CASE LAW UPDATE

HON. PATRICK J. GARZA, *San Antonio*
Associate Judge
386th District Court

State Bar of Texas
26th ANNUAL ROBERT O. DAWSON
JUVENILE LAW INSTITUTE
February 11-13, 2013
San Antonio

CHAPTER 2

PAT GARZA
Associate Judge
386th District Court
235 E. Mitchell St.
San Antonio, Texas 78210

EDUCATION

Board Certified – Juvenile Law – by the Texas Board of Legal Specialization
1980: Admitted to the Texas Bar.
1977 - 1980: Jurist Doctor, South Texas College of Law, Houston, Texas.
1977: B.A., University of Texas at Austin, Texas.

PROFESSIONAL

2009 – Present: Texas Board of Legal Specialization Juvenile Law Exam Commissioner
Fellow of the Texas Bar Foundation
Editor – State Bar Juvenile Law Section Report.
2007 Franklin Jones Best Continuing Legal Education Article Award by the State Bar College Board of Directors. Police Interactions with Juveniles.
2004 Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation. Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent.
1999 - Present, Juvenile Court Associate Judge/Referee, 386th Judicial District Court.
1997 - 1999, Juvenile Court Associate Judge/Referee, 73rd Judicial District Court.
1989 - 1997, Juvenile Court Master (Associate Judge)/Referee, 289th Judicial District Court.
Fall 1997, Adjunct Professor of Law (Juvenile Law), St. Mary's Law School, San Antonio, Texas.

SPEECHES AND PRESENTATIONS

- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; Juvenile Law CLE, Sponsored by the San Antonio Bar Association, San Antonio, Texas, September, 2012.
- Arrest, Confessions, and Search and Seizure; Third Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2012.
- Juvenile Law; 2012 State Bar College Summer School, Sponsored by the Texas State Bar College, Galveston, Texas, July, 2012.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 25th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Corpus Christi, Texas, February, 2012.
- Caselaw Updates; 25th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Corpus Christi, Texas, February, 2012.
- Police Interactions with Juveniles – Arrest, Confessions, Search and Seizure; Advanced Juvenile Law Certification Seminar, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2011.
- Juvenile Overview; 2011 Summer School Course, Sponsored by the Texas State Bar College, Galveston, Texas, July, 2011.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 24th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Corpus Christi, Texas, February, 2011.
- Caselaw Updates; 24th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Corpus Christi, Texas, February, 2011.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; Advanced Juvenile Law Certification Seminar, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2010.

- Juvenile Search & Seizure; Nuts and Bolts of Juvenile Law, Sponsored by The Texas Juvenile Probation Commission and the Juvenile Law Section of the State Bar of Texas, Austin, Texas, July, 2010.

PUBLICATIONS

- "Any Detectable Amount of Alcohol": Taking a Breath or Blood Specimen of a Juvenile. Texas Bar Journal, Volume 75, Number 2, February, 2012. A legal article analyzing the taking of a Breath or Blood Specimen of a Juvenile.
- Police Interactions with Juveniles. 20th Annual Juvenile Law Conference Article, February, 2007. This article won the Franklin Jones Best Continuing Legal Education Article for 2007, as voted on by the State Bar College Board of Directors, February 2, 2008.
- Juvenile Legislation. The San Antonio Lawyer, Sept–October 2007. An article hi-lighting the 2007 legislative changes in juvenile law.
- TYC and Proposed Legislation . State Bar Section Report Juvenile Law, Volume 21, Number 2, June 2007. An article discussing the proposed juvenile legislative changes from the 2007 legislative session.
- Mandatory Drug Testing of All Students, It's Closer Than You Think . State Bar Section Report Juvenile Law, Volume 20, Number 3, September 2006. An article discussing the Supreme Court's decisions on mandatory drug testing in schools.
- Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent. The San Antonio Lawyer, July–August 2003. An article discussing the requirements of parental presence during juvenile confessions. This article received a 2004 Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation.
- Juvenile Law: 2003 Legislative Proposals. The San Antonio Defender, Volume IV, Issue 9, April 2003. An early look at proposed Juvenile Legislation for this 2003 session.
- A Synopsis of Earls. The San Antonio Defender, Volume IV, Issue 9, April 2003. A synopsis of the Supreme Court's decision in *Board of Education v. Earls* and the random drug testing of students involved in extracurricular activities.
- Police Interactions with Juveniles and Their Effect on Juvenile Confessions. State Bar Section Report Juvenile Law, Volume 16, Number 2, June 2002. An article regarding the requirements for law enforcement during the taking of a confession.
- Juvenile Confessions: "I Want My Mommy!" The San Antonio Defender, Volume III, Issue 9, April 2002. An article regarding the pitfalls of taking a juvenile confession.
- Doing the Right Thing. The San Antonio Defender, Volume II, Issue 6, December 2000. An article regarding the rights of a juvenile during a confession.
- Doing the Right Thing. State Bar Section Report Juvenile Law, Volume 14, Number 4, December 2000. An article regarding the rights of a juvenile during a confession.
- School Search and Seizure. State Bar Juvenile Law Section Report, Volume 13, Number 2, June 1999. A legal article updating legal issues regarding the search of students in school, including consent, drug testing and dog sniffing.

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CASE LAW UPDATE

REVIEW OF RECENT CASES

ADJUDICATION PROCEEDINGS—

Tolder v. State, MEMORANDUM, No 14-11-00179-CR, 2012 WL 3582645, Tex.Juv.Rep. Vol.26, No. 4 ¶ 12-4-6. (Tex.App.-Hous. (14 Dist.), 8/21/12).

CONVICTION WAS NOT VOID WHERE APPELLANT WAS 17 AT THE TIME OF ARREST AND INDICTMENT.

Facts: On April 12, 2006, appellant's mother reported to police that appellant had been sexually assaulting his sister "dating back to 2005." On December 8, 2006, appellant entered a plea of guilty in exchange for a punishment of six years' deferred adjudication probation. The State subsequently filed a motion to adjudicate appellant's guilt on the grounds that appellant violated the terms and conditions of his probation. On December 15, 2010, the trial court adjudicated appellant's guilt and assessed punishment at 15 years' confinement in the Institutional Division of the Texas Department of Criminal Justice. This appeal followed.

In a single issue, appellant contends he received ineffective assistance of counsel at the time of his original plea because counsel failed to investigate whether appellant was under the age of 17 when the offense occurred.

Held: Affirmed

Memorandum Opinion: Appellant contends that if he were improperly tried as a juvenile, the original conviction is void. Appellant was charged with aggravated sexual assault of a child alleged to have been committed in July, 2005. Appellant turned 17 years old on June 28, 2005. Appellant alleges it is possible he committed the offense prior to July, 2005. There is no question, however, that appellant was indicted and tried after he turned 17. Being 17 years old, appellant was not a juvenile within the terms of the statute at the time he was arrested, indicted, or tried. See Ex parte Morgan, 595 S.W.2d 128, 129 (Tex.Crim.App.1980) (petitioner charged with an offense after he turned 17 was not a juvenile). Therefore, even accepting appellant's contention as true, the conviction was not void because he was 17 at the time of the arrest and indictment.

Thus, appellant was required to challenge the effectiveness of his counsel at the time the trial court placed him on deferred adjudication. See Manuel, 994 S.W.2d at 661–62. Because he did not do so, his appeal after adjudication and revocation is untimely, and we cannot address his issue. The judgment of the trial court is affirmed.

APPEALS—

In the Matter of J.R., MEMORNADUM, No. 10-12-00201-CV, 2013 WL 135729, Tex.Juv.Rep. Vol.27, No. 1 ¶ 13-1-6 (Tex.App.-Waco, Jan. 10, 2013).

UNLIKE AN ADULT, A JUVENILE'S WAIVER OF APPEAL BEFORE DISPOSITION IS VALID EVEN WITHOUT HAVING ENTERED INTO A PLEA BARGAIN WITH THE STATE.

Facts: The State alleged in its amended petition that J.R. engaged in delinquent conduct by committing four offenses: (1) indecent exposure; (2) burglary of a habitation; (3) attempted sexual assault; and (4) sexual assault. Before the adjudication portion of the proceeding, appellant, his mother, and his attorney signed a "Court's Admonition of Statutory and Constitutional Rights and Juvenile's Acknowledgement," which included information about potential dispositions and several waivers. Among the waivers contained in this document was the right to appeal.

At the beginning of the December 5, 2011 adjudication hearing, the trial court confirmed that appellant understood the rights that he was waiving and that he waived those rights voluntarily. The trial court also provided several admonishments, including potential dispositions that could apply in this case—namely, probation at home, probation with placement outside the home, and confinement at the Texas Youth Commission ("TYC") for an indeterminate sentence. The trial court also informed appellant that he could be required to register as a sex offender. Appellant acknowledged that he discussed all of these matters with his trial counsel and that he did not have any questions regarding his rights.

Appellant, his mother, and appellant's attorney also signed a written stipulation in which appellant stipulated to the first three allegations contained in the State's amended petition. The trial court discussed the stipulation with appellant and subsequently admitted the stipulation into evidence. Thereafter, the trial court concluded that appellant had engaged in delinquent conduct based on the signed stipulation.

During the disposition phase, the State offered several reports and a social history on appellant. The trial court learned that appellant had a previous juvenile adjudication for which he had received felony probation. Appellant and his parents testified at the hearing, and appellant requested that he be granted probation, placed in an inpatient-sex-offender-treatment program, and excused from the sex-offender-registration requirement.

At the conclusion of the hearing, the trial court committed appellant to TYC for an inde-terminate period. In addition, the trial judge, in open court, ordered that appellant register as a sex offender. However, contrary to the trial judge's statements in open court, the December 5, 2011 disposition order deferred the registration requirement pending the successful completion of a sex-offender-treatment program at TYC.

Appellant subsequently filed a motion for new trial, which was denied. He then filed his notice of appeal in appellate cause number 10–12–00003–CV. After appellant filed his notice of appeal, the State, on May 8, 2012, filed a “Motion for Dispositional Order of Commitment to the Texas Youth Commission Nunc Pro Tunc” in the trial court. In this motion, the State requested that the trial court modify its December 5, 2011 disposition order to reflect the statement it made in open court—that appellant is required to register as a sex offender. On the same day, the trial court granted the State's nunc pro tunc motion and reformed the December 5, 2011 disposition order to reflect that appellant is required to register as a sex offender. This appeal followed.

Held: Affirmed as modified

Memorandum Opinion: In his first issue, appellant contends that he did not validly waive his appellate rights. Specifically, appellant complains that the “trial court did not specifically discuss the waiver of appeal with [appellant],” nor did it “confirm that [appellant] intended to waive his right of appeal after pronouncing the court's disposition.”Appellant also argues that his waiver is invalid because the State did not give consideration for the waiver. We disagree.

Texas courts have noted that the Texas and United States Constitutions do not provide for a right of appeal. In re J.H., 176 S.W.3d 677, 679 (Tex.App.-Dallas 2005, no pet.)(citing Phynes v. State, 828 S.W.2d 1, 2 (Tex.Crim.App.1992); In re Jenevein, 158 S.W.3d 116, 119 (Tex.Spec.Ct.Rev.2003)).“The right to appeal is regulated by the legislature, and the legislature ‘may deny the right to appeal entirely, the right to appeal only some things, or the right to appeal all things only under some circumstances.’ “ Id. (quoting In re Jenevein, 158 S.W.3d at 119). “Thus, when a legislative enactment says a juvenile may appeal orders delineated in the statute, there is no right to appeal orders not so included.” Id. (citing In re Jenevein, 158 S.W.3d at 119).

Section 56.01 of the Texas Family Code sets out a child's right to appeal a juvenile court's orders and describes which of those orders are appealable. SeeTEX. FAM.CODE ANN. § 56.01 (West Supp.2012). Subsection (c) provides that an appeal may be taken:

(1) except as provided by Subsection (n), by or on behalf of a child from an order entered under:

  (A) Section 54.03 with regard to delinquent conduct or conduct indicating a need for su-pervision;
  (B) Section 54.04 disposing of the case;
  (C) Section 54.05 respecting modification of a previous juvenile court disposition; or
  (D) Chapter 55 by a juvenile court committing a child to a facility for the mentally ill or mentally retarded; or

(2) by a person from an order entered under Section 54.11(i)(2) transferring the person to the custody of the Texas Department of Criminal Justice.Id. § 56.01(c).

However, subsection (n) limits the appellate rights of a child in the following way:
A child who enters a plea or agrees to a stipulation of evidence in a proceeding held under this title may not appeal an order of the juvenile court entered under Section 54.03, 54.04, or 54.05 if the court makes a disposition in accordance with the agreement between the state and the child regarding the disposition of the case unless:

(1) the court gives the child permission to appeal; or
(2) the appeal is based on a matter raised by written motion filed before the proceeding in which the child entered the plea or agreed to the stipulation of evidence.Id. § 56.01(n).

Further, any appellate rights that a juvenile may have can be waived. In fact, section 51.09 of the Texas Family Code provides that:

Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if:

(1) the waiver is made by the child and the attorney for the child;
(2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it;
(3) the waiver is voluntary; and
(4) the waiver is made in writing or in court proceedings that are recorded.

TEX. FAM.CODE ANN. § 51.09 (West 2008).

In the present case, appellant was represented by an attorney at all times. At the adjudication hearing, the trial court explained the charges filed against appellant and noted the following:

THE COURT: And in addition to the amended petition[,] I do have some other paperwork in front of me that you've signed. One of those things is called The Court's Admonition of Statutory and Constitutional Rights and Juvenile's Acknowledgement. This is a four[-]page document that does several things. One of the things that it does is it lists most of the rights that you have as a juvenile that's charged with committing a crime and by signing this on the last page, page four, you're telling me that you understand that you have these rights, but you're also telling me that you want to waive these rights or give up these rights and appear here today and go forward in this particular case accompanied by your parents and your attorney. And on the last page, page four, I can see that you, your mother[,] and your lawyer have all signed this. Did you understand the rights that were listed in here before you signed this?

THE JUVENILE: Yes, sir.

THE COURT: Did you go over these things with Mr. Keathley [appellant's counsel] before you signed it?

THE JUVENILE: Yes, sir.

The trial court then described the potential outcomes of the proceeding, including registration as a sex offender, probation, placement in a residential-treatment program, or confinement with the TYC.

Subsequently, the trial court asked appellant if he understood the possible outcomes of the proceeding, to which appellant responded, “Yes, sir.” The trial court then stated: “All right. Because you said you went over all of these things with Mr. Keathley before you signed it, I'm not going to reread all of this to you, but do you have any questions about the rights that you're giving up today, [appellant]?” Appellant answered, “No, sir.”

In addition, the record includes a copy of the “Court's Admonition of Statutory and Con-stitutional Rights and Juvenile's Acknowledgement,” which was signed by appellant, appellant's mother, appellant's attorney, and the trial judge on December 5, 2011—the day of the adjudication hearing-and stated the following:

WAIVER OF APPEAL

Now comes the aforementioned respondent in the above-entitled and numbered cause, and the attorney for said child, in writing and in open court, and after complete consultation with said attorney of record, and being fully aware of the sentence heretofore pronounced against me by the Court do state:

....

3) That I understand that I have the right to give notice of appeal and to appeal from the judgment, sentence, or order of this Court unless otherwise prohibited from doing so by the law;

....

I state that I desire to waive each and all of my rights to appeal, including the filing [of] a motion for new trial, requesting permission to appeal, appealing matters raised by written motion prior to trial, giving notice of appeal, appealing the judgment, sentence, or order of the Court and a free record, transcript, and attorney on appeal. I make this waiver freely, intelligently[,] and voluntarily. I desire to accept the sentence or order of this Court and ask the Court to allow me to waive all rights I have to appeal. I ask the Court to approve this waiver which will render the judgment, sentence, and order of the Court final in all respects.

I have read the above and foregoing admonitions by the Court regarding my rights. I have read the above and foregoing waivers. I understand the admonitions and waivers, and understand and am aware of the consequences of my plea or stipulation.
(Emphasis in original).

Based on our review of the record, appellant's waiver of his appellate rights meets all of the statutory requirements of section 51.09 of the Texas Family Code. SeeTEX. FAM.CODE ANN. § 51.09. There is nothing in the record to support a contention that appellant waived his appellate rights unintelligently, involuntarily, or unknowingly. Accordingly, we cannot say that appellant's waiver of his appellate rights is invalid. See id.; see also Jernigan v. Langley, 111 S.W.3d 153, 156 (Tex.2003) (noting that "waiver" is the intentional relinquishment of a right actually or constructively known, or intentional conduct inconsistent with claiming that right); Mandell v. Mandell, 214 S.W.3d 682, 692 (Tex.App.-Houston [14th Dist.] 2007, no pet.)(stating that waiver is a matter of intent to be determined by the words, acts, and conduct of the parties); Alford, Meroney & Co. v. Rowe, 619 S.W.2d 210, 213 (Tex.Civ.App.-Amarillo 1981, writ ref'd n.r.e.) (explaining that a party's express renunciation of a known right can establish waiver).

Nevertheless, appellant appears to argue that we should adopt the criminal standard in deciding whether a juvenile defendant's waiver of appeal is valid. See Washington v. State, 363 S.W.3d 589, 589–90 (Tex.Crim.App.2012) (per curiam) ("But when a defendant waives his right to appeal before sentencing and without an agreement on punishment, the waiver is not valid."). However, section 56.01(b) of the Texas Family Code states that "[t]he requirements governing an appeal are as in civil cases generally."TEX. FAM.CODE ANN. § 56.01(b) (West Supp.2012). In fact, "[i]n juvenile cases, the criminal standard for the burden of proof applies at trial, but the procedure for civil cases applies on appeal." In re E.U.M., 108 S.W.3d 368, 372 (Tex.App.-Beaumont 2003, no pet.); see In re R.J.M., 211 S.W.3d 393, 394 (Tex.App.-San Antonio 2006, pet. denied) (noting that appeals from delinquency proceedings are civil in nature (citing Vasquez v. State, 739 S.W.2d 37, 42 (Tex.Crim.App.1987) (plurality op.))); see also In re S.J.P., No. 04–09–00005–CV, 2010 Tex.App. LEXIS 18, at *5 (Tex.App.-San Antonio Jan.6, 2010, no pet.)(mem.op.) (citing TEX. FAM.CODE ANN. § 51.17(a) (West Supp.2012)).

Conclusion: Because appeals from delinquency proceedings, such as the one here, are civil in nature, we decline appellant's invitation to adopt the criminal standard in deciding whether his waiver of appeal is valid. Therefore, based on the foregoing, we overrule appellant's first issue.

Eyhorn v. State, No. 07-12-0019-CR, --- S.W.3d ----, 2012 WL 3264032, Tex.Juv.Rep. Vol.26, No. 4 ¶ 12-4-8 (Tex.App.-Amarillo, 8/10/12).

NON-JURISDICTIONAL COMPLAINTS WHICH ARISE DURING A DISCRETIONARY TRANSFER TRIAL SHOULD BE APPEALED EMEDIATELY AFTER CONVICTION OR DEFERRED ADJUDICATION.

Facts: Alexander Clay Eyhorn appeals from a final judgment adjudicating him guilty of aggravated sexual assault of a child. He was fifteen years old when he committed the crime but was not prosecuted until he was eighteen. Upon his arrest, he was remanded to the jurisdiction of the juvenile court. Per a motion filed by the State, the juvenile court transferred its jurisdiction over the proceeding and appellant to the district court. Thereafter, appellant entered a plea bargain wherein he pled guilty to the offense in exchange for being placed on deferred adjudication for ten years. No appeal was taken from the order deferring his adjudication of guilt. However, the State later moved for such adjudication, which motion the court granted. After being found guilty and sentenced to forty years in prison, appellant contests the juvenile court's decision to transfer jurisdiction over him and the cause to the district court.

Held: Affirmed

Opinion: The contentions before us involve the decision to transfer jurisdiction over appellant from the juvenile court to the district court. First, the State allegedly failed to prove that it was not practicable to prosecute appellant as a juvenile despite its use of due diligence to do so, and because it failed in that regard, the district court allegedly acquired no jurisdiction over him. Second, appellant suggests that the juvenile court abused its discretion in "certifying appellant as an adult" because of the tenuousness of the evidence underlying the decision; the expert's conclusions were unfounded and did not support the decision, according to appellant.

No complaint was made of either matter until now. This is of import since 1) claims regarding the want of jurisdiction in juvenile proceedings "must be made by written motion in bar of prosecution filed with the court in which criminal charges against the person are filed," TEX.CODE CRIM. PROC. ANN. art. 4.18(a) (West 2005), while 2) other claims (non-jurisdictional in nature) of "defect or error in a discretionary transfer proceeding in juvenile court ..." may be appealed "only as provided by Article 44.47." Id. art. 4.18(g). Here, there was no written motion questioning jurisdiction or its transfer filed with either the juvenile or district court. Thus, appellant did not comply with the statutorily devised manner by which such issues may be raised.

As for appealing via art. 44.47, the latter specifies that an appeal of a transfer order can be taken "only in conjunction with the appeal of a conviction or of an order of deferred adjudication for the offense for which the defendant was transferred...." Id. art. 44.47(b) (West 2006). At first blush, one could read this to mean that an appellant need not appeal non-jurisdictional error concerning such transfers after being granted deferred adjudication; instead, he may wait until he is finally convicted. Such an interpretation of the statute, however, tends to run afoul of analogous precedent from our Court of Criminal Appeals.

For over a decade, non-jurisdictional mistakes arising before issuance of an order deferring the adjudication of guilt had to be appealed immediately after the accused was placed on community supervision; appellant could not wait until the trial court ultimately convicted him to complain of such matters. Webb v. State, 20 S.W.3d 834, 836 (Tex.App.-Amarillo 2000, no pet.); see also Daniels v. State, 30 S.W.3d 407, 408 (Tex.Crim.App.2000) (stating a defendant may raise issues related to his original plea proceeding only in appeals taken when deferred adjudication is first imposed); Manuel v. State, 994 S.W.2d 658, 661–62 (Tex.Crim.App.1999) (stating the same). Furthermore, non-jurisdictional complaints arising in a proceeding that resulted in deferred adjudication and implicated the standard of abused discretion, see e.g. Strowenjans v. State, 919 S.W.2d 142, 145–146 (Tex.App.-Dallas 1996), set aside on other grounds, 927 S.W.2d 28 (Tex.Crim.App.1996) (objections to evidence), generally were and are of that ilk. So they must be appealed immediately. We see no logical reason why art. 44.47(b) should be read as jettisoning that rule simply because the accused was initially subject to being tried as a juvenile. Once certified as an adult, the defendant is subjected to other procedures applicable in the prosecution of adults.

Furthermore, the policy underlying Manuel, Daniels, and Webb fosters the notion that errors should be corrected at their earliest opportunity. If juveniles who commit criminal acts are to be matriculated via different procedures, it would seem appropriate, then, to address complaints regarding the subjection of minors to adult procedures as early as possible.

Finally, reading the statute to comport with Manuel and company would be tantamount to reading it as recognizing the realities of current practice. See Miller v. State, 33 S.W.3d 257, 260 (Tex.Crim.App.2000) (holding that courts are to presume that the legislature was aware of current judicial opinions when enacting a statute). That is, certifying a minor to be tried as an adult can lead to either immediate prosecution and conviction or deferred adjudication. If non-jurisdictional complaints arise during a trial resulting in a conviction, they should be appealed immediately after conviction. If they arise in a proceeding that results in a deferred adjudication, they should be immediately appealed at that point. And, that is how art. 44.47(b) is to be interpreted.

Conclusion: The objections asserted here arose before the district court decided to defer the adjudication of appellant's guilt. Thus, objections regarding the expert's conclusion upon which the juvenile court relied in certifying appellant as an adult were susceptible to review once he was placed on deferred adjudication. Furthermore, whether the juvenile court abused its discretion in ruling as it did after considering those conclusions is not jurisdictional in nature. So, the complaint should have been raised and appealed at the earliest opportunity. That was immediately after the district court deferred the adjudication of his guilt and placed appellant on community supervision. Because it was not, we cannot review the matter now. The issues raised by appellant are overruled, and the judgment of the trial court is affirmed.

In the Matter of R.R., No. 14-10-01233-CV, --- S.W.3d ----, 2012 WL 1881342, Tex.Juv.Rep. Vol.26, No. 3 ¶ 12-3-5 (Tex.App.-Hous. (14 Dist.), 5/24/12).

A JUVENILE'S RIGHT TO A JURY IS STATUTORY, AND AS A RESULT, VIOLATIONS ARE NOT CONSTITUTIONAL AND SUBJECT TO HARMLESS-ERROR ANALYSIS.

Facts: On October 11, 2010, an agreed-setting form resetting the case for "Court Trial" was signed by R.R.'s parent/guardian, his attorney, and the prosecutor. A bench trial was held three days later.

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

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

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

Held: Affirmed

Opinion: We turn to R.R.'s jury-trial waiver issue, and we note in passing that it is properly before us even without an objection in the trial court. Under the Family Code, jury trials are the default course of action, and a trial court has a duty to commence a trial by jury unless and until both the juvenile and his attorney release the trial court from that duty. Tex. Fam.Code §§ 51.09, 54.03(c). When a statute directs a juvenile court to take certain action, the failure of the juvenile court to do so may be raised for the first time on appeal unless the juvenile defendant expressly waived the statutory requirement. In re C.O.S., 988 S.W.2d 760, 767 (Tex.1999).

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

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

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

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

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

attorney and relies on the well-settled rule that waiver cannot be inferred from a silent record. See, e.g., Carnley v. Cochran, 369 U.S. 506, 516 (1962).

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

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

In the Matter of D.M.T., MEMORANDUM, No. 02-11-00251-CV, 2012 WL 1947340, Tex.Juv.Rep. Vol.26, No. 3 ¶ 12-3-7 (Tex.App.-Fort Worth, 5/31/12).

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

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

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

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

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

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

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

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

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

Memorandum Opinion: Appellant argues that there is legally insufficient evidence to prove that he entered Hunter's house with the intent to commit theft. The intent with which a defendant enters a habitation is a fact question to be decided based upon the surrounding circumstances. Robles v. State, 664 S.W.2d 91, 94

(Tex.Crim.App.1984). Intent is an essential element of burglary of a habitation that the State must prove; "it may not be left simply to speculation and surmise." LaPoint v. State, 750 S.W.2d 180, 182 (Tex.Crim.App.1986).

The State argues only that Appellant's flight, when startled in the house by Hunter, is sufficient to infer Appellant's intent to commit theft.

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

Although a combination of circumstances can give rise to a reasonable inference of an intent to commit theft, we must apply the rigorous due-process standard of Jackson, 443 U.S. at 318–19, 99 S.Ct. at 2788–89. Considering the various things Appellant could have done in Hunter's house, there is insufficient evidence to support that he intended to commit theft. There was no property disturbed in Hunter's house, Appellant did not testify or make any statement to the police, and there was no circumstantial evidence that he was in need of money. See Duncan v. State, No. 14–11–00298–CR, 2012 WL 1137910, at *3 (Tex.App.-Houston [14th Dist .] Apr. 3, 2012, no pet. h.) (holding that evidence that closet door in garage was open and an air compressor was in the middle of the garage rather than its usual location in a closet supported a finding of intent to commit theft); Black v. State, 183 S.W.3d 925, 928 (Tex.App.-Houston [14th Dist.] 2006, pet. ref'd) (holding that evidence of a computer system stacked and "ready to go" near point of entry supported a finding of intent to commit theft); White v. State, 630 S.W.2d 340, 342 (Tex.App.-Houston [1st Dist .] 1982, no pet.)(holding that movement of equipment from one part of garage to another supported a finding of intent to commit theft). The evidence in this case presents no circumstance from which a rational fact finder could divine Appellant's intent when entering Hunter's house. See Solis, 589 S.W.2d at 446–47. We therefore sustain that portion of Appellant's issue.

Criminal trespass can be a lesser-included offense of burglary. See Goad v. State, 354 S.W.3d 443, 446 (Tex.Crim.App.2011)."An offense is a lesser-included offense ... if it is es-tablished by proof of the same or less than all the facts required to establish the commission of the offense charged."Tex.Code Crim. Proc. Ann. art. 37.09(1) (West 2006). A person commits criminal trespass when "the person enters ... property of another, including residential land ..., without effective consent and the person ... had notice that the entry was forbidden."Tex. Penal Code Ann. § 30.05(a) (West Supp.2011). Criminal trespass is established by proof of the facts of burglary of habitation as Appellant was charged, less proof of the specific intent to commit theft. See Goad, 354 S.W.3d at 446.

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

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

CIVIL LIABILITY—

El Paso v. Aguilar, No. 08-11-00206-CV, --- S.W.3d ----, 2012 WL 1611899, Tex.Juv.Rep. Vol.26, No. 3 ¶ 12-3-1 (Tex.App.-El Paso, 5/9/12).

THE EL PASO JUVENILE BOARD IS A POLITICAL SUBDIVISION WITH GOVERNMENTAL IMMUNITY AGAINST SUIT.

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

Held: Reversed, Dismissed for want of jurisdiction.

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

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

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

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

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

While the Juvenile Board does not strictly meet every element of the general judicial definition of a political subdivision, we bear in mind the unusual nature of a juvenile board. A juvenile board is a statutorily created entity which exists separately from the county it serves and the commissioner's court. See El Paso County v. Solorzano, 351 S.W.3d 577, 581 n. 2 (Tex.App.-El Paso 2011, no pet.). The Juvenile Board and the Juvenile Probation Department are funded with both county and state funds. Solorzano, 351 S.W.3d at 583;seeTEX.HUM.RES.CODE

ANN. §§ 152.0012, 152.0054, 223.001–.005. A juvenile board may, with the advice and consent of the commissioners court, employ probation officers and other personnel necessary to provide juvenile probation services. TEX.HUM .RES.CODE ANN. § 142.002. The commissioners court is required to pay the salaries of juvenile probation personnel and other necessary expenses from the county's general funds.TEX.HUM. RES.CODE ANN. § 152.0004. Even though a juvenile board is a separate governmental entity, a juvenile board's employees are considered to be county employees because they are paid and their benefits are provided by the county. SeeTEX.HUM.RES.CODE ANN. § 222.006 (providing that a juvenile probation officer whose jurisdiction covers only one county is considered to be an employee of that county). Further, the Legislature appears to consider a juvenile board as a political subdivision. Section 142.004 of the Human Resources Code provides that juvenile probation personnel employed by a political subdivision of the state are state employees for the purposes of Chapter 104 of the Civil Practice and Remedies Code. TEX.HUM.RES.CODE ANN. § 142.004(b)(West 2001). We agree with the Juvenile Board that this provision would be unnecessary if juvenile probation personnel were state employees.

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

COLLATERAL ATTACK—

Ross v. State, MEMORANDUM, No. 02-11-00439-CR, 02-11-00440-CR, 2013 WL 43992, Tex.Juv.Rep. Vol. 27, No. 1 ¶ 13-1-4 (Tex.App.-Fort Worth, Jan 4, 2013).

WHEN A DEFENDANT COLLATERALLY ATTACKS A PRIOR CONVICTION, THE STATE HAS THE INITIAL BURDEN TO PRODUCE PRIMA FACIE PROOF OF THAT THE PRIOR CONVICTION IS VALID.

Facts: During trial, the State offered Ross's 1981 burglary conviction as a predicate for the unlawful possession of a firearm by a felon charge and as an enhancement on the organized crime charge, and it offered a parole report and oral testimony to show that Ross had been discharged less than five years before his arrest in this case.

Ross complains that the 1981 conviction was void for lack of jurisdiction and that his substantial rights were violated when the trial court admitted it during the guilt phase of his trial, the State introduced a pen packet that contained a copy of the 1981 judgment and Ross's fingerprints and photo, and connected the pen packet to Ross by expert testimony. After Ross complained that the pen packet listed his birthday incorrectly, the State obtained and offered the original file from the 1981 conviction. Although the file did not contain the juvenile court's certification order, it contained the State's motion for an examining trial recounting the events leading up to Ross's transfer from juvenile court to the district court and the motion for the examining trial transcript, in which Ross's counsel at the time stated, “This Defendant was certified as an adult to stand trial in the above entitled and numbered cause.”In response to the State's evidence, Ross offered nothing to show that he had not been certified as an adult before his 1981 trial.

Although there is no “presumption of regularity” when a defendant attacks a juvenile transfer on direct appeal, which requires the State to prove that the jurisdictional transfer requirements were met, See White v. State, 576 S.W.2d 843, 845 (Tex.Crim.App.1979), when a defendant collaterally attacks a prior conviction, the State has only the initial burden to produce prima facie proof of a valid prior conviction. Johnson v. State, 725 S.W.2d 245, 247 (Tex.Crim.App.1987); see alsoTex. Fam.Code Ann. §§ 51.02, 51.04, 54.02 (West 2008 & Supp.2012) (setting out the procedure for a juvenile court to transfer jurisdiction to a district court). “Once the State properly introduces a judgment and sentence and identifies appellant with them, we presume regularity in the judgments,” and the defendant then has the burden to “make an affirmative showing of any defect in the judgment.” Johnson, 725 S.W.2d at 247. To prevail, the defendant must prove that the prior conviction is void or “tainted by a constitutional defect.” Galloway v. State, 578 S.W.2d 142, 143 (Tex.Crim.App.1979).

Conclusion: Because the State's evidence provided prima facie proof of Ross's 1981 conviction, see Johnson, 725 S.W.2d at 247 (noting that a pen packet containing a judgment, sentence, and fingerprints was sufficient to establish that the defendant's prior conviction as a juvenile was “regular on its face”), and because Ross then did not

affirmatively show any defect in the judgment, the trial court did not abuse its discretion by admitting the 1981 conviction. See id .Further, although Ross argues that he received no limiting instruction on the 1981 conviction, the record does not reflect that he requested one, although it does reflect that one was included in the jury charge. We overrule Ross's first two points.

In the Matter of R.G., No. 01-11-00748-CV, --- S.W.3d ----, 2012 WL 3774430, Tex.Juv.Rep. Vol. 26, No. 4 ¶ 12-4-3 (Tex.App.-Hous. (1 Dist.), 8/30/12)

JUVENILE COURT EXCEEDED ITS PLENARY POWER WHEN IT VACATED ITS OWN ORDER GRANTING HABEAS CORPUS RELIEF MORE THAN SIX MONTHS AFTER IT ORIGINALY GRANTED IT.

Facts: On March 20, 1995, a jury found that relator, who was fourteen years old at the time, engaged in delinquent conduct, namely, committing the offense of murder, and assessed his punishment at confinement for forty years. The Fourteenth Court of Appeals affirmed the adjudication of delinquency. *In re R.G.,* No. 14–95–00584–CV, 1997 WL 379151 (Tex.App.-Houston [14th Dist.] July 10, 1997, pet. denied) (not designated for publication).

On August 4, 2009, relator filed, in the juvenile court, an application for a writ of habeas corpus, alleging that he was denied effective assistance of counsel during his adjudication. On January 28, 2011, after a hearing, the juvenile court found that relator's adjudication was "based on the admission of inadmissible testimony, improper questions, argument outside the record, and ineffective assistance of counsel." Accordingly, it granted relator habeas corpus relief and a new trial.

Six months later, on June 28, 2011, relator filed a motion to dismiss the case against him for lack of jurisdiction. He asserted that the juvenile court lacked jurisdiction to retry him after he had become 17 years of age. The State responded, arguing that the juvenile court retained continuing jurisdiction over relator to retry his adjudication of guilt. After a hearing on the motion to dismiss, the juvenile court concluded that it had "no jurisdiction to re-try [the] case," further stating that "it appears this Court lacked jurisdiction to consider [relator's] habeas corpus or grant a new trial." The juvenile court then vacated its order granting relator habeas relief and a new trial, and it reinstated relator's adjudication of delinquency.

At the outset, we note that the State argues that this Court does not have jurisdiction to hear this "appeal" because it not authorized by the Texas Family Code. *See* TEX. FAM.CODE ANN. § 56.01(c)(1) (Vernon Supp.2011).

> Section 56.01(c)(1) provides that an appeal may be taken "by or on behalf of a child" from an order entered under:
>
> (A) Section 54.03 with regard to delinquent conduct or conduct indicating a need for supervision;
> (B) Section 54.04 disposing of the case;
> (C) Section 54.05 respecting modification of a previous juvenile court disposition; or
> (D) Chapter 55 by a juvenile court committing a child to a facility or the mentally ill or mentally retarded....

Moreover, an appeal may be taken "by a person from an order entered under Section 54.11(i)(2) transferring the person to the custody of the Texas Department of Criminal Justice." *Id.* § 56.01(c)(2). The State argues that because this "appeal" does not fall into any of the above categories, this Court must dismiss the appeal for lack of jurisdiction. However, section 56.01 also provides that it "does not limit a child's right to obtain a writ of habeas corpus." *Id.* § 56.01(o).

Relator requests that, if this Court concludes that it does not have appellate jurisdiction, we construe his appeal as a petition for a writ of mandamus. The Texas Supreme Court recently held that an interlocutory appeal should not have been dismissed for lack of jurisdiction, but instead should have been considered as a petition for a writ of mandamus as requested by the petitioner. *CMH Homes v. Perez,* 340 S.W.3d 444, 453–54 (Tex.2011). The court explained that "Texas policy ... 'disfavors disposing of appeals based upon harmless procedural defects.' " *Id.* at 453 (quoting *Higgins v. Randall County Sheriff's Office,* 257 S.W.3d 687, 688 (Tex.2008)); *see also In re J.P.L.,* 359 S.W.3d 695, 703 (Tex.App.-San Antonio 2011, pet. filed) (construing appeal from nonfinal order granting petition to enforce child custody as request for writ of mandamus). Accordingly, we construe relator's briefing as a petition for writ of mandamus.

Held: Writ of mandamus conditionally granted

Opinion: In his sole issue, relator argues that the juvenile court erred in vacating its order granting him habeas corpus relief because it did have jurisdiction to grant him the relief and it vacated the order granting him relief after its plenary power had expired.

Although relator filed his application for a writ of habeas corpus under the same cause number as that used in the previous juvenile proceedings, he styled it as an "Application for Writ of Habeas Corpus," alleging that he was denied effective assistance of counsel at his trial. In his application, relator argued that the juvenile court had jurisdiction, pursuant to the Texas Constitution, to consider a writ of habeas corpus. The State, and the juvenile court, treated relator's pleading as an application for a writ of habeas corpus during every stage of the proceedings. The court referred to it as an application for a writ of habeas corpus in its order granting relief and in its order vacating relief, noting that relator filed his application "pursuant to Article 5, Section 8 of the Texas Constitution." Thus, despite filing his application under the same cause number as that used in the previous juvenile proceedings, relator actually filed an application for a writ of habeas corpus, and he invoked the constitutional jurisdiction of the juvenile court, as a district court, to consider such writs. See TEX. CONST. art. 5, § 8; In re Hall, 286 S.W.3d 925, 926–27 (Tex.2009) (recognizing civil district court, which was also juvenile court, had jurisdiction to hear writ of habeas corpus); Ex Parte Valle, 104 S.W.3d 888, 889–90 (Tex.Crim.App.2003) (holding that civil, not criminal, district courts should entertain writs of habeas corpus, and noting that "several courts of appeals have entertained appeals when writs of habeas corpus were issued by district courts on the application of juveniles accused of delinquent conduct"). Accordingly, we hold that the juvenile court had jurisdiction to entertain relator's application for a writ of habeas corpus pursuant to its constitutional jurisdiction as a district court.

Relator next argues that the juvenile court lacked the power to vacate its order granting him habeas corpus relief because a trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform a judgment "within thirty days after the judgment is signed." See TEX.R. CIV. P. 329b(d). Relator further argues that because the juvenile court's order vacating its grant of habeas corpus relief was entered more than thirty days after the original order, it acted outside of its plenary power to modify the original order.

The State argues that relator's application is in effect an out-of-time motion for new trial. See In re Baylor Med. Ctr. at Garland, 280 S.W.3d 227 (Tex.2008). In Baylor, a trial court vacated a previous order granting a motion for new trial two months after it had granted the new trial, reinstating the original jury verdict. Id. at 228–29. The Texas Supreme Court explained that once a new trial is timely granted, "the case stands on the trial court's docket 'the same as though no trial had been had.' " Id. at 230–31 (citing Wilkins v. Methodist Health Care Sys., 160 S.W.3d 550, 563 (Tex.2005)). The court noted that federal courts and commentators have observed that there is "no sound reason why the court may not reconsider its ruling [granting] a new trial" at any time. Id. at 232 (citing 6A James William Moore, Moore's Federal Practice ¶ 59.13[1], at 59–227 (2d ed.1996)). Ultimately, the court concluded that a trial court should "have the power to set aside a new trial order 'any time before a final judgment is entered.' " Id. at 231 (quoting Fruehauf Corp. v. Carrillo, 848 S.W.2d 83, 84 (Tex.1993)).

Here, the juvenile court entered its order granting relator habeas corpus relief on January 28, 2011, and the State did not appeal from or otherwise complain about that order. And, as stated above, the juvenile court had jurisdiction to grant relator's application for a writ of habeas corpus pursuant to its constitutional jurisdiction as a district court. Accordingly, we hold that the juvenile court abused its discretion and exceeded its plenary power when it vacated its order granting relator habeas corpus relief more than six months after granting the relief. Thus, its order vacating relief is void. See TEX.R. CIV. P. 329b(d) (providing that trial court has plenary power to vacate or modify its judgment within thirty days after it is signed); In re State ex rel. Sistrunk, 142 S.W.3d 497, 503 (Tex.App.-Houston [14th Dist.] 2004, no pet.) (noting that trial court generally retains plenary jurisdiction over case for thirty days after sentencing). We sustain relator's sole issue.

Conclusion: We conditionally grant the writ of mandamus and reverse the juvenile court's order vacating its order granting habeas corpus relief, and we reinstate the juvenile court's order granting relator a new trial. The writ will issue only if the trial court fails to comply.

FN1. See TEX. FAM.CODE ANN. § 51.03 (Vernon Supp.2011).

FN2. See TEX. PENAL CODE ANN. § 19.02 (Vernon 2011).

FN3. We note that during R.G.'s incarceration, the Texas Legislature provided an exception to the holding of In re N.J.A. See TEX. FAM.CODE ANN. § 51.0412 (Vernon Supp.2011); see also In re V.A ., 140 S.W.3d 858, 859 (Tex.App.-Fort Worth, no pet.). Section 51 .0412 provides that a juvenile court retains jurisdiction over a person, "without regard to the age of the person," if the original petition was filed before the person turned 18 years of age, the proceeding is not complete before the person turned 18 years of age, and the juvenile court enters a finding that

the prosecuting attorney exercised due diligence in an attempt to complete the proceedings before the person turned 18 years of age. TEX. FAM.CODE ANN. § 51.0412. However, section 51.0412 does not apply "to conduct that occur[red] on or after the effective date," which was September 1, 2001. See Act of Sept. 1, 2001, 77th Leg., R.S., ch. 1297, § 72, 2001 Tex. Gen. Laws 3142, 3175.

FN4. See, e.g., State v. Nkwocha, 31 S.W.3d 817, 818 n. 1 (Tex.App.-Dallas 2000, no pet.) (noting that State could appeal grant of habeas corpus relief, ordering new trial, on grounds of newly-discovered evidence); State v. Kanapa, 778 S.W.2d 592, 593 (Tex.App.-Houston [1st Dist.] 1989, no pet.) (noting that State can appeal from habeas corpus proceeding when it would otherwise have right to appeal under Code of Criminal Procedure).

In the Matter of M.P.A., No. 10-0859, --- S.W.3d ----, 2012 WL 1759513, Tex.Juv.Rep. Vol.26, No. 3 ¶ 12-3-2 (Tex.Sup.Ct., 5/18/12).

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

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

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

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

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

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

Held: Remanded for new disposition

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

Scientific Evidence: Toward Providing the Lay Trier With the Comprehensible and Reliable Evidence Necessary to Meet the Goals of the Rules of Evidence, 32 ARIZ. L.REV. 915, 941–42 (1990)).

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

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

Furthermore, contrary to Willoughby's testimony, the Brigham Young University (BYU) studies failed to establish the Abel Assessment's reliability as applied to adults and actively established that it was unreliable as applied to adolescents. Regarding adults, they found that it was a "promising instrument based on a sound idea," but concluded that "the evidence of its reliability and validity for use with adults is weak as of yet," labeled it a "nonvalidated instrument," and called for "further research" and "refinement."

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

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

- The statement in one of the BYU articles that "approximately 300 therapists in 36 states and two foreign countries, as well as 8 states' judicial systems" used the assessment;
- Abel's study of the Abel Assessment;
- Four independent studies supporting the theory underlying the Abel Assessment;
- The inability of M.P.A. and J.W.A.'s attorneys to find an expert to attack the Abel Assessment.

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

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

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

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

C. Harm Analysis

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

- "He's been diagnosed as a pedophile by an expert. He is at a high risk to re-offend."
- "[Y]ou've heard the psychologist tell you he is a pedophile. He is at a high risk to reoffend."
- "You now know he's been classified as a pedophile by an expert. You now know that he is interested in children, interested in children, in fact, in the same age group as little [S.A.]. Think about her and think about that."

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

- "[I]f you put him on probation, we've already seen that just allows for victims."
- "Our community simply cannot take that chance by releasing him back in that home. It's a tough decision to make, but it's a decision that's backed up by the evidence and the testimony."
- "How are you going to protect the public? The evidence has shown that the only way you're going to be able to do that is by putting him away for some time. Because you're going to have to protect other children. And with your verdict, you can at least keep him out of your community for a while."
- "[Y]ou're also telling him, 'If I put you on probation, I'm going to walk right out this door with you.' He could be next to you in the parking lot today and in your neighborhood tomorrow. Think about that."

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

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

Ex Parte Espinosa, No. AP-76778, 2012 WL 1438694, Tex.Juv.Rep. Vol. 26, No. 2 ¶ 12-2-4 (Tex.Crim.App., 4/25/12).

WRIT OF HABEAS CORPUS GRANTED WHERE JUVENILE PLEAD TO OFFENSE IN ADULT COURT WHILE STILL A JUVENILE.

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 pleaded guilty to forgery of a financial instrument, and originally received deferred adjudication community supervision. Her guilt was later adjudicated and she was sentenced to eighteen months' state jail imprisonment. She attempted to appeal her conviction, but notice of appeal was untimely filed and the appeal was dismissed for want of jurisdiction.

Applicant contends, *inter alia,* that her plea was involuntary, that she received ineffective of counsel at the original plea, and that she was denied her right to appeal after adjudication because of adjudication counsel's erroneous advice. We remanded this application to the trial court for findings of fact and conclusions of law. The trial court conducted a habeas hearing, at which the court heard testimony and received evidence.

Held: Relief is granted

Opinion: Based on the evidence adduced at the hearing, the trial court determined that the trial court lacked jurisdiction to accept Applicant's original plea, because Applicant was a juvenile at the time of the offense. The trial

court concludes that Applicant's counsel at the original plea was ineffective for failing to investigate and discover that Applicant was a juvenile, and to advise her that she was not subject to the jurisdiction of the criminal court. The trial court finds that Applicant would not have pleaded guilty to the charge had she known that she was not subject to the jurisdiction of the criminal court. The trial court also concludes that Applicant was denied her right to appeal because her counsel at adjudication failed to properly file a motion for new trial, and thereafter advised Applicant incorrectly regarding the deadline for filing notice of appeal. Applicant is entitled to relief. *Ex parte Huerta,* 692 S.W.2d 681 (Tex.Crim.App.1985).

Conclusion: Relief is granted. The judgment in Cause No. A14705–0211 in the 64th Judicial District Court of Hale County is set aside, and Applicant is remanded to the custody of the sheriff of Hale County to answer the charges as set out in the indictment. The trial court shall issue any necessary bench warrant within 10 days after the mandate of this Court issues.

CONFESSIONS—

McCreary v. State, MEMORANDUM, No 01-10-01035-CR, 2012 WL 1753005, Tex.Juv.Rep. Vol. 26, No. 3 ¶ 12-3-3 (Tex.App.-Hous. (1 Dist.), 5/17/12).

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

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

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

Having no other suspects and also having received two anonymous tips about McCreary's involvement in Pham's death, WPD Detectives Quintana, Palermo, and Latham made contact with McCreary, then 15 years-old, at his mother's home. There, police recovered a pair of blue shorts and an I–Pod. According to McCreary's mother, McCreary wore the blue shorts on the day of Pham's death. Although it was his opinion that probable cause did not yet exist to arrest McCreary, Detective Latham asked McCreary to make a voluntary statement at the police station. Detective Latham informed McCreary that he was "not being placed under arrest ... not being charged with the crime. And that he's going to be able to leave whenever he wants and that [the detectives would] be glad to give him a ride back."Both McCreary and his mother consented.

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

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

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

Detective Latham took McCreary to an interview room and shut the door. Just as he did the day before, Detective Latham began the interview by asking McCreary whether he was at the police station of his own free will and whether he understood that he was not under arrest. McCreary responded affirmatively, and no admonishments were given. Detective Latham characterized the one-hour interview that followed as "an intense interview, a tactical interview" during which McCreary laughed, cried, got angry, and made incriminating statements about the amount of money stolen from the store and the manner in which Pham was shot. The interview was video-recorded. Although

Detective Latham exaggerated the evidence and repeatedly accused McCreary of murdering Pham, Detective Latham never expressed an intent to arrest McCreary. And, when McCreary indicated he was ready to leave, Detective Latham did not arrest McCreary. Instead, he and Detective Quintana gave McCreary a ride home.

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

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

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

“A motion to suppress is nothing more than a specialized objection to the admissibility of evidence.” Simmons v. State, 288 S.W.3d 72, 76–77 (Tex.App.-Houston [1st Dist.] 2009, pet. ref d). McCreary argues that the trial court erred by admitting his recorded and unrecorded statements because they were custodial statements taken in violation of sections 51.095, 52.02 and 52.025 of the Family Code. SeeTEX. FAMILY CODE ANN. §§ 51.095 (West 2008) (governing admissibility of statements by juvenile), 52.02 (West 2008) (governing taking of juvenile into custody), 52.025 (West 2008) (governing designation of juvenile processing office). Specifically, with respect to the oral statements recorded during his interview with Detective Latham, McCreary asserts that Detective Latham violated the Family Code by (1) conducting the interrogation at the Webster police station instead of a juvenile processing office as required by sections 52.02 and 52.025 and (2) failing to have a magistrate give McCreary the statutory warnings required by sections 51.095(a)(1)(A) and 51.095(a)(5). With respect to his unrecorded statement—“you got a chrome .45, man, that's nice”—McCreary asserts that sections 51.095(a)(1)(A) and 51.095(a)(5) likewise preclude its admission in evidence because he made the statement while in custody, he made the statement in response to “conversational interaction” with Detective Palermo, and he was not given any statutory admonishments by a magistrate.

Held: Affirmed

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

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

under the objective circumstances, a reasonable child of the same age would believe his freedom of movement was significantly restricted. Jeffley, 38 S.W.3d at 855.

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

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

A juvenile may be in custody when he is interrogated alone by an armed police officer in an enclosed space. See In re D.J.C., 312 S.W.3d at 713;see also In re D.A.R., 73 S.W.3d 505, 511–12 (Tex.App.-El Paso 2002, no pet.). Being the focus of an investigation alone does not amount to being in custody. Meek v. State, 790 S.W.2d 618, 621 (Tex.Crim.App.1990). Neither does stationhouse questioning, in and of itself, constitute custody. Dowthitt, 931 S.W.2d at 255. When the circumstances show that an individual acts upon the invitation or request of the police and there are no express or implied threats that he will be forcibly taken, that person is not in custody. Dancy v. State, 728 S.W.2d 772, 778–79 (Tex.Crim.App.1987); In re D.J.C., 312 S.W.3d at 713. “The mere fact that an interrogation begins as non-custodial, however, does not prevent it from later becoming custodial; police conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation.” Dowthitt, 931 S.W.2d at 255.

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

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

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

Applying the first part of our analysis, we examine all the circumstances surrounding McCreary's interview with Detective Latham to determine whether there was a formal arrest or restraint to the degree associated with an arrest. See In re D.J.C., 312 S.W.3d at 712. It is undisputed that McCreary was never handcuffed and was not formally arrested until well after the interview; in fact, immediately after the interview, the detectives gave McCreary a ride home. McCreary twice agreed to accompany the detectives to the police station and make a statement. En route to and from the police station, McCreary rode in the front passenger seat of the detective's vehicle, not in the back seat

of a marked patrol vehicle. Before making any statement, McCreary was told more than once that he was not under arrest and was free to leave at any time. On both days McCreary was at the police station, the detectives placed him in an interview room and shut the door. Nonetheless, on the detective's first attempt to question McCreary, McCreary asked to leave. The detectives permitted him to exit both the interview room and the police station unhindered. On the second day, McCreary endured one hour of questioning before he stopped the interview on his own accord. The detectives again permitted McCreary to leave the police station unhindered. Based on all the objective circumstances surrounding the interview, the trial court reasonably could have concluded that McCreary was not under formal arrest nor restrained of freedom to the degree associated with an arrest at the time he made the recorded statements.

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

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

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

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

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

Elizondo v. State, No. PD-0882-11, --- S.W.3d ----, 2012 WL 5413318, Vol. 26, No. 7 ¶ 12-4-13 (Tex.Crim.App., 11/7/12).

STORE'S LOSS-PREVENTION OFFICER DID NOT NEED TO GIVE MIRANDA WARNING SINCE HE WAS COLLECTING EVIDENCE ON BEHALF OF STORE WHICH EMPLOYED HIM AND NOT LAW ENFORCEMENT.

Facts: Appellant and her friend were shopping in an Old Navy store. The store's loss-prevention officer, David Mora, noticed that Appellant's friend was carrying a flat purse. Mora watched the two women part ways inside the store and meet together behind a clothing rack a few minutes later. Mora then watched between the racks as Appellant's friend, standing shoulder-to-shoulder with Appellant, put items of merchandise into her purse. The two women, followed by Mora, left the store without paying for the items. Mora intercepted the women when they were outside the store and asked them to return to the store. Mora escorted the women to a room, accompanied by a female Old Navy manager, and retrieved the items from the purse. After retrieving the items, Mora asked Appellant to read and sign a document entitled "GAP INC. CIVIL DEMAND NOTICE," FN1 a document that contained the statement, "I, Becky Abajo Elizondo, have admitted to the theft of merchandise/cash valued at $65.00 from GAP INC., Store No. 6220, located at 6249 Slide Rd. I also hereby acknowledge that my detention on this date was reasonable." Appellant signed the form, dated it, and completed the address information section. Mora also had Appellant sign a store receipt reflecting the value of the merchandise and took photographs of Appellant and the stolen items. After completing what Mora testified was typical protocol for theft at Old Navy, he called the Lubbock Police Department, and officers came to the store to arrest Appellant and her friend. Before the trial began, the District Attorney's office obtained a copy of Mora's Old Navy report, including the civil demand notice. Appellant filed a motion to suppress the civil demand notice.

The trial court held a hearing on the motion to suppress outside the presence of the jury to consider the admissibility of the civil demand notice taken by Mora. Appellant argued that Mora was required to give Miranda warnings when he obtained the civil demand notice because he was engaged in an agency relationship with law enforcement.

Mora testified that he had been a loss-prevention officer at Old Navy for three years and had never worked in law enforcement. He testified that, in those three years, he obtained written confessions in about 99% of the encounters with accused shoplifters. He stated that the written confessions were kept for the store's records, but the store would give a copy of the report to a police officer or attorney upon request. Mora said that the police officer who arrested Appellant did not take a copy of the civil demand notice with him, although he was aware that one existed. Mora testified that the document was not handed over to the District Attorney until a couple of months after Appellant was arrested. Mora explained that, in line with the written policy contained in his manual provided by Gap Inc., his common practice is to ask the apprehended individual to sign the confession, however they may refuse to sign it if they wish. Mora stated that the primary reason for the store's policy requiring all documents to be signed is for punitive or monetary damages associated with the shoplifting incident.

Appellant claimed that, because she was taken to a manager's office and did not believe she was allowed to leave, she was in custody. She also cited cases stating that, if a private individual and law enforcement work together, or a private individual acts to benefit law enforcement, the private individual is required to issue Miranda warnings as if he were part of law enforcement.

The State argued that Article 38.22 does not re-quire Miranda warnings for written confessions taken by private security personnel and pointed the court to Oriji v. State, 150 S.W.3d 833 (Tex.App.-Houston [14th Dist.] 2004, pet. ref'd). The State asserted that there was no evidence that Mora was acting at the behest of law enforcement or the District Attorney; rather he collected evidence on behalf of Gap Inc.

The trial court denied Appellant's motion to suppress the written confession and entered findings of fact including that Mora was not a peace officer, that the defendant was not in custody, and that the civil demand notice contained no Miranda requirements. The trial court's conclusion of law was that the civil demand notice was not obtained as a result of a custodial interrogation of the defendant by a law enforcement officer. The case proceeded to trial, and Appellant was found guilty of theft of fifty to five hundred dollars and sentenced to 30 days in jail.

On appeal, Appellant argued that the trial court erred in failing to suppress her written confession, claiming that it was obtained in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution, Article 1, Section 10, of the Texas Constitution and Article 38.22 of the Texas Code of Criminal Procedure. The court analyzed the relationship between Mora and law enforcement using the three-factored test from Wilkerson v. State, 173 S.W.3d 521 (Tex.Crim.App.2005). The court considered whether authorities were using Mora for their own purposes and examined records related to Mora's actions and perceptions and Appellant's perceptions of the en-counter with Mora. The court determined that Mora did not obtain Appellant's statement pursuant to police practices. Elizondo, 338 S.W.3d at 211. The court further concluded that Mora was serving his employer's interests and that a reasonable person in Appellant's shoes would believe that Mora was a loss-prevention officer and not a law-enforcement agent.

Id. at 212–13. The court of appeals held that the record supported the trial court's admission of the evidence and affirmed the judgment of the trial court.

Held: Affirmed

Opinion: The law does not presume an agency relationship, and the party alleging such a relationship has the burden of proving that it exists. Wilkerson, 173 S.W.3d at 529. Appellant argues that there was an agency relationship between Mora and law enforcement because of: (1) the complicity of law enforcement as evidenced by the continuing relationship between Mora and the police, (2) the prosecutorial purpose of Mora's investigations, and (3) Appellant's reasonable belief that Mora was acting under the veil of authority. Because of this relationship, Appellant argues, Miranda warnings were required in order for her written confession to be admissible. To determine if Mora was working as an agent of law enforcement, we will apply the three Wilkerson factors to the facts of this case.

First, we look for information about the relationship between the police and Mora. Mora stated that every time he apprehended shoplifters he asked them to fill out a civil demand notice for Old Navy's records, and that 99% of the time the accused shop-lifter signed the document. While officers may have been aware that Old Navy had a policy of obtaining a civil demand notice, there is no indication that this knowledge led to a calculated practice between the police and the store's loss-prevention staff. The police had not even been contacted when Mora obtained Appellant's confession, so they clearly did not instruct Mora to get specific information or give him questions to ask Appellant. The police were not using Mora to get information from Appellant that they could not lawfully obtain themselves, and neither the police nor the DA's office asked Mora to obtain an admission of guilt to use in a criminal proceeding.

The second part of the Wilkerson test evaluates the purpose of the interview. In Oriji, the record showed that a written confession was obtained in order to further the store's need to prevent theft and was not for law enforcement purposes. 150 S.W.3d at 837. Similarly, in Wilkerson, we concluded that the CPS worker was not an agent of law enforcement because her questioning of the defendant was part of her duty regarding the placement of his children in foster care. 173 S.W.3d at 532. Here, Mora's reason for obtaining the civil demand notice was to adhere to the policies in the Gap Inc. loss-prevention manual. Although Gap Inc.'s policy manual says that theft incident reports serve to aid in criminal prosecutions and convictions, help maintain a good rapport with law enforcement, and prevent defense attorneys from discrediting the testimony of the loss-prevention staff, those are not the primary purposes of the report. The manual says reports, which should include a civil demand notice, are necessary to record and preserve observations, details, and information about the events surrounding the theft, and it says that the reports are for company use and records only. The civil demand notice states that the law permits merchants to recover civil monetary damages and that the civil penalties are not intended to compromise any criminal action the store may seek as a result of the shoplifting incident. While Mora did help build a case that led to Appellant's arrest, and his testimony indicates that the purpose of obtaining a written confession goes beyond merely civil reasons, his primary duty was to document the incident for company records. The record indicates that Mora believed that he was following Old Navy policy and acting on the store's behalf, not acting as a police agent.

Under the third Wilkerson factor, because there is nothing in the record from the suppression hearing regarding Appellant's perception of her encounter with Mora, we consider whether a reasonable person in Appellant's position would believe that Mora was a law-enforcement agent. See Id. at 531. Mora testified that he was not wearing a uniform when he approached Appellant and her friend outside the store. He informed them that he was a loss-prevention officer for Old Navy, escorted them to the store manager's office, and asked them to fill out paperwork about the theft. A female Old Navy manager was present during the encounter, and the door to the manager's office was left ajar. Mora printed out an Old Navy store receipt for the items found in Appellant's purse and photographed Appellant and the stolen items. Under these circumstances, we cannot say that a reasonable person in Appellant's position would believe that Mora was a law-enforcement agent. There was nothing in the record indicating that Mora appeared to Appellant to be cloaked with the actual or apparent authority of the police. See Id. at 530.

Conclusion: We conclude that Mora was not acting in tandem or "in cahoots" with the police. The fact that Mora eventually gave the District Attorney's office a copy of Appellant's written confession does not transform him into an agent of law enforcement. See Wilkerson, 173 S.W.3d at 533. Because Mora was working on a path parallel to, yet separate from, the police, Miranda warnings were not required in this situation. See Wilkerson, 173 S.W.3d at 529. The record supports the trial court's decision to deny Appellant's motion to suppress the written confession and the court of appeals did not err in affirming the trial court's denial of the motion to suppress. The judgment of the court of appeals is affirmed.

In the Matter of C.M., MEMORANDUM, No. 10-10-00421-CV, 2012 WL 579540, Tex.Juv.Rep. Vol. 26, No. 3 ¶ 12-3-8A (Tex.App.-Waco, 2/22/12)

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

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

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

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

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

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

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

C.M. was taken to the Bryan Police Department to see a magistrate. C.M. was in an interview room for approximately an hour waiting for the magistrate to arrive. There is no dispute that C.M. was in custody at this time. Gore, a magistrate, arrived and met with C.M. in the interview room. She reviewed the required warnings and advised C.M. of his rights as required by section 51.095(a)(5)(A) of the Family Code. C.M. signed an acknowledgment that he had been read and had his rights explained to him by the magistrate, that he understood them, and had asked any questions he had regarding them. This was electronically recorded both visually and aurally.

The magistrate asked C.M. if he still wanted to talk with the detectives and C.M. responded affirmatively. Gore also testified at the suppression hearing that she believed that C.M. understood his rights and that he voluntarily wanted to speak with the officers. C.M. was interviewed by Hines and another detective and made a statement similar to the statement recorded in the police vehicle. This statement by C.M. is the third statement of which C.M. complains.

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

Held: Affirmed

Memorandum Opinion: In determining whether or not the statements should have been suppressed, the initial inquiry is at what time C.M. was in custody of the police because the protections of the 5th and 14th Amendments of the United States Constitution, article 1, sections 9 and 10 of the Texas Constitution, and relevant sections of the Family Code concerning the admissibility of statements of a juvenile do not apply if the juvenile is not in custody when the statement was made. *See* TEX. FAM.CODE ANN. § 51.095(d); *Roquemore v. State,* 60 S.W.3d 862, 866 (Tex.Crim.App.2001).

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

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

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

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

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

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

First Statement

C.M. complains that he was in custody at the time he made the first statement to Hines while he was sitting on the back of Charles's truck. Although the officer who initiated contact with C.M. and brought him back to the residence told him he could not leave, no other indicia of an arrest were present. C.M. was not handcuffed or otherwise restrained, nor did the officers make any threats that he would be forcibly taken if he attempted to leave. At that time, C.M. was at most a suspect but there was no probable cause to believe that he had committed the robbery. The shotgun and money from the robbery were found under Charles's porch stairs after C.M. had made his first two incriminating statements but not because of C .M.'s statements. C.M. stated that he had thrown them away while hiding from the police. There was no other evidence regarding whether C.M. subjectively felt he was in custody or not. Viewing the evidence in the light most favorable to the trial court's ruling, we find that C.M. was not restrained to the degree associated with a formal arrest. He was not in custody and therefore, the officers were not required to give the required warnings and admonishments. The trial court did not abuse its discretion in denying the motion to suppress the first statement made by C.M.

Second Statement

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

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

In the Matter of C.M., MEMORANDUM, No. 10-10-00421-CV, 2012 WL 579540, Tex.Juv.Rep. Vol. 26, No. 3 ¶ 12-3-8B (Tex.App.-Waco, 2/22/12)

GUARDIAN'S TESTIMONY THAT IF THEY HAD BEEN ABLE TO SPEAK WITH JUVENILE THEY WOULD HAVE ADVISED HIM NOT TO MAKE ANY STATEMENTS DID NOT ESTABLISH CAUSAL CONNECTION

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

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

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

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

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

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

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

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

Held: Affirmed

Memorandum Opinion: In his second issue, C.M. complains that the trial court abused its discretion by denying his motion to suppress his third statement made at the police department because Charles and Laura were not allowed to speak to him prior to his making the statement nor were they allowed to accompany C.M. to the police department. Rather, they were affirmatively told that they could not speak with C.M. or accompany him when they asked the officers, which C.M. contends is a violation of section 52.025(c) of the Family Code, which states that "[a] child ... is entitled to be accompanied by the child's parent, guardian, or other custodian or by the child's attorney." Tex.

Fam.Code Ann. § 52.025(c) (West 2008). However, there is no requirement that such a person be present. *See Cortex v. State,* 240 S.W.3d 372, 380 (Tex.App.-Austin 2007, no pet).

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

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

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

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

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

ONCE A JUVENILE HAS BEEN CERTIFIED TO ADULT COURT, OBTAINING HIS CONFESSION IS GOVERNED BY THE RULES OF THE CODE OF CRIMINAL PROCEDURE.

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

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

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

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

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

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

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

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

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

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

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

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

Held: Affirmed

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

In this case there is no evidence appellant ever invoked his right to counsel in the context of a custodial interrogation. Neither appellant's own testimony (that in June 2008, he told law enforcement and the magistrate he did not want to talk) nor Lieutenant Castañeda's testimony (that an attorney arrived at the Harlingen police station and stated no one could speak to appellant) showed that appellant invoked his Miranda rights during a custodial interrogation. Therefore, the trial court properly denied appellant's motion to suppress his written statement because the record did not show that appellant's statement was obtained in violation of his rights under the Fifth and Sixth

Amendments to the United States Constitution. See id. (citing Montejo); see also Montejo, 556 U.S. at 689 (explaining the Sixth Amendment does not categorically prohibit law-enforcement officers from approaching a defendant and asking him to consent to custodial interrogation solely because he is represented by counsel); Montelongo v. State, 681 S.W.2d 47, 53–54 (Tex.Crim.App.1984) (explaining the trial court may reject the accused's testimony at a suppression hearing and believe the police officers' testimony instead; holding that absent an accused's clear invocation of the right to counsel during custodial interrogation, an attorney's unsolicited advice to not give a statement is not an invocation of the right to have counsel present during custodial interrogation). Accordingly, we overrule appellant's first issue.

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

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

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

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

Neither Family Code section 51.095 ("Admissibility of a Statement of a Child") nor section 54.02 ("Waiver of Jurisdiction and Discretionary Transfer to Criminal Court") makes the date the transfer order is signed dispositive of whether the admissibility of a statement is governed by Family Code Section 51.095. See id. §§ 51.095, 54.02. Section 51.02 of the Family Code defines a "child" as someone who is "ten years of age or older and under 17 years of age."See id. § 51.02. The protections of Family Code section 51.095, pertaining to the admissibility of statements, apply only to "the statement of a child." See id. § 51.095. Appellant was not a child when he made his written statement because he had already turned seventeen. See id.; see also Griffin v. State, 765 S.W.2d 422, 427 (Tex.Crim.App.1989) (explaining the admissibility of a statement made at age sixteen and before juvenile court relinquished jurisdiction was properly analyzed under the Family Code); Lovell v. State, 525 S.W.2d 511, 514

(Tex.Crim.App .1975) (same); Ramos v. State, 961 S.W.2d 637, 639 (Tex.App.-San Antonio 1998, no pet.)(citing Griffin, 765 S.W.2d at 427 and applying TEX. FAM.CODE ANN. § 51.095).

Our interpretation is supported by the following language in section 54.02 which the dissent did not include as pertinent to its analysis: "[o]n transfer of the person for criminal proceedings, the person shall be dealt with as an adult and in accordance with the Code of Criminal Procedure.... The transfer of custody is an arrest."TEX. FAM.CODE ANN. § 54.02(h). Appellant had been transferred to an adult-detention facility when he made his statement. Without ruling on the issue of the precise timing of a transfer order, the Court of Criminal Appeals has interpreted the arrest language in the statute to mean that once a person is transferred to adult custody from juvenile custody, he is arrested "as an adult suspect." See Vasquez, 739 S.W.2d at 40.FN9 While the Vasquez Court stated in dicta, "[u]ntil the moment transfer is ordered, the juvenile is cloaked with the trappings of a non-criminal proceeding with attendant safeguards such as greater protections in the areas of confession law and notice requirements[,]"Vasquez does not contemplate, in dicta or otherwise, the proper procedure and timing for signing a transfer order under section 54.02 of the Family Code. See id. at 44.Thus, the dissent's emphasis on Vasquez is misplaced.

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

Conclusion: We affirm the trial court's judgment.

CRIMINAL PROCEDINGS

Wilson v. State, MEMORANDUM, No. 14-09-01040-CR, 2012 WL 6484718, Tex.Juv.Rep. Vol. 27, No. 1 ¶ 13-1-3 [Tex.App.-Hous. (14 Dist.), Dec. 13, 2012].

FOR A JUVENILE AN AUTOMATIC SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE VIOLATES THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION.

Facts: Appellant Herbert Ray Wilson was convicted of capital murder and sentenced to life in prison without the possibility of parole. On original submission, appellant argued that (1) his confession was involuntary, and (2) an automatic sentence of life without the possibility of parole violated the Eighth Amendment to the U.S. Constitution because he was a juvenile at the time of the offense. Finding no error, a panel of this Court affirmed appellant's conviction and sentence. Wilson v. State, 348 S.W.3d 32 (Tex.App.-Houston [14th Dist.] 2011, pet. ref'd). On petition for writ of certioriari, the United States Supreme Court vacated the judgment and remanded to this court for further consideration in light of Miller v. Alabama, 567 U.S. ——, 132 S.Ct. 2455 (2012).

Held: Reverse and remand for new punishment hearing only.

Opinion: Following a line of cases recognizing that juveniles may have less "moral culpability" because of their youth, the Supreme Court held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition against cruel and unusual punishment. Miller, 132 S.Ct. at 2460. The Court in Miller reasoned:

[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.Id. at 2475.

The Court specifically did not consider the argument that the Eighth Amendment categorically bars life without parole for juveniles. Id. at 2469.Although the Supreme Court thought "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," it did "not foreclose a sentencer's ability to make that judgment in homicide cases."Id . at 2469.The Court required that sentencers "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."Id. The Court cited immaturity, family environment, circumstances of the crime and the possibility of rehabilitation as important considerations for the sentencer. Id. at 2468–70.

In this case, the evidence shows that appellant was seventeen years old at the time of the offense. Under the current statutory scheme, appellant's crime carries a mandatory minimum punishment of life without the possibility of parole. SeeTex. Penal Code Ann. § 12.31(b)(2). Because appellant's punishment violates the Eighth Amendment to the United States Constitution, we sustain his second issue.

Ordinarily, this court has authority to reform an improper sentence to reflect the sentence that should have been given. SeeTex.R.App. P. 43.3. We cannot modify the sentence to impose one that is not statutorily authorized, however. See Henry v. State, No. 05–11–00676–CR, 2012 WL 3631251 (Tex.App.-Dallas Aug. 24, 2012, no pet.)(mem.op.).

Conclusion: Accordingly, we affirm the trial court's judgment on guilt for the reasons given in our original opinion. For the reasons explained above, however, we reverse the judgment as to punishment and remand to the trial court for a new punishment hearing.

Miller v. Alabama, No. 10-9646, 567 U.S. ——, 132 S.Ct. 2455, The Oyez Project at IIT Chicago-Kent College of Law. 12 January 2013, Tex.Juv.Rep. Vol. 27, No. 1 ¶ 13-1-1 (US Sup.Ct., June 25, 2012)

A MANDATORY LIFE-WITHOUT-PAROLE SENTENCE ON A FOURTEEN-YEAR-OLD CHILD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS' PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Facts: In July 2003, Evan Miller, along with Colby Smith, killed Cole Cannon by beating Cannon with a baseball bat and burning Cannon's trailer while Cannon was inside. Miller was 14 years old at the time. In 2004, Miller was transferred from the Lawrence County Juvenile Court to Lawrence County Circuit Court to be tried as an adult for capital murder during the course of an arson. In 2006, a grand jury indicted Miller. At trial, the jury returned a verdict of guilty. The trial court sentenced Miller to a mandatory term of life imprisonment without the possibility of parole.

Miller filed a post trial motion for a new trial, arguing that sentencing a 14-year-old to life without the possibility of parole constituted cruel and unusual punishment in violation of the Eighth Amendment. The trial court denied the motion. On appeal, the Alabama Court of Criminal Appeals affirmed the lower court's decision. The Supreme Court of Alabama denied Miller's petition for writ of certiorari.

Held: Writing for a 5-4 majority, Justice Elena Kagan reversed the Arkansas and Alabama Supreme Courts' decisions and remanded.

Opinion: The Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders. Pp. 6–27. (a) The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." Roper v. Simmons, 543 U. S. 551, 560. That right "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' " to both the offender and the offense. Ibid. Two strands of precedent reflecting the concern with proportionate punishment come together here. The first has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. See, e.g., Kennedy v. Louisiana, 554 U. S. 407. Several cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, Roper v. Simmons held that the Eighth Amendment bars capital punishment for children, and Graham v. Florida, 560 U. S. ___, concluded that the Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted of a non- homicide offense. Graham further likened life without parole for juveniles to the death penalty, thereby evoking a second line of cases. In those decisions, this Court has required sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death. See, e.g., Woodson v. North Carolina, 428 U. S. 280 (plurality opinion). Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life without parole for juveniles violates the Eighth Amendment.

As to the first set of cases: Roper and Graham establish that children are constitutionally different from adults for sentencing purposes. Their " 'lack of maturity' " and " 'underdeveloped sense of responsibility' " lead to recklessness, impulsivity, and heedless risk-taking. Roper, 543 U. S., at 569. They "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. Ibid. And because a child's character is not as "well formed" as an adult's, his traits are "less fixed" and his actions are less likely to be "evidence of irretrievabl[e] deprav[ity]." Id., at 570. Roper and Graham emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders,

even when they commit terrible crimes. While Graham's flat ban on life without parole was for nonhomicide crimes, nothing that Graham said about children is crime specific. Thus, its reasoning implicates any life-without-parole sentence for a juvenile, even as its categorical bar relates only to non- homicide offenses. Most fundamentally, Graham insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.

The mandatory penalty schemes at issue here, however, prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. This contravenes Graham's (and also Roper's) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children. Graham also likened life-without-parole sentences for juveniles to the death penalty. That decision recognized that life-without-parole sentences "share some characteristics with death sentences that are shared by no other sentences." 560 U. S., at ___. And it treated life without parole for juveniles like this Court's cases treat the death penalty, imposing a categorical bar on its imposition for nonhomicide offenses. By likening life-without-parole sentences for juveniles to the death penalty, Graham makes relevant this Court's cases demanding individualized sentencing in capital cases. In particular, those cases have emphasized that sentencers must be able to consider the mitigating qualities of youth. In light of Graham's reasoning, these decisions also show the flaws of imposing mandatory life- without-parole sentences on juvenile homicide offenders. Pp. 6−17. (b)

The counterarguments of Alabama and Arkansas are unpersuasive. Pp. 18–27. (1) The States first contend that Harmelin v. Michigan, forecloses a holding that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment. Harmelin declined to extend the individualized sentencing requirement to noncapital cases "because of the qualitative difference between death and all other penalties." Id., at 1006 (KENNEDY, J., concurring in part and concurring in judgment). But Harmelin had nothing to do with children, and did not purport to apply to juvenile offenders. Indeed, since Harmelin, this Court has held on multiple occasions that sentencing practices that are permissible for adults may not be so for children. See Roper, 543 U. S. 551; Graham, 560 U. S ___.

The States next contend that mandatory life-without-parole terms for juveniles cannot be unconstitutional because 29 jurisdictions impose them on at least some children convicted of murder. In considering categorical bars to the death penalty and life without parole, this Court asks as part of the analysis whether legislative enactments and actual sentencing practices show a national consensus against a sentence for a particular class of offenders. But where, as here, this Court does not categorically bar a penalty, but instead requires only that a sentencer follow a certain process, this Court has not scrutinized or relied on legislative enactments in the same way. See, e.g., Sumner v. Schuman, 483 U. S. 66. In any event, the "objective indicia of society's standards," that the States offer do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment. Fewer States impose mandatory life-without-parole sentences on juvenile homicide offenders than authorized the penalty (life-without-parole for nonhomicide offenders) that this Court invalidated in Graham. And as Graham and Thompson v. Oklahoma, explain, simply counting legislative enactments can present a distorted view. In those cases, as here, the relevant penalty applied to juveniles based on two separate provisions: One allowed the transfer of certain juvenile offenders to adult court, while another set out penalties for any and all individuals tried there. In those circumstances, this Court reasoned, it was impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice). The same is true here. Pp. 18–25. (2)

The States next argue that courts and prosecutors sufficiently consider a juvenile defendant's age, as well as his background and the circumstances of his crime, when deciding whether to try him as an adult. But this argument ignores that many States use mandatory transfer systems. In addition, some lodge the decision in the hands of the prosecutors, rather than courts. And even where judges have transfer-stage discretion, it has limited utility, because the decision maker typically will have only partial information about the child or the circumstances of his offense. Finally, because of the limited sentencing options in some juvenile courts, the transfer decision may present a choice between a light sentence as a juvenile and standard sentencing as an adult. It cannot substitute for discretion at post trial sentencing.

Conclusion: The Court holds that the Eighth Amendment's prohibition against cruel and unusual punishment forbids the mandatory sentencing of life in prison without the possibility of parole for juvenile homicide offenders. Children are constitutionally different from adults for sentencing purposes. While a mandatory life sentence for adults does not violate the Eighth Amendment, such a sentence would be an unconstitutionally disproportionate punishment for children.

No. 10−9646, 63 So. 3d 676, and No. 10−9647, 2011 Ark. 49, ___ S. W. 3d ___, reversed and remanded. KAGAN, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. BREYER, J., filed a concurring opinion, in which SOTOMAYOR, J., joined. ROBERTS, C. J., filed a

dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined. ALITO, J., filed a dissenting opinion, in which SCALIA, J., joined.

Dissent: Justice Stephen G. Breyer filed a concurring opinion. He argued for an additional determination that the offender actually killed or intended to kill the robbery victim. Without such a determination, the State could not pursue a mandatory life sentence. Justice Sonia Sotomayor joined in the concurrence.

Dissent: Chief Justice John G. Roberts, Jr. filed a dissenting opinion. He reasoned that the Court's role is to apply the law, not to answer questions about morality and social policy. The majority did not sufficiently characterize the punishment as unusual, therefore the punishment did not violate the Eighth Amendment. Justices Antonin Scalia, Clarence Thomas, and Samuel A. Alito joined in the dissent.

DEFENSE COUNSEL—

Ex Parte Bell IV, No AP-76808, 2012 WL 1882270, Tex.Juv.Rep. Vol. 26, No. 3 ¶ 12-3-6 (Tex.Crim.App., 5/23/12).

COUNSEL RENDERED INEFFECTIVE; JUVENILE FELONY CONVICTION IS NOT AVAILABLE AS THE PREDICATE FELONY FOR THE OFFENSE OF FELON IN POSSESSION OF A FIREARM.

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

Held: Relief granted

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

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

DETERMINATE SENTENCE TRANSFER—

Thorn v. State, MEMORANDUM, No. 12-10-00287-CR, 2011 WL 5877021, Tex.Juv.Rep. Vol. 26, No. 1 ¶ 12-1-1B (Tex.App.-Tyler, 11/23/11).

FAILURE TO OBJECT AND REQUEST A HEARING ON ADMISSION OF DOCUMENTS, WAIVES ERROR TO TRIAL COURTS RESPONSIBILITY TO PROVIDE THE DOCUMENTS AT LEAST A DAY BEFORE THE HEARING.

Facts: The State filed a petition in April 2009 alleging that Appellant, who was then seventeen years of age, had committed a delinquent act. Specifically, the State alleged that he committed the felony offense of aggravated sexual assault. In June 2009, the State filed a petition requesting the juvenile court to waive its original jurisdiction and transfer this matter to district court where Appellant could be prosecuted as an adult.

The juvenile court held a hearing on the State's petition in August 2009. At the conclusion of the hearing, the juvenile court waived its jurisdiction and transferred the matter to district court. In the district court, Appellant pleaded guilty to the felony offense of indecency with a child. There was no plea agreement, and the trial court assessed a sentence of imprisonment for twelve years. This appeal followed.

In his first and second issues, Appellant argues that the juvenile court lacked jurisdiction to transfer his case to district court because it failed to serve his mother in advance of the transfer hearing and because all of the relevant documents were not provided to him prior to the transfer hearing.

Held: Affirmed

Memorandum Opinion: There are a number of procedural requirements that must be met before a juvenile court may waive its jurisdiction and transfer a child to district court. Two of those requirements are at issue here. The first requirement is that a juvenile court must issue a summons to the child and the child's parent, guardian, or custodian before holding a hearing. SeeTEX. FAM.CODE ANN. § 53.06(a), 54.02(b) (West 2008 & Supp.2010). This requirement is placed on the juvenile court, and the court lacks jurisdiction to transfer the matter to district court if it does not comply with the summons requirement. See Carlson v. State, 151 S.W.3d 643, 645–46 (Tex.App.-Eastland 2004, no pet.)(citing Grayless v. State, 567 S.W.2d 216 (Tex.Crim.App.1978); Ex parte Burkhart, 253 S.W. 259, 260 (Tex.Crim.App.1923) (op. on reh'g)).

The second requirement is that the court must provide to the child any written material it may consider at the hearing. The present law requires that this material be provided at least five days prior to the transfer hearing. SeeTEX. FAM.CODE ANN. § 54.02(e) (West Supp.2010). The previous requirement had been that the materials be provided one day in advance, and the law amending the statute continued in effect the previous law for adjudications of conduct that occurred before September 1, 2009. See Act of June 16, 1973, 63rd Leg., R.S., ch. 544, 1973 Tex. Gen. Laws 1460, 1476, amended by Act of Sept. 1, 2009, 81st Leg., ch. 1354, § 1, 2009 Tex. Gen. Laws 4287, 4287–88.

With respect to the requirement that a juvenile be provided with written material in advance of the hearing, Appellant argues that there is nothing in the record to indicate that he was provided with the written material in advance of the hearing as required by statute.

The documents considered by the court consist of reports from Child Protective Services, a report from the juvenile probation department, and a report and two addenda to that report from James Brown. Appellant is correct that there is no formal showing that the juvenile court provided the documents to his counsel as required by the statute. But there is also no showing that the documents were not provided, and Appellant did not object when the documents were introduced.

As the State notes, Appellant's counsel submitted a bill for her services in which she records that she received and reviewed the report and the two addenda from “Jim Brown” on June 25, 2009, July 24, 2009, and August 4, 2009, and that she met with Brown on July 20, 2009. Her billing also shows that she received and reviewed other items of discovery during the summer of 2009. In addition, Appellant's counsel appeared to have reviewed Brown's reports and specifically directed the court to the “last report from Mr. Brown” and to some of his conclusions that were helpful to Appellant's position during her presentation.

Conclusion: After considering all of the evidence, we cannot conclude that the juvenile court violated Section 54.02(e) by not providing written documents at least a day before the hearing. It appears that the documents were provided. Because Appellant did not object to the admission of the documents, and because there was no hearing on the issue, there is no basis on which we can conclude that the juvenile court did not comply with its responsibility to provide the documents at least a day before the hearing. We overrule Appellant's second issue.

J.C.O. v. State, MEMORANDUM, No. 04-11-00019-CR, 2012 WL 76968, Tex.Juv.Rep. Vol. 26, No. 1 ¶ 12-1-7 (Tex.App.-San Antonio, 1/11/12).

IN A DETERMINATE SENTENCE PROBATION TRANSFER TO ADULT COURT, SECTION 54.05(D) OF THE FAMILY CODE DOES NOT REQUIRE PERSONAL SERVICE, ONLY REASONABLE NOTICE OF THE HEARING.

Facts: The sole issue presented in this appeal is whether a juvenile must be personally served with a motion to transfer filed pursuant to section 54.051 of the Texas Family Code. Appellant argues that a district court to which a juvenile is transferred lacks jurisdiction absent personal service.

Held: Affirmed

Memorandum Opinion: Section 54.051 of the Texas Family Code permits the State to file a motion to transfer a juvenile, who is placed on probation that will continue after the juvenile's 18th birthday, to an appropriate district court. Tex. Fam.Code Ann. § 54.051(a) (West 2008). The hearing on the State's motion must be conducted “in the same manner as a hearing on a motion to modify disposition under Section 54.05.”Id. at § 54.051(b).Section 54.05(d) requires that “reasonable notice” of a hearing to modify disposition be given to all parties. Id. at § 54.05(d).

Notwithstanding the statutory language requiring that only reasonable notice be given, appellant argues that personal service is required because a hearing to modify disposition is triggered by the filing of a petition, and Section 53.06 requires personal service of petitions. Id. at §§ 53.06, 54.05(d). Appellant's argument ignores that the

Texas Legislature has "provided different rules for different stages of a juvenile proceeding." In re J.P., 136 S.W.3d 629, 630 (Tex.2004). This court has previously recognized that reduced due-process requirements apply to a hearing to modify a juvenile's disposition. In re S.J., 940 S.W.2d 332, 339 (Tex.App.-San Antonio 1997, no writ). Although personal service is required for petitions at the adjudication stage, only reasonable notice is required of a hearing to modify disposition. In re T.E., No. 03–04–00590–CV, 2005 WL 1583463, at *2 (Tex.App.-Austin July 7, 2005, no pet.)(mem.op.); In re D.E.P., 512 S.W.2d 789, 791 (Tex. Civ. App–Houston [14th Dist.] 1974, no writ); Tex. Fam.Code Ann. § 54.05(d) (West 2008). The only authority appellant cites to support his contention that he was entitled to personal service is Franks v. State, 498 S.W.2d 516, 518 (Tex.Civ.App.-Texarkana 1973, no writ).Franks, however, was decided prior to the effective date of the Juvenile Justice Code (contained in Title 3 of the Texas Family Code), which sets forth the different rules for the different stages of a juvenile proceeding and requires only reasonable notice of a hearing to modify disposition. See Act of May 25, 1973, 63rd Leg., R.S., ch. 544, 1973 Tex. Gen. Laws 1460); In re J.P., 136 S.W.3d at 630.

Conclusion: Because Section 54.05(d) requires only reasonable notice of a hearing on a motion to transfer under Section 54.051, we overrule appellant's contention that personal service was required and affirm the trial court's judgment.

DISPOSITION PROCEEDINGS—

Diamond v. State, Nos. 09–11–00478–CR, 09–11–00479–CR, --- S.W.3d ----, 2012 WL 1431232, Tex.Juv.Rep. Vol. 26, No. 2 12-2-3B (Tex.App.-Beaumont, 4/25/12).

NINETY-NINE YEAR SENTENCE FOR VIOLATING AGGRAVATED ROBBERY DEFERRED ADJUDICATION DID NOT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Facts: Terrell Dewayne Diamond appeals from the trial court's revocation of his deferred adjudication community supervision and imposition of sentence in two cases. Because Diamond was under the age of seventeen years, the cases were initially referred to the juvenile court. That court waived its jurisdiction and transferred the matters to the district court for trial as an adult.

In accordance with a plea-bargain agreement, Diamond entered a plea of guilty to the offense of the unauthorized use of a motor vehicle. *See* Tex. Penal Code Ann. § 31.07 (West 2011). The trial court found the evidence sufficient to find Diamond guilty, deferred further proceedings, and placed Diamond on community supervision for five years. In the second case, Diamond entered a plea of guilty to the offense of aggravated robbery. *See* Tex. Penal Code Ann. § 29.03 (West 2011). The trial court found evidence sufficient to find Diamond guilty, deferred further proceedings, placed Diamond on community supervision for ten years, and assessed a $1,000 fine. The State subsequently filed motions to revoke Diamond's unadjudicated community supervision in both cases. At the hearing on the motion to revoke, Diamond pled "true" to four violations of the conditions of his community supervision. The trial court found that Diamond violated the terms of his community supervision, found him guilty of aggravated robbery, and assessed his punishment at 99 years' confinement. The trial court further found Diamond guilty of the unauthorized use of a motor vehicle, and assessed his punishment at 2 years' confinement, to run consecutive to his sentence for the aggravated robbery charge.

Diamond filed a motion to reconsider the imposition of his state jail sentence. In both cases Diamond also filed a motion for new trial and motion in arrest of judgment wherein Diamond argued that the verdict is contrary to the law and the evidence, and that his sentence is inappropriate and unreasonable. As there is not a signed order in the record denying Diamond's motions for new trial, we deem they were denied by operation of law. *See* Tex.R.App. P. 21.8. Diamond appealed both cases.

In his appeal in cause numbers 7889 and 7890, Diamond argues that he has been denied a complete record. In his appeal in cause number 7890, Diamond raises three additional issues. He argues that the record fails to establish that the trial court had proper jurisdiction, that the trial court erred in failing to grant his motion for new trial, and that his sentence for aggravated robbery constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article 1.09 of the Texas Code of Criminal Procedure.

Held: Affirmed

Opinion: In Diamond's third and fourth issue in cause number 7890, he contends that the trial court should have granted his motion for a new trial because his sentence is disproportionate and constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and article 1.09 of the Texas

Code of Criminal Procedure [FN2]. The State argues that Diamond did not object and therefore waived any claim of disproportionate sentence on appeal.

FN2. Diamond has briefed his article 1.09 claim with his issue regarding the Eighth Amendment. He has not by argument or authority established that the cruel and unusual provisions of the state statute are broader and offer greater protection than the Eighth Amendment. Therefore, nothing is presented for review. *See Johnson v. State,* 853 S.W.2d 527, 533 (Tex.Crim.App.1992).

To preserve error for appellate review, the complaining party must present a timely and specific objection to the trial court, and obtain a ruling. Tex.R.App. P. 33.1(a). A party's failure to specifically object to an alleged disproportionate or cruel and unusual sentence in the trial court or in a post-trial motion waives any error for the purposes of appellate review. *Rhoades v. State,* 934 S.W.2d 113, 120 (Tex.Crim.App.1996); *Noland v. State,* 264 S.W.3d 144, 151 (Tex.App.-Houston [1st Dist.] 2007, pet. ref'd). While Diamond did not raise any objections when the trial court sentenced him, he did subsequently file post-sentence motions complaining about the alleged excessive sentence. We find that Diamond preserved this issue for review.

Generally, a sentence that is within the range of punishment established by the Legislature will not be disturbed on appeal. *See Jackson v. State,* 680 S.W.2d 809, 814 (Tex.Crim.App.1984). The appellate court rarely considers a punishment within the statutory range for the offense excessive, unconstitutionally cruel, or unusual under either Texas law or the United States Constitution. *See Kirk v. State,* 949 S.W.2d 769, 772 (Tex.App.-Dallas 1997, pet. ref'd); *see also Jackson v. State,* 989 S.W.2d 842, 846 (Tex.App.-Texarkana 1999, no pet.). Aggravated robbery is a first-degree felony, which carries a punishment range of confinement from five to ninety-nine years. Tex. Penal Code Ann. §§ 12.32, 29.03(b) (West 2011). Diamond's sentence of ninety-nine years is within the statutory range authorized by the Legislature for the crime of aggravated robbery. *See id.*

Diamond failed to prove that his sentence was grossly disproportionate to the offense he committed. Further, there is no evidence in the record of sentences imposed for similar offenses by which we can make a reliable comparison. *See Jackson,* 989 S.W.2d at 846. Diamond cites to a number of cases wherein the appellate courts have found lengthy sentences constitutional. *See Thomas v. State,* 916 S.W.2d 578, 584 (Tex.App.-San Antonio 1996, no pet.) (40–year conviction constitutional noting appellant had two prior felonies, including theft from a person and robbery); *Phillips v. State,* 887 S.W.2d 267, 268–69 (Tex.App.-Beaumont 1994, pet. ref'd) (99 years for aggravated sexual assault after adjudication based on failure to attend offenders program and failure to wear electronic monitoring device); *Lackey v. State,* 881 S.W.2d 418, 420–21 (Tex.App.-Dallas 1994, pet. ref'd) (35–year sentence for enhanced shoplifting constitutional when punishment enhanced by prior felony convictions for burglary and robbery); *Nevarez v. State,* 832 S.W.2d 82, 86–87 (Tex.App.-Waco 1992, pet. ref'd) (life sentence constitutional when punishment enhanced by two prior felony convictions); *Smallwood v. State,* 827 S.W.2d 34, 37–38 (Tex.App.-Houston [1st Dist.] 1992, pet. ref'd) (50–year sentence found constitutional when appellant's punishment was enhanced pursuant to the habitual offenders statute and when appellant had other theft offenses and felony convictions); *Simpson v. State,* 668 S.W.2d 915, 919–20 (Tex.App.-Houston [1st Dist.] 1984, no pet.) (life sentence constitutional when appellant convicted for possession of cocaine had two prior felony convictions). Diamond argues each of these cases had aggravating factors not present in his case. We disagree. During his sentencing hearing, the trial court questioned Diamond about the circumstances surrounding the aggravated robbery offense for which he had previously pleaded guilty. Diamond stated that while he was robbing a man, he hit him with a rock and knocked the man unconscious. He admitted that after knocking the man unconscious, he left the man to die while his “co-partner” continued beating the unconscious man. Diamond indicated to the court that his drug addiction was the source of his problems. Further, contrary to Diamond's argument, his community supervision violations were not purely administrative. His violations included his testing positive for marijuana use twice and breaking curfew by being at a residence other than his own at 2:17 a.m. The same drug problems Diamond had when he nearly killed a man, he continued to struggle with while on community supervision. The record indicates that the trial court also considered Diamond's juvenile offenses, which were substantial, including among others, second-degree robbery, theft, unauthorized use of a motor vehicle, and aggravated robbery. The trial court was lenient in granting Diamond community supervision in the first instance. The trial court apparently sought to instill in Diamond the seriousness of his situation by imposing a 180–day up-front time period in jail. Diamond was placed on community supervision to participate in programs to reform his behavior. However, his testimony established that he did not fulfill his community supervision requirements. Prior to sentencing, the trial court not only had the statements made by Diamond and his pleas of true as to the violations of his community supervision, but also had his original plea of guilty to the indictment of aggravated robbery. The trial court was very explicit regarding the reasons for the sentence imposed, wherein the court stated:

And the only reason that somebody's not dead yet is because we just haven't given you enough time out on the street to make that happen. But I believe in my heart that if you're given an opportunity to get back out on the street you're going to kill the next one.

Based on the record before us, we are unable to conclude that Diamond's sentence constitutes a cruel and unusual punishment. We overrule Diamond's constitutional challenges to the length of the sentence assessed by the trial court in cause number 7890.

Conclusion: Having overruled Diamond's issues in cause numbers 7889 and 7890, we affirm the trial court's judgment in both cases.

IMMIGRATION—

In re Interest of Erick M., No. S-11-919, --N.W.2d--, 284 Neb 340, Tex.Juv.Rep. Vol. 26 No. 4 ¶ 12-4-12 (Neb. Sup. Ct., 9/14/12).

NEBRASKA SUPREME COURT FOUND THAT THE SINCE JUVENILE WAS NOT SEEKING SPECIAL IMMIGRANT JUVENILE (SIJ) STATUS TO ESCAPE FROM PARENTAL ABUSE, NEGLECT, OR ABANDONMENT, REQUEST FOR FINDING THAT HE WAS ELIGIBLE FOR SIJ STATUS FAILED.

Facts: Erick M., a juvenile, requested that the juvenile court issue an order finding that under 8 U.S.C. § 1101(a)(27)(J) (Supp. IV 2010), he was eligible for "special immigrant juvenile" (SIJ) status. SIJ status allows a juvenile immigrant to remain in the United States and seek lawful permanent resident status if federal authorities conclude that the statutory conditions are met. Under § 1101(a) (27) (J) (i), the conditions include a state court order determining that the juvenile's reunification with "1 or both" parents is not feasible because of abuse, neglect, or abandonment. The juvenile court found that Erick did not satisfy that statutory requirement. Erick appeals.
Held: Affirmed

Opinion: Under § 1101(a) (27) (J), a juvenile's petition for SIJ status must include a juvenile court order showing that the juvenile satisfies the statutory criteria. The court's findings in an "eligibility order" are a prerequisite to SIJ status, but they are not binding on federal authorities' discretion whether to grant a petition for SIJ status.

There are two eligibility provisions under § 1101(a) (27) (J), which we will refer to as "the reunification and best interest components." Subparagraph (i) is the reunification component and has two requirements: (1) The juvenile must be one whom a state juvenile court has determined to be a dependent, or has committed to or placed under the custody of a state agency or department, or has committed to or placed with an individual or entity appointed by the state or court; and (2) "reunification with 1 or both of the immigrant's parents [must not be] viable due to abuse, neglect, abandonment, or a similar basis found under State law." Subparagraph (ii) is the best interest component. It requires a judicial or administrative finding that "it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence." If a state court finds that both of the eligibility components are satisfied, then federal authorities may grant a petition for SIJ status.

Here, the juvenile court adjudicated Erick and committed him to the care and custody of a state agency. The court committed him to the Office of Juvenile Services (OJS) in December 2010 because of two charges of being a minor in possession of alcohol. The court initially placed him in a residential treatment center. In July 2011, the juvenile court heard OJS' motion to transfer Erick to the Youth Rehabilitation and Treatment Center in Kearney, Nebraska. While in the residential treatment center, Erick had continually disappeared from the residential center, used alcohol and drugs, committed law violations, and threatened staff. Erick did not resist the motion for more restrictive custody, but his attorney stated that Erick's goal was to "get back home" and work on a rehabilitation program from there. The court sustained the motion for the transfer.

In September 2011, the court heard Erick's motion for an eligibility order for SIJ status. Erick's family permanency specialist testified that she had no contact information for Erick's father. In fact, she did not know whether paternity had ever been established. She said Erick was unsure whether his father was in Mexico or New York. She anticipated that she would continue to work with Erick's mother after OJS released Erick from the Youth Rehabilitation and Treatment Center in Kearney. She did not know of any reports or investigations of abuse or neglect by Erick's mother. Erick's mother testified that she did not know where Erick's father was and had not spoken to him in many years. She had never been accused of abusing or neglecting Erick. The court overruled Erick's motion for an eligibility order. It found that the first requirement was met because Erick was committed to a state agency or department. But the court found that the facts failed to show that reunification with Erick's mother

was not viable because of abuse, neglect, or abandonment. The court found that (1) it had removed Erick from his home because of his alcohol abuse and he had never been removed from his mother's home because of abuse, neglect, or abandonment; (2) Erick's mother had been present at almost every hearing; (3) Erick had lived with her before the court committed him to OJS; and (4) no evidence showed that he would not be returned to his mother when he was paroled or discharged from the Youth Rehabilitation and Treatment Center in Kearney.

The court concluded that there was no evidence that Erick's father had ever abused or neglected Erick. It made no findings whether he had abandoned Erick. Because the reunification component was not met, the court did not consider whether return to Erick's country of origin would be in his best interest.

As stated, this case hinges on the meaning of the federal statute's requirement that a juvenile court determine that reunification with "1 or both of the immigrant's parents" is not feasible because of abuse, neglect, or abandonment. Both parties argue that the plain language of the statute supports their interpretation.

Erick argues that § 1101(a) (27) (J) (i) requires that he show only that reunification with one parent is not feasible because of abuse, neglect, or abandonment. He contends that by using the word "or" in the phrase "1 or both," Congress intended the statute to be disjunctive. And he argues that the evidence shows his father abandoned him.

The State counters that if Congress had intended that a juvenile could satisfy the statute by showing only that reunification with one parent was not feasible, then it would not have included the words "or both." It contends that Erick's interpretation renders this language superfluous and that Congress did not intend courts to ignore the presence of a parent with whom reunification is feasible. It argues that under Erick's interpretation, a juvenile court would be required to find that the reunification component was satisfied every time the State could not identify or find a juvenile's parent, even when reunification with the other parent was appropriate. In addition, the State argues that the evidence fails to show that Erick's father ever established paternity or abandoned him.

Interpreting this statute to reach a legal conclusion presents a challenge. To construe it as something other than an indigestible lump, we turn to familiar statutory canons. Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning. We will not look beyond the statute to determine the legislative intent when the words are plain, direct, or unambiguous. But we can examine an act's legislative history when a statute is ambiguous. A statute is ambiguous if it is susceptible of more than one reasonable interpretation.

Although Erick's argument is reasonable, Congress' use of the word "or" does not necessarily decide the issue in his favor. Because "or" describes what a juvenile court must determine in the alternative, we could also reasonably interpret the phrase "1 or both" parents to mean that a juvenile court must find, depending on the circumstances, that either reunification with one parent is not feasible or reunification with both parents is not feasible. Unfortunately, there are no related provisions in the act from which we can discern Congress' intent.

A petition for SIJ status is typically filed for two general categories of juveniles: (1) for juvenile aliens who came to the United States without their parents or who began living with someone else soon after coming with their parents; and (2) for juveniles who came to the United States with one or both parents but later became a juvenile court dependent. In either circumstance, if the petitioner shows that the juvenile never knew a parent or that a parent has failed to provide care and support for the juvenile for a significant period, USCIS and courts have agreed that reunification with the absent parent or parents is not feasible because of abandonment.

But even when reunification with an absent parent is not feasible because the juvenile has never known the parent or the parent has abandoned the child, USCIS and juvenile courts generally still consider whether reunification with the known parent is an option. Thus, if the juvenile lives in the United States with only one parent and never knew the other parent, the reunification component is satisfied if reunification with the known parent is not feasible.

We believe that this result shows that the "1 or both" parents rule is consistent with Congress' intent to expand the pool of potential applicants. That is, under the "1 or both" parents rule, a juvenile is not disqualified from SIJ status solely because one parent is unknown or cannot be found and, thus, cannot be excluded from the possibility of reunification.

So we reject the State's argument that Erick was required to show that his father had established paternity before Erick could prove abandonment. Because Erick has lived with only his mother, his family circumstances appear to fall within Congress' intent that a juvenile court may sometimes focus primarily on whether reunification with only one parent (the custodial parent) is feasible. In accordance with USCIS cases, we hold that for obtaining SIJ status under § 1101(a)(27)(J), a petitioner can show an absent parent's abandonment by proof that the juvenile has never known that parent or has received only sporadic contact and support from that parent for a significant period.

Whether an absent parent's parental rights should be terminated is not a factor for obtaining SIJ status. These cases also illustrate, however, that USCIS does not consider proof of one absent parent to be the end of its inquiry under the reunification component. A petitioner must normally show that reunification with the other parent is also not feasible.

But if a juvenile lives with only one parent when a juvenile court enters a guardianship or dependency order, the reunification component under § 1101(a)(27)(J) is not satisfied if a petitioner fails to show that it is not feasible to return the juvenile to the parent who had custody. This is true without any consideration of whether reunification with the absent parent is feasible because the juvenile has a safe parent to whose custody a court can return the juvenile. In contrast, if the juvenile was living with both parents before a guardianship or dependency order was issued, reunification with both parents is usually at issue. These varied results are all consistent with Congress' intent that SIJ status be available to only those juveniles who are seeking relief from parental abuse, neglect, or abandonment.

Although a literal reading of the statute would seem to permit a state court to ignore whether reunification with an absent parent is feasible, in practice, courts and USCIS officials normally consider whether the petitioner has shown that an absent parent abused, neglected, or abandoned the juvenile.

We believe that this is the better rule. If a juvenile alien's absent parent has abused, neglected, or abandoned the juvenile, a petitioner seeking SIJ status for the juvenile should offer evidence on this issue. Thus, when ruling on a petitioner's motion for an eligibility order under § 1101(a) (27) (J), a court should generally consider whether reunification with either parent is feasible. But this case presents the exception. Because Erick was living with only his mother when the juvenile court adjudicated him, he could not satisfy the reunification component without showing that reunification with his mother was not feasible. Because he failed to satisfy this requirement, the court had no need to consider whether reunification with Erick's father was feasible. We conclude that the juvenile court did not err in concluding that Erick did not satisfy the reunification component. Erick was not seeking SIJ status to escape from parental abuse, neglect, or abandonment. There is no claim that reunification with his mother is not feasible for those reasons.

Conclusion: Congress wanted to give state courts and federal authorities flexibility to consider a juvenile's family circumstances in determining whether reunification with the juvenile's parent or parents is feasible. Erick lived with only his mother when the juvenile court adjudicated him as a dependent. So the juvenile court did not err in finding that because reunification with Erick's mother was feasible, he was not eligible for SIJ status.

PETITION AND SUMMONS—

In the Matter of X.B., No. 06-11-00122-CV, --- S.W.3d ----, 2012 WL 1889638, Tex.Juv.Rep. Vol. 26 No. 3 ¶ 12-3-4 (Tex.App.-Texarkana, 5/25/12).

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

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

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

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

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

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

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

Held: Reversed and remanded

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

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

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

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

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

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

RESTITUTION—

Gipson v. State, No. PD-1470-11, --- S.W.3d ----, 2012 WL 5503677, Tex.Juv.Rep. Vol. 26 No. 4 ¶ 12-4-14 (Tex.Crim.App., 11/14/12).

APPELLANT MUST PRESERVE ERROR FOR APPEAL WHERE HE PLED TRUE TO THE FAILURE-TO-PAY ALLEGATION WITHOUT RAISING ANY ARGUMENT THAT HE WAS UNABLE TO PAY.

Facts: The trial court revoked appellant's community supervision on the basis of appellant's plea of true to the failure-to-pay allegation alone. The State's motion to revoke proceeded on the sole allegation that appellant had "failed to pay court assessed fees as directed by the Court," to which he pled true. Those "fees" included a court-ordered fine; court costs; and fees for supervision, pre-sentence investigation, and Crime Stoppers. He signed a stipulation of evidence acknowledging that he had violated the terms and conditions of his community supervision by

failing to make these payments. Neither the motion to revoke nor the stipulation of evidence mentioned appellant's financial ability to pay the amounts due. Similarly, during the hearing on the motion to revoke, the parties stood mute regarding appellant's financial ability to pay the amounts due. Finding the failure-to-pay allegation true, the trial court revoked appellant's com-munity supervision and sentenced him to eight years' imprisonment for his underlying conviction of felony assault.

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

FN1. In relevant part, the statute states,

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

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

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

Sustaining appellant's first issue and not reaching his second, the court of appeals reversed the trial court's judgment. Gipson, 347 S.W.3d at 897. Interpreting appellant's first issue "as a challenge to the sufficiency of the evidence," the court of appeals acknowledged that a plea of true is "generally sufficient to support" revocation. Id. at 896–97 (citing Cole v. State, 578 S.W.2d 127, 128 (Tex.Crim.App.1979). The court stated, however, that "Bearden requires that to revoke community supervision and impose imprisonment, 'it must be shown that the probationer willfully refused to pay or make sufficient bona fide efforts to do so.' " Id. at 896 (quoting Lively v. State, 338 S.W.3d 140, 146 (Tex.App.—Texarkana 2011, no pet.)). The court observed that, because the motion to revoke alleged only failure to make the required payments, appellant's plea of true to that allegation did not satisfy the State's evidentiary burden under the ability-to-pay statute to prove that appellant was able to pay. Id. at 897.

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

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

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

The State explains that “[a]ppellant's plea of true not only served to prove what the State alleged but also constituted a waiver.”

Appellant responds by also reurging his direct-appeal arguments. He claims that the State had the burden to prove that his failure to pay fees was willful despite his plea of true and that, because the motion to revoke did not allege that he was able to pay the fees, his plea of true does not constitute evidence of his ability to pay.

Held: Remanded for further proceedings

Opinion: This Court has held that a defendant who states that he does not desire to contest a motion to revoke may not complain, on appeal, of a trial court's failure to hear evidence on the motion. See Mitchell, 482 S.W.2d at 222–23; Cole, 578 S.W.2d at128 (“[S]ufficiency of the evidence could not be challenged in the face of a plea of true”). However, these holdings pre-dated Marin v. State, in which we explained that certain requirements and prohibitions are absolute and that certain rights must be implemented unless expressly waived. 851 S.W.2d 275, 279 (Tex.Crim.App.1993). These holdings also pre-dated enactment of the ability-to-pay statute. See TEX.CODE CRIM. PROC. art. 42.12 § 21(c).

In Menefee v. State, we were confronted with the similar issue of whether “the appellant procedurally defaulted his [Texas Code of Criminal Procedure] Article 1.15 sufficiency claim because he made no complaint about” any evidentiary deficiency at trial. 287 S.W.3d 9, 18 (Tex.Crim.App.2009). “Because issues of error preservation are systemic in first-tier review courts,” we remanded the question to the court of appeals to decide the question within the Marin framework. Id.; see also, e.g., Patterson v. State, 204 S.W.3d 852, 857 (Tex.App.Corpus Christi 2006, pet. ref'd) (deciding appellant's accomplice-witness-corroboration sufficiency challenge under Texas Code of Criminal Procedure art. 38.14 not subject to default under Marin framework).

As in Menefee, we must remand the State's procedural arguments to the court of appeals to determine whether, by pleading true to an allegation that he failed to pay and by failing to assert his inability to pay, a defendant waives or forfeits a claim that he is unable to pay. See Menefee, 287 S.W.3d at 18. Although the court of appeals failed to address the State's procedural arguments, it did analyze the ability-to-pay statute and federal constitutional requirements in its sufficiency analysis. We, therefore, must evaluate that analysis to the extent that it may impact this case on remand.

We agree with the State that the court of appeals's opinion fails to address the State's procedural challenge regarding preservation of appellant's sufficiency claim. A court of appeals must hand down a written opinion “that addresses every issue raised and necessary to final disposition of the appeal.” TEX.R.APP. P. 47.1; Keehn v. State, 233 S.W.3d 348, 349 (Tex.Crim.App.2007) (per curiam). “[I]ssues of error preservation are systemic in first-tier review courts”; such issues “must be reviewed by the courts of appeals regardless of whether the issue is raised by the parties.” Menefee, 287 S.W.3d at 18; Haley v. State, 173 S.W.3d 510, 515 (Tex.Crim.App.2005). An appellate court “may not reverse a judgment of conviction without first addressing any issue of error preservation.” Meadoux v. State, 325 S.W.3d 189, 193 n.5 (Tex.Crim.App.2010). Because the court of appeals did not address the State's procedural questions before reversing the case on insufficiency grounds, we sustain the State's sole issue and reverse the judgment of the court of appeals.

Conclusion: The court of appeals erred in failing to address the State's procedural arguments before reversing the trial court's judgment revoking appellant's community supervision on sufficiency grounds. We reverse the judgment of the court of appeals and remand the case for proceedings consistent with this opinion.

In the Matter of R.A., No. 03-11-00054-CV, 2012 WL 2989224, Tex.Juv.Rep. Vol. 26 No. 3 ¶ 12-3-10 (Tex.App.-Austin, 7/20/12).

DISPOSITION RECORD SHOWED THAT JUVENILE’S MOTHER HAD THE FINANCIAL ABILITY TO REIMBURSE THE COUNTY FOR PAYMENTS OF HER SON'S ATTORNEY.

Facts: On November 12, 2010, the State filed a petition alleging that R.A. had engaged in delinquent conduct. See id. § 53.04 (West 2008). The petition alleged that on or about August 31, 2010, R.A. “did then and there, in the course of committing theft of property and with intent to obtain or maintain control of said property, intentionally or knowingly threaten or place [D.H.] in fear of imminent bodily injury or death” and that such conduct violated section 29.02 of the penal code. On November 18, 2010, the trial court issued an order appointing counsel for R.A. on the basis that “[n]o parent has appeared in regard to this Cause after being duly notified on more than one occasion” and “the Juvenile–Respondent is unable to afford an attorney for himself at this time.”

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

After hearing testimony, the trial court orally announced its finding that the robbery allegation was supported by evidence beyond a reasonable doubt and therefore concluded that R.A. was a juvenile who had engaged in delinquent conduct. See Tex. Fam.Code Ann. §§ 51.03 (defining delinquent conduct as "conduct ... that violates a penal law of this state or of the United States punishable by imprisonment or confinement in jail."), 54.03 (providing for adjudication hearing to determine if juvenile engaged in delinquent conduct).

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

> IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT that [R.A.] be and is hereby committed to the care, custody, and control of the Texas Youth Commission ... for an in-determinate period of time not to exceed his nineteenth birthday or until duly discharged....
>
> IT IS FURTHER ORDERED that the parent of the Juvenile–Respondent, Deandrea [ ] pay attorney's fees incurred in this matter in the amount of $810.00, to be paid in monthly payments of $67.50 per month....
>
> The Court finds that Deandrea [ ] is the parent responsible for supporting the Juvenile–Respondent. The court further finds Deandrea [ ] is able to make payments for the support of the Juvenile–Respondent.
>
> IT IS THEREFORE ORDERED that Deandrea [ ] make payments to the Texas Youth Commission ... in the amount of $500.00/mo. for the support of the Juvenile–Respondent on the first day of each month that the Juvenile–Respondent is committed to the Texas Youth Commission.

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

Held: Affirmed

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

The State urges us to reject this argument for two reasons. First, the State asserts that R.A. has no standing to challenge the trial court's order as to attorney's fees because the order "was directed solely toward Appellant's parent, not him." Second, the State asserts that there was sufficient evidence to support the order. The trial court heard Deandrea testify about her income and made a finding that she was able to pay $500 per month for the support, maintenance, and education of R.A. As a result, the State contends, there was sufficient evidence for the court to require Deandrea to pay an additional $67.50 per month in attorney's fees.

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

disposes of R. A.'s case under section 54.04. See id.§ 54.04(d)(2). It therefore appears that R.A. may appeal on the basis of that requirement.

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

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

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

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

> (k) Subject to Chapter 61, the juvenile court may order the parent or other person responsible for support of the child to reimburse the county for payments the county made to counsel appointed to represent the child under Subsection (f) or (g)....
>
> (l) The court may not order payments under Subsection (k) that exceed the financial ability of the parent or other person responsible for support of the child to meet the payment schedule ordered by the court. Id.§ 51.10(k), (l).

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

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

Furthermore, in the present case, the record supports the trial court's order requiring Deandrea to repay attorney's fees. At the disposition hearing, Deandrea testified that she received a total of $1,408 in monthly income, $688 of which she received for the benefit of R.A. Subsequently, in addition to ordering Deandrea to pay $67.50 per month for R. A.'s attorney's fees, the court found that Deandrea could afford to pay $500 per month for R. A.'s support and ordered her to pay TYC accordingly. The total of these payments would be $567.50, which is $120.50 less than Deandrea had testified to receiving on R. A.'s behalf each month.

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

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

**WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT—
CONFESSIONS—**

Navarro v. State, MEMORANDUM, No. 01-11-00139-CR, 01-11-00140-CR, , 2012 WL 3776372, Tex.Juv.Rep. Vol. 26 No. 4 ¶12-4-4 (Tex.App.-Hous. (1 Dist.), 8/30/12).

IN DISCRETIONARY TRANSFER TO ADULT COURT, JUVENILE WAS NOT ENTITLED TO MOTION TO SUPPRESS HEARING PRIOR TO CHILD'S TRANSFER TO ADULT COURT.

Facts: After appellant, then fifteen years of age, was charged with the murder of Matthew Haltom FN4 and the aggravated assaults of Joe Eodice FN5 and Joel Arnold, the State filed a Petition for Discretionary Transfer in the juvenile court, requesting that it waive its jurisdiction and certify appellant to stand trial as an adult in criminal district court.

FN4. Trial court cause number 10–DCR–05236A; appellate cause number 01–11–00139–CR.

FN5. Trial court cause number 08–DCR–050238; appellate cause number 01–11–00140–CR.

Before the transfer hearing, appellant moved to suppress certain statements that he had made to police officers. The State argued that the juvenile court was not required to consider the motion because a transfer hearing is "only a baseline finding as to whether or not [the juvenile court believes] that there is probable cause" that appellant committed the offense. The juvenile court agreed that appellant was not entitled to a hearing on his motion, and, at the conclusion of the transfer hearing, it granted the State's petition.

Held: Affirmed

Memorandum Opinion: At a transfer and certification hearing, a juvenile court need only determine if there is "probable cause" that the juvenile committed the charged offense. In re D.W.L., 828 S.W.2d 520, 524 (Tex.App.-Houston [14th Dist.] 1992, no writ). The transfer and certification hearing is a nonadversary preliminary hearing, in which the juvenile court may rely upon hearsay as well as written and oral testimony. L.M.C. v. State, 861 S.W.2d 541, 542 (Tex.App.-Houston [14th Dist.] 1993, no writ). A transfer hearing "does not require the fine resolution of conflicting evidence that an adjudication of guilt or innocence requires"; the hearing's only goal is to determine the proper forum in which to adjudicate the defendant's guilt or innocence. Id.

Numerous courts of appeals have held that juvenile courts are not required to consider the admissibility of statements at a transfer hearing. See, e.g., In re T.L.C., 948 S.W.2d 41, 44 (Tex.App.-Houston [14th Dist.] 1997, no writ); L.M.C., 861 S.W.2d at 542; In re M.E.C., 620 S.W.2d 684, 686–87 (Tex.Civ.App.-Dallas 1981, no writ); In re Y.S., 602 S.W.2d 402, 404–05 (Tex.Civ.App.-Amarillo 1980, no writ). For example, in L.M.C., a juvenile defendant argued that the juvenile court erred in admitting his confession at a transfer hearing. 861 S.W.2d at 541–42. The court noted that the juvenile court was required to consider whether there was "evidence on which a grand jury may be expected to return an indictment," and a grand jury is not bound by the rules of evidence in making a probable cause determination. Id. at 542 (citing TEX. FAM.CODE ANN. § 54.02(f)(3) (Vernon 1986)). The court further noted that a juvenile defendant's constitutional rights would not be violated by considering the confession during a transfer hearing because:

A transfer hearing does not require the fine resolution of conflicting evidence that an adjudication of guilt or innocence requires.... Moreover, appellant's rights will be fully protected when the case reaches trial, whether it ultimately takes place before the juvenile court or the criminal district court.

In support of his argument that the juvenile court erred in not holding a hearing on his motion to suppress evidence, appellant relies on two cases from the San Antonio Court of Appeals. See In re S.A.R., 931 S.W.2d 585 (Tex.App.-San Antonio 1996, writ denied); R.E.M. v. State, 541 S.W.2d 841 (Tex.App.-San Antonio 1976, writ ref d n.re.). In S.A.R., the juvenile defendant argued that his statements were inadmissible at the transfer hearing because they were obtained in violation of section 51.09(b) of the Texas Family Code, which provides that "the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if" the child is read his legal rights and told the consequences and sentencing possibilities of admitting to various crimes. 931 S.W.2d at 587 (citing TEX. FAM.CODE ANN. § 51.09(b) (Vernon Supp.1996)). The State argued that it

was unnecessary to consider the admissibility of the statements because "a waiver and certification hearing" is "not adjudicatory in nature." Id. The court held that the plain language of section 51.09(b), which refers to "any future proceeding," requires the juvenile court to consider the admissibility of the juvenile defendant's statements at the transfer hearing. Id.

The court in S.A.R. relied in part on R.E.M., in which the juvenile defendant argued that the juvenile court improperly relied on witness testimony from a previous transfer hearing in waiving its jurisdiction. R.E.M., 541 S.W.2d at 845. The juvenile defendant relied on the evidentiary rule that "the testimony of a witness given at a prior trial of the same case" may only be introduced into evidence if the witness is otherwise unable to testify. Id. (citing Houston Fire & Cas. Ins. Co. v. Brittian, 402 S.W.2d 509, 510 (Tex.1966)). The court held that there is "no reason why the rule should not be applied in a hearing for the purpose of determining whether a youthful offender is going to be deprived of the protection afforded by the juvenile court system." Id. The court concluded that the juvenile court erred in relying on the prior witness testimony, and it remanded the case to juvenile court. Id. at 847.

Appellant notes that the Juvenile Justice Code was amended to delete the provision that the juvenile court, during a transfer hearing, "shall consider, among other matters ... whether there is evidence on which a grand jury may be expected to return an indictment." Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 106(a), 1995 Tex. Gen. Laws 2517, 2591. However, as noted in L.M.C ., the consideration of grand-jury evidence was only one justification for not requiring juvenile courts to rule on the admissibility of evidence during a transfer hearing. 861 S.W.2d at 541–42. The Texas Family Code still only requires a juvenile court to determine whether there is probable cause that the juvenile committed the alleged offense. TEX. FAM.CODE ANN. § 54.02(a)(3). Thus, a transfer hearing remains a "nonadversarial preliminary hearing" and "appellant's rights will be fully protected when the case reaches trial." L.M.C., 861 S.W.2d at 542; see also State v. Lopez, 196 S.W.3d 872, 874 (Tex.App.-Dallas 2006, pet. ref'd) (holding juvenile defendant was not entitled to jury trial at transfer hearing because, during such hearing, juvenile court "is not required to conform to all of the requirements of a criminal trial or even of the usual administrative hearing" and transfer hearing "is comparable to a criminal probable cause hearing and the court need not resolve evidentiary conflicts beyond a reasonable doubt").

Conclusion: Accordingly, we opt to agree with our sister court in L.M.C. and hold that the juvenile court was not required to resolve the admissibility of appellant's statements before the transfer hearing. We overrule appellant's second issue.

In re B.R.H., No. 01-12-00146-CV, --- S.W.3d ----, 2012 WL 3775759, Tex.Juv.Rep. Vol. 26 No. 4 ¶ 12-4-5 (Tex.App.-Hous. (1 Dist.), 8/28/12).

AMENDED PETITION FILED AFTER CHILD'S EIGHTEEN BIRTHDAY COMPLIED WITH STATUTORY REQUIREMENT BECAUSE ORIGINAL PETITION WAS FILED BEFORE CHILD'S EIGHTEEN BIRTHDAY.

Facts: B.R.H. was born on August 4, 1993. In September 2009, on the date of the alleged offense, B.R.H. was sixteen years old. In June 2011, approximately two months before B.R.H.'s eighteenth birthday, the State filed an original petition alleging that he had engaged in delinquent conduct. The State amended its original petition in September 2011. The amended petition was approved by the Grand Jury for Determinate Sentencing.

In September 2011, B.R.H. moved to dismiss the case against him, contending that the juvenile trial court lacked jurisdiction because he had turned eighteen the month before. After a hearing, the trial court denied the motion to dismiss. The trial court's order denying the motion to dismiss includes the following findings:

1. The Petition ... was filed on June 6, 2011, alleging that the offense occurred prior to the Respondent's eighteenth birthday, which was August 4, 2011, the Respondent having been born on August 4, 1993.
2. The Respondent was detained on the offense ... and released from detention on May 19, 2011.... The State of Texas filed its petition on June 6, 2011 and the first setting on this case was August 18, 2011, after the date that the respondent turned eighteen years old.
3. The State of Texas was in possession of the offense report in this case in December 2010 and did not charge the Respondent until May 18, 2011. The State of Texas failed to request that the case be docketed prior to Respondent turning eighteen years old.
4. On September 30, 2011 the State of Texas filed an Amended Petition which was approved by the Grand Jury for Determinate Sentencing....
5. The State of Texas has used due diligence in prosecuting Respondent.

B.R.H. contends that the trial court abused its discretion in denying his motion to dismiss. Relying on the Texas Supreme Court's decision in In re N.J.A., 997 S.W.2d 554 (Tex.1999), he maintains that the trial court lacks jurisdiction over the underlying case because he turned eighteen in August 2011, and the State failed to act with diligence in prosecuting the case. B.R.H. also contends that the trial court's order is not supported by the record because the State's amended petition, filed after his eighteenth birthday, and "extinguished" the original petition.

Held: Mandamus Relief Denied

Opinion: A juvenile court has exclusive, original jurisdiction over all proceedings involving a person who has engaged in delinquent conduct as a result of acts committed before age seventeen. See TEX. FAM.CODE ANN. §§ 51.02, 51.04 (West 2011). A juvenile court does not lose jurisdiction when a juvenile turns eighteen, but its jurisdiction becomes limited. The juvenile court retains limited jurisdiction to either transfer the case to an appropriate court or dismiss the case. N.J.A., 997 S.W.2d at 556; In re T.A.W., 234 S.W.3d 704, 705 (Tex.App.-Houston [14th Dist.] 2007, pet. denied). However, the Texas Family Code provides an exception to this rule, which applies to incomplete proceedings. In re V.A., 140 S.W.3d 858, 859 (Tex.App.-Fort Worth 2004, no pet.). Section 51.0412, which the legislature enacted after the Court decided N.J.A., provides:

> The court retains jurisdiction over a person, without regard to the age of the person, who is a respondent in an adjudication proceeding, a disposition proceeding, a proceeding to modify disposition, or a motion for transfer of determinate sentence probation to an appropriate district court if:
>
> (1) the petition or motion to modify was filed while the respondent was younger than 18 years of age or the motion for transfer was filed while the respondent was younger than 19 years of age;
>
> (2) the proceeding is not complete before the respondent becomes 18 or 19 years of age, as applicable; and
>
> (3) the court enters a finding in the proceeding that the prosecuting attorney exercised due diligence in an attempt to complete the proceeding before the respondent became 18 or 19 years of age, as applicable.

TEX. FAM.CODE ANN. § 51.0412 (West Supp.2011).

The State filed its original petition before B.R.H. turned eighteen, and the proceedings were incomplete at the time of B.R.H.'s eighteenth birthday. After a hearing, the trial court entered a finding that the prosecutor used due diligence in attempting to complete the proceedings before B.R.H.'s eighteenth birthday, and concluded that section 51.0412 authorized it to retain jurisdiction.

B.R.H. objected to the trial court's jurisdiction in September 2011, before any adjudication hearing. See id. (requiring respondent to object to jurisdiction due to age at adjudication hearing or discretionary transfer hearing, if any). B.R.H. contends that, despite section 51.0412's exception for incomplete proceedings, the Supreme Court's holding in N.J.A. requires dismissal of the suit against him for lack of jurisdiction. Under N.J.A., a juvenile court retains jurisdiction over the person after he turns eighteen, but that jurisdiction is limited to either dismissing the case or transferring the case to another court under Texas Family Code section 54.02(j). See 997 S.W.2d at 555–56. Enacted after the Supreme Court's decision in N.J.A., section 51.0412 abrogated N.J.A. by expanding juvenile court jurisdiction for cases that meet the statutory criteria.

B.R.H. contends that this proceeding fails to meet the statutory criteria for two reasons. First, citing Texas Rule of Civil Procedure 65, B.R.H. maintains that the State's amended petition, filed in September 2011, "extinguishes" the original petition—filed before his eighteenth birthday. Second, he challenges the trial court's finding that the State exercised due diligence in prosecuting the case against him.

Texas Rule of Civil Procedure 65 provides that a substituted instrument takes the place of prior pleadings and "the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation." TEX.R. CIV. P. 65. Amended pleadings relate back to the time of filing of the original petition. See id.; TEX. FAM.CODE ANN. 51.17 (rules of civil procedure apply to juvenile cases unless in conflict with juvenile justice code); cf. Carrillo v. State, 480 S.W.2d 612, 615 (Tex.1972) (observing that strict prohibition against amended pleadings applicable to criminal cases does not apply to juvenile proceedings); In re J.A.D., 31 S.W.3d 668, 671 (Tex.App.-Waco 2000, no pet.) (relation back doctrine inapplicable to motion to

modify filed after end of probation period in juvenile case because rules of civil procedure conflicted with juvenile justice code provision permitting modifications only during term of probation). The amendment in this case, containing an approval by the Grand Jury for Determinate Sentencing, relates back to the date of the original petition—June 2011. It is undisputed that the State filed the original petition before B.R.H.'s eighteenth birthday. Because the amended petition relates back to the filing date of the original petition—before B.R.H. turned eighteen years old—the statute's requirement that suit be filed before age eighteen has been met. See TEX. FAM.CODE ANN. § 51.0412(1).

Diligence is usually a question of fact that the trial court determines in light of the circumstances of each case. See In re J.C.C., 952 S.W.2d 47, 49–50 (Tex.App.-San Antonio 1997, no pet.) (reviewing trial court's findings on diligence for abuse of discretion). When reviewing factual issues, we defer to the trial court's findings unless the record contains no evidence to support them. Marcus v. Smith, 313 S.W.3d 408, 417 (Tex.App.-Houston [1st Dist.] 2009, no pet.). Even if we would have decided the matter differently, we may not disturb the trial court's decision unless it is shown to be arbitrary and unreasonable. Id. This is particularly the case with requests for mandamus relief. “[A]n appellate court may not deal with disputed areas of fact in an original mandamus proceeding.” Brady v. Fourteenth Court of Appeals, 795 S.W.2d 712, 714 (Tex.1990). Mandamus relief will not lie if the record contains legally sufficient evidence both against and in support of the trial court's decision; weighing conflicting evidence is a trial court function. In re Pirelli Tire, L.L.C, 247 S.W.3d 670, 686 (Tex.2007, orig.proceeding); Marcus, 313 S.W.3d at 417.

B.R.H. maintains that a two-month delay in setting the first hearing—after an approximately five-month delay in bringing charges against him—does not demonstrate diligence in prosecution. But the record contains ample evidence that the State has moved forward with its prosecution by filing charges within the limitations period and about eighteen months after the alleged delinquent conduct took place, and by promptly amending the petition to request determinate sentencing upon grand jury approval. We hold that some evidence supports the trial court's finding that the State used due diligence in its prosecution of the case. See e.g., Hooks v. Fourth Court of Appeals, 808 S.W.2d 56, 60 (Tex.1991) (court of appeals may not disturb trial court ruling on disputed fact question in mandamus proceeding); Brady, 795 S.W.2d at 714; West v. Solito, 563 S .W.2d 240,245 (Tex.1978).

Conclusion: We conclude that the juvenile court did not abuse its discretion in denying B.R.H.'s motion to dismiss and in retaining the case for adjudication as a pending action under Texas Family Code section 51.0412. We therefore deny the request for mandamus relief.