TEXAS COURT OF CRIMINAL APPEALS

ORDER[1]

The Court grants the State's petition for discretionary review from the decision rendered by the Fifteenth Court of Appeals and request for oral argument as to the following four issues:

1) **When the Governor suspends the operation of a statute by executive order under the Texas Disaster Act, does the executive order need to explicitly state why strict compliance with the statute at issue would in any way prevent, hinder, or delay necessary action in coping with a disaster? If not and the courts may imply an anti-hindrance rationale into such an executive order, was the Governor's Third Emergency Order preempting a county government's local mask mandate done for a legitimate anti-hindrance purpose as required by the Act?**

2) **Does a Texas Disaster Act executive order that retroactively applies a moratorium on confining individuals for criminal violations of TEX. HEALTH & SAFETY CODE ANN. § 81.087 and allows for fine-only punishments violate the Texas Constitution's Pardon Clause?**

3) **Did the trial court err by failing to suppress a medical record that inadvertently disclosed the defendant's unredacted blood alcohol results (released in possible violation of HIPAA) when a valid administrative warrant for medical records permitted the disclosure of only a patient's COVID-19 test results for contact tracing purposes?**

4) **Does a COVID-positive defendant who grabs a police officer's cloth face mask and coughs in his face cause "bodily harm" sufficient to sustain a charge of felony assault on a public servant?**

[1] Official Texas Young Lawyers Association 2021 State Moot Court Competition Problem written by Kirk Cooper, Committee Chair and TYLA District 14 Representative. Committee Chairs Kirk Cooper and Jonathan Zendeh Del thank chair emerita Kaylan Estes Dunn for her helpful comments and editorial assistance.

TEXAS COURT OF APPEALS

FOR THE FIFTEENTH DISTRICT

BALBOA BAY, TEXAS

*** * ***

CAUSE NO. 15-20-00420-CR

Lucille Bluth, Appellant

v.

State of Texas, Appellee.

*** * ***

Appeal from the 915th District Court

En Banc Before Chief Justice LOPEZ and Justices ROYCE, BALVIN, LONDOÑO-ARIAS, MARTIN, MEBARAK, and ANTHONY

OPINION

LOPEZ, C.J., joined by LONDOÑO-ARIAS, ROYCE, and MARTIN, JJ., for the majority—

Lucille Bluth appeals her conviction on one count of violating a public health control order, one count of public intoxication, and one count of felony assault on a public servant. We reverse and render a judgment of acquittal.

BACKGROUND

COVID-19 and the Orange County Mask Mandate

For purposes of this appeal, the following facts are undisputed.

In late 2019, a novel coronavirus traced back to the city of Wuhan in Hubei Province, China, began to spread through the region. This coronavirus, which was transmissible through the air and easily spread, caused a syndrome known as COVID-19. The effects of COVID-19 varied among people who contracted the disease. Some patients who were infected with the coronavirus showed no symptoms. For other patients, COVID-19 caused symptoms no more serious than that of a stronger-than-average cold. However, some COVID-19 patients, especially those over age 65 or with underlying cardiorespiratory conditions, suffered severe, debilitating symptoms that persisted months after the initial infection. Others ended up needed to be put on mechanical ventilators due to extensive lung damage, and many people died. Due to the fast-spreading nature of the disease, health officials worried that a surge of COVID-19 patients would overwhelm healthcare capacity in a given area and lead to a cascading crisis. Because there was then no known cure for COVID-19 and no preventative vaccine, non-pharmaceutical public health measures such as social distancing, quarantines, and increased hygiene were recommended to stop the spread.

While it was initially hoped the COVID-19 outbreak would be contained to Hubei province, the virus spread beyond the region into Europe, other parts of Asia, and Australia, turning an outbreak into a full-blown pandemic. By February 2020, American scientists confirmed that community spread had begun and the novel coronavirus was circulating in the United States. In an attempt to stem the tide of cases and avoid overwhelming local hospital systems with patients while scientists searched for a potential cure or vaccine, most states of the

United States, including Texas, issued unprecedented lockdown orders quarantining their populaces in their homes for a period of six to twelve weeks beginning in March and April of 2020.

In the first of a series of emergency proclamations, the Governor on March 14, 2020, certified that the novel coronavirus was an imminent threat of disaster to all Texas counties under the Texas Disaster Act of 1975, *see* TEX. GOV'T CODE ANN. §§ 418.001-.261, and he ordered all nonessential businesses to operate at 0% capacity, effectively closing large swaths of the state's economy. The First Emergency Order worked in temporarily "flattening the curve" and preventing cases from increasing and overwhelming the hospital system, but the measures came at great economic cost.

Defendant Lucille Bluth was one such Texan who suffered direct economic loss as the result of the COVID-19 lockdowns. Bluth lost $20,000 when she was unable to have her annual "Cinco de Cuatro" celebration on May 4th, and the lockdown measures began to grate on her psychologically as she stayed in isolation with her adult son. Growing increasingly agitated, Bluth began posting material on social media advocating against the lockdown measures and gained a significant social media following after the hashtag #LucilleUncaged began trending on Twitter.

Meanwhile, after granting an initial 30-day extension for the lockdowns required by the First Emergency Order, the Governor allowed the First Emergency Order to expire on May 15, 2020. The expiration of the First Emergency Order meant that while there were no emergency directives at the state level, local governments were free to exercise their inherent powers and those powers granted to them by the Texas Disaster Act and the Texas Health and Safety Code.

On June 1, 2020, the Governor announced that Texas was "back open for business" and released his Second Emergency Order. The order lifted statewide occupancy requirements on certain businesses, including bars and restaurants, from 0% to 25%, and prevented local governments from setting occupancy limits below those minimums. The Second Emergency Order contained an explicit finding that the Governor found this action "necessary to balance the need for health measures with the need for Texans to get back to work and keep the economy from shutting down." Apart from raising business occupancy limits to a fixed level across the State, the Second Emergency Order did not prevent local governments from using their own disaster management authority to address other issues.

On June 15, 2020, Orange County Judge Lisa Jimenez directed the local health authority to issue an order requiring all residents of Orange County, including those residing in Balboa Bay, to wear face coverings any time they were in public. The order specified that failure to comply with the face covering requirement could result in criminal penalties including fines and imprisonment under Section 81.087 of the Texas Health and Safety Code.

The so-called "mask mandate" sparked an outcry among some citizens of Orange County, including Bluth. Bluth used her social media influence to ask her followers to put pressure on their political representatives to put a stop to the health measure that she felt restricted her freedom. In a Twitter post that obtained more than 1,000 likes, Bluth posted a picture of herself and told her followers: "It's time @TXGovernor put a stop to tyrants like Lisa Jimenez who want us to wear masks. I spent on lot of money on this face, and there is no way in hell I am covering it up with some rag!"

On June 20, 2020, following public outcry and calls for protest, the Governor issued a terse third emergency order, the entirety of which reads as follows:

> By the power vested in me as Governor under the Texas Disaster Act, I hereby suspend Section 81.087 of the Texas Health and Safety Code and any other statutes to the extent necessary to accomplish the following stated directive: no local entity may mandate the wearing of face coverings enforceable by fines or imprisonment. Any such order to the contrary currently in force or adopted after this date is void and unenforceable.

That evening, Judge Jimenez held a press conference regarding the Governor's Third Emergency Order. At the press conference, Judge Jimenez continued to urge people to wear face coverings in public voluntarily and stated that the Orange County Attorney's Office was reviewing the Governor's order to determine what the county's options were moving forward. When asked if she would continue forward with enforcing criminal penalties for failure to wear a face mask, Judge Jimenez responded, "if there is a way for us to do that legally and it's appropriate under the circumstances, absolutely." She also stated, when asked about whether she believed her actions constituted an invasion of personal liberty, "I do not, but if anybody would like to try me on this, we can always hash this out in court."

Lucille Bluth is Arrested for Allegedly Violating the Mask Mandate

On July 4, 2020, Bluth, enraged by Judge Jimenez's comments, announced on Twitter that she would publicly defy the mask order in protest and that anyone who wished to join her could do so at a local bar named Señor Tadpole's. A 30-second video clip from social media admitted at trial showed Bluth standing on a chair in the bar patio with a drink in her hand addressing a crowd of about 20 people. Most members of the audience were holding cans of beer and were not wearing masks. In the clip, Bluth told the crowd that she was "not afraid of a little flu" and that "crazy Judge Jimenez isn't going to muzzle me!" Bluth also coughed loudly and cleared her throat several times, which caused the crowd to laugh.

Orange County Sheriff's Officer Abel Tesfaye was dispatched to the protest site after receiving a report that there was a disturbance going on in an entertainment district known as

The Hills. Upon arriving, Officer Tesfaye witnessed a crowd of about 20 people surrounding a woman he would later come to learn was Lucille Bluth. At trial, Officer Tesfaye testified that as he approached, most members of the crowd began to put on their masks, but Bluth stared him down before rolling her eyes and saying, "great. Here come the fake police ready to take me away for telling you all the truth." When asked if the crowd was unruly in any way, Officer Tesfaye stated that initially protestors were angry but peaceful, but he had a feeling something bad would happen, testifying that he could "feel it coming."

Officer Tesfaye approached Bluth and asked her to come down off the chair and speak with him. He also advised her that by not wearing a mask, she was in violation of a local health control measure but that if she put on a mask, he would let her off with a verbal warning and she would not be criminally prosecuted. Witnesses testified that as she descended down from the table, Bluth swung her arm at Officer Abel Tesfaye's face and grabbed his cloth face mask, which snapped back into his face, causing Officer Tesfaye to shout. She then leaned toward him and coughed in his face as he attempted to arrest her for violating the mask mandate.

The Contact Tracing Investigation

Because Bluth complained about a pain in her foot while in the back of the police car, police transported her to the Saint Walter Mercado Medical Center following her arrest. At St. Walter's, Bluth's blood was drawn for a standardized infectious disease assay by Nurse Selena Quintanilla Gomez. Bluth's blood was also tested for alcohol or drugs, as was standard procedure. At the time of her admission, Bluth's body temperature was 100.3 degrees.

At a pretrial suppression hearing, Nurse Gomez testified that when she asked Bluth if it was okay to draw her blood, Bluth waved her hand around and said, "take it. See if I care. Run

whatever damn test you want. I have the money to pay for whatever ghoulish medical treatment you do, you bloodsuckers. I could buy and sell you and all your friends!"

While Bluth's blood samples were being analyzed, Officer Tesfaye asked Nurse Gomez for access to the lab results, telling her that the results were necessary to engage in contact tracing. Nurse Gomez told Officer Tesfaye that St. Walter's policy was to not release medical information without a valid court order. Nurse Gomez testified that Officer Tesfaye then became agitated, telling her in a loud voice that he didn't need a warrant for the records because "we're in the middle of a damn pandemic" and that the health department needed to know if Bluth was COVID-positive in order to begin contact tracing efforts before the virus spread further. Nurse Gomez testified that Officer Tesfaye's actions frightened her, so she printed out the blood test results and handed them to Officer Tesfaye at 4:58 p.m., the time that was handwritten in a notation on the printout. The results showed that Bluth was positive for COVID-19.[2] The printout also contained Bluth's unredacted blood alcohol content test results (0.15). A magistrate judge issued a valid administrative health warrant for Bluth's COVID-19 information at 5:10 p.m.

On cross-examination, Nurse Gomez testified that Officer Tesfaye did ultimately show her a copy of a PDF document on his cell phone that he said was an administrative warrant signed by a judge, but that she could not read the specifics of the documents because Officer Tesfaye was "waving his phone in [her] face." She reiterated that she handed Officer Tesfaye the printout before she was shown the purported warrant.

[2] Nurse Gomez testified that because Bluth tested positive for COVID-19, hospital regulations required that any remaining blood from Bluth's blood draw be immediately destroyed to prevent the potential spread of disease.

Bluth was initially indicted on the sole charge of violating a public health order on July 15, 2020. That day, Bluth posted on Twitter: "Lisa Jimenez is trying to throw ME in jail when SHE is the one violating the law! @TXGovernor where r u??? #FreeLucille #LucilleUnmasked."

On July 17, 2020, following a spike in cases across the State, the Governor appeared at a press conference wearing a face mask and urged Texans to follow his lead and "mask up." He also issued his Fourth Emergency Order, which stated as follows:

> The Third Emergency Order is hereby rescinded effective immediately. This Fourth Emergency Order takes its place and is operative immediately upon my signature.
>
> The scientific consensus shows that the wearing of face coverings is an effective way to prevent the spread of airborne diseases like COVID-19 in public spaces while still allowing people to maintain some freedom of movement during a pandemic. Therefore, I suspend Section 81.087 of the Health and Safety Code as well as any other statutes to the extent necessary to accomplish the following directive:
>
> Local governments may issue face covering mandates, but any face covering mandate may be enforced by fine only and not through confinement. This prohibition on local governments' ability to confine persons for violation of a local face covering mandate applies to any and all conduct occurring before, after, or on the effective date of this order.
>
> I find that a fine-only approach to face covering enforcement is the least restrictive means to promote public health by creating an incentive to wear face coverings that does not infringe on the civil rights of Texas citizens.

Procedural History

In addition to the count of violating a public health control order, Bluth was later charged with public intoxication, TEX. PENAL CODE ANN. § 49.02(a), and felony assault on a public servant, TEX. PENAL CODE ANN. §§ 22.01(a), (b-2). Orange County prosecutors only sought probation for the assault and intoxication charges, but they indicated that if Bluth was convicted on the health control order violation charge, they would seek a sentence up to the maximum extent permitted by Section 81.087. Counsel for Bluth, Barry Zuckerkorn, argued to the trial

court that a sentence of confinement was not permitted by the Fourth Emergency Order, and he filed a motion asking the trial court to prevent Orange County prosecutors from arguing for confinement. The trial court never ruled on Zuckerkorn's motion.

At a pretrial hearing on Bluth's motion to suppress the blood test evidence, Officer Tesfaye was asked why he did not seek a criminal warrant to obtain the BAC information after he learned of it while conducting the preliminary administrative contact tracing investigation. Office Tesfaye testified that he did not get a warrant because he was in a mandatory quarantine for 14 days following his exposure to Bluth. Once he was released from quarantine and placed back on active duty, Officer Tesfaye learned that in the days following Bluth's blood draw, St. Walter's Hospital, other healthcare providers, and several government agencies were subject to a ransomware attack that affected certain patient records, including those of Bluth. Officer Tesfaye testified that because the original file containing the lab results had been locked in the ransomware attack, because St. Walter's has a policy not to pay ransoms in cyberattacks, because there was an extremely low likelihood that an IT professional would be able to open the file, and because the original blood sample had been destroyed pursuant to St. Walter's infectious disease protocols, obtaining a warrant was futile and the paper copy handed to him by Nurse Gomez remained the only extant copy of the test results. The trial court denied Bluth's motion to suppress,[3] and the printout containing the unredacted BAC information was ultimately admitted at trial.

Following trial, the jury found Bluth guilty on all charges, and she elected to be sentenced by the trial judge. The trial court sentenced her to one year in prison on the assault of a

[3] Neither side requested fact findings in connection with the trial court's suppression ruling.

public official charge, probated for six months; one day in county jail for the public intoxication charge; and one day for the violation of a public health order along with a $500 fine.

This appeal followed. We set this case for expedited consideration.

DISCUSSION

In Issue One, Bluth argues that she cannot be criminally prosecuted for violating the Orange County mask mandate order because that order had been preempted by the Governor's Third Emergency Order by the time she was arrested. In Issue Two, Bluth contends that her public intoxication conviction must be reversed because the State's only valid evidence against her came in the form of unredacted lab results that should have been suppressed under the Fourth Amendment because she did not consent to their release and she had a reasonable expectation of privacy in the records. And in Issue Three, Bluth urges us to reverse her felony assault on a public officer conviction because the State failed to prove beyond a reasonable doubt that her actions caused Officer Tesfaye bodily harm.

With respect to the health order violation charge, the State advances two arguments in support of conviction: first, that the Third Emergency Order did not, in fact, preempt contrary local mask mandates, and second, the Fourth Emergency Order's retroactive restriction on imposing confinement for violation of a mask mandate health order was an attempted gubernatorial commutation that was unconstitutional under the Pardon Clause of the Texas Constitution.

We agree with Bluth on all her issues. For clarity's sake, we will regroup the parties' arguments into four main subject matter areas for our analysis.

1.

Did the Governor act within the scope of his authority under the Texas Disaster Act of 1975 in suspending Orange County's mask mandate?

The Texas Disaster Act distributes various powers and responsibilities among various officials and entities across all levels of state government. *See generally State v. El Paso Cty.*, -- S.W.3d --, No. 08-20-00226-CV, 2020 WL 6737510, at *5 (Tex. App.—El Paso Nov. 13, 2020, no pet.). Some of these powers overlap as between the Governor and local officials acting in their capacity as disaster managers for their county. *Id*. However, "[j]ust as a servant cannot have two masters, the public cannot have two sets of rules to live by, particularly in a pandemic" and particularly "when those rules carry criminal penalties substantially impacted peoples' lives and livelihood." *Id.* at *11. Thus, when there is a conflict between a valid emergency executive order issued under the Act and a valid county-level emergency order issued under the Act, the Governor's executive order controls over the county-level order. *See id*.

Neither side disputes that the Orange County local health control order requiring masks was valid at the time it was issued, and neither side disputes that the Third Emergency Order by its own terms explicitly purports to preempt the Orange County order. The question for us on appeal is whether *the Governor* issued his Third Emergency Order validly under the conditions set by the Texas Disaster Act. In an interesting twist of fate, the State argues that the State's chief executive's order is invalid, whereas Bluth contends the Governor's order is valid and preemptive.

The Governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster. *See* TEX. GOV'T CODE ANN. § 418.016(a). Orange

County insists that Bluth's conviction is valid because the Governor's Third Emergency Order failed to articulate an explicit, rational reason why the Orange County mask mandate in any way prevented, hindered, or delayed necessary action in coping with a disaster. Without such an explicit articulation, the State argues that the Third Emergency Order is defective under the Texas Disaster Act and does not preempt the Orange County mask mandate. We disagree.

The State criticizes the Governor's Third Emergency Order because it does not explicitly detail how local mask mandates like the one imposed by Orange County prevented, hindered, or delayed necessary action in coping with a disaster. This elevates form over substance. The order preempting mask mandates came as part of a general plan to balance the needs of public health, the need to keep the State's economy moving, and the need to preserve individual liberty. That the Governor omitted explicit findings should not be fatal here, especially in the context of a crisis. The Governor's intentions may be understood contextually. The Governor is this State's Chief Executive. We will not tie his hands in dealing with public health emergencies. *See Abbott v. Anti-Defamation League Austin, S.W. & Texoma Regions*, 610 S.W.3d 911, 918 (Tex. 2020).

The State also complains that to the extent explicit anti-hinderance findings are not required, the Third Emergency Order still fails to pass muster under the Texas Disaster Act because there is no rational basis explaining how suspension of the enabling statute giving counties the ability to autonomously manage disasters so as to prevent the imposition of a mask mandate in any way prevented necessary action in coping with the coronavirus. We again disagree. The Governor has wide berth to deal with crises as he sees fit. He may take many factors into account, including the economic side of disaster recovery and undesirable practical consequences unrelated to the disaster. *Id*. His determinations are entitled to deference, and we as judges cannot and will not second guess his judgment.

Because the Third Executive Order preempted the Orange County mask mandate, Bluth's conviction for violation the mask mandate cannot stand. We reverse the public health order violation conviction and render a judgment of acquittal as to that charge.

2.

Assuming that the Governor's Second Emergency Order contravening local mask mandates was void, did his Third Emergency Order retroactively suspending imprisonment penalties violate the Constitution's Pardon Clause?

Although our resolution of the preemption matter in Issue One means we do not necessarily need to discuss the effect of the Fourth Emergency Order, we chose to do so here to respond to arguments raised by the dissent. The State contends not only that the Third Emergency Order failed to preempt the Orange County mask mandate, but also that the Fourth Emergency Order's retroactive prohibition on confinement as a punishment violated the Pardon Clause of the Texas Constitution. We again disagree.

A pardon is an act of grace proceeding from the power entrusted with the execution of the laws which exempts the individual from the punishment the law inflicts for a crime he has committed. *See Vandyke v. State*, 538 S.W.3d 561, (Tex. Crim. App. 2017). Article 4, Section 11(b) of the Texas Constitution, which deals with the Governor's pardon powers, states:

> In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction, on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishment and pardons; and under such rules as the Legislature may prescribe, and upon the written recommendation and advice of a majority of the Board of Pardons and Paroles, he shall have the power to remit fines and forfeitures. . . .

The Pardon Clause makes clear that a pardon or other act of clemency can only occur *after* conviction. The Governor's actions here came *before* conviction. Further, the Governor's

actions were not directed at one specific individual, but were made as part of an overarching emergency management plan. We view the Governor's action in preempting local governments as being more akin to an act of prosecutorial discretion than one of clemency. Mechanically, the Fourth Executive Order suspends the ability of local governments to undertaken prosecutions in a manner contrary to the Governor's directive. The Fourth Executive Order does not "forgive" any crimes. How could it when at the time of its issuance, Bluth's conviction was not final, and an act of grace requires a final conviction?

Thus, to the extent we are incorrect about the Third Emergency Order suspending the ability to prosecute Bluth altogether, we would still be correct that it was error for the trial court to sentence Bluth to one day of confinement against the Governor's directive in the Fourth Emergency Order.

3.

Did the disclosure of Bluth's BAC results violate the Fourth Amendment?

In Issue Three, Bluth contends that the trial court erred by not suppressing her medical records from St. Walter's containing unredacted BAC information released in possible violation of HIPAA. We agree. The admission of these records was reversible error.

The Fourth Amendment protects person both from searches that result in physical trespass to their persons, houses, papers, and effects, and from the breach of privacy when the person has a reasonable expectation of privacy in particular information. A person has a privacy interest in their medical records, *see generally State v. Martinez*, 570 S.W.3d 278 (Tex. Crim. App. 2019), and at the risk of stating the obvious, there is no coronavirus exception to the Fourth Amendment. This case is similar to *Martinez*, as many of the same factors that made the blood draw in that case subject to suppression are present here. This case is even worse than *Martinez*

in that Officer Tesfaye's high-pressure attempts to coerce the test results from Nurse Gomez taint the process.

The State argues that Bluth's statement "take it, see if I care" constituted consent. This is absurd. At the time of the blood draw, Bluth was intoxicated and suffering from a fever, which casts serious doubts on her mental state. *See Martinez*, 570 S.W.3d at 288 (blood drawee's lack of consent considered as a factor in Fourth Amendment analysis). Simply put, the release of her unredacted BAC results to the police constituted an unwarranted invasion of her privacy, and the BAC result should have been suppressed.

Without the evidence of Bluth's BAC from the printout, the evidence is legally insufficient to establish that Bluth was intoxicated beyond a reasonable doubt. The only evidence of Bluth's intoxication came from the testimony of Officer Tesfaye, which was equivocal. What Officer Tesfaye described as belligerence can also be explained by Bluth's passionate protest and need to raise her voice to communicate a message to a noisy crowd in an outdoor venue. Bluth's bloodshot eyes could be equally explained by the fact that during the protest, Bluth was overcome with emotion and began weeping. And his claim that he could smell alcohol coming off Bluth when he was surrounded by other protestors who were holding beers is not worthy of credence. In short, this equivocal evidence does not meet the stringent burden of proof beyond a reasonable doubt.

We reverse the judgment of conviction as to public intoxication and render an acquittal on that count.

4.

Was the evidence sufficient to convict for felony assault on a public servant?

Finally, we address the State's most egregious prosecutorial overreach as presented in Bluth's Issue Four, to wit: her conviction on one count of felony assault on a public servant. Here, the evidence is legally insufficient to support the element of bodily injury beyond a reasonable doubt.

A person commits an offense if the person intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse. Tex. Penal Code Ann. § 22.01(a)(1). The offense of assault is generally a Class A misdemeanor. *Id.* § 22.01(b). However, if the assault is committed against a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant, the offense is a third-degree felony. *Id.* § 22.01(b). When the assault is committed against a peace officer, the offense is a second-degree felony. *Id.* § 22.01(b-2). Bluth was convicted of the second-degree felony.

Bodily injury as used in the assault statute means physical pain, illness, or any impairment of physical condition. TEX. PENAL CODE ANN. § 1.07(8). While this definition is broad and may encompass relatively minor physical contacts, it does not encompass "mere offensive touching." *Lane v. State*, 763 S.W.2d 785, 786 (Tex. Crim. App. 1989).

Officer Tesfaye testified on direct examination that when Bluth grabbed his cloth face mask, it "popped back against his face like a rubber band," and one other witness to the assault testified that she heard Officer Tesfaye shout out when the mask snapped back. However, on cross-examination, Officer Tesfaye testified as follows:

Q. You shouted when the mask snapped back in your face?

A. Yes, that's right.

Q. Was that shout because you felt pain or because you felt surprised?

A. Well, getting hit in the face with your own mask is surprising, so it could have been both.

Q. It could have been both. Sounds like you're not too sure—

[PROSECUTOR]: Objection, Your Honor. That's not a question, that's a comment. Argumentative.

THE COURT: Sustained. You're on thin ice, counsel.

[BY DEFENSE COUNSEL]:

Q. Officer Tesfaye, have you ever been in a physical altercation with a suspect before?

A. Yes, several times.

Q. Have you ever been punched in the face?

A. I have.

Q. Have you ever been kicked?

A. I have.

Q. So you know what pain is.

A. I do.

Q. And you as a big, burly police officer who's been punched in the face and kicked by suspects expect this jury to believe that you experienced pain from having a piece of cloth hit you in the face? Because an elderly woman tugged at your face mask? (indicating)

[PROSECUTOR]: Objection, Your Honor. Argumentative.

MRS. BLUTH: Who are you calling elderly, you piece of—

THE COURT: Mrs. Bluth, sit down and stay quiet. You've been warned about your outbursts. One more and I'll hold you in contempt. The objection is overruled. Officer, answer the question.

A. It snapped back into my face like a rubber band.

Q. But did it hurt you?

A. It made my eyes water. What do you think?

Q. I don't know why your eyes were watering. You tell me. Did it cause you pain? Are you telling me you can't feel your face?

A. Yes. It caused me pain. On like the elastic part on the side around my ears.

Q. Really?

A. Yes, really.

Q. I don't see any scars on your face, so I'm guessing it didn't break the skin, is that right?

A. It left a red mark.

Q. Did you take a picture of the red mark?

A. Why would I take a picture of the red mark?

Q. I ask the questions here, Officer. Did you take a picture of this supposed injury?

A. I was too busy trying to manage an uncooperative suspect who coughed on me and forced me to go into a 14-day quarantine—

[DEFENSE COUNSEL]: Objection, Your Honor. He's not answering the question.

THE COURT: Officer, please answer the question asked. Counsel, repeat your question.

Q. Did you take a picture of this phantom red mark?

A. No.

Q. You mentioned you were in quarantine after your interaction with my client. What is your COVID status?

A. I'm negative.

Q. Have you ever had COVID?

A. No.

Q. Were you allowed to have your cell phone in quarantine?

A. Yes.

Q. Does your cell phone have a camera?

A. Yes.

[DEFENSE COUNSEL]: Nothing further.

Based on the testimony above, no reasonable juror could infer that snapping a cloth face mask would result in any sort of significant pain. The evidence is legally insufficient to support a

finding that Bluth's actions surpassed mere offensive touching and resulted in actual bodily injury to Officer Tesfaye.

The statute does provide that illness can constitute bodily injury, and the State argued illness as an alternative ground of bodily injury in the trial court based on Bluth's coughing on him. But Bluth's coughing on Officer Tesfaye did not result in "bodily injury" because Officer Tesfaye did not, in fact, contract COVID-19. Because Officer Tesfaye did not contract illness from Bluth's actions, the evidence is insufficient to support the assault on a public servant charge.

Because none of the three charges are supported by legally sufficient evidence, we reverse the judgment of the trial court and render a judgment of acquittal in favor of Lucille Bluth to remedy this stunning example of prosecutorial overreach.

IT IS SO ORDERED

*** * ***

CONCURRING/DISSENTING OPINION

ANTHONY, J., concurring in part and dissenting in part—

I join in the majority's analysis as to the health order violation charge and the public intoxication charge and vote to reverse and render a judgment of acquittal on those charges.

I agree with the majority that the felony assault on a public servant charge cannot stand because the evidence is legally insufficient to show that Officer Tesfaye suffered any actual pain. I also agree that the felony assault on a public servant charge cannot be sustained on an "illness" theory of bodily harm because the evidence affirmatively shows that Officer Tesfaye remains healthy and free of COVID-19. On this point, Bluth lucked out. I would not discount that

possibility that if Officer Tesfaye had contracted COVID-19 from Bluth, the felony assault on a public official charge could theoretically pass muster under the statute. But since Officer Tesfaye is COVID-19 negative, the evidence here is legally insufficient to support the public servant assault charge on an illness theory. The assault on a public servant charge is obviously overkill and being shoehorned into a set of facts that do not support conviction on this charge.

That said, before we reverse a conviction, we must determine whether the conviction may be reformed to a lesser-included offense. *See Thorton v. State*, 425 S.W.3d 289 (Tex. Crim. App. 2014). I believe that by reading illness as a potential bodily injury, Bluth's conduct falls squarely within the ambit of at least two misdemeanor assault offenses: misdemeanor assault by threat from Bluth coughing on him during a pandemic ("intentionally or knowingly threatens another with imminent bodily injury") or misdemeanor assault by offensive physical contact with Officer Tesfaye's person under Section 22.01(c). Additionally, I note that *attempt* to commit assault on a public servant is a lesser-included offense of assault on a public servant as a matter of law, *see* TEX.CODE CRIM.PROC. ANN. art. 37.09(4), meaning that under *Thornton*, we must give serious consideration to reforming the judgment to reflect criminal attempt if the facts so warrant reformation.

Here, I believe a reasonable juror could find that Bluth intended to make Officer Tesfaye sick with COVID-19 by coughing on him, and that her actions would have caused him bodily harm in the form of illness but for the fact that by the grace of God he did not end up contracting the disease even though Bluth later turned out to be COVID-positive. Since we must reform to the most serious lesser-included offense, and since I believe the evidence was sufficient to show that Bluth was *attempting* to give Officer Tesfaye COVID-19, I would vote to reform the

judgment to reflect a conviction for attempted assault on a public servant and remand that aspect of this case for further sentencing.

With these comments, I concur in part and respectfully dissent in part.

* * *

DISSENTING OPINION

MEBARAK, J., joined by BALVIN, J., dissenting—

The majority mischaracterizes the record and breezes past serious legal questions on its way toward granting Lucille Bluth a full acquittal on all charges. Because there are no reversible errors apparent from this face of this record, I dissent.

Violation of a Public Health Directive

The majority contends that the Governor's Third Emergency Order is valid despite never stating a reason why he broadly suspended unspecified statutes as a way to reverse engineer a commandeering of local governments. This is astounding. The majority's opinion fundamentally misunderstands the nature of gubernatorial power in Texas. While this appeal turns on the interpretation of a statute, we also cannot ignore the constitutional strictures imposed on the Governor in interpreting the statute that gives the Governor this extraordinary power.[4]

History teaches us that the framers of this State's current constitution, adopted in 1876, did not share a unitary executive-type ideology that elevated the Governor above all others. Far from it. Conventioneers "limited his powers by setting forth his duties in great detail," and split powers traditionally associated with a unitary chief executive among several directly-elected officials accountable to the electorate instead of vesting them all with the Governor. *See State v.*

[4] The constitutionality of the Governor's actions are not at issue in this appeal.

El Paso Cty., -- S.W.3d --, No. 08-20-00226-CV, 2020 WL 6737510, at *13 (Tex. App.—El Paso Nov. 13, 2020) (Rodriguez, J., dissenting) (citing A. J. Thomas, Jr. & Ann Van Wynen Thomas, *The Texas Constitution of 1876*, 35 TEX. L. REV. 907, 912-13 (1957)).

The Framers, in addition to weakening the Governor's powers as a way to ensure the balance of powers horizontally among the three branches of state government, also intended to limit the Governor's powers vertically over local governments. Indeed, the 1876 Constitution was a reaction against a Reconstruction government that imposed its will on, and countermanded laws and orders made by, duly-elected local government authorities during Reconstruction. "The convention was determined to cut down on the governor's power to prevent a future renewal of executive despotic control over state or local administrations[.]" *Id*.

Unlike the federal constitution from which executive authority may be implied by silence, it is clear from its level of detail that the Texas Constitution constrains the Governor's powers both horizontally and vertically. We must presume Legislature understood this constitutional limitation placed on the Governor in passing the Texas Disaster Act, and while we must always construe a statute from a plain language perspective, we must also not construe a statute to contravene the Constitution, if at all possible.

The Third Emergency Order does not indicate what "necessary action in coping with a disaster" was being prevented, hindered, or delayed by the Orange County mask mandate. We cannot and should not imply authority from silence. The fact that the statute granting the Governor the power to suspend laws only under certain enumerated circumstances implies that he must make his reasons plain so his actions may be subject to judicial review. I would find that the failure to include an explicit finding of hinderance rendered the Third Emergency Order void ab initio.

Even if we could possibly imply a hinderance finding into silence, in this case, I also see no logical way that local mask mandates would serve to hinder the state's response to coping with the coronavirus pandemic disaster such that the Governor was justified in suspending enabling statutes. Indeed, the Governor's own Fourth Emergency Order recognized that the scientific consensus showed that face masks were effective. To say that we can imply hinderance findings into the Third Emergency Order when none exist, and then to say that we must defer to those implied hinderance findings because he is the Governor, we are in a crisis, and he must have had a good reason to suspend statutes is not only unreasonable, it is nonsensical, especially when the Governor himself later admitted that mask mandates work. There must be some limit to the Governor's power.

It was only *after* Bluth violated that the mask mandate that the Governor issued the Fourth Executive Order (perhaps, I speculate, after realizing that the rushed Third Emergency Order was defective). In terms of articulating a rationale sufficient to pass muster under the Texas Disaster Act, the Fourth Executive Order comes closer to hitting the mark, though I still foster serious doubts about the Governor's ability to undercut local governments even under the terms of the Fourth Executive Order.

But putting that issue aside, the Governor's action in retroactively suspending confinement as punishment after Bluth was already under a live indictment clearly constituted an attempted pretrial commutation. The majority holds that the Governor's action was not one of clemency but one of quasi-prosecutorial discretion. But the Governor's actions were not only forward-looking. They applied to retroactively change punishment ranges for people like Bluth who had already committed crimes and were under indictment, thereby lessening their potential sentencing exposure.

A commutation is a gubernatorial act of clemency that changes a punishment assessed to a less severe one. *Vandyke*, 538 S.W.3d at 574. That is precisely what the Governor's Fourth Emergency Order attempted to do, plain and simple.[5] The fact that the Fourth Executive Order was framed as an emergency health order does not change its character as a commutation. "The substance of the proclamation and not the name by which it is designated controls its effects." *Ex parte Lefors*, 303 S.W.2d 394 (Tex. Crim. App. 1957).

In order for a commutation order to be valid, the Governor's clemency powers are conditioned upon approval from the Board of Pardons and Paroles. *See Rose v. State*, 752 S.W.2d 529, 531-32 (Tex. Crim. App. 1987). Additionally, the Governor's clemency power can only be exercised "after conviction," not before. TEX. CONST. art. 4 Sec. 11(b). Because the Governor's attempt to commute sentences was not first approved by the Board of Paroles and Pardons as required by the Texas Constitution, the Governor's order is unconstitutional to the extent it applies retroactively. As such, I would find there is no impediment to holding Bluth accountable for her reckless behavior and prosecuting her to the fullest extent of the law.

Public Intoxication

The majority cites *State v. Martinez* as its basis for finding that Bluth's BAC results should be suppressed. *Martinez* is a highly fact-specific case, and the majority selectively omits crucial facts from the suppression hearing in this case and credits the testimony of Nurse Selena Quintanilla Gomez without ever considering contrary evidence from Officer Tesfaye, who despite the majority's attempt to paint him as a rookie, is actually a seasoned law enforcement

[5] The majority is correct that the Fourth Emergency Order is structured to try and limit the ability of local prosecutors to pursue certain punishments, but then the majority claims that the *trial court* erred by sentencing Bluth to confinement contrary to the Governor's order. Because the judiciary does not directly answer to the Governor generally under the separation of powers doctrine *except* when the Governor is exercising clemency powers, the only way it would have been "error" for the trial court to sentence Bluth to one day of confinement is if the Governor was attempting to exercise a clemency power. Otherwise, this is merely an attempt to cover up a serious defect in the order by conflating prosecutorial discretion and judicial punishment powers.

officer.[6] The majority snubs Officer Tesfaye, but we must consider his testimony as well, since the trial court denied the motion to suppress.

Although the majority takes it as fact that Nurse Gomez's handwritten annotation that the records printout was prepared at 4:56 p.m. definitively establishes that Officer Tesfaye obtained the results prior to him receiving electronic notice of the administrative warrant at 5:10 p.m., the majority leaves out that at the suppression hearing, Officer Tesfaye testified that he informed Nurse Gomez that a request for an administrative warrant for Bluth's COVID test results was pending and suggested that Nurse Gomez "print up her records" so that they could be transmitted to the health department in the event the warrant was approved, as contact tracing needed to begin immediately. However, according to Officer Tesfaye, Nurse Gomez did not turn over the records to him until after he showed her the PDF of the approved administrative warrant he received at 5:10 p.m., which he said Nurse Gomez studied carefully. And contrary to Nurse Gomez's account, Officer Tesfaye testified that his interaction with Nurse Gomez was friendly, and that the two held a light conversation and joked around while waiting for confirmation of the administrative warrant to come through. The trial court could have credited Officer Tesfaye's testimony over Nurse Gomez's testimony as to timeline and found that Officer Tesfaye followed proper procedures.

As for the scope issue, the majority does not contest that the administrative warrant for Bluth's COVID test results was valid and done for the purposes of contact tracing. The inclusion of the unredacted BAC information was an inadvertent error made on the part of Nurse Gomez.

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[6] Q. How long have you been with the Orange County Sheriff's Department?
A. This is my third year.
Q. But this isn't your first job in law enforcement, correct?
A. That is correct. I previously worked for the local police department.
Q. And how long in total have you worked in law enforcement?
A. Seven years I've been swimming with the sharks now.

There is no evidence the State specifically requested it, or, more specifically, the trial court resolved any conflicting evidence against suppression. While the disclosure of Bluth's BAC may have constituted a HIPAA violation on St. Walter's part,[7] the State's use of that information at trial is not unconstitutional. *See State v. Huse*, 491 S.W.3d 833, 841-43 (Tex. Crim. App. 2016) (stating that the passage of HIPAA did not give defendant a reasonable expectation of privacy against grand jury subpoena for medical records under Fourth Amendment). The trial court did not err by declining to suppress the BAC test results.

Separate and apart from the blood results, there is other evidence in the record supporting the jury's finding that Bluth was publicly intoxicated. The majority's sufficiency analysis raises the specter of the long-discredited equipoise doctrine, which is not the current standard for sufficiency. Under the proper contemporary standard, the evidence is more than sufficient to show intoxication beyond a reasonable doubt. When asked about Bluth's appearance upon first confronting her at Señor Tadpole's, Officer Tesfaye testified that Bluth had glassy bloodshot eyes and smelled strongly of alcohol. On cross-examination, Officer Tesfaye reaffirmed his belief that the smell coming from Bluth was alcohol and not her perfume, stating that he knew what alcohol smelled like and that it smelled like she had been "drinking tequila by the liter." He also testified that her belligerent attitude, her presence outside a bar around other people who were drinking alcohol, and the fact that she was holding a margarita glass and waving it around "like a party monster" led him to believe she was intoxicated.

[7] Nurse Gomez did acknowledge that St. Walter's HIPPA Compliance Office initiated an internal review of why Bluth's BAC information had not been redacted before Nurse Gomez handed the material to Officer Tesfaye. The compliance officer cleared Nurse Gomez of any wrongdoing, finding that Nurse Gomez's actions were the result of Officer Tesfaye's "heartless" efforts to coerce her into giving him Bluth's medical records in the absence of proof of a valid warrant. I note this information simply to point out that it could serve to impeach Nurse Gomez's credibility by showing she may have had an incentive to avoid discipline for a HIPAA violation resulting from her failure to properly redact documents by blaming Officer Tesfaye for her mistake.

For the aforementioned reasons, I would affirm the judgment as to the public intoxication count.

Assault on a Public Servant

Finally, I would also affirm the assault on a public servant (peace officer) charge. While it is always preferable for the complainant to affirmatively state he suffered pain during the alleged assault, such testimony is not required to sustain a conviction; the jury is permitted to draw reasonable inferences about pain based on the circumstances surrounding the assault. *See Guzman v. State*, 552 S.W.3d 936, 942 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd). Here, a reasonable juror could find beyond a reasonable doubt that Officer Tesfaye suffered sufficient pain from Bluth's actions to constitute bodily harm, as the bodily harm threshold for an assault charge like this one is extremely low. *See, e.g., Smith v. State*, 587 S.W.3d 412, 420 (Tex. App.—San Antonio 2019, no pet.) (hair pulling sufficient to show physical pain).

CONCLUSION

Lucille Bluth violated multiple laws and endangered multiples lives in the context of a historic pandemic. The majority's vote to acquit Bluth, especially given the trial court's already lenient sentence, represents a gross miscarriage of justice. For the reasons stated above, I would vote to affirm. Because the majority does not, I respectfully dissent.