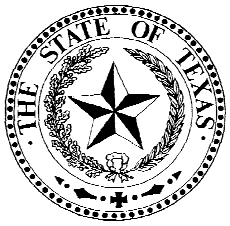
Affirmed and Opinion filed April 4, 2002.



In The

Fourteenth Court of Appeals

NO. 14-01-00561-CR

MARTIN PEREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 361st District Court
Brazos County, Texas
Trial Court Cause No. 27,874-361

O P I N I O N

Martin Perez appeals a conviction for aggravated sexual assault[1] on the ground that the trial court erred in refusing his request to instruct the jury on the lesser included offense of sexual assault. We affirm.

The complainant was beaten and sexually assaulted in a cell at a State juvenile incarceration facility. Appellant's indictment alleged as an aggravating element of

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[1] A jury convicted appellant and sentenced him to seventeen years confinement.

appellant's sexual assault that he placed the complainant in fear that serious bodily injury would be imminently inflicted on the complainant.[2]

Prior to submission of the charge to the jury, appellant requested, but was denied, a jury charge instruction on the lesser included offense of sexual assault.[3] On appeal, he challenges that ruling on the ground that there was evidence that he did not commit the aggravating element, *i.e.*, threatening the complainant with serious injury.

A defendant is entitled to an instruction on a lesser included offense if: (1) proof of the charged offense includes the proof required to establish the lesser included offense,[4] and (2) there is some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. *Ferrel v. State*, 55 S.W.3d 586, 589 (Tex. Crim. App. 2001). Because it is not disputed in this case that sexual assault is a lesser included offense of aggravated sexual assault, the first prong is satisfied, and we will confine our attention to the second prong. As to that prong, anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser included offense charge. *Id*. However, it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. *Solomon v. State*, 49 S.W.3d 356, 369 (Tex. Crim. App. 2001). Rather, there must be some evidence from which a rational jury could acquit the defendant of the greater offense while convicting him of the lesser included offense. *Feldman v. State*, 63 S.W.3d 416, 427 (Tex. Crim. App. 2001).

In this case, there was testimony that appellant participated in the beating of the complainant which coerced him to submit to the sexual assault. However, appellant asserts

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2 *See* TEX. PEN. CODE ANN. § 22.021(a)(2)(A)(ii) (Vernon Supp. 2002) (including among the aggravating elements for aggravated sexual assault that the actor, by acts or words, places the victim in fear that serious bodily injury will be imminently inflicted on any person).

3 *See* TEX. PEN. CODE ANN. § 22.011 (Vernon Supp. 2002) (defining sexual assault).

4 *See* TEX. CODE CRIM. PROC. ANN. art. 37.09(1) (Vernon 1981) (defining lesser included offense as an offense that is established by proof of the same or less than all the facts required to establish the commission of the offense charged).

that one of the witnesses, Leary, testified that, before the assault, appellant was standing against the wall watching and that Leary did not see appellant strike the complainant until after the sexual assault occurred. Appellant contends that this testimony by Leary was evidence that appellant did not threaten the complainant and thereby entitled him to a charge instruction on the lesser included offense of sexual assault.

However, Leary testified that while the complainant was being beaten before the sexual assault, Leary was looking "out the door to make sure no staff was coming." When then asked whether appellant had been involved in hitting the complainant, Leary answered that he didn't remember and "didn't see any." This testimony does not show that appellant did not hit the complainant before the sexual assault, but only that Leary did not see or did not remember whether appellant did so. Therefore, it was not evidence showing that appellant was guilty of only sexual assault and did not entitle him to a charge on that lesser included offense. Accordingly, appellant's sole point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed April 4, 2002.
Panel consists of Justices Hudson, Fowler, and Edelman.
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