In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00172-CR

HUGO SANCHEZMACHADO, Appellant

V.

THE STATE OF TEXAS

On Appeal from County Criminal Court No. 5
Tarrant County, Texas
Trial Court No. 1575796

Before Sudderth, C.J.; Birdwell and Wallach, JJ.
Memorandum Opinion by Justice Birdwell

MEMORANDUM OPINION

In one issue on appeal from his assault conviction and ninety-day sentence, Hugo Sanchezmachado contends that the trial judge erred by including an instruction and question in the jury charge on reckless assault, the offense for which he was convicted, because the information charged appellant only with intentional or knowing assault. Because the trial judge did not err by including the reckless-assault question in the jury charge, we affirm.

Background

The State charged appellant by information with intentionally or knowingly causing bodily injury to the complainant, either as a member of his household or as a person with whom he had a dating relationship, "by grabbing, scratching, or striking her with his hand." At trial, the evidence showed that appellant had pushed and scratched the complainant, leaving marks on her neck, and that he had hit her in the face. The complainant—who did not want to prosecute appellant—testified that during the argument appellant had tried to grab her sweater as she was walking away from him, but he instead grabbed and scratched her neck. She also said that when she was holding her phone to call 911, appellant had reached for it, but then when she tried to move the phone to her other hand, appellant's "hand slid and [he] hit" her by accident.

The proposed jury charge included a question on the lesser-included offense of reckless assault in addition to the charged intentional or knowing assault. Although

appellant objected to the inclusion of the reckless-assault instruction and question, the trial judge overruled his objection, and the jury convicted appellant of the lesser-included offense.

Inclusion of Reckless-Assault Instruction and Question Not Error

In a single issue, appellant complains that the inclusion of the instruction and question on the lesser-included offense allowed the jury to convict him on a theory not alleged in the information and, thus, was error of constitutional dimension.

"In a prosecution for an offense with lesser[-]included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser[-]included offense." Tex. Code Crim. Proc. Ann. art. 37.08. Reckless assault is a lesser-included offense of intentional or knowing assault. *See id.* art. 37.09(3); *Hicks v. State*, 372 S.W.3d 649, 652 (Tex. Crim. App. 2012); *In re R.H.*, No. 2-05-340-CV, 2006 WL 1653171, at *1 (Tex. App.—Fort Worth June 15, 2006, no pet.) (per curiam) (mem. op.); *see also Brackens v. State*, No. 02-17-00328-CR, 2019 WL 1179383, at *5 (Tex. App.—Fort Worth Mar. 14, 2019, no pet.) (mem. op., not designated for publication). A trial judge may instruct the jury "on any lesser-included offense for which there is some evidence presented to rationally convict the defendant of [that] lesser offense." *Hicks*, 372 S.W.3d at 652.

Appellant does not argue that reckless assault is not a lesser-included offense of intentional or knowing assault, nor does he contend that no evidence supported the inclusion of a reckless-assault instruction and question. Instead, appellant argues that

the information accusing him of intentional or knowing assault did not provide him adequate notice to prepare a defense to reckless assault. He relies on *State v. Rodriguez*, 339 S.W.3d 680, 682–83 (Tex. Crim. App. 2011), and *Adams v. State*, 707 S.W.2d 900, 903 (Tex. Crim. App. 1986), Texas Court of Criminal Appeals cases in which the issue was not whether the trial judge could include a lesser-included-offense question in the charge but whether the trial courts had erred in their rulings on pretrial motions to quash the indictments. Here, appellant did not timely file a motion to quash the indictment, so the holdings in these cases do not apply. *See Adams*, 707 S.W.2d at 901 (noting that defendant invokes constitutional notice questions by timely asserting them in a motion to quash); *Cabral v. State*, 170 S.W.3d 761, 764 (Tex. App.—Fort Worth 2005, pet. ref'd) (holding that complaint about indictment's failure to give adequate notice was forfeited by failure to file pretrial motion to quash).

Regardless, the Court of Criminal Appeals has already addressed appellant's notice argument and rejected it. *See Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007); *Day v. State*, 532 S.W.2d 302, 310, 315 (Tex. Crim. App. 1975) (op. on reh'g), *disapproved of in part on other grounds by Hall*, 225 S.W.3d at 537. *But cf. Reed v. State*, 117 S.W.3d 260, 261–65 (Tex. Crim. App. 2003) (reversing conviction for reckless assault when only intentional or knowing assault was charged in the indictment and jury charge did not include separate questions for each offense but instead included reckless, intentional, and knowing mental states in a single question). We will not depart from this precedent without a compelling reason to do so; appellant has not

provided us with such a reason. *See Wiley v. State*, 112 S.W.3d 173, 175 (Tex. App.—Fort Worth 2003, pet. ref'd) ("[A]s an intermediate appellate court we are bound to follow the pronouncements of the court of criminal appeals."). Thus, we conclude that the trial court did not err by including the lesser-included-offense instruction and question in the charge.

Conclusion

Having concluded that the trial court did not err, we overrule appellant's sole complaint and affirm the trial court's judgment.

/s/ Wade Birdwell

Wade Birdwell
Justice

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Delivered: June 11, 2020