Juvenile Law Case Summaries

By
Robert O. Dawson
Bryant Smith Chair in Law
University of Texas School of Law

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Evidence sufficient to support aggravated assault with a golf club by a juvenile on his probation officer [In re R.M.] (03-1-12).

On December 19, 2002, the El Paso Court of Appeals held that the evidence was sufficient for aggravated assault when the juvenile threatened his probation officer with a golf club during a home visit.

03-1-12. In the Matter of R.M., UNPUBLISHED, 08-02-00105-CV, 2002 WL 31840968, 2002 Tex.App.Lexis ___ (Tex.App.-El Paso 12/19/02) Texas Juvenile Law (5th Ed. 2000).

Facts: R.M., a Juvenile, appeals from an adjudication order and disposition order. A jury found R.M. engaged in delinquent conduct by committing aggravated assault with a deadly weapon. Following a disposition hearing, the juvenile court placed R.M. on intensive supervised juvenile probation.

On July 26, 2001, the juvenile court placed R.M. on supervised juvenile probation after he was found to have engaged in delinquent conduct by intentionally and knowingly possessing an explosive weapon, a grenade. As a condition of his probation, R.M. was required to permit Noemi Ramos, a juvenile probation officer, to visit in his home. R.M. filed a notice of appeal but he filed a document withdrawing his notice of appeal on December 4, 2001. This Court issued a written opinion and judgment dismissing the appeal on January 11, 2002.

On January 4, 2002, Ramos went to R.M.'s home for the purpose of conducting her weekly home visit. R.M. answered the door and upon seeing Ramos simply stated "What?" Ramos invited herself into the apartment and noticed that R.M. was playing with two golf clubs. She told R.M. that she needed to speak with him and his mother together in the living room. R.M.'s mother, who was in the kitchen, told Ramos that she would be with her shortly. Because the television located in the dining area was extremely loud, Ramos asked R.M. to turn it off so that she could talk. R.M. refused, explaining that he was recording a movie. Ramos then asked him to turn down the volume so that they could talk, but R.M. refused this request as well. Ramos walked over to the television and turned it off. R.M. turned the television back on and Ramos turned it off. Ramos then explained to R.M.'s mother why she had turned off the television. In the meantime, R.M. turned on the television again. Ramos turned off the television a final time, and when she looked up, she saw R.M. holding up one of the golf clubs and looking her directly in the eye while yelling that he was going to kill her. Ramos described R.M. as having a vicious look on his face and he held the golf club in a manner indicating that he wanted to strike her. Ramos quickly walked out of the apartment and telephoned the police. Ramos walked back to the apartment while waiting for the police to arrive. She entered and stood in the living room with R.M .'s mother while he remained in the dining area watching a movie. The officers arrived and talked to R.M. and Ramos about the incident.

Johnny Ferrer, an El Paso police officer, entered the apartment and attempted to speak with R.M. who was in the dining area of the apartment. When Ferrer asked R.M. to turn off the television so that they could talk, he blew up at Ferrer and said, "Fuck you, you can't come in here." Ferrer was at first unsuccessful in his attempt to gain custody of the remote control, so he attempted to turn off the television manually. At that point, Ferrer had to physically restrain R.M. and another officer, Leo Quintana, handcuffed him. Ferrer took custody of the golf club found in the kitchen by Quintana and booked it into evidence.

On January 11, 2002, the State filed a petition alleging that R.M. had committed aggravated assault with a deadly weapon. It also filed a motion to modify disposition in the first case but later dismissed that motion. A jury found that R.M. engaged in delinquent conduct by committing aggravated assault as alleged in the petition. The juvenile court placed R.M. on intensive supervision probation.

Held: Affirmed.

Opinion Text: EXTRANEOUS OFFENSE

In Points of Error Nos. One and Two, R.M. alleges that the juvenile court erred in admitting evidence of extraneous offenses. He argues that the court should not have permitted Ramos to testify about her employment as a juvenile probation officer or the purpose of her visit to R.M.'s home.

Prior to trial, R.M. filed a motion in limine seeking to prohibit the State from eliciting any evidence that Ramos was a juvenile probation officer because it constituted proof of an extraneous offense. At the hearing, the prosecutor informed the juvenile court that it was necessary to show the purpose for Ramos' visit to R.M.'s home but the State had no intention of going into the nature of the adjudication. The juvenile court ruled that the State would be permitted to show that Ramos is a juvenile probation officer and she was at the home conducting official business.

When Ramos testified before the jury that she was employed by the El Paso Juvenile Probation Department, R.M. objected that permitting Ramos to identify herself as a probation officer constituted evidence of an extraneous offense. The juvenile court overruled the objection. Ramos then testified that she was at R.M.'s home on January 4, 2002 for the purpose of making a weekly home visit. R.M. did not renew his objection to this aspect of her testimony.

Preservation of Error

Rule 33.1 of the Texas Rules of Appellate Procedure require a party to make a timely and specific objection in order to complain of any error on appeal. Tex.R.App.P. 33.1. It is well-settled that the denial of a motion in limine is not sufficient to preserve error for review, but rather there must be a proper objection to the proffered evidence. McDuff v. State, 939 S.W.2d 607, 618 (Tex.Crim.App.1997); Ortiz v. State, 825 S.W.2d 537, 541 (Tex.App.-El Paso 1992, no pet.). Although R.M. objected to Ramos testifying that she was employed by the juvenile probation department, he did not object when she stated her purpose for the visit to the home. Consequently, he preserved error only with respect to the first question and answer. See McDuff, 939 S.W.2d at 618; Geuder v. State, 76 S.W.3d 133, 136 (Tex.App.-Houston [14th Dist.] 2002, pet. filed).

Ramos' Employment by the Juvenile Probation Department

R.M. asserts that the State introduced evidence showing that Ramos is a juvenile probation officer. Ramos testified that she is employed by the juvenile probation department but she never stated in the jury's presence that she is a juvenile probation officer. R.M. failed to object when a police officer subsequently identified Ramos as a "probationary officer" or "probation officer." The State argues that the evidence showing Ramos is employed by the juvenile probation department would not necessarily have led the jury to believe that R.M. had been placed on juvenile probation, and therefore, it is not evidence of an extraneous offense. We agree.

To constitute an extraneous offense, the evidence must show a crime or bad act, and that the defendant was connected to it. Lockhart v. State, 847 S.W.2d 568, 573 (Tex.Crim.App.1992), cert. denied, 510 U.S. 849, 114 S.Ct. 146, 126 L.Ed.2d 108 (1993); McKay v. State, 707 S.W.2d 23, 32 (Tex.Crim.App.1985), cert. denied, 479 U.S. 871, 107 S.Ct. 239, 93 L.Ed.2d 164 (1986). This necessarily includes some sort of extraneous conduct on behalf of the defendant which forms part of the alleged extraneous offense. Harris v. State, 738 S.W.2d 207, 224 (Tex.Crim.App.1986), cert. denied, 484 U.S. 872, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). If the evidence fails to show that an offense was committed or that the accused was connected to the offense then it is not evidence of an extraneous offense. Moreno v. State, 858 S.W.2d 453, 463 (Tex.Crim.App.1993); McKay, 707 S.W.2d at 32. The juvenile court noted that the juvenile probation department is involved with various programs involving youth in El Paso. Consequently, the evidence showing that an employee of the juvenile probation department visited R.M.'s home does not show that R.M. committed an offense or bad act. See Laca v. State, 893 S.W.2d 171, 186 (Tex.App.-El Paso 1995, pet. ref'd)(statement indicating that defendant had been in detention but showing nothing in regard to what, if any, offense had been committed by defendant was not evidence of extraneous offense); see also Williams v. State, 927 S.W.2d 752, 756 (Tex.App.-El Paso 1996, pet. ref'd) (admission of defendant's affidavit of indigency did not show commission of extraneous offense). The trial court did not abuse its discretion in admitting this evidence. Points of Error Nos. One and Two are overruled.

LEGAL AND FACTUAL SUFFICIENCY

In Point of Error No. Three, R.M. challenges the legal and factual sufficiency of the evidence to support the jury's finding that he engaged in delinquent conduct by committing aggravated assault with a deadly weapon. More specifically, he challenges the evidence supporting the jury's findings that he threatened Ramos with imminent bodily injury and he used or exhibited a deadly weapon.

Standards of Review

When reviewing challenges to the legal sufficiency of the evidence to establish the elements of the penal offense that forms the basis of the finding that the juvenile engaged in delinquent conduct, we apply the standard set forth in Jackson v. Virginia, 443 U.S. 307, 320, 99 S.Ct. 2781, 2789-90, 61 L.Ed.2d 560 (1979). In the Matter of A.S., 954 S.W.2d 855, 858 (Tex.App.-El Paso 1997, no pet.).

Under this standard, an appellate court must review all the evidence, both State and defense, 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, 443 U.S. at 318-19, 99 S.Ct. at 2789; Alvarado v. State, 912 S.W.2d 199, 207 (Tex.Crim.App.1995).

In reviewing this factual sufficiency challenge, we view all of the evidence but do not view it in the light most favorable to the verdict in determining whether the State met its burden of proof beyond a reasonable doubt. A.S., 954 S.W.2d at 860; see also Clewis v. State, 922 S.W.2d 126, 129 (Tex.Crim.App.1996). Only if the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust will we conclude that the State failed to carry its burden. A.S., 954 S.W.2d at 860.

Elements of the Offense

A person commits aggravated assault with a deadly weapon if he intentionally or knowingly threatens another with imminent bodily injury and he uses or exhibits a deadly weapon during the commission of the assault. Tex.Pen.Code Ann. section 22.02(a)(2)(Vernon 1994). The State's petition tracked the language of this section of the Penal Code, alleging that R.M. threatened Ramos with imminent bodily injury and used or exhibited a deadly weapon, namely, a golf club. Further, the court's charge properly submitted this issue to the jury.

Imminent Bodily Injury

Citing Gaston v. State, 672 S.W.2d 819 (Tex.App.-Dallas 1983, no pet.), R.M. argues that the State failed to prove that Ramos believed she was in imminent danger of serious bodily injury since she voluntarily went back into the apartment. [FN1] In Gaston, the defendant, holding a sawed-off shotgun, entered the freezer of the restaurant where the complainant worked. The complainant screamed and the defendant approached her. He did not verbally threaten her or point the gun at her but instead held it by his side, and placed one hand over her mouth while telling her to "hush ." The defendant then removed his hand from the complainant's mouth and she asked him not to shoot her. When a co-worker opened the door, the defendant fled the premises. On appeal from his conviction for aggravated assault with a deadly weapon, the court of appeals found the evidence sufficient to show that the defendant used a deadly weapon even though he made no physical motion to employ the weapon and did not verbally threaten the victim. Gaston, 672 S.W.2d at 822. In summarizing the evidence, the court noted that the assault victim justifiably felt threatened with imminent bodily injury under these facts. The Gaston court was not faced with a challenge to the sufficiency of the evidence proving a threat of imminent bodily injury and we do not read the opinion as holding that the State must prove that the victim reasonably felt threatened by the defendant's conduct in order to prove imminent bodily injury. Further, Section 22.02(a)(2) does not place this burden on the State. The State is only required to show that the defendant threatened the complainant with imminent bodily injury.

FN1. The juvenile court excluded the State's efforts to show why Ramos went back into the apartment.

In both assault and robbery cases involving a threat of imminent bodily injury, the term "imminent" has been interpreted as meaning "on the verge of happening" or "near at hand." See Devine v. State, 786 S.W.2d 268, 270 (Tex.Crim.App.1989)(robbery); Hill v. State, 844 S.W.2d 937, 938 (Tex.App.- Eastland 1992, no pet.)(aggravated assault). Black's Law Dictionary defines "imminent" as meaning "near at hand" and "on the point of happening." BLACK'S LAW DICTIONARY 676 (5th ed.1979). Thus, the term "imminent" refers to a present, not a future, threat of bodily injury. See Devine, 786 S.W.2d at 270. R.M., standing only four to five feet from Ramos and while holding a golf club in a threatening manner and yelling, stated to Ramos that "he was going to fucking kill [her]." This is a threat of present, not future bodily injury. Consequently, we find the evidence is legally sufficient to prove that R.M. threatened Ramos with imminent bodily injury. See Rogers v. State, 877 S.W.2d 498, 500 (Tex.App.-Fort Worth 1994, pet. ref'd)(evidence supported finding that defendant threatened aggravated assault victim with imminent bodily injury where defendant insisted that victim cash defendant's money order, defendant moved within two feet of victim and drew knife, and defendant threatened to cut off victim's head); see also Green v. State, 567 S.W.2d 211, 212-13 (Tex.Crim.App. [Panel Op.] 1978)(in robbery case, defendant's statement "If you don't give me the money, I'm going to cave your head in" constituted a threat of imminent bodily injury).

With respect to the factual sufficiency of the evidence to prove this same element, R.M.'s mother testified that she did not hear her son yell or threaten Ramos either verbally or by raising the golf club. She believed Ramos had made up the story because she did not like R.M. After reviewing all of the evidence, including the testimony of R.M.'s mother, we cannot say that the jury's verdict is contrary to the overwhelming weight of the evidence.

Use or Exhibit a Deadly Weapon

R.M. next argues that the evidence is insufficient to show that he used or exhibited a deadly weapon because the trial court did not admit the golf club into evidence and the officers' testimony failed to establish that a golf club is capable of causing death or serious bodily injury. Although R.M. makes much of the State's failure to successfully introduce the golf club into evidence, the State is not required to do so in order to prove the challenged element. [FN3] See Jackson v. State, 913 S.W.2d 695, 698 (Tex.App.-Texarkana 1995, no pet.); Victor v. State, 874 S.W.2d 748, 751 (Tex.App.-Houston [1st Dist.] 1994, pet. ref'd). Therefore, we will restrict our

review to whether the State proved that the golf club is a deadly weapon.

FN3. The trial court refused to admit the golf club because the State failed to establish the chain of custody.

The Penal Code defines a deadly weapon as:

(A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or
(B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Tex.Pen.Code Ann. section 1.07(a)(17)(A)(B)(Vernon 1994).

A golf club is not designed, made or adapted for the purpose of inflicting death or serious bodily injury, and therefore, it is not a deadly weapon per se as defined under Section 1.07(a)(17)(A). Items that are not deadly weapons per se have been found to be deadly weapons by reason of their use or intended use under Section 1.07(a)(17)(B). Hill v. State, 913 S.W.2d 581, 582 (Tex.Crim.App.1996). Their use or intended use must be capable of causing death or serious bodily injury. Id.

It is not necessary that the State show that R.M. actually used the golf club in a deadly manner or that the golf club actually caused serious bodily injury. Under the above authorities, the State must show only that R.M. used or intended to use the golf club in a manner which caused or had the potential to cause death or serious bodily injury. The jury may consider all of the facts in determining whether a weapon is deadly, including the words of the accused, the intended use of the weapon, the size and shape of the weapon, the testimony of the victim, the severity of the wounds inflicted, and testimony as to the weapon's potential for deadliness. Bui v. State, 964 S.W.2d 335, 343 (Tex.App.-Texarkana 1998, pet. ref'd); Hicks v. State, 837 S.W.2d 686, 690 (Tex.App.-Houston [1st Dist.] 1992, no pet). Further, the jury may infer intent to use an object in a deadly manner from the acts or words of the defendant. See Parrish v. State, 647 S.W.2d 8, 10-11 (Tex.App.-Houston [14th Dist.] 1982, no pet.).

Ramos testified that R.M., who stood only four or five feet from her, yelled and threatened to kill her while holding the golf club over his head in a manner indicating he wanted to strike her with it. Officer Ferrer, whose training included the identification of deadly weapons, offered his expert opinion that a golf club could cause death or serious bodily injury. It could be used as a blunt object to strike another person and in that manner of use could cause serious bodily injury. Ferrer had actually responded to one case in which a husband had struck his wife with a golf club. The jury could have rationally found that R.M. intended to use the golf club in a deadly manner and that the golf club, in the manner of its intended use, had the potential of causing death or serious bodily injury. Therefore, the evidence is legally sufficient.

R.M. offered no evidence to contradict Ferrer's expert opinion. Our review of the evidence regarding this element does not show that the jury's verdict is contrary to the overwhelming weight of the evidence. Because the evidence is legally and factually sufficient to support the jury's determination that R.M. committed aggravated assault as alleged in the State's petition, we overrule Point of Error No. Three. The adjudication and disposition orders are affirmed.

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