IN THE
TENTH COURT OF APPEALS

No. 10-19-00252-CR

ROBERTO HERNANDEZ,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 13th District Court
Navarro County, Texas
Trial Court No. D38732-CR

MEMORANDUM OPINION

In one issue, appellant, Roberto Escobar Hernandez, contends that the trial court abused its discretion by denying his request for a lesser-included-offense instruction in the jury charge. We reverse and remand.

I. BACKGROUND

Appellant was charged by indictment with aggravated sexual assault of a child, a first-degree felony. *See* TEX. PENAL CODE ANN. § 22.021(a)(2)(B). Specifically, the indictment alleged that appellant,

> on or about the 1st day of September, 2018, . . . did then and there intentionally and knowingly cause the penetration of the mouth of [the child victim], a child who was then and there younger than 14 years of age and not the spouse of the defendant, by the Defendant's sexual organ . . . .

This case proceeded to a trial before a jury.

At the charge conference, defense counsel requested instructions on the offenses of indecency with a child by contact and indecency with a child by exposure as lesser-included offenses and provided the trial court with a proposed jury charge. The trial court denied appellant's requested jury-charge instructions.

The jury ultimately found appellant guilty of the charged offense and assessed punishment at thirty-five years' incarceration in the Institutional Division of the Texas Department of Criminal Justice. The trial court certified appellant's right of appeal, and this appeal followed.

II. ANALYSIS

In his sole issue on appeal, appellant argues that the trial court abused its discretion by denying his request for an instruction in the jury charge on the offense of indecency with a child by contact as a lesser-included offense. We agree.

A. Instructions on Lesser-Included Offenses and Jury-Charge Error

We review a trial court's refusal to include a lesser-included-offense instruction for an abuse of discretion. *See Threadgill v. State*, 146 S.W.3d 654, 666 (Tex. Crim. App. 2004). An offense is a lesser-included offense if, among other things, it is established by proof of the same or less than all the facts required to establish the commission of the offense charged. *See* TEX. CODE CRIM. PROC. ANN. art. 37.09(1); *Hall v. State*, 225 S.W.3d 524, 527 (Tex. Crim. App. 2007). The Court of Criminal Appeals has set forth a two-step analysis to determine whether a defendant is entitled to a lesser-included-offense instruction. *Hall*, 225 S.W.3d at 535-36; *see Jones v. State*, 241 S.W.3d 666, 670 (Tex. App.—Texarkana 2007, no pet.). Under the "cognate-pleadings" test, as set forth in *Hall*, the first step concerns whether a lesser-included offense exists based on a comparison of the greater offense, as contained in the charging document, and the lesser offense, without looking to the evidence adduced in that particular case. *Hall*, 225 S.W.3d at 526; *see Jones*, 241 S.W.3d at 670. "This is a question of law, and it does not depend on the evidence to be produced at trial." *Rice v. State*, 333 S.W.3d 140, 144 (Tex. Crim. App. 2011). Only after the first step is answered positively do we proceed to the second step of conducting an inquiry concerning whether there was sufficient evidence at trial to have required the court to submit to the jury the issue of the lesser-included offense. *Jones*, 241 S.W.3d at 670-71.

The State concedes, and we agree, that the offense of indecency with a child by contact can be a lesser-included offense of aggravated sexual assault of a child. *See Ochoa v. State*, 982 S.W.2d 904, 908 (Tex. Crim. App. 1998) (concluding that indecency with a child is a lesser-included offense of aggravated sexual assault of a child where both charges are based on the same incident); *see also Evans v. State*, 299 S.W.3d 138, 143 & n.6 (Tex. Crim. App. 2009). We therefore proceed to the second step in the *Hall* analysis.

Step two of the *Hall* analysis involves the consideration of whether there is some evidence that would permit a rational jury to find that, if appellant is guilty, he is guilty only of the lesser offense. *See Cavazos v. State*, 382 S.W.3d 377, 383 (Tex. Crim. App. 2012); *see also Hall*, 225 S.W.3d at 536. "This second step is a question of fact and is based on the evidence presented at trial." *Cavazos*, 382 S.W.3d at 383. A defendant is entitled to a lesser-included-offense instruction if some evidence from any source raises a fact issue on whether he is guilty of only the lesser offense, regardless of whether such evidence is weak, impeached, or contradicted. *Id.* However, a defendant is not entitled to a lesser-included-offense instruction simply because the evidence supporting the greater offense is weak, the evidence supporting the greater charge is discredited or weakened during cross-examination, or the jury might disbelieve crucial evidence pertaining to the greater offense. *See Bignall v. State*, 887 S.W.2d 21, 24 (Tex. Crim. App. 1994). That is, "there must be some evidence directly germane to a lesser included offense for the factfinder to consider before an instruction on a lesser included offense is warranted." *Id.* "The

evidence must establish the lesser-included offense as 'a valid, rational alternative to the charged offense.'" *Rice*, 333 S.W.3d at 145 (quoting *Hall*, 225 S.W.3d at 536).

At trial, the State proffered the testimony of the child victim's mother (the outcry witness); the child victim; and Lieutenant Clint Andrews of the Navarro County Sheriff's Office (the investigator of the alleged incident). The child victim testified that, while inside a storage container with appellant, appellant lowered the child victim to her knees and inserted his penis into her mouth. The testimony of the child victim's mother and the investigator corroborated much of the child victim's testimony.

Appellant testified on his own behalf and denied inserting his penis into the child victim's mouth. In fact, appellant denied that he intentionally or knowingly touched the child victim at all with his penis. Rather, appellant admitted to touching the child victim inappropriately with his hands with intent to arouse his sexual desire while they were both inside the container. Appellant further testified that both he and the child victim pulled their pants down while in the container, and appellant pulled the child victim close to him and rubbed their bodies together. When asked about the child victim's allegation, appellant suggested that the child victim was lying or confused because the child victim's brother purportedly penetrated the child victim's mouth with his penis days before this alleged incident.

Ordinarily, a defendant's own testimony that he committed no offense, or testimony that otherwise shows that no offense occurred at all, is not adequate to raise

the issue of a lesser-included offense. *See Lofton v. State*, 45 S.W.3d 649, 652 (Tex. Crim. App. 2001). Although appellant denied committing the charged offense of aggravated sexual assault of a child by causing the penetration of the child victim's mouth by his penis, appellant offered a valid, rational alternative version of the incident, which included his admission to a different offense—indecency with a child by contact. *See Cavazos*, 382 S.W.3d at 383 (noting that a defendant is entitled to a lesser-included-offense instruction if some evidence from any source raises a fact issue on whether he is guilty of only the lesser offense, regardless of whether such evidence is weak, impeached, or contradicted); *Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998) ("If there is evidence within a defendant's testimony which raises the lesser included offense, it is not dispositive that this evidence does not fit in with the larger theme of that defendant's testimony."); *see also Kachel v. State*, No. PD-1649-13, 2015 Tex. Crim. App. Unpub. LEXIS 402, at *8 (Tex. Crim. App. Mar. 18, 2015) (not designated for publication) ("Therefore, a defendant can point to his or her own statements as evidence that he or she is guilty of only the lesser-included offense, even if that defendant also denied committing any offense."). Moreover, appellant's testimony did not rise to the level of a flat denial of any culpability that would prevent the requested lesser-included offense from serving as a "valid, rational alternative to the charged offense." *Rice*, 333 S.W.3d at 145; *see Hall*, 225 S.W.3d at 536; *Lofton*, 45 S.W.3d at 652.

Because the jury may believe all, some, or none of any witness's testimony, *see Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986), a reasonable jury—in light of all the evidence in the record—could have disbelieved the child victim's testimony, as well as the other witnesses called by the State, and believed appellant's version of the events—that he only committed the offense of indecency with a child by contact, not aggravated sexual assault of a child. As such, a reasonable juror could have found appellant guilty of only indecency with a child by contact—an option that was not available to the jury in this case. We therefore conclude that the trial court abused its discretion by denying appellant's request for an instruction on the offense of indecency with a child by contact as a lesser-included offense. *See Cavazos*, 382 S.W.3d at 383; *Hall*, 225 S.W.3d at 535-36; *Threadgill*, 146 S.W.3d at 666; *Jones*, 984 S.W.2d at 257; *see also Kachel*, 2015 Tex. Crim. App. Unpub. LEXIS 402, at *8.

B. *Almanza* Harm Analysis

The erroneous refusal to give a requested instruction on a lesser-included offense is charge error subject to an *Almanza* harm analysis. *See Saunders v. State*, 840 S.W.2d 390, 392 (Tex. Crim. App. 1992) (per curiam) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)). Because appellant objected to the charge, under *Almanza*, we will reverse if the error in the court's charge resulted in some harm to appellant. *See Almanza*, 686 S.W.2d at 171. The harm from denying a lesser-included instruction stems from the potential to place the jury in the dilemma of convicting for a greater offense in which the

jury has reasonable doubt or releasing entirely from criminal liability a person the jury is convinced is a wrongdoer. *Masterson v. State*, 155 S.W.3d 167, 171 (Tex. Crim. App. 2005); *see Saunders v. State*, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995). Typically, 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, some harm exists. *See Saunders*, 913 S.W.2d at 571. Because the jury could have reasonably believed that appellant committed the lesser-included offense of indecency with a child by contact, but was only given the option to convict him of the greater offense of aggravated sexual assault of a child, the denial of the requested instruction caused appellant some harm. *See Masterson*, 155 S.W.3d at 171; *Saunders*, 913 S.W.2d at 571; *see also Almanza*, 686 S.W.2d at 171. As such, we sustain appellant's sole issue on appeal.

III. CONCLUSION

We reverse the trial court's judgment and remand the case for a new trial.

JOHN E. NEILL
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Reversed and remanded
Opinion delivered and filed July 29, 2020
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