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San Antonio, Texas

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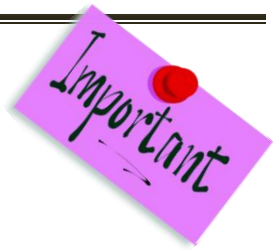
Dear Juvenile Law Section Members:

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 tell us what you think of the new format.



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.

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EDITOR'S FOREWORD By Associate Judge Pat Garza

So how's your year been? Do you realize we are half way through 2012? TYC and TJPC are long gone and TJJD is struggling through its growing pains. You should be aware that this is a transition year for many organizations and individuals. Our own Juvenile Law Section is no exception. For many years the Texas Juvenile Probation Commission worked hand in hand with our section to provide assistance in training, education, as well as dissemination of information through the internet, to not only our members, but to all who are working hard in the juvenile justice system. We should all take note; the Texas Juvenile Justice Department's growing pains are also our growing pains. There is no doubt that things will be different. So let's be patient and understand that while things may be different in the next few years, it does not necessarily mean they will be better or worse. They will simply be different.

No Nuts and Bolts. The Juvenile Law Section Council has decided to cancel the Nuts and Bolts Conference this year. Many of the topics that are normally covered by the Nuts and Bolts are being covered in local Juvenile conferences throughout the State. Please check with your local bar for upcoming juvenile law conferences in your area. We apologize for any inconvenience.

The Chinese use two brush stokes to write the word 'crisis'.
One brush stroke stands for danger; the other for opportunity.
In a crisis, be aware of the danger – but recognize the opportunity.

John F. Kennedy (1917-1963), Speech in Indianapolis (April 12, 1959)

CHAIR'S MESSAGE By Jill Mata

The Juvenile Law Section continued its proud tradition of providing quality continuing legal education during the 25th Annual Robert O. Dawson Juvenile Law Institute held in San Antonio in February 2012. We increased attendance this year to over 500 participants with our typically diverse range of practitioners, including prosecutors, defense attorneys, judges, probation personnel and treatment professionals. In addition, the conference silent auction helped raise over $8,000 to help provide college scholarships and financial support to several deserving TYC students. Please mark your calendar to attend next year's Robert O. Dawson Juvenile Law Institute, February 11-13, 2013, again at the Grand Hyatt in San Antonio, Texas.

The Section continues to participate with the Juvenile Justice Roundtable, a monthly meeting of juvenile justice advocates and stakeholders facilitated by Texas Care for Children. The Roundtable represents a coordinated effort to improve the juvenile justice system in Texas, and the collaboration it fosters have made us better informed and effective advocates for our various systems.

The Section also continues its collaboration with the Texas Lawyers for Children, Inc. (TLC) to provide online resources for TLC attorney members to utilize communication tools such as an email network, an online discussion board and document vault. This service offers a private, secure way for attorneys to discuss practice tips and share expertise about juvenile delinquency cases.

As you likely know by now, Senate Bill 63, passed by 82nd Legislative Session, resulted in the creation of Texas Juvenile Justice Department (TJJD) on December 1, 2011. The existing Texas Youth Commission (TYC) and the Texas Juvenile Probation Commission (TJPC) were abolished and duties were transferred to the new TJJD. The Section hopes to continue our strong collaboration with the agency that has allowed us to respond effectively to community safety and in meeting the critical needs of the youth in the justice system. We invite you to learn more about the Section on our website (www.juvenilelaw.org).

REVIEW OF RECENT CASES

APPEALS

A DEFENDANT PLACED ON DEFERRED ADJUDICATION COMMUNITY SUPERVISION MAY NOT RAISE ISSUES RELATING TO THE ORIGINAL PLEA PROCEEDING UNLESS HE TIMELY FILED HIS APPEAL AFTER THE IMPOSITION OF THE DEFERRED ADJUDICATION.

¶ 12-2-3A. **Diamond v. State**, Nos. 09–11–00478–CR, 09–11–00479–CR, --- S.W.3d ----, 2012 WL 1431232 (Tex.App.-Beaumont, 4/25/12).

Facts: Terrell Dewayne Diamond appeals from the trial court's revocation of his deferred adjudication community supervision and imposition of sentence in two cases. Because Diamond was under the age of seventeen years, the cases were initially referred to the juvenile court. That court waived its jurisdiction and transferred the matters to the district court for trial as an adult.

In accordance with a plea-bargain agreement, Diamond entered a plea of guilty to the offense of the unauthorized use of a motor vehicle. *See* Tex. Penal Code Ann. § 31.07 (West 2011). The trial court found the evidence sufficient to find Diamond guilty, deferred further proceedings, and placed Diamond on community supervision for five years. In the second case, Diamond entered a plea of guilty to the offense of aggravated robbery. *See* Tex. Penal Code Ann. § 29.03 (West 2011). The trial court found evidence sufficient to find Diamond guilty, deferred further proceedings, placed Diamond on community supervision for ten years, and assessed a $1,000 fine. The State subsequently filed motions to revoke Diamond's unadjudicated community supervision in both cases. At the hearing on the motion to revoke, Diamond pled "true" to four violations of the conditions of his community supervision. The trial court found that Diamond violated the terms of his community supervision, found him guilty of aggravated robbery, and assessed his punishment at 99 years' confinement. The trial court further found Diamond guilty of the unauthorized use of a motor vehicle, and assessed his punishment at 2 years' confinement, to run consecutive to his sentence for the aggravated robbery charge.

Diamond filed a motion to reconsider the imposition of his state jail sentence. In both cases Diamond also filed a motion for new trial and motion in arrest of judgment wherein Diamond argued that the verdict is contrary to the law and the evidence, and that his sentence is inappropriate and unreasonable. As there is not a signed order in the record denying Diamond's motions for new trial, we deem they were denied by operation of law. *See* Tex.R.App. P. 21.8. Diamond appealed both cases.

In his appeal in cause numbers 7889 and 7890, Diamond argues that he has been denied a complete record. In his appeal in cause number 7890, Diamond raises three additional issues. He argues that the record fails to establish that the trial court had proper jurisdiction, that the trial court erred in failing to grant his motion for new trial, and that his sentence for aggravated robbery constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article 1.09 of the Texas Code of Criminal Procedure.

Held: Affirmed

Opinion: For both cause numbers 7889 and 7890, Diamond contends he was denied a complete record on appeal despite his compliance with the rules to secure a complete record. *See* Tex.R.App. P. 34.6(b) (reporter's record request); Tex.R.App. P. 35.3(b) (reporter's record filing).

In both cases, Diamond timely filed a written designation of the record. The designations request a "[c]omplete transcription of court reporter's notes of all proceedings in this cause as requested in the attached written request pursuant to Rule 34.6." However, the designations in the appellate record do not include the written request referenced in the designation.

The reporter's record in both cases contains only the record from the revocation hearing and sentencing. The record of the transfer proceeding, the original plea hearing, and the hearing placing Diamond on deferred adjudication are not part of the appellate record. Diamond asserts that without the records from these hearings, he is unable to determine if the trial court committed reversible error in the transfer proceedings, or if the trial court pre-determined the sentence at the time of the entry of the original plea, or if the trial court made other comments that would render the ultimate sentence insupportable.

A defendant placed on deferred adjudication community supervision may raise issues relating to the original plea proceeding only in an appeal timely filed after the imposition of the deferred adjudication community supervision. *Manuel v. State,* 994 S.W.2d 658, 661–62 (Tex.Crim.App.1999). An appellate court's review of an order adjudicating guilt is generally limited to whether the trial court abused its discretion in determining that the defendant violated the terms of his community supervision. *See Staten v. State,* 328 S.W.3d 901, 904–05 (Tex.App.-Beaumont 2010, no pet.); Tex.Code Crim. Proc. Ann. art. 42.12, § 5(b) (West Supp.2011). A court of appeals lacks jurisdiction over an appeal of an earlier order of deferred adjudication

community supervision unless the trial court gives permission to appeal. *See* Tex.Code Crim. Proc. Ann. art. 44.02 (West 2006); *Chavez v. State,* 183 S.W.3d 675, 680 (Tex.Crim.App.2006).

Diamond did not timely appeal the trial court's order placing him on deferred adjudication community supervision. *See* Tex.R.App. P. 33.1. As the potential issues Diamond is concerned with raising are related solely to his original plea proceeding, the reporter's record from the original plea proceedings is unnecessary to the resolution of this appeal. Those issues were required to be appealed, if at all, within the allowable time period immediately after the trial court imposed community supervision. *See Manuel,* 994 S.W.2d at 661–62. Diamond did not obtain the trial court's permission for an appeal from the plea proceeding, but rather waived his right to an appeal. We overrule this issue.

Conclusion: Having overruled Diamond's issues in cause numbers 7889 and 7890, we affirm the trial court's judgment in both cases.

Dissent: This Court does not have any reporter's record on appeal other than of the last hearing, and appellant complains of the incomplete record. Appellant argues that denying him the entire record prevents him from reviewing whether the sentence was impermissibly predetermined when the plea was entered. *See Steadman v. State,* 31 S.W.3d 738, 741 (Tex.App.-Houston [1st Dist.] 2000, pet. ref'd) ("It is a denial of due process for the court to arbitrarily refuse to consider the entire range of punishment for an offense or refuse to consider the evidence and impose a predetermined punishment."); *Jefferson v. State,* 803 S.W.2d 470, 471 (Tex.App.-Dallas 1991, pet. ref'd). The State responds that "[w]hile counsel's inability to ascertain whether the trial court took some action or made a remark that would provide a challenge could be remedied by providing the requested records, the trial court has opted not to do so." This Court should order the filing of the complete record and allow the parties to provide supplemental briefs after a review of the record.

At the plea hearing, the trial judge apparently thought the appropriate resolution at that time was community supervision, because the judge deferred adjudication and placed appellant on community supervision. Appellant subsequently obtained his high school diploma after he completed the up-front time. At the revocation hearing, the probation officer and defense counsel mentioned the SAFPF program. Defense counsel stated "We would ask the Court, Your Honor, to send Mr. Diamond to SAFPF and all of the aftercare programs that are available, and give him an opportunity, Your Honor, to kick his dependence upon marijuana." The probation officer said "[w]e've tried to get him into different programs for him for anger management—I think he attended that once—and J.C.D.I. I[t] took me about three appointments to get him into that. Only thing I would recommend, if he is continued on probation, is to keep him locked up for SAFPF."

The Supreme Court has noted that "[f]ew, perhaps no, judicial responsibilities are more difficult than sentencing." *See Graham,* 130 S.Ct. at 2031. In rejecting a sentence of life without parole for juvenile nonhomicide offenders, the Court questioned whether "a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Id.* at 2032. Ninety-nine years is not a sentence of life without parole, but similar sentencing difficulties and considerations are present in this case. Appellant should be granted a complete record for review, and if then shown to be necessary, another hearing before the trial court at which the State and the defense can present evidence concerning an appropriate disposition.

COLLATERAL ATTACK

WRIT OF HABEAS CORPUS GRANTED WHERE JUVENILE PLEAD TO OFFENSE IN ADULT COURT WHILE STILL A JUVENILE.

¶ 12-2-4. **Ex Parte Espinosa**, No. AP-76778, 2012 WL 1438694 (Tex.Crim.App., 4/25/12).

Facts: Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for writ of habeas corpus. *Ex parte Young,* 418 S.W.2d 824, 826 (Tex.Crim.App.1967). Applicant pleaded guilty to forgery of a financial instrument, and originally received deferred adjudication community supervision. Her guilt was later adjudicated and she was sentenced to eighteen months' state jail imprisonment. She attempted to appeal her conviction, but notice of appeal was untimely filed and the appeal was dismissed for want of jurisdiction.

Applicant contends, *inter alia,* that her plea was involuntary, that she received ineffective of counsel at the original plea, and that she was denied her right to appeal after adjudication because of adjudication counsel's erroneous advice. We remanded this application to the trial court for findings of fact and conclusions of law. The trial court conducted a habeas hearing, at which the court heard testimony and received evidence.

Held: Relief is granted

Opinion: Based on the evidence adduced at the hearing, the trial court determined that the trial court lacked jurisdiction to accept Applicant's original plea, because Applicant was a juvenile at the time of the offense. The trial court concludes that Applicant's counsel at the original plea was ineffective for failing to investigate and discover that Applicant was a juvenile, and to advise her that she was not subject to the jurisdiction of the criminal court. The trial court finds that Applicant would not have pleaded guilty to the charge had she known that she was not subject to the jurisdiction of the criminal court. The trial court also concludes that Applicant was denied her right to appeal because her counsel at adjudication failed to properly file a motion for new trial, and thereafter advised Applicant incorrectly regarding the deadline for filing notice of appeal. Applicant is entitled to relief. *Ex parte Huerta,* 692 S.W.2d 681 (Tex.Crim.App.1985).

Conclusion: Relief is granted. The judgment in Cause No. A14705–0211 in the 64th Judicial District Court of Hale County is set aside, and Applicant is remanded to the custody of the sheriff of Hale County to answer the charges as set out in the indictment. The trial court shall issue any necessary bench warrant within 10 days after the mandate of this Court issues.

CRIMINAL PROCEEDINGS

EVIDENCE OF UNADJUDICATED JUVENILE OFFENSES ARE ADMISSIBLE IN ADULT PUNISHMENT HEARINGS.

¶ 12-2-2. **Alvarado v. State**, MEMORANDUM, No. 07-10-00465-CR, 2012 WL 762026 (Tex.App.-Amarillo, 3/9/12).

Facts: At approximately 6:00 a.m. on March 1, 2009, Billy Vanier discovered a vehicle on the road in an area northwest of Lubbock. After investigating, he discovered Amy Cahill asleep over the steering wheel of the vehicle. Cahill had no clothes on from the waist down. Vanier saw that Cahill had injuries to her face. Cahill appeared to be intoxicated. Vanier called the Lubbock Sheriff's Office to report the incident. Once officers arrived, Cahill was taken to the emergency room of University Medical Center in Lubbock. Cahill was unable to remember the events that led to her being found asleep in her vehicle and did not know how she had sustained the injuries.

A sexual assault examination was performed on Cahill. She had extensive injuries across her entire body including fractures of the orbital floor and wall of her eye and nasal bone fractures. Semen was found in Cahill's vagina and anus. However, Cahill could not recall having had sex with anyone. The semen that was found was eventually matched by DNA to appellant. Appellant's DNA was also discovered under Cahill's fingernails and in the front and back seats of Cahill's vehicle.

During the investigation of how Cahill was injured, officers became aware that Cahill had attended a party the preceding evening. Tiffany Kibiger was the host of the party that Cahill had attended. Kibiger remembered that Cahill had attended the party and had been among the last to leave. However, when Cahill left the party, she was fully clothed and in control of her body. Kibiger did not know appellant and had not seen him at the party.

On April 24, 2009, appellant was interviewed by Jason Stewart, an investigator with the Lubbock Sheriff's Office. Initially, appellant denied knowing Cahill. However, after Stewart disclosed that DNA proved that appellant had sex with Cahill, appellant admitted that he and Cahill had sex at the party but that it was consensual and that he did not injure Cahill. Appellant also indicated that he had received rides to and from the party from two different friends, but both of these friends denied this assertion.

Appellant was charged by indictment with aggravated sexual assault against Cahill. At the close of the State's case-in-chief, appellant moved for a directed verdict on the bases that the evidence was insufficient to prove a lack of consent, and that appellant caused Cahill's injuries. The trial court overruled this motion. The jury found appellant guilty of the offense of aggravated sexual assault, and the case proceeded to punishment.

During sentencing, the State sought to prove up an unadjudicated sexual assault committed by appellant when he was a juvenile against a 16-year-old mentally challenged female. A hearing was held outside the presence of the jury regarding the admissibility of this evidence. Appellant objected on the basis that the risk of unfair prejudice of the evidence substantially outweighed its probative value. Appellant did briefly mention that the offense was an unadjudicated offense occurring when appellant was a minor. The State presented argument and case law that the evidence was admissible under Texas Code of Criminal Procedure article 37.07, section 3. The trial court agreed with the State's argument, overruled appellant's objection, but granted appellant a running objection "to those matters." After hearing the punishment evidence, the jury sentenced appellant to life imprisonment in the Texas Department of Criminal Justice, Institutional Division.

By his third issue, appellant challenges the admission of evidence of the unadjudicated juvenile sexual assault during punishment.

Held: Affirmed

Memorandum Opinion: By his third issue, appellant contends that the trial court abused its discretion by admitting evidence during sentencing of an unadjudicated sexual assault offense that appellant committed when he was a juvenile. In his brief, appellant contends that the trial court incorrectly construed Texas Code of Criminal Procedure article 37.07, section 3(a)(1), as allowing the admission of evidence of unadjudicated juvenile offenses during the punishment phase of trial. SeeTEX.CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (West Supp.2011).

Initially, a fair reading of appellant's trial objection to this evidence was based on the probative value of the evidence being substantially outweighed by the danger of unfair prejudice. Such an objection does not comport with an appellate argument regarding the proper statutory construction of article 37.07. See Heidelberg v. State, 144 S.W.3d 535, 537 (Tex.Crim.App.2004) (when trial objection does not comport with issue raised on appeal, the appellate issue has not been preserved for our review). However, based on the State's argument and the authority presented by it as well as the trial court's statements immediately preceding its granting of a running objection to appellant, we conclude that the trial court was aware of appellant's complaint regarding the construction of article 37.07, and granted appellant a running objection on that basis. SeeTEX.R.APP. P. 33.1(a)(1)(A).

However, even if properly preserved, appellant's third issue has been decided against him by the Texas courts. Addressing the specific argument raised by appellant in this issue, the Eastland and the Texarkana courts have rejected the construction of article 37.07, section 3(a)(1), advanced by appellant. See Strasser v. State, 81 S.W.3d 468, 470 (Tex.App.-Eastland 2002, pet. ref'd); Rodriguez v. State, 975 S.W.2d 667, 687 (Tex.App.-Texarkana 1998, pet. ref'd). We agree with our sister courts that article 37.07, section 3(a), allows evidence of an unadjudicated juvenile offense to be admitted so long as it is relevant and shown beyond a reasonable doubt that it was the defendant that committed the offense. SeeTEX.CRIM. PROC.CODE ANN. art. 37.07, § 3(a)(1); Strasser, 81 S.W.3d at 469; Rodriguez, 975 S.W.2d at 687;see also McMillan v. State, 926 S.W.2d 809, 813 (Tex.App .-Eastland 1996, pet. ref'd). Appellant does not challenge the sufficiency of the evidence to establish that he committed the unadjudicated sexual assault of which he complains. Consequently, we overrule appellant's third issue.

Conclusion: Having overruled each of appellant's three issues, we affirm the judgment of the trial court.

DETERMINATE SENTENCE TRANSFER

IN DETERMINATE SENTENCE TRANSFER HEARING, TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING JUVENILE TRANSFERRED TO STATE DEPARTMENT OF CRIMINAL JUSTICE FOR COMPLETION OF HER MURDER SENTENCE.

¶ 12-2-7. **In the Matter of K.Y.**, No. 05-10-01305-CV, --- S.W.3d ----, 2012 WL 937874 (Tex.App.-Dallas, 3/21/12).

Facts: In July 2005, the trial court found that appellant, then fourteen years old, had engaged in delinquent conduct by committing murder and committed her to the Texas Youth Commission for a determinate sentence of twenty years. The youth commission, several years later, requested appellant be transferred to the Texas Department of Criminal Justice to complete her sentence. After a hearing, the trial court ordered appellant transferred. In this appeal, K.Y. contends the trial court abused its discretion by ordering her transferred from the youth commission to the TDCJ. Because we conclude that the trial court acted within its discretionary authority, we affirm the transfer order.

We review the trial court's decision to transfer appellant from the youth commission to TDCJ for an abuse of discretion. *In re D.T.,* 217 S.W.3d 741, 743 (Tex.App.-Dallas 2007, no pet.). If we find some evidence in the record that supports the trial court's decision, there is no abuse of discretion and we will affirm the trial court's order. *Id.*

Held: Affirmed

Opinion: When evaluating the evidence and deciding whether to transfer an individual to TDCJ, the trial court may consider: (1) the experiences and character of the person before and after commitment to the youth commission; (2) the nature of the penal offense and the manner in which the offense was committed; (3) the abilities of the person to contribute to society; (4) the protection of the victim of the offense or any member of the victim's family; (5) the recommendations of the youth commission and the prosecuting attorney; (6) the best interests of the person; and (7) any other relevant factor. *See* TEX. FAM.CODE ANN. § 54.11(k) (West Supp.2011). The trial court need not consider every factor, however, and may weigh differently the factors it does consider. *In re R.G.,* 994 S.W.2d 309, 312 (Tex.App.-Houston [1st Dist.] 1999, pet. denied).

At the transfer hearing, Tomi Miranda, appellant's program specialist at the youth commission, testified that appellant had completed the high treatment level

in the commission's Connections Program but currently had a very low privilege level because of behavior problems. She noted that appellant had problems with authority and interpersonal relationships with her peers. Appellant personalized things, overreacted, and tended to blow things out of proportion. Miranda testified that appellant was at a high risk to reoffend if paroled. Appellant's most recent major rule violation occurred just a few weeks before the transfer hearing when appellant got into an argument with a peer over the television, which ultimately resulted in damage to it and other electronic equipment.

Leonard Cucolo, the court liaison for the youth commission, testified that in the five years she had been at the youth commission, appellant's behavior had been extremely poor. She had 472 incidents of misconduct and had been placed "in security" on 200 occasions. Cucolo stated that, although the majority of appellant's incidents occurred during her first three years of confinement, the number of major rule violations during the last two years remained the same as her first three years. He noted that appellant was making it difficult not just for herself but for the rehabilitation of other inmates of the youth commission. Appellant threatened peers and staff. Cucolo also stated that, although appellant had completed some very important programs, she had not internalized the material in a way that would reduce her behavioral problems or make her more compliant. He considered appellant a public safety risk. Although appellant was eligible for release earlier based on the time she had served on her sentence, she was still very aggressive. Cucolo opined that it was unlikely that things would change. He further indicated that the youth commission had no additional programs that would benefit appellant.

Although her behavior improved for a while, appellant lost her privileges in March 2010 and, in the two months before the hearing, her behavior had become more negative. Cucolo admitted that appellant had done very well academically and had been diagnosed with bi-polar disorder. Cucolo also noted that appellant was receiving treatment for her mental health issues. He was of the opinion that the majority of appellant's behavior was volitional rather than the direct result of mental health issues.

Appellant also testified at the transfer hearing. She stated that if she were allowed to stay at the youth commission, she would request placement in the Aggression Replacement Therapy group and she would be compliant with her medication. She admitted that she needed help for her aggression. She suggested that some of her behavior problems were related to her medication. She said that if she were returned to the youth commission, she would stop the negative behavior and would take the opportunity very seriously.

The record reveals that appellant was committed to the youth commission for a determinative sentence of twenty years for the offense of murder. Although there was evidence of appellant's significant academic achievements, completion of the Capital Offender Program, a decline of appellant's incidents of misconduct during her last two years at the youth commission, and a bi-polar diagnosis for which she was being treated, there was other evidence that her incidents of serious misconduct had remained the same and that her behavior was largely volitional. Along with the youth commission's recommendation for transfer, there was evidence that appellant had not internalized what she had learned in the various programs to affect positive changes in her behavior. There was also evidence of serious misconduct on the part of appellant just weeks before the transfer hearing that resulted in damage to personal property. Witnesses testified that it was unlikely appellant's behavior would improve if she remained at the youth commission and that she was at a high risk to reoffend if paroled.

Conclusion: Considering this and other evidence in the record, we conclude there is evidence supporting the trial court's decision. The trial court did not abuse its discretion in ordering appellant's transfer. *See In re D.T.,* 217 S.W.3d at 744. We resolve appellant's sole issue against her. We affirm the trial court's order.

DISPOSITION PROCEEDINGS

NINETY-NINE YEAR SENTENCE FOR VIOLATING AGGRAVATED ROBBERY DEFERRED ADJUDICATION DID NOT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

¶ 12-2-3B. **Diamond v. State**, Nos. 09–11–00478–CR, 09–11–00479–CR, --- S.W.3d ----, 2012 WL 1431232 (Tex.App.-Beaumont, 4/25/12).

Facts: Terrell Dewayne Diamond appeals from the trial court's revocation of his deferred adjudication community supervision and imposition of sentence in two cases. Because Diamond was under the age of seventeen years, the cases were initially referred to the juvenile court. That court waived its jurisdiction and transferred the matters to the district court for trial as an adult.

In accordance with a plea-bargain agreement, Diamond entered a plea of guilty to the offense of the unauthorized use of a motor vehicle. *See* Tex. Penal Code Ann. § 31.07 (West 2011). The trial court found the evidence sufficient to find Diamond guilty, deferred further proceedings, and placed Diamond on community supervision for five years. In the second case, Diamond entered a plea of guilty to the offense of aggravated robbery. *See* Tex. Penal Code Ann. § 29.03 (West 2011). The trial court found evidence sufficient to find Diamond guilty, deferred further proceedings,

placed Diamond on community supervision for ten years, and assessed a $1,000 fine. The State subsequently filed motions to revoke Diamond's unadjudicated community supervision in both cases. At the hearing on the motion to revoke, Diamond pled "true" to four violations of the conditions of his community supervision. The trial court found that Diamond violated the terms of his community supervision, found him guilty of aggravated robbery, and assessed his punishment at 99 years' confinement. The trial court further found Diamond guilty of the unauthorized use of a motor vehicle, and assessed his punishment at 2 years' confinement, to run consecutive to his sentence for the aggravated robbery charge.

Diamond filed a motion to reconsider the imposition of his state jail sentence. In both cases Diamond also filed a motion for new trial and motion in arrest of judgment wherein Diamond argued that the verdict is contrary to the law and the evidence, and that his sentence is inappropriate and unreasonable. As there is not a signed order in the record denying Diamond's motions for new trial, we deem they were denied by operation of law. *See* Tex.R.App. P. 21.8. Diamond appealed both cases.

In his appeal in cause numbers 7889 and 7890, Diamond argues that he has been denied a complete record. In his appeal in cause number 7890, Diamond raises three additional issues. He argues that the record fails to establish that the trial court had proper jurisdiction, that the trial court erred in failing to grant his motion for new trial, and that his sentence for aggravated robbery constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article 1.09 of the Texas Code of Criminal Procedure.

Held: Affirmed

Opinion: In Diamond's third and fourth issue in cause number 7890, he contends that the trial court should have granted his motion for a new trial because his sentence is disproportionate and constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and article 1.09 of the Texas Code of Criminal Procedure [FN2]. The State argues that Diamond did not object and therefore waived any claim of disproportionate sentence on appeal.

FN2. Diamond has briefed his article 1.09 claim with his issue regarding the Eighth Amendment. He has not by argument or authority established that the cruel and unusual provisions of the state statute are broader and offer greater protection than the Eighth Amendment. Therefore, nothing is presented for review. *See Johnson v. State,* 853 S.W.2d 527, 533 (Tex.Crim.App.1992).

To preserve error for appellate review, the complaining party must present a timely and specific objection to the trial court, and obtain a ruling. Tex.R.App. P. 33.1(a). A party's failure to specifically object to an alleged disproportionate or cruel and unusual sentence in the trial court or in a post-trial motion waives any error for the purposes of appellate review. *Rhoades v. State,* 934 S.W.2d 113, 120 (Tex.Crim.App.1996); *Noland v. State,* 264 S.W.3d 144, 151 (Tex.App.-Houston [1st Dist.] 2007, pet. ref'd). While Diamond did not raise any objections when the trial court sentenced him, he did subsequently file post-sentence motions complaining about the alleged excessive sentence. We find that Diamond preserved this issue for review.

Generally, a sentence that is within the range of punishment established by the Legislature will not be disturbed on appeal. *See Jackson v. State,* 680 S.W.2d 809, 814 (Tex.Crim.App.1984). The appellate court rarely considers a punishment within the statutory range for the offense excessive, unconstitutionally cruel, or unusual under either Texas law or the United States Constitution. *See Kirk v. State,* 949 S.W.2d 769, 772 (Tex.App.-Dallas 1997, pet. ref'd); *see also Jackson v. State,* 989 S.W.2d 842, 846 (Tex.App.-Texarkana 1999, no pet.). Aggravated robbery is a first-degree felony, which carries a punishment range of confinement from five to ninety-nine years. Tex. Penal Code Ann. §§ 12.32, 29.03(b) (West 2011). Diamond's sentence of ninety-nine years is within the statutory range authorized by the Legislature for the crime of aggravated robbery. *See id.*

Diamond failed to prove that his sentence was grossly disproportionate to the offense he committed. Further, there is no evidence in the record of sentences imposed for similar offenses by which we can make a reliable comparison. *See Jackson,* 989 S.W.2d at 846. Diamond cites to a number of cases wherein the appellate courts have found lengthy sentences constitutional. *See Thomas v. State,* 916 S.W.2d 578, 584 (Tex.App.-San Antonio 1996, no pet.) (40–year conviction constitutional noting appellant had two prior felonies, including theft from a person and robbery); *Phillips v. State,* 887 S.W.2d 267, 268–69 (Tex.App.-Beaumont 1994, pet. ref'd) (99 years for aggravated sexual assault after adjudication based on failure to attend offenders program and failure to wear electronic monitoring device); *Lackey v. State,* 881 S.W.2d 418, 420–21 (Tex.App.-Dallas 1994, pet. ref'd) (35–year sentence for enhanced shoplifting constitutional when punishment enhanced by prior felony convictions for burglary and robbery); *Nevarez v. State,* 832 S.W.2d 82, 86–87 (Tex.App.-Waco 1992, pet. ref'd) (life sentence constitutional when punishment enhanced by two prior felony convictions); *Smallwood v. State,* 827 S.W.2d 34, 37–38 (Tex.App.-Houston [1st Dist.] 1992, pet. ref'd) (50-year sentence found

constitutional when appellant's punishment was enhanced pursuant to the habitual offenders statute and when appellant had other theft offenses and felony convictions); *Simpson v. State,* 668 S.W.2d 915, 919–20 (Tex.App.-Houston [1st Dist.] 1984, no pet.) (life sentence constitutional when appellant convicted for possession of cocaine had two prior felony convictions). Diamond argues each of these cases had aggravating factors not present in his case. We disagree. During his sentencing hearing, the trial court questioned Diamond about the circumstances surrounding the aggravated robbery offense for which he had previously pleaded guilty. Diamond stated that while he was robbing a man, he hit him with a rock and knocked the man unconscious. He admitted that after knocking the man unconscious, he left the man to die while his "co-partner" continued beating the unconscious man. Diamond indicated to the court that his drug addiction was the source of his problems. Further, contrary to Diamond's argument, his community supervision violations were not purely administrative. His violations included his testing positive for marijuana use twice and breaking curfew by being at a residence other than his own at 2:17 a.m. The same drug problems Diamond had when he nearly killed a man, he continued to struggle with while on community supervision. The record indicates that the trial court also considered Diamond's juvenile offenses, which were substantial, including among others, second-degree robbery, theft, unauthorized use of a motor vehicle, and aggravated robbery. The trial court was lenient in granting Diamond community supervision in the first instance. The trial court apparently sought to instill in Diamond the seriousness of his situation by imposing a 180–day up-front time period in jail. Diamond was placed on community supervision to participate in programs to reform his behavior. However, his testimony established that he did not fulfill his community supervision requirements. Prior to sentencing, the trial court not only had the statements made by Diamond and his pleas of true as to the violations of his community supervision, but also had his original plea of guilty to the indictment of aggravated robbery. The trial court was very explicit regarding the reasons for the sentence imposed, wherein the court stated:

> And the only reason that somebody's not dead yet is because we just haven't given you enough time out on the street to make that happen. But I believe in my heart that if you're given an opportunity to get back out on the street you're going to kill the next one.

Based on the record before us, we are unable to conclude that Diamond's sentence constitutes a cruel and unusual punishment. We overrule Diamond's constitutional challenges to the length of the sentence assessed by the trial court in cause number 7890.

Conclusion: Having overruled Diamond's issues in cause numbers 7889 and 7890, we affirm the trial court's judgment in both cases.

Dissent: In the appeal of the judgment in cause number 09–7890, appellant's counsel argues that a ninety-nine year sentence for a seventeen-year-old, who committed the offense when he was fifteen, is cruel and unusual punishment. Counsel states that the United States Supreme Court recently held it unconstitutional "to sentence a juvenile in a non-homicide case to a sentence that could not be discharged in his lifetime." In *Graham v. Florida,* the Supreme Court reasoned:

> *Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. [*Roper v. Simmons,* 543 U.S. 551, 569,] 125 S.Ct. 1183, 161 L.Ed.2d 1. As compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." *Id.,* at 569–570, 125 S.Ct. 1183, 161 L.Ed.2d 1. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.,* at 573, 125 S.Ct. 1183, 161 L.Ed.2d 1. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.,* at 569, 125 S.Ct. 1183, 161 L.Ed.2d 1. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." *Thompson, supra,* at 835, 108 S.Ct. 2687, 101 L.Ed.2d 702 (plurality opinion).

The State responds that "the probability of parole makes these circumstances different from *Graham.*" The Supreme Court also noted in *Graham* that "[t]hose who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Id.* at 2030. Although the State argues that the facts justify the sentence, the State acknowledges it "cannot disagree that holding a human being to what amounts to life in prison for horrendously bad decisions made at age fifteen is an ethically and morally monumental burden, not to be undertaken without serious consideration."

The law provides that, after an adjudication of guilt, "all proceedings, including assessment of punishment, pronouncement of sentence, granting of community supervision, and defendant's appeal continue as if the adjudication of guilt had not been deferred." Tex.Code Crim. Proc. Ann. art. 42.12, § 5(b) (West Supp.2011); *see Pearson v. State,* 994 S.W.2d 176, 178 (Tex.Crim.App.1999); *Issa v. State,* 826 S.W.2d 159, 161 (Tex.Crim.App.1992). In this case, sentencing occurred immediately after revocation, as follows:

Cause No. 7890, I find the evidence to be sufficient to find Counts 2, 3, 4, and 6 to be true. They are true. I hereby revoke your unadjudicated probation. I now find you guilty of the offense of aggravated robbery. I assess your punishment at 99 years' confinement in the Institutional Division. You'll get credit for whatever time that you're entitled to by law.

Defense counsel filed a motion for new trial noting that the sentence was "unreasonable and without consideration of existing verifiable facts [.]" Defense counsel also filed a motion for reconsideration of the imposition of sentence, asked for a hearing and opportunity to present evidence, and requested that defendant be placed on community supervision. Appellant argues that "[b]ased upon the age of the defendant and matters set out in the motion for new trial and motion for reconsideration of imposition of sentence, and the manifest injustice of the harsh sentence, the decision of the trial court was contrary to the law and evidence, and therefore the trial court should have granted the motion for new trial."

EVIDENCE

CIRCUMSTANTIAL INDICIA OF AUTHENTICITY REGARDING MYSPACE POSTINGS CONSIDERED SUFFICIENT TO JUSTIFY ADMITTING IT INTO EVIDENCE AND SUBMITTING THE ULTIMATE QUESTION OF ITS AUTHENTICITY TO THE JURY.

¶ 12-2-1. **Tienda v. State,** ---S.W.3d---, 2012 WL 385381 (Tex.Crim.App., 2/8/12).

Facts: David Valadez and his two passengers were the targets of a multiple car shootout while driving southbound in Dallas on I-35E towards I-30. The shooting was apparently the product of some tension displayed between two rival groups at a nightclub earlier that evening, where members of the appellant's group were "throwing" gang signs and "talking noise" to Valadez and his friends. Shortly after Valadez and his passengers left one nightclub to head to another "after hours" club, Valadez's car unexpectedly came under gunfire from a caravan of three or four cars also traveling southbound on I-35E towards I-30. The appellant was a passenger in one of the cars in the caravan.

Testimony at trial as to the appellant's specific involvement in the shooting varied widely. The witnesses agreed that the appellant was at least present during the shooting; however, there was inconsistent testimony as to who fired the first gunshots, whether the appellant was seen merely holding a gun or actually firing a weapon, which car the appellant was riding in, and from which car the fatal shots were fired. During the exchange of fire, Valadez was shot twice, causing him to lose control and crash his vehicle into the highway's center concrete divider. Valadez died as a result of the gunshot wounds shortly after being taken to a nearby hospital. Although cartridge casings consistent with at least two weapons were found at the scene of the shooting, the bullet recovered from the deceased's body could not be matched to a particular weapon, as no firearms were ever recovered.

During preparation of the State's case against the appellant, the deceased's sister, Priscilla Palomo, provided the State with information regarding three MySpace profile pages that she believed the appellant was responsible for registering and maintaining.[FN3] After subpoenaing MySpace.com for the general "Subscriber Report" associated with each profile account, the State printed out images of each profile page directly from the MySpace.com website, and then marked the profile pages and related content as State's exhibits for trial. The State used Palomo as the sponsoring witness for these MySpace accounts at guilt/innocence, and, over the appellant's running objection as to the authenticity of the profile pages, the State was permitted to admit into evidence the names and account information associated with the profiles, photos posted on the profiles, comments and instant messages linked to the accounts, and two music links posted to the profile pages.

The State had Palomo explain how she came across the profiles and brought them to the attention of the prosecutor. The trial judge sustained the appellant's first authentication objection when the prosecutor began asking Palomo questions about the specific content of the MySpace profiles prior to introducing any exhibits into evidence. After a brief sidebar conference at the bench with defense counsel off the record, the prosecutor marked the relevant MySpace profile printouts as numbered State's exhibits and had Palomo identify the printouts as the profiles she had found on MySpace. The prosecutor also offered into evidence the subscriber reports and accompanying affidavits subpoenaed from MySpace. The judge then admitted the printouts of the profiles, over the appellant's objection that the State still had not laid the proper predicate to prove that the profiles were in fact what the State purported them to be, namely, declarations that the appellant himself had posted on his personal MySpace pages.

According to the subscriber reports, two of the MySpace accounts were created by a "Ron Mr. T," and the third by "Smiley Face," which is the appellant's widely-known nickname. The account holder purported to live in "D TOWN," or "dallas," and registered the accounts with a "ronnietiendajr@" or "smileys_shit@" email address. The State introduced multiple photos "tagged" to these accounts because the person who

appeared in the pictures at least resembled the appellant. The person is shown displaying gang-affiliated tattoos and making gang-related gestures with his hands.

The main profile pages of the MySpace accounts contained quotes boasting "You aint BLASTIN You aint Lastin" and "I live to stay fresh!! I kill to stay rich!!" Under the heading "RIP David Valadez" was a link to a song that was played by Valadez's cousin at Valadez's funeral. Another music link posted to one of the profiles was a song titled "I Still Kill." The instant messages exchanged between the account holder and other unidentified MySpace users included specific references to other passengers present during the shooting, circumstances surrounding the shooting, and details about the State's investigation following the shooting. The author of the messages made specific threats to those who had been "snitchin" and "dont run shit but they mouth," assigning blame to others for being the "only reason im on lock down and have this shit on my back." The author also generally boasted to another user that "WUT GOES AROUND COMES AROUND" and "U KNO HOW WE DO, WE DON'T CHASE EM WE REPALCE EM." The author accused: "EVERYONE WUZ BUSTIN AND THEY ONLY TOLD ON ME." Several of the instant messages also complained about the author's electronic monitor, which was a condition of the appellant's house arrest while awaiting trial.

The State elicited additional testimony concerning the MySpace pages through a Dallas Police Department gang unit officer, Detective Daniel Torres, during guilt/innocence and through Valadez's mother during punishment. The officer testified regarding the common use of social networking media, such as MySpace, by gangs to stay in touch with members and to "promote" their gangs by bragging about participation in gang-related activities. At punishment, Valadez's mother was permitted to testify about how "devastated" she and her family were when they found the appellant's music link on his profile page with the title "RIP David Valadez," which in her eyes was the appellant's way of bragging about killing her son through the song that was played at his memorial. The appellant repeatedly objected, during both stages of trial, on the basis of improper authentication, hearsay, and relevance.

Through cross examination of Palomo, defense counsel elicited testimony regarding the ease with which a person could create a MySpace page in someone else's name and then send messages, purportedly written by the person reflected in the profile picture, without their approval. Defense counsel emphasized that any case-specific facts that were referenced in the MySpace messages associated with these accounts were not facts solely within the defendant's knowledge, but were known to the deceased's family, friends, and practically any other third party interested in the case. Although the gang officer, Torres, testified to having prior experience using MySpace to investigate gang-related activity, when asked on cross examination whether he had any particular knowledge regarding how a MySpace account is created, he stated: "None, whatsoever." The officer acknowledged that anyone could create a MySpace page, but he had never created one himself.

During the appellant's guilt/innocence closing argument, counsel again emphasized the ease with which a MySpace account could be created or accessed without someone's approval and highlighted the State's failure to prove that the accounts were created by the appellant through any technological or expert evidence, for example, by tracing the IP address listed in the subscriber report to the appellant's personal computer. In sum, defense counsel argued that the MySpace evidence was never authenticated and was not credible evidence that the jury should consider in supporting a guilty verdict. The State's closing arguments during both phases of trial included multiple MySpace references and specific quotes from the profile pages. The jury found the appellant guilty and assessed punishment at thirty-five years in prison.

On appeal, the appellant argued that the trial court erred in overruling his objections to the MySpace evidence. The court of appeals found sufficient "individualization" in the comments and photos on the MySpace pages to satisfy the factors laid out in Texas Rule of Evidence 901(b)(4) and admit the evidence as a "conditional fact of authentication" to support a "finding that the person depicted supplied the information." In so ruling, the court of appeals relied for authority solely upon the opinion of an intermediate appellate court in Maryland that has since been reversed, as the appellant emphasizes now in his brief on the merits before this Court, by that state's highest appellate court. We granted the appellant's petition for discretionary review to determine whether the court of appeals erred in holding that the trial court did not abuse its discretion in finding that the MySpace profiles were properly authenticated.

Held: Affirmed

Opinion: In this case, the internal content of the MySpace postings—photographs, comments, and music—was sufficient circumstantial evidence to establish a prima facie case such that a reasonable juror could have found that they were created and maintained by the appellant. That circumstantial evidence included:

• The first MySpace business record I.D. is # 120841341. The official MySpace Subscriber Report lists the User as "First Name: ron; Last Name: mr.t" with an email address of "smileys—shit@." [Witnesses testified that the appellant's nick-name is "Smiley."] The city is listed as "D TOWN."

• The Subscriber Report for MySpace User # 300574151 lists the owner as "First Name: ron; Last name: Mr. T" with an email address of "ronnietiendajr @." As with the first MySpace listing, the city for this listing is "D*Town." The zip code is 75212.

• The Subscriber Report for MySpace User # 435499766 lists the owner as "First Name: SMILEY; Last Name: FACE" with an email address of ronnietiendajr@. The city for this listing is "dallas" and the zip code is 75212.

• The first MySpace page of User # 120841341 offered into evidence contains a photograph of the appellant under the title "SMILEY FACE." The photograph shows the appellant pulling a shirt up over the bottom half of his face. The tattoos on his arms, however, are clearly visible. There is a date stamp on the photograph of "03/01/2007 17:09."

• To the right side of the appellant's photograph on that MySpace page is the following:

"You aint BLASTIN You aint Lastin"

Male
21 years old
D Town, Texas
United States
Last Login: 9/4/2007 [FN39]

• Below the appellant's photograph and the caption on that MySpace page is the legend "RIP David Valadez" and a music button which, according to Priscilla Paloma, played the song that was played at David Valadez's funeral.

• On the MySpace page for User # 300574151, there is a photograph of the appellant, bare-chested, with his gang tattoos—including "Tango Blast" written across his chest.

• The MySpace page is titled "MR. SMILEY FACE" even though the Subscriber Report lists the User's name as "ron Mr. T" and his email address as "ronnietiendajr@."

• Beside the appellant's photograph on that MySpace page is the following:

"I LOVE DRAMA SO
MUCH CUZ MY LIFE
IS SO ROUGH!!!
ANYTHING ELSE
WOULDN'T SEEM
NORMAL!!!
Male
22 years old
D*Town, Texas
United States
Last Login: 5/19/2008

• Below the appellant's photograph and the caption on that MySpace page is the music button for the "50 Cent I Still Kill by dj Bali" sound clip.

• Below that caption is the following:

MR. SMILEY FACE'S INTERESTS

General AINT PROUD OF MY PAST BUT IM LIVIN N DA PRESENT N ALWAYS PLANIN 4 DA FUTURE!!! NS XV111 ST

• Also on the MySpace Profile page for User # 300574151 is a later photograph of a bare-chested appellant, again showing his tattoo "Tango Blast."

• That photograph carries the heading: Mr. ONE OF A KIND.

• Beside the appellant's photograph on that MySpace page is the following:

"DIS IS WHO I AM!!!
DON'T LIKE IT FUCK
YOU!!!"
Male
22 years old
D*Town, Texas
United States
Last Login: 9/5/2008

• On the right hand side of the page is the following statement: Mr.ONE OF A KIND I LIVE TO STAY FRESH!! I KILL TO STAY RICH!! N OTHER WORDS IMA GO TO WAR BOUT MY SHIT!!

• The MySpace User # 300574151 message page contains numerous messages to other MySpace users. Only the 53 messages sent between 2:00 p.m. and 9:44 p.m. on September 21, 2008, were introduced into evidence. The messages that indicate that it is the appellant himself who is the creator, owner, and user of this MySpace account include the following:

• At 2:09 p.m. the User sent a message to User # 73576314: "SHIT CAN U BELIEVE I ALREADY BEEN ON DIS MONITOR A YEAR NOW AND SHIT AINT NO TELLING WHEN A NIGGA GONE GET OFF DIS HOE"

• At 2:17 p.m. the User sent a message to the same User: "SHIT IT AINT ME IT THE STATE SETTIN IT OFF AND SINCE I HAVE SNITCHES ON ME THEY TRYNA GET A NIGGA LOCKED UP"

• Also at 2:17 p.m., the User sent a message to User # 103410565: "U KNO ME AND U MY NIGGA SO U WANT

TO FUCK HIM UP U KNO HOW WE DO, WE DONT CHASE EM WE REPALCE EM"

• At 2:21 p.m. the User sent another message to User # 103410565: "IS IT DAT FRIENDLY ASS NIGGA IN ALL DEM PIX AND SHIT JUS PLAY IT COO WUT GOES AROUND COMES AROUND YA FEEL ME"

• At 2:22 p.m. the User sent a message to User # 73576314: "MAN JESSE BOY HECTOR SNITCHIN ON ME I AINT TRIPPIN ON BEEF BUT TELLIN A WHOLE NOTHER BALL GAME DAT I DONT PLAY"

• At 2:27 p.m. the User sent a message to User # 12231226: "SHIT ON STILL ON A MONITOR SO I AINT BEEN NO WHERE IN A BOUT A YEAR NOW AND MY B DAY WAS O THA12TH U FO GOT BOUT ME"

• At 2:35 p.m. the User sent a message to User # 73576314: "YEA Y U THINK IM ON DIS MONITOR MY NIGGA SHIT HATIN ASS NIGGAS WNNA TALK ALL DAT GANGSTA SHIT AND WEN THE GOIN GET TUFF DEM NIGGAS DON'T RUN SHIT BUT THEY MOUTH"

• At 2:42 p.m. the User sent a message to the same User: "YEA SHIT EVERYONE WUZ BUSTIN AND THEY ONLY TOLD ON ME"

• At 2:50 p.m. the User sent another message to the same User: "YEA SHIT U KNO I KEEP GANGST EVEN AFTER HECTOR SHOT AT NEW AT RUMORS WE STILL DIDNT TELL AND I KNO JESSE TOLD HIM WE WAS THERE CUZ WE SAW THEM AT THA CLUB BUT ITS COO IF I GET OFF MAN@!!!!!"

This combination of facts—(1) the numerous photographs of the appellant with his unique arm, body, and neck tattoos, as well as his distinctive eyeglasses and earring; (2) the reference to David Valadez's death and the music from his funeral; (3) the references to the appellant's "Tango Blast" gang; and (4) the messages referring to (a) a shooting at "Rumors" with "Nu–Nu," (b) Hector as a "snitch," and (c) the user having been on a monitor for a year (coupled with the photograph of the appellant lounging in a chair displaying an ankle monitor) sent from the MySpace pages of "ron Mr. T" or "MR. SMILEY FACE" whose email address is "ronnietiendajr@"—is sufficient to support a finding by a rational jury that the MySpace pages that the State offered into evidence were created by the appellant. This is ample circumstantial evidence—taken as a whole with all of the individual, particular details considered in combination—to support a finding that the MySpace pages belonged to the appellant and that he created and maintained them.

It is, of course, within the realm of possibility that the appellant was the victim of some elaborate and ongoing conspiracy. Conceivably some unknown malefactors somehow stole the appellant's numerous self-portrait photographs, concocted boastful messages about David Valadez's murder and the circumstances of that shooting, was aware of the music played at Valadez's funeral, knew when the appellant was released on pretrial bond with electronic monitoring and referred to that year-long event along with stealing the photograph of the grinning appellant lounging in his chair while wearing his ankle monitor. But that is an alternate scenario whose likelihood and weight the jury was entitled to assess once the State had produced a prima facie showing that it was the appellant, not some unidentified conspirators or fraud artists, who created and maintained these MySpace pages.

The court of appeals in this case relied upon the opinion of an intermediate court of appeals in Maryland in a case presenting similar facts. But that intermediate appellate court's opinion has since been reversed on discretionary review. In *Griffin v. State,* involving a prosecution for murder and assault, the State proffered a printout of portions of a MySpace profile purporting to be that of Griffin's girlfriend. Although the girlfriend testified at trial, the State did not attempt to authenticate the MySpace profile as genuinely hers through her testimony. Instead, the lead investigator in the case testified that the MySpace profile identified itself as being that of "Sistasouljah," having the same date of birth as the girlfriend. Also posted on the profile was a photographic image of the defendant with his girlfriend. The State argued that the date of birth and the photograph provided sufficient indicia of authentication to justify admission of other postings on the MySpace profile that amounted to veiled threats against the State's principal witness against the defendant. The Maryland Court of Appeals disagreed. "Anyone can create a MySpace profile at no cost," the Court observed, and "anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password[.]" Relying for "assistance" in its analysis upon *Lorraine,* the Maryland Court of Appeals concluded:

The potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user leads to our conclusion that a printout of an image from such a site requires a greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site in order to reflect that [the defendant's girlfriend] was its creator and the author of [the threatening language posted thereon].

Accordingly, the Maryland Court of Appeals held that the trial court had abused its discretion to find that the State had laid an adequate prima facie foundation for admission of the MySpace profile postings.

Along the way, the Maryland Court of Appeals recognized that such postings may readily be authenticated, explicitly identifying three non-exclusive

methods. First, the proponent could present the testimony of a witness with knowledge; or, in other words, "ask the purported creator if she indeed created the profile and also if she added the posting in question." That may not be possible where, as here, the State offers the evidence to be authenticated and the purported author is the defendant. Second, the proponent could offer the results of an examination of the internet history or hard drive of the person who is claimed to have created the profile in question to determine whether that person's personal computer was used to originate the evidence at issue. Or, third, the proponent could produce information that would link the profile to the alleged person from the appropriate employee of the social networking website corporation. The State of Maryland failed to take advantage of any of these methods in *Griffin.* And it is true that the State of Texas has likewise failed to utilize any of them in the appellant's case. Nevertheless, as we have explained, there are far more circumstantial indicia of authenticity in this case than in *Griffin*—enough, we think, to support a prima facie case that would justify admitting the evidence and submitting the ultimate question of authenticity to the jury. We hold that the court of appeals did not err to conclude that it was within the trial court's discretion to admit the MySpace postings, notwithstanding that the persuasive authority it relied upon for that proposition has since been overruled.

Conclusion: Because there was sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be—MySpace pages the contents of which the appellant was responsible for—we affirm the trial judge and the court of appeals which had both concluded the same.

SUFFICIENCY OF THE EVIDENCE

EVIDENCE CONSIDERED SUFFICIENT TO SUPPORT FINDING OF AGGRAVATED ASSAULT WITH A DEADLY WEAPON.

¶ 12-2-6. **In the Matter of F.D.M.**, MEMORANDUM, No. 01-11-00426-CV, 2012 WL 1249520 (Tex.App.-Hous. (1 Dist.), 4/12/12).

Facts: Aguga is a corrections officer for the Texas Department of Criminal Justice who earned extra money in his off-hours by selling ice cream from an ice cream truck. Late one afternoon while he was driving the ice cream truck, a group of teenagers flagged Aguga down and began asking him about his ice cream. One or two of the teenagers disappeared around the back of the truck, while Aguga continued answering questions for the other teenagers. Aguga heard a shot on the other side of the truck. He turned and was struck by a bullet in the neck. The teenager on the other side of the truck shot him a second time, in the shoulder. All of the teenagers then fled the scene.

Aguga was hospitalized for a month and had to have multiple surgeries as a result of his gunshot wounds. While he was in the hospital, and again at trial, Aguga identified F.D.M. as the teenager who had the gun and who shot him. He testified that none of the other teenagers was armed.

A. Craft lives in the neighborhood where Aguga was shot. She was entering the neighborhood as Aguga was exiting the ice cream truck, bleeding from the gunshot wounds. She witnessed the teenagers around the truck start running away, but she was unable to identify any of them. She testified that one of the teenagers was on a small bike.

C.R. was also in the neighborhood when Aguga was shot. C.R. testified that he was in the neighborhood that afternoon spending time with friends when they ran into F.D.M. C.R. testified that when he approached F.D.M., F.D.M. shooed him away and told him that he was going to rob the ice cream man. C.R. thought that F.D.M. was joking. C.R. testified that he subsequently heard two pops that sounded like firecrackers. He then saw Aguga screaming for help. He also testified that he saw F.D.M. and another acquaintance jogging away from the ice cream truck.

J.B. was with C.R. when they encountered F.D.M. He testified that F.D.M. waived them away because "he was about to do something bad." He further testified that he witnessed F.D.M. shoot Aguga and run away. He stated that he had seen F.D.M. with a gun several days earlier. J.B. identified the gun F.D.M. used in the shooting as a .32–caliber and testified that he had seen it at F.D.M.'s house days before the shooting. J.B. testified that he was not wearing his glasses when he witnessed the shooting but that he knew F.D.M. and could recognize him without glasses.

R.T. also testified about the day of the shooting. He testified that he was on his bike, talking to the ice cream man when F.D.M. approached. According to R.T., F.D.M. asked for a dollar, stating that he would pay R.T. back because he was "fixing to get the ice cream man." R.T. testified that F.D.M. pulled out a gun when he said this, and R.T. understood him to be saying that he was going to shoot the ice cream man. R.T. testified that he saw F.D.M. approach the side of the ice cream truck and heard shots but did not see the shooting. R.T. also testified that after the shooting F.D.M. threatened to beat him up if he called the police.

Deputy T. Pasket was the first officer on the scene after the shooting. He testified that they recovered two shell casings at the scene. Sergeant R. Minchew, to whom the case was assigned, testified that the shell

casings were from a .32–caliber gun. Sergeant Minchew also testified that Crime Stoppers received an anonymous tip that a young man named "Chris was the shooter" and that the young man lived on Carola Forest in the neighborhood where the shooting occurred. Sergeant Minchew spoke with an officer assigned to the neighborhood and identified F.D.M. as "Chris." At trial, all three of the young men who knew F.D.M. called him by the name "Chris," and another deputy testified that F.D.M. lived on Carola Forest.

A few days after the shooting, Sergeant Minchew visited Aguga while he was recovering in the hospital. Aguga gave a written statement and, in a photographic lineup, identified F.D.M. as the person who shot him. Sergeant Minchew testified that he asked Aguga, who was still not fully able to speak due to the neck wound, how sure he was about the identification and Aguga mouthed that he was "very sure."

F.D.M. presented testimony from one witness at trial-his mother, S.W. She also testified that everyone knew him as "Chris." She did not know where her son was at the time of the shooting. She testified that R.T. had come to her house to see her son after the shooting, contrary to his testimony that he did not see F.D.M. after the shooting until F.D.M. later threatened him not to go to the police.

Although juvenile cases are civil proceedings, we review challenges to the sufficiency of the evidence to support a finding that a juvenile engaged in delinquent conduct using the standards applicable to criminal cases. *In re C.J.,* 285 S.W.3d 53, 55–56 (Tex.App.-Houston [1st Dist.] 2009, no pet.); *In re G.A.T.,* 16 S.W.3d 818, 828 (Tex.App.-Houston [14th Dist.] 2000, pet. denied). This Court reviews criminal sufficiency-of-the-evidence challenges under a single standard of review-the Jackson standard-regardless of whether the appellant raises a legal or factual sufficiency challenge. *See Ervin v. State,* 331 S.W.3d 49, 52–54 (Tex.App.-Houston [1st Dist.] 2010, pet. ref d) (applying *Brooks v. State,* 323 S.W.3d 893, 894–913 (Tex.Crim.App.2010) and *Jackson v. Virginia,* 443 U.S. 307, 320, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)); *see also Bearnth v. State,* No. 01–09–00906–CR, 2011 WL 5110241, at *2 (Tex.App.-Houston [1st Dist.] Oct. 27, 2011, no pet.).

Under the Jackson standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational fact-finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson,* 443 U.S. at 317, 319, 99 S.Ct. at 2788–89; *Laster v. State,* 275 S.W.3d 512, 517 (Tex.Crim.App.2009). Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *See Jackson,* 443 U.S. at 314, 318 n. 11, 320, 99 S.Ct. at 2786, 2789 & n. 11; *Laster,* 275 S.W.3d at 518. The Jackson standard gives full play to the responsibility of the fact finder to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson,* 443 U.S. at 319, 99 S.Ct. at 2789; *Clayton v. State,* 235 S.W.3d 772, 778 (Tex.Crim.App.2007). An appellate court presumes the fact finder resolved any conflicts in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson,* 443 U.S. at 326, 99 S.Ct. at 2793.

Held: Affirmed

Memorandum Opinion: To prove that F.D.M. committed the aggravated assault with which the State charged him, the State had to prove that F.D.M. "intentionally, knowingly, or recklessly cause[d] bodily injury to [Aguga]" and "use[d] or exhibit[ed] a deadly weapon" when he did so. TEX. PENAL CODE ANN. §§ 22.01(a)(1), 22.02(a)(2) (West 2011). F.D.M. contends that the State's case rests primarily upon the testimony of two witnesses—Aguga and J.B.—and that the testimony of these witnesses is not credible.

F.D.M. argues that Aguga's testimony is not credible for two reasons. First, F.D.M. asserts that Aguga "testified that he felt like he was being surrounded and had to leave," and that "[u]nder these circumstances, [Aguga] could easily misidentify the individual who shot him." This contention is undermined by the testimony at trial. Aguga identified F.D.M. as his shooter and testified that he had a good view of F.D.M.'s face when F.D.M. shot him. Sergeant Minchew also testified that Aguga indicated that he was "very sure" when he identified F.D.M. as the shooter in the photographic lineup.

Jurors may rely on testimony from the victim to identify a shooter and on the victim's identification of his or her shooter in a photographic lineup. *See Harmon v. State,* 167 S.W.3d 610, 614 (rejecting argument that evidence was insufficient to support conviction when only one witness, the victim, was able to identify defendant as shooter); *see also Akbar v. State,* 190 S.W.3d 119, 124 (Tex.App.Houston [1st Dist.] 2005, no pet.) (relying on victim identification of shooter); *Gilstrap v. State,* 65 S.W.3d 322, 329 (Tex.App.-Waco 2001, pet. ref'd) (same); *Epps v. State,* 24 S.W.3d 872, 880 (Tex.App.-Corpus Christi 2000, pet. ref'd) (same); *Jones v. State,* 867 S.W.2d 175, 176 (Tex.App.-Beaumont 1993, no pet.) (same). Even the testimony of a single eyewitness may be sufficient to support a conviction. *Davis v. State,* 177 S.W.3d 355, 359 (Tex.App.-Houston [1st Dist.] 2005, no pet.) (citing *Aguilar v. State,* 468 S.W.2d 75, 77 (Tex.Crim.App.1971)); *Lewis v. State,* 126 S.W.3d 572, 575 (Tex.App.-Texarkana 2004, pet. ref'd). Here, two

witnesses identified F.D.M. as the shooter and several witnesses identified him as present at the time of the shooting and as having made statements indicative of guilt prior to the shooting.

Second, F.D.M. argues that Aguga could not identify the shooter when Sergeant Minchew first visited him in the hospital. But F.D.M. misstates the testimony. Sergeant Minchew was unable to speak to Aguga the first time he visited the hospital because of his medical condition. The testimony F.D.M. cites in his brief relates to Sergeant Minchew's second visit to Aguga in the hospital, at which time Aguga did identify F.D.M. as the shooter.

F.D.M. next contends that J.B.'s testimony was not reliable because the sun was "kind of in his eyes at the time of the shooting, and he was not wearing his glasses. J.B. testified that he knew F.D.M. and was able to identify F.D.M. without his glasses, and F.D.M. presented no evidence to contradict this testimony. As the sole judges of credibility, the jurors are free to believe or disbelieve all or any part of a witness's testimony. *Penagraph v. State,* 623 S.W.2d 341, 343 (Tex.Crim.App.1981); Davis, 177 S.W.3d at 358. Thus, it was the exclusive province of the jury to determine the credibility of J.B.'s testimony that he had been able to identify F.D.M. without his glasses.

F.D.M. also argues that "[t]he State produced several witnesses who heard the appellant say, shortly before the alleged offense, that he was going to rob the ice cream man," but "the probative value of this testimony is easily discounted by the testimony of C.R ., who" said that F.D.R. ' "joke[d] around a lot' and dismissed the statement as [F.D.R.] simply 'playing.' " F.D.R. asserts that C.R. believed that he was not serious about robbing anyone, and "[t]here was no reason for the jury to think otherwise." We disagree. Four witnesses placed F.D.M. at the scene of the crime; two witnesses identified F.D.M. as the shooter; one witnesses identified the type of gun F.D.M. used in the shooting and placed the same type of gun in F.D.M.'s home days before the shooting and in his possession immediately before the shooting. Additionally, one witness testified that F.D.M. threatened to beat him up if he went to the police. *See Wilson v. State,* 7 S.W.3d 136, 141 (Tex.Crim.App.1999) (holding that evidence of threatening witness is evidence of consciousness of guilt) (citing *Ransom v. State,* 920 S.W.2d 288, 299 (Tex.Crim.App.1996) (op. on reh'g)). This evidence reasonably could have caused the jury to conclude that F.D.M. was not joking when he made statements to others that he was going to rob the ice cream man immediately before the shooting.

Conclusion: We hold that the evidence is sufficient to support the jury's finding beyond a reasonable doubt that F.D.M. committed the offense of aggravated assault with a deadly weapon. We therefore affirm the trial court's judgment.

EVIDENCE WAS CONSIDERED SUFFICIENT TO SHOW SPECIFIC INTENT TO COMMIT ARSON.

¶ 12-2-5. **In the Matter of L.J.S.**, MEMORANDUM, No. 11-11-00253-CV, 2012 WL 1365961 (Tex.App.-Eastland, 4/19/12).

Facts: On July 23, 2010, a fire occurred at 101 South Avenue A in Cross Plains that resulted in the total loss of the residence. John Kondratick, a Texas State Fire Marshal's Office investigator, investigated the scene the following day and found that the fire had started in a closet within the residence. Kondratick testified that he was able to eliminate any accidental ignition sources in the closet. The police received tips from several other juveniles that implicated L.J.S. and codefendant R.D.H.

One of those tips came from Kevin James Baker, who testified at trial. On the night of the fire, Baker and several other boys were hanging out and playing games at one of the boys' homes. Baker testified that, at some point, L.J.S. and R.D.H. arrived and walked the others down the street to show them the burning house. Smoke was visibly coming from the house at that point. Baker testified that L.J.S. and R.D.H. said something about starting the fire in a closet and trying to put it out with hand sanitizer.

On July 30, 2010, Baker gave a statement to the Cross Plains police in which he stated that both L.J.S. and R.D.H. talked about starting the fire in a closet and trying to put it out with hand sanitizer and that, after hearing fire truck sirens, both said, "[T]hat's the house that we started the fire in." The State also introduced a statement taken from R.A. who had been subpoenaed as a witness but had failed to appear at court. R.A.'s statement echoed Baker's testimony; it provided, "They said they had started the fire in the big house by accident and tried to put it out with hand sanitizer but it ignited and became out of control."

On the night of the fire, Police Chief Don Gosnell received information that L.J.S. and R.D.H. had told several people that they had started the fire. This tip led him to the residence where Baker and the other boys were playing, and he collected written statements from five boys. All of the statements were consistent in implicating L.J.S. and R.D.H. in starting the fire. All of the statements were consistent in stating that L.J.S. and R.D.H. said they had accidentally started the fire in the closet and tried to put it out with hand sanitizer and that caused the fire to grow out of control. Chief Gosnell spoke to L.J.S. and R.D.H.; they admitted telling the other boys that they had started the fire, but

maintained that they only made up the story to impress the older boys.

In his sole point of error, L.J.S. contends that the evidence was both legally and factually insufficient to support his adjudication for engaging in delinquent conduct by committing the offense of arson. Specifically, L.J.S. argues that the evidence was not legally sufficient to prove he had the requisite intent to damage or destroy a habitation. The standard of review for claims that the evidence is insufficient to support findings that a child has engaged in delinquent conduct is the same as in criminal cases. *In re A.O.,* 342 S.W.3d 236 (Tex.App.-Amarillo 2011, pet. filed); *In re M.L.C,* No. 11–09–00081–CV, 2011 WL 322448, at *1 (Tex.App.-Eastland Jan. 27, 2011, no pet.) (mem.op.); *In re M.C.S ., Jr.,* 327 S.W.3d 802, 805 (Tex.App.-Fort Worth 2010, no pet.). The Court of Criminal Appeals in *Brooks v. State,* 323 S.W.3d 893, 912 (Tex.Crim.App.2010), abandoned the factual sufficiency standard, and we need only consider the sufficiency of the evidence under the legal sufficiency standard set forth in *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). *See In re M.C.S.,* 327 S.W .3d at 805 (applying *Brooks* to a juvenile proceeding); *see also In re M.L.C.,* 2011 WL 322448, at *1 (citing *M.C.S.* and applying only the standard applicable to questions of legal sufficiency).

Held: Affirmed

Memorandum Opinion: In conducting a sufficiency review, we view all of the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Brooks,* 323 S.W.3d at 899; *Hooper v. State,* 214 S.W.3d 9, 13 (Tex.Crim.App.2007) (citing *Jackson,* 443 U.S. at 318–19); *see In re M.D.T.,* 153 S.W.3d 285, 287 (Tex.App.-El Paso 2004, no pet.) ("When reviewing challenges to the legal sufficiency of the evidence to establish the elements of the penal offense that forms the basis of the finding that the juvenile engaged in delinquent conduct, we apply the standard set forth in *Jackson v. Virginia.*"). We consider whether the trier of fact reached a rational decision. *Beckham v. State,* 29 S.W.3d 148, 151 (Tex.App.-Houston [14th Dist.] 2000, pet. ref'd). The fact finder is the sole judge of the weight and credibility of the evidence. *Brown v. State,* 270 S.W.3d 564, 568 (Tex.Crim.App.2008).

Proof of a culpable mental state almost invariably depends upon circumstantial evidence and may be inferred from any facts tending to prove its existence, including the acts, words, and conduct of the accused. *Hart v. State,* 89 S.W.3d 61, 64 (Tex.Crim.App.2002). However, in an arson case, intent cannot be inferred from the mere act of burning. *Beltran v. State,* 593 S.W.2d 688, 689 (Tex.Crim.App.1980) (citing *Miller v. State,* 566 S.W.2d 614 (Tex. Crim App.1978)).

There was evidence that L.J.S. told the other boys that he had started the fire by *accident.* However, there were no possible accidental sources found by the fire investigator. The fire was started in an empty house that had been standing vacant long enough to attract trespassers. After the fire started, L.J.S. did not call 9–1–1 or otherwise report the fire. L.J.S. did not go next door to ask for help. Rather, he went to a friend's house where he did not ask for a phone to call 9–1–1 but, instead, showed the other boys what he had done. L.J.S. did not come forward; the police had to conduct an investigation to determine his involvement. All of the foregoing facts tend to contradict the supposition that L.J.S. did not intend to damage the habitation. *See In re H.A.G.,* No. 13–07–00677–CV, 2008 WL 2154095, at *3 (Tex.App.-Corpus Christi May 22, 2008, no pet.) (mem.op.) (Intent to damage or destroy school by arson was inferred, in part, because juvenile started fire in an empty bathroom, approximately ten minutes before the school day ended, juvenile did not report the fire when it was started, and the principal had to conduct an investigation to determine who was in the restroom at the time the fire started.).

Conclusion: Viewing the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found beyond a reasonable doubt that L.J.S. had the specific intent to damage or destroy the house when he started the fire. We overrule L.J.S.'s sole point of error. The judgment of the trial court is affirmed.