

Affirmed and Memorandum Opinion filed June 10, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00915-CR

SANTIAGO MELITON OLIVARES, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 1174911**

MEMORANDUM OPINION

A jury convicted appellant of aggravated assault with a deadly weapon. The trial court sentenced appellant to confinement for fifty (50) years in the Texas Department of Criminal Justice, Institutional Division. Appellant filed a timely notice of appeal.

In his sole issue on appeal, appellant claims the trial court erred in including the lesser-included offense of aggravated assault in the jury charge. Appellant was indicted with the offense of aggravated robbery. The State requested, and received, an instruction on the offense of aggravated assault. The jury convicted appellant of the lesser offense.

The Texas Court of Criminal Appeals established a two-pronged test for determining when a jury instruction on a lesser-included offense that is requested by the defendant should be given. *See Royster v. State*, 622 S.W.2d 442 (Tex. Crim. App. 1981); and *Rousseau v. State*, 855 S.W.2d 666 (Tex. Crim. App. 1993). The first prong is satisfied when the lesser-included offense is included within the proof necessary to establish the offense charged. *See Rousseau*, 855 S.W.2d at 673. Appellant does not dispute that aggravated assault is a lesser-included offense of aggravated robbery and therefore does not challenge the first prong.

The second prong requires there to be some evidence that if the defendant is guilty, he is guilty *only* of the lesser offense. *Id.* Appellant claims there was no evidence that would permit a rational jury to find he was guilty *only* of the lesser offense. Initially, the Texas Court of Criminal Appeals held this prong applied equally to the submission of a lesser-included offense instruction that was requested by the State. *See Arevalo v. State*, 943 S.W.2d 887 (Tex. Crim. App. 1997). But as the State correctly points out, the Court recently determined such evidence is not required when the State requests an instruction on a lesser-included offense. *See Grey v. State*, 298 S.W.3d 644, 645 (Tex. Crim. App. 2009). Because the State is not bound by the second prong of the *Royster-Rousseau* test, appellant's issue is overruled. *Id.*

The judgment of the trial court is affirmed.

PER CURIAM

Panel consists of Justices Brown, Sullivan, and Christopher.

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