TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-07-00017-CR

Thanh Long Nguyen, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 299TH JUDICIAL DISTRICT
NO. D-1-DC2004301555, HONORABLE JON N. WISSER, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant Thanh Long Nguyen appeals his third-degree felony conviction for attempted sexual assault. *See* Tex. Penal Code Ann. § 15.01(a) (West 2003), § 22.01(a)(1)(c) (West Supp. 2008). After the waiver of trial by jury, appellant entered a plea of not guilty before the trial court to the indictment charging sexual assault. The trial court found appellant guilty of the lesser-included offense and assessed punishment at ten years' imprisonment. The trial court, however, suspended the imposition of the sentence and placed appellant on community supervision subject to certain conditions.

POINTS OF ERROR

Appellant advances two separate points of error challenging the legal and factual sufficiency of the evidence to sustain the conviction.

PROCEDURAL BACKGROUND

Before discussing the facts and the sufficiency of the evidence, we will consider appellant's challenge to the validity of the amendment to the indictment and its possible impact on the sufficiency issues.

On April 16, 2005, the indictment containing two paragraphs was presented by the grand jury. The first alleged that Thanh Long Nguyen on or about July 20, 2005:

> did intentionally and knowingly cause the sexual organ of another person, namely Lawrence Evans, to contact and penetrate the mouth of Thanh Long Nguyen without the consent of Lawrence Evans in that Lawrence Evans had not consented and Thanh Long Nguyen knew that Lawrence Evans was unaware that sexual assault was occurring.

The second paragraph also alleged the date of July 20, 2005, and tracked the first paragraph in charging sexual assault except as to the allegations as to type of consent that was lacking. It alleged that Evans did not consent "in that Thanh Long Nguyen compelled Lawrence Evans to submit and participate by the use of physical force."[1]

An examination of the date alleged, July 20, 2005, reveals a date to occur after the presentment of the indictment on April 16, 2005. The State later filed a motion to amend the indictment on June 13, 2006. *See* Tex. Code Crim. Proc. Ann. art. 28.10 (West 2006).

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[1] The indictment was drafted under section 22.011 of the Texas Penal Code as enacted by Act of May 10, 2003, 78th Leg., R.S., ch. 155, §§ 1, 2, 2003 Tex. Gen. Laws 229, 230 (effective Sept. 1, 2003), and Act of May 28, 2003, 78th Leg., R.S., ch. 528, § 1, 2003 Tex. Gen. Laws 1805, 1806 (effective Sept. 1, 2003). Section 22.011, as enacted, was in effect on the date of the instant offense. The section combined what were formerly the offenses of rape and sexual abuse and now in subsection (b) sets forth the circumstances that define the lack of consent or negates consent. *See* 6 Michael B. Charleton *Texas Practice: Criminal Practice* § 13 (2d ed. 2001).

The motion simply requested that the indictment be amended in three ways. The first two ways concerned changing the date alleged in each of the two paragraphs of the indictment to July 20, 2004. The third way sought to add a third paragraph to the indictment alleging that on or about July 20, 2004, appellant "did intentionally and knowingly cause the sexual organ of Lawrence Evans to contact or penetrate the mouth of Thanh Long Nguyen without the consent of Lawrence Evans and Thanh Long Nguyen knew Lawrence Evans was unconscious or physically unable to resist."

On the same day the motion was filed, the trial court simply granted the motion. No further action was taken to amend the indictment after the trial court's order. The indictment was not altered on its face by interlineation or otherwise, nor was a document incorporating the new charging instrument filed in the record. All we have in this record is the authorization (motion and order) for action that was never taken.

The Texas Court of Criminal Appeals has held that neither the State's motion to amend the indictment nor the trial court's order granting the motion is an amendment. The two (motion and order) comprise only the authorization for the eventual amendment of the charging instrument pursuant to article 28.10. *Ward v. State*, 829 S.W.2d 787, 793 (Tex. Crim. App. 1993). The court required that, for an amendment to the indictment to be effective, the indictment itself must be physically altered; the amendment being the actual alteration of the charging instrument. *Id.*

After some eight years, the holding in *Ward* was expanded in *Riney v. State*, 28 S.W.3d 561, 568 (Tex. Crim. App. 2000). In *Riney*, it was held that the physical interlineation

of the original indictment on its face is not the only means of effecting an amendment to the indictment, modifying *Ward's* strict requirement. Now, an indictment may be amended by interlineation on the face of the charging instrument, or by incorporating into the trial court's file a separate document with the text of the amended charging language. *Id*; *Barfield v. State*, 202 S.W.3d 912, 919 (Tex. App.—Texarkana 2006, pet. ref'd); *Westmoreland v. State*, 174 S.W.3d 282, 287 (Tex. App.—Tyler 2005, no pet.); *Aguilera v. State*, 75 S.W.3d 60, 62 (Tex. App.—San Antonio 2002, pet. ref'd); *Valenti v. State*, 49 S.W.3d 594, 598 (Tex. App.—Fort Worth 2001, no pet.).

Here, as noted, after the authorization of the amendment, no action was taken to actually amend the original indictment by interlineation nor was any document incorporated into the trial court's file to show a proper amendment as required.

The State argues that appellant did not object to the proposed amendment of the indictment. Assuming that appellant had notice of the motion to amend[2] and did not object to the trial court's brief order, the indictment itself was never legally amended. It is the responsibility of the State to properly amend the charging instrument. *Serna v. State*, 69 S.W.3d 377, 381 (Tex. App.—El Paso 2002, no pet.). Here, the State failed to properly amend the indictment. Therefore, the original indictment remained the indictment of record. *Id.*

As a result, there is no third paragraph to be considered in any challenge to the sufficiency of the evidence. Moreover, the impossible dates remained in the indictment. Despite

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[2] The motion to amend the indictment was granted the same day it was filed, June 13, 2006. The record does not show that a copy of the motion was served on appellant or that he was given the notice required by article 28.10 of the Texas Code of Criminal Procedure. No record of a hearing on the motion is found. It is not clear that appellant had an opportunity to object.

the merits of appellant's procedural concerns, the failed amendment has little impact on this appeal. Appellant candidly concedes that he did not timely object pretrial to the original indictment and waived any defect as to form or substance as to the dates alleged. *See Ex parte Gibson*, 800 S.W.2d 548, 551 (Tex. Crim. App. 1990); *Studer v. State*, 799 S.W.2d 263, 273 (Tex. Crim. App. 1990). Appellant urges that despite the waiver, the State was still required to prove the date of the offense as anterior to the presentment of the indictment and not so remote to be barred by the statute of limitations. *See* Tex. Code Crim. Proc. Ann. art. 21.02(6) (West 2000). Appellant acknowledges that the State met its burden of proof in this cause.[3]

FACTUAL BACKGROUND

The complainant, Lawrence Evans,[4] a seventeen-year-old high school student, and a resident of another undisclosed state, was in Austin in July 2004, attending an American Ballet Theater's month-long summer dance program at the University of Texas.

On July 20, 2004, Evans injured his back while performing an aerial lift of a dance partner. Evans wanted to see a doctor or go to a hospital for his back pain. A "liaison" between the university and the dance program, Lucretia Faust, decided that he needed a "massage treatment." Evans had never had a massage.

Faust drove Evans to a massage therapist, whom she seemed to know. Evans found the therapist's office to be in a rather "seedy looking" apartment complex. Evans was

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[3] We observe that the proposed third paragraph of the indictment was never supported by evidence and could not have been utilized to sustain a conviction, even if the amendment to the indictment had been valid.

[4] The name is a pseudonym. *See* Tex. Code Crim. Proc. Ann. art. 57.02 (West Supp. 2008).

uncomfortable, but being unfamiliar with message therapy, he did not say anything to Faust. Evans was introduced to appellant by Faust and he identified appellant at trial.

Appellant led Evans to a massage table in a large room and told him to remove as much of his clothing as he "was comfortable with." Evans stripped to his boxer shorts and laid down on the table. He told appellant that the pain was in his back. Appellant began to knead Evans's back with oil and his hands. Faust remained in a nearby room.

Appellant moved to massage Evans's shoulders, his arms, and hands, which Evans found strange as the pain was in his back, but he did not know what to expect. Appellant had Evans move onto his side and then onto his back with his face up. When appellant began to massage an inner thigh, Evans told appellant to focus on his back.

Appellant then removed a pillow case from a pillow and placed the pillow case over Evans's face so Evans could not see. Evans recounted:

> And then at one point—it happened very quickly—he reached his hand into the opening of my boxers. It felt—I couldn't see but it felt like he pulled back my—my foreskin and began giving oral sex.

Evans explained that he was "startled" and "froze," and "he didn't know how to react." Evans told appellant to stop and he did. The massage, elsewhere on the body, continued for a minute or two. Appellant then told Evans that Evans was "tense" and Evans agreed. Appellant apologized that "this hasn't been a great massage experience." Appellant left the room, and Evans dressed.

On cross-examination, Evans, testifying almost two years after the event, was uncertain whether appellant had removed Evans's penis from his boxer shorts nor how long he remained silent while appellant attempted or actually performed oral sex on him. He was repeatedly asked how long appellant performed oral sex on him before he told appellant to stop. Evans never offered any specific time. Evans stated that he thought he was at appellant's office to receive "medical help" for his back, had never previously had a massage, and when the sexual contact occurred, he "was scared for [his] safety." He didn't know what the situation was and was concerned about sexual diseases. Evans stated that he did not want sexual contact with appellant and that he never discussed anything of a sexual nature with appellant. Evans made clear that he did not consent to the sexual contact by appellant. Evans admitted that under the circumstances, he did not call out to Faust in the next room.

Before leaving the building where the incident occurred, the seventeen-year-old Evans told Ms. Faust that appellant had attempted to give him oral sex. She did not offer to call the police. In her car, both talked to Evans's mother in another state on a cellphone, and told her what had happened. Thereafter, Evans asked to be taken to the police station, but Faust suggested the university police. Upon Evans's demand, he was taken to the Austin police department and subsequently submitted to a sexual assault examination. The DNA report revealed appellant's DNA on Evans's penis.

Neither party called Ms. Faust as a witness, and appellant offered no testimony. All the evidence the trial court had before it was the testimony of Lawrence Evans, the medical records

and the results of the DNA tests. The trial court found appellant guilty of attempted sexual assault without specifying an underlying theory of a lack of consent as alleged in the indictment.

LEGAL SUFFICIENCY

We turn to appellant's first point of error. In determining whether the evidence is legally sufficient to support the judgment, we view the evidence in the light most favorable to the verdict, asking whether any rational trier of fact could have found beyond a reasonable doubt all the essential elements of the offense charged. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000); *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000).

The evidence viewed in this light and all reasonable inferences drawn therefrom are evaluated in this review. *Alvarado v. State*, 912 S.W.2d 199, 207 (Tex. Crim. App. 1995) A reviewing court must consider all evidence, rightly or wrongly admitted, which the trier of fact was permitted to consider. *See Lockhart v. Nelson*, 488 U.S. 33, 41-42 (1988); *Garcia v. State*, 919 S.W.2d 370, 378 (Tex. Crim. App. 1994); *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993). The standard for review is the same for both direct and circumstantial evidence. *Green v. State*, 840 S.W.2d 394, 401 (Tex. Crim. App. 1992).

In analyzing a challenge to the legal sufficiency of the evidence, the reviewing court does not realign, disregard, or weigh the evidence. *Rodriguez v. State*, 939 S.W.2d 211, 218 (Tex. App.—Austin 1997, no pet.). Here, the trial court was the trier of fact, judge of the credibility of the witnesses and the weight to be given the evidence. *Joseph v. State*, 897 S.W.2d 374, 376 (Tex. Crim. App. 1995); *Mattias v. State*, 731 S.W.2d 936, 940 (Tex. Crim. App. 1987); *Limuel*

v. State, 568 S.W.2d 309, 311 (Tex. Crim. App. 1978); *Adams v. State*, 222 S.W.3d 37, 49 (Tex. App.—Austin 2005, pet. ref'd); *Winkley v. State*, 123 S.W.3d 707, 717 (Tex. App.—Austin 2003, no pet.).

As the trial court found appellant guilty of attempted sexual assault rather than sexual assault as alleged, we examine the attempt statute. Article 15.01(a) provides:

> 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 effect the commission of the offense intended.

Tex. Code Crim. Proc. Ann. art. 15.01(a) (West 2003).

Elements of a criminal attempt are (1) a person, (2) with specific intent to commit an offense, (3) does an act amounting to more than mere preparation, (4) that tends but fails to effect the commission of the offense intended. *Flanagan v. State*, 675 S.W.2d 734, 739 (Tex. Crim. App. 1984); *Torres v. State*, 618 S.W.2d 549, 550 (Tex. Crim. App. 1981); *Amos v. State*, 955 S.W.2d 468, 469-70 (Tex. App.—Fort Worth 1997, no pet.); *Hernandez v. State*, 903 S.W.2d 109, 113 (Tex. App.—Fort Worth 1995, pet. ref'd); *Matter of A.B.*, 868 S.W.2d 938, 940 (Tex. App.—Fort Worth 1994, no pet.).

The phrase "with the specific intent to commit an offense" as used in article 15.01(a) means to bring about the desired result. *Graves v. State*, 782 S.W.2d 5, 6 (Tex. App.—Dallas 1989, pet. ref'd). Proof of any culpable mental state generally relies upon circumstantial evidence because of the nature of mental culpability. *Dillon v. State*, 574 S.W.2d 92, 94 (Tex. Crim. App. 1978); *Skillern v. State*, 890 S.W.2d 849, 880 (Tex. App.—Austin 1994, pet. ref'd). Intent is usually

inferred by the trier of fact from the acts, words, and conduct of the accused. *Dues v. State*, 634 S.W.2d 304, 306 (Tex. Crim. App. 1982); *Romo v. State*, 593 S.W.2d 690, 693 (Tex. Crim. App. 1980); *Skillern*, 890 S.W.2d at 884. Inferences from the surrounding circumstances are also permissible. *Robertson v. State*, 871 S.W.2d 701, 705 (Tex. Crim. App. 1993). Knowledge, like intent, may be inferred from conduct and remarks by an accused and the surrounding circumstances. *Parramore v. State*, 853 S.W.2d 741, 745 (Tex. App.—Corpus Christi 1993, pet. ref'd).

Criminal attempt implies both intent and an active effort to carry out and consummate the intent or purpose. *Flores v. State*, 902 S.W.2d 618, 620 (Tex. App.—Austin 1995, pet. ref'd) (citing *Dovalina v. State*, 564 S.W.2d 378, 380 (Tex. Crim. App. 1978)). "Attempt" is more comprehensive than "intent," implying both a purpose and actual effort to carry that purpose into execution. *Flores*, 902 S.W.2d at 620.

The uncorroborated testimony of a complainant is sufficient alone to support a conviction for attempted sexual assault under sections 15.01(a) and 22.011 of the Texas Penal Code. *See* Tex. Code Crim. Proc. Ann. art. 38.07(a) (West 2005). There is, however, a statutory limitation upon the use of uncorroborated testimony found in article 38.07(a). The statute applies only when the victim informed a person, other than the defendant, of the alleged offense within one year of the date of the alleged offense. *Id*. The statutory limitation is not applicable here because (1) the complainant Evans reported the alleged offense to the Austin police department on the date of the offense, and (2) Evans was 17 years of age at the time of the alleged offense and is statutorily exempt from the limitation requirement. *Id.* Moreover, reliance upon article 38.07(a) is not needed where

the complainant's testimony is corroborated by other evidence. Here, there were the medical reports and DNA evidence reflecting appellant's DNA on Evans's sexual organ.

We note that attempted sexual assault is a lesser-included offense of sexual assault. Tex. Penal Code Ann. § 22.011(a)(1)(c) (West 2003); Tex. Code Crim. Proc. Ann. art. 37.09(4) (West 2006); *Jones v. State*, 225 S.W.3d 772, 776 (Tex. App.—Houston [14th Dist.] 2007, no pet.). In a bench trial, the trial court is authorized to find a defendant guilty of any lesser offense for which the State provides the required proof. *Shute v. State*, 877 S.W.2d 314, 315 (Tex. Crim. App. 1994). A conviction for an attempted criminal offense does not require accomplishment of every act short of actual commission of the offense. *Hackbarth v. State*, 617 S.W.2d 944, 946 (Tex. Crim. App. 1981); *Flores*, 902 S.W.2d at 620. Moreover, proof sufficient to support conviction of the greater offense will necessarily sustain a conviction for the lesser included offense. *Neely v. State*, 571 S.W.2d 926, 928 (Tex. Crim. App. 1978); *Daniels v. State*, 464 S.W.2d 368, 369-70 (Tex. Crim. App. 1971); 43 George E. Dix & Robert O. Dawson, *Texas Practice: Criminal Practice and Procedure* § 31.96 (2d ed. West 2001). In any attempted criminal offense, the sufficiency of the evidence must be determined on a case-by-case basis. *Gibbons v. State*, 634 S.W.2d 700, 707 (Tex. Crim. App. 1982).

Here, the trial court was the trier of fact and could accept or reject all or any part of the testimony and decided that the criminal behavior shown was attempted sexual assault. The trial court could draw reasonable inference from the evidence presented.

Viewing all the evidence in the light most favorable to the trial court's judgment, we conclude that a rational trier of fact could have found beyond a reasonable doubt all the essential elements of the offense of attempted sexual assault, a lesser-included offense of sexual assault

as charged in paragraph one of the indictment. On this basis, we overrule the challenge to the legal sufficiency of the evidence to sustain the conviction.

In view of our disposition, we need to address appellant's issue as to the second paragraph of the indictment. We do observe, however, that there is no evidence to support the allegation therein that Evans's consent was obtained by appellant compelling Evans to submit and participate by physical force.

FACTUAL SUFFICIENCY

Having determined that the evidence is legally sufficient to sustain the conviction, we may now turn to the challenge to the factual sufficiency of the evidence. In a factual sufficiency review, the evidence is analyzed in a neutral light rather than (as in a legal sufficiency review) in the light most favorable to the judgment. *Roberts v. State*, 220 S.W.3d 521, 524 (Tex. Crim. App. 2007). Evidence can be factually insufficient in one of two ways: (1) when the evidence supporting the judgment [verdict][5] is so weak that the judgment [verdict] seems clearly wrong and manifestly unjust; and (2) when the supporting evidence is outweighed by the great weight and preponderance of the contrary evidence so as to render the judgment [verdict] clearly wrong and manifestly unjust. *Id.*; *Watson v. State*, 204 S.W.3d 404, 414-15 (Tex. Crim. App. 2006). Under this standard of review, while we have the ability to second-guess the fact-finder to a limited degree, we must nonetheless be deferential to the fact-finder's determination and a high level of skepticism about the

[5] "A 'verdict' is a written declaration by a jury of its decision of the issue submitted to it in the case." Tex. Code Crim. Proc. Ann. art. 37.01 (West 2006). Thus "verdict" is properly used only in a jury case, not in a bench trial before the trial court.

judgment [verdict] is necessary before a reversal can occur. *Roberts*, 220 S.W.3d at 524; *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006); *Cain v. State*, 958 S.W.2d 404, 407, 410 (Tex. Crim. App. 1999). In a factual sufficiency analysis it must be remembered that the trial judge or jury is still the fact-finder and judge of the credibility of the witnesses. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997). Appellate courts should be on guard not to substitute their own judgment in these matters for the trier of fact. *Id.*; *Vasquez v. State*, 67 S.W.3d 229, 236 (Tex. Crim. App. 2002).

We need not reiterate the evidence. Appellant sets forth in his brief the standard of review as discussed above and cites authorities. He does not apply that standard to the facts or tell us how the facts considered in a neutral light undermine the judgment and entitle him to relief under his factual insufficiency claim. This may be because appellant offered no evidence.

Appellant's chief complaint under this point of error seems to be unobjected-to remark of the trial court:

> I do think the evidence supports a finding of criminal behavior, I'm not sure yet where in the range that is, be it the indicted offense or a lesser offense all the way down to the assault Mr. Karchmer [defense counsel] mentioned. "So I need to do more research on that."

These remarks were lifted out of the trial court's comments following the arguments of counsel on the case. There were no objections to the trial court's statements and no error was preserved. *See* Tex. R. App. P. 33.1. The remarks clearly did not impact the factual sufficiency of the evidence challenges.

Viewing all the evidence in a neutral light, a rational trier of fact could have found beyond a reasonable doubt that appellant was guilty of attempted sexual assault. The facts were factually sufficient. The verdict was not clearly wrong or manifestly unjust. The second point of error is overruled.

An examination of the appellate record reflects a formal written judgment that erroneously shows that appellant entered a plea of "guilty" to the indictment when in fact appellant entered a plea of "not guilty" before the trial court after waiving trial by jury. The judgment is reformed to reflect the proper plea of not guilty.

As reformed, the judgment of conviction is affirmed.

John F. Onion, Jr., Justice

Before Justices Patterson, Pemberton and Onion*

Reformed and, as Reformed, Affirmed

Filed: September 10, 2009

Do Not Publish

Before John F. Onion, Jr., Presiding Judge (retired), Texas Court of Criminal Appeals, sitting by assignment. *See* Tex. Gov't Code Ann. § 74.003(b) (West 2005).