Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-12-00830-CR

Joseph Lester **GREEN**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 38th Judicial District Court, Medina County, Texas
Trial Court No. 11-06-10686-CR
The Honorable Camile G. Dubose, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: August 10, 2016

AFFIRMED

This case is before us on remand from the Court of Criminal Appeals. *See Green v. State*, 476 S.W.3d 440 (Tex. Crim. App. 2015). Green was indicted for and convicted of one count of aggravated sexual assault of a child, and raised several issues on appeal. We reversed his conviction based on jury charge error. *Green v. State*, 434 S.W.3d 734, 738 (Tex. App.—San Antonio 2014, pet. granted). Upon review, the Court of Criminal Appeals agreed with our conclusion that the trial court erred in instructing the jury to apply non-statutory definitions of the terms "penetration" and "female sexual organ," but disagreed that the error was harmful. *Green*,

476 S.W.3d at 442. The court therefore reversed and remanded the case for our consideration of the two remaining appellate issues.

ANALYSIS

The two issues raised by Green on appeal that were not addressed in our prior opinion concern the trial court's exclusion of a video interview with the child and submission of a lesser-included offense in the jury charge. Both parties have opted to stand on their original briefing on these issues. The underlying facts of the offense are described in our prior opinion and need not be repeated here. *See Green*, 434 S.W.3d at 736.

Exclusion of Child's Video Interview

On appeal, Green argues that the entire videotaped interview of the child by Mary Barrios of Bluebonnet Advocacy, Inc. should have been admitted into evidence under the public records exception to the hearsay rule. *See* TEX. R. EVID. 803(8)(A). In the trial court, Green moved to admit the video as a whole as "evidence that was obtained at the direction of the D.A.'s office." The trial court refused Green's request to admit the entire video, stating the child's testimony was the best evidence and the video statements were hearsay, but noting the portions of the video that were inconsistent with the child's trial testimony could be used for impeachment purposes. The record reflects, and Green concedes, that he did use portions of the video interview to impeach the child with her prior statements on cross-examination. Green cites no legal authority in his brief in support of his argument that it was error for the court to refuse to admit the entire video as a public record, other than a citation to Rule 803(8); thus, Green has not adequately briefed the issue. *See* TEX. R. APP. P. 38.1(i) (requiring citations to legal authorities in support of the appellate argument); *Cardenas v. State*, 30 S.W.3d 384, 393 (Tex. Crim. App. 2000). Even if Green had adequately briefed the issue, he has not shown that the video fits within the parameters of Rule

803(8) or how he was harmed by the exclusion of the video as a whole.[1] We overrule Green's first issue.

Submission of Lesser-Included Offense Instruction

In his last issue, Green argues the trial court erred in submitting a charge on the lesser-included offense of indecency with a child by contact because it deprived him of his due process right to notice of the accusation against him and the opportunity to adequately prepare for trial.[2] Green asserts he was harmed by the lack of notice because his trial defense was focused on attacking the element of penetration required for a conviction of the indicted-offense of aggravated sexual assault, and he did not prepare to defend against a charge of indecency with a child or voir dire the jury on that offense. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i), (a)(2)(B) (West Supp. 2015) (aggravated sexual assault of a child as alleged in the indictment); *id.* § 21.11(a)(1) (West 2011) (indecency with a child by sexual contact). Green states that he was originally indicted for indecency with a child by contact, but the State dismissed that indictment, and re-indicted him on a single count of aggravated sexual assault of a child based on the same incident. Green asserts the State could have, and should have, included a second count alleging indecency with a child to provide him sufficient notice.

In support of his argument, Green relies on *Hall v. State*, 225 S.W.3d 524 (Tex. Crim. App. 2007), but misconstrues the court's holding. In *Hall*, the court held that the cognate pleadings approach is the sole test for determining the first step of the lesser-included offense analysis —

[1] In his brief, Green also argues the trial court erred in excluding the entire video because it contained admissions by a party opponent and prior inconsistent statements by the child. As noted, Green used portions of the video for impeachment. He does not identify any particular inconsistent statements or admissions on the video that he was precluded from using for impeachment purposes, and has therefore failed to show any harm.

[2] Green does not argue that indecency with a child by contact was not a lesser-included offense or that the trial evidence did not support submission of the lesser-included offense instruction. *See* TEX. CODE CRIM. PROC. ANN. art. 37.09 (West 2006).

whether an offense is a lesser-included offense of the charged offense. *Id.* at 535-36 (also noting that submission of a lesser-included offense instruction still depends on the second step, which requires some evidence adduced at trial to support the lesser-included offense instruction). As Green quotes, the court stated in *Hall* that the first step is a question of law that "may be, and to provide notice to the defendant must be, capable of being performed before trial." *Id.* at 535. However, Green overlooks the court's further explanation that the first step is conducted by looking at the statutory elements of the charged offense, as modified by the factual allegations in the indictment, and comparing those with the elements of the potential lesser-included offense. *Id.* at 535-36. This pleadings approach enables the defendant to "know before trial what lesser offenses are included within the indictment," and thus meets the requirements of due process. *Id.* at 537. In describing the cognate pleadings approach, the court stated, "the elements and the facts alleged in the charging instrument are used to find lesser-included offenses; therefore, the elements of the lesser offense do not have to be pleaded if they can be deduced from the facts alleged in the indictment." *Id.* at 535; *see Rice v. State*, 333 S.W.3d 140, 144-46 (Tex. Crim. App. 2011).

The Court of Criminal Appeals has determined that indecency with a child by contact is a lesser-included offense of aggravated sexual assault of a child. *Evans v. State*, 299 S.W.3d 138, 142 (Tex. Crim. App. 2009). The same argument was raised in *Evans* that Green makes in his brief — that indecency with a child by contact contains an element of specific intent "to arouse or gratify the [defendant's] sexual desire" that is not present in the offense of aggravated sexual assault. *See id.* The court rejected that argument, however, stating that, "'[i]ntent to arouse or gratify sexual desire' is part of the *definition* of 'sexual contact' . . . [which] supports the conclusion that the 'sexual desire' wording was not intended as an extra element not contained in the sexual assault statutes. Rather, the 'sexual desire' language appears to be intended to denote a form of touching, short of penetration, that is sexual in nature." *Id.* (quoting Judge Keller's concurrence

in *Ochoa v. State*, 982 S.W.2d 904, 910 (Tex. Crim. App. 1998)). Thus, "touching the female sexual organ with the intent to arouse or gratify sexual desire is a lesser-included species of conduct of the intentional or knowing penetration of the female sexual organ." *Id.* Therefore, Green had pre-trial notice that indecency with a child by contact was a potential lesser-included offense based on the indictment's allegation that he committed aggravated sexual assault by "intentionally or knowingly caus[ing] the penetration of the [child's] sexual organ" with his finger and the child was younger than 14 years of age. *See Hall,* 225 S.W.3d at 535-37. Submission of the lesser-included offense instruction did not violate Green's right to due process. We overrule his second issue.

CONCLUSION

Based on the foregoing reasons, we overrule Green's remaining issues on appeal and affirm the trial court's judgment of conviction.

Rebeca C. Martinez, Justice

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