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

KELLER, P.J., filed a concurring opinion.

Is a flyswatter a deadly weapon? It meets the literal definition of a deadly weapon by design described in Penal Code § 1.07(a)(17)(A): it is "manifestly designed . . . for the purpose of inflicting death" (on flies).[1] Does this mean that a person who hits another person with a flyswatter commits an aggravated assault because he has engaged in an assault (offensive touching) with a deadly

[1] *See* TEX. PENAL CODE § 1.07(a)(17)(A) ("a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury").

weapon?[2] Although this case involves a deadly weapon by usage (shovel) rather than one by design, both the design and usage definitions of deadly weapon fail to explicitly limit the contemplated death or serious bodily injury to humans, and that failure must be construed to mean the same thing. So, if the interpretation of the court of appeals is correct, then a flyswatter is a deadly weapon and hitting another person with a flyswatter is an aggravated assault, no matter what the circumstances. This is a patently absurd result that the legislature could not have possibly intended.

And the flyswatter example could be just the tip of the iceberg. One can think of other objects that are deadly weapons by design for animals, such as fishing rods and mouse traps. Under the court of appeals's construction, a shovel could be a deadly weapon if it is used to kill a bug or a rodent. Under that theory, killing a spider with a shovel during a trespass converts the trespass from a Class B to a Class A misdemeanor.[3]

The absurdity of applying the deadly-weapon definitions to living creatures other than humans allows the Court to examine extratextual factors such as the object to be attained and the consequences of a particular construction.[4] A holding that the definitions apply only to human beings is the only principled construction that avoids absurd results.

The dissent contends, however, that, even if the deadly-weapon-by-usage definition requires

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[2] *See id.* §§ 22.01(a)(3) ("intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative"), 22.02(a)(2) ("A person commits an offense if the person commits assault as defined in § 22.01 and the person . . . . uses or exhibits a deadly weapon during the commission of the assault.").

[3] *See id.* § 30.05(d)(3)(B) ("the person carries a deadly weapon during the commission of the offense.").

[4] *Ex parte White*, 506 S.W.3d 39, 42 (Tex. Crim. App. 2016).

that the object be used in a manner that is *capable* of causing death or serious bodily injury to a human, the shovel in the present case would qualify.[5] The dissent claims that this is so because the shovel struck the dog with enough force that, had the dog been a human, the shovel could have caused death or serious bodily injury. This argument could apply equally to the killing of a spider, as long as the shovel was swung with enough force that, had the spider been a human, the shovel could have caused death or serious bodily injury. Why limit the principle to an animal at all? If the shovel had been swung with the requisite force at a sapling, or even at the ground, the underlying logic would seem to be the same. If all that matters is that the force that had been exerted could have caused death or serious bodily injury to a human, if the human had been the object of that force, then striking the shovel against the ground should be sufficient. We rejected that sort of argument in *Brister v. State*, where we held that driving while intoxicated and crossing the center stripe was not sufficient to make the defendant's car a deadly weapon when there was no traffic on the road.[6] But even if *Brister* were wrong, on the theory that one should expect traffic on a road at any given time, that sort of expectation would not exist here.

I concur in the court's judgment.

Filed: June 28, 2017
Publish

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[5] *See id.* § 1.07(a)(17)(B) ("anything that in the manner of its use or intended use is capable of causing death or serious bodily injury").

[6] 449 S.W.3d 490, 494-95 (Tex. Crim. App. 2014).