Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00505-CR

Richard Alcorta **GARZA**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 198th Judicial District Court, Kerr County, Texas
Trial Court No. B15467
Honorable Rex Emerson, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: July 17, 2019

REVERSED AND REMANDED

Richard Garza was convicted of aggravated assault with a deadly weapon. Raising three issues, Garza argues: (1) the trial court did not follow proper procedures when Garza's counsel suggested Garza may be incompetent to stand trial; (2) the evidence is insufficient to support the jury's finding that Garza used a deadly weapon in the commission of the assault; and (3) the trial court erred when it denied Garza's request for a jury instruction on the lesser-included offense of

simple assault. We only address the third issue because it is dispositive in the outcome of this appeal.[1]

BACKGROUND

On July 5, 2015, Garza arrived at Mulligan's Pub (the "Bar") in Kerrville, Texas. Garza appeared intoxicated and was refused service. After the Bar refused to serve him, Garza allegedly brandished a knife and began yelling incoherent profanities directed to two of the Bar's bouncers in the parking lot. The police arrived shortly after the altercation began and arrested Garza.

Garza was indicted for aggravated assault with a deadly weapon and pled not guilty. At trial, the State called one bartender and one bouncer who were involved in the altercation while working at the Bar that night. The bartender testified the incident took place when it was dark outside, and the altercation occurred approximately forty feet away from her. Both the bartender and the bouncer testified Garza was at least ten feet away from the bouncers during the entire altercation, and neither could identify the blade Garza allegedly used in the assault.

The trial court denied Garza's request for a jury instruction on the lesser-included offense of simple assault. Garza appeals.

DISCUSSION

A. Lesser-Included Offense

"The two-step test for determining whether a trial court is required to give a requested instruction on a lesser-included offense is well established." *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016). "The first step is to determine whether the requested instruction pertains to an offense that is a lesser-included offense of the charged offense . . . ." *Id.* "An offense is a lesser included offense if . . . it is established by proof of the same or less than all the facts

[1] Although we do not address Garza's issue regarding his competency to stand trial, we note the standards and procedures outlined in *Boyett v. State*, 545 S.W.3d 556 (Tex. Crim. App. 2018) govern that issue.

required to establish the commission of the offense charged . . . ." TEX. CODE CRIM. PROC. ANN. art. 37.09(1). In this case, the first step is easily satisfied because simple assault, requested as a lesser-included offense, required the same proof as the charged offense of aggravated assault, but without the use or exhibition of a deadly weapon. *See* TEX. PENAL CODE ANN. § 22.02(a)(2) ("A person commits an [aggravated assault] offense if the person commits [simple assault] and the person . . . uses or exhibits a deadly weapon during the commission of the assault.").

"The second step in the analysis asks whether there is evidence in the record that supports giving the instruction to the jury." *Bullock*, 509 S.W.3d at 924–25. "Under this second step, a defendant is entitled to an instruction on a lesser-included offense when there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense." *Id.* at 925. "In this step of the analysis, anything more than a scintilla of evidence may be sufficient to entitle a defendant to a lesser charge." *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007). "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)).

With regard to the second step of the analysis, Garza argues the evidence supports giving the instruction because a jury could rationally find that the knife he brandished was not a deadly weapon due to the distance between him and the bouncers during the altercation. "A deadly weapon is defined as 'a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury' or 'anything that *in the manner of its use* or intended use is capable of causing death or serious bodily injury.'" *Johnson v. State*, 509 S.W.3d 320, 322 (Tex. Crim. App. 2017) (emphasis added) (quoting TEX. PENAL CODE ANN. § 1.07(a)(17)). "A knife is not a deadly weapon per se." *Blain v. State*, 647 S.W.2d 293, 294 (Tex. Crim. App. 1983) (en banc). "In determining whether a weapon is deadly in its manner of use or intended manner

of use, . . . we consider words and other threatening actions by the defendant, *including the defendant's proximity to the victim*; the weapon's ability to inflict serious bodily injury or death, including the size, shape, and sharpness of the weapon; and the manner in which the defendant used the weapon." *Johnson*, 509 S.W.3d at 323 (emphasis added); *see also Tisdale v. State*, 686 S.W.2d 110, 115 (Tex. Crim. App. 1984) (holding physical proximity of the parties is a factor in determining whether a knife is a deadly weapon).

Here, the witnesses testified Garza was always at least ten feet away from the bouncers. Because Garza was never closer than ten feet to the bouncers, there is more than a scintilla of evidence in the record from which a rational jury could have found the knife was not a deadly weapon in this instance and that Garza was guilty only of the lesser-included offense of simple assault. *Bullock*, 509 S.W.3d at 923, 925. Therefore, Garza was entitled to an instruction on the lesser-included offense because it was "a valid, rational alternative to the charged offense." *See Hall*, 225 S.W.3d at 536.

B. Harm Analysis

"The erroneous refusal to give a requested instruction on a lesser-included offense is charge error subject to a harm analysis [under] *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) . . . ." *Braughton v. State*, 569 S.W.3d 592, 613 (Tex. Crim. App. 2018). Because Garza objected to the charge, "the presence of *any* harm, regardless of degree . . . is sufficient to require a reversal of the conviction." *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986) (emphasis in original). "If the absence of the lesser-included offense instruction left the jury with the sole option either to convict the defendant of the charged offense or to acquit him, a finding of harm is essentially automatic because the jury was denied the opportunity to convict the defendant of the lesser offense." *O'Brien v. State*, 89 S.W.3d 753, 756 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (citing *Saunders v. State*, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995)). A

defendant is also harmed when the penalty actually imposed for the greater offense exceeds the potential maximum penalty for the lesser-included offense. *Bridges v. State*, 389 S.W.3d 508, 512 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

Here, the jury had two options: find Garza guilty of aggravated assault or acquit him. There is a distinct "possibility that [the] jury, believing the defendant to have committed some crime, but given only the option to convict him of a greater offense, may have chosen to find him guilty of that greater offense, rather than to acquit him altogether, even though it had a reasonable doubt he really committed the greater offense." *Saunders*, 913 S.W.2d at 571 (citing *Beck v. Alabama*, 447 U.S. 625, 634 (1980)). In addition, Garza was sentenced to prison for a term of sixty years as a result of his conviction. The maximum punishment for simple assault—even with Garza's prior felony enhancements—is imprisonment not to exceed one year and a fine not to exceed $4,000. *See* TEX. PENAL CODE ANN. §§ 12.43(a), 22.01(b). Consequently, Garza was harmed when the trial court refused to give an instruction on the lesser-included offense because the jury was not given the opportunity to find Garza guilty of the lesser offense.

Garza's third issue is sustained.

CONCLUSION

We reverse the judgment of the trial court and remand the cause for a new trial.

Rebeca C. Martinez, Justice

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