Review of Recent Juvenile Cases (2008)

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

When there is a material variance between the allegation and the findings of the juvenile court, the evidence will be deamed insufficient and will result in an acquittal.[In the Matter of C.E.S.C.](08-2-16)

On April 23, 2008, the San Antonio Court of Appeals held that when the trial court adjudicates on a manner of committing an offense not alleged in the petition, the respondent has no notice to defend himself on the manner not alleged, and as a result, the variance requires an acquittal of that charge.

¶ 08-2-16. **In the Matter of C.E.S.C.**, MEMORANDUM OPINION, No. 04-07-00490-CV, 2008 WL 1805512 (Tex.App.-San Antonio, 4/23/08).

Facts: On December 12, 2006, teacher Melanie Hutzler was having disciplinary problems with the students in her freshman algebra class. While Ms. Hutzler was outside the classroom disciplining one student, C.E.S.C. grabbed S.G. by the arm and caused her to fall and hit her head on a desk. S.G. was on the floor and holding the back of her head when C.E.S.C. put his hands between her thighs, pushed his groin against S.G.'s groin and moved his pelvis back and forth, imitating sexual intercourse. After class, Ms. Hutzler suggested to S.G. that she should consider filing charges against C.E.S.C.. Later in the week, after getting in trouble for punching C.E.S.C., S.G. told Ms. Hutzler and school disciplinary officials that C.E.S.C. had grabbed her, caused her to fall to the ground, and then "humped" her on the ground. C.E.S.C. was charged with one count of public lewdness and one count of assault bodily injury.

Held: Affirmed in part, Reversed in part.

MEMORANDUM OPINION: C.E.S.C. appeals the adjudication of Count I for public lewdness, and the State concedes this count should be reversed because of a variance between charging instrument and the findings of the juvenile court. "A 'variance' occurs when there is a discrepancy between the allegations in the charging instrument and the proof at trial." *Gollihar v. State,* 46 S.W.3d 243, 253 (Tex.Crim.App.2001). Only a material variance between the indictment and the proof will render the evidence insufficient. *Fuller v. State,* 73 S.W.3d 250, 253 (Tex.Crim.App.2002). The materiality of a variance is measured by the following two questions: (1) whether the indictment or information, as written, informed the defendant of the charge against him sufficiently to allow him to prepare an adequate defense at trial; and (2) whether prosecution under the deficiently drafted indictment or information would subject the defendant to the risk of being prosecuted later for the same crime. *See Gollihar,* 46 S.W.3d at 253.

In the State's first amended petition alleging delinquent conduct, Count I alleged that C.E.S.C "knowingly engaged in an act of sexual contact, to wit: TOUCHING THE GENITALS OF [S.G.] WITH THE INTENT TO AROUSE

AND GRATIFY THE SEXUAL DESIRE OF THE RESPONDENT OR COMPLAINANT, in a public place, NAMELY: WAGNER HIGH SCHOOL." After closing arguments, in which both sides discussed whether the alleged conduct occurred in a public place, the juvenile court stated "I'm going to find for Count One that the location of the offense was not a public place, however it was a place where the Respondent was reckless about whether another would be present and would be offended or alarmed by the sexual contact."

The Penal Code provides that "[a] person commits [the] offense [of public lewdness] if he knowingly engages in [an act of sexual contact] in a public place or, if not in a public place, he is reckless about whether another is present who will be offended or alarmed." *See* Tex. Penal Code Ann. § 21.07 (Vernon 2003). In the charging instrument the State alleged only that the sexual contact occurred in a public place. At trial C.E.S.C. did not attempt to refute evidence that others present in the classroom were offended or alarmed, but he did contest whether the contact occurred in a public place as alleged in the charging instrument. C.E.S.C. established by testimony on cross-examination that the classroom did not meet the statutory definition of a public place because according to school policy a person not enrolled in the class must have permission and receive a formal pass to access the classroom. *See* Tex. Penal Code Ann. § 1.07(a)(40) (Vernon 2003). Neither side sought testimony from witnesses who actually viewed the sexual contact and C.E.S.C was not on notice that he would have to defend based on the allegation that he was reckless about whether another was present who was offended or alarmed by his act. Therefore, a material variance occurred between the allegations in Count I and the findings of the juvenile court, rendering the evidence insufficient on the public lewdness count and requiring acquittal of the adjudication of delinquency as to that count.

Conclusion: Because C.E.S.C. does not challenge the order of adjudication as to the assault claim, we affirm that portion of the order of adjudication. [FN2] Because there was a variance between the allegation presented in the charging instrument and the finding of the juvenile court with regard to the public lewdness count, we reverse the juvenile court's order of adjudication and disposition order on this count and remand for further proceedings.

> FN2. We note that the Order of Adjudication and the Order of Disposition list both Count I and Count II as "PUBLIC LEWDNESS." This is apparently a typographical error, as all parties agree that Count I alleges public lewdness, while Count II alleges assault bodily injury.