Juvenile Law Case Summaries

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Failure of court to instruct jury it must find extraneous offenses beyond a reasonable doubt results in reversal of disposition and remand for new hearing [In re M.O.M.] (01-2-21).

On May 3, 2001, the Houston First District Court of Appeals held that the juvenile court erred in a determinate sentence disposition hearing in failing to instruct the jury under Article 37.07 of the Code of Criminal Procedure that it must find beyond a reasonable doubt that the respondent committed extraneous offenses in order to take them into account.

¶ 01-2-21. In the Matter of M.O.M., UNPUBLISHED, No. 01-00-00323-CV, 2001 WL 461388, 2001 Tex.App.Lexis ____ No. 01-00-00323-CV, 2001 WL 461388, 2001 Tex.App.Lexis ____ (Tex.App.--Houston [1st Dist.] 5/3/01)[Texas Juvenile Law (5th Ed. 2001)]

Facts: Appellant, a juvenile, was found to have engaged in the delinquent conduct of aggravated robbery. The jury assessed punishment at six years confinement at the Texas Youth Commission, with possible transfer to the Texas Department of Criminal Justice. In this appeal, appellant raises six points of error: (1) the trial court lacked jurisdiction due to the absence of service of process; (2) the trial court erred in denying appellant's motion to suppress; (3)-(4) legal and factual insufficiency; (5) the trial court erred in denying appellant's request for a jury instruction on the voluntariness of his statement; and (6) the trial court erred in denying appellant's request for a jury instruction on the State's burden to prove the extraneous offenses.

On Sunday, August 15, 1999, at about 7:45 a.m., appellant and two of his friends, Charles Stuart and William Dilworth, approached the house at 11023 Sagecrest with the intention of stealing a car parked in the street in front of the house. Appellant first approached alone and rang the doorbell. Lea Ann Hughes opened the door and noticed three boys standing near her driveway.

Appellant spoke up and told Hughes he and the others were asking people in the neighborhood whether they attend church regularly. Hughes answered yes and then went back inside. About 15 minutes later, the boys again approached the house, this time with Dilworth ringing the doorbell. While Dilworth was at the door, appellant and Stuart looked on from the sides of the house, out of Hughes's view. When Hughes opened the door, Dilworth asked the same question appellant had asked earlier. Dilworth then stepped back and pulled out a gun and pointed it at Hughes, intending to obtain the keys to the car out front.

Hughes, frightened, immediately closed the door, ran to her daughter's room, and locked herself and her daughter in a closet. While inside, they dialed 911. Several minutes later, the police arrived. No suspects were arrested at that time.

About two weeks later, Pearland Police Officer Samuel Alix located appellant at school, placed him in custody, and took him to the Pearland Police Department's juvenile facility. Alix did so based on information he had received from Detective Darryl Cherry of the Houston Police Department, who was investigating the aggravated robbery of Hughes.

Upon arriving at the juvenile facility, the officers called Justice of the Peace Matt Zapeda for the purpose of administering to appellant the required magistrate's warnings. After receiving those warnings and voluntarily waiving his rights, appellant gave a written statement detailing his involvement in the robbery of Lea Ann Hughes.

At trial, the defense rested without calling any witnesses. The State offered the testimony of Lea Ann Hughes and

her daughter Jill, Charles Dilworth, Officer Alix, Detective Cherry, and Justice of the Peace Zapeda. The State also offered appellant's written statement.

Held: Adjudication affirmed; disposition reversed and remanded.

Opinion Text: Service

In his first point of error, appellant claims the trial court lacked jurisdiction due to absence of service on appellant or his parents. See TEX. FAM. CODE ANN. §§ 53.06 ("Summons"), 53.07 ("Service of Summons") (Vernon 1996). However, a review of the clerk's supplemental record contains copies of the required service of summons on both appellant and his father. Appellant's first point of error is overruled.

Motion to Suppress

In his second point of error, appellant contends the trial court erred when it denied his motion to suppress his written statement.

Specifically, he contends appellant's statement was obtained in violation of his federal and state constitutional rights and provisions of the Texas Family Code. See U.S. CONST. amend. V; TEX. CONST. art. I, § 10; TEX. FAM. CODE ANN. §§ 51.09, 51.095 (Vernon Supp.2001). [FN1]

> FN1. Appellant also claims the arresting officers violated section 52.02(b) of the Family Code. TEX. FAM. CODE ANN. § 52.02(b) (Vernon Supp.2001) ("A person taking a child into custody shall promptly give notice of his action and a statement of the reason for taking the child into custody, to ... the child's parent, guardian, or custodian...."). Appellant, however, did not object on that basis in either his written motion to suppress or during the hearing on his motion. He, therefore, presents nothing for review based on that ground. TEX. R. APP. P. 33.1.

We review a trial court's ruling on a motion to suppress evidence for abuse of discretion. Villarreal v. State, 935 S.W.2d 134, 138 (Tex.Crim.App.1996); Taylor v. State, 945 S.W.2d 295, 297 (Tex.App.--Houston [1st Dist.] 1997, pet. ref'd). The Court will afford almost total deference to a trial court's determination of historical facts that the record supports, especially when the findings are based on the evaluation of credibility and demeanor. Guzman v. State, 955 S.W.2d 85, 89 (Tex.Crim.App.1997). The fact finder is the sole judge of the witnesses' credibility and may accept or reject any or all of the witnesses' testimony. Taylor, 945 S.W.2d at 297. In reviewing a ruling on a question of application of law to facts, we review the evidence in the light most favorable to the trial court's ruling. Guzman, 955 S.W.2d at 89. In the present case, appellant spells out two acts that he claims violated his rights. First, he states that, once he first marked "No" on the magistrate's warnings form, indicating he did not wish to waive his rights, any subsequent question posed to him by Judge Zapeda constituted a violation of his right to counsel. Second, he claims that, while Judge Zapeda was informing him of his rights, Alix and Cherry were in the room, in violation of the Texas Family Code. [FN2]

> FN2. Section 51.095 states, in part: "[T]he statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if ... the statement [is] signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present...." TEX. FAM. CODE ANN. § 51.095(a)(1)(B) (Vernon Supp.2001).

Judge Zapeda testified at the suppression hearing. He stated that, after he orally informed appellant of his rights, he asked appellant whether he wanted to waive his rights. Appellant said that he understood his rights and wrote "No" on the form. Judge Zapeda then asked appellant whether it was his intent to write "No." Appellant responded by saying no, after which Judge Zapeda said, "Well then, you need to correct it." Appellant proceeded to cross out the "No," write "Yes," and initial the form. Judge Zapeda gave appellant a second set of warnings several hours later, after appellant had given Detective Cherry a statement. At that time, Judge Zapeda asked appellant whether his statement had been made voluntarily. Appellant said yes.

Appellant testified at the suppression hearing. His testimony contradicted Judge Zapeda's version of the events. He stated that he specifically asked for his mother so she could get an attorney. He also claimed he asked for an attorney two or three times. Appellant did admit he crossed out the "No" and replaced it with a "Yes," but that he did so only after pressure from the officers, who, according to appellant, told him he would "get raped in prison" and that he would not be allowed to go home "until six hours was up."

Appellant argues that his writing "No" on the warnings amounted to a clear and unambiguous desire to speak with a lawyer. We disagree. See Dewberry v. State, 4 S.W.3d 735, 747 n.9 (Tex.Crim.App.1999); Robinson v. State, 851 S.W.2d 216, 223-24 (Tex.Crim.App.1993). Judge Zapeda said appellant did not "request" counsel. Further questioning was limited to ascertaining his wishes regarding the waiver of his rights. And Judge Zapeda testified that appellant expressed his desire to continue with the interview after he waived his rights. We will not disturb the trial court's ruling when such contradictory testimony relies on the credibility and demeanor of the witnesses.

As for the contention that the officers were present when appellant signed his written statement, appellant points to no evidence indicating this to be the case. In our review of the record, we note it is true that there is conflicting testimony regarding the presence of officers during Judge Zapeda's initial meeting with appellant. However, Detective Cherry provided uncontroverted testimony that he and Officer Alix left the room after Judge Zapeda arrived the second time to obtain appellant's signature on the confession and again give him his statutory warnings. This procedure is consistent with the mandate of section 51.095. TEX. FAM. CODE ANN. § 51.095(a)(1)(B) (Vernon Supp.2001). For the above reasons, we overrule appellant's second point of error.

Legal and Factual Sufficiency

In his third and fourth points of error, appellant challenges the legal and factual sufficiency of the evidence.

We follow the usual standard of review for legal and factual sufficiency. See Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89 (1979) (legal sufficiency); King v. State, 29 S.W.3d 556, 563 (Tex.Crim.App.2000) (factual sufficiency). Here, the cumulative weight of the evidence offered at trial provides sufficient proof of appellant's involvement. [FN3] That evidence includes Lea Ann Hughes's testimony, the testimony of Dilworth, and appellant's own statement, all of which implicate appellant both in the planning and the carrying out of the aggravated robbery. [FN4]

> FN3. The court instructed the jury it could find that appellant engaged in delinquent conduct as a principal or as a party to the offense. See TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 1994).
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> FN4. The elements of aggravated robbery are: (1) a person; (2) in the course of committing theft; (3) with intent to obtain or maintain control of property; (4) intentionally or knowingly; (5) threatens another with, or places another in fear of; (6) imminent bodily injury or death; and (7) uses or exhibits; (8) a deadly weapon. TEX. PENAL CODE ANN. §§ 29.02-.03 (Vernon 1994); Harper v. State, 930 S.W.2d 625, 630 (Tex.App.--Houston [1st Dist.] 1996, no pet.).

Appellant offers the following as evidence contrary to his delinquency: (1) Dilworth did not commit aggravated robbery because he made no demands on Hughes; and (2) Hughes did not identify appellant in the photo array she was shown by Detective Cherry. This evidence, however, does not render the State's evidence so obviously weak or contrary to the overwhelming weight of the evidence as to be factually insufficient. Appellant's third and fourth points of error are overruled.

Jury Question on Voluntariness of Appellant's Statement

Appellant's fifth point of error contends the trial judge erred when she denied appellant's request for a jury instruction on the voluntariness of his statement. See TEX. FAM. CODE ANN. § 51.17(c) (Vernon Supp.2001); TEX. CODE CRIM. PROC. ANN. art. 38.22 § 7 (Vernon 1979 & Supp.2001).

Appellant concedes that such an instruction is only warranted when the evidence presented at trial raises a fact issue regarding the voluntariness of the statement. He argues, however, that such facts were present in this case. In support of his argument, he refers us to the facts set out in his second point of error, concerning his motion to suppress. The hearing on the motion to suppress was held pre-trial. During trial before the jury, appellant did not testify. The evidence before the jury regarding the confession was uncontroverted and did not raise a fact issue concerning voluntariness. Accordingly, appellant's fifth point of error is overruled.

Jury Instruction on the Extraneous Offenses

Appellant's sixth point of error contends the trial court erred at the disposition hearing when it denied his request for a jury instruction on the State's burden to prove
extraneous offenses beyond a reasonable doubt. See TEX. FAM. CODE ANN. § 51.17(c) (Vernon Supp.2001); TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a) (Vernon 1981 & Supp.2001).

The Court of Criminal Appeals has held "that article 37.07, § 3(a) ... governs the admissibility of evidence at punishment in all non-capital cases." [FN5] Huizar v. State, 12 S.W.3d 479, 483-84 (Tex.Crim.App.2000) (citing Rogers v. State, 991 S.W.2d 263, 265 (Tex.Crim.App.1999)) (emphasis added); In the Matter of J.R., 907 S.W.2d 107, 109 (Tex.App.--Austin 1995, no writ) (noting that "[a]spects of juvenile proceedings governed by the rules of criminal proceedings include the State's burden of proof"). If a trial court fails to submit such an instruction, then the appellate court should conduct the harm analysis prescribed in Almanza v. State, 686 S.W.2d 157, 171 (Tex.Crim.App.1984). Huizar, 12 S.W.3d at 484-85. Because appellant properly preserved error with an objection to the charge, we will reverse only "as long as the error is not harmless." Almanza, 686 S.W.2d at 171. The presence of any actual, as opposed to theoretical, harm, regardless of degree, that results from preserved error is sufficient to require reversal of the conviction. Arline v. State, 721 S.W.2d 348, 351 (Tex.Crim.App.1986). When conducting a harm analysis, we consider the following factors: (1) the charge itself; (2) the state of the evidence, including contested issues and the weight of probative evidence; (3) arguments of counsel; and (4) any other relevant information revealed by the record of the trial as a whole. Bailey v. State, 867 S.W.2d 42, 43 (Tex.Crim.App.1993).

> FN5. Article 37.07 states, in part:
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> > [E]vidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to ... evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible....
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> TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a) (Vernon 1981 & Supp.2001). This provision " 'requires that such evidence may not be considered in assessing punishment until the fact-finder is satisfied beyond a reasonable doubt that [the extraneous bad acts and offenses] are attributable to the defendant.' " Huizar v. State, 12 S.W.3d 479, 483-84 (Tex.Crim.App.2000) (quoting Fields v. State, 1 S.W.3d 687, 688 (Tex.Crim.App.1999)).

In his brief, appellant points to three specific instances in the record demonstrating that the charge actually caused him "some harm." During the punishment phase of the trial, the State offered the testimony of, among others, Joseph Hargraves, a Pearland High School student, and Pearland Police Officers Jeffrey Jernigan and Rene Alvarado.

Officer Jernigan described an incident purportedly involving marijuana found in appellant's car. No charges were filed against appellant stemming from that incident. When asked by the State's attorney to identify appellant in the courtroom, the officer said he could not. He also stated that he did not field test the substance found in the car to confirm it was marijuana. Officer Alvarado testified about his investigation of an incident involving a home-made bomb and the resulting damage to a home.

The officer stated that two boys were involved, one of whom was appellant. On cross-examination, Alvarado said that the other boy involved had claimed responsibility for making the bomb. Alvarado did testify that appellant was charged with theft from the home involved in that incident. Finally, Joseph Hargraves testified to an incident at Charles Stuart's father's home in which appellant pointed a gun at Hargraves's head and said, "Are you talking shit?" Hargraves could not say that appellant intended to hurt or frighten him. Immediately after the incident, appellant, Hargraves and several other boys got into a truck and left the house together.

During her argument to the jury, the State's attorney referred to the extraneous offenses and bad acts summarized above. Specifically, she stated:

> We have an aggravated assault where he pointed a gun at someone's head. ... We have a bomb in the garage. We have two fights, a disorderly conduct. We have got possession of marijuana. We have this aggravated robbery. We have school suspensions. We have got problems with authority, with teachers. We have got recent problems in the detention center, again, problems with authority.

In conducting our review under the Almanza factors, we conclude appellant suffered "some harm" as a result of the trial judge's failure to include a reasonable doubt instruction in the jury charge during the punishment phase of the trial. See Arline, 721 S.W.2d at 351 (holding that "the presence of any harm, regardless of degree, which results from preserved charging error, is sufficient to require a reversal of the conviction"). We therefore sustain appellant's sixth point of error.
