

Review of Recent Juvenile Cases (2007)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

The record evidence did not establish robbery as a valid, rational alternative to aggravated robbery. [In the Matter of L.J., Jr.], (07-2-4)

On July 12, 2006, the San Antonio Court of Appeals held that the record evidence in this case did not raise the possibility that the offense committed was the lesser included offense of robbery by threats rather than robbery with a deadly weapon.

¶ 07-2-4. **In the Matter of L.J., Jr.**, ___ S.W.3d ___, No. 04-05-00771-CV, 2006 Tex.App.Lexis 5974, Tex.App.— San Antonio, 7/12/06) rel.for pub. 2/2/07, Rehearing denied 9/22/06, Pet. for review denied on 1/26/07.

Facts: L.J. appeals the trial court's judgment adjudicating him delinquent and sentencing him to a determinate sentence of twenty-five years. L.J. was found to have committed the offense of aggravated robbery. The sole issue presented is whether the trial court abused its discretion in failing to include the lesser included offense of robbery in the jury charge. We overrule L.J.'s issue and affirm the trial court's judgment.

Held: Affirmed

Opinion: To determine whether L.J. was entitled to a charge on a lesser included offense, we apply a two-prong test. *Feldman v. State*, 71 S.W.3d 738, 750 (Tex. Crim. App. 2002). First, the lesser included offense must be included within the proof necessary to establish the offense charged. *Id.* Second, some evidence must exist in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. *Id.* In other words, there must be some evidence from which a rational jury could acquit the defendant of the greater offense while convicting him of the lesser-included offense. *Id.* The record evidence must establish the lesser-included offense as a valid rational alternative to the charged offense. *Id.*

In this case, L.J. argues that the evidence raised the possibility that the offense committed was robbery by threats rather than robbery with a deadly weapon. L.J. asserts, "The complaining witness could not testify with certainty that the Appellant used a real weapon. While the State argued that the robber clearly used a weapon, the fact that the witness could not commit that a weapon was actually used left the door open for jury interpretation." The State responds that during cross-examination the store manager "was adamant that the gun pointed at him was a 'real' gun. In addition, Detective Mikolajczyk testified that based on his twenty-five years experience as an investigator that the weapon exhibited by [L.J.] in the videotape of the convenience store robbery was in fact a 'real' firearm."

In *Tijerina v. State*, this court held that the defendant was not entitled to an instruction on the lesser included offense of robbery because one complainant testified that she knew the gun was real and the other complainant, who said she was familiar with guns and described it as a revolver, also thought the gun was real. No. 04-01-00526-CR, 2003 Tex. App. LEXIS 807, 2003 WL 183686, at *1 (Tex. App.--San Antonio Jan. 29, 2003,

no pet.) (not designated for publication). In that case, the court noted that the defendant "did not testify and there was no evidence to suggest the gun was not real." *Id.* 2003 Tex. App. LEXIS 807, at [WL] *2. The court then held, "Because there was no evidence from any source that would permit a rational jury to find Tijerina was guilty only of robbery, the trial court properly denied defendant's request for a lesser-included offense instruction." *Id.*

Similarly, in *Briscoe v. State*, the Houston court held that a lesser included offense instruction was not required when the testimony of the complainant was that the complainant "was not sure if the gun was a deadly weapon or a toy." *No. B14-89-00713-CR, 1990 Tex. App. LEXIS 1459, 1990 WL 79845, at *1 (Tex. App.--Houston [14th Dist.] June 14, 1990, pet. ref'd)* (not designated for publication). The Houston court concluded that the testimony "show[ed] only that the complainant could not tell whether the gun was real. Absent any affirmative evidence that appellant did not use a firearm during the robbery, we find no merit in this argument." *Id.*

Phillip Ulibarri, the store manager of the convenience store, was at the register when the store was robbed. Ulibarri described the gun used in the robbery as a chrome plated, semiautomatic, .45 or .9 millimeter gun. A videotape of the robbery was introduced into evidence. In response to whether Ulibarri could determine whether the weapon was a fake gun, Ulibarri responded, "No, it was real." Ulibarri stated that he did not examine the gun. In response to whether he had ever seen weapons that were not actually guns, but would appear to be authentic, Ulibarri responded, "Yes, I have." Detective Mikolajczyk acknowledged that he had seen fake or replica weapons, but in his opinion, the gun used during the robbery was a "real weapon" based on his review of the videotape.

In this case, the record evidence did not establish robbery as a valid, rational alternative to aggravated robbery. L.J. did not testify, and there was no evidence to suggest the gun was not real. Accordingly, L.J.'s issue is overruled, and the trial court's judgment is affirmed.