STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1661

In the Matter of the Welfare of:
S. M. L., Child

Filed July 18, 2011
Reversed
Ross, Judge

Kandiyohi County District Court
File No. 34-JV-10-57

Susan J. Andrews, Assistant State Public Defender, Pamela A. Marentette, Special Assistant State Public Defender, Dorsey & Whitney LLP, Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Jennifer Kurud Fischer, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

This appeal concerns whether a 16-year-old boy committed felony possession of a dangerous weapon by bringing to school a pocketknife typical of those marketed by sporting-goods and general-merchandise stores and about which the state introduced no evidence of its design for use as a weapon. Because the state failed to prove either that

the knife was designed as a weapon or that S.M.L. used or intended to use it as a weapon, we reverse his adjudication of delinquency for possessing a dangerous weapon on school property under Minnesota Statutes section 609.02, subdivision 6 (2008).

FACTS

Willmar Police school resource officer Gene Schneider and a Willmar High School assistant principal received a tip that student S.M.L. brought drugs to school. They took S.M.L. from class and he turned over marijuana and a pipe. The officer asked whether he had "anything else that he shouldn't have," and S.M.L. admitted that he had a pocketknife in his jacket pocket, the possession of which violates school rules.

The officer went to the jacket, which S.M.L. was not wearing, and found a common pocketknife that folds open into a locked position. It has a plastic handle, a small thumb knob that allows for one-handed opening, and a lever that must be depressed to unlock the blade for folding into a closed position. The knife is 7.5 inches fully extended. It has a steel blade with a single sharpened edge that is slightly shorter than 3-inches long and that is about two thirds serrated. (We recognize that the district court's finding as to the blade's length is slightly different than this. It found that "the cutting edge of the knife is three and a half inches long," presumably based on the officer's testimony that "the blade itself was three and a half inches long." But the knife is in the record, and we observe that the finding and testimony as to length are a bit off. The knife does in fact measure nearly 3.5 inches from its point to the handle. But all of this length cannot constitute "the cutting edge"; this 3.5-inch measurement also includes what is by design an extension of the handle. Just beyond the sharpened edge is a curved and

unsharpened indentation where the user's index finger grips the knife. And the edge that is entirely unsharpened includes a curved and textured portion designed for the thumb's placement. So although these finger and thumb grips are part of the metal that also forms the blade, in use they are essentially part of the handle rather than the blade.)

Officer Schneider asked S.M.L. whether he brought the knife to school for protection, and S.M.L. told him "no," but added that "it didn't hurt." The school expelled S.M.L. for one year and the state charged him with felony possession of a dangerous weapon on school property and three petty drug and tobacco misdemeanors.

The district court tried S.M.L. in a delinquency proceeding. It found him guilty of all charges, including possessing a dangerous weapon on school property. S.M.L. appeals the delinquency determination only as it arises from possession of a dangerous weapon.

D E C I S I O N

S.M.L. challenges his delinquency adjudication contending that the evidence did not prove that he possessed a dangerous weapon. We must decide whether sufficient evidence supports the adjudication, relying on the record and any legitimate inferences drawn from it for reasonable support for the district court's findings. *In re S.A.M.*, 570 N.W.2d 162, 167 (Minn. App. 1997). The evidence does not support the adjudication.

The state has the burden to prove beyond a reasonable doubt all elements of the delinquency petition charging S.M.L. with possessing a dangerous weapon on school property. *See* Minn. R. Juv. P. 13.06. A person who "possesses, stores, or keeps a dangerous weapon" on school property commits a felony. Minn. Stat. § 609.66, subd. 1d(a) (2008). Whether an instrument is a dangerous weapon is a legal question reviewed

de novo. *State v. Basting*, 572 N.W.2d 281, 282 (Minn. 1997). Among other things, a "dangerous weapon" is "any device designed as a weapon and capable of producing death or great bodily harm, . . . or other device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm." Minn. Stat. § 609.02, subd. 6. The state did not meet its burden of proving that S.M.L.'s pocketknife is a weapon either by his intended use or by its design.

No evidence supports conviction on a theory that S.M.L. actually used or intended to use the knife to harm anyone. S.M.L. testified that his mother gave him the knife as a gift and that he uses it for cutting things, noting that because it has a serrated edge, "it's good for sawing." Officer Schneider testified that S.M.L. told him that he did not bring the knife to school for protection and that S.M.L. had added only that "it didn't hurt."

In its context, we take the phrase "it didn't hurt" to indicate at most that S.M.L. was acknowledging the officer's implied suggestion that the knife could be used for self protection and that the knife's availability would have made that use possible. Officer Schneider similarly testified that he understood S.M.L. to be saying only that "he would use it for protection *if needed*." But nothing in the record suggests that S.M.L. thought he might need to defend himself, let alone that he intended to use the knife for that purpose. S.M.L.'s acknowledgement says nothing to contradict his statement to the officer that he did not intend the knife's use for his own protection or that he actually used it instead for "[e]veryday common occurrences [for which] you need to use something sharp."

There being no evidence to support the conviction on the theory that S.M.L. intended to use the knife as a weapon, we turn to whether the knife was designed as a

weapon and capable of producing death or great bodily harm. *See In re Welfare of P.W.F.*, 625 N.W.2d 152, 154–55 (Minn. App. 2001) (reversing conviction of possession of knife as a dangerous weapon on state's failure to introduce specific evidence of knife's design). No one disputes the fact that S.M.L.'s knife, like any sharp, bladed, metal instrument, is capable of causing death, so we must decide only whether the district court accurately found that it was "designed as a weapon."

The finding lacks sufficient support in the record. It is true that Officer Schneider did follow the leading of the prosecutor, answering "It is" to the suggestive inquiry, "And is it your training that a knife of that type is a weapon?" The district court cautioned, "you're leading counsel," even though no objection on that ground had been asserted. The district court allowed that testimony nevertheless, but in the full context of the officer's other testimony, it is evident that the statement was an assertion that a law enforcement officer will treat a pocketknife as a dangerous weapon as a matter of tactics; it was not offered as testimony opining that the knife had been designed to be a weapon. This is significant, because we have held that the state does not prove any particular knife is a dangerous weapon without evidence demonstrating that the knife was actually designed to be a weapon. *P.W.F.*, 625 N.W.2d at 154–55. And even if the officer intended his testimony constitute his opinion that the knife was, by design, a dangerous weapon, the testimony would be of no probative value; he acknowledged that he had no training in the design of knives and said nothing indicating any other ground to qualify him as an expert witness on the design of any type of knife as a weapon. *See* Minn. R.

Evid. 702 (requiring expert witnesses to possess "knowledge, skill, experience, training, or education" about a technical fact at issue before opining about it).

Of course a police officer trained in defensive tactics and experienced in perilous situations will recognize the potentially dangerous application of a knife and may in some circumstances even treat its presence as calling for deadly force. *See State v. Trei*, 624 N.W.2d 595, 597–98 (Minn. App. 2001) (holding that evidence of a defendant holding kitchen knives near a police officer established probable cause that the defendant attempted to use deadly force against the officer); Minn. Stat. § 609.066 (2010) (authorizing police officers to use deadly force to protect themselves from death or great bodily harm). And as Officer Schneider testified, even a pen or scissors—objects designed as something other than weapons—can be used as weapons. Consistent with an officer's protection against potentially dangerous instruments, he implied that his testimony about the weapon-like nature of S.M.L.'s pocketknife was situation-oriented rather than categorical: "[It is known by law enforcement] as being a weapon and . . . we would defend ourselves with deadly force if presented with this." As we have just discussed, the statute similarly recognizes that the actual dangerous *use* of an object will qualify it as a dangerous weapon even if it is not designed to be a dangerous weapon. But our focus now is on design, not use, and the officer's testimony does not satisfy the state's burden to prove that S.M.L.'s pocketknife was designed for use as a weapon.

This case is similar to *In re Welfare of P.W.F.*, except that here the district court provided some findings and rationale for its conclusion. But the district court's findings and rationale do not convince us that S.M.L.'s knife was designed as a dangerous

weapon. The district court reasoned that "the cutting edge . . . appears to be sharp and serrated, easily capable of cutting animal or human flesh, with a dark handle, much more menacing in appearance than a pen, letter opener, eating utensil, or small pocket knife." It is true that the cutting edge is sharp and serrated, but if having a point and a sharp serrated edge were sufficient to find that a knife was designed as a weapon, most steak knives would qualify. That the handle was "dark" is not significant because the color of the plastic handle does not have any material bearing on its design. And we can agree that the knife is more "menacing in appearance" than a pen or a letter opener or a butter knife. But many sharp objects are even more menacing still, while they are designed for things other than use as a weapon: an axe is designed to cut trees; a machete is designed to clear brush; a scythe is designed to cut tall grasses; and a harpoon is designed to hunt large aquatic creatures. Identifying an object as more menacing in appearance than nonweapons is not a substitute for evidence of design as a weapon. And the district court's comparison of S.M.L.'s pocketknife to "a small pocketknife" is not helpful since S.M.L's pocketknife *is* a small pocketknife.

The district court also reasoned that "[t]he locking feature renders the knife safer for the user but more dangerous to the potential victim because the knife will not close upon the fingers of the user." The locking blade is a safety feature to avoid the knife's folding during any use, legitimate or not. But how is a pocketknife with a locking blade "more dangerous" to others than a pocketknife without a locking blade? Being slashed or jabbed by any pocketknife's blade, whether or not it locks, would presumably leave every similarly assaulted victim in a similarly unfortunate condition. The district court added,

"The possession of the knife in close proximity to a controlled substance by a student in a school environment is particularly dangerous." Being dangerous, even particularly dangerous by location, does not indicate that the knife was designed as a weapon.

Some knives may be of a variety so commonly understood to be a weapon that little additional evidentiary support is necessary to prove the element. These might include, for example, a bayonet, which is by design attached to a rifle in military combat; a dagger, with historic origins in battle and whose double-edged blade is of little practical use other than thrusting; a bladed brass knuckles, which can practically be used only when punching or slashing (*see* Minn. Stat. 609.66, subd. 1(a)(4) (2010) (criminalizing possession of metal knuckles)); a stiletto, with its origins in medieval warfare; or knives having rapidly deployable blades, like a balisong (also known as a "butterfly knife"), or a switchblade (which has been commonly associated with urban gang fighting in literature and film and which is also specifically identified by subdivision 1 of the same statute as illegal for carrying in public). But S.M.L.'s knife is not one of this class and in fact is of the kind routinely available as a sporting good by vendors not commonly associated with dangerous weapons.[1] And even if it were, some corroborating evidence of design would still have been necessary here because a district court may not take judicial notice that a pocketknife with roughly a 3-inch blade is designed as a weapon unless its purpose is a

[1] On appeal S.M.L. suggests that his knife is a tool similar to what might be used by individuals participating in outdoor recreation. The suggestion is not contested. *See, e.g.*, *REI*, http://www.rei.com/product/737698 (last visited Apr. 27, 2011); *Target*, http://www.target.com/mdp/B00007E1M1/ref=_2_qi?asin=B00007E1M1 (last visited June 20, 2011).

matter of common knowledge and no reasonable question exists as to whether it is a weapon. *In re P.W.F.* 625 N.W.2d at 154.

Reversed.