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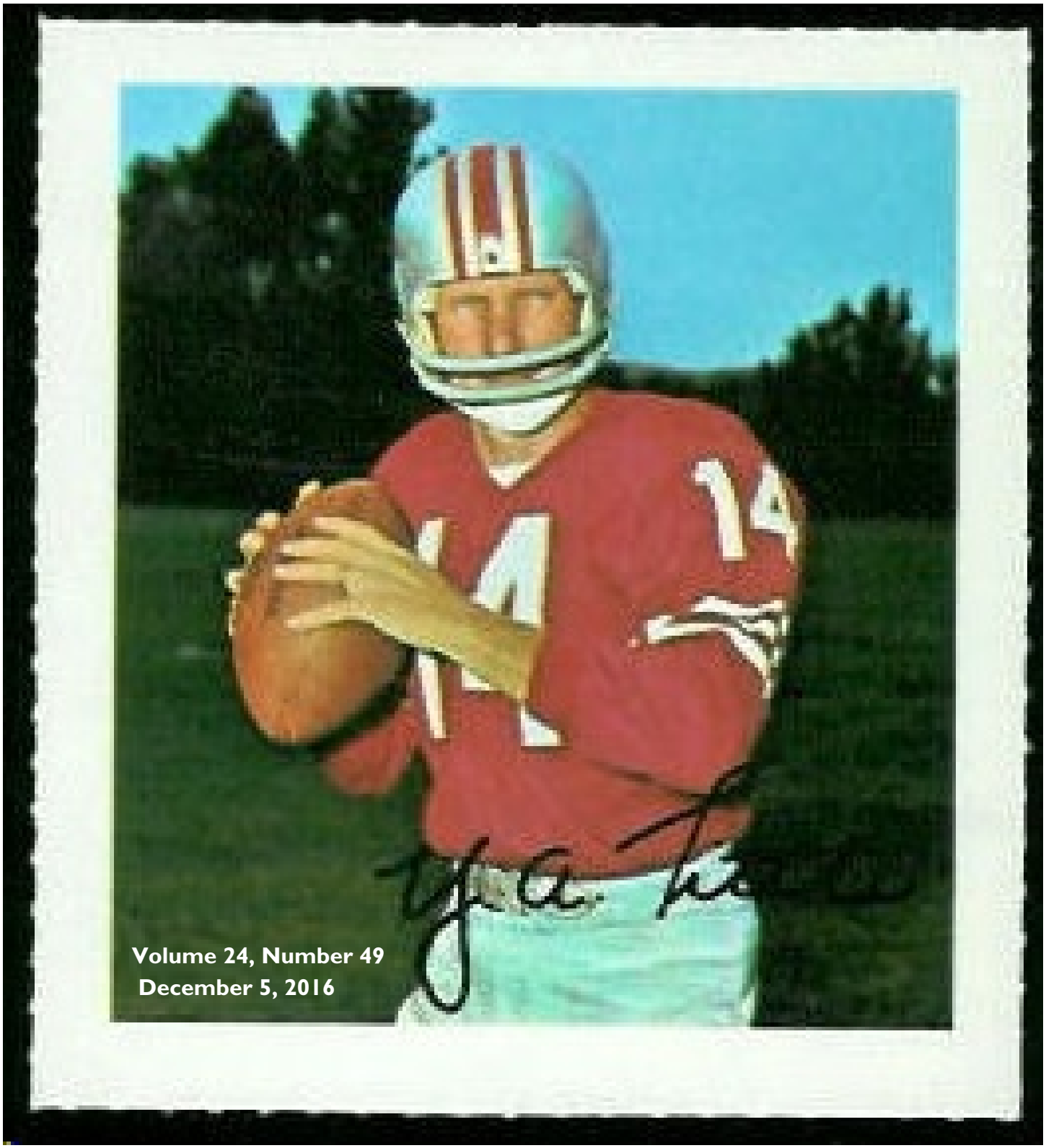

Volume 24, Number 49
December 5, 2016

the Jasuta-Schulman report

Monday, December 5, 2016 (No. 1,143)

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❶ A CPS investigator who testified for the State was not an accomplice witness,; ❷ the evidence is sufficient to sustain the conviction; ❸ the trial court did not deny the defendant by quashing subpoenas for the attorney representing CPS and the State's 1st Assistant District Attorney; and ❹ the defendant was not a victim of selective prosecution.

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Official Oppression

The evidence is sufficient to sustain the conviction because ❶ the evidence shows that the defendant, either as a primary actor or as a party, intentionally seized and searched a cell phone belonging to a fifteen-year-old girl; ❷ the defendant engaged in actions that were tortuous; and ❸ the defendant knew her actions that were tortuous.

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(14-15-00754-CR)
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In the Matter of J.C.
Houston [14th] Court of Appeals
(14-15-00696-CV)
Juvenile Proceedings

❶ The evidence to sustain the conviction is sufficient, because any rational trier of fact could find the elements of an aggravated robbery beyond a reasonable doubt; and ❷ the trial court did not abuse its discretion in denying the motion to suppress a BB gun seized from the Juvenile.

TIBA's Case of the Week

Twelfth Court of Appeals (Tyler)

Case Name: In the Matter of R.X.W

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- NATURE OF CASE: Juvenile Proceedings
- COUNTY: Henderson
- C/A CASE No. 12-16-00197-CV
- DATE OF OPINION: November 30, 2016
- DISPOSITION: Trial Court Reversed OPINION: Neeley, J.
- TRIAL COURT: CCL 1; Hon. Scott Williams
- LAWYERS: Christopher Tinsley & Brian Schmidt (Defense); Rebecca Ray (State)

(Background Facts): On or about March 16, 2016, four assailants entered the store and demanded money from the register. One of the assailants had a firearm. An employee pressed the panic button to alert the authorities as he fell to the floor. A customer, who was an off-duty police officer, announced himself and shot two of the assailants. After the police arrived, Appellant was identified as one of the individuals who had been shot. He was transported to the hospital and then held in a juvenile detention center following his release. Appellant was charged with aggravated robbery in juvenile court.

§§ 550.09 Sufficiency of the Evidence: The State filed a motion for discretionary transfer, asking the court to waive its exclusive jurisdiction and transfer Appellant's case to adult criminal court. The juvenile court ordered the "Required Studies for Discretionary Transfer" and set the motion for hearing. Following the hearing, the court granted the motion, waived its exclusive jurisdiction, and transferred the case to district court. Appellant contends the juvenile court abused its discretion when it granted the State's motion for discretionary transfer.

Holding: The juvenile court's written order in this case cites only "the prior history of the child" as its reason for waiving its jurisdiction and transferring [Appellant] to adult criminal court. *** However, the order does not include findings regarding the child's record and previous history. Instead, the trial court's findings relate to the sophistication and maturity of the child. *** Moon v. State, 451 S.W.3d 28 (Tex.Cr.App. 2014)(see §§, Vol. 22, No. 50; 12/15/2014), requires that the juvenile court's order waiving jurisdiction specifically state the reason for its waiver and the fact findings supporting that reason. *** Like the order at issue in Moon, the juvenile court's order does not contain case-specific facts supporting its stated reason for waiving jurisdiction. As a result, the order is not sufficiently specific and is deficient. *** We therefore hold that the juvenile court abused its discretion when it waived jurisdiction and transferred [Appellant]'s case to adult criminal court.

Court of Criminal Appeals

No Activity to Report this Week

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Case Name: In the Matter of S.A.H. RETURN TO TABLE OF CONTENTS

- NATURE OF CASE: Juvenile Proceedings
- COUNTY: Bexar
- C/A CASE No. 04-16-00340-CV
- DATE OF OPINION: November 30, 2016
- DISPOSITION: Trial Court Affirmed OPINION: Pulliam, J.
- TRIAL COURT: 436th D/C; Hon. Lisa Jarrett
- LAWYERS: Michael Robbins & Debra Parker (Defense); Andrew Warthen (State)

(Background Facts): In February of 2015, Appellant was adjudicated as a child who engaged in delinquent conduct, namely aggravated assault with a deadly weapon (a firearm), and was committed to the TJJD for a ten-year determinate sentence. He arrived at the TJJD in Brownwood on March of 2015, where he remained until April of 2015, at which time he was removed to the TJJD's facility in Giddings. During his short stay in Brownwood, Appellant was involved in three assaults. He assaulted peers during two of the incidents, and a peer and an adult staff member during the third incident. As a result of his assaulting the staff member, Appellant was arrested, as an adult, for assault of a public servant. Appellant was arrested on April 9 and returned to the juvenile facility the next day because the offense was not pursued. Appellant was later transferred to Giddings on April 16, 2015. During his first thirteen days at the Giddings facility, Appellant was involved in one assault on a staff member. On April 29, 2015, Appellant was bench-warranted to Bexar County to be a material witness in a case, and was in Bexar County until June 30, 2015. When he returned to Giddings from Bexar County in July, he was involved in two more assaults and two other incidents of threatening others. Of the two assaults, one involved the assault of an adult, and Appellant was again arrested for assault of a public servant. This time, Appellant was charged and transferred to the Lee County jail pending trial. He was eventually convicted of assault of a public servant and punishment was assessed at seven-year's confinement in the TDCJ.

§§ 550.09 Sufficiency of the Evidence: In March of 2016, TJJD requested the trial court conduct a transfer hearing to determine whether Appellant should be transferred to the TDCJ because he had not completed his sentence and the welfare of the community required that he be transferred. Following a hearing, the trial court ordered that Appellant be transferred to the TDCJ to complete his original ten-year determinate sentence. On appeal, Appellant asserts the trial court erred by transferring him, because the record shows he should have been placed on TJJD parole. Appellant argues he has the ability to contribute to society, he is aware of his anger-control issues, and he recognizes he needs to use the techniques he learned in order to better control himself.

Holding: Appellant asserts the trial court erred by transferring him to TDCJ, and instead, should have placed him on TJJD parole, which would have shortened, but not eliminated, his prison stay. On this record, however, we cannot agree the trial court abused its discretion. *** Although Appellant presented some favorable evidence, the State rebutted with evidence showing many instances of misconduct both before his TJJD commitment and during his TJJD commitment. Additionally, the State presented evidence of Appellant's history with juvenile authorities beginning as early as 2008. Moreover, the trial court was permitted to consider the TJJD's recommendation

that Appellant be transferred to TDCJ and the serious nature of the offense of which he was convicted. *** The trial court also could assign different weights to the factors it considers. *** Therefore, based on the evidence presented, we conclude the trial court did not abuse its discretion in ordering that Appellant be transferred to TDCJ because there is some evidence in the record to support its determination.

Case Name: Devin Donnell Fields v. The State of Texas RETURN TO TABLE OF CONTENTS

- OFFENSE: Capital Murder Life Sentence
- COUNTY: Bexar
- C/A CASE No. 04-15-00585-CR
- DATE OF OPINION: November 30, 2016
- DISPOSITION: Conviction Affirmed OPINION: Pulliam, J.
- TRIAL COURT: 144th D/C; Hon. Lorina Rummel
- LAWYERS: Michael Robbins & Michael Young (Defense); Mary Welsh (State)

(Background Facts): On July 4, 2013, the apartment Breanna Ancira and Appellant shared was burglarized. The burglars stole a television and a safe containing Appellant's drugs, money, and gun. According to testimony from the couple's downstairs neighbor as well as a roommate and Ancira, Appellant believed Stephon Finnell was responsible for stealing the safe because Appellant had declined to help Finnell rob someone else earlier in the day. Although the downstairs neighbor called the police, Appellant refused officers entrance into the apartment to investigate. Ancira testified Appellant was very angry. Ancira drove Appellant to his brother's home where Appellant obtained a handgun from his brother. Appellant emptied the handgun's clip and wiped each of the bullets clean before reloading the clip. Appellant then directed Ancira to drive him to the apartment complex where Finnell lived. Appellant knocked on the apartment door, and Finnell's girlfriend, Baby Girl Harrison, answered the door. Appellant opened fire with a .45 caliber handgun, hitting Harrison twice in the chest. Harrison, as well as her unborn child, died as a result of the gunshot wounds.

536 Sufficiency of the Evidence: In the months prior to the offense, Finnell who already had one child with Harrison, lived with Breanna Ancira and introduced Appellant to Ancira. A short time before the offense occurred, Finnell reunited with Harrison. Appellant informed Ancira the other couple reunited because Harrison was pregnant with Finnell's child. Appellant and Ancira subsequently became romantically involved. Ancira and Appellant's roommate, Desiree Schrimsher, and Appellant's cellmate, Christopher Uridales, testified Appellant knew before the shooting that Harrison was pregnant. Schrimsher testified Appellant often reminded Ancira that Harrison was pregnant and the pregnancy was the reason Finnell left Ancira for Harrison. On appeal, Appellant argues the State failed to prove it was his conscious objective or desire to kill Harrison or Harrison's unborn child.

Holding: The jury heard testimony that [Appellant] knew Harrison was pregnant and living with Finnell. Although [Appellant] asserted he went to Finnell's apartment simply to recover his property, the State presented testimony that [Appellant] went to the apartment carrying a loaded weapon. The jury also heard testimony that [Appellant] knew it was Harrison who opened the door and knew he was shooting at Harrison when he fired his gun. There was also testimony [Appellant] was aware of the damage the caliber handgun he carried caused. Finally, the jury heard testimony of [Appellant]'s own characterizations of the offense as he related it to others. *** The jury was within its right as the factfinder to find from the testimony that [Appellant] knew Harrison was pregnant and the one to open the door. The jury was also within its right to find [Appellant] knew he was shooting at Harrison when he fired the gun. When viewed in the light most favorable to the

verdict, a rational factfinder could have found [Appellant] intentionally or knowingly caused the death of Baby Girl Harrison and her unborn child in the same criminal transaction. Consequently, this court concludes the evidence in this case is sufficient to sustain the jury's finding that [Appellant] committed the offense of capital murder.

294.04 Hearsay & Confrontation / Exceptions / Present Sense Impression: Prior to fleeing San Antonio, Appellant allowed Ancira to visit her daughter at daycare. Rather than going to the daycare facility, Ancira went to the home of a friend where she penned a note to her parents and brother. During Breanna's testimony, the State offered the note as her present sense impression the afternoon following the offense. Appellant objected on the basis of hearsay and bolstering. The State responded the note was not being offered "for the truth, [but] to show her state of mind." The trial court overruled Appellant's objection, and the note was admitted. The notes begins with "If anything happens to me . . .," and discusses her wishes for what should happen to her baby and the money in her bank account. Appellant contends the trial court erred by admitting the note.

Holding: Although Ancira's note provides insight into Ancira's wishes regarding her bank account and the care of her daughter and lends support to Ancira's testimony that she feared for her life, the note does fall within the present sense impression exception to the hearsay rule. According to Ancira's testimony, the note was written shortly after the offense, but before [Appellant] and Ancira fled San Antonio. Ancira testified her instructions to her friend were to give the note to her parents if she was not heard from in three days. Ancira's testimony, as well as the wording of the note itself, indicate Ancira was able to formulate and carry out a plan to leave her family a note. "Once reflective narratives, calculated statements, deliberate opinions, conclusions, or conscious 'thinking-it-through' statements enter the picture, the present sense impression exception no longer allows their admission." *** "'Thinking about it' destroys the unreflective nature required of a present sense impression." *** Accordingly, this court concludes the trial court erroneously admitted State's Exhibit No. 13, the note written by Ancira.

Holding (Harm Analysis): Immediately prior to the admission of the note, Ancira testified regarding her fear for her own safety, as well as her fear for the safety of her daughter and other family members. Ancira testified she was threatened by [Appellant] and feared for her life. Schrimsher also testified Ancira was obviously fearful following the offense and spoke of the worry [Appellant] would shoot Ancira as he shot Harrison. Further, Uridales testified [Appellant] admitted to threatening Ancira and her daughter to maintain control over Ancira. Finally, Ancira testified she wrote the note and about the contents of the note without objection. ***Accordingly, having considered the record as a whole, this court is reasonably assured the trial court's erroneous admission of the evidence had but a slight effect, if any effect at all, on the jury's verdict.

(David A. Schulman) I think the Court is wrong, because its focuses is on the wrong time. I would say the note shows that, at the time she wrote it, Andira had the impression that her life was in danger. Whether and how that is relevant to guilt-innocence is a different question. It is, perhaps, that the Court of Appeals is confusing a present sense impression with an excited utterance, or at least an excited utterance before the Court of Criminal Appeals gutted that exception in McCarty v. State, 257 S.W.3d 238 (Tex.Cr.App. 2008)(see , Vol. 16, No. 25; 06/30/2008).

222.02 Evidence / Relevance / Probative Value v. Prejudicial Effect: The crime scene video was offered into evidence during the testimony of Crime Scene Investigator Yvonne Diaz. Appellant objected the video was repetitive and the "prejudicial effect is greater than any probative value." After viewing the video outside the presence of the jury, the trial court sustained Field's objection

in part, ruling the State could show the video from time stamp 00:00 to 10:12. The State redacted the portions of the video following time stamp 10:12 and tendered the redacted video as State's Exhibit 41A. Appellant renewed his objection to the admission of the redacted video, and the trial court overruled the objection. On appeal, Appellant contends the trial court erred by admitting the video.

Holding: In reviewing the crime scene video, this court notes the video is in color and does not include audio. The video, which is ten minutes and twelve seconds long, depicts the entirety of the crime scene. The video begins outside the apartment in which Harrison was shot and continues throughout the apartment, ending with views of the injuries to Harrison's body. *** The Court of Criminal Appeals has held video and still photographs are not entirely cumulative of each other. Ripowski v. State, 61 S.W.3d 378, 392 (Tex.Cr.App. 2001)(see ⅋, Vol. 9, No. 45; 11/12/2001). The video in this case offers a panoramic view of the scene depicting the dimensions, size, and close proximity of the crime scene not offered by photographs. *** [Appellant] also argues the video was unfairly prejudicial. However, the video in this case does nothing more than reflect the gruesomeness of the offense, which is not a sufficient reason for excluding evidence. *** Accordingly, this court concludes the probative value of the crime scene video admitted as State's Exhibit No. 41A was not substantially outweighed by the danger of unfair prejudice.

⅋ 252 Photographs (Autopsy Photos): Prior to the testimony of Medical Examiner Dr. Samantha Evans, the trial court held a hearing regarding the admissibility of the autopsy photographs. Appellant objected to admission of State's Exhibit No. 89, the autopsy photograph of Harrison's unborn child, because identification was not an issue and a description to the jury would be sufficient. Appellant further argued the photograph was inflammatory and highly prejudicial. The trial court indicated it conducted a balancing test and found the probative value of the autopsy photograph outweighed the danger of unfair prejudice. State's Exhibit No. 89 is a color photo depicting the unborn-child victim lying on its side with its umbilical cord attached to the placenta. The table on which the unborn-child victim is lying is substantially covered with red-tinged liquid and the unborn-child victim has not been cleaned. A portion of a ruler can be seen in the corner of the photograph. On appeal, Appellant claims the trial court erred by admitting these photographs.

Holding: Autopsy photographs are generally admissible unless they depict mutilation of the victim caused by the autopsy itself. *** The photograph in question is undeniably gruesome. However, the photograph shows the second victim for whose death Fields was on trial. Further, the photograph demonstrated an element of the offense the State was required to prove to obtain a conviction. *** In Erazo v. State, 144 S.W.3d 487 (Tex.Cr.App. 2004)(see ⅋, Vol. 12, No. 24; 06/21/2004), the Court of Criminal Appeals . . . found the admission of the photograph in question was erroneous because it was an autopsy photograph of an unborn child "whose death the defendant [was not] on trial [for]," rather than the mother, the actual victim. *** The Erazo court, in discussing cases that permitted the admission of autopsy photographs over a Rule 403 objection, stated: the "photographs in the cases cited above were helpful to the juries in those cases because they showed" the victim. *** "As a result, these photographs added something logical and relevant that made the photographs more probative than prejudicial." *** In this case, the State was permitted to introduce an autopsy photograph of the actual victim, which as noted by the Erazo court is relevant. *** This court concludes the trial court did not abuse its discretion in admitting the autopsy photograph of the unborn-child victim. Although the photograph is gruesome, it is such simply because of the nature of the offense. The State did not admit any other photographs of the unborn child. Considering the factors listed in Young v. State, 283 S.W.3d 854 (Tex.Cr.App. 2009)(see ⅋, Vol. 17, No. 16; 04/27/2009), as well as the circumstances particular to this case, this court concludes the autopsy photograph was not so prejudicial that it overcame its probative value. *** [Appellant]'s claim that

the photograph had a significant prejudicial effect outweighing its probative value is not supported by the record.

Concurring / Dissenting Opinions: Justice Chapa concurred. She believes that the "slight probative value" of the autopsy photo of the unborn child was substantially outweighed by its unfair prejudice and the trial court abused its discretion in admitting it. She also believes, however, that the error was harmless.

Sixth Court of Appeals (Texarkana)

Case Name: In the Matter of J.M.G.

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- NATURE OF CASE: Juvenile Proceedings
- COUNTY: Hunt
- C/A CASE No. 06-16-00011-CV
- DATE OF OPINION: November 29, 2016
- DISPOSITION: Trial Court Affirmed OPINION: Burgess, J.
- TRIAL COURT: CCL 1; Hon. Timothy Linden
- LAWYERS: Jason Duff (Defense); Joel Littlefield, Wiley Hollopeter, & Azhar Hussain (State)

(Background Facts): J.M.G. is a fifteen-year-old child who has been diagnosed with a variety of mental-health disorders, including autism, Asperger's syndrome, bipolar disorder, attention deficit disorder, unidentified depressive disorder, conduct disorder, and oppositional defiant disorder. He has an average intelligence quotient of 107 and "is a bright student, making A's in his subjects," but has received special education services for most of his life as a result of his behavior. He pled true to the State's allegation that in 2011 he engaged in delinquent conduct that would constitute indecency with a child by contact.

550.09 Sufficiency of the Evidence: At the disposition hearing, J.M.G. asked to be placed in the Grayson County Boot Camp or returned to Pegasus Residential Treatment Center, where he remained for twenty months, instead of being sent to TJJD. His mother testified that she did not believe that TJJD was the best option available for J.M.G The trial court found that J.M.G. had engaged in the delinquent conduct and, after a disposition hearing, entered a disposition order committing him to the Texas Juvenile Justice Department (TJJD) for an indeterminate period, not to exceed his nineteenth birthday. On appeal from the disposition order, J.M.G. argues that the trial court abused its discretion by committing him to the TJJD instead of "put[ting] him on probation with a placement outside the home at a secured facility boot camp in Grayson County."

Holding: [The] trial court had ample evidence to rely on in deciding the proper disposition for J.M.G. It was aware of J.M.G.'s long history of mental-health issues and his history of inappropriate sexual acts. The trial court heard that Pegasus and Willow Bend had been offering J.M.G. sexual-offender treatment for several years, but that J.M.G. continued to offend, even while placed in the Juvenile Detention Center during the pendency of this case. West testified that J.M.G. needed an environment that would even regulate J.M.G.'s free time because he was an opportunistic sexual offender. *** Failure to complete a local treatment program successfully supports a finding that TJJD may be more appropriate than placing a juvenile into another local treatment program. *** Because nothing demonstrated that either the Grayson County Boot Camp and Pegasus could provide any treatment that had not already been provided to J.M.G. and because Pegasus records contained incident reports demonstrating his disruption of the program, neglect of therapy, power struggles with staff, and failure to follow directives, the trial court could reasonably find that J.M.G. would have similar problems in another residential treatment facility or boot camp. *** In light of

the evidence presented at the disposition hearing, we cannot conclude that the trial court abused its discretion in determining that the proper disposition for J.M.G. was to be sent to the TJJD.

Case Name: Rebekah Thonginh Ross v. The State of Texas RETURN TO TABLE OF CONTENTS

- OFFENSE: Official Oppression
- COUNTY: Hunt
- C/A CASE No. 06-15-00179-CR
- DATE OF OPINION: November 30, 2016
- DISPOSITION: Conviction Affirmed OPINION: Burgess, J.
- TRIAL COURT: 354th D/C; Hon. Richard Beacom
- LAWYERS: Jessica Edwards (Defense); Steven Lilley & Noble Walker (State)

(Background Facts): On December 15, 2011, Child Protective Services filed a petition for orders in aid of investigation of a report of child abuse or neglect and for a temporary restraining order. Respondents in the cause were the parents of the "UNKNOWN CHILD," "Hunt" and "Vargas." The petition was supported by Appellant's affidavit. In her affidavit, Appellant averred that the Department had received a referral on December 12, 2011, stating that a child had been born at home and had not had medical attention, that the mother was using drugs during her pregnancy, that another of the mother's children had been removed due to drug use, and that it was believed that the new child had been exposed to drugs. Appellant's affidavit further stated that, while talking with the couple, she smelled an odor of ammonia emanating from the house, which she averred is often found where methamphetamine is being manufactured. The order authorized entry into one of eight addresses "for an interview with and/or examination of UNKNOWN CHILD, and observation of the premises or immediate surroundings." The order called for the "assistance from Law Enforcement if necessary."

Ed Note: (The Search) Jessica Francis, another investigator for the Department, testified she met Appellant at one of the addresses ("the Highway 69 house") to search for a newborn infant. Two deputies from the Hunt County Sheriff's Office were present, broke down the door, and went inside the residence to determine who, if anyone, was present. When they came back and told Francis and Appellant no one was there, Appellant went into the residence with the deputies. Francis took photographs while Appellant and the deputies thoroughly searched the house. Francis also testified that at some point they went into the kitchen, where Appellant instructed the deputy to get a crock pot or a pot down from either a shelf or the refrigerator to look in it. Francis felt that this was beyond what was contemplated in the order in aid of investigation since they were no longer looking for the baby. She told Appellant that there was not going to be a baby in the pot and that they needed to go find the baby, to which Appellant responded, "Okay, Kenny." Francis explained that Kenny Stillwagoner was a special investigator with the Department and that Appellant was implying that Francis was lazy. Francis also testified that the kitchen cabinets and drawers were also opened by either Appellant or the deputies. It appeared to her that the deputies were working at Appellant's direction throughout the house. One of the pots found in the kitchen had some residue dried up in it, and Appellant commented that it might have been used for making drugs. Based on the evidence in the bedroom, Francis concluded that the baby was not there, and Appellant agreed with that conclusion. Francis felt like they were wasting time searching the rest of the house. A short time later, they went outside and talked with the deputies. They then contacted Stillwagoner to go with them to another residence to look for the child. Since she did not believe Appellant was following the Department's policies, Francis reported the search of the kitchen to Appellant's supervisor, Natalie Reynolds, as soon as they left the first residence, and later she reported the search to her own supervisor, Rochell Bryant. Francis testified that they eventually located Hunt

and the baby at the third residence they visited. The baby was very small, but there was nothing troubling about it at first glance. However, when they changed its diapers, they found that the umbilical cord had been tied with a shoestring. Francis began making telephone calls to get the baby seen by a medical professional, but Appellant was making telephone calls to get a hair-follicle drug test approved for the baby. Appellant told her that she wanted to make sure the baby was taken for the drug screening before being seen by a doctor.

Ed Note: This is a very fact specific opinion, with the facts surround the case set out in considerable details. Thus, the facts set out here are not sufficient to provide one with a full understanding of the case. Members are encouraged to read the Court of Appeals' opinion.

§§ 530.01 Sufficiency of the Evidence / Corroboration of Accomplice Testimony: Appellant contends that there was insufficient evidence to convict her of official oppression because the only evidence was the uncorroborated testimony of an accomplice witness, Francis. She points to Francis' testimony establishing that she entered the house of her own volition, that she took photographs in the house, including at Appellant' direction, and that she looked through the journal with Appellant. Francis also testified that she photographed the bloody mattress and wall and that she went into the kitchen area. Appellant also points out that Francis testified that afterward, she went outside and discussed with Appellant what they would do next and eventually drove Appellant to two other residences until they found the child. Appellant argues that that evidence shows that Francis assisted Appellant before, during, and after the offense, making her an accomplice and that there is no other evidence showing Appellant was even at the Highway 69 house that day.

Holding: [The] record supports an implied finding that Francis was not an accomplice because she lacked the required culpable mental state. *** The only evidence in this case shows that, when [Appellant] began her search of the kitchen, Francis objected to the search and expressed her objections to [Appellant]. There was no testimony that Francis promoted or assisted in the kitchen in any way. In addition, Francis testified that she expressed her concerns later that day to both [Appellant] and [Appellant]'s supervisors. Both the State and [Appellant] contend that the actions of [Appellant] and Francis taken prior to the search of the kitchen were allowed under the order in aid of investigation. Further, the fact that Francis drove [Appellant] to two other residences in search of the child in no way shows that Francis promoted or assisted in the search of the kitchen and its contents. *** Accordingly, there is no evidence showing that Francis had a conscious objective or desire to promote or assist in the search of the kitchen. Therefore, the record supports the trial court's implied finding that Francis was not an accomplice. Since she was not an accomplice, no evidence corroborating her testimony was required.

§§ 542 Sufficiency of the Evidence: Appellant challenges the legal sufficiency of the evidence showing that any search was unlawful. She argues that there is insufficient evidence to support a finding that the search was unlawful because (1) she was acting under the authority of a lawful court order and (2) exigent circumstances justified her search of the kitchen and its contents.

Holding (Lawfulness of the Search): [Section] 1.07 of the Penal Code defines "unlawful" as used in the Code to mean "criminal or tortious or both and includes what would be criminal or tortious but for a defense not amounting to justification or privilege." *** Therefore, there must be sufficient evidence that the search and/or seizure of Hunt's property was criminal or tortious, that [Appellant] knew it was criminal or tortious, and that her defense was inadequate to establish a justification or privilege. *** [Both Appellant] and the State maintain that the initial entry into the residence and the actions taken in the bedroom were necessary to verify that the child was not located in the residence. Assuming, without deciding, that those actions were authorized under Section 261.303(b) and the order, we find that the subsequent search of the kitchen and its contents was not authorized under the order or the statute. *** Francis testified that, based on what they saw in the bedroom,

she and [Appellant] concluded that the child had been there at one time, but that she was no longer there. *** Further, Francis testified that she questioned the search of the kitchen, stating that the child was not there. She also testified that [Appellant] told her she wanted to search other areas for evidence that the parents had been making drugs. That testimony was not contradicted. Therefore, we find that there was sufficient evidence for the trial court to find that the search of the kitchen and its contents occurred after [Appellant] determined that the child was not located in the residence. Since that search occurred after it was determined that the child was not present in the residence, it was not authorized under the order or the statute and was, therefore, unlawful, unless an emergency justified the search.

Holding (Lack of Emergency): [All of the] evidence would reasonably tend to confirm the information [Appellant] set forth in her affidavit that the baby was born at home. Considering all of the circumstances and the facts known to the investigators at the time of the search of the kitchen, it would not be objectively reasonable to conclude that the blood and bodily fluid stains on the mattress were evidence that the baby had been killed or injured, as [Appellant] contends. Therefore, the evidence does not show that a warrantless search was justified by a need to protect or preserve life or to avoid serious injury. *** Since the search occurred after it was determined that the child was not in the residence, it was not authorized under the order in aid of investigation, and since the evidence shows that the search was not justified under the emergency doctrine, we find that there was sufficient evidence to support the trial court's finding that the search was unlawful.

GS 542 Sufficiency of the Evidence: Appellant contends that there is insufficient evidence that she intended to conduct a search she knew was unlawful. She points out that part of the State's burden is to establish beyond a reasonable doubt that she knew that the search was unlawful, i.e., that it was criminal, tortious, or both. In addition, she contends that she cannot be guilty of official oppression if a justification or privilege exists for her conduct. She argues that, based on her training, she reasonably believed that the order in aid of investigation authorized her entry into the home and that the blood on the mattress and walls constituted exigent circumstances that justified continuation of her search. This, she reasons, shows she only intended to conduct a lawful search. She further contends that the evidence of the training she received on the Fourth Amendment shows that she was taught that she could conduct a search if she had consent, a court order, or exigent circumstances, but without further elucidation of what those entailed. She argues that subjective testimony of what others would have done based on the same training revealed contradictory answers, so that there was no clear answer for what she should have done under the circumstances. Thus, she concludes, the evidence shows that she could not have known, based on her training, what course of action would be considered lawful and, therefore, she did not have a "fair and clear warning" that her conduct was unlawful.

Holding: Viewed in the light most favorable to the trial court's judgment, the trial court could reasonably infer from this evidence that [Appellant] knew that the order did not authorize the search of the kitchen and its contents, and that she could not have reasonably believed the order authorized her to search the kitchen and its contents. Further, the trial court could reasonably infer that [Appellant] knew the search was tortious since her training informed her both that a search included inspecting a place where a person had a reasonable expectation of privacy and that, if she violated a person's Fourth Amendment rights, she could be personally liable. Therefore, we find there is sufficient evidence to support the trial court's finding that [Appellant] intended to conduct a search that she knew was unlawful.

GS 32.01 Search & Seizure / Reasonable Expectation of Privacy: Ross challenges the sufficiency of the evidence to support the trial court's finding that Hunt had a justifiable, reasonable, or legitimate expectation of privacy. She argues (1) that Hunt abandoned the Highway 69 house, (2) that she had

no reasonable expectation of privacy in the residence at the time of the search, and (3) that the State was improperly attempting to assert Hunt's Fourth Amendment rights, since Hunt was not even aware of the search until shortly before trial.

Holding (Abandonment) [The] testimony was conflicting regarding whether Hunt abandoned the Highway 69 house and its contents. *** Hunt testified that she and her husband lived at the house off and on for about one and one half years. She also testified that they lived there when the baby was born, but moved from it several days later after finding out that the Department was looking for them. Her husband wanted to flee to Mexico, and she testified that they returned briefly to the house to quickly gather some of their belongings. After that, they stayed in a motel for several days, then stayed at another house, where they were located by the Department. Yet, Hunt also testified that she still had belongings at the Highway 69 house, such as a calendar, a journal, clothes, furniture, appliances, and food. Although it was her husband's intent that when they picked up their belongings, they would not return to the Highway 69 house, Hunt did not like the idea and snuck back to the house when he was at work. *** Although Hunt left the house, she also testified that she returned at least once, and that she still had personal property at the house. Further, Hunt was unclear regarding whether she intended to leave the house permanently. This is some evidence that she did not intend to relinquish her interest in the property. Therefore, the trial court could reasonably infer that her conduct indicated that she did not intend to abandon the house and her personal property. When viewed in the light most favorable to the trial court's implied finding that Hunt did not abandon the residence and its contents, we find there is legally sufficient evidence to support that finding.

Holding: [Appellant] argues that, even if Hunt did not abandon the house, she had no expectation of privacy in the residence. She points out that Hunt testified that she knew the Department was looking for her and the child and that that is why she cleaned the bathroom and why Vargas flipped the mattress. This, she argues, shows that Hunt had no expectation of privacy in the residence and that, therefore, there was no Fourth Amendment violation. *** [Appellant] cites no caselaw or other authority supporting her argument, which essentially posits that a person loses her expectation of privacy in her residence if she temporarily absents herself from her residence to avoid being interviewed by a government employee. We have found no authority that supports this proposition. *** Since the trial court impliedly found that she had not abandoned her residence and its contents, Hunt retained her reasonable expectation of privacy in the house and its contents.

Holding (State's Assertion of Hunt's Rights) [Appellant] argues that, since Fourth Amendment rights may only be enforced by the person whose rights were violated, the State could not assert a violation of Hunt's rights when Hunt did not complain and was not aware that they had been violated. She points toHunt's testimony that she was not aware of the search or that it may have been illegal until shortly before trial. Since Hunt was not complaining, [Appellant] argues, the State could not unilaterally enforce her rights for her. *** Again, [Appellant] cites no direct authority in support of this argument. Rather, she relies on cases in which a defendant is implicated in a crime as a result of the search of a third party's property, and the defendant seeks to suppress the evidence. *** There is no such consideration in a case prosecuted under Section 39.03(a)(1) of the Penal Code. Further, Section 39.03(a)(1) criminalizes the conduct of the public servant who "intentionally subjects another to mistreatment or arrest, detention, search [or] seizure . . . that he knows is unlawful." *** Therefore, we find Section 39.03(a)(1) of the Penal Code gave the State standing to prosecute this action against [Appellant].

§§ 209 Trial Courts / Fair Trial: Appellant served subpoenas on the attorney for CPS, Holly Peterson, and Hunt County First Assistant District Attorney Keli Aiken. The State filed a motion to quash the subpoenas, asserting that any testimony by these witnesses was protected by the attorney-client privilege or by attorney work product. Appellant argued that she needed testimony

from Peterson that she drafted the petition for the order in aid of investigation, as well as the order, and presented them to the trial court. She argued that she needed testimony from Aiken that the Fourth Amendment training she gave to the Department's Hunt County office occurred eleven months after the incident alleged in the indictment. Appellant contends she was denied her constitutional right to a fair trial when the trial court quashed her subpoenas. The State filed factual stipulations, then re-filed them before trial began. Neither of those documents was signed by Appellant. Before any testimony was taken at trial, the trial court asked about the factual stipulations and requested a copy. However, the factual stipulations were not introduced into evidence, nor were they mentioned again. Further, the trial court made no indication that the stipulations satisfied what Appellant represented she wanted from the witnesses. In addition, no order quashing the subpoenas appears in the clerk's record. Neither Peterson nor Aiken were called as witnesses at the trial by either Appellant or the State. On appeal, Appellant argues that she had subpoenaed both of these witnesses for trial that was originally scheduled for February 23, 2015, and that at a hearing to suppress those subpoenas, the trial court made it clear that it was going to sign an order quashing the depositions if the State submitted a stipulation of testimony. She argues that any further complaint would have been futile and that, as a result, she was denied the right to bring witnesses on her own behalf and the right to cross-examine witnesses.

Holding: A fair reading of the hearing on the motion to quash the subpoenas shows that the trial court made it clear to [Appellant] that the subpoenas would remain active until the trial court signed an order quashing them. In addition, after the stipulations were filed, the trial court neither indicated that it thought the stipulations were satisfactory, nor entered an order quashing the subpoenas. Since no order quashing the subpoenas was signed, nothing prevented [Appellant] from compelling the attendance of Peterson and Aiken and calling them as witnesses at trial. Thus, [Appellant] has failed to show that her right to call these witnesses was denied. Further, since neither of these persons was called as a witness by the State, [Appellant] has failed to show her right to confront and cross-examine them was denied

§§ 124 Right to Counsel / Ineffective Assistance: Appellant contends that she was denied effective assistance of counsel because trial counsel failed to request a hearing to determine whether she was the victim of selective prosecution.

Holding: In this case, there is no evidence in the record that the other three persons involved in the search have not been prosecuted, although the State does not dispute that assertion. Even if the record had shown that [Appellant] was singled out for prosecution while others similarly situated were not, there is no evidence that the prosecution was initiated for impermissible considerations such as race, religion, or the desire to prevent [Appellant] from exercising her constitutional rights. Thus, the record does not show that [Appellant] would have prevailed on a claim of selective prosecution if it had been asserted. Therefore, [Appellant] has not shown that the outcome of her trial would have been different if trial counsel had asserted a claim of selective prosecution.

§§ 124 Right to Counsel / Ineffective Assistance: Appellant also contends that counsel was ineffective because, when the trial court quashed the subpoenas of Peterson and Aiken, trial counsel did not object to the offer of the State's factual stipulations into evidence and that he failed to make a bill of exceptions to the exclusion of the testimony of Peterson and Aiken.

Holding: Even assuming that the stipulations were admitted into evidence, a review of the stipulations shows that they state essentially the same facts that [Appellant]'s trial counsel represented to the trial court he sought from the testimony of Peterson and Aiken. The record does not reflect why trial counsel did not call Peterson and Aiken, but we presume he had valid strategic reasons not to call them. These reasons could include not wanting to risk that these witnesses might provide testimony more damaging to his client's case than any benefit he might gain from the

evidence obtained in the State's stipulation. There is no evidence in the record to overcome this presumption. *** Therefore, [Appellant] has not shown that her trial counsel's performance was deficient.

Case Name: Natalie Ausbie Reynolds v. The State of Texas RETURN TO TABLE OF CONTENTS

- OFFENSE: Official Oppression
- COUNTY: Hunt
- C/A CASE No. 06-15-00194-CR
- DATE OF OPINION: November 30, 2016
- DISPOSITION: Conviction Affirmed OPINION: Morriss, CJ.
- TRIAL COURT: 354th D/C; Hon. Richard Beacom
- LAWYERS: Michael Mowla (Defense); Steven Lilley & Noble Walker (State)

(Background Facts): In June 2012, it was reported to the Greenville, Texas, office of the Texas Department of Family and Protective Services (the Department) that a fifteen-year-old girl, A.K., had run away from home, had troubling activities and associations -- using illegal drugs and living with non-family adult males -- and needed the Department's assistance. On June 13, 2012, the Hunt County Sheriff's Department located A.K. at the home of a twenty-three-year-old male and transported her to the Hunt County Juvenile Detention Center. On A.K.'s arrival, the center's personnel took A.K.'s personal effects, including a bracelet, a ring, and her cell phone. The subsequent actions of Appellant, a supervisor for CUPS, and Rebekah Thonginh Ross, one of the Department investigators (see ℘, Vol. 24, No. 49; 12/05/2016), regarding the seizure and search of A.K.'s cell phone are the basis for this case.

℘ 542 Sufficiency of the Evidence: Kenny Stillwagoner, formerly with the Department, testified that he believed Appellant, Ross, or both of them, took possession of A.K.'s cell phone without her consent. He also testified that Appellant remained in possession of the cell phone because she believed it contained contact information for drug dealers. In addition, Edie Diane Fletcher, also formerly with the Department, testified that, when she contacted Appellant about the situation regarding A.K.'s cell phone, Appellant explained to her that she could not return the phone to A.K. because she believed A.K.'s cell phone contained contact information relating to drug dealers and that "they" needed to "finish their investigation." A.K. testified that she became very upset when Ross and Appellant refused to return her cell phone and that both Ross and Appellant looked through her cell phone. Further, A.K. testified that Ross and Appellant retrieved information from her cell phone relating to Steve Lamb and Michael Watts, and there was no evidence presented that either of these men was considered as a potential placement option for A.K. In fact, A.K. had little, if any, information as to why she was questioned about her relationship to either man. Appellant contends that the State failed to provide legally sufficient evidence that she individually, or acting as a party with Ross, searched or seized A.K.'s cell phone.

Holding: As the fact-finder, the trial court is the judge of the credibility of the witnesses and is free to believe or disbelieve all or part of any witness's testimony. *** Appellate courts do not engage in a second evaluation of the weight and credibility of the evidence, but ensure only that the fact-finder reached a rational decision. *** Here, the trial court chose to believe that the evidence showed that [Appellant] was involved in taking A.K.'s cell phone, refusing to return it to her on her request, and then searching through it, either as a principal actor or as a party to Ross' actions. There is sufficient evidence to support the trial court's finding.

§ 542 Sufficiency of the Evidence: Appellant also contends that there was insufficient evidence to show that her actions were unlawful. She contends that the Department was acting as A.K.'s de facto managing conservator or that it was acting in loco parentis "because there clearly was an emergency regarding A.K.'s physical and emotional well-being," and it was imperative that the Department locate a temporary placement home for A.K

Holding: Under the evidence in this record, the fact-finder could have rationally found that [Appellant] was not acting in loco parentis or as a de facto parent. *** A.K.'s cell phone was not seized pursuant to an arrest, and there is no evidence of any warrant, court order, or consent to seize or search A.K.'s cell phone. [Appellant]' claim of exigent circumstances is not compelled by the evidence. For these reasons, we find that [Appellant]' actions were not authorized. *** In a civil rights action under Title 42, Section 1983, of the United States Code, personal involvement in a constitutional deprivation is actionable, and a supervisor of a direct actor may be held liable if he or she affirmatively participated in the acts giving rise to the constitutional deprivation or if the supervisor's wrongful conduct is causally connected to the constitutional violation. *** There is legally sufficient evidence in this record from which the fact-finder could have rationally found, beyond a reasonable doubt, that [Appellant] engaged in actions that were tortious.

§ 542 Sufficiency of the Evidence: Appellant further contends that, because there was no clearly established right to be free from a warrantless search of a cell phone on June 14, 2012, there existed no clearly established right for A.K. to assert, and that there was no clearly established right of which Appellant could have been aware at the time of the incident.

Holding: We disagree. *** In addition to showing that [Appellant]' actions were unlawful, the State must show, beyond a reasonable doubt, that [Appellant] knew her conduct was criminal, tortious, or both. *** [Appellant] claims that the evidence shows she reasonably believed her actions were authorized by law, thereby justifying her conduct. Pre-2012 cases, such as U.S. v. Finley, 477 F.3d 250 (5th Cir. 2007); U.S. v. Zavala, 541 F.3d 562 (5th Cir. 2008); and Lemons v. State, 298 S.W.3d 658 (Tex.App. - Tyler 2009)(see §, Vol. 17, No. 20; 05/25/2009), , establish that, on the date of the incident, individuals had an expectation of privacy in the contents of their cell phones; thus, a state actor must have had consent to search, a warrant to search, or there must have existed an exception to the warrant requirement, or a corresponding arrest at the time A.K.'s phone was seized. None of these circumstances existed in the present case. *** In viewing the evidence in the light most favorable to the verdict, we find the trial court could have concluded beyond a reasonable doubt that [Appellant], either individually or acting as a party with Ross, intentionally subjected A.K. to an unlawful search and/or seizure that she knew was tortious at the time and that there existed no justification or privilege to excuse [Appellant]' actions.

Case Name: Eian Tilor Hurlburt v. The State of Texas RETURN TO TABLE OF CONTENTS

- OFFENSE: Aggravated Sexual Assault
- COUNTY: Coryell
- C/A CASE No. 10-15-00400-CR to 10-15-00403-CR
- DATE OF OPINION: November 30, 2016
- DISPOSITION: Conviction Affirmed OPINION: Gray, CJ.
- TRIAL COURT: 52nd D/C; Hon. Trent Farrell
- LAWYERS: Justin Smith (Defense); Charles Karakashian, Dustin Boyd, & Scott Stevens (State)

§§ 430 Judgments & Sentences / Court Costs as Part of Sentence: Appellant was charged in four separate indictments for four separate offenses of aggravated sexual assault of a child. He requested that all four cases be heard together in the trial court, and the State joined in this request. Appellant pled guilty by open pleas to the court to each offense, and the trial court accepted Appellant's plea after each plea was made. Punishment for each offense was tried together to the court on four different days spanning 6 months. The court sentenced Appellant to 20 years in prison for each offense and assessed $354 in costs for each conviction. On appeal, Appellant asserts that because he was convicted of four offenses "in a single criminal action," he is only required to pay court costs once. Accordingly, his argument continues, court costs in three of his four convictions must be deleted.

Holding: This is unlike the facts in Ex parte Pharr, 897 S.W.2d 795 (Tex.Cr.App. 1995)(see §§, Vol. 3, No. 11; 04/13/1995), where the trial court concluded each proceeding before the next one began. It is clear that all of Hurlburt's offenses were heard at one time. Thus, because allegations and evidence of more than one offense were presented in a single trial or plea proceeding, the trial court erred in assessing costs in each conviction.

Ed Note: The judgments in three of the convictions were modified to delete the assessed court costs. Additionally, in the one remaining case, the Court of Appeals found that some of the costs were not authorized, and they were deleted.

(David A. Schulman) The Court of Appeals handles the issue as raised properly. The problem is that, as in way too many cases, appellate counsel appears to have used this court cost issue to avoid filing an Anders brief. I understand that court costs are an important issue, certainly to the person from whose inmate trust account the costs will be deducted, but a challenge to the court costs, however, is not a substantive attack on the judgment. Thus, an Anders brief would have been more appropriate. There is no reason that appellate counsel could not have filed an Anders brief AND challenged the imposition of court costs as done in this case.

Case Name: Luis Eduardo Lara v. The State of Texas RETURN TO TABLE OF CONTENTS

- OFFENSE: Sexual Assault / Indecency / Continuous Sexual Abuse of a Child
- COUNTY: Galveston
- C/A CASE No. 14-15-00581-CR to 14-15-00583-CR
- DATE OF OPINION: November 29, 2016
- DISPOSITION: Convictions Affirmed OPINION: Boyce, J.
- TRIAL COURT: 405th D/C
- LAWYERS: Greg Russell (Defense); Rebecca Klaren & Allison Lindblade (State)

(Background Facts): Appellant was about 20 years old when he met Complainants John Jenkins, John Doe, and John Smith at a skate park in Galveston. Complainants were young teenagers at the time they met Appellant. They all became friends with Appellant and spent a lot of time with him and other friends skating at the skate park and attending skating competitions and other events. After the three Complainants accused Appellant of sexual abuse, the police started investigating the Complainants' allegations.

441.01 Evidence at Punishment Phase / Extraneous Bad Acts or Offenses / Notice Questions: At trial, Appellant objected to the State introducing evidence of extraneous offenses pursuant to Article 38.37, C.Cr.P., arguing that the State did not provide notice to Appellant of all of the extraneous offenses it wanted to introduce through the testimony of John Jenkins (a pseudonym used for one of the youths). Appellant argued that the State provided notice only that Jenkins would testify regarding two instances of sexual abuse by Appellant when it intended to introduce evidence of three additional and later-disclosed instances of sexual abuse. The trial court ruled that the State substantially complied with the notice requirement and "allowed testimony of . . . the additional three extraneous offenses in addition to the two that [Jenkins] was originally going to testify to." On appeal, Appellant argues that the trial court "erred in allowing the State, during guilt-innocence and punishment, to introduce evidence of five extraneous acts, contrary to" Rule 404(b), Tex.R.Evid., and Article 38.37, C.Cr.P. Appellant more specifically argues that the State should not have been allowed to introduce evidence of five extraneous offenses because the State failed to give him proper notice which Rule 404(b) and Article 38.37 require.

Ed Note: The Court of Appeals found that, because Appellant's argument in the trial court was only that the State should not be allowed to introduce extraneous offense evidence because it failed to give Appellant notice under Article 38.37, he failed to preserve his Rule 404(b) claim.

Holding: We need not decide whether the trial court erred in admitting the evidence because, assuming without deciding that the trial court erred, any error is harmless. Appellant's argument regarding how he was harmed by the lack of notice consists of the following statement: "In the case at bar, I do not see how it could be argued that allowing the jury to hear four additional sexual offenses when Appellant was on trial for sex offenses, did not have a 'substantial[ly] injurious effect or influence[d] the jury's verdict.'" *** [Appellant] admitted he was aware of the additional three incidents of sexual abuse Jenkins had alleged; Appellant protested only that he was unaware the State planned to introduce such evidence during Appellant's trial. If re-evaluation of trial strategy was required, Appellant could have requested a continuance. Appellant did not ask for a continuance of the trial and did not point out -- either in the trial court or in his appellate brief -- how his trial strategy would have been different if he had been provided notice. *** Based on the record before us, we cannot conclude Appellant was harmed by the alleged lack of notice under Article 38.37.

441.01 Evidence at Punishment Phase / Extraneous Bad Acts or Offenses / Notice Questions: Appellant contends that the trial court erred by allowing Jenkins's brother to testify during the punishment phase of trial that "when he was 8 or 9 years old he was at [Appellant]'s house and [Appellant] was masturbating while watching pornography." Appellant contends that the State failed to provide notice of its intent to introduce evidence of this extraneous offense.

Holding: Assuming without deciding that the trial court erroneously admitted the complained-of testimony, we conclude that any error is harmless. Appellant was not surprised by the extraneous offence evidence. He did not ask for a continuance and did not point out in the trial court or on appeal how his defense strategy might have been different had the State's notice not been "defective" or had it been clearer regarding the extraneous offense evidence. On appeal, Appellant does not assert that he was harmed by the trial court's allegedly erroneous admission of testimony. Based on the record before us, we cannot conclude that Appellant was harmed by the allegedly erroneous admission of extraneous offense evidence.

208.03 Trial Courts / Authority to Act / Joinder: Appellant contends that the trial court erroneously consolidated "all three cases for trial" when he "objected on the basis that it would affect his Voir Dire, dispense with his [Article] 38.37 hearing and prejudice his defense." Appellant objected in the trial court to consolidating the three causes brought against him, arguing that he "would be unduly prejudiced in this case if these cases are consolidated because it would force [Appellant] to divide up his defenses between the three indictments." Appellant stated, "[i]t is different trial strategy, different issues coming up, different defenses, you know, the ability to be able to divide up defenses pursuant to each particular indictment. . . . Additionally, Judge, it affects the Defense's strategy on voir dire preparations, on voir diring the jury, whether we're voir diring on one case or three cases." Appellant also argued that consolidation of the three causes would be improper because the State's Article 38.37 notice of intent to introduce testimony from Jenkins regarding five extraneous offenses was defective.

Holding: To the extent Appellant asserts that he was unfairly prejudiced by the consolidation because the State's Brady email (discussed in issue one) did not constitute effective notice of the State's intent to introduce Jenkins's testimony regarding three instances of sexual abuse in addition to two previously and properly noticed instances of sexual abuse, the alleged "defective notice" alone cannot support a claim of unfair prejudice. *** First, any allegedly defective notice would affect only admissibility of Jenkins's testimony regarding the later-disclosed additional three instances of sexual abuse; it would not preclude introduction of Jenkins's testimony regarding the two instances of sexual abuse the State properly noticed pursuant to Article 38.37 in its March 10, 2015 notice entitled "State's Intent to Introduce Extraneous Offenses/Bad Acts." *** Second, Appellant's "defective notice" argument extends only to Jenkins's extraneous offense testimony about three additional instances of sexual abuse. *** Further, Appellant acknowledges that the recorded telephone conversation between Appellant and Smith, during which Appellant acknowledged sexually abusing all three Complainants, constitutes overlapping evidence which would have been admissible in each cause. *** Accordingly, we conclude that the trial court reasonably could have determined that consolidation was not unfairly prejudicial against Appellant; therefore, the trial court acted within its discretion in trying the three causes together.

Case Name: Fidel Flores v. The State of Texas RETURN TO TABLE OF CONTENTS

- OFFENSE: Aggravated Sexual Assault
- COUNTY: Harris
- C/A CASE No. 14-15-00754-CR
- DATE OF OPINION: November 29, 2016
- DISPOSITION: Conviction Affirmed OPINION: Boyce, J.
- TRIAL COURT: 405th D/C
- LAWYERS: Jonathan Landers (Defense); Heather Hudson (State)

(Background Facts): Appellant is Complainant's uncle; Appellant's brother is Complainant's father. Appellant lived with Complainant, Complainant's mother, and Complainant's father in their one-bedroom apartment during the time frame relevant to the allegations in this case. Complainant's mother began working three days a week beginning in 2011. On the days she worked, Complainant's mother left Appellant as the sole caretaker of Complainant. There were no problems initially, but beginning in March 2012 Complainant started complaining of rectal pain and began exhibiting anger and aggression towards Appellant. On May 29, 2012, Complainant — who was four years old at the time — told his mother that he did not want to stay with Appellant during the day. When asked why, Complainant replied that Appellant would put a "stick" in his "culito" — the term Complainant used to refer to his anus. Complainant's mother told his father about Complainant's outcry but Complainant's father did not believe that Appellant had sexually assaulted Complainant.1 Complainant's father refused to evict Appellant from the apartment. Complainant's mother left Complainant with Appellant the next day because she did not have anybody else to watch him, but she promptly made alternate childcare arrangements for Complainant. Appellant picked Complainant up from school one day near the end of September 2012 because the person who would normally pick Complainant up was unavailable. The next morning Complainant told his mother that Appellant had sexually assaulted him again the previous afternoon. Complainant's mother took Complainant to his pediatrician on October 2, 2012. Complainant's mother told the pediatrician that Complainant had been complaining of rectal pain for three months. The pediatrician observed that Complainant had a small tear and an area of thinning in the anus. The pediatrician believed the rectal pain was a result of constipation and prescribed a stool softener. Complainant's demeanor was normal and neither Complainant nor Complainant's mother mentioned sexual abuse at that time. Complainant's mother took Complainant to the pediatrician again on October 23, 2012, because of continuing rectal pain. During that appointment, Complainant told the pediatrician that Appellant had "put a stick in his bottom several times." The pediatrician reported the abuse to police and to Child Protective Services.

321.04 Court's Charge / Application Paragraph (Unanimity): Appellant contends that the jury charge erroneously allowed for the possibility of a non-unanimous verdict. Appellant contends that the State presented evidence of two distinct sexual assaults of Complainant. The State responds that it presented evidence of a single sexual assault that occurred around June 1, 2012. The State concedes that "[t]here was testimony at trial that [Complainant] made a second outcry of abuse, however, the nature of the outcry is not apparent from the record." Appellant concedes that he did not require the State to elect the specific criminal acts that it intended to rely upon for conviction and that he did not object to the jury charge.

Holding: We agree with Appellant that evidence of two distinct sexual assaults was presented. *** During trial, the State presented evidence from several witnesses that Complainant was sexually abused on at least two occasions: (1) when Complainant made his initial outcry to his mother at the

end of May 2012 and she arranged for alternate childcare; and (2) when Appellant picked Complainant up from school and watched him one afternoon in late September 2012. *** The State . . . argued that Complainant's medical symptoms were "consistent and contemporaneous with a child saying he is being anally raped over and over again." *** From the evidence above, the jury could have concluded that more than one incident of sexual abuse occurred. *** [The] unanimity instruction did not cure the error in the charge because it only required the jury to unanimously agree on the verdict -- not on a specific offense committed. *** We conclude that the jury charge erroneously permitted a non-unanimous verdict based on the evidence presented at trial. The trial court failed to instruct the jury in the jury charge that it needed to unanimously base its verdict on a single offense among those presented. Accordingly, the jury charge was erroneous because members of the jury may have relied on separate incidents of criminal conduct committed by Appellant to find him guilty of the offense of aggravated sexual assault of a child.

Holding (Harm Analysis): Nothing in the charge ameliorated the error. The only reference that the jury need be unanimous stated that once the jury had unanimously agreed upon a verdict, the jury foreperson would certify the verdict. *** There was little medical evidence that Complainant was sexually assaulted in or around May 2012, and no DNA evidence linking Appellant to the assault. The majority of the evidence consisted of testimony from Complainant and those who heard him describe the incident. *** From the evidence the jury heard, it is very unlikely that any member of the jury believed that the second incident took place but that the first did not. *** Although the State reinforced that there were multiple incidents, neither the State, Appellant, nor the trial court instructed the jury either that it must be unanimous or that it need not be unanimous about the specific incident underlying the jury's verdict. *** Although the jury charge in this case permitted a non-unanimous verdict, the evidence presented combined with the jury's rejection of Appellant's defense demonstrates that Appellant did not suffer actual harm.

§§ 222 Evidence / Relevancy (Bolstering): During trial, there was significant discussion about whether penetration of the anus actually occurred. Complainant's mother testified that Complainant told her that "my uncle, he puts a stick in me -- he calls it a stick -- in the middle of my rear end. He calls it his culito, the part where he does No. 2." The mother further testified that Complainant referred to a "stick in his part." Complainant's mother clarified that Complainant "calls culito the little hole where the poop poop comes out whenever he goes to use the restroom;" that Complainant was referring to his anus; and that "culito" was not referring to the "butt cheeks" but instead to "the hole. Appellant contends the trial court erred by allowing the admission of testimony from Complainant's mother that she believed Complainant's outcry.

Holding: Considering the prior testimony and potential uncertainty as to exactly what conduct Complainant's outcry encompassed, the question asked what Complainant's mother understood Complainant's outcry to be, not whether she believed the outcry. Accordingly, the question was not seeking an opinion on the truthfulness of the child and was not an attempt to elicit the response received. The trial court did not err by overruling Appellant's objection to the question. To the extent Complainant's mother responded beyond the bounds of the question, Appellant did not object to the response and has waived any error.

Ed. Note: Besides the points discussed above, Appellant raised issues which have been raised and rejected in other cases, which the Court found error had not been preserved, or which are too fact specific to be of any importance to the bench and bar. Because they offer no insight into existing law and aren't new law, they aren't discussed.

Case Name: In the Matter of J.C.

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- NATURE OF CASE: Juvenile Proceedings
- COUNTY: Fort Bend
- C/A CASE No. 14-15-00696-CV
- DATE OF OPINION: December 1, 2016
- DISPOSITION: Trial Court Affirmed OPINION: Brown, J.
- TRIAL COURT: CCL 4
- LAWYERS: Leigh Love (Defense); Gail McConnell (State)

(Background Facts): The Riverside Drive-In was robbed at gunpoint on Friday, May 2, 2014. Mr. Matthew, the Complainant and part-owner of the Riverside Drive-In, testified that the robber was a male, wearing a long-sleeved T-shirt, black pants or jeans, and his face was covered with a white cloth and a "red thing on the head."1 Complainant also testified that the robber pointed a black gun at his head, directed him to the register, and handed him a grocery bag. Complainant gave the robber all the paper money in the register, about $260 to $270. The robbery took less than a minute and occurred around 8:45 in the evening. The Riverside Drive-In's surveillance video confirmed this testimony. On the same evening, an individual parked a truck in front of Mr. and Mrs. Macha's house. Mr. Macha testified that the individual's face was covered "with a kind of reddish hat and some kind of light-colored face mask." The individual ran in the direction of the Riverside Drive-In located a third of a mile away. Thinking this behavior odd, Mr. Macha recorded the truck's license plate number and provided it to the police. The police later confirmed that the plates were registered to Appellant's father.

§§ 550.09 Sufficiency of the Evidence: Appellant, a 16-year-old juvenile at the time of the offense, lived in East Bernard with D.C., his legal guardian and paternal grandmother. Around 7:40 p.m., D.C. told Appellant to walk the dogs and take the trash to their burn pit. D.C. generally allowed Appellant to use a truck, which belonged to his father, to take the trash. Appellant left to complete his chores and returned in time to watch a 9:00 p.m. television show. The next morning, Saturday, May 3, 2014, D. C. noticed that both Appellant and the truck were missing. Appellant did not have D.C.'s permission to leave home or take the truck. D.C. tried contacting Appellant, but he did not answer her calls. On Sunday, May 4, D.C. reported Appellant as a missing runaway. Later on May 4, Appellant contacted D.C. and told her he was with his girlfriend and on the river in New Braunfels. D.C. told Appellant that he needed to come home with the truck. Appellant did not comply.

Holding: The State presented no direct evidence identifying the man who robbed Complainant; however, there was sufficient circumstantial evidence to prove identity of the perpetrator here. *** Appellant left the house to complete his chores around the time the robbery occurred. The evidence indicated that the green truck -- of which Appellant had possession -- was connected to the robbery. On the night the robbery occurred, the truck registered to Appellant's father was parked near the Riverside Drive-In. There was testimony that the truck's driver wore a white cloth to conceal his face, like the robber concealed his face, and like Appellant concealed his face three days later when police located him. The robber used a black gun and Appellant was in possession of a black BB gun. Appellant's complaint about the inconsistency in Complainant's testimony about the color of the robber's skin does not undermine legal sufficiency here. *** The jury could reasonably infer that it was Appellant who robbed Complainant at the Riverside Drive-In with a deadly weapon, and any rational trier of fact could find the elements of an aggravated robbery beyond a reasonable doubt.

§§ 31.041 Search & Seizure / Warrantless Searches / Search Incident to Arrest: On May 5, Officer Bettice and Corporal Spence of the New Braunfels Police Department saw Appellant sitting on the street curb wearing a white T-shirt wrapped around his head. Corporal Spence identified Appellant and ran his name through dispatch. Corporal Spence learned that Appellant was listed on the National Crime Information Center (NCIC) as a runaway child. The NCIC database described Appellant as endangered because he was bipolar and off his medicine. Appellant was in possession of his father's truck. After officers made contact with Appellant, they attempted to contact an adult responsible for him. After about forty minutes, officers decided to transfer Appellant to the Juvenile Probation Office. Pursuant to a pat-down, the officers seized a black BB gun from Appellant and testified that it looked like a realistic handgun. Detective White testified that the BB gun could be a deadly weapon and cause serious bodily injury if it discharged into a person's eye. Appellant contends that the trial court erred in denying his motion to suppress the evidence, specifically Appellant's BB gun that policeseized following the pat-down.

Holding: [The] police officers who seized Appellant testified during the suppression hearing that they were made aware that Appellant: was age 16; left his grandmother's home without her permission; took the truck without permission; was absent for at least one night; was located roughly 150 miles away from home; and, during his absence, was "off his meds and using drugs," and covered his face and head with a shirt or towel on a hot day. The police officers also knew Appellant was in the NCIC runaway database. Considering the evidence, we hold that the trial court would not have abused its discretion in finding that Appellant was missing for a substantial length of time and that the police officers had probable cause to take Appellant into custody under Section 52.01 of the Texas Family Code. The pat-down was therefore lawful and the BB gun was admissible. The trial court did not abuse its discretion in denying Appellant's motion to suppress the BB gun.

Ed Note: The Court of Appeals also found that the trial court could have reasonably concluded that the probative value of presenting testimony and demonstrative evidence regarding the BB gun was not substantially outweighed by unfair prejudice and it did not abuse its discretion in admitting the evidence.

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On the cover: Yelberton Abraham ("Y.A.") Tittle Jr. - then with the San Francisco 49ers.