Opinion issued June 4, 2009

In The
Court of Appeals
For The
First District of Texas

NO. 01-08-00222-CR

JULIAN MARS MCKITHAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1108037

MEMORANDUM OPINION

A jury convicted appellant, Julian Mars McKithan, of aggravated sexual assault. Appellant pleaded true to two prior felonies, which were used to enhance punishment: possession of a controlled substance and possession of a controlled

substance with intent to deliver. The jury assessed punishment at life imprisonment. In one issue, appellant contends that the trial court erred by failing to instruct the jury on the lesser-included offense of assault.

We affirm.

Background

Complainant's friend introduced her to Dallas Temple and Ashley Carrera, who sold drugs from their Galleria-area apartment in Houston, Texas. One night in December 2006, after using drugs with Temple and Carrera, complainant left Temple and Carrera's apartment, helping herself to pain pills and about three grams of methamphetamines without paying for them. The next morning, complainant met up with Carrera at a store and followed her back to the apartment. While there, Carrera handed complainant a bottle of water and asked her to bring it to a man in the parking lot. Thirsty from doing drugs the night before, complainant took a drink. She immediately realized that the bottle contained GHB, the "date-rape drug," and she tried to spit it out.[1] She returned to the apartment and tried to make herself vomit. She passed out and remained unconscious for about eight hours.

[1] Complainant testified that she had tried GHB in high school, recognized its salty taste, and would never have taken it intentionally.

When she awoke, she heard Carrera say that she was "lucky" that Carrera was not kicking her in the head. Over the course of several hours, Carrera, Temple, and two other people, Ted Noble and Amanda Spano, assaulted, humiliated, threatened, and interrogated complainant, accusing her of stealing three ounces of methamphetamines and demanding that she return the drugs. Complainant testified that Noble threatened to kill her, handcuffed her, bound her with duct tape, and put her in the shower under cold running water for more than an hour. During the course of the assault, someone cut off complainant's ponytail with a knife. Complainant testified that after she was removed from the shower, Temple told her that he was going to have his friend Jules come over and rape her. Complainant was terrified: she was still recovering from the effects of the GHB, and although she was aware of what was going on around her, she was physically unable to move, resist, or fight back.

Complainant testified that appellant removed her pants and told her he was getting paid to rape her.[2] Complainant testified that appellant assaulted her in the bathroom for about 40 minutes, hitting her, kicking her, punching her in the eye, and sexually assaulting her with his fingers. While she was in the bathroom with appellant, complainant feared for her life because she heard Temple, Carrera, Noble, and Spano discussing kidnapping her, and she was aware that they had guns and rope.

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[2] "He says that he's going to get paid to [f–ck] me."

The assault ended just before a police officer or security guard knocked on the apartment door. Complainant went to the living room and sat on the couch beside appellant, as instructed. She left when appellant told her she was free to leave, and she drove home in her car, which had been ransacked and "mutilated" in an attempt to find the missing drugs. Complainant later learned that a videotape was made of part of her assault, which showed appellant putting his fingers inside of her.

The State charged appellant with aggravated sexual assault in an indictment that alleged, in the disjunctive, several different factors for aggravating the sexual assault. Specifically, the indictment alleged that on or about December 17, 2006, appellant "did then and there unlawfully, intentionally and knowingly cause the penetration of the FEMALE SEXUAL ORGAN of [complainant] . . . by placing A FINGER in the FEMALE SEXUAL ORGAN of the Complainant, without the consent of the Complainant . . . ." The State alleged the following aggravating factors in the disjunctive:

> . . . the Defendant compelled the Complainant to submit and participate by the use of physical force and violence, and by acts and words the Defendant placed the Complainant in fear that SERIOUS BODILY INJURY would be imminently inflicted on [Complainant].
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> . . . the Defendant compelled the Complainant to submit and participate by the use of physical force and violence, and by acts and words the Defendant placed the Complainant in fear that KIDNAPPING would be imminently inflicted on [Complainant].

> . . . the Defendant compelled the Complainant to submit and participate by threatening to use force and violence against the Complainant, and the Complainant believed that the Defendant had the present ability to execute the threat, and by acts and words the Defendant placed the Complainant in fear that SERIOUS BODILY INJURY would be imminently inflicted on [Complainant].
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> . . . the Defendant compelled the Complainant to submit and participate by threatening to use force and violence against the Complainant, and the Complainant believed that the Defendant had the present ability to execute the threat, and by acts and words the Defendant placed the Complainant in fear that KIDNAPPING would be imminently inflicted on [Complainant].
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> . . . the Complainant had not consented and the Defendant knew that the Complainant was unconscious and physically unable to resist, and by acts and words the Defendant placed the Complainant in fear that SERIOUS BODILY INJURY would be imminently inflicted on [Complainant].
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> . . . the Complainant had not consented and the Defendant knew that the Complainant was unconscious and physically unable to resist, and by acts and words the Defendant placed the Complainant in fear that KIDNAPPING would be imminently inflicted on [Complainant].

Appellant testified at trial, denying *sexually* assaulting complainant, explaining that the videotape showed his hands on complainant's upper thighs and his fingers touching only the outside of complainant's vagina, not penetrating it. He testified that he was trying to scare her into telling him where the missing drugs were.

Before the charge conference, appellant requested that the trial court instruct the jury on the lesser-included offenses of "assault, bodily injury, and assault

defensive touching."[3] Appellant also objected to the disjunctive pleading in the indictment. The trial court overruled appellant's objections. The jury convicted appellant of aggravated sexual assault and sentenced him to life imprisonment.

In his sole issue, appellant argues that the trial court erred by denying his requested instruction on the lesser-included offense of assault, because he denied intending to sexually assault complainant but admitted assaulting her.

Standard of Review

To preserve error, an appellant must request an instruction on the lesser-included offense or object to the trial court's omission of such an instruction from the jury charge. *Boles v. State*, 598 S.W.2d 274, 278 (Tex. Crim. App. 1980) (absent objection or request that court charge jury on lesser-included offense, defendant could not complain on appeal).

We use a two-pronged test to determine whether a defendant is entitled to an instruction on a lesser-included offense. *See Guzman v. State*, 188 S.W.3d 185, 188 (Tex. Crim. App. 2006); *Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005). The first step is to determine whether an offense is a lesser-included offense of the alleged offense. *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007);

[3] We understand appellant's objection to be "assault, *offensive* touching."

Salinas, 163 S.W.3d at 741. This determination is a question of law and does not depend on the evidence to be produced at the trial. *Hall*, 225 S.W.3d at 535.

> An offense is a lesser-included offense if:
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> (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
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> (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;
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> (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
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> (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 2006). When the greater offense may be committed in more than one manner, the manner alleged will determine the availability of lesser-included offenses. *Hall*, 225 S.W.3d at 531.

The second step is to determine if there is some evidence that would permit a rational jury to find that the defendant is guilty of the lesser offense but not guilty of the greater. *Id.* at 536; *Salinas*, 163 S.W.3d at 741; *Feldman v. State*, 71 S.W.3d 738, 750 (Tex. Crim. App. 2002). Anything more than a scintilla of evidence may be sufficient to entitle a defendant to a charge on the lesser offense. *Hall*, 225 S.W.3d at 536. "[I]t 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 finder of fact 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). We review all evidence presented at trial to make this determination. *Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993). If the evidence raises the issue of a lesser-included offense, a jury charge must be given based on that evidence, "whether produced by the State or the defendant and whether it be strong, weak, unimpeached, or contradicted." *Id.* at 672 (quoting *Bell v. State*, 693 S.W.2d 434, 442 (Tex. Crim. App. 1985)).

Discussion

Appellant argues that the elements of assault are included in the elements required to prove aggravated sexual assault as indicted by the first paragraph in the indictment. A person commits the offense of sexual assault by intentionally or knowingly causing "the penetration of the . . . sexual organ of another person by any means, without that person's consent." TEX. PENAL CODE ANN. § 22.011(a)(1)(A) (Vernon Supp. 2008). As charged in the indictment, a person commits the offense of aggravated sexual assault by "intentionally or knowingly caus[ing] the penetration of the . . . sexual organ of another person *by any means*, without that person's consent" and by committing one of six aggravating factors including causing serious bodily

injury, by acts or words plac[ing] the victim in fear of imminent death, serious bodily injury, or kidnapping, or by acts or words occurring in the presence of the victim threatening to cause the death, serious bodily injury, or kidnapping of any person. TEX. PENAL CODE ANN. § 22.021(a)(1)(A), (a)(2)(A) (Vernon Supp. 2008) (emphasis added).

A person commits an assault if the person:

> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
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> (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
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> (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

TEX. PENAL CODE ANN. § 22.01 (Vernon Supp. 2008). Appellant argues that the elements of assault were necessarily included in the elements required to prove *aggravated* sexual assault under the first paragraph of the indictment, which alleged:

> The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas **JULIAN MARS MCKITHAN**, hereafter styled the Defendant, heretofore on or about **DECEMBER 17, 2006**, did then and there unlawfully, intentionally and knowingly cause the penetration of the FEMALE SEXUAL ORGAN of . . . the Complainant, by placing A FINGER in the FEMALE SEXUAL ORGAN of the Complainant, without the consent of the Complainant, namely, the Defendant

> compelled the Complainant to submit and participate by the use of physical force and violence, and by acts and words the Defendant *placed the Complainant in fear* that SERIOUS BODILY INJURY would be imminently inflicted on [complainant].

(Emphasis added).

At trial, appellant requested that the jury be instructed on the lesser-included offenses of "assault bodily injury" and assault offensive touching. In other words, appellant specifically requested lesser-included offense instructions as to subparagraphs (1) and (3) of Penal Code section 22.01, but not subparagraph (2), which defines assault as intentionally or knowingly threatening another with bodily injury. *Id.* Accordingly, appellant did not preserve error regarding the trial court's omission of a lesser-included offense instruction based on assault by threat. *See, e.g.*, *Kelley v. State*, 845 S.W.2d 474, 479 (Tex. App.—Houston [1st Dist.] 1993 pet. ref'd) ("As appellant made no request for the instruction on the lesser included offense, we are not to consider it on appeal.").

However, we must address appellant's contention that assault bodily injury and assault offensive touching were lesser-included offenses of aggravated sexual assault as charged in the indictment. Assault bodily injury requires proof that the defendant caused bodily injury to the complainant; assault offensive touching requires proof that the defendant knew or should have reasonably believed that the complainant would

regard the contact as offensive or provocative. Neither of these elements are within the elements of aggravated sexual assault as charged in the indictment, which relied on assault by threat or kidnapping as aggravating factors. Accordingly, neither assault bodily injury nor assault offensive touching would be "established by proof of the same or less than all the facts required to establish the commission" of aggravated sexual assault as charged in the indictment. TEX. CODE CRIM. PROC. ANN. art. 37.09(1) (Vernon 2006). Therefore, we hold that assault bodily injury and assault offensive touching were not lesser-included offenses of aggravated sexual assault and that the trial court did not err by refusing to instruct the jury on either offense. *See Ramos v. State*, 981 S.W.2d 700, 701 (Tex. App.—Houston [1st Dist.] 1998 pet. ref'd) (holding assault not lesser-included offense of aggravated sexual assault because aggravated sexual assault does not require proof that actor knew or should have known that contact would be offensive); *see also Trejo v. State*, 242 S.W.3d 48, 52 (Tex. App.—Houston [14th Dist.] 2007) (holding that aggravated assault not lesser-included offense of aggravated sexual assault because aggravated sexual assault does not require proof of serious bodily injury), *rev'd on other grounds by Trejo*,280 S.W.3d 258, 261 (Tex. Crim. App. 2009) (holding that erroneous jury charge did not deprive trial court of subject-matter jurisdiction because indictment invoked trial court's jurisdiction by alleging aggravated sexual assault); *Dawson v.*

State, No. 11-98-00022-CR, 1999 WL 33747865, *1 (Tex. App.—Eastland March 18, 1999, no pet.) (not designated for publication).

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of the trial court.

Jim Sharp
Justice

Panel consists of Justices Bland, Sharp, and Taft.[4]

Do not publish. TEX. R. APP. P. 47.2(b).

[4] Justice Tim Taft, who retired from the First Court of Appeals on May 31, 2009, continues to sit by assignment for the disposition of this case, which was submitted on April 14, 2009.