Juvenile Law Section
STATE BAR OF TEXAS

Volume 27, Number 5 December 2013

Visit us online at
www.juvenilelaw.org

NEWSLETTER EDITOR

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

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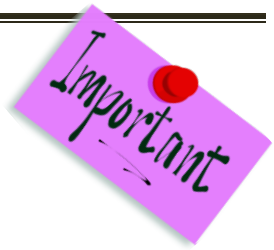
QUICK LINKS

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.



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EDITOR'S FOREWORD By Associate Judge Pat Garza

I was in Mrs. Keeney's 3rd grade class at Fenwick Elementary in San Antonio, Texas, on November 22, 1963. I remember the day before, November 21, President Kennedy had visited San Antonio. Some of the kids from my class had gone down to see him as he rode in his motorcade through the city. The day after, the 22nd, a little girl from my class brought a 9 X 11 framed portrait of President Kennedy and proudly presented it to Mrs. Keeney to keep in her classroom.

Mrs. Keeney's classroom was located across from the school office. Someone from the office had a bell on their desk and when they wanted to send a message to a teacher they would ring the bell and a student from our class would go across the hall and take the message to whoever needed to get the message. On that day, a Friday, there were suddenly a lot of messages going out, and I remember Mrs. Keeney was obviously upset about something. I don't remember being let out early, but I do remember Mrs. Keeney taking that portrait of the President and giving it back to that little girl saying, "You're going to want to keep this." We were told nothing before we were released to go home.

When I walked into my house, my mom was crying in the kitchen in front of the TV. It was the first time I remember ever seeing my mom cry, and for an eight year old boy that stays with you. A few days later, I remember lying on the floor in my parent's bedroom watching TV. My dad was lying on the bed and my mom was ironing clothes. They were bringing Lee Harvey Oswald through the police station when Jack Ruby shot him on live TV in front of everybody. I remember my dad jumping out of bed saying, "they just shot him!" It was all so surreal.

I didn't know a lot about President Kennedy back then. But, I've learned so much about him since. And while I recognize he was a flawed president, he was my favorite. He was young, with a beautiful wife, loved to play football, and had a relationship with his brother that we can't help but envy. For me, he and his brother Robert were a package deal. It is hard for me to not think of one without thinking of the other. They kept us out of nuclear war and they made us think of our country before ourselves.

Future generations will study that day in school for years to come. They will see the tapes, videos, or whatever the latest format will be in viewing that horrific weekend. And while 9/11 will forever resonate in all our lives, November 22, 1963, will stand on its own. For my generation, we lost our innocence on that day. As President Kennedy showed us so many years ago, every new generation must take its place in history, learn from previous generations and accept the torch of responsibility for the future of this great country. His eternal flame will forever burn in the hearts of my generation.

27th Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's 27th Annual Juvenile Law Conference will be held February 24-26, at the Omni Bayfront Hotel in Corpus Christi, Texas. Chair-Elect Laura Peterson and her planning committee are already working on putting together an excellent and practical conference.

Officer and Council Nominees. The Annual Juvenile Law Section meeting will be held in Corpus Christi, Texas on February 24, in conjunction with the Juvenile Law Conference. The Juvenile Law Section's nominating committee submitted the following slate of nominations:

Laura Peterson, Chair
Kevin Collins, Chair-Elect
Riley Shaw, Treasurer
Kameron Johnson, Secretary
Richard Ainsa, Immediate Past Chair

Council Members: Terms Expiring 2017
Patrick Gendron, Bryan
Jill Mata, San Antonio
Mike Schneider, Houston

Nominations from the floor during the meeting will be accepted. If you have someone that you would like to nominate from the floor, contact the Chair of the Nominations Committee, Jill Mata, at JMATA@BEXAR.ORG.

"Let the word go forth from this time and place, to friend and foe alike, that the torch has been passed to a new generation of Americans — born in this century, tempered by war, disciplined by a hard and bitter peace, proud of our ancient heritage.

John F. Kennedy, Inaugural Address, January 20, 1961

CHAIR'S MESSAGE By Richard Ainsa

By the time you receive this issue of the Juvenile Law Section Report, the holidays will be upon us. This is a time to give thanks for all the accomplishments we have managed to complete and those that have been bestowed upon us. Just to list a few important ones that come to mind, I am grateful to all the members of the Juvenile Law Section for their support and dedication during the year in doing the right thing for the children and families of Texas.

I would especially like to thank Judge Pat Garza for all the time and effort he puts in as Editor of the newsletter for the Section. I know that I depend heavily on him to update me on the current state of juvenile law in Texas. I think we all would agree that it would be much more difficult without him.

I would also like to thank the Texas Juvenile Justice Department for their unfailing support during the year. Once again, they have allowed us to use the services of their Training Director, Kristy Almager, as our conference coordinator. We all know what a fantastic job she does year in and year out.

And last but not least, I would like to thank the council members of the Juvenile Law Section for all their dedication and hard work during the year in planning the Robert O. Dawson Annual Juvenile Institute and improving the overall juvenile system in Texas.

Don't forget to mark your calendars for the 27th Annual Robert O. Dawson Juvenile Institute, on February 24 – 26, 2014, in Corpus Christi at the Omni Bayfront. You should have received your conference brochure by now. If not, please let me know and I will send you the information. I can assure you that it will be an excellent program. I look forward to seeing you there.

STATE BAR ANNOUNCES PRO BONO CHALLENGE

The State Bar of Texas - Legal Access Division is excited to issue a "Pro Bono Challenge" to the Sections of the State Bar. The purpose of the Challenge is to recognize the Sections for their pro bono participation and add to the competitive spirit amongst Sections. The Challenge was recently announced and launched through Bar media and will run through the end of the bar year (May 31, 2014).

To "log" pro bono hours, attorneys simply log in to their My Bar page, and click on Add Pro Bono Hours to add their pro bono hours. Now members can also assign their hours to a Section or combination of Sections by making multiple entries through the "add hours" tab. (Members may only count their pro bono hours once though.) Winners of the Pro Bono Challenge will be selected in two categories: (1) the highest number of hours reported by a Section; and (2) the highest percentage of Section members reporting pro bono hours. Winners will be recognized at a special reception at the State Bar of Texas Annual Meeting, in the Texas Bar Journal, and in other media. If you have any questions please contact the Legal Access Division at 800.204.222, ext. 1837.

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Visit us online here to print the conference brochure.

27th Annual Juvenile Law Conference

ROBERT O. DAWSON JUVENILE LAW INSTITUTE

February 24 – 26, 2014 I Omni Bayfront I Corpus Christi, Texas

Schedule of Events

Below is a tentative agenda. All sessions are subject to change.
The final agenda will be available online at www.juvenilelaw.org/CLE at least two weeks prior to the conference.

This year's conference offers a total of 15.00 Hours of MCLE (including 3.50 Hours of Ethics)

Monday, February 24, 2014
3.75 Hours (including 1.00 Hour of Ethics)

10:30 a.m. **Registration – Corpus Ballroom Foyer**
You may register at any time upon arrival after 10:30 a.m. to avoid the rush just prior to the conference kicking off. The registration table will be open throughout the duration of the conference.

12:55 p.m. **Welcoming Remarks**
Laura Peterson, Chair-Elect
Juvenile Law Section

1:00 p.m. **Electronic Evidence and Social Media (0.75 Hour)**
Sharon Pruitt, Assistant Attorney General
Office of the Attorney General

1:45 p.m. **Post-Legislative Update (0.75 Hour)**
Riley Shaw, Assistant District Attorney
Tarrant County District Attorney's Office
Fort Worth, Texas

2:30 p.m. **New Reporting Requirements for Attorneys – HB 1318 (0.25 Hour)**
Wesley Shackelford, Deputy Director/Special Counsel
Texas Indigent Defense Commission
Austin, Texas

2:45 p.m. **Break**

3:00 p.m. **Police Interactions with Juveniles: Arrest, Confessions, Waiver of Rights and Search & Seizure (1.00 Hour)**
The Honorable Pat Garza, Associate Judge
386th District Court
San Antonio, Texas

4:00 p.m. **Ethical Prosecution and Defense of Juveniles (1.00 Hour Ethics)**
The Honorable Kimberly McCary, Judge
Denton County Court at Law #1
Denton, Texas

5:00 p.m. **Adjourn**

5:10 p.m. **Juvenile Law Section Annual Meeting and Election of Officers**
Richard Ainsa, Chair and Jill Mata, Immediate Past Chair
Juvenile Law Section

5:30 p.m. **Texas Board of Legal Specialization: Answers to All of Your Questions About Becoming Board Certified**
Facilitated by Odessa Bradshaw, State Bar of Texas

5:30 p.m. **Judicial Caucus** *(all judges are invited)*

Contents

Important Dates

February 9
Last day to receive discount hotel rate

February 10
Last day to register and pay to receive early-bird discount. If you register or pay after this date, the onsite fee will apply.

February 14
Last day to cancel and receive partial refund

Conference, Registration and Social Events at a Glance

Monday, February 24, 2014

10:30 a.m. – 5:00 p.m.	Registration
12:55 p.m. – 5:00 p.m.	Conference
5:10 p.m. – 5:30 p.m.	Section's Annual Meeting and Election of Officers
5:30 p.m. – 6:00 p.m.	TBLS Answers Your Questions
5:30 p.m. – 6:30 p.m.	Judicial Caucus

Tuesday, February 25, 2014

8:00 a.m. – 5:15 p.m.	Registration
8:30 a.m. – 5:15 p.m.	Conference
5:30 p.m. – 6:30 p.m.	Reception and Silent Auction

Wednesday, February 26, 2014

8:00 a.m. – 12:30 p.m.	Registration
8:30 a.m. – 12:30 p.m.	Conference

Can't Attend? We're Videotaping!

See Page 5 for details.

TUESDAY, FEBRUARY 25, 2014

7.25 HOURS (INCLUDING 1.00 HOUR OF ETHICS)

7:30 a.m. **Continental Breakfast** *(provided)*

8:00 a.m. **What's New at TJJD?**
Mike Griffiths, Executive Director
Texas Juvenile Justice Department
Austin, Texas

8:30 a.m. **How Sex Abuse Interviews Go Astray:**
Implications for Law Enforcement, Prosecutors, CPS and Defense Attorneys (0.75 Hour)
Dr. James Wood, Professor of Psychology
University of Texas at El Paso

9:15 a.m. **Understanding DNA Evidence: Interesting Case Studies (1.00 Hour)**
Dr. Elizabeth Johnson, Private Forensic Consultation
Thousand Oaks, California

10:15 a.m. **Break**

10:30 a.m. **When "Just Get Over It" Isn't Enough: Responding to Trauma and Delinquency**
Dr. Shawn C. Marsh, Director
Juvenile and Family Law Department
National Council of Juvenile and Family Court Judges
Reno, Nevada

11:15 a.m. **TJJD Scholarship Committee Presentation**
Dr. Tracy Levins, Manager of Prevention and Early Intervention
Texas Juvenile Justice Department
Austin, Texas

11:30 a.m. **Lunch** *(provided)*

	Breakout Session A: Attorneys	Breakout Session B: Probation/Other	Breakout Session C: CPS Issues
12:45 p.m. (0.75 Hour)	**Certification and Determinate Sentencing** Jill Mata, Chief of Juvenile Division Bexar County District Attorney's Office San Antonio, Texas	**Gangs** Victor Gonzalez, Director *(invited)* Program Services Mayor's Anti-Gang Office Houston, Texas	**Case Law and Legislative Update** Brian Fischer Attorney at Law Houston, Texas
1:30 p.m. (1.00 Hour)	**The Psychology of False Confessions Among Children and Adolescents** Dr. James Wood Professor of Psychology University of Texas at El Paso	**Current Drug Trends: New Every Day** Dr. Jane Maxwell School of Social Work The University of Texas at Austin	**Trauma: Assessment and Treatment** Dr. Shawn C. Marsh Director, Juvenile and Family Law Dept. National Council of Juvenile and Family Court Judges Reno, Nevada
2:30 p.m. (0.75 Hour)	**Chapter 55 Hearings** Bill Cox Assistant Public Defender El Paso County Public Defender's Office	**Family Engagement** Rebecca Marquez Training Specialist Juvenile Justice Training Academy Texas Juvenile Justice Department	**Best Practices in Psychotropic Medication for Children in Care** Dr. Tracy Eilers Director of Foster Care Cenpatico
3:15 p.m.	**Break**	**Break**	**Break**

Schedule of Events *(continued)*

Tuesday, February 25, 2014 (Continued)
7.25 Hours (including 1.00 Hours of Ethics)

3:30 p.m. (0.75 Hour)	**Cell Phone Forensics** E.X. Martin III Attorney at Law Dallas, Texas	**Prevention and Early Intervention: Handling Youth and Families with Specialized Needs** Dr. Tracy Levins, Manager Prevention and Early Intervention Texas Juvenile Justice Department	**Fetal Alcohol Spectrum Disorders** Carole Hurley Administrative Law Judge Health and Human Services Commission
4:15 p.m. (1.00 Hour Ethics)	**Practical and Ethical Considerations in Using an Expert** Stephen Thorne, Psychologist Austin, Texas Kameron Johnson, Public Defender Travis County Juvenile Public Defender's Office Austin, Texas	**Ethical Considerations in Human Trafficking: Awareness, Prevention and Resources** Dawn Lew Senior Staff Attorney Children at Risk	**Hidden in Plain Sight: The Lawyer's Ethical Duty to Address the Impact of Trauma on Children and Parents** Barbara Elias-Perciful Director of Texas Lawyers for Children Dallas, Texas
5:15 p.m.	**Adjourn**	**Adjourn**	**Adjourn**

5:30 p.m. **Reception and Silent Auction**

NEW THIS YEAR... *Why wait until the reception to start bidding? This year's conference will allow conference participants to view all of the silent auction items prior to Tuesday's reception so you can bid as you would like. See detailed agenda upon arrival to the conference for exact times and locations.*

What better way to spend an evening than to network with your colleagues and support a great cause? The Reception and Silent Auction is scheduled for Tuesday evening from 5:30 p.m. – 6:30 p.m., with light hors d'oeurves and a cash bar. Everyone is invited to attend. It is now in its ninth year of existence and, with your help, the amount of money the Juvenile Law Section has raised has increased tremendously.

All proceeds raised at the silent auction are used to provide scholarships for Texas Juvenile Justice Department (TJJD) youth continuing their education after being paroled from TJJD facilities. The scholarship fund is a worthwhile and successful program directly benefiting youth who have been through the Texas juvenile justice system. The Juvenile Law Section is working with TJJD to identify a means for juvenile probation departments to identify youth on probation that could also benefit from the scholarship fund.

In addition to attending and participating, items are needed for the Silent Auction. Please help us make this a successful event by donating an item. You can donate items prior to or at the conference upon arrival. Can't attend the Reception and Silent Auction but still want to contribute? Donations will be accepted on-site at the conference. Please see the registration table upon arrival for information.

For additional information, or if you would like to donate items to the silent auction, please contact Susan Clevenger at 281.580.4501 or gtclevenger@yahoo.com.

Interested in Becoming an Exhibitor or Sponsor?

This conference brings together over 500 juvenile justice professionals statewide. This year, the Juvenile Law Section is offering a variety of opportunities for your organization to take part in the 27th Annual Juvenile Law Conference through exhibiting at or sponsoring this great conference. Examples include registration sponsorships to gain high visibility (i.e., USB drives, totes, lanyards, etc.), hospitality sponsorships, travel scholarships, or exhibitor booths. If you are interested or need additional details, please feel free to contact Susan Clevenger at 281.580.4501 or gtclevenger@yahoo.com. Don't miss out on this great opportunity for exposure.

Wednesday, February 26, 2014
4.00 Hours (1.50 Hour of Ethics)

7:30 a.m. **Continental Buffet** *(provided)*

8:00 a.m. **Ethical Considerations in Juvenile Records: Confidentiality, Sealing, Destruction and Restricted Access (.50 Hour Ethics)**
Kevin Collins, Attorney at Law
San Antonio, Texas

8:30 a.m. **Impact of Padilla and Chaidez on Juvenile Admonishments (.50 Hour)**
Brian Fischer, Attorney at Law
Houston, Texas

9:00 a.m. **Protecting the Juvenile Immigrant: What You Should Know (1.00 Hour)**
Justin Tullius
South Texas Pro Bono Asylum Representation Project (ProBAR)
Harlingen, Texas

10:00 a.m. **Break**
30 Minute Break to Allow for Adequate Time to Check-Out

10:30 a.m. **Are you Smarter than a Forensic Scientist? The Ethics of Hiring an Expert (1.00 Hour Ethics)**
Ronald L. Singer, M.S.
Tarrant County Medical Examiner's Office
Technical and Administrative Director

11:30 a.m. **Case Law Update (1.00 Hour)**
The Honorable Pat Garza
Associate Judge, 386th District Court
San Antonio, Texas

12:30 p.m. **Adjourn**

Can't Attend? We're Videotaping!

The Juvenile Law Section is once again partnering with TexasBarCLE to videotape this year's conference. The conference video will be available to download in TexasBarCLE's Online Classroom 6-8 weeks after the conference concludes and will be inclusive of all general session presentations, along with breakout session A. A detailed email will be provided by TexasBarCLE with the link to download the presentations. TexasBarCLE is unable to provide cost information in advance. You can contact TexasBarCLE at 512.463.1463 for questions or additional information.

Things You Need To Know...

Continuing Education Credits

The Juvenile Law Section has requested continuing education credits from the following agencies, organizations or associations for approximately 15.00 hours (including 3.50 hours of ethics): State Bar of Texas, Texas Center for the Judiciary, Texas Association of Counties, Texas Juvenile Justice Department and TCLEOSE.

As the Conference approaches, you may contact Monique Mendoza at 512.490.7913 or online at http://www.juvenilelaw.org/CLE.htm to see how many hours are approved.

Video Download Free to Attendees

Online videos of the presentations will be available to registrants 6-8 weeks after the conference on TexasBarCLE. A VALID email address must be included on the registration form so we may alert you when these benefits are available and how to access them. (Note: Presentation lengths may vary from times that were advertised.)

Thank You

On behalf of the Juvenile Law Section, the Council would like to extend its gratitude to Brian Fischer for serving on the Planning Committee for the Annual Conference.

Persons with Disabilities

Persons with disabilities who plan to attend this conference and are in need of auxiliary aids or services should contact Monique Mendoza at 512.490.7913 at least seven (7) working days prior to the conference so that appropriate arrangements may be made.

Conference Questions and Correspondence

Juvenile Law Section
c/o Monique Mendoza
P.O. Box 12757
Austin, Texas 78711
Phone: 512.490.7913 | Fax: 512.490.7919
Email: Monique.Mendoza@tjjd.texas.gov

Registration Information

Registration Fees and Deadlines

	EARLY Registration and Payment Received By Feb 10	LATE / ON-SITE Registration or Payment Received After Feb 10
Members of the Juvenile Law Section, Juvenile Probation Officers, Judges, Associate Judges, Referees, and Masters	$250	$325
Non-Members of the Juvenile Law Section	$275	$325
Conference Materials Only (USB drive)	$75	$100

- Conference fees are inclusive of attendance to any or all scheduled days. No special rate is available for partial attendance, students or non-profit agencies. No scholarships are available.
- If you need clarification on whether or not you are a member of the Juvenile Law Section, please contact the State Bar of Texas Sections Division at 512.427.1420 or view your MyBarPage online at www.texasbar.com.
- NOTE: You cannot register for this conference through the State Bar or Texas Bar CLE.

How to Register

To register, please complete the registration form on the following page. You may fax or mail in your completed registration form to the contact listed at the bottom of the page. You may also scan and email your completed form to Monique.Mendoza@tjjd.texas.gov. Online registration is not available.

Payment

The registration fee may be paid by credit card, check or money order. No purchase orders are accepted. Please make checks payable to the Juvenile Law Section.

Registration Fee Includes

The registration fee includes the continental breakfast on Tuesday and Wednesday, lunch on Tuesday, breaks for three days, Silent Auction Reception, and materials on a USB drive.

Materials Emailed Early

Course materials will be distributed only on a USB drive and in electronic format. If registration AND payment information is received by February 10, you will receive an email with a link to all materials received to date approximately one week prior to the conference. You may then print the materials if you would like to bring a hard copy to the conference. The Section will make every effort to have ample electrical outlets for those wishing to bring a laptop with the materials or powerpoint presentations saved on them.

Confirmation

You will receive an electronic confirmation that your registration was received. Please include a copy of your confirmation or a copy of your registration form if you mail in your payment.

Cancellation | Refunds | No Shows

Conference cancellations and refund requests must be made in writing to the Conference Coordinator. Please fax or e-mail your request for a refund to Monique Mendoza to 512.490.7919 or Monique.Mendoza@tjjd.texas.gov.

Cancellation requests must be received by **February 14** for a partial refund (less a $25 processing fee). Verbal cancellations will not be accepted.

Refunds will not be granted for no shows; however, course materials on a flash drive will be mailed within one week after the conclusion of the Conference.

Substitutions

Before the Conference, you may submit a substitution request. Please contact Monique Mendoza at 512.490.7913 or Monique.Mendoza@tjjd.texas.gov and request that the substitution be made and the existing payment be transferred.

NOTE: Substitutions cannot be made for individual sessions and/or days.

Registration Check-In

When you check-in, you can pick up your name badge, conference information and materials on a USB drive. The registration desk will open Monday morning at 10:30 a.m. and will be available the entire span of the Conference, so you may register at any time upon arrival. Please note that the conference does not start until 12:55 p.m. on Monday.

Registration Form

STEP 1: GENERAL INFORMATION

PRINTED NAME _____ BAR CARD NUMBER _____

JOB TITLE _____

COUNTY _____ AGENCY / DEPARTMENT _____

ADDRESS _____

CITY, STATE, ZIP _____

PHONE ( ) _____ EMAIL* _____

** Please be diligent in providing an accurate, legible email address. Emails will be sent both for registration confirmation and to email the materials just prior to the conference. A VALID email address is required to view the videotape of the conference from Texas Bar CLE after the conclusion of the conference.*

STEP 2: REGISTRATION FEES AND COURSE MATERIALS (CHECK ONE)

	EARLY Registration and Payment Recd By Feb 10	LATE / ON-SITE Registration or Payment Recd After Feb 10
Members of the Juvenile Law Section, Juvenile Probation Officers, Judges, Associate Judges, Referees, and Masters	☐ $250	☐ $325
Non-Members of the Juvenile Law Section	☐ $275	☐ $325
I cannot attend the Conference, however, I want to purchase the electronic materials only	☐ $75	☐ $100

STEP 3: PAYMENT

Payment can be made by credit card, check or money order made payable to the Juvenile Law Section. No purchase orders or vouchers will be accepted. The Juvenile Law Section's Federal Tax ID is 74-6000148. Mail your registration form, along with payment, to: Juvenile Law Section, c/o Monique Mendoza, P.O. Box 12757, Austin, Texas 78711. An e-confirmation will be sent once you are registered.

Method of Payment: ☐ Check ☐ Money Order ☐ Visa ☐ MC ☐ American Express ☐ Discover

[All information requested below is required if paying by credit card.]

CARD NUMBER _____ EXPIRATION _____

VERIFICATION CODE _____ *What is this? This is the 3-digit code on the back of your card*

NAME AS IT APPEARS ON THE CARD _____

BILLING ZIP CODE _____

SIGNATURE _____ DATE _____

You should receive an electronic confirmation via email within 72 hours.
Please note that this confirmation is for receipt of your registration, not necessarily your registration fee.
Please print a copy of your confirmation or this form and mail it along with payment (as specified in the email confirmation).

Conference Questions and Correspondence
Juvenile Law Section I c/o Monique Mendoza
P.O. Box 12757 I Austin, Texas 78711
Phone: 512.490.7913 I Fax: 512.490.7919 I Email: Monique.Mendoza@tjjd.texas.gov

Register today...Don't miss out on the Early Registration discount.

STATE BAR OF TEXAS
JUVENILE LAW SECTION
P.O. Box 12487
Austin, Texas 78711-2487

Hotel Accommodations

Omni Bayfront Hotel

900 North Shoreline
Corpus Christi, Texas 78401
Phone 361.887.1600
http://www.omnihotels.com
Check-In is at 3:00 p.m. I Check-Out is at 12:00 p.m.

Rates and Reservations

The hotel is offering a discounted rate as follows:
$97 (Single), $108 (Double) and $118 (Triple)

The deadline to make reservations is **February 9, 2014**. Reservations made after this deadline will only be honored based on availability.

Make your reservations online at http://www.omnihotels.com/FindAHotel/CorpusChristiBayfront/MeetingFacilities/27thAnnualJuvenileLawConference.aspx. This is a customized website for attendees of the Juvenile Law Conference only, therefore, the rates listed should automatically be at the contracted rate. You may also contact the Omni's Reservation Line directly at 800.243.6664. If you call to make accommodations, please specify that you are with the Juvenile Law Section to ensure the special conference rate. For your convenience, the hotel is extending the conference rate for guests staying up to two days prior to or one day after the conference, based on availability.

Parking

The Omni Bayfront will offer a discounted rate of $9 for overnight, covered self-parking. Valet parking is available for approximately $14 per day.

Hotel Shuttle

The hotel is approximately 12 miles or 15 minutes from the airport and for those individuals flying in, the Omni Bayfront Hotel offers a complimentary hotel shuttle service from 4:30 a.m. – midnight daily. A telephone call board in the baggage claim area is provided to contact the Omni to request shuttle service. There is an approximate 15-20 minute wait.

Directions

DIRECTIONS FROM THE NORTH – VIA I-37 SOUTH. Take I-37 South. At exit 1A turn left onto ramp. At exit 1B, keep left and stay on ramp. Bear right (south) onto North Shoreline Boulevard. The Bayfront Tower is on the corner of North Shoreline Boulevard and Twigg Street.

DIRECTIONS FROM THE NORTH – VIA US-77 SOUTH. Take US-77 South onto I-37 South. Follow I-37 South to exit 1A. Turn left onto ramp. At exit 1B keep left and stay on ramp. Bear right (south) onto North Shoreline Boulevard. The Bayfront Tower is on the corner of North Shoreline Boulevard and Twigg Street.

DIRECTIONS FROM THE SOUTH – VIA US-77 NORTH. Take US-77 North to where the road name changes to Five Points Road. Take ramp right onto I-37 South. Take I-37 South and at exit 1A turn left onto ramp. At exit 1B keep left and stay on ramp. Bear right (south) onto North Shoreline Boulevard. The Bayfront Tower is on the corner of North Shoreline Boulevard and Twigg Street.

DIRECTIONS FROM THE WEST – VIA US-59 EAST. Take US-59 East to I-37 access and take ramp onto I-37. Take I-37 South and at exit 1A turn left onto ramp. At exit 1B, keep left and stay on ramp. Bear right (south) onto North Shoreline Boulevard. The Bayfront Tower is on the corner of North Shoreline Boulevard and Twigg Street.

REVIEW OF RECENT CASES

APPEALS

AN INEFFECTIVE ASSISTANCE OF COUNSEL ARGUMENT MUST OVERCOME A STRONG PRESUMPTION THAT COUNSEL'S CONDUCT FELL WITHIN A WIDE RANGE OF REASONABLE REPRESENTATION.

¶ 13-5-1. **In the Matter of X.T.S.W.**, MEMORANDUM, No. 13-12-00646-CV, 2013 WL 4336149 (Tex.App.-Corpus Christi, 8/15/13).

Facts: Appellant, X.T.S.W., a juvenile, was found to have engaged in delinquent conduct and was sentenced to twelve months' community supervision. See TEX. FAM.CODE ANN. § 51.03(a)(1) (West Supp.2011). An agreed modified order was later rendered extending the term of community supervision to twenty-four months. On September 26, 2012, the trial court found that X.T.S.W. violated the terms of his community supervision and ordered him committed to the Texas Juvenile Justice Department. See id. § 54.05(f) (West Supp.2011). On appeal, X.T.S.W. contends that his counsel at the disposition hearing was ineffective "in that he failed to call [X.T.S.W.]'s psychiatrist or obtain an expert witness to testify about [X.T.S.W.]'s mental illness and the effect that newly prescribed medication would have on his behavior."

Held: Affirm.

Memorandum Opinion: To establish ineffective assistance of counsel, an appellant must show by a preponderance of the evidence that his counsel's representation fell below the standard of prevailing professional norms and that there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 687 (1984); Davis v. State, 278 S.W.3d 346, 352 (Tex.Crim.App.2009); see In re F.L.R., 293 S.W.3d 278, 280 (Tex.App.-Waco 2009, no pet.)(noting that "[a] juvenile has a right to effective assistance of counsel in an adjudication proceeding"). Review of counsel's representation is highly deferential, and we indulge a "strong presumption that counsel's conduct fell within a wide range of reasonable representation." Salinas v. State, 163 S.W.3d 734, 740 (Tex.Crim.App.2005). Direct appeal is usually an inadequate vehicle for raising an ineffective-assistance-of-counsel claim because the record is generally undeveloped. Menefield v. State, 363 S.W.3d 591, 592–93 (Tex.Crim.App.2012). This statement is true with regard to the deficient-performance prong of the inquiry when counsel's reasons for failing to do something do not appear in the record. Id. at 593.To overcome the presumption of reasonable professional assistance, "any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." Salinas, 163 S.W.3d at 740.

The Juvenile Justice Code provides, in relevant part, that:

a disposition based on a finding that the child engaged in delinquent conduct that violates a penal law of this state or the United States of the grade of felony may be modified so as to commit the child to the Texas Youth Commission [FN5] if the court after a hearing to modify disposition finds by a preponderance of the evidence that the child violated a reasonable and lawful order of the court.

FN5. Now known as the Texas Juvenile Justice Department. TEX. FAM.CODE ANN. § 54.04(f).

X.T.S.W.'s grandmother, his guardian, testified at the disposition hearing that X.T.S.W. "started acting out" while in the fourth grade and began seeing a therapist. When he was in fifth grade, he was prescribed Concerta, a medication used to treat, among other things, attention-deficit hyperactivity disorder ("ADHD"). Because the Concerta "caused him to act out more for some reason," he was instead prescribed Strattera, a similar drug, but that medication "kept him asleep all the time and dozing in school." When he was in the sixth grade, he saw a new doctor who diagnosed him with ADHD and put him back on Concerta.

In 2011, when X.T.S.W. was fourteen years old, he was examined by two psychologists who diagnosed him with bipolar disorder. A psychiatrist, Dr. Butera, prescribed Abilify, an anti-depressant, and later increased the dosage from two milligrams to five milligrams daily. Dr. Butera also prescribed sympatholytic medications Intuniv and Clonidine. X.T.S.W.'s grandmother testified that the drugs prescribed by Dr. Butera are "causing [X.T.S.W.] to calm down and think before he reacts." X.T.S.W.'s grandfather testified that the new medications have made him "calmer." X.T.S.W.'s probation officer testified that, since he started taking the new medications, "he's not as explosive or he hasn't been in 24–hour detention as much as he used to be."

On appeal, X.T.S.W. faults his trial counsel for failing to call Dr. Butera to testify regarding: "how mental illnesses can be misdiagnosed for years"; "how some patients respond to certain medications and some respond to others"; "how dosages have to be monitored and changed to reach the right therapeutic levels"; "how the change of Abilify from 2 milligrams to 5 milligrams might [a]ffect [X.T.S.W.]'s behavior and allow him to control his moods at home so that he could be supervised by his grandparents"; and whether the new dosage "would allow him to control his mood swings and function normally in society." X.T.S.W. claims that, without Dr. Butera's testimony, the trial court "had no information from an expert about [X.T.S.W.]'s mental illness, his course of treatment and his future prognosis with the recent change in dosage." See Mallet v. State, 9 S.W.3d 856 (Tex.App.-Fort Worth 2000, no pet.)("An attorney is ineffective if the failure to seek out and interview potential witnesses precludes the accused from advancing a viable defense.").

We disagree that the record establishes trial counsel's ineffectiveness. Trial counsel "should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." Menefield, 363 S.W.3d at 593. If trial counsel is not given that opportunity, then the appellate court should not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it."Id. Here, there is nothing in the record indicating why X.T.S.W.'s trial counsel did not subpoena Dr. Butera to appear at trial. Moreover, the trial court heard several lay witnesses testify regarding X.T.S.W.'s history of mental illness, the various medications he has been prescribed, and the relative effects of those medications on his behavior. In particular, the trial court heard unanimous testimony from X.T.S.W.'s grandparents and his probation officer that X.T.S.W.'s behavior improved at least slightly after starting the regimen prescribed by Dr. Butera. In light of this fact, we cannot conclude that counsel's failure to subpoena Dr. Butera to testify at the disposition hearing was "so outrageous that no competent attorney would have engaged in it." See id. Under these circumstances, we conclude that X.T.S.W. has not met his burden to overcome the "strong presumption" that his counsel's conduct was reasonable.

Conclusion: We affirm the judgment of the trial court.

CONFESSIONS

FAILURE TO ADEQUATELY NOTIFY THE TRIAL COURT OF SPECIFIC OBJECTION REGARDING JUVENILE'S STATEMENT DOES NOT PRESERVE ERROR.

¶ 13-5-12. **In the Matter of A.A.M.**, No. 08-12-00185-CV, __S.W.3d __, 2013 WL 5823042 (Tex.App.—El Paso, 10/30/13).

Facts: On March 7, 2012, the El Paso County Attorney's Office filed a petition based on delinquent conduct alleging that Appellant committed the offense of assault on December 15, 2011. At the adjudication hearing, Paula Lerma, a teacher at Paso Del Norte School, which Appellant attended, testified that she broke up a fight after school on December 15, 2011. According to Lerma, she was alerted to the fight by a student. Lerma quickly went outside and observed Appellant and another student punching and kicking the victim. Lerma told the boys to stop it, they complied, and she escorted Appellant and the other boy to the office of the assistant principal.

Yvonne Vallejo, an assistant principal at Paso Del Norte, testified that she had Appellant write a statement while he was in her office on the day of the fight. Vallejo obtained a written statement from Appellant for discipline purposes. Vallejo stated that she did not tell Appellant what to write in his statement. Appellant was not promised anything for writing a statement and he was not threatened in any way. After the State moved to admit Appellant's written statement into evidence Appellant's counsel objected and took Vallejo on voir dire examination.

On voir dire, Vallejo testified that she had never had a student refuse to write a statement. She explained that if a student chose not to write a statement, the student would be free to return to class. However, Vallejo would still be able to take administrative action based on her investigation without the student's written statement. Vallejo did not recall Appellant stating that he did not want to write his statement because she gave him the paper and he wrote a statement. Vallejo also testified that while Appellant was in her office, Appellant was not scared of her and he was not denied access to the restroom or water. When Appellant made his statement there was no police officer or school security officer present in the room. Vallejo was the only person present at that time. Vallejo also obtained statements from the other two boys involved in the incident. At the conclusion of Vallejo's testimony, the State again moved for the admission of Appellant's written statement. At that point, Appellant's attorney stated that he had no objection and the statement was admitted into evidence.

Appellant testified at the adjudication hearing and admitted that he threw the victim to the ground and hit the victim. Appellant denied that he kicked the victim. In regard to his written statement, Appellant testified that he did not want to write the statement, but stated that he felt pressured to do so. According to Appellant, when he stopped writing, Vallejo told him to keep writing what he had done. Appellant stated that Vallejo never told him that he could not leave Vallejo's office until he finished his statement. Vallejo did not threaten him and no police or school security officers were present in the room when he wrote the statement.

After the adjudication hearing, the juvenile court referee found that Appellant had engaged in delinquent conduct and the referee set the case for a disposition hearing. Following the disposition hearing, Appellant was placed on probation until his eighteenth birthday. This appeal followed.

In a sole issue on appeal, Appellant asserts that the juvenile court referee erred in admitting Appellant's written statement in violation of section 51.095 of the Texas Family Code. See TEX. FAM.CODE ANN. § 51.095 (West 2008). The State responds that Appellant failed to preserve error for review.

Held: Affirmed

Opinion: To preserve a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion that stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the court aware of the complaint, unless the specific grounds were apparent from the context. TEX.R.APP. P. 33.1; In re E.M.R., 55 S.W.3d 712, 716 (Tex.App.-Corpus Christi 2001, no pet.). Additionally, to preserve error for review a defendant must obtain an adverse ruling on his objection. Ramirez v. State, 815 S.W.2d 636, 643 (Tex.Crim.App.1991).

In this case, Appellant did not make a specific objection. Rather, when the State moved to admit Appellant's written statement, Appellant made a general objection and then requested to take Vallejo on voir dire. At the conclusion of Vallejo's voir dire examination, Appellant did not request a ruling on his prior objection and that the State moved again to admit the written statement as evidence. When the juvenile court referee inquired if there were any other objections, Appellant said, "[n]o objection." The record reflects that Appellant never objected or moved to suppress the written statement based on section 51.095 of the Texas Family Code. See TEX. FAM.CODE ANN. § 51.095 (West 2008).

On appeal, Appellant argues that his attorney should have continued to object to the written statement being introduced into evidence because it was taken in violation of Family Code section 51 .095. Appellant further contends that an error normally waived for failure to object may still be argued on appeal if it was fundamental and so egregious it created such harm that Appellant did not receive a fair and impartial trial. See Almanza v. State, 686 S.W.2d 157, 171 (Tex.Crim.App.1985). However, Appellant provides no further argument or evidence that fundamental error occurred in this case or that he suffered egregious harm. Because Appellant did not adequately notify the trial court of his specific complaint, we conclude that he failed to preserve error. See TEX.R.APP. P. 33.1; E.M.R., 55 S.W.3d at 716 (holding the appellant waived complaint that statement should have been suppressed because it was taken in violation of section 52.02(b) of the Texas Family Code because appellant failed to adequately notify trial court of his specific complaint). Similarly, because Appellant failed to obtain an adverse ruling on his general objection, Appellant has also waived error. Ramirez, 815 S.W.2d at 643 (error is waived if it is not clear from the record that the trial court made an adverse ruling on the defendant's objection).

Furthermore, we note that other witness testimony including Appellant's at the hearing corroborated the facts set forth in Appellant's written statement. Both the victim and Lerma testified without objection that Appellant punched and kicked the victim. Similarly, Vallejo testified that Appellant admitted to grabbing the victim and that Appellant had explained that when the victim fell on the floor, Appellant kicked and punched the victim. While Appellant denied kicking the victim, he testified that he threw the victim to the ground and intentionally made a fist and hit the victim on the arm. Appellant explained that he had intended to scare the victim because the victim had pushed him in class. Therefore, even if the juvenile court referee erred in admitting Appellant's written statement, any error was rendered harmless as the same evidence was provided elsewhere during the adjudication hearing without objection. See Valle v. State, 109 S.W.3d 500, 509 (Tex.Crim.App.2003) (an error in the admission of evidence is cured when the same evidence comes in elsewhere without objection); Leday v. State, 983 S.W.2d 713, 718 (Tex.Crim.App.1998) (it is well settled that a trial court does not reversibly err by admitting evidence over objection where the same evidence is admitted elsewhere during trial without objection). Issue One is overruled.

Conclusion: The trial court's ruling is affirmed.

CRIMINAL PROCEEDINGS

COMMUNICATING IN A SEXUALLY EXPLICIT MANNER WITH A PERSON BELIEVED TO BE A MINOR WITH AN INTENT TO AROUSE OR GRATIFY SEXUAL DESIRE, FOUND TO BE UNCONSTITUTIONALLY OVERBROAD.

¶ 13-5-11. Ex Parte Christopher LO, No. PD-1560-12, 2013 WL 5807802 (Tex.Crim.App., 10/30/13).

Facts: Appellant was charged with the third degree felony of communicating in a sexually explicit manner with a person whom he believed to be a minor with an intent to arouse or gratify his sexual desire. He filed a pretrial application for a writ of habeas corpus alleging

that this specific subsection of the felony offense of online solicitation of a minor is facially unconstitutional for three distinct reasons: (1) it is overbroad and criminalizes a wide range of speech protected by the First Amendment; (2) it is vague because the term "sexually explicit" communications that "relate to" sexual conduct chills the exercise of free-speech by causing citizens to steer wide of the uncertain boundaries between permitted and prohibited speech; and (3) it violates the Dormant Commerce Clause. The trial judge denied relief, and the court of appeals affirmed. We granted discretionary review to determine, as a matter of first impression, whether Section 33.021(b)—the "sexually explicit communications" provision—is facially unconstitutional.

Because the court of appeals used the wrong standard of review for addressing constitutional challenges to a penal statute that restricts speech based on its content, it reached the wrong conclusion. Applying the constitutionally required presumption that "content-based regulations [of speech] are presumptively invalid" and subject to strict scrutiny, we conclude that Section 33.021(b) of the Texas Penal Code is overbroad because it prohibits a wide array of constitutionally protected speech and is not narrowly drawn to achieve only the legitimate objective of protecting children from sexual abuse.

Held: Reversed and Remanded

Opinion: Whether a statute is facially constitutional is a question of law that we review de novo. When the constitutionality of a statute is attacked, we usually begin with the presumption that the statute is valid and that the legislature has not acted unreasonably or arbitrarily. The burden normally rests upon the person challenging the statute to establish its unconstitutionality. However, when the government seeks to restrict and punish speech based on its content, the usual presumption of constitutionality is reversed. Content-based regulations (those laws that distinguish favored from disfavored speech based on the ideas expressed) are presumptively invalid, and the government bears the burden to rebut that presumption. The Supreme Court applies the "most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."

To satisfy strict scrutiny, a law that regulates speech must be (1) necessary to serve a (2) compelling state interest and (3) narrowly drawn. A law is narrowly drawn if it employs the least restrictive means to achieve its goal and if there is a close nexus between the government's compelling interest and the restriction. If a less restrictive means of meeting the compelling interest could be at least as effective in achieving the legitimate purpose that the statute was enacted to serve, then the law in question does not satisfy strict scrutiny. Furthermore, when the content of speech is the crime, scrutiny is strict because, "as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

In this case, the court of appeals mistakenly applied the usual standard of review, including the presumption of the statute's validity, instead of the presumption-of-invalidity standard of review for First Amendment, content-based statutes.

First, we examine what the statute prohibits and what is its expressed legislative purpose.

B. Section 33.021 of the Texas Penal Code

1. Section 33.021(c): Solicitation of a Minor.

Section 33.021 of the Texas Penal Code is titled "Online Solicitation of a Minor." It includes subsection (c)—a provision that prohibits and punishes an actor who uses electronic communications to "solicit" a minor, "to meet another person, including the actor, with the intent that the minor will engage in" certain sexual behavior. Such solicitation statutes exist in virtually all states and have been routinely upheld as constitutional because "offers to engage in illegal transactions [such as sexual assault of a minor] are categorically excluded from First Amendment protection." Thus, it is the conduct of requesting a minor to engage in illegal sexual acts that is the gravamen of the offense. The First Court of Appeals previously upheld the constitutionality of the Texas online-solicitation-of-minors statute. That specific provision is not at issue in this case, but it provides an excellent contrast to the provision that is at issue.

2. Section 33.021(b): Sexually Explicit Communications.

Article 33.021 contains a separate, very different, subsection (b), that prohibits and punishes speech based on its content. That subsection prohibits a person from communicating online in a "sexually explicit" manner with a minor if the person has the intent to arouse and gratify anyone's sexual desire. According to the statute, " '[s]exually explicit' means any communication, language, or material, including a photographic or video image, that relates to or describes sexual conduct." The statute bars explicit descriptions of sexual acts, but it also bars any electronic communication or distribution of material that "relates to" sexual conduct. That bar would encompass many modern movies, television shows, and "young adult" books, as well as outright obscenity, material harmful to a minor, and child pornography.

3. The Legislative Purpose of Section 33.021.

The online-solicitation statute was enacted in 2005. As the State notes, the legislative purpose of that provision was to "allow for the filing of charges against individuals who engage in conversations over the Internet with the intent of meeting the child for sexual

activity before any physical contact takes place." It is directed against those who "engage in conversations over the Internet with the intent of meeting a minor for sexual activities." But subsection (c), read in conjunction with subsection (d), covers that "luring" scenario. Subsection (b) punishes, as a third-degree felony, salacious speech over the internet (but not "dirty talk" spoken face-to-face) and the distribution of sexually explicit materials over the internet (but not the distribution of those same materials hand-to-hand) to a minor as long as the actor has the intent to arouse or gratify anyone's sexual desires. It does not require that the actor ever have any intent to meet the minor for any reason. We turn now to the First Amendment.

II.

A. The First Amendment Overbreadth Doctrine

According to the First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a "substantial" amount of protected speech "judged in relation to the statute's plainly legitimate sweep." The State may not justify restrictions on constitutionally protected speech on the basis that such restrictions are necessary to effectively suppress constitutionally unprotected speech, such as obscenity, child pornography, or the solicitation of minors. "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." This rule reflects the judgment that "[t]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted[.]"

Thus, in Ashcroft v. Free Speech Coalition, the Supreme Court rejected the government's argument that a statute criminalizing the distribution of constitutionally protected "virtual" child pornography was necessary to further the state's interest in prosecuting the dissemination of constitutionally unprotected child pornography that used "real" children. The government had argued that "the possibility of producing images by using computer imaging makes it very difficult for [the government] to prosecute those who produce pornography using real children." Thus, according to the government, the protected speech (virtual child pornography) could be banned along with the unprotected speech (real child pornography). The Supreme Court rejected that notion entirely: "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." Free Speech Coalition tells us that a ban upon constitutionally protected speech may not be upheld on the theory that "law enforcement is hard," and the State may not punish speech simply because that speech increases the chance that "a pervert" might commit an illegal act "at some indefinite future time."

The State may regulate the content of constitutionally protected speech to promote a "compelling interest," such as the physical and psychological well-being of minors, if it chooses "the least restrictive means" to further that interest. But it is not enough that the governmental ends are compelling, the means to achieve those ends must be narrowly drawn to achieve only those ends

B. Section 33.021(b) Is Unconstitutionally Overbroad.

Although the State has a compelling interest in protecting children from sexual predators, this "explicit sexual communications" provision is not narrowly drawn to achieve that legitimate goal. Indeed, this subsection does not serve any compelling interest that is not already served by a separate, more narrowly drawn, statutory provision. This subsection covers obscene material, but obscene communications and materials are already proscribed by Sections 43.22 and 43.23. This subsection covers material harmful to a minor, but that material is already proscribed by Section 43.24. This subsection covers child pornography, but that material is already proscribed by Section 43.26. The only material that this subsection covers that is not already covered by another penal statute is otherwise constitutionally protected speech. "Sexual expression which is indecent but not obscene is protected by the First Amendment." Subsection (b) covers a whole cornucopia of "titillating talk" or "dirty talk." But it also includes sexually explicit literature such as "Lolita," "50 Shades of Grey," "Lady Chatterly's Lover," and Shakespeare's "Troilus and Cressida." It includes sexually explicit television shows, movies, and performances such as "The Tudors," "Rome," "Eyes Wide Shut," "Basic Instinct," Janet Jackson's "Wardrobe Malfunction" during the 2004 Super Bowl, and Miley Cyrus's "twerking" during the 2013 MTV Video Music Awards. It includes sexually explicit art such as "The Rape of the Sabine Women," "Venus De Milo," "the Naked Maja," or Japanese Shunga. Communications and materials that, in some manner, "relate to" sexual conduct comprise much of the art, literature, and entertainment of the world from the time of the Greek myths extolling Zeus's sexual prowess, through the ribald plays of the Renaissance, to today's Hollywood movies and cable TV shows.

In sum, everything that Section 33.021(b) prohibits and punishes is speech and is either already prohibited by other statutes (such as obscenity, distributing harmful material to minors, solicitation of a minor, or child pornography) or is constitutionally protected.

1. The State Has a Compelling Interest in Preventing Child Abuse, but Section 33.021(b) Is Not Narrowly Drawn.

"The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." There is no question that the State has a right-indeed a solemn duty-to protect young children from the harm that would be inflicted upon them by sexual predators. In upholding the constitutionality of Section 33.021(c)—the offense of online solicitation—the First Court of Appeals stated that "[t]he prevention of sexual exploitation and abuse of children addressed by the Texas online solicitation of a minor statute constitutes a government objective of surpassing importance." Indeed it does. The statute prohibits internet communications with a minor that solicit an illegal sex act.

Many states have enacted statutes aimed at preventing the dissemination of "harmful" materials to minors and solicitation of minors over the internet. Courts all across the United States have upheld these statutes. They share either of two characteristics: (1) the definition of the banned communication usually tracks the definition of obscenity as defined by the Supreme Court in Miller v. California; or (2) the statutes include a specific intent to commit an illegal sexual act, i.e., the actor intends to "solicit" or "lure" a minor to commit a sexual act. All of the cases cited by the State in its brief deal with such solicitation or dissemination statutes. None of them deal with non-obscene, non-solicitative, non-child pornographic, non-harmful-to-minors sexually explicit communications to minors.

Most states, like Texas, have also enacted a statute prohibiting the dissemination to children of material that is "harmful" to minors. These statutes, following the Supreme Court decision in Ginsberg v. New York, define "harmful" as "material defined to be obscene on the basis of its appeal to [minors] whether or not it would be obscene to adults." Such statutes do not invade "the area of freedom of expression constitutionally secured to minors," merely because the definition of obscenity is geared "to social realities by permitting the appeal of this type of material to be assessed in term[s] of the sexual interest" of minors. Although we have not directly addressed the issue, the First Court of Appeals upheld the constitutionality of Texas's statute prohibiting the sale of material harmful to minors in State v. Stone.

On the other hand, in Reno v. ACLU, the Supreme Court struck down as overbroad a portion of the federal Communications Decency Act that prohibited the "knowing" dissemination of "indecent" communications as well as "obscene" communications to children over the internet. As the court explained, "In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.' "Therefore, the communication of descriptions or other depictions of non-obscene sexual conduct that do not involve live performances or visual reproductions of live performances by children retain First Amendment protections.

Ginsberg and Reno are bookend cases: The Supreme Court upholds statutes prohibiting the dissemination of material that is defined as "obscene" for children, but it will strike down, as overbroad, statutes that prohibit the communication or dissemination of material that is merely "indecent" or "sexually explicit." New Mexico and Virginia enacted statutes that criminalized the dissemination of non-obscene but sexually explicit material to minors over the internet, but federal courts held those statutes unconstitutionally overbroad under Reno because they unconstitutionally burdened otherwise protected speech.

Looking at the present statute, the compelling interest of protecting children from sexual predators is well served by the solicitation-of-a-child prohibition in subsection (c). But subsection (b) does not serve that same compelling purpose. It may protect children from suspected sexual predators before they ever express any intent to commit illegal sexual acts, but it prohibits the dissemination of a vast array of constitutionally protected speech and materials. The State argues that this provision is intended to target "grooming" by predators who develop a relationship with their intended victim by befriending the child online, developing their trust, and then eventually engaging in sexually explicit conversations. We are unable to find anything in the 2005 legislative history to support an intent to criminalize "grooming" by titillating speech. The intent expressed in the bill analyses, the committee hearings, and the floor debate was that the crime of solicitation of a minor on the internet is complete at the time of the internet solicitation, rather than at some later time if and when the actor actually meets the child. Furthermore, the Supreme Court has rejected the notion that allowing the dissemination of "virtual" child pornography would "whet the appetites of pedophiles," and therefore could be banned. We must do the same here.

But even if the Legislature did have an intent to prohibit "grooming" in subsection (b), the culpable mental state prescribed in that provision—"intent to arouse or gratify the sexual desire of any person"—is not narrowly drawn to achieve that end. A more narrowly drawn culpable mental state would be "with intent to induce the child to engage in conduct with the actor or another individual that would constitute a violation of §§ 21.11, 22.011, or 22.021." The State suggests that, without the current provision, perverts will be free to bombard our children with salacious emails and text messages, and parents and law enforcement would be unable to stop it. But as we have just observed, there are more narrow means of drawing a statute to target the phenomenon of "grooming."

Moreover, section 42.07 of the Penal Code, the harassment law, already prohibits and punishes an electronic communication that "makes a comment, request, suggestion, or proposal that is obscene." Or, if the repeated emails or text messages are not obscene, but they are "reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend" the child, the sender may be prosecuted under Section 42.07(a)(7).64

In sum, we conclude that the statutory provision before us is not narrowly drawn to effectuate a compelling state interest because there are narrower means of achieving the State interests advanced here, at least some of which are already covered by other statutes prohibiting solicitation, obscenity, harassment, or the distribution of harmful material to minors.

2. The State's Arguments.
The State argues that the Texas "sexually explicit communications" provision is narrowly drawn because the statute reaches only "sexually explicit materials" and the statute requires that the actor communicate those materials with an intent to arouse or gratify someone's sexual desires. Neither of those arguments saves the statute from being unconstitutionally overbroad.

First, the State argues that appellant "has failed to demonstrate how intentional conversations, sexually explicit in nature, with minors constitute protected speech." That is, of course, exactly backwards. Statutes that regulate the content of speech—as this statute most assuredly does—are presumed to be invalid, and it is the State, not appellant, that must establish its validity. The State has not cited a single case from any jurisdiction that has held that sexually explicit speech that is not obscene or "harmful" to minors is outside the protection of the First Amendment as long as the actor has an intent to arouse or gratify sexual desire. And, as noted above, we are unable to find any such case or other state statute. The Supreme Court decisions in Reno, Ashcroft II, and Free Speech Coalition (none of which did the State discuss or distinguish) appear to contradict the State's position.

Second, the State claims that the "explicit sexual communications" law is not overbroad because it "is specifically tailored to battle the widespread use of the Internet and technology as a tool for adults who prey on children, with the specific intent to arouse or gratify a sexual desire." It argues that this law is narrowly tailored by this scienter requirement. But the First Amendment protects thoughts just as it protects speech. As the Supreme Court warned,

The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

A man's thoughts are his own; he may sit in his armchair and think salacious thoughts, murderous thoughts, discriminatory thoughts, whatever thoughts he chooses, free from the "thought police." It is only when the man gets out of his armchair and acts upon his thoughts that the law may intervene. To protect the right of citizens to think freely and to protect speech for its own sake, the Supreme Court's cases "draw vital distinctions between ... ideas and conduct." Section 33.021(b) prohibits constitutionally protected speech when that speech is coupled with constitutionally protected thought.

The State has a compelling need to protect children from sexual predators, but this statute is not narrowly drawn to achieve only that legitimate goal of prosecuting "sexual predators who attempt to solicit a minor, or a police officer posing as a minor, for unlawful activity when the individual does not show up for the meeting." This particular provision does not speak to an actor soliciting a child, meeting a child, intending to meet a child, or any other predatory conduct. Indeed, it would apply to a Texas defendant who has "titillating talk" with a child in Outer Mongolia or a Mongolian who has salacious communications with a child in Dallas. Instead, this law prohibits all internet communications relating to or describing explicit sexual material by an adult to a minor if that adult speaks with the intent to arouse or gratify sexual desire. But, consistent with the First Amendment, it is conduct designed to induce a minor to commit an illegal sex act with titillating talk that may be proscribed, not the titillating talk itself.

The State suggests that the statute prohibits only one-on-one communications—i.e., the sexual predator who is "grooming" a child with "titillating talk." But the statute is not limited to one-on-one communications; instead it would apply to one who communicates via the internet with one, ten, or a hundred minors, perhaps sending them salacious selections from "Lolita" with the intent to tickle their fancy. Furthermore, it would be anomalous to think that a person who makes "titillating talk" to one minor over the internet may be subject to felony prosecution, but that same person who makes "titillating talk" to two or more minors in a chat room or through a mass email is not subject to criminal prosecution. As the Tenth Circuit noted in ACLU v. Johnson, such an interpretation "would lead to the absurd result that no violation of the statute would occur if someone sent a message to two minors, or a chat room full of minors, or a minor and an adult."

Conclusion: For the above reasons, we hold that the court of appeals erred in applying an incorrect standard of review and in upholding the constitutionality of Section 33.021(b). We reverse the decision of that court and remand the case to the trial court to dismiss the indictment.

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THE CONTINUOUS ACT OF FLEEING FROM AN OFFICER, EVEN WHERE MULTIPLE OFFICERS ARE IN PURSUIT, CONSTITUTES A SINGLE CHARGE OF "EVADING ARREST."

¶ 13-5-9. **In the Matter of D.X.S.**, MEMORANDUM, No. 13-12-00446-CV, 2013 WL 5522722 (Tex.App.—Corpus Christi-Edinburg, 10/3/13).

Facts: Appellant's mother called 911 requesting police assistance, stating "[M]y 14–year–old son which [sic] is bipolar is out of control." Two peace officers responded, Officer Brian Hamlin and Officer Barry Hope. Officers Hamlin and Hope repeatedly attempted to convince appellant to "tell his side of the story" and to move into the living room, away from the many potential weapons in the kitchen. As the struggle intensified, appellant began to resist and broke free of the officers, leading them on a lengthy pursuit that culminated with the necessity of five officers working together to hand cuff appellant.

Appellant was charged with one count of assault against a public servant, a third-degree felony, two counts of resisting arrest, a class A misdemeanor, and two counts of evading arrest, a class A misdemeanor. See TEX. PENAL CODE ANN. §§ 22.01(b)(1), 38.03(a), 38.04(b) (West 2011). Appellant requested a jury trial and the case was submitted to the jury on five special issues. Specifically, for each count, the jury was asked whether it found appellant guilty of delinquent conduct because the evidence showed beyond a reasonable doubt that he committed the alleged offense. After the jury found appellant delinquent on each count, the trial court placed him on probation.

By his second issue, appellant contends that he could not be adjudicated for two acts of evading arrest or detention. Specifically, by special issue two, the jury was asked whether appellant evaded arrest from Officer Hope and by special issue three, the jury was asked whether appellant evaded arrest from Officer Hamlin. The record is clear that though both of these peace officers pursued appellant, the incident involved a single pursuit and arrest.

Adjudications of delinquency in juvenile cases are based on the criminal standard of proof. See TEX. FAM.CODE ANN. § 54.03(f) (West Supp.2012). In evaluating appellant's argument, we apply criminal law. See In re R.S.C., 940 S.W.2d 750, 751–52 (Tex.App.-El Paso 1997, no pet.) (stating delinquency proceedings are quasi-criminal in nature and that juveniles are entitled to many of the constitutional protections that are afforded to adult criminal defendants).

Held: Affirmed as Modified

Memorandum Opinion: The Fifth Amendment provides that "[n]o person shall be ... subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. "The United States Supreme Court has concluded that the Fifth Amendment offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense ." Ex parte Cavazos, 203 S.W.3d 333, 336 (Tex.Crim.App.2006) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Lopez v. State, 108 S.W.3d 293, 295–96 (Tex.Crim.App.2003)). At issue here is whether appellant received multiple punishments for the same offense.

Generally, a second prosecution is permitted when "each offense requires proof of an element that the other offense does not." Watson v. State, 900 S.W.2d 60, 62 (Tex.Crim.App.1995) (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)). The Blockburger test is not applicable when, as here, we are addressing multiple violations of a single statutory provision. Vineyard v. State, 958 S.W.2d 834, 837 (Tex.Crim.App.1998) (citing Ex Parte Rathmell, 717 S.W.2d 33, 35 (Tex.Crim.App.1986)).

Under these circumstances, we apply a different analysis. When a defendant's conduct allegedly violates the same statute multiple times, we must determine whether the conduct constitutes more than one offense under the statute. See Ex Parte Cavazos, 203 S.W.3d at 336. This determination is necessary because, although our state courts are bound by United States Supreme Court decisions interpreting the scope of double jeopardy, the determination of what constitutes an offense is largely a matter of state law. Iglehart v. State, 837 S.W.2d 122, 127 (Tex.Crim.App.1992) (en banc), disapproved on other grounds, Bailey v. State, 87 S.W.3d 122, 128 (Tex.Crim.App.2002). If we determine that a defendant's conduct comprises but a single offense, "our inquiry is ended, as a successive prosecution for the same offense after [defendant's] earlier conviction would be a prima facie violation of the double jeopardy clause." Id.

Whether a defendant's conduct constitutes one or more offenses under a statute depends on the legislature's intent and not on the principle of double jeopardy. See Ex parte Hawkins, 6 S.W.3d 554, 556 (Tex.Crim.App.1999) (en banc); Iglehart, 837 S.W.2d at 128. The legislature "defines whether offenses are the same ... by prescribing the 'allowable unit of

prosecution,' which is a 'distinguishable discrete act that is a separate violation of the statute.' " Ex Parte Hawkins, 6 S.W.3d at 556 (quoting Sanabria v. United States, 437 U.S. 54, 69–70 (1978)). When the statute is silent on the allowable unit of prosecution, we look to the gravamen of the offense. Jones v. State, 323 S.W.3d 885, 889 (Tex.Crim.App.2010).

The offense of "evading arrest" criminalizes obstruction of a lawful governmental operation. See TEX. PENAL CODE ANN. § 38.04. The gravamen of "evading arrest" is the evasion of an arrest, as opposed to evasion of a police officer. Rodriguez v. State, 799 S.W.2d 301, 302–03 (Tex.Crim.App.1990) (en banc); see also Alejos v. State, 555 S.W.2d 444, 449 (Tex.Crim.App.1977). Appellant fled his home, and officers pursued him until his ultimate capture. We conclude that appellant's continuous act of fleeing constitutes a single charge of "evading arrest" even though multiple officers were in pursuit of appellant. See Hobbs v. State, 175 S.W.3d 777, 780–81 (Tex.Crim.App.2005).

The question remaining is which counts of conviction should be deleted and which retained. "The Supreme Court has directed that when a defendant is convicted in a single criminal action of two offenses that are the 'same' for double jeopardy purposes, the remedy is to vacate one of the convictions." Landers v. State, 957 S.W.2d 558, 559 (Tex.Crim.App.1997), overruled on other grounds by Ex parte Cavazos, 203 S.W.3d at 338 (citing Ball v. United States, 470 U.S. 856, 864–65 (1985)). In making that determination, we retain the conviction for the "most serious" offense and set aside the other conviction. Ex parte Cavazos, 203 S.W.3d at 337; see also In the Matter of A.W.B., No. 07–08–0345–CV, 2010 WL 364250, at *2 (Tex.App.-Amarillo Feb. 2, 2010, no pet.). "[T]he 'most serious' offense is the offense of conviction for which the greatest sentence was assessed." Ex parte Cavazos, 203 S.W.3d at 338. When the offenses and punishments are identical, we may uphold the conviction for the first offense listed in the indictment and vacate the conviction for the second offense alleged. Lopez v. State, 80 S.W.3d 624, 629 (Tex.App.-Fort Worth 2002), aff'd on other grounds, 108 S.W.3d 293 (Tex.Crim.App.2003). Under Lopez, we may do so without performing a harm analysis.

Because the two offenses and punishments in this instance are identical, we will retain special issue number two, but vacate special issue number three. See id. We sustain appellant's second issue.

Conclusion: We vacate special issue three on double-jeopardy grounds. As modified, we affirm the trial court's delinquency order placing appellant on probation.

DEFENSE COUNSEL

WHILE IT MIGHT BE MORE APPROPRIATE, BECAUSE OF THE POSSIBILITY OF CONFLICT, TO APPOINT SOMEONE OTHER THAN THE CHILD'S ATTORNEY AS GUARDIAN AD LITEM, THE APPOINTMENT OF A CHILD'S ATTORNEY AS GUARDIAN AD LITEM IS STATUTORILY PERMITTED.

¶ 13-5-7. **In the Matter of C.A.G.**, No 08-12-00175-CV, 2013 WL 5429876,
(Tex.App.-El Paso, 9/27/13).

Facts: C.A.G. was charged with one count of criminal mischief and one count of unauthorized use of a motor vehicle. The trial court appointed Hank Chisolm to represent C.A.G. as both his defense attorney and guardian ad litem. At the adjudication hearing, C.A.G pled true to the charge of criminal mischief, informing the trial court that he was doing so knowingly and voluntarily. The trial court then found that C.A.G. had engaged in delinquent conduct and set the case for disposition at a later date. Before adjourning, the trial court informed C.A.G. that his mother—who was not present at the hearing—would be given notice to appear at the disposition hearing.

At the disposition hearing, the State presented evidence that the appropriate disposition for C.A.G. was his commitment to the custody of the Texas Juvenile Justice Department because his grandparents, with whom he had been placed, could not supervise him suitably. C.A .G.'s mother asked the trial court to give C.A.G. "a last chance," a sentiment echoed by both C.A.G. and Chisolm. The trial court was not swayed, however, and committed C.A.G. to the custody of the Texas Juvenile Justice Department.

After filing his notice of appeal, C.A.G. moved for a new trial on the basis, among others, that he "was denied the right to consult with his mother regarding [his] plea of true and the possible consequences" because "[t]he trial court proceeded with the plea of true [in his] mother's absence from the [disposition] hearing." The motion was overruled by operation of law.

In a single issue, C.A.G. contends that the trial court had a duty to postpone the adjudication hearing upon learning that his mother was not present in the courtroom because he had a right to consult his mother regarding the plea and its consequences.

Held: Affirmed

Opinion: Section 51.115 of the Texas Family Code requires all parents to attend the adjudication hearing. TEX.FAM.CODE ANN. § 51.115(a) (West 2008). This section also provides, however, that "[i]f a [parent] ...

fails to attend [the] hearing, the juvenile court may proceed with the hearing." Id. at § 51.115(c). As the State correctly points out, C.A.G. failed to object at the adjudication hearing that his mother was not present, waiting instead until after his disposition to complain. Moreover, although C.A.G. raised his complaint in a motion for new trial, there is nothing in the record showing he brought his motion to the trial court's attention. See TEX.R.APP.P. 21.6; Carranza v. State, 960 S.W.2d 76, 78–79 (Tex.Crim.App.1998) (complaint raised in motion for new trial not preserved unless motion is presented to trial court). Merely filing a motion for new trial is insufficient to show it was presented to the trial court. Carranza, 960 S.W.2d at 78. Accordingly, because C.A.G. did not object at trial to his mother's absence or present his motion for new trial to the trial court, we conclude he has failed to preserve his complaint for appellate review. See TEX.R.APP.P. 33.1(a)(stating that complaint must be made to trial court by timely request, objection, or motion as prerequisite to presenting complaint for appellate review); In re C.P.D., Nos. 2–03–132–CV and 2–03–133–CV, 2004 WL 1535218, (Tex.App.-Fort Worth July 8, 2004, no pet.)(mem.op.)(holding that juvenile waived complaint regarding his mother's absence during court proceedings by failing to object at trial to her absence); Carranza, 960 S.W.2d at 78–79.

Notwithstanding C.A.G.'s failure to preserve his complaint for appellate review, he maintains that his mother's absence necessitated the appointment of someone other than Chisolm as his guardian ad litem. C.A.G. concedes that Chisolm's appointment as his guardian ad litem was permissible pursuant to Section 51.11(c) of the Texas Family Code, but argues nevertheless that Chisolm's appointment "never made sense when one considers the potential for a conflict of interest especially in the situation where the parents of the child are not present." See TEX.FAM.CODE ANN. § 51.11(c)(West 2008)("An attorney for a child may also be his guardian ad litem."); Matter of J.E.H., 972 S.W.2d 928, 932 (Tex.App.-Beaumont 1998, pet. denied)(noting that "[w]hile it might be more appropriate, because of the possibility of conflict, to appoint someone other than the child's attorney as guardian ad litem," the appointment of a child's attorney as guardian ad litem was statutorily permitted). But the record here, as in Matter of J.E.H., is devoid of any evidence of conflict, potential or actual. See Matter of J.E.H., 972 S.W.2d at 932 ("There is no indication that the attorney ever advised the trial court of any conflict."). Indeed, there is evidence to the contrary. As was established above, Chisolm argued for the disposition sought by C.AG. and his mother: "a last chance." We overrule C.A.G.'s issue.

Conclusion: The trial court's judgment is affirmed.

DETERMINATE SENTENCE TRANSFER

WHILE APPELLANT RAISED VOIR DIRE, EVIDENTIARY, AND JURY CHARGE COMPLAINTS, THE TRIAL COURT DID NOT REVERSIBLY ERR IN DETERMINATE SENTENCE ADJUDICATION.

¶ 13-5-6. **In the Matter of C.H.**, No 02-11-00335-CV, --- S.W.3d ----, 2013 WL 5006695, (Tex.App.-Fort Worth, 9/12/13.

Facts: Eric Robinson (Robinson) got into a disagreement with his sister's boyfriend, Javontae Brown, outside Brown's home. Later that morning, Robinson and Brown spoke on the phone and agreed to meet up for a fist fight. Robinson waited at the agreed-upon site with his brother, Mercedes Smith, and his cousin, Dammion Armstead, but Brown did not show up. Shortly afterward, an incident involving a gun happened between Smith and Brown at another location.

Soon thereafter, Robinson, Armstead, Smith, and two other cousins of Robinson's met with Brown, Appellant, and others at the Green Fields, a park in the Como neighborhood of Fort Worth, to fight. When Robinson began walking toward the opposing group, another man in the group began shooting at Robinson. Smith began to shoot at that group, and then everyone returned to their respective cars and drove off, uninjured.

Smith's fiancee testified that about 1:30 or 2:00 p.m. that day, she saw Appellant, Brown, and another man unloading guns from the trunk of a black Monte Carlo and walking toward a dumpster near the Como community center. She called Smith and told him what she had seen. She then went to visit Smith in person, and they were together until about 3:30 p.m.

Sometime later that afternoon, Smith, Armstead, and Ashton Robinson (Ashton), another cousin, were driving past the Como community center in a Chevy Equinox SUV when they saw Brown and Appellant, armed, outside. Ashton saw Brown holding a handgun up to his chest and standing behind the dumpster. Ashton saw Appellant run toward the back of the property, grab an assault rifle, and run up the hill toward the sidewalk and street. Ashton testified that Appellant shot into the Equinox at his cousins and him repeatedly, killing Smith, but that Brown, although he carried a pistol, never fired a shot.

Armstead testified that he, Smith, and Ashton left their uncle's garage that afternoon and drove down Home Street. Armstead spotted Appellant standing near the dumpster. As they passed Appellant, Armstead could see that Appellant had "a long gun, like a rifle," with the barrel pointed up. Armstead also saw Brown standing by the dumpster, but he testified that he never saw a gun in Brown's hand during the entire incident. However, Armstead also admitted that he had told the police that Brown had a handgun, shot a

couple of times, and ran across the street. Armstead further testified that he had seen the revolver in Brown's hand. Armstead maintained, however, that he never saw Brown with a "long gun" or "big gun."

Smith, who was driving, held a gun in his hand, cocking it on top of the steering wheel as he drove in the vicinity of the community center and the neighboring convenience store. After Armstead told Smith that Appellant had a gun and to keep driving, Smith instead put the car in reverse, backed up to Appellant and Brown's location, and pointed his gun at Appellant. Armstead testified that Appellant and Brown could not see the gun but also admitted that he really did not know whether they could see it. He maintained that they could not have seen the gun before Smith backed up. Armstead testified that Smith tried to show his gun to Appellant and Brown but that they started shooting before he could get close enough. Armstead admitted that he had not told the police that Smith had backed the car up but insisted that he had told the police that Smith had a gun.

Detective Sarah Waters of the Fort Worth Police Department testified that Armstead told her that as they were turning the corner[, Smith] pulled the gun out and cocked it, so that aroused some concern. [Detective Waters] said, what did he do with the gun? And [Armstead] said he held it up and showed it to them to let them know he had a gun for protection. [Detective Waters] said, did he point it at them? Did he hold it out the window? And [Armstead's] response was no. If he had pointed at them, I figure he would have squoze (sic) one off, meaning he would have shot at them. All he did was hold it up....

Detective Waters further testified that Armstead had told her that "[Smith] held the gun up, just up inside the car, it was not pointed out, it was just held up inside the car, never pointed out the window, never pointed at anyone."

Armstead testified that Appellant and Smith exchanged angry words and that then Appellant began shooting. But Armstead also testified that he did not remember them exchanging words. Instead, Appellant just opened fire when Mercedes backed up; "gunfire was spoken." Smith was shot in the back of the head and died instantly. Armstead heard about six or seven rapidly fired rounds before returning fire. Appellant and Brown left the scene together.

The evidence conflicted regarding whether Appellant or Brown shot Smith. Smith's cousins testified that Appellant shot Smith. An eyewitness who was in the parking lot of the nearby convenience store testified that he heard repeated firing, "more than three or five" rounds, and that he saw the gunman "centered up in the middle of the street." The witness had seen the gunman before but did not know his name. The witness testified that the shooter was not in the courtroom (Appellant was in the courtroom). The witness also said that he saw Appellant get in the front seat of the same car that the shooter got in after the incident. The witness further testified that he never saw Appellant with a gun.

Within hours of the murder, the convenience store manager told the police that he was outside when the shooting occurred, that Appellant was shooting the rifle during the murder, and that he handed it to Brown during the gun battle. At trial, the manager testified that he heard shots from inside the store and went outside to find out what was happening. He testified that he saw Appellant and Brown "jump" in a car, with Brown carrying the rifle, and leave. The store manager testified that he did not see the shooting and that he had told the prosecutor that he was afraid to testify. He also testified without objection that he had heard "on the street" and told the police that Appellant had shot several times and that then Appellant and Brown had switched guns and continued shooting.

Homicide Detective Thomas Wayne Boetcher of the Fort Worth Police Department testified that the store manager had told him that he had seen Appellant shooting a rifle at "something down the street." Detective Boetcher also testified that the store manager told him that Appellant then gave the rifle to Brown, who also shot it. Detective Boetcher further testified that the store manager had not indicated that he was scared of retaliation.

Similarly, a female eyewitness, Felicia Houston, told police about a month after Smith's death that both Brown and Appellant were shooting. At trial, she testified that she could not remember whether Appellant had a gun but that she had seen Brown shoot a long gun repeatedly. She admitted that she had identified Appellant in a photo lineup and had told the police that "he was shooting, then ran and got in a car with [another man]." She also testified, however, that even in the photo lineup, it was Brown she associated with the "big gun."

Detective Waters testified that Houston had told her that she had seen Appellant shooting and that in the photo lineups, Houston had identified Appellant and Brown as shooters and Brown as the shooter of the "big gun."

Robinson testified that Houston was Brown's neighbor and had seen some of the events of his altercation with Brown that began that morning.

The jury also saw a black-and-white surveillance video from the convenience store taken at the time of the shooting. It partially captured the shooting.

Fifteen .30 shell casings from a .30 assault rifle were found at the scene. Four nine-millimeter casings were also found. The bullet that killed Smith was changed upon firing, and Victoria Lynn Kujala, Senior Forensic Scientist, Firearms, and Tool Mark Examiner at the Fort Worth Police Department Crime Laboratory, testified that she could not say with certainty that it matched the casings, but she also testified that it was consistent with a .30 caliber bullet and that it and a .30 caliber bullet recovered from the Chevy Equinox were fired from the same gun.

During voir dire, the State exercised peremptory challenges on the two black veniremembers in the strike zone, and Appellant raised a Batson2 challenge to both. As to one of the venire members struck, the State responded that the panel member had initially said that she could not sit in judgment of another individual and that although she later changed that answer, that alone was a cause for striking her. Additionally, the prosecutor stated that on her jury questionnaire, the veniremember had written that her mother had been arrested for possession of a controlled substance, and "[t]hat would indicate that she may hold that against the State, she's probably not going to be very happy with the State when her mother has been through this process as a Defendant." And also on the questionnaire, in ranking the purpose of the judicial system, "she was supposed to give a ranking to rehabilitation, deterrence, or punishment," but "[s]he wasn't able to fill out the form correctly, and also she checked, she put an "X" by deterrence." The State's attorney took that "to mean that she thinks that deterrence is the most important aspect of punishment in the criminal justice [system], and so that's a race-neutral reason why [he] wanted to strike her as well."

As for the other challenged venire member, the State's attorney pointed out that the jury questionnaire asked about unpleasant experiences with the police, and contended, "She said her daughter was arrested for speeding and tickets and nonpayment, so the race-neutral reason that I struck her was because she's going to hold that against the State." Additionally, "on question number 24, she ranked deterrence as the number one goal of the criminal justice system or the punishment, and that's another race-neutral reason why she was struck."

The trial court implicitly overruled Appellant's Batson challenges. Appellant offered no evidence to rebut the State's explanations for the strikes. When he tried to have the jury questionnaires made part of the appellate record about six months after the trial ended, he learned that they had apparently been destroyed after trial.

More than three months before trial started, the State filed a notice of potential Brady material concerning a conversation that Detective Waters had with the cellmate of co-defendant Brown. The notice states that Detective Waters had informed the State "that a fellow inmate of [Brown] was saying that [Brown] claimed to have been involved in a murder and that he was going to blame or 'pin' responsibility for the crime on the '16 yr old' who also participated in the murder." The notice further states that the State "learned a few days later that the fellow inmate was possibly a person named Eric Jaubert." The notice also states that Detective Waters had said that she was going to investigate this matter.

When Detective Waters testified at trial, Appellant asked her on cross-examination if she had spoken with Jaubert. The State objected on relevance grounds. After an off-the-record discussion, the trial court allowed Appellant to make an offer of proof outside the presence of the jury. Detective Waters acknowledged when asked that Jaubert had made a "vague reference" to a plan by Brown to "pin" the shooting on Appellant. She stated that the information Jaubert gave the police was "somewhat credible, but sketchy" in that it was "very minimal." The State objected to testimony about Jaubert's statements, and the trial court sustained the objection.

The trial court's jury charge included self-defense in the abstract portion but did not include self-defense in the application paragraph. The jury charge included both abstract and application paragraphs on the law of parties.

Held: Affirmed

Opinion: In his first three issues, Appellant complains about the destruction of the jury questionnaires. In his first issue, he contends that the rules of appellate procedure require that he receive a new trial because a significant exhibit or portion of the record has been lost or destroyed.5 Jury questionnaires are not included in the list of items required by rule 34.6 of the rules of appellate procedure to be included in the appellate record. Additionally, the record does not show that Appellant took any timely step below to ensure that the jury questionnaires would be included in the trial record and therefore in the appellate record before us; that is, he did not offer the jury questionnaires into evidence. Further, even though, as the State candidly concedes, the prosecutor discussed the answers of the two veniremembers in the Batson hearing, neither Appellant nor the trial court referred to information from the questionnaires, and there is no indication that the parties and the trial court considered the questionnaires themselves to be a significant part of the Batson evidence. Consequently, even if the questionnaires had not been destroyed, because they were neither admitted nor treated as evidence in the Batson hearing, we would not consider them in this case.

Finally, even if we were to consider as Batson evidence that small portion of the questionnaires referred to by the prosecutor in the Batson hearing, Appellant's delay in requesting that the questionnaires be made part of the appellate record would foreclose any right he might have to a new trial based on a lost exhibit. Rule 34.6(b) of the appellate rules of procedure provides that "[a]t or before the time for perfecting the appeal, the appellant must request in writing that the official reporter prepare the reporter's record." While supplementation of the record is allowed, subsection (f) requires that an appellant seeking a new trial based on a lost or destroyed portion of the reporter's record must have first timely requested a reporter's record and "without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed."13 In Appellant's original request for a reporter's record, he asked that "a transcript of all proceedings therein, including all pretrial hearings, opening statements, trial testimony and hearings, and post-trial matters in question and answer form as a Reporter's Record be prepared." He did not ask for the jury questionnaires. Appellant did not specifically request that the record be supplemented with the jury questionnaires in the trial court until February 29, 2012, more than six months after the trial ended and after appeal was perfected. Thus, even if we were to treat that portion of the questionnaires referred to by the prosecutor in the Batson hearing as a Batson exhibit and therefore part of the trial court record, it would not be a timely requested exhibit. Appellant would therefore not be entitled to a new trial under the appellate rules based on the destruction of the jury questionnaires. We overrule Appellant's first issue.

In Appellant's second issue, he contends that the destruction of the juror questionnaires constituted a violation of due process under both the federal and Texas constitutions. Appellant does not contend that rule 34.6(f), which we held above does not entitle him to a new trial, is unconstitutional. He also did not raise these contentions below. Because the destruction of the documents happened after the trial court lost jurisdiction, however, we will address the issue in the interest of justice.

Although juvenile delinquency proceedings are civil in nature, the child is entitled to due process and fair treatment because the proceedings may result in the child being deprived of liberty. Even though a juvenile does not have a right to a jury under the federal constitution and may not have such a right under the state constitution, the legislature has given a right to jury trials to juveniles. Because Texas has chosen to grant that right, it must also act in accordance with due process.

Voir dire plays a key role in ensuring the right to an impartial jury by allowing the parties to identify and exclude undesirable jurors. "[C]ounsel must be diligent in eliciting pertinent information from prospective jurors during voir dire in an effort to uncover potential prejudice or bias, and counsel has an obligation to ask questions calculated to bring out information that might indicate a juror's inability to be impartial." Counsel must therefore "not rely on written questionnaires to supply" material data.

Appellant does not challenge appellate rule 34.6(f), the rule put in place by the judiciary for handling record disputes, and we have already held that under that rule, he is not entitled to a new trial. Appellant's lack of diligence during voir dire, especially during the Batson hearing, placed him outside that rule's protections. Because Appellant does not challenge the procedures in place and because it is not the procedures imposed by the State of Texas but Appellant's failure to timely avail himself of them that resulted in his predicament, we overrule his second issue.

In his third issue, Appellant contends that the destruction of the juror questionnaires violated the public's First Amendment right to access. Even if Appellant has standing to raise this challenge, which we do not hold, he does not challenge section 54.08 of the family code, which allows the trial court to eliminate or restrict the public's access to juvenile trials in some instances, nor does he point to any evidence from the record that this jury trial was closed to the public. Finally, again, the questionnaires are absent from the record not because of the trial court's actions but because Appellant did not timely ensure that the questionnaires were included in the record by offering them into evidence at the Batson hearing. We therefore overrule Appellant's third issue.

B. Batson Challenges

In his fourth issue, Appellant contends that the trial court erred by overruling his Batson challenges. The Batson hearing played out as follows:

[Appellant's Trial Counsel]: Prior to them coming in, we'd like racially-neutral reasons as to why 21 and 28 were stricken. We'll make a Batson challenge at this time.
THE COURT: All right.
[Prosecutor]: Judge, she has yet to make a prima facie showing, judge.
[Appellant's Trial Counsel]: There were—my client is African–American, Your Honor. The two available jurors of his race were within the strike zone. Both were stricken. The State exercised peremptory challenges on both of the African–American jurors within the strike range. We feel that [Appellant] is entitled to a jury of his peers.

THE COURT: What numbers were those?
[Appellant's Trial Counsel]: Twenty-one and twenty-eight.
THE COURT: All right. Do you wish to respond?
[Prosecutor]: Yeah, I do, Judge. As far as Juror Number 21, as far as the questionnaire, not to mention what she initially, during the voir dire in the questioning, she said she couldn't sit in judgment of another individual. Now, she later changed that, but that alone was the cause for me to strike her, a reason for me to strike her, other than her race. But there is more. On her jury questionnaire, in response to question 16, she says that her mother has been arrested for possession of controlled substance. That would indicate that she may hold that against the State, she's probably not going to be very happy with the State when her mother has been through this process as a Defendant.

In response to question number 20, she said her mother has been arrested for drug addiction, and then second, using me as two-in-two, K–2. I don't know what that means, but it indicates she couldn't fill out the forms correctly. That's another thing, another race-neutral reason I struck her. And also, in response to question number four, rank the highest purpose of the judicial system, she couldn't—she was supposed to give a ranking to rehabilitation, deterrence, or punishment. She wasn't able to fill out the form correctly, and also she checked, she put an "X" by deterrence, and I would take that to mean that she thinks that deterrence is the most important aspect of punishment in the criminal justice [system], and so that's a race-neutral reason why I wanted to strike her as well.

THE COURT: All right.
[Prosecutor]: As far as number 28, in response to her questionnaire, in response to question number 16: "Have you ever or someone—have you or someone close to you ever had an unpleasant experience with the police"? If yes, please describe, and she says yes, so she's had an unfavorable or unpleasant experience with the police. She said her daughter was arrested for speeding and tickets and nonpayment, so the race-neutral reason that I struck her was because she's going to hold that against the State, and also, on question number 24, she ranked deterrence as the number one goal of the criminal justice system or the punishment, and that's another race-neutral reason why she was struck.
THE COURT: All right.
[Appellant's trial counsel]: Thank you, Your Honor.
THE COURT: All right. All right. We'll call in the panel and I'll seat this jury and we'll go to lunch.

As the Texas Court of Criminal Appeals has explained,
A Batson challenge to a peremptory strike consists of three steps. First, the opponent of the strike must establish a prima facie showing of racial discrimination. Second, the proponent of the strike must articulate a race-neutral explanation. Third, the trial court must decide whether the opponent has proved purposeful racial discrimination.

The trial court's ruling in the third step must be sustained on appeal unless it is clearly erroneous. Because the trial court's ruling requires an evaluation of the credibility and demeanor of prosecutors and venire members, and because this evaluation lies peculiarly within the trial court's province, we defer to the trial court in the absence of exceptional circumstances.28
Appellant did nothing in the trial court to satisfy his burden to show that the race-neutral explanations were a pretext for discrimination.29 He only thanked the trial court after the State offered race-neutral explanations for its peremptory challenges of black veniremembers. We note that it is at this point—voir dire—that Appellant potentially could have effectively and timely relied on the contents of the jury questionnaires to help satisfy his burden and ask that they be made part of the record, not more than six months after the trial ended. Because Appellant has not shown that the trial court's ruling was clearly erroneous, we overrule his fourth issue.

III. Evidentiary Issues
A. Brady Issue

In his fifth issue, Appellant contends that the State failed to turn over material evidence in violation of Brady. Appellant filed his Brady motion on April 7, 2011. At trial, he complained that he had never received the name of the cellmate. During his offer of proof, he appeared to concede that he had received the name, during his offer of proof, but he then reneged. Appellant now concedes that on April 25, 2011, about two and one-half weeks after he filed his Brady motion and more than three months before trial, he received the State's notice of potential Brady material and the name of the potential Brady witness. That notice provides that Brown's fellow inmate, possibly named Jaubert, had reported that Brown was claiming to have been involved in a murder and planned to place the responsibility for the crime on the "16 yr old" who also participated in the murder. That notice also provides that Detective Waters intended to investigate further.

Detective Waters testified in Appellant's offer of proof that she had videotaped the Jaubert interview and had given the State a copy on April 20. The prosecutor stated on the record that he had "a real good inventory of all the disks [he had] been provided, and [he had] not been provided the interview with Eric Jaubert, either." Detective Waters apologized. The prosecutor then objected to the information "coming in," and the trial court sustained his objection and ordered that "[n]one of this is to be brought up in front of the jury." After the trial court ordered a recess, Appellant stated,

I'm sorry. I just—regarding my offer of proof, I believe I need to put how I would have handled things differently if I would have received this evidence. I would have subpoenaed Eric Jaubert, or, at a minimum, would have interviewed him myself. I object strenuously to not being allowed to inquire into Detective Waters about this matter.

Later, Appellant again requested that he be allowed "to ask this detective in front of this jury, isn't it true that you never provided anyone the name of Javontae Brown's cell mate?" The prosecutor again referred to the State's April 25, 2011 Brady notice, filed in the clerk's record and including a certificate of service that he had sent it to Appellant's counsel by mail, email, and/or fax.

Appellant contends on appeal that the State violated Brady by failing to disclose and to turn over to him the videotaped police interview with Jaubert. But Appellant never raised that complaint below. To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if they are not apparent from the context of the request, objection, or motion. If a party fails to do this, error is not preserved, and the complaint is waived. Further, the complaint on appeal must be the same as that presented in the trial court. An appellate court cannot reverse based on a complaint not raised in the trial court. Because Appellant's complaint on appeal differs from his complaint below and is untimely by being first raised on appeal, it is forfeited. Additionally, we note that Appellant did not request a continuance so that he might watch the video, and the video is not in the appellate record. Thus, even had he preserved his Brady claim, Appellant could not satisfy his burden of showing a reasonable probability that earlier disclosure of the video would have changed the outcome of the trial. We overrule Appellant's fifth issue.

B. Detective Waters's Testimony Concerning Jaubert's Interview

In his sixth issue, Appellant contends that the trial court abused its discretion by excluding Detective Waters's testimony that Jaubert had told her that Brown had stated that he was going to pin the murder on Appellant. As to the trial court's sustaining of the State's relevance objection, we agree with Appellant that evidence that Brown had allegedly admitted to shooting Smith was relevant. Yet, as Detective Waters pointed out in her excluded testimony, "He didn't say he was the only one shooting." Further, other evidence had already been admitted that Brown had shot Smith, and again, the jury charge contained a charge on the law of parties.

Appellant's contention that the exclusion violated his constitutional right to present a defense was not raised below and was therefore forfeited.36 In the interest of justice, however, we note that our sister court has addressed a very similar case. In Hidrogo v. State, Hidrogo had been convicted of capital murder for killing a man while burglarizing the man's home. Another man, Eddie, admitted his involvement in the burglaries. Hidrogo offered evidence that Brian, Eddie's brother, had confessed that he was involved with Eddie in the murder. But the evidence consisted of text messages ostensibly sent from a phone belonging to Ryleigh LeFlame to Hidrogo's niece. LeFlame's texts stated that Brian had told her "that he was there that day and he shot the dude." Hidrogo attempted to get the contents of the text messages admitted into evidence through various witnesses who had read them, but not through LeFlame. The Eastland Court of Appeals held,

First, we note that the courts ... recognized that a defendant has a fundamental right to present evidence of a defense as long as the evidence is relevant and is not excluded by an established rule of procedure or evidence designed to assure fairness and reliability. The Court in Chambers determined that the hearsay rule may not be applied mechanistically to defeat the ends of justice. The Court held that Chambers was denied a fair trial by the exclusion of hearsay that constituted a declaration against penal interest (though Mississippi had no hearsay exception for declarations against penal interest at that time) and bore persuasive assurances of trustworthiness. In the present case, the text messages were double hearsay, and the proposed testimony of Clark and others who read the messages bore no such assurance of trustworthiness.

Second, the application of the hearsay rule to the present case did not deny appellant the opportunity to present his defense. Had appellant sought to introduce Brian's out-of-court statements through LeFlame, the evidence would have been admissible under Tex.R. Evid. 803(24) as statements against interest. The trial court permitted Leonard Stockinger to testify that he was at LeFlame's house and heard Brian admit to being present when the victim was murdered. According to Stockinger, Brian said he was with Eddie and appellant at the time of the offense, but Brian did not say he shot the victim—only that he spit on the victim. However, there was no such hearsay exception available for the testimony of witnesses such as Clark and her mother because they did not hear Brian's out-of-court statements; they merely read LeFlame's text messages about Brian's statements and attempted to testify regarding the content of LeFlame's out-of-court statements. Appellant was not denied the ability to present a defense; he could have called LeFlame as a witness. We hold that the trial court did not abuse its discretion in excluding the hearsay testimony regarding the text messages.

Similarly, in the case before us, Appellant did not call Jaubert as a witness; he instead attempted to get Jaubert's evidence of Brown's alleged statements before the court through the testimony of Detective Waters even though she described Jaubert's information as "somewhat credible," "sketchy," "not enough to be fleshed out," "very minimal," and "vague innuendo" and described Jaubert as "very strange." Jaubert's information does not bear persuasive indicia of trustworthiness, its exclusion did not prevent Appellant from presenting a defense, and the trial court did not abuse its discretion by excluding it. We overrule Appellant's sixth issue.

IV. Jury Charge

In his seventh issue, Appellant contends that the trial court erred by omitting his claim of self-defense from the application paragraph in the jury charge. The abstract section of the jury charge provides,

A person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force.

The use of force against another is not justified in response to verbal provocation alone. The use of force against another is not justified if the person provoked the other's use or attempted use of unlawful force. The use of force against another is not justified if the person sought an explanation from or discussion with the other person while carrying an unlawful weapon.

A person is justified in using deadly force against another if he would be justified in using force against the other, and if a reasonable person in the actor's situation would not have retreated; and when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force.

"Reasonable belief" means a belief that would be held by an ordinary and prudent person in the same circumstances as the actor.

"Deadly force" means force that is intended or known by the actor to cause death or serious bodily injury, or in the manner of its use or intended use is capable of causing death or serious bodily.

The application paragraph does not mention or allude to self-defense at all. At trial, Appellant did not lodge an objection to the charge. As the Supreme Court of Texas recently explained,
The Family Code provides that in juvenile justice cases, (t)he requirements governing an appeal are as in civil cases generally. In civil cases, unobjected-to charge error is not reversible unless it is fundamental, which occurs only in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas. Fundamental error is reversible if it probably caused the rendition of an improper judgment (or) probably prevented the appellant from properly presenting the case to the court of appeals. But ... a juvenile proceeding is not purely a civil matter. It is quasi-criminal, and ... general rules requiring preservation in the trial court ... cannot be applied across the board in juvenile proceedings. In criminal cases, unobjected-to charge error is reversible if it was egregious and created such harm that his trial was not fair or impartial, considering essentially every aspect of the case. If, for example, [i]t is ... highly likely that the jury's verdicts ... were, in fact, unanimous, unobjected-to charge error is not reversible.

The Supreme Court of Texas chose not to decide whether the civil standard or Almanza applies to jury charge error in juvenile cases, noting that in the case before it, the application of either standard would not result in a reversal. We therefore follow several other intermediate courts in applying the Almanza standard of review for unpreserved jury charge error.

As the Texas Court of Criminal Appeals recently reaffirmed,
The trial judge is ultimately responsible for the accuracy of the jury charge and accompanying instructions.... The trial judge has the duty to instruct the jury on the law applicable to the case even if defense counsel fails to object to inclusions or exclusions in the charge. But Article 36.14 imposes no duty on a trial judge to instruct the jury sua sponte on unrequested defensive issues because an unrequested defensive issue is not the law applicable to the case. A defendant cannot complain on appeal about the trial judge's failure to include a defensive instruction that he did not preserve by request or objection: he has procedurally defaulted any such complaint.
However, if the trial judge does charge on a defensive issue (regardless of whether he does so sua sponte or upon a party's request), but fails to do so correctly, this is charge error subject to review under Almanza. If there was an objection, reversal is required if the accused suffered "some harm" from the error. If no proper objection was made at trial, a reversal is required only if the error caused "egregious harm."

In the case before us, the trial court sua sponte included the law of self-defense in the abstract portion of the charge. But the trial court failed to apply the abstract instruction to the facts of the case. "[H]aving undertaken on its own to charge the jury on this issue, the trial court in this case signaled that self-defense was the law applicable to the case."44 Therefore, the omission of the law of self-defense from the application portion of the charge is error.

Appellant contends that the omission of the law of self-defense from the application paragraph deprived him of a fair and impartial trial, causing him egregious harm. But as the Texas Court of Criminal Appeals reaffirmed in Vega, to determine whether a defendant suffered egregious harm under Almanza, we must consider the jury charge, the evidence, including the weight of probative evidence, contested issues, jury argument, and any other relevant information in the record.

The evidence shows that Smith and his group had already faced off an opposing group including Brown and Appellant at least once that day. The evidence also shows that Brown and Appellant appeared to be preparing for a gunfight around two hours before the shooting, as they were seen unloading weapons near the dumpster by the community center.

There is no direct evidence that Appellant or Brown saw Smith pointing a gun at them before he was killed with a bullet from an assault rifle. Armstead testified that Appellant and Brown could not see the gun but also admitted that he did not know whether they had seen it. He maintained that they could not have seen the gun before Smith backed the Equinox up and that Smith tried to show it to them but was killed before he could get close enough to demonstrate his own weapon.

Appellant did not call any witnesses, and in addition to self-defense law in the abstract portion, the jury charge included both abstract and application paragraphs on the law of parties.

Appellant's theory of the case was that he was an innocent bystander at the scene of Smith's murder and that he had been mistakenly identified as the shooter. Appellant's counsel explicitly told the jury during closing arguments that Appellant was not claiming self-defense:

[R]eally, if I were representing Javontae Brown, I would be arguing self-defense, but [the prosecutor] indicated—I expect they're going to argue self-defense. How could he be defending himself if he wasn't involved? Javontae Brown, probably a real good self-defense argument. [Appellant]? No. He wasn't involved.

As our sister court in Austin has explained,
Self-defense, like other chapter nine defenses, justifies conduct that would otherwise be criminal. In other words, the defendant must "admit" violating the statute under which he is being tried, then offer a statutory justification for his otherwise criminal conduct. Thus, a defendant is not entitled to a jury instruction on self-defense if, through his own testimony or the testimony of others, he claims that he did not perform the assaultive acts alleged, or that he did not have the requisite culpable mental state, or both.

The State explained the law of self-defense in its closing argument and argued that it was not applicable because:
We have absolutely no proof from any source that [Appellant] or Javontae Brown saw a gun in Mercedes[Smith's] hand. Dammion [Armstead] was vague about how that gun was handled. He also said that the window was partially up or partially down. We have no proof from any source that those two fellows [Appellant and Brown] saw that gun. None. We also know this: They had a rifle. Again, a rifle is used to hit targets at long-range, not for self-defense.
Did they provoke the fight? Well, the fight was going on all day long.
Did Mercedes Smith fire a gun? No. There is nothing in the ballistics, there is nothing in the chart at the scene of the crime that will support that Mercedes Smith fired a weapon, or, for that matter, that he even displayed a weapon that was seen by [Appellant] and Vontae [Brown], so I'll urge you to disregard self-defense, no matter how much they proclaim it.

Based on all the above, we hold that the trial court's omission of the law of self-defense from the application paragraph was harmless error. We overrule Appellant's seventh issue.

Conclusion: Having overruled Appellant's seven issues, we affirm the trial court's judgment.

DISPOSITION PROCEEDINGS

DENIAL OF PRETRIAL HABEAS CORPUS AFFIRMED FOR SEVENTEEN-YEAR-OLD CHARGED WITH CAPITAL MURDER, EVEN WHERE NO CONSTITUTIONAL SENTENCE FOR A CONVICTION OF SAID CHARGE EXISTED.

¶ 13-5-2. **Ex parte Jacob Ryan Evans**, --- S.W.3d ----, 2013 WL 4473872 (Tex.App.-Fort Worth, 8/22/13).

Facts: In the first count of a December 2012 three-count indictment, a grand jury charged appellant with committing capital murder in October 2012 by intentionally or knowingly killing Jami Evans and Mallory Evans in the same criminal transaction.FN1 The other two counts of the indictment charged appellant with murdering Jami and Mallory individually. The trial court appointed counsel to represent appellant.

FN1. See Tex. Penal Code Ann. § 19.02(b)(1) (West 2011), § 19.03(a)(7)(A) (West Supp.2012).

In January 2013, appellant filed an application for a writ of habeas corpus, alleging that his incarceration for the

capital murder count of the indictment was unconstitutional because he was seventeen years old upon allegedly committing the offense FN2 and because two decisions by the United States Supreme Court had established that "neither of the two statutorily authorized punishments for this offense [could] be applied to him."FN3Appellant contended that under such circumstances, his continued detention, "and the continued restraint of [his] liberty in order to compel [him] to answer to such charge ... [was] unlawful." Thus, appellant urged the trial court to "immediately discharge[ ]" him from any further restraint under the capital murder allegation. Appellant also argued that the trial court had violated his constitutional and statutory rights by refusing to set a bond.

FN2. Appellant attached his birth certificate to his application. The birth certificate establishes that appellant was born in May 1995.

FN3.See Miller v. Alabama, 132 S.Ct. 2455, 2463, 2469 (2012) (holding that mandatory life without the possibility of parole for defendants under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition of cruel and unusual punishment); Roper v. Simmons, 543 U.S. 551, 568, 578, 125 S.Ct. 1183, 1194, 1200 (2005) (holding that the imposition of the death penalty on offenders who committed a crime before turning eighteen years old is unconstitutional).

The trial court set a hearing on appellant's application. In responding to the application and in urging the trial court to deny relief on part of it, FN4 the State principally contended that appellant was making pretrial as-applied challenges to the constitutionality of the Texas capital murder sentencing statutes and that such challenges were not cognizable through an application for a writ of habeas corpus.FN5 The State noted that appellant had not challenged the constitutionality of the penal code provision that defined capital murder and asserted, in part,

FN4. The State did not contest appellant's request for the trial court to set a bond.

FN5. The State relied on a decision by the court of criminal appeals in which that court held that a pretrial habeas corpus application "can be used to bring a facial challenge to the constitutionality of the statute that defines the offense but may not be used to advance an 'as applied' challenge."Ex parte Ellis, 309 S.W.3d 71, 79 (Tex.Crim.App.2010) (citing Ex parte Weise, 55 S.W.3d 617, 620–21 (Tex.Crim.App.2001)).

The state's capital murder sentencing statutes are not keeping [appellant] in confinement or otherwise restraining his liberty. Rather, it is the fact he was indicted with an allegation of violating the capital murder statute which has caused the present "restraint" of his liberty. It is not until [appellant] is actually convicted of the offense of capital murder after a trial that it can be said those statutes are "restraining" [appellant's] liberty interests.
In summary, the State argued that appellant's challenges to the constitutionality of any sentence that he could receive under Texas's capital murder sentencing statutes could be properly resolved only in the event of, and subsequent to, his conviction.

Appellant replied to the State's response by reiterating that no Texas statute provided a constitutional punishment that could be applied to appellant in the event of his conviction. Although appellant recognized that as-applied constitutional challenges could not generally be litigated in pretrial habeas corpus applications, he contended that he was not bringing such a challenge because the unconstitutional application of the Texas capital murder sentencing statutes to him had already been clearly established by the Supreme Court's precedent, which, according to appellant, affected the trial court's power to proceed on the capital murder charge.

The trial court heard arguments from both parties at a brief hearing on the writ application. During the hearing, the State conceded that at the time of the hearing, there was no constitutional sentence for a seventeen-year-old person convicted of capital murder. The State explained, however, that a "lot of things could happen" regarding the sentencing statutes before the trial of the case, and the State specifically referred to a bill that was pending in the legislature that could "fix" the constitutional problem.

Held: Affirmed

Opinion: In his first point, appellant argues that the trial court erred by denying his primary requested relief—discharge from custody on the capital murder charge against him—on the ground that as a result of the holdings in Miller and in Roper, no constitutional punishment could be applied to him if he was convicted of that offense.

The sole purpose of an appeal from a trial court's habeas corpus ruling is to "do substantial justice to the parties," and in resolving such an appeal, we may "render whatever judgment ... the nature of the case require[s]."Tex.R.App. P. 31.2, 31.3; see Ex parte Idigbe, No. 02–12–00561–CR, 2013 WL 772891, at *5 (Tex.App.-Fort Worth Feb. 28, 2013, pet. ref'd) (mem. op., not designated for publication). We review the trial court's decision to deny habeas corpus relief for an abuse of discretion. Kniatt v. State, 206 S.W.3d 657, 664 (Tex.Crim.App.), cert. denied, 549 U.S. 1052 (2006). We will uphold the trial court's judgment as long as it is correct on any theory of law applicable to the case. Ex parte Murillo, 389 S.W.3d 922, 926 (Tex.App.-Houston [14th Dist.] 2013, no pet.); Ex parte Primrose, 950

S.W.2d 775, 778 (Tex. App .-Fort Worth 1997, pet. ref'd).

Because appellant was seventeen years old at the time that he allegedly committed capital murder, he cannot be tried as a juvenile. SeeTex. Fam.Code Ann. § 51.02(2)(A) (West Supp.2012), § 51.04(a) (West 2008). At all points from the date of appellant's alleged offense through the date of the submission of this appeal, two Texas statutes relating to sentencing of a capital felony offense provided that an adult (such as appellant) found guilty of such an offense could be punished only by mandatory imprisonment for life without parole or by death. See Act of May 29, 2009, 81st Leg., R.S., ch. 765, § 1, 2009 Tex. Gen. Laws 1930, amended by Act of July 11, 2013, 83rd Leg., 2d C.S., S.B. 2, § 1 (to be codified at Tex. Penal Code Ann. § 12.31); Act of May 28, 2005, 79th Leg., R.S., ch. 787, § 1, 2005 Tex. Gen. Laws 2705, amended by Act of July 11, 2013, 83rd Leg., 2d C.S., S.B. 2, § 2 (to be codified at Tex.Code Crim. Proc. Ann. art. 37.071). Under Miller and Roper, neither of these two punishments could be constitutionally applied to appellant.FN7See Miller, 132 S.Ct. at 2463, 2469; Roper, 543 U.S. at 568, 125 S.Ct. at 1194;Ex parte Ragston, Nos. 14–12–01127–CR, 14–12–01128–CR, 2013 WL 2489965, at *1–2 (Tex.App.-Houston [14th Dist.] June 11, 2013, pet. filed); Henry v. State, No. 05–11–00676–CR, 2012 WL 3631251, at *6 (Tex.App.-Dallas Aug. 24, 2012, no pet.)(mem. op., not designated for publication).

FN7. Furthermore, under Texas law, no person may “be punished by death for an offense committed while the person was younger than 18 years.”Tex. Penal Code Ann. § 8.07(c) (West 2011).

Recognizing the problem created in cases similar to appellant's case, the legislature has recently amended the capital murder sentencing statutes to provide that if a defendant commits capital murder before turning eighteen years old and is convicted of that offense, the defendant shall be punished for life, rather than life without the possibility of parole. See Act of July 11, 2013, 83rd Leg., 2d C.S., S.B. 2, §§ 1–2. The new sentencing statutes take effect immediately and expressly apply to a pending criminal action, to one currently on appeal, or to one commenced on or after the day of their enactment, regardless of whether the criminal action is based on an offense before that date. Id. §§ 3–4.

The legislature's action has removed Texas's capital murder sentencing statutes from the express holdings of Miller and Roper. See Miller, 132 S.Ct. at 2463, 2469 (prohibiting the imposition of mandatory life without the possibility of parole for offenders under eighteen years old but expressly leaving open a “sentencer's ability” to impose life without the possibility of parole after considering competing factors in in appropriate cases); Roper, 543 U.S. at 568, 125 S.Ct. at 1194. Thus, appellant's argument, which hinges on his contention that the explicit, specific holdings in Miller and Roper preclude any constitutional punishment that can be applied to him and that his restraint for capital murder is therefore illegal, cannot now succeed, if it ever could have.FN8

FN8. In the State's brief, which was filed before the legislature amended the sentencing statutes, it argued that the trial court had correctly denied relief because appellant had impermissibly brought an as-applied constitutional challenge in his writ application. We note that in a habeas corpus appeal in which the facts and legal issues were strikingly similar to the facts and issues involved in this appeal, one of our sister courts held, in accord with the State's argument here, that an applicant was not entitled to relief, reasoning in part,

[A] pretrial writ of habeas corpus may not be used to address an as-applied constitutional challenge to a statute....

Here, Ragston does not contend that he is making a facial challenge to the constitutionality of the capital-felony sentencing statute. Nor does he challenge the capital-murder statute under which he is charged. Ragston argues only that neither death nor life in prison without parole “may be applied” to him because he was under the age of 18 at the time of the offense. But this claim, even if successful, would not result in Ragston's immediate release because it is directed to the sentence to be imposed after conviction, not the validity of the present indictment. At this stage of the proceedings, Ragston merely stands accused of violating the penal laws. The constitutionality of the sentencing statute will become an issue only if Ragston is found guilty of the capital offense and unconstitutionally sentenced, at which time he may raise his complaint on direct appeal. Ragston, 2013 WL 2489965, at *1–3 (emphasis added) (citations omitted).

Apparently anticipating on appeal the amendment to the capital murder sentencing statutes that has now occurred, appellant also contends in his brief that such an amendment cannot be constitutionally applied to him because of the ex post facto clause in the United States Constitution. SeeU.S. Const. art. I, § 10 (stating that no state shall pass any ex post facto law). But appellant did not raise this argument in his application for a writ of habeas corpus that he filed in the trial court; FN9 thus, we will not consider it in this appeal. See State v. Romero, 962 S.W.2d 143, 144 (Tex.App.-Houston [1st Dist.] 1997, no pet.)(“We may not consider grounds not raised before the trial court.”); Ex parte Torres, 941 S.W.2d 219, 220 (Tex.App.-Corpus Christi 1996, pet. ref'd); Greenville v. State, 798 S.W.2d 361, 362–63 (Tex.App.-Beaumont 1990, no pet.); see also Ex parte Fuertes, No. 02–11–00536–CR, 2013 WL

362763, at *4–5 (Tex.App.-Fort Worth Jan. 31, 2013, no pet.)(mem. op., not designated for publication).FN10

FN9. Appellant did not raise an ex post facto argument in his written application for a writ of habeas corpus. In the hearing on his application, his counsel stated, "[I]f [the legislature passes a statute amending the capital murder sentencing statutes], they might as well go ahead and stamp ex post facto on the bottom of it because that's the second writ we're going to file." [Emphasis added.].

FN10. Also, two of our sister courts have held that an ex post facto argument is an as-applied constitutional challenge that cannot be raised in a pretrial application for a writ of habeas corpus but must be litigated in the trial court and reviewed on direct appeal. See Ex parte Howard, 191 S.W.3d 201, 203 (Tex.App.-San Antonio 2005, no pet.); Ex parte Woodall, 154 S.W.3d 698, 701 (Tex.App.-El Paso 2004, pet. ref'd).

Because the trial court's order denying habeas corpus relief may be sustained on a theory of law applicable to this case-the legislature's amendment of the capital murder sentencing statutes-we must affirm the trial court's order denying habeas relief. See Primrose, 950 S.W.2d at 778. We overrule appellant's first point.

Conclusion: Having overruled appellant's points, we affirm the trial court's order that set his bond at $750,000 and that denied the remainder of the relief that he sought in his application for a writ of habeas corpus.

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MANDATORY SENTENCE OF LIFE WITHOUT PAROLE VIOLATED EIGHTH AMENDMENT RIGHTS OF JUVENILE WHO WAS 15 YEARS OLD AT THE TIME OF THE CRIME.

¶ 13-5-3. **Turner v. State**, No. 01-11-00839-CR, --- S.W.3d ----, 2013 WL 4520897, Tex.App.-Hous. (1 Dist.), 8/27/13.

Facts: A jury convicted appellant Litrey Demond Turner of capital murder, and in accordance with the mandatory sentencing statute that was in effect at the time of sentencing, the trial court sentenced him to life in prison without the possibility of parole.1 In three issues, Turner challenges his sentence arguing that because he was only 15 years old at the time of the offense, his sentence is unconstitutional. In two additional issues, he challenges the legal sufficiency of the evidence to support a conviction for either capital murder or murder, arguing that there is no evidence that he intended to kill the complainant.

Held: Reversed and remanded for a new disposition hearing.

Opinion: In his first three issues, Turner challenges the sentence he received as unconstitutional and in violation of the Eighth Amendment's prohibition of cruel and unusual punishment. In his first issue, he argues that Miller v. Alabama, —— U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), applies retroactively to this case. Miller held that a mandatory sentence of life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishments." Id. at 2460. Accordingly, in his second issue, Turner argues that his mandatory sentence of life without parole violated his Eighth Amendment rights because he was 15 years old at the time of the crime. Turner's third issue argues that even if the possibility of parole had been permitted under the statute applicable at the time of his sentencing hearing, a mandatory life sentence would still be unconstitutional. Turner thus argues that the sentencing statute is unconstitutional as applied to him and that this court cannot amend his sentence and render judgment that his sentence be life with the possibility of parole. The State concedes error on Turner's first two issues. Specifically, "[t]he State concedes Miller applies to Turner's case, and Turner should be resentenced." We agree that Miller is controlling and that the sentencing statute is unconstitutional as applied to Turner. We therefore sustain Turner's first two issues.

Both Turner and the State pray for remand for a new sentencing hearing. Accordingly, we remand this case for a new sentencing hearing in accordance with Miller and state law as recently revised in response to Miller. See Act of May 28, 2005, 79th Leg ., R.S., ch. 787, § 1, sec. 12.31, 2005 Tex. Gen. Laws 2705 (former version of Tex. Penal Code Ann. § 12.31), amended by Act of July 11, 2013, 83rd Leg.2d C.S., ch. 2 (S.B.2).

Conclusion: We reverse the trial court's judgment as to punishment, and we remand for a new sentencing hearing.

DOUBLE JEOPARDY

AN ADJUDICATION BASED ON AGGRAVATED SEXUAL ASSAULT AS WELL AS INDECENCY WITH A CHILD ARISING OUT OF THE SAME CONDUCT VIOLATES THE DOUBLE JEOPARDY CLAUSE.

¶13-5-4. **In the Matter of R.W.**, MEMORANDUM, No. 02-12-00458-CV, 2013 WL 4773436, (Tex.App.-Fort Worth, 9/5/13).

Facts: On August 1, 2012, the State filed a petition alleging that R.W., who was fifteen years old, had engaged in delinquent conduct. See Tex. Fam.Code Ann. § 53.04 (West 2008). The petition was based on a March 17, 2012 incident between R.W. and his seven-year-old cousin, A.H., where R.W. forced A.H. to have anal sex. The State's delinquent-conduct allegations included one allegation of aggravated sexual assault of a child and two allegations of indecency with a child by

contact. See id. § 51.03(a)(1) (West Supp.2012); Tex. Penal Code Ann. § 21.11 (West 2011), § 22.021 (West Supp.2012). All of the State's allegations arose out of the March 17 incident.

R.W. waived a jury and agreed to proceed before a juvenile-court referee. See Tex. Fam.Code Ann. § 51.09 (West 2008), § 54.10 (West Supp.2012). After an adjudication hearing, the referee recommended that the aggravated-sexual-assault allegation and one of the indecency-with-a-child allegations be found true and that R.W. be adjudged to have engaged in delinquent conduct. See id. § 54 .03 (West Supp.2012). The juvenile-court judge adopted the referee's recommendations. See id. § 54.10(d).

After a subsequent disposition hearing, the referee recommended that R.W. be placed on probation for two years, which the judge adopted. See id. §§ 54.04, 54.0405 (West Supp.2012). R.W. filed a notice of appeal and a motion for new trial, which was overruled by operation of law. See Tex.R. Civ. P. 329b(c); Tex.R.App. P. 26.1(a).

Held: Judgment Modified, and Affirmed as Modified.

Memorandum Opinion: On appeal, R.W. argues that (1) the adjudication based on both indecency with a child and aggravated sexual assault violated the Double Jeopardy Clause because they arose from the same course of conduct and (2) the evidence was insufficient to support the adjudication based on indecency with a child. The State concedes that the adjudication based on aggravated sexual assault as well as on the lesser-included offense of indecency with a child arising out of the same conduct violated the Double Jeopardy Clause. Indeed, if the evidence at trial shows only one instance of sexual contact, a conviction for aggravated sexual assault along with a conviction for the lesser-included offense of indecency with a child violates the prohibition against double jeopardy. See Ex parte Pruitt, 233 S .W.3d 338, 348 (Tex.Crim.App.2007); Patterson v. State, 152 S.W.3d 88, 92 (Tex.Crim.App.2004); Ex parte Herron, 790 S.W.2d 623, 624 (Tex.Crim.App.1990) (op. on reh'g). We sustain point one.

R.W. and the State agree that the appropriate remedy is to vacate the adjudication of delinquent conduct based on indecency with a child by contact. See Evans v. State, 299 S.W.3d 138, 141 (Tex.Crim.App.2009).

Conclusion: We modify the juvenile court's judgment of delinquency to vacate that portion of the judgment adjudging R.W. to have engaged in delinquent conduct based on indecency with a child by contact. As modified, we affirm the juvenile court's judgment of delinquency.

EVIDENCE

TESTIMONY OF EXPERIENCED OFFICERS CAN BE SUFFICIENT EVIDENCE FROM WHICH A JURY CAN DETERMINE BEYOND A REASONABLE DOUBT THAT A SUBSTANCE IS MARIJUANA.

¶ 13-5-5A. **In the Matter of Z.R.**, MEMORANDUM, No. 01-11-00715-CV, 2013 WL 4680241 (Tex.App.-Houston (1st Dist.), 8/29/13).

Facts: On August 25, 2010, Raymond Aguilar, a security officer at Foster High School in Richmond received an anonymous Crime Stopper tip that Z.R. may have marijuana in his possession. Aguilar went to Z.R.'s classroom, where he asked Z.R. to step outside and bring his belongings with him to Aguilar's office. When they arrived at Aguilar's office, Aguilar asked the assistant principal, Mr. Spates, to join them. Once Mr. Spates arrived, Aguilar told Z.R. that he had learned that Z.R. may have something on him that he should not have at school. Z.R. responded by unzipping his backpack, removing a pencil bag, and taking out a plastic bag containing a leafy substance. He also admitted the substance in the bag was marijuana.

Aguilar called Richmond Police Officer Sherman Phillips, the resource officer assigned to Foster High School, and gave Phillips the plastic bag. Based on its appearance and smell, Phillips believed the substance in the plastic bag was marijuana. He took it to his office and tested a small portion of it with a marijuana field test kit, or presumptive test. Phillips testified that when he performed the presumptive test, the substance changed colors, indicating "[t]hat the substance was marijuana." Phillips then arrested Z.R. for possession of marijuana.

At a pre-trial hearing, the trial court granted Z.R.'s motion to suppress his oral admission that the confiscated substance was marijuana, but ruled that Phillips and Officer Joshua Dale of the Fort Bend Narcotics Task Force could offer their opinions as lay witnesses, under Texas Rule of Evidence 701, that the substance was marijuana. Z.R. also sought to exclude evidence concerning presumptive tests, arguing: "[N]o Texas court has ever allowed presumptive tests before a jury for any purpose." The State responded that it was not offering evidence of the presumptive test results to prove that the substance was marijuana, but for the limited purpose of rebutting Z.R.'s defensive theory that the substance was a then-legal synthetic substance commonly referred to as cush and not marijuana. According to the State, there is no presumptive test for cush, and the fact that the test changed colors rebutted the defense theory that the substance was cush. The trial court ruled that Dale would be permitted testify about "the presumptive test

for ... cush ... but don't even go close to this marijuana." Once the trial began, Z.R. was granted a running objection to the officers' opinion testimony that the substance was marijuana and evidence about the results of the presumptive test.

At trial, Dale testified first. He testified that he had spent four of his sixteen years as an officer working on a narcotics task force, which investigates the sale, distribution, cultivation, and manufacture of illegal substances. Part of his job is to teach others how to recognize drugs. Dale was specially trained to identify marijuana and had substantial experience doing so in the field. He testified that he can identify marijuana by sight and smell and he described its physical appearance: budding organic green leafy material with stems and seeds, and a unique smell. He also explained that he had some field experience with cush, and that cush does not look or smell like marijuana. Rather, cush is granulated and loose and has a totally different odor.

Dale also testified that there is a presumptive test for marijuana—the liquid turns red if marijuana is placed in it—but that he is not aware of one for cush. During cross examination, Dale conceded that there are some problems with the reliability of a presumptive test. Specifically, Dale testified that results of a presumptive test for marijuana are not definitive, and that he did not know the presumptive test's rate of error. He further testified that there is a definitive lab test for marijuana, and that he did not know if State's Exhibit 2 had been tested in a lab, but that it was common practice not to send marijuana to the crime lab for testing.

Dale then physically examined State's Exhibit 2 and rendered the opinion based on its odor and appearance that it was marijuana. His testified that his opinion was based on his observation of the physical characteristics of State's Exhibit 2. In particular, Dale testified that he identified State's Exhibit 2 as marijuana because it is green and leafy with stems, it smells like marijuana, and it neither looks nor smells like cush. Dale distinguished the appearance of marijuana and cush, explaining that cush is "a very light, light brownish to green color."

Rosenberg Police Officer Jeremy Eder testified next. He had eleven years' experience as a police officer, and two of those were in the narcotics division. He had encountered cush on a few occasions but had no training on it. He testified that people try to pass off cush as marijuana, because they can resemble each other in appearance, but not odor. With respect to presumptive tests, he explained that there is a presumptive test for marijuana, there is not one for cush, and that, if one were to put cush in a presumptive test kit intended to test for marijuana, it would not come back positive (i.e., red or blue). Rather, the liquid would appear brown. Like Dale, Eder acknowledged that he did not know the rate of error for the presumptive test and that a lab test is more accurate than a presumptive test.

The final officer to testify, Phillips, had fourteen years' experience as a police officer and was assigned to Foster High School for the 2010–2011 school year. He testified that he has encountered marijuana many times during his training and experience as an officer, and can identify marijuana by sight—"[by its] stems, seeds, [and by] how it's bunched up"—and by its distinct odor. Phillips also testified that, upon receiving State's Exhibit 2 from Aguilar, Phillips looked at it and formed the opinion based on its appearance and smell that it was marijuana.

Regarding presumptive tests, Phillips testified that there was one for marijuana, but that he was unaware of a presumptive test for cush. He further testified about the procedure for performing a presumptive test, the results of the test performed on State's Exhibit 2, and the significance of those results. Specifically, he testified that, after receiving it from Aguilar and identifying the substance as marijuana based on its odor and appearance, he performed a presumptive test on State's Exhibit 2, and that the test turned red or blue, indicating the substance was marijuana. On cross-examination, Phillips, like Dale, admitted that he was not a chemist, that he did not know the rate of error of the presumptive test, that the presumptive test was not always accurate, and that no laboratory test was performed on State's Exhibit 2 to confirm that it was marijuana. Phillips also admitted that the jury was unable to view the presumptive test that he performed on State's Exhibit 2 in the field because he threw it away.1 On re-direct, the State sought to have Phillips perform an in-court demonstration of the presumptive test on State's Exhibit 2, and, over defense counsel's objections, the trial court ruled that defense counsel had opened the door to it during cross-examination. Phillips then performed, before the jury, a presumptive test for marijuana on a sample from State's Exhibit 2 and the liquid turned blue.

The jury found that Z.R. had engaged in delinquent conduct, and the trial court ordered that Z.R. be placed on probation for twelve months. Z.R. appealed.

Held: Affirmed

Memorandum Opinion: The State bore the burden to prove beyond a reasonable doubt that Z.R. knowingly or intentionally possessed two ounces or less of marijuana. TEX. HEALTH & SAFETY CODE ANN. § 481.121(a), (b)(1). This, in turn, required proof that: (1) Z.R. exercised actual care, control, and management over the contraband; and (2) Z.R. had knowledge that the substance in his possession was contraband. Brown v. State, 911 S.W.2d 744, 747 (Tex.Crim.App.1995).

Z.R. contends an officer's identification of State's Exhibit 2 was insufficient to prove it was marijuana

because a definitive lab test was required. But the Court of Criminal Appeals has held otherwise: because marijuana has a distinct odor and appearance, chemical testing and expert testimony is not necessary to prove that a substance is in fact marijuana; instead, the substance may be identified through the lay opinion of a police officer or other witness. See Osbourn v. State, 92 S.W.3d 531, 537 (Tex.Crim.App .2002) ("It does not take an expert to identify the smell of marijuana[;] ... [rather,] a witness who is familiar with the odor of marijuana ... through past experiences can testify as a lay witness that he or she was able to recognize the odor."). Moreover, the testimony of experienced officers can be sufficient evidence from which a jury can determine beyond a reasonable doubt that a substance is marijuana. See Boothe v. State, 474 S.W.2d 219, 221 (Tex.Crim.App.1971) ("The testimony from these experienced officers in the narcotics division that the substance found in the building and in the automobile appeared to them to be marihuana was sufficient for the jury to determine that it was marihuana.").

Here, two police officers testified that they identified State's Exhibit 2 as marijuana based on its appearance and smell. Phillips testified that, with his training and experience as a police officer, he is able to identify marijuana by sight and by its distinct smell. He testified that when he received State's Exhibit 2 from Aguilar, he formed the opinion based on its appearance and smell that it was marijuana. Dale likewise testified that, through his training and experience as a police officer, he can identify marijuana by sight and smell. He, like Phillips, examined State's Exhibit 2 and rendered the opinion based on its odor and appearance that it was marijuana.2

Considering this evidence in the light most favorable to the verdict, we hold that a fact finder could have rationally found that each essential element of the charged offense was proven beyond a reasonable doubt, and, therefore, the evidence is legally sufficient to support the judgment. See Osbourn, 92 S.W.3d at 537 (permitting police officer who is familiar with odor and appearance of marijuana through past experiences to testify as lay witness that he was able to recognize substance as marijuana); Boothe, 474 S.W.2d at 221 ("The testimony of these experienced officers in the narcotics division that the substance found in the building and in the automobile appeared to them to be marihuana was sufficient for the jury to determine that it was marihuana."); see also Williams v. State, No. 01–08–00936–CR, 2010 WL 2220586, at *9–10 (Tex.App.-Houston [1st Dist.] June 3, 2010, pet. ref'd) (mem. op., not designated for publication) (holding evidence sufficient to support conviction for possession of marijuana because two officers testified, under Rule 701, that, based on their training, experience, and personal observations, the substance was marijuana); In re J.H., No. 04–02–00464–CV, 2003 WL 21157245, at *1–2 (Tex.App.-San Antonio May 21, 2003, no pet.) (mem. op., not designated for publication) (finding sufficient evidence of possession of marijuana when juvenile, who was asked by school resource officer if he had anything he should not have, pulled foil-wrapped package from his shoe, officer testified he believed substance to be marijuana, took substance to his office, and its contents tested positive for marijuana).

Conclusion: We affirm the judgment of the trial court.

ANY ERROR IN ADMITTING TESTIMONY RELATING TO RESULTS OF PRESUMPTIVE TEST AND IN-COURT DEMONSTRATION DID NOT AFFECT JUVENILE'S SUBSTANTIAL RIGHTS AND, THEREFORE, WAS HARMLESS, WHERE STATE ADDUCED STRONG INDEPENDENT EVIDENCE DEMONSTRATING THAT JUVENILE WAS IN POSSESSION OF MARIJUANA.

¶ 13-5-5B. **In the Matter of Z.R.**, MEMORANDUM, No. 01-11-00715-CV, 2013 WL 4680241 (Tex.App.-Houston (1st Dist.), 8/29/13).

Facts: On August 25, 2010, Raymond Aguilar, a security officer at Foster High School in Richmond received an anonymous Crime Stopper tip that Z.R. may have marijuana in his possession. Aguilar went to Z.R.'s classroom, where he asked Z.R. to step outside and bring his belongings with him to Aguilar's office. When they arrived at Aguilar's office, Aguilar asked the assistant principal, Mr. Spates, to join them. Once Mr. Spates arrived, Aguilar told Z.R. that he had learned that Z.R. may have something on him that he should not have at school. Z.R. responded by unzipping his backpack, removing a pencil bag, and taking out a plastic bag containing a leafy substance. He also admitted the substance in the bag was marijuana.

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At a pre-trial hearing, the trial court granted Z.R.'s motion to suppress his oral admission that the confiscated substance was marijuana, but ruled that Phillips and Officer Joshua Dale of the Fort Bend Narcotics Task Force could offer their opinions as lay witnesses, under Texas Rule of Evidence 701, that the

substance was marijuana. Z.R. also sought to exclude evidence concerning presumptive tests, arguing: "[N]o Texas court has ever allowed presumptive tests before a jury for any purpose." The State responded that it was not offering evidence of the presumptive test results to prove that the substance was marijuana, but for the limited purpose of rebutting Z.R.'s defensive theory that the substance was a then-legal synthetic substance commonly referred to as cush and not marijuana. According to the State, there is no presumptive test for cush, and the fact that the test changed colors rebutted the defense theory that the substance was cush. The trial court ruled that Dale would be permitted testify about "the presumptive test for ... cush ... but don't even go close to this marijuana." Once the trial began, Z.R. was granted a running objection to the officers' opinion testimony that the substance was marijuana and evidence about the results of the presumptive test.

At trial, Dale testified first. He testified that he had spent four of his sixteen years as an officer working on a narcotics task force, which investigates the sale, distribution, cultivation, and manufacture of illegal substances. Part of his job is to teach others how to recognize drugs. Dale was specially trained to identify marijuana and had substantial experience doing so in the field. He testified that he can identify marijuana by sight and smell and he described its physical appearance: budding organic green leafy material with stems and seeds, and a unique smell. He also explained that he had some field experience with cush, and that cush does not look or smell like marijuana. Rather, cush is granulated and loose and has a totally different odor.

Dale also testified that there is a presumptive test for marijuana—the liquid turns red if marijuana is placed in it—but that he is not aware of one for cush. During cross examination, Dale conceded that there are some problems with the reliability of a presumptive test. Specifically, Dale testified that results of a presumptive test for marijuana are not definitive, and that he did not know the presumptive test's rate of error. He further testified that there is a definitive lab test for marijuana, and that he did not know if State's Exhibit 2 had been tested in a lab, but that it was common practice not to send marijuana to the crime lab for testing.

Dale then physically examined State's Exhibit 2 and rendered the opinion based on its odor and appearance that it was marijuana. His testified that his opinion was based on his observation of the physical characteristics of State's Exhibit 2. In particular, Dale testified that he identified State's Exhibit 2 as marijuana because it is green and leafy with stems, it smells like marijuana, and it neither looks nor smells like cush. Dale distinguished the appearance of marijuana and cush, explaining that cush is "a very light, light brownish to green color."

Rosenberg Police Officer Jeremy Eder testified next. He had eleven years' experience as a police officer, and two of those were in the narcotics division. He had encountered cush on a few occasions but had no training on it. He testified that people try to pass off cush as marijuana, because they can resemble each other in appearance, but not odor. With respect to presumptive tests, he explained that there is a presumptive test for marijuana, there is not one for cush, and that, if one were to put cush in a presumptive test kit intended to test for marijuana, it would not come back positive (i.e., red or blue). Rather, the liquid would appear brown. Like Dale, Eder acknowledged that he did not know the rate of error for the presumptive test and that a lab test is more accurate than a presumptive test.

The final officer to testify, Phillips, had fourteen years' experience as a police officer and was assigned to Foster High School for the 2010–2011 school year. He testified that he has encountered marijuana many times during his training and experience as an officer, and can identify marijuana by sight—"[by its] stems, seeds, [and by] how it's bunched up"—and by its distinct odor. Phillips also testified that, upon receiving State's Exhibit 2 from Aguilar, Phillips looked at it and formed the opinion based on its appearance and smell that it was marijuana.

Regarding presumptive tests, Phillips testified that there was one for marijuana, but that he was unaware of a presumptive test for cush. He further testified about the procedure for performing a presumptive test, the results of the test performed on State's Exhibit 2, and the significance of those results. Specifically, he testified that, after receiving it from Aguilar and identifying the substance as marijuana based on its odor and appearance, he performed a presumptive test on State's Exhibit 2, and that the test turned red or blue, indicating the substance was marijuana. On cross-examination, Phillips, like Dale, admitted that he was not a chemist, that he did not know the rate of error of the presumptive test, that the presumptive test was not always accurate, and that no laboratory test was performed on State's Exhibit 2 to confirm that it was marijuana. Phillips also admitted that the jury was unable to view the presumptive test that he performed on State's Exhibit 2 in the field because he threw it away.1 On re-direct, the State sought to have Phillips perform an in-court demonstration of the presumptive test on State's Exhibit 2, and, over defense counsel's objections, the trial court ruled that defense counsel had opened the door to it during cross-examination. Phillips then performed, before the jury, a presumptive test for marijuana on a sample from State's Exhibit 2 and the liquid turned blue.

The jury found that Z.R. had engaged in delinquent conduct, and the trial court ordered that Z.R. be placed on probation for twelve months. Z.R. appealed.

Z.R. asserts it was error to admit Phillips's testimony concerning the results of the presumptive test and to permit the in-court demonstration of the presumptive test on State's Exhibit 2. At trial, Z.R.'s defensive theory was that State's Exhibit 2 was not marijuana but, rather, a then-legal synthetic substance commonly referred to as cush. To rebut this theory, the State sought to prove that there was a presumptive test for marijuana, but not one for cush, and that if cush was tested using the presumptive test for marijuana, the test would not change color.

Held: Affirmed

Memorandum Opinion: With respect to presumptive tests, Dale testified that there is a presumptive test for marijuana, but that he is not aware of one for cush. Eder also testified that there is a presumptive test for marijuana, that there is not one for cush, and added that, if one were to put cush in a presumptive test intended to test for marijuana, it would not come back positive (i.e., red or blue). Rather, the liquid would appear brown. Finally, Phillips testified about the procedure for performing a presumptive test, the results of the test he performed on State's Exhibit 2 in the field, and the significance of those results—that the test turned red or blue, indicating the substance was marijuana. Phillips was also permitted to perform an in-court presumptive test on a sample taken from State's Exhibit 2 after the trial court ruled that defense counsel had opened the door to it during cross-examination by asking Phillips whether he thought it "would be nice if the ladies and gentlemen of the jury could look at [the presumptive test]," and having Phillips admit that the jury was "denied th[e] right [to view the presumptive test] because [he] threw it away."

We need not decide whether the admission of this evidence was error, because we conclude the errors in admitting it, if any, would not warrant reversal. Generally, the erroneous admission of evidence, including opinion testimony under Rule 701, is non-constitutional error governed by Texas Rule of Appellate Procedure 44.2 "if the trial court's ruling merely offends the rules of evidence." James v. State, 335 S.W.3d 719, 726 (Tex.App.-Fort Worth 2011, no pet.) (citing Solomon v. State, 49 S.W.3d 356, 365 (Tex.Crim.App.2001)). A non-constitutional error must be disregarded unless it affects the defendant's substantial rights. Barshaw v. State, 342 S.W.3d 91, 93 (Tex.Crim.App.2011); Tex.R.App. P. 44.2(b) ("Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). The Rule 44.2(b) harm standard is whether the error in admitting the evidence "had a substantial and injurious effect or influence in determining the jury's verdict." King v. State, 953 S.W.2d 266, 271 (Tex.Crim.App.1997) (citing Kotteakos v. United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253 (1946)). When we consider the potential harm, the focus is not on whether the outcome of the trail was proper despite the error, but whether the error had a substantial and injurious effect or influence on the jury's verdict. Barshaw, 342 S.W.3d at 93–94. The Barshaw court explained:

A conviction must be reversed for non-constitutional error if the reviewing court has grave doubt that the result of the trial was free from the substantial effect of the error. Grave doubt means that in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error. In cases of grave doubt as to harmlessness the petitioner must win. Id. at 94 (internal citations omitted).

In assessing the likelihood that the jury's decision was improperly influenced, we consider the record as a whole, including testimony and physical evidence, the nature of the evidence supporting verdict, and the character of the alleged error and how it might be considered in connection with other evidence in case. Id. We may also consider the jury instruction given by trial judge, the state's theory, any defensive theories, closing arguments, voir dire, and whether the State emphasized the error. Id.

In cases in which an officer was erroneously permitted to testify about the meaning of the results of a field test on cocaine, courts have held any error in admitting such testimony is rendered harmless if an expert chemist testifies that the substance was in fact cocaine. See Hicks v. State, 545 S.W.2d 805, 809–10 (Tex.Crim.App.1977) (concluding that any error in admission of officer's testimony that field test came back positive for cocaine was rendered harmless when qualified expert chemist testified that substance was cocaine); Smith, 874 S.W.2d at 722 (noting that any error in admission of officer's testimony regarding results of field test was rendered harmless by chemist's expert testimony that substance was cocaine); Tovar v. State, No. 07–07–0156–CR, 2009 WL 1066115, at *2 (Tex.App.-Amarillo Apr. 21, 2009, pet. ref'd) (mem. op., not designated for publication) (concluding that, even if admission of non-expert police officer's testimony identifying substance possessed by appellant as cocaine was error, it was harmless because expert chemist testified substance was cocaine); Williams v. State, No. 01–02–00405–CR, 2003 WL 203567, at *7 (Tex.App.-Houston [1st Dist.] Jan. 30, 2003, pet. ref'd) (mem. op., not designated for publication) (finding that any error resulting from police officer's testimony that field-tested crack pipe tested positive for cocaine was harmless in light of expert witness's subsequent testimony identifying substance as cocaine).

In the context of marijuana, however, an experienced lay witness may identify the substance alleged to be marijuana as such, and no expert testimony of a chemist is needed. See Osbourn, 92 S.W.3d at 538 (noting it does not take an expert to identify marijuana

because "[u]nlike other drugs that may require chemical analysis, marihuana has a distinct appearance and odor that are familiar and easily recognizable to anyone who has encountered it"); see also Curtis v. State, 548 S.W.2d 57, 59 (Tex.Crim.App.1977) (experienced officer may be qualified to testify that a certain green leafy plant substance is marijuana, but not to testify that a powered substance is heroin or some other controlled substance). Accordingly, in the context of a harm analysis in a marijuana case, the testimony of a lay witness, including a police officer, that the substance is marijuana likewise may render harmless the admission of evidence about the meaning of presumptive test results.

Having reviewed the entire record as a whole, we conclude that the trial court's error, if any, in admitting the challenged evidence did not affect Z.R.'s substantial rights. The State adduced strong evidence, independent of any evidence related to presumptive test results, demonstrating that Z.R. was in possession of marijuana. In particular, Dale, a narcotics officer, first testified that he can identify marijuana by its distinctive appearance and odor. Then, after examining State's Exhibit 2 on the witness stand, Dale testified that, based solely on the appearance and odor of State's Exhibit 2 (as opposed to any test result), it was his opinion that State's Exhibit 2 was marijuana. Phillips, the school resource officer who participated in Z.R.'s arrest, likewise testified that he is able to identify marijuana by sight and smell. He testified that when he received State's Exhibit 2 from Aguilar, and before performing any presumptive test on the substance, he examined it and formed the opinion, based on its distinctive odor and appearance, that State's Exhibit 2 was marijuana. And, Phillips, in particular, refuted the defense theory that the substance was cush by testifying that the appearance of marijuana, which has stems, buds, and seeds, differs from that of cush, which is granular and has uniform particles.

Additionally, Aguilar testified that Z.R., by taking State's Exhibit 2 out of his backpack when Aguilar asked whether he had "something he should not have", indicated with his conduct that State's Exhibit 2 was illegal as opposed to the then-legal cush. This testimony, together with the two officers' perception-based identifications of State's Exhibit 2 as marijuana, is strong evidence—independent of any evidence regarding presumptive tests—that State's Exhibit 2 was, in fact, marijuana.4 See Motilla v. State, 78 S.W.3d 352, 357 (Tex.Crim.App.2002) (reiterating that evidence of defendant's guilt is one factor to be considered when determining whether improper admission of evidence was harmful).

Z.R. correctly notes that the State referred to the presumptive tests in closing, and that this is a factor that weighs in favor of finding harm. However, we also note that the State reminded the jury in closing that an officer's identification of a substance as marijuana, based solely on its odor and appearance, is enough to prove that the substance is in fact marijuana. The State then explicitly stated: "We are not required to give you two tests. We are not even required to give you one. So it comes down to the credibility of the officers."

Moreover, considering it in the context of the entire record, we believe the challenged evidence would not have been assigned much weight by the jury, despite its mention in closing argument. Importantly, all three officers admitted, during vigorous cross-examination, that there were numerous problems with the reliability of presumptive tests. Specifically, the officers conceded that: (1) they are not chemists; (2) they did not understand the details of how the presumptive test works; (3) the presumptive tests yield false positives; (4) they did not know the rate at which the test yielded false positives; and (5) a lab test produces more reliable results than a presumptive test. See Coble v. State, 330 S.W.3d 253, 283 (Tex.Crim.App.2010) (finding error in admission of expert testimony harmless in part because other expert witnesses refuted that testimony by characterizing expert's methodology as "unreliable and inconsistent with the standard of practice").

Accordingly, we conclude that any error in permitting the in-court demonstration and admitting the testimony about the presumptive test results did not have a substantial injurious effect or influence on the jury's verdict because: (1) there was ample other evidence—independent of any evidence relating to the presumptive test—supporting a finding that Z.R. was in possession of marijuana; (2) the same evidence—the identification of State's Exhibit 2 as marijuana—was admissible and admitted through Dale's and Phillips' testimony that they each identified State's Exhibit 2 as marijuana based on its odor and appearance (and not based on the results of a presumptive test); (3) the reliability of the presumptive test results was undermined through cross-examination, and (4) although the State discussed the results of the presumptive test during closing, the State repeatedly reminded the jury that State's Exhibit 2 was identified by two officers as marijuana based on its appearance and odor, and that this identification alone was enough. We hold that, on this record, any error in admitting the testimony relating to the results of the presumptive test and the in-court demonstration did not affect Z.R.'s substantial rights and, therefore, was harmless. See id. at 286 (holding error in admitting expert's testimony about defendant's character for violence was harmless because (1) there was ample other evidence supporting finding that defendant would commit future acts of violence; (2) same evidence was admitted through other independent sources; (3) expert's opinion was not particularly strong or certain; (4) expert's testimony was effectively refuted through testimony of another expert; and (5) although State mentioned expert's testimony in closing, State did not emphasize it); McRae v. State, 152 S.W.3d 739, 744–45 (Tex.App.Houston [1st Dist.] 2004, pet.

ref'd) (holding error in admitting testimony about improperly administered field sobriety test harmless despite being mentioned in closing argument and sponsored by expert witness where it was cumulative of other more persuasive evidence establishing intoxication). We overrule Z.R.'s first and second points of error.

Conclusion: We affirm the judgment of the trial court.

RESTITUTION

REVOCATION OF PROBATION REVERSED WHERE STATE FAILED TO PROVE THAT PROBATIONER'S FAILURE TO PAY COURT ORDERED FEES WAS WILLFUL, EVEN WHERE DEFENDANT PLEAD TRUE TO THE VIOLATION.

¶ 13-5-10. **Gipson v. State**, No. 09–11–00032–CR, 395 S.W.3d 910 (Tex.App.–Beaumont, 3/13/2013).

Background: State filed motion to revoke community supervision, originally imposed following conviction of assault on a family member. The 252nd District Court, Jefferson County, Layne Walker, J., revoked supervision and sentenced probationer to eight years' imprisonment. Probationer appealed. The Court of Appeals reversed, 347 S.W.3d 893, and state appealed. The Court of Criminal Appeals, 383 S.W.3d 152, reversed and remanded.

Facts: The trial court revoked appellant's community supervision on the basis of appellant's plea of true to the failure-to-pay allegation alone. The State's motion to revoke proceeded on the sole allegation that appellant had "failed to pay court assessed fees as directed by the Court," to which he pled true. Those "fees" included a court-ordered fine; court costs; and fees for supervision, pre-sentence investigation, and Crime Stoppers. He signed a stipulation of evidence acknowledging that he had violated the terms and conditions of his community supervision by failing to make these payments. Neither the motion to revoke nor the stipulation of evidence mentioned appellant's financial ability to pay the amounts due. Similarly, during the hearing on the motion to revoke, the parties stood mute regarding appellant's financial ability to pay the amounts due. Finding the failure-to-pay allegation true, the trial court revoked appellant's com-munity supervision and sentenced him to eight years' imprisonment for his underlying conviction of felony assault.

On direct appeal, appellant raised two issues. In his first issue, he urged that the trial court erred in revoking his community supervision because, when a trial court revokes a defendant's community supervision solely for failure to make required payments, Texas Code of Criminal Procedure art. 42.12 § 21(c) requires that the State have proven that a defendant was able to pay and did not, and no evidence showed that appellant was able to pay the amounts due. FN1 See TEX.CODE CRIM. PROC. art. 42.12 § 21(c). We refer to this provision as the "ability-to-pay statute." See id. He asserted that this statute applies to all of the unpaid amounts, including those not specifically listed in it. See id. He also challenged the State's contention that his plea of true satisfied the State's burden of proof. He argued that, although he pled true to the allegation, the State's motion to revoke did not allege that he was able to pay, and, therefore, his plea of true does not constitute evidence that he was able to pay.

FN1. In relevant part, the statute states,
In a community supervision revocation hearing at which it is alleged only that the defendant violated the conditions of community supervision by failing to pay compensation paid to appointed counsel, community supervision fees, or court costs, the state must prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the judge. TEX.CODE CRIM. PROC. art. 42.12 § 21(c).

In his second issue, he argued that the trial court "committed constitutional error" in failing to inquire as to appellant's reasons for not having paid. In support, he cited Bearden v. Georgia, which held that, "in a revocation proceeding for failure to pay a fine," the Fourteenth Amendment requires that "a sentencing court must inquire into the reasons for the failure to pay." 461 U.S. 660, 672 (1983).

Addressing appellant's issues together, the State responded that a defendant's plea of true precludes him from challenging the sufficiency of the evidence to support the trial court's revocation order and that a plea of true, standing alone, supports revocation of community supervision. The State explained that, "in the absence of some challenge by Appellant at the time of the hearing," the State may rely on appellant's plea of true to support any requirements under the ability-to-pay statute and Bearden. See id. at 672.

Sustaining appellant's first issue and not reaching his second, the court of appeals reversed the trial court's judgment. Gipson, 347 S.W.3d at 897. Interpreting appellant's first issue "as a challenge to the sufficiency of the evidence," the court of appeals acknowledged that a plea of true is "generally sufficient to support" revocation. Id. at 896–97 (citing Cole v. State, 578 S.W.2d 127, 128 (Tex.Crim.App.1979). The court stated, however, that "Bearden requires that to revoke community supervision and impose imprisonment, 'it must be shown that the probationer willfully refused to pay or make sufficient bona fide efforts to do so.' " Id. at 896 (quoting Lively v. State,

338 S.W.3d 140, 146 (Tex.App.—Texarkana 2011, no pet.)). The court observed that, because the motion to revoke alleged only failure to make the required payments, appellant's plea of true to that allegation did not satisfy the State's evidentiary burden under the ability-to-pay statute to prove that appellant was able to pay. Id. at 897.

Although it acknowledged that the ability-to-pay statute explicitly includes only the failure to pay fees for appointed counsel, community supervision, and court costs, the court of appeals determined that the statute must be interpreted as also applying to failure to make other payments due under community supervision in order to comply with Bearden 's constitutional requirements. Id. at 896–97. The court determined that it was obligated to implement this due-process requirement because courts must presume that the Legislature intended for statutes to comply with the constitutions of this State and the United States. Id. Based on its interpretation of the ability-to-pay statute, the court determined that the State was required to prove a willful failure to pay, despite appellant's plea of true. Id. It concluded that the record contained no evidence that appellant had willfully refused to pay and that the trial court, therefore, had erred in revoking appellant's community supervision on that basis. Id. at 897.

The State filed a motion for rehearing, contending that the court of appeals had erred by deciding the merits of appellant's sufficiency challenge without first addressing the State's procedural argument. The State asserted that, because appellant had pled true to the allegation that formed the basis of revocation, any potential error was not preserved for appeal. Without opinion, the court of appeals denied the State's motion.

Does a defendant's plea of true to the State's allegations in a motion to revoke community supervision that the defendant failed to pay the court-assessed fine, costs, and fees relieve the State and the trial court of the requirement to establish that no payment was made despite the ability to do so, the failure to pay was willful, and no bona fide effort to pay was made before supervision can be revoked?

Held: Reversed and remanded

Opinion: In issue one, Gipson challenges the revocation of his community supervision for failure to pay court-ordered fees and fines. Condition 26 of the community supervision order required Gipson to pay a $500 fine, supervision fees, court costs, a PSI fee, a $50 Crime Stoppers fee, and $1,000 in attorney's fees. The allegation to which Gipson pleaded “true” stated that Gipson “has failed to pay court assessed fees as directed by the Court and as of November 29, 2010 was $1,589.00 in arrears, in violation of Condition (26) of Defendant's Community Supervision order.” Gipson contends that the trial court abused its discretion by revoking his community supervision based solely on his plea of “true” to the failure to pay court-assessed fees, absent evidence that he was able to pay and did not do so.

Generally, a defendant cannot challenge a revocation finding to which he pleaded “true.” See Cole v. State, 578 S.W.2d 127, 128 (Tex.Crim.App.1979). When the State alleges only that the defendant violated the conditions of community supervision by failing to pay appointed attorney's fees, community supervision fees, or court costs, the State must prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the trial court. Tex.Code Crim. Proc. Ann. art. 42.12, § 21(c) (West Supp.2012). The statute expressly applies to attorney’s fees, community supervision fees, and court costs. See id. PSI and Crime Stoppers fees are often assessed as court costs; thus, we conclude these costs may be included within the statute's purview. See id. art. 42.12, § 9; see also Tex.Code Crim. Proc. Ann. art. 37.073 (West Supp.2012); Tex.Code Crim. Proc. Ann. art. 42.152 (West 2006).

Although, in general, article 42.12 applies to fees and costs, and not fines, section*915 11(b) lists the payment of fines along with fees and costs as permissible requirements of community supervision. Tex.Code Crim. Proc. Ann. art. 42.12, § 11(b). It further requires the sentencing court to “... consider the ability of the defendant to make payments in ordering the defendant to make payments under this article.” Id. While this statute applies directly to the sentencing of a defendant to community supervision, it gives some guidance to appellate courts. Also, prior to the enactment of the statute, the common law generally required the state to prove that a defendant had willfully failed to pay court-ordered fees, restitution, and other costs. See Whitehead v. State, 556 S.W.2d 802, 805 (Tex.Crim.App.1977); McKnight v. State, 409 S.W.2d 858, 859–60 (Tex.Crim.App.1966); Taylor v. State, 172 Tex.Crim. 45, 353 S.W.2d 422, 424 (1962) (op. on reh'g). These cases make clear that, at common law, the state had the burden of showing that a defendant had the ability to pay court-ordered costs and willfully failed to do so. Although we can find no cases directly on point, it seems logical that the Court of Criminal Appeals, following its precedent that applies to fees, would treat the failure to pay a fine authorized by the Legislature, i.e. by the same way it has treated other fees that are authorized by the Legislature, requiring the state to show that a defendant was able to pay and acted intentionally in not doing so.

In this case, the record is devoid of evidence showing that Gipson's failure to pay attorney's fees, community supervision fees, or court costs, including PSI and Crime Stoppers fees, was willful. See Tex.Code Crim. Proc. Ann. art. 42.12, § 21(c). Nor does the record show that Gipson intentionally failed to pay his fine. We conclude that the trial court abused its discretion by revoking

Gipson's community supervision for failure to pay court-assessed fines and fees. Assuming, without deciding, that a harm analysis is required, revocation of Gipson's community supervision affected Gipson's substantial rights by subjecting Gipson to a prison sentence rather than continued community supervision. See Tex.R.App. P. 44.2(b) (No constitutional errors that do not affect substantial rights must be disregarded.); see also Rusk, at ——, 2013 WL 503957, at *6 n. 15, 2013 Tex.App. LEXIS 1274, at *21 n. 15. For these reasons, we sustain Gipson's first issue.

Constitutional Claim

In issue two, Gipson contends that the trial court committed constitutional error by revoking his community supervision based solely on his plea of "true" to the failure to pay court-assessed fees without first inquiring about the reasons for Gipson's failure to pay. Gipson maintains that the trial court's decision to impose a prison sentence resulted in a denial of due process.

When the State alleges that a defendant failed to pay court-assessed fees, a trial court must inquire as to a defendant's ability to pay and consider alternatives to imprisonment if it finds that a defendant is unable to pay. Gipson, 383 S.W.3d at 156 (citing Bearden v. Georgia, 461 U.S. 660, 672, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)). It may be unconstitutional to deprive a defendant of his liberty when he is unable to pay. Id. at 157. Unlike the ability-to-pay statute and the common law, Bearden does not impose an evidentiary burden on the State. Id. Thus, Gipson's second issue concerns the procedures utilized by the trial court when revoking Gipson's community supervision and is not a question of evidentiary sufficiency.

We first note that Gipson's plea of "true" did not expressly waive a Bearden violation. Waivers of constitutional rights must be voluntary, knowing, intelligent acts " 'done with sufficient awareness of the relevant circumstances and likely consequences.' " Rusk, at ——, 2013 WL 503957, at *6–7, 2013 Tex.App. LEXIS 1274, at *24 (quoting Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)). A failure to pay fees violates community supervision, but only a willful failure to pay fees supports revocation. Id. Gipson pleaded "true" to violating the terms of his community supervision by failing to pay court-ordered fines and fees, but this plea was neither an admission of willfulness nor a waiver of the trial court's duty to comply with Bearden. See id.

Whether Gipson implicitly waived his constitutional claim is analyzed under the framework of Marin v. State, 851 S.W.2d 275, 279 (Tex.Crim.App.1993). In Marin, the Court of Criminal Appeals identified three categories of rights. Id. at 279. First, absolute requirements and prohibitions are not forfeitable. Id. These rights must be observed even without a party's request and cannot lawfully be avoided even with a party's consent. Id. at 280. "[A]ny party entitled to appeal is authorized to complain that an absolute requirement or prohibition was violated, and the merits of his complaint on appeal are not affected by the existence of a waiver or a forfeiture at trial." Id. Second, rights of litigants which must be implemented by the system unless expressly waived are not forfeitable. Id. A party is never deemed to have given up a waivable right unless done plainly, freely, and intelligently, sometimes in writing and always on the record. Id. The party is not required to make a request at trial for the implementation of such rights because the trial court has an independent duty to implement them absent an effective waiver. Id. The trial court's failure to implement them is an error which may be urged for the first time on appeal. Id. Third, rights of litigants which are to be implemented upon request are subject to the Texas law of procedural default. Id. at 279.

Generally, complaints concerning procedural due process are not preserved for appeal if the appellant did not make a due process objection at the time of revocation. Rogers v. State, 640 S.W.2d 248, 263–64 (Tex.Crim.App.1982) (second op. on reh'g); see Tex.R.App. P. 33.1(a). The preservation rule "ensures that trial courts are provided an opportunity to correct their own mistakes at the most convenient and appropriate time-when the mistakes are alleged to have been made." Hull v. State, 67 S.W.3d 215, 217 (Tex.Crim.App.2002). Even "constitutional rights, including those that implicate a defendant's due process rights, may be forfeited for purposes of appellate review unless properly preserved." Anderson v. State, 301 S.W.3d 276, 280 (Tex.Crim.App.2009).

We consider the right identified by the Supreme Court in Bearden—to have the court in-quire as to the defendant's ability to pay—the type of procedural due process right that must be brought to the trial court's attention. The record does not indicate that Gipson complained to the trial court that revocation of his community supervision and imposition of a prison sentence would violate due process. Accordingly, Gipson's second issue is not preserved for appellate review and is overruled. See Tex.R.App. P. 33.1(a); see also Hull, 67 S.W.3d at 217; Rogers, 640 S.W.2d at 263–64.

Conclusion: Having sustained Gipson's first issue, we reverse the trial court's judgment revoking Gipson's community supervision and remand the case to the trial court for further proceedings consistent with this opinion.

_____

A DNA SAMPLE AND FEE CANNOT BE ORDERED FOR THE OFFENSE OF INJURY TO A CHILD UNLESS THE CONDUCT WAS COMMITTED INTENTIONALLY OR KNOWINGLY AND WAS PUNISHABLE AS A FIRST DEGREE FELONY, OR IT WAS SHOWN THAT THE JUVENILE USED OR EXHIBITED A DEADLY WEAPON DURING THE COMMISSION OF THE OFFENSE.

¶ 13-5-8. **In the Matter of M.L.**, MEMORANDUM, No. 05-13-00568-CV, 2013 WL 5314816 (Tex.App.-Dallas, 9/20/13).

Facts: The State alleged, and the trial court found, that appellant was a child engaged in delinquent conduct by committing the offense of injury to a child, a violation of section 22.04 of the penal code. The trial court placed appellant on probation until his eighteenth birthday. Later, the State filed a motion to modify disposition alleging that appellant violated three conditions of his probation. Appellant pleaded true to the alleged probation violations, and the trial court ordered him committed to the Texas Juvenile Justice Department. The trial court also ordered appellant and his grandmother to pay $50 to Dallas County for DNA fees. Appellant asserts that the trial court erred by ordering him and his grandmother to pay $50 for DNA fees.

Held: Trial court's order is modified to delete the order to pay $50 to Dallas County for DNA fees, and the order is affirmed as modified.

Memorandum Opinion: Under some circumstances, a trial court is required to order a juvenile adjudicated as a child engaged in delinquent conduct to provide a DNA sample as a condition of probation. TEX. FAM.CODE ANN. § 54.0409 (West Supp.2012). When the requirement applies, the trial court also must order the child and any parent or other person responsible for the child's support to pay a fee (either $50 or $34) to help defray the costs of any analysis that is performed on DNA samples provided by children. See id. § 54.0462(a)(1), (b).

The offense of injury to a child falls within the category of offenses for which a DNA sample and fee must be ordered (1) if the conduct was committed intentionally and knowingly and is punishable as a first degree felony, or (2) if it is shown that the juvenile used or exhibited a deadly weapon during the commission of the offense. See id. § 54.0409(a)(b); TEX.CODE CRIM. PROC. ANN. § 3g(a)(1)(I) (West Supp.2012). To be punishable as a first degree felony, the conduct must have caused serious bodily injury to the child victim. See TEX. PENAL CODE ANN. § 22.04(e).

In this case, the State alleged that the child victim suffered bodily injury, not serious bodily injury, as a result of appellant's conduct; the trial court did not make a finding that the child victim suffered serious bodily injury; and there is nothing in the record before us to show that appellant's conduct caused serious bodily injury to the child victim. Additionally, the trial court did not make a finding, and the record does not show, that appellant used or exhibited a deadly weapon during the commission of the offense. Based on the record before us, we conclude that the offense for which appellant was adjudicated did not fall within the category of offenses requiring the trial court to order the child to submit a DNA sample. Consequently, the trial court erred by ordering appellant and his grandmother to pay $50 to Dallas County as DNA fees.

Conclusion: We resolve appellant's first issue in his favor. Our resolution of this issue makes it unnecessary to address appellant's second issue. We modify the trial court's February 28, 2013 order modifying disposition with commitment to the Texas Juvenile Justice Department to delete the order to pay $50 to Dallas County for DNA fees. We affirm the order as modified.

SEX OFFENDER REGISTRATION

EVIDENCE WAS FACTUALLY SUFFICIENT TO SUPPORT AN IMPLIED FINDING THAT THE INTERESTS OF THE PUBLIC REQUIRE JUVENILE TO REGISTER AS A SEX OFFENDER.

¶ 13-5-13. **In the Matter of: L.L., Jr.** No. 08-10-00073-CV, 408 S.W.3d 383 (Tex.App.—El Paso, 6/1/13).

Facts: In 2007, the State filed a petition based on delinquent conduct alleging that fourteen-year-old Appellant committed the offense of indecency with a child by contact. The juvenile court, based on Appellant's written stipulation, found that Appellant engaged in delinquent conduct as alleged in the petition, and the court placed Appellant on supervised probation. An adjudication of delinquent conduct for indecency with a child requires the juvenile to register as a sex offender. See TEX.CODE CRIM.PROC.ANN. art. 62.001(5)(A)(West Supp.2010). As permitted by Article 62.352(b)(1), the juvenile court deferred making a decision on registration while Appellant participated in a sex offender treatment program. See TEX.CODE CRIM.PROC.ANN. art. 62.352(b)(1). After Appellant completed the program, the juvenile court entered an order requiring Appellant to register as a sex offender. This appeal follows.

In his sole issue, Appellant contends that the juvenile court abused its discretion by requiring him to register as a sex offender because the court failed to include the required findings in its order. Appellant additionally argues the evidence does not support the court's decision to require registration.

Held: Affirmed

Opinion: Article 62.352(a) of the Code of Criminal Procedure requires the juvenile court to enter an order

exempting a juvenile from registration if the court determines: (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 juvenile and the juvenile's family that would result from registration. TEX.CODE CRIM.PROC.ANN. art. 62.352(a). The juvenile court may also defer decision on requiring registration until the juvenile has completed treatment for the sexual offense as a condition of probation or while the juvenile is committed to the Texas Youth Commission. TEX.CODE CRIM.PROC.ANN. art. 62.352(b)(1). If the court enters an order pursuant to Article 62.352(b)(1), the court retains discretion and jurisdiction to require, or exempt the juvenile from, registration on the successful or unsuccessful completion of treatment. TEX.CODE CRIM.PROC.ANN. art. 62.352(c). Following successful completion of treatment, the juvenile is exempted from registration unless a hearing is held on motion of the state and the court determines the interests of the public require registration. TEX.CODE CRIM.PROC.ANN. art. 62.352(c). The standard of review is whether the juvenile court committed procedural error or abused its discretion in requiring the juvenile to register as a sex offender. TEX.CODE CRIM.PROC.ANN. art. 62.357(b).

Appellant's first argument concerns alleged procedural error. Citing In the Matter of J.D.G., 141 S.W.3d 319, 321 (Tex.App.-Corpus Christi 2004, no pet.), Appellant contends that the juvenile court erred by failing to enter an order which contains the findings required by Article 62.352(a). The Corpus Christi Court of Appeals noted in its opinion that the juvenile court had made certain written findings in its order, but the court did not hold that the findings must be included in the order. While Article 62.352(a) requires that the juvenile court exempt a juvenile from registration if the court finds certain facts, the statute does not require that the findings be included in the order. This portion of Appellant's argument is without merit.

Appellant next argues that the juvenile court abused its discretion because the evidence does not support the juvenile court's implied findings. As part of his contention that the juvenile court abused its discretion, Appellant may challenge the legal and factual sufficiency of the evidence supporting the court's implied findings of fact. In the Matter of M.A.C., 999 S.W.2d 442, 446 (Tex.App.-El Paso 1999, no pet.). In our review, we engage in a two-pronged inquiry: (1) Did the trial court have sufficient information upon which to exercise its discretion, and (2) did the trial court err in its application of discretion? In the Matter of M.A.C., 999 S.W.2d at 446. The traditional sufficiency of the evidence standards apply to the first question. Id. Once we have determined whether sufficient evidence exists, we must then decide whether the juvenile court made a reasonable decision or was it arbitrary. Id. A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner, without reference to guiding rules or principles. Bowie Memorial Hospital v. Wright, 79 S.W.3d 48, 52 (Tex.2002). When reviewing a matter committed to a trial court's discretion, we may not substitute our own judgment for that of the trial court.

Appellant directs his sufficiency argument at the two findings required by Article 62.352(a): (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 juvenile and the juvenile's family that would result from registration. The juvenile court had, however, previously made the decision to defer the registration decision until after Appellant completed sex offender treatment. See TEX.CODE CRIM.PROC.ANN. art. 62.352(b)(1). Consequently, Article 62.352(c) comes into play. Under that statute, Appellant is exempt from registration if he successfully completed the treatment program unless a hearing is held on motion of the State and the court determines that the interests of the public requires registration. TEX.CODE CRIM.PROC.ANN. art. 62.352(c). While Article 62.352(a) requires Appellant to establish certain facts in order to be exempt from registration, Article 62.352(c) requires exemption if Appellant successfully completed sex offender treatment unless the court finds that the interests of the public nevertheless requires registration.

In the absence of written findings, we will examine the implied findings which could support the juvenile court's decision. The juvenile court could have found under Article 62.352(c) that Appellant successfully completed the treatment program but the interests of the public requires registration. Appellant does not expressly state in his brief whether he is challenging the legal or factual sufficiency of the evidence supporting the implied finding under Article 62.352(c), but we have construed his argument as a factual sufficiency challenge because he asserts that the juvenile court's decision is contrary to the overwhelming evidence. In reviewing this sufficiency challenge, we view all of the evidence but do not view it in the light most favorable to the challenged finding. See In re M.A.C., 999 S.W.2d at 446; In the Matter of A.S., 954 S.W.2d 855, 860 (Tex.App.-El Paso 1997, no writ). Only if the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust will we conclude that the evidence is factually insufficient. In re M.A.C., 999 S.W.2d at 446; In re A.S., 954 S.W.2d at 860.

Appellant attended a sex offender residential treatment program at the Pegasus Schools from September 17, 2008 until September 8, 2009. The State introduced into evidence the discharge summary,

dated September 8, 2009, prepared by John Joslin, a therapist at Pegasus. Joslin recounted that Appellant had previously been in outpatient treatment for fourteen months but was discharged unsuccessfully because he made minimal progress. At Pegasus, Appellant had considerable behavioral difficulty in the early phases of treatment and avoided therapy by minimizing the offense and blaming the victim, and by the use of anger, intimidation, artificial confusion and aggression. He made steady improvement over time and eventually held himself accountable for the offense. He also became able to show more empathy for others but he would need to continue to work on this during outpatient therapy following discharge from Pegasus. *387 Joslin identified certain behaviors that demonstrated a risk of re-offense: (1) continued use of cognitive distortions (thinking errors he continued to use are victim stance, instant gratification, and anger); (2) unwillingness to control his impulses (sexual and criminal); (3) the number of sexual assault victims (approximately eleven); (4) the number of male victims (approximately two); (5) duration of sexual history (over one year); and school behavior problems. Despite these risks, Appellant had shown a reduction of "criminal pride thinking errors" and behavior and he did not require staff intervention for negative or aggressive behavior. Appellant had also demonstrated an ability to apply the therapy concepts he had learned to control his deviant impulses. Joslin administered the Juvenile Sex Offender Assessment Protocol II (J–SOAP–II) shortly before Appellant's discharge from the program. J–SOAP–II is a systematic review and assessment of items that may reflect an increased risk to re-offend. On the sex drive/preoccupation scale, Appellant scored 9 out of a possible 16 risk points suggesting a high risk. He scored 5 out of a possible 16 points on the impulsive/antisocial behavior scale indicating a low risk for general delinquency. With respect to the intervention scale, Appellant scored 5 out of 14 risk points indicating that Appellant had benefitted from treatment. Appellant's score on the intervention factor reduces the first two risk factors. Given Appellant's overall risk score of 34 percent, Joslin concluded that he was a low risk to re-offend. However, Joslin recommended that the J–SOAP–II results were only part of a comprehensive risk assessment and should be reevaluated three months after being transitioned back into the community. Joslin additionally recommended that Appellant continue with sex offender therapy with a licensed sex offender treatment provider following discharge. Due to Appellant's progress in treatment, Joslin recommended that Appellant not be required to register as a sex offender, and Appellant's treatment team at Pegasus recommended that the court defer sex offender registration for six months in order to determine compliance with probation.

Appellant's aftercare probation officer, Jennifer Parada, testified at the registration hearing and her review of probation report was admitted into evidence. Parada characterized Appellant's discharge from Pegasus as successful. As a result of the polygraph examiner's report, Parada became aware that Appellant had been watching pornographic materials and he had asked high school girls to send him photographs of themselves. At a home visit, Parada confronted Appellant with these violations of his safety plan and he took full ownership of them. Parada recommended that Appellant register as a sex offender but she admitted that was the department's stance in every case.

Margie Desrosiers is a licensed sex offender treatment provider who treated Appellant before he went to Pegasus and during his aftercare program. Appellant did not progress well during initial sex offender treatment with Desrosiers and he was subsequently placed at Pegasus. Desrosiers had reviewed the discharge summary from Pegasus and did not agree that Appellant had done well in that program or that he should have been successfully discharged. Desrosiers prepared a discharge summary dated November 23, 2009 indicating that Appellant had gained a full awareness of his inappropriate sexual behaviors and how he repeated his offense cycle, and further, he understood how his deviant sexual fantasies can lead him to re-offend if he did not interrupt them immediately. Desrosiers also expressed that Appellant had not always adhered to his relapse prevention plans. For example, Appellant was not forthcoming about his tardiness and truancy at his high school and he was unwilling to quit wearing gang colors because he liked to dress that way. The discharge summary also reported that Appellant disclosed all of his victims while at Pegasus, but Desrosiers recommended that he take a Maintenance Polygraph to determine if he had committed any new illegal sexual acts or had unsupervised contact with a child in violation of the court order. Desrosiers noted that Appellant disclosed in July 2009 that he had engaged in inappropriate sexual behaviors with a total of twenty-nine persons, both male and female, and of those, fourteen were family members. One of the victims was a one-year-old. Desrosiers concluded that Appellant's prognosis was poor unless he adhered to his relapse prevention plan which included impulse control, identifying and correcting cognitive distortions, avoiding negative peers and family members, and holding himself accountable for his actions. Desrosiers abstained from making a registration recommendation until after the polygraph had been administered.

The polygraph examiner interviewed Appellant prior to the exam on November 23, 2009. Appellant admitted that he had used marihuana on at least seven occasions since his July 2009 polygraph exam and had cut painkillers into little pieces and then inhaled them through his nose. He had also drank beer and what he believed to be whisky or a few occasions. Appellant had sexual fantasies with children on the average of three times per week and he had unsupervised contact with seven male and nine female children, mostly family

members. All of these children were Appellant's former victims. Appellant also told the polygraph examiner that he has viewed adult pornography both at school and home and he has solicited high school girls to send him "sexy pictures" of themselves. Finally, Appellant informed the examiner he had engaged in sexual contact with a six-year-old girl. It is unclear from the report whether this is a new victim or a victim which Appellant failed to disclose during his July 2009 examination. After reviewing the polygraph examiner's report, Desrosiers recommended that Appellant be required to register.

The juvenile court had before it conflicting evidence and conflicting recommendations as to registration, but that does not automatically render the evidence factually sufficient. There is credible evidence supporting an implied finding that Appellant successfully completed treatment at Pegasus. Turning to the interests of the public element, the evidence showed that Appellant had engaged in inappropriate sexual behavior with thirty people, both male and female, ranging in age from one year of age to seventeen years of age. Appellant continued to have sexual fantasies about children and he engaged in unsupervised contact with several former victims even after treatment at Pegasus and in violation of the court's order. Appellant's behavior indicates an unwillingness to control his impulses which both Joslin and Desrosiers identified as a risk factor for relapse. The evidence is factually sufficient to support an implied finding that the interests of the public require registration.

Conclusion: We conclude that the juvenile court did not abuse its discretion by entering the registration order. Appellant's sole issue is overruled and the judgment of the juvenile court is affirmed.