Juvenile Law Section
STATE BAR OF TEXAS

Volume 27, Number 2 June 2013

Visit us online at
www.juvenilelaw.org

NEWSLETTER EDITOR

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

OFFICERS AND COUNCIL MEMBERS

Richard Ainsa, Chair
Juvenile Court Referee, 65th District Court
6400 Delta Drive, El Paso, TX 79905

Laura Peterson, Chair-Elect
5502 Broadway, Garland, TX 75043

Kevin Collins, Treasurer
Vogue Building, 600 Navarro, Ste. 250
San Antonio, TX 78205

Riley Shaw, Secretary
Tarrant County District Attorney's Office
401 W. Belknap
Ft. Worth, TX 76196

Jill Mata, Immediate Past Chair
Bexar County District Attorney's Office
235 East Mitchell, San Antonio, TX 78210

Terms Expiring 2014
Kameron Johnson, Austin
Marisela Ledezma, Edinburg
Mike Schneider, Houston

Terms Expiring 2015
Ann Campbell, Houston
Michael O'Brien, Dallas
Kaci Sohrt, Austin

Terms Expiring 2016
Kin Brown, Ft. Worth
Anne Hazlewood, Lubbock
Lisa Capers, Austin

QUICK LINKS

Juvenile Law Section Website
Nuts and Bolts of Juvenile Law
State Bar of Texas Website
State Bar of Texas Annual Meeting
Texas Bar CLE
Texas Bar Circle
State Bar of Texas Facebook

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.

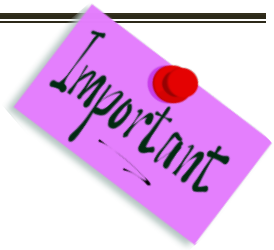

TABLE OF CONTENTS

Click Here to Return to Table of Contents

EDITOR'S FOREWORD By Associate Judge Pat Garza

Last month, a tragedy struck our neighbors in Oklahoma. The scenes coming from the devastation caused by the tornado that swept through that state leveling homes businesses and schools was heart wrenching. Listed as the highest category of storm - an EF5 on the Enhanced Fujita Scale - the twister damaged or obliterated 12,000 to 13,000 homes and affected an estimated 33,000 people, according to Oklahoma City Mayor Mick Cornett.

While this huge tornado roared towards the city of Moore (a suburb of Oklahoma City), heroes were already in the school buildings. As children cried and huddled in the hallways storm sirens wailed. It was heroic teachers who kept things calm. And if that was not enough, when they realized the magnitude of the tornado and that not even the fortified school would hold up, it was heroic teachers who lay their bodies across the children in their care to shield and protect them. Not their own children, but the children of others. Why? Because that is what teachers do. From Columbine, to Newtown, to Moore… that is what teachers do. You know it and I know it. So, the next time someone wants to cut education or teachers' salaries you remind them of what teachers do. They educate, they comfort, they discipline, they break up fights, they get abused by both students and parents alike, but when push comes to shove they will put the lives of our children before their own. You know it and I know it. Try to put a price on that!

Post-Legislative Conference. TJJD is sponsoring the 2013 Post-Legislative Conference on July 30-31, 2013, at the Crowne Plaza Hotel in Austin. You can get all the details to the conference online at www.tjjd.texas.gov or by contacting Randy Dickson at 512.490.7777 or Randy.Dickson@tjjd.texas.gov.

Special Legislative Issue. The special legislative issue of the Juvenile Law Reporter is in the infancy stage of development. This Legislative Issue should be available before September. We will keep you posted.

27th Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's 27th Annual Juvenile Law Conference will be held February 24-26, in Corpus Christi, Texas. Additional details will soon be available online at www.juvenilelaw.org.

What the teacher is, is more important than what he teaches.

Karl A. Menninger

CHAIR'S MESSAGE By Richard Ainsa

The Juvenile Law Section's primary mission is to provide quality continuing legal education to its members. It accomplishes this goal through a variety of means, the largest and most ambitious one being the annual Robert O. Dawson Juvenile Institute. After many years of coordinating the conference, the Section decided for this year's conference to engage the State Bar CLE to coordinate and present the conference, which was put on this past February. The State Bar did an excellent job of putting on the conference on relatively short notice. By all accounts, it was very well received by those participants that attended. However, the Section has decided to again coordinate and present the upcoming conference scheduled for next year. We have an excellent planning committee made up of council members and several other Section members working on potential topics. If any Section member would like to suggest a topic or topics they would be interested in hearing, please contact either myself or any of our council members. Our contact information can be found in this newsletter or at www.juvenilelaw.org. We hope to have the conference agenda firmed up by early August. Most importantly, plan on attending the annual Robert O. Dawson Juvenile Institute, scheduled for February 24 – 26, 2014, at the Corpus Christi Omni.

As we all know, the Legislature will have ended its session by the time this newsletter is published. There are several important bills which address juvenile law working their way through the committees, but as of the date of this message have not been signed into law. You can find out about all the changes by attending the Post-Legislative Conference, scheduled for July 30 – 31, 2013 at the Crowne Plaza Hotel, Austin. This conference is sponsored by the Texas Juvenile Justice Department and is always highly informative and a 'must' to attend if you wish to stay current in the juvenile area.

In an effort to bring our Section members other sources of legal information to enhance their knowledge and juvenile practice, the council is embarking on the task of updating all of our forms on our website. If you have any forms you think would benefit our Section members, please send them to us. Networking among us can be one of our best ways of continuing and expanding our legal education.

As always, the Section continues to collaborate with a number of organizations throughout the state (Juvenile Justice Roundtable and Texas Lawyers for Children) to improve our service to juveniles and the communities in which they live. The Section welcomes your participation and suggestions. We look forward to hearing from you. Thank you for your continued support and participation.

REVIEW OF RECENT CASES

APPEALS

IN REQUEST FOR JUVENILE RECORDS, MANDAMUS WILL ISSUE IF RELATOR DEMONSTRATES THAT THE ACT SOUGHT TO BE COMPELLED HAS NO OTHER ADEQUATE LEGAL REMEDY.

¶ 13-2-6. **In re J.B.H.**, MEMORANDUM, No. 14-13-00072-CV, 2013 WL 504106 [Tex.App.-Hous. (14 Dist.), 2/12/13].

Facts: Relator J.B.H. filed a pro se petition for writ of mandamus in this court. See Tex. Gov't Code § 22.221; see also Tex.R.App. P. 52. In the petition, relator asks this court to compel the Honorable Glenn Devlin, presiding judge of the 313th District Court of Harris County to rule on his motion to inspect and/or purchase a certified copy of the certification records in his juvenile case. According to his petition, the records in his juvenile case have been ordered sealed. Relator asserts that he requires the copies so that he may file a post-conviction application for writ of habeas corpus. See Tex.Code Crim. Proc. art. 11.07.

Held: Writ of Mandamus Denied

Per Curiam Memorandum Opinion: The juvenile court waived jurisdiction and transferred relator's case to district court. See Tex. Fam.Code § 54.02. He proceeded to trial, a jury convicted him of aggravated sexual assault, and this court affirmed his conviction. See Hines v. State, 38 S.W.3d 805 (Tex.App.Houston [14th Dist.] 2001, no pet.). Thus, even though relator is seeking juvenile court records, the relief that he seeks is from a final, felony conviction. Only the Texas Court of Criminal Appeals has jurisdiction over matters related to final post-conviction felony proceedings. Ater v. Eighth Court of Appeals, 802 S.W.2d 241, 243 (Tex.1991); Tex.Code Crim. Proc. art. 11.07.

Mandamus is an extraordinary remedy that will issue only if relator demonstrates that the act sought to be compelled is purely ministerial and he has no other adequate legal remedy. State ex rel. Rosenthal v. Poe, 98 S.W.3d 194, 198 (Tex.Crim.App.2003). If the respondent trial court has a legal duty to perform a nondiscretionary act, the relator must make a demand for performance that the respondent refuses. Barnes v. State, 832 S.W.2d 424, 426 (Tex.App.Houston [1st Dist.] 1992, orig. proceeding). The relator must also provide this court with a sufficient record to establish his right to mandamus relief. Walker v. Packer, 827 S .W.2d 833, 837 (Tex.1992).

The Family Code provides that sealed records may be inspected only of the trial court has signed an order permitting the inspection after a request by the juvenile. The Code provides as follows:

(h) Inspection of the sealed records may be permitted by an order of the juvenile court on the petition of the person who is the subject of the records and only by those persons named in the order. Tex. Fam.Code § 58.003(h).

Conclusion: Relator has not shown that he asked the trial court to sign an order permitting the sealed records to be inspected. See In re Z.Q., No. 14–12–00129–CV, 2013 WL 1761116, *3 (Tex.App.Houston [14th Dist.] Jan. 17, 2013, no pet. h.) (not designated for publication) (on appeal from denial of habeas relief, finding waiver of complaint that juvenile record was not unsealed where appellant did not show a request for an order unsealing records was called to the trial court's attention). Relator has not established his entitlement to the extraordinary relief of a writ of mandamus. Accordingly, we deny relator's petition for writ of mandamus.

TO PRESERVE A COMPLAINT FOR APPELLATE REVIEW, THE RECORD MUST SHOW THAT THE APPELLANT MADE HIS SPECIFIC COMPLAINT KNOWN TO THE TRIAL COURT BY A TIMELY REQUEST, OBJECTION, OR

MOTION, AND THAT THE TRIAL COURT RULED ON THE REQUEST, OBJECTION, OR MOTION.

¶ 13-2-1. **In the Matter of T.N.H.,** MEMORANDUM, NO. 04-12-00123-CV, 2013 WL 979123 (Tex.App.-San Antonio, 3/13/13).

Facts: In the afternoon on January 13, 2011, Jose Rodriguez and Paul Medellin were walking with three other friends to New Guilbeau Park to play basketball. Rodriguez and Medellin, fifteen and sixteen years old respectively, had been released early from high school due to the final exam schedule. They both testified they were released from school between 11:00 a.m. and 12:30 p.m. Medellin stated they went to play basketball at about 2:00 or 2:30 p.m. As Rodriguez and Medellin were walking about 30 feet behind the rest of the group, two older teenagers ran up behind them and demanded to know whether they "had anything." Medellin stated they asked whether they had any "money or weed." They appeared to be about seventeen or eighteen years old. Neither Rodriguez nor Medellin knew them. The taller individual started going through Medellin's backpack without his permission and took his sweats. The shorter individual took the headphones that Rodriguez had around his neck and, when Rodriguez pulled away, he pointed a handgun at Rodriguez's chest from approximately two feet away; the gun was partially covered by a cloth, but Rodriguez could see it was an automatic handgun. The taller individual then came over and took Rodriguez's iPod and cell phone from his pockets. As the robbers walked away, Rodriguez saw the taller individual give Rodriguez's cell phone to the shorter one. Rodriguez and Medellin informed their friends that they had just been robbed at gunpoint. They went to the home of a friend whose step-father was a policeman, and he called in the robbery.

During the next two weeks, Rodriguez discussed the robbery at school and described the person who held the gun on him to see if anyone knew him. He described the robber as short with a mole under his eye and a tattoo on his hand. A classmate overheard the description and said it sounded like a student named "T* * *." Rodriguez told his sister Denise, who then found a photo of "T* * * " on Facebook and showed it to Rodriguez; he immediately recognized it as the person who pointed the gun at him. Rodriguez's mother called the investigating detective and provided him with the possible suspect's information. The detective obtained a school photo of "T* * *," identified as T.N.H., and presented it as part of a 6–photo lineup to Rodriguez and Medellin. Rodriguez picked out the photo of T.N.H. as the person who held the gun on him; Medellin was unable to make an identification from the same photo lineup.

An original petition was filed alleging that T.N.H., sixteen years old at the time, had engaged in delinquent conduct by committing the felony offense of aggravated robbery and seeking a determinate sentence. TEX. PENAL CODE ANN. § 29.03 (West 2011); Tex. Fam.Code Ann. § 53.045(a)(7) (West Supp.2012). T.N.H. waived his right to a jury and proceeded to an adjudication hearing before the trial court. Rodriguez testified to the events of the robbery as stated above and identified T.N.H. in court as the shorter individual who pointed the gun at him during the robbery. Rodriguez confirmed that the person in court (T.N.H.) was the same person he picked out of the photo lineup and stated he was certain of his identification. Medellin gave the same version of events as Rodriguez. Medellin testified that Detective Van Geffen showed him a photo lineup but stated he was unable to identify any of the photos as the people who robbed them. At trial, Medellin was unable to identify T.N.H. as one of the robbers. Medellin testified that during the robbery he focused on the gun, not on what the two individuals looked like, and that he saw the gun even though it was partially wrapped in some cloth.

Detective Russ Van Geffen testified that he investigated the robbery. He received a phone call from Rodriguez's mother about a possible suspect identified by Denise Rodriguez and he determined the suspect, T.N.H., was enrolled in school. He contacted the Northside Independent School District (NISD) school police and they created a photo lineup of six photographs which he showed to Rodriguez and Medellin; Rodriguez identified T.N.H. as the robber who held the gun on him. Medellin also viewed the lineup, but was unable to make an identification.

During the defense case, Martha Fernandez, an assistant principal in charge of attendance at Taft High School, testified concerning T.N.H.'s attendance records that she had obtained from Holmes High School, where T.N.H. was enrolled on the day of the robbery, January 13, 2011.[FN1] That day was an NISD exam day and the record shows T .N.H. was present for his third period exam from 8:50 a.m. to 10:25 a .m. The next period from 10:35 a.m. to 12:10 p.m. was scheduled for the fifth period exam; T.N.H.'s fifth period class was his lunch period. No attendance is taken during lunch. The regular exam-day lunch period was from 12:10 p.m. to 12:30 p.m. and, thereafter, the students were released for the day; the buses started running at 12:30 p.m. On exam days, the students were able to pick up a sack lunch.

FN1. T.N.H. had subsequently transferred to Taft High School.

T.N.H. also called Lisa Hahne, an assistant principal who oversaw all the attendance records at Holmes High School, who testified that on exam days students like

T.N.H. who have fifth period lunch are allowed to leave at 10:25 a.m. after their third period exam; a sack lunch is available in the school cafeteria. The school does not keep attendance records for fifth period lunch. She had no way to confirm whether T.N.H. stayed at school after 10:25 a.m., nor whether he rode the bus on January 13, 2011. She stated that T.N.H. could not have ridden the school bus until 12:30 p.m., but agreed there are many city buses that run near the school or he could have gotten a ride with someone.

Finally, T.N.H. testified that on January 13, 2011, he rode the bus to Holmes High School in the morning, took his third period exam, had lunch in the cafeteria during fifth period, waited around for the school buses, rode the bus home, arrived home between 1:10 p .m. and 1:20 p.m., and stayed at home. He testified that students are not allowed to leave campus early unless they have a parent note and he did not have a note that day. T.N.H. stated he rides the bus for 30 minutes to and from school every day. He agreed there is a city bus stop near the school. On cross-examination, he admitted that he would sometimes leave campus without permission, but stated that on exam days the security was extra tight, with the school police officer and teachers blocking the exits the whole time. T.N.H. testified he knew nothing about the robbery on January 13, 2011 and did not have a gun. He stated he had never been to the basketball park where the robbery occurred. He admitted practicing for a quinceañera at a house near the park, but only on Fridays from December until the end of January 2011.[FN2]

FN2. January 13, 2011 was a Thursday.

At the conclusion of the adjudication hearing, the court found the allegation of delinquent conduct to be "true" and supported by the evidence. The court determined that disposition was necessary, and committed T.N.H. to the Texas Juvenile Justice Department for a determinate term of eight years, with a possible transfer to the Texas Department of Criminal Justice. T.N.H. now appeals.

On appeal, T.N.H. raises three issues, asserting the in-court identification by Rodriguez was tainted by an impermissibly suggestive photo lineup, the evidence is factually insufficient to prove T.N.H.'s identity as the person who robbed Rodriguez at gun point, and the court erred in denying his motion for new trial based on newly discovered evidence.

Held: Affirmed

Memorandum Opinion: T.N.H. argues Rodriguez's in-court identification of him was tainted by an impermissibly suggestive pretrial identification procedure, i.e., the photo lineup. *See Loserth v. State,* 963 S.W.2d 770, 771–72 (Tex.Crim.App.1998) (in-court identification is unreliable and thus inadmissible when it has been tainted by an impermissibly suggestive pretrial photographic identification, and test is whether, considering the totality of the circumstances, the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification) (citing *Simmons v. United States,* 390 U.S. 377, 384 (1968)). T.N.H. asserts the photo lineup was unduly suggestive because it only had one photo of a person with a birthmark. T.N.H. has a mark under his left eye.

A defendant may challenge the admissibility of evidence in either of two ways: (1) by objecting to the admission of the evidence at the time it is offered at trial and requesting a hearing outside the presence of the jury; or (2) by filing a pretrial motion to suppress evidence and having it heard and ruled on before trial. *Holmes v. State,* 248 S.W.3d 194, 199 (Tex.Crim.App.2008). Here, T.N.H. did neither. He filed a pretrial motion to suppress the identification evidence as impermissibly suggestive and unreliable, but did not obtain a ruling on the pretrial motion. During trial, T.N.H. raised no objection to Rodriguez's testimony concerning his identification of T.N.H. in the photo lineup or his testimony identifying T.N.H. in court. To preserve a complaint for appellate review, the record must show that the appellant made his specific complaint known to the trial court by a timely request, objection, or motion, and that the trial court ruled on the request, objection, or motion. TEX.R.APP. P. 33.1(a); *Ross v. State,* 678 S.W.2d 491, 493 (Tex.Crim.App.1984).

Conclusion: Because T.N.H. did not obtain a ruling on his motion to suppress or object to the identification evidence at trial, T.N.H. has failed to preserve this issue for review. TEX.R.APP. P. 33.1(a); *Aguilar v. State,* 26 S.W.3d 901, 905 (Tex.Crim.App.2000); *Samarron v. State,* 150 S.W.3d 701, 704 (Tex.App.-San Antonio 2004, pet. ref'd).

COLLATERAL ATTACK

APPLICATION FOR A WRIT OF HABEAS CORPUS FOR ADULT CONVICTIONS COMMITTED WHILE APPLICANT WAS A JUVENILE WAS DISMISSED BECAUSE APPLICANT HAD ALREADY BEEN RELEASED FROM THE FEDERAL BUREAU OF PRISONS, AND AS A RESULT, WAS NO LONGER SUFFERING THE COLLATERAL CONSEQUENCE PLED IN HIS APPLICATIONS.

¶ 13-2-5. **Ex parte Rodriguez-Padilla**, UNPUBLISHED, Nos. WR-78357-01, WR-78357-02, WR-78357-03, 2013 WL 541629 (Tex.Crim.App., 2/13/13).

Facts: Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court these applications for a writ of habeas corpus. Ex parte Young, 418 S.W.2d 824, 826 (Tex.Crim.App.1967). Applicant was convicted of

three counts of delivery of marijuana and sentenced to three years' imprisonment on each count. He did not appeal his convictions.

Applicant contends that because he was a juvenile when he committed these offenses, the trial court lacked jurisdiction. His sentences for these convictions have discharged, but he con-tends that he recently pleaded guilty in a federal case and that these convictions will increase the range of punishment in his federal case. On September 26, 2012, we remanded these applications for findings of fact and conclusions of law. On remand, the trial court made findings and conclusions and recommended that we grant relief. We disagree.

Held: Applications dismissed

Per Curiam Opinion: Based on our own independent review of the record, we conclude that Applicant was released from the Federal Bureau of Prisons in 2012, and that he is no longer suffering the collateral consequence pled in his applications.

Conclusion: Accordingly, these applications are dismissed.

DETERMINATE SENTENCE TRANSFER

IN DETERMINATE SENTENCE TRANSFER HEARING, TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING JUVENILE TRANSFERRED TO THE TDCJ SINCE THERE WAS SOME EVIDENCE TO SUPPORT THE COURT'S DECISION.

¶ 13-2-8. **In the Matter of L.C.**, MEMORANDUM, No. 04-12-00326-CV, 2013 WL 1338358 (Tex.App.-San Antonio, 4/3/13).

Facts: In 2010, L.C. was arrested after shooting Officer Matthew Martin, an officer with the San Antonio Police Department. At the conclusion of L.C.'s trial, a jury found that L.C. engaged in delinquent conduct by committing the offenses of aggravated assault against a public servant with a deadly weapon and deadly conduct, and assessed forty-year and ten-year determinate sentences, respectively. Under these determinate sentences, L.C. entered the TJJD with the possibility of later being transferred to the TDCJ to finish serving his sentence. In May of 2012, with L.C.'s nineteenth birthday approaching, the trial court held a transfer hearing to determine whether L.C. should be released on parole or transferred to the TDCJ for the remainder of his sentence. The State called one witness to testify at the hearing, and L.C. called three wit-nesses.

Most of the testimony, even from the State's witness, was favorable to L.C. For example, there was testimony that L.C. had successfully completed several programs and group therapy sessions, including a drug and alcohol program and Aggression Replacement Training (ART). Additionally, multiple witnesses discussed L.C.'s academic efforts during his nineteen months at the TJJD, despite his inability to pass the test for his GED, as well as his elected role as student council president. Two TJJD staff members testified that L.C. demonstrated good behavior and often volunteered to mentor other youths and help staff. Further, many of the witnesses testified that they believed L.C. had accepted responsibility for the crimes and felt true empathy for the victim. The court liaison for the TJJD expressed TJJD's recommendation that L.C. be released under supervision for the remainder of his sentence. Many witnesses also expressed L.C.'s plans for a brighter future and desire to mentor children from his community.

Nonetheless, the record also contains testimony that is unfavorable to L.C. For instance, several witnesses acknowledged L.C.'s delinquent record prior to the offenses at issue, including several offenses dating back to 2005. The record also reveals that L.C. was a gang member prior to his detention. Additionally, every witness recognized the serious and violent nature of the offenses L.C. committed against Officer Martin. Finally, TJJD staff members testified that there were fifteen reported behavioral incidents involving L.C; some were aggressive in nature, and three were reported within the six months preceding the transfer hearing.

An issue of concern to the trial court was whether L.C. had accepted responsibility for the crimes. Although the witnesses testified that they believed L.C. accepted responsibility, all but one witness failed to convey any statement made by L.C. indicating his acceptance of shooting Officer Martin. In fact, two witnesses specifically stated that L.C. told them that he was not the person who shot Officer Martin. One TJJD staff member, who testified that L.C. seemed to genuinely accept responsibility for the crimes and express empathy for the victim, only promoted L.C. to the next stage of rehabilitation because L.C. convinced her that he accepted responsibility for the crimes. The trial court was also concerned that, although the minimum length of time someone must ordinarily serve for the crime of aggravated assault against a public servant is three years, L.C. had served only nineteen months of his sentence.

After both parties rested, the complainant, Officer Martin, made an impact statement to the court. In his statement, Officer Martin focused heavily on L.C.'s failed efforts to obtain his GED. Officer Martin also discussed the fact that gang violence increased in L.C.'s

neighborhood since L.C. was detained. He was concerned that it would be difficult for L.C. to avoid involvement with gangs given his previous history as a gang member and the violent nature of the offenses he committed against Officer Martin when he was only sixteen years old. In addition, Officer Martin stated that he had received numerous death threats, some apparently in relation to this case, and that he fears for his safety and the safety of his family at all times. Following Officer Martin's statement, both parties made closing arguments. After hearing the parties' evidence and arguments, the trial court ordered L.C. to be transferred to the TDCJ to serve the remainder of his sentence.

Held: Affirmed

Memorandum Opinion: In this case, the trial court heard four witnesses and was provided multiple reports and exhibits for consideration. Both favorable and unfavorable evidence was presented. In its Order of Transfer, the trial court stated it took into consideration the seven factors listed in the Family Code. SeeTEX. FAM.CODE ANN. § 54.11(k). The court also found that L.C. was of "sufficient intellectual abilities and sophistication to be committed at the Institutional Division of the Texas Department of Criminal Justice." In making its determination, the trial court reviewed the witnesses' testimony and reports provided by the TJJD. Ultimately, the trial court found that it was "in the best interest[s] of [L.C.] and of society that [L.C.] be placed in the custody of the [TDCJ] for the remainder of his ... sentence."

Although L.C. presented favorable testimony regarding his behavior while committed to the TJJD, his academic efforts, his future goals, his acceptance of responsibility for the crimes, and his completion of multiple treatment programs, the record also contains evidence of misbehavior while detained, failure to obtain his GED, and his prior criminal history. Additionally, throughout the hearing, the trial court appeared to place emphasis on the length of the sentences assessed by the jury, the fact that L.C. had not even served the minimum time ordinarily required for one of the offenses he had committed, and the seriousness of the crimes. Indeed, when announcing its decision, the court stated: "[T]he seriousness of the offense is such that I would be derelict in my duties to put this young man on parole." The trial court also appeared to question the witnesses' testimony that L.C. accepted responsibility for the crimes. L.C. gave conflicting statements about his role in the crimes up to a day before the hearing, and the only witness who could affirmatively convey a statement in which L.C. accepted responsibility was the same person who controlled the fate of his progression in treatment. The trial court also considered the protection of Officer Martin and his family, including Officer Martin's statement that he received numerous death threats from L.C.'s previous gang. The trial court was permitted to assign varying amounts of weight to the evidence, as well as believe or disbelieve the witnesses' testimony. See In re N.K.M., 387 S.W.3d at 864; see also State v. Ross, 32 S.W.3d 853, 854 (Tex.Crim.App.2000) (explaining that the fact finder is the sole judge of credibility of witnesses). Therefore, based on the evidence presented, there is some evidence in the record to support the court's decision to transfer L.C. to the TDCJ.

Conclusion: The trial court reviewed all of the materials available and considered every factor listed in section 54.1 l(k) of the Texas Family Code. Because there is some evidence to support the court's decision, we conclude the trial court did not abuse its discretion in ordering that L.C. be transferred to the TDCJ. Accordingly, the order of the trial court is affirmed.

DISPOSITION PROCEEDINGS

TO COMMIT JUVENILE TO TJJD THE RECORD MUST REFLECT THAT REASONABLE EFFORTS WERE MADE TO PREVENT OR ELIMINATE THE NEED FOR THE JUVENILE'S REMOVAL FROM THE HOME AND TO MAKE IT POSSIBLE FOR THE JUVENILE TO RETURN TO THE JUVENILE'S HOME.

¶ 13-2-10. **In the Matter of L.F.R.**, MEMORANDUM, No. 02-12-00454-CV, 2013 WL 1830325 (Tex.App.-Fort Worth, 5/2/13).

Facts: Appellant entered a plea of true to delinquent conduct—aggravated robbery; the trial court adjudicated him delinquent. After a disposition hearing, the trial court ordered Appellant committed to the Texas Juvenile Justice Department (TJJD) for an indeterminate sentence. In a single issue, Appellant argues that the evidence is legally and factually insufficient to support the trial court's findings under Texas Family Code section 54.04(i)(1), subsections (A), (B), and (C).

Memorandum Opinion: Subsection (B) requires the trial court to find, before committing a juvenile to TJJD, that reasonable efforts were made to prevent or eliminate the need for the juvenile's removal from the home and to make it possible for the juvenile to return to the juvenile's home. Tex. Fam.Code Ann. § 54.04(i)(1)(B) (West Supp.2012). Although the trial court included the required statutory findings in its disposition order, the State concedes—and we agree—that there is no evidence in the record supporting a section 54.04(i)(1)(B) finding that reasonable efforts were made to prevent or eliminate the need for the juvenile's removal from the home and to make it possible for the juvenile to return to the juvenile's home. See In re A.D., 287 S.W.3d 356, 367 (Tex.App.-Texarkana 2009, pet. denied) (holding that evidence did not support trial court's findings under section 54.04(i) and remanding for a new disposition hearing); In re J.S.,

993 S.W.2d 370, 374–75 (Tex.App.-San Antonio 1999, no pet.)(same); In re K.L.C., 972 S.W.2d 203, 206–07 (Tex.App.-Beaumont 1998, no pet.)(same); In re A.S., 954 S.W.2d 855, 862–63 (Tex.App.-El Paso 1997, no pet.)(same).

Conclusion: We sustain Appellant's sole issue, reverse the trial court's disposition order, and remand the case to the trial court for a new disposition hearing. SeeTex. Fam.Code Ann. § 56.01(i) (providing that appellate court may remand an order that it reverses for further proceedings by the trial court).

EVIDENCE

PARTS OF VICTIM'S INTERVIEW WITH CHILD ADVOCACY CENTER REPRESENTATIVES SHOULD NOT HAVE BEEN ADMITTED BECAUSE FAMILY CODE SECTION 54.031 DOES NOT ALLOW THE PLAYING OF A VIDEO OF AN OUTCRY IN ADDITION TO THE OUTCRY WITNESS'S TESTIMONY AND THEY WERE ALSO NOT ADMISSIBLE AS A PRIOR CONSISTENT STATEMENT.

¶ 13-2-3. **In the Matter of C.N.**, MEMORANDUM, No. 02-11-00394-CV, 2013 WL 826353 (Tex.App.-Fort Worth, 3/7/13).

Facts: The complainant, Theresa, testified that she and her sister rode home after school on the bus and that appellant sometimes stayed at her home with them and their little brother until their mother came home. According to Theresa, when she was in third grade, appellant touched her on her private, which is where she goes "pee from," and he touched her underneath her underwear and inside her private. She tried to get away from appellant, but he locked the door to the room they were in; Theresa cried for her sister Donna to open the door with a hanger. Once her sister got her out of the room, Theresa told her what had happened. Theresa's sister corroborated her testimony about Theresa's being in the room with appellant and having to let her out, but she did not remember the door being locked. Theresa was twelve and Donna ten at the time of trial.

Donna was a witness to the circumstances relevant to the offense alleged against Theresa, i.e., she testified about the day Theresa was in the bedroom alone with appellant. Both alleged assaults took place under similar circumstances, after school when the children were alone in the house. Both girls were interviewed at the Children's Advocacy Center on the same day and were examined by a sexual assault nurse examiner on the same day.

Appellant contends that the trial court abused its discretion by admitting Exhibit 14, which included video of Theresa's and Donna's interviews at the Child Advocacy Center. Appellant argues that Theresa's interview should not have been admitted because family code section 54.031 does not allow the playing of a video of an outcry in addition to the outcry witness's testimony. Tex. Fam.Code Ann. § 54.031 (West Supp.2012). He also argues that neither of the interviews was admissible as a prior consistent statement. See Tex.R. Evid. 801(e)(1)(B).

The State first attempted to admit the video interview of Theresa as outcry evidence in conjunction with the testimony of the forensic interviewer. The trial court was initially reluctant to admit the video in addition to the forensic interviewer's testimony. The trial court decided to take the matter under advisement until it could review the video outside the jury's presence. The trial court ruled that the video of the interview of Theresa was admissible "in lieu of [the interviewer's] testimony about those things that are subject to the outcry statute." The court admonished the State not to play any part of the video that was not related to "what happened." The State later offered the video of Donna's interview under the rule of optional completeness, which the trial court denied.

On the second day of trial, the State reoffered Exhibit 14, consisting of the interviews of both girls. According to the State, because the girls' mother testified on cross-examination that she believed something had happened to Theresa, but not what the State had alleged, the State moved to admit the entirety of both interviews as prior consistent statements to rebut an allegation of recent fabrication. The trial court ultimately admitted the entirety of the interviews of both girls as prior consistent statements, and the video was played for the jury after a nurse testified about her physical examinations of the girls.

We must review whether the remainder of Theresa's interview and all of Donna's interview are admissible as prior consistent statements.

Held: Affirmed, error was harmless

Memorandum Opinion: The content, tone, and tenor of defense cross-examination may " 'open the door' to the admissibility of a prior consistent statement by an express or implied suggestion that the witness is fabricating her testimony in some relevant respect." See Hammons v. State, 239 S.W.3d 798, 808 (Tex.Crim.App.2007). Because "much of the force of cross-examination depends upon the tone and tenor of the questioning, combined with the cross-examiner's demeanor, facial expressions, pregnant pauses, and other nonverbal cues," a reviewing court should focus on "the 'purpose of the impeaching party, the surrounding circumstances, and the interpretation put on them by the [trial] court.' " Id. We may also consider

clues from the voir dire, opening statements, and closing arguments. Id. We must decide, "[f]rom the totality of the questioning, giving deference to the trial judge's assessment of tone, tenor, and demeanor, could a reasonable trial judge conclude that the cross-examiner is mounting a charge of recent fabrication or improper motive?" Id. at 808–09. For a prior consistent statement to be admissible, "the prior consistent statement must be made prior to the time that the supposed motive to falsify arose." Id. at 804.

The prosecutor began her opening statement by saying that "[t]his is a story about little girls that share secrets and things that are secretive happening behind locked doors. Today you're going to hear from ... a number of different people. You're going to hear that [Donna] told her secret ... a couple different times." In her opening statement, defense counsel said, "The real secret here is that you're going to be the judges of the credibility of who's telling the truth, who's not telling the truth." On cross-examination of the girls' mother, the State's first witness, the defense elicited testimony that the mother did not believe "that the secret is true." But on redirect, the girls' mother testified that the girls told her the same day that appellant had done "something sexual" to them; she just did not believe he had penetrated them. She thought that she and appellant's mother had taken care of things by making sure he never came back over to the house alone with the girls. Defense counsel's cross-examination of Theresa and Donna consisted of asking them to verify details unrelated to the specific allegations, such as who was present at the house the day of the alleged assaults and whether Donna used a hanger to unlock the door. The girls' testimony was inconsistent in this regard.

During closing argument, appellant's counsel again stressed the jury's role in determining credibility, pointing out discrepancies in the alleged dates and the fact that the girls' mother did not believe their secret. Counsel also emphasized the testimony about various cousins who had lived in the home with the girls. Counsel argued specifically that the girls' testimony was a result of the facts not being thoroughly and accurately investigated and that the forensic interviewer asked leading questions during the interviews, "creating a story ... and that's when [appellant's] name got filled in the blank, basically, of a cousin that fondled two girls."

Here, it is difficult to tell whether counsel's demeanor and questioning suggested to the jury that the girls fabricated their testimony before or after the interviews. Counsel clearly intimated that the girls were coached during the interviews into saying that appellant, as opposed to another person, assaulted them. It appears that counsel's defense as a whole was directed at showing that the girls were mistaken about the details of events, including when they occurred, what exactly happened, and who did it. Counsel appeared to be attacking what the girls said in the interviews as well as at trial. Accordingly, it does not appear that counsel was suggesting that any fabrication occurred after the interviews.

The girls' mother testified that the girls had told her appellant did "something sexual" to them and that she and appellant's mother took care of it. This appears to have happened fairly close in time to the assault of Theresa and the alleged assault of Donna. Several months later, Donna told one of her friends "her secret" about appellant; that friend told her own mother, who went to Donna's teacher. Donna's teacher called CPS, who arranged the interviews, in which both girls stated that appellant assaulted them. Thus, the interviews occurred after both Theresa and Donna had made outcries, specifically about appellant.
Accordingly, we conclude and hold that the trial court abused its discretion by admitting the part of Theresa's interview not related to her outcry and the entirety of Donna's interview. See id. at 808–09.

However, after viewing the interviews in light of the entire record, we conclude and hold that the error was harmless. Donna's answers during the interview are more descriptive than her trial testimony; however, other evidence, such as the nurse examiner's notes and appellant's social history provided many of the same details. Additionally, the primary details regarding appellant as the perpetrator, that he penetrated both girls, and that they told their friends and their mother are the same as in the interviews. It is well-settled that the improper admission of evidence does not constitute reversible error if the same facts are proved by other properly admitted evidence, especially when the improperly admitted evidence essentially repeats victim testimony. See Brooks v. State, 990 S.W.2d 278, 287 (Tex.Crim.App.), cert. denied, 528 U.S. 956 (1999); Dunn v. State, 125 S.W.3d 610, 615 (Tex.App.-Texarkana 2003, no pet.); Matz v. State, 21 S.W.3d 911, 912 (Tex.App.-Fort Worth 2000, pet. ref'd). Thus, we overrule appellant's second point.

Conclusion: Having overruled appellant's three points, we affirm the trial court's order adjudicating him delinquent.

MODIFICATION OF DISPOSITION

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MODIFYING THE PREVIOUS DISPOSITION ORDER TO COMMIT RESPONDENT TO THE TYC RATHER THAN PLACING HIM IN A BOOT CAMP.

¶ 13-2-7. **In the Matter of J.G.**, MEMORANDUM, No. 03-11-00892-CV, 2013 WL 490941 (Tex.App.-Austin, 2/7/13).

Facts: J.G. was referred for juvenile-delinquency proceedings based on allegations that he (1) elbowed a teacher's aide in the stomach and (2) scratched,

resisted, and repeatedly slapped the arm of another school employee. J.G. stipulated to the evidence of these charges, and on July 15, 2010, he was adjudicated delinquent for two counts of assault on a public servant, a third-degree felony, and placed on probation for one year in his mother's custody. See Tex. Penal Code Ann. §§ 22.01(b) (assault on a public official), .02 (enhancing penalty for assault with bodily injury) (West 2011).

Nearly a year later, the State filed a motion to modify the disposition based on J.G.'s failure to comply with the terms of probation—specifically, failing to report to his probation officer on at least five occasions in the preceding three-month period, missing at least fourteen days of school without excuse in the preceding two-month period, and violating school rules on four occasions in the preceding month. Based on these violations, and with the agreement of the parties, the trial court extended J.G.'s probation for six months and placed him back in his mother's custody. See generally Tex. Fam.Code Ann. § 54.05 (West Supp.2012) (authorizing trial court to modify prior disposition, including extending period of probation).

Shortly thereafter, and on the State's motion, J.G. was placed in a juvenile detention center based on further probation violations, including multiple unexcused absences from school, four violations of school rules, and a curfew violation. While J.G. was in custody, he was repeatedly written up for major and minor infractions. As a result, the State filed a second motion to modify the disposition, requesting that J.G. be committed to the TYC.

At the hearing on the motion to modify, J.G. pleaded true to the probation violations. The court heard evidence that J.G. had been unable to comply with the terms of probation while in his mother's care, including the requirement that he consistently take medications prescribed for his mental-health and behavioral issues. The court also heard evidence that a structured and supervised environment was necessary for treatment and was in J.G.'s best interest, but that J.G. had been unsuccessful in maintaining appropriate behavior even in the structured juvenile-detention-center environment. In that regard, the evidence was undisputed that J.G. had been repeatedly written up for both major (31 incidents) and minor (44 incidents) infractions during his 82–day stay at the detention center. Those incidents included physical aggression toward staff, flooding his cell on multiple occasions, attempting to obscure observation of his actions in his cell by covering the windows, using inappropriate language with staff and peers, and inciting his peers. Probation Officer James Mejias further testified that J.G. had twelve previous referrals for delinquent conduct and that, even in the detention-center environment, he "has not done well. He refuses to comply with the program. He shows extreme levels of defiance and disrespect." Consequently, Mejias recommended that J.G. be placed in the TYC because he needs a greater level of structure than can be provided in the community.

On cross-examination, Mejias conceded that J.G. was not taking his prescribed medications while at the detention center because his prescriptions had expired and his mother had failed to make an appointment for J.G. to be reevaluated by his physicians. Mejias had no opinion as to whether J.G. could be successful in a boot camp if properly medicated, but he observed that J.G. was not doing well in his mother's care even when he was taking medication as prescribed.

J.G.'s mother confirmed both that J.G. had been taking his medication when he violated probation and that he was so resistant to taking his medication that he would throw it away on occasion. Nevertheless, she believed that J.G. would do well in a structured environment like a boot camp and asked the court to consider that as a less-restrictive placement.

The court found that J.G. violated the terms of his probation and ordered that he be committed to the custody of the TYC for an indeterminate period not to extend past his nineteenth birthday. J.G. appeals from the last modification order, contending that the trial court abused its discretion in committing him to the TYC rather than placing him in boot camp, which J.G. contends is an appropriate, less-restrictive placement.

Held: Affirmed

Memorandum Opinion: Commitment to the TYC by modification order is proper only if a juvenile originally committed a felony and subsequently violated one or more conditions of probation. Id. § 54.05(f). If the court modifies a prior disposition, the court "shall specifically state in the [modification] order its reasons for modifying the disposition." Id. § 54.05(i). If the court places the child on probation outside the child's home or commits the child to the TYC, the order must further include findings that (1) it is in the child's best interests to be placed outside the child's home, (2) reasonable efforts were made to prevent or eliminate the need for the child's removal from the child's home and to make it possible for the child to return home, and (3) the child cannot, in the child's home, be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation. Id. § 54.05(m).

If these conditions are satisfied, an appellate court will not disturb a district court's determination of a suitable disposition for a child who has engaged in delinquent conduct, absent an abuse of discretion. See In re J.P., 136 S.W.3d 629, 632 (Tex.2004); In re A.I., 82 S.W.3d

377, 379–80 (Tex.App.-Austin 2002, pet. denied); In re M.S., 940 S.W.2d 789, 791 (Tex.App.-Austin 1997, no writ). A trial court abuses its discretion when it acts without reference to guiding rules or principles. In re C.L., 874 S.W.2d 880, 886 (Tex.App.-Austin 1994, no writ). In reviewing the trial court's disposition order, we must determine whether the court acted in an unreasonable or arbitrary manner. Id. We may not reverse the trial court's determination for abuse of discretion as long as the court acted within its discretionary authority. Id.

On appeal, J.G. does not contend that the trial court lacked authority to commit him to the TYC or that the trial court's order does not meet the statutory requirements. Nor does he contend the court should have placed him on probation in the custody of his mother. Rather, J.G. contends that the trial court abused its discretion by failing to place him in a boot camp because there is no evidence that it would have been an inappropriate alternative to the TYC.

We conclude that the undisputed evidence in the record supports the disposition order. J.G. was originally adjudicated delinquent for assaulting and causing bodily injury to two teachers (a third-degree felony) after having been previously referred to probation a dozen times. He was placed on probation, which he repeatedly violated by being truant from school, failing to report to his probation officer, and violating school rules on several occasions in a short period of time. He was continued on probation but almost immediately resumed violating that probation by missing school and curfew. When he was subsequently placed in a detention center prior to the modification hearing, he continued to be violent, abusive, and defiant of authority. Among other things, the evidence at the modification hearing showed that J.G. assaulted detention center officers, created a flood by plugging his toilet on more than one occasion, and was generally disruptive. In fact, it is undisputed that J.G. was written up for 75 infractions in a mere 82 days at the detention center. We further observe that there is no evidence that a placement other than the TYC was more appropriate.FN3 The only evidence regarding the propriety of a boot-camp placement is that J.G.'s mother desired that he be placed in boot camp; that boot camp would be more structured than placement in his mother's care; and that it was unknown whether boot camp would be a satisfactory placement for J.G. However, there is no evidence that J.G. had been or would be accepted to any boot camp or that the boot camp would ultimately serve J.G.'s needs better than the TYC.

FN3. We do not hold that such evidence is required or that we would hold otherwise if there were such evidence. We note only the absence of any evidence for the court to consider in exercising its discretion.

In the commitment order, the court referred to J.G.'s twelve prior referrals to probation, the underlying adjudications for felony offenses, and J.G.'s inability to succeed in the detention-center environment, stating "[J.G.] continues to be defiant of all authority and is at a high risk to reoffend based upon (75) incident reports while [he] was detained at the [Bell County Juvenile] Detention Center."

Conclusion: Given J.G.'s original adjudication of delinquency for serious offenses, repeated probation violations, and significant offenses at the detention center—none of which he disputes—we hold that the trial court did not abuse its discretion in modifying the previous dis-position order to commit J.G. to the TYC rather than placing him in a boot camp. There is more than sufficient evidence to support the findings required under section 54.05(m) of the family code. We therefore overrule J.G.'s sole appellate issue. For the reasons stated, we affirm the trial court's judgment.

PETITION AND SUMMONS

LANGUAGE IN PETITION PROVIDED MORE NOTICE THAN WAS REQUIRED BECAUSE IT ALLEGED ADDITIONAL EVIDENTIARY FACTS THAT WERE NOT ESSENTIAL TO PROPER NOTICE.

¶ 13-2-4. **In the Matter of A.D.M.**, MEMORANDUM, No. 04-12-00484-CV, 2013 WL 621525 (Tex.App.-San Antonio, 2/20/13).

Facts: The State proceeded on the second paragraph of its First Amended Petition Regarding Child Engaged in Delinquent Conduct, which stated:

Paragraph Two: And it is further presented that said child has engaged in delinquent conduct in that the child violated a penal law of this State punishable by imprisonment, to-wit: Section 38.03(A) of the Texas Penal Code when on or about the 19th day of April, 2012, in the County of Tarrant and State of Texas, he did then and there intentionally prevent or obstruct J.C. Sao, a person he knew to be a peace officer, from effecting an arrest or search of said respondent, by using force against said peace officer, to-wit: *by pulling away and moving his arm* to prevent J.C. Sao from handcuffing him during his arrest.[emphasis added]

In his special exceptions, A.D.M. asserted the petition failed to state an offense. Specifically, A.D.M. contended that the paragraph alleged that he used force against a peace officer by pulling away and moving his arm; however, "[t]he case law is conflicting on whether pulling away constitutes resisting arrest." After the juvenile court overruled the special exceptions, A.D.M. stipulated that Officer J.C. Sao was in full uniform when he placed A.D.M. under arrest and attempted to handcuff him. A.D.M. further stipulated that Officer Sao would testify that he "felt [A.D.M.] jerk

away while yelling—while he was yelling and threatening Officer Sao which caused him to struggle with [A.D.M.] to control him for approximately 20 or 30 seconds." Based on the stipulated evidence, the juvenile court found that A.D.M. engaged in the conduct as alleged.

Held: Affirmed

Memorandum Opinion: A petition for an adjudication in a juvenile proceeding must state "with reasonable particularity the time, place, and manner of the acts alleged and the penal law or standard of conduct allegedly violated by the acts." TEX. FAM.CODE ANN. § 53.04(d)(1) (West 2008). "The allegations in a petition at the adjudication phase of a juvenile proceeding need not be as particular as a criminal indictment so long as the allegations are reasonable and definite." In re J.P., 2008 WL 4595030, at *3; see also M.A.V., Jr. v. Webb County Court at Law, 842 S.W.2d 739, 745 (Tex.App.-San Antonio 1992, writ denied).

A person commits the offense of resisting arrest if he "intentionally prevents or obstructs a person he knows is a peace officer ... from effecting an arrest ... of the actor ... by using force against the peace officer." TEX. PENAL CODE ANN. § 38.03(a) (West 2011). The State's petition in the instant case tracks the statute. "Generally, a juvenile petition which tracks the language of the statute gives sufficient notice of the offense charged." In re M.T., 2007 WL 2265072, at *3; see also In re J.B.M., 157 S.W.3d 823, 826 (Tex.App.-Fort Worth 2005, no pet.). In this case, the petition provided more notice than was required because it alleged additional evidentiary facts that were not essential to proper notice.FN1 See Tullos v. State, 23 S.W.3d 195, 198 (Tex.App.-Waco 2000, pet. ref'd) (holding information charging defendant with resisting transportation under section 38.03 was not required to allege the character of the force to provide adequate notice); see also In re J.P., 2008 WL 2595030, at *3 (juvenile petition "need not recite evidentiary facts unless they are essential to proper notice"). Accordingly, the juvenile court did not abuse its discretion in denying A.D.M.'s special exceptions.

FN1. We note this court has held, "a person who uses force in order to shake off an officer's detaining grip, whether by pushing or pulling, may be guilty of resisting arrest under section 38.03." Torres v. State, 103 S.W.3d 623, 627 (Tex.App.-San Antonio 2003, no pet).

Conclusion: The juvenile court's judgment is affirmed.

SEX OFFENDER REGISTRATION

JUVENILE COURT ACTED WITHIN ITS DISCRETION IN CONCLUDING THAT RESPONDENT FAILED TO SHOW THAT THE PROTECTION OF THE PUBLIC WOULD NOT BE INCREASED BY RESPONDENT'S REGISTRATION OR THAT ANY INCREASE IN PROTECTION OF THE PUBLIC RESULTING FROM REGISTRATION WAS CLEARLY OUTWEIGHED BY THE ANTICIPATED SUBSTANTIAL HARM TO RESPONDENT.

¶ 13-2-2. **In the Matter of S.M.**, MEMORANDUM, No. 12-12-00264-CV, 2013 WL 1046891 (Tex.App.-Tyler, 3/13/13).

Facts: In January 2011, S.M.'s elementary age niece made an outcry that S.M. sexually abused her. As that allegation was being investigated, S.M. essentially conceded to law enforcement that he had committed the offense of aggravated sexual assault. Evidence of other related crimes also surfaced. Based on this evidence, the State filed a petition alleging that S.M. engaged in delinquent conduct, and he was charged as a juvenile with that offense. The State then sought and obtained grand jury approval to seek a determinate sentence. An agreement was reached whereby S.M. pleaded "true" to the allegations in exchange for an assessment of a determinate sentence of confinement in the Texas Youth Commission (TYC) for twenty years.

However, the issue of whether S.M. would be required to register as a sex offender remained contested. S.M. asked that the court defer registration, while the State argued that such a requirement should be immediately imposed. After a hearing, the trial court ordered that S.M. register as a sex offender in a public database. A motion for new trial was filed and overruled. This appeal followed.

In his sole issue, S.M. contends that the trial court abused its discretion when it ordered that he register publicly as a sex offender because "there was no evidence to rebut the conclusion that the interest of the public and [S.M.] were best served by deferring registration."

Held: Affirmed

Memorandum Opinion: Generally, a person convicted of, or a child adjudicated as a delinquent for, a serious sexual offense is required to register with the law enforcement authority in the community where the person lives. See TEX.CODE CRIM. PROC. ANN. arts. 62.001(5) (A), 62.051(a) (West Supp.2012). For a child adjudicated as a delinquent, the juvenile court may leave the registration requirement in place, exempt the respondent from registration, or defer a decision as to whether registration is required while the juvenile

Juvenile Law Section www.juvenilelaw.org Volume 27, Number 2

participates in a sex offender treatment program. See id. art. 62.352(a), (b) (West 2006).

When the juvenile seeks a deferral of the registration requirement, he has the burden of persuasion at the hearing. Id. art. 62.351(b) (West 2006). To obtain an exemption, the juvenile must show by a preponderance of the evidence

(1) that the protection of the public would not be increased by registration ...; or
(2) that any potential increase in protection of the public resulting from registration ... is clearly outweighed by the anticipated substantial harm to the respondent....
See id. art. 62.352(a); In re C.G.M., No. 11–12–00031–CV, 2012 WL 2988818, at *3 (Tex.App.Eastland July 19, 2012, no pet.) (mem.op.); In re J.D.G., 141 S.W.3d 319, 322 (Tex.App.Corpus Christi 2004, no pet.).

In reaching a decision regarding the sexual offender registration option, the juvenile court is authorized under the law to consider (1) the receipt of exhibits, (2) the testimony of witnesses, (3) representations of counsel for the parties, or (4) the contents of a social history report prepared by the juvenile probation department that may include the results of testing and examination of the respondent by a psychologist, psychiatrist, or counselor. TEX.CODE CRIM. PROC. ANN. art. 62.351(b).

It is undisputed that there was no procedural error in this case. Rather, S.M. argues that the trial court abused its discretion when it denied his request to defer registration because (1) there was no evidence before the trial court regarding S.M.'s risk to reoffend, (2) there was no evidence that sex offender treatment would be unsuccessful, and (3) the public's immediate safety interest was protected while attempts to rehabilitate S.M. were made during his period of confinement. We disagree.

At the hearing, S.M.'s mother was the sole witness to testify. However, the "Pre–Disposition Report" was also admitted into evidence. The evidence from that report shows that S.M. admitted molesting his young niece by putting his sexual organ in her mouth. S.M. blamed his niece's alleged sexual advances for his actions. S .M. admitted further that his grandmother observed that he had no pants on with an erect sexual organ while allegedly changing an infant relative's dirty diaper as the infant sat on his lap. S.M. also admitted that he had an ongoing sexual relationship with a mentally challenged eighteen year old female who also resided in the home where he lived. Reports from sources other than S.M. indicated that he might have engaged in sexual misconduct with other young children, including his young male nephew, and that S.M. himself may have been sexually abused.

The report also showed that S.M. claimed to be a member of a criminal street gang, and school records show that S.M. has a long history of being physically aggressive and disrespectful to teachers, staff, and fellow students. For example, he threatened to commit a shooting at school and to "go to jail for murder." The counselor preparing the report noted that S.M. had significant mental illness, that "his behavior has escalated from Oppositional Defiant Disorder to Conduct Disorder," and that he has "clearly been out of control and presented a danger to others." The counselor went on to conclude that

[S.M.'s] treatment in a controlled environment will need to be for an extended period of time, perhaps as much as two years. The Conduct Disordered type of behaviors will disrupt progress in treatment and make it difficult to deal with issues of trauma or sexualization. It is not possible to project how he will respond to treatment at this point, but I feel that a guarded prognosis may be overly optimistic.

Moreover, the record shows that while awaiting trial in confinement, S.M. continued his aggressive and assaultive behavior against detention center staff and his peers. After the parties made their closing arguments, the juvenile court concluded as follows:
Well, this is one of those cases, and I don't see that many of them, where someone of [S.M.'s] age is showing I guess what you could call predatory behavior. And that being the case[,] and based on what I've read today[,] I'm going to go ahead and order registration[,] and I'm going to order it be public as well. When he finishes his minimum stay at TYC he'll be 17 or older. So when he's released he'll be an adult person. It won't be like you've got a 14 year old out there living next door or in the neighborhood with somebody who's being registered. He'll be 17 or older. So that's what the Court's going to do is order a public registration on this one.

Based on the record, and given the counselor's conclusion that treatment may not be effective, there is sufficient evidence to support the juvenile court's decision to require public registration. S.M. argues that other evidence showed he was unlikely to reoffend and had the ability to respond to treatment. He points to other evidence that S.M. had himself been abused, that there were reports that S.M. exhibited "unusually positive behavior," he "was spending more time in general classes than Special Education classes," and that he desired to become eligible to play football. However, the weight to attribute this evidence was for the juvenile court to decide in its discretion, and this court is in no position to question that assessment. See In re T.E.G., 222 S.W.3d 677, 678 (Tex.App.Eastland 2007, no pet.).

Likewise, we conclude that the juvenile court acted within its discretion in concluding that S.M. failed to show that the protection of the public would not be

increased by registration or that any increase in protection of the public resulting from registration is clearly outweighed by the anticipated substantial harm to S.M. See In re C.G.M., 2012 WL 2988818, at *3. To the contrary, the record shows that S.M. continually violates the law, that he is dangerous, and that he has shown predatory behavior against individuals who may not comprehend or be able to resist his actions. Furthermore, given the counselor's assessment that S.M. may not respond well to treatment, and in light of the other evidence in the record described above, we cannot conclude that the trial court's decision to require public registration was arbitrary, unreasonable, or made without reference to guiding rules or principles. S.M.'s sole issue is overruled.

Conclusion: Having overruled S.M.'s sole issue, we affirm the judgment of the juvenile court.

SUFFICIENCY OF THE EVIDENCE

INDIVIDUAL WHO PROVIDES INFORMATION TO POLICE, ON THE POSSIBLE WHEREABOUTS OF APPELLANT FALLS WITHIN THE DEFINITION OF AN INFORMANT FOR PURPOSES OF THE RETALIATION STATUTE.

¶ 13-2-9. **Lewis v. State**, No. 07-11-0444-CR, --- S.W.3d ----, 2013 WL 1665835 (Tex.App.-Amarillo, 4/17/13).

Facts: Lewis, a juvenile at the time of the offense, was certified to be tried as an adult.

On Friday, August 22, 2008, Constable Thomas Prado was at the Emerald Green Apartments searching for Appellant. The apartment manager, Jamie Lujan, and a maintenance worker, Mark Jimenez, informed Prado that Appellant could be located at apartment 214 of the Beverly Arms Apartments, an adjoining complex. Although Appellant was not at that apartment, Jimenez later pointed out a vehicle driven by Andre Hamilton, in which Appellant might be a passenger, and Prado waved down that vehicle. Although Appellant was not in the vehicle, a passenger, Montreal Wright, was arrested on an outstanding warrant and for carrying a pistol. According to witnesses, Appellant was extremely upset over Wright's arrest.

When Jimenez left work that day, he was at a stop sign when four males made threatening gestures towards him. He called Lujan and told him he would not be coming back to work. Lujan assured him it would be "okay" to return and he did so the following Monday. After returning to work Jimenez noticed an individual, later identified as Appellant, following him around for a few days while he was picking up the grounds. Because Appellant, Hamilton and others were angry with Jimenez for pointing out Hamilton's vehicle, which had led to Wright's arrest, they conspired to "get" Jimenez. There was conflicting testimony on whether "getting" him meant shooting him or beating him.

On August 28, 2008, Jimenez arrived at work at 7:50 a.m. and Lujan was already in the office. They noticed a male, later identified as Anthony Thomas, walk by the office. Thomas had been previously banned from the complex. Jimenez left the office to do some work at a nearby apartment complex. Approximately twenty minutes later, he heard an ambulance.FN4 When he returned to the apartment complex, he observed the ambulance as well as police cars. He was told the manager had been shot and saw Lujan being carried out on a stretcher. Lujan suffered five gunshot wounds and on September 1, 2008, he died as a result of those wounds.

Yolanda Evans, a tenant at the Beverly Arms Apartments, testified that she was looking out her window on the morning of the shooting when she observed Appellant, Hamilton and Thomas cover their faces with bandanas while standing outside the manager's office at the Emerald Green complex.FN5 Soon thereafter, she heard gunshots, followed by three individuals running from the area. Lakeisha Davis, a tenant at the Beverly Arms Apartments, testified she heard a noise and looked out her window and saw Appellant, Hamilton and Thomas running up the stairs of the Beverly Arms complex. Thomas was carrying a black bag.FN6 Another witness testified that she was working on her car when she heard shots and later saw the suspects run into apartment number 112 where Thomas's cousin lived. Thomas's cousin testified that shortly after hearing gunshots, Appellant and Hamilton entered his apartment and Thomas showed up not long thereafter.

Numerous officers arrived at the scene. After interviewing witnesses, they determined the suspects were holed-up in an apartment at the Beverly Arms. After SWAT arrived, an officer trained as a negotiator was able to convince the three suspects to come out of the apartment and they were arrested. They were identified as Appellant, Hamilton and Thomas and they were each subsequently charged with capital murder for causing the death of Lujan while in the course of retaliating against Jimenez.

On the morning of the shooting, Inga McCook, Thomas's girlfriend, was cleaning when she heard a boom similar to a dumpster lid closing. She went to look out her window and saw Thomas carrying a black bag. Suddenly, she realized that Thomas was in her apartment and he told her, "[t]hey shot him. They shot ... the [racial slur]." She ordered him out of her apartment. When he left her apartment, Thomas did not have the black bag on his person.

McCook also testified that Thomas called her from jail to tell her he had hidden the black bag in a Christmas tree box in her bedroom closet. She found the bag, discovered it had two guns inside and drove down a country road to dispose of them. When she returned to her apartment, investigators were waiting to question her and she eventually led them to the area where she had tossed the guns.

Appellant, Hamilton and Thomas were each tested for gunshot primer residue. An expert testified that a classic primer mixture consists of three compounds and a particle of primer residue can contain one, two or all three of those compounds. He further testified that a particle that contains all three compounds usually results from the discharge of a firearm. The policy of the Texas Department of Public Safety is that any gunshot primer residue collected more than four hours after a shooting is usually not analyzed because too much time has passed. An exception is made when a district attorney requests testing. However, under those circumstances, interpretations are not drawn from the results.

In the underlying case, Appellant's gunshot primer residue test was conducted within the four hour window. Test results were consistent with him having recently fired a weapon, being nearby when a weapon was fired or contacting some surface with gunshot primer residue on it. Results from the gunshot residue collected from Thomas, which was also timely obtained, did not show any gunshot primer residue particles on his hands, but some was detected on the pocket of his shorts. Hamilton's test was not conducted within the four hour window; however, his results were consistent with him having fired a weapon or having been in the proximity to or touching a weapon that had been fired. Due to the time frame issue, the expert did not draw any conclusions from those results.

Thomas originally agreed to testify against Appellant and Hamilton at their trials in exchange for an offer to plead guilty to a lesser included offense. Following this development, the State moved to jointly try Appellant and Hamilton. The trial court granted that motion and they were subsequently tried together in the same proceeding. Eventually however, at Thomas's plea hearing, he withdrew from his plea bargain and instead entered a plea of guilty to the offense of capital murder. He testified that he initiated the shooting and "it just wouldn't seem right blaming two individuals that absolutely had, you know, nothing to do with the whole situation, sir." At trial, an excerpt from Thomas's plea hearing was offered into evidence; however, the State's objection was sustained. It was subsequently introduced by the defense for purposes of appeal.

Appellant maintains the evidence is legally insufficient to support his conviction for capital murder when the indictment alleges retaliation against a person other than the victim of the murder as the aggravating circumstance elevating the offense of murder to capital murder.

Held: Affirmed

Opinion: The only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt is the standard set forth in Jackson v. Virginia, 443 U.S. 307, 33 S.Ct. 2781, 61 L.Ed.2d 560 (1979).See Brooks v. State, 323 S.W.3d 893, 912 (Tex.Crim.App.2010). Under that standard, in assessing the sufficiency of the evidence to support a criminal conviction, this Court considers all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson, 443 U.S. at 319; Brooks, 323 S.W.3d at 912. We measure the legal sufficiency of the evidence by the elements of the offense as defined by a hypothetically correct jury charge. Malik v. State, 953 S.W.2d 234, 240 (Tex.Crim.App.1997). In our review, we must evaluate all of the evidence in the record, both direct and circumstantial, whether admissible or inadmissible. Dewberry v. State, 4 S.W.3d 735, 740 (Tex.Crim.App.1999), cert. denied, 529 U.S. 1131, 120 S.Ct. 2008, 146 L.Ed.2d 958 (2000). We must give deference to the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences from basic facts to ultimate facts. Hooper v. State, 214 S.W.3d 9, 13 (Tex.Crim.App.2007).

A person commits capital murder if he commits murder as defined in section 19.02(b)(1) and intentionally commits the murder in the course of committing or attempting to commit, among other offenses, the offense of retaliation. TEX. PENAL CODE ANN. § 19.03(a)(2) (WEST SUPP. 2012). A person commits murder if he "intentionally or knowingly causes the death of an individual." Id. at § 19.02(b)(1).See Adames v. State, 353 S.W.3d 854, 861–62 (Tex.Crim.App.2011), cert. denied, 2012 U.S. LEXIS 2268, 132 S.Ct. 1763, 182 L.Ed.2d 533 (2012). A person commits retaliation if he intentionally or knowingly harms or threatens to harm another by an unlawful act in retaliation for or on account of the service or status of another as an informant. TEX. PENAL CODE ANN. § 36.06(a)(1)(A) (WEST 2011). An informant is a person who has communicated information to the government in connection with any governmental function. Id. at 36.06(b)(2).

By amended indictment, Appellant was charged with intentionally causing the death of Jamie Lujan ... in the course of committing or attempting to commit the offense of retaliation against Mark Jimenez. The charge

instructed the jury on transferred intent, the law of parties and criminal responsibility for conduct of another as follows:

[a] person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that:

(1) a different offense was committed; or

(2) a different person or property was injured, harmed or otherwise affected.

A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or both.

Each party to an offense may be charged with commission of the offense.

A person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy. SeeTEX. PENAL CODE ANN. §§ 6.04(b), 7.01(a) & (b), 7.02(a)(2) & (b) (WEST 2011).

Conspiracy requires an agreement with one or more persons that they or one or more of them engage in conduct that would constitute the offense; and the person or one or more of them performs an overt act in pursuance of the agreement. SeeTEX. PENAL CODE ANN. § 15.02(a) (WEST 2011). The essential element of conspiracy is the agreement to commit the crime. Williams v. State, 646 S.W.2d 221, 222 (Tex.Crim.App.1983). A person may be guilty of conspiracy by doing nothing more than agreeing to participate in the conspiracy so long as another co-conspirator does some overt act in furtherance of the conspiracy. Walker v. State, 828 S.W.2d 485, 487 (Tex.App.-Dallas 1992, pet. ref'd). However, if the evidence shows there was no actual, positive agreement to commit a crime, the evidence is insufficient to support a conviction for conspiracy. Brown v. State, 576 S.W.2d 36, 43 (Tex.Crim.App. [Panel Op.] 1978). Commission of the underlying substantive offense is not an essential element of conspiracy. McCann v. State, 606 S.W.2d 897,898 (Tex.Crim.App. [Panel Op.] 1980). Since direct evidence of intent is rarely available, the existence of a conspiracy can be proven through circumstantial evidence. Rhoten v. State, 299 S.W.3d 349, 351 (Tex.App.-Texarkana 2009, no pet.).

Nothing in section 19.03(a)(2) of the Penal Code requires that the intended victim of the aggravating offense must also be the murder victim. See Chirinos v. State, 2011 Tex.App. LEXIS 147, at *14 n. 3 (Tex.App.-Houston [14th Dist.] 2011, pet. ref'd). Appellant does not cite this Court to any authority holding otherwise and we see no reason to read such a requirement into the statute.

Jimenez provided information to Constable Prado, a government official, on the possible whereabouts of Appellant. Thus, he falls within the definition of an informant for purposes of the retaliation statute. Jimenez testified that he felt threatened when four individuals made gestures to him when he left work the same day he gave that information to Prado. McCook, who lived in an upstairs apartment at the Beverly Arms, testified that Thomas told her Appellant and Hamilton blamed Jimenez for Wright's arrest and were plotting against him. Lakeisha Davis testified she had told the police that Appellant, Hamilton, Thomas and others were going to “get” the maintenance man [Jimenez]. Although she wavered in her testimony before the jury on whether Hamilton was present during the conversation, she did testify that the group talked about shooting the maintenance man.

Byronishia Moore, Appellant's girlfriend and a tenant at the Beverly Arms, testified she and Appellant went to a motel room with a group a few days after Wright was arrested. While there, they engaged in a conversation about getting the maintenance man. She denied any conversation about killing Jimenez and just thought the group was conspiring to beat him up. We conclude the evidence shows that Appellant conspired with others to harm or threaten to harm Jimenez in retaliation for providing information to Constable Prado that lead to Wright's arrest.

Conclusion: Appellant is guilty of Lujan's murder regardless of which conspirator actually fired the fatal shots. Thus, the evidence is legally sufficient to support the jury's verdict that Appellant, as a principal or party, murdered Jamie Lujan while in the course of attempting to commit the offense of retaliation against Mark Jimenez as alleged in the indictment. Issue two is overruled.