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386th District Court
San Antonio, Texas

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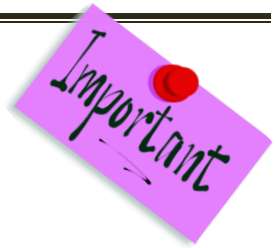
Dear Juvenile Law Section Members:

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

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



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EDITOR'S FOREWORD By Associate Judge Pat Garza

For those of you who were actually looking may have noticed that the first quarterly issue of the Juvenile Reporter (Newsletter) for 2015 was not published in March of this year. Each year the months of release of the Reporter had been March, June, September, and December. Part of being a current member of the Juvenile Law Section of the State Bar of Texas is the receipt of each Reporter. The issues for many years were a hard copy mailed to all our members. Recently we have gone to release through email. However, it was brought to our attention that during the month of June, almost no one was receiving their issue. As it turns out, each new membership of the Juvenile Law Section of the State Bar of Texas begins in June of each year. As a result, the Bar Association purges all members from the sections at the end of May until the dues have been received and the records have been updated. So, when the June issue of the Reporter is sent out, the number of "current" members is very few. To avoid the majority of our members missing the June issue, we have decided to change the release schedule of the Reporter.

The new schedule for release of the Juvenile Law Reporter will be during the months of February, May, August, and November. I realize I could have published the first issue this year in February (two months after the December issue), but there's just not much new going on from Thanksgiving through the first of the year to make it worthwhile. As a result, we decided to begin the new schedule in May. And now you know the rest of the story.

Believe it or not, Krystal my youngest will be graduating high school next month. I realize I may not be the only parent going through a graduation next month and as many of you may know, this won't be my first rodeo. If I count graduation ceremonies from preschool, kindergarten, middle school, high school, college, graduate school, and technical school, this will be my twenty-sixth. Did I mention I have five kids? At any rate, high school is the biggie, not necessarily for them, but for me. It is the time when, for the most part, I stop making the day to day choices for them, and they start making them for themselves.

For those of you with younger kids, all I can say is cherish each day. Enjoy the act of being a parent. Relish in being the "go to" person and the role model. Celebrate that you are the person they ask, so they don't have to look it up. And above all else, make sure they know that they are important to you. Remember, love is not what you tell them, it's how you treat them. Show them they are loved. Don't just listen to them talk, listen to what they're saying. Show them you are interested in what is important to them. There is nothing like getting home at the end of the day and your child looking up at you all excited and saying "I couldn't wait to tell you what happened to me today."

That having been said, and being I have been through this a few times before, I would like to congratulate all the parents of the graduates of 2015. And I ask you to think as I do… I was blessed with this child, to raise as I thought was right, to hold her hand when she needed guidance, to heal her when she was sick, to strengthen her when she was weak, and most of all to give her light when all seemed so dark. For me, I have parented a beautifully smart free thinker through over twelve years of schooling to where she is today. And I know, as I look at her during graduation there will be a tear in my eye for I will be remembering all we have done and all we have been through, together. So, when you look at your graduate in line waiting for their name to be called and you feel that gush of pride for all they have accomplished, don't forget to give yourself a pat on the back as well. Be proud of them, but be proud of yourself for very few can say I was there at the beginning.

Condolences. Jo Nelson, the first chair of the Juvenile Law Section, passed away April 22, 2015. Ms. Nelson served as chair of the section during the 1986-87 term. Our condolences are extended to her family.

TJJD Post-Legislative Conference. The Texas Juvenile Justice Department will be sponsoring the 2015 Post-Legislative Conference in San Antonio, Texas on July 27-28, at the Wyndham Riverwalk Hotel. It is an excellent conference to get the latest scoop on juvenile and probation related legislation. You can get all the details to the conference online at www.tjjd.texas.gov.

Special Legislative Issue. The special legislative issue of the Juvenile Law Reporter is in its infancy stage and should be available in August. This is the sole issue that will be mailed out to all members, as well as, being published online at www.juvenilelaw.org. We will keep you posted.

29th Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's 29th Annual Juvenile Law Conference will be held February 22-24, 2016 at the Wyndham Riverwalk Hotel in San Antonio, Texas.

Treat a difficult child the way you would your boss at work.
Praise his achievements, ignore his tantrums and resist the urge to sit him down and explain to him how his brain is not yet fully developed."

Robert Brault

CHAIR'S MESSAGE By Kevin Collins

I am excited to be the Chair of the Juvenile Law Section this year. There has been an amazing evolution in juvenile jurisprudence over the years, as the pendulum has swung back and forth between punishment and rehabilitation. However, the current approach to juvenile law, at least in Texas, reflects a sea change. We have seen a movement towards local control of juvenile offenders, so that where practicable, they are placed in the community where they are from. This allows better reintegration of the juvenile, and lessens the negative impact of institutionalization.

Another big step under consideration is legislation that would raise the age of adulthood for prosecution purposes, from those under 17, to those under 18. This change will probably be expensive to implement, but should ultimately pay great dividends. All high school students should be subject to the same consequences, and not be burdened with an adult arrest record due to their date of birth.

I was very energized with the 28th Annual Juvenile Law Conference, in Ft. Worth this year, and really enjoyed all the speakers, especially the three keynote speakers, as well as Judge Garza's summary of important new cases. I hope we all have a great year together, advancing the common cause of the best interest of the child.

REVIEW OF RECENT CASES

APPEALS

TO PRESERVE ERROR, A PARTY MUST MAKE A TIMELY AND SPECIFIC OBJECTION REGARDING THE ADJUDICATION OF A LESSER INCLUDED OFFENSE.

¶ 15-1-9. **In the Matter of M.L.M.**, No. 08-13-00250-CV, --- S.W.3d ----, 2015 WL 400562 (Tex.App.-El Paso, 1/30/15).

Facts: This proceeding arises out of events that took place at a Macy's Department store in Tarrant County on January 8, 2013.FN3 Ian Pokluda, a loss prevention officer, was alerted that two females had entered the store. One of the females, an adult named Marketia Surrell, was well known to the store as a "refunder," which is someone who habitually returns goods, likely stolen, without any sales receipts. The juvenile, M.L.M., was accompanying Surrell on this day.

FN3. This case was transferred from our sister court in Fort Worth pursuant to the Texas Supreme Court's docket equalization efforts. See TEX. GOV'T CODE ANN.. § 73.001 (West 2013). We follow the precedents of the Fort Worth Court to the extent they might conflict with our own. See Tex.R.App.P. 41.3.

Ian Pokluda watched the two females on the store's surveillance cameras. He kept track of the clothing items that Surrell was selecting. After a time, both Surrell and M.L.M went into the same dressing booth with the items that Surrell had selected. Store surveillance footage showed they were in the dressing room for twenty-one minutes. Surrell came out with fewer items than she took in. Another Macy's clerk went into the vacated dressing room to count any clothing items left there. The security officer determined the number of items taken into the room did not match the number taken out and those left in the room.

Surrell, still accompanied by M.L.M., went to a register and initiated a refund transaction. After she and M.L.M. left the store, they were apprehended by Macy's loss prevention officers and asked to return to the store's loss prevention office. While in route to the office, M.L.M called someone on a cell phone to say that they had been apprehended. Surrell and M.L.M. were being escorted by two male Macy's security officers, and Catherine Aker, another Macy's store employee. When they were at the bottom of an escalator and inside the store, M.L.M made another call on the phone to a man later identified as Demon Barrett, who at that time was at the top of the escalator.

Demon Barrett rushed down the escalator, handed car keys to Surrell, and told her to run. Barrett then blocked the two male security officers who started to give chase. He put his hand in his clothing as if he had a weapon. Aker, the female Macy's employee, chased after Surrell, but Barrett tried to head her off and verbally threatened her. The local police department was notified and Surrell was apprehended several blocks from the store.

A search showed that Surrell had six items of clothing that had been stuffed inside of several girdles that she was wearing. A police officer testified that girdles are often used by shoplifters to compress items of clothing they are stealing. The officers doing the search were amazed at how tight the girdles fit on Surrell, which led the lead investigating officer to believe that she must have had assistance in putting the girdles on over the stolen items. The police recovered a total of $829.99 worth of stolen clothing on Surrell.

During the chase and apprehension of Surrell, M.L.M. had stayed in the store. The Macy's employees returned, found her, and escorted her back to the security office. Aker testified that M.L.M. admitted to helping put the girdle on Surrell. Other witnesses only recalled that M.L.M. denied any involvement in the theft. She identified Surrell as a relative who had picked her up from school and they had stopped by the store.

PROCEDURAL BACKGROUND

The State alleged in its petition that M.L.M. violated Tex. Penal Code Ann. § 1.16(c)(3) (West Supp.2014) by intentionally acting to "conduct, promote, or facilitate an activity in which the respondent receives, possesses, conceals, stores, barters, sells, or disposes of stolen merchandise, to wit: clothing items, of a value of more than five hundred dollars but less than $1500." M.LM. waived a jury and agreed to proceed before a juvenile-court referee. See Tex.Fam.Code Ann. § 51.09 (West 2014). At the adjudication hearing, the State called as witnesses Pokluda, the Macy's security officer, Aker, the female Macy's clerk, and an additional clerk who had searched the dressing room. Following the adjudication hearing, the docket sheet reflects a notation that M.L.M. was found guilty of the "lesser included offense of theft" of $500 to $1,500, with a citation to Tex. Penal Code Ann. 31.03 (West Supp.2014).

The disposition hearing was held sixteen days later. The referee stated that: "I found you had engaged in delinquent conduct on basically a shoplifting charge." He recommended a "no

disposition" outcome which was adopted by the district court. The disposition order recites that M.L.M. had engaged in delinquent conduct which is the focus of this appeal.

ISSUES FOR REVIEW

M.L.M.'s brings three issues on appeal, all sharing a common thread. In Issue One, she contends that the State was required to pursue this case only under the "Organized Retail Theft" statute because that enactment exclusively deals with theft of "retail merchandise" which was at issue here. M.L.M. complains that the general theft statute under which she was found delinquent is supplanted by the more specific Organized Retail Theft statute by the doctrine of in pari materia. Accordingly, because the referee refused to find her guilty under the Organized Retail Theft statute, the referee could not find her guilty under the supplanted general theft statute.

In a related contention, M.L.M. claims in Issue Three that the general theft statute cannot be a "lesser included offense" of Organized Retail Theft because while both statutes cover the same conduct, Organized Retail Theft exclusively governs theft of "retail merchandise." In essence, she argues that one could never be convicted under the general theft statute for taking retail merchandise.

Held: Affirmed.

Opinion: To frame these issues, we begin with the text of two statutes. The relevant provisions of Tex. Penal Code Ann. § 31.16 (West Supp.2014), titled the "Organized Retail Theft" provide:

(b) A person commits an offense if the person intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, or disposes of:

(1) stolen retail merchandise; or
...
(c) An offense under this section is:
...
(3) a state jail felony if the total value of the merchandise involved in the activity is $500 or more but less than $1,500....

The relevant provisions of Tex.Penal Code Ann. § 31.03 (West Supp.2014), titled "Theft" provide:
(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.

(b) Appropriation of property is unlawful if:

(1) it is without the owner's effective consent;

(2) the property is stolen and the actor appropriates the property knowing it was stolen by another; or
...
(e) Except as provided by Subsection (f), an offense under this section is:

(3) a Class A misdemeanor if the value of the property stolen is $500 or more but less than $1,500....

The history of the enactments provides some needed background. The earliest version of Tex.Penal Code Ann. § 31.03 was enacted in 1973 with this explanation textualized in Section 31.02:

Theft as defined in Section 31.03 constitutes a single offense superseding the separate offenses previously known as theft, theft by false pretext, conversion by a bailee, theft from the person, shoplifting, acquisition of property by threat, swindling, swindling by worthless check, embezzlement, extortion, receiving or concealing embezzled property, and receiving or concealing stolen property. TEX.PENAL CODE ANN. §31.02 (West 2012)[Emphasis added].

The Court of Criminal Appeals has expressly endorsed the Practice Commentary to § 31.02 which stated: "No part of the old Penal Code produced more confusion, more appellate litigation, and more reversals on technicalities unrelated to the actor's guilt or innocence than the multitude of offenses proscribing criminal acquisitions of another's property." Chance v. State, 579 S.W.2d 471, 474 (Tex.Crim.App.1979). Accordingly, the various theft statutes were consolidated into Section 31.03. Id.

But straying from the effort to consolidate theft offenses, the Legislature added the offense titled "Organized Retail Theft" in 2007. Act of June 15, 2007, 80th Leg. R.S., ch. 1274, § 1, 2007 Tex.Gen.Laws 4258, codified at Tex.Penal Code Ann. § 31.16 (West Supp.2014). The legislative history indicates the purpose was to address groups of people who were engaged in theft rings:

Organized retail theft is a highly organized criminal activity that depends on many thieves organized by a central 'fence' who collects the stolen merchandise and then resells it to the general public. Last year, it was estimated that organized retail theft cost retailers and the American public more than $37 billion and Texans $100 million in sales tax revenues.

C.S.S.B.1901 adds a new offense entitled 'Organized Retail Theft' to the theft provisions of the Penal Code and provides specific criminal penalties for persons charged with engaging in these activities. This bill also increases the penalty for those supervising one or more individuals engaged in organized retail theft. This bill authorizes an organized retail theft case to be prosecuted in any county in which an underlying theft could have been prosecuted as a separate offense. House Comm. on Criminal Jurisprudence, Bill Analysis, C.S.H.B. 3584, 80th Leg., R.S. (2007)(available at http://

www.lrl.state.tx.us/scanned/srcBillAnalyses/80–0/SB1901RPT.PDF). We have found no cases substantively construing the provisions of the Organized Retail Theft statute since it was enacted.

M.L.M. contends that because both of these enactments address the same conduct and the goods taken were "retail merchandise," only the Organized Retail Theft enactment can apply here because it is the more specific statute. The Court of Criminal Appeals has held that where a general statute, and a specific statute complete within itself, both proscribe a defendant's conduct, the defendant should be charged under the more specific statute. Cheney v. State, 755 S.W.2d 123, 127 (Tex.Crim.App.1988); Williams v. State, 641 S.W.2d 236, 238 (Tex.Crim.App.1982). This rule is based on the in pari materia rule of statutory construction, which provides that if two statutes deal with the same general subject, have the same general purpose, or relate to the same person or class of persons, they are considered in pari materia and should, wherever possible, be construed to harmonize any conflicts. Cheney, 755 S.W.2d at 126; Mills v. State, 722 S.W.2d 411, 414 (Tex.Crim.App.1986). If there are irreconcilable conflicts between statutes as to elements of proof, or penalties for the same conduct, then the more specific statute controls. Cheney, 755 S.W.2d at 127; Williams, 641 S.W.2d at 239. In M.L.M.'s view, if a theft only involves retail merchandise, then only the Organized Retail Theft statute can apply.

The State responds that the Organized Retail Theft statute is designed for the distinct purpose of addressing theft rings, or as it suggests, "Fagan like conduct." FN4 Thus what elevates ordinary shoplifting type theft to Organized Retail Theft is the organized activity of participants in a group. Moreover, the State contends that Section 31.03 primarily addresses the person getting the goods, and Section 31.16 targets the schemer.

FN4. "This is him, Fagin," said Jack Dawkins; "my friend Oliver Twist." Dickens, Oliver Twist, in Three Novels (Hamlyn 1977) (Fagan being the Charles Dickens' character who recruited and trained a cadre of street urchins as pickpockets).

Additionally, the State raises a waiver contention, arguing that the pari materia argument was never made before the referee or the district court below.FN5 With this contention we must agree. To preserve error, a party must make a timely and specific objection. TEX.R.APP.P. 33.1(a); Wilson v. State, 71 S.W.3d 346, 349 (Tex.Crim.App.2002). The complaining party must also obtain an adverse ruling on the objection. Ramirez v. State, 815 S.W.2d 636, 643 (Tex.Crim.App.1991).

FN5. The State raised the waiver argument in its Appellee's Brief and we were not favored with a Reply Brief responding to the waiver claim.

Specifically with reference to the pari materia issue, the Court of Criminal Appeals has focused on the adequacy and timing of the objection made at trial. Azeez v. State, 248 S.W.3d 182, 193–94 (Tex.Crim.App.2008)(holding that objection made at directed verdict stage and in motion for new trial were timely). The same is true for a number of court of appeals, including the Fort Worth court which guides our decision in this transferred case. Rodriguez v. State, 336 S.W.3d 294, 301 (Tex.App.—San Antonio 2010, pet. ref'd)(issue was waived when not raised until amended motion for new trial); Short v. State, 995 S.W.2d 948, 953 (Tex.App.—Fort Worth 1999, pet. ref'd)(failure to raise in pari materia claim before trial waives the complaint for appellate review); Haywood v. State, 344 S.W.3d 454, 465 n.2 (Tex.App.—Dallas 2011, pet. ref'd)(same).

M.L.M. would not have had any occasion to raise this issue before, or even during the adjudication hearing, as there was no suggestion that the State was asking for a finding under a lesser included offense.

Conclusion: The bifurcated nature of the juvenile proceedings provided M.L.M. the opportunity to object to the referee's finding on the lesser included offense before or during the disposition hearing held sixteen days later. See In re A.C., 48 S.W.3d 899, 905 (Tex.App.-Fort Worth 2001, pet. denied)(holding complaint made first in amended motion for new trial when juvenile had notice of the issue before trial and during both phases was untimely). By that time, it was clear the referee had considered theft as a lesser included offense. Accordingly, we overrule Issues One and Three.

_____

FAILURE OF TRIAL COURT TO PROPERLY ADMONISH CHILD PRIOR TO PLEA OR TRIAL REQUIRES AN OBJECTION TO PRESERVE ERROR FOR APPELLATE REVIEW.

¶ 15-1-4B. **In the Matter of S.A.**, MEMORANDUM, No. 06-14-00055-CV, 2014 WL 7442507 (Tex.App.-Texarkana, 12/31/14).

Facts: In the first five months of 2014, fifteen-year-old Sandra had, let's say, a tumultuous relationship with her sixty-five-year-old father, marked by three documented instances in which Sandra assaulted or injured him. The first two instances resulted in Sandra's probation.

The final confrontation occurred the afternoon of May 10, 2014. That afternoon, Sandra was listening to music on a cellular telephone while she sunbathed outside her home. Wanting to hear different music, Sandra went inside to download more music from the computer. Since the conditions of Sandra's existing probation forbad her to use the computer, her father

sought to stop her. Her father, who had broken his foot several days before, stumbled as he tried to get between Sandra and the computer. As he sought to stop her, he grabbed the base of the back of her neck. At about the same time, Sandra stomped his broken foot, which was in a cast, on top and at the ankle, and kicked his shin. Her mother then restrained her as her father tried to get out of the door. As she was being restrained, she slung her telephone with its charger, and it struck and cut her father's arm.

At Sandra's June 12, 2014, hearing, Sandra's mother appeared at trial, sat at the counsel table with Sandra, and was ultimately called as a witness by the State. Sandra's mother's testimony generally confirmed the testimony of Sandra's father—that Sandra had assaulted him on the occasion in question.

On appeal, Sandra complains that the trial court did not appoint a guardian ad litem because her mother was incapable of making decisions in her best interest. Sandra asserts that her mother had an inherent conflict of interest because she was the victim's wife, a witness to the incident, and a key witness for the State. At the hearing below, Sandra did not ask for a guardian ad litem to be appointed or point to any conflict of interest her mother may have had. Nevertheless, Sandra maintains that the right to a guardian ad litem is a "waivable only" right and that the right to a guardian ad litem is on par with the right to counsel. She cites no authority, however, and we have found none, that has so held when a parent is present at the hearing.

Held: Affirmed

Memorandum Opinion: Sandra also complains that the trial court did not admonish her regarding her right to confront witnesses. Sandra is correct in asserting that the trial court had a duty to admonish her regarding her right to confront witnesses. The trial court is obligated, at the beginning of the hearing, to explain to the child and her parent, inter alia, "the child's right ... to confrontation of witnesses." TEX. FAM.CODE ANN. § 54.03(b)(4) (West 2014). The failure of a trial court to give any of the admonishments in Section 54.03 is error. See In re C.O.S., 988 S.W.2d 760, 763 (Tex.1999). To preserve the error for appeal, however, "the failure of the court to provide the child the explanation required by Subsection (b), the attorney for the child must comply with Rule 33.1, Texas Rules of Appellate Procedure, before testimony begins.... " TEX. FAM.CODE ANN. § 54.03(i) (West 2014) (emphasis added); In re M.D.T., 153 S.W.3d 285, 288–89 (Tex.App.—El Paso 2004, no pet.). Rule 33.1 of the Texas Rules of Appellate Procedure requires a "timely request, objection, or motion" be made to the trial court that

(**A) states the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; TEX.R.APP.P. 33.1(a)(1)(A).**

Conclusion: Neither Sandra nor her trial counsel complained about any deficiency in the statutory admonishments before testimony began. Thus, we hold that Sandra failed to preserve any error related to the failure of the trial court to admonish her on her right to confront witnesses. We affirm the judgment of the trial court.

COLLATERAL ATTACK

BY FAILING TO PROVIDE FILE-STAMPED COPIES OF THE MOTIONS HE WANTED THE TRIAL COURT TO ACT ON, JUVENILE DID NOT SHOW THAT HIS MOTIONS HAD BEEN PRESENTED TO THE TRIAL COURT, WHICH WOULD IN TURN BE NECESSARY TO SHOW HE WAS ENTITLED MANDAMUS RELIEF.

¶ 15-1-13. **In re J.B.H.**, MEMORANDUM, No. 14-15-00114-CV, 2015 WL 732665 (Tex.App.-Hous. (14 Dist.), 2/19/15).

Facts: On February 9, 2015, relator J.B.H. filed a petition for writ of mandamus in this court. See Tex. Gov't Code Ann. § 22.221 (West 2004); see also Tex.R.App. P. 52. In the petition, relator asks this court to compel the Honorable Glenn Devlin, presiding judge of the 313th District Court of Harris County, to rule on his motion to inspect and/or purchase a certified copy of the certification record in his juvenile case.

The juvenile court waived jurisdiction and transferred relator's case to the district court. In re J.B.H., No. 14–13–00072–CV, 2013 WL 504106, at *1 (Tex.App.—Houston [14th Dist.] Feb. 12, 2013, orig. proceeding) (mem.op.). A jury convicted relator of aggravated sexual assault and, after making a deadly weapon finding, sentenced him to life imprisonment, and this court affirmed the conviction. See Hines v. State, 38 S.W.3d 805, 807 (Tex.App.—Houston [14th Dist.] 2001, no pet.).

Relator brought a prior mandamus proceeding in this court, seeking to compel the trial court to rule on his motion to inspect and/or purchase a certified copy of the certification records in his juvenile case. J.B.H., 2013 WL 504106, at *1. Section 58.003(h) of the Texas Family Code provides that sealed records may be inspected if the trial court has signed an order permitting the request by the person who is the subject of the records. Tex. Fam.Code Ann. § 58.003(h) (West 2014). This court denied relator's mandamus petition because relator had not shown that he had asked the trial court to sign an order permitting the sealed records to be inspected. J.B.H., 2013 WL 504106, at *1.

Relator asserts that he filed four motions with the juvenile court, on February 16, 2013, March 16, 2013, March 31, 2013, and March 5, 2014, requesting that (1) he be allowed to inspect or purchase a copy of the certification record; or (2) the court unseal the certification record. The juvenile court never ruled on these motions.FN1

FN1. Relator states that he filed a petition for writ of mandamus with the Texas Court of Criminal Appeals, which ordered the trial court to respond in thirty days. According to relator, the district clerk supplied a supplemental clerk's record, purposely "withholding court records filed prior to and after October 29, 1998." Relator also states that he later filed another petition with the Court of Criminal Appeals seeking mandamus relief. The court denied relator's second petition because relator first should have sought relief in the court of appeals pursuant to Padilla v. McDaniel, 122 S.W.3d 805 (Tex.Crim.App.2003) (orig.proceeding).

Held: Petition for relief – denied

Opinion (per curium): A trial court has a ministerial duty to consider and rule on motions properly filed and pending before it, and mandamus may issue to compel the trial court to act. In re Blakeney, 254 S.W.3d 659, 661 (Tex.App.—Texarkana 2008, orig. proceeding); Ex parte Bates, 65 S.W.3d 133, 134 (Tex.App.—Amarillo 2001, orig. proceeding). To be entitled to mandamus relief compelling a trial court to rule on a properly filed motion, relator must establish that the trial court (1) had a legal duty to rule on the motion; (2) was asked to rule on the motion; and (3) failed or refused to rule on the motion within a reasonable time. In re Layton, 257 S.W.3d 794, 795 (Tex.App.—Amarillo 2008, orig. proceeding); In re Molina, 94 S.W.3d 885, 886 (Tex.App.—San Antonio 2003, orig. proceeding).

It is relator's burden to provide a sufficient record to establish that he is entitled to relief. See Walker v. Packer, 827 S.W.2d 833, 839 (Tex.1992) (orig.proceeding). Relator has not done so. Although relator has attached to his petition for mandamus relief copies of three of his four motions, relator has not provided file-stamped copies of his motions in the mandamus record, establishing that his motions are pending in the trial court. See Tex.R.App. P. 52.3(k), 52.7(a). Relator also has not shown that any of his motions have been presented to the trial court. The trial court is not required to consider a motion that has not been called to its attention by proper means. See Layton, 257 S.W.3d at 795.

Conclusion: Relator has not established that he is entitled mandamus relief. Accordingly, we deny relator's petition for a writ of mandamus.

CONFESSIONS

JUVENILE DID NOT INVOKE HIS RIGHT TO COUNSEL BY HIS QUESTION TO DETECTIVE REGARDING CALLING HIS MOTHER TO SEE IF SHE GOT HIM A LAWYER.

¶ 15-1-12. **Stanley v. State**, No. 04-13-00663-CR , MEMORANDUM, 2015 WL 358524 (Tex.App.-San Antonio, 1/28/15).

Facts: Stanley was arrested for the capital murder of Gilbert Fernandez. Prior to trial, Stanley filed a motion to suppress oral statements he made to San Antonio detectives, Timm Angell and Omar Omungo. At the hearing on the motion, the State presented both detectives as witnesses. Additionally, the trial court admitted into evidence an audio recording of Stanley's interview with Detective Angell and a DVD recording of Stanley's post-arrest interview with Detective Omungo.

At the hearing, Detective Angell testified he was working at the main police station when Detective Omungo received a phone call advising him that two men, Stanley and Eric Ramirez, were at the Prue Road police substation. Stanley and Ramirez wanted to talk about a murder. Detective Angell stated he and Detective Omungo went to the substation to question the men. When they arrived, the detectives questioned the men separately.

Detective Angell testified he found Stanley seated with another officer at a desk located behind the service counter. Stanley was not in handcuffs. According to Detective Angell, he introduced himself to Stanley and discovered Stanley, who was eighteen-years-old, was at the substation to turn himself in for a robbery. Detective Angell stated he told Stanley he was not under arrest and he could leave whenever he wanted. According to Detective Angell, Stanley stated he did not understand why he was not under arrest. Detective Angell advised Stanley that he might be arrested later, but at this time, he was not under arrest. Stanley then told Detective Angell that he and Ramirez robbed Fernandez and during the robbery, Ramirez killed Fernandez by hitting him with a bat. The conversation lasted approximately thirty-six minutes; thereafter, Stanley left with his parents.

Detective Omungo testified he conferred with Detective Angell about the conversation with Stanley. Thereafter, Detective Omungo prepared a warrant for Stanley's arrest. The police arrested Stanley the next morning and took him to a police substation where Detective Omungo interviewed him.

Detective Omungo testified that when he arrived at the substation, Stanley was in an interview room. Detective Omungo also testified he removed Stanley's handcuffs, introduced himself, and asked Stanley if he was "okay." Thereafter, the detective read Stanley his Miranda rights. According to Detective Omungo, after

he asked Stanley if he understood his rights, Stanley nodded affirmatively. Detective Omungo then asked Stanley to share his side of the story. Stanley replied, stating his mother had told him to wait for a lawyer. Detective Omungo testified he told Stanley he could not force him to talk. Stanley then asked if he could call his mother to see if she was obtaining a lawyer. Detective Omungo testified he told Stanley he could call his mother if he wanted or he could talk to him about what happened. Stanley remained quiet for a moment and then proceeded to tell Detective Omungo how he and Ramirez robbed Fernandez and during the robbery, Ramirez murdered Fernandez.

Stanley was ultimately indicted for the offense of capital murder. Before trial, Stanley sought to suppress the statements he made to the two detectives. After the suppression hearing, the trial court denied Stanley's motion to suppress, making oral findings of fact. The trial court found Stanley's first statement—the statement he made to Detective Angell—was voluntary. The trial court further found Stanley waived his Miranda rights and failed to invoke his right to counsel when he made his post-arrest statement to Detective Omungo. After the trial court denied his motion to suppress, Stanley and the State entered into a plea agreement whereby Stanley pled guilty to the lesser offense of murder. Stanley preserved his right to appeal the denial of his motion to suppress. After judgment was rendered, Stanley perfected this appeal.

ANALYSIS

In two issues on appeal, Stanley contends the trial court erred by overruling his motion to suppress the oral statements he made during his interviews with Detective Angell and Detective Omungo. Specifically, Stanley argues the statement he made to Detective Angell was the product of a custodial interrogation and he was not given Miranda warnings. As to his post-arrest statement to Detective Omungo, Stanley contends the statement was involuntary and obtained in violation of his right to counsel.

Held: Affirmed

Memorandum Opinion: 1. Pre–Arrest Statement to Detective Angell

As stated above, Stanley contends the trial court erred by overruling his motion to suppress the statement he made to Detective Angell. He contends the statement was the product of a custodial interrogation and he was not given Miranda warnings. Therefore, he asserts his statement was involuntary.

As this court held in Hines v. State, law enforcement must, under Miranda v. Arizona, warn suspects of certain constitutional rights prior to a custodial interrogation. 383 S.W.3d 615, 621 (Tex.App.—San Antonio 2012, pet. ref d) (citing Miranda v. Arizona, 384 U.S. 436, 444, 478 (1966); Hodson State, 350 S.W.3d 169, 173 (Tex.App.—San Antonio 2011, pet. ref'd)). Additionally, law enforcement must abide by the provisions of Article 38.22 of the Texas Code of Criminal Procedure with regard to statements made during a custodial interrogation. See Tex. Code Crim. Proc. Ann. art. 38.22 (West 2011). Article 38.22 provides that an oral statement is admissible against a defendant if the defendant was given certain warnings prior to making the statement, the warnings and the statement were electronically recorded, and the defendant "knowingly, intelligently, and voluntarily" waived these rights. Id. art. 38.22, §§ 2(a), 3(a)(l)-(2). However, warnings pursuant to Miranda and Article 38.22 are necessary only when a suspect is in custody. Hines, 383 S.W.3d at 621 (citing Miranda, 384 U.S. at 444; Hodson, 350 S.W.3d at 173). "'A person is in 'custody' only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest.' " Hodson, 350 S.W.3d at 173–74 (quoting Dowthitt v. State, 931 S.W.2d 244, 254 (Tex.Crim.App.1996)).

According to the Texas Court of Criminal Appeals, four situations constitute situations in which a defendant may be in custody: (1) when a suspect is physically deprived of his freedom of action in any significant way; (2) when a police officer tells a suspect he cannot leave; (3) when a police officer creates a situation that would lead a reasonable person to believe his freedom of movement has been significantly restricted; and (4) when there is probable cause to arrest and a police officer does not tell a suspect he is free to leave. Hodson, 350 S.W.3d at 174. It is the objective circumstances, not the subjective views of either the police officer or the defendant, that determine whether the defendant was subject to custodial interrogation. Hines, 383 S.W.3d at 621 (citing Dowthitt, 931 S.W.2d at 254); Garza v. State, 34 S.W.3d 591, 593 (Tex. App—San Antonio 2000, pet. ref'd).

The State has no burden to show it complied with the mandates of Miranda or Article 38.22 "unless and until the defendant proves that the statements he wishes to exclude were the product of custodial interrogation." Hines, 383 S.W.3d at 621 (quoting Herrera v. State, 241 S.W.3d 520, 526 (Tex.Crim.App.2007) (quoting Wilkerson v. State, 173 S.W.3d 521, 532 (Tex.Crim.App.2005)). Accordingly, Stanley had the burden to establish he was in custody before the State was required to show compliance with Miranda or Article 38.22. See id. We hold Stanley failed to meet this burden with regard to the statement made to Detective Angell.

A determination as to whether Stanley was in custody when he made the complained of statement to Detective Angell presents a mixed question of law and fact. See Herrera v. State, 241 S.W.3d at 526. Therefore, as to the portion of the custody issue that turns on witness credibility, we will defer to the trial court. See Hodson, 350 S.W.3d at 173. However, we

will review the court's application of the law to the facts under a de novo standard. See id.

Stanley contends the interrogation by Detective Angell was custodial because: (1) Stanley provided the police with a damaging statement that established probable cause for his arrest, and (2) he was not allowed to speak to his family, who were in the process of obtaining an attorney on his behalf. We disagree and conclude the conversation between Detective Angell and Stanley did not rise to the level of a custodial interrogation.

Although a defendant's damaging admission with regard to a crime may be the key factor in establishing probable cause for his arrest, merely making a damaging statement is not enough to turn a situation into a custodial interrogation. See Saenz v. State, 411 S.W.3d 488, 497 (Tex. Crim.App.2013) (holding officer's knowledge of probable cause to arrest does not by itself create situation classified as custodial interrogation); Trejos v. State, 243 S.W.3d 30, 46–47 (Tex.App.—Houston [1st Dist.] 2007, pet. ref'd) ("Although a statement made by a person is sufficient to establish probable cause, the statement is not custodial if the court determines based on other facts that the person was not under arrest."). Instead, custody is established if the manifestation of probable cause in combination with other factors would lead a reasonable person to believe he is under restraint to the degree associated with a formal arrest. Saenz, 411 S.W.3d at 496.

In this case, the trial court's oral findings of fact support the trial court's conclusion that despite his admissions, Stanley was not in custody during his interview with Detective Angell. First, the evidence establishes, and the trial court found, that Stanley voluntarily went to the police substation to provide police with his version of the robbery and killing of Fernandez. See Estrada v. State, 313 S.W.3d 274, 294–95 (Tex.Crim.App.2010) (holding that defendant was not in custody when he went to police station voluntarily, was told he was free to leave, and stayed willingly for five-hour interview); White v. State, 395 S.W.3d 828, 836 (Tex.App.—Fort Worth 2013, no pet.)(holding that defendant was not in custody when he voluntarily went to police station for one-hour interview, despite making pivotal admission). Second, Detective Angell testified he repeatedly told Stanley he was not under arrest, and the trial court subsequently found that although Stanley may have thought his admission would cause him to be arrested, he was informed several times he was not under arrest. See Estrada, 313 S.W.3d at 295 (holding reasonable person would believe he was free to leave when told by police several times he was free to leave even if defendant states he wants to leave but voluntarily stays); Garcia v. State, 106 S.W.3d 854, 858 (Tex.App.—Houston [1st Dist.] 2003, pet. ref d) (holding that defendant was not in custody when he voluntarily went to police station, and after he was told he could leave, he gave damaging statement). In addition, the record shows Stanley was questioned by Detective Angell for approximately thirty-six minutes in an open area, was not physically prevented from leaving the substation, was allowed to speak with his parents when he asked to speak to them, and was permitted to leave the substation with his parents.

Stanley points out that Detective Angell ignored his repeated requests to speak to his family regarding an attorney. However, Detective Angell testified he told Stanley he was free to leave when Stanley expressed concern about talking with an attorney. Detective Angell also testified that when Stanley asked to speak to his father, Detective Angell took Stanley to his father, who was seated twenty yards away.

Applying the applicable legal standard, we must give almost total deference to the trial court's custody determination when questions of historical fact turn on witnesses' credibility or demeanor. Here, we hold Detective Angell's testimony provides sufficient evidence to support the trial court's finding that Stanley was not in custody.

Under these circumstances, we hold a reasonable person would not believe he was under restraint to the degree associated with an arrest. We therefore conclude Stanley failed to meet his burden to establish he was in custody when he made his oral statement to Detective Angell. Because Stanley was not in custody, Detective Angell was not required to give Stanley warnings pursuant to Miranda or Article 38.22 prior to or during the interview. Accordingly, we hold the trial court did not err in denying the motion to suppress.

2. Post Arrest Statement to Detective Omungo

Stanley next contends the trial court erred in denying his motion to suppress with regard to his post-arrest statement to Detective Omungo. Stanley contends his post-arrest statement was involuntary because he did not fully understand the Miranda warnings read to him, and he did not waive his rights after the warnings were read. Stanley also claims he invoked his right to counsel before giving any statement to Detective Omungo, but Detective Omungo ignored his request for counsel. We will address each of these arguments separately.

Waiver

As noted above, Article 38.22 of the Code of Criminal Procedure provides that an oral statement made by an accused as a result of custodial interrogation shall not be admissible against him in a criminal proceeding unless the statement was recorded and, prior to the statement but during the recording, the accused was warned of his rights and knowingly, intelligently, and voluntarily waived those rights.

Tex.Code Crim. Proc. art. 38.22 § 3. The Article 38.22 warning must inform a defendant that:

(1) [H]e has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;

(2) any statement he makes may be used as evidence against him in court;

(3) he has the right to have a lawyer present to advise him prior to and during any questioning;

(4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview at any time[.]
TEX.CODE CRIM. PROC. art. 38.22, § 2.

The State bears the burden to show by a preponderance of the evidence that the accused knowingly, intentionally, and voluntarily waived his rights. See Joseph v. State, 309 S.W.3d 20, 24 (Tex.Crim.App.2010) (citing Miranda, 384 U.S. at 444).

To be valid, a waiver of rights must be made with the full awareness of not only the nature of the rights being abandoned, but also the consequences of the decision to abandon those rights. Joseph, 309 S.W.3d at 25. To be voluntary, a waiver must be the product of a free and deliberate choice, not a result of coercion, intimidation or deception. Id. However, a waiver does not need to assume a particular form and can be inferred by the actions and words of the accused. Id. at 24 (citing North Carolina v. Butler, 441 U.S. 369, 373 (1979)); see also Watson v. State, 762 S.W.2d 591, 601 (Tex.Crim.App.1988) (highlighting that waiver is not required to be written or orally expressed). In other words, a waiver may be presumed upon a showing that an individual was given proper warnings, acted in a manner that indicated he fully understood his rights and the consequences of waiving such rights and made an uncoerced statement. Berghuis v. Thompkins, 560 U.S. 370, 384–85 (2010); Joseph, 309 S.W.2d at 25. To determine if an accused validly waived his rights, we must consider the totality of the circumstances surrounding the interrogation. See Joseph, 309 S.W.2d at 25–26.

The DVD recording of the post-arrest statement shows Detective Omungo read Stanley his rights and asked Stanley if he understood his rights. Stanley remained silent, but appeared to nod his head affirmatively. Detective Omungo confirmed Stanley's action by responding, “Yes.” At the suppression hearing, Detective Omungo testified he asked Stanley if he understood his rights, and Stanley indicated he did. Furthermore, Detective Omungo testified he did not have any concerns about Stanley's mental capacity or his ability to understand the process. And, it is undisputed that after the detective read the warnings to Stanley, Stanley continued with the interview.

Stanley counters, arguing he did not affirmatively nod, and therefore, he did not expressly waive his rights. Stanley also contends he did not act in any way to show an affirmative waiver of his rights. The trial court found that although Stanley may not have clearly nodded, there was no showing or indication that Stanley did not want to proceed with the interview, and therefore, he waived his rights. We agree. As stated above, an express waiver of rights is not required. See Joseph, 309 S.W.2d at 24. It is within the trial court's discretion to rely upon an implied waiver when the totality of the circumstances, as reflected by the DVD recording and Detective Omungo's testimony, supports it. Id. at 25–26. There is nothing in the record to lead this court to conclude Stanley did not understand his rights. Although Stanley did not specifically state that he wished to waive his rights or that he understood his rights, Stanley acted in a manner to show he understood his rights when he proceeded to speak to Detective Omungo and gave no indication he wished to remain silent. We therefore conclude the totality of the circumstances supports the trial court's reliance upon appellant's implied waiver of his rights.

Invocation of Right to Counsel

Stanley next contends that even if he did initially waive his rights, he later invoked his right to counsel when he asked to speak to his mother about an attorney before providing any statement to Detective Omungo. We disagree.

When an accused requests to speak to an attorney, a police officer must stop asking the accused questions until he is provided with an attorney. Davis v. State, 313 S.W.3d 317, 339 (Tex.Crim.App.2010); State v. Gobert, 275 S.W.3d, 888, 893 (Tex.Crim.App.2009). However, a request for counsel must be unambiguous; in other words, it must be sufficiently clear that a reasonable police officer would understand the statement to be a request for an attorney. Davis v. United States, 512 U.S. 452, 459 (1994); Davis, 313 S.W.3d at 339; Dalton v. State, 248 S.W.3d 866, 872 (Tex.Crim.App.2008). If an accused makes an ambiguous or equivocal statement, a police officer is under no obligation to ask the accused questions to clarify whether he really wants an attorney. Davis, 313 S.W.3d at 339; Dalton, 248 S.W.3d at 872.

Whether an accused actually invoked his right to counsel is an objective inquiry. Davis, 313 S.W.3d at 339. To determine if an accused invoked his right to counsel, we look at the totality of the circumstances surrounding the interrogation in combination with the accused's statement. Dalton, 248 S.W.3d at 872–73.

The DVD recording shows Stanley told Detective Omungo that his mother told him not to speak to

anyone unless he had an attorney. Detective Omungo informed eighteen-year-old Stanley that it was up to him whether he wanted to discuss what happened. Stanley then asked if he could call his mother to ask if she was bringing an attorney, and Detective Omungo told Stanley he could call his mother, but he was old enough to decide if he wanted to speak to the detective. Moreover, at the suppression hearing, Detective Omungo testified he told Stanley he was an adult and could make the decision on his own whether to speak to the detective without an attorney. Stanley paused, and Detective Omungo asked him what he would like to do. Stanley then proceeded to provide Detective Omungo with a statement regarding the robbery and murder.

After watching the DVD recording and hearing the testimony, the trial court found that Stanley did not clearly invoke his right to counsel. Rather, Stanley considered his options and decided to move forward and provide Detective Omungo a statement. We agree.

When considering the totality of the circumstances, we hold Stanley's request to speak to his mother with regard to her obtaining an attorney for him was not a clear invocation of his right to counsel. Texas case law holds that an invocation of the right to counsel must be clear and unambiguous. See, e.g., Davis, 313 S.W.3d at 341 (holding that defendant's statement "Should I have an attorney?" was not clear request for counsel); Dalton, 248 S.W.3d at 873 (holding that defendant's statement to officer to tell his friends to get lawyer was not direct, unequivocal request for attorney); Mbugua v. State, 312 S.W.3d 657, 665 (Tex.App.—Houston [1st Dist.] 2009, pet. ref d) (holding that "Can I wait until my lawyer gets here?" was not clear and unambiguous invocation of right to counsel).

Here, Detective Omungo attempted to clarify Stanley's statement by asking him what he wanted to do. Contrary to the situation presented in In re H.V., where a Bosnian juvenile's statement that he "wanted his mother to ask for an attorney" was construed as an unambiguous request for an attorney under the totality of the circumstances, this case involves an adult requesting to ask his mother whether she hired an attorney. See 252 S.W.3d 319, 327 (Tex.2008). Stanley's ambiguous question about calling his mother to inquire about the status of counsel was followed by his unambiguous decision to continue to discuss the situation with Detective Omungo. Accordingly, considering the totality of the circumstances from an objective viewpoint, we conclude the trial court did not err in concluding Stanley did not invoke his right to counsel. If anything, Stanley's request to speak to his mother about an attorney confirms Stanley understood his rights as well as the consequences of waiving such rights, and therefore, made a valid waiver. Consequently, we hold the trial court did not err in denying the motion to suppress Stanley's post-arrest statement to Detective Omungo.

Conclusion: Based on the foregoing, we conclude the trial court did not err in denying Stanley's motion to suppress. Accordingly, we overrule Stanley's complaints and affirm the trial court's judgment.

DETERMINATE SENTENCE TRANSFER

IN DETERMINATE SENTENCE TRANSFER HEARING, NOTICE TO MOTHER WAS SATISFIED WHERE THE TRANSFER ORDER STATED THAT NOTICE WAS GIVEN TO ALL PARTIES.

¶ 15-1-11. **In the Matter of D.B.,** No. 06–14–00053–CV, --- S.W.3d ----, 2015 WL 348268 (Tex.App.-Texarkana, 1/28/15).

Facts: In January 2012, D.B., who was sixteen years old at the time, was charged with engaging in delinquent conduct for the aggravated robbery of Cornelius Richardson. D.B. waived his right to a jury, and after a hearing on March 27, 2012, D.B. was found to have engaged in delinquent conduct by the district court, sitting as a juvenile court, and was committed to the TYC for a determinate sentence of thirteen years. The TJJD may not retain custody of a youthful offender beyond his nineteenth birthday. See TEX. HUM. RES..CODE ANN. § 245.151(d), (e) (West 2013). If the youthful offender has been committed to the TJJD for conduct constituting a first degree felony, the TJJD is prohibited from releasing him on parole without approval of the juvenile court that entered the order of commitment unless the youthful offender has served three years of his determine sentence. See TEX. HUM. RES..CODE ANN. § 245.051(c)(2) (West 2013). Because D.B. would reach his nineteenth birthday before he had completed three years of his determinate sentence for aggravated robbery, the State filed a motion to transfer D.B. to the TDCJ. See TEX. FAM.CODE ANN. § 54.11 (West 2014); TEX. HUM. RES..CODE ANN. § 244.014 (West Supp.2014). In its motion to transfer, the State requested that the court set a hearing and give notice of the hearing to D.B. and his mother. D.B., his mother, and his older brother attended the hearing and testified on D.B.'s behalf. After hearing testimony from witnesses for the State and D.B. and considering the documentary evidence, the trial court entered its transfer order, finding it was in the best interest of D.B. and the public that D.B. be transferred to the TDCJ to serve the remainder of his thirteen-year sentence.

On appeal, D.B. asserts only that the transfer hearing was unlawful because, he alleges, there was no notice of the hearing given to the victim of his offense or a member of the victim's family as required by the Texas Family Code. See TEX. FAM.CODE ANN. § 54.11(b). Section 54.11(b) requires that the court give

notice of the transfer hearing to, among others, the victim of the offense that was a ground for the delinquent conduct disposition or a member of the victim's family. TEX. FAM.CODE ANN. § 54.11(b)(5). Initially, we note that D.B. did not object at the hearing or in any way direct the trial court's attention to any defect related to not giving the victim or his family member notice of the hearing. Generally, to preserve a complaint for appellate review, a party must present a timely request, objection, or motion to the trial court that states the specific grounds for the desired ruling. TEX.R.APP. P. 33.1(a); Holmes v. Concord Homes, Ltd., 115 S.W.3d 310, 316 (Tex.App.—Texarkana 2003, no pet.). If a party fails to do this, error is not preserved. Id. The State takes the position, however, that under In re C.O.S., D.B. may raise this point for the first time on appeal. In re C.O.S., 988 S.W.2d 760, 767 (Tex.1999). We are not convinced that the rule expressed in C.O.S. is applicable in this case,FN2 but without objection from the State, we will assume, arguendo, that D.B. may raise this error for the first time on appeal.

FN2. C.O.S. involved the failure of the juvenile court, at the adjudication hearing, to give the juvenile admonitory instructions, required by statute, that included an admonishment that the juvenile adjudication could be used in a future adult criminal prosecution and an admonishment concerning his right to confront witnesses. C.O.S., 988 S.W.2d at 762. The Texas Supreme Court, relying on Texas Court of Criminal Appeals precedent since juvenile proceedings are quasi-criminal, held that the failure to give these admonishments required by statute could be raised for the first time on appeal unless expressly waived by the juvenile. Id. at 767. In contrast, the release/transfer hearing is not a trial, and the juvenile is not being adjudicated. In re J.M.O., 980 S.W.2d 811, 813 (Tex.App.—San Antonio 1998, pet. denied). Since guilt/innocence is not being determined, the same considerations used to protect constitutional or statutory rights are not as stringent in a release/transfer hearing. See id.; In re D.S., 921 S.W.2d 383, 387 (Tex.App.—Corpus Christi 1996, writ dism'd w.o.j.). This would be especially true here, where the alleged failure to give notice involved the victim, not the juvenile or his relatives. See In re E.V., 225 S.W.3d 231, 234 (Tex.App.—El Paso 2006, pet. denied); cf. In re J.L.S., 47 S.W.3d 128, 130 (Tex.App.—Waco 2001, no pet.)(when alleged failure to give notice of hearing involved juvenile, issue could be raised for first time on appeal), with In re B.D., 16 S.W.3d 77, 80 (Tex.App.—Houston [1st Dist.] 2000, pet. denied) (questioning whether error preserved when not raised at trial court).

D.B. argues that the release/transfer hearing was unlawful because it was allegedly held contrary to the requirements of Section 54.11(b). An action taken by a court that is contrary to a statute or rule makes it voidable or erroneous, but not void. In re Masonite Corp., 997 S.W.2d 194, 198 (Tex.1999) (citing Mapco, Inc. v. Forrest, 795 S.W.2d 700, 703 (Tex.1990) (per curiam) (orig.proceeding)); In re O.R.F., 417 S.W.3d 24, 43 (Tex.App.—Texarkana 2013, pet. denied). In order to show that the hearing and the resulting order were voidable or erroneous, D.B. must show that the court's action was taken contrary to the statute.

Held: Affirmed

Opinion: The transfer order recites that the hearing was held "after due notice had been issued on all parties as required by Tex. Fam. Code § 54.11."We indulge every presumption in favor of the regularity of the trial court's judgment and the recitations therein. Breazeale v. State, 683 S.W.2d 446, 450 (Tex.Crim.App.1984); E.V., 225 S.W.3d at 234; Gen. Elec. Capital Assurance Co. v. Jackson, 135 S.W.3d 849 (Tex.App.—Houston [1st Dist.] 2004, pet. denied); B.D., 16 S.W.3d at 80; Willingham v. Farmers New World Life Ins. Co., 562 S.W.2d 526, 528 (Tex.Civ.App.—El Paso 1978, no writ). This means we will presume the recitations contained in the transfer order are true unless the record contains controverting evidence demonstrating their falsity. Breazeale, 683 S.W.2d at 450; E.V., 225 S.W.3d at 234; Willingham, 562 S.W.2d at 528.

In E.V., the appellant asserted that the transfer hearing was unlawful because his mother did not receive notice of the hearing as required by Section 54.11(b)(2). E.V., 225 S.W.3d at 234; TEX. FAM.CODE ANN. § 54.11(b)(2). As in this case, the transfer order recited that due notice had been issued on all parties as required by Section 54.11(b). Although there was no affirmative showing that notice had been given to his mother, the only evidence controverting the recitations in the order was the absence of appellant's mother at the hearing. Under these facts, the record supported the recitation in the order that notice had been issued on the parties as required by the statute. E.V., 225 S.W.3d at 234–35.

In this case, D.B. does not point to any controverting evidence that shows the victim or his family member did not receive notice. D.B. points to the fact that the victim was not at the hearing, that the motion to transfer did not specifically request notice be given the victim, and that the record does not reflect any notice being sent to the victim's last known address as evidence that notice was not given. However, while these facts may raise a suspicion, none of them could support an inference that the notice was not issued, much less overcome the presumption in favor of the recitation in the order that notice was issued. Further, although D.B. seems to imply that the State has the burden to show notice was issued, he cites no authority in support of that proposition, and we have found none. See B.D., 16 S.W.3d at 81.

Conclusion: Since there is no evidence in the record to controvert the recitations in the transfer order that notice was given to all parties as required under Section

54.11, D.B. has failed to show that the trial court acted contrary to the requirements of the statute. We overrule D.B.'s point of error. We affirm the trial court's order.

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IN A DETERMINATE SENTENCE TRANSFER HEARING, THERE IS NO ABUSE OF DISCRETION IF THERE WAS "SOME EVIDENCE" IN THE RECORD TO SUPPORT THE TRIAL COURT'S DECISION.

¶ 15-1-8. **In the Matter of D.V.W.**, MEMORANDUM, No. 06-14-00054-CV, 2015 WL 167682 (Tex.App.-Texarkana, 1/14/15).

Facts: D.V.W., previously adjudicated for aggravated assault, had his community supervision revoked, received a determinate sentence of three years, and was committed to the Texas Juvenile Justice Department (TJJD) February 5, 2013. Because D.V.W. will not complete the statutory minimum period of confinement for his offenses before turning eighteen years of age, a hearing was conducted to determine whether he should be released on parole or finish serving his sentence as an adult. More formally, the trial court's choice was between supervision by the Texas Department of Criminal Justice–Parole Division (Parole Division) or custody in the Texas Department of Criminal Justice–Institutions Division (Institutions Division).FN1 After the hearing, the trial court ordered D.V.W. transferred to the Institutions Division.

FN1. See TEX. FAM.CODE ANN. § 54.11 (West 2014); TEX. RES.CODE ANN . § 244.014 (West Supp.2014), § 245.051 (West 2013).

On appeal, D.V.W. contends that the trial court abused its discretion in transferring him to the Institutions Division rather than the Parole Division.

Held: Affirmed.

Memorandum Opinion: We review for an abuse of discretion a trial court's decision to transfer a juvenile from the TJJD to the TDCJ. In re D.L., 198 S.W.3d 228, 229 (Tex.App.—San Antonio 2006, pet. denied); In re J.L.C., 160 S.W.3d 312, 313 (Tex.App.—Dallas 2005, no pet.). In determining whether the trial court abused its discretion, we review the entire record to determine if the trial court acted without reference to any guiding principles or rules. D.L., 198 S.W.3d at 229; J.L.C., 160 S.W.3d at 313. We do not substitute our opinion for the trial court's discretion and reverse only if the trial court acted in an unreasonable or arbitrary manner. In re T.D.H., 971 S.W.2d 606, 610 (Tex.App.—Dallas 1998, no pet.).

Section 54.11 of the Texas Family Code governs release or transfer proceedings involving juveniles. See TEX. FAM.CODE ANN. § 54.11. In determining whether the youthful offender should be released on parole or transferred to the Institutions Division, the trial court may consider the experiences and character of the person before and after commitment to the [TJJD] or post-adjudication secure correctional facility, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of the [TJJD], county juvenile board, local juvenile probation department, and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided. TEX. FAM.CODE ANN. § 54.11(k).

Evidence of each factor is not required, and the trial court need not consider every factor in making its decision. In re R.G., 994 S.W.2d 309, 312 (Tex.App.—Houston [1st Dist.] 1999, pet. denied). In making its determination, "the court may consider written reports from probation officers, professional court employees, professional consultants, or employees of the [TJJD], in addition to the testimony of witnesses." TEX. FAM.CODE ANN. § 54.11(d); In re F.D., 245 S.W.3d 110, 113 (Tex.App.—Dallas 2008, no pet.). At the conclusion of the hearing, the trial court may order the person back to the TJJD, released under parole supervision, or order the person transferred to the Institutions Division for the completion of his sentence.FN2 TEX. FAM.CODE. ANN. § 54.11(i), (j).

FN2. The transfer hearing is a "second chance hearing" after a child, such as D.V.W., has already been sentenced to a determinate number of years. See F.D., 245 S.W.2d at 113. It is not part of the guilt/innocence determination and need not meet the extensive due process requirements of an actual trial. Id. (juvenile has no right of confrontation at transfer hearing because it is dispositional rather than adjudicative in nature); In re D.S., 921 S.W.2d 383, 387 (Tex.App.—Corpus Christi 1996, writ dism'd w.o.j.).

At the hearing, Leonard Cucolo, court liason for the TJJD, testified for the State, and Cucolo's report was admitted into evidence. Cucolo testified that D.V.W. does not have any mental health issues that would interfere with his ability to fully participate in the TJJD program. According to Cucolo, D.V.W. has all the abilities needed to succeed. D.V.W. completed the required alcohol and drug treatment programs. D.V.W., however, was unable to complete the "Serious Violent Offender Treatment Program" because he was removed from the group due to poor behavior and poor participation. Cucolo noted, "[T]o be fair[,] ... once he was removed there was little time for him to be able to reenter the group, because it's a closed group, and another group wouldn't have started. And even if it did start, he wouldn't have enough time to complete it."

Cucolo's report includes an evaluation of D.V.W. by Dewayne K. Jones, M.A., a psychologist. In the report, Jones stated that D.V.W.'s profile indicates that he has "an increased probably of delinquent, externalizing, and aggressive behaviors," but, ultimately, Jones recommended that D.V.W. be released to parole rather than Institutions Division.FN3 D.V.W. performed "exceptionally well" academically while at the TJJD, has a high school diploma, completed college-level classes, and obtained two vocational certifications.

FN3. Jones noted that, if D.V.W. were transferred to the Institutions Division, "he would be exposed to individuals who would likely reinforce his tendency to use thinking errors to justify criminal behavior but more importantly he would not likely receive any time on parole to supervise his transition to the community."

Cucolo also testified that D.V.W. had serious behavioral issues. He had fifty-three documented incidents of misconduct, for which he was "placed in the security unit on 24 occasions." FN4 The report noted that seven of the incidents were for horseplay, four were for threatening others, two were for assault, and one was for fighting. Cucolo was concerned because, despite being in the program for fourteen or fifteen months, D.V.W. consistently had behavioral problems and made poor decisions, but his behavior began to improve the month before the hearing. D.V.W. was "still struggling with maintaining good, stable behavior while he was still confined," and that made Cucolo question D.V.W.'s ability to "make it on parole." However, based on an objective review of D.V.W.'s case, every member of the special services committee, the body making the TJJD's recommendation, agreed that D.V.W. should be released on parole because "his risk factors can be managed in the community."

FN4. The report noted that one incident was "a self-referral and not considered behavioral in nature."

Ultimately, the trial court ordered D.V.W. transferred to the TDCJ–ID to continue serving his sentence. There is evidence in the record to support the court's decision: (a) D.V.W. continued to have behavioral problems while in TJJD's custody; (b) the prosecuting attorney recommended transfer to TDCJ–ID; and (c) the underlying offense was violent. See TEX. FAM.CODE ANN. § 54.11(k).

Conclusion: As there is "some evidence" in the record to support the trial court's decision, there is no abuse of discretion. See D.L., 198 S.W.3d at 229. Accordingly, we overrule this point of error. We affirm the trial court's order transferring D.V.W. to the TDCJ–ID.

DISPOSITION PROCEEDINGS

SEVENTEEN YEAR OLD WHO WAS CONVICTED OF CAPITAL MURDER AND AUTOMATICALLY SENTENCED TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE GETS A NEW PUNISHMENT HEARING TO DECIDE BETWEEN A SENTENCE OF LIFE WITH PAROLE AND LIFE WITHOUT PAROLE.

¶ 15-1-6. **Ex Parte Criss**, UNPUBLISHED, No. WR-78,242-02, 2014 WL 7188949 (Tex.Crim.App., 12/17/14).

Facts: Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for writ of habeas corpus. Ex parte Young, 418 S.W.2d 824, 826 (Tex.Crim.App.1967). Applicant was convicted of capital murder and automatically sentenced to life imprisonment without the possibility of parole in April 2008. The Fifth Court of Appeals affirmed the conviction. Criss v. State, No. 05–08–00491–CR (Tex.App.–Dallas June 30, 2010).

Applicant contends that his sentence of automatic life without parole violates the Eighth Amendment of the U.S. Constitution because he was a juvenile at the time of the offense. Miller v. Alabama, 132 S.Ct. 2455 (2012). This Court recently held that Miller applies retroactively in Texas. Ex parte Maxwell, AP–74,964 (Tex.Crim.App. Mar. 12, 2014)(designated for publication).

Applicant was seventeen years old at the time of the offense. After being found guilty by a jury, he was automatically sentenced to life in prison without the possibility of parole under the law at the time. Tex. Penal Code § 12.31(a)(2007).

Held: Writ Granted

Per Curiam Opinion: Both the State and the trial court recommend granting relief. That recommendation is supported by the record. Applicant is entitled to relief.

Conclusion: Relief is granted. The sentence in Cause No. 07–49170–Q in the 204th District Court of Dallas County is set aside, and Applicant is remanded to the custody of the Sheriff of Dallas County for a new punishment hearing to decide between a sentence of life with parole and life without parole. The trial court shall issue any necessary bench warrant within 10 days after the mandate of this Court issues.

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THERE IS NO REQUIREMENT THAT THE JUVENILE COURT "EXHAUST ALL POSSIBLE ALTERNATIVES" PRIOR TO COMMITTING A JUVENILE TO AN OUT-OF-HOME PLACEMENT.

¶ 15-1-10. **In the Matter of J.M.D.D.L.C.**, No. 08-13-00332-CV, --- S.W.3d ----, 2015 WL 392817 (Tex.App.-El Paso, 1/29/15).

Facts: In 2012, Appellant was adjudicated delinquent for misdemeanor assault. The juvenile court placed him on supervised probation. In May 2013, the State moved to modify Appellant's disposition based on violation of probation terms. The trial court ordered continued supervised probation with electronic monitoring based on an agreed order of disposition entered May 15, 2013.

On September 10, 2013, the State again moved for modification of disposition, which led to the order at issue in this appeal. The State alleged that Appellant violated the terms of his probation by using marijuana, failing to remain at school until his parents picked him up, and associating with negative peers. Pursuant to TEX.FAM.CODE ANN. § 54.05(e)(West 2014), the juvenile court held separate hearings on the issues of the probation violation merits and disposition.

During the probation violation hearing, Appellant pleaded true to using marijuana four times while on probation. He also pleaded true to failing to remain on school grounds after school until he was picked up by his parents and failing to go to his place of confinement accompanied by his parents. The juvenile court accepted his pleas and set the second hearing on disposition for a later date.

At the disposition hearing, El Paso County Juvenile Probation Officer Lorenzo Porter testified that Appellant repeatedly violated the terms of his probations, had already had his probation terms modified once before, continued to use marijuana, and was defiant toward his parents. Appellant tested positive for marijuana usage four times in 2013. Officer Porter further testified that he believed Appellant's risk of re-offending was high. Porter testified that Appellant was passing six out of seven classes at the Delta Academy, with no grade for biology. Appellant had only one unexcused absence, as opposed to 46 unexcused absences at his previous high school. In Officer Porter's opinion, Appellant's best interests would be served by placing him into the Samuel F. Santana Challenge Academy ("Challenge Academy"), a facility run by the El Paso County Juvenile Probation Department.FN1 Officer Porter also stated that Appellant's parents had agreed with his recommendation.

FN1. According to the El Paso County web site, the Challenge Academy is a "military-style correctional facility and aftercare program that aims to inhibit criminal activity and recidivism through the implementation of evidence-based programming, substance abuse treatment and life skills for the overall growth and development of [its] cadets and their families." El Paso Cnty. Juvenile Prob. Dep't, Samuel F. Santana Challenge Academy, http://www.epcounty.com/jvprobation/challenge.htm (last visited Jan. 23, 2015). The program entails a "full term, 210 day residential program, designed for 14–17 year old males and females who have exhausted the department's continuum of services, and are in need of long-term behavioral modification or drug and alcohol treatment for dependency [.]" Id.

On cross-examination, Officer Porter stated that Appellant had never been placed in a level four probation program such as ISP or the Drug Court, or in a level five probation program such as CAAP or APECS.FN2 Porter clarified that ISP and the Drug Court both declined to accept Appellant and instead recommended that Appellant be placed in the Challenge Academy. Porter also testified that Appellant told him he wanted to do the Challenge Academy because it would allow him to get his G.E.D. and graduate from high school in a shorter period of time.

FN2. According to the El Paso County Juvenile Probation Department web site, CAAP is a "short term, 10 days residential program, designed to work with 14–17 year old males and females whom had not adhered to their conditions of placement in the community and are in need of a short-term intensive behavioral modification period. CAAP is a 10–day reminder to participants that they will be held accountable for their actions [.]" APECS is a "short/intermediate term, 60 day residential program, designed to work with 14–17 year old males and females who have not adhered to their conditions of placement in the community and are in need of a stabilization period due to behavioral issues, drug use and family issues [.]" El Paso Cnty. Juvenile Prob. Dep't, Samuel F. Santana Challenge Academy, http://www.epcounty.com/jvprobation/challenge.htm.

In comments Appellant made at the close of the case, he stated that he knew what he had done was wrong and asked for a second chance. He stated that he could comply with probation requirements, he had just chosen not to in the past. The juvenile referee sustained the State's motion to modify disposition and ordered Appellant to continue serving probation at the Challenge Academy. This appeal followed.

DISCUSSION

In his sole issue, Appellant claims the trial court abused its discretion by placing him at the Challenge Academy when less restrictive probation options were available.

Held: Affirmed

Opinion: Appellant argues that the trial court abused its discretion by imposing a more restrictive probation condition when a spectrum of other probation options were available. However, there is no requirement that the juvenile court "exhaust all possible alternatives" prior to committing a juvenile to an out-of-home

placement. See In re J.A.M., No. 04–07–00489–CV, 2008 WL 723327, at *2 (Tex.App.–San Antonio Mar. 19, 2008, no. pet.)(mem.op.). Here, the record shows that the juvenile court did not abuse its discretion in placing Appellant in the Challenge Academy. Although Appellant was never placed into a Level 4 or Level 5 program prior to being sentenced to the Challenge Academy, nor was he placed into CAAP or APECs, Officer Lozano testified that ISP and the Drug Court both recommended that Appellant be placed at the Challenge Academy.

Additionally, the record shows that reasonable efforts were made to prevent or eliminate the need for the child's removal from the home. Appellant was transferred from his high school to the Delta Academy alternative school, and the juvenile court previously modified his probation to order electronic monitoring in lieu of confinement, but Appellant continued to violate time-and-place probation restrictions. The record also shows that Appellant's home could not provide the quality of care and level of support and supervision he needed. Although Officer Lozano testified that Appellant's mother and stepfather were not contributing to his delinquency, Officer Porter testified Appellant consistently refused to obey their orders, acted disrespectful to his mother, continued to violate probation restrictions, and continued to use marijuana. The trial court is in the best position to determine a parent's ability to follow through on a promise to adequately supervise the juvenile. In re K.E., 316 S.W.3d 776, 781 (Tex.App.–Dallas 2010, no pet.); see also In re D.E., No. 04–12–00600–CV, 2013 WL 2645527, at *3 (Tex.App.–San Antonio June 12, 2013, no pet.)(mem.op)(trial court does not abuse discretion in ordering an out-of-home probation placement where juvenile continues drug use and parents are unable to control behavior).

As the Texas Supreme Court has noted, "the statute allows a trial court to decline third and fourth chances to a juvenile who has abused a second one." In re J.P., 136 S.W.3d 629, 633 (Tex.2004). The juvenile court in this case had substantial discretion in modifying the terms of Appellant's probation, and it had sufficient information it could use to guide the exercise of its discretion.

Conclusion: We cannot say on the record before us that the trial court acted arbitrarily or without guiding principles in ordering Appellant into the Challenge Academy. Issue One is overruled. The judgment of the trial court is affirmed.

TRIAL COURTS ARE NOT REQUIRED TO DETERMINE THAT NO COMMUNITY-BASED INTERMEDIATE SANCTION ARE AVAILABLE TO COMMIT A JUVENILE TO TJJD, ONLY THAT REASONABLE EFFORTS HAVE BEEN MADE TO PREVENT THE JUVENILE'S REMOVAL FROM HIS HOME.

¶15-1-2. **In the Matter of M.O.**, No. 08-13-00148-CV, --- S.W.3d ----, 2014 WL 6865451 (Tex.App.-El Paso, 12/3/15).

Facts: On August 29, 2011, M.O. was adjudicated for committing aggravated assault with a deadly weapon, a felony. See TEX. PENAL CODE ANN. §§ 22.01(a)(1), 22.02(a)(2), (b), 71.02(a). M.O.'s initial disposition in September 2011 placed him on probation in his mother's home under standard supervision at home and at school. Subsequently, the State moved to modify the disposition, and in January 2012, M.O.'s disposition was modified to Intensive Supervised Probation (ISP) under the terms and conditions of the Serious Habitual Offender Comprehensive Action Program (SHOCAP).

In March 2013, the State moved a second time to modify M.O.'s disposition. The State alleged that M.O. had violated the terms and conditions of his supervised probation by: (1) committing arson and aggravated assault with a deadly weapon; (2) using, consuming, or possessing marijuana; (3) twice leaving electronic-monitoring premises without the court's permission; and (4) committing school-related infractions resulting in his suspension and expulsion from public school. M.O. entered into an agreed modification order committing him to TJJD. M.O. then filed a motion for new trial contending he had agreed to the disposition to TJJD by mistake, believing he had no other option and could not contest the disposition. The trial court granted M.O.'s motion and set a modification-disposition hearing for May 3, 2013.

At the modification-disposition hearing, the trial court admitted into evidence a modification-disposition report prepared by Juvenile Probation Department Officer Oscar Miranda. Miranda's report noted that from January 2012 to February 2013, M.O. had been charged with aggravated assault against a public servant, had committed arson at his public school, had used or possessed marijuana, had absconded from his home for several days, and had been suspended and then expelled from school. In February 2013, M.O. was placed in detention, and while there attempted to assault and twice assaulted other juveniles, flooded his room, and was caught in possession of a utensil he intended to make into a shank. The report indicated that in April 2013, the SHOCAP team, the "staffing committee," and the Chief Juvenile Probation Officer all unanimously recommended M.O. be committed to TJJD due to his referral history, his continued commission of serious felony offenses while on probation in the community, and because he constituted a danger to himself and others. The report noted M.O. had received psychological assessments, Emotional Regulation Group Counseling, and services from the El Paso Emergence Health Network and MRT, from which he was discharged due to non-attendance. The report concluded and recommended that M.O. be committed to TJJD because despite being given the opportunity to

correct his behavior through ISP under SHOCAP and being afforded counseling services in the community, M.O. continued to violate the terms of his probation by committing felony offenses, abusing drugs, failing to attend school, and leaving his home premises.FN1TJJD was recommended not only for the safety of M.O. and the community, but also because TJJD would provide a secure, structured setting that would restrict M.O.'s interactions with negative peers and ensure he received educational services, vocational training, therapeutic services, and independent living skills. The report noted that reasonable efforts had been made to avoid removing M.O. from his home, as he had been afforded community-based counseling services, community-based supervision through two intensive programs, and out-of-home placement in the local Challenge Academy program. The report stated that M.O's mother was the subject of on-going contempt hearings and concluded that M.O's home could not provide the level of support needed to complete probation as shown by M.O's continued disregard for the conditions of his probation.

FN1. M.O. was also determined to have a high risk to re-offend.

The trial court also admitted into evidence a March 2013 Psychological Assessment Report prepared by clinical psychologist, Dr. Michael P. Hand. Dr. Hand's report included diagnoses of childhood-onset conduct disorder, attention-deficit/hyperactivity disorder (hyperactive-impulsive type), learning disorder, and mild mental retardation. Dr. Hand made no recommendation on M.O.'s placement, but rather recommended in part that the trial court consider M.O.'s low intellectual functioning and ADHD, and the limits those disabilities placed on M.O.'s judgment, impulse control, and susceptibility to influence by others. He further recommended that medications appropriate to M.O.'s treatment be continued, that M.O. receive special education, and that M.O. be given individual psychotherapy to assess his mood, behavior, coping skills, and self-concept. Juvenile Probation Department Officer Oscar Miranda was the only witness to testify at the hearing. On the whole, his testimony confirmed and elaborated on what was contained in his modification-disposition report. For instance, Miranda testified that after being placed on SHOCAP probation, M.O. had committed two felony offenses, including an unadjudicated charge of arson to which M.O. had admitted. M.O. also left his school campus, tested positive for marijuana, and absconded from home for four to five days. After being placed in detention on February 7, 2013, M.O. was involved in three assaults and twice flooded his room. Miranda testified that he presented M.O.'s case to the SHOCAP team, the “staffing committee,” and the Chief Juvenile Probation Officer, all of whom recommended that M.O. be committed to TJJD.

Miranda noted that the Juvenile Probation Department had provided M.O. with standard supervision at home and at school, but opined that M.O.'s mother could not adequately supervise him. According to Miranda, TJJD was the only remaining option for providing any kind of help to M.O., both because M.O. needed the rehabilitation TJJD would provide and because the protection of the public required that disposition. Miranda testified that the Juvenile Probation Department offered M.O. counseling services through El Paso Emergence Health Network, MRT, and the Emotional Regulation Group Counseling, and that the Department had attempted and exhausted rehabilitation efforts to address the diagnoses noted in a prior psychology report prepared in January 2012.

On cross-examination, Miranda stated that he did not “staff” M.O. for any other programs in January 2012, and did not think that M.O. would need a mental health program other than the programs to which M.O. had already been referred. Miranda acknowledged that SHOCAP is not a mental health program, and that MRT and the Emotional Regulation Counseling Group are standard SHOCAP programs for all gang-involved youth. Miranda explained that he was in the process of referring M.O. to the El Paso Mental Health Collaborative in 2012, but acknowledged that the Department had not modified its programs to address M.O.'s impulse control, low intellectual functioning, low vocabulary, low verbal comprehension, difficulty with information retention, or learning difficulties. Miranda testified that an El Paso Emergence caseworker had been working with M.O. to address the depressive features of M.O.'s conduct disorders but admitted the Department had not verified whether El Paso Emergence was addressing the issues identified in a January 2012 psychology report. Miranda admitted that M.O.'s anger issues continued after the Emotional Regulation Group Counseling and agreed that M.O.'s negative behaviors accelerated during his detention in February 2013. Miranda explained, however, that TJJD differs from the Department's local detention facilities because TJJD has an assessment center. He also stated that despite M.O.'s mental health issues and learning disabilities, when M.O. desires, he can perform well in school.

At the conclusion of the modification-disposition hearing, the trial court committed M.O. to TJJD. The trial court found that (1) it was in M.O.'s best interest to be placed outside his home; (2) reasonable efforts were made to prevent or eliminate the need for M.O.'s removal from the home and to make it possible for him to return to his home; and (3) M.O could not be provided the quality of care and level of support in his home necessary to meet the standards of his probation. In particular, the trial court found that reasonable efforts had been made to prevent M.O.'s removal from his mother's home, including previously

placing M.O. on probation, previously referring him to the Intensive Supervised Probation program under SHOCAP, previously referring him to counseling or psychological services with El Paso Emergence Health Network, Emotional Regulation Group, and MRT, and providing him psychological evaluations and assessments. The trial court also found that it was contrary to M.O.'s welfare to remain in his mother's home and in his best interest to be placed outside of his home, because M.O. had a history of running away, a history of aggression, had been on probation previously, and was a known gang member, and because his mother lacked sufficient skills to provide adequate supervision and had refused to cooperate with court orders. The court also found that M.O. needed to be held accountable for his delinquent behavior, that he posed a risk to the safety and protection of the community, that no community-based intermediate sanction was available to adequately address M.O.'s needs or to adequately protect the needs of the community, and that the gravity of the offense and M.O's prior juvenile record required he be confined to a secure facility.

In his sole issue on appeal, M.O. contends the trial court abused its discretion when it committed him to TJJD because other community-based alternatives for addressing M.O.'s mental health issues had not been considered.

Held: Affirmed

Opinion: M.O. contends the trial court abused its discretion when it committed him to TJJD because other community-based alternatives for addressing M.O.'s mental health issues had not been considered. In particular, M.O. argues that short of the commitment to TJJD, "they had never before considered placing the Juvenile in an out-of-home facility," that there were alternatives that admittedly were not explored, and that the finding that "no community-based intermediate sanction is available to adequately address the needs of the juvenile" is not supported by the evidence.

First, we note that despite the trial court's finding, it was not required to determine that no community-based intermediate sanction was available to adequately address M.O.s' needs, before modifying M.O.'s disposition and committing him to TJJD.FN2 The applicable standard is contained in section 54.05 of the Family Code, which governs modifications to dispositions. Under section 54 .05 the trial court was required to determine, in pertinent part, that "reasonable efforts were made to prevent or eliminate the need for the child's removal from the child's home and to make it possible for the child to return home[.]"TEX. FAM.CODE ANN. § 54.05(m)(l)(B). Finding that "reasonable efforts were made" is a different and lesser standard from a determination that "no community-based intermediate sanction is available." The exhaustion of all possible alternatives to commitment is not required before a court modifies a disposition and commits a juvenile to TJJD. In re M.A.S., 438 S.W.3d at 807; In re J.R.C., 236 S.W.3d 870, 875 (Tex.App.-Texarkana 2007, no pet.). Nor is a court required to consider alternative dispositions in a modification hearing regarding a juvenile adjudicated delinquent based on conduct that would constitute a felony. In re A.T.M., 281 S.W.3d at 72; see TEX. FAM.CODE ANN. § 54.05(f). Further, the trial court is permitted to decline third or fourth chances to a juvenile who has abused a second chance. In re M.A.S., 438 S.W.3d at 807. Rather, the trial court was required to find that reasonable efforts had been made to prevent removal from and to permit M.O. to remain in his home. See TEX. FAM.CODE ANN. § 54.05(m)(l)(B).

FN2. In making this finding, the trial court cites to "Section 54.04(f), Title Three, Family Code." But, section 54.04 governs initial dispositions, not the modification of a prior disposition, and subsection (f) does not require a finding that no community-based intermediate sanction is available. See TEX. FAM.CODE ANN. § 54.04(f) (requiring the court to "state specifically in the order its reasons for the disposition," to furnish a copy of the order to the child, and to include in the order any terms of probation). In fact, section 54.04(i) governing original dispositions requires the same findings when committing the child to TJJD as those required by section 54.05(m) for modifications of disposition. Cf. TEX. FAM.CODE ANN. § 54.04(i) with § 54.05(m).

Here, M.O. was initially placed on probation in his home under standard supervision, but violated his probation. He was then given a second chance at probation when he agreed to a modification to Intensive Supervised Probation. But, M.O. failed his second chance at probation. From January 2012 to February 2013, M.O. was charged with aggravated assault against a public servant, committed arson at his public school, used or possessed marijuana, absconded from his home for several days, and was suspended and then expelled from school. In February 2013, after he was placed in detention, he attempted to assault and twice assaulted other juveniles, flooded his room, and was caught in possession of a utensil he intended to make into a shank. Based on this behavior, the SHOCAP team, the "staffing committee," and the Chief Juvenile Probation Officer all recommended that M.O. be committed to TJJD. And, Miranda testified that based on his experience, TJJD was the only remaining option for providing any kind of help to M.O., both because M.O. needed the rehabilitation that could be provided at TJJD and because the protection of the public required that disposition. Thus, there was some evidence to support the trial court's determination that reasonable efforts had been made to prevent M.O.'s removal from his home and to support the trial court's decision to commit M.O. to TJJD.

Conclusion: Because some evidence of substantive and probative character exists to support the trial court's decision to commit M.O. to TJJD, we are unable to conclude the trial court acted arbitrarily or unreasonably. See In re M.A.S., 438 S.W.3d at 806; In re A.T.M., 281 S.W.3d at 70. Because the trial court did not abuse its discretion in committing Appellant to TJJD, Appellant's issue on appeal is overruled. The trial court's judgment is affirmed.

IN A SEXUAL CONTACT ADJUDICATION, A CONDITION OF PROBATION WHICH REQUIRED THE JUVENILE TO REQUEST PERMISSION EVERY TIME HE NEEDED TO USE A COMPUTER, OR EVERY TIME HE NEEDS TO ACCESS THE INTERNET, WAS DEEMED UNREASONABLY RESTRICTIVE.

¶ 15-1-15. **U.S. v. Sealed Juvenile**, No. 14-30357, --- F.3d ----, 2015 WL 1449878, C.A.5 (La.), 3/16/15 (NO. 14-30357).

Facts: The Juvenile is a 15-year-old male who suffers from Oppositional Defiant Disorder and Bipolar Disorder, Type I, Mixed, with suicidal ideations and hallucinations. On November 3, 2013, while living on a military base with his family, the Juvenile had sexual contact with a four-year-old child. Because the offense occurred on a military base, he was charged in a sealed juvenile information with an act of juvenile delinquency by engaging or attempting to engage in a sexual act with a person who had not attained the age of 12 years, in violation of 18 U.S.C. §§ 2241(c), 5032 (2012). He pleaded guilty pursuant to a plea agreement to the lesser included offense of abusive sexual contact with a minor who had not attained the age of 12 years, in violation of 18 U.S.C. § 2244(a)(5) (2012) and § 5032.

A probation officer issued a predispositional report that described the offense conduct. The Juvenile admitted that he lied on top of the victim, that both had their pants around their ankles, that he placed his mouth on the victim's vagina, that he planned to put his penis into her vagina but changed his mind just before his sister entered the room, and that his erect penis was above the victim's vagina while he was lying on top of her. The victim stated that the Juvenile had rubbed her with his hand in "the middle" and indicated toward her vaginal area. The victim's five-year-old brother, who was present during the offense, indicated that the Juvenile "bit and licked the victim on her butt."

After describing behavioral problems that included physical outbursts of anger and getting into fights with others, the report said the following about other sexually inappropriate behavior besides the offense conduct:
In the last year, the juvenile's problems transformed from being anger oriented to being sexually oriented.

His parents indicated that he became obsessed with sex, and looking up sexual material on the internet. They found notes to and from various girls at school in which the juvenile discusses having sexual intercourse with the girls. He also asked his sister to engage in sexual activity with him, and aggressively held her down.

The report used the 2013 Sentencing Guidelines and calculated the advisory guidelines range as if the Juvenile was an adult. The report recommended a base offense level of 30 under U.S.S.G. §§ 2A3.1, 2A3.4, because the offense involved a criminal sexual act. Four levels were added under U.S.S.G. § 2A3.1(b)(2) because the victim was under the age of 12 years. With a three-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a), the total offense level was 31. Because he had no prior criminal history, his criminal history score was I. With an offense level of 31 and a criminal history category of I, the advisory guidelines range was 108 to 135 months of imprisonment if the Defendant had been an adult. However, under 18 U.S.C. § 5037(c)(1) (2012) and the plea agreement, the maximum sentence that he could receive was detention until he reached 21 years of age and juvenile delinquent supervision until he reached 21 years of age. Defense counsel did not object to the report, but did file a dispositional memorandum concerning sentencing, which included as attachments, among other things, a copy of a report of a local mental health treatment facility explaining the Juvenile's history, diagnosis, and prognosis, and a letter from the Juvenile's parents.

The district court adjudicated the Juvenile as a juvenile delinquent and sentenced him to 18 months in the Garza County Juvenile Treatment Center in Post, Texas (where he is currently detained), and to a term of juvenile delinquent supervision "until his 21st birthday, in a non-secure facility such as AMIKids in Sandoval, New Mexico." In addition to the mandatory and standard conditions of supervision, the district court imposed numerous special conditions of supervision. Specific conditions at issue in this appeal are ones restricting the Juvenile's contact with children, choice of occupation, ability to loiter near certain places, and use of computers and the Internet. The Juvenile timely appealed.

Held: Affirmed as modified.

Opinion: This Court has recognized that district courts have broad discretion in imposing conditions of supervised release, subject to statutory requirements. Under 18 U.S.C. § 3563, a court may provide discretionary conditions "to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the

purposes indicated in section 3553(a)(2)." 18 U.S.C. § 3563(b) (2012) (emphasis added). Under 18 U.S.C. § 3553(a)(1), a sentencing court is to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1) (2012). Under § 3553(a)(2), the court is to consider:

(2) the need for the sentence imposed—
(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

The district court may, under § 3563(c), "modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation."

On appeal, the Juvenile makes three major arguments. First, he argues that the district court failed to give reasons at the sentencing hearing for its decision to impose the special conditions, and thus failed to explain how the conditions were reasonably related to the factors in § 3553(a). Second, regarding the work, loitering, and computer and Internet conditions, the Juvenile argues that the special conditions of supervised release are not reasonably related to the goals of sentencing. Third, as to all the special conditions at issue before us, the Juvenile argues that the conditions were greater deprivations of liberty or property than reasonably necessary for the purposes indicated in § 3553(a)(2). We first discuss whether the district court failed to adequately provide reasons for imposing the special conditions, and then the special conditions themselves.

For each of the special conditions, the Juvenile argues that the district court did not give any reasons for imposing the conditions at the sentencing hearing, and thus failed to explain how the conditions were reasonably related to the factors of § 3553(a). Because this issue was not specifically raised before the district court, we review for plain error. See United States v. Alvarado, 691 F.3d 592, 598 (5th Cir. 2012). Plain-error review involves four steps:
First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant.
Second, the legal error must be clear or obvious, rather than subject to reasonable dispute.
Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings.
Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Puckett v. United States, 556 U.S. 129, 135 (2009) (internal quotation marks, brackets, and citations omitted).

The Juvenile has not been able to meet this high standard. Even though the district court did not provide reasons during the sentencing hearing, it did provide a statement of additional facts in the judgment to explain the imposition of these special conditions. In that statement, the district court gave the following reasons for the sentence imposed:

The juvenile defendant J.C.C. is adjudicated delinquent for a very serious sexual offense, in which he forced a sexual act upon a four year old child. Had his sister not walked into the room, he may have had sexual intercourse with the victim. He has acted out sexually towards his sister, and is aggressive towards his siblings. He continues to try to lure his sister into his room, when he knows that this is not acceptable. He also has a history of serious mental health issues, including but not limited to suicidal ideations and hallucinations.

In addition, the district court noted that the sentencing decision was based on the recommendation of the U.S. Probation Department of the District of New Mexico, which "has an extensive history of working with juvenile offenders," and that the Bureau of Prisons had agreed with that recommendation.

Given that the district court's statement refers to the nature of the offense at hand, as well as the Juvenile's history of serious mental health issues, we can conclude that the district court considered the factors under § 3553(a). Because the Juvenile has not shown that providing reasons during the sentencing hearing would have changed the outcome of the case, no plain error has occurred here. See United States v. Mondragon-Santiago, 564 F.3d 357, 364-65 (5th Cir. 2009); see also United States v. Gore, 298 F.3d 322, 32526 (5th Cir. 2002) (addressing the articulation requirement of § 3553(c) under plain-error review and finding that the district court's written explanation for departing from the sentencing guideline was "sufficient to allow meaningful appellate review" such that no plain error occurred). We now consider each of the special conditions at issue before us.

B. Contact Condition

Special Condition 6 states, "The juvenile must not have contact with children under the age of 16 without prior written permission of the Probation Officer. He must immediately report unauthorized contact with children to the Probation Officer." Because the Juvenile

specifically objected to this special condition, we review for abuse of discretion. See United States v. Rodriguez, 558 F.3d 408, 412 (5th Cir. 2009). That is, we determine "whether the district court imposed conditions that are substantively unreasonable, and, therefore, abused its discretion." Id.

The Juvenile argues that the restriction is a much greater deprivation of liberty or property than reasonably necessary for the purposes of § 3553(a)(2) for a number of reasons. First, he argues that the age cut-off is arbitrary because it was set at 16 despite any indication in the record that the offense involved anyone except the victim, who was four years old. Second, he argues that the restriction is overbroad considering it could have been limited to children closer in age to the victim, and considering the restriction would apply to the Juvenile's siblings and prevent him from returning home.

As to the challenge for arbitrariness, the record does not explicitly state how the district court settled on age 16 as the relevant age for the contact restriction. But the predispositional report does show, as noted in Part I, supra, that the Juvenile has a history of sexually inappropriate behavior directed toward other children, including his 12-year-old sister and girls at school who are likely close to his age. Because of this history of inappropriate conduct with children closer to 16 years old, and because "district courts have broad discretion in establishing conditions for supervised release," United States v. Miller, 665 F.3d 114, 132 (5th Cir. 2011), we do not find the age cut-off to be arbitrary.

Turning to the Juvenile's challenge that the restriction is overbroad and would deprive him of much needed interaction with peers, the Government argues that any interest in associating with children his own age is outweighed by the need to protect children, and that the condition is warranted in light of the Juvenile's history and risk he poses to children. We agree with the Government. While it is important to ensure that the Juvenile is set on a path to becoming a healthy, productive, law-abiding citizen—one who is able to appropriately engage with and have healthy relationships with peers—such that recidivism does not occur, we must also account for the justifiable concerns at the time of sentencing regarding the Juvenile's contact with children. Considering the threat posed by the Juvenile, as shown not only by the act that formed the basis of his conviction but also other inappropriate behavior toward his sister and other children, and recognizing that the district court may modify this condition (and any of the conditions before us) under § 3563(c) should it conclude that the Juvenile no longer poses a risk to children, we AFFIRM the district court's imposition of this condition.

C. Occupation Condition

Special Condition 7 states, "The juvenile is restricted from engaging in an occupation where he has access to children, without prior approval of the Probation Officer." Because the Juvenile did not specifically object to this special condition, we review for plain error. See Alvarado, 691 F.3d at 598.

The Juvenile argues that the occupation condition is not reasonably related to the factors of § 3553(a) because his offense bore no relation to work. While this is true, there is nevertheless a strong interest in preventing the Juvenile's access to children, even in his employment, and so we find that the Juvenile fails to establish plain error here.

The Juvenile argues that the condition imposed a much greater deprivation of liberty or property than reasonably necessary because he "will likely be unable to find employment since most employers of juveniles also employ other juveniles." Even if this were true, this would not provide a basis for finding plain error. As the Government points out, the Juvenile will be able to seek an exception from his probation officer, and then be free to pursue any employment opportunities after he turns 21. The Juvenile also argues that the condition is overbroad because he "could have, instead, been required to have adult supervision at a workplace where there are other minors." While this may be a reasonable alternative to what was actually imposed, making the condition subject to reasonable dispute, it is not a challenge that satisfies plain error review. See Puckett, 556 U.S. at 135. Finding no clear or obvious deviation from a legal rule, we AFFIRM the imposition of this condition.

D. Loitering Condition

Special Condition 8 states, "The juvenile must not loiter with[in] 100 feet of school yards, parks, playgrounds, arcades, or other places primarily used by children under the age of 16." Because the Juvenile specifically objected to this special condition, we review for abuse of discretion. See Rodriguez, 558 F.3d at 412.

The Juvenile argues that the restriction is not reasonably related to the factors in § 3553(a) because his offense had no relation to school. We agree with the Government, however, that the Juvenile's history of sending sexually explicit letters to girls at school means that he poses a threat to children at school and other places children might frequent. On this basis, we conclude that the restriction is reasonably related to the goal of protecting the public.

The Juvenile argues that the restriction is a much greater deprivation of liberty or property than is reasonably necessary for the purposes of § 3553(a)(2) because (1) he will not be able to return to school without room for exceptions, (2) he will not be able to engage in essential functions of a member of society, and (3) he will not be able to establish any relationships

with peers. He argues that the cumulative impact on his social and mental development requires finding an abuse of discretion.

Applying the common understanding of the word "loiter," we find no abuse of discretion as to this condition. The relevant definitions of "loiter" from Merriam-Webster are "to remain in an area for no obvious reason" and "to lag behind." Loiter, Merriam-Webster, http://www.merriam-webster.com/dictionary/loiter (last visited Feb. 20, 2015). With respect to the Juvenile's first challenge, the prohibition against loitering would not prevent the Juvenile from attending school because he would not be at a school to remain there for no obvious reason or to merely lag behind; he would be there to attend as a student. With respect to his second challenge—that the condition will prevent him from engaging in essential functions of a member of society— the specific language of the condition suggests otherwise. The type of places delineated as well as the limiting language of the condition imply that this condition would not restrict the Juvenile from going to a shopping center or anywhere else where children may be present, but rather from loitering near places primarily used by children under 16. Finally, regarding the Juvenile's third challenge, this condition will not prevent him from establishing any relationships with peers. The condition leaves open the possibility for him to go to—and even loiter near—places primarily used by people aged 16 and over. Since the Juvenile will be around 16 or 17 years old when he leaves the detention center and moves to a non-secure facility, this condition will not prevent him from interacting with people around his own age. Finding no abuse of discretion here, we AFFIRM the imposition of this condition.

E. Computer and Internet Conditions

The special conditions restricting the Juvenile's use of computers and the Internet—all challenged on appeal—are as follows:

(13) The juvenile shall not possess or use a computer with access to any "on-line computer service" at any location without the prior written approval of the probation office. The defendant must allow the Probation Officer to install appropriate software to monitor the use of the Internet.

(14) The juvenile must submit to search of person, property, vehicles, business, computers and residence to be conducted in a reasonable manner and at a reasonable time, for the purpose of detecting sexually explicit material at the direction of the Probation Officer. He must inform any residents that the premises may be subject to a search.

(15) The juvenile shall consent to the United States Probation Office conducting periodic unannounced examinations of his computer, hardware, and software which may include retrieval and copying of all data from his computer. This also includes the removal of such equipment, if necessary, for the purpose of conducting a more thorough inspection.

(16) The juvenile shall consent, at the discretion of the United States Probation Officer, to having installed on his computer, any hardware or software systems to monitor his computer use. The juvenile understands that the software may record any and all activity on his computer, including the capture of keystrokes, application information, Internet use history, e-mail [sic] correspondence, and chat conversations. Monitoring will occur on a random and/or regular basis. The defendant further understands that he will warn others of the existence of the monitoring software placed on his computer. The defendant understands that the probation officer may use measures to assist in monitoring compliance with these conditions such as placing tamper resistant tape over unused ports and sealing his computer case and conducting a periodic hardware/software audit of his computer.

(17) The juvenile shall maintain a current inventory of his computer access including but not limited to any bills pertaining to computer access; and shall submit on a monthly basis any card receipts/bills, telephone bills used for modem access, or any other records accrued in the use of a computer to the probation officer.

(18) The juvenile shall provide to the probation officer all copies of telephone bills, including phone card usage, all credit card uses, and any other requested financial information to verify there have been no payments to an Internet Service Provider or entities that provide access to the Internet. Because the Juvenile specifically objected to these special conditions, we review for abuse of discretion. See Rodriguez, 558 F.3d at 412.

The Juvenile contends that these conditions are not reasonably related to the factors in § 3553(a) because his offense did not involve the use of a computer or the Internet. He relies on United States v. Salazar, 743 F.3d 445 (5th Cir. 2014), and United States v. Tang, 718 F.3d 476 (5th Cir. 2013) (per curiam), cases in which this Court found that Internet restrictions were not reasonably related to the § 3553(a) factors for defendants convicted of failing to register as sex offenders. We find that both cases are distinguishable from this one. Salazar is distinguishable because, in that case, there was "[n]othing in [the defendant's] history [that] suggest[ed] that sexually stimulating materials fueled his past crimes," 743 F.3d at 452, whereas here the record shows that the Juvenile's obsession with sex was probably fueled by what he found on the Internet. In Tang, this Court found that an Internet ban was not reasonably related to the § 3553(a) factors because it was not related to the offense of failing to register as a sex offender, and because the defendant's prior conviction for assault with intent to commit sexual

abuse did not involve the use of a computer. 718 F.3d at 484. The Juvenile seeks to rely on the latter reason in Tang to argue that the special condition imposed here is also not reasonably related to the § 3553(a) factors. While it is true that, like in Tang, the Juvenile did not use the Internet to carry out the offense, it is nevertheless not difficult to infer that the sexually explicit materials accessed by the Juvenile online influenced his subsequent behavior. Because of this, we conclude that the conditions are reasonably related to the circumstances of the offense and the Juvenile's history.

The Juvenile gives four specific objections that these conditions are much greater deprivations of liberty or property than reasonably necessary: (1) the restrictions are not limited to sexually explicit conduct; (2) every keystroke and other action on his computer will be monitored; (3) the conditions allow the probation officer to enter the Juvenile's home and seize his computer at any time; and (4) the Juvenile will have to give access to his financial records even when there is no suspicion of any improper behavior.

In arguing that the restrictions are overbroad in substantive scope, the Juvenile argues that "[r]equiring prior written approval for everyday functions that use the internet[] will entomb Juvenile Appellant and prevent him from job hunting, conducting class assignments, or even emailing with his doctors and psychiatrists." We must recognize that access to computers and the Internet is essential to functioning in today's society. The Internet is the means by which information is gleaned, and a critical aid to one's education and social development. To the extent these conditions require the Juvenile to request permission every time he needs to use a computer, or every time he needs to access the Internet, we find them to be unreasonably restrictive. Moreover, the important interest underlying these computer and Internet restrictions is in preventing access to sexually explicit materials. There is already a separate condition that restricts access to sexually explicit materials, and that has not been challenged. Concluding that Special Condition 13 is unreasonably restrictive, the district court is instructed that Special Condition 13 is not to be construed or enforced in such a manner that the Juvenile would be required to seek prior written approval every single time he must use a computer or access the Internet. We intend this to allow for oversight of the Juvenile's computer and Internet usage, but not with the heavy burden of requiring prior written approval every time he must use a computer or access the Internet for school, health, work, recreational, or other salutary purposes. Accordingly, we AFFIRM subject to our interpretation and determination set out herein.

The Juvenile's second challenge is that it is overbroad to monitor every action on his computer. This Court has ruled both ways in cases addressing monitoring conditions imposed on adult offenders. Compare United States v. McGee, 559 F. App'x 323, 328-30 (5th Cir.) (per curiam), cert. denied, 135 S. Ct. 130 (2014) (affirming condition that required adult defendant to "install filtering software on any computer he possesses or uses which will monitor/block access to sexually oriented websites"), with United States v. Fernandez, 776 F.3d 344, 346-48 (5th Cir. 2015) (per curiam) (discussing similar cases like McGee and finding abuse of discretion in imposing software installation condition when neither the defendant's failure-to-register offense nor his criminal history had any connection to computer use or the Internet). What is most distinguishable about this case from the other cases is that Appellant is a mentally ill juvenile. Given the potential influence of the Internet on his sexual development, and the apparent influence the Internet has already had on his behavior, it is in the interests of deterrence and rehabilitation to monitor his access to technology. We AFFIRM the monitoring provisions because we recognize that these provisions are useful in ensuring that the Juvenile complies with the restrictions against accessing sexually explicit materials.

As to the Juvenile's third challenge—that the probation officer could seize his computer at any time—the Government responds that the district court was authorized to impose such a condition because the Juvenile is subject to the registration requirements of the Sex Offender Registration and Notification Act ("SORNA"). The district court did not impose a SORNA registration requirement. We need not determine whether the Juvenile would be subject to SORNA because, regardless of this, the search-and-seizure conditions are reasonably related to the Juvenile's history of accessing inappropriate materials on the Internet. They are also reasonably necessary, as an additional safeguard to supplement the monitoring provisions, to ensure that the Juvenile does not access prohibited materials and to check for whether he does access them. Thus, we AFFIRM the imposition of the search-and seizure conditions.

Finally, the Juvenile complains generally that the special conditions are overbroad insofar as they require him to provide his financial records, and that this constitutes an extreme and unreasonable deprivation of liberty and property. While his objections are not detailed and provide little argument, we assume that they relate to Special Conditions 17 and 18. We reject his contentions with regard to Special Condition 17 as this condition relates to the monitoring of his computer and Internet use, which we upheld above. With respect to Special Condition 18, we have already interpreted Special Condition 13 so as not to be unreasonably restrictive on the Juvenile's use of the Internet. Because he may use the Internet, it only follows that he should be able to make payments for the proper use of

the Internet. Because Special Condition 18's purpose is to verify that there have been no payments to an internet service provider, and payment for proper use should be made by the Juvenile, and because there is no other basis to justify the restriction imposed by Special Condition 18, Special Condition 18 is unreasonably restrictive. We MODIFY the special conditions by striking Special Condition any probation officer in the lawful discharge of the officer's supervision functions.

Conclusion: For the foregoing reasons, we AFFIRM AS MODIFIED with instructions that any enforcement of the conditions be subject to our interpretation, determinations, and instructions contained herein. In affirming, we reiterate that the Juvenile may seek modifications to any of the conditions under § 3563(c), and that the district court may lessen the burden of these restrictions if the Juvenile's behavior improves over time.

SUFFICIENCY OF THE EVIDENCE

TRIAL COURT DID NOT ERR IN ACCEPTING JUVENILE'S PLEA WHERE TRIAL COURT ACCEPTED PLEA BASED ON AN ERRONEOUS BELIEF THAT AGGRAVATED ROBBERY COULD BE COMMITTED WITH A TOY GUN.

¶ 15-1-3. **In the Matter of J.B.** MEMORANDUM, No. 01-13-00844-CV, 2014 WL 6998068 (Tex.App.-Hous. (1 Dist.), 12/11/14).

Facts: J.B. stipulated that, while committing theft of property from the complainant, he exhibited a firearm. The following exchange occurred after the trial court admonished J.B. and before the trial court accepted the stipulation:

The Court: I'm going to show you your stipulation of evidence. Is this your signature?

J.B.: Yes, ma'am.

The Court: Did you sign it because it's true?

J.B.: No, ma'am.

(Speaking simultaneously.)

The Court: Is it true?

Defense counsel: Tell her what you're—

J.B.: Yes, ma'am.

The Court: This charge is true?

J.B.: Yes, ma'am.

The Court: You signed it because it's true?

J.B.: Yes, ma'am.

The trial court then accepted the signed stipulation, in which J.B. waived his right to a jury trial, and adjudicated J.B. delinquent.

Following the adjudication of delinquency, the trial court considered disposition. The probation report was admitted without objection. The trial court confirmed that J.B.'s agreement with the State was for 18 months' probation. The trial court then asked whether a weapon was used and whether there were coactors.

Defense counsel: No.

The Court: No?

The State: No coactors, Your Honor.

The Court: But he had a gun? Where'd he get the gun from?

J.B.: I didn't have a gun, ma'am.

Defense counsel: It wasn't a real gun, but it was—

The Court: No bullets?

Defense counsel: The complainant thought it was a gun.

The Court: Blanks? No bullets in it?

Defense counsel: Toy.

J.B.: No, ma'am.

The Court: Well, you scared somebody. The fact that you scared them is enough. Whether it was real or not is another issue; but the fact that you scared somebody and you're charged with a felony is pretty serious.

The parties then discussed the terms of probation, and the trial court accepted the recommendation of 18 months' probation.

In his first issue, J.B. contends that his plea was not voluntary, knowing, or intelligent because it was premised on his, his attorney's, and the trial court's erroneous belief that aggravated robbery could be committed with a toy gun.

A. Standard of Review and Juvenile Pleas

To satisfy due process, a guilty plea "must be entered knowingly, intelligently, and voluntarily." Kniatt v. State, 206 S.W.3d 657, 664 (Tex.Crim.App.2006); see alsoTEX.CODE CRIM. PROC. ANN. art. 26.13(b) (West Supp.2014) (requiring that guilty plea be made voluntarily and freely). In examining the voluntariness

of a guilty plea, we examine the record as a whole. Martinez v. State, 981 S.W.2d 195, 197 (Tex.Crim.App.1998). When the record reflects that a defendant was duly admonished by the trial court before entering a guilty plea, it constitutes a prima facie showing that the plea was both knowing and voluntary. Id.Section 54.03(b) of the Family Code sets forth the admonishments required in juvenile proceedings:

(1) the allegations made against the child;

(2) the nature and possible consequences of the proceedings, including the law relating to the admissibility of the record of a juvenile court adjudication in a criminal proceeding;

(3) the child's privilege against self-incrimination;

(4) the child's right to trial and to confrontation of witnesses;

(5) the child's right to representation by an attorney if he is not already represented; and

(6) the child's right to trial by jury.
TEX. FAM. CODE ANN. § 54.03(b) (West 2014).

When the record demonstrates that the defendant was properly admonished, the burden then shifts to the defendant to show that he entered the plea without understanding the consequences of his actions and was harmed as a result. Martinez, 981 S.W.2d at 197. "The trial court is not required to withdraw a plea of guilty sua sponte and enter a plea of not guilty for a defendant when the defendant enters a plea of guilty before the court after waiving a jury, even if evidence is adduced that reasonably and fairly raises an issue as to his guilt." Rivera v. State, 123 S.W.3d 21, 32–33 (Tex.App.–Houston [1st Dist.] 2003, pet. ref'd) (citing Thomas v. State, 599 S.W.2d 823, 824 (Tex.Crim.App.1980)).

Whether the defendant used a real gun or a toy gun in committing a robbery affects the type of crime committed. If the defendant uses a real gun in robbing the complainant, he is guilty of aggravated robbery. See TEX. PENAL CODE ANN. § 29.03(a)(2). If the gun is a toy, however, the defendant is guilty of robbery only. See TEX. PENAL CODE ANN. § 29.02(a)(2) (West 2011); Payne v. State, 790 S.W.2d 649, 652 n.3 (Tex.Crim.App.1990). In Payne, the defendant moved to withdraw his guilty pleas after he testified in open court during sentencing that he used a toy gun, and not a real gun, when committing four robberies. 790 S.W.2d at 651–52. He testified that he did not tell his lawyer that the gun was a toy because he did not know that it mattered and that he signed his pleas without knowing that he could not be convicted for aggravated robbery if he used a toy gun. Id. at 651. The trial court refused the defendant's motion to withdraw his pleas, but the Court of Criminal Appeals reversed, holding the defendant's testimony raised an issue regarding the voluntariness of his confessions. Id. at 652.

Held: Affirmed

Memorandum Opinion: Here, the record reflects that the trial court admonished J.B., who was represented by counsel, regarding the allegations against him, the consequences of the proceeding, including the admissibility of his juvenile record in criminal proceedings, his right to remain silent, and his right to trial, a trial by jury, and to confront witnesses. *See* TEX. FAM. CODE ANN. § 54.03(b). Thus, J.B. bears the burden to show that he entered his plea without understanding the consequences of his actions and was harmed as a result. *See* Martinez, 981 S.W.2d at 197.

In support of his claim that his plea was involuntary, J.B. points to the portion of the record in which he told the trial court that the gun he used was a toy. But this occurred *after* he waived a jury and the trial court accepted his plea and adjudicated him delinquent. Thus, the question we consider is not whether the trial court erred in accepting the plea, but, rather, whether it erred in failing to withdraw the plea after J.B. asserted during the disposition inquiry that the gun he used in the robbery was a toy. *See* Rivera, 123 S.W.3d at 32–33.

The record does not reflect that J.B. requested that he be allowed to withdraw his plea. *See* Thomas, 599 S.W.2d at 824 (where defendant is admonished and does not request to withdraw plea, court reviews only whether trial court should have withdrawn plea). And "[t]he trial court is not required to withdraw a plea of guilty *sua sponte* and enter a plea of not guilty for a defendant when the defendant enters a plea of guilty before the court after waiving a jury, even if evidence is adduced that reasonably and fairly raises an issue as to his guilt." Rivera, 123 S.W.3d at 32–33.

The primary case upon which J.B. relies, *Payne,* involves a defendant who affirmatively requested that the trial court permit him to withdraw his plea. 790 S.W.2d at 651–52. *Payne* thus does not support J.B.'s argument that the trial court erred because J.B. never asked the trial court to allow him to withdraw his plea, and the trial court was not required to withdraw J.B.'s plea sua sponte. *See* Thomas, 599 S.W.2d at 824; Rivera, 123 S.W.3d at 32–33; *see also* Lawal v. State, 368 S.W.3d 876, 882 n.1 (Tex.App.–Houston [14th Dist.] 2012, no pet.) (*Payne* is distinguishable from cases where no timely motion to withdraw plea was made because in *Payne* a timely motion to withdraw plea was raised during plea hearing).

Moreover, in the other cases relied upon by J.B., In re T.W.C., 258 S.W.3d 218 (Tex.App.–Houston [1st

Dist.] 2008, no pet.), In re S.F., 2 S.W.3d 389 (Tex.App.–San Antonio 1999, no pet.), and In re E.Q., 839 S.W.2d 144 (Tex.App.–Austin 1992, no writ), the record affirmatively showed that the juvenile was misadvised and would not have entered a guilty plea but for the faulty advice. Here, the record does not affirmatively show that J.B. was misadvised. To the extent that J.B. argues that his plea or his failure to withdraw the plea was the result of faulty advice amounting to ineffective assistance of counsel, it is J.B's burden to prove ineffective assistance by showing that (1) counsel's performance was so deficient that counsel was not functioning as acceptable counsel under the Sixth Amendment, and (2) but for counsel's error, the result of the proceedings would have been different. *See* Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

J.B.'s appellate counsel filed a motion for new trial, but did not allege that his trial counsel was ineffective, and no hearing was held on the motion. The motion sought only a new trial or in the alternative, a modified judgment striking the deadly weapon finding, and did not seek to withdraw J.B.'s plea. Nothing in the record demonstrates why J.B.'s trial counsel did not seek to withdraw his guilty plea or what advice J.B.'s trial counsel gave him. Moreover, the probation report indicates that the complainant stated that J.B. pointed a black semi-automatic pistol at him and told the complainant that he would shoot him if he followed J.B. On this record, we cannot determine what, if any, conflicting evidence may have informed counsel's recommendations or J.B.'s decision to plead guilty. Accordingly, we must presume that counsel acted reasonably. *See* Rylander v. State, 101 S.W.3d 107, 111 (Tex.Crim.App.2003) (ordinarily, courts will not find counsel ineffective where counsel has not been afforded an opportunity to explain actions because presumption that counsel acted reasonably has not been rebutted); Thompson v. State, 9 S.W.3d 808, 814 (Tex.Crim.App.1999) (where record is silent regarding reasons for counsel's actions, presumption of reasonableness is not rebutted). We note, however, that the appeal procedures in the Family Code do "not limit a child's right to obtain a writ of habeas corpus." TEX. FAM. CODE ANN. § 56.01(o) (West 2014); *see* In re Hall, 286 S.W.3d 925, 926–27 (Tex.2009) (juvenile court had jurisdiction to hear writ of habeas corpus); In re R.G., 388 S.W.3d 820, 824 (Tex.App.–Houston [1st Dist.] 2012, no pet.)(juvenile court had jurisdiction to entertain application for writ of habeas corpus). The Court of Criminal Appeals has recognized that a defendant who shows that he pleaded guilty to aggravated robbery because his counsel did not inform him that aggravated robbery cannot be proven if a toy gun was used may be entitled to habeas relief. *See* Ex Parte Carriker, No. WR–77916–01, 2012 WL 3600313, at *1 (Tex.Crim.App. Aug. 22, 2012).

Accordingly, we hold that, on this record, J.B. has not met his burden to show that his plea was involuntary, the trial court did not err in failing to withdraw J.B.'s plea, and J.B. is not entitled to reversal based upon his ineffective assistance claim. *See* Thomas, 599 S.W.2d at 824 (following acceptance of possession of controlled substance plea, defendant's testimony that she did not buy drug or know she had it did not require trial court to sua sponte withdraw guilty plea); Rivera, 123 S.W.3d at 32–33 (where defendant argued on appeal that he involuntarily pleaded guilty due to ineffective assistance of counsel, trial court did not err in failing to sua sponte withdraw guilty plea); *see also* Quintanilla v. State, No. 01–02–00722–CR, 2003 WL 1938224, at *2 (Tex.App.–Houston [1st Dist.] Apr. 24, 2003, pet. ref'd) (where appellant never requested to withdraw guilty plea but claimed during sentencing that he committed offense because family's safety was threatened, trial court did not err in failing to sua sponte withdraw plea).

We overrule J.B.'s first issue.

Conclusion: We affirm the trial court's judgment.

EVIDENCE WAS CONSIDERED SUFFICIENT WHERE DISCREPANCIES IN TESTIMONY FROM EYE WITNESSES EXISTED.

¶ 15-1-1. **In the Matter of R.D.**, MEMORNADUM, No. 04-13-00876-CV, 2014 WL 5837543 (Tex.App.-San Antonio, 11/12/14).

Facts: The evidence showed that while they were away from home, April and Roy Medellin received a phone call from a neighbor who claimed someone was burglarizing the Medellin home. Ms. Medellin immediately called her cousin, Stephanie Correa, who lived near the Medellin home, and asked Ms. Correa and her husband, Raymond Correa, to investigate the claim. Ms. Medellin then called the police.

The Correas were first to arrive at the Medellin home. Ms. Correa went to the front of the house, and Mr. Correa went to the back. According to their testimony, they both could hear noises coming from inside the house. Mr. Correa saw two young men crawl out of a window at the back of the house. An altercation ensued, and one of the young men jumped over a fence and escaped. The other young man, later identified as R.D., ran around to the front of the house. Ms. Correa threw a small metal bar at R.D. as he was fleeing and struck him on his lower leg. Mr. Correa came within two feet of the young man, and Ms. Correa was almost pushed off the front step as R.D. ran by. R.D. was able to evade the Correas. Both Mr. and Ms. Correa identified R.D. at trial as one of the young men who was inside the Medellin home. With some discrepancies in the exact colors of the young men's clothes, both testified the young men were wearing shorts and one was wearing a striped shirt.

After R.D. fled, Mr. Correa drove around looking for him and his companion. Mr. Correa stated he found them outside of a home in the neighborhood, but testified they were wearing different clothes. Officer Gabriel Mendoza arrived at the Medellin home and was told Mr. Correa had found the alleged perpetrators at another home in the neighborhood.

Officers went to the home where Mr. Correa claimed to have spotted the two perpetrators. Mr. Correa and three young men were taken back to the Medellin residence. Law enforcement personnel separated the Correas, placing each in a separate police car. Thereafter, the three young men were shown to the Correas in one-on-one show ups. The Correas were advised that simply because they were shown a specific person did not necessarily mean the person committed a crime. Mr. and Mrs. Correa each identified R.D. as one of the young men that emerged from the Medellin home. Mr. Correa testified he was one hundred percent certain, identifying R.D. by his facial features, earrings, and haircut. Mrs. Correa testified she was sixty to seventy percent sure the young man she saw at the Medellin home was R.D., basing her identification on her encounter with him and an earring he was wearing. The Correas and relevant law enforcement personnel testified no improper influence or suggestion was used in the identification process.

The Medellins testified their air conditioning unit was removed from a window as an entry point for R.D. and his partner. The window unit's removal caused structural damage to the window sill and damaged an electrical outlet. The couple testified many of the drawers in the home were rifled through, pillowcases were taken from the bedroom to the front of the home, and things were strewn about. However, nothing was taken.

Ultimately, the jury found R.D. engaged in delinquent conduct by committing a burglary of a habitation. After disposition, R.D. perfected this appeal.

R.D. first complains the evidence is legally insufficient to support the jury's finding of "true" with regard to the charge of burglary of a habitation. More specifically, he contends the evidence was legally insufficient to establish R.D.'s: (1) identity as one of the young men who entered the Medellin home, and (2) intent to burglarize the home.

Held: Affirmed

Memorandum Opinion: To support the jury's finding of "true" to the burglary of a habitation allegation, the State had to prove R.D. intentionally or knowingly, with intent to commit theft, entered the Medellin home without the owner's consent. See TEX. PENAL CODE ANN. § 30.02(a)(1) (West 2011). R.D. contends the State failed to establish he was one of the young men in the Medellin home or that he intended to take anything from it.

In support of his contentions, R.D. points out that other than the testimony from the Correas, there is no evidence establishing he was one of the young men who entered the Medellin home. He notes his fingerprints were not found in the home, there was no testimony that any footprints outside the home matched shoes he owned, and he was not found to be in possession of any property taken from the Medellin home. In fact, he points out the Medellins admitted no property was taken from the home. Thus, according to R.D., there is no evidence of identity or intent to commit theft. We disagree.

As to intent in a burglary prosecution, Texas courts, including this court, have long held specific intent to commit theft may be inferred from the circumstances. Stine v. State, 300 S.W.3d 52, 57 (Tex.App.—Texarkana 2009, pet. ref'd, untimely filed) (citing McGee v. State, 774 S.W.2d 229, 234 (Tex.Crim.App.1989)); see Simmons v. State, 590 S.W.2d 137, 138 (Tex.Crim.App. [Panel Op.] 1979); Bailey v. State, 722 S.W.2d 202, 204 (Tex. App—San Antonio 1986, no writ). Moreover, it is not necessary that property actually be taken for the jury to conclude the defendant intended to commit theft. Jones v. State, 418 S.W.3d 745, 747 (Tex.App.—Houston [14th Dist.] 2013, no pet.) (citing Ortega v. State, 626 S.W.2d 746, 749 (Tex.Crim.App. [Panel Op.] 1981)).

We hold the evidence in this case was legally sufficient to establish identity and intent. The Correas testified they saw R.D. exiting the Medellin home. According to their testimony, it was still light outside when they saw R.D. leave the house. Further, Ms. Correa testified R.D. ran right by her, and Mr. Correa stated he saw both young men jump from the window. They separately identified R.D. at the scene as one of the young men who came out of the Medellin house through the window from which the air conditioning unit had been removed. It is true the lighting at the scene during the one-on-one show up was less than optimal and Ms. Correa was only sixty to seventy percent sure of her identification. However, these are issues relating to the weight of Ms. Correa's testimony and the credibility of the identification, which are to be resolved by the jury. See Brooks, 323 S.W.3d at 899; Orellana, 381 S.W.3d at 653.

As to Mr. Correa, however, he specifically testified he was one hundred percent certain R.D. was one of the young men who left the Medellin house through the window. He testified to close contact with R.D., struggling with him at the back of the house. Admittedly, there are some discrepancies in his testimony when compared with his wife's, but on whole, these discrepancies are not such that a jury could not rationally resolve them in favor of a finding

that R.D. was one of the men who entered the Medellin home and then attempted to escape when the Correas arrived. See Gonzales, 330 S.W.3d at 694. That the young men were wearing different clothes when Mr. Correa located them does not impugn the testimony provided by the Correas. The jury could have reasonably inferred the young men changed clothes to avoid identification. See Orellana, 381 S.W.3d at 653.

It is true no property belonging to the Medellins was taken. However, this is not necessary to support a finding of intent to steal. See Jones, 418 S.W.3d at 747. The Medellins testified the air conditioning unit in a window was removed to allow the thieves ingress into the home. The removal damaged the home. There was testimony that drawers in the home were opened and rummaged through by the thieves, as if they were looking for items to steal. There was also testimony that pillowcases were moved from the bedroom to the front of the house, permitting an inference they were placed there to allow transport of items to be stolen. From this evidence, the jury could have rationally inferred the young men entered the home without consent, intending to steal items from the Medellin home. See Orellana, 381 S.W.3d at 653; see also Gear v. State, 340 S.W.3d 743, 746 (Tex.Crim.App.2011) (holding evidence sufficient to sustain theft conviction where defendant entered home through broken window and fled when interrupted).

Conclusion: Accordingly, we hold, after viewing the evidence in the light most favorable to the jury's finding, there was sufficient evidence for the jury to conclude beyond a reasonable doubt R.D. was one of the persons who entered the Medellin home without consent and with the intent to commit theft. See Orellana, 381 S.W.3d at 652. We therefore overrule R.D.'s first point of error. Based on the foregoing, we hold the evidence was legally sufficient to support a finding that R.D. committed a burglary of a habitation. Accordingly, we overrule R.D.'s points of error and affirm the trial court's judgment.

TRIAL PROCEDURE

WHEN A JUVENILE VOLUNTARILY TAKES THE STAND TO TESTIFY IN HIS OWN DEFENSE, HE WAIVES HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

¶ 15-1-7. **In the Matter of J.G.M.**, MEMORANDUM, No. 13-13-00704-CV, 2015 WL 124177 (Tex.App.-Corpus Christi, 1/8/15).

Facts: Appellant pleaded "true" to the State's allegations that she engaged in delinquent conduct by committing the felony offense of assault on a public servant. See TEX. PENAL CODE ANN. § 22.01(a), (b)(1) (West, Westlaw through 2013 3d C.S.). The trial court held a contested disposition hearing. At the beginning of the hearing, appellant's counsel objected to the admission of an amended disposition report prepared by Sandy Perez, a probation officer with the Cameron County Juvenile Probation Department. Perez prepared the report based on information obtained in an interview with appellant, but did not advise appellant of her Miranda rights prior to the interview. Appellant's counsel argued that the report included incriminating statements made by appellant during the interview and therefore violated appellant's Fifth Amendment privilege against self-incrimination. See U.S. CONST. amend. V. The trial court noted that there were two sentences in the report in which appellant admitted prior drug use. The trial court struck the two sentences from the report, stated that it would disregard the statements, and admitted the remainder of the report.

Perez testified that she did not read appellant her Miranda rights before interviewing her. The State concedes that the statements made by appellant during the interview were taken in violation of article 38.22 of the code of criminal procedure. See TEX. CODE CRIM. PROC. ANN. art. 38.22, § 2(a) (West, Westlaw through 2013 3d C.S.) (providing statutory warnings virtually identical to Miranda warnings, except that article 38.22 includes a warning that the accused has the right to terminate the interview at any time, which is not required by Miranda). The State argues, however, that appellant's Fifth Amendment rights were not violated because the trial court properly excluded the statements and disregarded them.

Held: Affirmed

Memorandum Opinion: Appellant relies on In the Matter of J.S.S., in which the El Paso Court of Appeals held that, under the specific facts of that case, the Fifth Amendment applied to a probation officer's pre-disposition interview with a juvenile, and the juvenile should have been warned of his rights and informed that his statements could be used against him during the disposition hearing. 20 S.W.3d 837, 846–47 (Tex. App.–El Paso 2000, pet. denied). The El Paso Court found that the probation officer's interview of the juvenile "exceeded any arguably neutral purposes" by questioning the juvenile about two extraneous offenses. See id. at 846. The El Paso Court noted that the trial court explicitly stated that, in making his disposition decision, the trial judge "took into account that J.S.S. had committed the same offense on two prior occasions." Id. at 840. Moreover, the J.S.S. Court emphasized that its holding was limited to the facts in the case before it. Id. at 846 n.7. The El Paso Court added the following footnote:

Our opinion should not be read as holding that the Fifth Amendment applies to all pre-disposition interviews because of the facts in a given case may show that the interview served more neutral purposes, and therefore, did not implicate the juvenile's Fifth Amendment rights. Rather than focusing on the type of proceeding involved, we believe the better

approach is to examine the nature of the statement or admission and the exposure which it invites. Id.

In a more recent case, In re C.R.R.E., the El Paso Court of Appeals found J.S.S. distinguishable and found that a juvenile's Fifth Amendment rights were not violated where the juvenile's probation officer did not ask the juvenile about extraneous offenses and the trial court made its disposition decision without taking into account the juvenile's prior acts. See No. 08–02–00476–CV, 2004 WL 231928, at *5 (Tex. App.–El Paso Feb. 5, 2004, no pet.)(mem.op.).

In the present case, the State concedes that the incriminating statements made by appellant during the interview were taken in violation of article 38.22. See TEX. CODE CRIM. PROC. ANN. art. 38.22, § 2(a). However, the trial court struck the statements from the report and specifically stated that it would not consider the inadmissible statements. We assume the trial court disregarded the evidence unless the record clearly shows the contrary. See Herford v. State, 139 S.W.3d 733, 735 (Tex. App.–Fort Worth 2004, no pet.)(stating that while an appellate court no longer automatically presumes the trial court did not consider inadmissible evidence, it can assume that the trial court disregarded irrelevant or inadmissible evidence when it indicated it would and the record fails to show that the court did otherwise); see also Chavira v. State, No. 13–10–00002–CR, 2011 WL 2732610, at *5 (Tex. App.–Corpus Christi July 14, 2011, no pet.)(mem. op., not designated for publication) (holding the same). The trial court did not abuse its discretion in admitting the disposition report.

Appellant also argued that the trial court violated her Fifth Amendment rights by eliciting testimony from her during the disposition hearing. Appellant testified on her own behalf at the disposition hearing. The State declined to cross-examine appellant, but the trial court questioned appellant. The trial court asked appellant whom she stayed with during an earlier period when she ran away. Appellant's counsel objected and urged appellant to "invoke her [F]ifth [A]mendment privilege." The trial court denied the objection and stated that appellant waived her Fifth Amendment privilege by testifying. Thereafter, appellant responded to the trial court's questions by stating that she did not remember.

"When a criminal defendant voluntarily takes the stand to testify in his own defense, he waives his privilege against self-incrimination." Ramirez v. State, 74 S.W.3d 152, 155 (Tex. App.–Amarillo 2002, pet. ref'd) (citing Nelson v. State, 765 S.W.2d 401, 403 (Tex. Crim. App. 1989)); see Felder v. State, 848 S.W.2d 85, 99 (Tex. Crim. App. 1992) (en banc) ("Once an appellant decides to testify at trial he opens himself up to questioning by the prosecutor on any subject matter which is relevant.").

Conclusion: Here, appellant testified about incidents involving her mother and step-father that made her feel like running away. The trial court asked appellant about her whereabouts when she was on runaway status. We hold that appellant's Fifth Amendment privilege was not violated when the trial court questioned her. We overrule appellant's sole issue. We affirm the trial court's judgment.

_____

PARENT TESTIFYING AGAINST A CHILD DOES NOT WARRANT "SUA SPONTE" APPOINTMENT OF GUARDIAN AD LITEM BY THE COURT, SINCE THERE WAS NOTHING IN THE RECORD TO SUGGEST THAT THE PARENTS WERE INCAPABLE OR UNWILLING TO MAKE DECISIONS IN THE CHILD'S BEST INTEREST.

¶ 15-1-4A. **In the Matter of S.A.**, MEMORANDUM, No. 06-14-00055-CV, 2014 WL 7442507 (Tex.App.-Texarkana, 12/31/14).

Facts: In the first five months of 2014, fifteen-year-old Sandra had, let's say, a tumultuous relationship with her sixty-five-year-old father, marked by three documented instances in which Sandra assaulted or injured him. The first two instances resulted in Sandra's probation.

The final confrontation occurred the afternoon of May 10, 2014. That afternoon, Sandra was listening to music on a cellular telephone while she sunbathed outside her home. Wanting to hear different music, Sandra went inside to download more music from the computer. Since the conditions of Sandra's existing probation forbad her to use the computer, her father sought to stop her. Her father, who had broken his foot several days before, stumbled as he tried to get between Sandra and the computer. As he sought to stop her, he grabbed the base of the back of her neck. At about the same time, Sandra stomped his broken foot, which was in a cast, on top and at the ankle, and kicked his shin. Her mother then restrained her as her father tried to get out of the door. As she was being restrained, she slung her telephone with its charger, and it struck and cut her father's arm.

At Sandra's June 12, 2014, hearing, Sandra's mother appeared at trial, sat at the counsel table with Sandra, and was ultimately called as a witness by the State. Sandra's mother's testimony generally confirmed the testimony of Sandra's father—that Sandra had assaulted him on the occasion in question.

On appeal, Sandra complains that the trial court did not appoint a guardian ad litem because her mother was incapable of making decisions in her best interest. Sandra asserts that her mother had an inherent conflict of interest because she was the victim's wife, a witness to the incident, and a key

witness for the State. At the hearing below, Sandra did not ask for a guardian ad litem to be appointed or point to any conflict of interest her mother may have had. Nevertheless, Sandra maintains that the right to a guardian ad litem is a "waivable only" right and that the right to a guardian ad litem is on par with the right to counsel. She cites no authority, however, and we have found none, that has so held when a parent is present at the hearing.

Held: Affirmed

Memorandum Opinion: In any case in which it appears to the juvenile court that the child's parent or guardian is incapable or unwilling to make decisions in the best interest of the child with respect to proceedings under this title, the court may appoint a guardian ad litem to protect the interests of the child in the proceedings. TEX. FAM.CODE ANN. § 51.11(b) (West 2014) (emphasis added).

When a parent is present at the hearing, the appointment of a guardian ad litem is in the sound discretion of the trial court. In the Matter of P.S.G., 942 S.W.2d 227, 229 (Tex.App.—Beaumont 1997, no writ). In P.S.G., P.S.G.'s mother was present at trial and was called as a witness on behalf of her son. Nevertheless, P.S.G. asserted that since she was the mother of the alleged victim, she had an inherent conflict of interest and was therefore incapable of acting in P.S.G.'s best interest and rendering friendly support and guidance. Id. at 228. Since, under the statute, the decision to appoint a guardian ad litem is discretionary, the court of appeals found nothing in the statute to support the contention that the trial court's failure to sua sponte appoint a guardian ad litem deprived P.S.G. of any fundamental right. Id. at 229. Further, the court refused to assume, without evidence, that P.S.G.'s mother could not render the necessary support and guidance. Id.FN4

FN4. The court of appeals went on to hold that P.S.G., by failing to object at the hearing below, had not preserved his error. Id.; see TEX. R. APP. P. 33.1(a). We also doubt that Sandra preserved error in this case.

While acknowledging that Texas courts have not found error when a trial court does not sua sponte appoint a guardian ad litem, Sandra asserts that none have involved a parent who was closely related to the victim and testified on behalf of the State. Several cases, however, have involved parents who have been present at trial and gave testimony adverse to the juvenile. In the Matter of P.A.C. concerned the father of the juvenile who was present and seated at the counsel table with his daughter at her certification hearing. The State introduced the affidavit of the father, which, along with other documents, tended to implicate his daughter in the alleged crime. In the Matter of P.A.C., 562 S.W.2d 913, 917 (Tex.Civ.App.—Amarillo 1978, no writ). Finding nothing in the affidavit or record to indicate the father's lack of willingness to make decisions in the best interest of his daughter or his adversary position, the court of appeals found the trial court had not erred in failing to appoint a guardian ad litem. Id. In two cases the San Antonio court of appeals has also found no error when a parent testified adverse to the juvenile, but there was nothing in the record to show that the parent was incapable of making or unwilling to make decisions in the best interest of the juvenile. In re J.W.M.D., No. 04–08–00908–CV, 2009 WL 2878111 (Tex.App.—San Antonio Sept. 9, 2009, no pet.)(mem. op., not designated for publication); In re L.A.P., No. 04–07–00143–CV, 2008 WL 312704 (Tex.App.—San Antonio Feb. 6, 2008, no pet.)(mem.op.). In L.A.P., the fifteen-year-old juvenile was charged with two counts of assault causing bodily injury to her father. L.A.P., 2008 WL 312704, at *1. Both her father and mother testified against allowing L.A.P. to serve probation in the home because they feared for their own and her safety based on L.A.P.'s gang affiliation and threats she had made against her father. Id. at *1–2. The court of appeals held that, since (1) the father was present at the adjudication and disposition hearing and both parents were present at the continuation and (2) there was nothing in the record to suggest that the parents were incapable or unwilling to make decisions in L.A.P's best interest, the trial court had not abused its discretion in not appointing a guardian ad litem. Id. at *4.

In this case, Sandra's mother testified at the hearing, and her testimony confirmed the testimony of her husband, which had been placed in question by the vigorous cross-examination of Sandra's trial counsel. There is nothing in the record, however, to suggest that her mother was incapable or unwilling to make decisions in Sandra's best interest. Further, at no time did Sandra request that a guardian ad litem be appointed. Nor did she claim to the trial court that her mother was not giving her friendly support and guidance or that she was incapable of making or unwilling to make decisions in her best interest.

Sandra also asserts that additional harm caused by the trial court not appointing a guardian ad litem "is ... that [her] counsel would have been unable to invoke 'the rule' excluding witnesses from the courtroom." See TEX.R. EVID. 614. Sandra's counsel, however, invoked this rule before any testimony and, although the State had identified her mother as a witness before trial began, did not object to her remaining in the courtroom, nor did she object when her mother was eventually called as a witness by the State.

Conclusion: Under these facts, we find that the trial court did not abuse its discretion in failing to sua sponte appoint a guardian ad litem. We overrule this point of error.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

IN A DISCRETIONARY TRANSFER TO ADULT COURT, A FINDING BASED ON THE SERIOUSNESS OF THE OFFENSE ALONE IS NOT ENOUGH FOR TRANSFER.

¶ 15-1-5. **Moon v. State**, No. PD-1215-13, --- S.W.3d ----, 2014 WL 6997366 (Tex.Crim.App., 12/10/13). On state's petition for discretionary review from the First Court of Appeals, Harris County.

Facts: On November 19, 2008, the State filed a petition in the 313th Juvenile Court in Harris County alleging that the appellant engaged in delinquent conduct by committing an intentional or knowing murder. On the same date, the State also filed a motion for the juvenile court to waive its exclusive jurisdiction and transfer the appellant to criminal district court for prosecution as an adult, alleging as grounds for the transfer that, because of the seriousness of the offense alleged, ensuring the welfare of the community required waiver of juvenile jurisdiction. The juvenile court granted the State's request for a hearing on the motion and, pursuant to Section 54.02(d) of the Juvenile Justice Code in the Texas Family Code,FN1 ordered that the Chief Juvenile Probation Officer obtain a complete diagnostic study, social evaluation, and full investigation of the appellant's background and the circumstances of the alleged offenses.FN2 The juvenile court also ordered the Mental Health and Mental Retardation Authority of Harris County to conduct an examination and file its report.

FN1. TEX. FAM.CODE title 3, Juvenile Justice Code (hereinafter, "the Juvenile Justice Code").

FN2. TEX. FAM.CODE § 54.02(d). The appellant complains that "[p]rior to the hearing, the State failed to conduct the statutorily mandated diagnostic or social evaluation[.]" Appellant's Response to the State's Brief on Discretionary Review at 1. But the appellant did not raise this issue as grounds for reversal on direct appeal, and we have no occasion to speak to it. See Appellant's Brief on Direct Appeal at 16.

At the hearing, the State called a single witness to testify: Detective Jason Meredith, the Deer Park Police officer who investigated the crime scene and interviewed a number of potential suspects, including the appellant. Meredith's testimony on direct examination took the form of a non-chronological account of his investigation of the murder, up to and including his interrogation of the appellant. At the end of his testimony, over no objection from the appellant, the State introduced the following documents: (1) a juvenile offense report revealing the appellant's "Previous Referral" for "MISCHIEF-$500/$1499.99," which, subsequent testimony would show, resulted from the appellant's alleged "keying" of another student's vehicle; (2) a "Juvenile Probation Certification Report" detailing the positive and negative behaviors, as well as the academic history, of the appellant while he was under the observation of the juvenile-justice system; and (3) a "Physician's Medical Assessment" prepared by the Harris County Juvenile Probation Health Services Division, which listed the findings of the appellant's physical—but not any psychological or behavioral—examination.

For his part, the appellant elicited testimony from seven witnesses. Various family members, friends, and acquaintances testified both generally and specifically about the appellant's disadvantaged upbringing, fractured family life, and positive personal qualities, including politeness and pliability to adult supervision. Various actors within the juvenile-justice system testified both generally and specifically about the appellant's constructive conduct within, and positive progression through, the juvenile-justice system, characterizing him as "one of the best kids [to] come through as far as his intelligence and obedience and the way he carries himself in the facility." The appellant also introduced into evidence, among other things, forensic psychiatrist Dr. Seth W. Silverman's detailed and thorough recommendation as to whether [the] facilities currently available to the juvenile court will provide adequate protection to the public, and ... the likelihood that the respondent will be rehabilitated should the court decide to use the facilities available to the juvenile court as well as the sophistication, maturity, and aggressiveness [of the appellant].

It was Dr. Silverman's ultimate opinion that the appellant, as a "dependent, easily influenced individual" whose "thought process lacks sophistication" (a characteristic Silverman considered "indicative of immaturity") "would probably benefit from placement in a therapeutic environment specifically designed for adolescent offenders[.]" Silverman contrasted this environment to the "adult criminal justice programs[,]" which he deemed to have "few constructive, and possibly many destructive, influences to offer" the appellant. Silverman also noted that the appellant had, during his stint within the juvenile-justice system, already "responded to therapy."

At the close of evidence, and after both parties delivered closing arguments, the juvenile court granted the State's motion to waive jurisdiction. At the behest of the appellant's counsel, the court also made the following oral findings: (1) "that there is insufficient time to work with the juvenile in the juvenile system"; (2) "that the seriousness of the offense, murder, makes it inappropriate to deal with in this system"; (3) that "the respondent did have a prior criminal mischief probation"; (4) that the instant offense "actually occurr[ed] at the time respondent was on probation which ... makes the services and resources of the juvenile system look to be inadequate"; (5) "that because there is a co-respondent [certified to stand

trial in the adult criminal courts], there is a logic in putting respondents, where they are a year apart or two years apart, together"; and (6) that "judicial economy, although not the driving factor, is an issue" because "sometimes it's more convenient to hear the same matter, even though there are different people involved, in the same court for the convenience of the witnesses, the attorneys, and the system in general."

The following day, the juvenile court signed and entered a written order waiving its jurisdiction. Closely following the language of the juvenile transfer statute, the order affirmed that the juvenile court had determined "that there is probable cause to believe that the child committed the OFFENSE alleged and that because of the seriousness of the OFFENSE, the welfare of the community requires criminal proceeding." FN3 The juvenile court again simply recited from the statute when it stated that:

[i]n making that determination, the Court ... considered among other matters:

1. Whether the alleged OFFENSE WAS against person or property, with the greater weight in favor of waiver given to offenses against the person;

2. The sophistication and maturity of the child;

3. The record and previous history of the child; and

4. The prospects of adequate protection of the public and the likelihood of reasonable rehabilitation of the child by use of procedures, services and facilities currently available to the Juvenile Court.FN4

The juvenile court also specifically found in its written order: (1) that the appellant "is of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived[,] ... to have aided in the preparation of HIS defense and to be responsible for HIS conduct;" (2) that the alleged offense "WAS against the person of another;" and that (3) "there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of" the appellant "by use of procedures, services, and facilities currently available to the Juvenile Court."

FN3. TEX. FAM.CODE § 54.02(a).

FN4. Id. § 54.02(f).

Per the trial court's order, the appellant's case was transferred to the jurisdiction of the 178th District Court in Harris County, where he stood trial, certified as an adult, against the first-degree felony charge of murder. The jury convicted the appellant and sentenced him to thirty years' confinement in the penitentiary.

B. The Appeal

Before the First Court of Appeals, the appellant complained that the juvenile court's stated "reasons for waiver" were supported by insufficient evidence and that the juvenile court therefore abused its discretion by waiving jurisdiction over the appellant.FN5 Specifically, the appellant contended that, by focusing on the appellant's ability to "intelligently, knowingly, and voluntarily waive[ ] all constitutional rights heretofore waived," the juvenile court "misunderstood and misapplied the 'sophistication and maturity' element" of Section 54.02(f)—and that, even if it did not, there was still "no evidence to support the [juvenile] court's sophistication and maturity finding" as expressed.FN6 Indeed, given that this Court opined in Hidalgo that the purpose of the Section 54.02(d) "psychological examination" is to "provide[ ] insight on the juvenile's sophistication, maturity, potential for rehabilitation, decision-making ability, metacognitive skills, psychological development, and other sociological and cultural factors[,]" the appellant found it troubling that "the State presented no evidence of this type whatsoever." FN7 The appellant also maintained that there was "no evidence supporting the juvenile court's findings relating to adequate protection [of] the public and likelihood of rehabilitation," FN8 since "the only evidence was that" the appellant "is amenable to rehabilitation" and the "State presented no contrary evidence." FN9

FN5. See TEX. FAM.CODE § 54.02(h) ("If the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver[.]").

FN6. Appellant's Brief on Direct Appeal at 27.

FN7. Id. (emphasis added) (quoting Hidalgo v. State, 983 S.W.2d 746, 754 (Tex.Crim.App.1999)).

FN8. Id. at 30.

FN9. Id. at 34.

In a published opinion, the court of appeals agreed with the appellant that the evidence supported neither the juvenile court's "sophistication-and-maturity" finding nor its "adequate-protection-of-the-public-and-likelihood-of-rehabilitation" finding.FN10 The court noted that an "appellate court reviews a juvenile court's decision to certify a juvenile defendant as an adult ... under an abuse of discretion standard" and cited another of its own opinions for the proposition that "if an appellate court finds the evidence factually or legally insufficient to support the juvenile court's order ... it will necessarily find the juvenile judge has abused his discretion." FN11 At the same time, the court of appeals recognized that "the juvenile court may order a transfer on the strength of any of the criteria listed in"Section 54.02(f).

FN10. Moon v. State, S.W.3d 366 (Tex.App.—Houston [1st Dist.] 2013).

FN11. Id. at 370–71 (citing In re G.F.O., 874 S.W.2d 729, 731–32 (Tex.App.—Houston [1st Dist.] 1994, no writ)).

Regarding the juvenile court's sophistication-and-maturity finding, while the State argued that "[the appellant]'s efforts to conceal the crime and avoid apprehension demonstrate that he knew the difference between right and wrong and that his conduct was wrong," the court of appeals pointed out that the "finding of the juvenile court ... was based on [the appellant]'s ability to waive his rights and assist counsel in preparing his defense, not an appreciation of the nature of his actions[.]" FN12 And since the State's evidence of the appellant's "efforts to conceal the crime" consisted primarily of the appellant's "text messages instructing [a compatriot] to not 'say a word,' [and to] '[t]ell them ... you don't know where I live,' " the court of appeals determined that there was "no evidence supporting the juvenile court's finding that [the appellant] was sufficiently sophisticated and mature to waive his rights and assist in his defense." FN13

FN12. Id. at 374.

FN13. Id.

With respect to the juvenile court's finding that "there is little, if any, prospect of adequate protection of the public and likelihood of rehabilitation ... by use of procedures, services, and facilities currently available to the Juvenile Court[,]" the court of appeals found it significant that the appellant "had a sole misdemeanor conviction for 'keying' a car, and while locked up in the juvenile facility was accused of four infractions." FN14 The court of appeals took this to be "more than a scintilla of evidence" to "support the court's finding" in this regard, and thus found the evidence to be at least "legally sufficient to support the court's determination" that the lack of "adequate protection of the public and likelihood of reasonable rehabilitation" weighed in favor of waiver.FN15 "However," the court of appeals continued, "careful consideration of all of the evidence[,]" including Dr. Silverman's report, led to the "further ... conclusion that the evidence is factually insufficient to support the juvenile court's finding." FN16 Responding to the State's argument to the contrary, the court of appeals described the appellant's act of "keying a car" as "an undeniably low level misdemeanor mischief offense" and "hardly the sort of offense for which 'there is little, if any, prospect of adequate protection of the public.' " FN17 The court of appeals was also influenced by the fact that the appellant's juvenile custodial officers testified that "he followed orders, attended classes, and was not aggressive or mean-spirited." FN18 Finally, the court of appeals was clearly influenced by Dr. Silverman's assessment that the appellant "would probably benefit from placement in a therapeutic environment specifically designed for adolescent offenders[.]" FN19

FN14. Id. at 376.

FN15. Id. at 377.

FN16. Id.

FN17. Id.

FN18. Id.

FN19. Id. at 376–77.

Thus, of the three "reasons for waiver" that the juvenile court specifically gave in its written order, the court of appeals determined that one reason, sophistication and maturity, was supported by legally insufficient evidence. It determined that another reason, the protection of the public and likelihood of rehabilitation, was supported by factually insufficient evidence. With respect to the juvenile court's third reason for waiving jurisdiction—that the appellant's offense constituted a crime against the person of another, and not a mere property crime—the court of appeals regarded this as an inadequate justification, by itself, for waiver. To transfer jurisdiction to the criminal court for this reason alone was, the court of appeals ultimately concluded, an abuse of discretion.FN20 The court of appeals reasoned that, "[i]f, as the State argues, the nature of the offense alone justified waiver, transfer would automatically be authorized in certain classes of 'serious' crimes such as murder, and the subsection (f) factors would be rendered superfluous." FN21 Concluding that the juvenile court abused its discretion to waive jurisdiction, the court of appeals vacated the district court's judgment of conviction, dismissed the criminal proceedings, and declared the case to be still "pending in the juvenile court." FN22

FN20. Id. at 378.

FN21. Id. at 375 (citing R.E.M. v. State, 541 S.W.2d 841, 846 (Tex.Civ.App.—San Antonio 1976, writ ref'd n.r.e.), for the proposition that there is "nothing in the statute which suggests that a child may be deprived of the benefits of our juvenile court system merely because the crime with which he is charged is a 'serious' crime.").

FN22. Id. at 378.

C. The Petition for Discretionary Review

The State now challenges the court of appeals's ruling on four fronts. It argues that the court of appeals erred:

• to apply factual-sufficiency review to any aspect of its analysis of the question whether the juvenile court abused its discretion to waive jurisdiction.

• in failing to consider whether the seriousness of the offense could, by itself, justify the juvenile court's discretionary decision to waive jurisdiction.

• in limiting its abuse-of-discretion analysis to the reasons for waiver set forth in the juvenile court's written order, and failing to consider the reasons that the juvenile court proclaimed orally from the bench at the conclusion of the hearing.

• in limiting its abuse-of-discretion analysis to a review of the specific reasons the juvenile court gave (whether written or oral), rather than to assay the entire record for any evidence that would support a valid reason to waive jurisdiction, regardless of whether the juvenile court purported to rely on that evidence/reason.

Review of these various assertions necessitates a fairly global exegesis of the statutory scheme for the waiver of juvenile-court jurisdiction in Texas, as well as the abundant case law that has been generated in the courts of appeals over the past half a century.

Held: Court of Appeals order affirmed

Opinion: A. Kent v. United States

The transfer of a juvenile offender from juvenile court to criminal court for prosecution as an adult should be regarded as the exception, not the rule; the operative principle is that, whenever feasible, children and adolescents below a certain age should be "protected and rehabilitated rather than subjected to the harshness of the criminal system[.]" FN23 Because the waiver of juvenile-court jurisdiction means the loss of that protected status, in Kent v. United States, the United States Supreme Court characterized the statutory transfer proceedings in the District of Columbia as "critically important," and held that any statutory mechanism for waiving juvenile-court jurisdiction must at least "measure up to the essentials of due process and fair treatment." FN24 Among the requisites of a minimally fair transfer process, the Supreme Court tacitly assumed in Kent, is the opportunity for meaningful appellate review.FN25 The appellate court must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not assume that there are adequate reasons, nor may it merely assume that full investigation has been made. Accordingly, we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the [relevant District of Columbia] statute as requiring that this statement must be formal or that it should necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of full investigation has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review.FN26

In an appendix to its opinion in Kent, the Supreme Court included a policy memorandum promulgated by the District of Columbia Juvenile Court that describes "determinative factors" for guiding the juvenile court's discretion in deciding whether waiver of its jurisdiction over a particular juvenile offender is appropriate.FN27 The Texas Legislature soon incorporated those factors, albeit non-exclusively, into our own statutory scheme.FN28 Missing from the Supreme Court's Kent opinion, however, is any detailed description of a standard for appellate review of the juvenile court's transfer decision.

FN23. Hidalgo, S.W.2d at 754. See TEX. FAM.CODE § 51.01(2) (Juvenile Justice Code is to be construed to balance "the concept of punishment for criminal acts" with the ideal "to remove, where appropriate, the taint of criminality from children committing certain unlawful acts"—all "consistent with the protection of the public and public safety").

FN24. U.S. 541, 560–62 (1966).

FN25. See id. at 561 ("Meaningful review requires that the reviewing court should review.").

FN26. Id. (internal quotation marks omitted).

FN27. Id. at 565–67.

FN28. Acts 1967, 60th Leg., ch. 475, § 4, p. 1083–84, eff. Aug. 28, 1967 (currently codified at TEX. FAM.CODE § 54.02(f)). See Robert O. Dawson, Delinquent Children and Children in Need of Supervision: Draftsman's Comments to Title 3 of the Texas Family Code, 5 TEX. TECH. L.REV. 509, 562 (1974) ("Most of the procedural safeguards incorporated in [§ 54.02] are probably required as a matter of federal constitutional law by the Supreme Court's decision in Kent v. United States, 383 U.S. 541 (1966)."). But see, contra: Galloway v. State, 578 S.W.2d 142, 143 (Tex.Crim.App.1979) ("Kent did not purport to do more than construe the District of Columbia juvenile statutes, and it is not clear that it sets constitutional requirements.").

B. The Statutory Scheme

The Juvenile Justice Code of the Texas Family Code specifically provides that the designated juvenile court of each county has "exclusive original jurisdiction over proceedings in all cases involving ... delinquent conduct ... engaged in by a person who was a child within the meaning of this title at the time the person engaged in the conduct." FN29 "Delinquent conduct" includes "conduct ... that violates a penal law of this state ... punishable by imprisonment or by confinement in jail;" FN30 and a "child," as defined by the Juvenile

Justice Code, is any "person ... ten years of age or older and under 17 years of age[.]" FN31 Thus, any person accused of committing a felony offense between his tenth and seventeenth birthdays is subject to the exclusive original jurisdiction of a juvenile court, meaning that the juvenile court has the "power to hear and decide" matters pertaining to the juvenile offender's case "before any other court[,]" including the criminal district court, can review them.FN32

FN29. TEX. FAM.CODE § 51.04(a).

FN30. Id. § 51.03(a)(1).

FN31. Id. § 51.02(2)(a).

FN32. BLACK'S LAW DICTIONARY (10th ed.2014) (defining "original jurisdiction" as "[a] court's power to hear and decide a matter before any other court can review the matter"). See also id. at 981 (defining "exclusive jurisdiction" as "[a] court's power to adjudicate an action or class of actions to the exclusion of all other courts").

The right of the juvenile offender to remain outside the jurisdiction of the criminal district court, however, is not absolute. Section 54.02 of the Juvenile Justice Code provides that, if certain conditions are met, the "juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate district court ... for criminal proceedings [.]" FN33 Before it may exercise its discretion to waive jurisdiction over an alleged child offender, the juvenile court must find that (1) the child is alleged to have violated a penal law of the grade of felony; (2) the child was ... 14 years of age or older at the time [of the alleged] offense, if the offense is ... a felony of the first degree[;] and (3) after a full investigation and a hearing, the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings in the proper adult criminal court.FN34 "In making the determination required by Subsection [54.02](a)"—that is, whether the "welfare of the community" indeed requires adult criminal proceedings to be instituted against the juvenile, the [juvenile] court shall consider, among other matters: (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person; (2) the sophistication and maturity of the child; (3) the record and previous history of the child; and (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.FN35

These non-exclusive factors serve, we have said, to facilitate the juvenile court's balancing of "the potential danger to the public" posed by the particular juvenile offender "with the juvenile offender's amenability to treatment." FN36 Finally, should the juvenile court choose to exercise its discretion to waive jurisdiction over the child, then the Juvenile Justice Code directs it to "state specifically" in a written order "its reasons for waiver and [to] certify its action, including the written order and findings of the court." FN37

FN33. TEX. FAM.CODE § 54.02(a).

FN34. Id.

FN35. Id. § 54.02(f). These are the factors that derive from the Kent appendix. See note 27, ante. They are "intended to guide the [juvenile] court's discretion in making the determination to transfer." Dawson, 5 TEX. TECH. L.REV. at 564. Initially, Section 54.02(f) embraced all six of the Kent factors, but the statute was amended in 1996 to remove two of them. Acts 1995, 74th Leg., ch. 262, § 34, p. 2533, eff. Jan. 1, 1996.

FN36. Hidalgo, S.W.2d at 754.

FN37. TEX. FAM.CODE § 54.02(h)

For the juvenile, there are a number of advantages to remaining outside of the jurisdiction of the adult criminal courts. Not the least of these advantages is that, with but a few exceptions, a "child may not be committed or transferred to a penal institution or other facility used primarily for the execution of sentences of persons convicted of crime, except... after transfer for prosecution in criminal court under Section 54.02[.]" FN38 Indeed, a juvenile offender may not even be handed a sentence—"no disposition may be made"—upon his being "found to have engaged in delinquent conduct" unless and until the juvenile court or a jury determines that "the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made." FN39 And we ourselves have acknowledged the goals of the criminal justice system and the juvenile-justice system to be fundamentally different, describing the former as more "retributive" than its "rehabilitative" juvenile counterpart.FN40

FN38. There are other exceptions to this general rule not implicated in this case, including an exception for "temporary detention in a jail or lockup pending juvenile court hearing,"id. § 51.13(c)(1), as well as one for "transfer ... under Section 245.151(c), Human Resources Code."Id. § 51.13(c)(3); see also TEX. HUM. RES.CODE § 245.151(c) (the Texas Juvenile Justice Department "shall transfer" an adjudicated juvenile offender "to the custody of the Texas Department of Criminal Justice for the completion of the person's

sentence" when, pursuant to court order under TEX. FAM.CODE § 54.11(i)(2) and TEX. HUM. RES.CODE § 244.014(a), the juvenile court determines that "the child's conduct" while under State supervision "indicates that the welfare of the community requires the transfer").

FN39. See TEX. FAM.CODE § 54.04(c) ("If the court or jury does not so find, the court shall dismiss the child and enter a final judgment without any disposition."). In keeping with the Juvenile Justice Code's stated purpose to "remove, where appropriate, the taint of criminality from children committing certain unlawful acts[,]"TEX. FAM.CODE § 51.01(2)(B), the juvenile-justice equivalent of a "conviction" for delinquent conduct is referred to instead as an "adjudication," TEX. FAM.CODE § 54.03, and the juvenile-justice equivalent of a "sentence" for an adjudication is instead referred to as a "disposition." TEX. FAM.CODE § 54.04.

FN40. Hidalgo, S.W.2d at 755.

Prior to January 1, 1996, Section 56.01 of the Juvenile Justice Code provided, in one phrasing or another, that an appeal "from an order entered under ...Section 54.02 of this code respecting transfer of the child to criminal court for prosecution as an adult" could be taken "by or on behalf of a child" directly from the juvenile court to the proper court of appeals.FN41 What this meant in practical terms was that an alleged juvenile offender could complain immediately of the juvenile court's order waiving its jurisdiction, and, if appropriate, seek discretionary review from the Texas Supreme Court "as in civil cases generally." FN42 In 1995, however, the Legislature approved an amendment to the Juvenile Justice Code, effective January 1, 1996, in which the portion of Section 56.01(c) that provides for the direct, civil appealability of Section 54.02 waivers was struck.FN43 Contemporaneous with this amendment, the Legislature added Article 44.47 to the Texas Code of Criminal Procedure, providing in Section (b) thereof that a "defendant may appeal a transfer under [Section 54.02, Family Code] only in conjunction with the appeal of a conviction of ... the offense for which the defendant was transferred to criminal court." FN44 What this means in practical terms is that an alleged juvenile offender may no longer immediately appeal from the juvenile court's waiver of jurisdiction; instead, he must wait until such time as he may be convicted in an adult criminal court to complain, on appeal, of some error in the juvenile court's transfer ruling. Although the Legislature designated an appeal from a juvenile court's Section 54.02 order to be a "criminal matter ... governed by [the Code of Criminal Procedure] and the Texas Rules of Appellate Procedure that apply to a criminal case[,]" it nevertheless expressly provided, in Article 44.47(d), that an appeal under Article 44.47(b)"may include any claims under the law that existed before January 1, 1996, that could have been raised on direct appeal in a transfer under Section 54.02, Family Code." FN45

FN41. See Acts 1973, 63d Leg., ch. 544, § 1. p. 1483, eff. Sept. 1, 1973.

FN42. Id.

FN43. Acts 1995, 74th Leg., ch. 262, § 48, p. 2546, eff. Jan. 1, 1996.

FN44. Id. at § 85, p. 2584 (emphasis added).

FN45. Id.

What is lacking in our statutory scheme—as is lacking in Kent—is any express statement of the applicable standard of appellate review of the juvenile court's transfer order. In the absence of an explicit statutory standard of appellate review, the courts of appeals have filled the void with decisional law spelling out how they will go about providing the "meaningful review" contemplated by Kent.

C. The Consensus in the Courts of Appeals

In the absence of explicit provisions in the Juvenile Justice Code that define a standard for appellate review of juvenile transfer orders, the general consensus of the various courts of appeals has been as follows. The burden is on the petitioning party, the State, to produce evidence to inform the juvenile court's discretion as to whether waiving its otherwise-exclusive jurisdiction is appropriate in the particular case.FN46 Transfer of a juvenile offender to criminal court is appropriate only when the State can persuade the juvenile court, by a preponderance of the evidence,FN47 that the welfare of the community requires transfer of jurisdiction for criminal proceedings, either because of the seriousness of the offense or the background of the child (or both).FN48 In exercising its discretion, the juvenile court must consider all of the Kent factors as currently codified in Section 54.02(f) of the Juvenile Justice Code; FN49 "it is from the evidence concerning [the Section 54.02(f)] factors that a [juvenile] court makes its final determination." FN50 But it need not find that each and every one of those factors favors transfer before it may exercise its discretion to waive jurisdiction.FN51 It may transfer the juvenile so long as it is satisfied by a preponderance of the evidence that the seriousness of the offense or the background of the child (or both) indicates that the welfare of the community requires criminal proceedings.FN52

FN46. Matter of Honsaker, S.W.2d 198, 201 (Tex.Civ.App.—Dallas 1976, ref'd n.r.e.); B.R.D. v. State, 575 S.W.2d 126, 131 (Tex.Civ.App.—Corpus Christi 1978, writ ref'd n.r.e.); Matter of M.I.L., 601 S.W.2d 175, 177 (Tex.Civ.App.—Corpus Christi 1980, no writ); Matter of E.D.N., 635 S.W.2d 798, 800 (Tex.App.—Corpus Christi 1982, no writ); Moore v. State, 713

S.W.2d 766, 768 (Tex.App.—Houston [14th Dist.] 1986, no writ).

FN47. Matter of P.B.C., S.W.2d.448, 453 (Tex.Civ.App.—El Paso 1976, no writ).

FN48. Faisst v. State, S.W.3d 8, 11 (Tex.App.—Tyler 2003, no pet.).

FN49. See In re J.R.C., S.W.2d 579, 584 (Tex.Civ.App.—Texarkana 1975, ref'd n.r.e.) (juvenile court's "findings should show an investigation in every material field [listed in Section 54.02(f)] was undertaken and the result thereof").

FN50. Matter of M.I.L., S.W.2d at 177.

FN51. E.g., Matter of J.R.C., S.W.2d 748, 753 (Tex.Civ.App.—Texarkana 1977, ref'd n.r.e.); D.J.R. v. State, 565 S.W.2d 392, 395 (Tex.Civ.App.—Fort Worth 1978, no writ); Matter of G.B.B., 572 S.W.2d 751, 756 (Tex.Civ.App.—El Paso 1978, ref'd n.r.e.); Casiano v. State, 687 S.W.2d 447, 449 (Tex.App.—Houston [14th Dist.] 1985, no writ); Matter of K.D.S., 808 S.W.2d 299, 302 (Tex.App.—Houston [1st Dist.] 1991, no writ); C.M. v. State, 884 S.W.2d 562, 564 (Tex.App.—San Antonio 1994, no writ).

FN52. See, e.g., Matter of J.R.C., S.W.2d at 753 ("Section 54.02 does not require that, in order for the juvenile court to waive its jurisdiction, all of the matters listed in Subsection (f) must be established. * * * The statute only directs that the juvenile court consider the matters listed under Subsection (f) in making its determination. * * * They are the criteria by which it may be determined if the juvenile court properly concluded that the seriousness of the offense or the background of the child required a transfer to criminal court."); In re Q.D., 600 S.W.2d 392, 395 (Tex.Civ.App.—Fort Worth 1980, no writ) ("[T]he [juvenile] court is bound only to consider all [of the Subsection (f)] factors. It need not find that each factor is established by the evidence."); P.G. v. State, 616 S.W.2d 635, 639 (Tex.Civ.App.—San Antonio 1981, ref'd n.r.e.) ("The [juvenile] court need not find that all the factors in subdivision (f) have been established, but it must consider all these factors and state the reasons for its transfer so that the appellate court may review the basis on which the conclusion was made and can determine whether the evidence so considered does in fact justify that conclusion."); Matter of E.D.N., 635 S.W.2d at 800 ("If the evidence establishes enough of the factors in subdivision (f) to convince the [juvenile] court that a transfer is in the best interest of the child and community, we will not disturb that order."); McKaine v. State, 170 S.W.3d 285, 291 (Tex.App.—Corpus Christi 2005, no pet.) ("While the juvenile court must consider all of these factors before transferring the case to district court, it is not required to find that each factor is established by the evidence. * * * The court is also not required to give each factor equal weight as long as each is considered.").

With respect to the adequacy of the written order mandated by Section 54.02(h), the courts of appeals have generally agreed, first of all, that the written order must reflect the juvenile court's "reasons" for waiving jurisdiction.FN53 Despite the express edict of the statute (i.e., the written order "shall state specifically [the juvenile court's] reasons for waiver"), the courts of appeals have sometimes sanctioned orders that recited the reasons for transfer in terms no more specific than the bare statutory language, namely, that because of the seriousness of the offense or the background of the child, transfer is required to ensure the welfare of the community.FN54 In addition to specifying "reasons," the order should also expressly recite that the juvenile court actually took the Section 54.02(f) factors into account in making this determination.FN55 But it need make no particular findings of fact with respect to those factors, FN56 notwithstanding Section 54.02(h)'s pointed requirement that the juvenile court "certify its action, including the ... findings of the court[.]"

FN53. See e.g., In re J.R.C., S.W.2d at 584 ("The reasons motivating the Juvenile Court's waiver of jurisdiction must expressly appear."); P.G., 616 S.W.2d at 639 (juvenile court must "state the reasons for its transfer").

FN54. Matter of Honsaker, S.W.2d at 200, 201–02 (construing In re J.R.C. and holding that a transfer order that recited the statutory criteria for waiver of juvenile jurisdiction and found them to be satisfied provided "sufficient specificity ... to allow an appellate court to review and understand the reason for the juvenile court's determination"); D.L.C. v. State, 533 S.W.2d 157, 159 (Tex.Civ.App.—Austin 1976, no writ) (order stating in conclusory terms that the Subsection (f) factors were satisfied, without going into detail, was nevertheless sufficient to comply with the requirement of written "reasons" in Subsection (h)); In re W.R.M., 534 S.W.2d 178, 181 (Tex.Civ.App.—Eastland 1976, no writ) ("In the instant case, the order discloses that the matters listed in Subsection (f) were considered, and the order states specific reasons for waiver. The fact that some of the recitations constitute conclusions does not require a reversal of the court's order."); Q.V. v. State, 564 S.W.2d 781, 784 (Tex.Civ.App.—San Antonio 1978, ref'd n.r.e.) (written transfer order that merely stated conclusorily that Subsection (f) factors were satisfied, sans any detailed description of the evidence, was nevertheless "sufficiently specific as to the 'reasons' for" the juvenile court's decision to waive jurisdiction); In re C.L.Y., 570 S.W.2d 238, 239, 241 (Tex.Civ.App.—Houston [1st Dist.] 1978, no writ) (same); Appeal of B.Y., 585 S.W.2d 349, 351 (Tex.Civ.App.—El Paso 1979, no writ) ("Reversible error is not present here by the fact that the [juvenile court's] order seems to parrot the Section 54.02 list of factors the [juvenile court] should consider in making a

transfer; the enumerated reasons are supported by evidence. The order is sufficient."); In re I.B., 619 S.W.2d 584, 587 (Tex.Civ.App.—Amarillo 1981, no writ) (same); Matter of T.D., 817 S.W.2d 771, 775–77 (Tex.App.—Houston [1st Dist.] 1991, writ denied) (same).

FN55. In re W.R.M., S.W.2d at 182 (order is sufficient if it "discloses that the matters listed in Subsection (f) were considered"); In re C.L.Y., 570 S.W.2d at 239 (transfer order stated that the juvenile court "has considered" the Subsection 54.02(f) factors); P.G., 616 S.W.2d at 638–39 (juvenile court's order "listed the ... factors of section 54.02(f) and stated that each had been considered in making a determination" that waiver of jurisdiction was appropriate); Casiano, 687 S.W.2d at 449 ("An order is sufficient which states [inter alia] that all factors listed in § 54.02(f) were considered by the [juvenile] court[.]").

FN56. See note 54, ante. Early case law seemed to contemplate that greater specificity might be necessary to satisfy Kent 's emphasis on meaningful appellate review. See In re J.R.C., 522 S.W.2d at 583–84 ("To sum up, besides giving reasons for waiver in its order the Juvenile Court has a mandatory duty to file findings covering matters actually considered, including all matters mentioned in Subsection (f), and to certify such order and findings to the appropriate district court."). This insistence on "rigid adherence to the governing statutes ... in proceedings of this nature[,]" id. at 584, however, soon gave way to a laxer attitude that, so long as the juvenile court's order identified the relevant factors (however conclusorily) and the evidence would support a transfer based on those factors, the order would be regarded as sufficient. See Douglas A. Hager, Does the Texas Juvenile Waiver Statute Comport with the Requirements of Due Process?, 26 TEX. TECH. L.REV. 813, 838–45 (1995) (tracing the retreat of the courts of appeals from "the procedural safeguards inherent in the J.R.C. holding"); Robert O. Dawson, Delinquent Children and Children in Need of Supervision: Draftsman's Comments to Title 3 of the Texas Family Code, 5 TEX. TECH. L.REV. 509, 564–65 (1974) ("The committee's draft [of Section 54.02(h)] stated that if the juvenile court waives jurisdiction 'it shall briefly state in the order its reasons for waiver.' The fact that the Legislature changed 'briefly state' to 'state specifically' indicates that it contemplated more than merely an adherence to printed forms and, indeed, contemplated a true relevation [sic] of reasons for making this discretionary decision.").

The courts of appeals have also uniformly agreed that, absent an abuse of discretion, a reviewing court should not set aside the juvenile court's order transferring jurisdiction.FN57 What they mean by "abuse of discretion" in this context is not altogether clear. Some courts of appeals have declared that the juvenile court's decision must simply be a guided one, not arbitrary or capricious.FN58 Even so, the courts of appeals have entertained various challenges to the legal and/or factual sufficiency of the evidence presented at the transfer hearing to support the juvenile court's decision to waive its jurisdiction.FN59 Some courts of appeals (like the court of appeals in this case) have examined the evidence to determine its sufficiency to support specific findings of fact with respect to the Section 54.02(f) factors,FN60 while mindful that not every factor must support transfer before the juvenile court may exercise its discretion to waive jurisdiction.FN61 Other courts of appeals have accepted the juvenile offender's invitation to measure the sufficiency of the evidence to support the juvenile court's ultimate conclusion, pursuant to Section 54.02(a), that the seriousness of the offense or background of the child indicated the need for transfer in order to ensure the welfare of the community.FN62 No court of last resort in Texas, insofar as our research reveals, has yet spoken on these matters.

FN57. E.g., Matter of Honsaker, S.W.2d at 201; C.M., 884 S.W.2d at 563; Matter of J.P.O., 904 S.W.2d 695, 698 (Tex.App.—Corpus Christi 1995, writ denied); Matter of K.B.H., 913 S.W.2d 684, 687–88 (Tex.App.—Texarkana 1995, no pet.); In re J.J., 916 S.W.2d 532, 535 (Tex.App.—Dallas 1995, no writ); State v. Lopez, 196 S.W.3d 872, 874 (Tex.App.—Dallas 2006, pet. ref'd); Faisst, 105 S.W.3d at 12. Cf. T.P.S. v. State, 590 S.W.2d 946, 953–54 (Tex.Civ.App.—Dallas 1979, ref'd n.r.e.) (observing that Kent "recognizes that the statute of the District of Columbia there in question gave the juvenile court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached") (internal quotation marks omitted).

FN58. See, e.g., Matter of M.D.B., S.W.2d 415, 417 (Tex.App.—Houston [14th Dist.] 1988, no writ) ("In reviewing the [juvenile] court's action for an abuse of discretion, this court must determine if the [juvenile] court acted without reference to any guiding rules and principles."); Matter of T.D., 817 S.W.2d at 773 ("The [juvenile] court must act with reference to guiding rules and principles, reasonably, not arbitrarily, and in accordance with the law.").

FN59. See, e.g., Matter of I.J., Jr., S.W.2d 110, 111 (Tex.Civ. App.—Eastland 1977, no writ) (finding the evidence to support "the findings in the transfer order" to be both legally and factually sufficient); Matter of T.D., 817 S.W.2d at 777 ("The [juvenile] court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards applied in reviewing the legal or factual sufficiency of the evidence supporting the jury's answers to special issues."); Matter of G.F.O., 874 S.W.2d 729, 731–32 (Tex.App.—Houston [1st Dist.] 1994, no writ) ("If an appellate court finds the evidence factually or legally insufficient to support the juvenile court's order transferring jurisdiction of a youth to the criminal district court, it will necessarily find the juvenile court

has abused its discretion."); Matter of J.P.O, 904 S.W.2d at 699–700 ("The juvenile court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards as are applied in reviewing the legal or factual sufficiency of the evidence supporting a jury's answers to a charge."); Matter of K.B.H., 913 S.W.2d at 688 ("Under an abuse of discretion standard, the legal sufficiency of the evidence is not an independent ground of error, but is a relevant factor in assessing whether the [juvenile] court abused its discretion."); Faisst, 105 S.W.3d at 12 ("Relevant factors to be considered when determining if the [juvenile] court abused its discretion include legal and factual sufficiency of the evidence."); Bleys v. State, 319 S.W.3d 857, 861 (Tex.App.—San Antonio 2010, no pet.)(same).

FN60. See, e.g., Matter of P.A.C., S.W.2d at 916–17 (finding that the evidence was factually sufficient to support the juvenile court's findings with respect to several of the subsection (f) factors); Moore, 713 S.W.2d at 768–70 (reviewing both the legal and factual sufficiency of the evidence to support the juvenile court's findings with respect to various subsection (f) factors); Matter of T.D., 817 S.W.2d at 777–79 (conducting legal and factual sufficiency analysis of the last subsection (f) factor); In re J.J., 916 S.W.2d at 537 ("Additionally, there was legally and factually sufficient evidence before the [juvenile] court supporting affirmative findings regarding each of the ... factors set forth in section 54.02(f) of the family code."); Matter of D.D., 938 S.W.2d 172, 174–76 (Tex.App.—Fort Worth 1996, no writ) (reviewing the factual sufficiency of the evidence to support the juvenile court's finding regarding two of the subsection (f) factors); Bleys, 319 S.W.3d at 862–63 (reviewing the factual sufficiency of the evidence to support the juvenile court's finding under Section 54.02(f)(4)).

FN61. See, e.g., L.M. v. State, S.W.2d 808, 813 (Tex.Civ.App.—Houston [1st Dist.] 1981, ref'd n.r.e.) ("Although all of the factors enumerated in section 54.02(f) must be considered by the [juvenile] judge, each one need not be present in a specific case."); Matter of E.D.N., 635 S.W.2d at 800 ("While the court must consider all of these factors, it need not find that they have all been established."); C.W. v. State, 738 S.W.2d 72, 75 (Tex.App.—Dallas 1987, no writ) ("The [juvenile] court is bound to consider, as it did in this case, all [of the] statutory factors, among other matters. It need not find that each of the ... factors is established by the evidence."); Matter of M.D.B., 757 S.W.2d at 417 ("[W]hile the juvenile court is required to consider all [of the] factors of § 54.02(f)..., it is not required to find that each factor is established by the evidence."); Matter of C.C.G., 805 S.W.2d 10, 15 (Tex.App.—Tyler 1991, writ denied) (same); In re J.J., 916 S.W.2d at 535 (same); Matter of D.D., 938 S.W.2d at 176 (same); Bleys, 319 S.W.3d at 862 (same).

FN62. See, e.g., Moore, S.W.2d at 767–68, 770 (reviewing the legal and factual sufficiency of the evidence to support the juvenile court's determination that the seriousness of the offense and the child's background justified transfer); Matter of T.D., 817 S.W.2d at 777 (at least nominally reviewing legal and factual sufficiency of the ultimate question of whether there is "probative evidence that the welfare of the community required a waiver of jurisdiction of the juvenile court and criminal proceedings against appellant"); Matter of J.P.O., 904 S.W.2d at 700–02 (Reviewing both the legal and factual sufficiency of the evidence to support the juvenile court's bottom-line conclusion that transfer was appropriate); In re J.J., 916 S.W.2d at 536–37 (finding the evidence sufficient to support the juvenile court's determination that both the seriousness of the offense and the child's background merited waiving jurisdiction); Matter of D.D., 938 S.W.2d at 176–77 (reviewing the factual sufficiency of the evidence to support the juvenile court's subsection (a) determination whether the seriousness of the offense or the child's background warranted transfer); Bleys, 319 S.W.3d at 862–63 (reviewing the factual sufficiency of the evidence to support the juvenile court's conclusion under Section 54.02(a)(3)).

The State argues that the court of appeals in this case erred in four respects. First, the court of appeals erred to conduct a factual-sufficiency review, since appeal from a juvenile transfer order is now "a criminal matter" that is "governed" by the Texas Code of Criminal Procedure and the rules of appellate procedure that apply to criminal cases.FN63 After all, this Court, in Brooks v. State, rejected factual sufficiency for purposes of criminal appeals.FN64 Second, the court of appeals erred to conclude that the seriousness of the offense could not, by itself, justify the juvenile court's transfer order. Third and fourth, the court of appeals erred by failing to take into account the reasons for waiver of jurisdiction that the juvenile court gave orally on the record, and, for that matter, any other justifications for transfer that may appear in the record, regardless of whether the juvenile court purported to rely on them, either orally on the record or in its written order. These are questions that the courts of appeals have never explicitly addressed.

FN63. TEX.CODE CRIM. PROC. art. 44.47(c).

FN64. Brooks v. State, S.W.3d 893 (Tex.Crim.App.2010).

III. ANALYSIS

A. Factual Sufficiency Under Section 54.02

The State argues that the court of appeals erred to apply a factual-sufficiency standard to the Section 54.02(f)(4) factor, regarding "the prospects of adequate protection of the public and the likelihood of rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile

court." FN65 Indeed, in a supplemental brief filed after oral argument in this Court, the State argues that the appropriate standard of appellate review ought to be a bare abuse-of-discretion standard, unencumbered by any inquiry into the sufficiency of the evidence, either legal or factual, to support the juvenile court's transfer order. We disagree.

FN65. TEX. FAM.CODE § 54.02(f)(4). See Moon, 410 S.W.3d at 377 (holding that the evidence was legally sufficient to establish this factor, but factually insufficient).

That the appeal of a transfer order is now regarded as a "criminal matter," under Article 44.47(c), does not in itself control the question of whether factual-sufficiency review is available on direct appeal.FN66 The juvenile transfer proceeding remains civil in character, governed by the Juvenile Justice Code; the proceedings do not become criminal unless and until the juvenile court waives its exclusive jurisdiction and transfers the child to a criminal court for prosecution as an adult. More to the point, the availability of factual-sufficiency review is, in any event, not so much a function of the character of the proceeding—civil versus criminal—as it is a function of the applicable burden of proof. As we have already pointed out, in a juvenile transfer proceeding, the burden is on the State to produce evidence that persuades the juvenile court, by a preponderance of the evidence, that waiver of its exclusive jurisdiction is appropriate. Facts which must be proven by a preponderance of the evidence are ordinarily susceptible to appellate review for factual sufficiency.FN67 In arguing that factual-sufficiency review is unavailable, the State analogizes to the juvenile-adjudication proceedings.FN68 In that context, the courts of appeals have declined to conduct factual-sufficiency review, noting that adjudication proceedings are "quasi-criminal" in nature.FN69 But the burden of proof in a juvenile-adjudication proceeding is beyond a reasonable doubt,FN70 not a preponderance of the evidence. In that context, it is certainly arguable that our holding in Brooks applies.FN71 In the review of any issue that is subject to a burden of proof less than beyond a reasonable doubt, however, the Texas Supreme Court has authorized the courts of appeals to conduct a factual-sufficiency review.FN72 The particular appellate standard for factual sufficiency depends upon the level of confidence applicable to the burden of proof—whether preponderance of the evidence or clear and convincing evidence—in the trial court.FN73 But the courts of appeals have continued to address issues of factual sufficiency when they are raised on appeal in all but the juvenile-adjudication context. Indeed, even in criminal cases, we have said that the courts of appeals may conduct factual-sufficiency reviews when confronted with fact issues for which the burden of proof is by a preponderance of the evidence.FN74 The court of appeals did not err to address the appellant's contention that the evidence was factually insufficient to support the juvenile court's finding with respect to Section 52.04(f)(4).FN75

FN66. Indeed, in light of Article 44.47(d), it is arguable that factual sufficiency remains a viable claim on appeal from a transfer order, notwithstanding that it is now a "criminal matter." After all, factual sufficiency was a "claim[ ] under the law that existed before January 1, 1996, that could have been raised on direct appeal of a transfer under Section 54.02, Family Code."TEX.CODE CRIM. PROC. art. 44.47(d).

FN67. Matlock v. State, S.W.3d 662, 667 (Tex.Crim.App.2013).

FN68. State's Brief on the Merits at 12–13.

FN69. See In re R.R., S.W.3d 730, 734 (Tex.App.—Houston [14th Dist.] 2012, writ denied) ("Although juvenile [adjudication] proceedings are civil matters, the standard applicable in criminal matters [i.e., proof beyond a reasonable doubt] is used to assess the sufficiency of the evidence a finding the juvenile has engaged in delinquent conduct."); In re A.O., 342 S.W.3d 236, 239 (Tex.App.—Amarillo 2011, writ denied) (same). Cf., In re B.L.D., 113 S.W.3d 340, 351 (Tex.2003) (juvenile delinquency cases are considered to be "quasi-criminal"). The State cites only one case which suggests, and then only in obvious dicta, that factual-sufficiency review may likewise be inappropriate for appellate review of juvenile transfer proceedings after the enactment of Article 44.47. See In re M.A.V., 88 S.W.3d 327, 331 n.2 (Tex.App.—Amarillo 2002, no pet.).

FN70. See TEX. FAM.CODE § 54.03(f) ("The child shall be presumed to be innocent of the charges against the child and no finding that a child has engaged in delinquent conduct or conduct indicating a need for supervision may be returned unless the state has proved such beyond a reasonable doubt.").

FN71. In re R.R., S.W.3d at 734; In re A.O., 342 S.W.3d at 239; In re C.E.S., 400 S.W.3d 187, 194 (Tex.App.—El Paso 2013, no writ).

FN72. See In re C.H., S.W.3d 17, 25 (Tex.2002) (announcing the appropriate appellate standard for review of factual-sufficiency claims in cases of termination of parental rights, in which the State must satisfy a clear and convincing evidence burden of proof); In re J.F.C., 96 S.W.3d 256, 266–67 (Tex.2002) (same). And, indeed, in In re A.O., the Amarillo Court of Appeals, having refused to subject the juvenile-adjudication proceeding to factual-sufficiency review, in the next breath did conduct a factual-sufficiency review of the evidence proffered at the juvenile disposition hearing. 342 S.W.3d at 240.

FN73. See In re C.H., S.W.3d at 25 (distinguishing appropriate appellate standard for factual sufficiency depending upon whether the trial-level burden of proof

is preponderance of the evidence or clear and convincing evidence); In re J.F.C., 96 S.W.3d at 267 (same). See also Southwestern Bell Telephone Co. v. Garza, 164 S.W.3d 607, 627 (Tex.2004) ("In sum, we think that whenever the standard of proof at trial is elevated, the standard of appellate review must likewise be elevated.").

FN74. See Matlock, S.W.3d at 667, 670 ("Prior to Brooks, we used the traditional Texas civil burdens of proof and standards of review in the context of affirmative defenses where the rejection of an affirmative defense is established by a 'preponderance of the evidence.' Our decision in Brooks did not affect that line of cases. * * * A criminal defendant might also raise a factual-sufficiency challenge to the jury's adverse finding on his affirmative defense.") (footnotes omitted).

FN75. The State does not take issue with the court of appeals's formulation of the difference, under current law, between legal- and factual-sufficiency analyses:

"Under a legal sufficiency challenge, we credit evidence favorable to the challenged finding and disregard contrary evidence unless a reasonable fact finder could not reject the evidence. * * * Under a factual sufficiency challenge, we consider all of the evidence presented to determine if the [juvenile] court's finding is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust." Moon, S.W.3d at 370–71 (citations omitted).

Having said that, we do agree with the State's contention to the limited extent that it may argue that sufficiency review should not apply to appellate review of the ultimate question under Section 54.02(a)(3), that is, whether "because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings." The discretion of the juvenile court is at its apex when it makes this largely normative judgment.FN76 As long as the appellate court can determine that the juvenile court's judgment was based upon facts that are supported by the record, it should refrain from interfering with that judgment absent a scenario in which the facts identified in the transfer order, based on evidence produced at the transfer hearing as it relates to the non-exclusive Subsection (f) factors and beyond, bear no rational relation to the specific reasons the order gives to justify the conclusion that the seriousness of the offense and/or the juvenile's background warrant transfer. The appellate courts should conduct appellate review of the juvenile court's discretionary decision to waive jurisdiction in essentially the same way that the El Paso Court of Appeals has said that the juvenile court's discretion in determining juvenile dispositions should be scrutinized on appeal, to wit:

We apply a two-pronged analysis to determine an abuse of discretion: (1) did the [juvenile] court have sufficient information upon which to exercise its discretion; and (2) did the [juvenile] court err in its application of discretion? A traditional sufficiency of the evidence review helps answer the first question, and we look to whether the [juvenile] court acted without reference to any guiding rules or principles to answer the second.FN77

Similarly, we hold that, in evaluating a juvenile court's decision to waive its jurisdiction, an appellate court should first review the juvenile court's specific findings of fact regarding the Section 54.02(f) factors under "traditional sufficiency of the evidence review." But it should then review the juvenile court's ultimate waiver decision under an abuse of discretion standard. That is to say, in deciding whether the juvenile court erred to conclude that the seriousness of the offense alleged and/or the background of the juvenile called for criminal proceedings for the welfare of the community, the appellate court should simply ask, in light of its own analysis of the sufficiency of the evidence to support the Section 54.02(f) factors and any other relevant evidence, whether the juvenile court acted without reference to guiding rules or principles. In other words, was its transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria? And, of course, reviewing courts should bear in mind that not every Section 54.02(f) factor must weigh in favor of transfer to justify the juvenile court's discretionary decision to waive its jurisdiction.FN78

FN76. Whether the offense is serious enough, and/or the juvenile's background demonstrates, that waiver of the juvenile court's jurisdiction is warranted to ensure the welfare of the community is, in many respects, similar to the question of whether the non-exclusive Keeton factors warrant a jury's prediction, at the punishment phase of a capital-murder trial, that the accused will probably commit criminal acts of violence that would constitute a continuing threat to society. Even before Brooks was decided, we insisted that this special issue, while not "wholly normative in nature," is nevertheless too "value-laden" to be amenable to a factual-sufficiency review. McGinn v. State, 961 S.W.2d 161, 169 (Tex.Crim.App.1998); Keeton v. State, 724 S.W.2d 58, 61–64 (Tex.Crim.App.1987); TEX.CODE CRIM. PROC. art. 37.071 § 2(b)(1).

FN77. In re J.R.C.S., S.W.3d 903, 914 (Tex.App.—El Paso 2012, no writ). See also In re M.A.C., 999 S.W.2d 442, 446 (Tex.App.—El Paso 1999, no writ).

FN78. See Hidalgo, S.W.3d at 754 n. 16 ("The juvenile court is not required to find each criterion before it can transfer a case to district court. The court may order a

transfer on the strength of any combination of the criteria.").

B. The Seriousness of the Offense

The State complains that the court of appeals should not have concluded that the juvenile court abused its discretion for waiving jurisdiction based upon the seriousness of the offense. The State points out that the juvenile court made an explicit finding of fact in its transfer order that the appellant's alleged offense was committed against the person of another, under Section 54.02(f)(1). This finding of fact was amply supported by the record, the State contends, and was sufficient by itself to provide a legitimate basis for the trial court's discretionary decision to waive jurisdiction. The court of appeals rejected this contention because "[i]f, as the State argues, the nature of the offense alone justified waiver, transfer would automatically be authorized in certain classes of 'serious' crimes such as murder, and the subsection (f) factors would be rendered superfluous." FN79 In support of the court of appeals's observation, the appellant reminds us that the Supreme Court in Kent seems to have disfavored the "routine waiver [of juvenile-court jurisdiction] in certain classes of alleged crime." FN80

FN79. Moon, S.W.3d at 375.

FN80. Appellant's Response to the State's Brief at 13 (citing Kent, 383 U.S. at 553 n. 15).

The courts of appeals have long held that the offense that the juvenile is alleged to have committed, so long as it is substantiated by evidence at the transfer hearing and of a sufficiently egregious character, will justify the juvenile court's waiver of jurisdiction regardless of what the evidence may show with respect to the child's background and other Section 54.02(f) factors.FN81 This is different from holding that the mere category of offense the juvenile is alleged to have committed, without more, will serve to justify transfer. If that is the only consideration informing the juvenile court's decision to waive jurisdiction—the category of crime alleged, rather than the specifics of the particular offense—then we agree with the Supreme Court's intimation in Kent that the transfer decision would almost certainly be too ill-informed to constitute anything but an arbitrary decision.

FN81. The earliest case to so hold was In re Buchanan, 433 S.W.2d 787, 789 (Tex.Civ.App.—Fort Worth 1968, ref'd n.r.e.). Almost eight years later, another court of appeals reversed a juvenile transfer order, inter alia, because of a lack of evidence substantiating a bare recitation in the transfer order that "the offense was murder, committed against the person of another[.]" R.E.M., 541 S.W.2d at 846–47. The San Antonio Court of Appeals distinguished Buchanan, observing that there, "the 'evidence introduced at the hearing show[ed] without dispute that appellant shot and killed a man without provocation or cause.' 433 S.W.2d at 789. Here there is no admissible evidence to that effect." R.E.M., supra, at 847. Later cases have likewise found the evidence sufficient to support waiver of juvenile jurisdiction based on the seriousness of the offense alone, as established by evidence presented at the transfer hearing. See e.g., Matter of C.C.G., 805 S.W.2d at 14–15 ("[A]ssuming, arguendo that there is insufficient evidence concerning the background of appellant, the juvenile court's determination that the seriousness of the offense, as substantiated by the evidence, is alone sufficient."); C.M., 884 S.W.2d at 564 ("The [juvenile court] is free to decide to transfer the case due to the seriousness of the crime, even if the background of the child suggests the opposite."); Matter of D.D., 938 S.W.2d at 177 ("The seriousness of the offenses D.D. is charged with [capital murder, murder, aggravated kidnapping, among others] is sufficient to support his transfer despite his background."); Faisst, 105 S.W.3d at 11 ("[C]ourt does not abuse its discretion by finding the community's welfare requires transfer due to the seriousness of the crime [intoxication manslaughter] alone, despite the child's background."); McKaine, 170 S.W.3d at 291 (same).

The transfer order in this case made no findings about the specifics of the capital murder, finding no more than probable cause to believe that the appellant committed "the OFFENSE alleged." It gave as the juvenile court's sole reason for waiving jurisdiction that, "because of the seriousness of the OFFENSE, the welfare of the community requires criminal proceedings[,]" and then it simply recited "that the OFFENSE allege [sic] to have been committed WAS against the person of another[.]" FN82 The evidence at the hearing, of course, painted a much more graphic picture of the appellant's charged offense. Whether the court of appeals should have taken that evidence into account in evaluating the juvenile court's exercise of discretion depends upon whether the abuse-of-discretion evaluation must be limited to a review of the "specific reasons" and facts in support thereof that are expressly set out in the juvenile court's written transfer order as per Section 54.02(h), or whether the court of appeals may take into account other reasons and other facts not explicitly set out in the transfer order. We turn to that question next.

FN82. The other two Subsection (f) findings of fact, stated equally conclusorily in the juvenile court's transfer order, corresponded to the sophistication-and-maturity factor (Section 54.02(f)(2)) and the prospects-for-adequate-public-protection-and-rehabilitation-of-the-juvenile factor (Section 54.02(f)(4)). Both of these factors seem far more relevant to the background-of-the-child reason for concluding that the welfare of the community requires criminal proceedings than to the seriousness-of-the-offense reason—the latter of which was the only Section 54.02(a)(3) reason that the juvenile court actually provided in its transfer order to justify the waiver of jurisdiction.

C. Appellate Review of the Reasons/Facts Cited in the Transfer Order

There is an inherent tension between the broad discretion that the juvenile court is afforded in making the normative judgment of whether to waive jurisdiction, on the one hand, and Kent 's insistence upon the primacy of appellate review in order to assure that the juvenile court's broad discretion is not abused, on the other. The legislative response to this inherent tension was to mandate, in Section 54.02(h), that the juvenile court "shall state specifically in its order its reasons for waiver and certify its action, including the written order and findings of the court[.]" FN83 Although the committee that drafted the Juvenile Justice Code had recommended a version of this provision that would have required no more than a "brief" statement of the reasons justifying transfer, the Legislature deemed this insufficient: "The fact that the Legislature changed 'briefly state' to 'state specifically' indicates that it contemplated more than merely an adherence to printed forms and, indeed, contemplated a true relevation [sic] of reasons for making this discretionary decision." FN84 Moreover, Section 54.02(h) obviously contemplates that both the juvenile court's reasons for waiving its jurisdiction and the findings of fact that undergird those reasons should appear in the transfer order.FN85 In this way the Legislature has required that, in order to justify the broad discretion invested in the juvenile court, that court should take pains to "show its work," as it were, by spreading its deliberative process on the record, thereby providing a sure-footed and definite basis from which an appellate court can determine that its decision was in fact appropriately guided by the statutory criteria, principled, and reasonable—in short, that it is a decision demonstrably deserving of appellate imprimatur even if the appellate court might have reached a different result. This legislative purpose is not well served by a transfer order so lacking in specifics that the appellate court is forced to speculate as to the juvenile court's reasons for finding transfer to be appropriate or the facts the juvenile court found to substantiate those reasons.FN86 Section 54.02(h) requires the juvenile court to do the heavy lifting in this process if it expects its discretionary judgment to be ratified on appeal. By the same token, the juvenile court that shows its work should rarely be reversed.

FN83. TEX. FAM.CODE § 54.02(h).

FN84. Dawson, 5 TEX. TECH. L.REV. at 564–65.

FN85. In re J.R.C., S.W.2d at 583–84.

FN86. Cf. State v. Cullen, S.W.3d 696, 698 (Tex.Crim.App.2006) (requiring trial courts to enter explicit findings of fact in the pre-trial motion to suppress context because "courts of appeals should not be forced to make assumptions (or outright guesses) about a trial court's ruling on a motion to suppress"; thus ensuring "a resolution [on appeal] that is based on the reality of what happened rather than on assumptions that may be entirely fictitious").

Given this legislative regime, we think it only fitting that a reviewing court should measure sufficiency of the evidence to support the juvenile court's stated reasons for transfer by considering the sufficiency of the evidence to support the facts as they are expressly found by the juvenile court in its certified order. The appellate court should not be made to rummage through the record for facts that the juvenile court might have found, given the evidence developed at the transfer hearing, but did not include in its written transfer order. We therefore hold that, in conducting a review of the sufficiency of the evidence to establish the facts relevant to the Section 54.02(f) factors and any other relevant historical facts, which are meant to inform the juvenile court's discretion whether the seriousness of the offense alleged or the background of the juvenile warrants transfer for the welfare of the community, the appellate court must limit its sufficiency review to the facts that the juvenile court expressly relied upon, as required to be explicitly set out in the juvenile transfer order under Section 54.02(h).

D. Application of Law to Fact

The juvenile court did not "show its work" in the transfer order in this case. The only reason specifically stated on the face of the transfer order to justify waiver of juvenile jurisdiction is that the offense alleged is a serious one. The only fact specified in the written transfer order in support of this reason is that the offense that the appellant is alleged to have committed is an offense against the person of another. We agree with the court of appeals's conclusion that a waiver of juvenile jurisdiction based on this particular reason, fortified only by this fact, constitutes an abuse of discretion.

It is true that the juvenile court found other facts that would have been relevant to support transfer for the alternative reason that the appellant's background was such as to render waiver of juvenile jurisdiction appropriate. First, without going into any relevant detail, the juvenile court's order found that the appellant was sophisticated and mature enough to have been able to waive his constitutional rights effectively and assist in the preparation of his defense at trial, just as an adult would.FN87 Second, again without elaboration, the juvenile court found "little, if any" prospect of protecting the public and rehabilitating the appellant given its available resources. But, because the juvenile court did not cite the appellant's background as a reason for his transfer in its written order, these findings of fact are superfluous.

FN87. In any event, it is doubtful that the Legislature meant for the sophistication-and-maturity factor to embrace the juvenile's ability to waive his constitutional rights and assist in his defense. It is true that a great many of the courts of appeals seem to think that it does. The juvenile court's transfer order in the early case of In re Buchanan included such a finding. 433 S.W.2d at 788. So did the juvenile courts's orders in In re W.R.M., 534 S.W.2d at 181–82, Matter of Honsaker, 539 S.W.2d at 200, P.G., 616 S.W.2d at 639, Casiano, 687 S.W.2d at 449, and Matter of D.D., 938 S.W.2d at 175. Another relatively early case, however, found this emphasis on the juvenile's ability to waive his rights and assist in his defense "somewhat difficult to understand." R.E.M., 541 S.W.2d at 846. The San Antonio Court of Appeals "believe[d] that the requirement that the juvenile court consider the maturity and sophistication of the child refers to the question of culpability and responsibility for his conduct, and is not restricted to a consideration of whether he can intelligently waive rights and assist in the preparation of his defense." Id. Later, the Houston 1st Court of Appeals observed that "[o]ur courts have held that the requirement that the [juvenile] court consider the child's sophistication and maturity refers to the question of culpability and responsibility of the child for his conduct, as well as the consideration of whether he can intelligently waive his rights and assist in his defense." Matter of S.E.C., 605 S.W.2d at 958 (emphasis added). Thus did the latter view of the relevance of a juvenile's ability to waive his rights and assist in his defense as an adult creep into our jurisprudence. No case has ever undertaken to explain, however, exactly how the juvenile's capacity (or lack thereof) to waive his constitutional rights and assist in his defense is relevant to whether the welfare of the community requires transfer, and we fail to see that it is. Other courts of appeals have rightly declared "the purpose of an inquiry into the mental ability and maturity of the juvenile [to be] to determine whether he appreciates the nature and effect of his voluntary actions and whether they were right or wrong." Matter of E.D.N., 635 S.W.2d at 801 (citing L.W.F. v. State, 559 S.W.2d 428, 431 (Tex.Civ.App.—Fort Worth 1977, ref'd n.r.e.)). In our view, the juvenile's capacity to waive his constitutional rights and help a lawyer to effectively represent him is almost as misguided as the juvenile court's logic in the present case when it orally pronounced that the appellant should be transferred, inter alia, merely for the sake of judicial economy, so that his case could be consolidated with that of his already-certified-as-an-adult co-defendant. Such a notion is the very antithesis of the kind of individualized assessment of the propriety of waiver of juvenile jurisdiction that both Kent and our statutory scheme expect of the juvenile court in the exercise of its transfer discretion.

Moreover, even were we to regard the recitation of these conclusory facts in the written transfer order to constitute an acceptably implicit indication that the juvenile court also considered the appellant's background as a reason for the transfer, we would nonetheless uphold the court of appeals's judgment. First, with respect to the appellant's sophistication and maturity, we agree with the court of appeals that the evidence was legally insufficient to support such a finding, since the State offered no evidence at the juvenile hearing to inform the juvenile court's consideration of that Section 54.02(f) factor.FN88 Second, with respect to the prospects for protecting the public and rehabilitating the appellant, we are not at liberty to second-guess the court of appeals's conclusion that the juvenile court's finding regarding this Section 54.02(f) factor was supported by factually insufficient evidence in that it was so against the great weight and preponderance of the evidence as to be manifestly unjust.FN89

FN88. See Moon, S.W.3d at 375 ("[T]here must be some evidence to support the juvenile court's finding that [the appellant] was sufficiently sophisticated and mature for the reasons specified by the court in order to uphold its waiver determination. Our review finds no evidence supportive of the court's finding that [the appellant] was 'of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived ... [and] to have aided in the preparation of [his] defense.' "). We find no such evidence in the record either.

FN89. Id. at 377–78. See Cain v. State, 958 S.W.2d 404, 408 (Tex.Crim.App.1997) ("Our inability to decide questions of fact precludes de novo review of courts of appeals'[s] factual decisions."); Laster v. State, 275 S.W.3d 512, 519 (Tex.Crim.App.2009) ("We do not conduct a de novo factual sufficiency review."); Villarreal v. State, 286 S.W.3d 321, 328 (Tex.Crim.App.2009) ("Once a court of appeals has determined such a claim of 'factual' insufficiency, this Court may not conduct a de novo review of the lower court's determination.").

Conclusion: The court of appeals did not err to undertake a factual-sufficiency review of the evidence underlying the juvenile court's waiver of jurisdiction over the appellant. Because the juvenile court made no case-specific findings of fact with respect to the seriousness of the offense, we agree with the court of appeals that the evidence fails to support this as a valid reason for waiving juvenile-court jurisdiction. Even had the juvenile court cited the appellant's background as an alternative basis to justify his transfer, the court of appeals was correct to measure the sufficiency of the evidence to support this reason against the findings of fact made in the transfer order itself and to conclude that the evidence was insufficient to support those findings. We affirm the judgment of the court of appeals.FN90

FN90. Neither the State nor the appellant has contested the propriety of the court of appeals'

ultimate disposition; neither party argues that the court of appeals erred, even in light of its holding that the juvenile court abused its discretion to waive jurisdiction, to declare that the cause remains "pending in the juvenile court." Moon, 410 S.W.3d at 378. The question nevertheless ineluctably presents itself: Pending for what? We leave that question for the juvenile court, but we do note that at least one legislatively provided alternative would seem to be for the juvenile court to conduct a new transfer hearing and enter another order transferring the appellant to the jurisdiction of the criminal court, assuming that the State can satisfy the criteria under Section 54.02(j) of the Juvenile Justice Code. See TEX. FAM.CODE § 54.02(j)("(j) The juvenile court may waive its exclusive original jurisdiction and transfer a person to the appropriate district court or criminal district court for criminal proceedings if: (1) the person is 18 years of age or older; (2) the person was: (A) 10 years of age or older and under 17 years of age at the time the person is alleged to have committed ... an offense under Section 19.02, Penal Code; ... (3) no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted; (4) the juvenile court finds from a preponderance of the evidence that: ... (B) after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because: ... (iii) a previous transfer order was reversed by an appellate court or set aside by a district court; and (5) the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged."(emphasis supplied)).

It has been suggested that, rather than affirm the court of appeals's reversal of the juvenile court's transfer order, we should first remand the cause to the court of appeals with an order that the court of appeals remand the cause to the juvenile court for additional specific findings of fact to determine retroactively whether its original transfer order was valid. In State v. Elias, 339 S.W.3d 667, 675–77 (Tex.Crim.App.2011), for example, we held that the court of appeals should not have affirmed the trial court's grant of a motion to suppress without first remanding the case to the trial court to supply missing but critical findings of fact to inform appellate review of the ruling on that motion, under the aegis of Rule 44.4 of the Texas Rules of Appellate Procedure. Subsection (a) of this rule provides that "[a] court of appeals must not affirm or reverse a judgment or dismiss an appeal if: (1) the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeals; and (2) the trial court can correct its action or failure to act." TEX.R.APP. P. 44.4(a). Subsection (b) requires the appellate court to "direct the trial court to correct the error." TEX.R.APP. P. 44.4(b). There are at least two problems with such a remand here. First of all, it is far from clear that Rule 44.4 can be read to authorize an appellate court to direct a juvenile court (not "the trial court") to supply a missing finding of fact. Secondly, and more fundamentally, there is a jurisdictional impediment to applying Rule 44.4 in the present context—a kind of chicken-and-egg paradox. The juvenile court has either validly waived its exclusive jurisdiction, thereby conferring jurisdiction on the criminal courts, or it has not. We cannot order the court of appeals to remand the cause to the juvenile court unless and until we affirm its judgment that the juvenile court's transfer order was invalid and that the criminal courts therefore never acquired jurisdiction. Unless and until the transfer order is declared invalid, the criminal courts retain jurisdiction, and the juvenile court lacks jurisdiction to retroactively supply critical findings of fact to establish whether or not it has validly waived its jurisdiction.

Keller, P.J., filed a dissenting opinion in which Hervey, J., joined.
Meyers, J., dissented.

Keller, P.J., filed a dissenting opinion in which Hervey, J., joined.

For almost forty years, the tendency among the courts of appeals has been to hold that a juvenile transfer order need not specify in detail the facts supporting the order. The court of appeals in this case broke rank with the weight of that authority, and this Court now goes along with the court of appeals's unconventional holding. I would, instead, stick with the conventional path followed by most of the courts of appeals. In the present case, the transfer order complied with the statute by listing the reason for the transfer. Moreover, the order was effective if the reason given for transfer—seriousness of the offense—was supported by sufficient evidence. The evidence clearly supports the reason given.

A. What the Statute Requires

1. The Text

The Family Code provides that, for a child above a certain age who commits one of the types of offenses listed, a juvenile court may waive its jurisdiction if, after a full investigation and a hearing, the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings.FN1

In making this determination, the juvenile court must consider, among other matters:
(1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;

(2) the sophistication and maturity of the child;

(3) the record and previous history of the child; and

(4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.FN2

A juvenile court order waiving jurisdiction must "state specifically ... its reasons for waiver and certify its action." FN3

FN1. TEX. FAMILY CODE § 54.02(a)(3).

FN2. Id. § 54.02(f).

FN3. Id. § 54.02(h).

2. The Transfer Order Need not Detail the Facts

In construing a statute, we give effect to the plain meaning of its text unless the language of the statute is ambiguous or the plain meaning leads to absurd results that the legislature could not have possibly intended.FN4 None of the provisions quoted above require the juvenile court to recite the facts upon which its transfer holding is based. Rather, the statutory scheme merely directs the juvenile court to state the reasons for the waiver. And as the Court's opinion makes clear, the weight of authority in the courts of appeals suggests that the reasons in support of transfer may be conclusory, and transfer orders may simply recite the statutory language.FN5 The legislature's failure to change the statutory wording in light of this authority is some indication that the legislature approves of the construction given.FN6 Moreover, if the legislature had wanted to require the juvenile court to recite the facts that support its decision to transfer, the legislature could have easily drafted language to that effect.FN7

FN4. Boykin v. State, 818 S.W.2d 782, 785 (Tex.Crim.App.1991).

FN5. See Court's op. at n. 54.

FN6. State v. Colyandro, 233 S.W.3d 870, 878 (Tex.Crim.App.2007).

FN7. See e.g. TEX.CODE CRIM. PROC. art. 11.07, § 4(a) (requiring a subsequent application to contain sufficient "specific facts" establishing circumstances that would constitute an exception to the general rule prohibiting subsequent habeas applications).

And even assuming the Supreme Court's pronouncements in Kent v. United States FN8 influenced the statutory scheme before us, that case did not hold that a juvenile court was required to set forth in its order the facts that supported its transfer decision. Rather, the Supreme Court simply held that the federal statute before it required the juvenile court "to accompany its waiver order with a statement of the reasons or considerations therefor." FN9 The Supreme Court expressly stated that it did not read the federal statute to require that the statement of reasons "be formal or that it should necessarily include conventional findings of fact." FN10 The Supreme Court did suggest that a "statement of relevant facts" was necessary for appellate review, but that suggestion was made in the context of a case in which no hearing was held,FN11 and, so, no evidence would have been heard on the matter. In the present case, there was a hearing, the record of which can be reviewed on appeal to determine whether the facts elicited at the hearing support the juvenile court's stated reason for the transfer.

FN8. 383 U.S. 541 (1966).

FN9. Id. at 561.

FN10. Id.

FN11. Id.

3. The Four Statutory Factors are not Individually Subject to a Sufficiency Review

The court of appeals treated the four statutory factors outlined above as individually subject to a sufficiency review,FN12 and the Court upholds this approach as legitimate. But this approach artificially constrains a court's analysis beyond what the statute requires. If the legislature had wanted the factors listed to be supported by sufficient evidence and subject to a sufficiency review, it could have made them special issues, imposed a burden of proof with respect to the individual factors, or required that a finding be made on a particular factor or factors.FN13 But the statute does not require the juvenile court to find any particular factor true, and the factors are not exclusive. The juvenile transfer statute's closest analogues to a special issue are the "seriousness of the offense" and "background of the child" reasons for transfer. The four statutory factors appear to be mere non-exclusive guides in deciding whether one of those two reasons for a transfer exists. In that respect, the four statutory factors appear to play a role similar to that of the Keeton factors with respect to the future-dangerousness special issue in capital murder cases.FN14

FN12. See Moon v. State, 410 S.W.3d 366, 372–78 (Tex.App.-Houston [1st Dist.] 2013, pet. granted).

FN13. See TEX.CODE CRIM. PROC. arts. 37.071, § 2(b) (special issues in a death penalty case), 42.12, § 3g(a)(2) (deadly-weapon finding).

FN14. See Keeton v. State, 724 S.W.2d 58, 61 (Tex.Crim.App.1987) (setting forth a list of factors that may be considered in assessing a defendant's future dangerousness).

Attempting to conduct a sufficiency review on the four factors individually creates myriad problems, especially when a factual sufficiency review is involved. If one conducts a factual sufficiency review of each factor individually, how does one account for the possible cumulative effect of multiple factors? That is, if two or more factors are supported by legally sufficient but factually insufficient evidence, must all of the factors be disregarded as insufficient, or can multiple factors that are individually supported by factually insufficient evidence nevertheless add up to sufficient evidence as a whole?

And conducting a sufficiency review of individual factors is not enough to resolve the transfer question because, at least in the Court's estimation, proof of an individual factor is not necessarily enough to support a transfer. If it were, appellant's transfer would clearly be supported because the first factor, whether the alleged offense is against a person or property, has been definitively established in the State's favor. Under the Court's reasoning, because proof of an individual factor is not necessarily enough, the appellate court must still decide whether the factors as a whole, and any other relevant factors, are sufficient to justify either the "seriousness of the offense" or "background of the child" reasons for transfer (or both). This results in a two-tiered approach to sufficiency: first analyzing the sufficiency of the individual factors, and then assessing the sufficiency of the factors as a whole. The closest analogue to this two-tiered approach is the test for constitutional speedy-trial violations, in which the individual factors are subject to a bifurcated standard of review and the balancing of those factors is subject to de novo review.FN15 But in that context, the factors are exclusive and, once a threshold showing is made, they must all be balanced against each other FN16—neither of which is true of the statutory factors in the juvenile transfer context.

FN15. See Cantu v. State, 253 S.W.3d 273, 282 (Tex.Crim.App.2008); Johnson v. State, 954 S.W.2d 770, 771 (Tex.Crim.App.1997).

FN16. See Gonzales v. State, 435 S.W.3d 801, 808–15 (Tex.Crim.App.2014).

Moreover, the nature of at least two of the four statutory factors suggests that a sufficiency review of the individual factors is inappropriate. The first statutory factor—whether the alleged offense was against person or property—is just a question of law. The question is simply whether the offense alleged is a crime against a person, a crime against property, or a crime that falls within neither of those categories. The answer to that question can be resolved by looking solely to the State's charges. The fourth statutory factor—the prospects of protecting the public and rehabilitating the child—calls for predictions, and as such, would not seem to be the sort of issue that would be subject to a factual sufficiency review.FN17

FN17. See McGinn v. State, 961 S.W.2d 161, 168 (Tex.Crim.App.1998) ("But, predictions are not right or wrong at the time of trial—they may be shown as accurate or inaccurate only by subsequent events.... [O]nce the rationality of the prediction is established, attempting to determine whether a jury's prediction of the probability of future dangerousness is nevertheless wrong or unjust because of countervailing evidence is an impossible task.").

Finally, the non-exclusivity of the four statutory factors also raises the issue of the juvenile court importing its own factors and how we would conduct a sufficiency review in that context. This is not a mere hypothetical question because, in the present case, the transfer order included two factual conclusions that are not covered by the four statutory factors: (1) that appellant was charged with murder and (2) that there was probable cause to believe the offense had been committed. The first is undeniably true as a legal matter and the second is supported by legally and factually sufficient evidence. The fact that a trial court can import its own factors suggests that conducting a sufficiency review of an individual factor is myopic at best. The real, relevant question is whether the matters considered by the trial court are sufficient to justify a transfer on the basis of the seriousness of the offense or of the background of the child.

4. Factors Two and Four are Relevant to the Seriousness–of–the–Offense Reason for Transfer

The Court also errs when it concludes that the second and fourth statutory factors are relevant only to the "background of child" reason for transfer. The statutory language does not limit the purpose for which the four statutory factors may be considered, and the second and fourth factors in particular may well be relevant to the "seriousness of the offense" reason for transfer. The second factor—the sophistication and maturity of the child—relates to the seriousness-of-the-offense reason for transfer in two ways. First, the more sophisticated and mature the child, the more blameworthy his conduct is likely to be.FN18 Blameworthiness is a legitimate factor in determining the seriousness of an offense.FN19 Second, the circumstances of the offense can be used to assess the sophistication and maturity of the child, at least in some respects.FN20

FN18. See Roper v. Simmons, 543 U.S. 551, 571 (2005) ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.").

FN19. See Penry v. Lynaugh, 492 U.S. 302, 322–28 (1989) (defendant's moral culpability constitutionally

relevant to whether he should receive the death penalty and jury must be given a vehicle to give effect to evidence of facts that would reduce the defendant's blameworthiness).

FN20. See Ex parte Sosa, 364 S.W.3d 889, 894 (Tex.Crim.App.2012) ("We cannot agree that the facts of the offense are categorically irrelevant to the determination of mental retardation for Eighth Amendment purposes. The capital offense for which an Atkins claimant was convicted will generally be one of the best documented events in his life, and certain facts will have been proven to a jury beyond a reasonable doubt. In some cases—and we believe this is one of them—the complexity of the offense and the applicant's role in the offense need to be squared with a finding of mental retardation."); Ex parte Briseno, 135 S.W.3d 1, 8–9 (Tex.Crim.App.2004) (circumstances of offense may show forethought, planning, and complex execution of purpose).

With respect to the fourth factor, the circumstances of the crime and the background of the child are both relevant to determining whether society can be protected and the child can be rehabilitated. As we have explained in the capital murder context, the circumstances of the offense are highly relevant to determining whether a defendant poses a future danger to society, and sometimes are sufficient by themselves to do so.FN21 The protection-of-public/rehabilitation issue in the juvenile context is much like the inquiry into the future-dangerousness special issue.

FN21. Devoe v. State, 354 S.W.3d 457, 462 (Tex.Crim.App.2011) ("The circumstances of the offense and the events surrounding it may be sufficient in some instances to sustain a 'yes' answer to the future dangerousness special issue."); Druery v. State, 225 S.W.3d 491, 507 (Tex.Crim.App.2007) ("But the circumstances of the offense itself can be among the most revealing evidence of future dangerousness.") (internal quotation marks omitted).

B. The Statute Was Satisfied

The juvenile court's transfer order states that "because of the seriousness of the offense, the welfare of the community requires criminal proceeding." FN22 Under § 54.02(a)(3), this by itself was a sufficient reason to justify a transfer, if it is adequately supported by the record.

FN22. The exact wording of this portion of the juvenile court's order is as follows:

After full investigation and hearing at which hearing, the said CAMERON MOON, FATHER, MICHAEL MOON were present; the court finds that the said CAMERON MOON, is charged with a violation of a penal law of the grade of felony, if committed by an adult, to wit: MURDER committed on or about the 18TH day of JULY, 2008; that there has been no adjudication of THIS OFFENSE; that he was 14 years of age or older at the time of the commission of the alleged OFFENSE having been born on the 26TH day of FEBRUARY, 1992; that there is probable cause to believe that the child committed the OFFENSE alleged and that because of the seriousness of the OFFENSE, the welfare of the community requires criminal proceeding.

Moreover, the transfer order stated that the juvenile court had considered the four statutory factors, and the transfer order found three of those factors in the State's favor. With regard to the first factor, the court found and that this offense was one against the person. With regard to the second statutory factor, the juvenile court found that appellant was "of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived[,] ... to have aided in the preparation of his defense and to be responsible for his conduct." FN23 And with regard to fourth statutory factor, the juvenile court stated that, based on the evidence and reports presented, "there is little if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of [appellant] by use of procedures, services, and facilities currently available to the Juvenile Court." The transfer order also pointed out that appellant was charged with murder and concluded that there was probable cause to believe that the offense had been committed.

FN23. Emphasis added.

The evidence presented at the hearing demonstrates the seriousness of appellant's offense. Appellant pretended to be a drug seller and set up a fake drug deal in order to accomplish a robbery. He pursued and shot the victim as the victim fled. Appellant sent instructions by text message to a co-conspirator both before and after the offense. Text messages sent before the crime asked a co-conspirator if he was ready to begin and to bring a gun. In text messages after the crime, appellant attempted to cover up his involvement, saying: "Don't say a word." "Tell them my name is Crazy, and you don't know where I live."

The offense appellant was charged with—murder—is one of the most serious crimes in the Penal Code, but under the evidence presented, appellant's conduct—a murder in the course of a robbery—could have been charged as capital murder, the offense that carries the most serious punishment in this state.FN24 Appellant showed forethought in planning a robbery by setting up a fake drug deal and giving instructions to his accomplice. He showed aggressiveness in pursuing the fleeing victim. And he attempted to cover up his involvement in the crime by admonishing his accomplice to refer to appellant only by a nickname and say he was unaware of where appellant lived. This evidence showed a crime that was serious, not only

because of its effect, but also because of how it was conducted—with aggression and forethought and without apparent remorse.

FN24. See TEX. PENAL CODE § 19.03(a)(2).

This Court and the court of appeals not only arrive at the wrong result by applying the wrong standards; there are other flaws in those courts' analyses. In analyzing the sophistication-and-maturity factor, the court of appeals and this Court focus on appellant's ability to waive his constitutional rights and assist in his defense. But that was not the only aspect of sophistication and maturity described in the juvenile court's order. Overlooked by the court of appeals and this Court is the fact that the juvenile court also found appellant to have sufficient sophistication and maturity to be responsible for his conduct. That latter conclusion is amplysupported by the evidence in the record. And in connection with the fourth statutory factor, the court of appeals gave short shrift to the State's legitimate arguments regarding the circumstances of the offense and inaccurately accused the State of conflating various subsections of the statute.FN25 Given the flaws in the court of appeals's opinion and its clearly erroneous conclusions, we should not be affirming its decision today.

FN25. See Moon, 410 S.W.3d at 375 (acknowledging that the State pointed to the offense itself, to evidence showing that it was committed during a drug transaction, and to the fact that appellant repeatedly shot the victim while he fled and acknowledging the State's contention that "based on the seriousness of the offense alone, the evidence sufficiently demonstrated that appellant's transfer was consistent with the public's need for protection" but concluding that the State conflated subsections (a)(3) and (f) of the statute); id. at 376–78 (only discussion of the circumstances of the offense or the State's arguments was a passing reference to "the nature of the charged offense" as helping to establish the legal sufficiency (but not factual sufficiency) of the evidence to show the fourth statutory factor). Even if a factual sufficiency review could apply to the fourth statutory factor, the court of appeals's analysis would be inadequate for failing to "detail all the relevant evidence and ... explain in exactly what manner the evidence is factually insufficient." Steadman v. State, 280 S.W.3d 242, 247 (Tex.Crim.App.2009).

Dissent Conclusion: I would hold that the court of appeals improperly overturned the juvenile court's decision and that the juvenile court did not err in transferring appellant to adult criminal court. I respectfully dissent.

IN DISCRETIONARY TRANSFER CRIMINAL TRIAL, FAILURE TO INSTRUCT JURY THAT OFFENSE MUST HAVE OCCURRED AFTER DEFENDANT'S (JUVENILE'S) FOURTEENTH BIRTHDAY CONSIDERED ERROR.

¶ 15-1-14. **Randall v. State**, MEMORANDUM, No. 09-13-00322, 2015 WL 1360115 (Tex.App.-Beaumont, 3/25/15).

Facts: In 2012, the State indicted Randall for three felonies that occurred in 2005 and 2006, alleging that he had sexually assaulted two minors, A.B. and B.B.FN2 When Randall was indicted, he was twenty-one years old. In 2013, the State re-indicted Randall, adding an additional count to his indictment. The additional count alleges that in 2005, Randall committed another aggravated sexual assault against A.B. At the conclusion of Randall's trial, the jury found Randall guilty on all four of the counts of the indictment. Following the punishment phase of Randall's case, the jury assessed Randall's punishment at nine years in prison on each of his convictions for aggravated sexual assault.

FN2. To protect the privacy of the children relevant to Randall's case, we identify them by using initials that disguise their identities. SeeTex. Const. art. I, § 30 (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

Charge Error

In issue one, Randall argues the trial court erred by submitting a charge that allowed his conviction based on testimony that he had engaged in delinquent conduct.FN3 According to Randall, by failing to instruct the jury that he could not be prosecuted or convicted for any offenses that he committed before attaining the age of fourteen, the jury was im-properly allowed to use the evidence of his delinquent conduct to find him guilty of the crimes with which he was charged in the indictment. SeeTex. Penal Code Ann. § 8.07(a)(6) (West Supp.2014) FN4 (providing generally that a person may not be prosecuted for any offenses committed when the person is younger than fifteen, but then allowing a person over fourteen to be convicted if it is shown that the person committed a first degree felony and the case alleging the crime was transferred from juvenile court to criminal district court).FN5

FN3. We have characterized the testimony about Randall's sexual conduct before he was fourteen years of age as delinquent conduct, as the conduct at issue is classi-fied that way under the Texas Family Code. SeeTex. Fam.Code Ann. § 51.03(a) (West 2014) (defining delinquent conduct); see id. § 54.03(f) (West 2014) (re-quiring a finding of delinquent conduct to be proven beyond a reasonable doubt).

FN4. We cite to the current version of the statute, as the subsequent amendment does not affect the outcome of this appeal.

FN5. In this case, Randall argues the State did not show that all of his conduct occurred after he was fourteen. SeeTex. Fam.Code Ann. § 54.02(a)(2)(A) (West 2014) (authorizing a juvenile court to transfer a case to the appropriate district court for criminal proceedings if the conduct occurred when the child was fourteen or older and where the conduct at issue could be prosecuted as a first degree felony).

Held: Affirmed

Opinion: The record reflects that Randall did not ask the trial court to include an instruction in the charge that would have explained to the jury that the State could not prosecute Randall based on the evidence of his delinquent conduct. By failing to object or request the trial court to include an instruction in the charge regarding the testimony that related to his delinquent conduct, Randall failed to properly preserve error regarding his complaint that the charge was defective. Despite Randall's failure to properly preserve error, we conclude that the trial court was required to include an instruction in the charge to guide the jury regarding its use of the evidence admitted during the trial that addressed Randall's delinquent conduct. See Taylor v. State, 332 S.W.3d 483, 486 (Tex.Crim.App.2011) (noting that "the judge's duty to instruct the jury on the law applicable to the case exists even when defense counsel fails to object to inclusions or exclusions in the charge").

We use an egregious harm standard to review issues complaining of charge error that the defendant failed to properly preserve for appeal. See Almanza v. State, 686 S.W.2d 157, 171 (Tex.Crim.App.1984) (op. on reh'g). To demonstrate that he is entitled to a new trial based on the arguments he raises in issue one, Randall must show that the error was so egregious and created such harm that he was denied a fair and impartial trial. See id. In determining whether charge error is egregious, we consider: (1) the entire jury charge; (2) the state of the evidence, including contested issues; (3) arguments of counsel; and (4) any other relevant information revealed by the trial record as a whole. Gelinas v. State, 398 S.W.3d 703, 705–06 (Tex.Crim.App.2013). The question of whether egregious harm occurred is determined on a case-by-case basis. Taylor, 332 S.W.3d at 489.

Harm

First, we consider the role the charge may have played in Randall's trial. Generally, a trial court should avoid submitting a charge that would allow a defendant to be convicted of conduct that was not criminal when the conduct occurred. See id. at 486. In evaluating whether the jury convicted Randall based on the testimony about his delinquent conduct, we must examine the charge as a whole to evaluate the role the charge played in the four convictions at issue in Randall's appeal. See Vasquez v. State, 389 S.W.3d 361, 366 (Tex.Crim.App.2012). In the absence of evidence to the contrary, appellate courts are to presume that the jurors followed the instructions provided in the charge. See Reeves v. State, 420 S.W.3d 812, 818 (Tex.Crim.App.2013).

In Randall's case, the application paragraphs of the charge restricted the evidence the jury could consider in deciding whether Randall was guilty of the four crimes that are alleged in Randall's indictment. See Vasquez, 389 S.W.3d at 366 (explaining that the application paragraph "is that portion of the jury charge that applies the pertinent penal law, abstract definitions, and general legal principles to the particular facts and the indictment allegations"); Hutch v. State, 922 S.W.2d 166, 173 (Tex.Crim.App.1996) (explaining that under the facts before the jury, the authority to consider certain evidence came from the application paragraph of charge). Based on Randall's indictment, to prove Randall guilty, the State was required to prove that each of the aggravated sexual assaults involved penetration. In contrast, A.B.'s testimony about Randall's delinquent conduct did not assert that the conduct included penetration. Additionally, the application paragraphs of the charge required the jury to find that Randall was fourteen years of age or older when he committed the acts alleged in the indictment. We conclude that the charge, when read as a whole, did not allow the jury to convict Randall based on A.B.'s testimony addressing Randall's delinquent conduct. Cf. Taylor, 332 S.W.3d at 486.

Next, we consider the state of the evidence as it relates to the jury's decision to convict Randall of the crimes alleged in the indictment. In Randall's case, the State was required to prove that Randall sexually assaulted A.B. and B.B. on a total of four occasions in 2005 and 2006. Randall turned fourteen in July 2005. At trial, A.B. testified about the approximate dates that Randall assaulted him; his testimony indicates that the assaults that involved acts of penetration occurred in 2006. The evidence before the jury also shows that the assaults involving B.B. that included acts of penetration also occurred when Randall was fourteen or older. We conclude the record supports the jury's conclusion that Randall was fourteen or older when he committed the assaults for which he was convicted.

We also consider the arguments of counsel in assessing whether the charge at issue caused Randall to suffer egregious harm. During closing, the prosecutor pointed to the evidence that established the sexual assaults occurred when Randall was fourteen or older. Additionally, Randall's attorney explained the State was required to prove that Randall committed the assaults when he was fourteen or older. In closing argument, Randall's attorney argued that A.B. and B.B. were mistaken about when the incidents described by A.B.

and B.B. occurred; instead, he argued that if such incidents occurred, they occurred when Randall was twelve years old or younger. While the State mentioned the testimony regarding Randall's delinquent conduct in final argument, it did not dwell on the testimony regarding Randall's delinquent conduct; instead, the prosecutor's argument focused on the testimony that described the assaults as having occurred in 2006. The arguments of the attorneys, in our opinion, made it clear to the jury that it was required to find that the conduct relevant to the crimes occurred after Randall was fourteen.

Finally, we consider any other relevant information in assessing whether the absence of an instruction in the charge regarding Randall's delinquent conduct denied his right to receive a fair and impartial trial. During jury selection, the State explained that one of the elements that it had to prove was that Randall was at least fourteen at the time the offenses occurred. Additionally, Randall's counsel explained that the State had to prove that the assaults occurred when Randall was fourteen or older. Finally, during jury selection, the trial court instructed the jury that "the fact that you may believe the act occurred doesn't stop there. There are other elements, and the one he is talking about is the defendant's age[.]" In our opinion, the jury would have understood from the remarks made by the prosecutor, Randall's counsel, and the trial court that the State was required to prove that Randall was fourteen years of age or older when the offenses occurred.

Conclusion: After reviewing the testimony, the arguments of counsel, and the charge as a whole, we believe the jury understood that it could convict Randall only for conduct that occurred after he reached the age of fourteen. We hold that the trial court's failure to include an instruction in the charge addressing the testimony relevant to Randall's delinquent conduct did not cause any egregious harm. See Almanza, 686 S.W.2d at 171. Issue one is overruled.