Affirmed and Memorandum Opinion filed April 27, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-01023-CR

QUAN NGUYEN, Appellant

V.

THE STATE OF TEXAS, Appellees

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 1475832

M E M O R A N D U M O P I N I O N

A jury convicted Quan Nguyen of murder and sentenced him to confinement for sixty years in the Institutional Division of the Texas Department of Criminal Justice. In his sole issue on appeal, appellant claims trial counsel rendered ineffective assistance. Specifically, appellant claims trial counsel recommended, based on an erroneous statement of law, that he abandon his request for the trial

court to instruct the jury on the lesser-included offense of aggravated assault. Because appellant was not entitled to the instruction, we affirm.

PROCEDURAL BACKGROUND

The record reflects appellant requested an instruction on the lesser-included offense of aggravated assault, to which the State objected. Following a discussion off the record and in accordance with counsel's recommendation, appellant rescinded the request. The record of the hearing on appellant's motion for new trial reveals, according to the trial court, the request was rescinded because two enhancement allegations, if proven, would result in a punishment range of twenty-five to life even if appellant was convicted of aggravated assault. However, the State subsequently abandoned the enhancement allegations. Appellant contends that without enhancement, had he been convicted of the lesser-included offense the maximum range of punishment would have been reduced to twenty years. The State does not dispute this assessment of the circumstances.[1]

STRICKLAND STANDARD

The standard of review for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Under the *Strickland* two-step analysis, a defendant must demonstrate that (1) his counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 687–88, 694, 104 S. Ct. at 2064, 2068; *Andrews v. State*, 159 S.W.3d 98, 101–02 (Tex. Crim. App. 2005). Regardless of the reason for the rescission, and notwithstanding the abandonment of the enhancement allegations, we cannot

[1] The State does contend it cannot be assumed the enhancement allegations would have been abandoned had the jury found appellant guilty of the lesser offense.

conclude appellant has satisfied the first *Strickland* prong unless he was, in fact, entitled to the instruction. *Cardenas v. State*, 30 S.W.3d 384, 392 (Tex. Crim. App. 2000) (en banc) (recognizing that in order to establish counsel's performance was deficient for failing to request a lesser-included offense instruction the defendant must show that he was entitled to it); *see also Washington v. State*, 417 S.W.3d 713, 726 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) ("To demonstrate deficient performance based on the failure to request a jury instruction, an appellant must show that he was entitled to the instruction."). To make that determination, we apply the two-part *Rousseau* test.

ROUSSEAU TEST

A defendant is entitled to a lesser-included offense instruction if: (1) the lesser-included offense is included within the proof necessary to establish the offense charged, and (2) some evidence exists in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser-included offense. *Rousseau v. State*, 855 S.W.2d 666, 672-73 (Tex. Crim. App. 1993); *see also Guzman v. State*, 188 S.W.3d 185, 188 (Tex. Crim. App. 2006). Regarding the first requirement, 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. Tex. Code Crim. Pro. art. 37.09.[2]

As applicable to the facts of this case, a person commits the offense of murder if he intentionally or knowingly causes the death of an individual or intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. Tex. Penal Code § 19.02(b)(1), (2). A person commits the offense of assault if the person intentionally, knowingly, or recklessly causes bodily injury to another. Tex. Penal Code § 22.01(a)(1). The offense is aggravated if the person causes serious bodily to another or uses a deadly weapon during the offense. Tex. Penal Code § 22.02(a)(2).

Aggravated assault may be established by a lesser culpable mental state (recklessly) than murder (intentionally or knowingly). Tex. Code Crim. Pro. art. 37.09(3). However, a defendant does not satisfy the second prong of the *Rousseau* test if there is evidence that he committed an offense that is a lesser-included of the charged offense, but greater than the requested lesser-included offense, *i.e.*, it "lies between." *Flores v. State,* 245 S.W.3d 432, 439 (Tex. Crim. App. 2008).

Because aggravated assault differs from murder under section 19.02(b)(2) — it does not require that the person committed an act clearly dangerous to human life that caused the individual's death — it could be established by proof of the same or less than all the facts required to establish the commission of the offense charged. *See Coit v. State*, 629 S.W.2d 263, 265 (Tex. App.—Dallas 1982, pet. ref'd); Tex. Code Crim. Pro. art. 37.09(1). Thus the first requirement is satisfied. *See Cardenas*, 30 S.W.3d at 392.

[2] This case does not involve either an attempted murder or a less serious injury. *See* Tex. Code Crim. Pro. art. 37.09(2), (4); Tex. Penal Code § 1.07(a)(46) (defining serious bodily injury as bodily injury that causes death).

Consequently, we proceed to the second requirement, which is to determine whether the evidence showed that if appellant is guilty, he is guilty only of the lesser offense of aggravated assault. *See Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012); *McKinney v. State*, 207 S.W.3d 366, 370 (Tex. Crim. App. 2006). This second prong is a question of fact and is based on the evidence presented at trial. *Cavazos*, 382 S.W.3d at 383. The evidence must be more than mere speculation—affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense is required. *Id*. at 385. The evidence produced must be sufficient to establish the lesser-included offense as a "valid, rational alternative" to the charged offense. *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007). If the evidence establishing a lesser-included offense also casts doubt on the greater offense, a lesser-included offense instruction allows the jury to vote for a rational alternative. *Forest v. State*, 989 S.W.2d 365, 367 (Tex. Crim. App. 1999). Anything more than a scintilla of evidence is sufficient to entitle a defendant to an instruction on a lesser-included offense. *See Goad v. State*, 354 S.W.3d 443, 446 (Tex. Crim. App. 2011). The evidence can come from any source, and a defendant's testimony alone is sufficient to raise the issue. *Bell v. State*, 693 S.W.2d 434, 442 (Tex. Crim. App. 1985). In our review of the entire record, we cannot consider "whether the evidence is credible, controverted, or in conflict with other evidence." *Hall v. State*, 158 S.W.3d 470, 473 (Tex. Crim. App. 2005).

The evidence adduced at trial reveals the following events occurred in relation to the death of the complainant, Brian McBee. Dana Chesney received a call from Angel Keith that Fallon Wagner, who was accompanied by McBee, was at Keith's hotel room to purchase drugs. Wagner owed Chesney money for drugs

received in the past. Chesney and appellant then went to Keith's room for Chesney to collect money from Wagner.

At the hotel room, Chesney confronted Wagner. Appellant stood in front of McBee, who was seated. Wagner testified that McBee stood up to retrieve his crack pipe from his pocket and appellant pulled out a knife and stabbed McBee in the chest. According to Wagner, the knife blade was six or seven inches. Similarly, Chesney testified that when McBee stood up she saw appellant's hand, which was holding a knife, go towards the complainant's chest. Chesney saw appellant stab McBee in the chest.

Appellant testified that after entering the hotel room he had used a steak knife to cut a rock of crack cocaine into several pieces. He still had the knife in his hand when matters escalated between Wagner and Chesney. According to appellant, he pushed Wagner's forehead back to prevent her from rising out of her chair. When he turned around, appellant testified, McGee was already up and reaching for him. Appellant testified McBee was coming at him, like he was going to grab appellant. Appellant said he was scared and frightened.[3] Appellant's testimony was that he "brought the knife up" and "pushed the knife." Appellant also testified that McBee "jumped into the knife" and "for me, it's a flick." Appellant then testified that "it's like he [sic] coming at me and I'm thrusting at him. . . . I did say I thrust the knife, defended myself. . . . I have no intention to even try to stab him." In answer to questions regarding the doctor's testimony that the blade penetrated six and a half inches into McBee's body, appellant said, "The doctor was not there. . . . I was there. It's a flick." Appellant stated that he had no intention of harming McBee and that it was "a freak accident."

[3] The jury was given an instruction on self-defense, as requested,

Dr. Hines testified the complainant died from a single stab wound to the chest. The wound was six and a half inches deep in the upper center chest. Officer Xavier Flores described the wound as a "slit" in McBee's chest. This evidence reflects the knife was pushed straight into McBee's chest up to, or very nearly up to, the hilt. The blade injured the cartilage connecting the ribs to the sternum and then continued through the heart, as well as the diaphragm, and then penetrated the liver's left lobe. According to Dr. Hines, the wound was neither accidental nor self-inflicted.

Appellant's testimony is some evidence that his actions were reckless, rather than intentional or knowing, and that he did not commit an act clearly dangerous to human life. *See* Tex. Penal Code §§ 19.02(b)(2), 22.01(a)(1). However, proof of the lesser culpable mental state does not entitle appellant to an instruction on aggravated assault.

"When a person recklessly causes the death of an individual, the offense is manslaughter, an offense which lies between murder and aggravated assault." *See Jackson v. State*, 992 S.W.2d 469, 475 (Tex. Crim. App. 1999) (footnote omitted); *see also* Tex. Penal Code § 19.04(a). "The court of criminal appeals has held that 'a defendant is not entitled to a jury instruction on a lesser-included offense if the evidence on which the defendant is relying raises another offense that lies between the requested and charged offenses.'" *Darkins v. State,* 430 S.W.3d 559, 567 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (quoting *Flores*, 245 S.W.3d at 439).[4] Accordingly, even though a defendant might have been entitled to an instruction on the lesser-included offense of manslaughter based on evidence that he recklessly

[4] As we noted in *Darkins*, 430 S.W.3d at 567 n.2, the court's decision in *Sweed v. State*, 351 S.W.3d 63, 67 (Tex. Crim. App. 2011), is not in conflict with the long-standing general rule that if the evidence supports the offense that "lies between" the charged offense and the requested offense, the evidence does not support a conclusion that the appellant is guilty *only* of the requested offense. *See Hudson v. State*, 394 S.W.3d 522, 525 (Tex. Crim. App. 2013).

caused death, he is not entitled to an instruction on aggravated assault for recklessly causing mere serious bodily injury.[5] *See Flores*, 245 S.W.3d at 439 (explaining *Jackson*, 992 S.W.2d at 475); *see also Forest v. State*, 989 S.W.2d 365, 368 (Tex. Crim. App. 1999) (a defendant charged with murder was not entitled to lesser-included offense of aggravated assault because there was no evidence the defendant was guilty only of "anything less than some form of murder"); *James-Baines v. State*, No. 14-08-00265-CR, 2009 WL 136922, at *5 (Tex. App.—Houston [14th Dist.] Jan. 20, 2009, pet. ref'd) (mem. op., not designated for publication) ("When there is no evidence from which a rational jury could conclude a defendant did other than cause the death of the victim, he is not entitled to a lesser-included offense instruction on aggravated assault.").

In this case, as in *Jackson*, because "there was no evidence from which a rational jury could conclude that appellant did other than cause the death of the victim, the only lesser included offense that was raised by the evidence of recklessness was manslaughter." 992 S.W.2d at 475. Accordingly, there is no evidence that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of aggravated assault. *See id.*

In addition, for appellant to be entitled to an instruction on aggravated assault there must have been some evidence his acts were not "clearly dangerous to human life." *See* Tex. Penal Code § 19.02(b)(2); *Blair v. State,* No. 14-89-00535-CR, 1991 WL 63620, at *2-3 (Tex. App.—Houston [14th Dist.] Apr. 25, 1991, pet. ref'd) (not designated for publication) (citing *Coit*, 629 S.W.2d at 265). Appellant testified that he "flicked" and "thrust" a six-inch knife at McBee — an act clearly dangerous to human life. Moreover, appellant's testimony that McBee "jumped" or

[5] We do not decide whether appellant was entitled to such an instruction in this case as that issue is not presented in this appeal.

"walked" into the knife reflects that appellant was holding the six-inch knife at close range to, and pointed directly at, McBee's chest — also an act clearly dangerous to human life. Thus the evidence does not permit a rational juror to finding appellant was guilty only of aggravated assault. *See Blair*, 1991 WL 63620, at *3.

Because the second requirement under *Rousseau* was not satisfied, appellant was not entitled to an instruction on the lesser-included offense of aggravated assault.

CONCLUSION

In accordance with our conclusion that appellant was not entitled to the lesser-included-offense instruction,[6] we cannot say trial counsel erred. *See Young v. State*, 991 S.W.2d 835, 839 (Tex. Crim. App. 1999) (concluding the defendant did not show counsel's performance in failing to request an instruction was deficient because he was not entitled to the instruction). Because appellant has not satisfied the first *Strickland* prong, we overrule appellant's sole issue.[7] The judgment of the trial court is affirmed.

/s/ John Donovan
Justice

Panel consists of Justices Christopher, Jamison and Donovan.
Do Not Publish — Tex. R. App. P. 47.2(b).

[6] We note that convicting a defendant on an unindicted, lesser-but-not-included offense is a due process violation that satisfies the egregious harm standard. *See Beasley v. State*, 426 S.W.3d 140, 149 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *Farrakhan v. State*, 263 S.W.3d 124, 145 (Tex. App.—Houston [1st Dist.] 2006, pet. granted), *aff'd,* 247 S.W.3d 720 (Tex. Crim. App. 2008).

[7] Thus we need not consider the second prong. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001) (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. 2052).