

## Juvenile Law Case Summaries

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### ***Evidence sufficient to support adjudication for graffiti writing with indelible instrument [In re A.F.] (02-2-27).***

On August 1, 2002, the El Paso Court of Appeals held that evidence was sufficient to support an adjudication for graffiti writing with an indelible instrument even though the instrument was not introduced into evidence.

02-3-27. In the Matter of A.F., UNPUBLISHED, No. 08-01-00441-CV, 2002 WL 1767567, 2002 Tex.App.Lexis \_\_\_\_ (Tex.App.-El Paso 8/1/02) [Texas Juvenile Law (5th Edition 2000)].

Facts: A.F., a juvenile, appeals the finding in an adjudication order that he engaged in delinquent conduct by committing a graffiti offense.

Ismael Salcido is employed as a teacher at Our Lady of the Assumption Catholic School. On February 14, 2001, Salcido was working as a substitute teacher at Coronado High School in El Paso. He was assigned to teach the alternative class. The classroom has cubicles which are affixed to the wall and arranged in such a manner that the students are unable to see one another unless they are out of their cubicle. Approximately fifteen to twenty students were in the classroom and each was assigned a cubicle. The students are not allowed to go in each other's cubicles. As Salcido made his rounds through the cubicles to make sure the students were working, he saw A.F. was writing on the cubicle with a black marker. When he got closer, Salcido could see that A.F. had drawn a marijuana leaf. Salcido stuck his hand out and gestured for A.F. to give him the marker, but he instead put it in his right pocket. Salcido did not persist in retrieving the marker.

Henry Dorantes, assistant principal at Coronado High School, learned the following day of the tagging allegation made by Salcido. As part of his investigation, Dorantes viewed the graffiti on the sides of the cubicle. The markings made by A.F. could not be washed off and Dorantes described them as permanent. The school had to paint over the markings. Neither Salcido nor Dorantes had given A.F. permission to write on the school's property.

The State filed a petition alleging that A.F. had engaged in delinquent conduct by making a marking on school property with an indelible marker (Count I), and by resisting a search by a peace officer (Count II). A.F. waived his right to a jury trial and entered a plea of not true to Count I. He pled true to Count II. At the conclusion of the evidence, the juvenile court found that the State had proven the elements of the criminal mischief offense beyond a reasonable doubt. Based upon A.F.'s plea of true to a second count, the juvenile court also found that A.F. had engaged in delinquent conduct by resisting a search by a peace officer. This appeal concerns only the tagging or graffiti offense.

Held: Affirmed.

Opinion Text: SUFFICIENCY OF THE EVIDENCE

In his sole issue on appeal, A.F. challenges the legal sufficiency of the evidence to support the trial court's finding that he engaged in delinquent conduct by committing the tagging offense. He argues that because the State never recovered the marker or introduced it into evidence, it failed to prove beyond a reasonable doubt that he used an indelible marker.

Standard of Review

When reviewing such a challenge by a juvenile, we apply the Jackson v. Virginia standard. In the Matter of A.S., 954 S.W.2d 855, 858 (Tex.App.-El Paso 1997, no pet.). This standard requires us to review all the evidence, both State and defense, in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson, 443 U.S. at 318- 19, 99 S.Ct. at 2789, 61 L.Ed.2d at 573; Geesa v. State, 820 S.W.2d 154, 159

(Tex.Crim.App.1991). This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic to ultimate facts. Jackson, 443 U.S. at 319, 99 S.Ct. at 2789, 61 L.Ed.2d at 573. We do not resolve any conflict of fact or assign credibility to the witnesses, as it was the function of the trier of fact to do so. See Adelman v. State, 828 S.W.2d 418, 421 (Tex.Crim.App.1992); Matson v. State, 819 S.W.2d 839, 843 (Tex.Crim.App.1991). Instead, our duty is only to determine if both the explicit and implicit findings of the trier of fact are rational by viewing all of the evidence admitted at trial in a light most favorable to the verdict. Adelman, 828 S.W.2d at 422. In so doing, any inconsistencies in the evidence are resolved in favor of the verdict. Matson, 819 S.W.2d at 843. Further, the standard of review is the same for both direct and circumstantial evidence cases. Geesa, 820 S.W.2d at 158.

#### Elements of the Underlying Criminal Offense

A person commits an offense if, without the effective consent of the owner, he intentionally or knowingly makes markings, including inscriptions, slogans, drawings, or paintings, on the tangible property of the owner with an indelible marker. Tex.Pen.Code Ann. 28.08(a)(2)(Vernon Supp.2002). An offense under this section is a state jail felony if the marking is made upon a school. Tex.Pen.Code Ann. 28.08(d)(1). According to Section 28.08(e), "indelible marker" means a device that makes a mark with a paint or ink product that is specifically formulated to be more difficult to erase, wash out, or remove than ordinary paint or ink products. Tex.Pen.Code Ann. 28.08(e)(3). A.F. argues that since the marker was never recovered the State failed to prove that it is an indelible marker within the meaning of the statute.

Salcido saw A.F. using a black marker to draw the marijuana leaf on the cubicle. According to Dorantes, the marking was permanent and could not be removed from the cubicle. Further, Jeff McKinley, an El Paso police officer assigned to the CRASH gang unit, is familiar with graffiti and the methods by which juveniles place graffiti on walls and property. McKinley personally observed the graffiti markings on the cubicle. In his opinion, the markings were made by an indelible marker and are permanent. Taken in the light most favorable to the verdict, the evidence showing that the markings were permanent and could not be erased or washed off establishes indirectly or circumstantially that the ink product in this marker is specifically formulated to be more difficult to erase, wash out, or remove than ordinary ink products. Officer McKinley's unchallenged opinion that the marking was made with an indelible marker is further proof of this element. Therefore, we find the evidence legally sufficient to prove that A.F. made the marking with an indelible marker. We overrule the sole issue for review and affirm the adjudication order.

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