Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00188-CR

Hardy Burl **PURVIS**, IV,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 25th Judicial District Court, Guadalupe County, Texas
Trial Court No. 17-0050-R-B
Honorable William D. Old, III, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: June 17, 2020

AFFIRMED

Hardy Burl Purvis, IV was convicted by a jury of aggravated assault with a deadly weapon. The sole issue presented on appeal is whether the trial court erred in denying Purvis's request for the inclusion of an instruction on the lesser included offense of assault in the jury charge. We affirm the trial court's judgment.

BACKGROUND

Purvis was living with his parents when he entered their bedroom with a baseball bat. Purvis testified he heard someone outside by his truck and was concerned someone was attempting

to burglarize the truck. Purvis further testified he entered his parents' bedroom to retrieve the "relays" his father removed from his truck so he could check on his truck. The testimony of Purvis and his parents conflicted as to whether Purvis was floundering or flailing the bat around. Purvis's father testified he retrieved a gun from the windowsill and yelled at his wife to run. At that point, his wife left the bedroom. Purvis and his father both testified that Purvis struck his father resulting in him dropping the gun. Purvis testified he only used his hands in striking his father, while Purvis's father testified Purvis struck him on the elbow with the bat. During the ensuing struggle, Purvis's father testified Purvis struck him repeatedly with the bat, while Purvis testified he only tried to prevent his father from grabbing the gun by striking him with his fists.

Purvis was subsequently indicted for committing the offense of aggravated assault with a deadly weapon. During trial, when defense counsel noted on the record he was going to request a charge on the lesser included offense of assault, the following exchange occurred:

> [Defense Counsel]: I'm also going to ask for a lesser included assault bodily injury. I think there's at least a scintilla of evidence that if he did do this, he only did it with his hands, and that's assault.
>
> [Prosecutor]: We can argue it during the charge conference; but the rule is that if there is some evidence of it, it's that he's only guilty of the lesser included and not the greater offense, and I don't think you meet that burden.
>
> [Defense Counsel]: I think there's some evidence and the law says it could be the slightest amount of evidence. He's testified. He's been subject to cross-examination. He admits to hitting him. I think if the jury doesn't buy self-defense, then they should be allowed to consider assault bodily injury.
>
> THE COURT: Well, either they buy that he used the bat, or they didn't so — I mean, the charge is there as an assault with a deadly weapon, that's what he's indicted for. If the jury believes that he didn't use the bat, then he's acquitted. So, that doesn't get you — I mean, that doesn't get you the instruction.

At the formal charge conference, defense counsel reurged the request, which the trial court denied. The jury found Purvis guilty of aggravated assault with a deadly weapon, and Purvis appeals.

STANDARD OF REVIEW AND APPLICABLE LAW

"We use a two-step analysis to determine if a defendant is entitled to a lesser-offense instruction." *Ritcherson v. State*, 568 S.W.3d 667, 670 (Tex. Crim. App. 2018). "First, we compare the statutory elements of the alleged lesser offense and the statutory elements and any descriptive averments in the indictment." *Id.* at 670–71. "This is a question of law, and it does not depend on the evidence to be produced at trial." *Rice v. State*, 333 S.W.3d 140, 144 (Tex. Crim. App. 2011).

"Second, there must be evidence from which a rational jury could find the defendant guilty of only the lesser offense." *Ritcherson*, 568 S.W.3d at 671. "The issue is not whether a rational jury could have found [Purvis] guilty of [aggravated assault with a deadly weapon]; it is whether a jury could have reasonably interpreted the record in such a way that it could find [Purvis] guilty of only [assault]." *Id.* at 676. "When determining whether there is evidence that would allow a jury to find that, if a defendant is guilty, he is guilty of only the lesser-included offense, appellate courts examine the entire record and cannot 'pluck[] certain evidence from the record and examin[e] it in a vacuum.'" *Id.* at 677 (quoting *Enriquez v. State*, 21 S.W.3d 277, 278 (Tex. Crim. App. 2000)). "The evidence must establish the lesser-included offense as a valid rational alternative to the charged offense." *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011) (internal quotation marks omitted).

IS ASSAULT A LESSER INCLUDED OFFENSE OF THE OFFENSE CHARGED?

Turning our attention to the first prong of the analysis, we must first determine whether assault is a lesser included offense of aggravated assault with a deadly weapon as charged in the indictment. As the State notes in its brief, *Irving v. State*, 176 S.W.3d 842 (Tex. Crim. App. 2005), guides our analysis.

A. *Irving*

In *Irving*, Charles Ray Irving was convicted of aggravated assault. 176 S.W.3d at 843. On appeal, Irving argued "the trial court erred in failing to instruct the jury on the lesser-included offense of simple assault." *Id.* The Beaumont court of appeals held Irving was entitled to the instruction and reversed and remanded the cause to the trial court. *Id.* The Texas Court of Criminal Appeals reversed the Beaumont court, holding Irving was not entitled to the lesser included offense instruction. *Id.* at 846.

Irving and the victim had known each other for almost twenty years and had previously lived together. *Id.* at 843. The victim testified she found Irving inside her house when she arrived home on the day of the offense. *Id.* She testified Irving was holding a bat and told her "it was 'her day to die,'" before striking her several times with the bat. *Id.* The victim further testified she and Irving fell against a glass shelf during the attack, and the glass cut her head. *Id.* at 843–44. The victim crawled out her front door for help when Irving went to get a towel to stop the victim's bleeding, and a neighbor helped the victim and called police. *Id.* at 844. The victim suffered a broken ankle, leg, and arm, and a head laceration. *Id.* at 843–44.

Irving testified the victim invited him to meet her at her home so he could retrieve some of his personal belongings. *Id.* at 844. Irving further testified he picked up a bat when the victim started cursing at him but stated he threw the bat down and denied ever striking the victim with the bat. *Id.* He admitted he physically struggled with the victim, and they fell into the glass shelves. *Id.* He further admitted the victim went out the door when he went to get her a towel for the cut she sustained. *Id.* Irving testified he saw the victim lying in the walkway outside the door when he returned, and he assumed her injuries were the result of her falling on the walkway. *Id.*

Irving was indicted for aggravated assault. *Id*. at 845. The indictment contained two separate theories: (1) Irving attacked the victim with a deadly weapon; to wit, a baseball bat; and (2) Irving caused the victim serious bodily injury by hitting her with a bat. *Id*.

At trial, Irving requested an instruction for the lesser offense of simple assault based on his "conduct of grabbing the victim and eventually falling on top of her, and not hitting the victim with a baseball bat." *Id*. at 846. The Texas Court of Criminal Appeals first noted "simple assault may be a lesser-included offense of aggravated assault in some cases;" however, Irving was "asking for a lesser-included offense instruction based on facts not required to establish the commission of the offense *charged*." *Id*. at 845 (emphasis in original). "In other words, the conduct constituting the lesser-included offense for which [Irving] requested an instruction is different from the conduct which was alleged in the charging instrument for [Irving]'s aggravated-assault charge." *Id*. The court held Irving was not entitled to the instruction "because the same facts or less than the same facts required to prove the greater aggravated assault offense are not required to prove the assault offense." *Id*. at 846. "[A]ssault by means of grabbing the victim and eventually falling on top of her is not a lesser-included offense of aggravated assault by striking the victim with a bat." *Id*. The court concluded, "Assault by grabbing and falling on someone may be a lesser-included offense of aggravated assault in some instances, ***but not as the greater offense was charged in the indictment in this case***." *Id*. (emphasis added).

B. Analysis

The analysis in *Irving* emphasizes the importance of the comparison that must be made under the first prong of the test. The statutory elements of the requested lesser offense must be compared to the statutory elements of the greater offense "***and any descriptive averments in the indictment***." *Ritcherson*, 568 S.W.3d at 670 (emphasis added). In *Irving*, the descriptive

averments included attacking the victim with a bat and causing serious bodily injury by hitting the victim with a bat. 176 S.W.3d at 845.

In the instant case, Purvis was indicted for "intentionally, knowingly, and recklessly caus[ing] bodily injury to [his father] by striking him in the head and/or back with a baseball bat, and the defendant did there and then use or exhibit a deadly weapon, to-wit: baseball bat during the commission of the assault." Accordingly, the only theory of aggravated assault alleged in the indictment was that Purvis assaulted his father by striking him with a bat, which was a deadly weapon.[1] As a result, Purvis striking his father with a bat is the conduct alleged in the indictment. Because Purvis striking his father with his hands is different from the conduct alleged in the indictment, simple assault is not a lesser included offense of aggravated assault in this case, and the trial court did not err in denying the instruction. *Irving*, 176 S.W.3d at 846; *see also Flores v. State*, No. 14-17-00745-CR, 2019 WL 2536004, at *4 (Tex. App.—Houston [14th Dist.] June 20, 2019, no pet.) (mem. op., not designated for publication) ("Misdemeanor assaults based on appellant striking Gomez with his fists are not lesser-included offenses of an aggravated assault based upon appellant shooting Gomez with a firearm because they do not involve the same conduct as the conduct charged in the indictment. As a result, while there was affirmative evidence from defense witnesses that appellant and Gomez punched each other, were part of a larger brawl, and that a third-party was the shooter, those facts do not require a lesser-included offense instruction here because they are different from those required to prove that appellant shot Gomez with a firearm as alleged in the indictment."); *Harris v. State*, No. 02-15-00424-CR, 2017 WL 1173832,

[1] This differs from *Irving* where the indictment alleged the second theory of aggravated assault by causing serious bodily injury to the victim by hitting her with a baseball bat. Because the indictment in the instant case only alleged "bodily injury" this second theory was not alleged in the instant case. *See* TEX. PEN. CODE ANN. § 22.02(a) ("A person commits [the] offense [of aggravated assault] if the person commits assault as defined in § 22.01 and the person: (1) causes serious bodily injury to another, including the person's spouse; or (2) uses or exhibits a deadly weapon during the commission of the assault.").

at *2 (Tex. App.—Fort Worth Mar. 30, 2017, no pet.) (mem. op., not designated for publication) ("Here, the indictment alleged that Harris shot Derrick with a firearm. Because punching Harris in the face is not the same conduct as shooting Harris in the face, simple assault is not a lesser-included offense.")

CONCLUSION

The trial court's judgment is affirmed.

Liza A. Rodriguez, Justice

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