IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1453-15

HENRY RICHARD BULLOCK, JR., Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS HARRIS COUNTY

YEARY, J., filed a concurring opinion.

CONCURRING OPINION

I join the majority opinion. I write separately only to point out a few additional things that further persuade me that the majority opinion reaches the correct result in this case on the merits.

A person commits the offense of theft if he "unlawfully *appropriates* property with intent to deprive the owner of property."[1] "Appropriate" means "to *acquire or otherwise*

[1] TEX. PENAL CODE § 31.03(a) (emphasis added).

exercise control over property other than real property."[2] Generally speaking, a crime is complete when each of the elements of the crime has occurred.[3] The inchoate offense of "criminal attempt" occurs, however, when, with "specific intent to commit an offense, [a person] does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended."[4]

Criminal attempt is a lesser included offense of the offense intended.[5] It has also been settled for quite some time that a requested lesser included offense instruction—such as attempt—should not be denied when there is some evidence in the record "that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense."[6] Therefore, because Appellant requested a lesser included offense instruction on criminal attempt, if there is evidence in the record of this case that rationally might have persuaded the jury to believe that Appellant fully formed the specific intent to commit the theft of the truck, and that he committed an act amounting to more than mere preparation to commit theft of the truck that tended but failed to effect its commission, the lesser included offense

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[2] TEX. PENAL CODE § 31.01(4)(B) (emphasis added).

[3] *Barnes v. State*, 824 S.W.2d 560, 562 (Tex. Crim. App. 1991), *overruled on other grounds, Proctor v. State*, 967 S.W.2d 840 (Tex. Crim. App. 1998).

[4] TEX. PENAL CODE § 15.01(a).

[5] TEX. CODE CRIM. PROC. art. 37.09(4); *Hill v. State*, 521 S.W.2d 253, 255 (Tex. Crim. App. 1975) (coming to the conclusion that "an attempt to commit burglary is a lesser included offense of the consummated act of burglary").

[6] *Rousseau v. State*, 855 S.W.2d 666, 672-73 (Tex. Crim. App. 1993).

instruction on attempted theft should have been given to the jury for its consideration.

The evidence in the record of this case shows that Roy Martinez was a manager at a furniture rental company who was making a delivery with the company's delivery truck. While Martinez was inside the back of the truck, Appellant got into the cab, and Martinez heard Appellant start the engine and rev the motor several times. Martinez went to the cab of the truck, where he confronted Appellant and observed Appellant sitting in the driver's seat with his hands on the steering wheel and his feet pushing the gas and brake pedals. I am satisfied that the evidence in this case was at least sufficient to support the giving of an instruction to the jury on the charged theft offense.

But in this case, Appellant testified in his own defense. On cross-examination by the State, he expressly denied exercising control over the truck. He was then questioned about whether he thought "sitting in the driver's seat pushing the accelerator, messing with all of the buttons and trying to drive away would not be exercising control over the truck," and he responded, "If that's what I did, *but that's not what I did*." (emphasis added). He then admitted getting into the truck, but he claimed he "was looking around" and he claimed he "never pushed on the accelerator" or "hit the brakes . . . and all that."

As I read Appellant's testimony, Appellant did not deny sitting in the driver's seat, but he did deny doing anything from that vantage point that would constitute exercising control over the truck. If the jury believed Appellant's claims that he did not start the engine or press the gas or brake pedals, it might have concluded that Appellant failed to *acquire or exercise*

control over the truck and thereby *appropriate* it. It would have been rational under those circumstances for the jury to conclude that he attempted, but did not complete, the offense of theft.

The definition of "property" in Chapter 31 of the Penal Code recognizes that there is a difference between real and personal property.[7] But vehicles present a special case. Vehicles are ordinarily considered personal property, but they are also—similar to real property—different from other, smaller objects like books or wallets or guns or even laptop computers.[8] Books, wallets, guns, and laptop computers can be acquired readily by the grasp of a hand. But I do not believe we would consider evidence that would be legally sufficient to show the completed theft of a laptop computer to be so definitive that a lesser included offense instruction on attempted theft should be denied if contradictory defensive evidence were introduced at trial showing that the defendant only placed his hand on the laptop computer but was interrupted and ran away without taking it. Whether the evidence demonstrated acquisition or the exercise of control over the laptop computer sufficiently to constitute appropriation in such a case would be a matter about which rational fact finders might disagree.

It takes more than touching or grasping to acquire or exercise control over a typical vehicle. A child who sits in a vehicle without access to its key, for example, could hardly be

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[7] *See* TEX. PENAL CODE § 31.01(5) (defining "property").

[8] Similar to real property, vehicles in Texas have registered titles. TEX. TRANSP. CODE § 501.022(a).

said to have acquired it or even exercised control over it. If the evidence demonstrates that a person sitting inside a vehicle has more experience and perhaps knowledge of how to operate it, the inference that he may be acquiring or exercising control over it becomes something that can reasonably be considered. And if the evidence further demonstrates that the person took action while inside the vehicle that tended to show a desire to affect its operation, the inference of appropriation grows stronger. Finally, if the evidence demonstrates that the person, with intent to deprive the owner of the vehicle, engaged the operation of the engine, placed his hands on the steering wheel, released the brake, and pushed on the gas pedal, it becomes harder to credibly deny that a theft has been completed.

Importantly, the "vehicle" at issue in this case is larger and more complex than the average vehicle. Even if the jury rejected Appellant's claim that he did not start the engine or press the gas or brake pedals, and accepted Martinez's testimony that Appellant had started the engine and was pushing on the gas and brake pedals, the evidence also showed that Appellant had not yet been able to disengage the air brake on the truck before he was interrupted and fled the scene. I believe that this evidence could have led some rational fact finder to conclude that, as much as Appellant tried to appropriate the vehicle, his efforts failed to accomplish his intended goal. And if the jury was capable of rationally drawing that conclusion from the evidence, it should have been permitted to consider the lesser included offense of attempted theft.[9]

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[9] *See* TEX. PENAL CODE § 15.01(a) ("A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation *that tends but fails to*

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effect the commission of the offense intended.") (emphasis added).