
YEAR 2006 CASE SUMMARIES

By
The Honorable Pat Garza

Associate Judge
386th District Court
San Antonio, Texas

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Motion for new trial prerequisite to factual sufficiency challenge on appeal. [In the Matter of D.J.H.](06-1-11)

On January 12, 2006, the Fort Worth Court of Appeals held that as a prerequisite to raising a factual sufficiency challenge on appeal from a juvenile adjudication hearing, an appellant must first file a motion for new trial challenging the factual sufficiency of the evidence.

¶ 06-1-11. **In the Matter of D.J.H.**, ___ S.W.3d ___, No. 2-05-039-CV, 2006 Tex.App.Lexis 212 (Tex.App.— Fort Worth, 1/12/06).

Background: D.J.H. appeals the trial court's adjudication order declaring that he engaged in the delinquent conduct of criminal trespass. In two points, appellant challenges the legal and factual sufficiency of the evidence to support the jury's finding that he engaged in delinquent conduct.

Held: Affirmed.

Facts: The evidence in this case shows as follows: Spielmaker owned the home where the alleged criminal trespass occurred, and he resided there with his girlfriend of six or seven years, Sherrie Curry, and Curry's two minor children, Lane and Kelsey. A well-understood rule in Curry-Spielmaker residence was that when it became dark and the streetlight came on, the Curry children had to wrap up their play and all other children had to leave the residence. Sherrie Curry testified that she had told appellant "numerous times" about the "streetlight rule" and had also informed him that he was not to come into the home unless he was invited. Spielmaker also testified that, due to prior problems with appellant coming onto his property uninvited, he had personally informed both appellant and his parents more than once before January 5 that appellant was not to come into the house uninvited.

On January 5, 2004, when the streetlight came on, the Curry children told appellant that he had to leave, and he left via the front door. Spielmaker testified that the children had authority to provide such notice to their friends and that on January 5 he observed both the children telling appellant to leave and appellant's departure. Spielmaker heard the front door close when appellant left.

After appellant left, Spielmaker and a friend, Dale McCarthy, talked in the kitchen for about twenty minutes. Spielmaker and McCarthy then walked from the kitchen into the living room, where they saw appellant "going through the stuff on the coffee table." Spielmaker did not know that appellant had returned to the residence.

Spielmaker testified that he'd had problems with appellant before and "freaked out" and asked him, "What are you doing in my house?" Appellant was startled, had a look on his face like "I just got

caught," and ran out the front door. Neither Spielmaker nor the children had given appellant permission to re-enter the house. Kelsey testified that she saw him come back in the front door and begin "going through stuff on our coffee table" just before Spielmaker and McCarthy entered the living room. She confirmed that appellant "jumped up in a weird motion" and looked surprised when Spielmaker saw him. Kelsey further testified that Spielmaker yelled at appellant "for coming into the house without asking or knocking."

Spielmaker sent Lane to appellant's home across the street to find out what was going on. Lane returned with appellant, and Spielmaker again asked appellant what he was doing in Spielmaker's house. When appellant did not respond to Spielmaker's questioning, n9 Spielmaker slapped him. That same evening, appellant's mother filed an assault charge against Spielmaker. Spielmaker did not report the trespassing incident until after he learned of the assault charge. n10

n9 Lane testified that appellant had returned to the home to get some CDs he had left behind, but that he came back inside uninvited. Kelsey confirmed this. Lane further testified that appellant said, "Jim, wait," when Spielmaker made appellant leave; but both Lane and Kelsey testified that appellant did not tell Spielmaker that he had come back for his CDs. Appellant's mother testified that the CDs were later left on her doorstep.

n10 Spielmaker testified that he had pleaded guilty in municipal court to the assault charge and paid a \$ 280 fine.

Legal Sufficiency Issue Omitted.

Opinion: In his second point, appellant challenges the factual sufficiency of the evidence. He did not, however, raise this issue in his motion for new trial. This court has held in an en banc opinion that "as a prerequisite to raising a factual sufficiency challenge on appeal from a juvenile adjudication hearing, an appellant must first file a motion for new trial challenging the factual sufficiency of the evidence." n14 In reaching this result we relied on *In re M.R.*, in which the Supreme Court of Texas held that a motion for new trial is a prerequisite to asserting a factual sufficiency complaint in an appeal from a delinquency judgment. n15 Accordingly, the doctrine of stare decisis demands that we hold that appellant's factual insufficiency complaint is waived. n16 Therefore, we overrule appellant's second point.

n14 *In re J.B.M.*, 157 S.W.3d 823, 827-28 (Tex. App.--Fort Worth 2005, no pet.) (en banc).

n15 *J.B.M.*, 157 S.W.3d at 827-28; see *In re M.R.*, 858 S.W.2d 365, 366, 36 Tex. Sup. Ct. J. 1015 (Tex. 1993), cert. denied, 510 U.S. 1078, 114 S. Ct. 894, 127 L. Ed. 2d 87 (1994).

n16 See *Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 5, 43 Tex. Sup. Ct. J. 1086 (Tex. 2000); see also *Lubbock County, Texas v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 585, 45 Tex. Sup. Ct. J. 873 (Tex. 2002) (explaining that, once the supreme court announces a proposition of law, the decision is considered binding precedent and it is not for a court of appeals to abrogate or modify such established precedent).

Conclusion: Having overruled both of appellant's points, we affirm the trial court's adjudication order.

Dissent:

Concurring and Dissenting Opinion

While I concur with the majority's holding that, applying the appropriate standard of review, the

evidence is legally sufficient to support D.J.H.'s delinquency adjudication, I dissent from the majority's holding that D.J.H. failed to preserve his factual sufficiency challenge. For the reasons set forth by Justice Dauphinot in her dissenting opinion in *In re J.B.M.*, which I joined, I would hold that D.J.H.'s failure to file a motion for new trial complaining that the evidence was factually insufficient to support his adjudication did not forfeit his factual sufficiency complaints on appeal. *157 S.W.3d 823, 830-32 (Tex. App.--Fort Worth 2005, no pet.)* (Dauphinot, J. dissenting). I do not agree that *In re M.R.*, *858 S.W.2d 365, 366, 36 Tex. Sup. Ct. J. 1015 (Tex. 1993)*, *cert. denied, 510 U.S. 1078, 114 S. Ct. 894, 127 L. Ed. 2d 87 (1994)* requires that a factual sufficiency claim in a juvenile case must be preserved by a motion for new trial, because when *M.R.* was decided we did not have jurisdiction to review factual sufficiency in criminal cases. *In re J.B.M.*, *157 S.W.3d at 831*. I would therefore address the merits of his complaints. Because the majority refuses to do so, I respectfully dissent.

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