

Review of Recent Juvenile Cases (2007)

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

In self defense of third person, Appellant stands in shoes of third person for purposes of evaluating appellant's defense of a third person defense.[In the Matter of D.O.](07-1-1A)

On November 9, 2006, the Houston (1st. Dist.) Court of Appeals held that because third person provoked the use of force by others, Appellant was not justified in using force against them, as a defense of that third person.

¶ 07-1-1A. **In the Matter of D.O.**, ___S.W.3d ___, No. 01-05-00989-CV, 2006 Tex.App.Lexis 9710 [Tex.App.—Houston (1st Dist.), 11/9/06].

Facts: On August 12, 2005, Jose Silva and Jose Gomez were hanging banners on a business property when they were confronted by George Romero. Romero accused the two young men of talking badly about his cousin, and, after an exchange of words, Romero struck Silva on the back of the head. Gomez then proceeded to strike Romero.

Appellant, an "associate" of Romero's, had trailed behind Romero at a distance of 12 to 13 feet. According to appellant's testimony, he knew Romero was going "to start something," so he urged Romero to "chill out" and leave Gomez and Silva alone. Appellant stated that he felt compelled to join the fight when it became a "two on one" situation, with both Gomez and Silva striking Romero. To keep the fight from escalating, appellant grabbed Silva and threw him to the ground. Appellant testified that, after he threw Silva to the ground, Silva began to strike him repeatedly. In response, appellant struck Silva once in the head.

At trial, appellant stipulated to the fact that he knowingly caused Silva bodily injury and relied entirely on the justification of defense of a third person. The trial court, however, found that appellant had engaged in delinquent conduct and placed him in the custody of the Texas Youth Commission.

Held: Affirmed

Opinion: When a person is justified in using force to protect a third person, it is a defense to prosecution. *TEX. PEN. CODE ANN. §§ 9.02, 9.33* (Vernon 2003). A person is justified, under *section 9.33*, in using force or deadly force to protect a third person if:

(1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 [self-defense] or 9.32 [deadly force in defense of person] in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and

(2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.

TEX. PEN. CODE ANN. § 9.33.

A person defending on the grounds of defense of a third person stands in the shoes of the third person. *Hughes v. State*, 719 S.W.2d 560, 564 (Tex. Crim. App. 1986). "So long as the accused reasonably believes that the third person would be justified in using [force] to protect himself, the accused may step in and exercise [force] on behalf of that person." *Id.* Thus, the use of force to protect a third person is justified in any situation in which the third person would be justified in using force to protect himself. *Id.* The law of self-defense provides, however, that the use of force is not justified where "the actor provoked the other's use or attempted use of unlawful force." *TEX. PEN. CODE ANN. § 9.31(b)(4).*

The evidence viewed in the light most favorable to the verdict shows that appellant stipulated to having knowingly caused bodily injury to Silva. Additionally, appellant, Silva, and Gomez all testified that Romero initiated the confrontation between the four young men. Because he provoked the use of force by Silva and Gomez, Romero would not have been justified in using force to protect himself. Appellant stands in Romero's shoes for purposes of evaluating appellant's defense of a third person defense. Because Romero's use of force was not justified, appellant was not justified in using force against Silva on behalf of Romero. A rational trier of fact could have concluded that the evidence failed to establish that appellant acted in defense of Romero. Thus, we hold that the evidence was legally sufficient to support the trial court's finding that appellant did not act in defense of a third person.

Accordingly, we overrule appellant's first issue.

As evidence contrary to the finding that he did not act in defense of Romero, appellant relies on the fact that Romero provoked only Silva's use of force. Stated differently, Romero did not provoke the use of force by Gomez, and, thus, appellant was justified in acting with force on Romero's behalf. It cannot be said that this evidence greatly outweighs the testimony indicating that Romero initiated the confrontation with both Gomez and Silva. Similarly, it cannot be said that this evidence renders the verdict manifestly unjust or clearly wrong. As a result, we hold the evidence was factually sufficient to support the finding that appellant did not act in defense of a third person.

Accordingly, we overrule appellant's second issue.

Conclusion: We affirm the trial court's judgment.