**IN THE**
**TENTH COURT OF APPEALS**

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**No. 10-16-00445-CR**

**THE STATE OF TEXAS,**

**Appellant**

**v.**

**MARY LOU GARCIA,**

**Appellee**

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**From the County Court at Law No. 2**
**Brazos County, Texas**
**Trial Court No. 14-02862-CRM-CCL2**

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## MEMORANDUM OPINION

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In one issue, the State of Texas, contends that the trial court's sentencing of appellee, Mary Lou Garcia, is illegal because the punishment is less than the statutory minimum afforded by section 12.43(a) of the Penal Code. *See* TEX. PENAL CODE ANN. § 12.43(a) (West 2011); *see also* TEX. CODE CRIM. PROC. ANN. art. 44.01(b) (West Supp. 2017) ("The state is entitled to appeal a sentence in a case on the ground that the sentence is illegal."). Because section 12.43(a) affords the trial court discretion to impose a fine, jail

time, or both, and because we conclude that the trial court complied with section 12.43(a), we affirm.

## I. BACKGROUND

Here, Garcia was charged by information with assault bodily injury-family violence for "intentionally, knowingly, or recklessly caus[ing] bodily injury to Roy Mendez, a member of the defendant's family or household, by scratching his face with her hands." *See* TEX. PENAL CODE ANN. § 22.01(a)(1) (West Supp. 2017). Thereafter, the State provided "Notice of Enhancement for Class A Misdemeanor," wherein the State invoked section 12.43(a) of the Penal Code and asserted its intention to offer evidence of Garcia's prior conviction for burglary of a building. *See id.* §§ 12.43(a), 22.01(b).

This case proceeded to trial. The jury ultimately convicted Garcia of the charged offense; however, the trial court assessed punishment at zero days in jail and a fine of $500. Subsequently, the State filed its notice of appeal, and this appeal followed.

## II. ANALYSIS

In its sole issue on appeal, the State contends that the trial court illegally sentenced Garcia to less than the statutory minimum of ninety days confinement in violation of section 12.43(a). *See id.* § 12.43(a). As such, the State requests that we void the trial court's sentence as illegal and remand the case for a new sentencing hearing.

An examination of the State's issue in this case requires that we interpret section 12.43(a) to determine whether the trial court erred in sentencing Garcia to no jail time.

> Statutory construction is a question of law, and we review the record de novo. *Ramos v. State*, 303 S.W.3d 302, 306 (Tex. Crim. App. 2009). In construing a statute, we must "seek to effectuate the 'collective' intent or purpose of the legislators who enacted the legislation." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). We look first to the statute's literal text, and "we read words and phrases in context and construe them according to the rules of grammar and usage." *Lopez v. State*, 253 S.W.3d 680, 685 (Tex. Crim. App. 2008). We must "presume that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible." *State v. Hardy*, 963 S.W.2d 516, 520 (Tex. Crim. App. 1997). Only if the statutory language is ambiguous, or leads to absurd results that the Legislature could not have possibly intended, may we consult extra-textual sources. *Boykin*, 818 S.W.2d at 785.

*Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011).

> Section 12.43(a) provides:
>
> If it is shown on the trial of a Class A misdemeanor that the defendant has been before convicted of a Class A misdemeanor or any degree of felony, on conviction he shall be punished by:
>
> (1) a fine not to exceed $4,000;
>
> (2) confinement in jail for any term of not more than one year or less than 90 days; *or*
>
> (3) both such fine and confinement.

TEX. PENAL CODE ANN. § 12.43(a) (emphasis added).

As emphasized above, section 12.43(a) includes the disjunctive "or" when setting out the three options for punishment for a Class A misdemeanor with a prior conviction for a Class A misdemeanor or a felony. With regard to the usage of the disjunctive "or," members of the Court of Criminal Appeals have stated the following:

> "The disjunctive 'or' usually, but not always, separates words or phrases in the alternate relationship, indicating that either of the separated words or phrases may be employed without the other. The use of the disjunctive usually indicates alternatives and requires that those alternatives be treated separately. It generally means that the terms joined by the disjunctive 'or' must have different meanings because otherwise the statute or provision would be redundant.

*Perez v. State*, 11 S.W.3d 218, 225 (Tex. Crim. App. 2000) (Holland, J., concurring, McCormick, P.J. and Keasler, J., joined) (quoting 1A SUTHERLAND STAT. CONST. § 21.14 (5th ed. 1993 & Supp. 1999)); *see City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634, 642 (Tex. 2013) ("We have previously held that the Legislature's use of the disjunctive word 'or' is significant when interpreting statutes."); *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 581 (Tex. 2000) ("[T]he use of the disjunctive conjunction 'or' between the two phrases . . . signifies a separation between two distinct ideas."); *see also Miles v. State*, 468 S.W.3d 719, 734 (Tex. App.—Houston [14th Dist.] 2015), *aff'd*, 506 S.W.3d 485 (Tex. Crim. App. 2016) ("The Legislature's use of the disjunctive term "or" typically signifies a separation between two distinct ideas." (internal citation and quotations omitted)).

In light of the foregoing, we construe the plain language of section 12.43(a) to afford the trial court discretion to apply one of three options for punishment: fine, jail time, or both. *See* TEX. PENAL CODE ANN. § 12.43(a). In other words, the usage of the disjunctive "or" signifies a separation between distinct ideas: fine, jail time, or both. *See* 1A SUTHERLAND STAT. CONST. § 21.14; *Perez*, 11 S.W.3d at 225; *Miles*, 468 S.W.3d at 734; *see also City of Lorena*, 409 S.W.3d at 642; *Spradlin*, 34 S.W.3d at 581. If we were to adopt the

State's position that the statute requires a minimum term of confinement of ninety days, then the language after the disjunctive "or" would be redundant and meaningless. *See* TEX. GOV'T CODE ANN. § 311.021(2) (West 2013) ("In enacting a statute, it is presumed that . . . the entire statute is intended to be effective."); *Tapps v. State*, 294 S.W.3d 175, 177 (Tex. Crim. App. 2009) ("'[E]ach word, phrase, clause, and sentence should be given effect if reasonably possible.'" (quoting *Campbell v. State*, 49 S.W.3d 874, 876 (Tex. Crim. App. 2001))); *see also State v. Hollis*, 327 S.W.3d 750, 763 (Tex. App.—Waco 2010, no pet.).

In any event, the State contends that interpreting section 12.43(a) to mean the trial court has discretion to apply the above-mentioned three options for punishment leads to an absurd result that the Legislature could not possibly have intended. *See Boykin*, 818 S.W.2d at 785. Citing *State v. Morgan*, 160 S.W.3d 1, 4 (Tex. Crim. App. 2004), the State argues that:

> [section] 12.43(b) carried a mandatory minimum of 30 days confinement. Since [section] 12.43(b) and [section] 12.43(a) are structured the same both grammatically and through the use of punctuation[,] their equivalency is explicit. The State does not see any reason for [section] 12.43(a) to not be interpreted to require a mandatory minimum confinement when [section] 12.43(b) does.

However, the State's reliance on *Morgan* is misplaced. Nowhere in the opinion did the Court of Criminal Appeals state that section 12.43(b) creates a mandatory minimum punishment of thirty days confinement, regardless of the other punishment options of a

fine or jail time and a fine afforded by section 12.43(b).[1] The Court of Criminal Appeals noted that the punishment range for a Class B misdemeanor with a prior conviction of a Class A or Class B misdemeanor or any other felony is thirty to 180 days' incarceration. *Id.* at 4. However, the *Morgan* Court did not address the interplay between section 12.43(b)'s three options for punishment and the disjunctive "or" because it was not at issue in the case. Accordingly, contrary to the assertions of the State, the *Morgan* Court did not hold that section 12.43 created a mandatory minimum jail-time punishment range, regardless of the other punishment options. *See id.* Therefore, we are not persuaded by the State's reliance on *Morgan*. And given the above, we cannot say that the trial court erred in only assessing a $500 fine, rather than jail time, in this case. We overrule the State's sole issue on appeal.

## III. CONCLUSION

We affirm the judgment of the trial court.

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[1] The State does correctly argue that section 12.43(b) is structured similarly to section 12.43(a). In fact, section 12.43(b) provides the following:

> If it is shown on the trial of a Class B misdemeanor that the defendant has been before convicted of a Class A or Class B misdemeanor or any degree of felony, on conviction he shall be punished by:
>
> (1) a fine not to exceed $2,000;
>
> (2) confinement in jail for any term of not more than 180 days or less than 30 days; *or*
>
> (3) both such fine and confinement.

TEX. PENAL CODE ANN. § 12.43(b) (West 2011) (emphasis added).

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
*(Chief Justice Gray concurring with a note)
Affirmed
Opinion delivered and filed May 9, 2018
Do not publish
[CR25]

*(Chief Justice Gray concurs in the judgment and provides the following note. A separate opinion will not issue. When the legislature wants to require a minimum level of incarceration plus the option for a fine, they certainly know how to word the statute to accomplish that objective. See Tex. Penal Code seq. 12.32, 12.33, and 12.42(c)(1).)