Missouri Court of Appeals

Southern District

Division Two

In the Interest of: D.C.M., a minor,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SD35418
	)	
PEMISCOT COUNTY JUVENILE OFFICE,	)	FILED: November 13, 2018
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF PEMISCOT COUNTY

Honorable W. Keith Currie, Judge

AFFIRMED

D.C.M. (Appellant) appeals a § 211.031.1(3) juvenile-delinquency judgment that found he had made a second-degree terrorist threat (§ 574.120).[1] He challenges the sufficiency of the evidence, admission of certain testimony, denial of a continuance request, and effectiveness of his trial counsel. Finding no merit to these complaints, we affirm the judgment.[2]

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[1] Statutory citations are to RSMo as amended through 2017. Rule references are to Missouri Court Rules (2018).

[2] We decline discretionary plain-error review of another, unpreserved claim because Appellant has not shown substantial grounds to believe that manifest injustice or a miscarriage of justice has resulted. ***State v. Bartlik***, 363 S.W.3d 388, 391 (Mo.App. 2012).

Background[3]

Appellant attended Hayti High School for five days, having transferred from a school where his record of threats to a teacher and student had resulted in suspension. He cussed frequently at Hayti, repeatedly said there were too many black students, and used the "N word" in their presence. Hayti staff twice warned Appellant against racial slurs.

On his fifth morning, Appellant boarded the school bus and began talking about a Florida school shooting. He wondered aloud how it felt to shoot someone, refused student pleas to drop the subject, said his father had guns like the Florida shooter used, and continued to talk up the Florida shooting in a loud, aggressive manner in school hallways that morning.

In the cafeteria at lunch, Appellant said, loud enough for students at the next table to hear, "I feel like blowing the school up." He then said he might blow it up tomorrow because there were too many black people there.

Nearby students got scared. Some left their tables, quickly exited the cafeteria, and notified the principal. One student was frightened not only by Appellant's words, but by his pointed stare.

The principal called the police and could have evacuated or locked-down the school but chose not to because staff had isolated Appellant and he had not threatened

[3] Because Appellant challenges the sufficiency of the evidence, we take as true all evidence and reasonable inferences that support the judgment, ignore contrary evidence and inferences, and defer to the juvenile judge's finding that the witnesses against Appellant were the more credible. ***In re D.M.***, 370 S.W.3d 917, 922 (Mo.App. 2012). We summarize the record accordingly.

to blow up the school immediately. Officers arrived within minutes, removed Appellant from school, and took him to the juvenile office.

To quote one schoolmate, "everybody was talking about it" afterward. Student attendance dropped the next day. Parents were calling the school to find out what happened and whether their children would be safe.

The juvenile office filed a delinquency petition. An adjudication hearing was held 12 days later.[4] Appellant's appointed counsel did not object to that timing and confirmed that he was ready to proceed at the start of the hearing.

The juvenile office called seven witnesses: four students, a police officer, and two school principals. Appellant also testified, largely to the effect that he alone was correct and the other witnesses were lying on the key issues. Thereafter, Appellant's counsel sought time to subpoena three other students, but made no offer of proof or record of what their testimony might be. The request was denied.

After both parties rested, the court addressed its duty to determine witness credibility, finding no clear motive for the juvenile office's witnesses to lie, but that Appellant stood to gain by being untruthful, and observing the other witnesses' accord on key issues: a threat was made, it was heard by other students, and it scared them. The court assumed jurisdiction and, after a disposition hearing, committed Appellant to the Division of Youth Services.[5]

[4] When a juvenile is detained, Rule 127.08 requires an adjudication hearing on the petition "at the earliest possible date."

[5] We commend the trial court's patience throughout the adjudication and disposition hearings.

Sufficiency of Evidence

Appellant charges that the evidence was insufficient for the court to assume jurisdiction over him on the basis alleged in the delinquency petition, *i.e.*, that he "recklessly disregarded the risk of causing the evacuation, quarantine or closure of the school ... and knowingly communicated an express or implied threat to cause an incident or condition involving danger to life [by making] a threat to blow up the school."[6]

Appellant primarily attempts to draw parallels with ***C.G.M., II v. Juvenile Officer***, 258 S.W.3d 879 (Mo.App. 2008), and cites that reversal as a reason to reverse here. We find ***C.G.M.*** distinguishable. There, school authorities heard in May of a student who, months earlier, had talked of blowing up the school the previous Christmas. The school principal there testified that he did not consider evacuating or closing the school in May when he finally heard of the prior comments, nor would he have done so if he had heard the same thing before Christmas because he would not have discerned an imminent threat. ***Id***. at 880-81, 883. The Western District cited this in reversing, but made a point "to caution C.G.M. that he came very close to crossing the line." ***Id***. at 883-84.

In contrast, Appellant's statements immediately instilled fear into others and was the kind of "conduct that creates serious alarm for personal safety or serious

[6] We decline to reach two aspects of this argument. One is Appellant's assertion that his words were not a "true threat" but constitutionally-protected free speech, a claim not raised below and thus waived. ***State v. Plopper***, 489 S.W.3d 848, 851 n.3 (Mo.App. 2016)(failure to raise "true threat" constitutional issue in trial court "preserves nothing for our review"). We also decline Appellant's invitation, allegedly as a matter of first impression, to explicitly adopt a "reasonable child standard" to evaluate his conduct. We are an error-correcting court, not a law-declaring court. ***Cork v. State***, 539 S.W.3d 920, 925 (Mo.App. 2017).

public inconvenience" targeted by our statutes criminalizing terroristic threats. ***State v. Tanis***, 247 S.W.3d 610, 614 (Mo.App. 2008). Scared students went straight to school authorities, police were called and responded immediately, and evacuation or lockdown could have been necessary had school staff not isolated and monitored Appellant in the meantime.[7] School attendance was down the next day and parents were calling to see if their children were safe.

In short, there was evidence here that was not in ***C.G.M.***, and the trial court could find that Appellant crossed the line that C.G.M. "came very close to crossing." 258 S.W.3d at 883-84. This point fails.

School-Shooting Comments

Appellant asserts that the court should have excluded his school-shooting comments as irrelevant to the charge that he threatened to blow up the school.[8] Even had the court erred in admitting such evidence, which we do not find,[9] it is nearly impossible to win reversal for improperly-admitted evidence at a bench trial. *See* ***In re I.R.S.***, 361 S.W.3d 444, 449 (Mo.App. 2012), further discussed *infra*. This case is no exception to that rule. Point denied.

Continuance

We reject Appellant's complaint that the court abused its discretion in denying

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[7] To his credit, Appellant agrees that all these actions were proper – students were correct to report as they did and the authorities were correct to act as they did.

[8] Appellant also alleges this was bad-character evidence, a theory not included in his trial objection and which we do not consider because "[a] point on appeal must be based upon the theory voiced in the objection at trial and a defendant cannot expand or change on appeal the objection as made." ***State v. Cannady***, 660 S.W.2d 33, 37 (Mo.App. 1983).

[9] Making a terrorist threat implicates the speaker's intent, which is rarely subject to direct proof, but may be inferred from surrounding circumstances. ***Tanis***, 247 S.W.3d at 615.

his request, after all witnesses had testified, to continue the case so Appellant could subpoena three more students. We can find neither abuse of discretion nor prejudice when there was, and is, insufficient representation as to what these students might have said. *Compare* ***State v. Selvy***, 921 S.W.2d 114, 118 (Mo.App. 1996)(juvenile court did not abuse discretion in denying continuance to obtain additional witness absent adequate offer of proof as to expected testimony); Rules 24.10 & 65.04 (in both criminal and civil cases, application for continuance to secure absent witness must show, *inter alia*, what "particular facts" the witness allegedly would prove).[10]

Effective Assistance of Counsel

Finally, we take together charges that Appellant's counsel was ineffective in (1) not subpoenaing the aforementioned students, and (2) failing to object to, and sometimes eliciting, irrelevant testimony. We find helpful Appellant's restatement of the issues this way:

1. "Whether appellants in juvenile cases may raise claims on direct appeal attacking the effectiveness of their trial attorney?"
2. If so, whether this record establishes that Appellant's attorney was ineffective in the two respects alleged above?

Respondent replies by citing Appellant's concessions that no Missouri statute, rule, or appellate decision "has authorized direct appellate review of such claims in a juvenile delinquency matter" and asserting that these issues are more appropriately addressed to our state supreme court or legislature.

[10] The result would not change even if we considered Appellant's appellate tender of a police report that was not self-proving or received as a trial exhibit and reflects only that police interviewed one of these students, who "stated that he did not recall [Appellant] making any threats or statements but that he didn't doubt it" and that Appellant had made racial statements toward other students.

We considered similar arguments in the context of juvenile-court terminations of parental rights in ***I.R.S.***, 361 S.W.3d 448-50. For purposes of that opinion, we assumed that applicable law implied a right to effective assistance of counsel, then reviewed the record to determine if counsel deprived the appellant of a meaningful hearing. ***Id***. We do likewise here.[11]

"The test is whether the attorney was effective in providing his client with a meaningful hearing based on the record." ***Interest of J.P.B.***, 509 S.W.3d 84, 97 (Mo. banc 2017)(citation and internal quotation marks omitted); *see also* ***Grado***, slip op. at 2, 13.[12]

Appellant's complaint that counsel was ineffective in not subpoenaing students mentioned in the last point fails for the same reason the last point failed. Absent an adequate record of those students' expected testimony, Appellant has not demonstrated why their absence deprived him of a meaningful hearing.

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[11] Our supreme court recently considered similar issues in sexually-violent-predator cases which, like juvenile-delinquency proceedings, are civil in nature but potentially involve loss of liberty. *See* ***Grado v. State***, SC96830, slip op. at 6-15 (Mo. banc September 25, 2018), from which two observations are particularly relevant to the issues before us:

- The state's initiation of an original civil action to take away a person's fundamental right to liberty is comparable to a criminal trial where courts have recognized that the right to counsel means the right to effective counsel (***id***., slip op. at 8-10); and
- Ineffective assistance of trial-counsel claims may be reviewed on direct appeal. ***Id***., slip op. at 10-12.

Juvenile parties have a right to counsel in Missouri juvenile-court proceedings. Rule 115.01. The court shall appoint counsel for a juvenile when necessary to assure a full and fair hearing. Rule 115.02. Indeed, counsel's appointment in this case was a matter of constitutional due process. ***In re Gault***, 387 U.S. 1, 41 (1967). A constitutional or statutory right to counsel implies that counsel must be effective; otherwise these rights would be hollow. ***Grado***, slip op. at 10.

[12] Given the recency of ***Grado*** and ***J.P.B.*** from our state's highest court, we decline Appellant's invitation to apply the standard used in post-conviction cases. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). That said, as in ***Grado***, slip op. at 2, 14, our result would be the same under either test.

Appellant's complaint that counsel elicited and failed to object to irrelevant testimony fares no better. As previously noted, "[i]t is nearly impossible in a court-tried case to predicate reversal on the erroneous admission of evidence" because we defer "to the judge's ability to consider that evidence which is relevant and admissible." ***I.R.S.***, 361 S.W.3d at 449 (internal punctuation and citations omitted). "Trial judges are perfectly capable of receiving some evidence for one purpose and not another. On appeal, this Court presumes the trial judge, as the trier of fact, was not prejudiced by any inadmissible evidence and was not influenced by such evidence in reaching his decision." ***Id***. (internal punctuation and citations omitted).

On this record, Appellant has not convinced us that the court was influenced or prejudiced by inadmissible evidence at the adjudication hearing:

- Appellant's racial animus was put forth as a possible motive for his actions, so counsel cannot be faulted for failing to make a meritless relevancy objection or for trying to rebut the juvenile office's evidence once it had been admitted.

- When Appellant's disciplinary history was offered as evidence, the court said, "we'll look at that if we reach the dispositional stage." Similarly, when Appellant's mother disputed Appellant's disciplinary record, the court stated, "I understand what you're telling me. But I want you to keep in mind, right now I've got to decide whether the allegations of the petition are true."

- Although one witness should not comment directly on the veracity of another witness's testimony, Appellant has not shown prejudice from counsel's failure to object, and none of Appellant's cited cases found reversible prejudice in the failure to object to such testimony.

With light editing, what we said in ***Interest of N.L.W.*** applies equally here:

> [Appellant] fails to show that he was deprived of a meaningful hearing based on the record. [Appellant]'s attorney … made efforts to cross-examine witnesses and elicit testimony favorable to [Appellant]'s case, and presented evidence on [Appellant]'s behalf,

> including [Appellant]'s own testimony. While [Appellant] may have wanted other witnesses at the trial, or felt that his attorney could have better prepared him for the experience of trial, such complaints do not, under the facts of this case, amount to deprivation of a meaningful hearing.

534 S.W.3d 887, 902 (Mo.App. 2017)(internal citation omitted). We deny these points and affirm the judgment.

DANIEL E. SCOTT, J. – OPINION AUTHOR

WILLIAM W. FRANCIS, JR., P.J. – CONCURS

MARY W. SHEFFIELD, J. – CONCURS