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⚖ Vol. 15, No. 7, February 26, 2007

Case Name: [Hijinio Trevino v. The State of Texas](#)

- OFFENSE: Burglary of a Habitation
- COUNTY: Harris
- C/A CASE No. 14-06-0265-CR and 14-06-0266-CR
- DATE OF OPINION: February 15, 2007
- DISPOSITION: Conviction Affirmed OPINION: [Justice Hedges](#)
- TRIAL COURT: 263rd D/C; Hon. Jim Wallace
- LAWYERS: [Kenneth McCoy](#) (Defense); [Eric Kugler](#) (State)

Ed Note: (Background Facts) Appellant was serving a term of community supervision following his pleas of guilty to two charges of burglary of a habitation. Three college students, Tim Sims, Michael Hoetzlein, and Michael Nestico, were vacationing in South Padre Island when they were robbed at gunpoint by Appellant and two co-defendants. The complainants were walking from a restaurant on the island to their condominium when a Cadillac with Ohio license plates stopped approximately three feet in front of them. Tim Sims testified that Appellant stepped out of the back seat of the car and told the complainants to stop and give him their wallets. When Sims heard this he turned around and saw Appellant holding a gun to Hoetzlein's head. Hoetzlein gave Appellant the beer he was carrying, but did not give him his wallet. Appellant then turned the gun on Sims and asked for his wallet and the beer he was carrying. Sims's wallet was in the bag with the beer, so he gave his wallet and beer to Appellant. Appellant then turned the gun on Nestico and took his beer. All three complainants identified Appellant as the gunman and said they saw two other people in the car. Sims identified his stolen credit cards, which were found in the car. The State moved to revoke Appellant's probation based on this alleged aggravated robbery.

⚖ **292 Hearsay & Confrontation / Oral Statements (Crawford Violations)** Appellant contends that the trial court erred in permitting Detective Jaime Rodriguez to testify about what Appellant's co-defendant said in his statement following the aggravated robbery of the complainants.

Holding: (Confrontation Clause) Most federal appellate courts have held that the Sixth Amendment does not apply to hearings in which the government seeks revocation of supervised release (the federal equivalent of probation and parole). This court has consistently held in light of the Confrontation Clause's focus on criminal prosecutions, that the clause does not apply to post-conviction proceedings. Nothing in the Supreme Court's opinion in *Crawford* indicates an intent to extend the Confrontation Clause beyond the purview of the criminal prosecution. We therefore join our sister courts of appeals and the majority of the federal courts of appeals in concluding that because a probation revocation hearing is not a criminal prosecution, and therefore, the protections of the Confrontation Clause do not apply.

⚖ **292 Hearsay & Confrontation / Oral Statements:** Appellant contends his co-defendant's statement was inadmissible hearsay because it is an out of court assertion offered to prove the truth of the matter asserted.

Holding: A statement against penal interest includes a statement which, at the time of its making, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true. An admission against a co defendant declarant's penal interest may be admissible against the defendant so long as it is sufficiently against the declarant's interest to be reliable and is sufficiently corroborated by other evidence. A co-defendant's confession is presumptively unreliable as to those portions that detail a co defendant's conduct or culpability because those portions may be the result of the co-defendant's desire to shift the blame, curry favor, avenge himself, or divert attention to another. In his statement, Gonzalez implicated Appellant: he stated that Appellant was the one who opened the car door and pointed the gun at the complainants. Gonzalez' statement does not tend to inculcate himself, but rather is an attempt to shift the blame to Appellant. Accordingly, Gonzalez' statement does not fall under the admission against interest exception to the hearsay rule. (**Harm Analysis**) In this case, all three complainants identified Appellant as the man who exited the car and pointed the gun at them. Therefore, any error committed by the trial court in admitting Gonzalez' statement was harmless.

⚖️ **427 Judgments & Sentences / Stacked Sentences:** Appellant claimed that the trial court erred in ordering the sentences in both convictions to run consecutively because the indictments alleged offenses committed during the same criminal episode and Appellant was prosecuted in the same criminal action.

Holding: Separate plea papers were filed and separate judgments were entered. Because appellant waived a court reporter at the plea hearing, the record does not reflect whether the burglaries were prosecuted in a single action. Appellant contends that because the revocation motions were heard in the same hearing, which constituted a single punishment hearing was held, implicating the application of Penal Code §3.03. To be entitled to concurrent sentences, however, Appellant must establish that the offenses were consolidated at the time of his pleas as well as at the hearing on the revocation motions. Because Appellant failed to establish that the offenses arose out of the same criminal episode and that he was prosecuted in a single criminal action, the sentences were properly cumulated.

Sidebars: ([David A. Schulman](#)) Proving once again that it is never a good idea to waive the presence of the court reporter!