Review of Recent Juvenile Cases (2008)

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

Evidence insufficient to establish offense of burglary of a habitation, therefore, appellate court modified judgment replacing finding of burglary of a habitation with a finding of criminal trespass of a habitation.[In the Matter of F.H.](08-3-5)

On May 30, 2008, the Austin Court of Appeals found, in burglary of a habitation appeal, where element of theft or attempted theft was not proved, appellate court could modified judgment to adjudicate for lesser offense of criminal trespass of habitation.

¶ 08-3-5. **In the Matter of F.H.**, MEMORANDUM, No. 03-07-00428-CV, 2008 WL 2220018 (Tex.App.-Austin, 5/30/08).

Facts: In its original petition, the State alleged that F.H. engaged in delinquent conduct by committing the offense of burglary of a habitation. *See* Tex. Fam.Code Ann. § 51.03(a)(1) (West Supp.2007) (defining "delinquent conduct" to include conduct that "violates a penal law of this state ... punishable by imprisonment"). The State prosecuted F.H. under section 30.02(a)(3) of the penal code, which provides that a person commits burglary "if, without the effective consent of the owner, the person ... enters a building or habitation and commits or attempts to commit a felony, theft, or an assault." Tex. Penal Code Ann. § 30.02(a) (West 2003). According to the State's petition, F.H. did "knowingly and intentionally enter a habitation without the effective consent of Mark Tran, the owner, and therein attempted to commit and committed theft" on or about March 29, 2007. Following a bench trial on May 31 and June 7, 2007, the trial court found that F.H. committed the charged offense and adjudicated F.H. as delinquent. [FN1]

> FN1. The adjudication hearing was conducted by Associate Judge Leonard Ray Saenz. Judge W. Jeanne Meurer signed the judgment of delinquency.

On appeal, F.H. asserts that the evidence is legally and factually insufficient to establish that F.H. committed theft or attempted to commit theft--an essential element of the charged offense of burglary of a habitation. A person commits theft if he "unlawfully appropriates property with intent to deprive the owner of property." *Id.* § 31.03(a) (West Supp.2007). A person attempts to commit theft if he, with specific intent to commit theft, "does an act amounting to more than mere preparation that tends but fails to effect the commission" of the theft. *Id.* § 15.01(a) (West 2003).

Held: Modify judgment, affirmed as modified.

Memorandum Opinion: We review adjudications of delinquency in juvenile cases by applying the same standards applicable to sufficiency of the evidence challenges in criminal cases. *In re M.C.L.*, 110 S.W.3d 591, 594 (Tex.App.-Austin 2003, no pet.). In assessing the legal sufficiency of the evidence to support a criminal conviction, we consider all the evidence in the light most favorable to the verdict and determine whether,

based on that evidence and reasonable inferences therefrom, a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Hooper v. State,* 214 S.W.3d 9, 13 (Tex.Crim.App.2007) (citing *Jackson v. Virginia,* 443 U.S. 307, 318-19 (1979)). Where the trial court's judgment is necessarily based on inferences from the evidence, we must determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *See id.* at 16-17.

The trial court's stated reasoning on the record for its finding that F.H. committed theft or attempted to commit theft was that because F.H. told Tran he would lead him to where the other boy had taken Tran's items, F.H. was responsible under the law of parties. Contrary to the trial court's recollection of the evidence, there is nothing in the record to indicate that F.H. referred to any of Tran's items when he told Tran to follow him. Considering all the evidence that *is* in the record regarding the other boy--his discovery in and flight from the damaged house, Tran observing nothing in his possession upon his discovery in the house, and F.H. identifying him as the "ringleader" responsible for most of the damage--we conclude that no rational trier of fact could have found beyond a reasonable doubt that the other boy committed or attempted to commit theft. We must determine, therefore, whether the evidence is legally sufficient to support the judgment for any reason other than the law of parties. [FN2] *See State v. Herndon,* 215 S.W.3d 901, 905 n. 4 (Tex.Crim.App.2007) ("[T]he general rule is that a trial court's ruling will be upheld if it is correct on any applicable legal theory, even if the court articulated an invalid basis.").

> FN2. The State conceded at oral argument that the conviction could not be supported on the theory that F.H. is guilty of burglary of a habitation under the law of parties.

The State provided no evidence that F.H. had any connection to the two prior incidents of theft at the house. Nor is there any evidence that, on March 29, F.H. had any stolen property in his possession either upon his discovery in the house, during his flight, or upon his capture by the police. There is no evidence that any items which had been in the house on Tran's last visit had disappeared and remained unfound, and there is no evidence that any items inside the house both before and after the March 29 break-in had been touched or moved.

Further, none of F. H.'s actions following his discovery in the house raises a reasonable inference that he committed theft or attempted to commit theft. *See Hooper,* 214 S.W.3d at 13 ("In reviewing the sufficiency of the evidence, we should look at 'events occurring before, during and after the commission of the offense and may rely on actions of the defendant which show an understanding and common design to do the prohibited act.' " (quoting *Cordova v. State,* 698 S.W.2d 107, 111 (Tex.Crim.App.1985)). Although the State argues that F. H.'s flight is circumstantial evidence of guilt, the State does not explain how the flight can be reasonably attributed to theft or attempted theft rather than to the observed trespass or the visible damage to the house. *See Hodge v. State,* 506 S.W.2d 870, 873 (Tex.Crim.App.1974) (op. on reh'g) ("If the defendant offers evidence that the ... flight may have sprung from some other cause, but its connection to the offense on trial remains a logical one, the evidence [of flight] would still be admissible, the defensive evidence going only to the weight of evidence."). The fourth incident at the house, which Tran appeared to attribute to F.H. because it happened soon after F.H. was released, involved damage to the house but no evidence of a theft or an attempted theft. Likewise, neither of F. H.'s statements concerning his or the other boy's culpability--his denial upon discovery and his confession a week before trial--made any explicit connection to theft or attempted theft, or to any wrong committed other than "the damages" to the house.

The only other evidence the State argues demonstrates that F.H. on or about March 29 committed or attempted to commit theft--rather than, for instance, criminal trespass, criminal mischief, or arson--is Tran's testimony that "some items," which may or may not have included two rakes, were found in the backyard of F. H.'s house . [FN3] Because there is no evidence that any such items were removed from the house upon Tran's

discovery of the boys in the house, we would need to infer from the testimony regarding the items either that, after removing those items during the preceding week, F.H. returned to the house on March 29 and attempted to commit theft of additional items, or that F.H. had removed the items from the house and re-entered the house immediately prior to Tran's arrival on March 29. To make either inference, we must first infer that F.H. stole the items found in his yard. However, there is no evidence that F.H. had anything to do with getting the items to his backyard. The yard abutted the Tran property, and there is no evidence that F . H. alone had access to his backyard or the ability to throw the items over the fence into his backyard. Significantly, there is no evidence of when those items appeared in F. H.'s yard (Tran did not notice the items' disappearance until seeing them in the backyard). Thus, the items could have been stolen during the first or second incident of burglary of the Tran property, and the State offered no evidence that F.H. had any connection to either incident. [FN4] Nor was F.H. charged in connection with either incident. We conclude that, on this record, no rational trier of fact could have found the essential element of theft or attempted theft beyond a reasonable doubt. [FN5]

> FN3. In its brief, the State conceded that there is insufficient evidence to establish that F.H. committed theft based solely on the evidence relating to the items found in F. H.'s yard because "the State did not establish that appellant had sole access to the property" where the items were found, and thus focused on whether F .H. *attempted* to commit theft.
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> FN4. The State both in its brief and at oral argument stated that Tran had moved most items from the house to the shed--other than the tools, rakes, and shovels--*after the second break-in.* This would strengthen the inference that if the two missing rakes were among the items in F. H.'s yard, they were taken in connection with the March 29 incident. However, Tran testified that his father's belongings were moved to the shed when they "started the remodeling," and that when his father's shed was broken into during the first incident, "we had all his belongings in there." Thus, Tran's testimony indicates that the items' removal to the shed, and the placement of the tools, rakes, and shovels inside the house, occurred prior to the first incident.
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> FN5. We note that the trial court did not adjudicate F.H. delinquent based on any evidence of F. H.'s direct involvement with theft or attempted theft. The trial court's rationale for adjudicating F.H. delinquent was solely the court's mistaken impression that the record supported a finding based on the law of parties.

The evidence is legally insufficient to establish that F.H. committed the offense of burglary of a habitation. [FN6] The offense of criminal trespass is a lesser-included offense of burglary. *See Day v. State,* 532 S.W.2d 302, 306 (Tex.Crim.App.1975).

Conclusion: Both appellant and the State conceded at oral argument that reformation of the judgment to reflect an adjudication of delinquency for criminal trespass of a habitation would be proper. *See Collier v. State,* 999 S.W.2d 779, 782 (Tex.Crim.App.1999) (setting forth the standards for reforming a judgment of conviction to reflect conviction of a lesser-included offense); *Garrett v. State,* 161 S.W.3d 664, 672 (Tex.App.-Fort Worth 2005, pet. ref'd) ("A court of appeals may modify the trial court's judgment to reflect guilt of a lesser-included offense and affirm it as modified ."); *see also* Tex. Penal Code Ann. § 30.05(d) (West Supp.2007) (making criminal trespass a Class A misdemeanor if committed in a habitation). Therefore, we modify the judgment to replace the finding that F.H. committed burglary of a habitation with a finding that he committed criminal trespass of a habitation, and we affirm the judgment as modified.

> FN6. Because we conclude that the evidence is legally insufficient to support the trial court's finding that F.H. committed or attempted to commit theft, we do not need to consider whether the evidence is factually sufficient to support the finding.