellant knowingly violated the express terms of a judgment or order when Appellant was never served the order, never saw the order, and never had the terms of the order explained to him in either open court or in any other manner.**

2. **This Honorable Court and the Texas Supreme Court are in conflict in their interpretation of virtually identical statutes promulgated for the same purpose, and said disparity creates a due process and equal protection violation for Texas citizens and should be addressed by this court.**

3. **Appellant's constitutional right to due process and equal protection have been violated as he has been denied his right to court appointed attorney at critical stages in the criminal proceedings.**

VII. Argument

Ground for Review 1: The Court of Appeals erred by finding that the evidence was legally sufficient to find Appellant guilty of interfering with child custody because the State failed to prove beyond a reasonable doubt that Appellant knowingly violated the express terms of a judgment or order.

Introduction

Appellant, in what appears to be an issue of first impression, has been convicted of violating an order with which he was never served, an order with which he was never provided a copy, and which no person ever explained the terms of the order to Appellant. In upholding this conviction with no evidence that Appellant had any notice of the contents of the order, the Court of Appeals has created a new avenue of prosecution, allowing that a person can be held criminally liable for violating a court order when they have had no notice of the terms of the order. Appellant contends that the Court of Appeals erred in finding the evidence legally sufficient to prove beyond a reasonable doubt that Appellant knowingly violated the express terms of an order as the record is crystal clear that Appellant was never informed in any manner of the express terms of the order he has been convicted of violating.

After an exhaustive search, the undersigned attorney cannot find a single case where a person has been convicted of violating an order when the person has not either been 1. Given a copy of the order or 2. Heard the terms of the order announced in open court. This Court is being asked to decide whether an adverse party's opinion

that a Defendant knew the terms of an order he never saw is enough to prove a person's guilt beyond a reasonable doubt.

VIII. Facts

These facts are derived from the Clerk's Record, Supplemental Record, and Reporter's Record Volume 6.

A stipulation of evidence was entered into at trial in this case, which stated that a valid court order was entered on February 27, 2018 giving the Texas Department of Family and Protective Services (CPS) sole managing conservatorship of the minor child, Daphney Hammack. The stipulation further stated that as of the date of the Courts' Order, Appellant did not have a legal right to possess, take, or retain his minor child. However, the stipulation does **not** state that Appellant knew that the order was in existence, was valid, nor does it state he knew any of the terms of the order.

The State presented the following testimony in regards to the relevant issue of Appellant's knowledge of the existence of the court order:

Officer Kelvin Rhodes testified that, based on his conversation with Appellant, he believed Appellant knew that the minor child had been picked up by CPS. Officer Rhodes stated Appellant allowed him to come into his home and search for the child and did not see any evidence that Appellant had ever been served with the court orders in this case. Officer Rhodes testified that he believed Appellant had

knowledge of the fact that CPS had custody of the child as of the time Officer Rhodes arrived at Appellant's house. Rhodes did not give Appellant a copy of the order nor discuss the terms of the order with Appellant.

Sergeant Marcus Cantera testified he believed that, based on his interactions with Appellant, Appellant knew CPS had custody of his daughter. Sgt. Cantera described Appellant as being argumentative and uncooperative with him and would not allow him to search the residence without a warrant. Based on those actions, Sgt. Cantera believed Appellant was aware of the court order. Cantera did not give Appellant a copy of the order nor discuss the terms of the order with him.

Amber Davidson, an investigator with CPS, testified she called Appellant and informed him that she had an order granting CPS custody of Daphney and that she had Daphney in her custody. Davidson said Appellant's response was "that can't be possible." Davidson stated there was no doubt in her mind that Appellant knew CPS had a court order for custody of Daphney at the end of her telephone conversation with Appellant. However, Ms. Davidson further testified that CPS never served Appellant with the order. Davidson also conceded that, if a person had not physically read a court order, and unless that order had been explained to them in detail, a person could not possibly know what was contained in said order. Davidson testified she never explained the terms of the order to Appellant.

CPS worker, Rhonda West, testified she went with Davidson to Appellant's

residence after the court orders had been issued. West stated when they tried to explain to Appellant why they were there, Appellant ordered them off his property and they complied. West testified that neither she nor Davidson went over the details or provisions of the order with Appellant.

There was no testimony in the record that anyone ever explained to Appellant the terms of the court order. At best, the record supports that, if Appellant believed what the CPS investigator told him, he knew of the existence of an order. There is no evidence that Appellant knew the express terms of said order. There is no evidence that Appellant knew what custodial or possessory rights the order may or may not have given him.

Challenges to the sufficiency of the evidence are reviewed under the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 318–20, 99 S.Ct. 2781, 2788–89, 61 L.Ed.2d 560 (1979). *Brooks v. State,* 323 S.W.3d 893, 894–913 (Tex.Crim.App.2010). Under the *Jackson* standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson,* 443 U.S. at 317–19, 99 S.Ct. at 2788–89; *Laster v. State,* 275 S.W.3d 512, 517 (Tex.Crim.App.2009). Evidence is insufficient under four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record

contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; or (4) the acts alleged do not constitute the criminal offense charged. *See Jackson*, 443 U.S. at 314, 318 & n. 11, 320, 99 S.Ct. at 2786, 2788–89 & n. 11; *Laster*, 275 S.W.3d at 518; *Williams v. State*, 235 S.W.3d 742, 750 (Tex.Crim.App.2007). Courts consider both direct and circumstantial evidence and all reasonable inferences that may be drawn from that evidence in making a determination. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex.Crim.App.2007).

To prove an offense, the person must have notice of the order. *Cf. Ramos v. State*, 923 S.W.2d 196, 198 (Tex.App.-Austin 1996, no pet.); *Small v. State*, 809 S.W.2d 253, 256 (Tex.App.- San Antonio 1991, pet. ref'd). At a minimum, the person must be "somehow aware of what he is prohibited from doing by a specific court order.... " *Cf. Small*, 809 S.W.2d at 256.

In *Small v. State* 809 S.W.2d 253, 256 (Tex.App.- San Antonio 1991, pet. ref'd) the Court in San Antonio considered a similar issue. In *Small*, the defendant was convicted of violating a protective order with which, like the case at bar, the defendant had never been served. Reversing that conviction, the court held, "Unless a defendant is somehow aware of what he is prohibited from doing by a specific court order, he cannot be guilty of knowingly and intentionally violating that court order. We hold that this is an essential element of this offense, and the State is

required to prove that the appellant "knowingly and intentionally" violated the court order in question beyond a reasonable doubt." *Id.* at 256.

The only evidence presented at trial that Appellant had any knowledge whatsoever that an order existed was the testimony of CPS investigator, Amber Davidson, who testified that she told Appellant over the phone that CPS had obtained an order giving them custody of the child. Ms. Davidson clearly testified that she ***did not*** explain to Appellant the terms of the order. She further testified that there was ***no way*** Appellant could have known the terms if he had not seen the order or if someone had not detailed the order for him. The testimony is undisputed that no person ever served Appellant with a copy of the order, allowed Appellant to view a copy of the order, or told Appellant of the terms of the order.

The 6th Court of Appeals states that intent can be inferred by acts done. But Appellant's actions are just as keeping with an innocent person who simply doesn't wish to cooperate with CPS. At best, the record, including the inferences drawn from Appellant's actions, supports a finding that Appellant knew an order existed. There is nothing in the record to support the 6th Court's holding that the evidence is sufficient to find that Appellant knew "the order granted sole custody of the child to the Department." No facts in the record support any holding that Appellant was made aware of any such terms. The lengths to which the 6th Court had to reach to support this jury verdict are beyond merely viewing the evidence in the light most

favorable to the verdict and extend to rewriting the facts presented at trial.

In *Walker v. State*, No. PD-1429-14, 2016 Tex. Crim. App. Unpub. LEXIS 973 (Tex. Crim. App. 2016) (not designated for publication), this Court notes that "…[a] conviction that is based upon juror speculation raises only a suspicion of guilt, and mere suspicion is inadequate to satisfy the constitutional sufficiency standard that requires proof beyond a reasonable doubt. *Id*. at *25, citing *Winfrey*, 323 S.W.3d at 882. As in *Walker*, a careful consideration of the facts leads to the conclusion that a rational jury would have had, at most, only a suspicion of guilt under these circumstances, which required the Sixth Court to hold the evidence insufficient and render a judgment of acquittal.

The 6th Court erred in upholding Appellant's conviction because the evidence simply cannot prove that Appellant intentionally and knowingly violated the express terms of a court order. It is not enough for others to testify that it was their opinion that Appellant knew. It is not sufficient to show that Appellant merely thought that an order may have existed. The evidence must show conclusively that Appellant *actually knew* the express terms of the order and knowingly violated said terms. As the evidence introduced at trial in this case wholly fails to support such a finding, the 6th Court erred in finding that the evidence was legally sufficient to uphold the jury's verdict. Appellant respectfully asks this Court to correct this error and reverse and enter a judgment of not guilty.

IX. Ground for Review Two: This Honorable Court and the Texas Supreme Court are in conflict in their interpretation of virtually identical statutes promulgated for the same purpose, and said disparity creates a due process and equal protection violation for Texas citizens and should be addressed by this court.

After the Sixth Court of Appeals affirmed his conviction, Appellant who had previously been found indigent by the trial court, applied to the trial court for a court appointed attorney to assist him in the preparation of a petition for discretionary review. That motion was denied.

Appellant alleges for himself, and every other indigent criminal defendant in the state of Texas, that this Court should clarify the statutes of the law and the inconsistency between this Court's interpretation of Texas Code of Criminal Procedure 26.04 and the Texas Supreme Court's interpretation of Texas Family Code 107.016 as the two interpretations lead to confusion and to equal protection violations.

Texas Code of Criminal Procedure 26.04 and Texas Family Code 107.013 were both drafted with identical purposes; to provide indigent persons who find themselves answering charges brought by the government with court appointed counsel. Although the intent of the statutes are the same, and the wording almost identical, the two highest courts in our State have interpreted the two statutes vastly different. Tex. Crim. Proc. Code Ann. § 26.04 (West) Tex. Fam. Code Ann. § 107.013 (West)

Texas Family Code 107.016 (3)(b) states that an attorney appointed to represent a parent continues to serve in that capacity until the earliest of the date all appeals are exhausted or waived. The Supreme Court of Texas in *In re P.M.*, 520 S.W.3d 214 (2016), has interpreted this statue to hold that indigent parents in a termination of parental rights case brought by the government are entitled to court appointed counsel up to and including the preparation of a petition for discretionary review.

Texas Code of Criminal Procedure 26.04 j(2) states that a court appointed attorney shall "represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is permitted or ordered by the court to withdraw as counsel for the defendant after a finding of good cause is entered on the record." Although the wording is almost identical, and certainly the intent of the statute was one and the same, this Honorable Court has, rather than use the plain meaning of the words in the statute, interpreted 26.04j(2) to exclude the right to a court appointed attorney to prepare a petition for discretionary review. See *Ross v. Moffit*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

The uneven application of due process and equal protection in this area is of the utmost concern. Common sense would suggest that criminal cases, with their higher burdens of proof and many procedural safeguards, would provide at least the same due process and equal rights protection on appeal as is provided for persons in

civil termination of parental rights cases. Instead, indigent defendants are provided less. Appellant asks this Honorable Court to correct this error in the law, to make the interpretation of these two statutes uniform across our state, and to find that the lower court erred by not granting Appellant a court appointed attorney on appeal.

X. Ground for Review Three: Appellant's constitutional right to due process and equal protection have been violated as he has been denied his right to court appointed attorney at critical stages in the criminal proceedings.

The Sixth Amendment to federal Constitution provides that in all criminal prosecutions the accused shall enjoy right to assistance of counsel for his defense. U.S. Const. amend. VI

Appellant contends that he has been denied his constitutional right to due process and equal protection under the law in that he has been denied court appointed counsel at a critical stage in his criminal proceedings. Appellant is requesting this Honorable Court to correct a constitutional violation for himself, and every other indigent criminal defendant in the state of Texas who wishes to file a Petition for Discretionary review with this court.

The right to assistance of counsel is made obligatory on the states by the Fourteenth Amendment, and indigent defendant in criminal prosecution in state court has right to have counsel appointed for him. *See Gideon v. Wainwright,* 372 U.S. 355 (1963); 83 S.Ct. 792, 93 A.L.R. 2d 799, 23 O.O.2d 258. This

fundamental constitutional right has been codified in Texas Code of Criminal Procedure Art. 1.051.

Texas Code of Criminal Procedure 26.04 j(2) states that a court appointed attorney shall "represent the defendant until… *appeals are exhausted*…." However, as stated above, this Court has held that 26.04j(2) does not include the right to a court appointed attorney to prepare a PDR. However, if an indigent defendant is lucky enough to have a PDR granted, CCP 1.051 (d)(2) states that the defendant is then entitled to have an attorney appointed by the court. However, this a hollow right, empty of any true meaning as indigent defendants have been denied the right to court appointed counsel at the critical stage of the process which includes applying to this court for a petition for discretionary review. Tex. Code of Crim. Proc. 26.04j(2)

Without the benefit of counsel during the perpetration of a PDR, an indigent defendant is on his own after the court of appeals has disposed of his case and counsel has advised him of the merits of further review. While a defendant has the right to prepare and file a PDR *pro se,* it is ludicrous for our bar to continue to pretend that this "right" holds any true value to the indigent defendant. The chances that a petition will be granted are reduced when an indigent defendant, unfamiliar with the procedural requirements and substantive law, files a petition without the assistance of counsel. *See Degrate v. State*, 712 S.W.2d 755 (Tex.Crim.App.1986); *Pumphrey v. State,* 689 S.W.2d 466 (Tex.Crim.App.1985). The Texas Rules of Appellate

Procedure must be followed and legal reasons for a petition to be granted require a firm grasp of the legal and factual aspects of the case for which review is sought, a knowledge of relevant procedural and substantive law, and access to current Court of Criminal Appeals and courts of appeals decisions. This task is difficult for a seasoned attorney. It is neigh on impossible for in indigent, *pro se* defendant.

The due process deprivations that indigent defendants encounter due to the current statutory scheme are severe. Not only is a defendant being denied his right to a fair and full review to the court of last resort in Texas but missing this critical step in the appellate process also has an impact on many federal appellate issues. If an indigent defendant, lacking education and sophistication, is unable to maneuver through the complicated legal process to file a PDR, that defendant has then also lost his right to proceed to the Supreme Court on a certiorari petition, as a certiorari does not lie from a decision of a Texas court of appeals absent an unsuccessful PDR. Filing a PDR also has an impact on the statute of limitations for a federal writ under 28 USC Section 2254, as if there is no PDR, then there is no possibility of certiorari petition to the Supreme Court and the 90 days for filing certiorari, which exist if a PDR is filed, is not added to the one year statute of limitation because when no PDR is filed, the court of appeals opinion becomes final when the time frame for filing the PDR expires.

Therefore, a PDR can be a critical step in the appellate process and by denying

indigent defendants the right to court appointed counsel at this critical stage in the appellate process, we are, in all practical ways, denying them the right to any further appellate avenues that may be open to them. Clearly, due process rights are infringed by our current appellate process.

And this is all being done simply because they are too poor to hire their own attorney and too uneducated to maneuver through a highly technical process on their own. Which brings us to the serious equal protection concerns in the current statutory deprivation of appellate rights.

All litigants, both rich and poor, should have meaningful access to discretionary review. Compensation for appellate counsel who, in their professional judgment and after consulting with their clients, choose to file petitions for discretionary review will help provide equal protection for indigents in the appellate process. Although compensation will not ensure that appointed counsel will choose to petition this Court in every deserving case, it will help avoid unfair denial of review in many cases. *Peterson v. Jones*, 894 S.W.2d 370, 378 (Tex. Crim. App. 1995).

Under the present scheme, persons who can afford an attorney are treated differently from persons who cannot, as persons who can afford an attorney have the benefit of the professional experience, education and judgment of an appellate attorney to draft and file their PDR whereas indigent defendants are left to their own

devices. This is not only detrimental to the individual indigent defendant, but to all citizens of our state. To illustrate this point, I would point the courts attention to the case of *Ross v. State,* 543, S.W.3d 227 (2018).

In *Ross,* the Appellant applied for a court appointed attorney, but was denied when the court found that she was not indigent. Ms. Ross then hired undersigned counsel who drafted and filed her PDR. After granting the PDR, this Court, in an unanimous decision, reversed a conviction that was not only a miscarriage of justice, but also set right a holding that would have hamstrung CPS investigators across the state, leading to more Texas children being in harm's way. Had Ms. Ross not been able to find the resources to hire counsel, the chances of her being able to file a PDR at all, let alone drafted one in such a way as to highlight the legal issues that allowed for it to be granted, would have been slim to none. The current statutory scheme not only denies indigent defendants their right to due process and to equal protection under the law, but also prevents this court from being made aware of miscarriages of justice across the state that have potential impact on millions of Texas citizens, all because we expect indigent defendants to have the education and sophistication to craft a PDR worthy of being granted by this Court.

We can no longer hide behind our excuses. We can no longer pretend that indigent defendants have a "right" to PDR any more than they would have the "right" to a jury trial or the "right" to a direct appeal if they were denied assistance of

counsel. It is time for this Court to set this right. It is time for this Court to interpret 26.04j(2) to read, as the plain language reads, that indigent defendants are entitled to court appointed attorneys until their appeals are exhausted, which includes an attorney to assist in the preparation of a petition for discretionary review.

XI. Conclusion and Prayer

For the reasons stated in this petition, the Court of Appeals erred by affirming the Judgment and sentence, and: (1) decided an important question of state and federal law that should settled by the Texas Court of Criminal Appeals; and (2) decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Texas Court of Criminal Appeals and the Supreme Court of the United States. *See* Tex. Rule App. Proc. 66.3 (2017). Appellant respectfully prays that this Court grant discretionary review, reverse the *Judgment* and sentence, and enter a judgment of acquittal.

Respectfully submitted,

/s/Jessica McDonald
Jessica McDonald
PO Box 9318
Greenville, Texas 75404
Phone: 903-458-9108
Fax: 903-200-1359
jessica@jessicamcdonaldlaw.com
Texas Bar No. 24000994
Attorney for Appellant

XII. Certificate of Services

I certify that on July 31, 2019, a true and correct copy of this document was served on Hunt County District Attorney Nobie Walker by Texas efile to nwalker@huntcounty.net, and on Stacey Soule, by Texas efile to stacey.soule@spa.texas.gov, and information@spa.texas.gov. See Tex. Rule App. Proc. 9.5 (2017) and Tex. Rule App. Proc. 68.11 (2017).

XIII. Certificate of Compliance with Tex. Rule App. Proc 9.4

I certify that this document complies with: (1) the type-volume limitations because it is computer-generated and does not exceed 4,500 words. Using the word-count feature of Microsoft Word, this document contains 3763 words except in the following sections: caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented (grounds for review section), statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix; and (2) the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point font. *See* Tex. Rule App. Proc. 9.4 (2017).

/s/Jessica McDonald
Jessica McDonald

2019 WL 2292334
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Do Not Publish
Court of Appeals of Texas, Texarkana.

Michael Anthony HAMMACK, Appellant
v.
The STATE of Texas, Appellee

No. 06-18-00212-CR
|
Submitted: May 29, 2019
|
Decided: May 30, 2019

On Appeal from the 354th District Court, Hunt County, Texas, Trial Court No. 32355CR

Attorneys and Law Firms

Jessica McDonald, for Michael Anthony Hammack.

Noble D. Walker Jr., Christopher Bridger, for The State of Texas.

Before Morriss, C.J., Burgess and Stevens, JJ.

MEMORANDUM OPINION

Memorandum Opinion by Chief Justice Morriss

***1** During Michael Anthony Hammack's Hunt County jury trial on a charge of interfering with child custody, Rhonda West, investigator with the Texas Department of Family and Protective Services (Department), testified that she and another Department investigator, Amber Davidson, went to Hammack's residence to attempt to serve an Order of Protection of a Child in an Emergency (Order) dated February 27, 2018, that awarded custody of Hammack's child to the Department. At the residence, Davidson explained to Hammack that, pursuant to the Order, they were there to take custody of the child. Davidson testified that Hammack understood such result from the Order, became aggressive, and ordered them off the property. Davidson and West departed, but then took custody of the child at the child's school with the assistance of a peace officer and telephoned Hammack to tell him that the Department (1) had obtained custody of the child as a result of the Order and (2) had thus picked her up at school. The child managed to escape from the Department's possession and was later, temporarily, secreted by Hammack.

As a result, Hammack was convicted of interfering with child custody, sentenced to two years' confinement in state jail, and fined $ 10,000.00. The sentence was suspended and Hammack was placed on five years' community supervision. As a condition of Hammack's community supervision, the trial court ordered him confined to jail for 180 days.[1]

In his sole point of error on appeal, Hammack claims the evidence was legally insufficient to prove he knew he was violating the terms of a judgment or order when he secreted the child. Because we find the evidence legally sufficient to support the conviction, we affirm the trial court's judgment.

In evaluating legal sufficiency of the evidence, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The "hypothetically correct" jury charge is "one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.*

***2** A person commits the state jail felony of interfering with child custody if he or she takes or retains a child "when the person knows that the person's taking or retention violates the express terms of a judgment or order, including a temporary order, of a court disposing of the child's custody." TEX. PENAL CODE ANN. § 25.03(a)(1), (d). Hammack does not contest the fact that he secreted the child in violation of the terms of a temporary order. Instead, he challenges the jury's finding that he had knowledge of the order. While it is the State's burden to prove the element of knowledge beyond a reasonable doubt, knowledge "can be inferred from the acts, words, and conduct of the accused." *Louis v. State*, 329 S.W.3d 260, 269 (Tex. App.—Texarkana 2010), *aff'd*, 393 S.W.3d 246 (Tex. Crim. App. 2012); *see Charlton v. State*, 334 S.W.3d 5, 12 (Tex. App.—Dallas 2008, no pet.) (citing *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002)).

The State indicted Hammack for taking or retaining his child "when the said defendant knew [the retention of the child] ... violated the express terms of ... [an] Order of Protection of a Child in an Emergency." Hammack stipulated that this Order granted the Department the temporary sole managing conservatorship and "the sole right of possession and physical custody" of the child until the March 9, 2018, temporary hearing. A writ of attachment securing the child's possession in favor of the Department was also issued.

At trial, Hammack established that he was never served with the Order. However, the jury was presented with other evidence suggesting his knowledge about its contents.

This record contains the above evidence of the Department's attempt to serve and execute the Order at Hammack's residence and the follow-up telephone call to Hammack. Also, during the call, Hammack reportedly questioned how Davidson had obtained the Order, and, when Davidson replied with the name of the judge who signed the Order, Hammack said, "[T]hat can't be possible because I only work with a different judge." Davidson testified that, as a result of their telephone conversation, Hammack understood the Order and knew that the Department had obtained custody of the child. Davidson asked Hammack to meet her at the office to discuss the situation, but Hammack did not comply. It was after this telephone conversation that the child escaped from the Child Protective Services (CPS).

Kelvin Gene Rhodes, Jr., an officer with the Commerce Police Department (CPD), testified that he was asked to help locate the child. According to Rhodes, the Department believed that the child was at Hammack's house. Rhodes and CPS workers travelled to Hammack's home, but he told them he had not seen the child. Rhodes informed Hammack that the child was "missing from the custody of [the Department]." In Rhodes' opinion, Hammack was not surprised by this information and knew the child was supposed to be with the Department. Rhodes' search of the home revealed that the child was not there.

Alvarado Torres, another investigator with the Department, testified that, shortly after Rhodes confronted Hammack at his house, he saw the child, the child's boyfriend, and Hammack walk into Hammack's mother's house. Torres called the local

police and waited outside. A police officer, Marcus Cantera, testified that he arrived at the house and spoke with Hammack's mother, Linda Hammack. Cantera testified that he told Linda that the child escaped from the Department after the writ of attachment was executed. In searching Linda's home, Cantera heard people talking in the attic and found Hammack on a ladder leading to the attic. Cantera testified that Hammack began yelling and accusing Cantera of violating his constitutional rights. On witnessing the confrontation, Linda recanted her prior consent to Cantera's search of the house. Cantera left, even though he heard people in the attic. He added that Hammack followed him outside and saw Torres' vehicle waiting to transport the child if found. According to Cantera, Hammack "was told about the order before [Cantera] got there" and knew that the Department had temporary custody of the child.

***3** The child was found in Hammack's home on March 6.[2] Davidson and Laura Sumner, the clerk for Choctaw County, Oklahoma, testified that Hammack brought the pregnant child to Oklahoma and consented to her marriage to her older boyfriend on March 5. A copy of the marriage certificate containing Hammack's signature was presented to the jury.

We conclude the evidence is legally sufficient to support the jury's finding that Hammack knew (1) the Order existed, (2) it granted sole custody of the child to the Department, (3) the Department had obtained a writ of attachment to secure the child, and (4) his possession of the child violated the Order. Although he was not formally served with the Order, West, Davidson, Rhodes, and Cantera testified Hammack was notified about the Order and knew the Department had obtained custody of the child. Davidson testified she again told Hammack that the Department had obtained custody of the child after the child was escorted to the CPS office. When the child went missing, Torres saw her, the boyfriend, and Hammack enter, but not exit, Linda's home. This testimony, combined with Cantera's testimony, showed that Hammack was at least participating in the child being secreted in Linda's attic. From this evidence, the jury could infer that Hammack knew he was violating the terms of the Order by possessing the child.

We find the evidence legally sufficient to support the jury's verdict of guilt. Accordingly, we overrule Hammack's sole point of error.

We affirm the trial court's judgment.

All Citations

Not Reported in S.W. Rptr., 2019 WL 2292334

Footnotes

1 The trial court also ordered Hammack to pay $ 3,320.00 in attorney fees for his court-appointed counsel. Hammack informed the trial court that he could afford to pay $ 100.00 in attorney fees per month.

2 According to Torres, the child escaped CPS offices again on March 6.