In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-18-00360-CR

JORGE LUIS OVALLEGUTIERREZ, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 213th District Court
Tarrant County, Texas
Trial Court No. 1458422R; Honorable Louis E. Sturns, Presiding

July 10, 2020

QUINN, CJ., and PIRTLE and PARKER, JJ.

MEMORANDUM OPINION

A jury convicted Appellant, Jorge Luis Ovallegutierrez, of murder[1] and assessed his sentence at twenty-eight years of confinement in the Correctional Institutions Division of the Texas Department of Criminal Justice. Appellant timely filed a *Notice of Appeal* to the Court of Appeals for the Second District of Texas in Fort Worth. This appeal was

[1] TEX. PENAL CODE ANN. § 19.02(b)(1), (2) (West 2019).

subsequently transferred to this court by an order of the Texas Supreme Court.[2] Through a single issue, Appellant contends the trial court erred by denying his request for a jury instruction on the lesser-included offense of manslaughter. We affirm the judgment of the trial court.

BACKGROUND

Appellant was convicted of murdering Jaime Mantilla with a knife following a brief encounter in April 2016. At the time of the encounter, Appellant and his wife, Stephanie Ovalle, were estranged—Appellant was living and working in Odessa, Texas, and Stephanie was living with her parents in Fort Worth, Texas. Appellant believed that he and Stephanie were on the verge of reconciling when he learned she was romantically involved with Jaime.

On Sunday, April 3, 2016, Appellant traveled from Odessa to Fort Worth to discuss his marriage with Stephanie. When he arrived, Appellant drove to his in-laws' residence. Rather than approach the residence, Appellant chose to park his vehicle at an adjacent business and wait. That evening, Stephanie's extended family gathered at her parents' house for a backyard barbeque. A short time later, Jaime arrived and began socializing in the backyard with Stephanie's family. At the time, Stephanie was not present.

Later that evening, after observing Jaime at Stephanie's parents' house, Appellant exited his vehicle. He then returned to the vehicle to retrieve a large knife. Appellant

[2] Originally appealed to the Second Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Second Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

approached Jaime, exclaiming, “I’ve been looking for you.” As he spoke, Appellant swung the knife in Jaime’s direction, hitting him in the arm and in the chest. Within seconds, Jaime collapsed to the ground as Appellant made his way back to his vehicle and fled the scene. By the time the Fort Worth police arrived on the scene, Jaime’s pulse had stopped. He was promptly transported to the hospital where he was pronounced dead.

At approximately 4:15 the next morning, a veteran police officer observed a suspicious vehicle at a convenience store in Del Rio, Texas. He decided to check its license plate. Earlier, the Del Rio Police Department had received a “be on the lookout” report concerning Appellant and his vehicle. When the license plate on the suspicious vehicle matched Appellant’s vehicle, the police officer detained and subsequently arrested Appellant. Appellant’s vehicle was impounded so that a search warrant could be procured. A subsequent search of the vehicle revealed a “black and orange camouflage knife” that was stained with blood which ultimately matched Jaime’s DNA profile.

Critical to Appellant’s issue on appeal, through the use of an interpreter, Appellant gave an oral statement to detectives of the Fort Worth Police Department that was admitted into evidence at trial as State’s Exhibit 48. Because Appellant did not testify at trial, he contends this evidence raised a sufficient basis entitling him to an instruction with respect to the lesser-included offense of manslaughter. Using State’s Exhibit 48, defense counsel questioned the Del Rio police officer who served as an interpreter between Appellant and the Fort Worth detectives. In a parsing of words and a disagreement as to the proper translation of Spanish to English, defense counsel elicited the interpreting officer’s agreement that a proper interpretation of Appellant’s statement was that “[he]

wanted to *do it* because of what [Jaime] was doing to [Appellant] with regard to [his] wife more than anything." Under questioning by defense counsel, the interpreting officer admitted it was the police detectives who interjected the phrase "get him or hurt him" into the interview and further admitted that prior to that point Appellant had only said that he wanted to "do it." The interpreting officer also admitted Appellant stated he "simply wanted to . . . hurt and hit" someone.

At the conclusion of the presentation of evidence, Appellant requested a written instruction regarding the lesser-included offense of manslaughter. The trial court denied Appellant's request and the matter was presented to the jury based on two separate theories of murder.

CHARGED OFFENSE—MURDER

Appellant was charged with the offense of murder in a two-count indictment alleging alternate theories. TEX. PENAL CODE ANN. § 19.02(b)(1), (2) (West 2019). Count One of the indictment alleged that on April 3, 2016, Appellant "intentionally or knowingly cause[d] the death of an individual, Jaime Mantilla[,] by stabbing him with a deadly weapon, to wit: a knife . . . ." Count Two of the indictment alleged that, on that same day, Appellant did "intentionally, with the intent to cause serious bodily injury to Jaime Mantilla, commit an act clearly dangerous to human life, namely, stabbing him with a deadly weapon, to wit: a knife . . . which caused the death of Jaime Mantilla."

LESSER-INCLUDED OFFENSES

Numerous intermediate appellate courts, including this court, have held that a trial court's decision to grant or deny a request for the inclusion of a lesser-included offense

instruction in the charge of the court to the jury is a matter which should be reviewed under an abuse of discretion standard. *See Speed v. State*, No. 07-13-00034-CR, 2015 Tex. App. LEXIS 171, at *12 (Tex. App.—Amarillo Jan. 9, 2015, pet. ref'd.) (mem. op., not designated for publication) (citing *Jackson v. State*, 160 S.W.3d 568, 574 (Tex. Crim. App. 2005)). The Fort Worth Court of Appeals has held the same. However, in doing so, it specifically noted that "[a] trial court has no discretion in determining what the law is or applying the law to the facts." *See Cardona v. State*, No. 02-15-00036-CR, 2015 Tex. App. LEXIS 12800, at *10 n.6 (Tex. App.—Fort Worth Dec. 17, 2015, pet. ref'd) (citing Larry A. Klein, *The Evolved Appellate Brief*, 37 Litigation 38, 40 (2010) ("There is generally no discretion for a court not to instruct on a theory of the case, such as . . . a lesser included offense.")). In *Cardona*, without specifically applying an abuse of discretion standard of review, the Fort Worth Court of Appeals found that because a lesser-included instruction was required by law, the trial court committed reversible error by refusing Cardona's specific request for such an instruction. *Cardona,* 2015 Tex. App. LEXIS 12800, at *10.

Determining whether an accused is entitled to a lesser-included offense instruction requires a two-prong analysis. *Goad v. State*, 354 S.W.3d 443 (Tex. Crim. App. 2011) (citing *Hall v. State*, 225 S.W.3d 524, 528 (Tex. Crim. App. 2007)). The first prong involves an examination as to whether proof of the asserted lesser offense is, in fact, included within the proof necessary to establish the charged offense. *Rousseau v. State*, 855 S.W.2d 666, 672-73 (Tex. Crim. App. 1993). The circumstances under which an offense is a lesser-included offense of the charged offense is a matter determined by

statute.[3] *See* TEX. CODE CRIM. PROC. ANN. art. 37.09 (West 2006); *Hall*, 225 S.W.3d at 527-28. Application of this first prong is a question of law. *Hall*, 225 S.W.3d at 535.

The second prong of the analysis considers whether there is sufficient evidence of record to permit the jury to rationally find that the accused, if guilty at all, is guilty *only* of the lesser-included offense. *Rousseau*, 855 S.W.2d at 673. The second prong is a question of fact requiring an evaluation of all the evidence presented at trial to determine if there is some evidence that would permit a rational jury to find the accused guilty only of the lesser offense. *Mathis v. State*, 67 S.W.3d 918, 925 (Tex. Crim. App. 2002). In determining whether this second prong has been met, "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather, there must be some evidence directly germane to the lesser-included offense for the fact finder to consider before an instruction on a lesser-included offense is warranted." *Hampton v. State*, 109 S.W.3d 437, 441 (Tex. Crim. App. 2003) (finding no instruction was warranted because there was no evidence germane to the lesser-included offense); *Goad*, 354

[3] Article 37.09 of the Texas Code of Criminal Procedure provides:

An offense is a lesser included offense if:

(1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

(2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;

(3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or

(4) it consists of an attempt to commit the offense charged or an otherwise included offense.

S.W.3d at 447 (finding instruction was warranted where there was evidence from which a rational jury could find the accused guilty of the lesser-included offense).

As a reviewing court, we must consider all of the evidence admitted at trial, not just evidence presented by the party requesting the lesser-included instruction, *Bullock v. State*, 509 S.W.3d 921, 925 (Tex. Crim. App. 2016), and while a mere scintilla of evidence is sufficient to warrant the giving of a lesser-included instruction, we must carefully examine the evidence to ascertain whether there is "some evidence directly germane to the lesser-included offense." *Roy v. State*, 509 S.W.3d 315, 317 (Tex. Crim. App. 2017); *Cavazos v. State,* 382 S.W.3d 377, 385 (Tex. Crim. App. 2012) (holding that the appellate court must consider whether there was some evidence from which a rational jury could acquit the accused of the greater offense of murder and still convict him of the lesser-included offense of manslaughter).

In *Cavazos*, the Court of Criminal Appeals held that in the prosecution of the offense of murder under section 19.02(b)(2) of the Texas Penal Code, there must be some affirmative evidence that the accused did not intend to cause serious bodily injury when he shot the victim, as well as affirmative evidence from which a rational jury could infer that the accused was aware of but consciously disregarded a substantial and unjustifiable risk that death would occur as a result of his conduct. *Cavazos*, 382 S.W.3d at 385. In other words, the evidence must be sufficient to establish the lesser-included offense as a "valid, rational alternative" to the charged offense. *Id.* (quoting *Forest v. State*, 986 S.W.2d 365, 367 (Tex. Crim. App. 1999)).

If, as here, the jury is charged on alternative theories, the second prong of the lesser-included test is met "only if there is evidence which, if believed, refutes or negates every theory which elevates the offense from the lesser to the greater." *Richardson v. State*, 568 S.W.3d 667, 671 (Tex. Crim. App. 2018) (quoting *Arevalo v. State*, 970 S.W.2d 547, 549 (Tex. Crim. App. 1998) (per curiam)). This is so because only if every theory properly submitted to the jury is challenged would the jury be authorized to find the accused guilty *only* of the lesser-included offense. *Arevalo*, 970 S.W.2d at 549.

LESSER-INCLUDED OFFENSE—MANSLAUGHTER

Appellant contends manslaughter is a lesser-included offense to the offense of murder under both theories of murder charged in the indictment. A person commits the offense of manslaughter if he recklessly causes the death of an individual. *See* TEX. PENAL CODE ANN. § 19.04(a) (West 2019). A person acts recklessly if he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. *Id.* at § 6.03(c) (West 2011).

Applying the standard found in article 37.09 of the Texas Code of Criminal Procedure, manslaughter is a lesser-included offense to the offense of murder under section 19.02(b)(1) (knowingly or intentionally causing the death of an individual) because "it differs for the offense charged only in the respect that a less culpable mental state suffices to establish its commission," i.e., recklessly causing the death of an individual. *See* TEX. CODE CRIM. PROC. ANN. art. 37.09(3) (West 2006).

The question of whether manslaughter is a lesser-included offense to the offense of murder under section 19.02(b)(2) (intentionally causing serious bodily injury and

committing an act "clearly dangerous to human life that causes the death of an individual") requires a more complex analysis. Applying the cognate-pleadings approach, an appellate court must determine whether the indictment charging the defendant with murder under section 19.02(b)(2) alleges the elements of manslaughter, or elements and facts from which all the elements of manslaughter may be deduced. *Cavazos*, 382 S.W.3d at 382. In *Cavazos*, the Court of Criminal Appeals concluded that "causing death while consciously disregarding a risk that death will occur differs from intending to cause serious bodily injury with a resulting death only in the respect that a less culpable mental state establishes its commission." *Id.* at 384 (citing TEX. CODE OF CRIM. PROC. ANN. art. 37.09(3)). Based on the reasoning of the Court of Criminal Appeals in *Cavazos*, we conclude that manslaughter is a lesser-included offense to the offense of murder as charged in Count Two of the indictment, alleging Appellant caused the death of Jaime Mantilla, while committing an act clearly dangerous to human life, namely, stabbing him with a deadly weapon, to wit: a knife.

We thus turn to the second prong of our analysis to determine whether there is sufficient evidence of record to permit the jury to rationally find that if Appellant is guilty of any offense, he is only guilty of the lesser-included offense. *Rousseau*, 855 S.W.2d at 673. In doing so, we must give particular attention to whether there is some evidence directly germane to the lesser-included offense which would authorize a rational jury to find that, if Appellant is guilty of any offense, he is only guilty of the lesser-included offense. *Roy*, 509 S.W.3d at 317; *Cavazos*, 382 S.W.3d at 385. Additionally, we must remain mindful of the requirement that, to be sufficient, the evidence must establish the

lesser-included offense as a "valid, rational alternative" to the offense charged. *Roy*, 509 S.W.3d at 317.

ANALYSIS

Here, Appellant did not testify. He did not tell the jury he was merely reckless in his actions and did not intend to cause Jaime's death, nor did he tell the jury that he only intended to cause serious bodily injury. Instead of direct testimony which, if believed, could have refuted an intent to cause Jaime's death, Appellant relies on the translator's interpretation of the statements he made to the Fort Worth detectives. While it is true that the evidence supporting a lesser-included offense may be weak or contradicted, the evidence must still be "directly germane" to the lesser-included offense and it must rise to the level that a rational jury could find that if Appellant is guilty of any offense, he is only guilty of the lesser-included offense. Meeting this threshold requires more than mere speculation—it requires affirmative evidence that both supports the lesser-included offense and rebuts or negates an essential element of the charged offense. *Roy*, 509 S.W.3d at 317.

Here, Appellant contends that evidence adduced at his trial suggests he "might not have intended to [cause Jaime's death] or cause serious bodily injury." According to his view of the evidence, the translation of his statement to the Fort Worth detectives suggests he lacked the requisite culpable mental state to kill or cause serious bodily injury since he was merely "poking" Jaime with a knife. He argues that this evidence, if believed by the jury, would have allowed it to conclude he was reckless by consciously disregarding the substantial and unjustifiable risk that Jaime might die of the injuries inflicted when he was "poked" by Appellant with the knife. The medical examiner's report

illuminates the absurdity of this argument. That report showed Appellant repeatedly stabbed Jaime in his upper torso, causing deep penetrating "sharp-force injuries" requiring sufficient force "to be able to go through the skin, through muscle, and through the ribs." The medical examiner described the wounds as being "deep," with one wound being sufficient to penetrate Jaime's heart. The wounds were sufficiently severe that both the left and right carotid arteries were cut, and the injuries sustained caused both lungs to collapse.

Relying on *Lugo v. State*, 667 S.W.2d 144, 147 (Tex. Crim. App. 1984), Appellant contends that in a case where the sole issue at trial concerns the accused's *mens rea,* the accused is entitled to a lesser-included offense instruction if, based on the evidence presented, the jury could reasonably conclude that the accused's action constituted a conscious disregard of a substantial and unjustifiable risk that harm would result. In *Lugo,* the deceased was shot and killed when the accused pointed a loaded rifle at his wife in an attempt to persuade her to relinquish the keys to a car. Needless to say, the rifle went off and the accused's wife was killed. The accused wanted a lesser-included offense instruction because it was his theory that the rifle accidentally discharged.

What Appellant fails to recognize is that in *Lugo*, the accused testified at trial that he did not intend to kill his wife and that the shooting was an accident. Under the circumstances of that case, such testimony made manslaughter a valid, rational alternative to the charged offense of murder. The Court of Criminal Appeals found the appellant's testimony to be directly germane to the lesser-included offense because such evidence directly rebutted an essential element of the charged offense, to wit: the *mens*

rea of the accused (a critical fact lacking in this case) and it tended to support a finding of guilt as to the lesser-included offense. *Id.* at 149.

Appellant further contends his statements to the Fort Worth detectives show that while he may have intended to "hurt and hit" Jaime, he did not knowingly or intentionally cause his death, as shown by the fact that he was surprised to learn that Jaime had died of the injuries inflicted. But, here again, evidence that he may have been surprised to learn that Jaime died is not affirmative evidence that he did not have the *mens rea* to knowingly or intentionally cause his death. Because no such evidence exists in this case, Appellant has not shown that manslaughter is a valid, rational alternative to the offense of murder, as charged in Count One of the indictment.

As to Count Two of the indictment, to be entitled to a lesser-included offense instruction, there must be some affirmative evidence that Appellant did not intend to cause Jaime serious bodily injury when he "poked" him with a deadly weapon and further, there must be some evidence from which a rational jury could infer that his conduct was merely reckless. The record simply does not support even a weak inference that Appellant did not intend to cause serious bodily injury or that his conduct was merely reckless. His statement to the detectives was that he had every intention to "get" the deceased and that he had the specific intent to "poke" him with a knife he had intentionally retrieved from his vehicle only moments before aggressively confronting the deceased. Because the evidence does not support an inference that Appellant acted recklessly when he "poked" the deceased with a deadly weapon, it does not present a valid, rational alternative to the offense of murder as charged in Count Two of the indictment.

Having conducted the *Hall/Rousseau* two-prong analysis of the evidence presented, we find Appellant did not satisfy the second prong of that analysis. Accordingly, we find the trial court did not err in denying Appellant's request for a lesser-included offense instruction pertaining to the offense of manslaughter. As a result, Appellant's sole issue is overruled.

CONCLUSION

We affirm the judgment of the trial court.

Patrick A. Pirtle
Justice

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