Review of Recent Juvenile Cases (2007)

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

Evidence was sufficience to establish specific intent to commit a felony, theft, or assault in adjudication for attempted burglary.[In the Matter of J.O.T.](07-3-14A)

On July 19, 2007, the Corpus Christi - Edinburg Court of Appeals held that, in attempted burglary, evidence was sufficient to establish intent to commit felony, theft, or assault, where child was seen attempting to enter the habitation, without permission, by wiggling a knife against the deadbolt lock, and not leaving the premises on his own.

¶ 07-3-14A. **In the Matter of J.O.T.**, MEMORANDUM, 13-06-226-CV, 2007 Tex.App.Lexis 5637 (Tex.App.—Corpus Christi - Edinburg, 7/19/07).

Facts: On July 26, 2005, C.T. was at home with his two younger sisters, Lu.T. and La.T. At approximately 10:00 a.m. in Travis County, Texas, J.O.T. knocked on the front door of the residents' home. C.T. saw J.O.T. through the peephole and knew him from school, but chose not to answer the front door. After knocking on the front door and receiving no answer, J.O.T. approached the front window and then went around to the rear door of the residence. Once at the rear door, J.O.T. knocked and again received no answer. He then inserted a knife blade into the doorjamb at the location of the dead bolt lock and wiggled the knife up and down. After J.O.T. had been at the back door of the residence for some time, C.T. asked Lu.T. to open the back door and ask what J.O.T. wanted. When she opened the back door, J.O.T. asked if C.T. was home, and Lu.T. replied that he was not. J.O.T. ran from the area and left on a bicycle.

On October 18, 2005, J.O.T. was charged with attempted burglary of a habitation and criminal trespass. The juvenile court referee found J.O.T. guilty on both counts. J.O.T. moved for a new trial on March 8, 2006, but the district court denied the request. J.O.T. now appeals. [1]

> 1 The case was transferred to the Thirteenth Court of Appeals pursuant to a docket equalization order issued by the Supreme Court of Texas. *TEX. GOV'T CODE ANN. § 73.001* (Vernon 1998).

II. STANDARD OF REVIEW

The Texas Family Code places juvenile delinquency proceedings in civil courts but requires that their adjudication be based on the standard of proof used in criminal cases. *TEX. FAM. CODE ANN. §§ 51.17, 54.03(f)* (Vernon Supp. 2006). In addition, the Texas Supreme Court has held that juvenile delinquency proceedings are "quasi-criminal" in nature, and therefore criminal rules of procedure must be looked to for guidance. *In re B.L.D, 113 S.W.3d 340, 351 (Tex. 2003)*. Thus, for each of J.O.T.'s claims, we apply the same standards of review for sufficiency of the evidence that are applicable in criminal cases. *In re M.C.L., 110 S.W.3d 591, 594* (Tex. App.-Austin 2003, no pet.).

In evaluating a legal sufficiency challenge, the appellate court views the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*; *Drichas v. State, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005)*; *Sanders v. State, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003)*. In determining whether evidence is sufficient to convict, the appellate court must examine the totality of the circumstances. *Vodochodsky v. State, 158 S.W.3d 502, 509 (Tex. Crim. App. 2005)*. This standard is applicable in both direct and circumstantial evidence cases. *Chambers v. State, 711 S.W.2d 240, 244-45 (Tex. Crim. App. 1986)*. The appellate court is not a fact finder; its role is to act as a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *Moreno v. State, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988)*.

When evaluating a challenge to the factual sufficiency of the evidence, the appellate court views all the evidence in a neutral light, favoring neither party. *Watson v. State, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006)*; *Drichas, 175 S.W.3d at 799*. The appellate court should set the verdict aside only if: (1) the evidence supporting the conviction, although legally sufficient, is nevertheless so weak that the fact-finder's determination is clearly wrong and manifestly unjust; or (2) the verdict is against the great weight and preponderance of the evidence. *Watson, 204 S.W.3d at 414-15, 417*; *Johnson v. State, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000)*. The appellate court cannot conclude that a conviction is "clearly wrong" or "manifestly unjust" simply because it would have voted to acquit. *Watson, 204 S.W.3d at 417*. In other words, we may not simply substitute our judgment for the fact-finder's judgment. *Johnson, 23 S.W.3d at 12*; *Cain v. State, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997)*. To reverse for factual insufficiency, the appellate court must determine, with some objective basis in the record, that the great weight and preponderance of the evidence contradicts the verdict. *Watson, 204 S.W.3d at 417*. In examining a factual sufficiency challenge, the appellate court should defer to the fact-finder's determinations regarding credibility of the evidence. *Swearingen v. State, 101 S.W.3d 89, 97 (Tex. Crim. App. 2003)*.

III. ATTEMPTED BURGLARY DEFINED

The Texas Penal Code defines a criminal attempt as follows: "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. PENAL CODE ANN. § 15.01(a)* (Vernon 2003). Burglary is defined in the penal code, in pertinent part, as follows:

(a) A person commits an offense if, without the effective consent of the owner, the person:

> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault. *Id*. at § 30.02.

Accordingly, a charge of attempted burglary is proven by establishing that the appellant committed an act amounting to more than mere preparation to enter a habitation not then open to the public, without the effective consent of the owner, with intent to commit a felony, theft, or an assault, and that the act tended but failed to effect the commission of a burglary. *Flournoy v. State, 668 S.W.2d 380, 382 (Tex. Crim. App. 1984)*.

Held: Affirmed.

Memorandum Opinion: In his first issue, J.O.T. alleges that the evidence presented at trial was not legally or factually sufficient to prove that an actual entry occurred. This issue is irrelevant, though, because entry is not an element of attempted burglary. One need only commit an act amounting to more than mere preparation to enter the habitation to satisfy the entry element of attempted burglary. Issue one, therefore, is overruled.

In his second issue, J.O.T. argues that the evidence presented at trial was not legally or factually sufficient to prove his intent to commit a felony, theft, or assault. To support this assertion, J.O.T. alleges that the trial court deliberately omitted any mention of the intent to commit a felony, theft, or assault from its findings of fact. We disagree on both counts.

Juvenile criminal cases in Texas are governed by the Texas Rules of Civil Procedure, unless otherwise provided by statute. *TEX. FAM. CODE § 51.17(a)*. J.O.T. claims that according to *Rule 299 of the rules of civil procedure*, a deliberate omission from the findings of fact cannot be logically supplied by implication. While this is true, J.O.T. neglects to mention what exactly constitutes a deliberate omission under *Rule 299*. The rule states, in pertinent part:

> The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted *unrequested* elements, when supported by evidence, will be supplied by presumption in support of the judgment. *TEX. R. CIV. P. 299* (emphasis added).

In the instant case, the element of intent to commit a felony, theft, or assault is an omitted *unrequested* element. J.O.T. did not request a finding on the element of specific intent, nor did he mention specific intent in his Proposed Findings of Fact and Conclusions of Law. Furthermore, J.O.T. never asked for clarification on the element of specific intent, which was an option available to him under *Texas Rule of Civil Procedure 298*. J.O.T. must have specifically requested a finding or a clarification of the element in question for the presumption that a court inadvertently omitted the finding of fact on that element to be rebutted. *Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241, 253* (Tex. App.-Houston [14th Dist.] 1999, pet. denied) (citing *Stretcher v. Gregg, 542 S.W.2d 954, 958 (Tex. Civ. App.-Texarkana 1976, no writ)*). Because J.O.T. did none of these things, the presumption applies.

Rule 299 also states that to presume that a court has ruled on a particular element of an offense, even though it has been omitted from the findings of fact, the omitted element must be supported by the evidence. J.O.T. contends that the element of specific intent is not supported by the evidence, and for this reason, the presumption that the court inadvertently omitted a finding of fact on this element should not apply. We disagree, and infer specific intent according to our discussion below.

A defendant's conduct and the surrounding circumstances may be found to imply intent to commit burglary. *Linder v. State, 828 S.W.2d 290, 294 (Tex. App.-Houston [1st Dist.] 1992, pet. ref'd)*; *Roane v. State, 959 S.W.2d 387, 388* (Tex. App.-Houston [14th Dist.] 1998, pet. ref'd) (implying intent where defendant was found to be wearing gloves and chipping away at the caulking around the window of a stranger's house, screen on the window had been removed); *Richardson v. State, 973 S.W.2d 384, 385 (Tex. App.-Dallas 1998, no pet.)* (finding implied intent where a man observed two strangers who had pulled up to his neighbor's house in an unfamiliar car making trips between the car and the front door of that house, police found a flat head screwdriver in the defendant's pocket, the size of which matched fresh pry marks that were found on the door of the house); *Flournoy, 668 S.W.2d at 381-382* (implying intent where defendant had already "reached his hand through a screen door of [the] habitation" when he was scared away by the shotgun-wielding owner).

In the instant case, the evidence showing that J.O.T. was attempting to burglarize the residents' home is as strong, if not stronger, than any of the evidence in the three cases presented above. As opposed to the defendant in *Roane*, who was merely chipping away at the caulking of a window, the appellant inserted a knife blade in the doorjamb at the location of the dead bolt lock and wiggled the knife up and down. *Roane, 959 S.W.2d at 388*. Like the defendant in *Richardson*, J.O.T. was seen by an eyewitness at the door of the residence in question. *Richardson, 973 S.W.2d at 385*. Unlike the defendant in *Richardson*, though, J.O.T. was seen

actually manipulating a knife against the doorjamb by both Lu.T. and C.T., whereas the neighbor who called the police in *Richardson* could not see what the suspect was doing at the front door of his neighbor's house. *Id*. Comparing the facts of *Flournoy*, the defendant had simply reached his hand through the screen door to the main door of the habitation. *Flournoy, 668 S.W.2d at 382*. J.O.T. went considerably further than this, actually sticking a knife into the doorjamb of the residents' back door.

J.O.T. compares his case to two other cases where a conviction for attempted burglary was overturned. In *Solis v. State*, the defendant removed a screen from the window of a house, then put the screen down against the side of another house and walked away, without having been disturbed in the process. *Solis, 589 S.W.2d 444, 445-46 (Tex. Crim. App. 1979)*. The Court of Criminal Appeals ruled that even though removing the screen was enough of an act to infer intent to enter the house, the defendant's actions after he removed the screen cast a reasonable doubt on his specific intent to commit theft. *Id. at 446-47*. Here, J.O.T. was interrupted while in the act of putting a knife into the residents' door jamb, making it impossible to know if he would have left the premises of his own accord. Furthermore, there was no evidence that Solis made an attempt to open the window, whereas J.O.T. was actually wiggling a knife between the doorjamb and the back door of the residents' home. *Id*. Therefore, the evidence of guilt is more apparent than in *Solis*. *Id*.

J.O.T. also compares his situation to the facts of *Perez v. State, 695 S.W.2d 51, 52 (Tex. App.-Corpus Christi 1985, no pet.)*. The ruling in *Perez*, though, was based on the "exclusion of reasonable outstanding hypothesis" theory [2], which was rejected by the Texas Court of Criminal Appeals as a method of evaluating the sufficiency of evidence. *Geesa v. State, 820 S.W.2d 154, 161* (Tex. Crim. App. 1991, *overruled on other grounds*, *Paulson v. State, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000)*). Thus, this precedent cannot be followed when deciding on the legal or factual sufficiency of evidence, since the theory of law that the holding was based on has been overturned.

> 2 The "reasonable outstanding hypothesis" theory held that when an appellate court reviewed the sufficiency of evidence supporting a conviction, the court had to consider all other reasonable hypotheses besides the theory of guilt advanced by the state. *Perez, 695 S.W.2d at 54*. If the court found that the credible evidence could support another reasonable hypothesis, then the court would hold that the state had not proved its case beyond a reasonable doubt, and the verdict would be overturned. *Id*.

According to the foregoing analysis, the evidence presented at trial is both legally and factually sufficient to support the court's implied finding of specific intent to commit a felony, theft, or assault. With regard to legal sufficiency, a reasonable trier of fact could have found that J.O.T. had the specific intent to commit a felony, theft, or assault, since he was seen by two witnesses attempting to enter the habitation without permission from the owner. The evidence is also factually sufficient to support a finding of specific intent. J.O.T. was seen attempting to enter the habitation, without permission, by wiggling a knife against the deadbolt lock of the residents' back door. Furthermore, J.O.T. did not leave the premises on his own - it was only when Lu.T. opened the door that he left. The finding is not manifestly unjust, and the great weight and preponderance of the evidence does not undermine the verdict reached by the trial court.

Conclusion: We find that the evidence presented at trial was both legally and factually sufficient to support the adjudication of delinquency for attempted burglary of a habitation. The judgment of the district court is AFFIRMED.