Affirmed; Opinion of March 9, 2000 Withdrawn and Substitute Opinion filed June 1, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01014-CR

RUBEN PALACIOS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 757,349

We withdraw our opinion of March 9, 2000 and substitute the following.

S U B S T I T U T E D O P I N I O N

Ruben Palacios appeals his conviction by jury for the felony offense of burglary of a habitation with intent to commit theft. Appellant's indictment was enhanced with two prior felony convictions. The jury assessed punishment at forty-five years confinement in the Texas Department of Criminal Justice, Institutional Division. In one point of error, appellant complains that the trial court erred in denying his request for a charge to the jury on the lesser included offense of criminal trespass. Because appellant was not entitled to such a charge, we affirm the judgment of the trial court.

BACKGROUND

Mr. Jose Rojas was at home on July 6, 1997 when he heard his dogs barking loudly. Rojas looked out of his window and observed a man and a woman trying to force their way into his neighbor's house. The man had a metal object that resembled a bar in his hand and was using it to open the neighbor's door. Rojas recalled that the man wore a white T-shirt and that the woman wore a T-shirt with green stripes. After observing the two individuals, Rojas called the police.

The police arrived shortly thereafter. Officer Alejandro Munoz proceeded in the direction where the suspects had been reported to be heading. Munoz soon spotted appellant, carrying a television, walking with a woman along a bayou. Officer Munoz identified himself and ordered the suspects to stop. Upon hearing this, appellant dropped the television, began to run, and jumped in the bayou. The female suspect complied with the officer.

Officer Ramona Parnell arrived at the bayou after the female had already been taken into custody. Along the bank of the bayou, she spotted a damaged television set, a VCR, and a white pillow case that contained a crowbar and two remote controls. She also observed appellant swimming in the bayou. The police later apprehended appellant as he made his way out of the bayou.

Gilberto Reyes, the complainant, arrived home after the suspects had been taken into custody. He noticed that his back door had been pried open and that he was missing a nineteen inch television set, a VCR, and two remote controls. He subsequently identified the property recovered from the banks of the Bayou as the same property missing from his home. The white pillow case also belonged to Reyes.

The suspects were taken to the police station, where they were later identified by Mr. Rojas. Rojas said that he recognized the clothing the suspects were wearing as being the same as he had seen earlier.

Barbara Larivee, the co-defendant, was the sole defense witness. Larivee admitted that she committed the burglary. However, she testified that she had falsely told appellant that she was going to her ex-boyfriend's house to pick up some of her belongings. Larivee claimed she instructed appellant to stay down the street while she entered the house. She stated that appellant remained outside the fence while

she jumped over and went to the back door of the house. After taking the television and the VCR from the house, Larivee said that she called to appellant to have him help her carry the objects. Appellant then jumped the fence and helped her move the stolen goods.

Larivee contended that appellant never encouraged her to commit the burglary, didn't plan the burglary with her, and that she didn't tell him that she was committing the burglary. She also testified that appellant never entered the house.

POINT OF ERROR ONE

In his sole point of error, appellant complains of the court's failure to charge the jury on criminal trespass of a habitation, contending that it is a lesser included offense of burglary of a habitation with intent to commit theft. After examining the facts of this case, we find no error in the court's exclusion of the requested charge.

When a defense issue is raised by the evidence from any source and a charge thereon is properly requested, it must be submitted to the jury. *See Gavia v. State*, 488 S.W.2d 420, 421 (Tex. Crim. App. 1973). Entitlement to a jury instruction on a lesser included offense must be made on a case-by-case basis according to the particular facts. *See Livingston v. State*, 739 S.W.2d 311, 336 (Tex. Crim. App. 1987); *Broussard v. State*, 642 S.W.2d 171 (Tex. Crim. App. 1982). In reviewing the facts all of the evidence presented by the State and the defendant must be considered. *See Dowden v. State*, 758 S.W.2d 264, 269 (Tex. Crim. App. 1988); *Lugo v. State*, 667 S.W.2d 144, 147 (Tex. Crim. App. 1984).

The Court of Criminal Appeals has implemented a two-prong test for determining whether a jury must be charged on a lesser-included offense. *See Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985); *Royster v. State*, 622 S.W.2d 442, 444 (Tex. Crim. App. 1981) (opinion on rehearing). First, the lesser included offense must be included within the proof necessary to establish the offense charged. Second, there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense. *See Arevalo v. State*, 943 S.W.2d 887, 889 (Tex. Crim. App. 1997); *Aguilar*

v. State, 682 S.W.2d at 558; *Royster v. State*, 622 S.W.2d at 444. Under the facts of this case, the offense of criminal trespass of a habitation is a lesser included offense of burglary. *See Day v. State*, 532 S.W.2d 302 (Tex. Crim. App. 1975) (analyzing the elements of burglary and criminal trespass). However, the second prong of *Royster*, whether there was some evidence that, if guilty, appellant was guilty of only the lesser included offense of criminal trespass, is not satisfied.

Merely because a lesser offense is included within the proof of a greater offense does not always warrant a jury charge on the lesser offense. *See Creel v. State*, 754 S.W.2d 205, 210 (Tex. Crim. App. 1988); *Lincecum v. State*, 736 S.W.2d 673 (Tex. Crim. App. 1987). Isolated portions of evidence, standing alone and outside the context of the defensive theory offered by the accused, will not justify the submission of a lesser-included offense. *See Godsey v. State*, 719 S.W.2d 578, 584 (Tex. Crim. App. 1986). Moreover, if the evidence raises the issue of whether the accused is guilty only of the charged offense or not guilty of any offense whatsoever, the charge on the lesser offense is not required. *See McKinney v. State*, 627 S.W.2d 731, 732 (Tex. Crim. App. 1982); *Thomas v. State*, 578 S.W.2d 691, 698 (Tex. Crim. App. 1979).

Based on the evidence presented in the instant case, the jury could have found appellant guilty of burglary, or not guilty of any offense whatsoever. The defense advanced the theory that Larivee falsely told appellant that they were going to complainant's house to pick up Larivee's belongings. Larivee, the sole defense witness, testified that appellant never entered the habitation. Such testimony by itself reflects exculpatory statements denying that appellant committed any offense at all. Specifically, such testimony negates the criminal trespass requirement that appellant had notice that entry was forbidden or that he received notice to depart but failed to do so. *See* TEX. PEN. CODE ANN. § 30.05 (Vernon Supp. 2000). The jury had the choice of believing Larivee's exculpatory statements and finding appellant not guilty of any offense, or disbelieving her testimony and finding appellant guilty of burglary. The record shows that while the State raised evidence to refute Larivee's story, none of it suggested that appellant was guilty only of criminal trespass. The second prong of the *Royster* test was not met. The trial court did not err in denying the requested charge. *See Daniels v. State*, 633 S.W.2d 899, 901-02 (Tex. Crim. App. 1982); *McKinney*, 627 S.W.2d at 732. Appellant's sole point of error is overruled.

We overrule appellant's point of error and *affirm* the judgment of the trial court.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed June 1, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig (J. Edelman concurs in the result only).

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