

Merely being questioned by an officer, even when the officer has reason to believe the juvenile is involved in a criminal activity, does not constitute custody. [Gonzales v. State](15-2-2B)

On May 6, 2015, the San Antonio Court of Appeals held that because the evidence supports that juvenile was free to leave at any time and that he elected to continue speaking to detective, the trial court did not abuse its discretion in allowing detective to testify regarding juvenile's statement and to admit a video-recording of his statement.

¶ 15-2-2B. **Gonzales v. State**, No. 04-14-00352-CR, --- S.W.3d ----, 2015 WL 2124773 (Tex.App.-San Antonio, May 6, 2015).

Facts: On August 13, 2012, David Estrada and Appellant Gonzales went to an apartment complex to purchase marijuana from James Whitley. Gonzales was fifteen-years-old at the time. Gonzales exchanged several phone calls with Whitley regarding the purchase of the marijuana. Before going to the apartment complex, Gonzales and Estrada decided to rob Whitley of the marijuana. Gonzales brought his Smith & Wesson .40 caliber semi-automatic firearm for purposes of the robbery.

Estrada and Gonzales were driven to the apartment complex by a third individual who did not know of their plans and did not know Gonzales brought a firearm to the meeting. When they arrived at the apartment complex, Estrada and Gonzales met Whitley and another individual, Pablo Pecina, by the washroom. Gonzales asked for the drugs and Whitley asked for the money. Estrada stalled and Gonzales lifted his shirt and pulled out his fire-arm. To Gonzales's surprise, Whitley also pulled a weapon and both men fired.

Whitley was struck in the thigh and died from his injuries; the bullet that struck Gonzales grazed his head, requiring a couple of staples. Gonzales and Estrada ran back to the vehicle and Gonzales asked the driver to take him to the hospital. Instead, the driver pulled into a gas station a short distance away. The driver called 911, told the dispatch, "Hey, my friend's been shot. Here he is," and he and Estrada left. Before leaving, Gonzales gave Estrada the firearm and told him to get rid of it.

While the San Antonio police officers were investigating Whitley's shooting, they received the call of Gonzales's shooting. It was not until later that the officers realized the two gunshot victims were connected. When officers arrived at the gas station, Gonzales reported "We were walking down the street, somebody drives by and shoots me." While they were investigating, Gonzales's mother arrived. His mother told him to tell the officers the truth. Gonzales finally told them "I was at the apartment complex, the guy shoots me and I shot him back." By all accounts, at that point in the evening, the officers were investigating the incident as a case of self-defense.

Gonzales was originally handcuffed and taken to the juvenile facility. However, shortly after arriving, the officers transported Gonzales to the Santa Rosa Children's Hospital to be

treated for his injuries. While Gonzales was at the emergency room, San Antonio Police Detective Raymond Roberts interviewed Estrada. Estrada told the officer that Whitley shot first; however, when confronted by the officer, Estrada confessed their plan to rob Whitley and identified Gonzales as possessing and firing the weapon. Detective Roberts requested Detective Kim Bower proceed to Santa Rosa Children's Hospital to check on Gonzales's condition and to tell his mother that Detective Roberts would like to speak to him. Detective Bowers testified she gave Gonzales's mother a card with her phone number and asked to her contact them when Gonzales was released.

Gonzales arrived at the police station between 2:30 a.m. and 3:00 a.m. Detective Roberts told both Gonzales and his mother "If y'all don't want to do it tonight, we don't have to do it tonight." The record shows Detective Roberts insisted Gonzales was not under arrest, and that Gonzales and his mother came in on their own, and they were both free to leave. In fact, Detective Roberts told both Gonzales and his mother that Gonzales would be leaving at the end of the interview. Detective Roberts did not Mirandize Gonzales and did not take him before a magistrate.

Detective Roberts asked Gonzales if he knew what was going on, if he was in pain, and how he felt. Gonzales responded, "I feel fine." Detective Roberts testified that Gonzales was able to answer all of his questions and did not appear to be in any distress. Gonzales originally told Detective Roberts that Whitley fired first and that he returned fire; Detective Roberts confronted him with Estrada's version of events and Gonzales ultimately told Detective Roberts their plan was to steal the marijuana from Whitley. Gonzales also told Roberts that he always takes a gun with him whenever he goes to buy weed.

When asked to relay what transpired, Detective Roberts described Gonzales's demeanor to the court. He "kind of chuckled, smiled and he said, 'That was my first mistake. My second was letting him stand up.' " When Detective Roberts asked Gonzales to explain what he meant, Gonzales explained that he should have pointed his weapon directly at Whitley instead of pointing it down.

Before leaving the police station, Detective Roberts gave Gonzales an opportunity to tell his mother the version of events he had relayed to the officer. Detective Roberts told Gonzales and his mother that the information would be presented to a magistrate and, if the magistrate determined the facts satisfied the elements set forth in the murder statute, then a warrant would issue. He also explained that if Gonzales ran, it would make matters worse. Later that morning, the magistrate issued an arrest warrant and Gonzales was arrested for the murder of James Whitley. On September 26, 2012, the State filed its original petition for waiver of jurisdiction and discretionary transfer to criminal court.

After a hearing, the juvenile trial court found probable cause to believe that Gonzales committed the offense. The court concluded that due to the nature of the offense, Gonzales's use of a deadly weapon, the psychiatric evaluation, the probation officer's certification and transfer

report, and the recommendations from the probation officers, the State's petition should be granted.

Gonzales contends the juvenile court erred when it found that the protection of the public and rehabilitation of Gonzales could not be served with the juvenile probation's resources and programs. At the hearing, defense counsel maintained that a Texas Juvenile Justice Department commitment would have adequately protected the public and rehabilitated Gonzales. Gonzales argued he was not a violent person by nature and exhibited excellent behavior throughout both the proceedings and all meetings with the probation officers. Defense counsel argued that Gonzales was the picture of someone who could be rehabilitated. He acknowledged the wrongfulness of Gonzales's delinquent behaviors and expressed his beliefs that Gonzales had improved because "he grew up."

On appeal, Gonzales further argues the trial court erred by failing to focus on the individual child. Instead, Gonzales contends the juvenile court focused solely on the severity of the allegations. Gonzales was cooperative with law enforcement and there were no reports of behavior issues during his incarceration. Gonzales suffers from cerebral palsy and epilepsy and requires services available through the juvenile system. Finally, counsel argues that determinate sentencing is a good option and would provide adequate protection to the community at large.

The State contends the factors weigh heavily in favor of transferring jurisdiction. Although the individual factors are subject to review, the ultimate determination is based on a review of the entire record. The State acknowledged Gonzales's cerebral palsy and epilepsy; yet, the State pointed out neither diagnosis prevented him from committing either this offense or previous offenses which invoked the juvenile justice system. Moreover, this was not just a murder—but felony murder. Gonzales went to the scene intending to steal drugs from a drug dealer. He took his own weapon to the drug deal and murdered the dealer. This was the third time in four years that Gonzales was involved in the legal system and, although he was not classified as a gang member, he did claim membership in YTC (Young Texas Click), a "tagging crew."

Held: Affirmed

Opinion: At trial and on appeal, defense counsel argued Gonzales was a scared fifteen-year old and that any reasonable individual in his position would have believed that he was not free to leave. The interrogation was, therefore, custodial and the officer was required to take Gonzales before a magistrate prior to obtaining a statement.

The State was adamant that Gonzales was not in custody when he gave his statement to Detective Roberts. Both he and his mother were told they could leave and did not have to talk to the officers. They were both told that no matter what Gonzales relayed to the officer, his mother would be taking him home that night. And, in fact, as the officer promised, Gonzales left with his mother and the case was presented to a magistrate.

B. Standard of Review

When an appellate court reviews a trial court's ruling on a motion to suppress, we apply a bifurcated standard. *State v. Kelly*, 204 S.W.3d 808, 818–19 (Tex.Crim.App.2006); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App.1997). When a question turns on credibility and demeanor, an appellate court views the evidence in the light most favorable to the trial court's ruling and gives “almost total deference to a trial court's determination of the historical facts that the record supports.” *Guzman*, 955 S.W.2d at 89; accord *Montanez v. State*, 195 S.W.3d 101, 106 (Tex.Crim.App.2006) (quoting *Guzman*). We give the same deference to the trial court's rulings on mixed questions of law and fact “if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor.” *Guzman*, 955 S.W.2d at 89; accord *Montanez*, 195 S.W.3d at 106.

We review other mixed questions of law and fact and questions of law de novo. *Guzman*, 955 S.W.2d at 89; accord *Montanez*, 195 S.W.3d at 106. When custody attaches is a mixed question of law and fact. *Herrera v. State*, 241 S.W.3d 520, 526 (Tex.Crim.App.2007); *Garza v. State*, 34 S.W.3d 591, 593 (Tex.App.–San Antonio 2000, pet. ref d).

B. Texas Family Code section 51.09

When a defendant is a juvenile at the time of his arrest, the provisions of the Texas Family Code control issues involving his substantive rights. *Roquemore v. State*, 60 S.W.3d 862, 866 (Tex.Crim.App.2001). *Gonzales* contends his interrogation by Detective Roberts constituted a custodial interrogation and that his confession should have been suppressed under Texas Family Code section 51.095 because he was not brought before a magistrate. See Tex. Fam.Code Ann. § 51.095 (West 2014); *Meadoux v. State*, 307 S.W.3d 401, 408 (Tex.App.–San Antonio 2009), *aff'd*, 325 S.W.3d 189 (Tex.Crim.App.2010).

C. *Gonzales's* Interrogation

In determining whether an individual is in custody, an appellate court examines all of the circumstances surrounding the interrogation to determine if there was a formal arrest or “restraint on freedom of movement to the degree associated with a formal arrest.” *Stansbury v. California*, 511 U.S. 318, 322 (1994) (internal quotation marks omitted); *In re D.J.C.*, 312 S.W.3d 704, 712 (Tex.App.–Houston [1st Dist.] 2009, no pet.). This de-termination focuses on the objective circumstances of the interrogation and not on the subjective views of either the interrogating officers or the person being questioned. See *Stansbury*, 511 U.S. at 323; *In re D.J.C.*, 312 S.W.3d at 712. Our review focuses on whether, in light of the particular circumstances, a reasonable person would have felt that he was at liberty to terminate the interrogation and leave. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *In re D.J.C.*, 312 S.W.3d at 712.

In *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex.Crim.App.1996), the Court of Criminal Appeals set forth four factors relevant to the determination of whether an individual is in custody: (1) Was the suspect “physically deprived of his freedom of action in any significant way”?; (2) Did “a law enforcement officer tell the suspect that he cannot leave”?; (3) Did the

“law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted”?; or (4) Was there “probable cause to arrest and law enforcement officers [did] not tell the suspect that he [was] free to leave”? Id.; see also *In re D.J.C.*, 312 S.W.3d at 713. We remain mindful that because the custody determination is based entirely on objective circumstances, whether the law enforcement official had the subjective intent to arrest is irrelevant unless that intent is somehow communicated to the suspect. *Stansbury*, 511 U.S. at 323–24; *Dowthitt*, 931 S.W.2d at 254; *In re D.J.C.*, 312 S.W.3d at 713. We, therefore, turn to an analysis of each of the *Dowthitt* factors.

1. Was Gonzales Physically Deprived of His Freedom of Action?

“[O]rdinarily, when a person voluntarily accompanies a law enforcement officer to a certain location, even though the person knows or should know that the officer suspects that he or she may have committed or may be implicated in the commission of a crime, the person is not restrained or ‘in custody.’ ” *Garcia v. State*, 237 S.W.3d 833, 836 (Tex.App.–Amarillo 2007, no pet.) (citing *Miller v. State*, 196 S.W.3d 256, 264 (Tex.App.–Fort Worth 2006, pet. ref’d)). “When the circumstances show that the individual acts upon the invitation or request of the police and there are no threats, express or implied, that he will be forcibly taken, then that person is not in custody at that time.” *In re D.J.C.*, 312 S.W.3d at 713; *Garcia*, 237 S.W.3d at 836 (citing *Shiflet v. State*, 732 S.W.2d 622, 628 (Tex.Crim.App.1985)).

Here, the only testimony before the juvenile court was that Gonzales and his mother were told they did not have to speak to the officers and that they could leave at any time. Gonzales's mother did testify that Detective Bowers told her that the officers “thought it was self-defense and that if I would take him back that they could clear it all up.” However, that does not rebut the officer's testimony that Gonzales and his mother knew they could leave the interrogation if they chose to do so.

2. Did Detective Roberts Communicate that Gonzales Was Not Free to Leave?

There is no indication, and Gonzales does not allege, that at any point during his conversation with Detective Roberts that Detective Roberts, or any other individual, told Gonzales that he was not free to leave. All evidence contained within the record supports the contrary proposition.

3. Would a Reasonable Person Believe His Freedom of Movement Was Restricted?

At several points prior to the interview, and at several points during the interview, Detective Roberts told Gonzales that he would be leaving the police station after giving his statement. Detective Roberts testified he did not consider Gonzales in custody and did not plan to arrest Gonzales prior to seeking an arrest warrant from a magistrate. Detective Roberts clearly articulated his subjective intent to Gonzales and his mother. See *Stansbury*, 511 U.S. at 323 (communicating subjective intent affects objective circumstances); *Dowthitt*, 931 S.W.2d at 254 (same); *In re D.J.C.*, 312 S.W.3d at 713 (same).

Although Gonzales contends that his age and the events earlier that evening would lead a reasonable person to believe he was in custody, the record simply does not support such an allegation. At no time following the doctor's examination at the hospital was Gonzales in handcuffs. Gonzales left the hospital with his mother and his mother took him to the police station. Nothing compelled either Gonzales or his mother to be at the police station. When they arrived, Gonzales and his mother were informed they were free to leave at any time and did not have to talk to the officers. After Gonzales finished speaking to Detective Roberts, he and his mother voluntarily left the police station.

4. Was There Probable Cause to Arrest and Detective Roberts Failed to Tell Gonzales He Was Free to Leave?

By the time Detective Roberts interviewed Gonzales, he had already interviewed Estrada and knew Gonzales was involved in Whitley's death. However, Detective Roberts testified that although Estrada claimed the firearm belonged to Gonzales and that Gonzales was the individual who shot Whitley, he anticipated Gonzales could reasonably point the finger at Estrada as the shooter. It was not until Gonzales told the officer that the gun used during the robbery was his firearm, that he brought the weapon to the apartment complex, and that he fired at Whitley that Detective Roberts was able to confirm Estrada's statement.

Although Detective Roberts may well have possessed probable cause to arrest Gonzales at some point during the interview, there is no controverting evidence that Detective Roberts instructed Gonzales that he was free to leave and Gonzales left. Detective Roberts also clearly articulated his intent to present the evidence to the magistrate and that he anticipated a warrant would issue for Gonzales's arrest. The concern that an officer has established probable cause to arrest and does not tell the defendant that he is free to leave, as outlined in *Dowthitt* and its progeny, is not present in this case. See *Dowthitt*, 931 S.W.2d at 255; *Aguilera v. State*, 425 S.W.3d 448, 456 (Tex.App.–Houston [1st Dist.] 2011, pet. ref'd).

D. Application

Because this case turns on the trial court's determination of credibility and demeanor, we give almost total deference to the trial court's factual findings. *Montanez*, 195 S.W.3d at 106; *Guzman*, 955 S.W.2d at 89. Although the evidence supports Gonzales was originally handcuffed at the gas station, and when he was transported to the juvenile facility and Santa Rosa Children's Hospital, he was never in handcuffs or restrained in any manner when he spoke to Detective Roberts. Detective Roberts' s testimony that he specifically told both Gonzales and his mother that she would be taking Gonzales home that evening was supported by Detective Bowers's testimony as well as the video recording of Gonzales' s statement. Merely being questioned by an officer, even when the officer has reason to believe the juvenile is involved in a criminal activity, does not constitute custody. *Dowthitt*, 931 S.W.2d at 255; *In re D.J.C.*, 312 S.W.3d at 713. Gonzales was present with his mother, both Gonzales and his mother agreed for Gonzales to speak to Detective Roberts, Gonzales was told that he was not under arrest, and he left the police station after his statement.

Conclusion: Because the evidence supports that Gonzales was free to leave at any time and that he elected to speak to Detective Roberts, we conclude that a reasonable person would have believed he was at liberty to terminate the interrogation and leave. See *Thompson*, 516 U.S. at 112; *Stansbury*, 511 U.S. at 323; *Dowthitt*, 931 S.W.2d at 254–55. Accordingly, the trial court did not abuse its discretion in allowing Detective Roberts to testify regarding Gonzales's statement and to admit a video-recording of the same statement into testimony. We, therefore, overrule Gonzales's second issue.