**Opinion issued December 9, 2010**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-09-00754-CR**

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**JUAN RIVERA ROMAN, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 176th District Court**
**Harris County, Texas**
**Trial Court Case No. 110787**

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## MEMORANDUM OPINION

A jury found appellant, Juan Rivera Roman, guilty of the offense of aggravated sexual assault of a disabled person. *See* TEX. PENAL CODE ANN. § 22.021(a)(l)(A)(i), (a)(2)(C) (Vernon Supp. 2010). The jury also found "true" the allegations in the indictment's enhancement paragraph, which alleged that

appellant had previously been convicted "of the felony of aggravated rape" in 1981. Pursuant to Penal Code section 12.42(c)(2), which provides for a mandatory life sentence for certain types of repeat sexual offenders, appellant was sentenced to life in prison. *See* TEX. PENAL CODE ANN. § 12.42(c)(2) (Vernon Supp. 2010).

In two issues, appellant contends that the trial court erred when it did not instruct the jury regarding two lesser-included offenses.

We affirm.

## Background

With regard to the primary offense, the indictment in this case reads, in part, as follows:

> [O]n or about March 11, 2007, [the Defendant, Juan Rivera Roman,] did then and there unlawfully, intentionally and knowingly cause the penetration of the mouth of [V.R.], hereinafter called the Complainant, a DISABLED PERSON with the sexual organ of the Defendant, without the Complainant's consent, namely, the Defendant knew that as a result of mental disease and defect that the Complainant was at the time of the sexual assault incapable of appraising the nature of the act and of resisting the act.

At trial, the State's principal witness was V.R.'s mother, Teresa Duenas.

Duenas first described V.R.'s disability for the jury. She testified that V.R. is a severely mentally retarded 30-year-old man with an I.Q. of approximately 20. He functions at the level of a one- to three-year old child. V.R. is considered non-verbal with a limited vocabulary of five words. He enjoys playing with balls and stuffed animals. V.R. does not know how to use the bathroom and wears diapers.

V.R. is not able to care for or protect himself and cannot provide himself with the most basic needs.

Duenas is not employed because taking care of V.R. is a full-time job. Duenas told the jury that V.R. cannot be left alone without supervision because "he's like a small child, a baby." She told the jury that family members watch V.R. when she needs to run errands.

In March 2007, V.R. and Duenas lived in a two-bedroom apartment. Appellant, who is Duenas's half-brother, also lived in the apartment. On the evening of March 11, 2007, appellant and Duenas drank some beer together at the apartment. After she had drunk three beers, Duenas went to visit her neighbor, who lived three doors down. She left V.R. in appellant's care. When Duenas left, V.R. and appellant were each in his own bed.

Duenas went to her neighbor's apartment and drank one beer. After she had been gone for 30 minutes, Duenas returned to her apartment to check on V.R. Duenas testified that when she walked into V.R.'s bedroom, she saw appellant standing over V.R., who was sitting on the bed. Duenas testified that she saw appellant's penis in V.R.'s mouth. Appellant's hands were on V.R.'s head, and appellant was moving V.R.'s head back and forth. Duenas confirmed that she could tell that appellant's penis was erect. Duenas screamed and yelled at

appellant to get out of her house. Appellant said that he was sorry and left the apartment.

Duenas called 9-1-1 and the police were dispatched to her home. While the police were there, appellant called Duenas and told her that he was sorry. Duenas testified that although she had drunk four beers that night, she was not intoxicated. The responding police officer also testified that Duenas did not appear intoxicated that night.

The State also presented evidence that buccal swabs were collected from V.R.'s mouth on the night of the offense. Testing on the samples revealed that no semen or DNA foreign to V.R. were present in V.R.'s mouth when the samples were collected. The only DNA present in the samples was V.R.'s DNA.

At the charge conference, appellant requested lesser-included offense instructions on the offenses of sexual assault, indecent exposure, and assault by offensive touching. The trial court instructed the jury on the lesser-included offense of sexual assault, but denied appellant's request with respect to instructions on indecent exposure and assault by offensive touching.

The jury found appellant guilty of aggravated sexual assault. During the punishment phase, the jury found the enhancement allegations regarding appellant's 1981 conviction for the offense of aggravated rape to be true.

Appellant was, as statutorily required, sentenced to life in prison. This appeal followed.

## Lesser-Included Offense Instructions

In two issues, appellant contends that the trial court erred when it denied his request for lesser-included offense instructions for the offenses of assault by offensive touching and indecent exposure.

### A. Legal Principles

We employ a two-part test to determine whether a trial court should have given a lesser-included offense instruction requested by the defendant. *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). In the first part, we 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); *Salinas*, 163 S.W.3d at 741. This determination is a question of law, and it does not depend on the evidence to be produced at the trial. *Hall*, 225 S.W.3d at 535. When the greater offense may be committed in more than one manner, the manner alleged will determine the availability of lesser-included offenses. *Id.* 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. 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)).

**B. Analysis**

To determine whether assault by offensive contact and indecent exposure are lesser-included offenses of aggravated sexual assault, a comparison must be made of the elements of the offense as they are alleged in the indictment with the elements of the potential lesser-included offenses. *Id*. at 535–36. Here, the statutory elements of aggravated sexual assault as modified by the allegations in the indictment are as follows:

(1) appellant

(2) intentionally or knowingly

(3) caused the penetration of the mouth of V.R. with appellant's sexual organ

(4) without V.R.'s consent, namely, appellant knew that as result of mental disease or defect, V.R. was at the time of the sexual assault incapable of appraising the nature of the act or of resisting it, and

(5) V.R. is a disabled person.

*See* TEX. PENAL CODE ANN. § 22.021(a)(l)(A)(i), (a)(2)(C).

The statutory elements of assault by offensive contact are as follows:

(1) a person

(2) intentionally or knowingly

(3) caused physical contact with another

(4) when the person knew or should have reasonably believed that the other person would regard the contact as offensive or provocative.

*See* TEX. PENAL CODE ANN. § 22.01(a)(3).

The statutory elements of indecent exposure are as follows:

(1) a person

(2) exposes his anus or any part of his genitals

(3) with intent to arouse or gratify the sexual desire of any person, and

(4) the person is reckless about whether another is present who will be offended or alarmed by his act.

*See* TEX. PENAL CODE ANN. § 21.08 (Vernon 2003).

We ask whether the elements of the potential lesser-included offense is established by proof of the same or less than all the facts required to establish the commission of the charged offense. *See Hall*, 225 S.W.3d at 536. In *McKithan v. State*, we held that assault by offensive touching was not a lesser-included offense of aggravated sexual assault. No. 01-08-00222-CR, 2009 WL 1562883, at *4 (Tex. App.—Houston [1st Dist.] June 4, 2009) (mem. op., not designated for publication), *aff'd* 2010 WL 4483511 (Tex. Crim. App. Nov. 10, 2010) (citing *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)).

Appellant contends that this Court's holding in *McKithan* is incorrect. Since appellant filed his brief, the Court of Criminal Appeals affirmed this Court's judgment in *McKithan*, however, the affirmance was based on an issue not pertinent to the issue before us. *McKithan v. State*, No. PD-0969-09, 2010 WL 4483511, at *5 (Tex. Crim. App. Nov. 10, 2010).

With respect to whether the offense of indecent exposure is a lesser-included offense, appellant cites *Evans v. State*, 299 S.W.3d 138 (Tex. Crim. App. 2009). In *Evans*, the Court of Criminal Appeals held that indecency with a child by sexual contact is a lesser-included offense of aggravated sexual assault of a child when

both offenses are predicated on the same act. *Id* at 143. The court explained why this is true despite the fact that the indecency offense contains what might appear to be an extra element of intent to arouse or gratify sexual desire. *See id.* at 141–43 The court reasoned that "intent to arouse or gratify sexual desire" was not an extra element because it was already part of the definition of "sexual contact," and sexual contact was a form of touching subsumed within the "penetration" required to prove aggravated sexual assault. *Id.* Appellant contends that the reasoning and logic of *Evans* applies in this case.

Regardless of the merit of appellant's contentions, we need not resolve whether assault by offensive contact and indecent exposure are lesser-included offenses of aggravated sexual as alleged in this case. Appellant has not shown the second part of the test as necessary to be entitled to the lesser-included instructions for assault and indecent exposure in this case; that is, he has not shown that the record contains some evidence that he is guilty only of one of the claimed lesser-included offenses. *See Guzman*, 188 S.W.3d at 188–89.

Appellant argues that he could have been found guilty only of assault by offensive touching because there was some evidence from which the jury could have inferred that no penetration occurred of V.R.'s mouth by appellant's penis. Appellant asserts that "[t]he only evidence of penetration came from the testimony of the complainant's mother Teresa Duenas." Appellant points to evidence that

Duenas had been drinking that evening. He also cites Duenas's testimony indicating that appellant's back was to her when she walked into V.R.'s bedroom. Appellant also relies on the forensic evidence showing that no semen or foreign DNA were found in the samples taken from V.R.' mouth that night.

Similarly, appellant contends that he could have been found guilty only of the offense of indecent exposure because there was some evidence from which the jury could have inferred that there was no contact between V.R. and appellant's penis. Appellant cites the same evidence discussed above as evidence showing no contact.

We disagree with appellant that the cited evidence supports his request for the lesser-included offense instructions. To the contrary, the record does not contain evidence from which a jury could find that, if he is guilty, appellant is guilty only of the offense of assault by offensive contact or of indecent exposure. The conduct described by Duenas was a single act of penetration of V.R.'s mouth by appellant's penis. Duenas did not describe any other offensive conduct besides the act of appellant placing his penis in V.R.'s mouth. Duenas also did not testify that she saw appellant's penis exposed other than when she saw it in V.R.'s mouth. In fact, she testified that is specifically when she saw it.

With regard to the offense of indecent exposure, appellant contends that exposure of his penis would have necessarily preceded the alleged penetration.

Regardless of the truth of such assertion, there is no evidence on which to base a finding that one event occurred and the other did not. Stated differently, there is no affirmative evidence that exposure occurred even though no penetration occurred.

The same can be said of the offense of assault by offensive touching. There is no evidence that an offensive touching occurred aside from the penetration of V.R.'s mouth. Neither Duenas's testimony nor the forensic evidence indicates as much. Appellant did not testify, and V.R. did not testify. In short, there is no evidence that, if he is guilty, appellant is guilty of only one of the two claimed lesser-included offenses.

This is not to suggest that a defendant must introduce evidence to establish that he committed a lesser-included offense. To the contrary, an instruction should be given if the evidence of the element distinguishing the charged offense from the lesser-included offense is so weak that a rational jury might interpret it to have it no probative value. *See Wolfe v. State*, 917 S.W.2d 270, 278 (Tex. Crim. App. 1996).

Nonetheless, a guilty finding for the lesser and greater offenses cannot stand or fall on the exact same evidence. There must be some evidentiary distinction between the offenses. *See Hampton*, 109 S.W.3d at 441. In this case, the evidence showing that appellant exposed his penis or engaged in an offensive touching is precisely the same evidence that he penetrated V.R.'s mouth. Evidence that

negated the penetration element would also negate the offensive touching and exposure elements of the claimed lesser-included offenses.

We conclude that there is no evidence in the record showing that, if he is guilty, appellant is guilty only of the lesser-included offense of assault by offensive conduct or indecent exposure. We hold that the trial court properly denied appellant's request for the lesser-included offense instructions.

We overrule appellant's two issues.

## Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Bland

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