

Review of Recent Juvenile Cases (2009)

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

Evidence was factually insufficient to show that juvenile used or exhibited a deadly weapon during the commission of the offense.[In the Matter of L.A.](09-3-4)

On June 10, 2009, the Waco Court of Appeals concluded that conflicting evidence was so strong as to render the jury's verdict clearly wrong and manifestly unjust regarding whether juvenile used or exhibited a deadly weapon "during the commission" of the assault.

¶ 09-3-4. **In the Matter of L.A.**, MEMORANDUM, No. 10-08-00052-CV, 2009 WL 1623201 (Tex.App.-Waco, 6/10/09).

The State's petition alleges in pertinent part that L.A. did "intentionally or knowingly threaten Cristobal Lisboa with imminent bodily injury by hitting him in the head and did then and there use or exhibit a deadly weapon, to wit: a large kitchen knife, during the commission of said assault." This Court has recently addressed what must be proved to establish that a deadly weapon was used or exhibited "during the commission" of an assault. The evidence must show that the deadly weapon was "used [or exhibited] at the same time as the assault." Defining "when" the assault occurred depends in part on whether the offense alleged is a result-oriented offense or a nature-of-conduct offense. But it also depends in part on the factual allegations of the charging instrument. We explained that there are three categories of penal statutes proscribing the use or exhibition of a deadly weapon.

According to our research, statutes governing the use or exhibition of a deadly weapon may be divided in three categories: (1) those which, like section 22.02(a)(2), proscribe the use or exhibition of a deadly weapon "during the commission" of the offense; see TEX. PEN.CODE ANN. § 20.04(b) (Vernon 2003), §22.02(a)(2) (Vernon Supp.2008), § 30.05(d)(2) (Vernon Supp.2008); (2) those which proscribe the use or exhibition of a deadly weapon "in the course of the same criminal episode"; id. § 22.021(a)(2)(A)(iv) (Vernon Supp.2008); and (3) those which proscribe the use or exhibition of a deadly weapon "during the commission of the offense or during immediate flight following the commission of the offense." Id. § 12.35(c)(1) (Vernon Supp.2008); see also TEX.CODE CRIM. PROC. ANN. art. 17.291(b)(2)(B) (Vernon 2005), art. 42.12, § 3g(a)(2) (Vernon Supp.2008). Id. The statute applicable to L.A.'s prosecution lies in the first category. See TEX. PEN.CODE ANN. § 22.02(a)(2).

The petition alleges that L.A. assaulted Lisboa by threatening him with imminent bodily injury. This is a nature-of-conduct offense which can be considered a continuing offense, depending on what threatening conduct is alleged. Because the petition alleges that L.A. threatened Lisboa "by hitting him in the head," the petition alleges a single, discrete threatening act rather than a continuous offense. Cf. Hall, 145 S.W.3d at 759 (indictment alleged that defendant threatened complainant with imminent bodily injury and used and exhibited a deadly weapon during the commission of the assault but did not allege with any more

specificity how defendant threatened complainant). Thus, the State had to present evidence that she used or exhibited the kitchen knife "at the same time as" she hit him in the head.

Held: Reversed and remanded.

Memorandum Opinion: Three witnesses presented testimony pertinent to this issue. Lisboa testified that they had "a big argument" and then L.A. "punched [him] in the forehead." They continued arguing as his wife (and L.A.'s mother) called the police. A few moments later, "she grabbed the knife" and raised it up pointing in his direction. She was about five feet away from him at the time. Lisboa left the kitchen to get a stick for his own defense. When he returned to the kitchen, L.A. had gone into her bedroom.

Deputy Kenneth Bartlett testified on direct examination that he was told L.A. "tried to stick [Lisboa] with the knife." On cross-examination, however, he clarified that he was told L.A. hit Lisboa with her hand and then grabbed the knife. No one reported to Bartlett that L.A. had any physical contact with Lisboa when she held the knife.

Deputy Dusty Ford testified without objection that he had been informed L.A. displayed the knife "in a threatening manner." Like Deputy Bartlett, however, he agreed on cross-examination that L.A. first hit Lisboa and then later grabbed the knife.

Viewing the evidence in a light most favorable to the verdict and focusing in particular on the deputies' testimony on direct examination, the evidence is legally sufficient to establish that L.A. used or exhibited a deadly weapon "during the commission" of the assault. *See Klein*, 273 S.W.3d at 302 (legally sufficiency standard allows trier of fact to resolve conflicts in testimony).

Regarding factual sufficiency, the State contends that the evidence is sufficient because L.A.'s brandishing of the knife was "part of the same criminal activity." However, this contention is misplaced because neither of the latter two categories of deadly weapon statutes [FN2] we identified in *Johnson* are applicable. Rather, the question is whether the evidence shows that L.A. brandished the knife "at the same time as" she hit Lisboa in the head.

When the deputies' testimony on direct examination is considered with the other testimony referred to above, we must conclude that the conflicting evidence is so strong as to render the jury's verdict clearly wrong and manifestly unjust regarding whether L.A. used or exhibited a deadly weapon "during the commission" of the assault. Thus, we hold that the evidence is factually insufficient.

We overrule L.A.'s first issue and those portions of her second and fifth issues challenging the legal sufficiency of the evidence, but we sustain those portions of her second and fifth issues challenging the factual sufficiency of the evidence. We do not address her remaining issues.

Conclusion: We reverse the judgment and remand this cause for further proceedings consistent with this opinion.