

## Review of Recent Juvenile Cases (2009)

by  
The Honorable Pat Garza  
Associate Judge  
386th District Court  
San Antonio, Texas

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### **In Criminal Mischief prosecution evidence was sufficient to show damage to door, even where testimony was that door had to be replaced.[In the Matter of M.S.M.](09-1-2)**

**On December 4, 2008, the Austin Court of Appeals held that, viewed in the light most favorable to the result, the testimony at trial supported the court's finding that it would cost \$50 or more to repair the damage to the door.**

¶ 09-1-2. **In the Matter of M.S.M.**, MEMORANDUM, No. 03-05-00236-CV, 2008 WL 5100999 (Tex.App.-Austin, 12/4/08).

**Facts:** M.S.M. was found to have engaged in delinquent conduct by committing criminal mischief that resulted in a pecuniary loss of \$50 or more but less than \$500. See [Tex. Fam.Code Ann. § 51.03](#) (West Supp.2008); [Tex. Penal Code Ann. § 28.03](#) (West Supp.2008). The juvenile court placed M.S.M. on probation for nine months in his father's custody. M.S.M. contends that the evidence is legally and factually insufficient to prove the amount of the pecuniary loss and that the juvenile court erroneously admitted lay testimony regarding the amount of the loss.

**Held:** Affirmed.

**MEMORANDUM OPINION:** A person commits criminal mischief if, without the owner's effective consent, he intentionally or knowingly damages or destroys the owner's tangible property. [Tex. Penal Code Ann. § 28.03\(a\)\(1\)](#). The seriousness of the offense is determined by the pecuniary loss suffered by the property owner. [Id. § 28.03\(b\)](#). In this case, following a series of events that need not be described, M.S.M. kicked the front door of the house occupied by David Moore, his wife Norma, and their children Richard, Dustin, and Candice. The door, which had a metal exterior, was dented by the kick. The petition alleged that M.S.M. "intentionally and knowingly damage[d] tangible property, to-wit: a door, without the effective consent of Norma Moore, the owner, and thereby caused pecuniary loss to said owner in the amount of more than \$50.00 but less than \$500."

The penal code prescribes the measure for determining the amount of pecuniary loss in a criminal mischief prosecution. If the property in question is damaged, the pecuniary loss is the cost of repairing or restoring the damaged property. [Id. § 28.06\(b\)](#) (West 2003). If the property is destroyed, the pecuniary loss is the fair market value of the property at the time and place of the destruction or, if that value cannot be ascertained, the cost of replacing the property. [Id. § 28.06\(a\)](#). In his challenges to the sufficiency of the evidence, M.S.M. contends that the State, having alleged that he damaged the Moores' front door, was required to prove the cost of repairing the door pursuant to section 28.06(b). Instead, he argues, the State proved the cost of

replacing the door pursuant to section 28.06(a), a measure M.S.M. contends does not apply because the State did not allege that he destroyed the door.

Adjudications of delinquency are based on the criminal standard of proof. [Tex. Fam.Code Ann. § 54.03\(f\)](#) (West Supp.2008). Therefore, we review the sufficiency of the evidence by applying the standards applicable to challenges to the sufficiency of the evidence in criminal cases. [In re E.P., 963 S.W.2d 191, 193 \(Tex.App.-Austin 1998, no pet.\)](#). In a legal sufficiency review, we view all the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. [Clayton v. State, 235 S.W.3d 772, 778 \(Tex.Crim.App.2007\)](#). In a factual sufficiency review, we view all the evidence in a neutral light and determine whether the verdict is clearly wrong and manifestly unjust or against the great weight and preponderance of the available evidence. [Watson v. State, 204 S.W.3d 404, 414-15 \(Tex.Crim.App. 2006\)](#).

The State contends that M.S.M. failed to preserve his factual sufficiency complaint because he did not file a motion for new trial as required by the rules of civil procedure. See [Tex.R. Civ. P. 324\(b\)\(2\)](#); see also [Tex. Fam.Code Ann. § 51.17\(a\)](#) (West Supp.2008); [In re J.B.M., 157 S.W.3d 823, 827 \(Tex.App.-Fort Worth 2005, no pet.\)](#). M.S.M.'s adjudication hearing was a bench trial, however, and [rule 324\(b\)\(2\)](#) applies only to jury findings. [Westech Eng'g, Inc. v. Clearwater Constructors, Inc., 835 S.W.2d 190, 197 \(Tex.App.-Austin 1992, no writ\)](#). M.S.M.'s factual sufficiency complaint is properly before us.

Citing David Moore's testimony that the door could not be repaired and that a new door would cost \$450, M.S.M. asserts that the State failed to prove the cost of repairing the damaged door and hence failed to prove that the pecuniary loss was greater than \$50. Alternatively, M.S.M. argues that the State proceeded on the theory that he destroyed the door, a theory not alleged in the petition, and thus there is a fatal variance between the pleading and the proof.

M.S.M.'s arguments overlook Moore's testimony that he explored the possibility of repairing the door and that the "crudest bondo type repair" would cost at least \$50. The juvenile court cited this testimony in its findings regarding the pecuniary loss. Viewed in the light most favorable to the result, this testimony supports the court's finding that it would cost \$50 or more to repair the damage to the door. There is no evidence that the cost of repairing the door would be less than \$50. [\[FN1\]](#) Viewing the evidence in a neutral light, we conclude that the court's finding regarding the cost of repair was neither manifestly unjust nor against the great weight of the evidence. Finally, we find no variance between the pleading and the proof. Whatever the relevance of the testimony regarding the cost of a replacement door, the State's theory at all times was that M.S.M. had damaged the door, and this is what the juvenile court found. M.S.M. does not contend that the evidence fails to show that the door was damaged. Issues one and two are overruled.

[FN1.](#) M.S.M.'s mother testified that she went to the Moores' house after the incident and saw no damage to the door. M.S.M. does not, however, challenge the finding that the door was damaged.

M.S.M.'s remaining contention is that the juvenile court erred by overruling his objection that David Moore was not qualified to estimate the cost of repairing the damaged door. See [Elomary v. State, 796 S.W.2d 191, 193 \(Tex.Crim.App.1990\)](#) (expert testimony required to prove cost of repairs not yet made). The testimony to which M.S.M. objected did not relate to the cost of repairing the door, however, but to the cost of replacing the door. M.S.M. did not object to Moore's testimony that it would cost at least \$50 to repair the door. Because the latter testimony is sufficient to support the juvenile court's finding regarding the pecuniary loss, any error in overruling M.S.M.'s objection to the replacement cost testimony was harmless. See [Tex.R.App. P. 44.2\(b\)](#); see also [In re C.R., 995 S.W.2d 778, 785 \(Tex.App.-Austin 1999, pet. denied\)](#). Issue three is overruled.

**Conclusion:** The **juvenile** court's judgment is affirmed.