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⚖ Vol. 22, No. 11, March 17, 2014

Case Name: [Orlando Salinas v. The State of Texas](#)

- OFFENSE: Injury to an Elderly Person
- COUNTY: Harris
- C/A CASE No. 14-12-0378-CR
- DATE OF OPINION: March 6, 2014
- DISPOSITION: Conviction Affirmed OPINION: [Boyce, J.](#)
- TRIAL COURT: 228th D/C;
- LAWYERS: [Jani Wood](#) (Defense); [Bridget Holloway](#) (State)

Ed Note: On original submission, the Court of Appeals affirmed this conviction, holding that ❶ the trial court did not err in determining that the testimony of a State's expert was relevant to understanding why the Complainant may have changed his account of the incident that led to Appellant's prosecution; ❷ the trial court acted within its discretion in overruling the hearsay objection to an "excited utterance," and ❸ Appellant had not demonstrated that Local Government Code Section 133.102(a)(1), was unconstitutional (see ⚖, [Vol. 21, No. 50](#); 12/16/2013). That opinion is withdraw and this one has been substituted in its place.

(Background Facts) Appellant was charged with assaulting his 80-year old father, Salvador Salinas. Several witnesses at trial described the assault, including Complainant's grandson, Salvador Salinas III, and two of the grandson's friends, Omar Morales and Sean Finch. The altercation occurred at the Complainant's house, where Appellant was staying. Appellant and the Complainant argued, and, according to witnesses, Appellant shoved the complainant to the floor and got on top of him. Appellant also shoved the Complainant against a wall. After the physical confrontation, the Complainant was bleeding from a wound on his arm. Several witnesses said the wound looked like a bite mark. The Complainant's other son, Salvador Salinas, Jr., arrived at the home during the dispute and called 9-1-1.

⚖ **301.01 Witnesses / Experts / Qualifications:** At trial, the complainant testified that Appellant did not hit or bite him during the argument. The complainant denied telling Officer Castellani that Appellant had assaulted him. The State thereafter called an employee of the District Attorney's Office, Kapriva Johnson Hutchinson, as an expert regarding family violence. Hutchinson, a caseworker in the Family Criminal Law Division, related her training and experience, detailed her experience working with domestic violence victims and her familiarity with their tendency to minimize or recant abuse allegations. Appellant objected to this testimony on relevance grounds, and on grounds that Hutchinson lacked the necessary qualifications to testify. The trial court overruled these objections and permitted Hutchinson to opine that it was common for domestic

abuse victims to recant or minimize allegations. Appellant contends that the trial court erred by permitting Hutchinson to testify as an expert because she was not shown to be qualified and her testimony was not relevant.

Holding: Appellant makes no specific arguments on appeal challenging the relevance of Hutchinson's testimony. Hutchinson testified that it is common for domestic abuse victims to recant or minimize allegations of abuse. Other evidence suggested that the complainant in this case had made allegations against Appellant, but complainant denied at trial that Appellant had assaulted him. The trial court did not err in determining that Hutchinson's testimony was relevant to understanding why the complainant may have changed his account of the incident that led to Appellant's prosecution.

§ 294.04 Hearsay & Confrontation / Exceptions / Excited Utterance: Houston Police Officer Christopher Castellani testified that he arrived on the scene about six minutes after Salinas, Jr. called 9-1-1. Castellani described the Complainant as being "visibly shocked," "dazed," "very upset," and "very sad." Castellani observed that the Complainant was bleeding from lacerations on his arm and called for EMS to treat the wound. Appellant contends that the trial court erred in permitting Castellani to testify regarding the complainant's statements made shortly after the alleged assault occurred. Appellant raised several hearsay objections to this testimony, but "it appears that the trial court overruled these objections under the excited utterance exception."

Holding: Castellani testified that he arrived on the scene within six minutes of the 9-1-1 call; although it is not clear how much time elapsed before Castellani spoke to complainant, the trial court reasonably could have concluded that no significant amount of time elapsed between Castellani's arrival and his conversation with complainant. Castellani described the complainant as being "visibly shocked," "dazed," "very upset," and "very sad." Castellani also observed that complainant was bleeding from lacerations on his arm. These factors put this case well within the range of circumstances justifying application of the excited utterance exception. *** Accordingly, the trial court acted within its discretion in overruling the hearsay objection.

§ 430 Judgments & Sentences / Court Costs (Constitutionality): The trial court assessed the cost pursuant to Section 133.102(a)(1) of the Texas Local Government Code, which mandates that a person convicted of a felony must pay \$133 "as a court cost, in addition to all other costs." *** The collected amounts must be remitted to the State Comptroller, who in turn must allocate this money to fourteen specified "accounts and funds . . ." Appellant contends that the trial court's assessment of a "consolidated court cost" against him violates the Texas Constitution. He maintains that Section 133.102(a)(1) is facially unconstitutional under the separation of powers clause of the Texas Constitution.

Holding: (Ripeness) As a threshold matter, we reject the State's contention that this issue is not ripe because the Texas Department of Criminal Justice has not attempted to collect the costs from Appellant. The trial court assessed costs against Appellant, and a bill of costs has issued. Appellant therefore owes the costs regardless of whether an attempt to collect has been made. (Merits) Even if it is assumed solely for argument's sake that at least some of the fund recipients identified in subsection 133.102(e) are invalid, Appellant identifies no reason why section 133.102(a)(1)'s \$133 court cost cannot be collected and distributed in accordance with severability principles to the admittedly appropriate funds specified in subsections 133.102(e)(12) and (14). *** Because the admittedly valid uses are severable and are not foreclosed by other assertedly invalid uses to which the challenged court cost is put, Appellant has not established that section 133.102(a)(1)'s \$133 court cost always operates unconstitutionally as a tax or that it must be deleted in its entirety from the trial court's judgment.

Concurring / Dissenting Opinions: [Justice Jamison](#) delivered a concurring and dissenting opinion. She disagrees with the majority as to the court cost issue and would find Gov't Code section 133.102(a)(1) to be unconstitutional on its face. Specifically, she would find that none of the funds

mentioned in the statute meet the test Ex parte Carson, 159 S.W.2d 126 (1942), “despite Appellant’s attempted concession on appeal,” and the court costs cannot be reallocated.