Reversed and Remanded and Opinion filed July 19, 2001.

In The

Fourteenth Court of Appeals

NO. 14-98-00968-CR

MICHAEL JAMES PIPKIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd Judicial District Court
Harris County, Texas
Trial Court Cause No. 775, 099

O P I N I O N O N R E M A N D F R O M
T H E C O U R T O F C R I M I N A L A P P E A L S

Appellant, Michael James Pipkin, was indicted for capital murder. A Harris County jury found him guilty of the lesser-included offense of aggravated robbery, and the trial court assessed punishment at forty years' confinement. This Court affirmed his conviction. *Pipkin v. State*, No. 14-98-00968-CR, 2000 WL 729395 (Tex. App.—Houston [14th Dist.] June 8, 2000). The court of criminal appeals vacated our judgment and remanded for us to consider whether the trial court erred in failing to submit the lesser-included offense of theft. *Pipkin v. State*, No. 1508-00 (Tex. Crim. App. Dec. 11, 2000) (per curiam) (not designated for publication). Finding that the trial court did err, and that the error was harmful, we reverse and

remand.

Appellant was convicted in connection with the August 30, 1994 home-invasion murder and robbery of Willie Carson. Testimony showed that the house in which Carson was killed harbored a substantial marihuana-dealing operation, and that robbery was apparently the motive behind Carson's murder. The case went unsolved for more than three years. When appellant was jailed on unrelated charges, he agreed to provide information on Carson's murder to police in an attempt to win a better plea bargain in his own case. Police took a statement from appellant in which he told officers that two brothers, Dennis and Terry Johnson, committed the robbery and murder using a gun which he sold to one of the brothers. Appellant said he had taken Terry Johnson to the house the night before to buy marihuana; the next day, as he left his house with the Johnsons ,they told him they were going to rob the house. At that point, appellant said he told the Johnsons to let him out of the car, because he didn't want to be involved. According to the statement, appellant called his wife to come pick him up, and while he was on the telephone with her, the Johnsons returned. Appellant said he thought no crime had been committed because they returned fairly quickly, so he got in the car with them. He said the brothers then told him about killing someone at the house and supplied details, and that Terry was covered in blood. He also acknowledged that the brothers gave him two pounds of marihuana, which he later sold for $1,000. The statement led to appellant's indictment.

At trial, the jury was charged on both capital murder and on the lesser included offense of aggravated robbery. Appellant's request for a charge on the lesser-included offense of theft – that is, appropriating property knowing it was stolen by another – was refused by the trial court. *See* TEX. PEN. CODE ANN. § 31.03(b)(2)(Vernon 1994). The jury found appellant guilty of aggravated robbery.

The court of criminal appeals noted that our original opinion did not specifically address the testimony of appellant's wife and directed us to "consider Appellant's wife's testimony in [our] analysis of whether evidence from any source—no matter how weak, contradicted, or impeached—raised the issue that if guilty, Appellant was guilty only of theft." *Id*. (citing *Saunders v. State*, 840 S.W.2d 390 (Tex. Crim. App. 1992)).

A defendant is entitled to a charge on a lesser offense only if the lesser offense is included within the proof necessary to establish the offense charged, and there is some evidence that would permit the jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. *See Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993); *Dowden v. State*, 758 S.W.2d 264, 268 (Tex. Crim. App. 1988). The credibility of the evidence and whether it conflicts with other evidence or is controverted may not be considered in determining whether an instruction on a lesser included offense should be given. *See Banda v. State*, 890 S.W.2d 42, 60 (Tex. Crim. App. 1994). Regardless of its strength or weakness, if any evidence raises the issue that the defendant was guilty only of the lesser offense, then the charge must be given. *See Medina v. State*, 7 S.W.3d 633, 638 (Tex. Crim. App. 1999); *Saunders*, 840 S.W.2d at 391.

Appellant's wife, Julie Neuman, largely corroborated her husband's statement. She said that when her husband left the house with the brothers that day, he did not know what they were planning and had no intent to rob anyone. Neuman said appellant called her shortly after he left with the brothers. While he was on the telephone, the co-defendants returned and gave him a ride back to the house. Neuman also acknowledged that the brothers gave her husband marijuana taken in the robbery.

Appellant contends his wife's testimony evidences his intention to abandon the evil intent of his co-defendants. Moreover, appellant argues this is some evidence which, if believed, would permit a rational jury to find him guilty of only theft. *See Rousseau*, 855 S.W.2d at 673. We agree; thus, we find the trial court erred in denying appellant's request for an instruction on the lesser included offense of theft.

Having found error in the charge, we must next determine whether sufficient harm resulted from the error to require reversal. *See Irizarry v. State*, 916 S.W.2d 612, 614 (Tex. App.—San Antonio 1996, pet. ref'd). Where, as here, appellant objected to the charge and affirmatively requested an instruction on the lesser-included offense, reversal is required so long as appellant has suffered *some* harm. *See Abdnor v. State*, 871 S.W.2d 726, 732 (Tex. Crim. App. 1994); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). We

determine the actual degree of harm by examining the error in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole. *See Almanza*, 686 S.W.2d at 171. We measure harm in our particular case by looking to whether the jury could have found itself ultimately in a dilemma between convicting of a greater-included offense and acquitting defendant. *See Saunders*, 913 S.W.2d 564 (Tex. Crim. App. 1995) (quoting *Beck v. Alabama*, 447 U.S. 625, 634 (1980)). If the jury is faced with this dilemma, a finding of harm is essentially automatic. *Jimenez v. State*, 953 S.W.2d 293, 299-300 (Tex. App.—Austin 1997, pet. ref'd) (quoting *Saunders*, 913 S.W.2d at 571). Alternatively, a jury conviction on the greater inclusive offense constitutes strong evidence that failure to submit a lesser included offense was harmless error. *See, e.g., Saunders*, 913 S.W.2d at 569-570.

Because appellant was convicted on the lesser of two charged offenses, we do not have strong evidence that this error was harmless. *Id.* Furthermore, the evidence in this case was sharply contested. Once this jury discarded the option of convicting appellant of capital murder, it was faced with the dilemma of convicting appellant for a first-degree felony or acquitting. At that point, given the state of this record, we believe the jury likely found itself in the dilemma posed in *Beck*.

Because the jury was put in the position of convicting appellant of a first-degree felony or of acquitting, and because appellant was entitled to a lesser included offense which was not given, we believe appellant has shown that he suffered some harm.

The judgment of the trial court is reversed and the cause remanded for new trial.

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Norman R. Lee
Justice

Judgment rendered and Opinion filed July 19, 2001.

Panel consists of Justices Cannon, Lee, and Draughn.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Bill Cannon, Norman R. Lee and Joe L. Draughn sitting by assignment.