
YEAR 2005 CASE SUMMARIES

By
The Honorable Pat Garza

Associate Judge
386th District Court
San Antonio, Texas

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Evidence sufficient to support adjudication for burglary of a building. [In the Matter of D.H.](05-3-33)

On June 24, 2005, the Dallas (5th Dist.) Court of Appeals held that the evidence under the proper standards, was legally and factually sufficient to support the trial court's finding that respondent committed burglary of a building.

05-3-33. In the Matter of D.H., ___ S.W.3d ___, No. 05-04-00906-CV, 2005 Tex.App.Lexis 4919, [Tex.App.— Dallas (5th Dist.), 6/24/05] rel. for pub. 7/20/05.

Background: D.H. appeals the trial court's judgment of disposition that adjudicated him a child engaged in delinquent conduct and placed him on probation for twelve months in his mother's custody. In three points of error, D.H. contends the evidence is legally and factually insufficient to support the trial court's finding that he committed burglary of a building, and the judgment should be reformed to correct clerical errors.

Held: Affirmed

Facts: Glen Stevens, owner of a Volkswagen shop located at 622 Hickory Tree Road, testified that on August 27, 2003, he received a call from Brandy Wood, one of his employees. Wood stated he had seen a truck backed up to a building down the street and people were loading items into the truck. The building was leased by one of his employees who had already left work for the day. Stevens drove to the scene and saw that Wood had used his vehicle to block the suspect truck from leaving. Stevens saw eight people at the scene: two teenage girls were inside the suspect truck, two teenage boys and two adult males were standing next to the suspect truck, and two of Stevens's employees were standing in front of the suspect truck. Stevens identified D.H. as one of the teenage boys. Stevens testified he confronted a red-haired man who appeared to be the oldest. The man said he had purchased "some stuff from a guy" and had come there to pick it up. Stevens told the man that he would have to explain everything to the police. The man said, "I'm not going back to jail," then he ran off. Stevens and one his employees chased the man, but never caught him. Stevens then saw the four teens walking up the street in the opposite direction. Stevens chased them, but lost sight of them when they ran into a field. Stevens went back to the building, where officers arrested the other adult who appeared to be the owner of the suspect truck. A short time later, Stevens went with officers to another location where he identified the teens. Stevens testified that some of the teens made verbal threats against him, but he was not certain if D.H. made any of the threats.

Brandy Wood, who worked as a mechanic for Stevens, testified he noticed a pickup truck backing up to

the garage door of a building that he knew belonged to another employee. Wood called Stevens and told him about the suspect truck, then he and fellow employee Matt Lipscomb drove to the building and blocked the truck with their vehicle. Wood testified he saw two girls sitting inside the suspect truck and four males walking out of the building with items in their hands. Two of the males were teenagers and two were older adults. Wood identified D.H. as one of the teenagers. Wood testified he saw D.H. walking from the building with property in his hands. D.H. put the property in the back of the suspect truck. One of the adult suspects, a man with red-hair said he was there picking up yard equipment that he had bought from someone; the other adult suspect said nothing. Wood told the red-haired man that they were not supposed to be there, and they would have to wait for Wood's boss. While they waited, Wood saw D.H. and the other teenager take items from the back of the suspect truck and carry them back inside the building. When Stevens arrived on the scene, the red-haired man began "freaking out," then ran off. The other adult suspect stayed near the truck, and D.H. and the other teens walked down the street. Lipscomb and Stevens chased the red-haired man. Wood stayed at the building with the other suspect. The police arrived a short time later and arrested the adult suspect, who police determined was the owner of the truck. After talking with the police, Wood left the scene to go home. Wood saw the four teens on a nearby street. Wood drove back to the building to notify the officers, then led the officers to the teens' location.

Matt Lipscomb testified he went to the building with Wood to see what was going on. Lipscomb saw a truck that was backed up to the loading door of the building, and two young girls were sitting in the front seat. The loading door was open. After one or two minutes, Lipscomb saw four males inside the building. Lipscomb saw the males, two teenagers and two adults, walk out of the loading door carrying items in their hands. Lipscomb identified D.H. as one of the teens he saw carrying property from the building. An adult who had red hair appeared to be the leader of the group. The red-haired man said that a friend had sold the items to him and he was just picking them up. Lipscomb told them they would need to wait there for the owner of the building. While they waited, D.H. and the other teen started taking items from the back of the truck and laying them on the ground. When Stevens arrived at the building, the red-haired man said, "I'm not going back to jail," then he ran away. Lipscomb ran after the red-haired man and Stevens ran after D.H. and the other teens. Lipscomb testified he never caught the red-haired man, so he went back to the shop and talked with police officers. Lipscomb went with Wood and the officers to where the teens had been found. Lipscomb testified that after D.H. was arrested, D.H. said, "I know where you live; I'm gonna get you."

John Larsen testified he was a mechanic at Stevens's shop and also leased a building down the street that he used to store his property, including tools, motorcycles, household items, plumbing and electrical supplies, and cellular telephone items. Larsen testified he received a telephone call about a burglary at the building after he had already gone home for the day. Larsen arrived at the building after the police officers were already at the scene. Larsen saw Stevens, Wood, and Lipscomb with officers, and he saw a man who the police said owned a truck that was parked near the building's garage door. Officers found several items in the back of the man's truck. Larsen identified the items as those that had been inside the building when he left the premises that day. Larsen testified that after he talked with the officers, he took the items from the truck and put them back inside the building. Larsen then secured the garage door and locked the building. Larsen testified that the garage door had been locked from the inside earlier that day, the building was not open to the public, and he did not give anyone permission to go into the building.

Mesquite police officer Chad Roden testified he arrived at the building and spoke with Wood, who stated that five suspects had broken into the building, that four of them had run off, and the remaining suspect was the owner of the truck that he blocked with his own vehicle. Wood told Roden that he had seen the suspects taking items out of the building and loading them into the back of the truck. Roden testified that Wood left the scene for a short time, then returned and said he knew the location of the four

teenage suspects. Roden followed Wood to the location and arrested two boys and two girls. Roden identified D.H. as one of the boys he had arrested. Roden testified that D.H. and the other teens were "mouthing off" at the witnesses who had identified them by saying "I'm gonna get you when I get out."

Iona Jones, who was also charged with burglary of a building, testified on D.H.'s behalf. Jones testified that she and D.H. were with two other friends when they saw a man she knew by the name Shaggy. Shaggy, who was driving a truck, offered to give them a ride to the store. There was another man in Shaggy's vehicle that Jones did not know. After Shaggy drove her and the others to the store, he said his boss wanted him to pick up some tools at a building. Jones, D.H., and the other teens were in the vehicle when Shaggy parked at the side of a building on Hickory Tree Road. Jones testified that Shaggy and the man with him went inside the building, but D.H. and the other boy stayed outside the building. Jones and another girl were inside Shaggy's truck. Jones testified she saw Shaggy and the other man bringing items out of the building and putting them in the back of the truck. According to Jones, neither D.H. nor the other boy ever went inside the building or handled any of the property. Jones testified that Shaggy got out of the truck and opened the garage door. She did not see Shaggy break or damage the door. After a short time, Jones saw another truck pull up and block them from leaving. A man got out of the truck and said that they were not supposed to be there. Jones testified that no one knew Shaggy did not have permission to be there. When Jones and the others realized Shaggy was stealing the property, they decided to leave. Jones, D.H., and their two friends walked to another friend's house nearby. They stayed only a few minutes, then left to go to a different friend's house to get a ride home. The police stopped them. Jones testified that when she and D.H. were arrested, no one made any verbal threats to the people at the scene.

Memorandum Opinion: A juvenile court has broad discretion in determining a suitable disposition for a juvenile who has been adjudged to have engaged in delinquent conduct. *In re K.B.*, 106 S.W.3d 913, 915 (Tex. App.-Dallas 2003, no pet.). Absent an abuse of discretion, we will not disturb the findings of the juvenile court. *In the Matter of K.L.C.*, 972 S.W.2d 203, 206 (Tex. App.-Beaumont 1998, no pet.).

In juvenile cases, we apply the same standards used in criminal cases to determine the legal and factual sufficiency of the evidence. *In re J.D.P.*, 85 S.W.3d 420, 426 (Tex. App.-Fort Worth 2002, no pet.). In our legal sufficiency review, we examine the evidence in the light most favorable to the judgment and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *Sanders v. State*, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003). In our factual sufficiency review, we examine all of the evidence in a neutral light to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Zuniga v. State*, 144 S.W.3d 477, 484 (Tex. Crim. App. 2004); *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). Under either review, the fact finder is the exclusive judge of the witnesses' credibility and the weight to be given to their testimony. *Harvey v. State*, 135 S.W.3d 712, 717 (Tex. App.-Dallas 2003, no pet.).

A person commits burglary of a building if he intentionally and knowingly enters a building not then open to the public, and without the owner's effective consent, commits or attempts to commit a theft. See TEX. PEN. CODE ANN. § 30.02 (Vernon 2003).

LEGAL AND FACTUAL SUFFICIENCY

In two issues, D.H. argues the evidence is legally and factually insufficient to support the trial court's finding that he committed burglary of a building because, at most, he was only present at the scene of the burglary, but was not a party to the burglary. D.H. asserts that no one saw him enter or leave the building, he was at the scene only because he had received a ride, and he did not know that the man he was helping was actually burglarizing the building. The State responds the evidence is legally and

factually sufficient to support the trial court's finding that D.H. committed burglary of a building because the trial court was free to believe eyewitness testimony.

Both Wood and Lipscomb testified they became suspicious when they saw a truck back up to the loading door of the building because they knew the building and property belonged to a co-worker who had already left work that day. Wood and Lipscomb testified they saw D.H. walk from the building with property in his hands. Lipscomb testified he saw D.H. inside the building, then D.H. walked outside to the truck. When D.H. realized the police were being called, he and another teenager began taking some of the property they had just loaded in the truck out of the truck. Larsen, the lessee of the building, testified the building was not open to the public and he had locked the garage door from the inside. Larsen testified he had secured the building before he left for the day. Larsen also testified that property found in the back of the truck had been inside the building when Larsen left the premises that day.

Jones, an accomplice, testified she never saw D.H. enter the building or handle any of the property. Jones testified she, D.H., and two other teens had accepted a ride from a man she knew named Shaggy, who was the owner of the truck. Jones also testified that D.H. did not know that Shaggy and the other adult were stealing property from the building.

Appellant essentially asks this Court to find that Wood's and Lipscomb's testimony was not as credible as Jones's testimony. However, the trial court, as fact finder in this case, was the exclusive judge of the credibility of the witnesses and the weight to be given to their testimony, and as such, resolved the conflicts in the testimony. *See Obigbo v. State*, 6 S.W.3d 299, 305 (Tex. App.-Dallas 1999, no pet.).

Having reviewed all of the evidence under the proper standards, we conclude it is legally and factually sufficient to support the trial court's finding that D.H. committed burglary of a building. *See Sanders*, 119 S.W.3d at 820; *Zuniga*, 144 S.W.3d at 484. We resolve D.H.'s first two issues against him.

REFORM JUDGMENT

In his third issue, D.H. argues the judgment should be reformed to correct two clerical errors: (1) to show that D.H. did not waive his right to have a trial before the court, and (2) to show that the trial court found one of the allegations in the State's petition not true. The State agrees only that the judgment should be modified to reflect that D.H. did not waive his right to have a trial before the court. We agree with the State.

In its petition, the State alleged D.H. committed two offenses: (1) criminal trespass on August 23, 2003 and (2) burglary of a building on August 27, 2003. The trial court found the criminal trespass allegation not true, the burglary allegation true, and adjudicated D.H. a child engaged in delinquent conduct. The judgment of disposition clearly shows the criminal trespass allegation was found "to be not true." However, the judgment erroneously states that D.H. waived his right to have a trial before the court. We resolve D.H.'s third issue in his favor as to the waiver of his right to have a trial before the court.

We have the power to modify incorrect judgments when we have the necessary information to do so. *See TEX. R. APP. P. 43.2(b)*; *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529-30 (Tex. App.-Dallas 1991, pet. ref'd). We modify the trial court's judgment of disposition to show that appellant did not waive his right to have a trial before the court.

Conclusion: As modified, we affirm the trial court's judgment.

