Summaries of Some Recent Opinions of the Second Court of Appeals

Updated Through Week of August 29, 2016

NOTICE OF OTHER SECOND COURT REFERENCES

Please visit the "Second Court Update" page on the website, which will have links to the pages on the Second Court's website showing cases set for submission, and opinions recently released, in addition to providing a compilation of summaries of the opinions in some cases issued by the Court. *See* www.stevehayeslaw.com/update.html .

Summaries of Some Recent Opinions

The following summaries concern opinions issued by the Second Court of Appeals in Fort Worth, Texas, in some, but not all, cases. This compilation will not relate to opinions issued prior to January 1, 2009, and will not necessarily include summaries of opinions issued more than a year ago. This compilation contains the most recently released opinions in Part One. The author of this compilation makes no representation as to the significance of the opinions summarized below.

The Second Court of Appeals does not sponsor nor endorse these compilations, nor does it have any input or involvement in this compilation. These summaries set out below come verbatim from the website of the Second Court of Appeals. You can find the summaries, in chronological order, on the Court's website at Case Summaries. On its website, the Court makes the following notation as to the opinion summaries:

> "Summaries are prepared by the court's staff attorneys and law clerks for public information only and reflect his or her interpretation alone of the facts and legal issues. The summaries are not part of the court's opinion in the case and should not be cited to, quoted, or relied upon as the opinion of the court. "

We group the following summaries by subject matter, as discerned from the summaries themselves. Individual opinions may, and in all likelihood do, address other issues not reflected by the subject matter headings below. Within each subject matter, the summaries appear in chronological order, with summaries from most recently issued opinions set forth first.

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Part One. Opinion Summaries by Court Since Previous Posting of This Compilation

Section A. Civil

Bankruptcy

Revell v. Morrison Supply Co., No. 02-15-00195-CV (Aug. 29, 2016) (Livingston, C.J., joined by Meier and Gabriel, JJ.).

Held: Under the plain and unqualified language of 11 U.S.C.A. § 349(b)(3) (West 2015), the dismissal of a bankruptcy case revests the bankruptcy estate's property in the "entity in which such property was vested immediately before the commencement of the case" even if a debtor did not properly disclose the property during the bankruptcy. Because Appellant's claim against Appellee revested in him upon the dismissal of his bankruptcy case, he has standing to bring the claim in this suit. To the extent that it conflicts with this holding, we overrule our decision in Kilpatrick v. Kilpatrick, 205 S.W.3d 690, 701–03 (Tex. App.—Fort Worth 2006, pet. denied).

Section B. Criminal Law.

Hearsay

Geotcha v. State, Nos. 02-15-00326-CR, 02-15-00327-CR (Aug. 31, 2016) (Livingston, C.J., joined by Gardner, J.; Dauphinot, J., concurs and dissents with opinion).

Concurrence and Dissent: The outcome in cause number 02-15-00327-CR is correct, but in cause number 02-15-00326-CR, the trial court reversibly erred by denying Appellant's confrontation and hearsay complaints regarding the admission of hearsay, testimonial evidence of the absent complainant, who the State had assured the trial court and jury would be available at trial. Appellant preserved his complaints by securing a ruling on his running objection.

Recorded Phone Call From Jail/Blood Draw

Siddiq v. State, No. 02-15-00095-CR (Aug. 31, 2016) (Walker, J., joined by Meier, J.; Dauphinot, J., dissents with opinion.).

Held: The trial court did not err by determining that Siddiq's recorded phone call from the booking desk at the Frisco jail did not violate the federal or state wiretap statutes or penal code section 16.02 because the law-enforcement exception to the wiretap statutes applied to Siddiq's recorded call. The trial court also did not err by determining under the totality of the circumstances that the blood draw performed on Siddiq was performed in a reasonable manner as required by the Fourth Amendment. Based on these holdings, the trial court did not err by refusing to include in the jury charge a 38.23(a) instruction pertaining to the recorded phone call from the jail or to the blood draw.

Dissent: At a minimum, the trial court reversibly erred by denying Appellant's requested article 38.23 instructions.

Part Two. Previously Listed Summaries

Section A. Civil Law

Anti-SLAPP

Bedford v. Spassoff, No. 02-15-00045-CV (Feb. 11, 2016) (Meier, J.; Dauphinot, J., concurs without opinion; Walker, J., dissents with opinion).

Held: The trial court erred by denying the Bedfords' motion to dismiss Appellees' business disparagement, IIED, tortious interference, and breach of contract claims, but Appellees met their burden to establish by clear and specific evidence a prima facie case for each essential element of their libel claim.

Dissent: Appellees failed to meet their burden under the TCPA by presenting clear and specific evidence a prima facie case for the elements of libel concerning either of Mr. Bedford's written statements. Mr. Bedford's email could not form the basis of a libel claim because it was not published to a third party. Mr. Bedford's Facebook post was not defamatory because a person of ordinary intelligence would view the entire post as well as each statement contained in that post as an expression of Mr. Bedford's own opinion. Even if the post was defamatory, it was not defamatory per se, and Appellees presented no evidence on the elements of damages.

Arbitration:

> ***City of Arlington v. Kovacs***, No. 02-14-00281-CV (Aug. 13, 2015) (Meier, J., joined by Gardner and Gabriel, JJ.).
>
> Held: The arbitrator exceeded his authority as specified by the City's personnel manual by improperly considering post-termination evidence in determining whether Kovacs violated the City's personnel rules as charged.
>
> ***BBVA Compass Inv. Solutions, Inc. v. Brooks***, No. 02-13-00047-CV (Feb. 12, 2015) (Gardner, J., joined by Dauphinot & Walker, JJ.)

Held: The trial court erred by denying appellants' motion to stay proceedings and compel arbitration. Appellees' tort and DTPA claims were so interwoven with the breach-of-contract claim that the arbitration clause encompassed them as well. Appellees failed to show that the arbitration provision was substantively unconscionable because of excessive arbitration costs and failed to show that the arbitration provision was procedurally unconscionable at the time it was formed.

> ***Brand FX, LLC v. Rhine***, No. 02-14-00249-CV (Feb. 26, 2015) (Gabriel, J., joined by Livingston, C.J., and Meier, J.).

Held: Evidence submitted in the trial court in support of Appellant's motion to reconsider the trial court's denial of Appellant's motion to compel arbitration could not be considered in accelerated appeal from the order denying the motion to compel. Appellant, even in the absence of this evidence, established that its employment contract with Appellee affected interstate commerce; thus, the Federal Arbitration Act applied and preempted the Texas Arbitration Act's requirement that a

waiver of a personal-injury claim also must be signed by Appellee's attorney. Appellant, therefore, met its burden to show the existence of a valid arbitration agreement between the parties. Because Appellee failed to meet his burden to prove his defenses against enforcing the otherwise valid arbitration provision, the trial court abused its discretion by failing to grant Appellant's motion to compel arbitration.

Bill of Review

Nussbaum v. Builders Bank, No. 02-14-00304-CV (October 1, 2015) (op. on reh'g) (Walker, J., joined by Livingston, C.J.; Sudderth, J., concurs without opinion).

Held: Nussbaum presented summary judgment evidence that indicated that Builders Bank knew his current address but nonetheless utilized an outdated address in its Rule 239a certificate of defendant's last known address to support its default judgment. Thus, in light of the Texas Supreme Court's recent opinion in Katy Venture, Ltd. v. Cremona Bistro Corp., No. 14-0629, 2015 WL 4497983 (Tex. July 24, 2015), Nussbaum raised a fact issue as to the third bill-of-review element-that the default judgment was rendered unmixed with his own fault or negligence. Accordingly, the trial court erred in granting summary judgment for Builders Bank.

Certificate of Merit

Childress Eng'g Servs. v. Nationwide Mut. Ins. Co., No. 02-14-00332-CV (Feb. 12, 2015) (Dixon W. Holman (Senior Justice, Retired, Sitting by Assignment), joined by Walker & Meier, JJ.)

Held: The trial court did not abuse its discretion by denying appellant's motion to dismiss under civil practice and remedies code section 150.002 because appellee's indemnity claim stemmed from the parties' contract, the trial court could determine the indemnity clause's enforceability as a question of law without requiring recourse to an expert's report, and the alleged error resulting in the breach-of-contract claim was appellant's failure to comply with the indemnity clause, not a specific act, error, or omission in its provision of engineering services.

Constructive Trust

In re Hayward, No. 02-15-00299-CV (Oct. 26, 2015) (orig. proceeding) (Walker, J., joined by Dauphinot and Gabriel, JJ).

Held: Relators' petition for writ of mandamus is conditionally granted because Real Party in Interest failed to prove the third element necessary to entitle her to the establishment of a constructive trust—a res of $10 million cash that was wrongfully taken from her. As Real Party in Interest did not establish an identifiable res constituting the same property—or the proceeds from the sale thereof, or revenues therefrom—that was wrongfully taken from her, Respondent abused her discretion in ordering the constructive trust.

Contract

Contract

Tri-County Elec. Coop., Inc. v. GTE Sw. Inc. d/b/a Verizon Sw., No. 02-14-00199-CV (Feb. 11, 2016) (Livingston, C.J., joined by Gardner and Meier, JJ.).

Held: The visiting trial judge erred by granting summary judgment for Verizon on Tri-County's claims for breach of contract and, alternatively, trespass because the contract between them for the joint use of each's utility poles required removal of attachments upon termination of the contract. A fact issue exists as to which of Tri-County's claims is viable because there is a fact issue as to whether Tri-County treated Verizon as a tenant at sufferance or a tenant at will. The trial judge did not err, however, by granting Verizon a no-evidence summary judgment on Tri-County's claim for exemplary damages because Tri-County did not present evidence sufficient to raise a fact issue as to malice.

> ***Nussbaum v. Builders Bank.***, No. 02-14-00304-CV (July 2, 2015) (Walker, J., joined by Livingston, C.J.; Sudderth, J., dissents without opinion).

Held: Nussbaum's failure to update a contractually-agreed-to address for service of process—so that service of process is attempted via the Texas long-arm statute at the old agreed-to address set forth in the contract—constitutes fault or negligence on the part of Nussbaum contributing to the entry of a default judgment against him. The summary-judgment evidence thus conclusively negated the third bill-of-review element on which Nussbaum bore the burden of proof—that the default judgment was rendered unmixed with his fault or negligence—and therefore, the trial court properly granted Builders Bank's motion for summary judgment in the bill-of-review proceeding.

> ***McCoy v. Alden Indus., Inc.***, No. 02-12-00200-CV (July 9, 2015) (Meier, J., joined by Walker, J.; Dauphinot, J., dissents with opinion).

Held: The trial court erred by granting Alden summary judgment but not by denying McCoy partial summary judgment. The grounds upon which Alden relied to show that the alleged insurance-funded redemption agreement is unenforceable are either not missing or are not essential, and material fact issues exists regarding whether the interim agreements contained sufficient consideration and whether there was a meeting of the minds between the parties that Alden would pay McCoy $250,000 per year for as long as he was a member of Alden's board of directors.

Dissent: McCoy did not provide evidence raising a fact issue about whether Alden had agreed to an insurance-funded redemption agreement on the terms he seeks to enforce or about whether he and Alden had an agreement to pay him $250,000 for his services as a director. Accordingly, the trial court's summary judgment should be affirmed.

Default Judgment

U.S. Bank Nat'l Ass'n v. TFHSP LLC Series 6481, No. 02-15-00209-CV, (Mar. 17, 2016) (Walker, J., joined by Gabriel, J.; Sudderth, J., concurs with opinion).

Held: In this restricted appeal from a no-answer default judgment, U.S. Bank has shown error apparent on the face of the record because Appellee did not strictly comply with the requirements set forth in subchapter A of chapter 505 of the Texas Estates Code or the long-arm statutes for

service of process on U.S. Bank. Because service on U.S. Bank was defective, the trial court did not acquire personal jurisdiction over U.S. Bank, and the default judgment is therefore void.
Concurrence: The relevant authorities do not appear to require a plaintiff to go so far as to include an allegation as to the manner in which the defendant became a fiduciary under the estates code or to include an additional allegation that the suit relates to the fiduciary's action in its fiduciary capacity if the petition also includes the statement "Defendant is sued in its fiduciary capacity" and contains a reference to the pertinent provision of the estates code.

Disqualification

In re Barrera, No. 02-15-00333-CV (Dec. 30, 2015) (orig. proceeding) (per curiam; Dauphinot, J., concurs with opinion).

Concurrence: The record is disturbing, as is the failure to disclose evidence. But Relator did not meet his burden of showing actual prejudice based on the prosecutor's additional role as member of the board of regents of the college where the alleged offense occurred. The trial court therefore did not abuse its discretion by denying Relator's motion to disqualify the prosecutor.

Elections

In re Stephanie Wilson, No. 02-14-00007-CV (orig. proceeding) (Jan. 15, 2014) (Livingston, C.J., joined by Walker and Gabriel, JJ.)
Held: Deborah Peoples, the Tarrant County Democratic Party Chair, did not violate a ministerial duty by removing Stephanie Wilson's name from the Tarrant County Democratic primary election ballot for Justice of the Peace, Precinct 8, after Peoples verified via voter registration records that at least 72 of Wilson's signatures were from persons who were either not registered to vote in Tarrant County or were not residents of Precinct 8, leaving Wilson short of the 250 required petition signatures. Thus, Wilson is not entitled to mandamus relief.

Expunction

Ex Parte S.B.M., No. 02-13-00360-CV (June 11, 2015) (Walker, J., joined by Gardner, J.; Dauphinot, J., concurs without opinion).

Held: Because the evidence admitted at the expunction hearing established that the statute of limitations for the sexual assault offense that S.B.M. had been arrested for had expired prior to the filing of S.B.M.'s petition for expunction, and because S.B.M. established each statutory condition necessary to obtain an expunction under article 55.01(a)(2)(B) of the code of criminal procedure, the trial court abused its discretion by denying S.B.M.'s petition for expunction.

Family Law:

In re S.T., No. 02-15-00014-CV (June 12, 2015) (orig. proceeding) (Livingston, C.J., joined by Dauphinot and Gardner, JJ.).

Held: In this divorce and SAPCR, Husband's third-party claim against the alleged biological

father of the child born during the marriage is barred by limitations. When the child was born, Family Code section 160.607(b) did not include an exception to the statute of limitations for fraud based on a misrepresentation of the child's paternity, and the addition of the exception in 2011 was not merely a codification of the common law discovery rule. Because the alleged biological father's right to rely on the prior statute of limitations vested well before 2011, the trial court abused its discretion by allowing Husband's suit against him to continue. Additionally, because Husband and Wife entered into stipulations in the divorce that would circumvent S.T.'s right to rely on his limitations defense, mandamus relief is proper.

Forcible Detainer:

Norvelle v. PNC Mortg., No. 02-14-00322-CV (Aug. 20, 2015) (Sudderth, J., joined by Livingston, C.J., and Walker, J.).

Held: Rule of civil procedure 510.3(a)'s requirement that a petition in an eviction case "must be sworn to by the plaintiff" did not defeat jurisdiction when appellee bank filed a forcible detainer petition sworn to and signed by its attorney because corporations and other business entities generally may appear in court only through licensed counsel, and the other rules in the same section clarify rule 510.3(a)'s meaning and application. Further, appellant cited no authority to support the argument that defects in an eviction petition can make a resulting eviction judgment void, and this court has previously held that a defective verification does not defeat jurisdiction over a forcible detainer action.

Foreign Judgments

Clamon v. DeLong, No. 02-14-00410-CV (Oct. 8, 2015) (Walker, J., joined by Dauphinot and Gardner, JJ).

Held: There was no error on the face of the record in this restricted appeal of the enforcement of a foreign judgment. The documents relied upon by Appellant to challenge the enforcement of the foreign judgment were not before the trial court when the judgment was enforced, and Appellant did not file a motion for new trial or other postjudgment motion attacking the judgment during the trial court's plenary power.

Fraud

Alexander v. Kent, No. 02-13-00469-CV (Nov. 5, 2015) (Gardner, J., joined by Dauphinot and Walker, JJ.).

Held: Even though Alexander, the president and sole stockholder of K.B. Alexander Co. of Texas, Inc. (KBA), was not a party to the construction contract between KBA and Kent and did not sign the monthly payment applications in his individual capacity, Alexander was individually liable for the fraudulent statements made in the payment applications. The language in the payment applications submitted by KBA to Kent—certifying that to the best of KBA's "knowledge, information, and belief . . . all amounts have been paid by the Contractor for Work for which previous Certificates of Payment were issued"—were statements actionable for fraud, and Kent's reliance on this language when making the payments requested by the payment applications was justifiable. Kent did not have

equal access to KBA's records that might have precluded his fraud action against Alexander. The lack of evidence establishing that Alexander had no intent to perform the construction contract when it was executed is irrelevant because Kent did not allege or attempt to prove fraud in the inducement of the construction contract. The evidence was legally and factually sufficient to support the $20,061.32 in actual damages the trial court awarded to Kent. However, the evidence was legally and factually insufficient to support $22,249.97 in attorney's fees and the $3,000 in additional bankruptcy counsel fees awarded by the trial court. Attorney's fees are not recoverable in a common-law fraud action, and the additional bankruptcy counsel fees were not reliance damages, were not shown to have been caused by Alexander's fraud, and were not supported by expert testimony or any other evidence establishing that they were reasonable or necessary.

Friendly Suit

J. Fuentes Colleyville, L.P., d/b/a Gloria's Rest. v. A.S., No. 02-15-00354-CV (Aug. 18, 2016) (Meier, J., joined by Walker and Sudderth, JJ.).

Held: Appellants have no justiciable interest in A.S.'s friendly suit to obtain judicial approval of the settlements that she made with Hayter and Consumers.

Governmental Immunity

FLCT, Ltd. v. City of Frisco, No. 02-14-00335-CV (May 26, 2016) Livingston, C.J., joined by Walker and Sudderth, JJ.).

Held: The trial court did not err by granting the City's plea to the jurisdiction as to Appellant landowners' claims that the City's December 2012 zoning ordinance amendment is void for lack of notice to individual property owners under section 211.007(c) of the local government code because the zoning ordinance amendment did not effect a change in zoning "classification." As to landowners' remaining declaratory judgment claims based on chapter 245 of the local government code, and their regulatory takings claim, the trial court erred by granting the plea to the jurisdiction. Landowners' declaratory judgment claims are not pre-empted by the alcoholic beverage code, nor do they fall outside the scope of chapter 245, as pleaded; thus, the City is not immune from suit as to these claims. Likewise, landowners pleaded a valid takings claim from which the City is not immune from suit.

Homeowners' Association

Savering v. City of Mansfield, No. 02-15-00034-CV, (May 26, 2016) (op. on reh'g) (Sudderth, J., joined by Gardner, J.; Meier, J., dissents with opinion).

Held: The trial court did not abuse its discretion by denying Appellants' amended application for a temporary injunction when it had the discretion to believe or disbelieve any of the parties' conflicting evidence and from which evidence it had the discretion to determine that Appellants did not make the clear and compelling presentation of the extreme necessity or hardship required to impose the mandatory injunction requested by Appellants or the related, tangential prohibitive injunctions that they sought. Further, Appellants have no standing for their trespass claim, which relies on ownership of the lots at issue by their homeowners' association (HOA). The record shows that the HOA did not exist when the developer filed the declaration that the HOA "will hold" record fee simple title to the

"Common Properties." Assuming that the declaration attempted to convey the lots at issue to the HOA, a conveyance cannot be made to a nonexistent legal entity.

Dissent: The majority misidentifies the type of injunctive relief sought by Appellants, erroneously concludes that the HOA was incapable of owning the R2 lots when the Declaration was filed, and misconstrues a Declaration provision that is no impediment to Appellants' application for temporary injunctive relief.

Judgment

> ***Orca Assets, G.P. v. Dorfman and JPMorgan Chase Bank v. Dorfman.***, Nos. 02-14-00056-CV, 02-14-00057-CV (July 16, 2015) (Livingston, C.J., joined by Walker and Meier, JJ.).

Held: A judgment entered by a Karnes County district court in 1944 is not void, and therefore cannot be collaterally attacked, because under the doctrine of virtual representation, a trust, although not explicitly made a party to that suit, is deemed to have been a party. When the 1944 judgment cancelled a 1929 deed and held the deed for naught, the judgment prospectively rendered the deed incapable of passing title even to any alleged innocent purchasers who did not have notice of the judgment.

Juvenile

In re R. D., No. 02-15-00115-CV (Feb. 11, 2016) (Meier, J., joined by Gardner and Walker, JJ.).

Held: This is a case of first impression regarding the Texas Education Code's "Exhibition of Firearms" statute. Here, the law authorized by the State's charging instrument, as modified by the factual details pleaded by the State, required the State to prove that R.D. intended to cause alarm to the school's on-campus police officer when R.D. repeatedly stated that he was going to "kill" the officer by bringing a gun to school grounds and "shoot" him. Even though the threats were not made in the presence of the officer, when viewing the evidence in the light most favorable to the trial court's finding, a reasonable inference from the cumulative force of the evidence supports that R.D. intended that his threats would be conveyed to the officer and that they were intended to cause alarm to the officer.

Invited Error

> ***In re S.T.***, No. 02-15-00203-CV (Dec. 17, 2015) (Sudderth, J., joined by Gardner, J.; Dauphinot, J., dissents without opinion).

Held: The doctrine of invited error estops a party from challenging the trial court's ruling on appeal if he or she deliberately, clearly, and unequivocally requested the action that the trial court took. However, even assuming that the invited error doctrine would preclude a party who sought relief in the alternative from complaining on appeal when the trial court wholly accepts one of the alternatives, that party must still have unequivocally taken a position in the trial court that is clearly adverse to its position on appeal. Here, Appellant equivocated at almost every turn, making it difficult—if not impossible—for the trial court to have been guided at all by his expressed desires.

Because his requests for alternative relief were unclear, his position at trial is not clearly adverse to his position on appeal, and the trial court did not grant him any relief on the only request for which he remained steadfast, Appellant's position on appeal is not barred by the invited error doctrine.

Lost Profits

> ***Acadia Healthcare Co. v. Horizon Health Corp..***, No. 02-13-00339-CV (July 23, 2015) (op. on reh'g) (Gabriel, J., joined by Livingston, C.J., and Walker, J.).

Held: Expert's future-lost-profits testimony was based on unsupported factual assumptions and analyses not admitted into evidence and, therefore, was not competent to prove future lost profits with reasonable certainty. Because appellee's compensatory damages were reduced based on the legally insufficient evidence of its future lost profits, the awarded exemplary damages were rendered unconstitutionally excessive. Thus, a remittitur was suggested to comport with a 4-to-1 ratio of exemplary damages to compensatory damages on a per-defendant basis. Because the jury did not specifically award exemplary damages against the corporate appellants, exemplary damages may not be awarded jointly and severally against the corporate appellants but only against the individual appellants. The reduction of compensatory damages based on legally insufficient evidence of future lost profits also requires a new trial on attorney's fees.

Mandamus:

> ***In re Cox***, No. 02-15-00132-CV (Nov. 5, 2015) (orig. proceeding) (op. on reh'g en banc) (Walker, J., joined by Livingston, C.J.; Dauphinot, Gardner, Meier, and Gabriel, JJ.; Sudderth, J., dissents with opinion, joined by Charles Bleil, Senior Justice, Retired, Sitting by Assignment).

Held: Because Respondent misapplied well-settled law concerning the disqualification of special prosecutor Cary Piel to the undisputed facts presented at the disqualification hearing, and because Relator possesses no adequate remedy at law concerning Respondent's denial of her motion to disqualify Piel, Relator has shown that she is entitled to mandamus relief concerning the disqualification of Piel.

Dissent: Respondent heard conflicting evidence at the hearing on Relator's disqualification motion, and deference must be given to the trial court's factual determinations that are supported by evidence, as they are in this case. Upon proper application of the standard of review, the record does not support the majority's conclusion that Piel and Eric Erlandson "co-counseled in this very case." Therefore, because Respondent's decision was not so arbitrary and unreasonable that it amounted to a clear and prejudicial error of law, Relator has not shown that she is entitled to mandamus relief.

Modification of Temporary Orders

In re G.P. & D.P., No. 02-16-00236-CV (Aug. 17, 2016) (orig. proceeding) (Livingston, C.J.; joined by Dauphinot and Gardner, JJ.).

Held: The trial court abused its discretion by refusing to set a hearing and rule on a motion by

relators—a child's grandparents—to modify temporary orders. The plain language of section 156.006 of the Texas Family Code limits the section's applicability to the modification of a final order, not a temporary order. Thus, the grandparents were not required to plead or prove one of the three grounds for modification under section 156.006. Because there is no adequate remedy at law, relators are entitled to relief.

Negligence

> ***Wise Elec. Coop., Inc. v. Am. Hat Co.***, No. 02-13-00439-CV (Sept. 17, 2015) (Walker, J., joined by Gardner, J.).

Held: The evidence is sufficient to support the trial court's findings: (1) that Wise Electric was negligent in failing to crimp one end of a Burndy Insulink connector it installed on an overhead service wire and that the uncrimped end of the service wire disconnected and caused a fire; (2) that the smoke from the fire destroyed American Hat's inventory valued at $13,385,969.37; and (3) that American Hat sustained $5,100,379.00 in past lost-profits damages. Although Wise Electric established its entitlement to some amount of offset for the amount that American Hat had received from its commercial property and casualty policy, the evidence is factually insufficient to support the $2,578,067.00 offset amount awarded to Wise Electric.

New Trial

In re State Farm Mut. Auto. Ins. Co., No. 02-15-00252-CV (Jan. 26, 2016) (orig. proceeding) (Gardner, J., joined by Livingston, C.J., and Gabriel, J.).

Held: After conducting a merits-based review of the trial court's articulated reasons for granting plaintiffs a new trial—as permitted by In re Toyota Motor Sales, USA, Inc., 407 S.W.3d 746 (Tex. 2013) (orig. proceeding)—the court determined that the jury's finding that one of the plaintiffs sustained no compensable physical pain and suffering was not so clearly against the "great weight and preponderance of the evidence" as to be clearly wrong and unjust. Therefore, the trial court abused its discretion by granting a new trial. Because a remedy by appeal is inadequate, relator is entitled to mandamus relief.

Oil and Gas:

> ***Griswold v. EOG Res., Inc.***, No. 02-14-00200-CV (Mar. 5, 2015) (Walker, J., joined by Gardner and Meier, JJ.).

Held: Applying the binding precedent of Pich v. Lankford, 157 Tex. 335, 343, 302 S.W.2d 645, 650 (1957), we hold that the save-and-except clause in the Caswell Deed and in the Griswold Deed excepted from the conveyance a 1/2 interest in the oil, gas, and other minerals in plain and unambiguous language so that title to that 1/2 interest remained in the grantor.

Bradshaw v. Steadfast Fin., L.L.C., No. 02-10-00369-CV (Feb. 14, 2013) (McCoy, J., joined by Livingston, C.J., and Gabriel, J.).

Held: The level of duty owed by the executive rights holder depends on the amount of control placed in his or her hands by the terms of the NPRI reservation itself—i.e., whether a "fraction of royalty" or a "fractional royalty" is reserved. Because Appellant's NPRI is a fraction of royalty, see

Range Res. Corp. v. Bradshaw, 266 S.W.3d 490, 497-98 (Tex. App.—Fort Worth 2008, pet. denied) (op. on reh'g), Appellee Steadfast owed her a "fiduciary" duty as that duty is understood in oil and gas law.

Ordinances:

Town of Annetta S., Tex. v. Seadrift Dev., L.P., No. 02-12-00171-CV , 02-12-00171-CV (Sept. 25, 2014) (orig. proceeding) (Walker, J., joined by Meier, J.; Dauphinot, J., dissents with opinion.).

Held: The Town's Ordinance 011 violates Texas Local Government Code section 212.003(a)(4), which states that a municipality "shall not regulate" within its extraterritorial jurisdiction the number of residential units that can be built per acre of land, and the summary-judgment evidence establishes that Seadrift's preliminary plat was denied based on the provision of Ordinance 011 that violates section 212.003(a)(4).

Dissent: Section 212.003 does not regulate density, and even if it did, the ordinance does not regulate density of residents in the Town's ETJ.

Parent Child Relationship:

In re a Child, No. 02-15-00118-CV, (Apr. 7, 2016) (Walker, J., joined by Dauphinot, J.; Sudderth, J., concurs with opinion).

Held: We affirm the trial court's summary judgment for The Gladney Center for Adoption because Gladney conclusively negated the third element of Mother and Father's bill-of-review proceeding.

Dissent: I disagree that the trial court "correctly" recharacterized The Gladney Center for Adoption's three-page, bare-bones "Motion to Dismiss" as a motion for summary judgment pursuant to rule of civil procedure 71 when the dismissal motion made no mention of rule 166a, never employed the terms "summary" or "summary judgment," included no reference to the summary judgment standard of review, provided no guidance on whether a traditional or no-evidence burden should apply, and did not request summary judgment relief. But I concur in the outcome because the trial court cured the erroneous redesignation by providing the procedural safeguards required to grant summary judgment.

In re S.T., No. 02-15-00203-CV (Feb. 18, 2016) (on denial of reh'g en banc) (Sudderth, J.; joined by Livingston, C.J., Dauphinot, Gardner, and Meier, JJ.; Walker, J., concurs with opinion, joined by Gabriel, J.).

Concurrence: The Majority Opinion's analysis of the invited error doctrine as applied to Father's alternative requests for relief is obiter dictum.

> ***In re C.R.A. & S.A.A.***, No. 02-12-00498-CV (Dec. 31, 2014) (Gardner, J., joined by Livingston, C.J., and Gabriel, J.)
>
> Held: The Georgia divorce decree giving Mother "primary physical custody" of the children and imposing a geographic restriction that expired at the end of the children's school year did not comply with section 153.134(b)(1) of the Texas Family Code. Mother's "primary physical custody" did not include the exclusive right to determine the primary residence of the children as contemplated by section 153.134(b)(1). Regarding the geographic restriction,

section 153.134(b)(1)(A) contemplates geographic restrictions being modified only by order and does not contemplate geographic restrictions simply expiring with time. Section 153.134(b)(1)(B) requires the absence of a geographic restriction be specified; the Georgia divorce decree failed to specify either parent could determine the children's primary residence without regard to geographic location but was, instead, silent as to the parents' respective rights after the expiration of its geographic restriction. Father's suit was, therefore, not a suit seeking to modify the designation of the person having the exclusive right to determine the primary residence of the children and was not a suit seeking a modification of a geographic restriction as contemplated by section 153.134(b)(1)(A) and (B).

Partnership

Lake v. Cravens, No. 02-11-00464-CV, (Apr. 28, 2016) (op. on reh'g) (Meier, J., joined by Dauphinot, J.; Gabriel, J., concurs without opinion).

Held: Dr. Cravens has standing to recover in his individual capacity—Appellants improperly conflate the standing requirement that Dr. Cravens suffer a personal injury with his ability or inability to recover damages that were arguably incurred by a different entity—but the jury's fraud, promissory estoppel, and unjust enrichment awards cannot be sustained.

Personal Jurisdiction

Rubinstein v. Lucchese, Inc., No. 02-15-00317-CV (July 7, 2016) (Kerry FitzGerald (Senior Justice, Retired, Sitting by Assignment), joined by Dauphinot and Gardner, JJ.).

Held: Based on evidence that Appellant executed a personal guaranty to induce Appellee to extend credit to Appellant's corporation, coupled with evidence that the guaranty's choice-of-law provision dictated that Texas law applied to disputes stemming from that indebtedness, we conclude that the record contains sufficient proof to support the trial court's finding that Appellant established the necessary minimum contacts such that Appellant is amenable to suit in Texas. Furthermore, the trial court's exercise of personal jurisdiction over Appellant comports with traditional notions of fair play and substantial justice.

Premises Liability

Duncan v. First Tex. Homes, No. 02-12-00464-CV (Feb. 12, 2015) (Gardner, J., joined by Walker, J.).

Held: The trial court erred by granting summary judgment in favor of employer on employee's premises liability claim because there were genuine issues of material fact as to employer's knowledge of the condition on the premises that caused employee's injury, whether the condition posed an unreasonable risk of harm, and whether the employer's failure to use reasonable care proximately caused the employee's injuries.

Probate

In re Sloan, No. 02-15-00198-CV (June 16, 2016) (Livingston, C.J., joined by Gardner and Gabriel,

JJ.).

Held: A surviving spouse's constitutional homestead right in a decedent spouse's separate property, allowing the surviving spouse to live at the property for the remainder of that spouse's life, reduces the property's fair market value because it affects what a willing buyer would pay a willing seller for the property.

Property Taxes

Jack Cty. Appraisal Dist. v. Jack Cty. Hosp. Dist., No. 02-14-00188-CV (Jan. 14, 2016) (Gardner, J., joined by Walker, J.; Gabriel, J., dissents with opinion).

Held: The Hospital District—a political subdivision of Texas—established as a matter of law that it was the owner of a leased CT scanner within the meaning of tax code section 11.11(h) because the lease agreement gave the Hospital District the right to purchase the CT scanner at the end of the lease term, thereby giving the Hospital District the right to compel delivery of legal title to the CT scanner at the end of the lease term. Thus, the CT scanner, which was used for public purposes, was tax exempt under tax code section 11.11(a), and the trial court did not err by granting summary judgment in favor of the Hospital District.

Dissent: The lease between the Hospital District and Provident Leasing expressly provided that it was a finance lease and, by its terms, was not a lease-purchase agreement. The finance lease did not give the Hospital District the right to compel delivery of legal title at the end of the lease term; thus, the Hospital District did not carry its burden to show it was entitled to the tax exemption.

Special Appearance

> ***Aero at Sp. z.o.o. v. Gartman***, No. 02-14-00330-CV (July 9, 2015) (Walker, J., joined by Dauphinot and Meier, JJ.).

Held: Appellant filed a special appearance less than thirty days after the trial court signed a default judgment against Appellant. Because the special appearance, in this circumstance, constituted a timely-filed postjudgment motion, Appellant is precluded from pursuing a restricted appeal.

Standing

> ***Lake v. Cravens***, No. 02-11-00464-CV (Oct. 29, 2015) (Meier, J., joined by Dauphinot and Gabriel, JJ.).

Held: Cravens lacked standing to recover individually for lost profits that allegedly derived from his interest in the Partnership, and he lacked standing to recover benefit-of-the-bargain damages because he presented no evidence that he was personally aggrieved by the alleged fraud. Further, legally insufficient evidence supports the jury's award of reliance damages to Cravens, the Partnership cannot recover against RCC or Lake for unjust enrichment because an express contract covers the subject matter of the dispute, and Maguire was entitled to recover attorneys' fees pursuant to his claim for contractual indemnity.

Tax Foreclosure Sale

Am. Homeowner Preservation Fund, LP v. Pirkle, No. 02-14-00293-CV (Sept. 3, 2015) (Sudderth, J.; Dauphinot and Gabriel, JJ., concur without opinion).

Held: Regardless of whether Appellant's predecessor in interest was named and served with citation in the tax suit regarding its lien on the property, Appellant was provided ample notice and opportunity to challenge the validity of Pirkle's deed obtained in a tax foreclosure sale under the legislature's statutory framework for such challenges. Under the circumstances presented by this case, Appellant has no standing to assert the violation of its predecessor in interest's due process rights, and Appellant's purported lien was not enforceable against Pirkle. Likewise, because Appellant did not bring its taking claim against the governmental-entity appellees within 180 days of the date it knew or should have known about the tax sale and constable's deed, the claim is barred by limitations.

Uniform Child Custody Jurisdiction and Enforcement Act

In re T.B., No. 02-16-00006-CV (July 14, 2016) (Walker, J., joined by Meier and Sudderth, JJ.).

Held: Under the unique facts presented here, we hold that the Florida court's failure to communicate with the trial court in Texas and failure to rule on Father's motion requesting that the Florida court assert its continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act constituted an implied determination by the Florida court to decline to exercise its home-state jurisdiction and an implied determination that Texas is a more convenient forum for litigation of Mother's modification suit affecting the parent-child relationship. And because the Florida court's initial child-custody order does not constitute a child-support order under the Uniform Interstate Family Support Act and because no prior child-support order exists concerning Mother and Father's children, the Texas trial court possessed jurisdiction under the UIFSA to issue a child-support order concerning Mother and Father's children.

WhistleBlower Act/Jury Charge

Fort Worth ISD v. Palazzalo, No. 02-14-00262-CV (July 7, 2016) (Meier, J., joined by Dauphinot and Sudderth, JJ.).

Held: The legislature intended section 554.004(b) of the Texas Whistleblower Act to function as an affirmative defense, not as an inferential rebuttal issue, and the trial court abused its discretion by failing to submit a question on the defense because FWISD both pleaded and presented evidence to support the submission.

Access to Appellate Record

Armandariz v. State, No. 02-15-00116-CR, (May 12, 2016) (Walker, J., joined by Gardner and Meier, JJ.).

Held: In this Anders case, we granted Appellant's motion to access the appellate record and directed the trial court clerk to make the appellate record available to him. The trial court clerk diligently complied with our order by sending Appellant printouts of the paper documents in the record along with a disk containing audio and video exhibits. The trial court clerk also sent a letter to the warden of Appellant's prison unit with instructions that Appellant was to be provided supervised access to a computer upon which he could view the audio and video exhibits. The prison unit returned the disk to the trial court clerk with a note stating that prisoners were not permitted access to disks or computer equipment. Thus, the record does not reflect, and we are not satisfied, that Appellant has received access to the complete appellate record. As such, we abate the appeal and remand the cause to the trial court.

Affidavits and Pretrial discovery

Saho v. State, No. 02-14-00352-CR (May 28, 2015) (Dauphinot, J., joined by Walker and Sudderth, JJ.).

Held: The trial court did not abuse its discretion by denying Appellant's motion for new trial based on the conclusory affidavit of the traditional practitioner in Cameroon, who was in this locale and gave Appellant a potion on the day of his DWI arrest and whose date of departure to Cameroon was not in evidence. The record did not suggest any barriers that would have prevented Appellant's taking a pretrial deposition of the practitioner under article 39.02 of the code of criminal procedure.

Aggravated Assault With a Deadly Weapon

Hernandez v. State, Nos. 02-13-00196-CR, 02-13-00197-CR (Aug. 6, 2015) (Gardner, J., joined by Livingston, C.J.; Dauphinot, J., dissents with opinion).

Held: The evidence was sufficient to show Appellant committed the offense of aggravated assault with a deadly weapon against Complainant notwithstanding the fact that Appellant never successfully located Complainant in the parking lot after returning with a gun. The evidence showed: (1) Appellant and Complainant had two prior incidents, one of which involved physical contact; (2) Complainant had a refreshment stand in a parking lot, and Complainant's customers remained in the parking lot to enjoy their snacks; (3) on the night of the offense, Appellant came to the parking lot in his vehicle, burned tires, peeled out, and caused gravel to fly from his tires, thereby frightening Complainant's customers; (4) after Appellant returned a second time to burn tires and peel out in the parking lot, Complainant confronted Appellant about endangering his customers; (5) Appellant responded by telling Complainant that Complainant was going down; (6) in turn, Complainant responded by throwing a tow hitch at Appellant's vehicle, damaging its car door and breaking out its back window, after which Appellant left; (7) Appellant returned to the parking lot a third time

with a gun and headed towards Complainant's refreshment stand; (8) Complainant, having been alerted by his son that Appellant was in the parking lot, brandishing a firearm, and heading his way, successfully hid in a nearby building before Appellant was able to locate him; (9) not being able to find Complainant, Appellant left the parking lot, and a few minutes later, someone shot up Complainant's pickup parked outside Complainant's home a short distance away; (10) later that evening, Appellant went home to his wife, reloaded his pistol, and complained about how Complainant's family had ambushed him and damaged his pickup; and (11) Complainant later learned from his brother-in-law that Appellant had been constantly asking his brother-in-law about where and when Appellant could find Complainant.

Dissent: There is no evidence that Appellant knew that Complainant was hiding in a building but watching Appellant when Appellant pointed his gun at someone else in the nearby parking lot, and there is no evidence that Appellant later shot Complainant's truck at his house. There is therefore no evidence that Appellant knew that he was threatening Complainant and placing him in fear of imminent death or serious bodily injury.

Aggravated Sexual Assault

Bledsoe v. State, No. 02-14-00450-CR (Oct. 29, 2015) (Gabriel, J., joined by Walker, J.; Dauphinot, J., dissents with opinion).

Held: Although convictions for aggravated sexual assault of a child under the age of six and indecency with a child under the age of 17 are affirmed, the judgment for aggravated sexual assault of a child is modified to clarify that the age of the child was younger than six and to add penal code section 22.021(f)(1) to the judgment's reference to section 22.021(a)(2)(B). The age of the child was an element of the offense as charged that the State was required to prove and ensures the proper calculation of Bledsoe's sentence by prison officials.

Dissent: Subsection (f) of section 22.021 is a punishment provision, not an element of the offense. The trial court's judgment was correct; it already provided that the child was younger than six. The trial court's judgment also provided the correct statute under which Appellant was convicted, the name of the offense in the space for the name of the offense, and the punishment information in the space for the punishment information.

Smallwood v. State, No. 02-13-00532-CR (Aug. 6, 2015) (op. on reh'g) (Dauphinot, J., joined by Gardner and Walker, JJ.).

Held: The evidence showed that Appellant made various death threats to keep the minor complainant participating in the relationship over time. She understood those threats to be continuing threats of imminent harm at any time. Under the unique facts of this case, the element of imminence is satisfied for each aggravated sexual assault.

Smallwood v. State, No. 02-13-00532-CR (April 30, 2015) (Dauphinot, J.; Gardner and Walker, JJ., concur without opinion).

Held: The evidence showed that Appellant made various death threats to keep the minor complainant participating in the relationship over time. She understood those threats to be

continuing threats of imminent harm at any time. Under the unique facts of this case, the element of imminence is satisfied for each aggravated sexual assault.

Arson

Pruett v. State, No. 02-14-00222-CR (Dec. 10, 2015) (Sudderth, J., joined by Gardner and Meier, JJ.)

Held: Appellant was convicted of arson after he set fire to a home he owned jointly with his siblings. The evidence was insufficient to support a deadly weapon finding because there was no threat of actual danger of death or serious bodily injury under the circumstances. No one was in the house when the fire occurred, a neighbor used a garden hose to prevent the spread of a grass fire, and the fire had played out by the time the fire department arrived.

Blood Draws

Chidyausiku v. State, Nos. 02-14-00077-CR, 02-14-00078-CR (Feb. 19, 2015) (Dauphinot, J.; Gabriel, J., concurs with opinion, joined by Livingston, C.J.).

Held: The trial court reversibly erred by denying Appellant's motions to suppress evidence resulting from a warrantless, involuntary blood draw.

Concurrence: Although the arresting police officer and the trial court correctly concluded that Appellant's blood could be drawn without a warrant and without Appellant's consent based on a then-valid statute, a subsequent decision of the court of criminal appeals mandates that an involuntary blood draw cannot occur without a warrant or an exception to the warrant requirement. Here, neither a warrant nor an exception existed. Based on Appellant's counsel's statements to the trial court regarding Appellant's intention to plead guilty after the trial court denied Appellant's motion to suppress, it cannot be determined beyond a reasonable doubt that the trial court's error in failing to suppress the blood-test results did not contribute to Appellant's decision to plead guilty.

Blood Draws

Burke v. State, No. 02-13-00560-CR (Jan. 8, 2015) (Walker, J., joined by Meier and Gabriel, JJ.).

Held: The trial court erred by denying Burks's motion to suppress blood alcohol test results obtained using the mandatory-blood-draw procedure of the Texas Transportation Code and without Burks's consent or a valid search warrant.

Burglary

Morgan v. State, No. 02-14-00231-CR (May 28, 2015) (Dauphinot, J., joined by Livingston, C.J., and Gardner, J.).

Held: Because the evidence shows that Appellant lived with Complainant when he kicked the front door open and assaulted her, the evidence is insufficient to support a burglary conviction. Even though burglary was charged via intent to commit assault, attempt to

commit assault, and a completed assault, Appellant conceded at trial and in his brief on appeal that he is guilty of the lesser included offense of assault and requested that we modify the judgment to reflect an assault conviction. Further, the evidence is sufficient to support an assault conviction beyond a reasonable doubt, and assault is the highest-level lesser included offense available. In these circumstances, a new trial on guilt-innocence of assault is unnecessary before modifying the judgment to reflect an assault conviction.

Character Testimony

Pantajo v. State, No. 02-15-00204-CR, 02-15-00205-CR (June 9, 2016) (Walker, J., joined by Meier and Sudderth, JJ.).

Held: The trial court did not abuse its discretion in overruling Pantoja's objections to the State's cross-examination of his father concerning images found on Pantoja's cell phone depicting cocaine use, guns, and other prejudicial images, including satanic images. Pantoja's father had offered opinion character testimony of Pantoja's good character, and the State was entitled to cross-examine him through "did-you-know" questions about any relevant specific instances of Pantoja's conduct to test the basis of his good-character opinion of Pantoja. Pantoja's sixty-year sentence, which is within the statutorily-authorized range of punishment, does not constitute cruel and unusual punishment.

Closing Argument

Lake v. State, No. 02-13-00521-CR (Feb. 19, 2015) (Dauphinot, J., joined by Gardner, J.; Livingston, C.J., concurs without opinion).

Held: The denial of properly requested closing argument violates a defendant's Sixth Amendment right to counsel and the right to be heard under Article I, Section 10 of the Texas constitution. Harm is presumed.

Confession/Robbery

Davis v. State, Nos. 02-15-00087-CR, 02-15-00088-CR (May 5, 2016) (Dauphinot, J., joined by Sudderth, J.; Walker, J. concurs without opinion).

Held: The trial court did not abuse its discretion by denying Appellant's motion to suppress his confession because the evidence conflicted on whether the police officer had told Appellant that if he made a statement, it could be used for him at trial.

The gravamen of robbery is assault. The law of parties requires no agreement. A video captured the aggravated robberies in the store. There is therefore sufficient evidence that Appellant participated at least as a party not only in the aggravated robbery of the cashier but also in the aggravated robbery of the customer, and he was not entitled to a lesser-included offense instruction for theft. Further, Appellant suffered no harm from the trial court's erroneous refusal to narrow the general charge on the law of parties in the application paragraph. Finally, Appellant did not admit to each element of either aggravated robbery; the trial court therefore did not err by refusing to instruct the jury on the necessity defense.

Continuing Criminal Enterprise

Cox v. State, No. 02-14-00399-CR, (May 12, 2016) (Sudderth, J., joined by Livingston, C.J.; Dauphinot, J., concurs with opinion).

Held: The State of Texas had jurisdiction to prosecute Appellant for the sexual assault of a child that occurred in Juarez, Mexico, where the Appellant kidnapped the child in Tarrant County, Texas, and sexually assaulted the child on the bus ride from Tarrant County to El Paso. Appellant's actions constituted a continuing criminal episode and the Texas Legislature has expressed its intent to exercise extraterritorial jurisdiction over criminal conduct involving the sexual assault of a child. Additionally, the evidence was sufficient to show that Appellant "restrained" the child by intimidating her through threats and displays of anger.

Concurrence: The record shows that Appellant moved the child from her middle school to Mexico, more than a 120-mile radius from her home, without her parents' acquiescence, and took steps to prevent her parents from finding the complainant. The record also shows that he intended to sexually assault her. Because of her age, that is enough evidence to prove restraint and aggravated kidnapping.

Controlled Substance

Tate v. State, No. 02-14-00179-CR (May 14, 2015) (Sudderth, J., joined by Gardner, J.; Walker, J., dissents with opinion).

Held: Appellant was removed from the vehicle he had been driving while two passengers remained inside. The passengers were described as actively moving around for at least five minutes after his removal. When the vehicle was later inventoried at the scene, police discovered a syringe containing .25 grams of methamphetamine in an open compartment underneath the air conditioner/heater control panel, which was within reach of both the driver and the front passenger. Because the only link between Appellant and the syringe at the time he was removed from the vehicle was that he had been the vehicle's driver and self-purported owner, the evidence is insufficient to support Appellant's conviction of possession of a controlled substance.

Dissent: The logical force of the combined evidence and reasonable inferences therefrom—when viewed in its totality in the light most favorable to the verdict and with deference to the jury's weight- and credibility-of-the-evidence determinations—is sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Tate exercised actual care, custody, control, or management of the syringe of methamphetamine and that his relationship to it was more than merely fortuitous.

Cruelty to Animals

Amos v. State, No. 02-13-00244-CR (July 2, 2015) (Gardner, J., joined by Dauphinot and Walker, JJ.).

Held: In a cruelty-to-nonlivestock-animal case: (1) The admission of a testifying witness's recorded statement to the police was not error where another witness testified to its substance without objection; (2) the trial court did not err by denying Appellant's motion to quash the

indictment where the indictment tracked the language of the criminal statute; (3) the trial court did not err by denying Appellant's six challenges for cause where the venire members verbally indicated they would not follow the law but later, by their silence, indicated the contrary, that is, that they would follow the law; (4) the trial court did not err by denying Appellant's objections to the charge where the charge tracked the statutory language, and (5) the trial court did not err by denying Appellant's motion to suppress the necropsy of the dog because Appellant had abandoned the dog's body when he left it with the veterinarian with a request to dispose of the dog's body by means of a communal cremation.

Swilling v. State, No. 02-13-00569-CR (June 11, 2015) (Gardner, J., joined by Livingston, C.J., and Gabriel, J.).

Held: The evidence was sufficient to convict Appellant of the offense of cruelty to an animal where, although no one saw Appellant shoot the stray dog with a crossbow, one witness saw Appellant walking with a crossbow only moments after the stray dog was shot with a bolt from a crossbow. Regarding references to an extraneous offense in a video, Appellant waived his complaint by not objecting to the video when it was admitted into evidence. Appellant's motion in limine did not preserve the error either. Finally, Appellant complained that the trial court only compounded the error by instructing the jury to disregard the extraneous-offense references in the video. Appellant waived this complaint as well by not objecting.

Deadly Weapon Finding

Hopper v. State, No. 02-14-00467-CR (Jan. 14, 2016) (Gabriel, J., joined by Sudderth, J.; Dauphinot, J., dissents with opinion).

Held: In conviction for continuous family violence with a deadly weapon, evidence was sufficient to support jury's finding that Appellant used his hands as a deadly weapon because both complainants testified they believed they would die while Appellant impeded their breathing, both were physically injured, and an expert testified that Appellant used his hands during the attacks in a manner that was capable of causing serious bodily injury or death.

Dissent: The evidence was not sufficient to support the deadly weapon finding because there was no evidence that when Appellant committed family violence assault under the statute by intentionally, knowingly, or recklessly impeding the normal breathing of the complainants, who did not lose consciousness, he also intentionally or knowingly used his hands as deadly weapons.

Green v. State, No. 02-14-00426-CR (June 4, 2015) (Dauphinot, J., joined by Walker and Meier, JJ.).

Held: Even though the complainant did not see and the police did not recover a gun, the evidence that the complainant felt a gun barrel pressed against her and that Appellant told her that the gun he held was a .357 is sufficient to support the deadly weapon finding and the aggravated sexual assault conviction.

Disqualification

In re Cox, No. 02-15-00132-CV (July 23, 2015) (orig. proceeding) (Sudderth, J., joined by Charles Bleil, Senior Justice, Retired, Sitting by Assignment; Walker, J., concurs and dissents with opinion.).

Held: The trial court heard conflicting evidence at the hearing on relator's disqualification motion, and deference must be given to the trial court's factual determinations that are supported by evidence, as they are in this case. Because the trial court's decision was therefore not so arbitrary and unreasonable that it amounted to a clear and prejudicial error of law, relator has not shown that she is entitled to mandamus relief.

Concurrence and Dissent: Because Respondent misapplied well-settled law concerning the disqualification of special prosecutor Cary Piel to the undisputed facts presented at the disqualification hearing, and because Relator possesses no adequate remedy at law concerning Respondent's denial of her motion to disqualify Piel, Relator has shown that she is entitled to mandamus relief concerning the disqualification of Piel.

Driving While Intoxicated

Clement v. State, No. 02-14-00267-CR (July 14, 2016) (Walker, J., joined by Gabriel, J.; Dauphinot, J., dissents with opinion).

Held: The trial court did not abuse its discretion when it allowed Officer McCoy to test Clement in court for resting nystagmus because the testing did not elicit testimonial communications and therefore did not implicate Clement's rights under the Fifth Amendment to the United States Constitution or article 1, section 10 of the Texas constitution. Because Clement's performance during the resting nystagmus testing was not testimonial in nature, the trial court also did not abuse its discretion by admitting Officer McCoy's testimony regarding the HGN results. Moreover, after reviewing the entire record, we have fair assurance that the alleged error—in admitting the prosecutor's statement in front of the jury that "if she [Clement] had resting nystagmus three years ago, she absolutely would have it today" and Officer McCoy's comment that if Clement had resting nystagmus in 2011, then "[r]ight now she would have resting nystagmus"—did not influence the jury or had but a slight effect. And because Clement's right to a fair trial was not substantially affected by the admission of the nontestimonial in-court nystagmus testing, the results of that testing, or Officer McCoy's comment concerning resting nystagmus, the trial court did not abuse its discretion in denying Clement's motion for new trial based solely on these grounds.

Dissent: The visiting trial judge reversibly erred by allowing the prosecutor and officer to make scientific statements regarding the presence or absence of resting nystagmus in Appellant's eyes at the time of her arrest and at the time of trial when neither the prosecutor nor the officer had been designated or qualified as an expert on resting nystagmus. The trial court abused its discretion by denying Appellant's motion for new trial. The evidence here was hotly contested, and therein lies the harm. The harm was exacerbated by the trial court's denial of a continuance to respond to a Brady notice dated the same date as voir dire regarding the first officer at the scene and another denial of a continuance to allow defense counsel to retain an expert to rebut the surprise testimony that contradicted the testifying officer's offense report.

Dearmond v. State, No. 02-15-00195-CR, (Mar. 3, 2016) (Gabriel, J., joined by Meier, J.; Dauphinot, J., dissents with opinion).

Held: In conviction for driving while intoxicated, a police officer's stop of a car with two flat tires and subsequent detention of the driver were justified by law enforcement's community-caretaking function and by the presence of reasonable suspicion that the driver was violating the transportation code.

Dissent: Because the police officer's community-caretaking purpose was neither the primary justification for the stop nor distinct from his goal and actions in detecting, investigating, and acquiring evidence relating to an alleged crime, community caretaking cannot be used to justify the stop.

Evidence/Jury Argument

> ***Hammer v. State***, No. 02-13-00480-CR (Mar. 26, 2015) (Dauphinot, J., joined by Gardner and Meier, JJ.).

Held: Appellant preserved his disproportionality complaint in his motion for new trial. We do not compare the community supervision violations to the sentence in resolving a disproportionality complaint. Instead, we compare the gravity of the original offense to the severity of sentence imposed.

Excluded Evidence

> ***Schumm v. State***, No. 02-15-00102-CR (Dec. 3, 2015) (Dauphinot, J., joined by Meier, J.; Walker, J., concurs without opinion).

Held: The excluded evidence of Appellant's acquittal of the underlying felony assault had no bearing on the challenged element in this misdemeanor—whether an emergency existed that prompted the complainant to attempt to use her cell phone to call 911.

Expert Witnesses

Bekendam v. State, No. 02-10-00444-CR (Mar. 21, 2013) (en banc) (Meier, J., joined by Livingston, C.J., and McCoy and Gabriel, JJ.; Walker, J., dissents with opinion, joined by Dauphinot and Gardner, JJ.).

Held: The trial court did not abuse its discretion by allowing the State's expert to testify that she detected trace levels of cocaine in Appellant's blood when using the Gas Chromatograph/Mass Spectrometer (GCMS) test, even though the trace amount fell below the Texas Department of Public Safety's policy regarding what its technicians may include on the department's toxicology reports. At a pretrial evidentiary hearing, the expert testified to her qualifications; to her utilization of the GCMS test; that this test is generally accepted in the scientific community; and that testimony concerning GCMS has been admitted in courts both in Texas and throughout the United States.

Dissent: The trial court abused its discretion by allowing the State's expert witness, a forensic scientist with the Texas Department of Public Safety (DPS) Crime Laboratory, to testify that Gas Chromatograph/Mass Spectrometer testing of Appellant's blood showed trace amounts of cocaine that were below the .05 mg/L reportable cut-off set by the DPS.

Facial Unconstitutionality

State v. Empey, No. 02-14-00407-CR (Aug. 4, 2016) (Livingston, C.J.; Dauphinot, J., dissents with opinion; Sudderth, J., concurs with opinion).

Held: Section 31.03(e)(4)(F) of the Texas Penal Code, which makes theft of certain metals a state jail felony (when the theft might otherwise constitute a less serious offense when measured by the value of the metals), is not facially unconstitutional merely because a prosecutor may choose between pursuing alternative but clearly defined penalties that may apply to the same act of theft.

Dissent: Section 31.03(e)(4)(F) of the penal code is facially unconstitutional and void for vagueness because it does not provide adequate notice to citizens of the forbidden conduct or sufficient guidance to law enforcement to prevent its arbitrary or discriminatory enforcement. Due process demands that this court affirm the trial court and that the legislature revise the statute so that it does provide adequate notice and guidance.

Concurrence: Appellant did not establish that the statute always operates unconstitutionally as required to sustain a facial challenge to constitutionality, and the facts and circumstances in this case do not otherwise present an opportunity to address the concerns about the statute raised by the trial court's findings of fact and conclusions of law and the dissenting opinion.

Ineffective Assistance of Counsel:

> ***Coffman v. State***, No. 02-14-00248-CR (June 11, 2015) (Dauphinot, J., joined by Gabriel and Sudderth, JJ.).
>
> Held: The record is not adequate to support Appellant's contention that trial counsel was ineffective for allowing him to plead true to allegations in the State's petition to proceed to adjudication without first fully investigating and retaining an expert to evaluate his mental abilities when experts disagreed about Appellant's competence to understand deferred adjudication community supervision and revocation proceedings and he had already pled guilty to the offense. We note that habeas relief may still be available.

Insanity

> ***Reyes v. State***, No. 02-13-00563-CR (Nov. 12, 2015) (Gardner, J., joined by Meier, J.; Gabriel, J., concurs without opinion).

Held: Appellant was convicted of murdering her husband. On appeal, the court held that (1) the jury finding against Appellant's affirmative defense of insanity was not against the great weight and preponderance of the evidence; (2) the evidence was sufficient to prove Appellant had the requisite mens rea notwithstanding a history of mental illness; (3) the probative value of an audiotape of the offense was not substantially outweighed by the danger of unfair prejudice, so the trial court did not err by admitting the audiotape; and (4) the trial court did not err by denying Appellant's motion for mistrial based upon the prosecutor's alleged direct comment on her right not to testify because the prosecutor's comment was not directed at her failure to testify but, instead, at her outbursts during his final arguments. A defendant's outbursts during trial are no different than other evidence offered at trial, and a prosecutor may properly, within reason, comment on the defendant's outbursts.

Jurisdiction

Schatz v. State, Nos. 02-15-00235-CR, 02-15-00236-CR, 02-15-00237-CR, 02-15-00238-CR, 02-15-00239-CR, 02-15-00240-CR, 02-15-00241-CR (Aug. 13, 2015) (Gabriel, J., joined by Livingston, C.J., and Sudderth, J.).

Held: Under the government code, a court of appeals has jurisdiction over a further appeal from a county court review of a municipal court's judgment when the issue does not concern the constitutionality of a statute or ordinance only when (1) the fine assessed is greater than $100 and (2) the county court affirms the municipal court's judgment. Because the county court dismissed these appeals (as opposed to affirming them), we lack jurisdiction over these appeals.

Jury:

Stillwell v. State, No. 02-14-00281-CR (May 28, 2015) (Sudderth, J., joined by Dauphinot and Gabriel, JJ.).

Held: Because the inability to understand English is a challenge for cause, the juror was excludable rather than disabled, and therefore, once the juror was removed, agreement of the parties was required for the trial to proceed with the remaining eleven jurors.

Barnett v. State, No. 02-13-00609-CR (June 18, 2015) (Meier, J., joined by Gardner, J.; Dauphinot, J., dissents with opinion).

Held: The trial court did not abuse its discretion by finding that the detaining officer had reasonable suspicion to stop Barnett's vehicle. Other cooperating officers had relayed to the detaining officer specific, articulable facts that, when combined with rational inferences, would have led him to believe that Barnett was involved in criminal activity. Further, the record supports the trial court's conclusion of law that Barnett "freely and voluntarily consented to the officers' search of his vehicle" and that such consent was "positive and unequivocal." Thus, the trial court did not abuse its discretion by overruling Barnett's suppression motion.

Dissent: Barnett preserved his suppression issue, and the warrantless detention of Barnett based on information that he had committed a crime several hours earlier was not justified by any exception to the warrant requirement.

Mistrial

Ex Parte Roberson, No. 02-13-00582-CR (Jan. 8, 2015) (Gardner, J., joined by Walker, J.; Dauphinot, J., dissents with opinion)

Held: Because the record supported the State's assertion that its investigator did not intentionally goad the defendant into moving for a mistrial, the trial court did not abuse its discretion by denying the defendant's pretrial application for writ of habeas corpus.

Dissent: The record does not support the State's assertion that it did not intentionally goad Appellant into moving for a mistrial. Nothing justified the experienced investigator's accosting a sitting juror and telling her, "You were struck, but then we got you on." The resulting mistrial removed a barrier to the admission of State-proffered extraneous offense evidence previously deemed inadmissible on notice grounds.

Murder–Jury Charge

Diko v. State, No. 02-15-00099-CR, (Apr. 14, 2016) (Walker, J., joined by Gardner, J.; Dauphinot, J., dissents with opinion).

Held: Sections 19.02(b)(1) and 19.02(b)(2) of the penal code do not describe different offenses, but simply set forth alternative means of committing the same offense, murder. Thus, there was no jury charge error when the charge required unanimity as to whether Appellant committed the act of murder, but did not require unanimity as to the means of committing that offense.

Dissent: As discussed in the Bundy dissent, the trial court reversibly erred by not charging the two mutually exclusive murder offenses separately to ensure a unanimous verdict.

Necessity and Sudden Passion

> ***Harper v. State***, No. 02-14-00189-CR (July 2, 2015) (Sudderth, J., joined by Livingston, C.J., and Walker, J.).

Held: Appellant, who caused a multi-car collision and then shot and killed one of the Good Samaritans who attempted to rescue his two-year-old twins from the backseat of Appellant's mangled, smoking vehicle, was not entitled to jury instructions on necessity and sudden passion because he failed to show that he was entitled to these defensive instructions. None of the evidence showed that Appellant's shooting of the eighteen-year-old young man was immediately necessary to avoid imminent harm or that an ordinary, prudent person in his circumstances would have believed that it was, and none of the evidence showed that Appellant experienced "sudden passion" as defined by penal code section 19.02(a)(2), provocation by the Good Samaritan—who tried to do no more than the other would-be rescuers that Appellant did not shoot—or an adequate causal connection between the provocation, passion, and homicide. Appellant was not entitled to a mistrial on the prosecutor's statements when he failed to object to all but one of the statements complained about on appeal and the probable effect of the statement in the preserved complaint—in light of the trial court's instruction to disregard, the evidence, and the certainty of Appellant's conviction based on the undisputed facts of the case—could not have adversely affected Appellant's rights so as to present reversible error.

New Trial

Herrera v. State, No. 02-14-00431-CR (Feb. 18, 2016) (abatement order and opinion) (Meier, J., joined by Dauphinot, J.; Walker, J., dissents with opinion).

Held: Appellant's motion for new trial and accompanying affidavits were sufficient to put the trial judge on notice that reasonable grounds existed to believe that the complainant did not author or

endorse the victim impact statement found in the presentence investigation report. Therefore, the trial court abused its discretion by failing to conduct a hearing on Appellant's motion for new trial.

Dissent: Because Herrera did not object to the victim's statement included in the PSI, because Herrera possesses no right under Texas Code of Criminal Procedure article 56.03(e) to cross-examine his victim on her punishment opinion included in the PSI, and because the trial court did not abuse its discretion by denying Herrera a hearing on his motion for new trial based on newly discovered evidence, Herrera's first issue should be overruled.

Notice of Appeal:

> ***State v. Palmer***, No. 02-14-00175-CR (June 25, 2015) (Gardner, J., joined by Livingston, C.J., and Walker, J.).
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> Held: The court dismisses the State's appeal of the trial court's order granting Palmer's motion to suppress. The State's timely-filed notice of appeal was defective because it was signed by the assistant district attorney and failed to show it was authorized by the district attorney in violation of article 44.01(i) of the Texas Code of Criminal Procedure. The State's amended notice of appeal was ineffective because it was filed untimely and because noncompliance with article 44.01 was not susceptible to correction through application of the amendment-and-cure provisions of the Texas Rules of Appellate Procedure. The State filed an untimely affidavit by the district attorney showing he authorized the assistant district attorney's timely-filed notice of appeal; however, it was ineffective because once the twenty-day deadline of article 44.01(d) expired, the defective notice of appeal could not be retroactively cured under either the Texas Rules of Appellate Procedure or article 44.01 of the Texas Code of Criminal Procedure. If there is no compliance within the twenty-day window, the window is thereafter closed.

Outcry Evidence

Reed v. State, No. 02-15-00225-CR (July 14, 2016) (Dauphinot, J., joined by Livingston, C.J., and Gardner, J.).

Held: The testimony of the three witnesses identified as outcry witnesses was properly admitted on other grounds. Appellant impeached the complainant. Her statements to two of the challenged witnesses, who testified after her, were therefore admissible as prior consistent statements under rule 801(e)(1)(B). The complainant's statements to the medical professional who performed the sexual assault exam were admissible as statements made for medical diagnosis or treatment under rule 803(4).

The trial court did not abuse its discretion by denying Appellant's motion for mistrial after the State played a video excerpt of a police officer asking Appellant if he would be willing to submit to a polygraph exam when the trial court found that the excerpt was published to the jury inadvertently.

> ***Gonzales v. State***, Nos. 02-15-00065-CR, 02-15-00066-CR, 02-15-00067-CR, 02-15-00068-CR (Sept. 24, 2015) (Dauphinot, J., joined by Gardner and Walker, JJ.).
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> Held: In this case involving rampant drug use corresponding with multiple occurrences of

sexual abuse of multiple children, the trial court did not abuse its discretion by admitting clear, specific, and unequivocal outcry evidence, by deciding that evidence of extraneous offenses was adequate to support a jury finding beyond a reasonable doubt that Appellant had committed them, or by admitting evidence of extraneous offenses over a rule 403 objection.

Participation

Daniel v. State, No. 02-14-00246-CR (July 2, 2015) (Livingston, C.J., joined by Walker and Sudderth, JJ.).

Held: The evidence is sufficient to show that appellant's participation in an automobile race resulted in the death and bodily injury of separate victims because it proves that the death and injury were directly and proximately caused by the offense. The evidence is also sufficient to show that in the manner of its use, appellant's car qualified as a deadly weapon.

Possession of a Controlled Substance

Dowden v. State, No. 02-14-00195-CR (Jan. 8, 2015) (Walker, J., joined by Meier and Gabriel, JJ.).

Held: The State was not required to prove that Dowden did not have a valid prescription or order of a practitioner because that is not an element of the offense of possession of a controlled substance under section 481.116 of the health and safety code; instead, it is an exception that Dowden had the burden to present evidence on, and he failed to satisfy his burden of bringing forth evidence with respect to the valid-prescription exception; trial counsel was not ineffective by failing to raise the defensive issue of the valid-prescription exception.

Presentence Investigation Report,

Sell v. State, No. 02-15-00199-CR, (Mar. 24, 2016) (Meier, J., joined by Livingston, C. J.; Dauphinot, J., concurs and dissents with opinion).

Held: Notwithstanding his argument that it was not incumbent upon him to object to the State's introduction of a presentence investigation report (PSI) at the punishment hearing, Appellant, based on established precedent from the court of criminal appeals, failed to preserve his Confrontation Clause argument regarding the trial court's consideration of the PSI. Moreover, even assuming this complaint had been preserved, established precedent from the court of criminal appeals dictates that when a PSI is used in a non-capital case in which the defendant has elected to have the trial court determine sentencing, there is no violation of a defendant's Sixth Amendment rights to confrontation.

Concurrence/Dissent: PSIs violate the Confrontation Clause, but Appellant affirmatively waived his right of confrontation by telling the trial court that he had no objection to the trial court's considering the PSI.

Punishment Enhancements

Patterson v. State, No. 02-12-00172-CR (May 14, 2015) (Walker, J., joined by Gabriel and

Sudderth, JJ.).

Held: Because the trial court erred by admitting—over Patterson's objections—the testimony of Texas Department of Public Safety Trooper Samuel Hellinger and of Cooke County Sherriff Michael Compton that Patterson was not a suitable candidate for probation and because, based on our examination of the record as a whole, we do not have "fair assurance" that the error did not influence the jury or had but a slight effect, Patterson is entitled to a new punishment hearing.

Reasonable Suspicion:

O'Bryan v. State, No. 02-14-00313-CR (May 28, 2015) (Sudderth, J., joined by Gabriel, J.; Dauphinot, J., dissents with opinion).

Held: Because Texas Courts have not applied the collective knowledge doctrine prohibitively and because NCIC has received widespread acceptance as providing a sufficient basis for both reasonable suspicion and probable cause, NCIC was sufficient to establish reasonable suspicion despite the fact the information turned out to be erroneous.

Dissent: No reasonable suspicion supports the stop because the Denton police's knowledge that the car was not stolen and that the NCIC entry reporting it stolen was erroneous is imputed to the Northlake police.

Search Warrant

State v. Crawford, No. 02-14-00289-CR (May 21, 2015) (March 19, 2015 opinion withdrawn) (Gabriel, J., joined by Sudderth, J.; Dauphinot, J., concurs with opinion).

Held: Affidavit requesting search warrant for blood draw supplied substantial basis for the magistrate to determine probable cause supported issuance of the requested warrant. The trial court erred by failing to defer to the magistrate's probable-cause determination, given the probable-cause facts shown in the four corners of the affidavit. The probable cause supporting the search warrant allowed admission of the blood-test results based on the good-faith exception to the exclusionary rule even if the search warrant contained a defect.

Self-Defense

Gamino v. State, No. 02-14-00356-CR (Nov. 12, 2015) (Gardner, J., joined by Walker and Meier, JJ.).

Held: The trial court committed reversible error by not submitting a self-defense instruction under section 9.31 of the Texas Penal Code. Appellant was charged with aggravated assault with a deadly weapon, a gun. Appellant admitted threatening the complainant with a gun; however, Appellant testified that he used the gun only to discourage the complainant and two other men from attacking him and his girlfriend. Under section 9.04 of the Texas Penal Code, Appellant's use of the deadly weapon was not the use of deadly force but was, instead, only the use of force, which meant that he was entitled to a self-defense instruction under section 9.31.

Sentencing

Rogers v. State, No. 02-14-00499-CR, (Apr. 7, 2016) (Dauphinot, J., joined by Gabriel and Sudderth, JJ.).

Held: Appellant had an opportunity to raise his sentencing complaint before the trial court pronounced sentence because the trial judge announced the sentence he planned to impose and then gave Appellant an opportunity to allocute. Appellant had an opportunity to raise his sentencing complaint in the trial court after sentencing by filing a motion for new trial alleging the complaint. Because Appellant did not take advantage of either opportunity, he forfeited his complaint.

Serious Bodily Injury to a Child

> ***Wolfe v. State***, No. 02-12-00188-CR (Feb. 26, 2015) (Livingston, C.J., joined by Gabriel, J.; Walker, J., dissents with opinion).

Held: The trial court did not abuse its discretion by admitting the State's experts' testimony on diagnosing abusive head trauma. Because appellant challenges only the reliability of the diagnosis globally and does not attack the reliability of the diagnosis as applied to the particular circumstances of this case, we decline to address the latter issue.

Dissent: Because the issue of the reliability of the State's experts' testimony that the victim suffered abusive head trauma is fairly included in Appellant's issue on appeal, the dissent would reach the merits of the issue.

Serious Bodily Injury to a Child

> ***Benefield v. State***, No. 02-14-00099-CR (Feb. 26, 2015) (Walker, J., joined by Livingston, C.J., and Gabriel, J.).

Held: The evidence was sufficient to show Benefield recklessly caused serious bodily injury to a child because the child sustained numerous physical injuries, including blunt force trauma to the head consistent with shaking or shaking with impact, while in Benefield's sole custody; Benefield's conviction of both injury to a child and continuous violence against a family member did not violate double jeopardy because the conduct alleged in the injury-to-a-child offense was not the same conduct alleged as part of the continuous-violence-against-the-family offense; the trial court's jail-time credit for Benefield's continuous-violence-against-the-family conviction was correct because it ran from the date he was indicted for that offense rather than from the date he was arrested for the separate, injury-to-a-child offense.

Sexual Abuse of a Child

Bleil v. State, No.02-15-00120-CR (June 9, 2016) (Sudderth, J., joined by Livingston, C.J., and Walker, J.).

Held: The evidence, which showed that Appellant traded sex with her twelve-year-old daughter on multiple occasions for several months in exchange for methamphetamine, is sufficient to support Appellant's conviction of continuous sexual abuse of a child as a party.

Sexual Assault

Estes v. State, No. 02-14-00460-CR, (Mar. 24, 2016) (Livingston, C.J., joined by Gardner and Gabriel, JJ.).

Held: Section 22.011(f) of the penal code, which increases the punishment range for sexual assault from a second-degree felony to a first-degree felony in some circumstances, is unconstitutional as applied to Appellant. The section punished Appellant more harshly for being married at the time he committed sexual assault than it would have punished an unmarried offender who had committed the same acts. There is no rational basis for this difference in treatment. Thus, as applied to Appellant under the circumstances of this case, section 22.011(f) violates the Equal Protection Clause. Because Appellant does not contest the sufficiency of the evidence to support his second-degree felony sexual assault convictions and because Appellant would receive an unjust windfall from the reversal of the convictions based on the equal protection violation, the proper remedy is to remand the charges to the trial court for a new trial on punishment.

Suppression

State v. Torrez, No. 02-15-00170-CR, (May 12, 2016) (Livingston, C.J., joined by Gabriel and Sudderth, JJ.).

Held: The findings expressed by the trial court at the hearing on appellee's motion to suppress—that a police officer credibly believed that appellee's right headlight was out but that the officer was simply mistaken in that belief as indicated by subsequent facts—cannot support the trial court's conclusion that suppression of evidence was warranted.

Time Served

Snodgrass v. State, No. 02-15-00351-CR, (May 5, 2016) (Sudderth, J., joined by Gardner and Gabriel, JJ.).

Held: When determining the number of days to be served in a sentence, a month equals thirty days and a year equals 365 days. In calculating credit for time served, we count the first day served and the last day served. Appellant was entitled to credit for time served between the date of filing of the motion for revocation and the date of hearing. However, Appellant's equal protection rights were not violated when the trial court denied credit for time served in jail from arrest to sentencing—even though he was indigent during this 358-day period—because when these days are added to the sentence assessed and the time served awaiting the revocation hearing, he still would not serve more than the maximum sentence of two years, or 730 days.

Traffic Violation:

> ***Dunn v. State***, No. 02-14-00059-CR (May 21, 2015) (Walker, J., joined by Gardner and Gabriel, JJ.).
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> Held: Because the constitutional prerequisite for a traffic stop is reasonable suspicion of a violation of the law, including a traffic law, the jury charge was not erroneous for instructing the jury that reasonable suspicion of a traffic violation justifies a traffic stop; the evidence

supported the trial court's denial of Dunn's motion to suppress evidence; Dunn failed to rebut the presumption of validity given a search warrant affidavit.

Trafficking in Persons

Davis v. State, No. 02-13-00468-CR, (Apr. 28, 2016) (Apr. 28, 2016) (Livingston, C.J., joined by Meier, J.; Gabriel, J., concurs without opinion).

Held: The State's pleading, the jury's instructions, and the trial's proof all focused on obtaining a conviction for Trafficking of Persons under a theory that the penal code explicitly declines to recognize and that a hypothetically correct jury charge would not include. Thus, we conclude that the evidence is insufficient to support the conviction.

Waiver of Counsel

Logan v. State, No. 02-15-00140-CR (Feb. 4, 2016) (Dauphinot, J., joined by Walker and Sudderth, JJ.).

Held: In this criminal trespass case, the trial court committed structural error by allowing Appellant to represent herself because her waiver of counsel, based in part on her fear that she would not be able to find an attorney independent of the system of harassment that she believed she had been subject to by a secret society and sex ring, was neither knowing nor voluntary. The trial court also violated article 46B.006 of the code of criminal procedure by failing to appoint counsel before the competency evaluation.

Voir Dire

Whitemon v. State, No. 02-13-00380-CR (Mar. 5, 2015) (Dauphinot, J., joined by Gardner, J.; Walker, J., concurs without opinion).

Held: Even if the trial court erred by prohibiting three voir dire questions concerning Appellant's "mere presence" theory on the basis that they were improper commitment questions, such error was harmless because the trial court allowed this question, "Would you agree that the State has to show for possession that a person intentionally and knowingly had the substance or exercised control over it?" to be asked of a juror, and Appellant does not show that he unsuccessfully tried to ask it of any other juror.

Voluntary Conduct

Wright v. State, No. 02-15-00203-CR (June 16, 2016) (Dauphinot, J., joined by Gardner and Gabriel, JJ.).

Held: Appellant committed a series of voluntary acts that culminated in her shooting the complainant. She was therefore not entitled to an instruction on voluntary conduct.