COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

GILBERT JOSEPH JORDAN,	§	No. 08-21-00006-CR
Appellant,	§	Appeal from the
v.	§	32nd Judicial District Court
THE STATE OF TEXAS,	§	of Nolan County, Texas
Appellee.	§	(TC# 13054)

O P I N I O N

A jury convicted Appellant Gilbert Joseph Jordan of aggravated assault with a deadly weapon against a family member. In his sole issue, Appellant argues that the trial court abused its discretion by failing to submit a jury charge that would allow the jury to consider the lesser-included offense of deadly conduct. For the reasons below, we affirm.[1]

I. BACKGROUND

A. The Offense

Appellant was married to Christine, the victim in this case. According to Christine, Appellant heavily consumed alcohol during their marriage, and he often drove his truck while he was intoxicated. One particular morning, Christine was getting ready for school when the couple

[1] This case was transferred from our sister court in Eastland, and we decide it in accordance with the precedent of that court to the extent required by TEX.R.APP.P. 41.3.

argued over Appellant's apparent intention to both drink and drive that day. It was her practice to take the keys to his truck if she had to leave him alone at the house, but she decided not to on that day, fearing he would hot-wire the vehicle.

Christine returned home at approximately 6:30 p.m., but Appellant was not there. She found empty alcoholic beverage containers and shell casings on the ground outside. The shell casings matched ammunition compatible with one of the several firearms the couple owned: two 9mm handguns, an AR-15 rifle, a shotgun, and a .22-caliber handgun. The guns were also missing from the house. A point of disagreement with the couple was Appellant's habit of shooting firearms while he was intoxicated.

Christine tried but failed to contact Appellant through text messages. She reported him as missing to law enforcement, and she spent the rest of the night driving around Nolan County looking for him. Christine finally located Appellant at his sister's house at approximately 8:00 a.m. the next morning. Upon arriving there, she saw Appellant urinating outside while standing next to his truck. She wanted to avoid confronting Appellant, who she believed was intoxicated. At the same time, Christine did not want him to drive away or gain access to the firearms in his truck, so she tried to retrieve the firearms and the keys to the truck. Christine managed to secure one firearm from Appellant's truck, but when Appellant saw what she was doing, he grabbed Christine and pulled her hair.

Christine managed to take the AR-15 and the truck keys, securing both in her truck. As the altercation progressed, Christine screamed for a neighbor to help and noticed a police car parked down the street. She got into her truck and drove toward the police car. Appellant repeatedly struck her truck as she pulled away. Christine parked her truck next to the police car about a half a block away. She then turned back and saw Appellant "looking at [her] square in

the face, right in [her] face" while he pointed and shot a 9mm Glock handgun at her. Appellant fired several rounds at Christine, with one round striking the driver-side door of Christine's truck, only "[i]nches" from her face. She then drove off and called 911.[2] Shortly thereafter, law enforcement arrived at the scene and arrested Appellant.

B. The Indictment and Trial

The State charged Appellant with aggravated assault with a deadly weapon against a family/household member. At trial, Christine testified to the events we note above. Each of the arresting officers testified and agreed that Appellant was intoxicated when they arrived on the scene. He was slow to obey police commands, incoherent, berated one officer, unstable on his feet, and reeked of alcohol. Appellant did not testify and there were no other eyewitnesses to the incident.

During the charge conference, Appellant requested an instruction that would allow the jury to consider the lesser-included offense of deadly conduct. Appellant reasoned that his intoxication and erratic behavior during the incident suggest that he acted recklessly, and not knowingly or intentionally as required for aggravated assault. Thus, Appellant contended that a rational fact finder could have found from the evidence that Appellant's conduct showed a lack of intent to harm Christine, and his actions therefore constituted only deadly conduct. The trial court denied Appellant's requested instruction because it did not find sufficient affirmative evidence of Appellant's recklessness.

The jury found Appellant guilty of aggravated assault, made affirmative deadly weapon and family violence findings, and assessed punishment at fifteen years' and six months'

[2] The police cruiser parked down the street belonged to the Sheriff who was inside his residence, and while hearing the commotion outside, witnessed none of the events we describe above.

imprisonment, along with a $10,000 fine. This appeal follows.

II. DISCUSSION

In his sole issue, Appellant argues that the trial court abused its discretion by failing to instruct the jury on the lesser-included charge of deadly conduct because the evidence was sufficient to have allowed the jury to rationally conclude that Appellant acted with recklessness, the required culpable mental state of deadly conduct.

A. Standard of Review and Applicable Law

We review a trial court's refusal to include a requested lesser-included offense for abuse of discretion. *See Threadgill v. State*, 146 S.W.3d 654, 666 (Tex.Crim.App. 2004) (en banc). Under the controlling *Rousseau/Royster* analysis, we apply a two-step test to determine whether a trial court should have issued a lesser-included offense instruction. *Id.*; *see also Rousseau v. State*, 855 S.W.2d 666, 672-73 (Tex.Crim.App. 1993); *Royster v. State*, 622 S.W.2d 442, 446 (Tex.Crim.App. 1981) (opin. on reh'g). First, we determine whether the offense is a lesser-included offense of the charged offense. *Threadgill*, 146 S.W.3d at 666. Next, we determine whether the record contains some evidence that would permit a rational jury to find that the defendant is guilty only of the lesser offense. *Id*. There must be some evidence from which a rational jury could acquit the defendant of the greater offense while convicting him of the lesser offense, and the evidence must establish the lesser-included offense as a valid rational alternative to the charged offense. *Id*.

B. Analysis

1. Deadly Conduct is a Lesser-Included Offense of Aggravated Assault

A person commits aggravated assault with a deadly weapon if he commits assault as defined in TEX.PENAL CODE ANN. § 22.01 and uses or exhibits a deadly weapon during the

commission of the assault. *Id.* § 22.02(a)(2). A person commits assault if he "intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse[.]" *Id.* § 22.01(a)(2). A person commits deadly conduct if he recklessly engages in conduct that places another in imminent danger of serious bodily injury. *Id.* § 22.05(b).

The Court of Criminal Appeals has determined that misdemeanor deadly conduct under the predecessor to TEX.PENAL CODE ANN. § 22.05(a) is a lesser-included offense of aggravated assault with the use or exhibition of a deadly weapon under section 22.02(a)(2). *Bell v. State*, 693 S.W.2d 434, 438-39 (Tex.Crim.App. 1985) (en banc); *see also Isaac v. State*, 167 S.W.3d 469, 474-75 (Tex.App.--Houston [14th Dist.] 2005, pet. ref'd). The State also concedes that deadly conduct is a lesser-included offense of aggravated assault with a deadly weapon. Recognizing the *Bell* decision, we conclude that deadly conduct is a lesser-included offense of aggravated assault with a deadly weapon, and Appellant has satisfied the first prong of the *Rousseau/Royster* test. *See Threadgill*, 146 S.W.3d at 666; *see also Bell*, 693 S.W.2d at 438-39.

2. The Record Does Not Contain Sufficient Evidence of Appellant's Recklessness to Justify the Issuance of an Instruction on Deadly Conduct

Next, we consider whether there is evidence in the record to justify the issuance of the lesser-included instruction. *See Threadgill*, 146 S.W.3d at 666. To do so, we examine all the record to determine whether an instruction on the lesser-included offense is warranted. *Cavazos v. State*, 382 S.W.3d 377, 384 (Tex.Crim.App. 2012). When the defendant is charged with an intent-oriented offense, to establish that he is entitled to an instruction on a lesser-included offense with recklessness as its culpable mental state, there must be some affirmative evidence that the defendant did not intend to cause death or serious bodily injury when he assaulted the victim. *See id*. at 385. And there must be some evidence that the defendant was aware of but consciously disregarded a substantial and unjustifiable risk that death or serious bodily injury would result

from his conduct. *See id*.[3]

In arguing that he meets both prongs of this test, Appellant analogizes his case with *Roy v. State*, 509 S.W.3d 315, 315-17 (Tex.Crim.App. 2017). In that case, the defendant while driving a vehicle consumed intoxicants, including a PCP-laced cigarette. *Id.* at 316. A passenger in his vehicle testified that the defendant "snapped" and made a comment about killing them both just before crashing into a parked car. *Id*. The occupant of that other vehicle was killed. *Id*. at 316-17. The defendant testified at the resulting murder trial that he had blacked out after smoking the PCP-dipped cigarette, and that he never intended to kill or harm anyone. He did acknowledge that PCP-dipped cigarettes caused him to become dizzy, disoriented, and lose consciousness; despite these known risks, he chose to drive that evening. Appellant here focuses on *Roy*, because the Court of Criminal Appeals concluded that based on that fact pattern, the defendant was entitled to a lesser included instruction on manslaughter. The court reasoned that the jury could have rationally found that the defendant was aware of, but consciously disregarded, the substantial and unjustifiable risk of causing another person's death by driving a vehicle while intoxicated. Additionally, the jury could have rationally found that the defendant did not intend to cause the victim's death. *Id*. at 319-20.

But both elements are missing here. First, there is no evidence that Appellant did not intend to shoot at Christine. If anything, Christine's testimony established that Appellant acted with intent, not recklessness. Appellant reacted violently to her attempts to take his firearms and

[3] "A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." TEX.PENAL CODE ANN. § 6.03(a). "A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." *Id*. § 6.03(c). "The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." *Id.*

truck keys. As Christine was pulling away in her truck, he was striking the truck with his hands. And as she fled the scene in her truck, she looked back to see Appellant "staring" at her when he fired, and she agreed that Appellant was "looking at [her] square in the face, right in [her] face" as he shot multiple rounds at her. One of the rounds struck the door of Christine's truck, only several inches from her head. One of the responding officers even commented to Christine that Appellant was a "good shot" when the officer learned how close the round came to striking Christine.

Unlike *Roy*, Appellant did not testify that he never intended to shoot at Christine or present any other testimony supporting that claim. At most, he tries to negate intent by pointing to testimony about his own voluntary intoxication. But voluntary intoxication alone cannot support a finding of recklessness, and does not negate his intent to commit aggravated assault with a deadly weapon. *See Skinner v. State*, 956 S.W.2d 532, 536, 543-44 (Tex.Crim.App. 1997) (rejecting the defendant's argument that his voluntary intoxication negated his intentional or knowing actions and entitled him to a lesser-included instruction on a recklessness-oriented offense because the evidence did not establish the defendant's recklessness in committing the charged offense), *citing Hawkins v. State*, 605 S.W.2d 586, 589 (Tex.Crim.App. 1980) (panel op.), *and Ramos v. State*, 547 S.W.2d 33, 34 (Tex.Crim.App. 1977); *see also* TEX.PENAL CODE ANN. § 8.04(a) (voluntary intoxication is not a defense to the commission of a crime).

Nor does Appellant present evidence that he acted with only a mental state of recklessness. His brief focuses on the married couple's previous fights over his drinking, and particularly Christine's concerns with Appellant shooting firearms when he drank. The record might support an inference that she confronted him with the riskiness of that behavior, such as her concern for her neighbor's livestock when he discharged firearms while intoxicated. But Christine's concerns, even if expressed to him during an argument, is not any proof that Appellant

acknowledged and agreed with that risk. It is a step-removed from the defendant in *Roy* who acknowledged the risk of ingesting PCP-cigarettes while driving. Moreover, the general risk of target shooting while intoxicated is simply not in the same category of pointing a gun at a fleeing vehicle.

Our ultimate inquiry is whether the record contains some evidence that would permit a rational jury to find that the defendant is guilty only of the lesser offense. *Threadgill*, 146 S.W.3d at 666. And here, nothing in the record suggests that Appellant inadvertently fired a firearm as he wildly waved it around or performed some other reckless act; rather, the evidence established that Appellant deliberately fired at Christine while she was approximately half a block away. He stared directly at Christine while he fired multiple rounds at her, and one round came dangerously close to striking her in the head. This evidence does not rationally support Appellant's conscious disregard of a substantial and unjustifiable risk but establishes Appellant's intent to cause death or serious bodily injury to Christine, regardless of his intoxicated state.

If anything, this case is like *Cavazos v. State*. There, the defendant pulled out a firearm in a crowded room and shot the victim twice, killing him. 382 S.W.3d at 380. Several days later, the defendant told a witness that he did not intend to shoot the victim. *Id*. The defendant was charged with and convicted of murder, and the trial court refused to issue an instruction on the lesser-included offense of manslaughter. *Id*. The defendant claimed on appeal that there was no evidence that he intentionally fired the gun at the victim, and that because his conduct constituted merely recklessness, he was entitled to an instruction on manslaughter. *Id*. at 385. The Court of Criminal Appeals held that the defendant was not entitled to an instruction on manslaughter, reasoning that "[p]ulling out a gun, pointing it at someone, pulling the trigger twice, fleeing the scene (and the country), and later telling a friend 'I didn't mean to shoot anyone' does not rationally

support an inference that [he] acted recklessly at the moment he fired the shots." *Id*. Of course, here we do not even have Appellant claiming that he did not intend to shoot at his wife.

Because the evidence did not raise the lesser-included offense of deadly conduct as an alternative to aggravated assault with a deadly weapon, we hold that Appellant has failed to meet the second prong of the *Rousseau/Royster* test. Thus, the trial court did not abuse its discretion by refusing to issue the requested lesser-included instruction. *See Cavazos*, 382 S.W.3d at 384-86.

Appellant's Issue One is overruled.

III. CONCLUSION

The trial court's judgment is affirmed.

JEFF ALLEY, Justice

February 25, 2022

Before Rodriguez, C.J., Alley, J., and Marion, C.J. (Ret.)
Marion, C.J. (Ret.)(sitting by assignment)

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