AFFIRMED and Opinion Filed June 2, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00427-CR

INOCENTE GARCIA CASTRO, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 5
Dallas County, Texas
Trial Court Cause No. F-1776601-L

MEMORANDUM OPINION
Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Osborne

Appellant, Inocente Garcia Castro, was convicted of continuous sexual abuse of a child and sentenced to life imprisonment. In a single issue on appeal, appellant claims the trial court committed reversible error by sua sponte charging the jury on three lesser included offenses that neither the defense nor the State requested. We affirm.

The facts of the case are well-known to the parties and appellant does not contest the sufficiency of the evidence to support his conviction. Therefore, we issue

this memorandum opinion and include only those facts necessary for disposition of the appeal. *See* TEX. R. APP. P. 47.4.

The Indictment

The indictment charging appellant with continuous sexual abuse of a child alleged two predicate offenses of aggravated sexual assault and one predicate offense of indecency with a child:

> That INOCENTE GARCIA CASTRO, hereinafter called Defendant, on or about the 1st day of June, 2017 in the County of Dallas, State of Texas, did then and there intentionally and knowingly, during a period that was 30 or more days in duration, when the defendant was 17 years of age or older, commit two or more acts of sexual abuse against . . . (K.R.) . . . a child younger than 14 years of age, hereinafter called complainant, namely by: the contact of the complainant's female sexual organ by the Defendant's sexual organ AND by the penetration of the complainant's anus by the Defendant's finger AND by contact between the mouth of the defendant and the sexual organ of the complainant AND by the contact between the hand of the Defendant and the genitals of the complainant with the intent to arouse and gratify the sexual desire of the Defendant.

Appellant entered a plea of not guilty to this charge and trial was held before a jury.

The Jury Charge

The trial court's jury charge instructed the jury on the charged offense of continuous sexual abuse of a young child. The charge went on to instruct the jury on the lesser included offenses that were alleged in the indictment as predicate offenses for the primary offense of continuous sexual abuse of a young child: (1) aggravated sexual assault of a child by contact of the female sexual organ of the

complainant by appellant's sexual organ, (2) aggravated sexual assault of a child by contact between the mouth of appellant and the sexual organ of the complainant, and (3) indecency with a child by causing contact between the hand of appellant and the genitals of the complainant with the intent to arouse and gratify the sexual desire of appellant.

The charge also contained four verdict forms permitting the jury to convict appellant on (1) continuous sexual abuse of a young child, or (2) and (3) aggravated sexual assault of a child by contact, or (4) indecency with a child. A fifth verdict form permitted the jury to return a verdict of acquittal. The jury returned a guilty verdict on the primary charge of continuous sexual abuse of a young child.

Appellant's Allegations and State's Response

Appellant claims the trial court's instructions were fundamentally defective because the Code of Criminal Procedure does not authorize a trial court to sua sponte charge the jury on unrequested lesser included offenses.[1] Appellant argues that, since no objections were made to the charge by either party, and no party requested any special charges, the trial court lacked the authority to charge on the lesser included offenses. Appellant further argues that he suffered egregious harm because the lesser charges focused the jury on possible extraneous offenses and biased the jury against appellant by indicating "he committed multiple sexual offenses."

[1] Appellant references TEX. CODE CRIM. PROC. ANN. art. 36.14.

The State responds that the instructions were requested and, even if they were not, the trial court had the authority to charge on the lesser included offenses.

Were the Lesser Included Offense Instructions Requested?

At the conclusion of the evidence, and prior to the charge being read to the jury, the following exchange was held between the trial court judge and the parties:

> THE COURT: Let's get on the record in the Castro case. Let the record reflect the jury is not present. The Court has prepared the charge and I've tendered copies to both sides. *A couple of changes have been made.*
>
> *After the changes have been made*, does the State have any objection to the charge or any requests for instructions not included?
>
> [BY THE PROSECUTOR]: No, Your Honor.
>
> THE COURT: Does the Defense have any objections or requests for instructions not included?
>
> [BY DEFENSE COUNSEL]: No, Your Honor.
>
> THE COURT: All right.

(emphasis added).

The reporter's record does not contain a record of any charge conference, does not indicate that a charge conference occurred off the record, and does not reflect what the wording of the charge was before the alluded to "changes" were made. Nevertheless, the State argues the prosecutor's final jury argument indicates that these instructions were requested:

> If he's guilty of continuous sexual abuse of a child, stop, that's it. Your job is done. If you cannot reach a decision, that's when you start to consider this. Now, this is the penis to vagina contact, that's in the charge. Mouth to vagina contact, that's also in the charge. And we

> have the hand to vagina contact, indecency, second degree felony that's also in the charge.
>
> *Now, they're in the charge just because someone asked for them.* The truth is, we could have put a number of offenses in this charge. I think we all know that this defendant, over the course of a year, year-and-a-half, committed much more than those three offenses that we listed as lesser included.

(emphasis added).

This Court, however, cannot reach the conclusion that these instructions were requested because the record is silent as to what changes were requested and by which party. And it is improper for this Court to speculate with regards to what may or may not have transpired off the record. *See Cockrum v. State*, 758 S.W.2d 577, 585 n.7 (Tex. Crim. App. 1988) (although "perhaps" one of the unrecorded bench conferences would have reflected some question to veniremen that was prohibited by the trial judge, supposition cannot substitute for what actually found its way into the appellate record); *Veras v. State*, 410 S.W.3d 354, 357–58 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (the court "cannot conclude that appellant preserved error based upon speculation or supposition as to what may have occurred during a bench conference at which no record was made"); *Bledsoe v. State*, 936 S.W.2d 350, 351 n. 2 (Tex. App.—El Paso 1996, no pet.) (because the record did not reflect the reason for the defendant's absence during the voir dire and jury selection portions of the trial, the appellate court would not assume his absence was voluntary).

While the trial court stated that a "couple of changes" had been made to the charge, it is impossible to know from this record what those changes were, and it cannot be assumed that those changes were the inclusion of the lesser included offenses or that either party requested those instructions. *See Zamora-Banegas v. State*, No. 05-18-00612-CR, 2019 WL 3315449, at *10 (Tex. App.—Dallas July 24, 2019, no pet.) (mem. op., not designated for publication) (holding that, because the record was silent as to how a "star" came to be on the jury charge, it could not be assumed that the "star" indicated a change made by the trial court or that the trial court sought to emphasize any portion of the charge). Therefore, we will address this issue as if the trial court sua sponte included the instructions on the lesser included offenses.

Lesser Included Offenses

An offense is a lesser included offense if (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission; (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or (4) it consists of an attempt to commit the offense charged or an otherwise included offense. TEX. CODE CRIM. PROC. art. 37.09. If an offense meets any of these definitions, then it is

a lesser included offense to the offense charged. *Hicks v. State*, 372 S.W.3d 649, 653 (Tex. Crim. App. 2012).

The Penal Code proscribes five elements for the offense of continuous sexual abuse of a child: (1) a person; (2) who is seventeen or older; (3) commits a series of two or more acts of sexual abuse; (4) during a period of thirty or more days; and (5) each time the victim is younger than fourteen. *See* PENAL § 21.02(b). Section 21.02(c) specifically enumerates the acts of sexual abuse. *See* PENAL § 21.02(c); *Price v. State*, 434 S.W.3d 601, 606 (Tex. Crim. App. 2014). Indecency with a child and aggravated sexual assault are two of the specifically enumerated predicate "acts of sexual abuse" for the offense of continuous sexual abuse. *See* PENAL § 21.02(c)(2), (4); *see also Id*., §§ 21.11(a)(1), 22.021. As such, these "acts of sexual abuse" are lesser included offenses of the offense of continuous sexual abuse. *See Price*, 434 S.W.3d at 606 (finding that a predicate offense listed under Section 21.02(c) will always be a lesser offense of continuous sexual abuse, because the latter is, by its very definition, the commission under certain circumstances of two or more of the offenses listed in that subsection); *Soliz v. State,* 353 S.W.3d 850, 854 (Tex. Crim. App. 2011) (same).

Authority to Sua Sponte Instruct on Lesser Included Offenses

The trial court must provide the jury with a written charge distinctly setting forth the law applicable to the case. TEX. CODE CRIM. PROC. ANN. art. 36.14. The trial judge has a duty to prepare a jury charge that accurately sets out the law

applicable to the specific offense charged and is ultimately responsible for the accuracy of the jury charge and accompanying instructions. *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007). We review a trial court's decision to submit a lesser included offense for an abuse of discretion. *Treadgill v. State*, 146 S.W.3d 654, 666 (Tex. Crim. App. 2004).

Appellate courts in Texas, including this Court, have held that if there is sufficient evidence to support a conviction on a lesser included offense, a trial court may submit instructions to the jury on lesser included offenses, even where the defendant did not request the charge and even over the defendant's objection. *See Humphries v. State*, 615 S.W.2d 737, 738 (Tex. Crim. App. [Panel Op.] 1981); *Ford v. State*, 38 S.W.3d 836, 840–41 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd); *McQueen v. State*, 984 S.W.2d 712, 717 (Tex. App.—Texarkana 1998, no pet.); *Cevallos v. State*, 699 S.W.2d 334, 335–36 (Tex. App.—Houston [1st Dist.] 1985, pet. ref'd); *Rodriguez v. State*, 661 S.W.2d 332, 337 (Tex. App.—Corpus Christi 1983, pet. ref'd); *see also Grey v. State*, 298 S.W.3d 644, 656 (Tex. Crim. App. 2009) (Cochran, J., concurring); *Pina v. State*, No. 05-17-00918-CR, 2018 WL 6629527, at *2 (Tex. App.—Dallas Dec. 19, 2018, pet. ref'd) (mem. op., not designated for publication); *Fazio v. State*, No. 04-17-00329-CR, 2018 WL 2694636, at *3 (Tex. App.—San Antonio June 6, 2018, no pet.) (mem. op., not designated for publication); *Le v. State*, No. 05-16-01324-CR, 2018 WL 2001609,

at *10 (Tex. App.—Dallas Apr. 30, 2018, no pet.) (mem. op., not designated for publication).

In this case, the lesser offenses were included within the indictment as predicate offenses for the greater offense of continuous sexual abuse of a young child. Those lesser offenses were, therefore, valid rational alternatives to the charged offense. *See Goad v. State*, 354 S.W.3d 443, 446 (Tex. Crim. App. 2011). The trial court had the authority to charge the jury sua sponte on these lesser offenses. Accordingly, the trial court did not abuse its discretion in doing so.

Because we find no error in the charge, we need not address the question of harm. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015).

We overrule appellant's sole issue.

Conclusion

The trial court's judgment is affirmed.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

DO NOT PUBLISH
TEX. R. APP. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

INOCENTE GARCIA CASTRO, Appellant	On Appeal from the Criminal District Court No. 5, Dallas County, Texas Trial Court Cause No. F-1776601-L.
No. 05-19-00427-CR V.	Opinion delivered by Justice Osborne. Justices Whitehill and
THE STATE OF TEXAS, Appellee	Carlyle participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered June 2, 2020