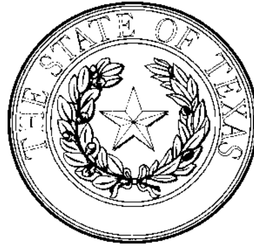
**Opinion issued February 24, 2011**




**In The**

**Court of Appeals**

**For The**

**First District of Texas**

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**NOS. 01-09-00926-CR**
**01-09-00927-CR**

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**MARK ALLEN STRANGE, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 182nd District Court**
**Harris County, Texas**
**Trial Court Case Nos. 1028067 & 1030104**

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## MEMORANDUM OPINION

A jury found appellant, Mark Allen Strange, guilty of two offenses of misapplication of fiduciary property, and the trial court assessed punishment at 15 years' confinement for each offense, to run concurrently. On appeal, appellant

contends (1) the evidence is insufficient and (2) the trial court erred by improperly ordering restitution. We modify the judgments and affirm as modified.

## BACKGROUND

### The Nature of Third-Party Administrators

Appellant, a former sales director for several insurance companies, began working for a third-party administrator in 1993. A third-party administrator is a company hired to administer an employer's self-funded health plan. In a self-funded health plan, the employer collects premiums from its employees and often makes its own contribution to the plan. With these funds, the employer opens a bank account at a bank of its choosing. The employer grants the third-party administrator the ability to write checks on this account. When an employee visits a doctor, the doctor will send the bill to the third-party administrator, who will then pay the doctor by writing a check on the employer's account.

The third-party administrator keeps a check registry that reflects the checks that it writes out of the employer's account. The third-party administrator sends this check registry to the employer on a regular basis so that the employer can deposit funds into the account to cover the checks on the registry. The accounts on which the third-party administrator writes the checks to the doctors are usually "zero-based" accounts, which means that money is transferred into this account

from a separate operating account to cover the exact amount of checks reflected on the check registry.

The indictments in these cases alleged that, in his role as a third-party administrator, appellant misapplied funds from the McAllen Independent School District ("McAllen ISD") and the Association of Vineyard Churches, U.S.A. ("Vineyard").

**The McAllen ISD Case**

John Bryan, Bruce Margulis, and Ralph Margulis owned a third-party administrator called Administrative Services of North America ("ASO"). Bryan and the Margulises hired appellant as president and Chief Excutive Officer of ASO in 1997. Appellant handled the day-to-day operations of the business and was paid an annual salary of $150,000.

McAllen ISD was a client of ASO and had a contract for third-party administrative services while appellant was ASO's president. Debbie Prukop, McAllen ISD's benefits coordinator, testified that ASO would send her a weekly check registry showing all the medical claims that ASO had processed during the previous week. Prukop would send the money necessary to pay these claims to a "claim-specific trust account," which was a zero-based account maintained solely to hold funds necessary to pay McAllen ISD's medical claims. Appellant's signature, along with three others, was on this account's signature card. Once

McAllen ISD funded this account in an amount necessary to pay claims on the weekly check registry, ASO would mail the checks to the doctors who had submitted claims for treating McAllen ISD employees. Prukop testified that the money McAllen ISD sent to this bank account was to be used only for the payment of medical provider claims as shown on the check registry.

During the school year, McAllen ISD would place money in the account on a weekly basis to cover the claims shown on the weekly check registry. However, during the winter holidays, the school district was closed for three weeks. Prukop estimated the claims that would come in during this three week period to be approximately $300,000, and she deposited that sum in the account on December 18, 1998. The purpose of "pre-funding" the account was permit ASO to continue to pay physician's claims during the district's three-week winter break.

When Prukop returned to work in January 1999, she learned that some of the doctor's claims checks had been returned for insufficient funds. Although Prukop had deposited sufficient funds to cover claims during the three-week holiday, the account was empty. Prukop contacted Ken Wethe, a employee benefit consultant for the district, to determine what she should do.

Wethe contacted ASO, and appellant told him that he would investigate the reasons for the bounced checks. Appellant suggested that new procedures adopted by ASO may have caused the problem. Wethe asked to see the bank records for

McAllen ISD so that he could determine how the $300,000 deposit had been used. Appellant said that he would provide the bank records, but he never did. Wethe, therefore, contacted the Texas Department of Insurance, and, with its assistance, obtained the bank records he sought. Wethe saw that several wire transfers had been withdrawn from the account. This was unusual, because the only withdrawals should have been checks made out to health care providers. Wethe also noticed some deposits into the accounts which did not come from McAllen ISD and which he could not explain. Wethe noticed a pattern of deposits and withdrawals into the account over a period of two months. Wethe eventually was able to calculate that McAllen ISD had suffered a net loss of over $300,000. This amount represented money that was withdrawn from the account but was not used to pay health care providers.

Shirley Sheu was ASO's corporate controller during the time of these events. Sheu recalled that, at the time, ASO was performing poorly and was unable to meet its payroll in December 1998. When Sheu told appellant about the situation, he instructed her to transfer $258,000 from McAllen ISD's account to ASO's payroll account on December 30, 1998. During the following months, appellant had Sheu transfer money from McAllen ISD's account to ASO's on several occasions.

ASO's owner, Bryan, learned of the bounced checks on the McAllen ISD account and asked appellant about it. Appellant told Bryan that Sheu had placed some funds in the wrong account, which caused the McAllen ISD account to be underfunded. Bryan assumed that appellant was going to move the money back to McAllen ISD's account, but he never did so. Checks continued to bounce on the McAllen ISD account.

Bryan, who lived in New Jersey, decided to visit Houston to investigate the situation. He soon discovered that appellant had been paying himself unauthorized $25,000 quarterly bonuses and buying unauthorized purchases for himself with corporate money, so Bryan fired him. One month later, in April 1999, ASO went out of business.

Bryan contacted the Department of Labor and reported the problems at ASO. The Department of Labor conducted an investigation, and at its conclusion, appellant signed a "consent order and agreement" with the Department. Under the terms of the consent order, appellant agreed not to act as a fiduciary for any employee benefit plan for ten years. He also agreed not to exercise authority or control over the management or disposition of the assets of any employee benefit plan or to be a signatory to any bank account holding employee benefit plan assets.

Appellant testified that he mistakenly approved the transfer of $458,000 from McAllen ISD's account to ASO accounts because he believed that ASO's

money had been erroneously placed in McAllen ISD's account. He later learned that his information was not correct that the transferred funds had never belonged to ASO. He admitted on cross-examination that, even though he thought that $458,000 of ASO's money had been mistakenly put in McAllen ISD's account, he authorized the transfer of $641,000 from the McAllen ISD account.

**The Vineyard Case**

Almost two weeks after he was fired from ASO, appellant met Don Marsh, and they began exploring the possibility of purchasing a third-party administration. In 2001, Marsh and James Holtz formed a company, National Administrators, Inc. ("NA"). Appellant was a 51 % owner of NA. When NA was unable to obtain a third-party administrator license from the State, NA purchased another company, National Employee Benefit Administrators, Inc. ("NEBA"), which already had a third-party administrator license and an existing client base.

Appellant, Marsh, and Holtz also owned another company called Health Corp Group, Inc. ("HC"), and appellant was its president and Chief Operating Officer. HC purchased National Health Care Administrators, Inc. ("NHA"), which was not an operational company at the time, but which did hold a third-party administrator license. HC sold NHA to Marsh and Holz, individually. Appellant was not an officer or director in NHA, but he was its manager. NHA began doing

business as a third-party administrator, and the clients from NEBA, the subsidiary of HC, were transferred to NHA.

HC, NA, and NHA were in the same office building in Houston. Appellant ran the office and made the day-to-day decisions for all three companies. Marsh ran another NA office in Austin.

Jane Hardesty was the employee benefits plan administrator for Vineyard, an association of 650 churches. When Hardesty was unable to obtain a fully-funded health insurance plan for Vineyard employees, she decided to consider a self-funded plan with a third-party administrator. Appellant met with Hardesty and Gary Jurney, a benefits broker, on several occasions and explained how self-funded plans were put together. Appellant said that his company was NA, and he acted as if he owned it. Appellant was the only person representing NA at these meetings. Finally, appellant put together a proposal that he presented to Vineyard's national board. The board approved the proposal and entered an "administrative services agreement" with NA. The contract states that the third-party administration would be NHA, doing business as NA.

Don Marsh, rather than appellant, signed the contract, presumably because appellant was not an officer or director of NHA. Appellant explained to Hardesty that Marsh was NA's president and that he would sign the claims check that NA paid on Vineyard's behalf to health care providers.

Appellant set up the accounts for both his companies and for Vineyard. Appellant told Gayle Wilson, an employee of Compass Bank, that he owned HC and explained that the company administered health care benefits for several clients. Appellant told Wilson that he wanted to open several bank accounts. The HC account would be the "parent account" and the NHA accounts and client accounts, including Vineyard's, would be under the "HC Umbrella." Appellant told Wilson that he wanted all the accounts to be set up so that he could electronically transfer money between all the accounts. The accounts were set up as appellant requested, and he was the only person who could access them.

In January 2003, the checks that appellant sent to health care providers on Vineyard employees' behalf began to bounce. Hardesty testified that this should not have happened because she fully funded the Vineyard account every two weeks based on the check registry that appellant provided her. Often, Hardesty personally hand delivered the checks to appellant to be placed in Vineyard's account.

When Hardesty complained about the bounced checks, appellant told her that the bank had made a mistake and placed the money in the wrong account. She later learned this was not true. Vineyard continued to fund the account, but the checks continued to bounce. Hardesty had an audit conducted and determined that

$470,000 was missing from Vineyard's account and had not been used to pay health care providers.

Appellant, the only person with access to the accounts, had been transferring money out of Vineyard's account into other accounts, including NHA's payroll account. Appellant testified that, although he made the transfers, he did so at Marsh's direction. Marsh testified that he never told appellant to transfer money out of client accounts into corporate accounts.

## SUFFICIENCY OF THE EVIDENCE

In points of error one through four, appellant contends the evidence is legally and factually insufficient to show (1) that he was a fiduciary for McAllen ISD or Vineyard, (2) that the complainants, Prukop and Hardesty, were "persons for whose benefit the property was held," or (3) that any funds were misapplied.

### Standard of Review

This Court now reviews both legal and factual sufficiency challenges using the same standard of review. *Ervin v. State,* No. 01-10-00054-CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, pet. filed) (construing majority holding of *Brooks v. State,* 323 S.W.3d 893, 905, 912–13 (Tex. Crim. App. 2010)). Under this standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational factfinder could have found that each essential element of the

charged offense was proven beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *In re Winship,* 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Laster v. State,* 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State,* 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Viewed in the light most favorable to the verdict, the evidence is insufficient under this standard in two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense; or (2) the evidence conclusively establishes a reasonable doubt. *See Jackson,* 443 U .S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 & n.11; *Laster,* 275 S.W.3d at 518; *Williams,* 235 S.W.3d at 750. Additionally, the evidence is insufficient as a matter of law if the acts alleged do not constitute the criminal offense charged. *Williams,* 235 S.W.3d at 750.

An appellate court determines whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *See Clayton v. State,* 235 S.W.3d 772, 778 (Tex. Crim. App .2007) (citing *Hooper v. State,* 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007)). In viewing the record, direct and circumstantial evidence are treated equally; circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Id.* (citing *Hooper,* 214 S.W.3d at 13). An appellate

court presumes that the factfinder resolved any conflicting inferences in favor of the verdict and defers to that resolution. *See Jackson,* 443 U.S. at 326, 99 S. Ct. at 2793; *Clayton,* 235 S.W.3d at 778. An appellate court also defers to the factfinder's evaluation of the credibility of the evidence and weight to give the evidence. *See Williams,* 235 S.W.3d at 750.

**Law Applicable to Misapplication of Fiduciary Property**

A person commits misapplication of fiduciary property if he misapplies property, held as a fiduciary, and such misapplication involves a substantial risk of loss to the owner of the property or to a person for whose benefit the property is held. *See* TEX. PENAL CODE ANN. § 32.45(a)–(b) (Vernon Supp. 2009). "Misapply" means to deal with property contrary (1) to an agreement under which the fiduciary holds the property; or (2) by law prescribing the custody or disposition of the property. *Id.* § 32.45(a)(2). The agreement need not be written, but must merely be a harmonious understanding as to a course of action. *Bynum v. State,* 767 S.W.2d 769, 777 (Tex. Crim. App. 1989). "[A] fiduciary is one in whom another has justifiably reposed confidence to act in a certain manner." *Talamantez v. State,* 790 S.W.2d 33, 35 (Tex. App.—San Antonio 1990, pet. ref'd); *see also Coplin v. State,* 585 S.W.2d 734, 735 (Tex. Crim. App. 1979) (holding that fiduciary capacity includes joint adventurers, partners and other fiduciary relationships not

specifically mentioned in the statute). The Insurance Code provides the following regarding third-party administrators:

> (a) an administrator holds in a fiduciary capacity:
>
> > (1) a premium or contribution the administrator collects on behalf of an insurer, plan, or plan sponsor[.]

TEX. INS. CODE ANN. § 4151.106(b) (Vernon 2009).

**The Vineyard Case**

Appellant contends that there is insufficient evidence to show that he held money for Vineyard "in a fiduciary capacity." Specifically, appellant argues that he did not sign the contract with Vineyard, Marsh did. Thus, appellant argues, Marsh owed the fiduciary duty, not him. Appellant also argues that there is a lack of any written documentation that he agreed to act in a fiduciary capacity. We disagree.

That someone other than appellant signed the contract is irrelevant because appellant acted as a fiduciary pursuant to that contract in his capacity as the employee of the third-party administrator charged with holding premium contributions for payment to medical providers. *See Coleman v. State*, 131 S.W.3d 303, 308 (Tex. App.—Corpus Christi 2004, pet. ref'd); *Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984) (holding in civil context that fiduciary duty arises from relationship, not contract). That agreement is "written documentation" that authorized appellant to hold the property as a fiduciary and gave rise to a

"harmonious understanding" between the parties as to a course of action regarding the property. *Bynum*, 767 S.W.2d at 777; *Anderson v. State*, 322 S.W.3d 401, 406 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Here, appellant devised the health care plan in question and presented it to Vineyard's board. He alone negotiated the contract on the company's behalf. Appellant was the only contact that Hardesty had with NA. Appellant set up the financial accounts for both his companies and his clients, including Vineyard. He alone managed these accounts and had access to transfer money between the accounts. Hardesty gave money to appellant for the purpose of funding Vineyard's account so that its employees' healthcare providers could be paid. The checks written to healthcare providers on Vineyard's account bounced, despite the account having been properly funded by Hardesty. Appellant, who was the only person with electronic access to both the Vineyard account and the corporate accounts, transferred money from the Vineyard account to the corporate accounts, leaving no funds with which to pay Vineyard's employees' healthcare providers. From this evidence a reasonable jury could have formed a firm belief or conviction that appellant dealt with property contrary to an agreement with Vineyard concerning the property. *See Marin v. IESI TX Corp.*, 317 S.W.3d 314, 330 (Tex. App.—Houston [1st Dist.] 2010, pet. filed) (holding evidence legally sufficient to support finding beyond reasonable doubt that defendant misapplied fiduciary property by depositing funds tendered for payment

to one company's account into another company's account that she also controlled).

Appellant also contends that there is insufficient evidence to show that Hardesty and Vineyard are "persons for whose benefit the property [was] held." A fiduciary commits an offense when he misapplies property that involves a substantial risk of loss to "a person for whose benefit the property is held." TEX. PENAL CODE ANN. § 32.45(b) (Vernon Supp. 2010). "'Benefit' means anything reasonable regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested." TEX. PENAL CODE ANN. § 1.07(7) (Vernon Supp. 2010).

Appellant argues that he held the money for the benefit of the healthcare providers, not Hardesty or Vineyard. The Vineyard account, in this case, was an employee benefit provided to Vineyard employees, including Hardesty. The purpose of this account was to hold funds collected as premiums to pay the debts that Vineyard employees owed to the healthcare providers. By diverting the money from Vineyard's account, appellant deprived Vineyard and its employees of their premium contributions and their debts went unpaid. A reasonable jury could have concluded beyond a reasonable doubt that the money in the account was held for the benefit of Hardesty and Vineyard.

We overrule points of error one and two.

**The McAllen ISD Case**

In points of error three and four, appellant challenges the sufficiency of the evidence in the McAllen ISD case. Appellant makes the same arguments as that in the Vineyard case. Specifically, appellant contends that "[n]o evidence was presented that he entered into any agreement with McAllen or that he was using the funds in violation of that agreement." We disagree.

Again, it is irrelevant that appellant did not sign the contract that provides written documentation of the agreement because appellant's relationship as an employee of the administrator charged with the responsibility of holding the funds is evidence supporting his status as a fiduciary. Here, Prukop, McAllen ISD's benefits coordinator, testified that appellant would send her a weekly check registry showing all the medical claims that ASO had processed during the previous week. Prukop would then send the money necessary to pay these claims to a "claim-specific trust account," to hold funds necessary for ASO to pay McAllen ISD's medical claims. Prukop testified that the money McAllen ISD sent to this bank account was to be used only for the payment of medical provider claims as shown on the check registry. Sheu, ASO's corporate controller, testified that appellant instructed her to transfer $258,000 from McAllen ISD's account to ASO's payroll account. Thereafter, appellant had Sheu transfer money from McAllen ISD's account to ASO's on several other occasions.

From this evidence a reasonable juror could have formed a firm belief or conviction that appellant dealt with property contrary to an agreement with McAllen ISD concerning the property. *See Marin*, 317 S.W.3d at 330 (holding evidence legally sufficient to support finding beyond reasonable doubt that defendant misapplied fiduciary property by depositing funds tendered for payment to one company's account into another company's account that she also controlled).

We overrule points of error three and four.

## RESTITUTION

In his fifth issue, appellant contends the trial court violated appellant's due process rights by entering improper restitution orders. At the conclusion of the punishment hearing, the trial court assessed punishment at 15 years' confinement in each case and stated on the record that she would "make a notation of judgment for restitution." Each case contained a judgment addendum in which the trial court found "that the parole board should require the Defendant to make restitution . . . as a condition of parole."

### Oral Pronouncement

Appellant first contends that the restitution orders are invalid because they were not pronounced in his presence. It is true that a defendant's sentence must be pronounced in his presence. TEX. CODE CRIM. PROC. ANN. art. 42.03 § 1(a)

(Vernon Supp. 2010). The sentence is part of the judgment that orders that the punishment be carried into execution in the manner prescribed by law. TEX. CODE CRIM. PROC. ANN. art. 42.02 (Vernon Supp. 2010).

If a court orders restitution in the judgment, it is punishment. *See Weir v. State*, 278 S.W.3d 364, 366 (Tex. Crim. App. 2009); *see also* TEX. CODE CRIM. PROC. ANN. art. 42.037 (Vernon 2006) (permitting trial court to order restitution). A trial court may also *recommend* restitution as a condition of parole, which is what occurred in these cases. *See Figueroa v. State*, 250 S.W.3d 490, 516 (Tex. App.—Austin 2008, pet. ref'd); *McNeill v. State*, 991 S.W.2d 300, 302 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd, untimely filed). When the trial court recommends restitution as a condition of parole, but does not order it in the judgment, the trial court need not pronounce it in the defendant's presence. *See Massey v. State*, No. 01-02-00839-CR, 2004 WL 1688559, *1 (Tex. App.—Houston [1st Dist.] July 29, 2004 (pet. ref'd) (not designated for publication) (holding that recommending restitution as condition of parole is not a part of judgment), *see also Tolar v. State*, No. 02-10-00033-CR, 2010 WL 5186799, at *1 (Tex. App.—Waco Dec. 23, 2010, no pet.) (not designated for publication) (holding trial court erred by ordering restitution in judgment when oral pronouncement did not include restitution). Here, the trial court recommended restitution as a condition of parole, but it did not order restitution. Therefore, the

trial court did not err by not pronouncing the restitution recommendation in appellant's presence.

**The McAllen ISD Case**

In the McAllen ISD case, the judgment contained two addenda. The first addendum checked a box marked as follows: "The Court finds that the parole board should require the Defendant to make restitution in the amount of $337,000 to be paid to McAllen Independent School District as a condition of parole." The second addendum checked this same box and duplicated this information, but also checked a second box ordering appellant to pay $807,000 in restitution to ASO/Vineyard. The words "ASO/Vineyard" were effaced. The second addendum also stated that appellant was convicted under Chapter 20 or sections 25.03, 25.031, or 25.04 of the Penal Code and directing restitution for the medical and psychiatric care of a victim under the age of 17.

Appellant contends that the second addendum in the McAllen ISD case is erroneous because it (1) orders restitution to the wrong victim, "ASO/Vineyard," (2) it sets restitution at $807,000, an amount unsupported by the record, and (3) it references penal statutes that do not apply to appellant's case.

The State concedes that the second addendum is incorrect because it orders restitution to "ASO/Vineyard," not McAllen ISD, the correct amount of restitution to McAllen ISD is $337,000, and that the penal statutes referenced are not

applicable. The second addendum also duplicates information found in the first addendum. Accordingly, we reform the judgment to delete the second addendum in the McAllen ISD case. *See* TEX. R. APP. P. 43.2(b) (appellate court may modify trial court's judgment and affirm as modified).

Appellant also contends that the amount of restitution recommended by the trial court in the first addendum is not supported by the evidence. We review such a challenge under an abuse of discretion standard. *Cartwright v. State,* 605 S.W.2d 287, 288–89 (Tex. Crim. App. [Panel Op.] 1980); *Lemos v. State,* 27 S.W.3d 42, 45 (Tex. App.—San Antonio 2000, pet. ref'd). The court abuses its discretion when it acts in an arbitrary or unreasonable manner. *Montgomery v. State,* 810 S.W.2d 372, 380 (Tex. Crim. App. 1990) (op. on reh'g). The amount of restitution must be just, and it must have a factual basis within the loss of the victim. *See Cartwright,* 605 S.W.2d at 289 (holding that due process requires that evidence in the record must exist to show that the amount has a factual basis).

In the McAllen ISD case, the trial court recommended restitution in the amount of $337,000. Appellant argues that there was testimony that some of the money had been returned. The record shows that in addition to unauthorized withdrawals, appellant also made unauthorized deposits to McAllen ISD's account. However, Ken Wethe, McAllen ISD's insurance consultant testified that he calculated that the district had suffered a net loss of $334,230. Bryan Vaclavik, a

fraud examiner hired the Harris County District Attorney's office testified that he calculated the district's loss to be $337,000. Thus, there is a factual basis in the record to support the restitution recommended in the McAllen ISD case.

**The Vineyard Case**

In the Vineyard case, the judgment also contained two addenda. The first addendum checked a box marked as follows: "The Court finds that the parole board should require the Defendant to make restitution in the amount of $470,000 to be paid to Association of Vineyard Church, USA as a condition of parole." The second addendum did not check this box, but instead checked another ordering appellant to pay $837,000 in restitution to ASO/Vineyard. The second addendum also states that appellant was convicted under Chapter 20 or sections 25.03, 25.031, or 25.04 of the Penal Code and directing restitution for the medical and psychiatric care of a victim under the age of 17.

The State concedes that "[i]nsofar as this second addendum is fraught with errors it should be deleted[.]" We agree. Accordingly, we reform the judgment to delete the second addendum in the Vineyard case. *See* TEX. R. APP. P. 43.2(b) (appellate court may modify trial court's judgment and affirm as modified).

Appellant also contends that the amount of restitution recommended by the trial court in the first addendum is not supported by the evidence. We review such a challenge under an abuse of discretion standard. *Cartwright,* 605 S.W.2d at 288–

89; *Lemos,* 27 S.W.3d at 45. The court abuses its discretion when it acts in an arbitrary or unreasonable manner. *Montgomery,* 810 S.W.2d at 380. The amount of restitution must be just, and it must have a factual basis within the loss of the victim. *See Cartwright,* 605 S.W.2d at 289.

In the Vineyard case, the trial court recommended restitution in the amount of $470,000. Gary Jurney, a consultant hired by the Vineyard, and Randy Reimer, an accountant hired by the Vineyard to conduct an audit of their accounts, testified that $470,000 was missing from Vineyard's account. Thus, there is a factual basis in the record to support the restitution recommended in the Vineyard case.

We sustain appellant's point of error five as to the second addendum to each judgment, and modify the judgments to delete the second addendum to each case. We overrule point of error five in all other respects.

**CONCLUSION**

We modify the judgments to delete the second addendum in each case. As hereinabove modified, we affirm the judgments of the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.

Do not publish. TEX. R. APP. P. 47.2(b).