



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00106-CR

Ramon **CASTILLO** Jr.,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 399th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR6729
Honorable Ray Olivarri, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: July 12, 2017

AFFIRMED

On January 19, 2016, having found Appellant Ramon Castillo Jr. guilty of assault on a peace officer, enhanced by two prior felony convictions, a Bexar County jury assessed punishment at twenty-five years' confinement in the Institutional Division of the Texas Department of Criminal Justice. On appeal, Castillo contends the trial court's jury charge did not contain all of the applicable law necessary to a fair and impartial verdict by jury and caused Castillo egregious harm. We affirm the trial court's judgment.

FACTUAL BACKGROUND

On February 11, 2015, Marie Trinidad Esparza, a certified peace officer with the San Antonio Park Police Department, was patrolling the area around La Villita Historic Arts District, in San Antonio, Texas. Officer Trinidad was wearing her bike uniform, including San Antonio Police Department patches, a Park Police badge, a taser, a firearm, a full utility belt, and a helmet emblazoned with the word “Police.” Officer Trinidad’s bike bags were also clearly marked “Police.”

Officer Trinidad testified that San Antonio maintenance employee Mario Martinez stopped her and reported an individual trying to sell jewelry in violation of the city ordinance prohibiting solicitation. Mario, and his co-worker, Fred Polanco, described the individual as tall, male, and carrying a cane. Mario and Fred further described his clothing and pointed Officer Trinidad toward the direction in which the individual headed. Officer Trinidad made contact with the individual in question—who was carrying a cane. The officer identified herself and explained, “I have a complaint that you are trying to sell jewelry to individuals and customers around this area.” The individual, later identified as Ramon Castillo Jr., acknowledged attempting to sell the jewelry, handed Officer Trinidad his driver’s license, and removed a long necklace from his right pocket.

Pursuant to her training, Officer Trinidad requested the San Antonio Police Department dispatch run a criminal history check. Castillo started to become edgy, but denied Officer Trinidad’s inquiry whether he had active warrants. After learning Castillo had six outstanding warrants, Officer Trinidad attempted to detain him. Castillo told Officer Trinidad, “I’m not going to jail,” and proceeded to fight Officer Trinidad’s attempts to detain him. When Castillo became violent, Officer Trinidad grabbed both of Castillo’s hands and attempted to push him against the wall. During the struggle, Officer Trinidad grabbed her radio and requested assistance.

Officer Trinidad testified that Castillo “just turned very violent, very strong,” and he “looked like he was under the influence of something.” A brawl ensued with punches thrown by Castillo and returned by Officer Trinidad. Martinez described the encounter as follows: “[W]hen [Officer Trinidad] moved forward to, you know, put the handcuffs, [Castillo] started throwing punches. . . . he was throwing wild punches, a lot of wild punches, and hitting her with his cane.” During the exchange, Castillo twice struck Officer Trinidad’s face with a closed fist. When Castillo attempted to run, Officer Trinidad grabbed his shirt; the shirt tore and Castillo started running again.

Martinez testified that when he ran to assist Officer Trinidad, Castillo threw his cane and started running “big time.” Martinez ultimately caught up to Castillo and tripped him; Castillo fell straight down, head first, onto the concrete causing bloody nose and a gash on the right side of his face. Officer Trinidad explained that Castillo was trying to get up again when she climbed on top of him to hold him down. “It [was] like a horse bucking a cowboy. He trie[d] to get me off, and he’s head butting me, whatever he can do.” Officer Trinidad testified that Castillo was too close to use her taser to subdue him. By that time, both maintenance workers were assisting Officer Trinidad in keeping Castillo on the ground. In addition to the blood from the initial fall, Castillo also had scratches on his face from the struggle with Officer Trinidad. Castillo was transported by EMS for medical treatment. During transport, Castillo was apologetic, somewhat remorseful, explaining that he was “just sorry the whole thing occurred.”

After the fight, Officer Trinidad described she felt dizzy. Her face was red and puffy on the right side; the fingers on her right hand appeared deformed and the hand was starting to swell. San Antonio Police Officer Steve Gomez described Officer Trinidad as visibly shaken and her clothing was tattered. Officer Trinidad suffered broken and severely sprained fingers, a broken wrist, and a torn rotator cuff. She testified that she suffers from vertigo and migraines since the

assault. At the time of trial, Officer Trinidad was still unable to return to regular duty and was limited to working four-hour periods answering the Park Police telephones. During cross-examination, Officer Trinidad explained she had intended to charge Castillo with aggressive solicitation in violation of a city ordinance, but was still investigating the incident when the struggle ensued.

Castillo was charged with assault on a police officer, enhanced by two prior felony convictions, and assessed punishment at twenty-five years' confinement in the Institutional Division of the Texas Department of Criminal Justice. This appeal ensued.

LESSER-INCLUDED OFFENSE

A. Arguments of the Parties

Castillo contends trial counsel's failure to request the lesser-included offense of assault jury instruction denied Castillo the right to a fair and impartial verdict by the jury. Castillo further asserts that in light of trial counsel's failure to request the instruction, the trial court should have submitted the charge sua sponte. Specifically, he asserts the trial court failed to provide additional instructions to allow the jury to resolve whether Officer Trinidad lawfully (1) discharged her duties; (2) detained Castillo for the criminal offense of aggressive solicitation; (3) discharged her duties in using force to arrest and detain Castillo, and (4) discharged her duties when she used force and arrested Castillo on unconfirmed warrants.

B. Standard of Review

In reviewing claims of jury charge error, we engage in a two-step process. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015); *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). First, we determine whether the charge was erroneous, and if it was, we then determine whether the error was harmful. *Cortez*, 469 S.W.3d at 598; *Kirsch*, 357 S.W.3d at 649. When error is preserved, "reversal is required if the error is 'calculated to injure the rights of

defendant,' meaning there must be some harm.” *Segovia v. State*, 467 S.W.3d 545, 556 (Tex. App.—San Antonio 2015, pet. ref’d) (quoting TEX. CODE CRIM. PROC. ANN. art. 36.19); *see also Sakil v. State*, 287 S.W.3d 23, 25–26 (Tex. Crim. App. 2009).

Additionally, for harm to result, the record must show “actual, rather than merely theoretical, harm.” *Sandoval v. State*, 467 S.W.3d 545, 556 (Tex. App.—San Antonio 2015, pet. ref’d) (quoting *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013)). An appellate court is further directed to consider “the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole.” *Id.* (quoting *Barron v. State*, 353 S.W.3d 879, 883 (Tex. Crim. App. 2011)); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh’g), *superseded on other grounds by rule as stated in Rodriguez v. State*, 758 S.W.2d 787, 788 (Tex. Crim. App. 1988) (same).

C. Necessary Proof for Lesser-included Offense

Appellate courts apply a two-prong test to determine whether a defendant was entitled to a charge on a lesser-included offense. *See Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998); *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim App. 1993) (en banc). First, the lesser-included offense must be included within the proof necessary to establish the offense charged; and, second, the record must show some evidence that would permit a rational jury to find that if the defendant is guilty of an offense, he is guilty only of the lesser offense. *Feldman v. State*, 71 S.W.3d 738, 750–51 (Tex. Crim. App. 2002); *Rousseau*, 855 S.W.2d at 672. Whether one offense is a lesser-included of another is determined on a case-by-case basis. *Jacob v. State*, 892 S.W.2d 905, 907 (Tex. Crim. App. 1995).

1. *Comparison of the Elements*

An appellate court's determination whether the lesser-included offense is included within the proof necessary to establish the offense charged requires a comparison of the statutory elements required to prove the greater offense, as charged within the indictment, with the statutory elements necessary for conviction of the lesser offense. *See* TEX. CODE CRIM. PROC. ANN. art. 37.09 (West 2006); *Ex parte Amador*, 326 S.W.3d 202, 206 n.5 (Tex. Crim. App. 2010); *Hall v. State*, 225 S.W.3d 524, 535–36 (Tex. Crim. App. 2007). This comparison is a question of law and does not consider evidence, or lack thereof. *Hall*, 225 S.W.3d at 535.

Texas Penal Code section 22.01(b)(1) provides an assault on a public servant requires:

- (1) a person;
- (2) intentionally, knowingly, or recklessly;
- (3) causes bodily injury;
- (4) knew that the person upon whom he committed the assault was a public servant;
- (5) while the public servant was lawfully discharging an official duty.

TEX. PENAL CODE ANN. § 22.01(b)(1) (West Supp. 2013).

Texas Penal Code defines the class A misdemeanor assault as

- (1) a person
- (2) intentionally, knowingly, or recklessly
- (3) causes bodily injury to another.

Id. § 22.01(a)(1).

Here, the required elements of misdemeanor assault are included within the proof necessary to establish an assault on a public servant; Castillo satisfies the test's first prong. *See Hall v. State*, 158 S.W.3d at 472–73 (misdemeanor assault is a lesser-included offense of assault on a public servant); *see also Reed v. State*, No. 04-10-00325-CR, 2011 WL 446638, at *1 (Tex. App.—San Antonio Feb. 9, 2011, no pet.) (mem. op., not designated for publication). We, thus, turn to

whether there is some evidence from which a rational jury could acquit the defendant of the greater offense, while convicting him only of the lesser-included offense. *See Guzman v. State*, 188 S.W.3d 185, 188–89 (Tex. Crim. App. 2006); *Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005).

2. *Guilt Only of Lesser Offense*

In the present case, Castillo does not contest that he intentionally, knowingly, or recklessly caused bodily injury to Officer Trinidad. *See* TEX. PENAL CODE ANN. § 22.01(a)(1). Castillo is only entitled to the lesser-included charge, however, if he did not know that Officer Trinidad was a public servant or that she was not lawfully discharging her duty as a public servant. *See id.* § 22.01(a)(1), (b)(1). “[A]nything more than a scintilla of evidence may be sufficient to entitle a defendant to a lesser charge.” *Hall*, 225 S.W.3d at 536 (citing *Bignal v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994)). “In other words, the evidence must establish the lesser-included offense as ‘a valid, rational alternative to the charged offense.’” *Id.* (quoting *Forest v. State*, 989 S.W.2d 365, 367 (Tex. Crim. App. 1999)).

A defendant is entitled to an instruction on every issue raised by the evidence, regardless of the strength or weakness of the evidence; “if any evidence raises the issue that the defendant was guilty only of the lesser offense, the charge must be given.” *Cavazos v. State*, 382 S.W.3d 377, 384 (Tex. Crim. App. 2012). When raised by the evidence, the trial judge must “instruct the jury on statutory defenses, affirmative defenses, and justifications.” *Walters v. State*, 247 S.W.3d 204, 208–09 (Tex. Crim. App. 2007).

Officer Trinidad testified that she was wearing a distinctive San Antonio Park Police Department uniform; her badge visible, and her bicycle, helmet, and bag were clearly marked with “Police.” She identified herself to Castillo, told him that she was a police officer, and explained why she was approaching him. Both maintenance workers knew Officer Trinidad was a police

officer; Martinez testified he reported the incident to Officer Trinidad because she was a peace officer. The fact that Officer Trinidad was a peace officer, wearing a standard, clearly marked uniform, was undisputed. We cannot conclude that the trial court abused its discretion in finding the evidence did not support a lesser-included offense based on Officer Trinidad's standing as a peace officer. *See Segovia v. State*, 467 S.W.3d 545, 556 (Tex. App.—San Antonio 2015, pet. ref'd).

Castillo asserts several arguments that Officer Trinidad's arrest was unlawful and the trial court therefore erred in failing to provide: (1) the lesser-included offense, and (2) several instructions supporting that Officer Trinidad's arrest was unlawful. His arguments, however, are "without merit." *See Gonzales v. State*, 574 S.W.2d 135, 136–37 (Tex. Crim. App. 1978). "Regardless of whether the [Castillo's] arrest was lawful or unlawful, [Officer Trinidad] was in the lawful discharge of [her] duty when [she] attempted to arrest [Castillo]." *Id.* at 137. Courts have long held "it is not a defense to assaulting a public servant in the lawful discharge of his official duties that the arrest attempted by the public servant was illegal." *Tucker v. State*, 114 S.W.3d 718, 723 (Tex. App.—Corpus Christi 2003, pet. ref'd) (citing *Traylor v. State*, 43 S.W.3d 725, 729 (Tex. App.—Beaumont 2001, no pet.); *Cooper v. State*, 956 S.W.2d 95, 98 (Tex. App.—Tyler 1997, pet. ref'd)). Whether an arrest is legal is a question for the court and not one "to be determined in a street confrontation." *Tucker*, 114 S.W.3d at 723 (quoting *Cooper*, 956 S.W.2d at 98). "The duty of a citizen is to submit to the arrest, legal or not, and later resolve the issue in the due course of law." *Id.*

Once again, the evidence is undisputed that Officer Trinidad was attempting to detain Castillo while the sheriff's office dispatch completed a warrant check and she investigated whether the evidence established Castillo violated the city ordinance. Whether Castillo actually committed aggressive solicitation, Officer Trinidad presumed a criminal offense and targeted Castillo, or

Officer Trinidad used her taser to retain Castillo is irrelevant. The record is completely void of evidence that Officer Trinidad used excessive force during the incident or that she stopped Castillo for any reason other than to investigate the incident as reported by the maintenance workers. Based on a review of the entire record, there is no evidence to support instructing the jury on misdemeanor assault was a “valid, rational alternative” to the indicted offense of assault of a peace officer. *See Hall*, 225 S.W.3d at 536. Therefore, we cannot conclude the trial court abused its discretion in concluding that no reasonable person would fail to recognize that Officer Trinidad was in the lawful discharge of her duties. *Ferrel v. State*, 55 S.W.3d 586, 591 (Tex. Crim. App. 2001) (finding no evidence to support defense of unlawful arrest that entitled defendant to instruction).

Because the record does not include even a scintilla of evidence that the lesser-included offense was a valid, rational alternative to the charged offense, *see Hall*, 225 S.W.3d at 536, we cannot conclude the trial court erred in failing to sua sponte include the lesser-included offense in the court’s charge, *see Cortez*, 469 S.W.3d at 598.

Having overruled each of Castillo’s arguments, we overrule his sole issue on appeal.

Patricia O. Alvarez, Justice

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