

In graffiti prosecution, circumstantial evidence and witness testimony can support a finding that a marker is indelible.[In the Matter of M.S.](12-1-9)

On February 2, 2012, the Fort Worth Court of Appeals held that the evidence was legally sufficient to support the trial court's finding that Appellant used an indelible marker as defined by the statute.

¶ 12-1-9. **In the Matter of M.S.**, MEMORANDUM, No. 02-11-00041-CV, 2012 WL 335864 (Tex.App.-Fort Worth, 2/2/12).

Facts: Appellant enrolled at Timber Creek High School on Friday, October 15, 2010. On that date, principal Todd Tunnell spoke with Appellant and his mother about Appellant's prior placement in an alternative school through Alternative Education and Placement (AEP). During that conversation, Appellant told Tunnell that he had completed his time in AEP. Appellant was scheduled to start regular classes on Monday, October 18, 2010. Before Appellant arrived on Monday, Tunnell learned that Appellant had not in fact completed his time in AEP. Upon his arrival at Timber Creek, Appellant was called to the principal's office where they discussed the discrepancies in what Appellant had told Tunnell.

During the meeting, Tunnell noticed that Appellant had a “defensive and surly” attitude. He also noticed that Appellant had “Pretty Boy” written on his backpack, that he was dressed totally in blue, and that he had a tattoo of three dots on his hand. Tunnell discussed the tattoo with the school resource officer and asked if it had any gang implications.

Tunnell told Appellant that he could not attend Timber Creek until he served the rest of his AEP time in Keller. Tunnell instructed Appellant to wait in the front office for his mother to pick him up. Appellant left the area he was instructed to wait in, and Tunnell found him in the hallway talking to students. Tunnell directed Appellant back to the office. Tunnell recalled walking through the front office again “close to noon” and noticing that Appellant had left.

Shortly after Appellant left, Tunnell received a report of graffiti on a toilet paper dispenser in one of the boys' restrooms. Officer Michael Shunk, a Fort Worth policeman assigned to Timber Creek, took pictures of the graffiti, which included “Pretty Boy Prince” written in blue ink and stars and “Fresh” written in black ink. “Fresh” was written in a different style than “Pretty Boy Prince.” Tunnell thought the graffiti was written with a permanent marker, and Shunk was not able to remove or smear the graffiti with his finger. The graffiti was cleaned off by the custodial staff, and the markers used to write the graffiti were not recovered.

Shunk reviewed tape from the school's video surveillance system. A person fitting Appellant's description was seen on the video entering the restroom at 12:07 and leaving approximately three minutes later. Shunk showed the video to Tunnell, who identified the person as Appellant.

Shunk had over twenty-four years' experience with the Fort Worth Police Department, had been a school resource officer for nine years, and was working his second year at Timber Creek when this event occurred. He had experience with graffiti both as a school resource officer and while working in the gang unit. He was not aware of any graffiti on the dispenser prior to that day. Based on Shunk's visual observations of the graffiti on the toilet paper dispenser, as well as his efforts to remove or smear it, he determined that the markings were made with a "permanent indelible marker."

At his adjudication hearing, Appellant admitted to writing "Pretty Boy Prince" on the dispenser but claimed that he used a blue, washable marker. He denied writing "Fresh" or drawing the stars, although he admitted to having a black marker in his backpack the morning of the incident. Appellant's mother testified that she had first learned of the graffiti incident approximately a week after it occurred and had searched Appellant's backpack at that time. She found a washable marker. The judge found Appellant delinquent and placed him on felony probation for one year. This appeal followed.

Held: Affirmed

Memorandum Opinion: A person commits an offense under penal code section 28.08(a)(2) "if, without the effective consent of the owner, the person intentionally or knowingly makes markings, including inscriptions, slogans, drawings, or paintings, on the tangible property of the owner with an indelible marker." Tex. Penal Code Ann. § 28.08(a)(2) (West 2011). An indelible marker is a "device that makes a mark with a paint or ink product that is specifically formulated to be more difficult to erase, wash out, or remove than ordinary paint or ink products." Id. § 28.08(e)(3).

Principal Tunnell testified that he believed that the graffiti was made with a permanent marker and that it did not come off nor smear when Officer Shunk tried to remove it with his finger. Officer Shunk likewise clearly testified that the markings were made by a "permanent indelible marker." A picture of the graffiti was admitted into evidence. Appellant testified that he made only the "Pretty Boy Prince" markings using a blue, washable marker and that the black "Fresh" was already there. Even where the actual marker used for the graffiti is not recovered, as is the case here, circumstantial evidence and witness testimony can support a finding that a marker is indelible. See *Harvey v. State*, 116 S.W.3d 816, 820–21 (Tex.App.-Fort Worth 2003, no pet.) (upholding finding that a marker was indelible without the marker being submitted into evidence when two witnesses testified that the graffiti was made with a "permanent ink marker"). The trial court weighed the conflicting evidence and the credibility of the witnesses. By its judgment, it resolved the conflict by finding the testimony of the principal and the police officer to be credible. We shall not re-evaluate that decision. See *Williams*, 235 S.W.3d at 750.

Conclusion: Viewing the evidence in the light most favorable to the verdict, we hold that a rational fact finder could have found that Appellant wrote the graffiti with a permanent marker. The evidence is legally sufficient to support the trial court's finding that Appellant used an indelible marker as defined by the statute. We overrule Appellant's second issue.

