Review of Recent Juvenile Cases (2010)

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

Evidence was sufficient to establish offense of attempted aggravated assault with a deadly weapon. [In the Matter of V.R.](10-2-14)

On March 10, 2010, the Waco Court of Appeals held that evidence was sufficient to establish that juvenile's act of placing knife in trunk of car and grabbing it out of trunk was an act amounting to more than mere preparation that tended but failed to effect the commission of the offense of attempted aggravated assault with a deadly weapon.

¶ 10-2-14. In the Matter of V.R., MEMORANDUM, No. 10-09-00293-CV, 2010 WL 966168 (Tex.App.-Waco, 3/10/20).

Facts: V.R., his mother, and his infant brother were in the process of moving to another residence. V.R.'s mother, who was ill at the time, had enlisted her boyfriend, Marks, to help with the move. Marks attempted to get V.R. to help move items out of the apartment. V.R. refused and got angry with Marks. He left the apartment for a short time but returned. V.R. still refused to help Marks. It is disputed as to whether Marks got angry with V.R. during this time and whether he was the instigator of the verbal altercation.

During the altercation, V.R. made threats to Marks that he was going to f* * * you up and kill you. At some point during this time, Marks observed V.R. taking a long knife from the apartment. V.R. carried the knife downstairs and put it in the trunk of his mother's vehicle. He did not make threats or brandish the weapon during this time. V.R.'s mother got V.R. into her car and attempted to hold him in there with her body because he was very upset and yelling that he was going to f* * * him up. V.R.'s mother asked Marks to call the police. However, V.R. pushed his way out of the car, and he and his mother fell to the ground.

V.R. got up, went to the driver's side of the car and popped open the trunk, went over to the trunk and opened it, and picked up the knife. V.R.'s mother came over and hit V.R.'s arm, causing him to drop the knife. V.R. heard sirens and ran away. V.R.'s mother testified that the knife was not visible to Marks and was never more than several inches off of the floor of the trunk. Marks testified that he never saw the knife and was not in fear of injury from V.R. At the time that V.R. picked up the knife, Marks was a short distance away next to his vehicle.

An officer responded to a call that a younger Hispanic male was threatening to kill some-one with a knife. She met with V.R.'s mother and Marks, who relayed to her that V.R. had been yelling threats at Marks. Neither party informed the officer that V.R. was acting in self-defense or that Marks was verbally aggressive toward V.R. that day. Marks and V.R.'s mother did not want charges pressed against V.R. for the incidents that day. Marks was subpoenaed to attend the trial, but still did not want V.R. prosecuted for the offense.

Held: Affirmed

Memorandum Opinion: V.R. contends that the evidence was both legally and factually insufficient for the trial court to have found that the act of picking up a knife went beyond mere prep-aration as required by the attempt statute. See TEX. PEN.CODE ANN. § 15.01 (Vernon 2005). The relevant portion of section 15.01 states that: (a) A person commits an offense

if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended. TEX. PEN.CODE ANN. § 15.01(a) (Vernon 2005).

Section 22.02(a)(2) of the Penal Code states in relevant part that: (a) A person commits an offense if the person commits assault as defined in § 22.01 and the person: (2) uses or exhibits a deadly weapon during the commission of the assault. TEX. PEN.CODE ANN. § 22.02(a)(2) (Vernon 2005).

The charging paragraph of the State's petition alleged that:

On or about March 11, 2009, in Brazos County, Texas, the said child violated a penal law of this State punishable by imprisonment or confinement in jail to wit: Section 15.01 of the Penal Code, in that the said child did, then and there, with specific intent to commit the offense of Aggravated Assault, do an act, to wit: pick up a knife, which amounted to more than mere preparation that tended but failed to effect the commission of the offense intended.

The question then becomes what constitutes an act that is more than mere preparation in accordance with the criminal attempt statute. The law of criminal attempt does not require that every act short of actual commission of the offense be accomplished. Santellan v. State, 939 S.W.2d 155, 163 (Tex.Crim.App.1997). There is necessarily a gray area between conduct that is clearly no more than mere preparation and conduct that constitutes the last proximate act prior to actual commission of the offense. Come v. State, 82 S.W.3d 486, 489 (Tex.App.-Austin 2002, no pet.) (citing McCravy v. State, 642 S.W.2d 450, 460 (Tex.Crim.App.1982) (op. on reh'g)). Whether conduct falling in that gray area amounts to more than mere preparation must be determined on a case-by-case basis. Id. (citing Gibbons v. State, 634 S.W.2d 700, 707 (Tex.Crim.App. [Panel Op.] 1982)).

The Court of Criminal Appeals has stated that [w]hile simple acquisition and possession of a weapon would, in most situations, be preparation, putting that weapon to use to inflict inju-ries clearly goes beyond preparation. Hart v. State, 581 S.W.2d 675, 678 (Tex.Crim.App.1979). Use of a deadly weapon means that a deadly weapon must be utilized, employed, or applied in order to achieve its intended result, the result being the commission of a felony offense or during immediate flight therefrom. Coleman v. State, 145 S.W.3d 649, 652 (Tex.Crim.App.2004) (quoting Patterson v. State, 769 S.W.2d 938, 941 (Tex.Crim.App.1989)). Use could mean any employment of a deadly weapon, even simple possession, if such possession facilitates the associated felony. Id. To exhibit a weapon, however, requires a weapon to be consciously shown, displayed, or presented to be viewed. Id.

Viewing the evidence in a light most favorable to the judgment and in a neutral light, we find that the evidence was legally and factually sufficient for the trial court to determine that picking up the knife constituted more than mere preparation for V.R. to commit the offense of aggravated assault by threat. Relevant to this determination are the facts that (1) earlier Marks had observed V.R. put the knife in the trunk; (2) immediately prior to picking up the knife, V.R. was out of control, yelling and physically shoving his mother out of the way in order to force his way out of her vehicle; (3) a report was made to the police that a threat to kill a person with a knife had been made by a young Hispanic male; and (4) V.R.'s acts in first going to open the trunk from the inside of the car and proceeding to the trunk and reaching in to pick up the knife that Marks already knew was in the trunk. Neither Marks nor V.R.'s mother wanted to pursue charges against V.R.

Conclusion: The trial court, as the fact-finder, was free to believe or disbelieve any or all of the testimony of the witnesses. See Lancon v. State, 253 S.W.3d 699, 707 (Tex.Crim.App.2008). Due deference must be given to the fact-finder's determinations concerning the weight and credibility of the evidence, and reversal of those determinations is appropriate only to prevent the occurrence of a manifest injustice, which is not present here. Martinez v. State, 129 S.W.3d 101, 106 (Tex.Crim.App.2004). We overrule issue one.