Juvenile Law Section
STATE BAR OF TEXAS

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NEWSLETTER EDITOR

Associate Judge Pat Garza
386th District Court
San Antonio, Texas

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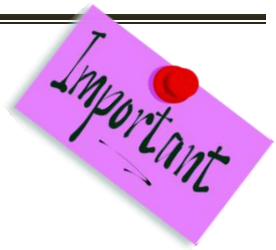
Dear Juvenile Law Section Members:

Welcome to the e-newsletter published by the Juvenile Law Section of the State Bar of Texas. Your input is valued so please take a moment to email us and tell us what you think of the new format.

The "Review of Recent Cases" includes cases that are hyperlinked to Casemaker, a free service provided by TexasBarCLE. To access these opinions, you must be a registered user of the TexasBarCLE website, which requires creating a password and log-in. If you do not wish to receive emails from TexasBarCLE, you can opt-out of their email list.



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EDITOR'S FOREWORD By Associate Judge Pat Garza

Ok, so maybe I'm getting old. But, I can still surf the net with the best of 'em. Ok, maybe with the best of 'em, my age. In fact, I have learned that a sure sign of getting old is when you search the net for the benefits of getting old. Don't laugh, I know you're curious. So, since you asked. Here are my top 10 benefits of getting old:

10. Kidnappers are not very interested in you.
9. In a hostage situation you are more likely to be released first.
8. No one expects you to run into a burning building.
7. People no longer view you as a hypochondriac.
6. There's nothing left to learn the hard way.
5. Things you buy now won't wear out.
4. You consider coffee one of the most important things in life.
3. You have a party and the neighbors don't even realize it.
2. Your neighbors have a party and you don't realize it.

And the No. 1 benefit of getting older— your investment in health insurance is finally beginning to pay off. Have a fun day!

Elections. The council plans to have elections for council and officer positions in connection with our February conference. That means under State Bar rules the slate of nominees must be published in the December issue of this newsletter. If you have ideas for council members or officers, please contact Nydia Thomas, Nominations Committee Chair at (512) 424-6683 or Jill Mata at (210) 335-1965 on or before October 15.

25th Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's Juvenile Law Institute will be held on February 11-13, in San Antonio, Texas. Chair-Elect Richard Ainsa and the planning committee are already working on putting together an excellent and practical conference. Registration information will be sent out and available online at www.juvenilelaw.org in October.

What is objectionable, what is dangerous about extremists,
is not that they are extreme, but that they are intolerant.
The evil is not what they say about their cause,
but what they say about their opponents.

Robert Kennedy

CHAIR'S MESSAGE By Jill Mata

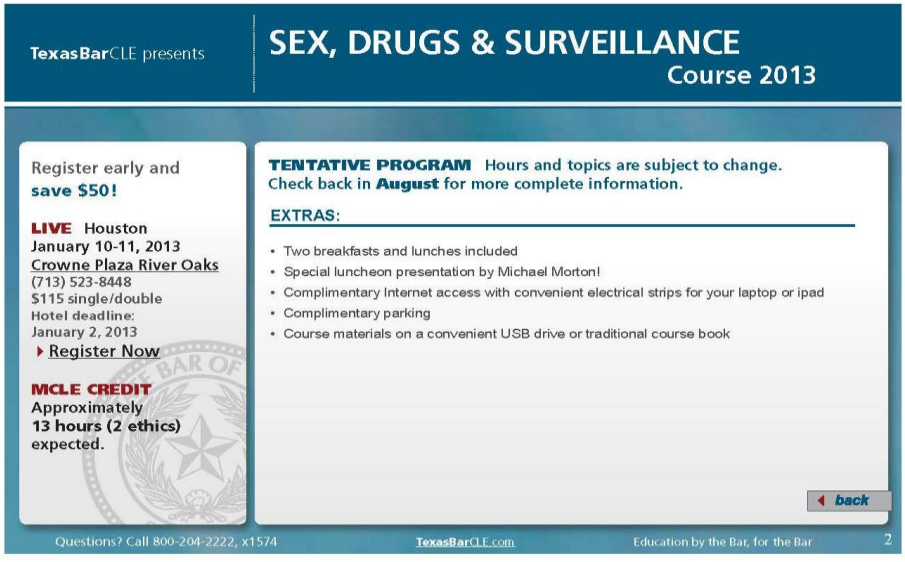
Welcome to the September edition of the Juvenile Law Section Report. This edition is filled with plenty of great information. Thanks to Judge Pat Garza, you can remain current on significant decisions that affect our special practice of juvenile law. Thank you Judge Garza. We are lucky to have you!

I know I sound like a broken record when I say that there have been a lot of changes with the Texas Juvenile Justice Department, but that continues to be the case. You likely already know that TJJD's Executive Director Cherie Townsend has recently retired and the TJJD Board has appointment Jay Kimbrough Interim Director until a new agency director can be appointed. Applications for a permanent Executive Director are currently being accepted by the Board and we are hopeful that a final decision will be made in the coming months. We thank Cherie for all of her hard work and dedication on behalf of all the kids involved in the juvenile justice system, and we wish her a happy and fulfilling next chapter of her life. We are available to offer Jay any assistance he may need as Interim Director.

The Council just finished a planning meeting with TexasBarCLE to set the agenda for the annual conference in February. The topics and speakers look great and you can expect an informative and fun conference in San Antonio at the Grand Hyatt, February 11-13, 2013. Please mark your calendars!

Remember, if you encounter any problems or have suggestions for how we can improve our newsletter, please send us an email. As always, thank you for your continued membership in the Juvenile Law Section. We hope you enjoy the newsletter!

25th ANNUAL ROBERT DAWSON JUVENILE LAW INSTITUTE



REVIEW OF RECENT CASES

APPEALS

COURT OF APPEALS CAN REFORM TRIAL JUDGMENTS TO LESSER INCLUDED OFFENSES.

¶ 12-3-7. **In the Matter of D.M.T.,** MEMORANDUM, No. 02-11-00251-CV, 2012 WL 1947340 (Tex.App.-Fort Worth, 5/31/12).

Facts: During the morning hours of May 27, 2011, Hunter was on the phone while working in her home located on Hickory Hill, in Arlington, Texas, when she heard a "banging" at the front door. She went to the front door, looked out through the peephole, and saw a man continuing to bang on the door. She went to another room in the front of the house to look out a window and saw a champagne-colored Dodge Charger drive by. Hunter returned to her desk, and after about three minutes, she heard the window in her bedroom open and heard someone climb through. Hunter called 911 and, while moving to the front door to leave the house, saw a shadow coming out of the bedroom. As she exited the house, she saw a young man come from her house where the window had been opened and run between her house and the neighbor's house. Hunter yelled at him that she saw him as he ran down the street.

Hunter testified that about that same time, her neighbor's son, Terrence Brown, came home. She informed him of what had happened and described the Charger she had seen. Brown left to look for the car.

Officers Marcus Dixon and Roy Mitchell of the Arlington Police Department were driving in separate cars when they were dispatched to the burglary call. Both officers were at the in-tersection of Collins and Mayfield when a man jumped out of another vehicle and ran toward their squad cars. Each officer testified that the man asked if they were en route to a call on Hickory Hill and that when they confirmed that they were, the man pointed to a gray Dodge car sitting at the intersection and identified it, saying, "[T]hat's the one next to my car."

The officers made contact with the three Hispanic males who were in the car, and after speaking with them briefly, the officers moved everyone to a nearby CVS parking lot. At this same time, Officer Frank Smith arrived at the scene and took command of Appellant, who was in the back left seat of the Dodge car. Hunter arrived at the CVS parking lot and identified the vehicle as the one she saw drive by her house, one of the car's occupants as the individual who knocked on her door, and Appellant as the person she saw running away from her house.

There was no stolen property found in Appellant's possession, and Hunter testified that there was no property taken from her home. Hunter also testified that she did not give anyone permission to enter her house on that date.

Appellant claims in his sole issue that the evidence is legally insufficient to support the adjudication of delinquency. Although appeals from juvenile court orders are generally treated as civil cases, we apply a criminal sufficiency standard of review to sufficiency of evidence challenges regarding the adjudication phase of juvenile proceedings. In re M.C.S., Jr., 327 S.W.3d 802, 805 (Tex.App.-Fort Worth 2010, no pet.). In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); Isassi v. State, 330 S.W.3d 633, 638 (Tex.Crim.App.2010).

A person commits an offense under penal code section 30.02(a)(1)"if, without the effective consent of the owner, the person: (1) enters a habitation ... with intent to commit a felony, theft, or an assault...."Tex. Penal Code Ann. § 30.02(a)(1).

Held: Judgment reformed to reflect the lesser-included offense of criminal trespass, and remand for a new disposition hearing

Memorandum Opinion: Appellant argues that there is legally insufficient evidence to prove that he entered Hunter's house with the intent to commit theft. The intent with which a defendant enters a habitation is a fact question to be decided based upon the surrounding circumstances. Robles v. State, 664 S.W.2d 91, 94 (Tex.Crim.App.1984). Intent is an essential element of burglary of a habitation that the State must prove; "it may not be left simply to speculation and surmise." LaPoint v. State, 750 S.W.2d 180, 182 (Tex.Crim.App.1986).

The State argues only that Appellant's flight, when startled in the house by Hunter, is sufficient to infer Appellant's intent to commit theft. The State relies on Gear v. State, 340 S.W.3d 743, 748 & n. 9 (Tex.Crim.App.2011), in which the facts were similar, up to a point, with the present case. In Gear, the complainant was home during the day when she heard a rattling noise and subsequent bangs from a side door that had been nailed shut. Id. at 744.When she went to investigate, she saw the defendant trying to enter her home through a broken window that had not been

broken before she heard the noises.Id. She startled the intruder, who ran.

The facts then diverge from the present case. In Gear, the defendant testified that he thought the house he was entering was abandoned and that he went to the back of the house to urinate. Id. at 745.He further testified that he may have punched the wall of the house because he was angry at himself for having quit his job when he had no transportation and only about a dollar in his pocket. Id. At trial, he denied breaking the window. During the investigation, the defendant had told the police that he broke the window when he leaned on it and never said he hit the wall. Id. The court concluded,

On this record, we decide that a fact finder could reasonably find beyond a reasonable doubt that the recently unemployed appellant with about one dollar in his pocket intended to commit theft inside the complainant's home when he attempted to enter the home through the window that he had just broken and where the evidence also shows that appellant ran when interrupted by the complainant and that appellant gave conflicting and implausible explanations for his actions. Id. at 747–48.

The court of criminal appeals distinguished the facts of Gear from those of Solis v. State, 589 S.W.2d 444 (Tex.Crim.App. [Panel Op.] 1979). In Solis, the defendant removed a screen from a window of one house and took it to another house, set it down, and tried to enter the second house. Id. at 445.The trial court convicted Solis of attempted burglary with the intent to commit theft of the first home. The court of criminal appeals reversed, concluding “that, although the circumstances show that appellant probably intended to enter the [first] house with intent to commit theft, his behavior after removal of the screen was sufficiently inexplicable that reasonable doubt remains as to what his [s]pecific criminal intentions actually were.”Id. at 446–47.

In the present case, there is sufficient evidence to support the finding that Appellant entered Hunter's house without her consent. But there is legally insufficient evidence, when viewed in the light most favorable to the trial court's judgment, to support a finding that Appellant intended to commit theft when he entered the house. There is no evidence that allows any inference as to what Appellant intended to do in the house. It is undisputed that there was no property removed from or even disturbed inside Hunter's home and that there was no stolen property found on Appellant or inside the vehicle. Case law says that flight alone is not dispositive of guilt but is a circumstance that, when combined with other facts, may suffice to show an accused is guilty of an offense. Valdez v. State, 623 S.W.2d 317, 321 (Tex.Crim.App.1979) (op. on reh'g); In re L.A.S., 135 S.W.3d 909, 915 (Tex.App.-Fort Worth 2004, no pet.). The cases do not hold, however, that flight is sufficient to show an accused had the specific intent to commit theft upon unlawfully entering a habitation versus any other felony. Flight alone is just as consistent with the offense of criminal trespass as burglary with intent to commit theft.

In Gear, in addition to a finding that the defendant was fleeing the scene, the majority found sufficient circumstances to infer specific intent by relying on evidence that Gear was unemployed with no transportation and a dollar in his pocket and that Gear gave untruthful, conflicting, and implausible stories. 340 S.W.3d at 747–48;see Padilla v. State, 326 S.W.3d 195, 201 (Tex.Crim.App.2010) (noting that a rational fact finder can consider a defendant's untruthful statements, in connection with the other circumstances of the case, as affirmative evidence of the defendant's guilt). Although a combination of circumstances can give rise to a reasonable inference of an intent to commit theft, we must apply the rigorous due-process standard of Jackson, 443 U.S. at 318–19, 99 S.Ct. at 2788–89. Considering the various things Appellant could have done in Hunter's house, there is insufficient evidence to support that he intended to commit theft. There was no property disturbed in Hunter's house, Appellant did not testify or make any statement to the police, and there was no circumstantial evidence that he was in need of money. See Duncan v. State, No. 14–11–00298–CR, 2012 WL 1137910, at *3 (Tex.App.-Houston [14th Dist .] Apr. 3, 2012, no pet. h.) (holding that evidence that closet door in garage was open and an air compressor was in the middle of the garage rather than its usual location in a closet supported a finding of intent to commit theft); Black v. State, 183 S.W.3d 925, 928 (Tex.App.-Houston [14th Dist.] 2006, pet. ref'd) (holding that evidence of a computer system stacked and “ready to go” near point of entry supported a finding of intent to commit theft); White v. State, 630 S.W.2d 340, 342 (Tex.App.-Houston [1st Dist .] 1982, no pet.)(holding that movement of equipment from one part of garage to another supported a finding of intent to commit theft). The evidence in this case presents no circumstance from which a rational fact finder could divine Appellant's intent when entering Hunter's house. See Solis, 589 S.W.2d at 446–47. We therefore sustain that portion of Appellant's issue.

Criminal trespass can be a lesser-included offense of burglary. See Goad v. State, 354 S.W.3d 443, 446 (Tex.Crim.App.2011).“An offense is a lesser-included offense ... if it is es-tablished by proof of the same or less than all the facts required to establish the commission of the offense charged.”Tex.Code Crim. Proc. Ann. art. 37.09(1) (West 2006). A person commits criminal trespass when “the person enters ... property of another, including residential land ..., without effective consent and the person ... had notice that the

entry was forbidden."Tex. Penal Code Ann. § 30.05(a) (West Supp.2011). Criminal trespass is established by proof of the facts of burglary of habitation as Appellant was charged, less proof of the specific intent to commit theft. See Goad, 354 S.W.3d at 446.

As stated above, a reasonable trier of fact could, on the cumulative evidence presented, find beyond a reasonable doubt that Appellant was the person who entered Hunter's house through the window without her consent. A house automatically gives sufficient notice that entry is forbidden because it is an enclosure obviously designed to exclude intruders. See Moreno v. State, 702 S.W.2d 636, 640 n. 7 (Tex.Crim.App.1986); Jackson v. State, 3 S.W.3d 58, 62 (Tex.App.-Dallas 1999, no pet.). In finding Appellant delinquent based on burglary of a habitation, the trial judge necessarily found evidence sufficient to find Appellant delinquent based on criminal trespass. See Goad, 354 S.W.3d at 446. There is legally sufficient evidence to support a charge of criminal trespass.

In a bench trial, the trial court may find the defendant guilty of a proven lesser-included offense even if the lesser-included offense is not requested by either party. See Mello v. State, 806 S.W.2d 875, 877 (Tex.App.-Eastland 1991, pet. ref'd). On an appeal of a bench trial, the appellate court's ability to reform a judgment is not limited by whether a charge on the lesser-included offense was submitted to the jury. See Bigley v. State, 865 S.W .2d 26, 27 (Tex.Crim.App.1993). Thus, we may reform the judgment in this case to a conviction for the lesser-included offense of criminal trespass. See Dugger v. State, No. 03–00–00785–CR, 2001 WL 987373, at *3 (Tex.App.-Austin Aug. 30, 2001, no pet.)(not designated for publication).

Conclusion: Having overruled in part and sustained in part Appellant's sole issue on appeal, we reform the trial court's judgment to reflect finding Appellant delinquent for criminal trespass. We remand the case to the trial court to consider disposition based on the reformed judgment.

THE RIGHT TO JURY TRIAL PROVIDED IN THE TEXAS CONSTITUTION APPLIES ONLY TO ADULTS, AND IT IS THE FAMILY CODE THAT CREATES A STATUTORY RIGHT TO A JURY TRIAL IN JUVENILE PROCEEDINGS, AND AS A RESULT, VIOLATIONS ARE NOT CONSTITUTIONAL AND SUBJECT TO HARMLESS-ERROR ANALYSIS.

¶ 12-3-5. **In the Matter of R.R.**, No. 14-10-01233-CV, --- S.W.3d ----, 2012 WL 1881342 (Tex.App.-Hous. (14 Dist.), 5/24/12).

Facts: Appellant, R.R., was charged with the aggravated sexual assault of a child under the age of 14. After a bench trial, the trial court found R.R. engaged in delinquent conduct and assessed punishment at five years' confinement in the Texas Youth Commission with a possible transfer to the Texas Department of Criminal Justice. On appeal, R.R. asserts that the trial court erred by (1) proceeding to a bench trial without obtaining a waiver of jury trial by R.R.'s trial counsel, (2) excluding witness testimony attacking the complainant's credibility, and (3) finding the evidence presented to be legally and factually sufficient to support adjudicating R.R. as a delinquent.

On October 11, 2010, an agreed-setting form resetting the case for "Court Trial" was signed by R.R.'s parent/guardian, his attorney, and the prosecutor. A bench trial was held three days later after the following exchange in open court among the trial judge, the prosecutor (Sarah Bruchmiller), and R.R.'s attorney (Fred Dahr):

THE COURT: Okay. [R.R.], you are charged with first degree felony offense of aggravated sexual assault of a child under the age of 14. That is said to have occurred on January 11th, 2009. You had a right to have a trial in front of a jury, but it appears that you have given up that right; is that true?

RESPONDENT: Yes, sir.

THE COURT: Okay. All right then. And I'm going to enter a plea of not true to the allegation that you're charged with. All right then. You may proceed.

MS. BRUCHMILLER: Your Honor, at this time State offers Petitioner's Exhibit 1 which is a signed stipulation of the date of birth of the respondent.

(Whereupon Petitioner's Exhibit 1 is offered into evidence.)

MR. DAHR: No objection, Judge.

THE COURT: All right. It's admitted.

During the bench trial, R.R. called S.K. to the stand, and the following exchange occurred:

MR. DAHR: About how long did you know [the complainant] for?

A: Since beginning of eighth grade.

MR. DAHR: What's your opinion of her, her truthfulness?

A: She don't have—

MS. BRUCHMILLER: Objection. Improper question.

THE COURT: That's sustained.

MR. DAHR: Have you talked to people in your community about whether [the complainant] tells the truth?

MS. BRUCHMILLER: Objection. Improper question regarding to character. [sic]

THE COURT: That's sustained.

MR. DAHR: Pass the witness, Judge.

At the conclusion of the bench trial, the trial court found that R.R. engaged in delinquent conduct and assessed punishment at five years' confinement in the Texas Youth Commission with a possible transfer to the Texas Department of Criminal Justice. The same afternoon, the trial court issued a judgment providing, in relevant part:

BE IT REMEMBERED that this cause being called for trial, came on to be heard before the above Court with the above numbered and entitled cause and came the State of Texas by her Assistant District Attorney, SARA BRUCHMILLER, and came in person the Respondent, [R.R.], with his/her defense attorney, DAHR, FRED, and the Respondent's parent(s), guardian(s), or custodian(s),, [sic] and pursuant to the Texas Family Code all parties waived a jury, waived/had prior access to all reports to be considered by the courts and announced ready for a hearing; and there upon the Court, after hearing the pleading of all the parties and hearing the evidence and argument of counsel, finds beyond a reasonable doubt that said child committed the offense(s) alleged in the petition and/or established by the evidence.

R.R. timely moved for a new trial, alleging the same issues alleged in this appeal. The trial court denied that motion, and this appeal followed.

Held: Affirmed

Opinion: We turn to R.R.'s jury-trial waiver issue, and we note in passing that it is properly before us even without an objection in the trial court. Under the Family Code, jury trials are the default course of action, and a trial court has a duty to commence a trial by jury unless and until both the juvenile and his attorney release the trial court from that duty. Tex. Fam.Code §§ 51.09, 54.03(c). When a statute directs a juvenile court to take certain action, the failure of the juvenile court to do so may be raised for the first time on appeal unless the juvenile defendant expressly waived the statutory requirement. In re C.O.S., 988 S.W.2d 760, 767 (Tex.1999). Because R.R. argues that he did not waive his right to a jury trial, the issue is properly before us without an objection below.

A more difficult question is whether the trial court reversibly erred when it found that R.R. validly waived his right to a jury trial despite the absence of a written or recorded waiver by R.R.'s attorney. The State concedes that the record does not contain a written or oral waiver by R.R.'s attorney but argues the error is harmless. Initially, then, we must determine whether the error below is subject to harmless-error analysis.

Except for certain federal constitutional errors the U.S. Supreme Court has labeled as structural, no error—even if it relates to jurisdiction, voluntariness of a plea, or some other mandatory requirement—is categorically immune to a harmless-error analysis. Cain v. State, 947 S.W.2d 262, 264 (Tex.Crim.App.1997) (superseded by statute on other grounds). Denial of an adult defendant's right to a jury trial is a structural error not subject to harmless-error analysis. Green v. State, 36 S.W.3d 211, 216 (Tex.App.Houston [14th Dist.] 2001, no pet.). However, a court's failure to follow statutory procedures for waiving a defendant's right to trial is not structural error. See Johnson v. State, 72 S.W.3d 346, 348 (Tex.Crim.App.2002); Ex parte Sadberry, 864 S .W.2d 541, 543 (Tex.Crim.App.1993) (“Neither the federal nor the state constitution require that a trial by jury be waived in writing. Rather, the legislature has chosen to observe careful regulation of that constitutional right by specifying how that right may be waived.”). Such a failure must somehow harm a defendant to be reversible error. Johnson, 72 S.W.3d at 348.

For adults, trial by jury is a fundamental right guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and article I, section 15, of the Texas Constitution. Hall v. State, 843 S.W.2d 190, 193 (Tex.App.-Houston [14th Dist.] 1992, no writ). Few jurisdictions afford the right to juvenile defendants, but Texas does.FN4Section 54.03 of the Family Code sets out the procedure for juvenile adjudication hearings and plainly provides: “Trial shall be by jury unless jury is waived in accordance with Section 51.09.”Tex. Fam.Code § 54.03(c). The State relies on the supreme court's decision in In re D.I.B. to argue that the requirements of section 54.03—and by extension, section 51.09—are statutory in nature and that failure to comply with those procedures is subject to harmless-error analysis. See 988 S.W.2d 753, 754 (Tex.1999). But the holding there was explicitly limited:

FN4. The majority of states and the federal government do not guarantee juveniles the right to a jury trial. Tina Chen, Comment, The Sixth Amendment Right to a Jury Trial: Why Is It A Fundamental Right For Adults and Not Juveniles?, 28 J. Juv. L. 1, 6 (2007). Texas has historically granted juvenile defendants broad legal protections unavailable to them in many states. See McKeiver v. Pennsylvania, 403 U.S. 528, 549 n. 9 (1971) (naming Texas as one of ten states to provide a juvenile's right to a jury trial in some situations); see also Tamar R. Birckhead, Toward a Theory of Procedural Justice for Juveniles, 57 Buff. L.Rev. 1447, 1489 n. 166 (2009) (naming Texas as one of only two states to completely

prohibit the waiver of counsel by juveniles); Mark Ells, A Brief Analysis of Some Elements of a Proposed Model Juvenile Code, 28 Hamline J. Pub.L. & Pol'y 199, 206 (2006) (naming Texas as one of five states to provide heightened statutory guidelines for interrogations of juveniles); Tory J. Caeti et al., Juvenile Right to Counsel: A National Comparison of State Legal Codes, 23 Am. J. C rim. L. 611, 625 (1996) (listing Texas among seven states offering the most comprehensive protections for juvenile defendants).

We note that our holding today regarding the explanations required by section 54.03(b) of the Family Code is limited. The only issue before us is whether an appellate court should conduct a harm analysis when a trial court fails to explain the potential use of the record from a juvenile proceeding in a future criminal case. We are not called upon to decide, and do not decide, whether the failure to give one or more of the other explanations required by section 54.03(b) of the Family Code might be a "structural defect[ ] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards." D.I.B., 988 S.W.2d at 759 (citing Arizona v. Fulminante, 499 U.S. 279, 309 (1991)).

We must decide the source of a juvenile's right to a jury trial. See Miles v. State, 154 S.W.3d 679, 680 (Tex.App.-Houston [14th Dist.] 2004), aff'd, 204 S.W.3d 822 (Tex.Crim.App.2006). Only those errors that directly offend the U.S. Constitution or the Texas Constitution are structural errors immune from harmless-error analysis. Id.; Fox v. State, 115 S.W.3d 550, 563 (Tex.App.-Houston [14th Dist.] 2002, pet. ref'd). It is clear that the federal constitution does not guarantee a juvenile the right to a jury trial. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971). This, of course, does not prevent the Texas Constitution from guaranteeing that right. Hous. Chronicle Publ'g Co. v. Crapitto, 907 S.W.2d 99, 106 (Tex.App.-Houston [14th Dist.] 1995, no writ) ("The federal constitution sets the floor for individual rights; state constitutions establish the ceiling.").

If the Texas Constitution guarantees the right to a jury trial to juveniles, section 54.03 of the Family Code merely recognizes that right. In that case, any error denying a jury trial to a juvenile is structural and not subject to harmless-error analysis. See Green, 36 S.W.3d at 216. On the other hand, if the right to jury trial provided in the Texas Constitution applies only to adults, section 54.03 creates a statutory right to jury trial in juvenile proceedings, and violations are subject to harmless-error analysis. See Johnson, 72 S.W.3d at 348.

Although this appears to be a matter of first impression in Texas, this court has previously chosen not to distinguish the federal and state constitutions on this issue. Strange v. State, 616 S.W.2d 951, 953 (Tex.Civ.App.-Houston [14th Dist.] 1981, no writ) ("[A] jury trial is not a constitutional requirement in the adjudicative stage of a juvenile proceeding.") (citing McKeiver v. Pennsylvania, 403 U.S. 528 (1971)). The supreme court cited Strange approvingly to support the proposition that "[a]lthough minors have constitutional rights, they do not have the same constitutional rights as adults."See Barber v. Colo. Indep. Sch. Dist., 901 S.W.2d 447, 451 (Tex.1995). We see no reason to alter our previous assessment. Though Texas does more than most jurisdictions to preserve the right to a jury trial for juveniles, it does not go so far as to constitutionally require jury trials in juvenile proceedings. See Strange, 616 S.W.2d at 953. The Family Code—not the Texas constitution—creates a juvenile's right to a jury trial.

Because a jury trial is not constitutionally required, a juvenile must demonstrate that his substantial rights were affected in order to obtain reversal based on the erroneous denial of a jury trial under section 54.03. SeeTex.R.App. P. 44.2(b); See Johnson, 72 S.W.3d at 348. In a non-jury case, an error does not affect substantial rights if the error does not deprive the complaining party of some right to which he was legally entitled. Johnson, 72 S.W.3d at 348; Smith v. State, 290 S.W.3d 368, 375 (Tex.App.-Houston [14th Dist.] 2009, pet. ref'd). In determining harm, we consider the entire record. Smith, 290 S.W .3d at 375.

Here, R.R. does not assert any harm, and the judgment indicates that "all parties waived a jury." That recitation is binding in the absence of direct proof of its falsity. Johnson, 72 S.W.3d at 349; Breazeale v. State, 683 S.W.2d 446, 450 (Tex.Crim.App.1985) (op. on reh'g). There is no such proof in the record, and in fact, R.R. makes no challenge at all to the judgment itself. Instead, R.R. portrays the record as completely silent on any waiver from his attorney and relies on the well-settled rule that waiver cannot be inferred from a silent record. See, e.g., Carnley v. Cochran, 369 U.S. 506, 516 (1962).

We do not agree that the record is silent. R.R. orally waived his right to a jury in open court on the record with his attorney present. Additionally, R.R's attorney signed a form agreeing to a "Court Trial." Although neither the oral waiver nor the trial-setting form are sufficient to satisfy the requirements of section 54.03, they both weigh against any suggestion that a trial to the bench harmed R.R.

Conclusion: Because the record reflects that R.R. opted for a bench trial, we conclude that any failure by the trial court to adhere to the requirements of section 54.03 was harmless. See Johnson, 72 S.W.3d at 349. We overrule R.R.'s second issue. For the foregoing reasons, we affirm the trial court's judgment.

CIVIL LIABILITY

THE EL PASO JUVENILE BOARD IS A POLITICAL SUBDIVISION OF THE STATE AND HAS GOVERNMENTAL IMMUNITY AGAINST SUIT.

¶ 12-3-1. **El Paso v. Aguilar,** No. 08-11-00206-CV, --- S.W.3d ----, 2012 WL 1611899 (Tex.App.-El Paso, 5/9/12).

Facts: Dolores Aguilar filed suit alleging that the Juvenile Board terminated her employment in violation of Chapter 451 of the Texas Labor Code because she filed a claim for worker's compensation. A few days after the Supreme Court issued Travis Central Appraisal District v. Norman, 342 S.W.3d 54 (Tex.2011), the Juvenile Board filed a plea to the jurisdiction asserting that it is immune from suit because it is a political subdivision and its immunity has not been waived. Aguilar responded that Norman did not control because the Juvenile Board is not a political subdivision. The trial court denied the plea to the jurisdiction. The Juvenile Board timely filed its notice of accelerated appeal. SeeTEX.CIV.PRAC. & REM.CODE ANN. § 51.014(a)(8)(West Supp.2011).

Held: Reversed, Dismissed for want of jurisdiction.

Opinion: In its sole issue, the Juvenile Board argues that the trial court lacks subject matter jurisdiction because it is a political subdivision under Section 504.001 of the Texas Labor Code and its governmental immunity from suit has not been waived. Aguilar concedes in her brief that the Juvenile Board is a political subdivision as defined in Section 504.001(3) of the Labor Code and that Norman controls this appeal. Despite Aguilar's concession, we will address the issue as subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel. See Van Independent School District v. McCarty, 165 S.W.3d 351, 354 (Tex.2005); Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 76 (Tex.2000).

Sovereign immunity protects the State, its agencies, and its officials from lawsuits for damages. Ben Bolt–Palito Blanco Consolidated Independent School District v. Texas Political Subdivisions Property/Casualty Joint Self–Insurance Fund, 212 S.W.3d 320, 323–24 (Tex.2006). The common-law doctrine of governmental immunity likewise protects political subdivisions of the state. Id., 212 S.W.3d at 324. A political subdivision enjoys governmental immunity from suit to the extent that it has not been abrogated by the Legislature.Id.

We review a trial court's ruling on a plea to the jurisdiction de novo. Texas Department of Parks and Wildlife v. Miranda, 133 S.W.3d 217, 228 (Tex.2004). Where, as here, the juris-dictional question is limited to the sufficiency of the plaintiff's pleadings, we will accept as true all factual allegations in the petition to determine if the plaintiff has met her burden to allege facts which affirmatively demonstrate a waiver. Miranda, 133 S.W.3d at 224.

Aguilar filed suit alleging that the Juvenile Board retaliated by discharging her because she filed a worker's compensation claim. Section 451.001 specifically prohibits an employer from retaliating against an employee because the employee files a good faith claim for worker's compensation. SeeTEX.LABOR CODE ANN. § 451.001(1)(West 2006). An employee who is terminated or discriminated against in violation of Section 451.001 has a cause of action against the employer for damages incurred as a result of the violation. SeeTEX.LAB.CODE ANN. § 451.002. A cause of action based on Chapter 451 cannot proceed against a governmental entity absent Legislative consent to the suit. Texas Workforce Commission v. Olivas, 349 S.W.3d 174, 176 (Tex.App.-El Paso 2011, pet. filed). To the extent immunity may be waived, that waiver is provided by the State Applications Act (SAA) found in Chapter 501 of the Labor Code or by the Political Subdivisions Law (PSL) found in chapter 504 of the Labor Code. SeeTEX.LAB.CODE ANN. §§ 501.001–501.051 (West 2006 & West Supp.2011)(the SAA); TEX.LAB.CODE ANN. §§ 504.001–504.073 (The PSL). The SAA and the PSL make many of the provisions of the worker's compensation system applicable to the state (the SAA) and political subdivisions of the state (the PSL).SeeTEX.LAB.CODE ANN. § 501.001(6)(SAA); TEX.LAB.CODE ANN. § 504.001(3)(PSL).

Both the SAA and the PSL provide that Chapter 451, the Anti–Retaliation Law, is included within the SAA and PSL except to the extent it is inconsistent with the provisions of these chapters. TEX.LAB.CODE ANN. § 501.002(a)(10); TEX.LAB.CODE ANN. § 504.002(a)(10). The Legislature amended the PSL in 2005 to provide that "[n]othing in this chapter waives sovereign immunity or creates a new cause of action."TEX. LAB. CO DE ANN. § 504.053(e). The Supreme Court held in Travis Central Appraisal District v. Norman that with the addition of the no-waiver provision, the PSL no longer waives immunity for retaliatory discharge claims under Chapter 451. Travis Central Appraisal District, 342 S.W.3d at 58–59.

The Juvenile Board argues it is a political subdivision under the PSL because it is a "county board," and therefore, its governmental immunity has not been waived. The PSL defines "political subdivision" as a county, municipality, special district, school district, junior college district, housing authority, community center for mental health and mental retardation services established under Chapter 534 of the Health and Safety Code, or any other legally constituted political subdivision of the state. TEX.LAB.CODE ANN. § 504.001(3). A county juvenile board is not specifically

identified as a political subdivision in the statute. The issue is whether it is a legally constituted political subdivision of the state.

The Texas Supreme Court has held that a political subdivision: (1) has jurisdiction over a portion of the State, (2) has the power to assess and collect taxes, and (3) the members of its governing body are elected in local elections or are appointed by locally elected officials. Guaranty Petroleum Corporation v. Armstrong, 609 S.W.2d 529, 531 (Tex.1980). A juvenile board is a body established by law to provide juvenile probation services to a coun-ty.TEX.HUM.RES.CODE ANN. § 201.001(6)(West Supp.2011). To that end, a juvenile board is required to establish a juvenile probation department, employ personnel to conduct probation services, and to operate or supervise juvenile probation services in the county. TEX.HUM.RES.CODE ANN. § 152.0007 (West 2001). Thus, the Juvenile Board has jurisdiction over only a portion of the State.

The Juvenile Board does not have the power to assess and collect taxes. It does, however, have the authority to establish certain fees. TEX.FAM.CODE ANN. § 53.03 (West 2008). The Juvenile Board of El Paso County is composed of the county judge, each family district court judge, each juvenile court judge, up to five judges on the "El Paso Council of Judges" to be elected by majority vote of that council, a municipal judge from El Paso County selected by the chairman of the Juvenile Board of El Paso County, and a justice of the peace in El Paso County selected by the chairman of the Juvenile Board of El Paso County. TEX.HUM.RES.CODE ANN. § 152.0771(a)(West 2001). The elected members of the governing body are elected in local elections to other offices and are not elected solely to serve on the juvenile board. At least some of the members of the governing body are appointed by locally elected officials.

While the Juvenile Board does not strictly meet every element of the general judicial definition of a political subdivision, we bear in mind the unusual nature of a juvenile board. A juvenile board is a statutorily created entity which exists separately from the county it serves and the commissioner's court. See El Paso County v. Solorzano, 351 S.W.3d 577, 581 n. 2 (Tex.App.-El Paso 2011, no pet.). The Juvenile Board and the Juvenile Probation Department are funded with both county and state funds. Solorzano, 351 S.W.3d at 583;seeTEX.HUM.RES.CODE ANN. §§ 152.0012, 152.0054, 223.001–.005. A juvenile board may, with the advice and consent of the commissioners court, employ probation officers and other personnel necessary to provide juvenile probation services. TEX.HUM .RES.CODE ANN. § 142.002. The commissioners court is required to pay the salaries of juvenile probation personnel and other necessary expenses from the county's general funds.TEX.HUM. RES.CODE ANN. § 152.0004. Even though a juvenile board is a separate governmental entity, a juvenile board's employees are considered to be county employees because they are paid and their benefits are provided by the county. SeeTEX.HUM.RES.CODE ANN. § 222.006 (providing that a juvenile probation officer whose jurisdiction covers only one county is considered to be an employee of that county). Further, the Legislature appears to consider a juvenile board as a political subdivision. Section 142.004 of the Human Resources Code provides that juvenile probation personnel employed by a political subdivision of the state are state employees for the purposes of Chapter 104 of the Civil Practice and Remedies Code. TEX.HUM.RES.CODE ANN. § 142.004(b)(West 2001). We agree with the Juvenile Board that this provision would be unnecessary if juvenile probation personnel were state employees.

Conclusion: For all of these reasons, we conclude that the El Paso County Juvenile Board is a political subdivision of the state for purposes of Chapter 504 of the Labor Code. Consequently, the Juvenile Board's governmental immunity has not been waived with respect to Aguilar's retaliatory discharge suit under Chapter 451. Travis Central Appraisal District, 342 S.W.3d at 58–59. The sole issue presented on appeal is sustained. We reverse the trial court's order denying the plea to the jurisdiction and render judgment dismissing Aguilar's suit for want of subject matter jurisdiction.

COLLATERAL ATTACK

FALSE TESTIMONY BY A LICENSED PSYCHOLOGIST AND REGISTERED SEX OFFENDER TREATMENT PROVIDER WARRANTED HABEAS RELIEF REGARDING SENTENCING.

¶ 12-3-2. **In the Matter of M.P.A.**, No. 10-0859, --- S.W.3d ----, 2012 WL 1759513 (Tex.Sup.Ct., 5/18/12).

Facts: S.A. and A.A. accused their cousins M.P.A. and J.W.A. of sexually assaulting them. At the time of the alleged acts, S.A. was seven, A.A. was five, M.P.A. was fourteen, and J.W.A. was fifteen. M.P.A. and J.W.A. were charged with three counts of aggravated sexual assault of a child. J.W.A. entered a plea bargain and pleaded true to the allegations regarding S.A. M.P.A. pleaded not true and went to trial.

At trial, A.A. did not testify that M.P.A. had sexually assaulted him, but both S.A. and A.A. testified that M.P.A. sexually assaulted S.A. In addition, Alice Linder, a sexual assault nurse examiner who had examined S.A. and A.A. testified that they told her that M.P.A. and J.W.A. had sexually assaulted them. M.P.A. was the only defense witness and he testified that he did not sexually assault S.A. The trial court granted a defense motion for a directed verdict regarding the count that M.P.A. had sexually assaulted A.A. The jury found that M.P.A. had sexually assaulted S.A.

At the disposition phase, the State presented two witnesses: Dr. Frederick Willoughby, a licensed psychologist and registered sex offender treatment provider, and Kathie Lewis, a probation officer. Willoughby testified regarding an "Abel Assessment" that he had administered to M.P.A. Willoughby testified that the Abel Assessment is a test that predicts which people have an interest in particular sexes and age groups. One portion of the test consists of a questionnaire. M.P.A.'s answers to this portion of the test were "socially desirable." The portion of the Abel Assessment at issue in this case consists of a series of slides that are shown to the subject. The slides depict individuals of various age and gender, and the subject's sexual interest is measured by how long the subject looks at each slide. The results are computerized and sent to Atlanta, where the test is "scored."

After the trial court overruled M.P.A.'s reliability objection to the Abel Assessment, Willoughby testified that M.P.A. was a "pedophile" who had a "significant sexual interest in eight to ten year-old females and two to four and eight to ten year-old males ."Lewis testified that probation and home supervision would be inappropriate for M.P.A. The only witness for M.P.A. was his mother, who testified that she would supervise M.P.A. if the jury assessed a sentence of probation. The jury sentenced M.P.A. to twenty years' confinement.

A.A. recanted approximately nine months after the trial and S.A. recanted approximately twenty months after the trial. At the habeas court below, both S.A. and A.A. testified that they falsely accused their cousins because their mother, LaVonna, told them to. J.W.A. also recanted his confession and testified at the habeas court that he did not sexually assault A.A. and S.A. In addition, the evidence at the habeas hearing showed that approximately four years after M.P .A.'s original trial, Willoughby entered into an agreed order with the Texas State Board of Examiners of Psychologists stating that he "misstated in his court testimony the research that had been conducted with respect to the Abel Assessment."

M.P.A. filed the writ of habeas at issue in this case, arguing that he was actually innocent, that Willoughby's false testimony contributed to his sentence, and that his trial counsel rendered ineffective assistance. The habeas court found that the recantations were not credible. In so finding, it relied on J.W.A.'s confession and the testimony from all the witnesses. It also found that Willoughby's "misstatements, if any," did not contribute to M.P.A.'s sentence, and that M.P.A.'s trial counsel was effective. The court of appeals affirmed and M.P.A. appealed to this Court.

Held: Remanded for new disposition

Opinion: Willoughby testified as an expert in this case. A party offering scientific expert testimony must show by clear and convincing evidence that the science is reliable. *Kelly v. State,* 824 S.W.2d 568, 573 (Tex.Crim.App.1992); *see also In re D. W.P.,* No. 06–07–00113–CV, 2008 WL 53211, at * 1 (Tex.App.-Texarkana Jan.4, 2008, no pet.)("Even though appeals of **juvenile** court orders are generally treated as civil cases, we believe the criminal standard for the admission of scientific evidence should apply in light of the quasi-criminal nature of **juvenile** proceedings."(footnote and citation omitted)). " 'Unreliable ... scientific evidence simply will not assist the [jury] to understand the evidence or accurately determine a fact in issue; such evidence obfuscates rather than leads to an intelligent evaluation of the facts.' " *Kelly,* 824 S.W.2d at 572 (alterations in original) (quoting Kenneth R. Kreiling, *Scientific Evidence: Toward Providing the Lay Trier With the Comprehensible and Reliable Evidence Necessary to Meet the Goals of the Rules of Evidence,* 32 ARIZ. L.REV. 915, 941–42 (1990)).

Kelly governs the reliability determination and specifies several non-exclusive factors to guide the inquiry. 824 S.W.2d 571–73.Two of these factors, the potential error rate and the existence of supporting literature, are the primary issues in M.P.A.'s false testimony claim and the subjects on which Willoughby testified falsely.

Willoughby testified regarding the Abel Assessment outside the presence of the jury. When asked about the Abel Assessment's error rate, he stated that "[f]or classifying people who have significant sexual interest in female children under the age of fourteen, the accuracy rate is 85 percent."This is particularly significant because at the time of the alleged offense, S.A. fell into this category. In addition, in response to a question regarding the existence of literature supporting or rejecting the Abel Assessment, Willoughby stated that "[t]here is [sic] a number of articles out by Gene Abel and his colleagues. Also researchers at Brigham Young University have established the reliability of the instrument and the classification accuracy of the instrument."

Much of this testimony was false. In 1998, the accuracy rate of the Abel Assessment, according to Abel and his colleagues, for classifying people with a significant sexual interest in female children under fourteen was only 65%, not 85%. This weighs against the reliability of the Abel Assessment.

Furthermore, contrary to Willoughby's testimony, the Brigham Young University (BYU) studies failed to establish the Abel Assessment's reliability as applied to adults and actively established that it was unreliable as applied to adolescents. Regarding adults, they found

that it was a "promising instrument based on a sound idea," but concluded that "the evidence of its reliability and validity for use with adults is weak as of yet," labeled it a "nonvalidated instrument," and called for "further research" and "refinement."

Regarding the application of the Abel Assessment to adolescents, they found that no research other than their own had been done and that Abel's initial study only included two adolescents. Their own research led them to conclude that data did "not support the reliability of [the Abel Assessment] for use with adolescents,""that the ability of [the Abel Assessment] to discriminate adolescent offenders from nonoffenders was not significantly better than chance," and the Abel Assessment's "ability to screen or diagnose adolescent perpetrators reliably has not been demonstrated."

The State argues that the following evidence supports the admission of Willoughby's testimony:

• The statement in one of the BYU articles that "approximately 300 therapists in 36 states and two foreign countries, as well as 8 states' judicial systems" used the assessment;

• Abel's study of the Abel Assessment;

• Four independent studies supporting the theory underlying the Abel Assessment;

• The inability of M.P.A. and J.W.A.'s attorneys to find an expert to attack the Abel Assessment.

With the exception of Abel's own study, the State did not present this evidence to the trial court. Nor would this evidence have been presented to the trial court had Willoughby testified truthfully regarding the Abel Assessment's error rate and the BYU studies' reliability findings. Therefore, we do not consider it in our determination of whether the trial court would have found the Abel Assessment reliable absent Willoughby's false testimony.

The State argues that we should consider the four independent studies because the State would have used them to rebut the criticisms in the BYU studies if Willoughby had testified truthfully about the BYU studies. The State's framework would require that we assume Willoughby was aware of these studies and speculate as to how he would have testified about them. We reject this approach and do not consider the four studies. *See, e.g., Graves v. Cockrell,* 351 F.3d 143, 156 (5th Cir.2003) (referencing the largely speculative nature of allegations of what an uncalled witness would have testified to as a reason why complaints of uncalled witnesses are not favored).

The State additionally argues that we should apply the less stringent standard from *Nenno v. State* to this case. 970 S.W.2d 549, 561 (Tex.Crim.App.1998), *overruled on other grounds by State v. Terrazas,* 4 S.W.3d 720, 727 (Tex.Crim.App.1999).*Nenno* held that *Kelly's* reliability requirement applies with less rigor to fields of study aside from the hard sciences. *Id. Nenno* noted that "hard science methods of validation, such as assessing the potential error rate or subjecting a theory to peer review, may often be inappropriate for testing the reliability of fields of expertise outside the hard sciences."*Id.*

This case stands in sharp contrast to *Nenno.*There, an expert testified regarding future dangerousness based on his experience studying cases. *Id.* at 562.That expert "did not contend that he had a particular methodology."*Id.* Here, the Abel Assessment was subject to peer review and testing of its accuracy rate. Therefore, we consider those factors. *See Mendoza v. State,* No. AP–7521, 2008 WL 4803471, at *22 n. 62 (Tex.Crim.App. Nov.5, 2008) (applying peer review factor in the soft science context of predicting future dangerousness because expert claimed to have a methodology, and contrasting *Nenno); Nenno,* 970 S.W.2d at 561 & n. 9 (stating that *Nenno* does not preclude employing the error rate and peer review factors in appropriate cases).

In sum, had Willoughby testified truthfully, the trial court would have been faced with testimony regarding a test that had only a 65% accuracy rate as applied to this case, was subject to at least some criticism in the literature as applied to this case, and had no support from independent studies as applied to this case. The only evidence to support admission of the testimony regarding the Abel Assessment would have been a study by its creator that did not address the assessment's application to this case. Given the evidence regarding the Abel Assessment's application to adolescents, had Willoughby testified truthfully, the State would not have established the assessment's reliability under *Kelly.* Therefore, we hold that the trial court would have excluded Willoughby's testimony.

C. Harm Analysis

In order to obtain a new sentencing hearing, M.P.A. must prove by a preponderance of the evidence that Willoughby's testimony contributed to his sentence. *Ex parte Williams,* 65 S.W.3d 656, 658 (Tex.Crim.App.2001). We review a trial court's legal conclusions de novo, but defer to its fact findings if they are supported by the record. *See Reliance Nat'l Indem. Co. v. Advance'd Temporaries, Inc.,* 227 S.W.3d 46, 50 (Tex.2007) ("Appellate courts review legal determinations de novo, whereas factual determinations receive more deferential review based on the sufficiency of the evidence."). Applying this standard to the instant case, we conclude that the State's use of Willoughby's testimony throughout its closing argument contributed to M.P.A.'s sentence.

The State argues that the testimony of M.P.A.'s trial counsel, Bobby Barina, supports the habeas court's finding that Willoughby's testimony likely did not sway the jury. Barina stated in his affidavit that Willoughby's testimony had "zero impact" on the jury. At the habeas hearing, he explained that Willoughby's testimony was "boring." He stated that it "didn't provide any insight to anybody," but did not remember that Willoughby likened M .P.A. to a pedophile. Barina also described Willoughby as "arrogant" and stated that the jury did not take "much consideration to anything Dr. Willoughby told them ... just because of the nature of Willoughby."

Barina's observations do not address the State's use of Willoughby's testimony to refer to M.P.A. as a pedophile throughout its closing argument. *See Serv. Corp. Int'l v. Guerra,* 348 S.W.3d 221, 236 (Tex.2011) (stating that determination of whether error is harmful includes evaluating closing argument and counsel's emphasis of erroneous evidence); *Mathis v. State,* 67 S.W.3d 918, 929 (Tex.Crim.App.2002) (Johnson, J., concurring) (separately analyzing admission of testimony and State's use of that testimony during closing statements); *LaPoint v. State,* 750 S.W.2d 180, 192 (Tex.Crim.App.1988) (analyzing whether the State exploited erroneous instruction during closing argument). Here, the State argued:

• "He's been diagnosed as a pedophile by an expert. He is at a high risk to re-offend."

• "[Y]ou've heard the psychologist tell you he is a pedophile. He is at a high risk to reoffend."

• "You now know he's been classified as a pedophile by an expert. You now know that he is interested in children, interested in children, in fact, in the same age group as little [S.A.]. Think about her and think about that."

These references to Willoughby's testimony bolstered the State's closing theme of protecting the community:

• "[I]f you put him on probation, we've already seen that just allows for victims."

• "Our community simply cannot take that chance by releasing him back in that home. It's a tough decision to make, but it's a decision that's backed up by the evidence and the testimony."

• "How are you going to protect the public? The evidence has shown that the only way you're going to be able to do that is by putting him away for some time. Because you're going to have to protect other children. And with your verdict, you can at least keep him out of your community for a while."

• "[Y]ou're also telling him, 'If I put you on probation, I'm going to walk right out this door with you.' He could be next to you in the parking lot today and in your neighborhood tomorrow. Think about that."

In sum, the State utilized Willoughby's testimony throughout its closing theme of protecting the community. In addition, the State emotionally appealed to the jury to think about Willoughby's classification of M.P.A. as a pedophile with a specific interest in S.A.'s age group. Indeed, the State's closing argument made more express references to Willoughby's testimony than to any other testimony in the case. Therefore, we conclude that the State's use of Willoughby's testimony at closing contributed to M.P.A.'s sentence.

Conclusion: M.P.A. is entitled to a new disposition hearing because Willoughby's false testimony contributed to his sentence. We remand this cause to the district court to grant M.P.A.'s writ of habeas corpus in accordance with this opinion.

CONFESSIONS

JUVENILE WAS NOT CONSIDERED IN CUSTODY WHEN OFFICER TOOK HIM TO AN UNMARKED POLICE CAR, WHERE A RECORDING DEVICE HAD BEEN ACTIVATED, TO DISCUSS WHAT HAD HAPPENED IN ARMED ROBBERY.

¶ 12-3-8A. **In the Matter of C.M.**, MEMORANDUM, No. 10-10-00421-CV, 2012 WL 579540 (Tex.App.-Waco, 2/22/12)

Facts: An armed robbery of a convenience store committed with a shotgun took place a short distance from the place C.M. was residing with his cousin, Charles, and Charles's wife, Laura. At this time, C.M. was fifteen years old. Shortly after the robbery, a neighbor called the police to report a suspicious person attempting to enter Charles and Laura's residence through the back door. Multiple officers had been dispatched to the scene to attempt to locate the robber, some of whom were in uniform and some were not. An officer came to the residence and asked to search the residence because of the neighbor's report to make sure that no one had broken into the residence. Laura was the only person at home and gave consent.

At one point during the search for the robber, a suspect was spotted and chased, but that person escaped. A short time later, an officer spotted C.M. in an alley a short distance away peering around a corner of a building. When he saw an officer and a deputy constable, C.M. turned and tried to walk away. The officers took off running after C.M. and told him to

stop, which he did. C.M. was frisked for weapons and walked back with the officers to the residence.

At the residence, C.M. was told not to leave and to wait next to Charles's vehicle. C.M. sat down on the back of Charles's truck and waited. Hines, a detective, and at least one other officer stood with CM. and had a conversation with CM. about what he had been doing that day and why he was not in school. During this time other officers were in the vicinity of CM. and were armed, although the officers testified that no weapon was pointed at CM. at any time and the weapons were unholstered only during the protective sweep of the residence. Additionally, some of the officers at the scene carried patrol rifles but the officers testified that they were pointed at the ground in a safety circle position and not at CM. While sitting on Charles's truck, the officers observed that CM. seemed to be very nervous and shaking. He was dressed in a t-shirt and shorts, which the officers believed was odd for the weather that day, which was cool. CM. was not handcuffed at any time prior to the conclusion of the second statement made in the patrol car.

C.M.'s initial story regarding his whereabouts that day were shown to be untrue, and after a short conversation of approximately five to ten minutes, Hines confronted C.M. by telling him that they knew what had happened that morning and that CM. might as well be truthful with the officers. At this point, CM. admitted that he had robbed a store with a shotgun. He had stolen a shotgun from a friend in Dallas and had hidden it under his bed wrapped in a towel. CM. committed the robbery so he could get the money to return to Dallas, his hometown. CM. contended that he had thrown down the money and shotgun while he was being chased. This is the first statement of which C.M. complains.

Hines then took CM. to an unmarked police car so they could discuss what had happened in a quieter environment. Hines got into the driver's side and CM. got into the passenger side front seat. Another officer had already activated a recording device in the vehicle. Hines asked CM. similar questions except in more detail and CM. again confessed to stealing the shotgun and committing the robbery with the shotgun that was loaded. CM. stated that if the store clerk had resisted that he would have shot the clerk. CM. did not seem overly nervous or upset during this interview but was calm and matter-of-fact. After this discussion, Hines told CM. that he was under arrest and that he would be taken to juvenile detention. This was the second statement of which CM. complains. CM. was then left in the vehicle for a short time when another officer came and asked him to exit the vehicle, at which time he was then handcuffed.

Multiple officers spoke with Charles and Laura during this time. Laura consented to a search of C.M.'s room and the residence. Charles and Laura both testified that they asked to speak to C.M., but were not allowed to do so. Both stated that if they had been allowed to speak to CM. they would have advised him against making any statements until after speaking with an attorney and that they believed that CM. would have listened to their advice. Charles asked to accompany CM. to the police station but the officers told him no and that he could not speak with CM. until he was taken to juvenile detention. CM. did not have any prior adjudications as a juvenile; however, Charles testified that CM. had been in trouble before but had not been caught when he lived in Dallas.

C.M. was taken to the Bryan Police Department to see a magistrate. C.M. was in an interview room for approximately an hour waiting for the magistrate to arrive. There is no dispute that C.M. was in custody at this time. Gore, a magistrate, arrived and met with C.M. in the interview room. She reviewed the required warnings and advised C.M. of his rights as required by section 51.095(a)(5)(A) of the Family Code. C.M. signed an acknowledgment that he had been read and had his rights explained to him by the magistrate, that he understood them, and had asked any questions he had regarding them. This was electronically recorded both visually and aurally. The magistrate asked C.M. if he still wanted to talk with the detectives and C.M. responded affirmatively. Gore also testified at the suppression hearing that she believed that C.M. understood his rights and that he voluntarily wanted to speak with the officers. C.M. was interviewed by Hines and another detective and made a statement similar to the statement recorded in the police vehicle. This statement by C.M. is the third statement of which C.M. complains.

C.M. filed a motion to suppress each of these statements, which was denied after a hearing by the trial court. C.M. did not testify at the suppression hearing. After the motion was denied, C.M. pled true to the offenses of aggravated robbery and possession of a prohibited weapon, a sawed-off shotgun. In the disposition phase, the trial court accepted the disposition of a determinate sentence of fifteen years' confinement to be served in the custody of the Texas Youth Commission for the aggravated robbery which had been agreed-upon by the State and C.M.

Held: Affirmed

Memorandum Opinion: In determining whether or not the statements should have been suppressed, the initial inquiry is at what time C.M. was in custody of the police because the protections of the 5th and 14th Amendments of the United States Constitution, article 1, sections 9 and 10 of the Texas Constitution, and relevant sections of the Family Code concerning the admissibility of statements of a juvenile do not apply if the juvenile is not in custody when the statement was made.[FN1] *See* TEX. FAM.CODE ANN. § 51.095(d);

Roquemore v. State, 60 S.W.3d 862, 866 (Tex.Crim.App.2001).

FN1. Although C.M. complains that the statements were made in violation of the Texas Constitution, he makes no further arguments regarding what protections the Texas Constitution provides that differ from those of the United States Constitution; therefore we will not address that portion of his issue. *See* TEX.R.APP. P. 38.1(i); *see also Johnson v. State,* 853 S.W.2d 527, 533 (Tex.Crim.App.1992) (declining to address appellant's arguments regarding his state constitutional rights when the appellant did not make a distinction between the United States Constitution and the Texas Constitution).

Custodial interrogation is questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom in any significant way. *See Stansbury v. California,* 511 U.S. 318, 322, 114 S.Ct. 1526, 1528–30, 128 L.Ed.2d 293 (1994); *Cannon v. State,* 691 S.W.2d 664, 671 (Tex.Crim.App.1985); *Martinez v. State,* 131 S.W.3d 22, 32 (Tex.App.-San Antonio 2003, no pet.). "A custodial interrogation occurs when a defendant is in custody and is exposed 'to any words or actions on the part of the police ... that [the police] should know are reasonably likely to elicit an incriminating response/" *Roquemore v. State,* 60 S.W.3d at 868 (quoting *Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S.Ct. 1682, 1689–90, 64 L.Ed.2d 297 (1980)). A child is in custody if, under the objective circumstances, a reasonable child of the same age would believe his freedom of movement was significantly restricted. *In re U.G.,* 128 S.W.3d 797, 799 (Tex.App.-Corpus Christi 2004, pet. denied); *Jeffley v. State,* 38 S.W.3d 847, 855 (Tex.App.-Houston [1st Dist.] 2001, pet. ref'd).

We employ a two-step analysis in a juvenile delinquency proceeding to determine whether a child is in custody. *In re M.R.R.,* 2 S.W.3d 319, 323 (Tex.App.-San Antonio 1999, no pet.). First, we examine all the circumstances surrounding the interrogation in order to determine whether there was a formal arrest or restraint of freedom of movement to the degree associated with a formal arrest. *Stansbury,* 511 U.S. at 322, 114 S.Ct. at 1528–29; *In re M.R.R.,* 2 S.W.3d at 323. This initial determination focuses on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the child being questioned. *Stansbury,* 511 U.S. at 322, 114 S.Ct. at 1529; *In re M.R.R.,* 2 S.W.3d at 323. Second, we consider whether a reasonable child would have felt he or she was at liberty to terminate the interrogation and leave in light of the given circumstances. *Thompson v. Keohane,* 516 U.S. 99, 112, 116 S.Ct. 457, 465, 133 L.Ed.2d 383 (1995); *In re M.R.R.,* 2 S.W.3d at 323.

The four factors relevant to a determination of custody include (1) probable cause to arrest; (2) focus of the investigation; (3) subjective intent of the police; and (4) subjective belief of the defendant. *Dowthitt v. State,* 931 S.W.2d 244, 254 (Tex.Crim.App.1996); *In re J.A.B.,* 281 S.W.3d at 65; *In re M.R.R.,* 2 S.W.3d at 323. Because the determination of custody is based on primarily objective circumstances, whether the law enforcement officials had the subjective intent to arrest is irrelevant unless that intent is somehow communicated to the suspect. *Stansbury,* 511 U.S. at 323, 114 S.Ct. at 1529; *Dowthitt,* 931 S.W.2d at 254; *Jeffley,* 38 S.W.3d at 855; *In re M.R.R.,* 2 S.W.3d at 323.

The following situations generally constitute custody: (1) when the child is physically deprived of his freedom of action in any significant way; (2) when a law enforcement officer tells the child that he cannot leave; (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; or (4) when there is probable cause to arrest and law enforcement officers do not tell the child that he is free to leave. *Dowthitt,* 931 S.W.2d at 255; *Jeffley,* 38 S.W.3d at 855.

However, merely being the focus of an investigation does not amount to being in custody. *Meek v. State,* 790 S.W.2d 618, 621 (Tex.Crim.App.1990); Martinez, 131 S.W.3d at 32. "Words or actions by the police that normally attend an arrest and custody, such as informing a defendant of his *Miranda* rights, do not constitute a custodial interrogation." *Roquemore,* 60 S.W.3d at 868. When the circumstances show that the individual acts upon the invitation or request of the police and there are no threats, express or implied, that he will be forcibly taken, then that person is not in custody at that time. *Dancy v. State,* 728 S.W.2d 772, 778–79 (Tex.Crim.App.1987); Martinez, 131 S.W.3d at 32.

"The mere fact that an interrogation begins as non-custodial, however, does not prevent it from later becoming custodial; police conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation." *Dowthitt,* 931 S.W.2d at 255; *Jeffley,* 38 S.W.3d at 856.

First Statement

C.M. complains that he was in custody at the time he made the first statement to Hines while he was sitting on the back of Charles's truck. Although the officer who initiated contact with C.M. and brought him back to the residence told him he could not leave, no other indicia of an arrest were present. C.M. was not handcuffed or otherwise restrained, nor did the officers make any threats that he would be forcibly taken if he attempted to leave. At that time, C.M. was at most a suspect but there was no probable cause to believe that he had

committed the robbery. The shotgun and money from the robbery were found under Charles's porch stairs after C.M. had made his first two incriminating statements but not because of C .M.'s statements. C.M. stated that he had thrown them away while hiding from the police. There was no other evidence regarding whether C.M. subjectively felt he was in custody or not. Viewing the evidence in the light most favorable to the trial court's ruling, we find that C.M. was not restrained to the degree associated with a formal arrest. He was not in custody and therefore, the officers were not required to give the required warnings and admonishments. The trial court did not abuse its discretion in denying the motion to suppress the first statement made by C.M.

Second Statement

Hines testified that because of the noise and activity at the residence that he took C.M. to an unmarked police vehicle so that he could speak with him with fewer distractions. Hines testified that he told C.M. on the way to the vehicle that he was not under arrest. C.M. willingly followed Hines to the vehicle and got in the passenger side front seat to speak with Hines. The audio recording demonstrates that C.M. was calm and apparently wanted to tell his story to Hines. There were no threats or other statements that indicated that C.M. was not free to leave or was forced to make the statement on the audio recording. After the statement was given, Hines told C.M. at that time that he was under arrest. During the time of the making of this statement, the only other evidence connecting C.M. to the robbery was a resemblance between C.M. and the individual shown on the video recording of the robbery from the convenience store. There was no other evidence regarding C.M.'s subjective beliefs regarding whether he was in custody or free to leave when he made the second statement. Viewing the evidence in the light most favorable to the trial court's ruling and giving deference to the trial court's determinations of fact, we find that C.M. was not in custody until after he made the second statement. The trial court did not abuse its discretion by denying the motion to suppress the second statement because C.M. was not in custody when the statement was made. We overrule issue one.

Conclusion: Having found no error in the trial court's denial of the motion to suppress the statements, we affirm the trial court's orders of adjudication and disposition.

GUARDIAN'S TESTIMONY THAT IF THEY HAD BEEN ABLE TO SPEAK WITH JUVENILE THEY WOULD HAVE ADVISED HIM NOT TO MAKE ANY STATEMENTS PRIOR TO HIM SPEAKING WITH AN ATTORNEY, DID NOT ESTABLISH ENOUGH CAUSAL CONNECTION TO GRANT MOTION TO SUPPRESS.

¶ 12-3-8B. **In the Matter of C.M.**, MEMORANDUM, No. 10-10-00421-CV, 2012 WL 579540 (Tex.App.-Waco, 2/22/12)

Facts: An armed robbery of a convenience store committed with a shotgun took place a short distance from the place C.M. was residing with his cousin, Charles, and Charles's wife, Laura. At this time, C.M. was fifteen years old. Shortly after the robbery, a neighbor called the police to report a suspicious person attempting to enter Charles and Laura's residence through the back door. Multiple officers had been dispatched to the scene to attempt to locate the robber, some of whom were in uniform and some were not. An officer came to the residence and asked to search the residence because of the neighbor's report to make sure that no one had broken into the residence. Laura was the only person at home and gave consent.

At one point during the search for the robber, a suspect was spotted and chased, but that person escaped. A short time later, an officer spotted C.M. in an alley a short distance away peering around a corner of a building. When he saw an officer and a deputy constable, C.M. turned and tried to walk away. The officers took off running after C.M. and told him to stop, which he did. C.M. was frisked for weapons and walked back with the officers to the residence.

At the residence, C.M. was told not to leave and to wait next to Charles's vehicle. C.M. sat down on the back of Charles's truck and waited. Hines, a detective, and at least one other officer stood with CM. and had a conversation with CM. about what he had been doing that day and why he was not in school. During this time other officers were in the vicinity of CM. and were armed, although the officers testified that no weapon was pointed at CM. at any time and the weapons were unholstered only during the protective sweep of the residence. Additionally, some of the officers at the scene carried patrol rifles but the officers testified that they were pointed at the ground in a safety circle position and not at CM. While sitting on Charles's truck, the officers observed that CM. seemed to be very nervous and shaking. He was dressed in a t-shirt and shorts, which the officers believed was odd for the weather that day, which was cool. CM. was not handcuffed at any time prior to the conclusion of the second statement made in the patrol car.

C.M.'s initial story regarding his whereabouts that day were shown to be untrue, and after a short conversation of approximately five to ten minutes, Hines confronted C.M. by telling him that they knew what had happened that morning and that CM. might as well be truthful with the officers. At this point, CM. admitted that he had robbed a store with a shotgun. He had stolen a shotgun from a friend in Dallas and had hidden it under his bed wrapped in a towel. CM. committed the robbery so he could get the money to

return to Dallas, his hometown. CM. contended that he had thrown down the money and shotgun while he was being chased. This is the first statement of which C.M. complains.

Hines then took CM. to an unmarked police car so they could discuss what had happened in a quieter environment. Hines got into the driver's side and CM. got into the passenger side front seat. Another officer had already activated a recording device in the vehicle. Hines asked CM. similar questions except in more detail and CM. again confessed to stealing the shotgun and committing the robbery with the shotgun that was loaded. CM. stated that if the store clerk had resisted that he would have shot the clerk. CM. did not seem overly nervous or upset during this interview but was calm and matter-of-fact. After this discussion, Hines told CM. that he was under arrest and that he would be taken to juvenile detention. This was the second statement of which CM. complains. CM. was then left in the vehicle for a short time when another officer came and asked him to exit the vehicle, at which time he was then handcuffed.

Multiple officers spoke with Charles and Laura during this time. Laura consented to a search of C.M.'s room and the residence. Charles and Laura both testified that they asked to speak to C.M., but were not allowed to do so. Both stated that if they had been allowed to speak to CM. they would have advised him against making any statements until after speaking with an attorney and that they believed that CM. would have listened to their advice. Charles asked to accompany CM. to the police station but the officers told him no and that he could not speak with CM. until he was taken to juvenile detention. CM. did not have any prior adjudications as a juvenile; however, Charles testified that CM. had been in trouble before but had not been caught when he lived in Dallas.

C.M. was taken to the Bryan Police Department to see a magistrate. C.M. was in an interview room for approximately an hour waiting for the magistrate to arrive. There is no dispute that C.M. was in custody at this time. Gore, a magistrate, arrived and met with C.M. in the interview room. She reviewed the required warnings and advised C.M. of his rights as required by section 51.095(a)(5)(A) of the Family Code. C.M. signed an acknowledgment that he had been read and had his rights explained to him by the magistrate, that he understood them, and had asked any questions he had regarding them. This was electronically recorded both visually and aurally. The magistrate asked C.M. if he still wanted to talk with the detectives and C.M. responded affirmatively. Gore also testified at the suppression hearing that she believed that C.M. understood his rights and that he voluntarily wanted to speak with the officers. C.M. was interviewed by Hines and another detective and made a statement similar to the statement recorded in the police vehicle. This statement by C.M. is the third statement of which C.M. complains.

C.M. filed a motion to suppress each of these statements, which was denied after a hearing by the trial court. C.M. did not testify at the suppression hearing. After the motion was denied, C.M. pled true to the offenses of aggravated robbery and possession of a prohibited weapon, a sawed-off shotgun. In the disposition phase, the trial court accepted the disposition of a determinate sentence of fifteen years' confinement to be served in the custody of the Texas Youth Commission for the aggravated robbery which had been agreed-upon by the State and C.M.

Held: Affirmed

Memorandum Opinion: In his second issue, C.M. complains that the trial court abused its discretion by denying his motion to suppress his third statement made at the police department because Charles and Laura were not allowed to speak to him prior to his making the statement nor were they allowed to accompany C.M. to the police department. Rather, they were affirmatively told that they could not speak with C.M. or accompany him when they asked the officers, which C.M. contends is a violation of section 52.025(c) of the Family Code, which states that "[a] child ... is entitled to be accompanied by the child's parent, guardian, or other custodian or by the child's attorney." Tex. Fam.Code Ann. § 52.025(c) (West 2008). However, there is no requirement that such a person be present. *See Cortex v. State,* 240 S.W.3d 372, 380 (Tex.App.-Austin 2007, no pet).

The burden of proof is on the child to establish a causal connection between a statutory violation of section 52.025 and his statement. *See Gonzales v. State, 67* S.W.3d 910, 913 (Tex.Crim.App.2002) (holding that suppression required only when there is causal connection between violation of parental notice requirement and receipt of juvenile's statement). While the issue in *Gonzales* involved a violation of section 52.02(b) relating to prompt parental notification, the same causal connection is required to render a statement inadmissible for a statutory violation of section 52.025(c). *See Cortez,* 240 S.W.3d at 380–81.

Charles and Laura testified that if they had been able to speak with C.M. they would have advised him not to make any statements prior to him speaking with an attorney. Charles opined that C.M. would have heeded his advice because Charles had been in trouble with the law previously. However, when later recalled as a witness, Charles stated that he was unsure whether C.M. would have listened to his advice or not.

On the recording of C.M. at the police department, C.M. never requested the presence of Charles or Laura. C.M. had admitted that he committed the robbery because he was trying to get away from their residence because he was not happy there. C.M. is a distant cousin of Charles and had resided with Charles and Laura only for approximately two months prior to the robbery. Prior to that, he had lived in Dallas his entire life. In fact, when Charles reminded C.M. of his doctor's appointment scheduled that day, C.M. told Charles that he would not go, which could be construed as evidence of C.M.'s refusal to act in accordance with Charles's directions. Even if we assume without deciding that section 52.025(c) was violated, when viewing the evidence in a light most favorable to the trial court's decision, C.M. did not establish a causal connection between the alleged violation and his third statement. We overrule issue two.

Conclusion: Having found no error in the trial court's denial of the motion to suppress the statements, we affirm the trial court's orders of adjudication and disposition.

ONCE A JUVENILE HAS BEEN CERTIFIED TO ADULT COURT HE IS NO LONGER A JUVENILE UNDER THE FAMILY CODE, AND AS A RESULT, OBTAINING HIS CONFESSION IS GOVERNED BY THE RULES OF THE CODE OF CRIMINAL PROCEDURE.

¶ 12-3-11. **Dominguez v. State,** MEMORANDUM, No. 13-10-00493-CR, 2012 WL 3043072 (Tex.App.-Corpus Christi, 7/26/12).

Facts: After failing to arrive for work at the high school where he taught, John Edward Farr, the murder victim, was found dead in his apartment. There was no sign of forced entry and nothing in the apartment appeared to be out of order. Farr was lying in his bed on his back, dead. Farr was wearing pajamas and had been stabbed over twenty times. Farr died of severe stab wounds to the left and right internal jugular. There were no definitive defensive wounds on his body. A toxicology report revealed that Farr was intoxicated at the time of his death.

Police who arrived at the murder scene noticed that Farr's cellular phone and a laptop computer were missing. Farr's car was also missing from outside the apartment. Texas Rangers attempted to determine the location of Farr's phone in the hope that the phone would lead them to the person who killed Farr.

In the meantime, appellant's aunt contacted the Harlingen Police Department and reported that appellant admitted to killing someone. Police were dispatched to speak with appellant's aunt. When they arrived, appellant was with his aunt, and he told one of the officers, “You're going to find out anyway. I was stopped and arrested driving Mr. Farr's car.”The officer confirmed with the Texas Department of Public Safety that one of its troopers stopped appellant while he was driving Farr's car. Shortly thereafter, appellant was arrested on suspicion of murder.

The police learned from appellant's aunt that Farr was one of appellant's teachers and that Farr would give appellant money. At the time of his arrest on June 16, 2008, appellant was sixteen years old. Appellant was placed in a juvenile-detention facility until August 2008, when at age seventeen, he was certified to stand trial as an adult and transferred to an adult-detention facility. After being transferred, he gave law-enforcement officers a written statement in which he admitted to killing Farr.

A. The Relevant Contents of Appellant's Written Statement

Appellant's statement was admitted into evidence at trial. The beginning of appellant's statement includes a written warning and waiver of both his Miranda rights and his rights under article 38.22, section 2 of the Texas Code of Criminal Procedure. In his statement, appellant explained that he was giving his statement “voluntarily, without fear of duress or threat, and without promise of leniency.”He also explained that prior to making the statement, he was advised that he was “suspected of or charged with the offense of capital murder.”

Appellant described Farr's murder and the surrounding circumstances. Appellant explained that in January 2008, he started the second semester of his freshman year at Harlingen High School South. Farr was his speech teacher. About a week into the semester, Farr arranged for appellant to be in his “Theatre Tech” class. Farr would ask him if he worked out, and he would ask him to flex his muscles. Farr said appellant could be a model or a stripper. Appellant stated that some time before spring break 2008, Farr called him on his cellular phone and told him to skip school to meet a friend of his who was a male stripper. According to his statement, appellant did so. Appellant visited Farr's apartment about ten times, and Farr would give appellant alcohol and money.

On the night of June 16, 2008, appellant called Farr and asked to borrow twenty dollars. Farr answered “yes” and told appellant to come to his apartment. After appellant drank about four mixed drinks and eight beers, Farr made multiple overt sexual advances to appellant while appellant was lifting weights. Appellant declined the advances and Farr offered him cocaine. After consuming the cocaine, appellant asked Farr if he was going to give him the twenty dollars. Farr told appellant to wait in his bedroom for the money and appellant did so. According to appellant, Farr then entered the bedroom holding a pointed object with a brown handle. Farr then attempted to molest appellant and during a struggle, appellant stabbed Farr with the pointed object. Appellant then stole some liquor from the apartment and fled in Farr's car.

Appellant attached to his written statement a drawing he made of the pointed object. It looks like an ice pick, though appellant did not use this term. On his drawing, appellant identified the "brown handle" and noted that the pointed portion measured four inches in length. Appellant signed beneath the drawing and wrote the date and time, "8–11–08 10:42 p.m."

B. The Circumstances Surrounding Appellant's Written Statement

The transcript of the hearing on appellant's motion to suppress his written statement shows that law-enforcement officers did not attempt to interrogate appellant after his arrest on June 16, 2008, because an attorney arrived at the Harlingen Police Station, stated he represented appellant, and stated no one could speak to appellant .FN3On August 11, 2008, Lieutenant Rolando Castañeda of the Texas Rangers was informed that appellant had been certified to stand trial as an adult and was not represented by counsel.FN4He traveled to the adult-detention facility and asked appellant if he would give a statement. Detective Frank Rolph of the Harlingen Police Department and Lieutenant Victor Escalon, Jr. of the Texas Rangers accompanied Lieutenant Castañeda when he interviewed appellant. They were present during the entire interview.

FN3. Lieutenant Castañeda testified that in June 2008 an attorney named Trey Garza appeared at the police station and made that statement. Trey Garza, however, did not represent appellant in the trial court.

FN4. The appellate record does not include a copy of any motion to withdraw as counsel or any order permitting counsel to withdraw from representing appellant immediately following his certification to stand trial as an adult. After filing appellant's notice of appeal, appellant's trial counsel, Anthony P. Troiani, filed a motion to withdraw as counsel which the trial court granted before appointing appellate counsel.

Lieutenant Castañeda testified that appellant said he wanted to talk to the law-enforcement officers the night he was arrested, but that his attorney would not let him. After being read his Miranda warnings and the warnings required under Texas Code of Criminal Procedure article 38.22, appellant spoke with the officers and gave his written statement. The record shows appellant also initialed and signed a written copy of both sets of rights. Appellant was interviewed and gave his written statement in a law library and appellant, though handcuffed, was advised he was free to take a break any time during his three to three-and-a-half hour conversation with the officers. Appellant was very talkative and remained calm, though not emotionless, during the conversation.

Lieutenant Castañeda testified that if appellant had told him he did not want to speak, he would not have continued the conversation. Lieutenant Castañeda admitted that at one point in the conversation he probably did tell appellant he would "talk to the District Attorney's Office without promising anything and see what happens because of his cooperation."But when asked whether he told appellant this at the outset of the conversation, Lieutenant Castañeda responded that he could not recall at what point during the interview he made this statement. In response to questioning from defense counsel about when he made the statement, Lieutenant Castañeda clarified that the start of his conversation with appellant consisted of Lieutenant Castañeda introducing himself, telling appellant he was present to hear appellant's side of the story, and reading appellant his rights after appellant said he had wanted to give a statement from the "get-go." Lieutenant Castañeda testified that he did not promise appellant a reduced sentence in exchange for his statement, and that appellant was not threatened or coerced in any way to make a statement.

Detective Rolph testified that there was no conversation with appellant about how his confession would affect his case. Lieutenant Escalon testified that he did not remember anyone telling appellant that the officers would talk to the district attorney about his cooperation.

Appellant testified at the suppression hearing and, in several respects, gave a different account of the events that preceded his statement. Appellant testified that on the day of his arrest, June 16, 2008, he told law enforcement and a magistrate judge that he did not want to talk to any of them. He was not interrogated at that time. Appellant testified that no law-enforcement officer attempted to talk to him again until August 11, 2008, after he was certified to stand trial as an adult. When asked whether he had an attorney at the time he was certified to stand trial as an adult, appellant testified, "No, sir. Well, at that time it was a juvenile court-appointed attorney."

Appellant testified that when the law-enforcement officers came to talk to him on the night of August 11, 2008, the officers told him that they wanted to know the truth and that if he spoke to them, they would tell the district attorney to give him "less time" or "help" him "out." Appellant testified that he initially told the officers he did not want to speak, but because of their offer, he "just told them what happened from the beginning."

C. The Trial Court's Ruling on Appellant's Motion to Suppress

At the end of the suppression hearing, the trial court denied appellant's motion to suppress his written statement. The trial court found in open court that the

statement was obtained in compliance with Texas Code of Criminal Procedure article 38.22, and its findings are included in the reporter's record. SeeTEX.CODE CRIM. PROC. ANN. art. 38.22, § 6 (West 2011) (requiring the trial court to enter the specific findings of fact that support its conclusion that the written statement made by an accused as a result of custodial interrogation was voluntarily made); Drake v. State, 123 S.W.3d 596, 601–02 (Tex.App.-Houston [14th Dist.] 2003, pet. ref'd) (holding trial court's oral findings that were dictated to a court reporter and made part of the record satisfied the article 38.22 requirement that the trial court enter findings); Garza v. State, 915 S.W.2d 204, 211 (Tex.App.-Corpus Christi 1996, pet. ref'd) (explaining it is mandatory for the trial court to file findings under article 38.22, section 6). The court also found appellant was read his warnings, made a voluntary statement, and understood the consequences of giving his statement. See e.g., Drake, 123 S.W.3d at 601–02.

In the trial court, the focus of appellant's motion to suppress was that he lacked the in-telligence to validly waive his rights and give a knowing, voluntary statement to the law-enforcement officers. Appellant also argued in his motion to suppress that: (1) his written statement was inadmissible because it was obtained in violation of his rights under the Fifth and Sixth Amendments to the United States Constitution; and (2) the statement was induced by an improper promise from a law-enforcement officer.

Held: Affirmed

Memorandum Opinion: By his first issue, appellant argues that the trial court erred by admitting his written statement into evidence because it was obtained in violation of his rights under the Fifth and Sixth Amendments to the United States Constitution. SeeU.S. CONST. amends. V, VI. Specifically, appellant argues that his statement was inadmissible under Michigan v. Jackson and Edwards v. Arizona because he was represented by counsel when he gave the statement, counsel had previously advised law enforcement that no one was to speak to appellant, and counsel was not present when appellant was taken from his cell just after 10:00 p.m. and interrogated for over three hours. See Michigan v. Jackson, 475 U.S. 625, 636 (1986), overruled by Montejo v. Louisiana, 556 U.S. 778 (2009); Edwards v. Arizona, 451 U.S. 477, 485 (1981).

The Supreme Court of the United States has held that in deciding whether an accused actually invoked his right to counsel, reviewing courts must use an objective standard and determine whether an accused unambiguously requested counsel during custodial interrogation. See Pecina v. State, 361 S.W.3d 68, 79 (Tex.Crim .App.2012) (citing Davis v. U.S., 512 U.S. 452, 458–59 (1994)). This approach avoids difficulties of proof and provides officers guidance in conducting interrogations. Id. Thus, we review the totality of the circumstances from the viewpoint of the objectively reasonable police officer conducting a custodial interrogation.FN6Id.

FN6. This objective standard applies to a child's invocation of his constitutional right to have counsel present during custodial interrogation. In re H.V., 252 S.W.3d 319, 333 (Tex.2008) (citing Davis v. U.S., 512 U.S. 452, 459 (1994)). The federal Miranda rights "apply to juveniles just as they do to adults." Id. at 325.In Texas, a person who is seventeen at the time of making a statement to law enforcement is treated as an adult. See Ramos v. State, 961 S.W.2d 637, 639 (Tex.App.-San Antonio 1998, no pet.)(citing Griffin v. State, 765 S.W.2d 422, 427 (Tex.Crim .App.1989) and applying TEX. FAM.CODE ANN. § 51.095).

In Pecina v. State, the Texas Court of Criminal Appeals considered how the Fifth and Sixth Amendment rights to counsel are invoked and how they apply to custodial interrogation. See id. at 74–75.The Fifth Amendment prohibits the government from compelling a criminal suspect to incriminate himself. Id. (citing U.S. CONST. amend. V which states, "No person ... shall be compelled in any criminal case to be a witness against himself."). Before questioning a suspect who is in custody, police must give the suspect Miranda warnings.Id. at 75 (citing Miranda v. Arizona, 384 U.S. 436 (1966)). Only if the person voluntarily and intelligently waives his Miranda rights, including his right to have an attorney present during interrogation, may his statement be introduced into evidence against him at trial. Id. Under Edwards, once a person has invoked his right to have counsel present during custodial interrogation, police may not re-initiate interrogation; police may not badger a person into waiving his previously asserted Miranda rights. Id. (citing Edwards, 451 U.S. at 485). But Miranda rights can only be invoked within the context of custodial interrogation. Id. at 75–76.The Supreme Court of the United States has never accepted anticipatory invocation of Miranda rights (1) given by someone other than law-enforcement officers or other state agents; or (2) outside the context of custodial interrogation.Id. at 76 (citing McNeil v. Wisconsin, 501 U.S. 171, 182 n. 3 (1991)).

The Sixth Amendment right to counsel attaches once the adversary judicial process has been initiated, and it guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings, including custodial interrogation. Id. at 77 (citing Montejo, 556 U.S. at 786). Under Montejo, if an accused who requested counsel at an arraignment or other initial appearance also wishes to invoke his Sixth Amendment right to counsel during post-arraignment custodial interrogation, he may do so by invoking his Miranda rights at the outset of custodial interrogation. Id. at 78.A defendant's invocation of his right to counsel at the time of magistration says nothing about his

possible invocation of his right to counsel during a subsequent police-initiated custodial interrogation. Id.

In Pecina, paramedics responded to a 911 call and found Pecina and his wife in their apartment bleeding from stab wounds. Id. at 71.Pecina's wife died before the paramedics arrived and police believed Pecina had killed his wife, then stabbed himself. Id. While Pecina was still in the hospital, an arrest warrant was obtained and a magistrate visited Pecina in his room. Id. The magistrate arraigned Pecina and then asked him if he wanted a court-appointed attorney and if he wanted to talk to the Arlington Police Department detectives who were waiting outside his hospital room. Id. at 72.Pecina stated he wanted a court-appointed attorney. Id. Pecina also responded that he wanted to speak with the detectives and never indicated to the magistrate that he wanted an attorney present when he spoke with the detectives. Id. The magistrate then exited the room. Id. The detectives entered Pecina's hospital room, and after Pecina received his Miranda warnings and waived his Miranda rights, he gave the police a recorded statement. Id. Later, trial counsel was appointed to represent him. Id. at 73.The Court of Criminal Appeals concluded that because the defendant never invoked his right to counsel during the custodial interrogation, the trial court properly denied his motion to suppress the admission of his statement into evidence at trial.Id. at 81.

In this case, as in Pecina, there is no evidence appellant ever invoked his right to counsel in the context of a custodial interrogation. Neither appellant's own testimony (that in June 2008, he told law enforcement and the magistrate he did not want to talk) nor Lieutenant Castañeda's testimony (that an attorney arrived at the Harlingen police station and stated no one could speak to appellant) showed that appellant invoked his Miranda rights during a custodial interrogation. Therefore, the trial court properly denied appellant's motion to suppress his written statement because the record did not show that appellant's statement was obtained in violation of his rights under the Fifth and Sixth Amendments to the United States Constitution. See id. (citing Montejo);see also Montejo, 556 U.S. at 689 (explaining the Sixth Amendment does not categorically prohibit law-enforcement officers from approaching a defendant and asking him to consent to custodial interrogation solely because he is represented by counsel); Montelongo v. State, 681 S.W.2d 47, 53–54 (Tex.Crim.App.1984) (explaining the trial court may reject the accused's testimony at a suppression hearing and believe the police officers' testimony instead; holding that absent an accused's clear invocation of the right to counsel during custodial interrogation, an attorney's unsolicited advice to not give a statement is not an invocation of the right to have counsel present during custodial interrogation). Accordingly, we overrule appellant's first issue.

3. Admissibility of the Statement under the Code of Criminal Procedure

By his second issue, appellant argues that his written statement was inadmissible under article 38.21 of the Texas Code of Criminal Procedure because it was induced by Lieutenant Castañeda's alleged promise to help appellant if he made a statement to the law-enforcement officers.FN7SeeTEX.CODE CRIM. PROC. ANN. art. 38.21 (West 2005). We disagree.

FN7. In the trial court, appellant cited Texas Code of Criminal Procedure article 38.22 in support of his contention that a promise may have rendered his statement involuntary, but on appeal he cites article 38.21. SeeTEX.CODE CRIM. PROC. ANN. arts. 38.21, 38.22 (West 2005). Notwithstanding this discrepancy, we will address the merits of appellant's second issue because under both articles, the Texas Court of Criminal Appeals has used the same test in determining whether a promise rendered a confession involuntary. Compare Joseph v. State, 309 S.W.3d 20, 26 n. 8 (Tex.Crim.App.2010) (analyzing the voluntariness of a statement under article 38.22), with Martinez v. State, 127 S.W.3d 792, 794 (Tex.Crim.App.2004) (analyzing the voluntariness of a statement under article 38.21).

Article 38.21 provides that a statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion. Id. To decide whether a statement meets this standard, a court of appeals must examine the totality of the circumstances surrounding the acquisition of the statement to determine whether it was given voluntarily. Delao v. State, 235 S.W.3d 235, 239 (Tex.Crim.App.2007); Creager v. State, 952 S.W.2d 852, 856–57 (Tex.Crim.App.1997). For a promise to render a confession invalid under article 38.21, the promise must be: (1) positive; (2) made or sanctioned by someone in authority; and (3) of such an influential nature that it would cause a defendant to speak untruthfully. Martinez v. State, 127 S.W.3d 792, 794 (Tex.Crim.App.2004) (citing Henderson v. State, 962 S.W.2d 544, 564 (Tex.Crim.App.1997)). However, the relevant inquiry under state law is not whether the defendant spoke truthfully or not, but whether the officially sanctioned, positive promise would be likely to influence the defendant to speak untruthfully. Id. at 794–95.

In Masterson, the Court of Criminal Appeals held that a police officer's statement to a defendant that he would “pass along” information if the defendant admitted to owning certain drugs, did not amount to a positive promise. Masterson v. State, 155 S.W.3d 167, 171 (Tex.Crim.App.2005). Similarly, in Martinez, the Court of Criminal Appeals concluded that no positive promise was made when a police detective testified

that he made no promises to the defendant, he told the defendant he needed to know who owned the drugs, and that the defendant "could have gathered" from that statement that his brother and father would not be charged if the defendant accepted responsibility for the drugs. Martinez, 127 S.W.3d at 793, 795.

In considering appellant's motion to suppress, the trial court was free to believe the law-enforcement officers' testimony and to disbelieve appellant's testimony. See Delao, 235 S.W.3d at 238; Masterson, 155 S.W.3d at 171. With regard to whether a promise was made, Lieutenant Castañeda testified that he did not promise appellant anything, but testified that he probably did tell appellant he would talk to the district attorney's office and see what happened based on appellant's cooperation. Lieutenant Castañeda's testimony also showed that while he could not recall the point in the conversation at which he would have made this statement to appellant, it was not at the beginning of the conversation or before appellant agreed to give a statement. Conversely, Lieutenant Escalon and Detective Rolph testified respectively that they did not recall any conversation about how the statement would affect appellant's case and that there was no such conversation with appellant. Considering the totality of the circumstances, the evidence supports the trial court's implied finding that no positive promise was made to induce appellant to give his statement. See Martinez, 127 S.W.3d at 795; Masterson, 155 S.W.3d at 170. We overrule appellant's second issue.

D. Response to Dissenting Memorandum Opinion

The dissent argues that because the juvenile court had not yet signed its order waiving jurisdiction and transferring appellant's case to the trial court when appellant gave his written statement, law-enforcement officers improperly obtained appellant's written statement and the trial court reversibly erred by failing to suppress the written statement sua sponte. We cannot agree with the dissent's analysis because it fails to explain why its transfer-order argument is not subject to waiver and because it does not adequately address either the legal significance of appellant's age (seventeen) when he gave his written statement to law enforcement or the legal significance of appellant's physical transfer to an adult-detention facility prior to giving his statement. In addition, the dissent's reliance on dicta from Vasquez v. State is misplaced because Vasquez is not about the signing or timing of a juvenile court's transfer order. See 739 S.W.2d 37, 43 (Tex.Crim.App.1987) (en banc).

Procedurally, we note that even if appellant's statement was improperly obtained because the juvenile court's transfer order was not signed before appellant gave the statement, the dissent fails to explain how this Court could consider the argument when it was not raised in the trial court or on appeal. SeeTEX.R.APP. P. 33.1, 38.1. In the trial court, there was no dispute about whether appellant was an adult at the time he gave his written statement to law enforcement. Instead, appellant argued his motion to suppress his written statement on the premise that he was an adult at the time he gave the statement. At the outset of the suppression hearing, the State urged the trial court to dismiss appellant's motion because it was too vague. In response, appellant's counsel explained his suppression argument to the trial court, stating, among other things, that even though appellant had been certified to stand trial as an adult, had turned seventeen, and had been transferred to an adult-detention facility before giving his written statement, appellant lacked the intelligence to validly waive his rights and voluntarily give law-enforcement officers a statement.

On appeal, appellant has not changed his position concerning whether he was an adult when he gave his written statement. In other words, even assuming for the sake of argument only that appellant was entitled to the protections of Family Code section 51.095 when he gave his written statement, appellant waived this complaint by not raising it in the trial court and by not briefing it on appeal. See Ponce v. State, 985 S.W.2d 594, 595 (Tex. App .-Houston [1st Dist.] 1999, no pet.)(holding defendant failed to preserve for appellate review her claim that her statement was taken in violation of Family Code section 51.095 when she did not obtain a ruling on this claim in the trial court); see alsoTEX.R.APP. P. 33.1, 38.1; Geter v. State, No. 05–95–00775–CR, 1996 WL 459767, at *3 (Tex.App.-Dallas July 31, 1996, no pet.)(not designated for publication) (holding appellant failed to preserve for appellate review his complaint that his confession was inadmissible because it was not given in accordance with the Family Code requirements pertaining to admissibility of a child's statement).

We further note that there is no evidence in the record that law-enforcement officers at-tempted to interrogate appellant on June 16, 2008, after appellant's arrest. At the suppression hearing, appellant testified as follows about his interaction with law-enforcement officers at the time of his arrest. Appellant gave the following testimony on direct-examination:

Q. Okay. Back in June of 2008, how old were you?

A. I was 16.

Q. Okay. On June 16th, 2008, were you arrested?

A. Yes, sir.

Q. Okay. At that time, were you approached by officers of the—well, law enforcement officers?

A. Yes, sir, I was.

Q. Okay. Did you at that time agree to speak with law enforcement officers?

A. No, sir, I did not. I refused.

Q. Okay. Do you remember what the officers—did the officers speak to you at all?

A. No, sir.

Q. Okay.

A. They just asked me if I wanted to speak to them, and I said no, I did not.

Q. Okay. And where were you taken?

A. To Harlingen PD.

Q. Okay. And at Harlingen PD, were you placed in a cell?

A. No, sir. It was in, I believe it was like a little office.

Q. Okay.

A. It was in a room, yeah.

Q. Okay. And at that time what happened?

A. I was there for a while, about an hour, and they told me if I wanted to speak to anybody. I said, "No, I don't want to speak to anybody."And then I believe it was a, Judge Sallie Gonzalez, she came and told me that if I want to speak to her. I said no, I refused, and I signed the paper.

Q. Okay. And so when you spoke with the officers, you told them you didn't want to speak to them; and then when you spoke, when Judge Gonzalez asked you about it, you told her you didn't want to speak to the officers either?

A. No, sir.

Q. Okay. Between that time, between speaking with Judge Gonzalez and August 11th of 2008, did anyone attempt to speak with you or talk to you about this case?

A. No, sir.

Q. From law enforcement?

A. No, sir.

Lieutenant Castañeda testified that there was no attempt to interrogate appellant after his arrest on June 16, 2008, because an attorney arrived at the Harlingen Police Station, stated he represented appellant and no one could speak to appellant. As the sole fact finder at the suppression hearing, the trial court was free to believe Lieutenant Castañeda's testimony. See Wiede, 214 S.W.3d at 24.

The dissent would hold that section 54.02 of the Texas Family Code required the juvenile court to sign its transfer order before appellant made his statement in order for the statement to be admissible. Section 54.02 of the Family Code is titled "Waiver of Jurisdiction and Dis-cretionary Transfer to Criminal Court."SeeTEX. FAM.CODE ANN. § 54.02 (West 2008).Section 54.02 addresses the circumstances under which a juvenile court is authorized or required to waive its jurisdiction and transfer a case to a criminal court. See id. § 54.02(a),(m); see also Miller v. State, 981 S.W.2d 447, 449 (Tex.App.-Texarkana 1998, pet. ref'd) (discussing section 54.02).Section 54.02 also sets forth certain required contents of an order waiving jurisdiction and transferring a person to the appropriate court for criminal proceedings. SeeTEX. FAM.CODE ANN. § 54.02(h). However, the Legislature has not made section 54.02 the legal standard for the admissibility of a statement given by a seventeen year old incarcerated in an adult-detention facility.

Neither Family Code section 51.095 ("Admissibility of a Statement of a Child") nor section 54.02 ("Waiver of Jurisdiction and Discretionary Transfer to Criminal Court") makes the date the transfer order is signed dispositive of whether the admissibility of a statement is governed by Family Code Section 51.095. See id. §§ 51.095, 54.02. Section 51.02 of the Family Code defines a "child" as someone who is "ten years of age or older and under 17 years of age."See id. § 51.02. The protections of Family Code section 51.095, pertaining to the admissibility of statements, apply only to "the statement of a child." See id. § 51.095. Appellant was not a child when he made his written statement because he had already turned seventeen. See id.; see also Griffin v. State, 765 S.W.2d 422, 427 (Tex.Crim.App.1989) (explaining the admissibility of a statement made at age sixteen and before juvenile court relinquished jurisdiction was properly analyzed under the Family Code); Lovell v. State, 525 S.W.2d 511, 514 (Tex.Crim.App .1975) (same); Ramos v. State, 961 S.W.2d 637, 639 (Tex.App.-San Antonio 1998, no pet.)(citing Griffin, 765 S.W.2d at 427 and applying TEX. FAM.CODE ANN. § 51.095).

Our interpretation is supported by the following language in section 54.02 which the dissent did not include as pertinent to its analysis: "[o]n transfer of the person for criminal proceedings, the person shall be dealt with as an adult and in accordance with the Code of Criminal Procedure.... The transfer of custody is an arrest."TEX. FAM.CODE ANN. § 54.02(h). Appellant had been transferred to an adult-detention facility when he made his statement. Without ruling on the issue of the precise timing of a transfer order, the Court of Criminal

Appeals has interpreted the arrest language in the statute to mean that once a person is transferred to adult custody from juvenile custody, he is arrested "as an adult suspect." See Vasquez, 739 S.W.2d at 40.FN9 While the Vasquez Court stated in dicta, "[u]ntil the moment transfer is ordered, the juvenile is cloaked with the trappings of a non-criminal proceeding with attendant safeguards such as greater protections in the areas of confession law and notice requirements[,]"Vasquez does not contemplate, in dicta or otherwise, the proper procedure and timing for signing a transfer order under section 54.02 of the Family Code. See id. at 44.Thus, the dissent's emphasis on Vasquez is misplaced.

FN9. The issue before the Court of Criminal Appeals in Vasquez v. State was whether a defendant arrested as a juvenile, but later certified to stand trial as an adult, was entitled to the protections of the adult-arrest statute in Texas Code of Criminal Procedure article 14.04 at the time of his initial detention. 739 S .W.2d 37, 40 (Tex.Crim.App.1987) (en banc). The court held he was not. Id. at 43.

Conclusion: We affirm the trial court's judgment.

Dissenting Memorandum Opinion by Justice BENAVIDES.

A review of the record reveals the following timeline:

• On June 16, 2008, Dominguez was arrested under the juvenile justice code.

• That same day, as per Lieutenant Castañeda's testimony, attorney "Trey Garza" arrived at the Harlingen Police Department, declared himself attorney for Dominguez, and stated that no one was to talk to Dominguez.

• According to testimony, on June 16, 2008 Officers took Dominguez before Magistrate Sallie Gonzalez in an attempt to interrogate him, but Dominguez refused to speak with them. SeeTEX. FAM.CODE ANN. § 51.095 (West 2008).

• A hearing was held to determine whether Dominguez should be transferred to the criminal court system.FN1See id.§ 54.02 (West 2008). Dominguez testified in the motion to suppress hearing that he was declared an adult at this proceeding and was represented by a juvenile court-appointed attorney.

FN1. I am unable to the exact date of this hearing from the record. At the suppression hearing, defense counsel argued to the trial court that the transfer hearing was held on August 8, 2008, the State elicited testimony from Officer Rolph confirming that Dominguez had "waived his hearing on a discretionary transfer to become certified as an adult," and Dominguez testified that his adult certification hearing was "on the 12th."

• On August 11, 2008, Dominguez was transferred to the adult Carrizales–Rucker Detention Center.

• Lieutenant Castañeda received a call from an unidentified source advising him that Dominguez was certified as an adult and was being transferred to the Carrizales–Rucker facility.

• Lieutenant Castañeda and Officers Rolph and Escalon removed Dominguez from his cell after 10 p.m.

• Lieutenant Castañeda did not ask Dominguez if he was represented by an attorney because he was notified by an unnamed source that Dominguez was not represented. Lieutenant Castañeda proceeded to read Dominguez his Miranda rights and interrogate Dominguez along with the other officers.

• Lieutenant Castañeda testified at the suppression hearing that Dominguez told them that he wanted to talk to them before, but his attorney would not allow it. However, Dominguez testified that he told law enforcement officers that he did not want to be questioned, but they persisted.

• According to Dominguez's testimony, he signed his self-incriminating statement ap-proximately two to three hours after law enforcement officers arrived at the adult facility at 12:45 a.m.

• On August 27, 2008, the juvenile court signed an order waiving jurisdiction and transferring the cause to the criminal district court. See id.

Based on these facts, I would hold that the trial court committed harmful error in denying Dominguez's motion to suppress the August 12, 2008 statement because the officers obtained Dominguez's statement improperly under the juvenile justice code.

I. JURISDICTION AND WAIVER

As a matter of procedure, this Court is not precluded from addressing an issue not briefed or raised by Dominguez. When a defendant appeals his conviction, courts of appeals have the jurisdiction to address any error in that case. Pfeiffer v. State, 363 S.W.3d 594, 599 (Tex.Crim.App.2012). The jurisdiction of this Court is invoked by the timely filing of a notice of appeal. Id. Once our jurisdiction is invoked, our function to review is limited only by our own discretion or valid restrictive statute. See Carter v. State, 656 S.W.2d 468, 469 (Tex.Crim.App.1983) (en banc) (holding that "[a]fter jurisdiction attaches to a particular cause, a broad scope of review and revision has been asserted by appellate courts of this State—one that is still recognized, acknowledged and confirmed by the Legislature"). Furthermore, " '[t]here is a fundamental proposition pertaining to appellate functions of the [j]udicial [d]epartment: A constitutional grant of appellate jurisdiction treats a

right of appeal in criminal cases 'as a remedy to revise the whole case upon the law and facts, as exhibited in the record[.]' " Pfeiffer, 363 S.W.3d at 599 (quoting Carter, 656 S.W.2d at 468). Therefore, when a defendant appeals his conviction, courts of appeals have the jurisdiction to address any error, see Pfeiffer, 363 S.W.3d at 599; even those which "prompt sua sponte appellate attention" because the error involved constitutes a violation of established rules. Pena v. State, 191 S.W.3d 133, 136 (Tex.Crim.App.2006). I would hold that the error in this case is one that our Court's discretion cannot ignore and one that we must address sua sponte, in light of the age of the defendant at the time, the facts of the case, the magnitude of the offense, and the potential harm that ignoring it may cause.FN2

FN2. The waiver cases cited by the majority from our sister courts in Houston and Dallas deal with unrelated issues and are thus unpersuasive. The Ponce case involved a child committing the crime of perjury, which does not preclude prosecution; and in Geter, the appellant challenged the manner and means of waiving his rights before a magistrate under section 51.09 of the family code. See Ponce v. State, 985 S.W.2d 594, 595 (Tex.App.-Houston [1st Dist.] 1999, no pet.); Geter v. State, No. 05–95–00775–CR, 1996 WL 459767, at *3 (Tex.App.-Dallas July 31, 1996, no pet.)(not designated for publication). Neither of these cases applies here.

II. ANALYSIS

Juveniles and adult criminal defendants are not treated equal in Texas "until the former is certified as an adult and comes within the purview of the adult criminal system." Vasquez v. State, 739 S.W.2d 37, 43 (Tex.Crim.App.1987) (en banc). For purposes of the juvenile code, a "child" is a person who is older than ten, but younger than 17 years of age. TEX. FAM.CODE ANN. § 51.02(2) (West 2008)."Until the moment transfer is ordered, the juvenile is cloaked with the trappings of a non-criminal proceeding with attendant safeguards such as greater protections in the areas of confession law and notice requirements." Vasquez, 739 S.W.2d at 43.FN3

FN3. The Vasquez decision by Judge McCormick is an interpretation of the juvenile justice code as well as rigorous analysis of pertinent case law and constitutional principles. References to Vasquez are hardly "dicta" as the majority contends.

Some of the governing statutory safeguards include the rules regarding waiver of rights and admissibility of a child's statement. SeeTEX. FAM.CODE ANN. §§ 51.09–.095 (West 2008). For example, a child may not waive any federal or state constitutional rights without the consent of the child and his attorney, unless he received proper warnings from a magistrate without the presence of law enforcement. Compare id. §§ 51.09–.095withTEX.CODE CRIM. PROC. ANN. art. 38.22 (West 2003).

Here, Dominguez's transfer order was not signed until August 27, 2008—two weeks after law enforcement obtained his written confession at the Carrizales–Rucker facility. Because a juvenile court holds exclusive original jurisdiction over these matters, I would hold that a written transfer order under section 54.02 is jurisdictionally mandatory because it effectively waives the juvenile court's jurisdiction and transfers it from a juvenile proceeding to an adult proceeding. But see Evans v. State, 61 S .W.3d 688, 690 (Tex.App.-Fort Worth 2001, no pet.)(holding that a lack of written transfer order between two adult criminal district courts was a procedural matter rather than a jurisdictional one).

The record is unclear as to when Dominguez was certified as an adult. The majority assumes from testimony that Dominguez was certified prior to his self-incriminating statement. Without more details, I cannot join this assumption because dates are too critical to this issue. After his physical transfer to the Carrizales–Rucker facility on August 11, 2008, law enforcement visited Dominguez later that night into the early morning of the next day. The majority assumes, based on testimony, that a proper transfer order was in place on August 11, 2008, when Dominguez was moved to the adult facility. However, without being afforded the underlying juvenile record in this case, we must conclude that Dominguez's final transfer under section 54.02 was effective on August 27, 2008, not August 11, 2008.FN4The mere physical transfer of Dominguez from a juvenile facility to an adult facility, without a signed, corresponding written transfer order, is inadequate for me to conclude that the juvenile cloak had been lifted in this case at the time he made his statement.FN5 Vasquez, 739 S.W.2d at 43. I am baffled by the majority's position that Dominguez's physical transfer to an adult-detention facility without the proper, signed transfer order was enough to remove his "juvenile cloak," particularly when it appears from the record that the officers who conducted Dominguez's interrogation were acting on information told to them from unknown or undisclosed sources. This assertion is unreasonable because it effectively skirts and defies the Legislature's intent to hold juvenile defendants under a more protected justice system separate and apart from adult criminals.FN6Therefore, I would hold, based on the record, that until August 27, 2008, Dominguez was (1) a child, seeTEX. FAM.CODE ANN. § 51.02(2)FN7; (2) represented by counsel, see id. § 51.10(b)(1); and (3) should have been afforded the procedural safeguards for juvenile defendants, seeTEX. FAM.CODE ANN. §§ 51.09–095. Dominguez should not have been allowed to waive his Fifth Amendment right and sign his statement without his attorney or a magistrate present under the juvenile code. See id.

FN4. It is worth noting that the transfer order included in Dominguez's record is defective. The transfer order fails to comply with the statutory requisites of section 54.02. The pertinent statutes states that if a juvenile court waives jurisdiction:

it shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court, and shall transfer the person to the appropriate court for criminal proceedings and cause the results of the diagnostic study of the person ordered under Subsection (d), including psychological information, to be transferred to the appropriate criminal prosecutor.

SeeTEX. FAM.CODE ANN. § 54.02(h).

FN5. I would hold that cases like Rushing v. State, 50 S.W.3d 715 (Tex.App.-Waco 2001), aff'd 85 S.W.3d 283 (Tex.Crim.App.2002), are inapplicable to the instant case because they deal with late filings of transfer orders and not the effective dates of the orders. Here, a transfer order was not effective until August 27, 2008. The filing date of the order is irrelevant in this case.

FN6. The majority's interpretation of section 54.02 would be nonsensical and would create inconsistencies in the law. See Molinet v. Kimbrell, 356 S.W.3d 407, 414–15 (Tex.2011) (holding that "it is the Legislature's prerogative to enact statutes; it is the judiciary's responsibility to interpret those statutes according to the language the Legislature used, absent a context indicating a different meaning or the result of the plain meaning of the language yielding absurd or nonsensical results").

FN7. Dominguez's age by itself does not automatically remove him from the enhanced protections of the juvenile justice code. See Vasquez, 739 S.W.2d at 43 (noting that a child is not "arrested" for purposes of criminal action until a juvenile transfer order is entered).

The juvenile justice code was enacted by our legislature to meet several public policy goals and "pervasive themes," such as (1) to provide for the protection of the public and public safety; and (2) to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions. Id. § 51.01 (West 2008); Lanes v. State, 767 S.W.2d 789, 795 (Tex.Crim.App.1989) (en banc); see In re D.Z., 869 S.W.2d 561, 566–67 (Tex.App.-Corpus Christi 1993, writ denied). In order to further these intended goals and themes, law enforcement must comply with these statutes when dealing with juvenile defendants. That did not happen here. See generally id.

Accordingly, I conclude that law enforcement authorities in this case improperly obtained Dominguez's confession in the early morning hours of August 12, 2008, and in light of this impropriety, I would hold that the trial court committed error by denying Dominguez's pre-trial motion to suppress. See Shepherd v. State, 273 S.W.3d 681, 684 (Tex.Crim.App.2008). This error allowed the jury to place weight on Dominguez's improperly-obtained statement, and if I were to hold it harmless, it will encourage the State to repeat this impropriety with impunity. SeeTEX.R.APP. P. 44.2(a); Wilson v. State, 938 S.W.2d 57, 61 (Tex.Crim.App.1996) (en banc). Because I cannot determine beyond a reasonable doubt that this erroneous admission of evidence did not contribute to Dominguez's conviction or punishment, I would reverse the conviction and remand for a new trial. SeeTEX.R.APP. P. 44.2(a); Hernandez v.. State, 60 S.W.3d 106, 108 (Tex.Crim.App.2001).

For the foregoing reasons, I respectfully dissent.

SINCE FIFTEEN YEAR OLD WAS NOT CONSIDERED IN CUSTODY, PROVISIONS OF THE FAMILY CODE GOVERNING THE ADMISSIBILITY OF CUSTODIAL STATEMENTS DID NOT APPLY.

¶ 12-3-3. **McCreary v. State**, MEMORANDUM, No 01-10-01035-CR, 2012 WL 1753005 (Tex.App.-Hous. (1 Dist.), 5/17/12).

Facts: Officers from the Webster Police Department (WPD) responded to a report of a shooting at the Nasa Liquor Store. They discovered the body of the store owner, Thanh Pham, in a pool of blood behind the store's counter and a nearly empty cash register. Pham died from gunshot wounds to his head, torso, and upper extremity. Police recovered .45 caliber shell casings, a bullet fragment, and latent fingerprints from inside the store. Three of the fingerprints lifted from the store's counter belonged to McCreary. A firearms identification expert determined that the shell casings and bullet fragments could only have come from a limited number of firearms, including a Taurus brand .45 semiautomatic pistol.

When Joseph Rock, a Webster-area resident, learned of Pham's death, he informed WPD that he had shopped at the liquor store shortly before the shooting. As he pulled into the store's parking lot, Rock observed a young man wearing a light gray or white hoodie and blue shorts outside of the store listening to an I–Pod. The young man was in the same location when Rock left the store after making his purchases. Rock identified McCreary in a photo array.

Having no other suspects and also having received two anonymous tips about McCreary's involvement in Pham's death, WPD Detectives Quintana, Palermo, and Latham made contact with McCreary, then 15 years-old, at his mother's home. There, police recovered a pair of blue shorts and an I–Pod. According to

McCreary's mother, McCreary wore the blue shorts on the day of Pham's death. Although it was his opinion that probable cause did not yet exist to arrest McCreary, Detective Latham asked McCreary to make a voluntary statement at the police station. Detective Latham informed McCreary that he was "not being placed under arrest ... not being charged with the crime. And that he's going to be able to leave whenever he wants and that [the detectives would] be glad to give him a ride back."Both McCreary and his mother consented.

Due to the cold weather, the detectives suggested that McCreary bring some warm clothing to the police station. McCreary responded: "Let me get my white hoodie—I mean, my black hoodie[.]" McCreary sat in the front passenger seat of the detectives' vehicle on the way to the police station. He was not handcuffed or restrained. He inquired en route whether the detectives' service weapons were "four fives."

At the police station, Detective Latham reaffirmed that McCreary was still free to leave at any time, and, without answering any questions, McCreary asked to leave. McCreary walked out of the police station's back door, jumped a fence, and "shot" the detectives his "middle finger."

The next day, McCreary telephoned police and requested a second opportunity to give a voluntary statement. Detectives Quintana and Palermo picked McCreary up from his home. This time, however, McCreary's mother was not there. En route to the police station, McCreary again sat in the front passenger seat of the detective's vehicle without handcuffs or other restraints.

Detective Latham took McCreary to an interview room and shut the door. Just as he did the day before, Detective Latham began the interview by asking McCreary whether he was at the police station of his own free will and whether he understood that he was not under arrest. McCreary responded affirmatively, and no admonishments were given. Detective Latham characterized the one-hour interview that followed as "an intense interview, a tactical interview" during which McCreary laughed, cried, got angry, and made incriminating statements about the amount of money stolen from the store and the manner in which Pham was shot. The interview was video-recorded. Although Detective Latham exaggerated the evidence and repeatedly accused McCreary of murdering Pham, Detective Latham never expressed an intent to arrest McCreary. And, when McCreary indicated he was ready to leave, Detective Latham did not arrest McCreary. Instead, he and Detective Quintana gave McCreary a ride home.

The State accepted a capital murder charge against McCreary at a time when he was being held in a juvenile detention facility on an unrelated aggravated assault charge. Detectives Palermo and Quintana retrieved McCreary from the juvenile detention center and transported him to another facility for the purpose of entering his fingerprints in the Automatic Fingerprint Identification System (AFIS). McCreary did not receive any admonishments. While the detectives were processing McCreary's information, McCreary observed a deputy walking by and stated, "You got a chrome .45, man, that's nice."The detectives returned McCreary to the juvenile detention center.

Over the course of the eight-day trial on guilt-innocence, the State presented physical evidence and the testimony of twenty-one witnesses, including the investigating officers, medical and forensic experts, and Rock. McCreary's classmate, Edwin Alfaro, testified that, within one or two weeks of Pham's death, McCreary bragged about shooting Pham and taking money from the store. The State also presented evidence that Craig Lindhorst, McCreary's acquaintance, had stolen a Taurus brand .45 semiautomatic pistol and sold it to McCreary.

McCreary filed pre-trial motions to suppress his oral statements made during the video-recorded interview (the "recorded statements") and his oral statement, during fingerprinting, complimenting the deputy's .45 caliber service weapon (the "unrecorded statement"), contending that the statements were obtained in violation of provisions of the Family Code governing statements by a juvenile. After hearing testimony and argument at trial, the trial court denied the suppression motions and admitted McCreary's statements into evidence.

Admissibility of Statements by a Juvenile

"A motion to suppress is nothing more than a specialized objection to the admissibility of evidence." Simmons v. State, 288 S.W.3d 72, 76–77 (Tex.App.-Houston [1st Dist.] 2009, pet. ref d). McCreary argues that the trial court erred by admitting his recorded and unrecorded statements because they were custodial statements taken in violation of sections 51.095, 52.02 and 52.025 of the Family Code. SeeTEX. FAMILY CODE ANN. §§ 51.095 (West 2008) (governing admissibility of statements by juvenile), 52.02 (West 2008) (governing taking of juvenile into custody), 52.025 (West 2008) (governing designation of juvenile processing office). Specifically, with respect to the oral statements recorded during his interview with Detective Latham, McCreary asserts that Detective Latham violated the Family Code by (1) conducting the interrogation at the Webster police station instead of a juvenile processing office as required by sections 52.02 and 52.025 and (2) failing to have a magistrate give McCreary the statutory warnings required by sections 51.095(a)(1)(A) and

51.095(a)(5). With respect to his unrecorded statement—"you got a chrome .45, man, that's nice"—McCreary asserts that sections 51.095(a)(1)(A) and 51.095(a)(5) likewise preclude its admission in evidence because he made the statement while in custody, he made the statement in response to "conversational interaction" with Detective Palermo, and he was not given any statutory admonishments by a magistrate.

Held: Affirmed

Memorandum Opinion: The admissibility of custodial statements made by a juvenile is governed by section 51.095 of the Family Code. SeeTEX. FAMILY CODE ANN. § 51.095. Subsection 51.095(a)(5) provides that a juvenile's oral statement is admissible if these conditions are satisfied: (1) the statement is made while the child is in the custody of an officer, in a detention facility or other place of confinement, or in possession of the Department of Family and Protective Services; (2) the statement is recorded by an electronic recording device; and (3) at some time before making the statement, "the child is given the warning described by Subdivision (1)(A) by a magistrate, the warning is part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning."FN2Id. § 51.095(a)(5). A juvenile's oral statement made as a result of custodial interrogation without the benefit of a magistrate warning is inadmissible at trial. See id. § 51.095(a)(5), (b)(1); see alsoTex.Code Crim. Proc. Ann. art. 38.22 §§ 2, 3 (West 1979 & Supp.2000). But "[a] statement of a juvenile that is not the product of custodial interrogation is not required to be suppressed by section 51.095 [.]" In re D.J.C., 312 S.W.3d at 712 n.1;see Meadoux v. State, 307 S.W.3d 401, 408 (Tex.App.-San Antonio 2009), aff'd on other grounds, 325 S.W.3d 189 (Tex.Crim.App.2010) ("A voluntary oral statement by a juvenile that does not stem from custodial interrogation is admissible, even if the juvenile did not receive the statutory admonishments.").

FN2. The warnings required to be given by section 51.095(a)(1)(A) are as follows:

(i) the child may remain silent and not make any statement at all and that any statement that the child makes may be used in evidence against the child;

(ii) the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;

(iii) if the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and

(iv) the child has the right to terminate the interview at any time[.]

TEX. FAMILY CODE ANN. § 51.095(a)(1)(A).

Custodial interrogation is questioning that is initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom in any significant way. See Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528 (1994); In re D.J.C., 312 S.W.3d at 712 (addressing whether juvenile was in custody for purpose of determining admissibility of confession in juvenile delinquency proceeding)."A custodial interrogation occurs when a defendant is in custody and is exposed 'to any words or actions on the part of the police ... that [the police] should know are reasonably likely to elicit an incriminating response.' " Roquemore, 60 S.W.3d at 868 (quoting Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689–90 (1980)). A juvenile is in custody if, under the objective circumstances, a reasonable child of the same age would believe his freedom of movement was significantly restricted. Jeffley, 38 S.W.3d at 855.

Our analysis involves two steps. In re D.J.C., 312 S.W.3d at 712. First, we determine whether there was a formal arrest or restraint of movement to the degree associated with an arrest by examining all of the circumstances surrounding the interrogation. Stansbury, 511 U.S. at 322, 114 S.Ct. at 1528–29; In re D.J.C., 312 S.W.3d at 712. This determination focuses on the objective circumstances of the interrogation, not on the subjective views of either the interrogating officers or the person being questioned. Stansbury, 511 U.S. at 322, 114 S.Ct. at 1528–29; In re D.J.C., 312 S.W.3d at 712."[T]he restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention." Dowthitt v. State, 931 S.W.2d 244, 255 (Tex.Crim.App.1996).

Second, we consider whether, in light of the circumstances, a reasonable person would have felt that he was at liberty to terminate the interrogation and leave. In re D.J.C., 312 S.W.3d at 712. Courts have traditionally considered four factors in making this determination: (1) whether probable cause to arrest existed at the time of questioning; (2) the subjective intent of the police; (3) the focus of the investigation; and (4) the subjective belief of the defendant. Id. Because the custody determination must be based upon the objective circumstances, however, the subjective intent of both the interrogating officers and the person being questioned is irrelevant except to the extent that intent is manifested in words or actions. Id.

A juvenile may be in custody when he is interrogated alone by an armed police officer in an enclosed space. See In re D.J.C., 312 S.W.3d at 713;see also In re D.A.R., 73 S.W.3d 505, 511–12 (Tex.App.-El Paso 2002, no pet.). Being the focus of an investigation alone does not amount to being in custody. Meek v. State, 790 S.W.2d 618, 621 (Tex.Crim.App.1990).

Neither does stationhouse questioning, in and of itself, constitute custody. Dowthitt, 931 S.W.2d at 255. When the circumstances show that an individual acts upon the invitation or request of the police and there are no express or implied threats that he will be forcibly taken, that person is not in custody. Dancy v. State, 728 S.W.2d 772, 778–79 (Tex.Crim.App.1987); In re D.J.C., 312 S.W.3d at 713. "The mere fact that an interrogation begins as non-custodial, however, does not prevent it from later becoming custodial; police conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation." Dowthitt, 931 S.W.2d at 255.

Four general situations may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, or (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave. See id .;In re D.J.C., 312S.W.3d at 713.

McCreary relies on the fourth situation. The existence of probable cause, in and of itself, does not establish that a suspect is in custody. Dowthitt, 931 S.W.2d at 255. Custody requires that the law enforcement officer's knowledge of probable cause be manifested to the suspect. See id."Such manifestation could occur if information substantiating probable cause is related by the officers to the suspect or by the suspect to the officers."Id. Additionally, other circumstances must lead a reasonable person to believe that he is under restraint to the degree associated with an arrest.Id.

When a juvenile is taken into custody, Section 52.02 of the Family Code applies. In re D.J.C., 312 S.W.3d at 715. Section 52.02(a) provides, in relevant part, that a person taking a juvenile into custody must immediately bring that juvenile to a designated juvenile processing office or perform one of several other enumerated acts. TEX. FAMILY CODE ANN. § 52.02(a). A failure on the part of law enforcement to comply with the requirements of section 52.02 may render a statement obtained from a juvenile inadmissible. See In re U.G., 128 S.W.3d 797, 799 (Tex.App.-Corpus Christi 2004, pet. denied) (holding juvenile's statement inadmissible when, after being placed in custody, police took juvenile to police station and held juvenile in area where adult suspects were being held instead of taking juvenile "to a juvenile processing office or any of the places listed as an alternative" in section 52.02).

A. The recorded statements

The trial court determined that the recorded statements made by McCreary during his interview with Detective Latham were admissible because the statements did not arise from custodial interrogation. The trial court further concluded that probable cause to arrest McCreary did not exist at the time he gave the recorded interview and that, under the circumstances of the interview, no reasonable fifteen-year-old would have felt that he was not free to terminate the interview. In reaching these conclusions the trial court made the following fact findings on the record: (i) on the first day detectives made contact with McCreary, McCreary voluntarily went to the police station with the consent of his mother; (ii) McCreary only stayed at the police station for a short while, having been informed that he was not under arrest; (iii) McCreary left the police station on his own accord; (iv) the next day, McCreary initiated further contact with detectives by telephone and asked for a second opportunity to give a statement, (v) having been on probation in juvenile court before, McCreary was a "worldly 15–year–old" familiar with arrest procedures; (vi) McCreary voluntarily gave the recorded interview; (vii) McCreary concluded the interview "with words that he was done"; and (viii) McCreary asked for and received a ride home following the interview. Because the evidence adduced at the suppression hearing (i.e., the videotaped interview and Detective Latham's testimony regarding its circumstances), viewed in the light most favorable to the trial court's ruling, supports the trial court's findings, we afford the findings almost total deference. See Iduarte, 268 S.W.3d at 548; In re D.J.C., 312 S.W.3d at 711.

Applying the first part of our analysis, we examine all the circumstances surrounding McCreary's interview with Detective Latham to determine whether there was a formal arrest or restraint to the degree associated with an arrest. See In re D.J.C., 312 S.W.3d at 712. It is undisputed that McCreary was never handcuffed and was not formally arrested until well after the interview; in fact, immediately after the interview, the detectives gave McCreary a ride home. McCreary twice agreed to accompany the detectives to the police station and make a statement. En route to and from the police station, McCreary rode in the front passenger seat of the detective's vehicle, not in the back seat of a marked patrol vehicle. Before making any statement, McCreary was told more than once that he was not under arrest and was free to leave at any time. On both days McCreary was at the police station, the detectives placed him in an interview room and shut the door. Nonetheless, on the detective's first attempt to question McCreary, McCreary asked to leave. The detectives permitted him to exit both the interview room and the police station unhindered. On the second day, McCreary endured one hour of questioning before he stopped the interview on his own accord. The detectives again permitted McCreary to leave the

police station unhindered. Based on all the objective circumstances surrounding the interview, the trial court reasonably could have concluded that McCreary was not under formal arrest nor restrained of freedom to the degree associated with an arrest at the time he made the recorded statements.

Turning to the second part of our analysis, we consider whether a reasonable fifteen-year-old in the same circumstances as McCreary would have felt free to terminate the interview and leave. See id .In making this determination, we look first to the objective factors of the existence of probable cause to arrest McCreary and the focus of the detectives' investigation and then to the detectives' and McCreary's subjective intents as manifested by their words and actions. Id. Detective Latham testified that there was limited evidence of McCreary's involvement in Pham's death at the time of the interview—specifically, two anonymous tips about McCreary, a witness who placed McCreary at the store shortly before the shooting, and clothing and an I–Pod recovered from McCreary's home. Detective Latham acknowledged, however, that McCreary was the only suspect in Pham's death.

As to his subjective intent, Detective Latham testified that he did not believe that probable cause existed to arrest McCreary either before the interview commenced or after McCreary made incriminating statements. Although Detective Latham accused McCreary of capital murder more than once during the interview, his words and actions during the interview were consistent with a subjective intent not to arrest McCreary. Detective Latham told McCreary during the interview that an arrest would not be made until there was a stronger case. Detective Latham never handcuffed or restrained McCreary, and Detective Latham permitted McCreary to freely leave the police station upon his request. As to the subjective beliefs manifested by McCreary's words and actions, the record demonstrates that McCreary acknowledged he was making his statement voluntarily, he was not under arrest, and he was free to leave. Each time McCreary asked to leave the police station, the detectives permitted him to do so. Nothing in the record demonstrates that McCreary felt he was not free to withdraw his agreement to answer Detective Latham's questions.

Considering all the circumstances and the weight of the four traditional factors, we conclude that a reasonable fifteen-year-old in the same situation as McCreary would have felt free to terminate the interview and leave. We therefore hold that the trial court was within its discretion in concluding that McCreary was not in custody at the time he made his recorded statement; consequently, the provisions of the Family Code governing the taking of a juvenile into custody and the admissibility of custodial statements by a juvenile do not apply. See Meadoux, 307 S.W.3d at 408. Because the provisions of the Family Code do not apply, McCreary's recorded statement was admissible in evidence. The trial court did not abuse its discretion by denying McCreary's motion to suppress the recorded statement.

B. The unrecorded statement

Regarding McCreary's unrecorded statement—"you got a chrome .45, man, that's nice"—the trial court made a critical fact finding: "the statement made was spontaneous and not the result of any questioning."McCreary disagrees on appeal that the statement was spontaneous because "the State's proffer during the hearing outside the presence of the jury [established] that there was a conversational interaction between [Detective] Palermo and [McCreary] prior to [McCreary's] statements about the deputy's firearm."The standard by which we must review the trial court's denial of McCreary's motion to suppress, however, requires us to give almost total deference to the trial court's finding of historical fact when that finding is supported by the record. See Roquemore, 60 S.W.3d at 868. And, here, the record supports a finding that the statement was made spontaneously. According to Detective Palermo's testimony at the suppression hearing, McCreary was detained in a juvenile detention facility on unrelated charges for two days before the State accepted the capital murder charge arising from Pham's death. Detectives Palermo and Quintana received instructions to process McCreary on the new charge and add his fingerprints to AFIS. While the detectives were processing McCreary, a Harris County Deputy Sheriff walked by with a service pistol, and McCreary, without prompting from either detective, stated "you got a chrome .45, man, that's nice."Because "[a] statement of a juvenile that is not the product of custodial interrogation is not required to be suppressed by section 51.095[,]" we hold that the trial court did not abuse its discretion by denying McCreary's motion to suppress the unrecorded statement. See In re D.J.C., 312 S.W.3d at 712 n.1.

Conclusion: Having determined that the trial court did not err by refusing to suppress McCreary's recorded and unrecorded statements to police, we overrule his sole issue on appeal. The trial court's judgment is affirmed.

DEFENSE COUNSEL

COUNSEL RENDERED INEFFECTIVE BECAUSE HE FAILED TO INVESTIGATE AND LEARN THAT THE ALLEGED PRIOR JUVENILE FELONY CONVICTION WAS NOT AVAILABLE AS THE PREDICATE FELONY FOR THE OFFENSE OF FELON IN POSSESSION OF A FIREARM.

¶ 12-3-6. **Ex Parte Bell IV**, No AP-76808, 2012 WL 1882270 (Tex.Crim.App., 5/23/12).

Facts: On Application for a Writ of Habeas Corpus. Applicant pleaded guilty and was convicted of felon in possession of a firearm and sentenced to two years' imprisonment. He did not appeal his conviction. Applicant contends, inter alia, that his trial counsel rendered ineffective assistance because he failed to investigate the alleged prior felony conviction and learn that it was in fact a juvenile adjudication and was therefore not available as the predicate felony for this offense. TEX. FAM.CODE § 51.13.

Held: Relief granted

Opinion: The trial court has determined that trial counsel's performance was deficient and that such deficient performance prejudiced Applicant. We agree. Relief is granted.

Conclusion: The judgment in Cause No. 55,837 in the 27th District Court of Bell County is set aside, and Applicant is remanded to the custody of the Sheriff of Bell County to answer the charges as set out in the indictment.

EVIDENCE

On July 11, 2012, the San Antonio Court of Appeals held that the trial court did not abuse its discretion by committing juvenile to the Texas Youth Commission solely for the protection of the public and the serious nature of the offense.

¶ 12-3-9. **In the Matter of D.P.H.**, No. 04–11–00823–CV, 2012 WL 2835140 (Tex.App.-San Antonio, 7/11/12).

Facts: Two uniformed officers responded to a call that a suspect was in possession of a handgun at a store that sells alcohol. Upon arriving at the scene, one of the officers attempted to detain D.P.H. because he matched the suspect's description. D.P.H. resisted the officer and attempted to flee. A struggle ensued, and the two fell onto a nearby parked car. The other officer joined the scuffle. As the officers struggled to restrain D.P.H., he refused to remove his hand from an object hidden in his pants. One of the officers could feel the object and yelled, “Gun!” D.P.H. continued to resist, maintained his grip on the object in his pants, and kicked and punched the officers. One of the officers testified that he considered shooting D.P.H. because the officer feared for his life. He also testified that D.P.H. was manipulating the gun and was trying to use it. After subduing D.P.H., the officers discovered that the object was a loaded handgun, and they also found marihuana on D.P.H.'s person.

D.P.H. was subsequently charged with engaging in delinquent conduct by committing three felonies: two counts of assault on a public servant and one count of unlawfully carrying a weapon on a premises licensed to sell alcoholic beverages. Without the benefit of a plea bargain, D.P.H. pleaded true at an adjudication hearing. At the disposition hearing, a probation officer recommended that D.P.H. be placed on probation. D.P.H.'s parents testified at trial that they would provide a home atmosphere that would meet the conditions of probation. However, one of the officers assaulted by D.P.H. recommended that D.P.H. be committed to the TYC. After hearing testimony, the trial court opted to commit D.P.H. to the TYC. The trial court noted its decision was based primarily on (1) the protection of the public and of D.P.H. and (2) the serious nature of the offense. D.P.H. appeals the trial court's order from the disposition hearing.

Held: Affirmed

Opinion: In order to commit D.P.H. to the TYC, the trial court's order must have included the court's determination that

(A) it is in the child's best interests to be placed outside the child's home;

(B) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and

(C) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.
SeeTEX. FAM.CODE ANN. § 54.04(i); In re K.J.N., 103 S.W.3d at 466.

The evidence before the trial court showed that when D.P.H. was arrested, he was sixteen years old, out after 12:30 a.m., and in possession of a loaded handgun and marihuana. The gun was later determined to be stolen. When confronted by police, D.P.H. attempted to flee, punched and kicked two officers, and manipulated the gun while officers were attempting to subdue him. One of the officers feared for his life and thought D.P.H. would have used the weapon had he been able to free it from his pants. The trial court also heard evidence that earlier in the day before he was arrested, D.P.H. was involved in a disturbance where he brandished the weapon and threatened another person with it. Probation Officer Garcia's report showed that D.P.H. had been placed in alternative school twice in 2010: the first was for “gang related behavior,” and the second was for possession of drug paraphernalia. Additionally in 2010, D.P.H. was referred to the Bexar County Juvenile Probation Department (BCJPD) for three counts of assault with bodily injury; however, the assault counts were subsequently nonsuited.

In the trial court's judgment, the court specifically quoted the three statutory requirements for committing a juvenile to the TYC. SeeTEX. FAM.CODE ANN. § 54.04(i). In addition to including the three requirements of section 54.04(i) in the trial court's order, the court also gave specific reasons for the commitment: (1) the serious nature of the offense; (2) possession of a loaded gun; (3) D.P.H. attempted to use the gun at midnight in a store open to the public; (4) D.P.H. does not take responsibility for his actions; and (5) D.P.H. is a danger to the public. SeeTEX. FAM.CODE ANN. § 54.04(f) ("The court shall state specifically in the order its reasons for the disposition....").

A. D.P.H.'s Best Interests

The evidence supports the trial court's determination that commitment to the TYC was in D.P.H.'s best interests. D.P.H. committed a serious crime and may have committed a much more serious crime had the officers not subdued and disarmed him. The officer testified that D.P.H. was trying to manipulate the loaded gun while struggling with the officers. He also testified that he considered using deadly force against D.P.H. because he felt his life was in danger. Based on D.P.H.'s past conduct, his possession of marihuana, his assault of two officers, and his possession of a loaded handgun, we cannot conclude that the trial court abused its discretion in determining that it was in D.P.H.'s best interests to be placed outside of his home. SeeTEX. FAM.CODE ANN. § 54.04(i); In re K.J.N., 103 S.W.3d at 466.

B. Reasonable Efforts to Prevent D.P.H.'s Removal from His Home

The trial court was presented with evidence that D.P.H. had been referred to BCJPD for prior assaults and had twice been placed in alternative school for gang related behavior and possession of drug paraphernalia. Given this evidence and D.P.H.'s escalating pattern of violent behavior, the trial court did not abuse its discretion in determining reasonable efforts had been made to prevent D.P.H.'s removal from the home. SeeTEX. FAM.CODE ANN. § 54.04(i); In re K.J.N., 103 S.W.3d at 466.

C. D.P.H. Could Not Have Successfully Competed Probation in His Home

At the time of his arrest, D.P.H. was living at home under the supervision of his parents. Yet, he was out after midnight in possession of marihuana and a loaded gun that was later determined to be stolen. Additionally, the officer assaulted by D.P.H. testified that D.P.H. lived in a neighborhood surrounded by criminal influences, and in the officer's opinion, D.P.H. could not be supervised and would be involved in another violent incident if placed on probation. The evidence supported the trial court's determination that D.P.H. would not receive the required care, supervision, and support in the home needed to comply with D.P.H.'s conditions of probation. SeeTEX. FAM.CODE ANN. § 54.04(i); In re K.J.N., 103 S.W.3d at 466.

Conclusion: The trial court did not abuse its discretion by committing D.P.H. to the Texas Youth Commission.

PETITION AND SUMMONS

IN THE ABSENCE OF AN ACTUAL SERVICE OF SUMMONS AND A PETITION, THE TRIAL COURT IS WITHOUT JURISDICTION TO CONDUCT THE ADJUDICATION, DISPOSITION, AND MODIFICATION HEARINGS, OR TO ISSUE ADJUDICATION, DISPOSITION, AND MODIFICATION ORDERS.

¶ 12-3-4. **In the Matter of X.B.**, No. 06-11-00122-CV, --- S.W.3d ----, 2012 WL 1889638 (Tex.App.-Texarkana, 5/25/12).

Facts: A stipulation of evidence was presented to the trial court at X.B.'s adjudication hearing. The stipulation revealed that in July 2011, X.B., intentionally, and without the effective consent of the City of Paris Animal Shelter, entered the shelter at a time when it was not open to the public with the intent to commit theft. Also in July 2011, X.B., while in the course of committing theft of property with the intent to obtain or maintain control of said property, intentionally or knowingly threatened M.W. by placing M.W. in fear of imminent bodily injury or death.

The following month, X.B. unlawfully appropriated property from the CVS Pharmacy, of a value of $50.00 or more, but less than $500.00, with the intent to deprive the owner of the property. On that same day, X.B. intentionally fled from a peace officer who was attempting to lawfully arrest or detain him.

Based on this stipulation of evidence, after proper admonishment by the court, X.B. entered a plea of "true" to the offenses of theft of property, evading arrest, robbery, and burglary of a building. X.B. was adjudicated to have engaged in delinquent conduct and was placed on probation in the custody of his mother for a period of twenty-four months, or further order of the court.

In October 2011, the State filed a petition for hearing to modify X.B.'s probation based on an incident that occurred in September. According to D.K., who testified at the hearing on the State's motion to modify, D.K. was at the Sav–A–Lot with two friends when X.B. (with whom D.K. had problems in the past) showed up with two companions. X.B. invited D.K. to go behind the store and get "his [ass] whooped." After D.K. attempted to walk away, one of X.B.'s companions blindsided him and hit him multiple times. X.B. was a "couple of feet" away when this occurred. After the altercation, D.K. noticed his bracelets were gone. X.B. and his

companions ran when a truck pulled into the parking lot.

The trial court found that X.B. violated the terms of his probation, and X.B. was ultimately remanded to the custody of the TYC for an indeterminate period of time not to exceed the time when he shall be nineteen years of age. X.B. appeals the order modifying disposition to the TYC.

Initially, X.B. claims the trial court did not have jurisdiction to enter the modification order because he was not served with petition and citation for the initial adjudication. The State maintains that X.B. cannot collaterally attack the final, initial adjudication.

Held: Reversed and remanded

Memorandum Opinion: Section 53.06 of the Texas Family Code provides that a juvenile court "shall direct issuance of a summons to ... the child named in the petition," among others, and also requires that "[a] copy of the petition must accompany the summons."TEX. FAM.CODE ANN. § 53.06(a), (b) (West 2008).Section 53.06 of the Family Code further provides that a child may not waive service of summons by written stipulation or voluntary appearance at trial. TEX. FAM.CODE ANN. § 53.06(e) (West 2008); In re D.W.M., 562 S.W.2d 851, 853 (Tex.1978)."This language reflects the common law rule that a minor is without legal capacity under the law to waive service of summons."Id. When the record contains no affirmative showing of service on the juvenile, the juvenile court lacks jurisdiction, despite the juvenile's appearance at trial. Id. at 852–53; In re M.D.R., 113 S.W.3d 552, 553 (Tex.App.-Texarkana 2003, no pet.).

In M.D.R., this Court held that the trial court lacked personal jurisdiction because the State failed to properly serve the juvenile. M.D.R., 113 S.W.3d at 554. In that case, summons was served on M.D.R., but there was no indication that a copy of the petition was served on the juvenile. Because there was no showing of actual service of the petition on M.D.R., the trial court did not have personal jurisdiction. Id.; see also In re A.B., 938 S.W.2d 537, 539 (Tex.App.-Texarkana 1997, writ denied) (because record failed to affirmatively reflect that summons, accompanied by copy of petition served on juvenile, trial court did not have jurisdiction); In re T.T.W., 532 S.W.2d 418 (Tex.App.-Texarkana 1976, no writ) (compliance with Sections 53.06 (summons) and 53.07 (service) of Texas Family Code is mandatory prerequisite to exercise of juvenile court jurisdiction).

In the present case, the State concedes that "the Clerk's Record does not show that the Appellant received the summons/copy of the original petition; and neither does the Reporter's Record contain any references during the original adjudication hearing that the Appellant was served with oral notice of the petition."After reviewing the record in its entirety, we find no indication X.B. was served with a copy of the summons or petition.

The State maintains that because there was no direct appeal of the adjudication order, X.B.'s jurisdictional complaint here amounts to a collateral attack on that order. This, the State claims, is impermissible, citing In re D.E.P., 512 S.W.2d 789 (Tex.Civ.App.-Houston [14th Dist.] 1974, no writ). In that case, the juvenile did not appeal his initial adjudication and probationary disposition. After the expiration of the appellate filing period, the State filed a motion to modify the disposition. The trial court entered a modification order, committing the juvenile to the TYC. The juvenile appealed the modification decision and attacked the judgment rendered on adjudication, claiming the trial court lacked personal jurisdiction based on the initial lack of service. Id. at 790.The Houston Fourteenth court reasoned that Section 53.06(e), which forbids a juvenile from waiving service of summons, was not dispositive, stating,

Here appellant filed answer by his counsel.... He fully participated in the adjudication proceedings and was very carefully advised of his rights by the court and by his own attorney. Since no appeal was perfected from the adjudication hearing, this contention constitutes a collateral attack on that judgment. A far different question would have been presented had he objected on the hearing, perfected appeal of the adjudication order and assigned failure of service on the child as error.Id. at 791.

Having disposed of any claim that the trial court had no jurisdiction at the adjudication hearing, the court then determined the juvenile was not entitled to service of process for the hearing to modify disposition. SeeTEX. FAM.CODE ANN. § 54.05(d) (West Supp.2011) ("Reasonable notice of a hearing to modify disposition shall be given to all parties."). Because the issue of reasonable notice was not raised on appeal, and because the juvenile and his parents "were present and fully advised of the issues presented and the rights of the parties," no basis existed for complaint. D.E.P., 512 S.W.2d at 791.

With no citation to authority, discussion of whether the adjudication judgment was void, or other analysis, the court in D.E.P. found that the juvenile could not collaterally attack the adjudication judgment. Our review of authorities leads to a different conclusion.

The State further relies on caselaw stating that despite "the necessity of strict compliance with the procedural safeguards of the Family Code, we will not

permit collateral attacks on judgments of the trial courts based on separate adjudication and disposition hearings." In re O.S.S., 931 S.W.2d 42, 45 n. 2 (Tex.App.-Fort Worth 1996, writ denied). That case, however, did not involve the issue before us. O.S.S. held the appellate timetable from juvenile adjudication runs from the date the adjudication order is signed, and did not address the jurisdiction of the juvenile court in the absence of service on the juvenile.

While O.S.S. is not on point, it contains an additional sentence following that which is cited in the State's brief, which correctly recognizes that "a collateral attack may be allowed in cases of fundamental error...."Id.; see also Wagner v. D'Lorm, 315 S.W.3d 188, 192 (Tex.App.-Austin 2010, no pet.).D .E.P. did not discuss the concept of fundamental error, which is necessary to our decision here.

Courts will find fundamental error "only in those rare instances in which the record shows on its face that the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes and constitution of this state." Cox v. Johnson, 638 S.W.2d 867, 868 (Tex.1982); see also Estate of Pollack v. McMurrey, 858 S.W.2d 388, 395 (Tex.1993) (Gonzalez, J., concurring) ("Lack of jurisdiction is far and away the most common example of fundamental error."); Mapco, Inc. v. Carter, 817 S.W.2d 686, 687 (Tex.1991) (lack of jurisdiction is fundamental error and may be raised for first time on appeal).

In this case, it is alleged the trial court did not have jurisdiction of the original adjudication. The State concedes X.B. was not served with a summons or petition, thus consequently, the trial court never obtained personal jurisdiction over the child. See M.D.R., 113 S.W.3d at 554. Thus, the original adjudication proceeding in this case contained fundamental error.

Yet, the State complains X.B.'s assertion that the juvenile court was without jurisdiction to modify the disposition is an impermissible collateral attack on the judgment of adjudication. A collateral attack is an attempt to avoid the effect of a judgment in a proceeding brought for a different purpose. In re Ocegueda, 304 S.W.3d 576, 579 (Tex.App.-El Paso 2010, pet. denied).

A void judgment may be collaterally attacked. Browning v. Prostok, 165 S.W.3d 336, 346 (Tex.2005); Browning v. Placke, 698 S.W.2d 362, 363 (Tex.1985). When it is apparent that the court rendering a judgment "had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act," the judgment is void. Browning, 698 S.W.2d at 363. Errors other than lack of jurisdiction may render a judgment erroneous or voidable, and are thus subject only to direct attack. Cook v. Cameron, 733 S.W.2d 137, 140 (Tex.1987). Here, the judgment of adjudication is not merely erroneous or voidable. Because the trial court had no jurisdiction over X.B., a party, the judgment of adjudication is void, and is subject to collateral attack. See id.; Prostock, 165 S.W.3d at 346.

Conclusion: We hold that in the absence of an actual service of summons and a petition as required by the Texas Family Code, the trial court was without jurisdiction to conduct the adjudication, disposition, and modification hearings, or to issue adjudication, disposition, and modification orders. We reverse the trial court's judgment and remand to the trial court for a new trial.

RESTITUTION

TRIAL COURT COULD HAVE REASONABLY FOUND THAT JUVENILE'S MOTHER HAD THE FINANCIAL ABILITY TO REIMBURSE THE COUNTY FOR PAYMENTS OF HER SON'S ATTORNEY.

¶ 12-3-10. **In the Matter of R.A.**, No. 03-11-00054-CV, 2012 WL 2989224 (Tex.App.-Austin, 7/20/12).

Facts: On September 10, 2010, officers with the Temple Police Department received a report of robbery by then sixteen-year-old R. A. The complainant, D. H., was also sixteen years old and attended school with R.A. According to D. H., he encountered R.A. near a shopping mall just before the start of the new school year in August 2010. D.H. had just purchased new shoes at the mall and eaten at an adjacent restaurant. As D.H. walked away from the restaurant wearing his new shoes, R.A. and a friend of R. A.'s rode toward him on bicycles. D.H. later testified that he believed R.A. would beat him up and that he told R. A., "I already know what y'all are going to do. Y'all are going to hit me and shove me from one to the other." D.H. explained that he had known R.A. for approximately ten years prior to the incident, and R.A. had picked on him or beaten him up at least three times in the past.

According to D. H., R.A. responded, "I won't hit you or nothing unless you give me your shoes." D.H. initially refused to give up his shoes, but R.A. repeated, "Just give us the shoes and I won't hit you. Just give me the shoes and I won't hit you." D.H. testified that he believed R.A. and his friend would hurt him if he did not hand over the shoes. He therefore took off the shoes and gave them to R. A., who put them on in place of his own. R.A. handed his old shoes to D. H., and then rode away with his friend.

On November 12, 2010, the State filed a petition alleging that R.A. had engaged in delinquent conduct. See id. § 53.04 (West 2008). The petition alleged that on or about August 31, 2010, R.A. "did then and there,

in the course of committing theft of property and with intent to obtain or maintain control of said property, intentionally or knowingly threaten or place [D.H.] in fear of imminent bodily injury or death" and that such conduct violated section 29.02 of the penal code. On November 18, 2010, the trial court issued an order appointing counsel for R.A. on the basis that "[n]o parent has appeared in regard to this Cause after being duly notified on more than one occasion" and "the Juvenile–Respondent is unable to afford an attorney for himself at this time."

A bench trial was held on December 14, and R.A. pleaded false to the allegations in the petition. The State presented testimony from D. H., who testified about the events giving rise to his report to the police. D.H. also testified that he was reluctant to report R.A. to the police but did so because he wanted his shoes back and because his mother insisted it was the best way to force R.A. to leave him alone. Later, R. A.'s father gave money to D. H.'s mother in order to replace the shoes. As a result, D.H. stated that he wanted to drop the criminal charge against R.A. However, D.H. testified that he was on probation at the time and was told by his probation officer that dropping the charge would subject him to liability for making a false report, jeopardizing his probation. Testimony from both of R. A.'s parents corroborated that R. A.'s father repaid D. H.'s mother for the shoes and that D.H. offered to drop the robbery charge, but ultimately did not do so, claiming he changed his mind on account of his probation status.

The defense presented testimony from seventeen-year-old R. W., an eyewitness to the incident between R.A. and D.H.R.W. was a resident of the same neighborhood as R.A. and D. H., and testified that he saw them exchange shoes one day near the end of summer vacation. R.W. testified that the boys did not appear to be fighting when they gave each other their shoes, that he had previously seen them in the same place on multiple occasions, and that he believed they were friends. The defense also questioned two police officers, who testified that they investigated the case only by interviewing D.H. and did not try to confirm any of his claims, such as the date of the alleged offense or the past instances of R.A. antagonizing D.H. After hearing this testimony, the trial court orally announced its finding that the robbery allegation was supported by evidence beyond a reasonable doubt and therefore concluded that R.A. was a juvenile who had engaged in delinquent conduct. See Tex. Fam.Code Ann. §§ 51.03 (defining delinquent conduct as "conduct ... that violates a penal law of this state or of the United States punishable by imprisonment or confinement in jail."), 54.03 (providing for adjudication hearing to determine if juvenile engaged in delinquent conduct).

The trial court then proceeded to consider the disposition of R. A.'s case. See id.§ 54.04. The State presented testimony and an exhibit regarding R. A.'s extensive disciplinary history in school and with Bell County Juvenile Probation. The State also called R. A.'s mother, Deandrea to testify about her income. Deandrea stated that she received $1,200 per month in Social Security income, $480 of which was for R.A. She also testified that she received approximately $208 per month in child support for R.A. Afterward, the court entered an Order of Commitment including the following:

IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT that [R.A.] be and is hereby committed to the care, custody, and control of the Texas Youth Commission ... for an in-determinate period of time not to exceed his nineteenth birthday or until duly discharged....

IT IS FURTHER ORDERED that the parent of the Juvenile–Respondent, Deandrea [ ] pay attorney's fees incurred in this matter in the amount of $810.00, to be paid in monthly payments of $67.50 per month....

The Court finds that Deandrea [ ] is the parent responsible for supporting the Juvenile–Respondent. The court further finds Deandrea [ ] is able to make payments for the support of the Juvenile–Respondent.

IT IS THEREFORE ORDERED that Deandrea [ ] make payments to the Texas Youth Commission ... in the amount of $500.00/mo. for the support of the Juvenile–Respondent on the first day of each month that the Juvenile–Respondent is committed to the Texas Youth Commission.

R.A. now appeals, contending that the evidence is insufficient to support the finding that he committed robbery and the order for his mother to pay attorney's fees.

Held: Affirmed

Opinion: In his first issue on appeal, R.A. claims that the trial court erred in requiring his mother to repay court-appointed attorney's fees. R.A. argues that, under the Texas Family Code provisions governing the appointment of counsel for juveniles, there was insufficient evidence to support the requirement for Deandrea to reimburse the county for payments to R. A.'s court-appointed attorney. See Tex. Fam.Code Ann. §§ 51.10, .101 (West 2008).

The State urges us to reject this argument for two reasons. First, the State asserts that R.A. has no standing to challenge the trial court's order as to attorney's fees because the order "was directed solely toward Appellant's parent, not him." Second, the State

asserts that there was sufficient evidence to support the order. The trial court heard Deandrea testify about her income and made a finding that she was able to pay $500 per month for the support, maintenance, and education of R.A. As a result, the State contends, there was sufficient evidence for the court to require Deandrea to pay an additional $67.50 per month in attorney's fees.

We first consider whether R.A. has standing to challenge the trial court's order requiring his mother to repay attorney's fees. While a party is generally entitled to appellate review, a party generally may not complain on appeal of errors "that do not injuriously affect it or that merely affect the rights of others." Torrington Co. v. Stutzman, 46 S.W.3d 829, 843 (Tex.2000); Evans v. First Nat'l Bank of Bellville, 946 S.W.2d 367, 372 (Tex.App.—Houston [14th Dist.] 1997, writ denied). However, section 56.01 of the family code expressly grants juveniles the right to appeal "an order entered under ...Section 54.04 disposing of the case." Tex. Fam.Code Ann. § 56.01(c) (West Supp.2011). The requirement for R. A.'s mother to repay attorney's fees was contained in the court's Order of Commitment, which disposes of R. A.'s case under section 54.04. See id.§ 54.04(d)(2). It therefore appears that R.A. may appeal on the basis of that requirement.

Moreover, we disagree with the State's suggestion that R. A.'s claim is barred by family code section 61.106. That section states, "The failure or inability of a person to perform an act or to provide a right or service listed under [subchapter C of chapter 61 of the family code] may not be used by the child or any party as a ground for ... appeal." Id. § 61.106 (West 2008). However, subchapter C makes no mention of attorney's fees. See id. §§ 61.101–.107 (West 2008) (comprising "Subchapter C. Rights of Parents"). Rather, a trial court's authority to order a parent to repay attorney's fees is derived from section 61.054, in subchapter B of chapter 61 of the family code, and in section 51.10 of chapter 51. See id.§§ 51.10, 61.054 (West 2008). Accordingly, section 61.106 does not directly prohibit R. A.'s challenge to the order requiring repayment of attorney's fees.

However, we need not determine whether R.A. has standing to challenge the court's order as to attorney's fees. We conclude that, even if R.A. has standing, sufficient evidence supports the requirement for his mother to pay attorney's fees.

The family code states that juveniles are entitled to the assistance of counsel in adjudication and disposition hearings such as those at issue in this case. See id.§§ 51.10(b). Where a child is detained prior to such hearings and is not already represented by counsel, a juvenile court must either order the child's family to retain an attorney or else appoint one. Id.§ 51.10(c). The court is required to appoint counsel for a child if "the court determines that the child's parent or other person responsible for support of the child is financially unable to employ an attorney to represent the child" or "in any case in which it deems representation necessary to protect the interests of the child." Id.§ 51.10(f)(2), (g).

In addition, the family code permits the court to order the child's family to reimburse the county for payments to appointed counsel. The relevant provisions state:

(k) Subject to Chapter 61, the juvenile court may order the parent or other person responsible for support of the child to reimburse the county for payments the county made to counsel appointed to represent the child under Subsection (f) or (g)....

(l) The court may not order payments under Subsection (k) that exceed the financial ability of the parent or other person responsible for support of the child to meet the payment schedule ordered by the court. Id.§ 51.10(k), (l).

R.A. argues that, under these provisions, a court's authority to order reimbursement "is expressly conditioned on the court determining that the defendant has the financial resources and ability to pay." Because the trial court "never addressed" Deandrea's ability to pay before it ordered her to reimburse the county for attorney's fees, R.A. concludes that there was insufficient evidence to support the order. See Mayer v. State, 309 S.W.3d 552, 556 (Tex.Crim.App.2010) (Adult criminal case holding that "defendant's financial resources and ability to pay are explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees.").

To the extent that R.A. bases his insufficient-evidence claim on the lack of an express finding of Deandrea's ability to pay, we disagree. There is nothing in the family code requiring a trial court to make any express finding that a parent has the financial ability to repay court-appointed attorney's fees. Cf. Anderson v. State, No. 03–09–000630–CR, 2010 Tex.App. LEXIS 5033, at *6 (Tex.App.—Austin July 1, 2010, no pet.) (mem. op., not designated for publication) (noting that code of criminal procedure does not require trial court to make express finding that adult defendant is able to pay; it merely requires that record contain some evidence to that effect); see also Perez v. State, 280 S.W.3d 886, 887 (Tex.App.—Amarillo 2009, no pet.)(reversing order to repay attorney's fees because nothing in record showed defendant was able to pay).

Furthermore, in the present case, the record supports the trial court's order requiring Deandrea to repay attorney's fees. At the disposition hearing, Deandrea testified that she received a total of $1,408 in monthly income, $688 of which she received for the benefit of R.A. Subsequently, in addition to ordering

Deandrea to pay $67.50 per month for R. A.'s attorney's fees, the court found that Deandrea could afford to pay $500 per month for R. A.'s support and ordered her to pay TYC accordingly. The total of these payments would be $567.50, which is $120.50 less than Deandrea had testified to receiving on R. A.'s behalf each month.

Having reviewed the record in the light most favorable to the trial court's order, we conclude that the trial court could have reasonably found that Deandrea had the financial ability to pay $67.50 per month to reimburse the county for payments to R. A.'s attorney. Accordingly, the evidence is sufficient to support the order requiring Deandrea to repay attorney's fees. See Jackson, 443 U.S. at 318–19; Anderson, 2010 Tex.App. LEXIS 5033 at *6. We overrule R. A.'s first issue on appeal.

Conclusion: Because the evidence is legally sufficient to support the order for R. A.'s mother to repay court-appointed attorney's fees and the finding that R.A. committed robbery, we affirm the judgment of the trial court.