

AFFIRMED and Opinion Filed June 16, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-00561-CR

No. 05-19-00712-CR

**RICHARD LEE CORTEZ, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 283rd Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F17-33286-T; F17-33287-T**

MEMORANDUM OPINION

**Before Justices Bridges, Pedersen, III, and Evans
Opinion by Justice Bridges**

Richard Lee Cortez appeals his aggravated sexual assault convictions. A jury convicted appellant and sentenced him to fifteen years' confinement in each case. In a single issue, appellant argues the trial court erred in failing to include in the jury charge a lesser-included offense instruction. We affirm the trial court's judgment.

In June 2017, appellant was charged by indictment with aggravated sexual assault of B.W., a child under the age of fourteen. The indictment in cause number 05-19-00561-CR charged appellant with an October 1997 offense, and the

indictment in cause number 05-19-00712-CR charged appellant with an October 1998 offense. At appellant's trial, B.W. testified that she was born in September 1993. In August 2014, B.W. went to church with her friend Rachel, and the two sat on the front row. B.W. glanced over her shoulder and saw appellant. B.W. ran out of church crying, and Rachel followed her. B.W. told Rachel appellant had molested her when she was a child and her mother was dating appellant.

B.W. testified appellant lived with her and her mother at an apartment in Irving when B.W. was "the ages of four and five." B.W. testified appellant "used to make [her] perform oral sex on him" when she was between the ages of four and five. B.W. described the "typical way" appellant abused her on "multiple periods," and she testified "it was normally under the same circumstances." B.W. testified she was thirteen years old when she understood what appellant did to her was abuse, but she did not tell anyone "because [she] was ashamed" and "scared."

The trial court denied appellant's request to include in the charge an instruction on indecency with a child by exposure. However, the trial court did instruct the jury on the lesser-included offense of attempted aggravated sexual assault. The jury convicted appellant of aggravated sexual assault and sentenced him to fifteen years' confinement in each case. These appeals followed.

In a single issue, appellant argues the trial court erred in "refusing to grant a lesser-included offense instruction" on indecency with a child by exposure. Appellant argues his admission to police and B.W.'s mother that he intentionally

exposed himself to B.W. would have allowed the jury to find appellant guilty of the lesser-included offense of indecency with a child by exposure.

We use a two-prong test to determine whether a defendant is entitled to an instruction on a lesser included offense. *Hall v. State*, 158 S.W.3d 470, 473 (Tex. Crim. App. 2005). The first prong requires us to determine whether the offense for which the instruction was requested is a lesser included offense of the charged offense. *Id.* The second prong requires us to determine whether the record contains some evidence that would permit a rational jury to find the defendant guilty only of the lesser-included offense. *Id.* “It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. Rather, 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.” *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997). 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. *Evans v. State*, 299 S.W.3d 138, 143 n.6 (Tex. Crim. App. 2009) (citing *Ochoa v. State*, 982 S.W.2d 904, 908 (Tex. Crim. App. 1998)).

Here, B.W. testified appellant “used to make [her] perform oral sex on him” when she was between the ages of four and five, and the abuse occurred on “multiple periods.” Appellant’s admission to police and B.W.’s mother that he intentionally exposed himself to B.W. may have been true. However, there was no evidence that would have permitted the jury to find appellant guilty only of indecency by exposure

as part of the same incident in which he made B.W. “perform oral sex on him.” *See Hall*, 158 S.W.3d at 473; *Evans*, 299 S.W.3d at 143 n.6. Accordingly, we conclude the trial court did not err in “refusing to grant a lesser-included offense instruction” on indecency with a child by exposure. We overrule appellant’s single issue.

We affirm the trial court’s judgment.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

RICHARD LEE CORTEZ, Appellant

No. 05-19-00561-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial
District Court, Dallas County, Texas
Trial Court Cause No. F-1733286-T.
Opinion delivered by Justice Bridges.
Justices Pedersen, III and Evans
participating.

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

Judgment entered June 16, 2020



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

RICHARD LEE CORTEZ, Appellant

No. 05-19-00712-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial
District Court, Dallas County, Texas
Trial Court Cause No. F-1733287-T.
Opinion delivered by Justice Bridges.
Justices Pedersen, III and Evans
participating.

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

Judgment entered June 16, 2020