

# Juvenile Law Section

STATE BAR OF TEXAS



Volume 28, Number 4 December 2014

Visit us online at  
[www.juvenilelaw.org](http://www.juvenilelaw.org)



NEWSLETTER EDITOR  
**Associate Judge Pat Garza**  
 386<sup>th</sup> District Court  
 San Antonio, Texas

## OFFICERS AND COUNCIL MEMBERS

### Laura Peterson, Chair

Humphreys & Peterson PLLC  
 5502 Broadway, Garland, TX 75043

### Kevin Collins, Chair-Elect

Vogue Building, 600 Navarro, Ste. 250  
 San Antonio, TX 78205

### Riley Shaw, Treasurer

Tarrant County District Attorney's Office  
 401 W. Belknap  
 Ft. Worth, TX 76196

### Kameron Johnson, Secretary

Travis County Public Defender's Office  
 P.O. Box 1748  
 Austin, TX 78767

### Richard Ainsa, Immediate Past Chair

Juvenile Court Referee, 65<sup>th</sup> District Court  
 6400 Delta Drive, El Paso, TX 79905

### **Terms Expiring 2015**

Ann Campbell, Houston  
 Michael O'Brien, Dallas  
 Kaci Sohr, Austin

### **Terms Expiring 2016**

Kin Brown, Ft. Worth  
 Anne Hazlewood, Lubbock  
 Lisa Capers, Austin

### **Terms Expiring 2017**

Patrick Gendron, Bryan  
 Jill Mata, San Antonio  
 Mike Schneider, Houston

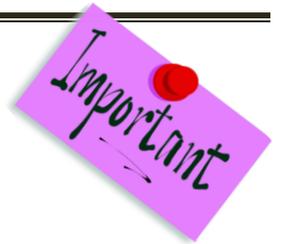
## QUICK LINKS

- [Juvenile Law Section Website](#)
- [Nuts and Bolts of Juvenile Law](#)
- [State Bar of Texas Website](#)
- [State Bar of Texas Annual Meeting](#)
- [Texas Bar CLE](#)

Dear Juvenile Law Section Members:

Welcome to the e-newsletter published by the Juvenile Law Section of the State Bar of Texas. Your input is valued so please take a moment to [email us](#) and provide us with any important information you would like included in the next issue.

The "Review of Recent Cases" includes cases that are hyperlinked to Casemaker, a free service provided by [TexasBarCLE](#). To access these opinions, you must be a registered user of the [TexasBarCLE](#) website, which requires creating a password and log-in. If you do not wish to receive emails from TexasBarCLE, you can opt-out of their email list.



## TABLE OF CONTENTS

<a href="#">Editor's Foreword</a> .....	2
<a href="#">Robert O. Dawson Juvenile Law Conference</a> .....	3
<a href="#">Chair's Message</a> .....	4
<a href="#">Review of Recent Cases</a> .....	5

### By Subject Matter

<a href="#">Confessions</a> .....	5
<a href="#">Determinate Sentence Transfer</a> .....	7
<a href="#">Disposition Proceedings</a> .....	9
<a href="#">Restitution</a> .....	12
<a href="#">Trial Procedure</a> .....	14

### By Case

<a href="#">B.S.P., In the Matter of</a> , MEMORANDUM, No. 04-14-00067-CV, 2014 WL 5464072 Juvenile Law Newsletter ¶ 14-4-6 (Tex.App.-San Antonio, 10/29/14) .....	5
<a href="#">Burt v. State</a> , No. PD-1563-13, --- S.W.3d ---, 2014 WL 5248051 Juvenile Law Newsletter ¶ 14-4-5 (Tex.Crim.App., 10/15/14) .....	12
<a href="#">E.A., In the Matter of</a> , No. 08-12-00183-CV, --- S.W.3d ---, 2014 WL 4100710 Juvenile Law Newsletter ¶ 14-4-3 (Tex.App.-El Paso, 8/20/14) .....	14
<a href="#">J.M.S.M., In the Matter of</a> , MEMORANDUM, No. 13-13-00353-CV, 2014 WL 4952763 Juvenile Law Newsletter ¶ 14-4-4 (Tex.App.-Corpus Christi, 10/2/14) .....	7
<a href="#">Turner v. State</a> , No. PD-1354-13, --- S.W.3d ---, 2014 WL 4627233 Juvenile Law Newsletter ¶ 14-4-1 (Tex. Crim. App., 9/17/14) .....	9
<a href="#">Womack v. State</a> , MEMORANDUM, No. 12-14-00019-CR, 2014 WL 4637968 Juvenile Law Newsletter ¶ 14-4-2 (Tex.App.-Tyler, 9/17/14) .....	10

## EDITOR'S FOREWORD By Associate Judge Pat Garza

It seems like just the other day I was talking with Jill Mata about her new position as Chief of the Juvenile Law Section of the Bexar County District Attorney's Office. You see, I had been in that same position some sixteen years earlier and thought I would impart some of that savvy wisdom one thinks they possess simply by experiencing something before someone else. Well, that was fifteen years ago, 1999. Now, fifteen years later Jill Mata has decided to leave the District Attorney's Office and begin her new career with the Juvenile Justice Department in Austin.

What a fifteen year career. A few years after becoming Chief, Jill received her board certification in Juvenile Law. That was 2001, the first year such a certification was offered. She has served on the State Bar of Texas Juvenile Law Section Board and in 2012 was elected Chair of that Board. In Texas, among her accolades, was serving on the Texas Board of Legal Specialization, Juvenile Law Advisory Commission. Nationally, she was selected to be a member of the Juvenile Prosecutor Leadership Network, which is a part of the National Resource Center for Juvenile Prosecutors housed at Georgetown University's Public Policy Institute in Washington, DC.

Jill Mata is my close friend, and has been for more years than either one of us want to admit. We have been a sounding board for each other for many, many, years. Not just regarding our jobs, but even regarding our families. It is clear that Jill is a gifted and talented lawyer. But her greatest asset is her friendship. Without trying to get too personal, I consider myself one of many who consider themselves fortunate to have met such a special person. Although we may be separated by time and distance in the interim, nothing will diminish the impact she has made here. Bexar County's loss is Texas' gain. I know she'll do well; nonetheless, she will be missed here. Good luck Jill, and if you need a board to sound off on, you have my number.

**Once again, thank you Brian Fischer and the Houston Bar Association, Juvenile Law Section.** The Board of the Houston Bar Association has once again authorized a \$5,000.00 donation from the HBA Juvenile Law Section account to the State Bar of Texas Juvenile Law Section TJJD Scholarship Fund. This will be the second year in a row that the HBA Juvenile Law Section has donated \$5,000.00 to the Scholarship Fund. Well done!

**28th Annual Robert Dawson Juvenile Law Institute.** The Juvenile Law Section's 28th Annual Juvenile Law Conference will be held February 16-18, at the Worthington Hotel in Ft. Worth, Texas. Chair-Elect Kevin Collins and his planning committee have put together an excellent and practical conference. The conference flyer is included in the newsletter, but may also be found online at [www.juvenilelaw.org](http://www.juvenilelaw.org).

**Officer and Council Nominees.** The Annual Juvenile Law Section meeting will be held in Fort Worth, Texas on February 16, 2015, in conjunction with the Juvenile Law Conference. The Juvenile Law Section's nominating committee submitted the following slate of nominations:

Kevin Collins, Chair  
Riley Shaw, Chair-Elect  
Kameron Johnson, Treasurer  
Kaci Singer, Secretary  
Laura Peterson, Immediate Past Chair

**Council Members: Terms Expiring 2018**

William (Bill) Cox, El Paso  
Patricia Cummings, Round Rock  
Michael O'Brien, Dallas

Nominations from the floor during the meeting will be accepted. If you have someone that you would like to nominate from the floor, contact the Chair of the Nominations Committee, Richard Ainsa, at (915) 849.2552 or [rainsa@epcounty.com](mailto:rainsa@epcounty.com).

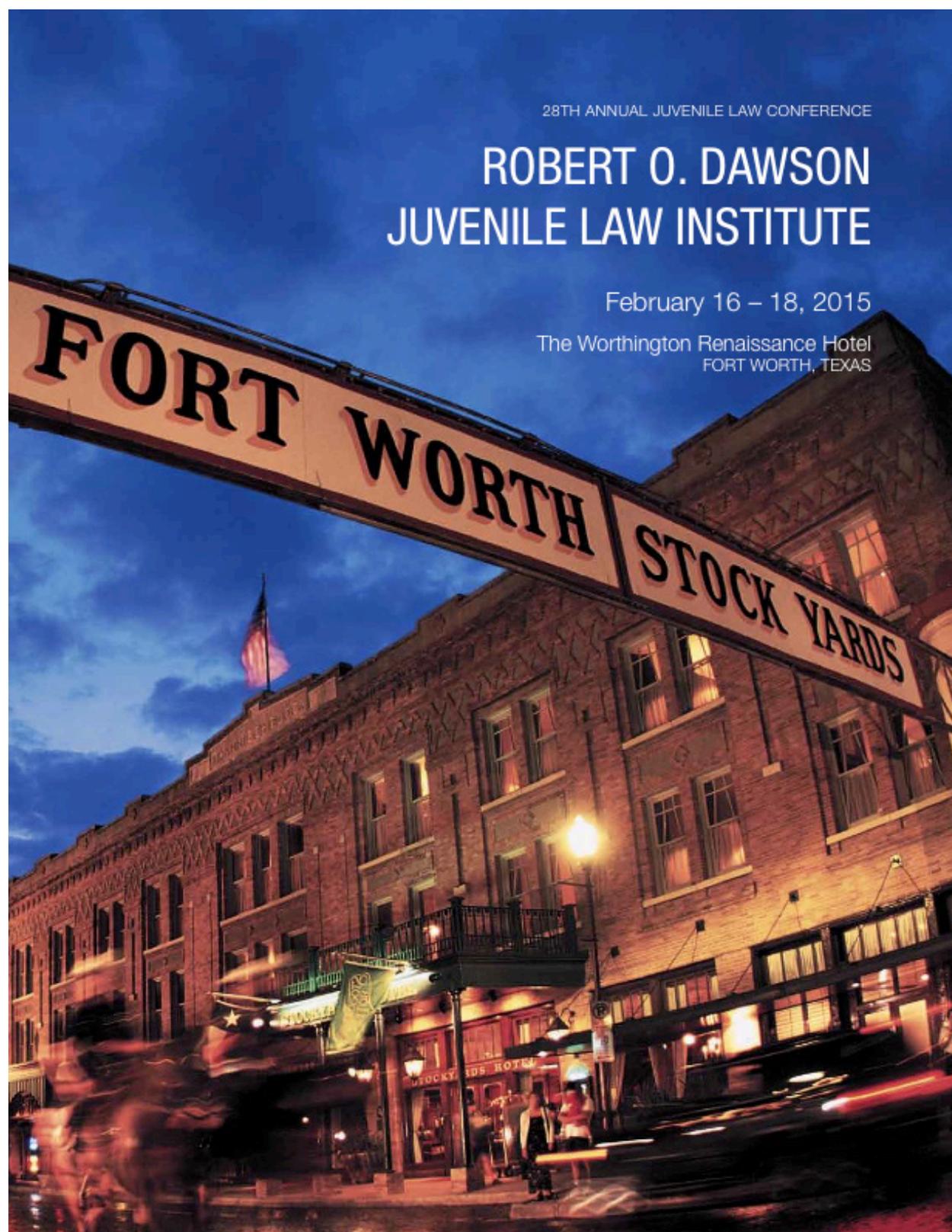
---

*We are afraid to care too much; for fear that the other person does not care at all.*

*Eleanor Roosevelt*

---

**28<sup>TH</sup> ROBERT O. DAWSON JUVENILE LAW INSTITUTE, February 16-18, 2015 Fort Worth, TX**  
[\[CLICK THE IMAGE BELOW TO GO TO THE FULL CONFERENCE BROCHURE ONLINE.\]](#)



28TH ANNUAL JUVENILE LAW CONFERENCE

# ROBERT O. DAWSON JUVENILE LAW INSTITUTE

February 16 – 18, 2015

The Worthington Renaissance Hotel  
FORT WORTH, TEXAS

## CHAIR'S MESSAGE By Laura A. Peterson

"Courage is not a man with a gun in his hand. It's knowing you're licked before you begin but you begin anyway and you see it through no matter what. You rarely win, but sometimes you do." - spoken by Atticus Finch.

"It was times like these when I thought my father, who hated guns and had never been to any wars, was the bravest man who ever lived." – Scout.

*To Kill a Mockingbird* by Harper Lee

This is my last message to you as Chair and with the holidays fast approaching, I find myself reflecting on the Juvenile Section and the practice of juvenile law. It takes a certain kind of attorney to enter into this practice. We are advocates but also counselors. We are called to think outside the box, to make a difference and change the path of our client's lives. And perhaps this creativity and the willingness of prosecutors, judges and defense attorneys to do out of the box thinking has led to our success as we have seen juvenile crime decrease nearly 60% nationwide since its zenith in the mid-90's. Less crime has allowed us to have loftier goals. We are allowed to focus on probation programs that help entire families, our client's education issues, specialty courts to avoid prosecution, sealing records so kids can go on to lead exemplary lives, and removing children from sex offender registries. It is the belief that we can make a difference that binds us together.

And frankly, having a good sense of humor helps too. Here is an excerpt from the testimony of a nine-year-old boy in a criminal case that I stole from Jerry Buchmeyer:

Q. Henry, do you remember what I told you about testifying today? Do you remember I talked to you about being on the witness stand?

A. Yes.

Q. What did I tell you is the most important thing to do? You remember what I said about telling the truth?

A. Yes.

Q. What did I tell you about that? What did I tell you, Henry?

A. To sit up straight.

Sound familiar? You would be hard pressed to find a seasoned juvenile attorney who did not have a similar story. Let's face it, children are just different. But representing them and their rights is no less important than if our clients were proficient in the law. According to the Texas Lawyer's Creed, which marks its 25th anniversary this year, we are "responsible to assure that all persons have access to competent representation regardless of wealth or position in life." And if we do not believe the measure of our profession is marked by how we represent the least of us, then what measure should we use? Being a lawyer is a profession. It is a high calling that allows us to make a difference. I am proud to have served as the Chair of a Section that includes so many extraordinary people who are also outstanding lawyers.

I will serve on the board for one more year as your immediate past president after February's election. I look forward to this position and my ongoing work from a new vantage point. I want to thank the members for allowing me this term as Chair, my tenure on the Council and my involvement with this Section. It has been a remarkable journey.

### Section News

The 28th Annual Juvenile Law Conference will be held February 16-18, 2015 at the Worthington Renaissance Hotel in Fort Worth, Texas. We are excited about our new location and new format for the conference. We are bringing some of the best speakers together to talk about the latest trends in the law and the issues that affect juveniles. Special thanks to Kevin Collins, Course Director, for his vision and leadership in putting this conference together. We hope to see you there!

Through the generosity of the Houston Bar Association Juvenile Section we have received another donation in the amount of \$5,000.00 for our scholarship fund. This brings Houston's 2014 total to \$10,000.00. Again, they are challenging all other Bar Associations to provide donations to this worthy cause. Our main fundraiser for the scholarship

fund is the auction which takes place in conjunction with the annual conference. Check out the annual conference brochure for ways you can participate. If nothing else, plan to attend the reception and silent auction. If you have heard our scholarship recipients speak in the past, you know how much this money means to them and their futures. Odessa Bradshaw and her staff from the Texas Board of Legal Specialization will be at the annual conference to talk about becoming board certified in juvenile law. All of your questions can be answered in this informal seminar. We are hopeful that many of our members will consider taking the board certification exam this year. If you feel you are qualified but do not match the specifications exactly, then I encourage you to talk with Odessa or one of the many board certified attorneys at the conference. TBLS will consider applications that do not match the specifications if you state why you are qualified. Every application will be given serious consideration. We are also making plans to specially recognize all of our board certified members at our conferences.

Our web site [www.juvenilelaw.org](http://www.juvenilelaw.org) has gotten a much needed facelift. Check it out. We are working on adding and editing forms and articles, so we need a little patience during this effort. We think our new site will bring you the information you need for your practice in a better format. One of the new features will be a one stop shopping place for all juvenile related CLE's around the State. If you have an upcoming CLE, please send us a copy of your brochure so we can post it to our site. Special thanks to Patrick Gendron and Kaci Singer for their leadership on this effort. The Section is only as strong as its members and we thank you for your continued and welcomed support.

## REVIEW OF RECENT CASES

### CONFESSIONS

#### **THREATS BY VICTIM'S MOTHER REGARDING SEXUAL ASSAULT ALLEGATIONS WHILE HOLDING A BAT AND PROMISING TO NOT CALL POLICE, THEN CALLING THEM, DID NOT MAKE JUVENILE'S STATEMENT INVOLUNTARY.**

¶ 14-4-6. **In the Matter of B.S.P.**, MEMORANDUM, No. 04-14-00067-CV, 2014 WL 5464072 (Tex.App.-San Antonio, 10/29/14).

**Facts:** On June 17, 2012, at around 11:00 p.m., the complainant, who was eleven years old, told his mother that he had been sexually assaulted by B.S.P., who was sixteen years old. The complainant and his mother were living with B.S.P. and his family. The assault had occurred two days earlier. After hearing the details of the assault, the complainant's mother decided to talk to B.S.P.'s mother about the assault. After learning of the complainant's allegation, B.S.P.'s mother awakened B.S.P., who was asleep in his bedroom. B.S.P. and his mother then went to the dining room to talk to the complainant's mother, who asked B.S.P. if he knew anything about the assault and if he had in fact assaulted the complainant.

Witnesses offered somewhat different accounts of the exchange that took place between the complainant's mother and B.S.P. Nevertheless, it was undisputed that, at some point, B.S.P. asked the

complainant's mother whether she would call the police if he told her what happened, and the complainant's mother said she would not call the police. B.S.P. then stated, "Okay, yeah, I did. I did it." Thereafter, both B.S.P.'s grandmother and the complainant's mother called 9-1-1 and the police were dispatched to the residence to investigate.

At the suppression hearing, B.S.P. challenged the admissibility of his statement, "Okay, yeah, I did. I did it." B.S.P. argued his statement should be suppressed because it was involuntary. The trial court disagreed, explained its ruling on the record, and denied the motion to suppress. Written findings of fact were not requested or filed. The matter was subsequently tried to a jury, which was instructed that it should not consider B.S.P.'s statement unless it believed beyond a reasonable doubt that the statement was freely and voluntarily made. The jury found that B.S.P. engaged in delinquent conduct as alleged by the State. B.S.P. appealed.

**Held:** Affirmed.

**Memorandum Opinion:** Juvenile proceedings are quasi-criminal in nature. Therefore, when analyzing juvenile proceedings, courts sometimes consider analogous cases in similar adult proceedings. At a suppression hearing, the burden of proof is on the State to prove by a preponderance of the evidence that the challenged statement was given voluntarily. In

considering the voluntariness of a juvenile's statement, we examine the totality of the circumstances. If the circumstances show the juvenile was threatened, coerced, or promised something in exchange for the confession, the confession is involuntary.

B.S.P. first argues his statement, "Okay, yeah, I did. I did it," was involuntary because it was induced by a promise from the complainant's mother that she would not call the police. B.S.P. acknowledges that most cases challenging the voluntariness of statements or confessions involve statements made to police officers or their agents. However, B.S.P. points out that the voluntariness of a statement or confession may also be challenged when it is induced by a promise made by a person other than a police officer, provided that the person is a person in authority. B.S.P. maintains that his statement to the complainant's mother was involuntary because it was induced by her promise not to call the police.

In order for the statement of an accused to be involuntary because it was induced by a promised benefit, the promise must: (1) be of some benefit to the defendant; (2) be positive; (3) be made or sanctioned by a person in authority; and (4) be of such character as would be likely to influence the defendant to speak untruthfully. As to the third factor, whether the person making the promise is a person in authority, courts consider the actual relationship between the parties as it appeared to the person making the statement. As to the fourth factor, whether the promise was of such character as would be likely to influence the defendant to speak untruthfully, courts consider whether the circumstances of the promise made the defendant inclined to admit to a crime he had not committed. "[I]f the influence applied was such as to make the defendant believe his condition would be bettered by making a confession, true or false, then the confession should be excluded." *Fisher*, 379 S.W.2d at 902.

Even if we assume that the first two factors described in *Fisher* were satisfied here, the third and fourth factors were not. The evidence showed that the complainant's mother was a family friend and a guest in the house belonging to B.S.P.'s family. At the time B.S.P. made the statement, B.S.P. was seated at the table in his own home. His mother and grandmother were seated next to him. B.S.P. initially refused to answer the questions posed by the complainant's mother and later expressed anger toward her. This evidence shows that, as it appeared to B.S.P., the complainant's mother was not a person in authority. Moreover, given the circumstances under which the promise was made, including the presence of others who could have called the police, it was unlikely to have influenced B.S.P. to speak untruthfully. For these reasons, we conclude that B.S.P.'s statement was not involuntary because it was induced by a promised benefit.

B.S.P. next argues his statement was involuntary because he was threatened or coerced by the complainant's mother. In support of this argument, B.S.P. cites to article 38.22, section 6, of the Texas Code of Criminal Procedure, which provides, in part, "In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions." TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6 (West Supp.2014). Fact scenarios raising a state-law claim of voluntariness have included the following: (1) the suspect was ill and on medication and that fact may have rendered his confession involuntary; (2) the suspect was mentally retarded and may not have knowingly, intelligently, and voluntarily waived his rights; (3) the suspect lacked the mental capacity to understand his rights; (4) the suspect was intoxicated, and he did not know what he was signing and thought it was an accident report; (5) the suspect was confronted by the brother-in-law of his murder victim and beaten; and (6) the suspect was returned to the store he broke into for questioning by several persons armed with six-shooters. Youth, intoxication, mental retardation, and other disabilities are usually not enough, by themselves, to render a statement inadmissible under Article 38.22. However, they are factors that a jury, armed with a proper instruction, is entitled to consider.

According to B.S.P., his "youth, his mental impairment, and the effects of his prescription medication, and [the complainant's mother]'s severely threatening demeanor and language, followed by her promise not to call the police, coalesced into a forced confession." In making this argument, B.S.P. points to the evidence regarding his emotional and mental condition, his medical history, and the complainant's mother's behavior during the confrontation.

As to B.S.P.'s emotional and mental condition, a psychologist stated in a report that B.S.P. "presents as much younger than his stated age of 17." As to B.S.P.'s medical history, B.S.P.'s mother testified that B.S.P. suffered a brain injury at birth. As a result, B.S.P. was placed in special education-type classes. B.S.P. took medication for his brain injury and a sedative at night to help him sleep. B.S.P. also experienced seizures when he was fourteen and this caused him to regress developmentally. However, B.S.P. was not mentally retarded. B.S.P. attended school on a regular basis and knew right from wrong.

As to the complainant's mother's behavior during the confrontation, B.S.P.'s grandmother testified that the complainant's mother was extremely angry, very hostile, and her whole presence was threatening. The complainant's mother was screaming at B.S.P. and telling him she was "going to fucking kill [him]." She was holding a bat. B.S.P. was extremely disoriented

because he had taken sleeping pills that night and was awakened from a drug-induced sleep. After B.S.P. woke up, he was “scared to death” and “terrorized” by the complainant's mother. However, even according to B.S.P.'s grandmother, the complainant's mother never hit or punched B.S.P., and she never pushed him to the ground. At one point, when B.S.P. came around the table to where the complainant's mother was standing, the complainant's mother turned, bumped into B.S.P., and he lost his balance and fell.

On the other hand, the complainant's mother testified that she was not holding a bat when she confronted B.S.P. She denied that she verbally or physically threatened B.S.P. She further denied that she shoved or hit B.S.P. She touched B.S.P.'s shirt one time. This happened when she lunged across the table and grabbed B.S.P.'s shirt. In response, B.S.P. pulled away from her and fell off the bench where he was sitting. However, this happened after B.S.P. admitted to the sexual assault.

At a suppression hearing, the trial court is the sole trier of fact. It may choose to believe or disbelieve any or all of a witness's testimony.

**Conclusion:** In light of the inconsistent evidence regarding B.S.P.'s impairments and the complainant's mother's behavior, the trial court acted within its discretion in finding that B.S.P.'s statement was not involuntary as a matter of law because of threats or coercion. Furthermore, the jury was later instructed that it should not consider B.S.P.'s statement unless it believed beyond a reasonable doubt that the statement was freely and voluntarily made. We hold that the trial court did not abuse its discretion in denying the motion to suppress. The trial court's judgment is affirmed.

## DETERMINATE SENTENCE TRANSFER

**SINCE THE TRANSFER HEARING IS A “SECOND CHANCE HEARING” AND NOT PART OF THE GUILT/INNOCENCE DETERMINATION EXTENSIVE DUE PROCESS REQUIREMENTS OF AN ACTUAL TRIAL ARE NOT REQUIRED.**

¶ 14-4-4. **In the Matter of J.M.S.M.**, MEMORANDUM, No. 13-13-00353-CV, 2014 WL 4952763 (Tex.App.-Corpus Christi, 10/2/14).

**Facts:** When he was sixteen years old, J.M.S.M. was adjudicated delinquent for the offense of engaging in delinquent conduct, namely knowingly and intentionally possessing, with intent to deliver, a controlled substance—cocaine in an amount by aggregate weight including adulterants and dilutants, of more than 400 grams. See TEX. HEALTH & SAFETY CODE ANN. § 481.112 (West, Westlaw through 2013 3d C.S.).

The trial court committed J.M.S.M. to the TJJD for a determinate sentence of eight years, subject to transfer to the TDCJ for the completion of his determinate sentence. See TEX. FAM.CODE ANN. § 53.045 (West, Westlaw through 2013 3d C.S.). Before J.M.S.M. reached his nineteenth birthday, the State filed a motion seeking J.M.S.M.'s release from the TJJD and transfer to the TDCJ. On May 23, 2013, the trial court, sitting as a juvenile court, held J.M.S.M.'s transfer hearing.

The State called Leonard Cucolo as its witness. Cucolo testified that he was employed by the TJJD as a court liaison and that his principal responsibility was to provide the trial court with case files and summary reports on youths being considered for either parole or prison. Regarding his report on J.M.S.M., Cucolo testified as to J.M.S.M.'s age, the offense for which he was committed, when he was committed to TJJD, and the sentence he received. Cucolo also discussed J.M.S.M.'s participation at the Orientation and Assessment Unit, his assessed needs, and where he was placed—the Evins Regional Juvenile Center—to address those needs. Regarding J.M.S.M.'s education, Cucolo testified that J.M.S.M. received eleven of twenty-two credits necessary for a high school diploma, performing inconsistently in his courses—doing well in some and failing others. According to Cucolo, J.M.S.M. did not pass all subject areas when he tested for a GED the preceding January. J.M.S.M. did complete the alcohol and drug treatment program, a moderate level aggressive retraining program, and the gang intervention curriculum. Cucolo then answered questions regarding the CoNextions Program, a five-stage program that manages and evaluates a youth's progress on a monthly cycle throughout his stay. The stages of the program build on one another and have different treatment objectives. Cucolo explained that between July 2011 and October 2012, J.M.S.M. advanced through the first three stages of the program. J.M.S.M. was promoted to stage four in October and had not yet been promoted to the final stage of the program. According to his review of the records, Cucolo testified that J.M.S.M. was retained at stage four every month for the past seven months because of “a variety of inconsistent effort on [his] individual case plan, inconsistent effort in behavior, and maintaining behavior.”

Cucolo testified that J.M.S.M. had thirty-eight documented incidents of misconduct since being committed to TJJD, thirty-five of which were security referrals (two self-referrals) and seventeen of which resulted in actual placements in the security unit. He explained that the majority of the incidents were for disruption of the program—for example, not participating in the program or not following staff instructions. But according to Cucolo, J.M.S.M. had a variety of major rule violations over time, including tattooing, fleeing apprehension, vandalism, assaults,

fighting, and threatening staff and other youths. Cucolo testified that J.M.S.M. “has been engaging in a lot of delinquent conduct that he was engaging in prior to his commitment up until a couple of months ago, even last month. So this has really kind of indicated to us that he is just not parole ready.”

According to Cucolo, if a youth has engaged in three or more major rule violations, an informal (level 2) hearing is held, and if those violations are found to be true, the youth can be sanctioned. J.M.S.M.'s last level 2 hearing was in April 2013 and was for fighting. Cucolo explained that this occurred after J.M.S.M. had completed the aggression replacement therapy and the gang intervention curriculum. Cucolo continued,

And with our criteria when we look at youth for return to court, if the youth has engaged in three or more major rule violations that's been confirmed through a level 2 hearing, then they're meeting the criteria for transfer. [J.M.S.M.] has five. He has multiple rule violations that he's engaged in. And as a result of that, that's pretty much why we're kind of making the recommendation we are today.

When asked what the TJJD was recommending for J.M.S.M., Cucolo responded as follows:

Well, we're recommending that [J.M.S.M.] be transferred to the Institutional Division of the Texas Department of Criminal Justice for the remainder of his sentence ... because of what we just talked about, that he's not ready to be released to parole. He's having difficulty—even up until now—following even the basic rules, following staff instructions. And that's within a highly structured setting with staff providing the necessary supervision for him. He's engaged in several new offenses while he's been confined. He has had the benefit of multiple interventions. And they have not really impeded his behavior. And he has not reduced, we believe, his risk to the community if he is released.

On cross-examination, Cucolo testified that J.M.S.M. did not have a relationship with his mother, who had returned to Mexico. He did not know about any relationship J.M.S.M. had with his three older siblings or his father, who, according to defense counsel, had died. And as summarized by J.M.S.M. on appeal, on cross-examination Cucolo also testified as follows: (1) he was aware of J.M.S.M.'s previous delinquent history; (2) in preparing his report, he reviewed written documentation submitted in March 2013 by J.M.S.M.'s school, including, among others, psychological evaluations, behavior summaries, and academic assessments by staff; (3) the referenced violations could be considered misleading because they involved only one “probation”; and (4) in preparing his report, he did not speak to J.M.S.M., his mother, case manager, teachers, or uncle. Cucolo also explained that he had no personal knowledge of any of J.M.S.M.'s incidents of misconduct and had to rely on the reports

of other staff and that he could not identify which events were assaults and which were fights. Cucolo also agreed that in the 700 days that J.M.S.M. had been at the TJJD, he only had thirty-eight incidents of misbehavior.

Without objection, the trial court admitted Cucolo's April 22, 2013 report as State's Exhibit 1. Case Manager III Ismelda Huerta prepared a second report sometime after April 2013. Huerta's report summarized J.M.S.M.'s behavior over the preceding ninety days. This second report provided information that was consistent with Exhibit 1 and Cucolo's testimony. The trial court admitted Huerta's behavior summary as State's Exhibit 2.

J.M.S.M. called Esther Olivia Castillo and Alfredo Yanez to testify on his behalf. Castillo, J.M.S.M.'s aunt, testified that she was willing to house and assist J.M.S.M. if paroled. Yanez testified that he was prepared to offer J.M.S.M. a job. Through these witnesses, the trial court admitted (1) two letters of reference from J.M.S.M.'s teachers; (2) one letter of reference from a juvenile correction officer; (3) a participation ribbon in volleyball; and (4) a ribbon and a certificate recognizing his participation in the Relay for Life Run.

At the conclusion of the hearing, the trial court ordered J.M.S.M. transferred to TDCJ for completion of his original sentence. See TEX. HUM. RES.CODE ANN. §§ 244.014, 244.151(c) (West, Westlaw through 2013 3d C.S.); TEX. FAM.CODE ANN. § 54.11(i)(2) (West, Westlaw through 2013 3d C.S.). J.M.S.M. appeals from the trial court's transfer order. See TEX. FAM.CODE ANN. § 56.01(c)(2) (West, Westlaw through 2013 3d C.S.).

**Held:** Affirmed.

**Memorandum Opinion:** By his first issue, J.M.S.M. contends that the trial court erred in allowing Cucolo to testify to records that were testimonial in nature. He asserts “the State introduced this evidence in violation of the Confrontation Clause” when Cucolo “testified to records pertaining to conduct of [J.M.S.M.] to which he had no personal knowledge and was testimonial in nature because it presented the impressions contained in the reports.” He also complains of evidence of other crimes, wrongs, or acts by J.M.S.M. that the State offered, apparently through Cucolo's report or his testimony. Finally, J.M.S.M. asserts that the evidence is barred by the hearsay rule.

Section 54.11 of the Texas Family Code governs release or transfer proceedings involving juveniles. See TEX. FAM.CODE ANN. § 54.11. And at a transfer hearing, “the court may consider written reports from probation officers, professional court employees, professional consultants, or employees of the [TJJD], in addition to the testimony of witnesses.” Id. § 54.11(d); In re F.D.,

245 S.W.3d 110, 113 (Tex.App.-Dallas 2008, no pet.). The transfer hearing is a “second chance hearing” after a child, such as J.M.S.M., has already been sentenced to a determinate number of years. In re F.D., 245 S.W.2d at 113. It is not part of the guilt/innocence determination and need not meet the extensive due process requirements of an actual trial. Id. (explaining that a juvenile has no right of confrontation at a transfer hearing because it is dispositional rather than adjudicative in nature); In re D.S., 921 S.W.2d 383, 387 (Tex.App.-Corpus Christi 1996, writ dismissed w.o.j.).

The trial court considered the written report prepared by an employee of the TJJ and heard Cucolo's testimony. See TEX. FAM.CODE ANN. § 54.11(d); In re F.D., 245 S.W.3d at 113. Cucolo testified at the transfer hearing. He testified as a TJJ employee and described himself as its court liaison who provides trial courts with case files and summary reports on youths being considered for either parole or prison. Cucolo answered questions about information that was contained in his written report. The trial court also considered Huerta's behavior summary, a second report that provided similar information.

**Conclusion:** Because the legislature has determined that such evidence may be considered in transfer hearings, the trial court acted with reference to guiding principles or rules. See In re D.L., 198 S.W.3d at 229; In re J.L.C., 160 S.W.3d at 313. Having reviewed the entire record, we conclude the trial court did not abuse its discretion when it allowed Cucolo to testify and when it admitted the reports. See In re S.M., 207 S.W.3d 421, 424–25 (Tex.App.-Fort Worth 2006, pet. denied); In re D.L., 198 S.W.3d at 230. We overrule J.M.S.M.'s first issue.

## DISPOSITION PROCEEDINGS

### JUVENILE SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE MAY BE REFORMED TO LIFE WITH THE POSSIBILITY OF PAROLE WITHOUT A REMAND FOR AN INDIVIDUALIZED SENTENCING HEARING.

¶ 14-4-1. **Turner v. State**, No. PD-1354-13, --- S.W.3d ---, 2014 WL 4627233 (Tex.Crim.App., 9/17/14).

**Facts:** Appellant was convicted of capital murder and sentenced to life in prison without the possibility of parole. While appellant's appeal was pending, the United States Supreme Court decided *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), in which it held that the Eighth Amendment to the United States Constitution forbids a sentencing scheme for juvenile offenders in which life without parole is mandatory rather than based upon an individualized sentencing assessment.

Citing *Miller*, appellant argued before the court of appeals that his punishment violated the Eighth Amendment because he was under the age of eighteen at the time of the offense. The State conceded that *Miller* applied and that appellant should be re-sentenced. The court of appeals agreed that *Miller* applied and was controlling and that the sentencing statute was unconstitutional as applied to appellant. Both parties prayed for a remand for a new sentencing hearing, and the court of appeals agreed, and reversed the trial court's judgment as to punishment and remanded for a new sentencing hearing “in accordance with *Miller* and state law as recently revised in response to *Miller*.” *Turner v. State*, 414 S.W.3d 791, 799–800 (Tex.App.-Houston [1st Dist.] 2013)(citing amendments to Texas Penal Code § 12.31(a)(1) which now provides for sentencing in a capital case for “life, if the individual committed the offense when younger than 18 years of age”).

Appellant filed a petition for discretionary review contending, in part, that he is entitled, under the rationale of *Miller*, to an individualized sentencing hearing with a sentencing range of between 5 and 99 years to life. He asks this Court to direct the court of appeals to order such a hearing in the trial court on remand.

**Held:** Affirmed as modified

**Opinion:** The Court recently decided *Lewis v. State* and *Nolley v. State*, PD-0833-12 and PD-0999-13 slip op. (Tex.Crim.App. April 30, 2014). The juvenile offenders in those cases were both sentenced to mandatory life without the possibility of parole. The courts of appeals in both cases affirmed the convictions but reformed the sentences to life imprisonment under *Miller*. We granted review in both cases to decide whether, under *Miller*, a juvenile offender is entitled to an individualized sentencing proceeding when faced with a sentence of life with the possibility of parole. The Court consolidated the cases and issued one opinion holding that *Miller* is limited to a prohibition on mandatory life without parole for juvenile offenders; thus, juvenile offenders sentenced to life with the possibility of parole are not entitled to individualized sentencing under the Eighth Amendment. The Court affirmed the judgments of the courts of appeals. Thus, contrary to appellant's argument, he is not entitled to an individualized sentencing hearing. He is only entitled to have his sentence reformed from life without parole to life with the possibility of parole. *Lewis/Nolley*, slip op. at 7; TEX. PENAL CODE § 12.31(a)(1). The court of appeals erred in remanding this case to the trial court for a new sentencing hearing.

**Conclusion:** We grant appellant's petition for discretionary review, modify the judgments of the trial court and the court of appeals by reforming appellant's sentence from life without parole to life with the

possibility of parole. See TEX.R.APP. P. 78.1; Tex. Penal Code § 12.31(a)(1). The judgments of the lower courts are affirmed as modified.

**JUVENILE ADJUDICATION CANNOT BE USED FOR ENHANCEMENT UNLESS THE JUVENILE WAS A CHILD UNDER THE FAMILY CODE AND THE CONDUCT OCCURRED ON OR AFTER JANUARY 1, 1996.**

¶ 14-4-2. **Womack v. State**, MEMORANDUM, No. 12-14-00019-CR, 2014 WL 4637968 (Tex.App.-Tyler, 9/17/14).

**Facts:** A jury convicted Appellant, Willie Womack, of the offense of assault on a public servant and assessed his punishment at imprisonment for twenty years.

Appellant assaulted correctional officer Dakota Acker in the Mark W. Michael Unit in Anderson County, Texas. In the attack, Acker suffered a laceration to his left temple, contusions to his right elbow and a finger of his left hand, and chipped upper incisors requiring dental surgery to repair.

While a juvenile, Appellant was found to have engaged in delinquent conduct, namely aggravated sexual assault, criminal solicitation to commit aggravated robbery, criminal solicitation to commit aggravated assault with a deadly weapon on a public servant, criminal solicitation to commit escape, and retaliation. Thereafter, on October 20, 2000, a disposition hearing was held, and Appellant was committed to the Texas Youth Commission under a determinate sentence. The court sentenced Appellant to twenty-five years of imprisonment and ordered him transferred to the Texas Department of Criminal Justice.

Before Appellant's trial for assault on the correctional officer, the State gave notice that it intended to use his juvenile offenses to enhance his punishment. Appellant pleaded "not true" to the enhancement allegation. To prove the enhancement allegation, the State offered into evidence a penitentiary packet containing the "Order to Transfer to the Institutional Division of the Texas Department of Criminal Justice" that stated Appellant's date of birth to be May 22, 1986. However, his fingerprint card in the same packet showed his date of birth as May 22, 1985.

At the close of the punishment evidence, Appellant requested the trial court instruct the jury, as follows:

I think in addition to finding [the enhancement allegation] true, the—that it should also include, "and that the Defendant was adjudicated by a juvenile court under Texas Family Code"—Let's see the statute. Has a section I believe it's 54.03, "and that the child engaged in delinquent conduct on or after January 1st, 1996,

constituting a felony offense for which the child was committed to the Texas Youth Commission," I believe is what the statute says. And that conviction—let's see if it says, "became final prior to the"—"the commission of the offense of assault on a public servant."

In opposition to Appellant's requested instruction, the State argued that because Appellant's juvenile adjudication occurred on or before October 20, 2000 (the date of the adjudication), "his juvenile adjudication statutorily became a final felony conviction before Womack committed this offense in TDC."

The trial judge, however, was fully cognizant that a juvenile adjudication cannot be used for enhancement unless the conduct occurred on or after January 1, 1996, the effective date of the provisions of Section 12.42(f) of the penal code. The trial judge noted that the transfer order showed Appellant's date of birth as May 22, 1986. She reasoned that Appellant could not have been ten years old and subject to the juvenile code until after January 1, 1996. Therefore, she determined that Appellant could not have committed the delinquent acts before January 1, 1996.

The trial court instructed the jury using the ordinary language for enhancement for a prior felony conviction.

Now, if you find from the evidence beyond a reasonable doubt that the defendant WILLIE WOMACK is the same person who was finally convicted of the offense listed in the enhancement paragraph and that the conviction alleged in [the] enhancement paragraph became final prior to the offense in this case, then you will assess his punishment at confinement in the Texas Department of Criminal Justice for any term of not more than twenty years (20) or less than two years (2) and in addition to imprisonment, a fine not to exceed \$10,000.00 may be imposed.

The jury found the enhancement allegation "true" and assessed Appellant's punishment at imprisonment for twenty years.

In his second issue, Appellant insists that the trial court's punishment charge failed to instruct the jury properly under Texas Penal Code Section 12.42(f)—that before it can find the enhancement allegation true, it must find that he engaged in the delinquent conduct forming the basis of his prior juvenile adjudication on or after January 1, 1996.

The trial court is required to deliver to the jury "a written charge distinctly setting forth the law applicable to the case." TEX.CODE CRIM. PROC. ANN. art. 36.14 (West 2007). "After the introduction of [punishment] evidence has been concluded, ... the court shall give such additional written instructions as may be necessary..." Id. art. 37.07 § 3(b) (West Supp.2014). A plea of "not true" forces the state to

prove the enhancement allegations in the indictment beyond a reasonable doubt. *Kucha v. State*, 686 S.W.2d 154, 155 (Tex.Crim.App.1985) (en banc).

Errors in the jury charge are reviewed under a special harm standard and not under the general harmless error standard set out in Rule 44.2 of the Texas Rules of Appellate Procedure. *Flores v. State*, 224 S.W.3d 212, 212–13 (Tex.Crim.App.2007). Error that is called to the trial court's attention requires reversal if the error caused "some" actual harm to the appellant; unobjected to error will not result in reversal unless the error was so egregious as to deprive the appellant of a fair and impartial trial. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App.1984); *Flores*, 224 S.W.3d at 213. "In both situations, the actual degree of harm must be assayed in the light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel [,] and any other relevant information revealed by the record of the trial as a whole." *Almanza*, 686 S.W.2d at 171.

To be subject to the juvenile code, one must be a "child" of ten years of age or older and under seventeen years of age. TEX. FAM.CODE ANN. §§ 51.02(2)(A); 51.04(a) (West 2014). An order of adjudication is not a conviction of a crime except as provided in section 51.13(d) of the family code. Id. § 51.13(a) (West 2014). Section 51.13(d) provides that only a felony adjudication in which a child engaged in conduct that occurred on or after January 1, 1996, can be a final felony conviction for enhancement purposes. Id.; TEX. PENAL CODE ANN. § 12.42(f) (West Supp.2014).

**Held:** Reversed and remanded for a new trial on punishment.

**Memorandum Opinion:** The critical inquiry in this case is when Appellant committed the acts for which he was adjudicated. There is no evidence of when the conduct occurred, and the record contains conflicting evidence regarding Appellant's date of birth. According to the date of birth stated in the transfer order, May 22, 1986, Appellant could not have been ten years old and subject to the juvenile code until after January 1, 1996. It would, therefore, be safe to assume that Appellant committed the delinquent conduct after January 1, 1996.

However, according to Appellant's birth date as shown on his fingerprint card, May 22, 1985, Appellant would have become ten years of age and subject to adjudication seven months and nine days before the effective date of Section 12.42(f). Therefore, the possibility exists that the conduct for which Appellant was adjudicated occurred during that period. In that event, his adjudication could not be used for enhancement.

In response to Appellant's first issue challenging the sufficiency of the evidence, the State argues that it is the jury's province to resolve conflicts in the evidence. Both birth dates were in evidence. The State contends the jury was free to choose the birth date, May 22, 1986, which eliminated any possibility that the conduct occurred before January 1, 1996.

However, the charge given by the trial judge foreclosed any consideration of the issue by the jury. The jury was left unaware that there was an issue to decide. Without instruction by the trial court, the jury could not have known that the decision as to the date of Appellant's conduct was a crucial question to be decided before they could find the enhancement to be true. Without the court's guidance, the jury could not possibly have understood that the date of Appellant's delinquent conduct was a fact of great consequence nor could they have appreciated the evidentiary significance of the conflicting dates of birth.

The trial court is required to deliver to the jury "a written charge distinctly setting forth the law applicable to the case." TEX.CODE CRIM. PROC. ANN. art. 36.14. The trial court erred in failing to instruct the jury that before it could find the enhancement allegation "true" as a final felony conviction, it must first find that Appellant was a child (as defined by Section 51.02(2) of the family code) who engaged in the delinquent conduct for which he was adjudicated on or before January 1, 1996.

The State contends that by not bringing the conflict in the evidence to the court's attention, Appellant waived error. Although incorrect, Appellant's requested instruction was sufficient to direct the trial court's attention to the omission in the charge, and it correctly set forth the legal basis for his objection to the charge and for an instruction under Section 12.42(f) of the penal code. See *Mays v. State*, 318 S.W.3d 368, 384 (Tex.Crim.App.2010).

"Some harm" is readily apparent. The jury found Appellant guilty of a third degree felony. Properly instructed with the language of Section 12.42(f) of the penal code and with the definition of a "child" in Section 51.02(2) of the family code, the jury could have returned a finding of "not true." In that case, the jury could have assessed no more than a ten year sentence, only half of the sentence Appellant received. Appellant's second issue is sustained.

It is unnecessary that we address Appellant's first issue because of our disposition of his second issue. See TEX.R.APP. P. 47.1.

**Conclusion:** We reverse the trial court's judgment as to punishment, and remand the case for a new trial on punishment.

## RESTITUTION

**THERE ARE THREE LIMITATIONS ON THE RESTITUTION A TRIAL JUDGE MAY ORDER: (1) THE RESTITUTION ORDERED MUST BE FOR ONLY THE OFFENSE FOR WHICH THE DEFENDANT IS CRIMINALLY RESPONSIBLE; (2) THE RESTITUTION MUST BE FOR ONLY THE VICTIM OR VICTIMS OF THE OFFENSE FOR WHICH THE DEFENDANT IS CHARGED; AND (3) THE AMOUNT MUST BE JUST AND SUPPORTED BY A FACTUAL BASIS WITHIN THE RECORD.**

¶ 14-4-5. **Burt v. State**, No. PD-1563-13, --- S.W.3d ----, 2014 WL 5248051 (Tex.Crim.App., 10/15/14).

**Facts:** The State alleged that appellant was involved in an elaborate Ponzi scheme. The record shows that he operated two programs in tandem. First, with his Credit Home Investment Program, appellant would lease-purchase a home, and then sell the contract rights to an investor for a profit. He promised the investors that they could immediately sell their newly acquired homes to downstream purchasers for a profit.

Second, through his Down Payment Assistance Program, appellant supplied the initial investors with home buyers who, if they lacked sufficient credit or down payment, could receive loans from appellant to obtain a mortgage. Appellant persuaded a separate pool of investors to provide the funds for this second program by promising \$2,500 profit for every \$10,000 invested. Appellant thus generated his own supply of home buyers and investors to make his Credit Home Investment Program profitable.

However, if the targeted home buyers from the Down Payment Assistance Program were not approved for mortgages, they could not purchase houses from the investors in the Credit Home Investment Program, and those investors were left with the mortgage payments. Appellant initially used funds from the Down Payment Assistance Program to pay the investors' mortgage payments, but he eventually ran out of money.

A jury convicted appellant of misapplication of fiduciary property in excess of \$200,000. At the end of the punishment hearing, and immediately after sending the jury to deliberate, the trial judge stated,

On the record. I am going to need the State to prepare a proposed order of restitution in the case, probably with some sort of supporting memorandum to justify whatever number you come up with. You can rely on everything that was introduced in the case. We don't need to have a hearing on it as far as an evidentiary hearing, but if y'all can't come up with an agreed figure, then we will need to have a hearing on it

at some point in the future, okay? And the sooner, the better.

The jury assessed punishment at fourteen years' confinement and a \$10,000 fine. The trial judge formally pronounced the sentence, and before adjourning, he stated, "The sooner we can get that restitution matter taken care of, the better." The next day, in the absence of the parties, without a hearing, and without any agreement by the parties, the trial judge entered a restitution order for \$591,000 into the written judgment.

On appeal, appellant argued that the restitution order should be deleted because restitution was not orally pronounced in open court. However, the appellate court did not originally reach this claim because it held that the issue had not been preserved for appeal.

**Held:** Reversed and remanded.

**Opinion:** Restitution is a victim's statutory right, and it serves a number of important purposes. First, it restores the victim to the "status quo ante" position he was in before the offense. Second, restitution serves as appropriate punishment for the convicted criminal. We have said, "[a]s punishment, restitution attempts to redress the wrongs for which a defendant has been charged and convicted in court." Third, because restitution forces the offender to "address and remedy the specific harm that he has caused," it aids in the rehabilitation process as "it forces the defendant to confront, in concrete terms, the harm his actions have caused." Fourth, restitution acts as a deterrent to crime. Indeed, the law so favors crime victims' compensation that our restitution statute requires the trial judge to justify his decision not to order restitution to a crime victim. Further, the statute provides that a parole panel "shall order the payment of restitution ordered" under Article 42.037, and it may revoke a defendant's parole or mandatory supervision if he fails to comply with the trial judge's restitution order. For all of these reasons, we have interpreted restitution statutes liberally to effectuate fairness to the victims of crime.

On the other hand, fairness to the defendant requires that his sentence be "pronounced orally in his presence." A written judgment is simply the "declaration and embodiment" of that pronouncement. Therefore, when there is a conflict between the oral pronouncement and the written judgment, the oral pronouncement controls.

A trial judge has neither the statutory authority nor the discretion to orally pronounce one sentence in front of the defendant, but then enter a different written judgment outside the defendant's presence. Rather, due process requires that the defendant be given fair notice of all of the terms of his sentence, so that he may object and offer a defense to any terms he

believes are inappropriate. The appellant then has a “legitimate expectation” that the punishment he heard at trial match the punishment he actually receives.

We have held that the deletion of a written restitution order is appropriate in at least two scenarios. The first scenario is when the trial judge does not have statutory authority to impose the specific restitution order. For example, a court has no authority to order restitution for injuries or damages for which the defendant is not responsible. And a trial judge does not have authority to order restitution to anyone except the victim(s) of the offense for which the defendant is convicted. The second scenario in which deletion of a restitution order is appropriate is when the trial judge is authorized to assess restitution, but the evidence does not show proximate cause between the defendant's criminal conduct and the victim's injury.

Put another way, due process places three limitations on the restitution a trial judge may order: (1) the restitution ordered must be for only the offense for which the defendant is criminally responsible; (2) the restitution must be for only the victim or victims of the offense for which the defendant is charged; and (3) the amount must be just and supported by a factual basis within the record.

In this third situation—if there is a lack of a sufficient factual basis—appellate courts should vacate and remand the case for a restitution hearing because the trial judge is authorized to assess restitution, but the amount of restitution is not (yet) supported by the record. This is in keeping with the liberal public-policy purpose of Article 42.037, which favors restitution to crime victims. Other state and federal courts embrace the principle that vacating a restitution order and remanding the case to the trial court for a restitution hearing is appropriate when the record lacks sufficient evidence of the damages. Of course, if the parties agree on a restitution amount through stipulation or a plea deal, that agreement itself is a sufficient factual basis to support the restitution order.

With that general background, we turn to the issue in the present case.

The trial judge in this case orally pronounced the “fact” of restitution at sentencing, but he did not state an amount. He told both parties that, if they could not agree upon a restitution amount, there would need to be a restitution hearing, and said, “The sooner we can get that restitution matter taken care of, the better.” This colloquy clearly put the defendant on notice that restitution was part of his sentence.

This case is not like those in which neither the parties nor the judge ever mentioned restitution during the sentencing hearing or as part of the oral pronouncement of sentence. In those cases, the

defendant was never put on notice that restitution might be ordered until it first appeared in the written judgment. That scenario leaves the defendant without notice and incapable of objecting or preparing a defense to the restitution order. That procedure—failing to mention restitution until its entry in the written judgment—also violates a defendant's legitimate expectation that the sentence actually received is the same as that orally pronounced in open court. In effect, the restitution order popped up unexpectedly in the written judgment. In those cases, the defendant was entitled to have the restitution order deleted because the written judgment did not match the oral pronouncement of sentence. In this case, however, restitution was part of the trial judge's oral pronouncement of sentence. The evidence at trial showed that a significant amount of restitution was a certainty as eighteen victims testified to losses exceeding \$591,000. There is no dispute that appellant is criminally responsible for the offense of misapplication of fiduciary property. There is no dispute that the losses were caused by the defendant's criminal conduct. There is no dispute that restitution under Article 42.037 is authorized. And there is no dispute that the trial judge told the defendant when orally pronouncing his sentence that restitution would be ordered.

The problem in this case is that appellant was never told of the specific amount of restitution in open court and given an opportunity to challenge the sufficiency of the evidence or the specific amount of restitution due to each victim.

This case more comfortably falls within that body of our case law in which the trial judge has the authority to order restitution and did order restitution, but the evidence is insufficient to support the restitution amount ordered. In those cases, there was never a question about the defendant's responsibility for restitution. Rather, the relevant question was what the restitution amount should be. In those cases, we vacated the restitution orders and remanded the cases for a hearing in which the parties could offer evidence, object, and reach an accurate restitution amount.

Because the trial judge in this case made restitution a part of his oral pronouncement of sentence, the restitution order should not be deleted. Instead, the case should be remanded to the trial court for a hearing in which appellant will have the opportunity to object to the amount, introduce evidence to support his position, and exercise all of his due process rights. He is entitled to what the sentencing judge promised him: a restitution hearing if the parties themselves could not agree on the amount of restitution. Notably, had the parties agreed to a specific restitution amount and had that amount been entered into the record, the need to remand could have been avoided and appellant's trip in the appellate orbit could have ended years ago.

**Conclusion:** We agree with the court of appeals that it is appropriate to remand a case for a restitution hearing when it is clear during the sentencing hearing that restitution will be ordered, but the amount or recipients of restitution are not orally pronounced. We therefore affirm the judgment of the court of appeals.

## TRIAL PROCEDURE

### TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING JUVENILE'S MOTION FOR MISTRIAL BECAUSE THERE WAS NO SHOWING THAT THE SPECTATOR (ACCUSED OF "MAD-DOGGING") ENGAGED IN ANY CONDUCT OR EXPRESSION THAT WOULD HAVE INTERFERED WITH THE JURY'S VERDICT AND DEPRIVED THE JUVENILE OF DUE PROCESS OF LAW.

¶ 14-4-3. *In the Matter of E.A.*, No. 08-12-00183-CV, --- S.W.3d ---, 2014 WL 4100710 (Tex.App.-El Paso, 8/20/14).

**Facts:** The State filed its first amended petition based on delinquent conduct and notice of intent to seek a determinate sentence under the Texas Family Code alleging the E.A. had engaged in delinquent conduct. This petition charged that E.A. intentionally, knowingly, or recklessly caused bodily injury of the complaining witness by (1) striking him about the head with a baseball bat, (2) by kicking him about the face with the foot, and (3) kicking him about the ribs with the foot. After the adjudication hearing, the jury found that E.A. had engaged in delinquent conduct by committing the offense of aggravated assault with a deadly weapon. The following day, the bailiff informed the trial court that a juror had notified him that a spectator was seen "mad-dogging" the jurors after the verdict was read in court and that another had observed the spectator standing at the parking garage exit, watching the vehicles exit. E.A.'s counsel asked that a record be made and then proceeded to move for a mistrial which the trial court denied.

At the close of the disposition hearing, the jury (1) found that a disposition was required in this case, (2) sentenced E.A. to the Texas Juvenile Justice Department with a possible transfer to the Institutional Division of the Texas Department of Criminal Justice for ten years, (3) refused to place E.A. on probation as an alternative to committing him to the TDCJ, and (4) found E.A. could not be provided with the quality of care, level of support, and supervision needed to meet the conditions of probation in his home or elsewhere. The trial court subsequently imposed a determinate sentence of ten years, and ordered that E.A. be committed to the care, custody, and control of the TJJ. This appeal followed.

**Held:** Affirmed

**Opinion:** In Issue One, E.A. contends the trial court abused its discretion in denying his motion for mistrial after the jury expressed experiencing fear due to a spectator's antagonistic conduct towards the jury. E.A. asserts that because a spectator "mad-dogged" the jury in open court and at the designated exit of the El Paso County Parking Garage the jury was actually and inherently prejudiced and as a result, E.A. was denied due process of law.

The record shows that the bailiff informed the court and parties that a juror had informed him that a spectator in the courtroom was "mad-dogging" the jury shortly after the jury's verdict on adjudication was read in court. After the bailiff was notified of the spectator's conduct, the bailiff asked the spectator to leave the courtroom for the remainder of the trial.FN1The following morning another juror notified the bailiff that she saw the spectator standing at the parking garage exit, watching as the vehicles left the garage the previous day. According to the bailiff, the two jurors were feeling intimidated by the spectator's conduct.

FN1. According to the bailiff, after informing the spectator as to the reason he was asked to leave the courtroom, the spectator responded that "he was not mad-dogging them."

Upon questioning by the State, the bailiff stated that he believed the spectator was E.A.'s brother-in-law. When asked if the two jurors relayed their fear to the other members of the jury, the bailiff answered: "Not to my knowledge. I mean, I was in the jury room with them this morning when it was relayed to me that he was seen at the county garage exit ... yesterday afternoon." E.A.'s counsel subsequently moved for a mistrial arguing that E.A. could not get a fair trial when it was clear that the jury exhibited "some fear." E.A.'s motion was denied.

An appellant bears the burden of showing that the jury was prejudiced by the spectator's conduct. *Alfaro v. State*, 224 S.W. 3d 426, 432 (Tex.App.-Houston [1st Dist.] 2006, no pet.). To prevail on a claim of prejudice resulting from external influence on the jury, an appellant must show either actual or inherent prejudice. *Howard v. State*, 941 S.W.2d 102, 117 (Tex.Crim.App.1996). To determine actual prejudice we look at whether jurors actually articulated "a consciousness of some prejudicial effect." See *id.* On the other hand, inherent prejudice is determined by looking at whether "an unacceptable risk is presented of impermissible factors coming into play." *Holbrook v. Flynn*, 475 U.S. 560, 569-70, 106 S.Ct. 1340, 1346-47 (1986). Inherent prejudice rarely occurs and "is reserved for extreme situations." *Howard*, 941 S.W.2d at 117. Spectator conduct or expression which impedes normal trial proceedings will not result in reversible error unless an appellant shows "a reasonable probability that the conduct or expression interfered

with the jury's verdict." *Id.*; *Landry v. State*, 706 S.W.2d 105, 112 (Tex.Crim.App.1985).

Appellant argues that the jury was actually prejudiced because jurors articulated that they were influenced by the presence and conduct of the antagonizing spectator. In support of this argument, Appellant refers us to the bailiff's testimony that the jurors felt threatened, were fearful, and intimidated by the spectator's conduct. Appellant further contends that "the in-court aggression, coupled with and aggravated by the out-of-court occurrences in the El Paso County Garage, was inherently prejudicial." Although there is some evidence in the record that the jurors articulated to the bailiff that they felt threatened, fearful, and were intimidated by the spectator's conduct, we do not agree with E.A. that this shows actual prejudice because the jurors did not indicate that they were influenced in any way by the spectator's conduct or expression. Moreover, there was no evidence that the spectator actually threatened anyone or attempted to influence the jury by conduct or expression. We cannot conclude without speculating what was meant by the spectator's conduct or expression in this case. See *Hill v. State*, 153 Tex.Crim. 105, 217 S.W.2d 1009, 1010–12 (1948) (where appellant moved for new trial based in part on fact that trial judge made "facial expressions in the nature of scowls or frowns" and "shook his head from side to side in a negative manner," the Court concluded appellant failed to present any error as the Court was at a loss on how to rule on a facial expression, or what was meant by a scowl, frown, or movement of the head and the trial seemed to have been fairly held and appellant was given wide latitude in presenting his evidence). Thus, E.A. has failed to show the jury was actually prejudiced.

E.A. has also failed to show inherent prejudice. The record reflects that the spectator was seen "mad-dogging" the jury after the jury's verdict on adjudication was read in court and that he was subsequently asked to leave the courtroom outside of the presence of the jury. Inherent prejudice rarely occurs and "is reserved for extreme situations." *Howard*, 941 S.W.2d at 117.

**Conclusion:** Based on the record before us, we cannot conclude that this is an extreme situation which merits a mistrial. Thus, because there is no showing that the spectator engaged in any conduct or expression that would have interfered with the jury's verdict, E.A. was not deprived of due process of law. Accordingly, we conclude the trial court did not abuse its discretion in denying E.A.'s motion for mistrial. *Coble*, 330 S.W.3d at 292. Issue One is overruled.

