IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0712-16

ROBERT MONTE PRICHARD, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FIFTH COURT OF APPEALS
DALLAS COUNTY**

YEARY, J., filed a dissenting opinion in which HERVEY, J., joined.

DISSENTING OPINION

Suppose that we were called upon today to construe, not Section 1.07(a)(17)(B) of the Penal Code, but Section 1.07(a)(17)(A): "'Deadly weapon' means . . . a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury[.]" TEX. PENAL CODE § 1.07(a)(17)(A). Suppose that, instead of hitting his dog on the head with a shovel and drowning her in a swimming pool, Appellant had first shot his dog with a firearm to disable her, and then used a garrote to strangle her to death. In that case, he would have committed the same state jail felony he was convicted of in this case, namely,

Cruelty to a Nonlivestock Animal under Section 42.092(b)(1) of the Penal Code, in that he would have, "in a cruel manner[,] kill[ed] or cause[d] serious bodily injury" to his domesticated dog. TEX. PENAL CODE § 42.092(b)(1) & (c). His punishment for this offense might then be boosted to that of a third degree felony "if it is shown on the trial of the offense that . . . a deadly weapon as defined by Section 1.07 was used . . . during the commission of the offense[.]" TEX. PENAL CODE § 12.35(c)(1).

Did my hypothetical Appellant, in fact, use a deadly weapon in contemplation of Section 12.35(c)(1)? Well, he used both a firearm, which by itself fits the definition of deadly weapon laid out in Section 1.07(a)(17)(A), and a garrote, which also meets that definition in the sense that it is "manifestly designed" to kill by strangulation—indeed, it has no other purpose. Moreover, the firearm and garrote both clearly "facilitated" Appellant's commission of the offense. *Plummer v. State*, 410 S.W.3d 855, 865 (Tex. Crim. App. 2013). It seems plain enough to me that, under this scenario, Appellant would be susceptible to punishment as a third degree felon.

Would the Court say otherwise today, if it were called upon to decide the applicability of Section 1.07(a)(17)(A), instead of (as we do today) Section 1.07(a)(17)(B)? Would the Court say that the use of a firearm or garrote does not support a deadly weapon finding because any victim of an offense under Section 42.092 of the Penal Code is a domesticated animal, not a person? Does a firearm constitute a firearm only when it is used to kill people? Is a garrote any less "manifestly designed" to cause death or serious bodily injury when it is

used to strangle a dog rather than a human? Under the plain and unambiguous language of Section 1.07(a)(17)(A), Appellant would have used a deadly weapon during the commission of the offense in contemplation of Section 12.35(c)(1), notwithstanding that his victim was a dog. So, in what way, exactly, is Section 1.07(a)(17)(B) any less plain?

Ambiguity?

Section 1.07(a)(17)(B) alternatively defines a deadly weapon to be "anything that in the manner of its use . . . is capable of causing death or serious bodily injury." TEX. PENAL CODE § 1.07(a)(17)(B). The Court says this language is ambiguous; that it is unclear whether the Legislature intended that, to be a deadly weapon, the thing must be capable of causing death or serious bodily injury to a human. Reading between the lines of the Court's opinion, it strikes me that what the Court really finds disquieting is not any genuine uncertainty about the meaning of the statute, but rather the obvious breadth of the statutory language. The Court concedes that there is nothing intrinsic in the language of Subsection (B) that necessarily limits its application to implements that are capable of killing or seriously injuring human beings. Majority opinion at 10-11.[1] The Legislature expressly contemplated

[1] On direct appeal, Appellant argued that our case law has limited the deadly weapon definition in Section 1.07(a)(17)(B) to implements capable by the manner of their use to causing death or serious bodily injury to "individuals." *See* TEX. PENAL CODE § 1.07(a)(26) (defining "individual" to mean "a human being who is alive"). But Section 1.07(a)(17)(B) does not limit its definition to things that, by the manner of their use, are capable of causing death or serious bodily injury to "individuals," as so defined. The court of appeals rightly rejected this particular argument. *Prichard v. State*, No. 05-14-01214-CR, 2016 WL 1615641, at *2-3 (Tex. App.—Dallas 2016). Indeed, the Legislature might easily have enacted the narrower meaning of Section 1.07(a)(17)(B) that the Court imposes upon it today had it expressly provided that a thing is a deadly weapon if, in the manner of its use, it is capable of

that other living creatures are susceptible to death or serious bodily injury, as the Cruelty to Nonlivestock Animals statute itself illustrates, making it an offense to kill or cause serious bodily injury to a domesticated animal. TEX. PENAL CODE § 42.092(b)(1). But neither the broad scope of the statutory language nor judicial disquietude about the potential sweep of that language renders a plain statute ambiguous.

Whether a statute is plain or ambiguous "is sometimes a function of the question that is brought to bear. A given statutory provision will sometimes clearly answer one question but remain hopelessly insoluble with respect to another." *McClintock v. State*, ___ S.W.3d ___, No. PD-1641-15, 2017 WL 1076289, at *3 n.5 (Tex. Crim. App. Mar. 22, 2017).[2] Certainly one question we confront today regarding Section 1.07(a)(17)(B) is this: To what must a thing be capable, in the manner of its use, of causing death or serious bodily injury before that thing may be designated a "deadly weapon"? On its face, the statute is quite broad in this respect. Nothing in the language of the statute places any restriction, explicit or implicit, on what must be found to have been exposed to death or serious bodily injury by the manner in which the defendant used the alleged implement. Thus, the answer seems

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causing death or serious bodily injury *to an individual*. But the Legislature did not, and there is no particular reason to believe it meant to.

[2] The Court observes that we have found Article 42.12, Section 3g(a), of the Texas Code of Criminal Procedure to be ambiguous in the past, and contends that this somehow serves as "precedent" for the proposition that the definition of deadly weapon contained in Section 1.07(a)(17)(B) of the Penal Code is also ambiguous. *See* Majority Opinion at 20 (discussing *Plummer*). But the question we brought to bear on Article 42.12, Section 3g(a), in *Plummer*, was not remotely the same as the one we must ask about Section 1.07(a)(17)(B) in this case.

evident enough: a deadly weapon, as so defined, may be found to be a deadly weapon regardless of the species of living creature it is used against—period.

Is it open to some reasonable alternative interpretation? Surely not simply on account of its breadth. Otherwise, the Legislature would be encumbered in its ability to enact broad provisions even when that is its manifest intention—or at least its broad intentions would always be subject to frustration in the form of meddlesome judicial narrowing. Still, the Court offers no arguments of consequence *beyond* the apparent breadth of the statute that justify declaring it to be subject to more than one reasonable construction.

Many, if not all, of the reasons that the Court provides to support its conclusion that Section 1.07(a)(17)(B)'s definition of deadly weapon may reasonably be construed to require a human victim fail to focus on the statutory language itself and are, frankly, non sequiturs. For example, the Court asserts that it would be "unusual" for the Legislature "to refer to a nonhuman as having 'serious bodily injury'" as that term is defined in Section 1.07 of the Penal Code, and that it would be equally "unusual" for the Legislature to apply Section 1.07's definition of "bodily injury" to a nonhuman. Majority Opinion at 12 (citing TEX. PENAL CODE § 1.07(a)(46)). But, as I have already observed, the Cruelty to Nonlivestock Animals statute itself criminalizes the act of causing "serious bodily injury" to a domesticated animal,[3] and presumably the Legislature intended the courts to consult Penal

[3] It is an offense under Section 42.092(b)(1) if a person "in a cruel manner kills or causes serious bodily injury to an animal[.]" TEX. PENAL CODE § 42.092(b)(1).

Code Section 1.07(a)(46)'s definition in construing that provision.

Next, the Court observes that the statutory provision that authorizes a deadly weapon finding, Article 42.12, Section 3g(a)(2), of the Code of Criminal Procedure, follows on the heels of a laundry list of offenses against persons, contained in Section 3g(a)(1). Majority Opinion at 12-13. To the Court, this suggests that deadly weapon findings themselves may have been intended similarly to focus only on crimes against persons, not "nonhuman victims." *Id*. at 13. But the Court itself immediately acknowledges that Section 3g(a)(2) could just as plausibly be intended to be a kind of catch-all, "to ensure that all types of offenses, including those involving . . . nonhuman victims, could result in a deadly weapon finding." *Id*. at 13. These considerations offer a disturbingly tenuous basis for departing from the plain, albeit broad, language of the statutory definition in the name of "ambiguity."[4]

Even the Court's asserted reasons why the ambiguity it perceives in the statute must be resolved in favor of requiring human victims lack substance. The Court begins with its analysis of the legislative history, claiming that it "suggests" a focus on protecting people rather than other living things. Majority Opinion at 22-24. But none of the sources it quotes backs this up. And, in fact, the Court admits that the legislative history is really "silent" with respect to this question. *Id*. at 23-24. Still, the Court insists, the Legislature must have

[4] Other arguments in favor of ambiguity are equally unpersuasive. Majority Opinion at 13-20. Some strike me as simply incomprehensible. For example, I simply do not understand the significance of the Court's all-killings-involve-death-but-not-all-deaths-involve-killings distinction. *Id*. at 11-16. Nor is it at all evident to me why it matters that the Cruelty to a Nonlivestock Animal statute requires proof of killing "in a cruel manner" or "without the owner's effective consent." *Id*. at 16-17.

contemplated deadly weapon ramifications only with respect to human victims because "it is extraordinarily unlikely that an animal would comprehend the significance of a deadly weapon in its interaction with a person." *Id*. at 24.[5] While many animals may lack the sentience to appreciate the peril of a deadly weapon, they are no less affected by its use, and recognizing the full scope of the plain statutory language better serves what we have already declared to be the legislative purpose, namely, to encourage criminals to leave their weapons at home. *Plummer*, 410 S.W.3d at 861.

Absurd Results?

With regard to absurdity, the Court seems to take conflicting positions. It first agrees with Appellant's claim that "it would be absurd to read the broadly written statute as permitting a deadly weapon finding for nonhuman victims." Majority Opinion at 26. It then refuses to hold that it would be irrational or absurd "for the Legislature to write a statute that expressly permits deadly weapon findings to elevate the punishment for exhibiting or using a deadly weapon that may threaten or cause serious bodily injury or death to certain animals or plants or even to all animals or plants." Majority Opinion at 29. I am not sure what to make of this.

On the question of absurdity, I agree with the concurring opinion that it would be absurd to read our deadly weapon statute to require a conclusion that a flyswatter is a deadly

[5] It is unclear to me why this argument appears in that portion of the Court's opinion devoted to the legislative history. The Court cites nothing from the legislative materials that remotely documents that any legislator ever actually articulated such a distinction.

weapon solely because it is "manifestly designed" to kill flies. Concurring Opinion at 1-2. Such an extreme application of the definition is not likely to have been contemplated by the Legislature. To my knowledge, the Texas Legislature has never enacted any provision making it a crime to cause death or serious bodily injury to a common housefly, and it is hard to imagine it ever meant to define deadly weapon in such a way as to impose consequences upon a criminal who would cause such a result. Likewise, I doubt that the Legislature intended that a bank robber who is unarmed should nevertheless be found to have used a deadly weapon if he stepped on a bug while taking the money from the bank teller—because the manner in which he used his shoe in perpetrating the offense was capable of causing death or serious bodily injury to an insect. TEX. PENAL CODE § 1.07(a)(17)(B).

One obvious limiting principle that would avoid such absurd applications would be to construe the statute, as the Court does today, to require that both the "manifestly designed" and "capable of causing" definitions of deadly weapon be limited to those things that are designed to cause, or are capable of causing, death or serious bodily injury to an "individual," *i.e.*, a human being. Even so, it seems to me that the majority focuses far too much on the limitation of the definition *it* finds most reasonable, and not enough on what the Legislature might have intended when it adopted the definition of a deadly weapon. We should not—as the Court seems to do today—apply the limiting principle that *we* most prefer. We should instead seek to discern the limiting principle that most seems to effectuate the Legislature's objective in adopting the statute.

At least one other workable limiting principle that the Legislature may well have intended comes to mind. We could look, for example, to other statutes enacted by the Legislature to enlighten our consideration of the question of *what* Section 1.07(a)(17)(B)'s definition of deadly weapon applies to (*i.e.*, anything capable of causing death or serious bodily injury to . . . *what*?). In this very case, the statute under which Appellant was prosecuted plainly proscribes killing or causing serious bodily injury to an "animal," meaning "a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured." TEX. PENAL CODE § 42.092(a)(2) & (b)(1). That the language of the Cruelty to a Nonlivestock Animal statute so closely tracks the "serious bodily injury" language found in Section 1.07(a)(17) could easily be taken as an indication that the Legislature intended that the consequences of a deadly weapon finding should extend to cases in which an implement is used in a manner that is capable of causing death or serious bodily injury to *some* other living entities besides human beings.[6]

In any event, even accepting the Court's "human-only" limiting principle and

[6] In making its case for the ambiguity of the legislative scheme, the Court argues that the parallel language in Section 1.07(a)(17)(B) and Section 42.092(b)(1) does not necessarily manifest a legislative intent that deadly weapon findings should extend to an animal victim of cruelty to a nonlivestock animal. *See* Majority Opinion at 15-16 ("Given these differences in the two statutes, we do not consider the fact that the Legislature used part of the phrase in the deadly weapon statute, 'serious bodily injury,' but not the entire phrase 'serious bodily injury or death,' to render the statutory language plain so as to reveal the Legislature's intent to permit a deadly weapon finding for violations of the animal-cruelty statute."). These arguments make no sense to me. *See* note 4, *ante*. In any event, even if the parallel statutory language does not *plainly* signify the Legislature's intent, it may yet serve to inform our judgment with respect to what extra-textual factors tell us about legislative intent.

applying it to the Section 1.07(a)(17) definition does not necessarily mean that a deadly weapon enhancement under Section 12.35(c) could not be made in this case. It seems to me that, even if the Court's construction of Section 1.07(a)(17)(B) is correct, the deadly weapon punishment enhancement was still appropriate on the facts presented. To be a deadly weapon, a thing must be, in the manner of its use, *capable* of causing death or serious bodily injury. TEX. PENAL CODE § 1.07(a)(17)(B). If the Court is right, the thing that the weapon must be *capable*, in the manner of its use, of causing death or serious bodily injury to is *a person*. Okay. Even accepting this premise, there is nothing about the statutory definition that suggests that the victim or intended victim must actually *be* a person; only that (assuming the Court's construction is correct) the thing used is *capable*, in the way in which it was used, of causing death or serious bodily injury *to a person*. Had Appellant hit *a person* over the head with a shovel and then drowned her in a swimming pool, that is a manner of use of those two things that would be capable of causing death or serious bodily injury. Thus, the manner in which Appellant used the shovel and water against his dog was *capable* of causing death or serious bodily injury to a person.[7] Surely we do not best effectuate even the Court's interpretation of the legislative intent by denying a Section 12.35(c) deadly weapon enhancement under these circumstances.

And finally, even if the Court is dead-set on mandating a "human-only" principle that

[7] If this argument is somehow inconsistent with the Court's opinion in *Brister v. State*, 449 S.W.3d 490 (Tex. Crim. App. 2014), Concurring Opinion at 2-3, then the Court ought to overrule *Brister*.

limits the definition of deadly weapon to those implements that are capable of causing death or serious bodily injury to a *person*, I would hope the Court would at least concede that this does not mean that such a finding could never be made for any conceivable violation of Section 42.092(b)(1). Suppose, for instance, that while Appellant was beating his dog over the head with the shovel, his neighbor tried to intervene, and Appellant paused from beating his dog long enough to wave the shovel menacingly at his neighbor to warn him to stay away. Would the Court say that a deadly weapon enhancement was unavailable on those facts in a prosecution for beating his dog because the victim of that offense was not a person? The Court ultimately holds a deadly weapon finding is appropriate "only if the recipient of the use or exhibition of the deadly weapon was a human." Majority Opinion at 30. Would the Court hold that a deadly weapon finding could be made in a prosecution for assault against the neighbor, but not also for the Section 42.092(b)(1) offense? Clearly in this hypothetical Appellant would have used the shovel to facilitate the cruelty to a nonlivestock animal offense, and he would have threatened a person. *See Plummer*, 410 S.W.3d at 865 (use of a deadly weapon must facilitate the charged offense to justify a deadly weapon finding). Yet I confess I am unsure how the Court would apply today's holding to this hypothetical.

I respectfully dissent.

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