Review of Recent Juvenile Cases (2008)

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

Defense of duress was not raised where evidence did not show that juvenile was compelled to participate in altercation by threat of imminent death or serious bodily injury to himself or another.[In the Matter of V.M.H.](08-2-6)

On October 10, 2007, the San Antonio Court of Appeals held that evidence that juvenile was taking orders or was instructed by his brother to remove victim's shoes and pants was not sufficient to raise the defense of duress.

¶ 08-2-6. **In the Matter of V.M.H.**, ___S.W.3d.___, No. 04-06-00618-CV, 2007 Tex.App.Lexis 8054 (Tex.App.—San Antonio, 10/10/07).

Facts: On Christmas Day in 2004, Jonathan Simmons was brutally attacked, stabbed and beaten by boys he thought were his friends. The pants and shoes that he received as Christmas presents that morning were stolen during the altercation. V.M.H.'s brother, R.H.T., pled guilty to aggravated assault with a deadly weapon. Another brother, Jamel, was certified to stand trial as an adult for the offense. A jury found that V.M.H. also participated in the altercation and engaged in delinquent conduct by committing the offense of aggravated robbery.

V.M.H. asserts the evidence is legally insufficient to support the jury's finding that V.M.H. committed the offense of aggravated robbery. Specifically, V.M.H. contends that the State failed to prove that he was in the course of committing a theft of Jonathan's shoes and pants because he did not intend to obtain and maintain control of the shoes and pants.

Held: Affirmed

Memorandum Opinion: Intent may be inferred from circumstantial evidence such as acts, words, and the conduct of the appellant. *Guevara v. State, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004)*. In reviewing the legal sufficiency of evidence in a juvenile case, we consider all the evidence in its most favorable light to determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*; *In re K.T., 107 S.W.3d 65, 71 (Tex. App.--San Antonio 2003, no pet.)*. We do not resolve any conflict of fact or assign credibility to the witnesses as this was the function of the jury. *In re M.A.L., 224 S.W.3d 233, 235 (Tex. App.--El Paso 2005, no pet.)*.

In this case, Jonathan testified that V.M.H. took his shoes and pants while he was being stabbed and beaten. In his brief, V.M.H. refers to R.H.T.'s testimony that V.M.H. did not take the shoes and pants and to discrepancies between Jonathan's testimony at trial and the initial statement given to the police while he was in the hospital recovering from surgery. The jury, however, is the sole judge of the credibility of the witnesses and the weight

to be given to the evidence. *In re M.A.L., 224 S.W.3d at 235.* Jonathan's testimony is legally sufficient to support the jury's finding that V.M.H. intended to obtain and maintain control of Jonathan's shoes and pants.

V.M.H. contends that the trial court erred in denying his motion for mistrial after Jonathan's grandmother testified that Jonathan's grandfather died seventeen days after the attack "with a broken heart." The trial court sustained V.M.H.'s objection to the testimony during trial and stated that giving an instruction to the jury would call attention to the information to which V.M.H. was objecting. V.M.H.'s sole complaint is that the trial court erred in denying the motion for mistrial.

A trial court's denial of a motion for mistrial is reviewed under an abuse of discretion standard. *In re A.W., 147 S.W.3d 632, 635 (Tex. App.--San Antonio 2004, no pet.)*. A mistrial is appropriate only for highly prejudicial and incurable errors. *Id.* A trial court is required to grant a motion for a mistrial only when the improper question is clearly prejudicial to the defendant and is of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors. *Id.*

In this case, the statement regarding the grandfather's broken heart was an isolated reference to which the trial court immediately sustained an objection. In light of the entire record and all of the evidence properly placed before the jury, the trial court did not abuse its discretion in determining that the isolated reference was not so inflammatory or prejudicial as to warrant a mistrial.

V.M.H. complains that the trial court erred in denying his requested charge on the affirmative defense of duress. A defendant is entitled to a charge on any defensive theory raised by the evidence whether it is strong or weak, unimpeached or contradicted. *Swails v. State, 986 S.W.2d 41, 45 (Tex. App.--San Antonio 1999, pet. ref'd)*. Duress is an affirmative defense if "the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another." *TEX. PEN. CODE ANN. § 8.05* (Vernon 2003). Threatened death or serious bodily injury is imminent only if it will occur in the present. *Swails, 986 S.W.2d at 45.* The claim of duress must have an objective, reasonable basis, and the fact that a defendant is taking orders from another is not sufficient to raise the defense of duress. *Cameron v. State, 925 S.W.2d 246, 250 (Tex. App.--El Paso 1995, no pet.)*.

V.M.H. relies on statements made by Jonathan to the detective during his interview at the hospital. Jonathan testified that he remembered telling the detective that V.M.H. came along because he was scared and that V.M.H.'s brothers forced him to do what he did. This testimony however, does not provide an objective, reasonable basis to establish that V.M.H. was compelled to participate in the altercation "by threat of imminent death or serious bodily injury to himself or another." *TEX. PEN. CODE ANN. § 8.05* (Vernon 2003). Evidence that V.M.H. was taking orders or was instructed by his brother to remove Jonathan's shoes and pants is not sufficient to raise the defense of duress. *See Cameron, 925 S.W.2d at 250.* Accordingly, the trial court did not err in denying the requested charge.

V.M.H. asserts that the charge permitted the jury to render a verdict that was not unanimous because it instructed the jury that V.M.H. could be found delinquent if the jury found that he had engaged in aggravated robbery either by using or exhibiting a deadly weapon or by causing serious bodily injury. V.M.H. contends that the jury verdict was not required to be unanimous because some jurors might have believed that V.M.H. committed aggravated robbery with a deadly weapon while others might have believed that V.M.H. committed aggravated robbery causing serious bodily injury. V.M.H.'s argument is based on the flawed premise that these are separate offenses. Instead, the use or exhibition of a deadly weapon and the causing of serious bodily injury are alternative methods or means of aggravation. *See Sidney v. State, 560 S.W.2d 679, 681 (Tex. Crim. App. 1978)*. "It is appropriate where the alternate theories of committing the same offense are submitted to the jury in the disjunctive for the jury to return a general verdict if the evidence is sufficient to

support a finding under any of the theories submitted." *Kitchens v. State, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991)*.

Finally, V.M.H. asserts that the trial court abused its discretion in committing him to the Texas Youth Commission "because the record indicates that probation would have been a more appropriate disposition." We review a juvenile court's disposition order under an abuse of discretion standard which requires us to view the evidence in the light most favorable to the trial court's ruling affording almost total deference to findings of historical fact that are supported by the record. *In re K.T., 107 S.W.3d at 75*.

V.M.H. contends he should have received probation because his probation officer recommended probation, his participation in the offense was minor, his brothers have been removed from the home, and he was only ten at the time of the offense. In addition to the evidence cited by V.M.H., however, the trial court also was required to consider evidence that V.M.H. was routinely permitted to be outside playing unsupervised at 1:00 a.m. Furthermore, the trial court was required to consider the testimony of V.M.H.'s mother that she did not believe V.M.H. had engaged in delinquent conduct and intended to supervise V.M.H. in the same manner if he remained in the home. Evidence was also introduced that V.M.H. and his brothers were suspected of killing several tortoises by pouring salt on them and of poking sticks at a dog belonging to Jonathan's grandmother. In the two prior academic years, V.M.H. had received several disciplinary referrals at school, including referrals for threatening another student, shoving another student, hitting another student, throwing a rock at a student, fighting at recess, and being disrespectful to his teachers. Finally, the trial court heard testimony that after Jonathan had been stabbed, beaten and left for dead, V.M.H. lied to Jonathan's mother when she was looking for Jonathan and asked if V.M.H. had seen him. Given the nature of the offense and all of the evidence presented to the trial court, the trial court did not abuse its discretion in ordering V.M.H. to be committed to the Texas Youth Commission.

Conclusion: The trial court's judgment is affirmed.