



**In The  
Court of Appeals  
Sixth Appellate District of Texas at Texarkana**

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No. 06-17-00179-CR

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CORY DON CROSBY, Appellant

V.

THE STATE OF TEXAS, Appellee

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On Appeal from the 52nd District Court  
Coryell County, Texas  
Trial Court No. 16-23730

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Before Morriss, C.J., Moseley and Burgess, JJ.  
Memorandum Opinion by Justice Moseley

## MEMORANDUM OPINION

A Coryell County jury found Cory Don Crosby guilty of injury to a child.<sup>1</sup> After Crosby pled true to the State’s enhancement allegation, the trial court sentenced him to twenty years’ imprisonment and ordered him to pay a \$5,000.00 fine. In his sole point of error on appeal, Crosby argues that the trial court erred by failing to *sua sponte* instruct the jury on lesser-included offenses of criminally negligent or reckless injury to a child.

In *Tolbert v. State*, the Texas Court of Criminal Appeals explained that while trial courts are obligated to prepare a jury charge that accurately states the law applicable to the case, a “trial court ha[s] no duty to *sua sponte* instruct the jury on . . . lesser-included offense[s],” because they are “not ‘applicable to the case’ absent a request by the defense for its inclusion in the jury charge.” *Tolbert v. State*, 306 S.W.3d 776, 781 (Tex. Crim. App. 2010). In explaining why there is no duty to *sua sponte* include lesser-included offenses in the jury charge, the Texas Court of Criminal Appeals wrote that “lesser-included instructions are like defensive issues,” which “frequently depend on trial strategy and tactics,” and counsel can engage in the valid trial strategy of the “all or nothing” approach. *Id.* at 780, 781 (quoting *Delgado v. State*, 235 S.W.3d 244, 249–50 (Tex. Crim. App. 2007)).

Here, it is undisputed that Crosby’s counsel failed to request the inclusion of any lesser-included offenses in the jury charge. “It is clear that the defense may not claim error successfully on appeal due to the omission of a lesser included offense if the defense refrained from requesting

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<sup>1</sup>Originally appealed to the Tenth Court of Appeals in Waco, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV’T CODE ANN. § 73.001 (West 2013). We follow the precedent of the Tenth Court of Appeals in deciding this case. *See* TEX. R. APP. P. 41.3.

one.” *Tolbert*, 306 S.W.3d at 781 (quoting *Delgado*, 235 S.W.3d at 250). Because the trial court has no duty to instruct the jury on lesser-included offenses in the absence of a request by the defense, we overrule Crosby’s sole point of error.

We affirm the trial court’s judgment.

Bailey C. Moseley  
Justice

Date Submitted: March 22, 2018  
Date Decided: March 23, 2018

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