In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00076-CR

AUNDRA DIRRELL JONES, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 108th District Court
Potter County, Texas
Trial Court No. 79,695-E-CR; Honorable Douglas R. Woodburn, Presiding

November 18, 2021

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

Following a plea of not guilty, Appellant, Aundra Dirrell Jones, was convicted by a jury of the lesser included offense of assault, a Class A misdemeanor.[1] Punishment was assessed by the trial court at one year confinement in county jail plus a $1,000 fine. In

[1] TEX. PENAL CODE ANN. § 22.01(a)(1), (b) (West Supp. 2021); § 12.21 (West 2019).

presenting this appeal, counsel has filed an *Anders*[2] brief in support of a motion to withdraw. We affirm and grant counsel's motion to withdraw.

In support of his motion to withdraw, counsel certifies he has conducted a conscientious examination of the record, and in his opinion, it reflects no potentially plausible basis for reversal of Appellant's conviction. *Anders v. California*, 386 U.S. 738, 744-45, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967); *In re Schulman*, 252 S.W.3d 403, 406 (Tex. Crim. App. 2008). Counsel candidly discusses why, under the controlling authorities, the record supports that conclusion. *See High v. State*, 573 S.W.2d 807, 813 (Tex. Crim. App. 1978). As required by *Anders* and *In re Schulman*, counsel provided a copy of the brief to Appellant and notified him of the right to file a *pro se* response if he desired to do so. However, counsel did not inform Appellant of the right to file a *pro se* petition for discretionary review.[3] *In re Schulman*, 252 S.W.3d at 408.[4] By letter, this court granted Appellant an opportunity to exercise his right to file a response to counsel's brief, should he be so inclined. *Id.* at 409 n.23. Appellant did not file a response. Neither did the State favor us with a brief.

[2] *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

[3] By letter, this court notified counsel that he had not satisfied his educational burden to inform Appellant of his right to file a *pro se* petition for discretionary review and counsel did not respond.

[4] Notwithstanding that Appellant was informed of his right to file a *pro se* petition for discretionary review upon execution of the *Trial Court's Certification of Defendant's Right of Appeal*, *counsel must comply* with Rule 48.4 of the Texas Rules of Appellate Procedure which provides that counsel shall within five days after this opinion is handed down, send Appellant a copy of the opinion and judgment together with notification of his right to file a *pro se* petition for discretionary review. *In re Schulman*, 252 S.W.3d at 408 n.22, 411 n.35. The duty to send the client a copy of this court's decision is an informational one, not a representational one. It is ministerial in nature, does not involve legal advice, and exists after the court of appeals has granted counsel's motion to withdraw. *Id.* at 411 n.33.

BACKGROUND

On the night of July 31, 2020, Officers Chase Ferrell and Brandon Beard were dispatched to a motor vehicle accident involving a pedestrian. Officer Ferrell learned that a white Chevrolet Trailblazer had jumped the curb and struck the complainant. The driver of the vehicle was identified as Appellant. Following the on-scene investigation, the complainant was transported by ambulance. Appellant was taken into custody. He was eventually indicted for aggravated assault with a deadly weapon—the Chevrolet Trailblazer.

At trial, the complainant testified that on night of the incident, Appellant picked him up at his home. Another friend of Appellant's was already in the vehicle. The three of them went to the house of another of Appellant's friends. Later that evening, Appellant drove the complainant and the other passenger back to the complainant's home. The passenger exited the vehicle first and walked to the porch. When the complainant exited Appellant's vehicle and began walking toward his porch,[5] Appellant turned his vehicle around, jumped the curb, and struck him. The complainant speculated that Appellant was angry with him because Appellant believed the complainant had been calling him names.

A witness to the incident testified that she and her husband were driving in the area when they observed Appellant turn his vehicle toward the complainant's home, jump the curb, and strike the complainant. She followed Appellant's vehicle down an alley while her husband called 911. After a brief pursuit, Appellant's vehicle came to rest when

[5] The complainant testified the porch was on the side of his house.

it struck a tree trunk in front of the complainant's driveway.[6] The Fire Department had already arrived on the scene and the complainant's family and numerous neighbors were also at the scene.

The complainant testified that after the incident, he experienced limited mobility in his right arm. However, one of the officers who interviewed the complainant testified that the complainant and Appellant had been in a physical altercation prior to the incident and he could not determine with certainty if the complainant's injuries were from the prior altercation or from being struck by Appellant's vehicle.

Officer Ferrell testified that he did not immediately observe any physical injuries on the complainant; however, he noticed his gait seemed different. The officer was familiar with the complainant from previous encounters.

After the State rested, Appellant voluntarily chose to not testify and the defense also rested. Defense counsel moved for a directed verdict arguing there was no evidence presented that the Chevrolet Trailblazer was used as a deadly weapon and there was no evidence that the complainant sustained "serious bodily injury."[7] The motion was denied.

Following the charge conference, the jury was instructed on the offense of aggravated assault and on the lesser included offense of assault. The charge included

[6] The witness and her husband speculated that Appellant was going to use his vehicle to strike the complainant a second time but they did not have a clear view.

[7] Aggravated assault requires the State to prove the commission of an assault by the accused accompanied by either "serious bodily injury" or by using or exhibiting a deadly weapon. TEX. PENAL CODE ANN. § 22.02(a) (West 2019). "'Serious bodily injury' is defined as bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." TEX. PENAL CODE ANN. § 1.07(a)(46) (West 2021).

definitions of the culpable mental states of "intentionally," "knowingly," and "recklessly." TEX. PENAL CODE ANN. § 6.03(a), (b), (c) (West 2021). The jury returned its verdict finding Appellant guilty of the lesser included offense.

APPLICABLE LAW

Generally, simple assault is a lesser included offense of aggravated assault. *Irving v. State*, 176 S.W.3d 842, 845 (Tex. Crim. App. 2005). That offense requires the State to present evidence that a defendant intentionally, knowingly, or recklessly caused bodily injury to another, including the person's spouse. TEX. PENAL CODE ANN. § 22.01(a)(1) (West Supp. 2021). "Bodily injury" is defined as physical pain, illness, or any other impairment of physical condition. TEX. PENAL CODE ANN. § 1.07(a)(8) (West 2021).

To determine whether a defendant is entitled to a lesser-included-offense instruction, courts apply a two-part test. *Simms v. State*, No. PD-1248-19, 2021 Tex. Crim. App. LEXIS 783, at *7-8 (Tex. Crim. App. Sept. 15, 2021); *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016). First, the court must determine whether the proof necessary to establish the charged offense also includes the lesser offense. *Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012). Second, if this requirement is met, there must be a further determination of whether there is some evidence in the record that would permit the jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser included offense. *Rice v. State*, 333 S.W.3d 140, 145 (Tex. Crim. App. 2011). Under this second step, "anything more than a scintilla of evidence may be sufficient to entitle a defendant to a lesser charge." *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007). A defendant is entitled to an instruction on a lesser included offense regardless of whether the evidence supporting the instruction "is

weak, impeached, or contradicted." *Cavazos*, 382 S.W.3d at 383. The threshold showing for entitlement to the instruction is "low" and may be satisfied by evidence that "refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations." *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011). However, "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 finder of fact to consider before an instruction on a lesser-included offense is warranted." *Bullock*, 509 S.W.3d at 925.

ANALYSIS

By the *Anders* brief, counsel evaluates the entirety of the proceedings from voir dire through the assessment of punishment. He candidly concedes there are no errors on which relief may be granted. In reviewing the testimony and evidence presented, counsel notes that none of the adverse rulings to defense counsel's objections reflect reversible error.

We too have independently examined the record to determine whether there are any non-frivolous issues which might support the appeal. *See Penson v. Ohio*, 488 U.S. 75, 80, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988); *In re Schulman*, 252 S.W.3d at 409; *Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991). We have found no such issues. *See Gainous v. State*, 436 S.W.2d 137, 138 (Tex. Crim. App. 1969). After reviewing the record and counsel's brief, we agree with counsel that there is no plausible basis for reversal of Appellant's conviction. *See Bledsoe v. State*, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005).

CONCLUSION

The trial court's judgment is affirmed and counsel's motion to withdraw is granted.

Patrick A. Pirtle
Justice

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