CASE LAW UPDATE

Professor Robert O. Dawson
The University of Texas School of Law

16th Annual Juvenile Law Conference
Austin, Texas
February 12, 2003

TABLE OF CONTENTS

I. CONFESSIONS

1. PROBABLE CAUSE SHOWN FOR MURDER ARREST; AFTER INITIAL REFUSAL, DECISION TO GIVE STATEMENT WAS VOLUNTARY

In the Matter of M.M.J.M., UNPUBLISHED, No. 08-99-00167-CV, 2002 WL 102203 (Tex.App.—El Paso 1/25/02, *review denied*) [*Texas Juvenile Law* 310, 291 (5th Edition 2000)].

Facts: This is an appeal from a juvenile proceeding. Appellant was adjudicated delinquent by a jury. At the close of the disposition hearing, the jury assessed punishment for a term not to exceed forty (40) years.

At the adjudication phase of trial, evidence was presented by the State that on January 15, 1998, three boys were walking home in East El Paso, Texas when they saw what appeared to be a female mannequin lying in a ditch. Closer examination revealed that the object was a female human body clothed in only a sports bra and socks. The police were promptly informed.

Detective Timothy Cook of the El Paso County Sheriff's Department responded to the call. The body was identified as being the body of a young woman named Amanda Howell. Examination of her personal items and the telephone records resulted in determining the names of her friends and acquaintances. Information was obtained that established that Appellant was seen with the victim during the evening of January 13, 1998.

On January 16, 1998, Detective James Reuter of the El Paso County Sheriff's Department contacted Appellant at his residence. He was in the company of his parents. Arrangements were made for Appellant to give a witness statement the following day. In this statement, Appellant confirmed that he had been with the victim, beginning at 6 p.m. on January 13, 1998. He related that at that time he went with the victim to a park to meet with one of her friends in order to obtain some cocaine and marijuana. While there, a dark blue Chevrolet Camaro arrived and the victim left in that vehicle ostensibly to obtain some drugs. The record shows that at 10:15 p.m ., she came to Appellant's home and they went to Nick Levey's house. At the time, she was driving her mother's two-door, white Cadillac. From the Levey residence, they went to a park and waited. At about midnight, the same Camaro arrived and the victim reportedly told Appellant to meet her at the Scenic Drive area in an hour. Once again, she left in the Camaro. Appellant then went to that location and waited for several hours, but the deceased did not arrive. He drove around the area looking for the deceased and then parked the car and went home to sleep. At ten o'clock the next morning, he got the Cadillac and again looked for the deceased. He then went to the east side of the city to visit a friend—Juan Mora. He went back to the west side of the city and picked up a girl named Crystal and her three friends. He then drove around in the car with various friends. He left the car with one of his friends and went home. Appellant related that he then learned of the deceased's death from his mother.

Detective Onecimo Esparza testified that he was assigned to assist Detective Cook with the investigation of Amanda Howell's murder. On February 12, 1998, Esparza detained Appellant and informed him he was being detained for the murder of Amanda Howell. Appellant was taken to his home and he called his mother. She was advised that Appellant was to be taken to the Juvenile Probation Department. Esparza was aware that Appellant had given the earlier affidavit. He took Appellant to the Juvenile Probation Department where a probation officer spoke to Appellant. Esparza then took Appellant to Magistrate Angelica Barill. Esparza obtained a statement from Appellant. Appellant was then taken to Judge Mike Herrera to have the statement reviewed with Appellant.

In Appellant's statement, he stated that the deceased arranged to meet him at his house on the evening of her death. She came by his house at approximately 10:30 p.m. She was driving her mother's white Cadillac El Dorado. An individual named Rene Ortiz and two other individuals he did not know were in the car. They drove to the house of an individual named Levey. The deceased got out of the car and went to speak to him through a window of the house. She then returned to the car and they drove around until they got on the freeway and proceeded eastbound until they arrived at a reservoir near Del Valle High School. Appellant and the deceased then got out of the vehicle. The deceased grabbed a light blue blanket and they proceeded to a tunnel that was nearby. They engaged in sexual intercourse—Appellant did not use a condom. They returned to the car. They then proceeded to a road off of North Loop Drive which ended in a dead end. Appellant and the other two occupants of the car got out and the deceased got into the backseat with Ortiz. They sat on the curb directly behind the car. They heard some gagging noises like someone was choking. The noises appeared to be coming from the deceased. The three then walked away to try to find some marijuana. They obtained some marijuana at a

house around the corner from where the car was parked. When they returned to the car, Ortiz stated that he had killed the deceased and had placed her body in the trunk of the car.

Appellant then indicated in his statement that they sped away with Ortiz driving the vehicle. At this time, it was approximately 1:30 a.m. They drove to a road near a canal where Ortiz dropped the deceased's body into the canal. She was wearing a sports bra and socks. As they drove away from the canal, Appellant found a cellular phone under the front seat of the car. He called a friend named Mora who lived in the area by Del Valle High School. He called several times and Mora's father finally answered and stated that his son was asleep. They then drove back to the reservoir and smoked some marijuana. After an hour, Appellant drove the car back to the west side of El Paso. As he was dropping off the other three, Appellant called a radio station to request a song. The other three were let off at a restaurant on Redd Road and Ortiz threatened Appellant not to tell what happened. Appellant then drove back to the east side of El Paso and met with a friend, Mora. Appellant told Mora that his mother had given him the cell phone. He let Mora borrow the cell phone and then Appellant drove the Cadillac back to the west side and he picked up three friends—Chris Anderson, David Hernandez, and an individual named Julio. At about 11 a.m., they returned to the east side to retrieve the cellular phone from Mora. They gave him a ride to school and they returned to Mora's house. They then went to a mall and Appellant called Julio Cesar Baron using the cellular phone. After arranging to pick up Baron, they cruised around. At 2:15 p.m., he let the other three off, and he picked up his ex-girlfriend and her three friends. After driving them home he noticed that one of them had taken the cellular phone. At 4 p.m. he drove to Julio's house and then returned to his own house so that Julio could take the car. He then told Julio, Hernandez, and Anderson that he had stolen the car from the deceased's house. He did not tell them about the killing.

He then visited Juventino Gonzalez and told him about the killing. Gonzalez wanted to drive the car so they contacted Julio who told them the car was parked up the street. When they got to that location, they saw the car being towed off. Appellant related in his statement that he did not tell the police of the killing because he was afraid of Ortiz. He admitted that he had sex with the deceased but stated that Ortiz also had engaged in sexual intercourse that evening. Karen Scalise testified that she was a DNA analyst for the Texas Department of Public Safety. Her primary area of expertise was in the analysis of body fluids. She was given blood and hair samples from Appellant, Ortiz, and the deceased. She performed tests on the samples and determined that the DNA of Rene Ortiz was not present in the samples taken from the deceased; however, Appellant's DNA was present in the samples.

The State then proceeded to put on the testimony of a number of friends and acquaintances of Appellant and the deceased. Levey testified that the deceased came by his house at approximately 11 p.m. on January 13, 1998. Appellant was with her in the car along with Ortiz and two other individuals who he did not know.

Julio Cesar Baron stated that Appellant picked him up in a white Cadillac around noon on January 14, 1998. He asked Appellant how he had obtained the car and Appellant replied that he had stolen it from the decedent's home while her mother was taking a shower. Appellant, Baron, and two other young men then drove around in the car. Later that afternoon, Appellant asked Baron to take the car and he agreed. However, he ultimately left the car on a street and called the deceased's mother to tell her the situation regarding the car. Appellant and Gonzalez returned and asked about the car. Baron told them where it was and they saw the car being towed off. Both Gonzalez and Appellant told Baron not to say anything about the car.

Approximately two weeks later, Baron and Appellant were riding in a car with Tony Perea when Baron asked Appellant in a joking manner why he had killed the deceased. After a moment of quiet, Appellant replied that they were both high on cocaine and, "... he had somehow hit her in the throat or strangled her." Appellant stated that he intended to place the blame on someone else in a blue Camaro and cautioned Baron not to tell anyone else. During cross-examination, Baron stated that he was not good friends with Ortiz but he was on friendly terms with him. The witness stated that he did not hang around Appellant and he did not care to be in his company.

On January 14, 1998, Mora testified that Appellant contacted him at about seven o'clock in the morning. Appellant drove the Cadillac to Mora's house and informed him that his mother had married and he was able to obtain the car and the cell phone. They used the cell phone that Appellant had in his possession. Mora stated that Appellant looked tired and told him that he had been driving around the night before.

Hernandez testified that Appellant picked him and Anderson up on January 14. Appellant stated that he had borrowed the car but later told Hernandez that he had broken into the deceased's house and had stolen the keys. Hernandez testified that Appellant looked tired and he told them he was tired.

Anthony Perea testified that in mid-February 1998, he was in a car with Julio Baron and Appellant. All three were drinking alcohol. Baron jokingly asked Appellant, "Why did you do it Matt?" Appellant responded, "Because she deserved it." The following exchange then appears in the record:

> STATE: Did he say how he killed her?
>
> WITNESS: No, he didn't. He said something about strangling, put his hands around her neck.
>
> STATE: Now, where were you in the vehicle?
>
> WITNESS: Passenger's seat.
>
> STATE: And did you turn around and actually see him do this?
>
> WITNESS: No, I didn't.
>
> STATE: Did he just say he strangled her?
>
> WITNESS: He said he put pressure on her neck.

Perea stated that Ortiz was a very good friend of his and they talked together a lot. He characterized Appellant as being an acquaintance.

Paul Trahan stated that Appellant told him that he had taken the car by going through the garage using the remote control. Appellant told Trahan that he had strangled the deceased because she stole some cocaine from him. During an occasion when he was driving around with Appellant, Appellant stated that there were several kids saying that Ortiz had killed the deceased and that Appellant was going to go along with that and say that Ortiz had done the killing. Trahan stated that both Appellant and Ortiz were friends of his.

Dr. Juan Contin, the coroner, stated that the cause of death was asphyxia due to the compression of the neck. He stated that it was not possible to determine the instrument used in causing the death as there was no imprint of hands on the deceased's neck. Contin speculated the compression, "... was caused by something very applicable like a piece of cloth most likely." A drug screening on the deceased revealed a positive result for marijuana but was negative with regard to cocaine.

During Appellant's presentation of his defense, he utilized the testimony of Dr. Paul Goldstein. Goldstein testified that he was a professor of genetics at the University of Texas at El Paso. He reviewed the tests performed by Scalise and he sat in on her testimony at trial. He questioned the validity of the tests performed by Scalise and questioned the interpretation of the results that were obtained. He also stated that based on the findings issued in her report, that Ortiz could not be excluded as a donor of DNA in the samples provided from the deceased. Appellant utilized the grand jury testimony of Ortiz by reading it to the jury as Ortiz had invoked his Fifth Amendment right to not incriminate himself. His grand jury testimony stated that he did not know Appellant and he did not know Levey. The testimony read that Ortiz was never in the car with the deceased the night she was murdered. Ortiz admitted to having had sex with the deceased on a prior occasion. He used two condoms on that occasion.

At the disposition stage of the trial, the court received all of the evidence admitted during the adjudication phase of trial for the jury's consideration for punishment. The State presented the testimony of Janell Howell, the deceased's mother. She testified regarding her daughter and the family situation and relationships. At the close of her testimony, the following exchange occurred:

> STATE: Now, Ms. Howell, let me ask you: This jury has already adjudicated this boy of your daughter's murder. Would you please tell the jury what you want done to this juvenile?
>
> DEFENSE: I objection (sic), Your Honor, relevance.
>
> COURT: Overruled.
>
> WITNESS: I want him to be made an example of because for every one that is brought to trial, there are 50 more in that school that are preying on our daughters and, believe me, it is insane when you have—if you have a friend that hurt you, you know? I wish that all of them—but that wouldn't do any good. I hope this never ever—any parent goes through what I did. And one little girl or one boy is saved, then it will be worth it. But they can't be let go for a long, long time.

The State also presented the testimony of Arnold Martinez, a parole officer for the Texas Youth Commission. He testified that the Texas Youth Commission was responsible for rehabilitating youthful offenders who have been adjudicated and are in need of supervision. He also related what facilities and programs were available in the juvenile justice system.

During the defense portion of the disposition phase, two of Appellant's teachers testified. Victor Reveles, a teacher and coach at Franklin High School testified that he taught Appellant at the alternative program at the high school. Appellant had not caused any problems and he participated in the program and took advantage of the opportunities offered by the program.

Heather Ann Cawley testified that she was a math teacher at the Raymond Telles Academy. She

stated that Appellant improved in her class and became more confident regarding his academic studies. She had a generally good opinion of Appellant.

Dr. James Schutte, a forensic psychologist, conducted various psychological tests on Appellant. Schutte testified that the results of an intelligence test reflected that Appellant was borderline mentally retarded. The Carlson Psychological Survey & MACI (Milan Adolescent Clinical Inventory) test results indicated that Appellant was introverted and socially withdrawn. The witness stated that Appellant did not show psychopathic, antisocial, or delinquent tendencies. He defined a psychopath as an individual who is chronically violent, tends to commit a wide range of offenses, and shows no remorse for the exhibited behavior. On cross-examination, the witness stated that a psychopath could be a person who committed a heinous offense and then bragged about committing the offense to others.

Debra Diane Morales, Appellant's mother, was the last defense witness. She requested leniency for Appellant because she stated that he was innocent of the offense. She asked the jury to place Appellant on probation. She characterized Appellant as being quiet, respectful, and of a non-violent nature. She stated that Appellant was not capable of committing the act for which he was adjudicated.

Held: Affirmed.

Opinion Text: In Point of Error Nos. Three and Four, Appellant contends that the court erred in admitting Appellant's statement given to Detective Esparza because Appellant was illegally detained and the statement was involuntary.

The pre-trial hearings on Appellant's motion to suppress his statement were held on August 7, 1998 and December 16, 1998. Detective Onesimo Esparza testified that he took a statement from Appellant on February 12, 1998. He located Appellant a block and a half from his house and took him into custody. They went to Appellant's house and found his mother's phone number where she could be located. Appellant's mother was called and Esparza told her that her son was being detained. Appellant was then transported to the Juvenile Probation Department where they contacted an intake officer. Appellant was questioned outside the presence of the officers regarding his desire to make a statement. He stated he did want to make a statement and he signed a form to that effect. Appellant was then taken to the municipal court offices and Judge Barill took Appellant alone into her office and closed the door. Judge Barill emerged from her office and told the officers that Appellant stated that he had already given a statement to the officers. On the way out to their vehicle, Appellant stated to Esparza that he had already given a statement. Esparza responded that he had given a witness affidavit but now he was a suspect and would he be willing to give a statement. Appellant responded affirmatively. Esparza testified that neither he nor any other officer acted in an angry manner when Appellant first stated that he did not want to give a second statement. They advised Judge Barill that Appellant wanted to give a statement and she took him back into her office. Later Judge Barill came out of her office and advised Esparza that Appellant wanted to give a statement and he signed a form to that effect.

They then went to the Juvenile Investigations Services Office of the El Paso Police Department where the statement was taken. Appellant was warned of his Miranda rights and Appellant signed a form indicating he was aware of his rights. Appellant then gave his statement.

Judge Angelica Juarez Barill, a municipal court judge, testified that she was working on February 12, 1998 and she gave Appellant his warnings. She had closed the door to her office and she inquired if Appellant wanted to give a statement. He stated that he had already given a statement and he did not want to give another one. She opened the door and told the officers that Appellant did not want to give a statement. After a short while the detectives came back with Appellant and she and Appellant went back into the office. She asked Appellant why he now wanted to give a statement given his prior decision and he stated that he wanted to give his side of what happened. She advised Appellant of his rights. She asked Appellant if he had been threatened or coerced and if his decision to give a statement was voluntary. He replied that his decision was voluntary.

Judge Mike Herrera, also a municipal court judge, testified that on February 12, 1998, Appellant was brought to him after he had given his statement. He gave Appellant the requisite warnings and he reviewed the entire statement with Appellant and allowed him to make corrections. Appellant was present during this procedure. Judge Herrera inquired if Appellant had been coerced or threatened and if he was sober. Appellant replied that he had not been threatened and he was not intoxicated. Appellant then signed the statement.

Detective Timothy Allen Cook testified that the police did not have a warrant prior to Appellant's detention on February 12, 1998. He testified regarding the probable cause the police had gathered prior to that detention. Cook stated that after the body was discovered they began interviewing a number of people including Appellant. The police began to notice that some of the people interviewed had con-

flicting stories with regard to what Appellant stated in his witness statement. The police interviewed Baron, Hernandez, Anderson, Perea, and Levey, among others. From these interviews, the police found that Appellant had been driving the Cadillac on the 13th and 14th of January and had been using the phone that was in the car. Further, in interviewing the witnesses they discovered that he had been telling different accounts of how he got possession of the car. They discovered that there was evidence of hair fibers and indications of semen in the trunk of the car indicating that the body of the deceased had been in the trunk. One of the witnesses had stated that Appellant had been last seen with the deceased and was seen using the cellular phone. The phone records indicated that the first call made on the cellular phone in the Cadillac was made at 1:58 a.m. from the area where the body was discovered. This phone call was made to Mora's residence. He had admitted to one witness that he had been partying all night. He looked very tired. He never mentioned the deceased being in the vehicle. He told varying stories regarding his possession of the car. One story was that the deceased had given him the car. Another story was that he had snuck into the house and stolen the keys to get the car. This differed from his initial statement concerning the blue Camaro. None of the witnesses who drove about with Appellant stated that they were looking for the deceased. He asked several witnesses not to say anything about his possession of the Cadillac.

Appellant testified at the hearing. He stated that on February 12, 1998, he was arrested by four detectives. He was taken to a judge and he told her he did not want to give a statement. Appellant testified that the police officers started harassing him and they handcuffed him. They stated that they were going to pin the murder on him unless he gave a statement. They called him bad names. After three or four minutes, he was taken back to the judge.

At a continuation of the hearing, James William Schutte, a forensic psychologist, testified for the defense. He evaluated Appellant on August 13, 1998. After administering various psychological tests, he determined that Appellant was borderline mentally retarded. The testing also indicated that Appellant was a passive individual lacking in ambition with no indications of antisocial or delinquent behavior. In reference to giving a statement, Schutte stated Appellant would be passive and compliant. The court denied the motion to suppress on December 29, 1998.

With regard to Point of Error No. Three, a trial court's ruling on a motion to suppress is generally reviewed for an abuse of discretion. Villarreal v. State, 935 S.W.2d 134, 138 (Tex.Crim.App.1996); Brewer v. State, 932 S.W.2d 161, 166 (Tex.App.—El Paso 1996, no pet.). Under this standard, an appellate court must defer to a trial court's determination of historical facts supported by the record, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. Guzman v. State, 955 S.W.2d 85, 89 (Tex.Crim. App.1997). These fact questions are viewed in the light most favorable to the trial court's ruling. Martinez v. State, 17 S.W.3d 677, 683 (Tex.Crim .App.2000). Although great weight should be given to the inferences drawn by trial judges and law enforcement officers, determinations of reasonable suspicion and probable cause are reviewed de novo on appeal. Guzman, 955 S.W.2d at 87 (citing Ornelas v. United States, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)); see Loesch v. State, 958 S.W.2d 830, 831-32 (Tex.Crim.App.1997). We will view the question of probable cause de novo.

Tex. Fam.Code Ann. § 52.01(a) (Vernon Supp.2002) explains the limited circumstances of when a child may be taken into custody. There are five instances when this may happen: (1) by order of the juvenile court; (2) according to the laws of arrest; (3) by a law-enforcement officer if there is probable cause to believe the child has violated a penal law of the State or has engaged in delinquent conduct indicating a need for supervision; (4) by a probation officer if there is probable cause to believe the child has violated a condition of probation; or (5) by a directive to apprehend issued under Section 52.015 of the Family Code. See Tex. Fam.Code Ann. § 52.01(a) 1-5 (Vernon Supp.2002). An arrest warrant is not needed to arrest a juvenile under Tex. Fam.Code Ann. § 52.01(a) (Vernon Supp.2002). Blackmon v. State, 926 S.W.2d 399, 404 (Tex.App. —Waco 1996, pet. ref'd).

Appellant maintains that the police did not have probable cause to detain Appellant. [FN2] Regarding probable cause, the test is whether at the moment of arrest, the arresting officer has knowledge which is based on reasonable trustworthy information and which would warrant a reasonable and prudent person in believing that a particular person had committed or is committing an offense. Vasquez v. State, 739 S.W.2d 37, 44 (Tex.Crim. App.1987). Probable cause requires more than mere suspicion but far less evidence than that needed to support a conviction or even that needed to support a finding by a preponderance of the evidence. Hughes v. State, 24 S.W.3d 833, 838 (Tex.Crim.App.2000).

FN2. Appellant points to two detention orders. One is dated February 16, 1998 and there is a handwritten motion stating "no probable cause." The other detention order April 2, 1998 and states, "no prob-

> able cause on murder charge; probable cause only as to (1) unauthorized use of a motor vehicle (2) tampering with evidence." Appellant maintains that as the court found no probable cause on these occasions, it could not find probable cause on the hearing on the motion to suppress. However, there is no record before us concerning these proceedings and we will not speculate what evidence was or was not heard on those occasions.

In the present case, Appellant was last seen with the deceased on the night of her death. Witnesses indicated that he had partied all night-contradicting his prior statement concerning his search for the deceased. He gave conflicting accounts of how he came into possession of the Cadillac and requested that his friends not say anything about the vehicle. He was linked to using a cellular phone and making a call to his friend Mora early in the morning at a location near where the body was found. He was in possession of a vehicle that had fibers and semen in the truck leading to a reasonable conclusion that the body had been in the truck of the vehicle. We find that there was probable cause to detain Appellant. Point of Error No. Three is overruled.

As stated, in Point of Error No. Four, Appellant contests the voluntariness of his statement given after his detention. In this instance, de novo review is not appropriate because the issue of the voluntariness of his statement hinged on the credibility of Appellant as opposed to the police testimony. Borrego v. State, 966 S.W.2d 786, 792 (Tex.App.—Houston [1st Dist.] 1998, pet. ref'd). Accordingly, we give almost total deference to the trial court's resolution of the issues and view the evidence adduced at the suppression hearing in the light most favorable to the trial court's findings. Borrego v. State, 966 S.W.2d 786, 792 (Tex.App.—Houston [1st Dist.] 1998, pet. ref'd).

Appellant's assertion that his statement was involuntary is based solely upon his testimony at the hearing. The trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony at a suppression hearing. Villarreal, 935 S.W.2d at 138; Borrego, 966 S.W.2d at 792. The trial judge is free to believe or disbelieve all or any part of a witness's testimony. Id.

In the present case, the evidence showed that Appellant signed a statement indicating he was aware of his rights before he went before the magistrate. In the magistrate's office, when he returned the second time in a very brief period of time, he was asked why he had changed his mind and if his decision was voluntary. He stated that his decision was voluntary and he wished to give his side of the matter. He also indicated that he had not been threatened or coerced. He also stated to Judge Herrera that he had not been threatened. The trial court was free to discount Appellant's rendition of events and, as such, we find that the court did not use its discretion in finding that the statement was voluntary. Point of Error No. Four is overruled.

---

2. PERSONALLY NOTIFYING PARENT JUSTIFIED ONE HOUR DELAY IN BRINGING CHILD TO JUVENILE PROCESSING OFFICE

Coffey v. State, UNPUBLISHED, No. 03-01-00342-CR, 2002 WL 437110, 2002 Tex.App. Lexis 2049 (Tex.App.—Austin 3/21/02) [*Texas Juvenile Law* 301 (5th Edition 2000).

Facts: The juvenile court waived jurisdiction over the sixteen-year-old appellant Jeremy Keith Coffey and certified him for trial as an adult. Appellant was indicted and convicted of the offense of murder. See Tex. Pen.Code Ann. § 19.02(b)(1) (West 1994). The jury assessed appellant's punishment at life imprisonment. On appeal, appellant asserts that his written confession was erroneously admitted in evidence.

> *Appellant's Confession*
>
> On Saturday night the 22nd of July Bryan Horton spent the night with me at my house in Copperas Cove. Around 11:30 PM my mother got me and Bryan into Southern Nights, which is a night club in Copperas Cove. We carried a small amount of rum in the club with us and mixed a few drinks while we were there. We left when the club closed, I think that was around 2:00 AM or 2:30 AM. We went back to my apartment and got ready to go over to a girl named Jamie's house.
>
> Earlier in the day we talked about getting a gun from a girl named Jamie Woods. Bryan knew that Jamie's father had a gun. I had never met her before. A couple of days prior to going to Jamie's I borrowed a knife from a friend of mine named Jeffrey Parker. I told Jeffrey that we were going to use the knife to scare somebody. Bryan and I had decided to use the knife to scare Jamie into giving us the gun.
>
> When we left my apartment after getting back from Southern Nights we drove out towards Jamie's house. We were in my mother's silver Ford Taurus. We went out U.S. 190 towards Kempner and turned onto FM 2657. We went down to Boys Ranch Road and

turned left. We passed Jamie's house and Bryan pointed it out. We turned left on the next street after her house and turned the car back around facing the way we had come down Boys Ranch Road.

We got out of the car and walked down to Jamie's house which was a trailer with stairs and a rail on the front. It still had Christmas lights on the front. Her blue truck was parked right in front of the house. We knocked on the door and she answered. Bryan asked her if we could use the phone because we had run out of gas, which was a story we had agreed to use to get in the house. She told us to hold on while she went and changed pants. She came back, opened the door, and invited us in. We went in and she offered Bryan the phone but he did not take it. He told her we would just hang out for a little bit.

She went over and sat down by her computer and offered us something to drink. She brought me a Mountain Dew and a cup. We talked for awhile and she called her boyfriend. She talked to him for a little bit. She got off of the phone with him and put her dog outside because it was barking. Bryan asked her if her father still had his gun and she said yes. She then asked Bryan if he wanted to see it and he said yes. She went into her father's room and got the gun, it was a 22 pistol. She started playing with the clip and he asked her if she could loan it to him. She said "hell no" and that it was her dad's and she was not even supposed to have it out. She then went and put it back up.

Jamie started talking about a guy she was going out with and how good looking the guy was. Bryan wanted to see what the guy looked like because he is bi-sexual. She went out to her truck and got a picture of the guy and came back inside. She sat down on the love seat right inside the front door and Bryan sat across from her on a couch. I stood beside the love seat with my back facing the front door. We talked about this guy she had the picture of. I had the knife stuck in the back of my pants in my waistline. I took the knife out and held it out in front of her, I moved it so the light shined off the blade. I then just stabbed her.

Jamie looked up at me and said "please don't kill me." She told me that I could take anything, she lifted up her keys and tried to hand them to me. I shook my head and I think she dropped them. I stabbed her again and she started breathing heavy and her eyes rolled. I don't remember how many times I stabbed her but it was three or more times. Several times I missed, one time I hit her face right on her cheek. I do remember stabbing her several times in her side. Bryan took a blanket and threw it on her body. I do not know if she was alive or not, I did not look. I went in the bathroom to get a wash cloth. I wiped up all of the places that I had touched through the house. Bryan and I went into her dad's bedroom looking for the gun. Bryan found the gun on the dresser on a shelf. We could not find the clip so Bryan went and looked in Jamie's pocket. He then came back in the bedroom and found the clip on the very top of the dresser. When I finished wiping everything up I told Bryan that I was going to go get the car.

I ran out of the house to get the car. I pulled up in front of Jamie's house on the right side of the road facing FM 2657. I started to get out of the car and I heard a pop. I then saw Bryan come running out of the house with the gun in his hand. He got in the car and we took off back to Copperas Cove. We went back to my apartment and I washed my hands because there was blood on them and my elbow. Bryan went and put the gun under the mattress. I put the knife in a Marlboro bag in my bedroom closet. I told him that I needed to get rid of some of the things I had. I got a trash bag and put the shoes I was wearing in along with the wash cloth used to wipe everything down and a bath mat with blood drops on it. I also put in some trash to make it look like regular trash. We drove to Five Hills Apartments, that was around 4:30 AM or 5:00 AM. I used to live at Five Hills and knew that nobody would be awake at that time. We put the bag in a dumpster there. We then drove back to my apartment and eventually went to sleep.

I left a blue rag in my mom's car and found it Tuesday. The gun had been wrapped in that rag and Bryan took it when he ran out of the house. I left it at the White Lighting Car Wash in Copperas Cove, beside Dairy Queen. Bryan left from my house Sunday afternoon. When he left he took the gun with him. I talked about hiding it in the air conditioning vent of his trailer house. The gun that was found in my mother's car when we got stopped today is the same one that came out of Jamie's house. We told a guy named Adam Becker about what we had done. We took the gun over to his house on Monday night and

showed it to him. We went in his back yard and shot a shack in his back yard. We shot the nine shells that were remaining in the clip.

Suppression Hearing Evidence

The trial court conducted a pretrial hearing of appellant's motion to suppress his confession. We will summarize the hearing evidence. Early in their investigation of the murder of Jamie Woods, Lampasas County officers received information that they believed furnished probable cause for taking appellant and Bryan Horton into custody. The officers had information that appellant lived in Copperas Cove with his mother and that Bryan Horton lived in Harker Heights with his aunt.

On July 25, late in the evening, Sergeant Investigator David Whitis and Texas Ranger Sergeant Fred Cummings drove to Harker Heights to find Horton. Lampasas County Sheriff Gordon Morris and Investigator Doug Kahlstrom drove to Copperas Cove to look for appellant. With the help of Sergeant George Ronnie, a Copperas Cove police officer, Sheriff Morris and Kahlstrom located the apartment where appellant lived with his mother. The officers had a specific description of a Ford Taurus car belonging to appellant's mother that the officers believed appellant was driving. When the officers did not see the Taurus parked near the apartment, they backed-off and maintained a surveillance of the area. At about 11:30 p.m., the Taurus with several passengers stopped momentarily in front of appellant's mother's apartment. The Taurus was then driven toward the parking lot exit. Sheriff Morris and Kahlstrom stopped the Taurus. Appellant was driving and one of his three passengers was Bryan Horton. Appellant and Horton were taken into custody and Kahlstrom advised them of their Miranda rights. By cell phone, Morris notified Whitis and Cummings that appellant and Horton were in custody. Whitis and Cummings drove to Copperas Cove and joined Morris and Kahlstrom. Horton told the officers that there was a handgun in the Taurus.

The officers awakened appellant's mother and told her they had taken her son into custody believing that he had committed the offense of murder. Appellant's mother gave written consent for the officers to search her car. Appellant's mother was "concerned" and "defensive" and asked many questions. Both Sheriff Morris and Ranger Cummings attempted to answer appellant's mother's questions. They told her that they were going to take appellant to Lampasas and that she could come to Lampasas. She did not indicate that she was coming to Lampasas or that she was going to obtain counsel for appellant. It was approximately one hour after appellant was taken into custody before Sheriff Morris and Kahlstrom took appellant to Lampasas.

A portion of the sheriff's office--two investigators' offices and a conference room--had been designated and certified by the Lampasas County Juvenile Board as a juvenile processing office suitable "for detention, questioning, interrogation and fingerprinting of juveniles upon arrest, not to exceed six (6) hours as provided by section 52.025 of the Texas Family Code." See Tex. Fam.Code Ann. § 52.025 (West Supp.2002). Appellant was taken directly from the place where he was taken into custody to the designated juvenile processing office within the sheriff's office in Lampasas.

Linda Rich, the Lampasas County Chief Juvenile Probation Officer, came to the juvenile processing office "between 12:30 and 1:00 a.m." She took custody of appellant and followed the "intake" procedure and obtained "basic information" to authorize appellant's detention. After the "intake" of appellant, Rich called appellant's mother at 2:18 a.m. and told her appellant was being charged with murder and that she would call her in the morning and tell her exactly what time the judge set for the detention hearing. At 2:40 a.m., Rich released appellant to Whitis and Cummings so that they could interrogate appellant.

After Rich returned appellant to the custody of Whitis and Cummings, they fully advised appellant of his Miranda rights. Appellant did not ask for counsel and he did not ask to see his mother. The officers interviewed appellant until 3:25 a.m. The record does not reveal what appellant told the officers during this interview. No oral confession was offered in evidence.

At 4:00 a.m., Justice of the Peace Francis Porter came to the juvenile processing offices. Acting as a magistrate, out of the presence of any law enforcement officers, Judge Porter administered to appellant the juvenile warnings required by the Texas Family Code. See Tex. Fam.Code Ann. § 51.095 (West Supp.2002). Judge Porter's written record of the warnings follow:

> On the 26th day of July 2000, at 4:00 o'clock A.M., before me, the undersigned Official acting as and in the capacity of Magistrate, personally appeared Jeremy Keith Coffey, a child, at Lampasas County Sheriffs Office (location), in Lampasas County, Texas. The following rights and warnings were read and explained to the child:
>
> You are charged by law enforcement with the offense of Murder which is a first degree felony (specify degree of misdemeanor or felony, or other offense).

1. You may remain silent and not make any statement at all and any statement that you make may be used in evidence against you;

2. You have the right to have an attorney present to advise you either prior to any questioning or during any questioning;

3. If you are unable to employ an attorney, you have the right to have an attorney appointed to counsel with you prior to or during any interview with peace officers or attorneys representing the state;

4. You have the right to terminate the interview at any time;

I have listened carefully to and understood each of the above rights as they were read and explained to me. I have asked the magistrate any questions that I may have regarding these rights. At this time, I fully understand all my rights as they have been explained to me, and I voluntarily wish to waive them.

Yes /s/ Jeremy Coffey

Answer YES or NO Signature of Juvenile

July 26, 2000

Date Signed Time Signed

July 26, 2000 4:03 AM

Date & Time Signed Parents Signature

On this day before me, personally appeared Jeremy Keith Coffey, age 16, a juvenile. I certify that the foregoing statutory rights were read and explained to said juvenile, at Lampasas County Sheriffs Office (location, in Lampasas County, Texas).

/s/ Frances Porter

Magistrate's Signature

FRANCES PORTER

Magistrate's Name (Printed or Typed)

The 27th Judicial District Court of Lampasas County, Texas

After appellant received the juvenile warnings from Judge Porter, she released appellant to Whitis and Cummings to make a written statement. When Whitis finished typing appellant's confession, Whitis read the confession to appellant and handed the confession to appellant. Appellant looked at the confession and did not ask to make any corrections. Appellant was then returned to Judge Porter, who out of the presence of any officers, examined appellant as evidenced by the certification bearing her signature that follows:

I HEREBY CERTIFY AND VERIFY that I, Judge Francis Porter, Acting as and in the capacity of a Magistrate, did on the 26th day of July 2000, at 4:20 o'clock A.M., administer the juvenile warnings required by Section 51.095 of the Texas Family Code to:

Name: Jeremy Keith Coffey, a juvenile.

Age: 16. Date of Birth: 042884.

Address: 105 East Avenue B # 3 Copperas Cove, TX who appeared before me in the city of Lampasas, Lampasas County, Texas.

I FURTHER CERTIFY AND VERIFY that I have examined the said juvenile above as required by the Texas Family Code Section 51.095. During the examination, I observed and/or was advised by the said juvenile that he:

1. claims to be 16 years of age and reasonably appears to be of that age.

2. can read the English language, and has demonstrated to me that he can do so.

3. claims to be a citizen of the United States of America;

4. advised me that he has completed the 9th grade in school, and is now in the 10th grade in school;

5. was not coerced, threatened or promised anything by law enforcement officers, prosecutors or any other agent of the State of Texas;

6. does not appear to be under the influence of drugs, alcohol, intoxicating beverages or inhalants;

7. does not appear to be physically or emotionally abused by law enforcement officers, or anyone else;

8. does not appear to have any physical or mental condition that might impair his ability to understand the rights read to him.

9. appears to understand the meaning of the warning given herein and has no questions about the warning, except as may be noted as follows, if any:

10. understands that the offense charged is Murder, and that this offense is a first degree felony (specify degree of offense)

11. understands what the statement says, and agrees that the statement is his version of the facts surrounding the said offense, and that it is true;

12. made such statement knowingly and voluntarily and in his own free will without any improper inducements or prohibited conduct by any law enforcement officers, prosecutors or any other persons; and

13. indicates that he has not been deprived of food, drink or sleep.

The juvenile named herein was brought before me on this day by law enforcement officer, David S. Whitis employed by the following agency: Lampasas County Sheriff's Department.

* * * * *

Only after receiving the proper warning and being examined by the undersigned magistrate did the juvenile, Jeremy Keith Coffey, sign the attached statement. Based upon the foregoing determinations and observations, I hereby verify and certify the following:

I have examined the child independently of any law enforcement officer or prosecuting attorney.

* * * * *

I have determined that the child understands the nature and content of his statement.

I am fully convinced that the said juvenile has knowingly, intelligently and voluntarily waived the attached statutory rights as set out in the warning given pursuant to Section 51.095 of the Texas Family Code prior to and during the making of the statement which is attached hereto and made a part hereof for all purposes.

* * * * *

This certification is hereby made by the undersigned Magistrate on this the 26th day of July 2000, 5:50 o'clock A.M., in Lampasas County, Texas.

After Judge Porter examined appellant, appellant signed the confession in her presence at 5:50 a.m. Appellant was then taken to the Juvenile Detention Facility in Killeen.

Appellant testified that just before he was taken into custody he had been "huffing gas" and that he didn't understand what was happening except that he was being arrested. He also testified that, before he made his confession, the Ranger told him that it would look better in court if he had made a statement and that it would look bad if he did not make a statement.

Section 51.095 Violation

In his second point of error, appellant insists that the "trial court erred in admitting the appellant's statement in violation of section 51.095 of the Texas Family Code." See Tex. Fam.Code Ann. § 51.095 (West Supp.2002). Under this point of error, appellant's arguments are actually focused on the voluntariness of his confession.

First, appellant argues that the statement he made before he was advised by a magistrate may have been coerced and was therefore made involuntarily. Appellant's bare assertion that his confession may have been coerced before he was advised by a magistrate has no factual support in the record. The record shows that the safeguards of section 51.095 were followed.

Second, appellant contends that immediately before he was taken into custody, he had been "huffing gas." Therefore, when he made his confession, he did not "understand the situation" rendering his confession involuntary. The only evidence in the record that appellant may have been "huffing gas" came from appellant's own testimony.

Sheriff Morris, Ranger Cummings, Investigator Whitis, Juvenile Probation Officer Rich, and Judge Porter all testified that they did not smell gasoline when they were in appellant's presence. Each of these witnesses testified that they did not believe appellant's capacity or ability to make his statement had been impaired in any way, specifically not by "huffing gas" or by the use of alcohol.

Third, appellant claims that before he made his confession he was told that if he made a statement it would "help him." Appellant contends that this promise rendered his statement involuntary. This claim does not relate to a specific violation of section 51.095. The claim rests entirely on appellant's testimony. In the suppression hearing, appellant testified for the limited purpose of determining whether his confession was admissible. He testified:

> A. After they gave me my rights, the Ranger, he explained to me that if I gave him the testimony or a statement, that it would look good in court and that I could live a better life. That it would look better in court. And if I didn't, that it would look bad in court.
>
> Q. What do you think that meant? What did that mean to you?
>
> A. I felt that if I gave him a statement, you know, what they said, then, you know, I would look good in court, that I would be looked upon with sympathy.

Appellant's credibility and the truthfulness of his testimony were matters to be determined by the trial court. Therefore, we must accord almost total deference to the trial court's ruling. See Roquemore v. State, 60 S.W.3d 862, 866 (Tex.Crim.App.2001); State v. Ross, 32 S.W.3d 853, 856-57 (Tex.Crim. App.2000); Guzman v. State, 955 S.W.2d 85, 89

(Tex.Crim.App.1997). The trial court is the sole judge of the credibility of witnesses in a pretrial hearing, and absent a showing of abuse of discretion, a trial court's finding on the voluntariness of a confession will not be disturbed. Butler v. State, 872 S.W.2d 227, 236 (Tex.Crim.App.1994).

Moreover, for a promise to render a confession involuntary, it must be (1) positive, (2) made or sanctioned by someone in authority, and (3) of such an influential nature that it would cause an accused to speak untruthfully. See Henderson v. State, 962 S.W.2d 544, 564 (Tex.Crim.App.1997); Muniz v. State, 851 S.W.2d 238, 254 (Tex.Crim.App.1993). We do not construe the statements appellant attributes to Ranger Cummings, even if true, to be a positive promise of such an influential nature that it would cause appellant to speak untruthfully.

The trial court did not abuse its discretion in denying appellant's motion to suppress his confession. No violations of section 51.095 have been shown. Appellant's second point of error is overruled.

Section 52.02 Delay

In his first point of error, appellant contends that the "trial court erred in admitting the appellant's statement in violation of section 52.02 of the Texas Family Code."

The Juvenile Justice Code, in the part relevant to this point of error, allows a child taken into custody to be taken to a juvenile processing office designated by a juvenile board where the child's statement may be taken, if the child is taken to the juvenile processing office without unnecessary delay and before the child is taken to any other place. See Tex. Fam.Code Ann. §§ 51.095, 52.02, 52.025 (West Supp.2002); Le v. State, 993 S.W.2d 650, 652-53 (Tex.Crim.App.1999). More specifically, appellant complains that his confession was inadmissible because after he was taken into custody it was approximately one hour before he was taken to a designated juvenile processing office. Appellant claims this delay at the place where he was taken into custody was unnecessary delay. Unnecessary delay "can only be determined on a case by case basis." Contreras v. State, No. 1682-99, slip op. at 7, 2001 Tex.Crim.App. Lexis 58 at *10 (Tex.Crim.App. June 27, 2001). Appellate review of this issue has been held to be de novo. See id.; Guzman, 955 S.W.2d at 88-90.

When appellant and Horton were taken into custody, there were two other young men in the car. The officers had to determine whether or not to release the other passengers. The officers then took time to advise appellant and Horton of their Miranda rights. Appellant's mother and a man living with her were in the apartment nearby. The officers were obligated by statute to inform her that appellant was being taken into custody. It was several minutes before she and the man appeared at the door. Sheriff Morris explained to appellant's mother that her son was being taken into custody because they believed he had committed murder. He informed her that appellant was being taken to Lampasas and that she had the right to come to Lampasas. He also told her that appellant would be taken to the juvenile detention facility in Killeen when the investigation was completed. The man with appellant's mother "was getting very verbal." After the officers determined that this man was not appellant's father or stepfather, the man was ordered to go back into the apartment. Appellant's mother became "very emotional" and went back and forth into the apartment. She asked many questions that the officers attempted to answer. Horton had told the officers that there was a handgun in appellant's mother's car. The officers took time to obtain her written consent to search the car. There is no evidence that either appellant or Horton were interrogated or made any statements before appellant was released to the chief juvenile probation officer in Lampasas. A review of the record of the officers' conduct at the time appellant was taken into custody, and subsequently, shows they were conscientiously complying with the dictates of the juvenile code.

Based on the record, we concur with the trial court's implied finding and we independently find de novo that appellant was taken to the designated juvenile processing office in Lampasas without unnecessary delay. See Contreras, 2001 Tex.Crim.App. Lexis 58 at *10.

---

3. STATEMENT EXCLUDED BECAUSE QUESTIONING BY POLICE OFFICER IN SCHOOL WAS CUSTODIAL

In the Matter of D.A.R., 73 S.W.3d 505 (Tex.App.—El Paso 4/4/02, *PDR ref'd*) [*Texas Juvenile Law* 283 (5th Edition 2000).

Facts: D.A.R., a juvenile, appeals his judgment of probation for delinquent conduct. He argues that the trial court erred in denying his motion to suppress statements because they were inadmissible as a result of noncompliance with Tex. Fam.Code Ann. 51.095 and that he therefore was denied his due process rights.

D.A.R. was indicted [SIC] for one count of delinquent conduct for carrying a firearm on school grounds. He was indicted [SIC] for one count of

delinquent conduct for possessing a firearm with an altered identification number. He initially pleaded not true to each count.

D.A.R. filed a pretrial motion to suppress, urging that at the time statements were made, he was under arrest and that he was deprived of the right to counsel and therefore did not intelligently, understandably, and knowingly waive his right to counsel. He argued that any resulting statements were involuntary, coerced, or enticed from him in violation of his constitutional and statutory rights. A hearing was held on the motion. Officer Jose A. Gonzalez, Jr., a school resource officer, was the only witness presented at the hearing. Officer Gonzalez testified that on November 17, 2000, he was notified by the assistant principal of Riverside Middle School that a student had said that D.A.R. had a weapon. D.A.R. was called to the assistant principal's office. Before D.A.R. entered the office, he was patted down. The assistant principal also went through D.A.R.'s backpack. No weapon was retrieved. D.A.R. was questioned but denied having any weapon.

D.A.R. was dismissed to return to class. Afterward, approximately fifteen students approached Officer Gonzalez and told him that D.A.R. was in possession of a gun and that they had been hearing that D.A.R. had brought a gun to school for his protection. One of the individuals told Officer Gonzalez that she had seen the gun before school. Although she did not know exactly where the gun was located, she took Officer Gonzalez to the area around a reservoir where the gun might be.

Officer Gonzalez summoned D.A.R. from class. A security guard brought D.A.R. to Officer Gonzalez's office. Officer Gonzalez again asked D.A.R. about the gun. He told D.A.R. that several students had told him that D.A.R. had a gun and that if D.A.R. had a gun it would be best for him to give it up.

During this second interrogation, a teacher signaled Officer Gonzalez and spoke privately with him. She told him that another student had information about the location of the gun. Officer Gonzalez testified at the hearing that if appellant had refused to speak to him, he would have spoken to the other student; however, he did not then speak to the student. Instead, he continued to speak to D.A.R. because of his need to secure the weapon as soon as possible. The other student was never questioned.

After the interruption, D.A.R. told Officer Gonzalez where the weapon was located and took him to it. The gun was discovered under a tire, approximately 150 feet from the school within the same area where the other student had taken Officer Gonzalez. The gun was not in plain view. D.A.R. was read his Miranda rights and placed in custody.

The trial judge denied the motion to suppress based on the belief that the statements were admissible under Tex. Fam.Code Ann. 51 .095(a)(2). [FN2]

> FN 2. Under Section 51.095(a)(2), the statement of a child is admissible in evidence if the statement is made orally and the child makes a statement of facts or circumstances that are determined to be true and tend to establish his guilt. Tex. Fam.Code Ann. § 51.095(a)(2) (Vernon Supp.2002).

Thereafter, D.A.R. entered into an agreement to plead true to one count of delinquent conduct based on carrying a firearm in violation of Tex. Penal Code Ann. 46.02, which was a modified version of the original first count. The second count of delinquent conduct was dropped. D.A.R. was adjudicated delinquent and received supervised probation until his eighteenth birthday for the offense.

D.A.R. brings one point on appeal of the judgment and seeks reversal and remand.

Held: Reversed and remanded.

Opinion Text: *Right to appeal*

A juvenile appellant is given the right to appeal under Tex. Fam.Code Ann. 56.01(n), which states:

> 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.

Tex. Fam.Code Ann. 56.01(n) (Vernon Supp.2002). Here, the trial court gave appellant implied permission to appeal his judgment. Moreover, appellant brings appeal based on the denial of his motion to suppress, which was filed pretrial, and it was only after appellant's motion to suppress was denied that his agreement with the State arose. Therefore, this appeal is appropriate.

Admissibility of statements

Under Tex. Fam.Code Ann. 51.095, certain requirements must be met in order for a statement from a juvenile to be admissible at trial. Tex. Fam.Code Ann. 51.095 (Vernon Supp.2002); see also In re Gault, 387 U.S. 1, 55, 87 S.Ct. 1428, 1458, 18 L.Ed.2d 527 (1967) (holding that the right against self- incrimination available to adults is also applicable in the juvenile context), cited in In re L.M., 993 S.W.2d 276, 287 (Tex.App.—Austin 1999, pet. denied). Here, appellant argues in his sole issue that the requirements of Section 51.095 were not met and that therefore his statements were inadmissible under Tex.Code Crim. Proc. Ann. art. 38.23. Specifically, appellant argues that he was in custody when the statements were made. As a result, he should have been informed of his rights before he was questioned. Appellant argues that even if he was not in custody when the confession was given, his statements were not made voluntarily. In response, the State argues that appellant was not in custody when the statements were made. The State further contends that the issue of voluntariness and coercion cannot be raised because appellant failed to preserve those claims in the lower court. If appellant was in custody when he was questioned by Officer Gonzalez, he was entitled to certain protections. Tex. Fam.Code Ann. 51.095(d) (Vernon Supp.2002). Therefore, the question central to this appeal is if appellant was in custody. We discuss this first.

Standard of review

In a suppression hearing, the trial court is the sole finder of fact. Pace v. State, 986 S.W.2d 740, 744 (Tex.App.—El Paso 1999, pet. ref'd). The trial judge may believe or disbelieve any of the evidence presented. Id. at 744. The totality of circumstances is considered in determining whether the trial court's findings are supported by the record and, absent a clear abuse of discretion, the reviewing court does not disturb those findings. Brewer v. State, 932 S.W.2d 161, 166 (Tex.App.—El Paso 1996, no pet.). If there are no findings of fact, the reviewing court presumes the trial court found the facts necessary to support its ruling, so long as those findings are supported by the record. State v. Fecci, 9 S.W.3d 212, 219 (Tex.App.—San Antonio 1999, no pet.). Therefore, the evidence adduced at the suppression hearing is reviewed in the light most favorable to the trial court's ruling. Brewer, 932 S.W.2d at 166.

In contrast, mixed questions of law and fact not turning on credibility and demeanor are subject to de novo review. Guzman v. State, 955 S.W.2d 85, 89 (Tex.Crim.App.1997). Because the issue of custody does not turn on the credibility or demeanor of witnesses, the determination of whether an appellant was in custody at the time he gave statements is one such mixed question reviewed de novo. Jeffley v. State, 38 S.W.3d 847, 853 (Tex.App.—Houston [14th Dist.] 2001, pet. ref'd).

Was appellant in custody?

The Court of Criminal Appeals, citing Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528-30, 128 L.Ed.2d 293, 298-99 (1994), stated that a person is in custody if "under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest." Dowthitt v. State, 931 S.W.2d 244, 254 (Tex.Crim.App.1996). [FN3] This is the standard of review that appellant relies on.

> FN 3. We rely on criminal cases in this analysis because, as we noted in In re R.S.C., 940 S.W.2d 750 (Tex.App.—El Paso 1997, no pet.), "[a]lthough juvenile delinquency proceedings are considered civil proceedings, they are quasi-criminal in nature. The juvenile is guaranteed the constitutional rights an adult would have in a criminal proceeding because the juvenile delinquency proceedings seek to deprive the juvenile of his liberty." Id. at 751 (citations omitted).

The State refers to the standard utilized in In re M.R.R., Jr., 2 S.W.3d 319 (Tex.App.—San Antonio 1999, no pet.), to determine whether appellant was in custody at the time the statements were made. That standard employs a two-step analysis, set forth by Stansbury and another U.S. Supreme Court case, Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). The first prong examines the circumstances surrounding the interrogation in deciding whether there was a formal arrest or restraint to the degree associated with a formal arrest. In re M.R.R., Jr., 2 S.W.3d at 323. Under the second prong, the court considers whether a reasonable person would have felt he or she was at liberty to terminate the interrogation and leave. Id.

Arguably, both standards allow for a consideration of the totality of circumstances and, we believe, implicit within that, the age of the juvenile. However, neither standard allows for an explicit consideration of the age of the juvenile. The standard that allows for such a consideration was set forth by the Austin Court of Appeals in In re L.M. See also Jeffley, 38 S.W.3d at 855 (adopting the standard of In re L.M.); In re E.M.R., 55 S.W.3d 712, 722-24 (Tex.App.—Corpus Christi 2001, no pet.) (Yanez, J., dissenting). The Austin court, in discussing the standard to be applied with respect to determining whether a juvenile is in custody, cited caselaw from other states that adopted the age of the

juvenile as a specific consideration. The court then concluded that it is appropriate for Texas courts to also consider the age of the juvenile. In re L.M., 993 S.W.2d 288-89. It then adopted the following inquiry: "whether, based upon the objective circumstances, a reasonable child of the same age would believe her freedom of movement was significantly restricted." Id. at 289. The court was quick to note that although it incorporated an explicit consideration of age in its standard, its holding did not conflict with earlier Texas cases. Id. And, we note that the standard is similar to the Stansbury standard but includes an explicit consideration of the age of the juvenile. [FN4]

> FN 4. See also In re S.A.R., 931 S.W.2d 585 (Tex.App.—San Antonio 1996, pet. denied), and In re V.M.D., 974 S.W.2d 332 (Tex.App.—San Antonio 1998, no pet.), which In re L.M. cites as using the reasonable person standard of Stansbury while impliedly considering the age of the defendant in reviewing the circumstances in each case. 993 S.W.2d at 288.

We too believe that a consideration of the age of the juvenile is appropriate. Furthermore, we believe that such a consideration is consistent with the stated purpose of the Juvenile Justice Code, which is, in part, to assure that juveniles receive a fair hearing and that their rights are recognized and enforced, Tex. Fam.Code Ann. 51.01(6)(Vernon 1996).

We believe the facts here establish that a reasonable thirteen-year-old would have believed he was in custody. We are aided in our inquiry by Dowthitt, which gave several factors that might be considered in determining whether an individual was in custody. Among them, the court may consider whether there was probable cause to arrest at the time of questioning; the subjective intent of the police; the focus of the investigation; and the subjective belief of the juvenile. 931 S.W.2d at 254; see also In re V.P., 55 S.W.3d 25, 31 (Tex.App.—Austin 2001, pet. denied) (applying the Dowthitt factors to a situation involving a juvenile). But, the subjective elements are only relevant to the extent that they are manifested in words or actions, Dowthitt, 931 S.W.2d at 254, as the test for custody relies solely on objective circumstances, id. Even a determination of probable cause is based on such an expression. Id. at 255.

First, there was probable cause to arrest appellant. (Vernon 1996). Officer Gonzalez testified that at least fifteen students had told him appellant had a gun. He felt that the statements could not be mere coincidence. At the very least, Officer Gonzalez had probable cause to arrest appellant after appellant admitted that he had a gun and had left it close to the school grounds. Tex. Fam.Code Ann. 52.01(a)(3) (Vernon 1996); Lanes v. State, 767 S.W.2d 789, 800 (Tex.Crim.App.1989); Vasquez v. State, 739 S.W.2d 37, 44 (Tex.Crim.App.1987) (holding that an officer may make a warrantless arrest if he has knowledge based upon reasonably trustworthy information that would warrant a reasonable and prudent person in believing that the person has committed or is committing a crime). At this point, Officer Gonzalez testified, appellant was no longer free to leave because he was under investigation.

A reasonable thirteen-year-old child in appellant's position, moreover, would have become aware of Officer Gonzalez's probable cause to arrest him. Appellant had been called to the assistant principal's office for the first interview, where the assistant principal, security officer, and Officer Gonzalez were present. Appellant had been released from the initial interview, but then the uniformed security guard escorted appellant from class to Officer Gonzalez's office for a second interview, during which only Officer Gonzalez and appellant were present. The door was closed, leaving appellant alone with an armed, uniformed police officer who confronted him with allegations by numerous students that appellant had a gun. During the initial interview, appellant was told that it was rumored he had brought a gun, but during the second interview, Officer Gonzalez told him that fifteen students had told him appellant had a gun. Officer Gonzalez pressed appellant to tell him where the gun was, telling appellant that it was too much of a coincidence that all of the students had told him appellant had a gun and that it would be best for appellant to confess. And certainly, after appellant made his confession, he would have realized Officer Gonzalez's probable cause to arrest him, given that the incriminating nature of his statement would substantiate Officer Gonzalez's probable cause. See Dowthitt, 931 S.W.2d at 255.

Officer Gonzalez testified that he did not question the student the teacher had told him about because he was worried about that child's safety. Specifically, he was concerned about any retaliation that might come as a result of the child acting as an informant. The second student would have been needed if appellant had been uncooperative and the student had helped locate the gun instead. Thus, appellant was the focus of the investigation, and the evidence suggests that the investigation was more than merely an attempt to secure the safety of the students; the evidence suggests that the investigation became criminal in nature and that not only was Officer Gonzalez attempting to secure the safety of the students, but he was also looking to the future criminal proceedings against appellant.

Officer Gonzalez also testified that he did not consider appellant to be in custody during either the first or second inquiries and testified that appellant was not Mirandized before the weapon was found because appellant was not then under arrest. During the second inquiry, in which only he and appellant were present, Officer Gonzalez believed that appellant was free to leave. Appellant was not handcuffed and the door was not locked. But, neither was appellant told that he could leave. The door, although unlocked, was closed. Officer Gonzalez testified if appellant had been uncooperative, he would not have been allowed to leave; rather, appellant would have been required to stay in Officer Gonzalez's office while the other student was questioned.

Appellant was first questioned in the assistant principal's office by the assistant principal. During the second inquiry, appellant was taken to the police officer's office by a uniformed security guard. Appellant was unaccompanied when he was questioned, and he was not told that he could leave or call an adult to join him. We believe the facts were such that appellant would have believed his freedom of movement was significantly restricted. Cf. In re v. .P., 55 S.W.3d at 33 (holding a juvenile not in custody where the juvenile, who brought a gun to school, was questioned in the assistant principal's office, because the juvenile was not questioned by the police officer and the officer was not present during the inquiry and as a result the juvenile was not the subject of a criminal investigation).

It was not until appellant was confronted with the statements the other students had made that he confessed to Officer Gonzalez that he had a gun and that he had left it close to the school grounds. Officer Gonzalez testified: "I told him I had information that he had the gun and it was too much of a coincidence that 15 students were telling me about his gun." Officer Gonzalez told appellant that "it would be best for [appellant]" if appellant told him about the gun. Even if appellant was not initially under arrest when he was called into Officer Gonzalez's office, the interrogation escalated into an arrest. See Jeffley, 38 S.W.3d at 857 (holding that when a suspect that was not previously in custody was pressed by the questioning officer for a truthful statement the situation escalated into a custodial interrogation and the appellant could have concluded that her freedom was inhibited significantly as to the extent of a formal arrest); Dowthitt, 931 S.W.2d at 255 ("[T]he mere fact that an interrogation begins as noncustodial does not prevent custody from arising later; police conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation.").

In light of the circumstances, we believe that appellant was in custody when his statements were made. Although the events here occurred in quick succession, there was sufficient time for Officer Gonzalez to realize that appellant came into custody and should have been given proper warnings. Yet, Officer Gonzalez issued no warnings to appellant and instead asked appellant to take him to the gun.

Appellant's statements were oral. Therefore, the admissibility of appellant's statements is guided by Tex. Fam.Code Ann. 51.095(a)(5). Among its several requirements, a statement is only admissible if the child is given warnings by a magistrate before the statement is made and the child knowingly, intelligently, and voluntarily waives each right stated in the warning. Tex. Fam.Code Ann. 51.095(a)(5)(A) (Vernon Supp.2002). The appropriate warnings were not administered to appellant here. Accordingly, we believe the trial court ruled incorrectly in concluding that appellant's statements were admissible under Section 51.095(a)(2).

Harm

We consider next whether the trial court's error was harmful under Tex.R.App. P. 44.2, which governs error in criminal cases. Error may be constitutional in nature, and the reviewing court must reverse the judgment of the lower court unless it determines beyond a reasonable doubt that the error was harmless. Tex.R.App. P. 44.2(a). If the error is nonconstitutional, it must be disregarded unless it affects substantial rights. Tex.R.App. P. 44.2(b); Johnson v. State, 43 S.W.3d 1, 4 (Tex.Crim.App. 2001). The improper admission of a statement in response to custodial interrogation implicates the constitutional right against self-incrimination. See Tex.Code Crim. Proc. Ann. art. 38.23 (Vernon 1979 & Supp.2002); In re L.M., 993 S.W.2d at 287 (relying on In re Gault in applying the constitutional right against self- incrimination to children). We therefore employ the harm analysis mandated by Tex.R.App. P. 44.2(a).

This Court stated in Villalobos v. State, 999 S.W.2d 132 (Tex.App.—El Paso 1999, no pet.), "Essentially, where constitutional error is shown, the burden is on the State to come forward with reasons why the error is harmless." Id. at 136. We will reverse unless the record establishes beyond a reasonable doubt that the admission did not contribute to the conviction.

In the present case, we cannot find beyond a reasonable doubt that the trial court's denial of the motion to suppress did not affect appellant's decision to plead guilty and the resulting conviction. The error arose from appellant's interrogation while in custody, which violated his rights under the Juvenile

Justice Code and his constitutional rights against self-incrimination. Likely, any juror would have placed great weight on the statements that appellant made. And the probable implication of the error was appellant's decision to plead guilty, subsequent to the denial of his motion to suppress. Thus, we conclude that error was harmful.

Because we find that the appellant was not properly warned in accordance with Section 51.095, we need not discuss the voluntariness of appellant's statement.

We sustain appellant's point.

ANN CRAWFORD McCLURE, Justice.

DISSENTING OPINION

The majority concludes that D.A.R. was in custody at the time he made his statements regarding possession of the gun and its whereabouts and that the statements are inadmissible because the State failed to establish compliance with Section 51.095(a)(5). In reaching this decision, the majority misapplies the objective test mandated by Dowthitt and Stansbury v. California. Under an objective standard, D.A.R. was not in custody at the time he made the statements and compliance with Section 51.095(a)(5) was not triggered. Because I believe the statements are admissible under Section 51.095(a)(2), I respectfully dissent.

General Law Governing Custody Determination

The Supreme Court held in Miranda v. Arizona that a person questioned by law enforcement officers after being taken into custody or otherwise deprived of his freedom of action in any significant way must first receive certain warnings, known commonly as the Miranda warnings. Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994), citing Miranda v.. Arizona, 384 U.S. 436, 444, 86 S.Ct.1602, 1612, 16 L.Ed.2d 694 (1966). Statements elicited in noncompliance with this rule may not be admitted for certain purposes in a criminal trial. Stansbury, 511 U.S. at 322, 114 S.Ct. at 1528; see Tex.Code Crim.Proc.Ann. art. 38.22 (Vernon 1979 and Vernon Supp.2002). The Miranda requirements apply only to a statement stemming from custodial interrogation. Thompson v. Keohane, 516 U.S. 99, 102, 116 S.Ct. 457, 460, 133 L.Ed.2d 383 (1995); see Tex.Code Crim.Proc.Ann. art. 38.22, 5 (Vernon 1979).

Custodial interrogation is questioning initiated by a law enforcement officer after a person has been taken into custody or otherwise deprived of his freedom in any significant way. Thompson, 516 U.S. at 107, 116 S.Ct. at 463; Cannon v. State, 691 S.W.2d 664, 671 (Tex.Crim.App.1985), cert. denied, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986). A reviewing court employs an objective standard in making the custody determination. A person is in custody only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest. Dowthitt v. State, 931 S.W.2d 244, 254 (Tex.Crim.App.1996), citing Stansbury v. California, 511 U.S. 318, 322-24, 114 S.Ct. 1526, 1528- 30, 128 L.Ed.2d 293, 298-99 (1994). The "reasonable person" standard presupposes an innocent person. Dowthitt, 931 S.W.2d at 254. Traditionally, courts have considered four factors in making the custody determination: (1) whether probable cause to arrest existed at the time of questioning; (2) subjective intent of the police; (3) focus of the investigation; and (4) subjective belief of the defendant. Dowthitt, 931 S.W.2d at 254. Both Stansbury and Dowthitt clarify that the determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. Stansbury, 511 U.S. at 323, 114 S.Ct. at 1529. Thus, the subjective intent of both the police and the defendant are irrelevant except to the extent that they may be manifested in the words or actions of the investigating officers. Dowthitt, 931 S.W.2d at 254.

The following situations generally 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 he cannot leave;
>
> (3) when a law enforcement officer creates a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; and
>
> (4) when there is probable cause to arrest and a law enforcement officer does not tell the suspect that he is free to leave.

Dowthitt, 931 S.W.3d at 255.

In the first three situations, the restriction upon freedom of movement must amount to a degree associated with an arrest and not merely an investigative detention. Id. In the fourth situation, the officer's knowledge of probable cause must be manifested to the suspect. 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. Custody is established under the fourth situation if the manifestation of probable cause, combined with other circumstances, would

lead a reasonable person to believe that he is under restraint to the degree associated with an arrest. Id.

Custody in the Context of Juvenile Law

The admissibility of a juvenile's oral and written statements is governed by Section 51.095 of the Texas Family Code. If a child is found to be in custody, the requirements of Sections 51.095(a)(1) or 51.095(a)(5) apply. See Tex.Fam.Code Ann. 51.095 (d)(2)(Vernon Supp.2002). Consistent with Article 38.22, however, the requirements of Section 51.095(a) do not preclude the admission of a statement made by a child if the statement does not stem from custodial interrogation. Tex.Fam.Code Ann. 51.095(b)(Vernon Supp.2002). Two intermediate appellate courts have recently modified the test when considering whether a juvenile is in custody so that consideration is given to the age of the juvenile. See Jeffley v. State, 38 S.W.3d 847, 855 (Tex.App.—Houston [14th Dist.] 2001, pet. ref'd); In re V.P., 55 S.W.3d 25, 31 (Tex.App.—Austin 2001, pet. denied); In re L.M., 993 S.W.2d 276, 289 (Tex.App.—Austin 1999, pet. denied). The inquiry, as modified, is whether, based upon the objective circumstances, a reasonable child of the same age would believe his or her freedom of movement was significantly restricted. Jeffley, 38 S.W.3d at 855; In re L.M., 993 S.W.2d at 289. In both of these cases, the courts adhered to the view that this is an objective test. See Jeffley, 38 S.W.3d at 855 (stating that under the modified standard, the determination of custody is based entirely upon objective circumstances); In re L.M., 993 S.W.2d at 289 (stating that its holding does not conflict with the standard applied in earlier cases but expressly provides for consideration of age under the reasonable-person standard established in Stansbury). Like the majority, I believe the age of the juvenile is an appropriate consideration when examining the custody issue but it must be reiterated that the test remains an objective one.

Application of the Law to the Facts

Applying a de novo standard of review, I turn now to an examination of the facts in light of the four situations described in Dowthitt. With respect to the first, there is no evidence that Gonzalez physically deprived D.A.R. of his freedom in any significant way. There is no evidence that the security guard who retrieved D.A.R. from class placed her hands on the juvenile. Gonzalez did not handcuff D.A.R., place his hands on him, or otherwise physically restrict his freedom of movement. While Gonzalez closed the door to his office, he did not lock it. Once D.A.R. admitted that he had been in possession of the gun, Gonzalez still did not handcuff him or take him into physical custody. These facts certainly show the kind of restriction of movement involved in an investigative detention, but not an arrest. It is even more apparent that the second situation is not applicable here since Gonzalez never advised D.A.R. that he could not leave.

Under the third scenario, a reviewing court must analyze whether a law enforcement officer has created a situation that would lead a reasonable juvenile to believe that his freedom of movement has been significantly restricted to the degree associated with an arrest as opposed to an investigative detention. D.A.R. had been summoned to the assistant principal's office earlier that morning, patted down, and questioned about the gun by the assistant principal in the presence of Officer Gonzalez. D.A.R. denied the allegations and was released to return to class. A short time later, he was again summoned to the school offices, this time by Officer Gonzalez. Gonzalez closed the door to his office, but did not lock it, and began to question D.A.R. about the other students' allegations that he had brought a gun to school. In considering these circumstances, I am aware there a juvenile would likely perceive a difference between being questioned by the assistant principal and by the on-campus police officer. However, even station house questioning does not, in and of itself, constitute custody. Dowthitt, 931 S .W.2d at 255; Jeffley, 38 S.W.3d at 855. Given the totality of the circumstances, including the fact that D.A.R. had been released earlier to return to class, a reasonable juvenile would have understood he was being temporarily detained for questioning about the gun but would not have believed his freedom of movement had been restricted to the degree associated with an arrest. See Jeffley, 38 S.W.3d at 855 (juvenile not in custody where she went to police station at request of police and there were no threats, express or implied, that she would be forcibly taken); see also Stone v. State, 583 S.W.2d 410, 413 (Tex. Crim.App. 1979)(interrogation was non-custodial where suspect, after being questioned twice and released, went to the police station; was given a polygraph test which he failed; was told he would probably be charged; was not placed under arrest or told he could not leave; and made a statement).

Although the majority does not explicitly so state, it appears to hold that custody is established under the fourth situation because probable cause existed to arrest D.A.R. and Gonzalez did not tell him he was free to leave. I agree with the majority that probable cause existed to arrest D.A.R. once he admitted to possessing the weapon. Probable cause also existed based upon the totality of the circumstances, including the statement of the student who told Officer Gonzalez that she had seen D.A.R. with the gun that morning before school. I further agree

that Gonzalez did not tell D.A.R. he was free to leave. But the majority does not complete the analysis by addressing whether Gonzalez manifested this knowledge of probable cause to D.A.R. or whether a reasonable juvenile would have believed that probable cause existed.

Before D.A.R. admitted he had brought a gun to school, Gonzalez never told him that there was probable cause to arrest him based upon the statement of the girl who had actually seen the gun. In fact, Gonzalez was careful not to relate this information to D.A.R. because Gonzalez wanted to protect the identity of the informant. While Gonzalez told D.A.R. it could not be a coincidence that so many students were saying that he had a gun, it is unlikely that a reasonable juvenile would believe he had been taken into custody based upon what amounted to school gossip, particularly since D.A.R. had been released earlier despite being questioned about the gun. Based upon these facts, I would find that knowledge of probable cause had not been manifested to D.A.R., and therefore, D.A.R. was not in custody at the time he made his admission to Officer Gonzalez. See Stone, 583 S.W.2d at 413. Consequently, the State was not required to demonstrate compliance with Section 51.095(a)(5) in order for this statement to be admissible. Turning to an examination of the facts surrounding the second statement, once D.A.R. admitted possession of the gun, probable cause clearly existed. A reasonable juvenile may have concluded that he could be taken into custody at that point. The facts show, however, that Officer Gonzalez did not handcuff D.A.R. or otherwise indicate that the circumstances had changed. Instead, he simply asked D.A.R. to take him to the weapon. I would find that even with the existence of probable cause, the circumstances would not lead a reasonable juvenile to believe that he was under restraint to the degree associated with an arrest. Consequently, D.A.R. was not in custody at the time he made the second statement.

Section 51.095(a)(2) and Voluntariness

The juvenile court determined that D.A.R.'s statements were admissible under Section 51.095(a)(2) which provides that a statement of a child is admissible in evidence if:

> [T]he statement is made orally and the child makes a statement of facts or circumstances that are found to be true and tend to establish the child's guilt, such as the finding of secreted or stolen property, or the instrument with which the child states the offense was committed.

Tex.Fam.Code Ann. 51.095(a)(2)(Vernon Supp. 2002).

This provision, which is substantially similar to Article 38.22, Section 3(c), [FN1] allows the admission of certain oral statements made by a juvenile while not in custody. [FN2] Even in the absence of custody, due process may be violated by statements that are not voluntarily given. Wolfe v. State, 917 S.W.2d 270, 282 (Tex.Crim.App.1996); In re V.M.D., 974 S.W.2d 332, 346 (Tex.App.—San Antonio 1998, no pet.). Therefore, if a juvenile raises an allegation of involuntariness with respect to a non-custodial oral statement that the State seeks to admit pursuant to Section 51.095(a)(2), he is entitled to a hearing outside the presence of the jury to determine the statement's admissibility. [FN3] At the hearing, the State has the burden to prove by a preponderance of the evidence that the statement was given voluntarily. See Alvarado v. State, 912 S.W.2d 199, 211 (Tex.Crim.App.1995). Further, the trial court is the sole judge of the weight and credibility of the evidence, and the trial court's finding may not be disturbed on appeal absent a clear abuse of discretion. Alvarado, 912 S.W.2d at 211.

> FN 1. Article 38.22, Section 3(c) provides: Subsection (a) of this section shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed. Tex.Code Crim.Proc.Ann. art. 38.22, § 3(c)(Vernon Supp.2002).

> FN 2. The statute may also apply to custodial statements. See e.g., Robertson v. State, 871 S.W.2d 701, 713-14 (Tex.Crim.App.1993); Braddock v. State, 5 S.W.3d 748, 753-54 (Tex.App.—Texarkana 1999, no pet.); Taylor v. State, 874 S.W.2d 362, 365 (Tex.App.—Fort Worth 1994, no pet.). In such a case, voluntariness is established by showing compliance with Miranda.

> FN 3. Once the voluntariness issue is raised, the due process guarantee requires the trial court to hold a hearing on the admissibility of the statement outside the presence of the jury. Jackson v. Denno, 378 U.S. 368, 380, 84 S.Ct. 1774, 1782-83, 12 L.Ed.2d 908 (1964). Article 38.22, Section 6 and Texas Rule of Evidence 104(c) contain the same requirement. Tex.Code Crim.Proc.Ann. art. 38.22, § 6 (Vernon 1979); Tex.R.Evid. 104(c)("In a criminal case, a hearing on the admissibility of a confession shall be conducted out of the hearing of the jury. All other civil or criminal hearings on preliminary matters shall be conducted out of the hearing of the jury when the interests of justice so require or in a criminal case when an accused is a

witness and so requests."). Even though Section 51.095 does not expressly require a separate hearing, the due process clause, and therefore, Rule 104(c) requires it in a juvenile case where the issue is properly raised. Despite D.A.R.'s objection raised in his written motion to suppress, the trial court did not expressly rule on the voluntariness issue.

A statement is "involuntary," for purposes of federal due process, only in the presence of official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker. Alvarado, 912 S.W.2d at 211. Due process is violated only by confessions that are not in fact freely given rather than by mere noncompliance with prophylactic rules. [FN4] See Wolfe, 917 S.W.2d at 282. Absent coercive police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. Id. In judging whether a juvenile confession is voluntary, the trial court must look to the totality of circumstances. Darden v. State, 629 S.W.2d 46, 51 (Tex.Crim.App.1982); In re V.M.D., 974 S.W.2d at 346.

FN 4. Miranda applies only to statements made during custodial interrogation. Miranda, 384 U.S. at 444, 86 S.Ct. at 1612.

As evidence of coercion, D.A.R. points to the evidence that he was removed from class and questioned by a uniformed and armed police officer without being given his Miranda warnings. The requirements of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) are not applicable to statements resulting from non-custodial interrogation. Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). Therefore, the absence of those warnings does not demonstrate the type of coercion that would establish a due process violation. See Wolfe, 917 S.W.2d at 282. Likewise, an interview of one suspected of a crime by a police officer will always have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. See Mathiason, 429 U.S. at 495, 97 S.Ct. at 714. Being questioned by a police officer about a crime does not constitute the kind of coerciveness which will establish a due process violation even where the suspect is a juvenile. In the absence of any evidence of coercion, I would find that the trial court properly determined the statement is admissible pursuant to Section 51.095(a)(2). With these comments, I dissent.

4. TEXAS SUPREMES SAY NON-CUSTODIAL ORAL CORRECTION OF UNLAWFUL WRITTEN STATEMENT IS ADMISSIBLE

In the Matter of R.J.H., 79 S.W.3d 1 (Tex. 5/30/02) [*Texas Juvenile Law* 296 (5th Edition 2000).

Facts: Whether a juvenile's noncustodial, inculpatory statements, made after the juvenile has already given police a confession inadmissible under state law because a magistrate was not present, are nevertheless voluntary and therefore admissible without offense to the Fourteenth Amendment to the United States Constitution must be determined from the totality of the circumstances. [FN1] Our main inquiry here is whether the court of appeals correctly applied this test in holding that the admission of a juvenile's statements was error. [FN2] We hold that it did not and therefore reverse the judgment of the court of appeals and reinstate the trial court's adjudication of delinquency.

FN1. Griffin v. State, 765 S.W.2d 422, 429-430 (Tex.Crim.App.1989); see Colorado v. Connelly, 479 U.S. 157, 169-170 (1986).

FN2. 28 S.W.3d 250 (Tex.App.—Austin 2000).

I

A

The record before us consists of the testimony of three Department of Public Service officers, Michael Scheffler, D.G. Elder, and Michael Telles, at a hearing on a motion to suppress evidence. We summarize their testimony as follows.

R.J.H., a sixteen-year-old boy, was a passenger in a car driven by his adult cousin, Pedro Ybarra, when they were stopped mid-afternoon by Officer Scheffler because neither was wearing a seat belt. When Ybarra could not produce a driver's license, Scheffler arrested him, and had the car inventoried and impounded. Scheffler noticed that there were no keys in the ignition and that the steering column had been "popped", indicating that the car may have been stolen. He also detected the odor of marijuana in the car and saw a marijuana cigarette in the ashtray. Scheffler asked R.J.H. whether the cigarette was his, and he admitted it was. In searching the car, Scheffler found an expensive set of golf clubs, some telephone equipment, and numerous compact disks and videotapes that had all been reported stolen from a residence the previous day.

Scheffler handcuffed R.J.H. and took him to Detective Elder's office at a local DPS station. Elder had R.J.H.'s handcuffs removed, determined that he

should be released, and telephoned his father to come to the station and pick him up. While R.J.H. waited for his father to arrive, he was free to walk around the office, go to the rest room, and get something to drink. He also talked with Elder for a little while, explaining that he had dropped out of school in the eighth grade, had fathered a child, and was on probation. Elder testified that he did not suspect R.J.H. of theft of the property that had been found in the car but wanted to ask him about Ybarra's involvement with his father present.

After about an hour R.J.H.'s father arrived, and Elder asked if he could question R.J.H. further. R.J.H. and his father agreed. Elder gave R.J.H. his Miranda warnings and then questioned him about the theft. R.J.H. said he had broken into a house and opened the door for Ybarra, and the two of them had carried off the property found in their car. R.J.H. stated that because he was a juvenile, he believed nothing serious would happen to him as a result of the crime. Elder did not take R.J.H. before a magistrate when R.J.H. began to implicate himself in the burglary because Elder did not consider R.J.H. to be in custody. Elder had R .J.H.'s statement reduced to writing, and R.J.H. and his father signed it. The two then left Elder's office.

Several days later, R.J.H. telephoned Elder and asked to change his written statement. He told Elder that he had committed the burglary by himself, that Ybarra had not been involved at all. After that conversation, Elder and R.J.H. spoke together several other times. R.J.H. repeatedly told Elder that he wanted to revise his written statement to take sole responsibility for the burglary, exonerating Ybarra. Based on what R.J.H. had told him before, Elder thought that R.J.H. believed the consequences would be less severe for himself than they would be for Ybarra if Ybarra, an adult, were charged with the crime. In the course of their conversations, Elder told R.J.H. that the burglary victims were anxious to recover all of the property taken, including an old Masonic ring that had been in the family for many years. Elder hoped to "guilt trip" R.J.H. into helping him locate the ring and other property, and R.J.H. did appear to cooperate, although no other property was found.

B

The State petitioned for an adjudication that R.J.H. had engaged in delinquent conduct, namely burglary, a felony. R.J.H. moved to suppress the written statement he gave to Elder on the ground that he had not been admonished of his rights by a magistrate as required by section 51.095(a)(1) of the Texas Family Code. Under the United States Constitution, a juvenile charged with delinquency is protected from self-incrimination and entitled to counsel and must be advised of these rights before being asked to make a statement while in police custody. [FN5] The Texas Family Code provides that a juvenile can waive his rights once he is in custody only if joined by his attorney [FN6] or if done in the presence of a magistrate. [FN7] R.J.H. also moved to suppress his later oral statements to Elder because they were tainted by the inadmissibility of the earlier written statement. The State countered that R.J.H. was not in custody when he gave his written statement and therefore section 51.095(a)(1) was inapplicable.

FN5. In re Gault, 387 U.S. 1 (1967).

FN6. Tex. Fam.Code § 51.09:

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.

FN7. Id. § 51.095:

(a) Notwithstanding Section 51.09, the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if:

(1) the statement is made in writing under a circumstance described by Subsection (d) and:

(A) the statement shows that the child has at some time before the making of the statement received from a magistrate a warning that:

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

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

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

(iv) the child has the right to terminate the interview at any time;

(B) and:

(i) the statement must be signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present, except that a magistrate may re-

quire a bailiff or a law enforcement officer if a bailiff is not available to be present if the magistrate determines that the presence of the bailiff or law enforcement officer is necessary for the personal safety of the magistrate or other court personnel, provided that the bailiff or law enforcement officer may not carry a weapon in the presence of the child; and

(ii) the magistrate must be fully convinced that the child understands the nature and contents of the statement and that the child is signing the same voluntarily, and if a statement is taken, the magistrate must sign a written statement verifying the foregoing requisites have been met;

(C) the child knowingly, intelligently, and voluntarily waives these rights before and during the making of the statement and signs the statement in the presence of a magistrate; and

(D) the magistrate certifies that the magistrate has examined the child independent of any law enforcement officer or prosecuting attorney, except as required to ensure the personal safety of the magistrate or other court personnel, and has determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights;

* * *

(b) This section and Section 51.09 do not preclude the admission of a statement made by the child if:

(1) the statement does not stem from interrogation of the child under a circumstance described by Subsection (d); or

(2) without regard to whether the statement stems from interrogation of the child under a circumstance described by Subsection (d), the statement is voluntary and has a bearing on the credibility of the child as a witness.

* * *

(d) Subsections (a)(1) and (a)(5) apply to the statement of a child made:

(1) while the child is in a detention facility or other place of confinement;

(2) while the child is in the custody of an officer; or

(3) during or after the interrogation of the child by an officer if the child is in the possession of the Department of Protective and Regulatory Services and is suspected to have engaged in conduct that violates a penal law of this state.

* * *

The State called Officer Scheffler and Detective Elder to testify on the motion. R.J.H. did not testify and called only one witness, Officer Telles, who testified only about the inventory he conducted of the car. At the conclusion of the hearing the court stated on the record that it found that R.J.H. had been in custody when he gave his written statement but not afterward. The court ordered that R.J.H.'s written statement be suppressed but not his subsequent oral statements. Subject to this ruling, R.J.H. then pleaded "true" to the petition and was sentenced to intensive-supervision probation for one year. (The State did not argue in the court of appeals that R.J.H.'s plea of "true" forecloses appeal from the ruling on the motion to suppress, and thus has failed to preserve that argument. We therefore express no opinion on that issue.)

A divided court of appeals reversed. [FN8] The court agreed that R.J.H.'s written statement was inadmissible under section 51.095(a)(1) of the Family Code, but held that as a result his later oral statements were involuntary and therefore inadmissible under the Fourteenth Amendment. The court also held that R.J.H.'s oral statements were inadmissible under section 54.03(e) of the Family Code, which provides in pertinent part: "An extrajudicial statement which was obtained without fulfilling the requirements of this title or of the constitution of this state or the United States, may not be used in an adjudication hearing."

FN8. 28 S.W.3d 250 (Tex.App.—Austin 2000) [Juvenile Law Newsletter ¶ 00-4-12].

The State's petition for review challenges these holdings, and R.J.H. does not argue here that his later statements were inadmissible for any other reason. Thus, the only issues before us are whether R.J.H.'s later oral statements to Detective Elder were admitted either in violation of constitutional due process because they were not voluntary, or in violation of section 54.03(e) of the Family Code. We consider each issue in turn.

II

The test for determining whether a confession was made voluntarily is well established: the totality of the circumstances surrounding the making of the confession must be examined to determine whether the confession was " 'the product of an essentially free and unconstrained choice by its maker' ". [FN11] Conversely, a statement is involuntary "only if there was official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker." [FN12]

FN11. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)); accord, Haynes v. Washington, 373 U.S. 503, 513-14 (1963); State v. Tarrazas, 4 S.W.3d 720, 723 (Tex.Crim.App. 1999); Griffin v. State, 765 S.W.2d 422, 428 (Tex.Crim.

App.1989); Creager v. State, 952 S.W.2d 852, 855 (Tex.Crim.App.1997).

FN12. Alvarado v. State, 912 S.W.2d 199, 211 (Tex.Crim.App.1995); accord, Colorado v. Connelly, 479 U.S. 157, 164 (1986) ("Absent [coercive] police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.").

Under federal law, whether a confession is voluntary is a mixed question of fact and law. Appellate review of the trial court's findings of historical fact is deferential because the trial court is in a better position to weigh credibility and make such determinations, but review of the application of the law to the facts is de novo because the trial court is in no better position to decide legal issues than the appellate court. he Texas Court of Criminal Appeals has stated that a trial court's ruling on a motion to suppress in a criminal case is reviewed by an abuse-of-discretion standard and has not said whether that standard of review is different from the standard under federal law. The Family Code, which governs juvenile delinquency proceedings in Texas, requires that they be conducted under the Texas Rules of Civil Procedure, except as to discovery, and under the Texas Rules of Evidence applicable to criminal proceedings. These rules do not set a standard for appellate review of a ruling on a motion to suppress. Finding no rule, statute, or court decision that prescribes a standard of review of such a ruling in a juvenile case, we choose to use an abuse-of-discretion standard, which for purposes of this case at least we take to be essentially identical to the federal standard, because it seems to us to make the most sense and is most consistent with appellate procedure in civil cases generally. Thus, we defer to the trial court's findings of historical fact but determine de novo whether those facts show that a juvenile's statements were made voluntarily for purposes of constitutional due process.

The Texas Code of Criminal Procedure requires trial judges to make written findings of fact in connection with rulings on motions to suppress, [FN18] and this requirement cannot be waived. [FN19] This rule does not apply in juvenile cases, [FN20] and there is no other requirement that findings be made in such cases. Neither the State nor R.J.H. requested written findings of fact in connection with the trial court's ruling on the motion to suppress, and the court made none, although it orally stated "findings" on the record as part of its explanation for its ruling. Absent findings of fact, we will "view the record in the light most favorable to the trial court's ruling," as we would for other rulings in civil cases. [FN21]

FN18. Tex.Code Crim. Proc. art. 38.22, § 6.

FN19. Green v. State, 906 S.W.2d 937, 939 (Tex. Crim.App.1995) (citing Bonham v. State, 644 S.W.2d 5, 8 (Tex.Crim.App.1983).

FN20. See Tex. Fam.Code § 51.17.

FN21. Ruiz v. Conoco, Inc., 868 S.W.2d 752, 758 (Tex.1993).

With respect to R.J.H.'s oral statements, the court of appeals concluded:

> Given (1) the undeniable connection between the earlier inadmissible statement and the later statements, indicating that [R.J.H.] would not have made the latter but for the former; (2) [R.J .H.'s] juvenile status; (3) [R.J.H.'s] belief that the written statement would be used against him; and (4) the paucity of evidence by the State to meet its burden to prove voluntariness, we conclude that, under the totality of the circumstances, [R.J.H.'s] statements to Elder requesting a revision of his written statement were not voluntary under the federal Due Process Clause.

The first factor cited by the court references the "cat out of the bag theory", which, as described by the court of appeals,

> is based on the notion that once a defendant has confessed, but is not aware the confession cannot be used against him, he may feel he has nothing to lose by making additional incriminating statements; so burdened by the psychological pressure of the first confession, his resolve to remain silent may be broken, rendering any subsequent statements involuntary under the federal due process clause. [FN23]

FN23. Id. at 252.

This theory was discussed, and for the most part rejected, by the United States Supreme Court in United States v. Bayer. [FN24] There the Supreme Court explained:

FN24. 331 U.S. 532 (1947).

Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psy-

chological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed. [FN25]

FN25. Id. at 540-541.

A defendant's voluntary statement was not inadmissible, the Supreme Court concluded, merely because his prior statement was inadmissible. More recently in Oregon v. Elstad, the Supreme Court held that a statement is not made inadmissible by a prior inadmissible statement unless the impropriety in obtaining the first statement actually extended to the later one. [FN26] In the Supreme Court's words, "moral and psychological pressures to confess emanating from sources other than official coercion" are no concern of the due process guarantee.

FN26. 470 U.S. 298, 311, 314 (1985).

The "cat out of the bag" theory has been similarly limited by the Court of Criminal Appeals. In Griffin v. State, the court held that a juvenile's confession was not involuntary and inadmissible merely because she had made an earlier statement at a time when she had been warned of her rights only by a police officer rather than by a magistrate, as required by the Family Code. [FN28] To determine the admissibility of the later statement, courts must look to the totality of the circumstances to determine whether that statement was the product of official coercion.

FN28. Griffin, 765 S.W.2d at 431.

Thus, under both federal and state jurisprudence, R.J.H.'s later statements to Elder were not involuntary merely because he made his prior statement to Elder rather than to a magistrate as required by section 51.095(a)(1) of the Family Code. We assume, consistent with the trial court's exclusion of R.J.H.'s written statement, that R.J.H. was in custody when he gave Elder that statement, and therefore section 51.095(a)(1) was applicable. The statute prescribes requirements for the admissibility of a juvenile's statement, but it does not determine whether a statement is voluntary for purposes of due process. R.J.H.'s written statement to Elder acknowledged that Elder had advised him of his constitutional rights and that he chose to make a statement "freely and voluntarily, without being induced by any compulsion, threats, promises, or persuasion". R.J.H. signed the statement, as did his father who was present throughout Elder's questioning. Elder's admonishments to R.J.H. satisfied the requirements of federal constitutional due process even though R.J.H. was not given the additional protections afforded juveniles by section 51.095 of the Family Code. R.J.H.'s later statements were therefore not "fruit of the poisonous tree"--a prior coerced statement--because for purposes of due process under the federal constitution, there was no poisonous tree.

Nor were R.J.H.'s later statements themselves the product of coercion. R.J.H. initiated contact with Elder on more than one occasion. The two spoke together several times. R.J.H. even offered to lead Elder to unrecovered stolen property. The evidence certainly supports the trial court's determination that R.J.H. was not in custody when he made the oral statements to Elder. Furthermore, there is no indication that R.J.H. felt any pressure to talk to Elder because he had already given Elder a statement that inculpated him in the burglary. For one thing, he and his cousin, Ybarra, had been caught with stolen property in their possession, so that their complicity in the burglary was not wholly dependent on R.J.H.'s confession. And for another, R.J.H.'s efforts to take sole responsibility for the crime appear to have been consistently motivated by his belief that any punishment imposed on him in the juvenile system would be less than the punishment his cousin, Ybarra, faced as an adult for the same crime. Elder did nothing to create or foster this belief in R.J.H. If R.J.H. thought he had nothing to lose by making the oral statements to Elder, it was not likely because he had already confessed, but because he had been caught and his previous experience with the juvenile justice system persuaded him that he would suffer no serious consequences.

The other three factors cited by the court of appeals in support of its conclusion add little. There is no indication that R.J.H.'s statements were coerced due to his age. R.J.H., 16, was already on probation, and he initiated some of the calls to Elder and met with him freely. Nor does R.J.H.'s belief that his written statement would be used against him--which is nothing more than the "cat out of the bag" theory restated--show coercion. The evidence is that R .J.H. made oral statements to Elder not because he thought he had nothing to lose after his written statement, but because he was afraid his cousin had much to lose if the written statement were not changed to shift all blame to R.J.H. Finally, while the evidence adduced by the State on the motion to suppress is by no means lengthy, the court of appeals did not suggest, and we cannot see, that the State ignored important evidence.

In the final analysis, the court of appeals made the inadmissibility of R.J.H.'s written statement virtually determinative of the inadmissibility of the later statements. In so doing, the court erred. The admission of the oral statements did not violate due process.

III

The court of appeals suggested, and R.J.H. argues here, that his oral statements were inadmissible under section 54.03(e) of the Family Code, which, as we have noted, excludes a juvenile's extrajudicial statements "obtained without fulfilling the requirements of this title or of the constitution of this state or the United States." We have already concluded that R.J.H.'s oral statements were not obtained in violation of federal constitutional due process, and R.J.H. does not argue that the state constitution afforded him any greater due process protections. R.J.H.'s argument is only that the oral statements were obtained without fulfilling the requirements of the Family Code. Because we agree with the trial court that R.J.H. was not in custody when he made those statements, section 51.095(a)(1) is inapplicable. R.J.H. does not identify any other requirement of the Family Code that was not met.

R.J.H.'s argument is really that because Elder did not meet the requirements of section 51.095(a)(1) in obtaining his written statement, his later oral statements were thereby tainted. This, again, is simply the "cat out of the bag" theory that we have already rejected. The admission of R.J.H.'s oral statements was thus not precluded by section 54.03(e).

* * *

For the reasons we have explained, we reverse the judgment of the court of appeals and reinstate the trial court's adjudication of delinquency.

Justice BAKER, Justice HANKINSON, and Justice O'NEILL, concur in the judgment only.

---

5. WRITTEN STATEMENT NOT PROVED TO BE A PRODUCT OF EARLIER, INADMISSIBLE ORAL STATEMENT

Horton v. State, 78 S.W.3d 701 (Tex. App.—Austin 5/31/02) [*Texas Juvenile Law* 296 (5th Edition 2000).

Facts: Appellant Bryan Scott Horton and another sixteen-year-old boy, Jeremy Keith Coffey, murdered a sixteen-year-old girl in her home, apparently because they wanted to take her father's pistol. Appellant and Coffey were taken into custody three days after the murder and, within hours, appellant confessed. Appellant, after being certified for trial as an adult, waived his right to trial by jury. The district court found him guilty of murder and sentenced him to imprisonment for forty years. [FN1] See Tex. Pen.Code Ann. § 19.02(b)(1) (West 1994). In five points of error, appellant contends the district court erred by overruling the motion to suppress his confession.

> FN1. Coffey was also tried as an adult. A jury found him guilty of murder and imposed punishment of life imprisonment. Coffey's conviction was affirmed by this Court. Coffey v. State, No. 03-01-00342-CR, 2002 Tex.App. LEXIS 2049 (Tex. App.—Austin Mar. 21, 2002, no pet.) (not designated for publication).

We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion. Villareal v. State, 935 S.W.2d 134, 138 (Tex.Crim.App. 1996).

In this review, we defer to the district court's factual determinations but review de novo the court's application of the law to the facts. Guzman v. State, 955 S.W.2d 85, 89 (Tex.Crim.App.1997). Where the district court did not make explicit findings of fact, we review the evidence in the light most favorable to the court's ruling and assume the court made findings that are supported by the record and buttress its conclusion. Carmouche v. State, 10 S.W.3d 323, 327-28 (Tex.Crim.App.2000).

Acting on information linking appellant and Coffey to the murder, Texas Ranger Fred Cummings and Lampasas County Sheriff's Investigator David Whitis drove to Harker Heights, where appellant lived with his aunt, Patty Craddock. The officers told Craddock they wanted to question appellant regarding his involvement in a murder. Craddock told the officers that appellant was with Coffey. The officers telephoned this information to Lampasas County Sheriff Gordon Morris and Investigator Doug Kahlstrom, who were at that time waiting outside the Copperas Cove apartment where Coffey lived with his mother. At about 11:30 p.m., an automobile matching the description the officers had been given drove into the apartment parking lot, stopped briefly, and then started to leave. Morris and Kahlstrom stopped the car, which was driven by Coffey, and took Coffey and appellant into custody. Kahlstrom testified that he advised appellant and Coffey of their rights. See Miranda v. Arizona, 384 U.S. 436 (1966); see also Tex.Code Crim. Proc. Ann. art. 38.22 (West 1979 & Supp.2002).

Morris called Cummings and Whitis, who were still at the Craddock residence, and told them that appellant and Coffey were in custody. Cummings testified that he told Craddock what had happened and advised her that appellant would first be taken to the Lampasas County Sheriff's office and then to the juvenile detention center in Killeen. Cummings also told Craddock that appellant was going to be questioned and that she had the right to be present. According to Cummings, Craddock said she would wait to speak with appellant at the detention center.

Approximately one hour after appellant and Coffey were taken into custody, they arrived with Morris and Kahlstrom at the Lampasas County Jail. Appellant was taken to the sheriff's conference room. Linda Rich, the Lampasas County Juvenile Probation Officer, came to the jail, met with appellant in the conference room, and filled out the "Caseworker 4 intake which is information we have to have for the computer to enter the juvenile into the computer." At this point, it was 2:20 a.m. Rich then called appellant's mother in San Angelo and Craddock in Harker Heights. Rich told both women that appellant was in custody for murder and that a detention hearing would probably be held later that day.

After completing the juvenile intake procedure, Rich turned appellant over to Morris and Kahlstrom for questioning. See Tex. Fam.Code Ann. § 52.04(b) (West Supp.2002). Morris testified that after he and Kahlstrom reentered the conference room, "I advised him of his rights using the Miranda card.... And we basically told Mr. Horton that we knew what had happened to [the victim], and he cried and told us his side of the story."

Justice of the Peace Frances Porter arrived at the jail after appellant made his oral statement to the officers. She went to the investigators' office where she met appellant and, with no one else present, administered the prescribed juvenile warnings. [FN2] Tex. Fam.Code Ann. § 51.095(a)(1)(A) (West Supp. 2002). Judge Porter's "magistrate's juvenile warning" was signed by appellant at 4:23 a.m. The judge then left the investigators' office and Kahlstrom returned. At this point, appellant gave Kahlstrom the written confession that was the subject of the motion to suppress. After the statement was typed, Judge Porter returned to the room and questioned appellant to determine whether he understood the nature and contents of the statement and was acting voluntarily. Appellant signed the statement in the judge's presence at 5:22 a.m. Judge Porter signed her "magistrate's juvenile verification and certification form" at 5:35 a.m.

FN2. It is not clear from the record when appellant was taken from the conference room to the investigators' office.

Craddock testified that the officers told her that appellant would not be questioned until he was taken to the juvenile detention center in Killeen. She said she told the officers that she wanted to be present for any questioning.

Appellant testified that he had been "huffing" gasoline on the night he was taken into custody. He said that he was not advised of his rights either at Coffey's residence or at the sheriff's office before he made his oral statement. Appellant claimed that he would not have made the oral statement had he been advised of his rights. Appellant initially claimed that he was not advised of his rights by Judge Porter until after he gave the written statement, but he later said that he may have met with the magistrate before the statement was given.

Held: Affirmed.

Opinion Text: By his first point of error, appellant contends his written statement should have been suppressed because neither of the officers who took him into custody notified his parent or custodian as required by law. A person taking a child into custody must promptly notify the child's parent, guardian, or custodian, and explain the reason for this action. Tex. Fam.Code Ann. § 52.02(b)(1) (West Supp. 2002). The failure to comply with the section 52.02(b) notice requirement will render inadmissible any subsequent statement by the child obtained as a result of the statutory violation. Gonzales v. State, 67 S.W.3d 910, 913 (Tex.Crim.App.2002).

Appellant argues that section 52.02(b) was violated because neither Morris nor Kahlstrom, the two officers who took him into custody, personally notified either Craddock or his mother. Instead, the testimony shows that moments after appellant was taken into custody, Sheriff Morris called the officers at Craddock's residence and told them that appellant was in custody. These officers, Cummings and Whitis, in turn told Craddock that appellant was in custody for murder. Appellant cites no authority holding that the statutory notice may not be given in the manner shown here. It would unreasonably elevate form over substance to hold that section 52.02(b) was not satisfied merely because the required notice was not personally given by Morris, but by a second officer acting on Morris's behalf. Because we conclude that appellant's custodian was properly notified in accord with section 52.02(b), we need not decide whether the later notice to appel-

lant's mother was adequate. Point of error one is overruled.

Next, appellant asserts that his written statement should have been suppressed because it was tainted by his earlier oral statement. It is undisputed that the earlier, unrecorded oral statement was not admissible. See Tex. Fam.Code Ann. § 51.095(a)(5) (West Supp.2002). Relying on what has been called the "cat- out-of-the-bag" theory, appellant argues that the psychological pressure of the oral confession, which he was not told could not be used against him, broke his resolve to remain silent and rendered the subsequent written statement involuntary under the Due Process Clause. See Griffin v. State, 765 S.W.2d 422, 428 (Tex.Crim.App.1989); In re R.J.H., 28 S.W.3d 250, 252 (Tex.App.—Austin 2000, pet. granted); U.S. Const. amend. XIV.

Making a confession under circumstances that preclude its use does not perpetually disable the confessor from making a usable one after those circumstances have been removed. Griffin, 765 S.W.2d at 428 (quoting United States v. Bayer, 331 U.S. 532, 541 (1947)). It has never been held that the psychological impact of the voluntary disclosure of a guilty secret qualifies as State compulsion or compromises the voluntariness of a subsequent informed waiver of the right to remain silent. Id. at 429 (quoting Oregon v. Elstad, 470 U.S. 298, 312 (1985)). The effect of giving a statutorily inadmissible statement on the voluntariness of a subsequent statement is determined from the totality of the circumstances, with the State bearing the burden of proving voluntariness by a preponderance of the evidence. Id. at 429-30; In re J.T.H., 779 S.W.2d 954, 958 (Tex.App.—Austin 1989, no writ).

Morris and Kahlstrom testified that appellant was advised of his Miranda rights both at the time he was taken into custody and immediately before he gave his oral statement. Although appellant denied this in his own testimony, we defer to the district court's implicit finding that the Miranda warnings were given. Appellant does not otherwise contend that the oral statement was involuntary. Thus, the inadmissibility of the oral confession resulted solely from alleged statutory noncompliance.

Judge Porter testified without contradiction that she fully admonished appellant before he made the written statement, that appellant appeared to understand the nature of the statement, and that he voluntarily signed the statement in her presence. Appellant does not dispute that the statutory requisites for the admission of the written statement were satisfied. See Tex. Fam.Code Ann. § 51.095(a)(1) (West Supp. 2002). Appellant did not testify or offer other evidence that he would not have given the written statement had he not previously made the oral confession.

R.J.H., on which appellant relies, is distinguishable. In that case, a juvenile gave a written custodial statement, later determined to be inadmissible, implicating himself and another person in a burglary. R.J.H., 28 S.W.3d at 251. The juvenile subsequently made several noncustodial oral statements to the police seeking to exonerate the other person and to accept sole responsibility for the burglary. Id. Finding a "direct causal connection" between the juvenile's inadmissible written statement and the later oral statements, this Court concluded that the earlier statement had tainted the later statements and rendered them involuntary under the Due Process Clause. Id. at 254. The record now before us does not reflect a causal connection between appellant's inadmissible oral statement and his later written statement. In fact, on substantially similar records, both the court of criminal appeals and this Court have upheld the admission of a written statement given by a juvenile who had earlier given an inadmissible oral statement. See Griffin, 765 S.W.2d at 430-31; J.T.H., 779 S.W.2d at 958- 59.

We hold that the State sustained its burden of proving that appellant's written statement was voluntary. Point of error two is overruled.

In his third point of error, appellant contends his written statement should have been suppressed because the sheriff's conference room in which he gave his oral statement was not a designated juvenile processing office. See Tex. Fam.Code Ann. § 52.025(a) (West Supp.2002) (juvenile board may designate office or room for temporary detention of child taken into custody). A child who is taken into custody may be detained in a juvenile processing office for up to six hours. Id. § 52.025(d). A juvenile processing office may be used to receive a statement from the child. Id. § 52.025(b).

At the suppression hearing, the State introduced in evidence an order of the Lampasas County Juvenile Board dated April 11, 1996, designating the conference room and investigation office at the Lampasas County Jail as juvenile processing offices. Appellant introduced an order of the board dated September 15, 2000, designating the investigation offices at the county jail and at the Lampasas Police Department, together with the conference room at the county juvenile probation office, as juvenile processing offices. Appellant urges that the September 15, 2000, order superceded the April 11, 1996, order, and therefore the sheriff's conference room was not a juvenile processing office on the night appellant gave his oral statement.

Assuming that the conference room was not a designated juvenile processing office, no basis for

suppressing appellant's written statement is shown. The failure to promptly take a child to a juvenile processing office or other place specified by Texas Family Code section 52.02(a) does not necessarily render inadmissible any subsequent statement given by the child. See Comer v. State, 776 S.W.2d 191, 196 (Tex.Crim.App.1989); Gonzales, 67 S.W.3d at 913; Tex. Fam.Code Ann. § 52.02(a) (West Supp. 2002). There must be a causal connection between the statutory violation and the receipt of the statement. Gonzales, 67 S.W.3d at 913; see Tex. Code Crim. Proc. Ann. art. 38.23(a) (West Supp. 2002).

Once again, the opinion on which appellant relies is distinguishable. In Baptist Vie Le v. State, 993 S.W.2d 650, 653 (Tex.Crim.App.1999), a juvenile gave a statement while being detained at the police homicide division, which was not a juvenile processing office, juvenile detention facility, or other designated office or official. Id. at 654-55. The court concluded that under the circumstances shown, the statement was obtained in violation of the family code and therefore should have been suppressed pursuant to article 38.23(a). Id. at 656. In contrast to Baptist Vie Le, it is undisputed that appellant's written statement was taken in a juvenile processing office. The only statement taken in the arguably unapproved location was the earlier oral statement that was not admitted in evidence. Assuming that there was a causal connection between the failure to detain appellant in a designated juvenile processing office and the receipt of appellant's oral statement, the only alleged connection between the oral statement and the later written statement is the "cat-out-of-the-bag" theory previously discussed and found inapplicable. There is no showing that the written statement was obtained by reason of the alleged family code violation and hence no basis for excluding the statement from evidence. Point of error three is overruled.

In his fourth point of error, appellant contends his written statement should have been suppressed because he was not taken before a magistrate in the county of his arrest as required by the code of criminal procedure. Tex.Code Crim. Proc. Ann. art. 14.06 (a) (West Supp.2002). Appellant concedes he knows of no authority holding that article 14.06(a) is applicable to juveniles. The court of criminal appeals has stated that issues involving the substantive rights of pretransfer juveniles, such as the legality of a detention or a confession, are controlled by the applicable provisions of the family code even when raised in the criminal forum. Comer, 776 S.W.2d at 196 (quoting Griffin, 765 S.W.2d at 427). In any event, noncompliance with article 14.06(a) will not vitiate an otherwise voluntary confession if the person arrested was properly advised of his Miranda rights. Cantu v. State, 842 S.W.2d 667, 680 (Tex.Crim. App.1992). Point of error four is overruled.

---

6. COURT OF CRIMINAL APPEALS REMANDS QUESTION OF ADMISSIBILITY OF STATEMENT TAKEN OUT-OF-STATE TO COURT OF APPEALS

Vega v. State, 84 S.W.3d 613 (Tex.Crim.App. 6/26/02, *PDR ref'd*) [*Texas Juvenile Law* 283 (5th Edition 2000).

Facts: In late December 1994, appellant and her boyfriend were implicated in a capital murder committed in Starr County, Texas. They fled to Chicago, Illinois, to stay with the boyfriend's aunt. Appellant was sixteen years old at the time of the charged offense. Texas authorities learned from relatives of appellant's boyfriend in Starr County that the two suspects were staying in Illinois. Starr County deputies sent a teletyped message to the Chicago Police Department, advising that Texas warrants had been issued for the two suspects. The message contained the address and telephone number of the home in which the Texas deputies believed appellant was staying. The Chicago police arrested appellant at that address.

Following Illinois law, the police obtained a written statement from appellant. It is undisputed that, while correct under Illinois law, the procedures followed in obtaining the statement, as well as the format of the statement itself, were not in compliance with Title 3 of the Texas Family Code. Appellant claims that, because the statement does not comply with Texas law, it was inadmissible at trial. The state argues that, because appellant was in Illinois when she gave the statement, Illinois law should apply and that the statement was admissible under Illinois law.

Held: Reversed and remanded to Court of Appeals.

Opinion Text: In holding that appellant's statement was inadmissible, the court of appeals relied upon our holding in Davidson v. State, 25 S.W.3d 183 (Tex.Crim.App.2000), to guide its analysis as to the admissibility of appellant's confession. Vega v. State, 32 S.W.3d 897, 901 (Tex.App.—Corpus Christi 2000) [Juvenile Law Newsletter ¶ 00-4-23]. In Davidson, we held that, because art. 38.22 § 3(a) of the Texas Code of Criminal Procedure was procedural in nature, a trial judge is required to apply Texas law to determine the admissibility of an oral confession obtained in another state. Davidson, 25

S.W.3d at 185-6. We also held that because the mandatory requirement of art. 38.22, § 3(a), that an oral custodial statement must be recorded before it can be used against a defendant, was not followed by the authorities in Montana, appellant's oral confession was inadmissible at his Texas trial. Id. at 186.

Although art. 38.22 § 3(a) of the Code of Criminal Procedure and Title 3 of the Family Code deal with the same general subject, the persons involved and the objectives of the two provisions are different. Vasquez v. State, 739 S.W.2d 37, 42 (Tex.Crim.App.1987). Like the current version, the 1994 version of Title 3, Juvenile Justice Code, began with a statement of purpose and interpretation. In pertinent part, section 51.01 stated that the title "shall be construed" to "to protect the welfare of the community and to control the commission of unlawful acts by children," and "to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced." Tex. Fam.Code Ann. § 51.01 (1994). Unlike the language in art. 38.22, the legislature did not mandate that Title 3 be "strictly" construed.

The holding in Davidson applies here only if art. 38.22 prevails over Title 3 of the Family Code. Here, the challenged statement was written and therefore did not violate the provisions of art. 38.22. In addition, this Court has held that, pursuant to the Code Construction Act, the sections of the Family Code relevant to confessions prevail over art. 38.22. Lovell v. State, 525 S.W.2d 511, 514 (Tex.Crim. App.1975). Thus, it is Title 3 that controls issues concerning juvenile confessions, not art. 38.22. See Griffin v. State, 765 S.W.2d 422, 427 (Tex.Crim. App.1989). This is not a Davidson case by statute, circumstances, or command to "strictly construe." Davidson is, therefore, inapplicable here. Because appellant was a juvenile at the time she gave her statement, its admissibility must be determined under Title 3 of the Family Code.

Traditional conflict-of-law principles prescribe that issues that are strictly procedural in nature are governed by the laws of the forum state, whereas issues that are substantive in nature require an analysis of which state has the most significant relationship with the communication in question. Gonzalez v. State, 45 S.W.3d 101, 104 (Tex.Crim. App.2001) citing Restatement (Second) of Conflict of Laws § 139 (1971). A substantive right has been defined by this Court as a right to the equal enjoyment of fundamental rights, privileges, and immunities or a right that can be protected or enforced by law. Gonzalez, 45 S.W.3d at 106 n.8, citing Black's Law Dictionary (5 th ed.1983 & 7 th ed.1999). A procedural right is a right that helps in the protection or enforcement of a substantive right. Gonzalez at 106 n.8 citing Black's Law Dictionary (7 th ed.1999).

Here, the state argues that Title 3 is substantive in nature because it arose out of the desire to bestow constitutional rights and protections upon juveniles facing delinquency proceedings. Appellant, on the other hand, says that Texas courts and the Texas legislature have mandated that the Family Code's procedural provisions on the taking of a juvenile statement be strictly followed and that this Court has held that juvenile confessions warrant special procedural considerations and protections. See e.g. Comer v. State, 776 S.W.2d 191 (Tex.Crim. App. 1989); Vie Le v. State, 993 S.W.2d 650 (Tex.Crim. App.1999).

There are, under Texas conflict-of-law principles, several factors to consider in determining which jurisdiction has the most significant relationship to the case, including: 1) where the injury or unlawful conduct occurred; 2) the place where the relationship between the parties is the strongest; 3) the number and nature of contacts that the non-forum state has with the parties and with the transaction involved; 4) the relative materiality of the evidence that is sought to be excluded; and 5) the fairness to the parties. Restatement (Second) of Conflict of Laws §§ 6, 145 (1971); Gonzalez, 45 S.W.3d at 104 n. 4 (Tex.Crim.App.2001) citing Restatement (Second) of Conflict of Laws § 139 (1971).

Here, a Texas resident is charged with an offense committed in Texas, and the non-forum's contact with the parties was limited to one occasion on which apparently unrequested questioning was done and a highly material statement obtained. The statement was obtained in Illinois, but Illinois has no interest in the offense or appellant. All these factors militate for application of Texas law. Only resolution of the issue of fairness is not obvious.

Illinois has a similar method of determining which state has the most significant relationship to the case. The Illinois Supreme Court found several factors important in determining which state's law would apply: where the crime was committed, where the crime was being prosecuted, where the defendant resided, in which state the defendant maintained his citizenship, where the majority of witnesses resided, and who would testify at trial. People v. Saiken, 275 N.E.2d 381, 385 (Ill.1971). All of these factors also favor the application of Texas law to substantive

As set out in the opinion of the court of appeals, Appellant raised thirteen complaints in regard to violation of the Texas Family Code.

Issue 1: § 52.02; appellant was not taken without unnecessary delay to a place designated in this section.
Issue 2: § 52.025; Chicago police failed to interview appellant in an approved juvenile processing center.
Issue 8: §§ 51.12 & 52.025; appellant was not detained in a facility approved by Texas authorities.

Appellant was taken to an equivalent Illinois facility. To hold that such actions were not sufficient to satisfy Texas' concerns would make impossible any apprehension of a Texas juvenile offender anyplace outside of Texas and would not advance Texas public policy as expressed in § 51.01.

Issue 3: § 51.09 & 52.04; Chicago police failed to have an authorized officer of the Texas juvenile court decide whether appellant should be further detained.

Issue 4: § 51.09; appellant's written statement does not contain all of the warnings required.

The warnings set out in § 51.09(b)(1)(A-D) are essentially the Miranda warnings. Appellant received those warnings at least three times. Additional warnings in § 51.09(b)(1)(E-F) required that a child over the age of 15 be told that he or she could be transferred to adult court for trial, and, if involved in a murder, that commitment to the Youth Commission could include transfer to adult prison. Appellant was informed of Illinois law, which while technically incorrect, accurately conveyed the possibility of being treated as an adult when accused of murder.

Issue 12: § 51.12; appellant was detained in an area where adults arrested for, or charged with, a crime are detained.

The language of this subsection is "a child shall not be detained in or committed to a compartment of a jail or lockup in which adults arrested for, charged with, or convicted of crime are detained or committed, nor be permitted contact with such persons." A reasonable inference is that the legislature intended to prohibit putting a juvenile into circumstances in which the juvenile might be victimized by adult offenders. This is supported by the current § 51.12(f), which states that a child who is detained in a building which contains an area of secure confinement "shall be separated by sight and sound from adults detained in the same building." Tex. Fam.Code Ann. § 51.12(f) (2002). Appellant was held in an interrogation room. She was at all times kept separate from adult offenders.

As to the above complaints, Illinois authorities, by following Illinois law, also complied with Texas law to the extent necessary to carry out Texas' intended purpose and public policy. We now address appellant's remaining complaints.

Issue 5: § 51.09; appellant's written statement does not contain a certificate by a magistrate that appellant knowingly, intelligently and voluntarily waived her rights before making the statement.
Issue 6: § 51.09; appellant was never advised of her rights by a magistrate before being interrogated.
Issue 7: § 51.09; appellant was never presented before a magistrate at any time before giving her statement.
Issue 9: § 52.025; appellant was detained for more than six hours before the conclusion of her statement.
Issue 10: § 51.09; appellant's statement was not signed in the presence of a magistrate with no law enforcement officer present.
Issue 11: § 51.09; appellant's statement was signed in the presence of at least one law enforcement official who was armed.
Issue 13: § 52.025; appellant was improperly left unattended in the interview room.

Appellant arrived at the police station at about 10:45 a.m. Her written statement was signed at about 9:40 p.m. As permitted by Illinois law, the youth officer who presided at the signing was an armed police officer. Appellant was left alone in the interrogation room for several periods before she was taken to the juvenile holding facility. From the record at hand, it appears that appellant was not taken before a magistrate. All of these circumstances violate provisions of Title 3.

However, a violation of the Family Code in this particular case does not necessarily dispose of the issue of admissibility. The holdings in our previous decisions in this area dealt with violations of § 51.095 by Texas law enforcement officers. When a law enforcement officer violates the laws of his or her own state, even while acting in good faith, exclusion of the evidence is appropriate because this remedy serves to deter future violations. State v. Mayorga, 901 S.W.2d 943, 946 (Tex.Crim.App. 1995). Here, automatically excluding appellant's statement will not have a similar deterrent effect on the arresting officers; Illinois police will continue to comply with their own laws and procedures. Rather,

the analysis should examine the effect of the absence of a magistrate on the admissibility on the challenged statement in a context of fairness to the parties, both the state and appellant, with the focus being on the purpose expressed in § 51.01: "to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced." Tex. Fam.Code Ann. § 51.01 (2002).

We, therefore, reverse and remand to the court of appeals for such an analysis.

COCHRAN, J., filed a concurring opinion in which WOMACK and HOLCOMB, J.J., joined.

In 2001, the Texas Legislature amended Article 38.22 of the Texas Code of Criminal Procedure. That amendment provided that Texas courts may admit an accused's custodial statement that was obtained in another state in compliance with that state's laws, even though the taking of the statement did not comply with all of the requirements of Article 38.22. Presumably, that legislative change was a reaction to this Court's opinion in Davidson v. State, 25 S.W.3d 183 (Tex.Crim.App.2000). The amendment reflects the common sense notion that we cannot (and should not) expect police officers in other jurisdictions to know and apply Texas confession law when they take a suspect's statement in their own jurisdiction. Those officers should, instead, comply with the applicable laws of their own jurisdiction. [FN1] If they do so, article 38.23, section 8 explicitly permits Texas courts to admit the resulting statements.

> FN1. See, e.g., Robert O. Dawson, TEXAS JUVENILE LAW 43 (5th ed. 2001 Supp.) ("it seems a much more sensible rule to judge the admissibility of a statement in accordance with the circumstances in existence at the time and place of questioning than later retroactively in accordance with the law of the forum state").

Although the Legislature amended the Code of Criminal Procedure to effect this change, it did not amend the corresponding Family Code provision concerning the admissibility of a juvenile's statements. [FN2] We can speculate about its reasons, but the fact remains that the Legislature did not amend Family Code section 51.09 to provide for the admissibility of a juvenile's custodial statements taken in compliance with another jurisdiction's law concerning a juvenile's statements. Until and unless the Legislature acts, we should follow the applicable Family Code provisions and our previous choice-of-law decisions.

> FN2. The same rationale that led the Legislature to amend Article 38.22 might well apply to the taking of a juvenile's statements. Perhaps the Legislature simply overlooked the juvenile's confession statute. Or perhaps the Legislature intended that its Section 8 amendment to article 38.22 also apply to statements given by juveniles in foreign jurisdictions who are later certified to stand trial as adults, because Section 8 of article 38.22 begins with the statement:
>
> > Notwithstanding any other provision of this article, a written, oral, or sign language statement of an accused made as a result of a custodial interrogation is admissible against the accused in a criminal proceeding in this state if ...
>
> Tex.Code Crim. Proc. art. 38.22 § 8 (Vernon Supp.2001). See Dawson, supra at 44 (suggesting that section 8 of article 38.22 "effectively abrogates [court of appeals' decision in] Vega, but leaves unchanged the possibility that a court may follow Vega in a juvenile case in which the child was not certified to criminal court for prosecution as an adult").

In any event, this provision applies only to the admission of statements made on or after September 1, 2001. Appellant gave her statement to Illinois police on December 28, 1994. Thus even if the Legislature intended for this provision to apply to statements made by a juvenile who is later certified to stand trial as an adult, it would not apply to appellant's statement, which she made more than five years before the amendment's effective date.

Therefore, I join the Court's opinion.

Keller, P.J., filed a dissenting opinion in which KEASLER and HERVEY, J.J., joined [omitted].

---

7. ARREST NOTICE CAN BE GIVEN TO ADULT COUSIN AS CUSTODIAN; TWO AND ONE-HALF HOUR DELAY OK

Vann v. State, ___ S.W.3d ___, No. 14-02-00544-CR, 2002 WL 1462901, 2002 Tex.App.Lexis 4676 (Tex.App.—Houston [14th Dist.] 6/27/02, *pet. stricken*) [*Texas Juvenile Law* 302 (5th Edition 2000).

Facts: Appellant Patrick Cornell Vann was certified to stand trial as an adult for capital murder, found guilty by a jury, and given a mandatory life sentence. See Tex. Pen.Code §§ 8.07(c), 12.31(a). He now appeals the trial court's ruling on his motion to

suppress a firearm and a statement he made in police custody.

On November 30, 1999, appellant (who was fifteen at the time) and an accomplice robbed a convenience store. In the course of the robbery, appellant shot and killed the clerk. The following day, appellant used the same handgun in an unrelated shooting. He then fled to his aunt's house--where he often stayed--changed his bloody clothes, and hid the handgun in an old refrigerator in the backyard before departing again.

Witnesses to the second shooting knew appellant, and shortly after he left his aunt's house, police arrived looking for him. The officers obtained the consent of Leticia Vann, appellant's twenty-five-year-old cousin (the daughter of his aunt), to search for him, and found the handgun in the backyard refrigerator.

A few hours later, police arrested appellant for the second shooting. Because his cousin had seen him enter her house wearing bloody clothes, she also went to the police station to give a statement. After a magistrate gave appellant his juvenile warnings, detectives separately interviewed appellant and Leticia. In his statement, appellant admitted placing the handgun in the refrigerator. [FN1] When appellant went before the magistrate again and signed his statement, the detective who interviewed appellant told Leticia what was occurring. By that point, appellant had been in police custody about two and one-half hours. Officers in the juvenile division contacted appellant's mother sometime later.

> FN1. Appellant's statement did not mention the convenience store robbery or murder. Although it had occurred the day before, police did not question appellant about the murder because they did not yet consider him a suspect in that case.

At the hearing on his motion to suppress, appellant attempted to exclude (1) his statement under the Texas exclusionary rule, [FN2] based on a violation of Family Code section 52.02(b), and (2) the handgun (proven to have been used in both shootings), based on a warrantless search that allegedly exceeded the scope of consent. The trial court denied the motion to suppress.

> FN2. Tex.Code Crim. Proc. Ann. art. 38.23(a) (Vernon Supp.2002).

Held: Affirmed.

Opinion Text: *Standard of Review*

In reviewing the trial court's ruling on a motion to suppress, we afford almost total deference to a trial court's determination of historical facts, and if no fact findings are filed we presume the trial court made implicit findings of fact that support its ruling, provided these facts are supported by the record. State v. Ross, 32 S.W.3d 853, 855 (Tex.Crim.App. 2000). We review de novo application-of-law-to-fact questions that do not turn on an evaluation of credibility and demeanor. Id. at 856. Because both questions at issue fall into this category, we will view the evidence in the light most favorable to the trial court's ruling and review de novo the trial court's resolution of both questions. See Contreras v. State, 67 S.W.3d 181, 185 (Tex.Crim.App.2001) (applying de novo review to determine if forty-five-minute delay was "unnecessary" under 52.02(a)); In re C.R., 995 S.W.2d 778, 783 (Tex.App.—Austin 1999, pet. denied) (applying de novo review to question of compliance with 52.02(b)); Simpson v. State, 29 S.W.3d 324, 327, 330 (Tex.App.—Houston [14th Dist.] 2000, pet. ref'd) (setting out de novo standard in case involving scope of consent to search).

Whom to Notify

In his first point of error, appellant contends his statement was obtained in violation of Family Code section 52.02(b). That section requires a person taking a juvenile into custody to "promptly give notice of his action and a statement of the reason for taking the child into custody, to ... the child's parent, guardian, or custodian." Tex. Fam.Code § 52.02(b). Once a juvenile produces evidence that section 52.02 was violated, the burden shifts to the State to show compliance. See Roquemore v. State, 60 S.W.3d 862, 869 (Tex.Crim.App.2001). Appellant does not take issue with the content of the officer's notification. Instead, he argues that the notice was not prompt and the officers should have given notice to his mother instead of his adult cousin.

The State argues that Leticia Vann qualified as appellant's "custodian." The Code defines this term as "the adult with whom the child resides." Tex. Fam.Code § 51.02(3). It is clear from the record before us that appellant did not have a single, fixed residence. Testimony indicated that officers had contacted appellant's mother on an earlier occasion, at which time she told the police that appellant "stayed where and when he wanted." It is also clear that appellant's cousin Leticia was the principal adult in the home where he often resided. Leticia's mother (appellant's aunt) raised him since he was two weeks old. Appellant had his own bedroom at the house and kept belongings there. Leticia was the adult who was most often at that home, and reported that appellant lived with her and her mother most of the time. At the time police took appellant into custody, he was still "in and out" of Leticia's home, although he was supposed to be living with his mother. Appel-

lant's written statement confirmed that he lived with his mother but sometimes spent the night at his aunt's house.

Viewing the evidence in the light most favorable to the trial court's ruling, [FN3] we find appellant's cousin Leticia qualifies as his "custodian" within the meaning of the Code, and find under the circumstances of this case that notice to her complied with section 52.02(b).

FN3. See Contreras, 67 S.W.3d at 185-86.

When to Notify

Appellant also argues in point of error one that the police violated section 52.02(b) because their notification was not prompt. In resolving this issue, other courts have considered (1) the length of time the juvenile had been in custody before the police notified a parent, guardian, or custodian; (2) whether notification occurred after the police obtained a statement; (3) the ease with which the police were ultimately able to contact the appropriate adult; and (4) what the police did during the period of delay. [FN4]

FN4. See, e.g., Gonzales v. State, 67 S.W.3d 910, 911 (Tex.Crim.App.2002) (noting five to six-hour delay in notification that came only after juvenile was processed into detention facility); Hampton v. State, 36 S.W.3d 921, 924 (Tex.App.—El Paso 2001, pet. granted) (finding delay violated § 52.02(b) when notification was delayed until juvenile was giving statement); Hill v. State, No. 12-00-00172 CR, 2001 WL 493275, at *7 (Tex.App.—Tyler May 9, 2001, pet. ref'd) (finding four hour and twenty-minute delay not prompt when officers waited until after juvenile confessed, and reached mother on first attempt at contact); In re C.R., 995 S.W.2d 778, 783 (Tex.App.—Austin 1999, pet. denied) (declining to hold one or two-hour delay alone would violate § 52.02(b)).

Here, the delay was approximately two and one-half hours long, and although officers could have notified Leticia earlier, they waited until appellant was being taken before a magistrate to sign his written statement. [FN5] But Leticia was present when the police apprehended and arrested appellant. She witnessed his attempt to hide evidence and advised him to turn himself in to the police. She was also present at the police station and knew when appellant was giving a statement to the police. [FN6]

FN5. The State argues that according to the record, the officers notified Leticia before they interviewed him. The officer's testimony that the State relies on, however, at best suggests that he notified Leticia either before or sometime during the hour he spent with appellant. The same officer later said he notified Leticia "as [appellant] was being brought back to the magistrate" for the second time.

FN6. Because she was present, the facts here are unlike those in Comer v. State, 776 S.W.2d 191, 196-97 (Tex.Crim.App.1989), in which the Court found the violation of section 52.02(a) may have affected the juvenile's decision to confess.

In order for evidence to be excluded under Code of Criminal Procedure article 38.23, there must be a causal connection between the illegal conduct and the acquisition of evidence. Gonzalez v. State, 67 S.W.3d 910, 912 (Tex.Crim.App. 2002); Roquemore v. State, 60 S.W.3d 862, 870-71 (Tex. Crim.App.2001) (finding causal connection when, but for violation of § 52.02(a), the police would not have obtained evidence when they did). Here, we find no causal link between the delay in notifying Leticia and appellant's statement. Consequently, the trial court properly denied appellant's motion to suppress the statement made in custody. We overrule appellant's first point of error.

---

8. REQUIRING PARENTAL NOTICE OF REASON FOR TAKING INTO CUSTODY DOESN'T REQUIRE NOTICE OF INTERROGATION PURPOSE

Hampton v. State, 86 S.W.3d 603 (Tex.Crim.App. 9/25/02) *Texas Juvenile Law* 301 (5th Ed. 2000).

Facts: When police officers took appellant, a juvenile, into custody, they told his mother that they were doing so because he had absconded from juvenile probation. The next morning, without re-establishing contact with appellant's mother, an Odessa officer questioned appellant about a March 1999 murder. Appellant gave a videotaped statement in which he admitted to killing the victim. Because we find that the police officer properly notified appellant's mother "of the reason for taking the child into custody," as required by Family Code section 52.02(b), he was not also statutorily required to tell her that he suspected her son of committing a murder or to notify her again before questioning appellant. In a separate issue, we also find that the court of appeals erred in confusing the standard for reversal for Brady error with the standard for reversal for constitutional error under Tex.R.App. P. 44.2(a). We therefore reverse the El Paso Court of Appeals' decision that the officer violated section 52 .02(b) and therefore illegally obtained appellant's confession. Hampton v. State, 36 S.W.3d 921, 924 (Tex.App.—

El Paso 2001) [Juvenile Law Newsletter ¶ 01-1-13]. We remand the case to the court of appeals for it to determine whether appellant has demonstrated that the State's failure to timely produce a police officer's supplementary report was material and thus created "a probability sufficient to undermine ... confidence in the outcome of the proceeding."

On March 18, 1999, Jarvis Preston and his sister, Lashara Preston, were watching TV when they heard gunshots outside Lashara's apartment at La Promesa Apartments in Odessa, Texas. Two or three minutes later, they saw someone run past her back window in the alley. Jarvis recognized that person as the appellant, "Tweet." Appellant was standing on the back porch and said, "Open the door for me." Lashara did not want appellant to come inside, but Jarvis considered appellant "just like a home boy," and so he asked Lashara for the keys to her car and offered to drive appellant home. Appellant told Jarvis that he thought he had shot somebody in self-defense. Appellant and Jarvis then spent the rest of the night driving around.

Meanwhile, police officers responded to a 911 call, came to the apartment complex, and found the body of William Nance, who had been shot to death. During their investigation, the officers obtained information which focused suspicion on appellant as the shooter. Four days after the murder and upon discovering that appellant was a probation absconder, Detective McCann and other officers arrested appellant at his friend's apartment. When appellant heard police officers at the front door, he ran out the back, but the officers caught him.

Appellant's mother, Deborah Jackson, arrived at the friend's apartment while the Odessa police were taking her son into custody. She asked Det. McCann why they were taking appellant into custody and he told her that they were picking him up for a probation violation-he was an absconder from juvenile probation. She told Det. McCann that appellant was a juvenile. [FN5]

> FN5. Under Texas law, a person who is not yet seventeen is a juvenile and police must deal with that person according to the terms of the Juvenile Justice Code which contains specific procedural protections, even though that person may later be certified to stand trial in an adult district court. Upon his seventeenth birthday, a person is an adult for purposes of the Texas criminal justice system, including all arrest and police interrogation purposes, even though he may already be under the supervision of the juvenile justice system.

Det. McCann, mistakenly believing that appellant was seventeen because he had booking photos and information from the Sheriff's Department that appellant had previously been arrested as an adult, drove him to the Odessa police station instead of the Ector County Youth Center. Appellant subsequently admitted to the detective that he had lied about his age when he was previously arrested by the Sheriff's Department and that he was really just sixteen. Det. McCann called the Youth Center to verify that appellant was indeed still a juvenile. Meanwhile, Det. McCann asked appellant several times if he wanted to give a statement at some time, although he did not ask him any questions. At first appellant was very "vocal and profane," but he soon "settled down" and said he would give a statement. Once appellant's age was verified, Det. McCann drove appellant to the Youth Center at about 12:30 a.m. and left him in the center's custody.

Det. McCann returned the next morning, was permitted to check appellant out of the juvenile detention center, and took him back to the police station, where a magistrate advised appellant of his rights and asked him whether he wanted to waive those rights and talk to Det. McCann. Appellant did. Both appellant's interview with the magistrate and his two hour interview with Detective McCann were videotaped and transcribed. Appellant stated that he had killed Mr. Nance, but claimed that he shot in self-defense.

Appellant explained that he had been at an apartment with several people that night, talking and watching TV while they smoked crack cocaine. At about 4:00 a.m., Appellant went outside to visit another friend and saw Mr. Nance. Appellant stated that Mr. Nance wanted some dope and he mistakenly thought appellant sold drugs. When appellant told Mr. Nance that he was not a drug dealer, Mr. Nance became hostile and threatening. As Mr. Nance started toward appellant, Nance slipped and appellant pulled his gun out of his pants and cocked it. The victim hit appellant's hand and the gun "went off." According to appellant, he started to run away, but Mr. Nance kept coming after him and so he shot twice more. He then ran back to the apartment where he had been watching T.V., but his friends refused to let him come in. They threw his jacket out to him, and he then ran to the apartment where Jarvis Preston and his sister were. While Det. McCann was

that, although appellant was taken into custody as a juvenile probation absconder, the police also suspected him of killing Mr. Nance. After hearing testimony, the trial judge denied the motion to suppress and admitted appellant's videotaped statement at trial.

Other evidence offered by the State at trial included the eyewitness testimony of John Cooper, who testified that he was "smoking crack" at a friend's apartment. Looking out the upstairs window, he had seen appellant, whom he knew as "Tweet," and another man outside arguing. After he turned away from the window, he heard a gunshot. When he looked back out the window, he saw a man run across the street and fall down. He also saw appellant with his arm extended and heard several more shots. Mr. Cooper said that appellant was the only other person in the area.

Fourteen-year-old Anthony Tuda testified that he was asleep in his bed at La Promesa Apartments at about 4:20 a.m. on March 18th when he heard a gunshot. He got up and looked out his window and saw "the one that got shot, he, like, struggled across the street and just fell down." He said he saw three people in all, the victim and two other people. Anthony Tuda explained that, at first, he saw only the shooter and his victim, but then after the shooter ran away, he thought he saw someone else drive off in a pick-up truck. He did not recognize any of the people. He called 911.

Andrea Travioli testified that she was at the apartment at La Promesa that night with appellant. He left, she heard shots, then, shortly thereafter, appellant banged on the door and said he needed his jacket because he "need[ed] to get the hell out of here." Jermaine Session testified that appellant came to his apartment the next morning and told him he had argued with Mr. Nance and shot him. Jason Yielding testified that appellant later came to his apartment and asked him for ride into the country. Jason did so and saw appellant throw a sack out of the window at a location where officers later recovered parts of a gun of the same type used to kill Mr. Nance.

After all of the State's witnesses testified, appellant's attorney told the judge that he had just discovered that the prosecutor had a supplemental police report which he had not previously seen. He said that this report, prepared by Sgt. Roberts of the Odessa Police Department, contained potentially exculpatory information, namely the first names of two girls who had lived in the apartment complex when the shooting occurred (but who had since moved). Appellant's attorney said that the girls told police officers shortly after the murder that they had seen two black males running away from the shooting scene, one of whom was Jarvis Preston, appellant's friend who drove him away from the murder scene. Appellant requested a continuance for his investigator to try to track down the two missing girls. The trial judge denied this request and then appellant asked for a mistrial which was also denied. Appellant did not file a motion for new trial or request a hearing to present further evidence relating to this issue.

A jury convicted appellant and sentenced him to 35 years imprisonment. The El Paso Court of Appeals, finding that: 1) appellant's videotaped statement was taken in violation of section 52.02(b); and 2) the State's failure to disclose potentially exculpatory material was harmful, reversed the conviction and ordered a new trial. We granted the State Prosecuting Attorney's petition for review.

Held: Reversed and remanded.

Opinion Text: Section 52.02(b) of the Texas Family Code requires a person who takes a juvenile into custody to promptly notify the child's parent and appropriate juvenile authorities of the detention and to state his reason. [FN9] The issue in this case is: What does the phrase "a statement of the reason for taking the child into custody" mean?

> FN9. Section 52.02(b) provides:
>
> A person taking a child into custody shall promptly give notice of his action and a statement of the reason for taking the child into custody, to:
>
> (1) the child's parent, guardian, or custodian; and
>
> (2) the office or official designated by the juvenile court.
>
> Tex. Fam.Code § 52.02(b) (Vernon Supp.2002).

We apply the traditional standards of statutory construction to analyze whether Section 52.02(b) requires police officers to inform a parent, not only of the "reason the child [has been] taken into custody," but also: (1) whether they harbor any suspicions of other criminal conduct; and (2) whether they must renotify a parent or guardian before questioning the child about the same or a different criminal offense. We look solely to the plain language of the statute for its meaning unless the text is ambiguous or application of the statute's plain language would lead to an absurd result that the Legislature could not possibly have intended.

Under the plain language of Section 52.02(b)(1), an officer must inform a child's parent of "the reason" for taking the child into custody. That is, police must provide a parent with the legal

justification for the officer's action. [FN11] Appellant argues that Section 52.02(b) "was adopted for children to have a knowing and intelligent advisor when faced with the intimidating prospect of law enforcement questioning." Section 52.02(b), on its face, does not require police to renotify parents or custodians concerning their suspicions of criminal conduct other than that for which the child has been taken into custody. This statute uses the singular; parents must be told of "the reason" for taking the child into custody. The statute does not say that a parent must be informed of "the legal reason for taking the child into custody, and any other suspicions." Both the plain words and the plain meaning of Section 52.02(b) are directed toward informing the parent of his child's whereabouts and the legal justification for taking him into custody. [FN12] Interpreting the statutory phrase "a statement of the reason for taking the child into custody" according to its plain meaning does not lead to an absurd result, nor does appellant contend otherwise.

> FN11. In In re S__ R__ L__, 546 S.W.2d 372 (Tex.Civ.App.—Waco 1976, no writ), the Waco Court of Appeals rejected a contention similar to appellant's:
>
> > Appellant contends that [Section 52.02(b)] was violated because the detective failed to tell the father that his reason for taking appellant into custody was to take a confession, and that the confession was therefore inadmissible. We disagree. The evidence shows that the reason appellant was taken into custody was the criminal offense involving the coin-operated machine. The statute was satisfied when the detective told the father about this charge against appellant.
>
> Id. At 373. At the time S__ R__ L__ was taken into custody, the State had filed a motion to revoke probation alleging that he had committed the offense of theft from a coin-operated machine. Id. Based on S__ R__ L__, Professor Dawson concludes that " 'Reason for taking the child into custody' means the offense for which he was arrested, not the purpose of the officer in making the arrest." Robert O. Dawson, TEXAS JUVENILE LAW 301 (5th ed.).

> FN12. The various legal justifications for taking a child into custody are set out in Family Code Section 52.01(a). One of those justifications is a "directive to apprehend" issued by the juvenile court under Section 52.015. A juvenile probation absconder warrant is one such "directive to apprehend."

In this case, there is no dispute that Det. McCann complied with Section 52.02(b)(1) by informing appellant's mother that he was taking appellant into custody because he was a probation absconder. However, the court of appeals assumed that, even if law enforcement authorities initially comply with Section 52.02(b)(1) by notifying a parent and giving that person an accurate statement of their legal reason for taking a child into custody, they must notify the parent again before questioning the juvenile about any other offense. The court of appeals stated:

> Although police initially informed Hampton's mother that he was being taken into custody on a juvenile absconder warrant, they did not tell her of the murder charge [sic] [FN13] until Hampton was in the process of making his statement, and then only when she called authorities to find out about her son's status.
>
> > FN13. There is no evidence in the record that appellant was "charged" with murder until some time after he gave his videotaped statement. The record does reflect that appellant was indicted for murder on June 25, 1999. There is nothing in the record to indicate when a petition alleging murder was filed in the juvenile court.
> >
> > Appellant was "suspected" of having committed a murder at the time Det. McCann took him into custody, but that was not the reason Det. McCann took him into custody. Det. McCann testified: "He wasn't locked up for the murder the night before. He was locked up for being an absconder." He repeatedly testified that appellant was not under arrest as a murder suspect.

Clearly, when Det. McCann took appellant into custody on the probation absconder warrant, he wanted to question appellant about Mr. Nance's murder. That fact is not in dispute. But we find no statutory requirement that law enforcement officers must renotify a juvenile's parents before questioning him, whether on the same or a different offense, once they have initially complied with Section 52.02(b)(1). The triggering event for purposes of parental notification is the act of taking a juvenile into custody. It is not the subsequent act of questioning the juvenile. The "reason" for taking the child into custody is the officer's legal justification, not his subjective motives. [FN15]

> FN15. See In re S__ R__ L__, 546 S.W.2d at 373; cf. Whren v. United States, 517 U.S. 806 (1996) (when traffic violation itself constitutes an objectively reasonable basis for stop and detention, any subjective motive on the part of officers is irrelevant); Walter v. State, 28 S.W.3d 538, 543 (Tex.Crim.App.2000).

Appellant argues that the court of appeals found that Det. McCann failed to notify the appro-

priate juvenile authorities that appellant had been taken into custody as an absconder from juvenile probation, as he was required under Section 52.02(b)(2). The record, however, reflects that as soon as appellant told Det. McCann that he really was a juvenile, not an adult, the detective called the Ector County Youth Center to verify appellant's age. [FN16] Once he verified appellant's age, Det. McCann told the juvenile intake officer that he was bringing appellant to the Center as a probation absconder. Det. McCann then promptly delivered appellant to the Youth Center.

> FN16. Det. McCann testified that any delay in taking appellant to the juvenile detention facility was because appellant had previously lied about his age to the Sheriff's Department and Det. McCAnn needed to verify his age with the juvenile facility before taking any further action.

A reviewing court must evaluate the historical facts in the light most favorable to the trial court's ruling. The record facts in this case, viewed in the light most favorable to the trial court's ruling, support the trial court's implicit factual finding that Det. McCann promptly notified appellant's mother and the juvenile authorities of appellant's detention and gave each "a statement of the reason" for taking appellant into custody. For mixed questions of law and fact, however, a reviewing court uses a de novo standard of review. The meaning of words and phrases used in a statute is a question of pure law; and the application of the scope of a statute to specific, undisputed historical facts is a mixed question of law and fact. Both of these matters are reviewed de novo at each appellate level. Under that standard, we find that Det. McCann complied with the requirements of Section 52.02(b), in that he promptly notified both appellant's mother and the appropriate juvenile authorities that he had taken appellant into custody and informed them of his reason for doing so. We therefore sustain the State's first ground for review.

Finding no violation of Section 52.02(b), we need not address whether appellant has demonstrated a causal connection between a violation of that statute and the making of his videotaped statement. Therefore, we dismiss the State's second ground for review.

[Discussion of Brady v. Maryland claim omitted.]

---

9. PARENTAL NOTIFICATION ONE AND ONE-HALF HOURS AFTER TAKING INTO CUSTODY PROMPT WHEN PRIOR EFFORTS FAILED

In the Matter of J.B.J., 86 S.W.3d 810 (Tex.App.—Beaumont 9/26/02) *Texas Juvenile Law* 301 (5th Ed. 2000).

Facts: The trial court adjudicated a fourteen year old juvenile as having engaged in delinquent conduct—the second degree felony offense of indecency with a child—and sentenced him to probation until the age of eighteen. See Tex. Pen.Code Ann. § 21.11(a), (d) (Vernon Supp.2002). On appeal, appellant ("JBJ") contends the trial court erred in failing to suppress a confession he made while in custody. The issue in this case is whether the parents of the juvenile were promptly notified after he was taken into custody as required by Section 52.02(b)(1) of the Texas Family Code.

Detective Page of the Montgomery County Sheriff's Department testified that on November 22, 2000, she received a report containing allegations of criminal conduct by JBJ, a juvenile, against a five year old child ("SW"). On January 8, 2001, Detective Page, along with another detective from the Montgomery County Sheriff's Department, went to the school security office and asked to speak with JBJ. School officials called JBJ to the school's police office. Detective Page testified she then told JBJ she had a report of his involvement in inappropriate touching of SW and asked him if he would come with her because she wanted to speak with him. JBJ responded "yes." Officer Tammy Trott, an employee of the Conroe Independent School District Police, testified that Detective Page's interview of JBJ at the school's security office was "very brief because basically he confessed to what she asked."

Upon leaving the school, the two Sheriff Department detectives transported JBJ by car to the office of Judge Spikes, a justice of the peace. Judge Spikes provided JBJ his juvenile warnings pursuant to the requirements of the Family Code. See Tex. Fam.Code Ann. § 51.095 (Vernon Supp.2002). After the initial warnings were given, Detective Page took JBJ to an empty office at the detective bureau and spoke with him. It was then that JBJ made a written confession. Once the written statement was completed, Page took JBJ back to Judge Spikes. With only himself and JBJ in the room, Judge Spikes completed the statutory warnings required for the admissibility of a statement of a juvenile. See Tex. Fam.Code Ann. § 51.095(a)(1)(B) (Vernon Supp. 2002). Detective Page testified that she then took JBJ to the ID Division and had him fingerprinted. At

that point, he was taken to the juvenile facility and released to the authorities there.

Officer Trott described the efforts made to contact JBJ's parents. She explained that the school has phone numbers in the computer system--both residence and work numbers. Trott told Detective Page she would try to contact JBJ's mother. JBJ gave Trott a residence number and told her that his mother would be out. Trott began making phone calls to try to reach the mother. Before the detectives left the school with JBJ, Trott told Detective Page that she (Trott) would continue her efforts to reach a parent until contact was made. For approximately an hour, Trott made six attempts to call the mother but was unable to reach her. Since the mother had not returned home, Trott then tried the father's work number. She reached a secretary, who indicated she would have the father call back. JBJ's father returned Trott's call in five or ten minutes, and Trott explained to him why his son had been taken into custody. Later that afternoon, the mother, who was very upset, contacted Trott and told Trott never to speak to JBJ again.

The State filed a petition asking that JBJ be adjudicated as a child engaged in delinquent conduct. Appellant filed a motion to suppress all oral and written statements he had made in reference to the case. At the suppression hearing, there was, in addition to the evidence recounted above, testimony regarding the following time chronology surrounding the making of the written statement:

> (1) Detective Page picked JBJ up at school at 10:40 a.m. and arrived at the sheriff's department a couple of minutes before 11 a.m.
>
> (2) Judge Spikes gave JBJ the first warnings at 11:05 a.m.
>
> (3) Page took JBJ to her office (across the hall from Judge Spikes' office), where JBJ completed his statement by 12:30 p.m.
>
> (4) At approximately 12:22 p.m., while Page was in the interview with JBJ, a phone call came for Page from JBJ's mother. However, Page did not know of the mother's call until after the interview and statement were completed.
>
> (5) JBJ was taken to the juvenile facility around 1:15 p.m.
>
> (6) Around 1:30 p.m. Page learned t(i)4.n aw[ime0005rr's call]TJ0 -1.14973TD0.00retu(for n4(s)-s')7gt'ooie th rcomp has t 2.6(d hi)4.3(su)4.3(sorem)13.3r9(.)4.gm byater.6(d hi3.3(p9(.)4.n3(by)-4.2(n)-4.2(e)5.5( )]TJ1.143709

and for that reason his confession should have been suppressed. We are required to decide whether an approximate hour and a half time frame meets the prompt notification requirement of the Texas Family Code.

> FN1. Section 51.09 of the Texas Family Code sets forth the requirements for obtaining a waiver of rights by a juvenile, and the section requires waiver be made by the child and an attorney for the child. See Tex. Fam.Code Ann § 51.09 (Vernon Supp. 2002). Section 51.095 provides for the admissibility of statements "[n]otwithstanding Section 51.09," and does not require the presence or joinder of a parent or attorney. See Tex. Fam.Code Ann. § 51.095 (Vernon Supp.2002). The U.S. Supreme Court has held that under proper circumstances a juvenile may waive constitutional rights without an attorney. See Fare v. Michael C., 442 U.S. 707, 727-28, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). However, the lack of the presence of a parent has been considered an important factor in determining whether a child's confession was made intelligently, knowingly, and voluntarily in at least one Texas case. See E.A.W. v. State, 547 S.W.2d 63, 64-65 (Tex.Civ.App.—Waco 1977, no writ). And we note the Texas Family Code entitles a juvenile to have a parent present in the juvenile processing office. See Tex. Fam.Code § 52.025(c) (Vernon Supp.2002). However, we do not address these issues in this case as they are not raised or briefed by the parties.

The Family Code does not provide us with a definition of "promptly" in this context. We look first to the meaning of "promptly" as the word is commonly used. See Tex. Gov't Code Ann. § 311.011(a) (Vernon 1998). The adjective "prompt" generally means "ready and quick to act as occasion demands; immediately or instantly at hand." See Webster's New Universal Unabridged Dictionary 1441 (2 nd ed.1983). Black's Law Dictionary defines the adverb "promptly" as doing something "without delay" and "with reasonable speed." See Black's Law Dictionary 1214 (6th ed. 1990). These definitions suggest the meaning of the word "promptly" in Section 52.02(b) includes consideration of what is reasonable speed under the circumstances.

We note that the words "prompt" or "promptly" are employed in other sections of the Juvenile Justice Code. For example, on referral of a child's case to the office designated by the juvenile court, the office shall promptly give notice of the referral and a statement of the reason for the referral to the child's parents. Tex. Fam.Code Ann. § 52.04(d) (Vernon Supp.2002). In Section 53.01, the Code provides that "[w]hen custody of a child is given to the office or official designated by the juvenile board, the intake officer, probation officer, or other person authorized by the court shall promptly give notice of the whereabouts of the child and a statement of the reason the child was taken into custody to the child's parent, guardian, or custodian unless the notice given under Section 52.02(b) provided fair notice of the child's present whereabouts." Tex. Fam.Code Ann. § 53.01(c) (Vernon Supp. 2002). In Section 53.012(a), the prosecutor is required to promptly review the circumstances and allegations of a referral. Tex. Fam.Code Ann. § 53.012(a) (Vernon 1996).

In contrast to these uses of the word "promptly," the Juvenile Justice Code also contains a section that provides that a detention hearing, subject to certain exceptions, shall be held "promptly, but not later than the second working day after the child is taken into custody[.]" See Tex. Fam.Code Ann. § 54.01(a) (Vernon Supp.2002). The fact that the parental notification provision, Section 52.02(b), gives no specific time deadline suggests that a determination of whether notification was "promptly" given requires consideration of the circumstances of the specific case. See Roquemore v. State, 60 S.W.3d 862, 870 n.11 (Tex.Crim.App.2001) (A strict interpretation of Section 52.02 would not necessarily foreclose a case where exigent circumstances would apply). We believe courts must determine what constitutes prompt parental notification as required by Section 52.02(b)(1) by determining whether, considering the circumstances of the particular case, the notification was with reasonable speed. See generally Vann v. State, No. 14-01-00544-CR, 2002 WL 1462901, at *2 (Tex.App.—Houston [14 th Dist.] June 27, 2002, no pet h.).

In Vann, the court cited the following four factors that have been considered by other courts in determining whether parental notification was prompt under the circumstances of a particular case: (1) the length of time the juvenile was in custody before the police notified a parent, guardian, or custodian; (2) whether notification occurred after the police obtained a statement; (3) the ease with which the police were ultimately able to contact the appropriate adult; and (4) what the police did during the period of delay. Id. at *2. We note some of the factors considered by other courts seem targeted at assessing whether the parental notification attempts were made in good faith or were reasonable under the circumstances. In determining whether parental notification was given with reasonable speed under the circumstances, we believe the factors noted in Vann are relevant considerations.

The Court of Criminal Appeals has emphasized the necessity of strict compliance with the Texas Family Code provisions regarding juveniles.

See Baptist Vie Le v. State, 993 S.W.2d 650, 656 (Tex.Crim.App.1999) (The Court "remind[ed] police officers of the Family Code's strict requirements" regarding juveniles.). Specifically, the parental notification requirement of Section 52.02(b) has been the subject of court decisions in criminal cases, where courts generally have strictly applied the requirement. See Gonzales v. State, 67 S.W.3d 910 (Tex. Crim.App.2002) (because of violation of section 52.02(a), case remanded for causal connection analysis by court of appeals); Pham v. State, 72 S.W.3d 346 (Tex.Crim.App.2002) (remanding for causal connection analysis because of section 52.02(b) violation). And we note that violation of the parental notification requirement, along with its effect on the admissibility of confessions of juveniles, has also been the subject recently of various courts of appeals decisions. See Vann, 2002 WL 1462901; State v. Simpson, 51 S.W.3d 633 (Tex.App.—Tyler 2000), judgment vacated and remanded, 74 S.W.3d 408 (Tex.Crim.App.2002); see also In the Matter of C.R., 995 S.W.2d 778. The parental notification statute requires strict compliance. However, we do not believe that the necessity for strict compliance precludes our consideration of the totality of the circumstances or of the reasonableness of the efforts to notify the parents. We conclude these considerations are within the meaning of the word "promptly" as used in Section 52.02(b).

Here, the parental notification responsibility was delegated by Detective Page to the C.I.S.D. police officer. We recognize that delegation of the parental notification responsibility to another officer may be necessary, and in fact may result in faster parental notification; but once the notification requirement is delegated to another officer, that officer must comply with the requirements of Section 52.02(b). See generally Horton v. State, 2002 WL 1071631, at *3 (Tex.App.—Austin May 31, 2002, no pet. h.) (allowing arresting officer to delegate duty of parental notice to another officer.).

We conclude, considering the reasonable speed exercised under the circumstances of this case, the parental notification here was prompt. We view the evidence in a light most favorable to the trial court's ruling when, as here, there are no findings of fact. See In the Matter of R.J.H., 45 Tex. Sup.Ct. J. 732, 2001 WL 1873054, at *3. Before being taken into custody by Detective Page, J.B.J. "confessed to what she asked." The juvenile then gave the school officer his residence number. JBJ told the officer his mother was not at home. The officer repeatedly tried to call the mother. When the mother still had not arrived home, the officer then called the father at work. Contact was made at that point with a parent—approximately one hour and a half after JBJ was taken into custody. No evidence suggests the attempts to notify the child's parents were less than good faith efforts. No claim is made here of a violation of constitutional rights or of a violation of some other statutory provision. It is undisputed that the confession was taken in compliance with the requirements of Section 51.095, which governs the admissibility of a statement of a child. See Tex. Fam.Code § 51.095 (Vernon Supp.2002). Considering the totality of the circumstances in this case and applying the law to the facts, we conclude no violation of Section 52.02(b) occurred.

Appellant's issue is overruled. The order adjudicating JBJ as having engaged in delinquent conduct is affirmed.

CONCURRING OPINION

Burgess, J.

I concur in the result, but respectfully disagree with the majority's analysis. The majority's analysis is strained in two aspects: the determination that the parental notification was promptly made, as required by the statute, and the use of the "totality of the circumstances" construct in making that determination.

THE PROMPTNESS ISSUE

The majority states:

> Before being taken into custody by Detective Page, JBJ "confessed to what she asked." The juvenile then gave the school officer his residence number. JBJ told the officer his mother was not at home. The officer repeatedly tried to call the mother. When the mother still had not arrived home, the officer then called the father at work. Contact was made at that point with a parent--approximately one hour and a half after JBJ was taken into custody.

The majority then concludes: "No evidence suggests the attempts to notify the child's parents were less than good faith efforts." I realize the concept of "good faith" is somewhat subjective, but I find the evidence shows, clearly and convincingly, the absence of good faith. After being told by the juvenile that his mother was not home, the school officer attempted six calls to the mother, over an hour's time, before she called the father's work number. On that first attempt, she reached a secretary and the father returned the call in five to ten minutes. Assuming, for the sake of argument, it was reasonable for the school officer to suspect that JBJ was being deceitful in saying his mother was not home; then it was reasonable to call the number. However, when the mother did not answer, was it reasonable to

call five additional times before calling the father? I think not.

The majority states the factors enumerated in Vann v. State, No. 14-01-00544-CR, 2002 WL 1462901, at *2 (Tex.App.—Houston [14th Dist.] June 27, 2002, no pet. h.), are relevant considerations. I agree. Below is comparison of the factors and the corresponding action in this case:

Factor	Action
1) the length of time in custody before notification	Six calls over 60-90 minutes
(2) whether notification occurred after police obtained a statement	Yes
(3) the ease in ultimately contacting a parent	Two calls over 10 minutes
(4) what the police did during delay	Obtained confession

These factors, separately or together, do not, in my view, suggest promptness. [FN2] They suggest the opposite: unreasonable delay. The majority is correct when they acknowledge the parental notification statute requires strict compliance. The actions in this case do not constitute strict compliance. I would hold the notification of JBJ's parents was not prompt and therefore not in compliance with the statute.

> FN2. But as a general, common sense matter, what is promptness? If we tell our teenagers to promptly call home when they change locations while visiting friends, would we accept them being at a location for an hour before calling us. Absolutely NOT. Would we accept the excuse that they called our office six times before calling home? Absolutely NOT.

THE TOTALITY OF THE CIRCUMSTANCES CONSTRUCT

The majority utilizes the totality of the circumstances construct in determining whether a violation of the notification statute occurred. No other Texas court has utilized this construct in this manner. If voluntariness of the confession were the issue, then the totality of the circumstances would be considered in making that determination. In re R.J.H., 79 S.W.3d 1 (Tex.2002). This appeal does not challenge the voluntariness of the confession; therefore the totality of the circumstances construct is applied inappropriately.

THE CONCURRENCE

Even with a determination that the notification was not prompt, the judgment must still be affirmed. The Court of Criminal Appeals has concluded that before a juvenile's confession can be excluded, there must be a casual connection between the Family Code violation and the making of the statement. Pham v. State, 72 S.W.3d 346 (Tex.Crim. App.2002); Gonzales v. State, 67 S.W.3d 910, 912 (Tex.Crim.App.2002). There is no evidence of such a casual connection. Therefore, the trial judge was correct in denying the motion to suppress.

---

10. THREE HOUR DELAY BEFORE TRANSPORTING DETAINED JUVENILE TO STATION OK BECAUSE HE WAS NOT IN CUSTODY UNTIL TRANSPORTED

Dang v. State, ___ S.W.3d ___, No. 14-00-00560-CR, 2002 WL 31426674, 2002 Tex.App. Lexis 7886 (Tex.App.—Houston [14th Dist.] 10/32/02) *Texas Juvenile Law* 301 (5th Ed. 2000).

Facts: A juvenile court certified fifteen-year-old appellant Tuan Anh Dang as an adult. After the juvenile court transferred appellant to the trial court, he was indicted and tried for capital murder. The jury found appellant guilty, and the trial court assessed appellant's punishment at confinement in the state penitentiary for life. On appeal, appellant asserts the trial court erred: (1) in not suppressing his oral statement because it allegedly was taken in violation of the Texas Family Code; (2) in refusing requested jury instructions; and (3) in limiting closing argument to twenty minutes.

On January 5, 1999, Binh Nguyen, the complainant, was working a shift from 4:00 p.m. to midnight as a machinist at a business owned by Son Dang, appellant's father. Tan Pham, another machinist at Dang's business, was to begin his shift at midnight. Typically, the employee in the building kept the door locked from the inside and would unlock the door for the next arriving employee. Pham arrived at work at 11:45 p.m. and knocked on the door. Binh did not answer. Pham noticed the doorknob had holes around it. Peering through a hole in the door, Pham saw Binh lying on the floor with his head toward the door. Pham went home, called Dang (the shop owner), and asked him to come to his house. When Dang arrived, Pham told him what he had seen. Dang called the police and then the two of them went to the shop.

Officer Kerr Richards of the Houston Police Department received a call from the police dispatcher at 12:11 a.m. on January 6, 1999, to go to the machine shop. When he approached the building, he saw that a side door was open. As he maneuvered

through the yard, Richards noticed a body lying inside the front section of the building. Richards immediately advised the dispatcher to send an ambulance. Through the same open doorway, Richards also observed an Asian female walking from the location of the body toward the east side of the building, and two Asian males in the back section ransacking some desks. Richards was not able to see into the front section of the building. Concerned that a fourth person might be in the front part of the building, Richards returned to his police car to call for help. As he retreated, Richards heard three gun shots coming from inside the building. Believing he was under fire, Richards dove behind his police car. Richards then saw an Asian male come to the side door and pull it shut.

Unaware of the danger, Son Dang, the shop owner, and Tan Pham pulled into the shop parking lot. Officer Richards immediately advised them to move across the street because the scene was not secure. Other police officers arrived within a few minutes and set up a perimeter around the building. Shortly thereafter, SWAT officers arrived and took charge of the scene.

Police later apprehended appellant and Linda Nguyen outside the building. Officers recovered a semiautomatic cartridge from appellant's front pants pocket and ten empty nine-millimeter shell casings from his back pocket. The police placed appellant and Linda in separate police cars. This occurred sometime between 1:30 a.m. and 1:50 a.m. Shortly thereafter, the police captured Quynh Tran and Kenneth Tran and placed them in separate police cars.

Homicide investigators, Sergeant G.J. Novak and Officer Henry Chisolm, arrived at the crime scene at 3:00 a.m. and 3:30 a.m., respectively. No one had access to the building until 3:10 a.m., when SWAT officers relinquished control of the crime scene. Novak interviewed Linda, Quynh, Kenneth, and appellant separately as each sat in a separate police car. Novak interviewed appellant last at 3:45 a.m. At approximately 4:00 a.m., Novak had these four individuals transported to the homicide office at 1200 Travis in downtown Houston.

At 5:45 a.m., Sergeant Ted Bloyd met appellant at the homicide office. Bloyd left appellant in the homicide office's family room to attend the interviews of Linda and Quynh. Based on information he learned in those interviews, Bloyd considered appellant a suspect. At 7:20 a.m., Bloyd returned to the family room and found appellant asleep on a couch. Bloyd woke appellant and informed him that he was now considered a suspect. Bloyd then took appellant to a magistrate for the administration of his legal warnings. Very soon thereafter, Bloyd and appellant returned to the homicide office, where, at 8:36 a.m., Bloyd reminded appellant of his legal warnings and recorded appellant's oral statement. The interview ended ten minutes later.

At appellant's trial, the State offered appellant's confession and the testimony of other witnesses to show that on the night of the murder, appellant and his friend, Quynh Tran, went to appellant's father's machine shop to steal money believed to be on the premises. Quynh, armed with a nine-millimeter pistol, and appellant attempted to enter through a side door routinely used by employees, but soon discovered the door was locked. However, Binh Nguyen was working in the shop. Recognizing appellant as the owner's son, Binh unlocked the door and permitted the youths to enter the building.

As Binh returned to his duties, Quynh told appellant to kill Binh because Binh would tell appellant's father they had been at the shop. Quynh handed the pistol to appellant. Appellant claims he could not bring himself to shoot the machinist, so he engaged the safety on the gun, pulled the trigger, and told Quynh the gun had jammed. Although ballistics tests indicated Binh was shot with two different pistols, appellant stated in his confession that Quynh alone shot Binh. In any event, Binh was shot several times.

Appellant claims that, immediately after the murder, Quynh and he quickly searched the premises. They discovered and took a nine-millimeter pistol appellant's father kept at the shop, but could find no money. While leaving the premises, Quynh fired several rounds at the side door in an attempt to make it appear the murder and robbery had been initiated by a forced entry. Appellant said that when he saw Quynh shooting holes in the door, he thought, "This is fun ... I wonder if I can hit it." Appellant then used his father's gun to shoot at the door.

After an unsuccessful search for money, appellant and Quynh went back to their apartment to get a crowbar. Once at the apartment, they told Linda Nguyen what they had done and called in another friend, Kenneth Tran. Quynh told Kenneth, "We shot and killed somebody. We need to go back to the shop." Kenneth noticed that Linda was crying and appellant was calmly wiping down a pistol with a towel. Believing his friends would reward him with a fair share of the money, Kenneth agreed to return to the shop and act as a lookout while appellant, Quynh, and Linda searched the premises for the elusive cache of money. It was while Linda, Quynh, and appellant were at the shop for the second time that evening that Officer Richards arrived on the scene.

The trial court denied appellant's motion to suppress the oral statement that he made at 8:36 a.m.

on January 6, 1999. The State introduced that statement as evidence during appellant's trial for capital murder. Appellant requested jury instructions regarding the voluntariness of his oral statement and regarding alleged violations of the Texas Family Code by the police. The trial court charged the jury regarding the voluntariness of appellant's oral statement but refused appellant's other proposed jury instructions. The jury convicted appellant of capital murder, and the trial court assessed appellant's punishment at confinement in the state penitentiary for life.

II. ISSUES PRESENTED

Challenging his conviction for capital murder, appellant asserts the following issues on appeal:

> (1) Did the trial court abuse its discretion by denying appellant's motion to suppress his oral statement, allegedly obtained in violation of sections 52.02 and 52.025 of the Texas Family Code? (first, second, and third issues);
>
> (2) Did the trial court err in refusing appellant's requested jury instructions concerning compliance with sections 52.02(a), 52.02(b)(1), and 52.025(d) of the Texas Family Code? (fourth issue); and
>
> (3) Did the trial court abuse its discretion in limiting closing argument to twenty minutes? (fifth issue)

Held: Affirmed.

Opinion Text: Generally, we review a trial court's ruling on a motion to suppress under an abuse-of-discretion standard of review. Oles v. State, 993 S.W.2d 103, 106 (Tex.Crim.App.1999). However, in this case, the resolution of the suppression issues does not turn on an evaluation of credibility and demeanor, and the facts relating to the suppression issues are not disputed. Therefore, we apply a de novo review. See Guzman v. State, 955 S.W.2d 85, 89 (Tex.Crim.App.1997); Jeffley v. State, 38 S.W.3d 847, 853 (Tex.App.—Houston [14th Dist.] 2001, pet. ref'd). In determining whether the trial court's ruling on a motion to suppress is supported by the record, we generally consider only the evidence adduced at the hearing on that motion unless the suppression issues have been consensually relitigated by the parties during the trial on the merits. Rachal v. State, 917 S.W.2d 799, 809 (Tex.Crim.App.1996). Because the parties in this case consensually relitigated the suppression issues at trial, we will examine the trial evidence as well as the evidence from the suppression hearing.

Did the trial court abuse its discretion by denying appellant's motion to suppress based on an alleged unnecessary delay under section 52.02(a) of the Texas Family Code?

In his first issue, appellant claims the trial court abused its discretion in overruling his motion to suppress his oral statement because it was obtained in violation of section 52.02(a) of the Texas Family Code. Under this section, once children are in police custody, the police must take them without unnecessary delay to a juvenile processing office. See Tex. Fam.Code § 52.02(a). Appellant, who was fifteen years old at the time, argues the police unnecessarily delayed taking him to a juvenile processing office based on the length of time they detained him in the police car at the scene of the murder.

We begin by observing that the legislature has designed special procedures and created a specific nomenclature for dealing with juvenile suspects. A juvenile, for example, technically cannot be "arrested," but he "may be taken into custody ... pursuant to the laws of arrest." Tex. Fam.Code § 52.01(a)(2). Thus, "[t]he taking of a child into custody is not an arrest except for the purpose of determining the validity of taking him into custody or the validity of a search under the laws and constitution of this state or of the United States." Tex. Fam.Code § 52.01(b). Moreover, the police do not process a child taken into custodial detention through a "booking room," but rather through a "juvenile processing office." See Tex. Fam.Code § 52.025. Finally, in most circumstances, the police do not confine a child in a "jail," but in a "certified juvenile detention facility." See Tex. Fam.Code § 51.12.

Though we recognize that a child can only be "taken into custody" or "detained," but never "arrested," the use of this terminology can be confusing, particularly when we must evaluate the validity of a juvenile's custody by applying the laws and constitutional provisions relating to the arrest of adult suspects. Accordingly, in our analysis, for the sake of clarity, hereafter we will refer to appellant's "temporary detention" and/or "arrest," though we recognize those terms are technically inappropriate when used with respect to a juvenile.

When the police take a suspect into custody, they either "arrest" or "temporarily detain" him. "A person is arrested when he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person arresting without a warrant." Tex.Code Crim. Proc. Ann. art. 15.22 (Vernon 1977). However, this "restraint of liberty" standard is not adequate when distinguishing between an arrest and a detention because it is a characteristic common to both. See Francis v. State, 896 S.W.2d 406, 410

(Tex.App.—Houston [1st Dist.] 1995, pet. dism'd). Whether a particular seizure of a person is an arrest or merely a temporary detention is a matter of degree and depends upon the length of the detention, the amount of force employed, and whether the officer actually conducts an investigation. See Woods v. State, 970 S.W.2d 770, 775 (Tex.App.—Austin 1998, pet. ref'd).

A "temporary detention," sometimes known as an "investigative detention," must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Balentine v. State, 71 S.W.3d 763, 770-71 (Tex.Crim.App.2002). To temporarily detain a person for investigative purposes, an officer need have only "specific and articulable facts which, in light of a police officer's experience and personal knowledge taken together with rational inferences from those facts, would reasonably warrant the intrusion upon a citizen's freedom." Hawkins v. State, 758 S.W.2d 255, 259 (Tex.Crim.App.1988). For a temporary investigative detention to be valid, the following factors must be present: (1) an unusual activity must be occurring or have occurred; (2) the accused must be connected with the suspicious activity; and (3) the suspicious activity must be connected with crime. Davis v. State, 829 S.W.2d 218, 219 n.2 (Tex.Crim.App.1992). Moreover, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. Davis v. State, 947 S.W.2d 240, 245 (Tex.Crim. App.1997). Finally, an investigative detention may be founded upon a reasonable, articulable suspicion while an arrest must be supported by probable cause to be constitutionally valid. Morris v. State, 50 S.W.3d 89, 94 (Tex.App.—Fort Worth 2001, no pet.).

The Legislature has declared that when the police take a juvenile into "custody," he first must be taken, "without unnecessary delay," to a "juvenile processing office." See Tex. Fam.Code § 52.02(a). Thus, the question presented is whether a juvenile, like an adult, may ever be "temporarily detained" in the field. In other words, if a police officer seizes a juvenile while conducting an investigative detention, must the officer immediately transport the juvenile to a juvenile processing office, or may the officer conduct a preliminary investigation in the field before deciding whether to "arrest" the suspect? Appellant contends section 52.02(a) becomes operative anytime the police take a juvenile into "custody."

Section 52.02(a) of the Family Code lists six specific procedures that police may perform at a juvenile processing office. All of(l)3..7(e)5(ha0,.7(ese(l)(of(lu5(ha0,n6(o)4c1(e)23..7(e(ffi)4onoces)7 eclase(l)in)]TJ0 -1.1497 TD

in custody" was manifested to appellant. Therefore, Officer Chisolm's subjective belief that appellant was "in custody"--whatever he meant by that--is irrelevant to our de novo determination of whether the police had arrested appellant or temporarily detained him. See Stevenson, 958 S.W.2d at 829 & n.7 (subjective beliefs of the police not relevant unless they were manifested to suspect). Instead, we must analyze the objective circumstances. See id.

The record reflects that at approximately 2:00 a.m., homicide detectives were awakened at their homes and instructed to report to the crime scene. In the meantime, SWAT officers were in control of the scene, as they were in the process of making certain the building and surrounding environs were safe for homicide detectives. The police did not know at that time whether more witnesses, victims, or suspects remained in the building. The SWAT team released the scene at 3:10 a.m., marking the first opportunity homicide detectives had to examine the victim, premises, and other physical evidence. Sergeant Novak began to interview Quynh, Linda, Kenneth, and appellant to determine the significance of their presence at the crime scene. After these individuals gave conflicting statements, Novak had them transported to a juvenile processing office--the homicide office at 1200 Travis. The act of detaining appellant in a police car while the scene was being cleared by SWAT officers does not necessarily show he was under arrest. See In the Matter of E.M.R., 55 S.W.3d 712, 717-18 (Tex.App.—Corpus Christi 2001, no pet.) (holding child not considered under arrest until he gave statement implicating himself). Instead, the record indicates police did not consider appellant a suspect until after they noticed inconsistencies in statements of the four individuals found near the crime scene. As late as 3:30 a.m., Lieutenant Maxey, who was in charge of the homicide investigation, advised Sergeant Bloyd that he was still trying to determine whether these four young people were witnesses or suspects. Thus, the record indicates the police temporarily detained appellant and his companions to preserve the status quo while the building was being cleared.

We are mindful, of course, that a temporary detention must be temporary, i.e., of as short a duration as possible to effectuate the purpose of the stop. See Davis, 947 S.W.2d at 245. However, there is no rigid, "bright-line" time limitation beyond which a temporary detention becomes a de facto arrest. See United States v. Sharpe, 470 U.S. 675, 685, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605 (1985). "Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop." Id. In assessing whether a detention is too long in duration to be justified as an investigative stop, the United States Supreme Court has held that we are to consider:

> ... whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. (citations omitted). A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. (citation omitted). A creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, itself, render the search unreasonable." (citations omitted). The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.

Id., 470 U.S. at 686-87, 105 S.Ct. at 1575-76.

When analyzing the facts of a particular case to determine whether the police acted reasonably in detaining a defendant for a particular length of time, we may consider, for example, such factors as the seriousness of the offense under investigation; whether it was necessary to search a premises or vehicle as part of the investigative stop; whether it was necessary for officers to detain the suspect to maintain the status quo while interviewing witnesses; whether the police needed to interview multiple suspects to determine if there were discrepancies in their stories; whether the length of the detention seriously interrupted the suspect's travels; and whether it was necessary to effectuate reasonable safety precautions. In other words, "in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria." Sharpe, 470 U.S. at 685, 105 S.Ct. at 1575.

Here, the police had evidence that at least one homicide, possibly a capital murder, had been committed. Because shots had been fired from within the building when the first officer arrived, police had reason to believe that armed suspects remained in the building. Moreover, the building had several entrances and multiple rooms, making any search of the premises a highly dangerous exercise. Police also knew that Officer Richards had observed three Asian young people (two males and a female) inside the

building moments after he arrived on the scene. After establishing a perimeter, the police eventually found four Asian young people (three males and a female) outside, but near, the building. A homicide detective, who had been awakened at his home and summoned to the scene, interviewed each of the young people separately to compare their stories and try to determine whether they were witnesses or suspects. The record does not suggest that, at the time of their detention, either appellant or his companions were driving an automobile, attempting to board a plane, walking to work, or otherwise "traveling." Finally, all of these events occurred in the dead of night, further slowing the pace of the police investigation and increasing the hazard of injury. Under these circumstances, we find the police did not arrest appellant until Sergeant Novak had him transported from the scene at approximately 4:00 a.m., after the four young people had given conflicting statements, indicating that appellant was a suspect. Accordingly, we conclude the police did not unnecessarily delay in transporting appellant to a juvenile processing office after arresting him at approximately 4:00 a.m. See In the Matter of E.M.R., 55 S.W.3d at 717-18.

Even if we were to conclude the police had arrested appellant when they first placed him in the police car, we still would find that any delay in taking appellant to the juvenile processing office was a necessary delay. Section 52.02(a) requires the police to transport an arrested juvenile to a designated juvenile processing office without unnecessary delay and therefore contemplates the possibility of a "necessary" delay. Contreras v. State, 67 S.W.3d 181, 185 (Tex.Crim.App.2001). Whether a delay is necessary is determined on a case- by-case basis. Id. The evidence in this case supports a finding that any delay was attributable to the police and SWAT team securing the crime scene. The evidence indicates that securing the building and perimeter was necessary to preserve the integrity of the crime scene and protect potential witnesses or victims.

Nonetheless, appellant argues a two-hour-and-45-minute delay is unnecessarily long. However, we do not judge the necessity of a delay solely by its length. Nor do we make a determination as to the necessity of a delay in a vacuum; rather, we consider the circumstances of each case and evaluate each scenario according to its own peculiar facts. In some cases, a detention of more than a few minutes might be unreasonable. Under most circumstances, a detention lasting approximately two-and-a-half hours would be a de facto arrest, but the situation the police found themselves facing here left them with few options. The evidence showed the crime occurred in the middle of the night and involved multiple suspects, an unsecured scene, and the possibility of multiple victims. Any delay was merely the result of a response to the demands of the particular situation. See In the Matter of J.D., 68 S.W.3d 775, 783 (Tex.App.—San Antonio 2001, pet. denied) (holding that two-and-a-half-hour delay was necessary for police to secure crime scene). In this context, we find nothing unreasonable about the pace of the police investigation or the length of the investigative detention. Accordingly, we find the police did not unnecessarily delay appellant's transportation to a juvenile processing office in violation of section 52.02(a) of the Texas Family Code. [FN10] We overrule appellant's first issue.

> FN10. We note that when the police transported appellant, the journey from the crime scene to the juvenile processing office took approximately ninety minutes. Whether the police deviated from the most expeditious route or otherwise delayed appellant's arrival at the juvenile processing office, we cannot discern from the record before us. Appellant did not challenge this anomaly at the suppression hearing. Further, appellant did not accuse the police of stopping, deviating, or engaging in unreasonable conduct in driving him to the juvenile processing office, and thus, the record is silent in this regard.

Did the trial court abuse its discretion by denying appellant's motion to suppress based on the parental-notification requirement of section 52.02(b) of the Texas Family Code?

In his second issue, appellant claims his oral statement was not admissible because the police obtained it in violation of section 52.02(b) of the Family Code. Section 52.02(b) provides:

> A person taking a child into custody shall promptly give notice of the person's action and a statement of the reason for taking the child into custody, to:
>
> (1) the child's parent, guardian, or custodian; and
>
> (2) the office or official designated by the juvenile board.

Tex. Fam.Code § 52.02(b). Appellant does not complain of a failure to notify the office or official designated by the juvenile board, but claims his parents were not promptly notified that he was in custody or of the reason he was in custody.

The police placed appellant in the police car at the scene between 1:30 a.m. and 1:50 a.m. Appellant left the scene in a police car at approximately 4:00 a.m., and he arrived at the juvenile processing office at 5:45 a.m. At approximately 8:45 a.m., appellant gave a statement implicating himself in the

capital murder. Appellant's parents were given formal notice that he was in custody later that day at approximately 3:00 p.m. Significantly, however, Son Dang, appellant's father, came to the crime scene shortly after the victim's body was discovered. At the crime scene, appellant's father identified his son to police and saw appellant sitting in the back of a police car. Appellant's father also saw his son being transported from the scene. When asked whether he received notification, Son Dang testified, "I was there. I didn't think no one need to call me. I was at the scene all the time, but I don't get any information about that." Appellant's father further testified he knew what had happened at the machine shop, but did not know any details or what he should do next. The trial court found that Son Dang was present when the police placed appellant in the police car and thus had actual knowledge that his son was in police custody and the circumstances surrounding that action. Section 52.02(b) does not require any more notice than what Dang received at the scene.

Appellant cites to Hampton v. State, 36 S.W.3d 921 (Tex.App.—El Paso 2001), rev'd--S.W.3d--, 2002 WL 31116647, at *1-*5 (Tex.Crim. App. Sept. 25, 2002) and In the Matter of C.R., 995 S.W.2d 778 (Tex.App.—Austin 1999, pet. denied), for the proposition that, even when the parents of a juvenile are aware that their child is being taken to the police station, the Family Code nevertheless requires that police formally notify the parents as to the reason the juvenile has been taken into custody. Here, appellant's father not only had actual knowledge that his son was in police custody, but also testified he knew why his son had been taken into custody. Appellant's father knew that his son often took friends to his business to play pool on a billiards table located in the machine shop, that one of his employees had been murdered, and that his son and several of his son's companions were found near the scene shortly after the murder. Accordingly, appellant's father had actual knowledge of both the fact that his son was in police custody and the reason therefore, so there was no violation of section 52.02(b).

Even if we were to find that appellant's father's actual knowledge did not satisfy the requirements of the statute, appellant did not show a causal connection between the delayed formal notice and his oral statement. [FN11] See Gonzales v. State, 67 S.W.3d 910, 913 (Tex.Crim.App.2002). We overrule appellant's second issue.

> FN11. We note in this regard that appellant's father was free to retain legal counsel for his son. However, even though appellant's father had actual knowledge that his son was in police custody, the record reflects that appellant's father did not visit him until appellant had been transported to the juvenile detention center and did not contact a lawyer for appellant until two days after the offense.

Did the trial court abuse its discretion by denying appellant's motion to suppress based on sections 52.025(c) and 52.025(d) of the Texas Family Code?

In his third issue, appellant claims his oral statement was inadmissible because the police violated sections 52.025(c) and (d) of the Family Code. Those statutes provide:

> (c) A child may not be left unattended in a juvenile processing office and is entitled to be accompanied by the child's parent, guardian, or other custodian or by the child's attorney.
>
> (d) A child may not be detained in a juvenile processing office for longer than six hours.

Tex. Fam.Code § 52.025(c),(d).

Appellant first contends he was left unattended in the family room at the juvenile processing office from 5:45 a.m. until 7:20 a.m. in violation of section 52.025(c). However, appellant did not assert this contention either in his written motion to suppress or at the hearing on his motion to suppress. Therefore, appellant did not preserve error on this complaint. See Jeffley, 38 S.W.3d at 853.

Even if appellant had preserved error, he could not prevail on his argument under section 52.025(c) of the Texas Family Code because it lacks merit. The record reflects that Officer Bloyd placed appellant in the family room at 5:45 a.m. and returned at 7:20 a.m. to find appellant asleep. At that time, Officer Bloyd woke appellant and took him to a magistrate so that appellant could be informed of his rights. Though there was evidence at trial that appellant was alone in the family room from 5:45 a.m. to 7:20 a.m., there was no evidence that the police failed to attend, watch, or guard appellant from outside the family room. Therefore, there was no evidence that appellant was left unattended while he was in the family room. In addition, appellant did not show a causal connection between allegedly being left unattended in the family room and his oral statement. See Gonzales, 67 S.W.3d at 913.

Appellant further contends the trial court should have suppressed his oral statement because the police held him in the juvenile processing office for more than six hours. The record reflects that appellant was in the juvenile processing office from 5:45 a.m. until approximately 12:25 p.m., an interval

slightly longer than six-and-a-half hours. From 5:45 a.m. to 7:20 a.m., appellant slept in the family room. At 7:30 a.m., he was taken to the magistrate and read his rights. At 8:00 a.m., he was returned to the juvenile processing office, where he gave his oral statement, which ended at 8:46 a.m. From 9:00 a.m. until 12:10 p.m., appellant remained in the family room. At 12:10 p.m., appellant telephoned his father, and at 12:25 p.m., appellant began his journey to the juvenile detention center.

Before appellant gave his statement, the police detained him in the juvenile processing office for less than two hours while he slept. After the statement, the police detained him for another three-and-a-half hours. Appellant finished giving his oral statement three hours after arriving at the juvenile processing office—halfway through the six-hour limit of section 52.025(d) of the Texas Family Code. Appellant did not show a causal connection between the length of his stay in the juvenile processing office and his oral statement. See Gonzales, 67 S.W.3d at 913. We overrule appellant's third issue.

II. DISPOSITION PROCEEDINGS

TYC COMMITMENT OK WHEN PLACEMENTS REJECTED RESPONDENT BECAUSE OF HIS SEXUAL ORIENTATION

In the Matter of C.J.H., 79 S.W.3d 698 (Tex.App.—Fort Worth 6/13/02) [*Texas Juvenile Law* 206 (5th Edition 2000)].

Facts: This is an appeal from an order of commitment. Appellant raises four points, arguing that the trial court abused its discretion by committing Appellant to the Texas Youth Commission ("TYC") (points one and two); that the punishment was excessive (point three); and that the trial court erred by admitting the social worker's report over defense counsel's hearsay objection (point four).

On July 9, 2001, after stipulating to the evidence, Appellant was adjudicated for engaging in the delinquent conduct of committing aggravated sexual assault of a child younger than fourteen years of age. He was placed on probation for twenty-four months. The conditions of probation included one year in boot camp or "in the custody of the Cooke County Department of Juvenile Services." Appellant filed a timely motion for new trial, arguing that his health would not allow him to attend boot camp.

Documents in the court record indicate other concerns about the judgment. Case notes filed by Brent O'Bannon, Appellant's therapist, indicate that Appellant did not want to go to boot camp and that if he did go to boot camp, he was in danger of "get[ting] into conflicts, fights, and be[ing] picked on for his sexual orientation or ... be[ing] exploited sexually for oral and anal sex." A letter, apparently from a boot camp teacher, indicated that the current boot camp inmates knew about Appellant's sexual orientation and planned to hurt him when he arrived. A letter from the boot camp case manager to the juvenile probation officer rejected Appellant as a candidate for the camp "due to safety issues." For the reasons stated in the motion for new trial and the safety concerns expressed in the above documents, the court granted the new trial and a new disposition hearing was held.

The evidence admitted during the disposition hearings and related detention hearings showed that

- Appellant himself had been a victim of sexual assault;
- he received counseling as a result;
- he was undergoing counseling when he perpetrated the sexual assault against a six-year-old, whose father was dating his mother; and
- Appellant had expressed no remorse for the offense

Soon after the offense, his mother sent him to another state to live with his former stepfather for about eight months because she believed he could better control Appellant. Neither she nor the former stepfather had arranged sex offender counseling for him during that time period. Nevertheless, Appellant's mother testified that she could provide 24-hour supervision of Appellant. A school bus driver, she planned to take him on her route before and after school to keep an eye on him. Her boyfriend of ten months, a former TYC employee, also testified that he could help supervise Appellant.

Additionally, despite the provision in the original order providing that the first year of probation could be served at boot camp or in the custody of the juvenile detention center, testimony at the second disposition hearing showed that neither option was available, given that the boot camp had rejected the placement and the detention center was not prepared to offer a longtime detention. Finally,

Ron Perrett, a licensed social worker who interviewed Appellant before the second hearing, recommended TYC placement. According to him, "[I]t's the one recommended by an organization known as A.T.S.A., ... which is pretty much where all the best experts are for juvenile and adult offenders." His report, provided to all parties, was admitted over defense counsel's objection. After the hearing, the trial court committed Appellant to TYC for an indefinite period. The trial court's order included the following findings:

> [T]he Court finds that on the 15th day of September, 1999, the Respondent ... committed the offense of Aggravated Sexual Assault which is a Felony and the Respondent is in need of rehabilitation and that the protection of the public and the Respondent requires that disposition be made.
>
> The Court finds:
>
> 1) It is in the child's best interest to be placed outside the child's home;
>
> 2) Reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and
>
> 3) The child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.

The order also included a provision that Appellant could be immediately released to his mother's care after he successfully completed TYC's sex offender program. The trial court deleted this provision more than three weeks later after the State filed a petition arguing that it made the entire order void. Appellant timely filed a notice of appeal.

Held: Affirmed.

Opinion Text: In his first point on appeal, Appellant argues that the trial court abused its discretion in committing him to TYC because the evidence did not support the finding that commitment was in his best interests. In the discussion of his first point, Appellant further argues that

> [t]he record contains no evidence to establish that reasonable efforts had been made to prevent or eliminate the need for Appellant's removal from the home. Further, the juvenile court's finding that Appellant's home cannot provide him with the support and supervision needed to meet the conditions of probation is contrary to the great weight and preponderance of the evidence. Other than Appellant's commission of this offense, there is no evidence to establish that Appellant's mother cannot provide the quality of care and level of support and supervision that Appellant needs to meet the conditions of probation.

The first point thus complains that the trial court abused its discretion in issuing the three statutory findings required for commitment because the evidence was legally and factually insufficient to support the findings.

In his second point, Appellant complains that the trial court abused its discretion in committing him to TYC "rather than assigning him to sanction level five as provided for in ... the Texas Family Code" because the evidence was insufficient to support the court's deviation from the progressive sanctions guidelines. As Appellant points out, he is prohibited from complaining directly about the trial court's failure to make a sanction level assignment or its deviation from the sanction level assignment guidelines. [FN2] This point, then, also complains about the factual sufficiency of the evidence to support the trial court's findings on commitment.

> FN2. Tex.Fam.Code Ann. § 59.014(2), (3) (Vernon Supp.2002); In re A.S., 954 S.W.2d 855, 861 (Tex. App.—El Paso 1997, no pet.).

1. Standard of Review: Abuse of Discretion

After a juvenile has been adjudicated delinquent, the court has broad discretion to determine disposition. We will not reverse the juvenile court's decision unless it abused its discretion. To determine whether a trial court has abused its discretion, we must decide whether it acted without reference to any guiding rules or principles; in other words, whether the act was arbitrary or unreasonable. Merely because a trial court may decide a matter within its discretion in a different manner than an appellate court would in a similar circumstance does not demonstrate that an abuse of discretion has occurred.

An abuse of discretion also does not occur where the trial court bases its decisions on conflicting evidence. Furthermore, an abuse of discretion does not occur as long as some evidence of substantive and probative character exists to support the trial court's decision. In appropriate cases, legal and factual sufficiency are relevant factors in assessing whether the trial court abused its discretion.

When juvenile appellants complain that the evidence was legally or factually insufficient to support the adjudication of delinquency, we apply the criminal standards of review. [FN11] Our rationale

for this decision is that in a juvenile adjudication proceeding, the State must prove beyond a reasonable doubt that the juvenile engaged in delinquent conduct. The State bears the same burden in a criminal case at guilt-innocence. But in the punishment phase in a criminal case, absent a statutorily prescribed exception, the State has no burden of proof. Similarly, the Texas Family Code does not impose any burden of proof on the State at the disposition phase of a juvenile proceeding. We therefore apply the civil standards when reviewing the legal and factual sufficiency of the findings at the disposition phase. Our use of these standards follows the procedural requirements of the Texas Family Code, appropriately empowers the trial court to use its discretion to make the findings, and affords no less protection to the juvenile than an adult defendant has at the punishment phase in a criminal case.

> FN11. In re A.P., 59 S.W.3d 387, 389, 391-92 (Tex.App.—Fort Worth 2001, no pet.) (applying criminal standards of review to legal and factual sufficiency challenges during the adjudication phase); In re J.S., 35 S.W.3d 287, 292 (Tex.App.—Fort Worth 2001, no pet.) (applying criminal standard of review to legal sufficiency challenge during the adjudication phase); *but see* In re J.K.R., 986 S.W.2d 278, 281 (Tex.App.—Eastland 1998, pet. denied) (applying civil "no evidence" standard).

a. Standard of Review: Legal Sufficiency

In determining a "no-evidence" point, we are to consider only the evidence and inferences that tend to support the finding and disregard all evidence and inferences to the contrary. Anything more than a scintilla of evidence is legally sufficient to support the finding. There is some evidence when the proof supplies a reasonable basis on which reasonable minds may reach different conclusions about the existence of the vital fact.

b. Standard of Review: Factual Sufficiency

An assertion that the evidence is "insufficient" to support a fact finding means that the evidence supporting the finding is so weak or the evidence to the contrary is so overwhelming that the answer should be set aside and a new trial ordered. We are required to consider all of the evidence in the case in making this determination. But generally, we do not have to detail supporting evidence when upholding the factual sufficiency of the evidence underlying the trial court's judgment.

2. The Mandatory Findings

Section 54.04(i) of the Texas Family Code sets out the mandatory findings that the trial court must make to commit a child to TYC. It thus informs the court's discretion. At the time of the offense, that section provided:

> (i) If the court places the child on probation outside the child's home or commits the child to the Texas Youth Commission, the court shall include in its order its determination that:
>
> (1) it is in the child's best interests to be placed outside the child's home;
>
> (2) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and
>
> (3) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.

3. Application of the Law to the Facts

The trial court made the mandatory findings in the disposition order. Evidence showed that Appellant had been sexually assaulted by a family member. He was in victim counseling when he sexually assaulted the six-year-old son of his mother's boyfriend. He admitted that he had sexually assaulted the six-year-old on several occasions. Soon after the offense, his mother sent him to live with a former stepfather in another state because she believed he could better control and supervise Appellant. During the several months between his commission of the offense and the adjudication hearing, neither Appellant's mother nor his former stepparent managed to get Appellant into counseling for his behavior.

Regarding disposition options, the evidence showed that Cooke County Juvenile Detention Center was not prepared to house Appellant on a long-term basis; the Grayson County boot camp had rejected him for "safety" reasons; Collin County did not accept out-of-county placements; and the Lena Pope facility no longer accepted juvenile sex offenders. Appellant's mother's plan of supervision included having Appellant ride with her as she drove a school bus before and after school. Ron Perrett, a licensed social worker who interviewed Appellant, recommended TYC placement because it provided comprehensive, long-term treatment in a confined setting. Appellant expressed no remorse for the offense.

We hold that the evidence available at disposition is legally sufficient evidence that the commitment was in Appellant's best interest, that reasonable efforts were made to prevent or eliminate the need for his removal from his home and to make it possible for him to return there, and that he could not be provided with the level of care, support, and supervision at home that he would need to successfully complete probation. The evidence was thus legally sufficient to support the findings required by section 54.04(i). We further hold that the evidence supporting those findings is not so weak, and the evidence to the contrary is not so overwhelming, that the findings should be set aside. We overrule Appellant's first and second points on appeal.

B. The Indeterminate Sentence

In his third point on appeal, Appellant argues that the trial court's commitment of Appellant to TYC for an indeterminate length of time, but no longer than his twenty-first birthday, constituted cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution and Article I, section 13 of the Texas Constitution even though the sentence was within the statutory limits. But Appellant does not indicate in his brief where he made a corresponding objection at the trial level, and we cannot find such an objection in our own review of the record. Without such objection, error, if any, is waived. We therefore overrule Appellant's third point.

C. The Therapist's Report

In his fourth point on appeal, Appellant argues that the trial court committed reversible error by admitting the social worker's records into evidence over trial counsel's hearsay objection. Trial counsel had access to the records before the hearing.

A trial court's rulings in admitting or excluding evidence are reviewed under an abuse of discretion standard. An appellate court must uphold the trial court's evidentiary ruling if there is any legitimate basis in the record for the ruling. Section 54 .04(b) provides that "the juvenile court may consider written reports from ... professional consultants" and that the reports must be provided to the child's attorney before the hearing. Thus, this statute provides an explicit exception to the hearsay rule. We hold that the trial court did not abuse its discretion and overrule Appellant's fourth point.

III. CONCLUSION

Having overruled Appellant's four points on appeal, we affirm the trial court's judgment.

III. MODIFICATION OF DISPOSITION

1. DISTRICT COURT CAN REVOKE PROBATION EVEN THOUGH ASSOCIATE JUDGE HAD RECOMMENDED CONTINUING PROBATION

In the Matter of D.G., UNPUBLISHED, No. 05-01-00208-CV, 2002 WL 338875, 2002 Tex.App. Lexis 1628 (Tex.App.—Dallas 3/5/02, *review denied*) [*Texas Juvenile Law* 221 (5th Edition 2000).

Facts: D.G. was adjudicated delinquent and sentenced to twenty-four months probation for possession of cocaine in an amount greater than one gram but less than four grams. Subsequently, the State filed a motion to modify the disposition alleging violations of several provisions of the probation order. A hearing to modify disposition was held before an associate judge, and D.G. pled true to the alleged probation violations. The associate judge recommended D.G. be placed on probation until his eighteenth birthday. The State appealed the associate judge's recommendation to the district court.

The district judge modified the associate judge's recommendation, and ordered D.G. committed to Texas Youth Commission for an indeterminate sentence. D.G. appeals the district judge's order. The background of the case and the evidence adduced at trial are well known to the parties; thus we do not recite them here in detail. Because all dispositive issues are clearly settled in law, we issue this memorandum opinion pursuant to Tex.R.App. P. 47.1.

Held: Affirmed.

Opinion Text: In his first issue, D.G. argues the trial judge violated the double jeopardy clauses of the state and federal constitutions by conducting a hearing after the associate judge recommended probation. In his second issue, D.G. argues the Texas statutory scheme is unconstitutional under the state and federal double jeopardy clauses. In his third issue, D.G. argues the trial court erred by assessing a higher sentence than the associate judge in violation

of the state and federal double jeopardy and due process of law provisions.

In Texas, judicial power is vested in the courts, and is exercised through the justices and judges who sit on these courts. See Tex. Const. art. V, § 1; In re D.L.M., 982 S.W.2d 146, 148 (Tex. App.—Houston [1st Dist.] 1998, no pet.). "Judicial power" includes the power to render and execute a judgment or sentence. Morrow v. Corbin, 122 Tex. 553, 62 S.W.2d 641, 645 (1933). Masters, referees, or associate judges are not vested with the authority to act as judges. In re D.L.M., 982 S.W.2d at 148-49. A referee may only make recommendations to the juvenile court judge. Tex. Fam.Code Ann. § 54.10(d) (Vernon Supp.2002). The judge is free to adopt, modify, or reject those recommendations. Id.

In this case, the associate judge had no power to enter a final judgment against D.G. Until there is a final judgment, a defendant remains under the initial jeopardy. Ex parte Queen, 877 S.W.2d 752, 754 (Tex.Crim.App.1994). Because the hearing before the associate judge did not, and indeed could not, result in a judgment against D.G., we conclude double jeopardy did not prevent the trial court from reviewing the referee's recommendation, modifying her findings, and placing D.G. in T.Y.C. rather than on probation. See id.; Swisher v. Brady, 438 U.S. 204, 215 (1978). Likewise, only the trial judge, not the associate judge, could impose a final sentence on D.G. Therefore, D.G. received only one sentence: the trial court's sentence committing him to T.Y.C. for an indeterminate sentence. We overrule each of D.G.'s three issues.

---

2. WRITTEN MATTER DISCLOSURE REQUIREMENT APPLIES ONLY TO PENALTY PHASE OF MODIFICATION HEARING

In the Matter of D.S.S., 72 S.W.3d 725 (Tex.App.—Waco 3/6/02) [*Texas Juvenile Law* 222 (5th Edition 2000).

Facts: The court below sitting as a juvenile court found that D.S.S. had engaged in delinquent conduct by committing the offense of aggravated sexual assault and placed him on probation for eighteen months. The State subsequently filed a motion to modify this disposition. The court heard the motion, modified the disposition, and committed D.S.S. to the Texas Youth Commission without a determinate sentence. D.S.S. claims in two points that the court abused its discretion in modifying his disposition because: (1) the State failed to establish the chain of custody for a urinalysis report it relied upon to show that he had used marihuana and failed to provide him a copy of the report before the hearing; and (2) the State failed to present sufficient evidence to prove that he had possessed marihuana on another occasion.

Held: Affirmed.

Opinion Text: D.S.S. contends in his first point that the court abused its discretion by admitting in evidence a urinalysis report relied upon by the State to prove he violated the conditions of his probation by using marihuana. D.S.S. argues that the court should not have admitted this report because the State failed to establish the chain of custody and failed to provide him a copy of the report before the hearing under the requirements of section 54.05(e) of the Juvenile Justice Code. See Tex. Fam.Code. Ann. § 54.05(e) (Vernon Supp.2002).

The State responds that D.S.S. has not properly preserved his chain-of-custody complaint for our review, that it adequately established the chain of custody for the urinalysis report, and that section 54.05(e) does not apply to the report.

Condition six of D.S.S.'s probation order prohibited him from using or possessing alcohol, marihuana, and other illegal substances. The State alleged in its motion to modify that he violated this condition when he tested positive for marihuana on or about September 20, 2000. To prove this allegation, the State called D.S.S.'s probation officer Ray Esparza, who testified that D.S.S. provided a urine specimen at Esparza's request on September 20.

Esparza sealed the specimen container with a piece of tape bearing a distinctive bar code. At the same time, he completed a "Chain of Custody Form" which requires that the donor's name be printed in two places and that the donor sign in two places. Esparza printed the name "Jason Sanders" in the first blank in which the donor's name was to be entered. [FN1] However, D.S.S.'s signature appears below this entry. In the other spaces, D.S.S. printed and signed his name. The form bears the date September 20, 2000. Esparza's printed name and signature appear in several places on the form as well. The form also contains a bar code with a number corresponding to that which Esparza testified was attached to the specimen container.

> FN 1. The form also bears a machine-printed notation with the name "Jason Sanders" and the bar code number which appears in several places on the form. Apparently, this notation was made later, presumably by the laboratory.

Esparza discovered that he had written the wrong name on the chain-of-custody form the next day. He called the laboratory to advise personnel there of the discrepancy. He also completed a notarized statement documenting the error, which he forwarded to the lab.

The State called the lab director to testify about the testing process and its results. The lab di- [illegible] custody of the specimen (including Esparza's notarized statement explaining the misnomer on the initial form). He explained how the lab maintains and safeguards specimens to prevent contamination or misidentification. He then testified that two independent tests of D.S.S.'s specimen indicated positive results for the presence of marihuana.

At the conclusion of the lab director's testimony, the State offered four sets of exhibits in evidence: (1) the chain-of-custody form prepared by Esparza; (2) lab records pertaining to the custody and testing of the specimen; (3) the lab results; and (4) the specimen itself. D.S.S. objected to the first three exhibits on the basis that the State had not provided him copies of them before the hearing as required by section 54.05(e). The court overruled these objections. D.S.S. objected to the admission of the specimen on the basis that the State failed to establish the chain of custody.

We review a court's decision to modify a juvenile disposition under an abuse- of-discretion standard. In re M.A.L., 995 S.W.2d 322, 324 (Tex. App.—Waco 1999, no pet.); In re Cockrell, 493 S.W .2d 620, 626 (Tex.Civ.App.—Amarillo 1973, writ ref'd n.r.e.). Because this appeal arises from a proceeding to modify a disposition based on an adjudication of delinquent conduct, we must determine "whether the record shows that the court abused its discretion in finding, by a preponderance of the evidence, a violation of a condition of probation." M.A.L., 995 S.W.2d at 324; accord In re D.R.A., 47 S.W.3d 813, 815 (Tex.App.—Fort Worth 2001, no pet.); Cockrell, 493 S.W.2d at 626; see also Tex. Fam.Code. Ann. § 54.05(f) (Vernon Supp.2002).

D.S.S. objected to the State's proof of chain of custody with respect to only the urine specimen. Thus, he did not properly preserve his chain-of-custody argument with respect to the results of the urinalysis which show that he used marihuana. The State did not have to admit the specimen to prove the results. See Lake v. State, 577 S.W.2d 245, 246 (Tex.Crim.App. [Panel Op.] 1979); Velasquez v. State, 941 S.W.2d 303, 306 (Tex.App.—Corpus Christi 1997, pet. ref'd); Stevens v. State, 900 S.W.2d 348, 352-53 (Tex.App.—Texarkana 1995, pet. ref'd). Accordingly, we conclude that D.S.S.'s chain-of-custody argument is without merit.

Section 54.05(e) of the Juvenile Justice Code provides:

> (e) After the hearing on the merits or facts, the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of other witnesses. Prior to the [illegible]

As explained by commentators, the Legislature enacted the 1979 amendments to enable the juvenile court to consider a social history report prepared by juvenile authorities to aid the court in deciding the appropriate disposition for a juvenile found to have violated the conditions of probation. See ROBERT O. DAWSON, TEXAS JUVENILE LAW 222 (5th ed.2000); see also 5 BARRY P. HELFT ET AL., TEXAS CRIMINAL PRACTICE GUIDE § 115.01[3][c] (July 2000); 29 THOMAS S. MORGAN AND HAROLD C. GAITHER, JR., TEXAS PRACTICE: JUVENILE LAW AND PRACTICE § 923, at 527-28 (1999). The plain language of subsections (d) and (e) of the statute both prohibit a juvenile court from considering such documents until after the court has determined whether the juvenile violated a condition of probation. See Tex. Fam.Code. Ann. § 54.05(d), (e); see also In re J.B.S., 696 S.W.2d 223, 225 (Tex.App.—San Antonio 1985, no writ).

Professor Dawson explains the interplay of subsections (d) and (e) thusly:

> The obvious purpose of [the 1979] amendment was to require the juvenile court to first decide whether the child violated a probation condition as alleged in the petition and to do so without knowing the possibly prejudicial material in the social history report. Only if the court decides that a violation has been proved may it then consider the social history report in order to decide whether probation should be continued or revoked.

DAWSON, TEXAS JUVENILE LAW at 222.

The State offered the urinalysis report during the initial hearing on the merits of the motion to modify to prove that D.S.S. had violated the conditions of his probation. Section 54.05(e) does not apply to evidence offered during this phase of a modification proceeding. Accordingly, we overrule D.S.S.'s first point.

Because Esparza's testimony and the urinalysis report provide sufficient evidence to support a finding that D.S.S. violated condition six of his probation order, we need not address his second point which challenges the court's finding that he violated a condition of his probation on a different occasion. See D.R.A., 47 S.W.3d at 815; M.A.L., 995 S.W.2d at 324; Cockrell, 493 S .W.2d at 626; see also Tex. Fam.Code. Ann. § 54.05(f).

---

3. VIOLATES DUE PROCESS TO REVOKE PROBATION FOR SAME OFFENSE FOR WHICH THE PROBATION TERM HAD EARLIER BEEN EXTENDED

In the Matter of J.L.D., 74 S.W.3d 166 (Tex.App.—Texarkana 4/18/02) [*Texas Juvenile Law* 219 (5th Edition 2000).

Facts: J.L.D., a juvenile, brings this appeal alleging that the juvenile court erred and violated her constitutional rights during her delinquency proceedings by revoking her community supervision and committing her to the Texas Youth Commission ("TYC") on the basis of an assault that the State had previously used to extend her community supervision.

Before a juvenile court may find that a minor has engaged in delinquent conduct, it must conduct an adjudication hearing. See Tex. Fam.Code Ann. § 54.03 (Vernon Supp.2002). If the court makes an affirmative finding that the juvenile has engaged in delinquent conduct, it must hold a separate disposition hearing for sentencing. See Tex. Fam.Code Ann. § 54.04 (Vernon Supp.2002). On June 29, 2000, the juvenile court held J.L.D.'s adjudication hearing and found that she engaged in delinquent conduct by committing an aggravated assault resulting in serious bodily injury to the victim. At J.L.D.'s disposition hearing, the court committed her to the TYC for an indeterminate period of time. Commitment to the TYC is statutorily permissible where a child has committed a felony offense. See Tex. Fam.Code Ann. § 54.04(d)(2). J.L.D. filed a motion for new trial. The court granted the motion, vacated the commitment order, and placed J.L.D. on community supervision for twelve months.

During this twelve-month period, J.L.D. assaulted another person. We refer to this assault as the "second assault." Based on the nonaggravated second assault, the State petitioned the court to modify the disposition, alleging that J.L.D. violated her condition of supervision that she must not violate any state law. The court held the requisite hearing to modify disposition. See Tex. Fam.Code Ann. § 54.05 (Vernon Supp.2002). Pursuant to a plea bargaining agreement, J.L.D. signed a stipulation of evidence admitting that she violated her community supervision by committing the second assault, and the court modified the prior disposition by extending J.L.D.'s supervisory period for five months and placing her in the custody of her grandmother.

Shortly thereafter, the State again petitioned the court to modify disposition. The State alleged in count one, that J.L.D. committed the nonaggravated

second assault mentioned above and, in count two that J.L.D. intentionally fled from her probation officer, who was lawfully attempting to arrest her. J.L.D. objected to count one on the bases of due process and former jeopardy. The trial court overruled her objection and ultimately ordered that J.L.D. be committed to the TYC for an indefinite period of time not to exceed the time at which she becomes twenty-one years of age.

Held: Reversed and remanded.

Opinion Text: J.L.D. contends her due process rights were violated because the second assault was used against her in two separate community supervision modification proceedings, the first to extend her supervision by five months and the second to revoke community supervision altogether. The State presents no argument on this issue. The State argues instead that count two, which alleges that J.L.D. fled from her probation officer, was a sufficient basis itself to revoke her supervision, and therefore, the trial court did not abuse its discretion.

We first consider whether J.L.D. has preserved her complaints for appellate review. To preserve a complaint for appellate review, a party must timely present to the trial court an objection or motion stating the specific grounds for the desired ruling, if the specific grounds are not apparent from the context. Tex.R.App. P. 33.1(a)(1). Within the context of revocation hearings, where the issue is the preservation of due process complaints, a due process objection must have been raised before the trial court to preserve it for appellate review, even where the defendant has a manifestly meritorious claim. See Rogers v. State, 640 S.W.2d 248, 265 (Tex. Crim.App.1982) (Opinion on State's Second Motion for Rehearing); Hise v. State, 640 S.W.2d 271, 273 (Tex.Crim.App.1982) (Opinion on State's Motion for Rehearing); Wright v. State, 640 S.W.2d 265, 269 (Tex.Crim.App.1982) (Opinion on State's Motion for Rehearing). Although J.L.D. focused on a double jeopardy objection at the revocation hearing, she also raised her right to due process. Her counsel stated, "We would allege that it has previously been disposed of and that hearing Count One [alleging the second assault] again here today is a violation of her due process right. It violates not only the United States Constitution but the Texas Constitution. It's res judicata, double jeopardy." We find this to be sufficient to preserve both a due process and a double jeopardy objection for appellate review. Both the court and the State were on notice of the due process objection.

Two counts formed the basis for the petition to revoke J.L.D.'s community supervision. However, it is clear from both the trial court's oral pronouncement of sentence and its written judgment that the trial court based its decision to revoke community supervision on only one of the counts, namely the second assault. The court specifically found in its oral pronouncement that the evidence was factually insufficient to support count two, which alleged that J.L.D. intentionally fled from her probation officer. Immediately following this oral finding, the court recited two more findings, that J.L.D. was previously found to have engaged in delinquent conduct (the first assault) because of which she was placed on community supervision for twelve months, and that on January 30, 2001, she violated her supervision terms by committing the second assault as alleged in count one of the State's petition. The court repeated these two additional findings in its written order, although it made no reference in this written order to the allegation that J.L.D. had fled from her probation officer. A trial court's pronouncement of sentence is oral, while the judgment, including the sentence assessed, is merely the written declaration and embodiment of that oral pronouncement. Tex.Code Crim. Proc. Ann. art. 42.01, § 1 (Vernon Supp. 2002); see Ex parte Madding, No. 74,082, slip op. at 3, Tex.Crim.App. LEXIS 44 at *8 (Tex. Crim.App. March 6, 2002, no pet. h.); Banks v. State, 708 S.W.2d 460, 461-62 (Tex.Crim.App. 1986) (reforming insufficient written judgment to accurately reflect cumulation order orally pronounced at sentencing). Thus, it is necessary to read the transcript of the trial court's oral pronouncement of sentence in order to properly understand the court's true ruling. The State's argument that count two is a sufficient basis to uphold the judgment is without merit because it is inconsistent with the court's actual finding against count two.

We next consider J.L.D.'s due process complaint. The Texas Court of Criminal Appeals has stated that when on community supervision, a probationer's liberty, "although indeterminate, includes many of the core values of unqualified liberty, such as freedom to be with family and friends, freedom to form other enduring attachments of normal life, freedom to be gainfully employed, and freedom to function as a responsible and self-reliant person." Rogers v. State, 640 S.W.2d at 251-52. Consequently, "[i]t would be the epitome of arbitrariness for a court first to conduct a hearing on alleged violations and exercise its discretion to return the probationer to probation (whether by a 'continuance of the hearing' or by a 'continuance of the probation'), and then decide several months later to exercise its discretion in the opposite fashion by revoking the probation without any determination of a new violation." Id. at 252.

Thus, where a trial court holds a hearing on a motion to revoke or modify community supervision and disposes of that motion by allowing a person to remain on supervision with modified conditions, the court is thereafter without authority to change that disposition at a subsequent hearing where no further violation of supervision is shown. Ex parte Tarver, 725 S.W.2d 195, 199-200 (Tex.Crim.App.1986); Furrh v. State, 582 S.W.2d 824, 827 (Tex.Crim.App. 1979). To do so violates a probationer's liberty interest as safeguarded by federal constitutional due process protection [FN2] and state constitutional due course of law protection. [FN3] See Rogers v. State, 640 S.W.2d at 252; Hise v. State, 640 S.W.2d at 272; Wright v. State, 640 S.W.2d at 269. The cases just cited all concern adult criminal proceedings. Juvenile delinquency procedures are civil in nature. See In re J .R.R., 696 S.W.2d 382, 383 (Tex.1985). Nevertheless, there are certain constitutional protections to which a juvenile is entitled as in a criminal trial, because juvenile proceedings may also result in deprivations of liberty. These include due process protections. See id. at 384 ("A juvenile is entitled to due process and is thus given double jeopardy protection."). There is no reason why the constitutional protections afforded adults against deprivations of liberty at community supervision revocation proceedings should not be available for juveniles. We therefore hold that they apply equally in circumstances such as these, where one act is twice used to modify or revoke community supervision.

> FN2. "Nor shall any State deprive any person of life, liberty, or property without due process of law...." U.S. Const. amend. XIV.
>
> FN3. "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Tex. Const. art. I, § 19.

J.L.D. characterizes her complaint in terms of double jeopardy rather than due process. A double jeopardy objection is a type of due process objection, which is why it is through the Fourteenth Amendment Due Process Clause that the Fifth Amendment Double Jeopardy provision is applied against the states. See Brown v. Ohio, 432 U.S. 161, 164, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). Despite the mischaracterization, the substance of J.L.D.'s argument on appeal is that the Court violated her right to due process by twice using one act to modify her community supervision. We conclude that the juvenile court violated J.L.D.'s due process liberty rights when it modified a previous disposition, revoking her community supervision without a showing of a further violation. [FN4]

> FN4. Although not raised as an issue either at trial or on appeal, we note that the court's actions appear to have been in violation of J.L.D.'s due process rights in another way as well. The record reveals that in the first community supervision modification proceeding, J.L.D. signed a stipulation of evidence admitting that she violated her community supervision by committing the second assault. Statements by defense counsel to the trial court suggest that this was done pursuant to a plea bargaining agreement in return for the five month extension of supervisory time. The United States Supreme Court has held that when a prosecutor makes a promise as part of a plea bargain, due process of law requires that the promise must be kept. See Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); see also Gibson v. State, 803 S.W.2d 316, 318 (Tex.Crim. App.1991). Using the same act to subsequently revoke J.L.D.'s community supervision appears to have been a breach of the plea bargain.

We reverse the judgment and remand the proceeding to the juvenile court for further proceedings consistent with this opinion.

---

4. FAILURE TO PARTICIPATE IN SEX OFFENDER TREATMENT PROGRAM JUSTIFIED PROBATION REVOCATION

In the Matter of C.C., UNPUBLISHED, No. 05-01-01882-CV, 2002 WL 1340319, 2002 Tex.App. Lexis 4384 (Tex.App.—Dallas 6/20/02, *review denied*) [*Texas Juvenile Law* 217 (5th Edition 2000).

Facts: C.C., a juvenile, appeals the order modifying disposition and committing him to the Texas Youth Commission (TYC). In three issues, C.C. contends: (1) the complained-of order is void because he did not enter a plea at the adjudication hearing; and (2) the trial court abused its discretion by committing him to the TYC.

After C.C. was adjudicated a child engaged in delinquent conduct, the trial court placed C.C. on probation in the custody of his parents. The terms and conditions of his probation required C.C. to attend school each day and to attend the Dallas County Sex Offender Family group with his parents. The State later filed a motion to modify disposition, alleging C.C. had not attended school each day in violation of his probation conditions. C.C. pleaded true, and after accepting C.C.'s plea, the trial court continued the disposition. Three months later, the trial

court modified the terms and conditions of C.C.'s probation. In particular, the trial court ordered C.C. to successfully complete the Grayson County Sex Offender Program.

Subsequently, the State filed a motion to modify disposition, alleging C.C. violated the conditions of his probation by failing to participate in the sex offender program on August 28, 2001. After a hearing, the trial court found C.C. failed to participate in the sex offender program and that C.C.'s home could not provide the level of support and supervision needed for C.C. to meet the conditions of his probation. The trial court modified the prior disposition order and ordered C.C. committed to the TYC. This appeal followed.

Held: Affirmed.

Opinion Text: In his first and second issues, C.C. contends that the adjudication, disposition, and all subsequent proceedings are void because C.C. did not enter a plea at the adjudication hearing or later at the second modification hearing. We disagree.

The code of criminal procedure requires a plea to be entered in every criminal case. See Tex.Code Crim.Proc. Ann. art. 26.12, 26.13 (Vernon 1989 & Supp.2002). If no plea is entered, the trial is a nullity. Lumsden v. State, 384 S.W.2d 143, 144 (Tex.Crim.App.1964). However, except for discovery and evidentiary matters, the trial of a juvenile case is governed by the Texas Rules of Civil Procedure, not the Texas Code of Criminal Procedure. See Tex. Fam.Code Ann. § 51.17 (Vernon Supp.2002); In re D.I.B., 988 S.W.2d 753, 756 (Tex.1999). There is no such requirement for a plea to be entered in the rules of civil procedure. Nor does the Texas Family Code contain such a requirement. Consequently, we conclude C.C.'s argument that his failure to enter a plea at the adjudication hearing or the second modification hearing rendered the proceedings a nullity lacks merit. We overrule C.C.'s first and second issues.

In his third issue, C.C. contends the trial court abused its discretion by committing C.C. to the TYC. In particular, C.C. argues that the State alleged he violated his probation conditions by not participating in his sex offender treatment program on August 28, 2001, but the evidence shows that he did participate on that date.

Juvenile courts are vested with a great amount of discretion in determining the suitable disposition of children found to have engaged in delinquent conduct. This is especially so regarding hearings to modify disposition. In re J.M., 25 S.W.3d 364, 367 (Tex.App.—Fort Worth 2000, no pet.). In determining whether a trial court abused its discretion, we determine only whether the trial court acted in an unreasonable or arbitrary manner. In re J.R.W., 879 S.W.2d 254, 257 (Tex.App.—Dallas 1994, no writ).

At the hearing on the motion to modify, Terry Bower testified that she provided therapy for C.C. while he was in the Grayson County sex offender program. According to Bower, C.C. was unsuccessfully discharged from the program on August 29, 2001. C.C.'s discharge was, in part, because of his father's hostility, but also due to C.C.'s failure to complete certain assignments. Bower explained that the night before C.C. was discharged from the program, C.C. and his parents came to the group therapy session. C.C.'s father became "very aggressive and very hostile," causing others in the group to be uncomfortable. C.C.'s father began to "escalate" to the point that Bower felt "unsafe." Eventually, C.C.'s father cursed and left the room, telling C.C. and his mother to follow him. After a short time, C.C. and his mother left the session. James Bateman, a Grayson County juvenile probation officer, testified that he supervised C.C. in Grayson County. In Bateman's opinion, C.C. and his father were "equally a problem: [his father] for not supervising [C.C.] and then [C.C.] for not putting forth the effort to work--work the program."

After reviewing this testimony as well as all of the evidence in the record, we cannot conclude that the trial court abused its discretion by finding C.C. violated condition 11 of his probation. We recognize that C.C. and his parents initially attended the group therapy session on August 28, 2001. However, C.C.'s father was hostile and aggressive, finally cursing and leaving the session early with C.C. and his mother. Thus, the trial court could reasonably conclude that C.C. did not meaningfully participate in the August 28, 2001 group therapy session. Moreover, the evidence clearly shows C.C. failed to successfully complete the sex offender program as required by condition 11 of the terms and conditions of C.C.'s probation. Under these circumstances, we conclude the trial court acted within its discretion by modifying C.C.'s disposition. We overrule C.C.'s third issue.

---

5. EL PASO COURT SAYS REMOVAL FROM HOME FINDINGS REQUIRED TO MODIFY PROBATION BY PLACING CHILD OUTSIDE HIS HOME

In the Matter of S.R.R., UNPUBLISHED, No. 08-01-00365-CV, 2002 WL 1874853 (Tex.App.—El Paso 8/15/02) [*Texas Juvenile Law* 224 (5th Edition 2000).

Facts: Appellant S.R.R., a juvenile, appeals from the trial court's judgment modifying and extending his probation for delinquency. Appellant brings one issue: (1) the trial court abused discretion in finding count three of the allegations in the State's motion to modify disposition true.

S.R.R. tried to burglize an elementary school in October 1999. After the juvenile stipulated to the facts and waived certain rights, including his right to a jury trial, the trial court placed S.R.R. on in-home probation on November 29, 1999. In March 2000, S.R.R. carried a gun he had stolen into his elementary school, and the judgment was modified on May 9, 2000, to require him to enter into Intensive Supervision Program for three to six months. A year later, on May 8, 2001, the State brought a second motion to modify the judgment and alleged that S.R.R. had sexually assaulted T.R., a child less than fourteen years old, by penetrating her mouth, anus, and sexual organ with his sexual organ. The trial court found that S.R.R. violated the juvenile court order by committing aggravated sexual assault on T.R. by penetrating her mouth with his sexual organ and also that probation outside of his home would best serve the child's and the community's interests. The disposition order contains the findings required by Section 54.04(i) of the Texas Family Code and also the reasons for the disposition as required by Section 54.05(i). [FN1]

> FN1. Section 54.04(i)(1) provides, in relevant part, as follows:
>
> > (i) If the court ... commits the child to the Texas Youth Commission, the court:
> >
> > > (1) shall include in its order its determination that:
> > >
> > > > (A) it is in the child's best interests to be placed outside the child's home;
> > > >
> > > > (B) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and
> > > >
> > > > (C) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation....
>
> Tex.Fam.Code Ann. § 54.04(i)(1)(Vernon Supp. 2002).
>
> Section 54.05(i) provides:
>
> > The court shall specifically state in the order its reasons for modifing the disposition and shall furnish a copy of the order to the child.
>
> Tex.Fam.Code Ann. § 54.04(i)(Vernon Supp. 2002).

Held: Affirmed.

Opinion Text: Before a juvenile court can modify disposition to place a child on probation outside the child's home or to commit the child to the Texas Youth Commission, the juvenile court must state sufficient reasons, including but not limited to those found in Section 54.04(i) of the Family Code, to justify such a decision. Tex.Fam.Code Ann. § 54.04(i); In the Matter of L.R., 67 S.W .3d 332, 337 (Tex.App.—El Paso 2001, no pet.). Therefore, on appeal, a juvenile may challenge (1) the juvenile court's finding that he violated a term or condition of probation, and (2) the reasons for the disposition stated in the order pursuant to the Family Code. Tex.Fam.Code Ann. §§ 54.04(i), 54.05(i); L.R., 67 S.W.3d at 337.

S.R.R. challenges the factual sufficiency of the evidence to support the trial court's finding that he violated a condition of the probation but does not contend the evidence was legally insufficient to find a violation of the condition of probation or that evidence was insufficient to support the reasons behind the disposition.

Juvenile courts are vested with broad discretion in determining the suitable disposition of children found to have engaged in delinquent conduct, and this is especially true in hearings to modify disposition. L.R., 67 S.W.3d at 338. Absent an abuse of discretion, we will not disturb the juvenile court's determination. Id. In conducting this review, we engage in a two-pronged analysis: (1) Did the trial court have sufficient information upon which to exercise its discretion; and (2) did the trial court err in its application of discretion? Id. The traditional sufficiency of the evidence review, articulated below, comes into play when considering the first question. Id. We then proceed to determine whether, based on the elicited evidence, the trial court made a reasonable decision or whether it is arbitrary and unreasonable. Id. The question is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action, but whether the court acted without reference to any guiding rules and principles. Id. The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. L.R., 67 S.W.3d at 339.

A factual sufficiency point requires examination of all of the evidence in determining whether the finding in question is so against the great weight

and preponderance of the evidence as to be manifestly unjust. Lindsey v. Lindsey, 965 S.W.2d 589, 591 (Tex.App.—El Paso 1998, no pet.). We may not pass upon the witnesses' credibility nor will we substitute our judgment for that of the jury, even if the evidence would clearly support a different result; rather, if competent evidence of probative force supports the challenged finding, we will sustain it. Gonzalez v. El Paso Hosp. Dist., 940 S.W.2d 793, 796-97 (Tex.App.—El Paso 1997, no writ).

A trial court may modify any disposition, except a commitment to the Texas Youth Commission, until the child reaches his eighteenth birthday or is discharged by the trial court or by the operation of law. Tex.Fam.Code Ann. § 54.05(a). To modify the disposition to commit a child outside the home, the trial court must find that the child violated a reasonable and lawful order of the court by a preponderance of the evidence. Tex.Fam.Code Ann. § 54.05(f), (j); L.R., 67 S.W.3d at 337-38.

A person commits aggravated sexual offense if the person intentionally or knowingly causes the penetration of the mouth of another child by the sexual organ of the actor and the child is younger than fourteen years of age. Tex.Pen.Code Ann. § 22.021 (a)(1)(B)(ii) & (2)(B)(Vernon Supp.2002).

S.R.R. lives with his grandmother and has two siblings, a twin brother and a younger sister; the sister had been friends with T.R. since they were in first grade.

In April 2000, the third grade children at Burnett Elementary school began circulating a note, which stated, in part, "T---sucked one of K---'s brothers' dick for two Pokemon cards." Concerned, the school's counselor, Sue Hardy, met with T.R. T.R. at first denied the allegations in the note then admitted that she had put her mouth on a boy's private parts and that S.R.R.'s sister had seen what had happened. There was no testimony on where the act had occurred.

T.R. said that she was ten years old at the time of the hearing and was also able to identify the private parts on a girl and a boy, including the penis. She said that she lied when she admitted to the two different counselors that she had done various sexual deeds.

When she and T.R. played at their home, S.R.R.'s sister never saw anything bad happen between T.R. and her brothers. However, she once heard her other brother, S.R.R.'s twin, tell T.R. that she "can't get by unless you suck my private" when they were playing in the backyard. T.R. was standing by the shed at the time. Also, she had seen S.R.R. take T.R. into the shed once, and afterwards, when T.R. said S.R.R. had been trying to rape her, S.R.R. told her that T.R. put her mouth on his private area for some Pokemon cards.

S.R.R.'s twin remembered finding his brother and T.R. together inside the shed at an unknown time. T.R. was wearing a dress, and she was bending over with her underwear pulled down to her knees. S..R.R.'s pants and underwear were down at his knees as well, and he was standing behind her. S.R.R. and T.R. were not touching each other, and S.R.R. said T.R. had pulled his pants and her underwear down. S.R.R. said nothing more to explain the situation to his brother.

The trial court need have found only by a preponderance of the evidence, not by beyond a reasonable doubt, that S.R.R. had intentionally and knowingly penetrated the mouth of a child younger than fourteen years old with a sexual organ, a violation of law and of a condition of the probation. Tex.Fam. Code Ann. § 54.05(f) & (j); Tex.Pen.Code Ann. § 22.021(a)(1)(B)(ii) & (2)(B). Since T.R. recanted her statement that S.R.R. had touched her sexually, no direct testimony of the alleged incident exists, and we cannot know what had actually occurred. However, testimony from S.R.R.'s twin and sister overwhelmingly placed S.R.R. with T.R. in a compromising position and location. S.R.R. was with T.R. at a shed at his home's backyard, and not only did his brother observe both children with their underwear down by their knees and standing close together but S.R.R. also told his sister that T.R. had touched his sexual organ with her mouth after his sister saw him take T.R. into the shed. The evidence is not so overwhelming that the trial court could not find by the preponderance of the evidence that S.R.R. penetrated T.R .'s mouth with his sexual organ and that T.R. was younger than fourteen years of age at the time. The evidence is factually sufficient to find S.R.R. violated a condition of his probation. Since S.R.R. does not challenge the trial court's modification of the disposition to place him on probation outside his home, we do not reach the second prong of the analysis. The trial court did not abuse discretion in modifying the disposition. We overrule S.R.R.'s sole issue.

---

6. SAN ANTONIO COURT REQUIRES THREE MISDEMEANOR ADJUDICATIONS TO AUTHORIZE A TYC COMMITMENT ON PROBATION REVOCATION

In the Matter of S.B., ___ S.W.3d ___, No. 04-01-00486-CV, 2002 WL 31464985, 2002 Tex.App.

Lexis 7905 (Tex.App.—San Antonio 11/6/02) *Texas Juvenile Law* 220 (5th Ed. 2000).

Facts: S.B. appeals the trial court's judgment, which modifies his probation disposition and commits him to the Texas Youth Commission. Because the trial court was not authorized to commit S.B. to TYC, we reverse the judgment and remand the cause for further proceedings consistent with this opinion.

On March 15, 2001 S.B. was adjudicated to have engaged in delinquent conduct for committing misdemeanor assault causing bodily injury. Tex. Pen.Code Ann. § 22.01(a)(1); § 22.01(b)(Vernon Supp.2002). S.B. was granted probation, including partial hospitalization and treatment at the Laurel Ridge Alternative Day Treatment Facility. This was S.B.'s second adjudication and probation for misdemeanor assault. On July 5, 2001 the juvenile court found S.B. had "failed to participate in and cooperate fully with day treatment" and thus violated a condition of his probation. The court modified its earlier judgment and committed S.B. to TYC under the authority of section 54.05(j) of the Texas Family Code:

> The court may modify a disposition under Subsection (f) [FN1] that is based on a finding that the child engaged in delinquent conduct that violates a penal law of the grade of misdemeanor if: (1) the child has been adjudicated as having engaged in delinquent conduct that violates a penal law of the grade of felony or misdemeanor on at least two previous occasions; and (2) of the previous adjudications, the conduct that was the basis for the adjudications occurred after the date of another previous adjudication. [FN2]
>
> FN1. Subsection (f) provides in part: "[A] disposition based on a finding that the child engaged in delinquent conduct that violates a penal law of this state or of the United States of the grade of felony or, if the requirements of Subsection (j) are met, of the grade of misdemeanor, may be modified so as to commit the child to the Texas Youth Commission if the court after a hearing to modify disposition finds by a preponderance of the evidence that the child violated a reasonable and lawful order of the court." Act of May 30, 1999, 76th Leg., R.S., ch. 1448, § 2, 1999 Tex. Gen. Laws 4919, 4920-21 (amended 2001) (current version at Tex. Fam.Code Ann. § 54.05(f) (Vernon 2002)).
>
> FN2. Act of May 30, 1999, 76th Leg., R.S., ch. 1448, § 2, 1999 Tex. Gen. Laws 4919, 4920-21 (amended 2001) (current version at Tex. Fam.Code Ann. § 54.05(k) (Vernon 2002)). The modification order was signed July 9, 2001 and thus controlled by the statute as it was worded at that time.

Held: Reversed and remanded.

Opinion Text: S.B. argues the modification order is void, because section 54.05(j) requires two adjudications of misdemeanor or felony conduct, not including the current adjudication that is the basis for the modification; and he has only been adjudicated twice. In response, the State argues section 54.05(j) permits commitment because the modification proceeding serves as the third adjudication. The State supports its theory with the statement of Professor Robert O. Dawson that "subsection (j) restricts TYC commitments to revocation of felony probation or revocation of misdemeanor probation if the child has two previous felony or misdemeanor adjudications, including the adjudication for which he was placed on probation." John J. Sampson et al., Texas Family Code Annotated 241-42, (1999). We disagree.

In construing a statute, our objective is to ascertain and give effect to the underlying legislative intent. Texas Water Comm'n v. Brushy Creek Mun. Util. Dist., 917 S.W.2d 19, 21 (Tex.1996). When the language is clear and unambiguous, legislative intent may be determined from the plain and ordinary meaning of the words used. Albertson's, Inc. v. Sinclair, 984 S.W.2d 958, 960 (Tex.1999). But even if the statute is unambiguous, we may consider the legislature's objective, the consequences of particular constructions of the statute, and any administrative constructions. Tex. Gov't Code Ann. § 311.023 (Vernon 1998); see Atascosa County v. Atascosa County Appraisal Dist., 990 S.W.2d 255, 258-59 (Tex.1999).

The clear and unambiguous language of the statute permits commitment only when the juvenile has been adjudicated for felony or misdemeanor conduct on two previous occasions. The two previous adjudications must be separate and in addition to the adjudication on which the modification is based. In re A.I., 82 S.W.3d 377, 380-81 (Tex.App.—Austin 2002, pet. denied); In re N.P., 69 S.W.3d 300, 302 (Tex.App.—Fort Worth 2002, pet. denied); In re A.N., 54 S.W.3d 487, 492-93 (Tex.App.—Fort Worth, 2001 pet. denied); In re Q.D.M., 45 S.W.3d 797, 802 (Tex.App.—Beaumont 2001, pet. denied). Contrary to the State's theory, section 54.05(j) does not equate a modification proceeding to an adjudication of misdemeanor or felony conduct. In re A.N., 54 S.W.3d at 492 ("We respectfully disagree with [Professor Dawson's] interpretation of the statute because it is contrary to the statute's plain meaning."). In re Q.D.M., 45 S.W.3d at 801-802 ("The 'plain meaning' of [section] 54.05(j), gleaned from

its literal text, does not permit the trial court's modification of appellant's probationary disposition to be equated with an 'adjudication'...").

The State also argues that the 2001 amendments to section 54.05(j) demonstrate the legislature's intent that only two adjudications are required. The 2001 amendment clarifies that "of the previous adjudications, the conduct that was the basis for one of the adjudications occurred after the date of another previous adjudication." [FN3] However the effect of the amendment is not at issue in this case; and, in any event we are not convinced the inserted language changes the requirements of the statute. See In re A.I., 82 S.W.3d at 379 n. 2.

FN3. Act of May 24, 2001, 77th Leg., R.S., ch. 1297 § 28, 2001 Tex. Gen. Laws 3142, 3154 (inserting "one of") (codified at Tex. Fam.Code Ann. § 54.05(k) (Vernon 2002)) (emphasis added). The amended statute applies only to conduct that occurs on or after the statute's effective date. Act of May 24, 2001, 77th Leg., R.S. ch. 1297 § 72(b), 2001 Tex. Gen. Laws 3142, 3175.

Because S.B. had only one previous adjudication, section 54.05 does not authorize TYC commitment. We therefore reverse the trial court's order and remand this cause to that court for further proceedings consistent with this opinion.

IV. CERTIFICATION PROCEEDINGS

1. FOURTH TIME IS CHARM; CAPITAL MURDER CETIFICATION APPROVED BUT NO PROBABLE CAUSE FOR BURGLARY CHARGES

In the Matter of M.A.V., 88 S.W.3d 327 (Tex.App.—San Antonio 7/24/02) [Texas Juvenile Law 137 (5th Edition 2000)].

Facts: This case concerns the State's fourth attempt to certify M.A.V. to stand trial as an adult for crimes he allegedly committed when he was sixteen. [FN1] M.A.V. is charged with seven counts of capital murder, three counts of murder, eleven counts of burglary, and one count of theft. In three issues, M.A.V. challenges the juvenile court's latest certification and transfer order, claiming: (1) transfer to criminal district court is improper because the juvenile court has already adjudicated him guilty of the alleged offenses; (2) there is legally and factually insufficient evidence to support several of the juvenile court's probable cause findings; and (3) the juvenile court failed to waive its jurisdiction over this matter.

FN1. Three prior certification and transfer orders were reversed and remanded by this Court. See In re M.A.V., 40 S.W.3d 581 (Tex.App.—San Antonio 2001, no pet.).

Held: Affirmed in part, reversed and rendered in part.

Opinion Text: *A. Double Jeopardy*

In his first issue, M.A.V. claims the juvenile court is precluded from transferring him to criminal district court because jeopardy has already attached regarding the alleged offenses. See Breed v. Jones, 421 U.S. 519 (1975). M.A.V. contends jeopardy has attached because the court's transfer order states: "the court finds ... [M.A.V.] did violate a penal law .... (the order then cites each penal provision M.A.V. purportedly violated)." We disagree.

In Breed v. Jones, the State of California filed a petition in juvenile court alleging Breed had committed robbery. Id. at 521. An adjudicatory hearing was held, and the court determined Breed had committed the offense. Id. at 521 22. Shortly thereafter, the court declared Breed "unfit for treatment as a juvenile" and transferred Breed to adult court. Id. at 524. Breed was tried as an adult and, once again, found guilty of robbery. Id. at 525. Breed filed a petition for a writ of habeas corpus in federal district court, alleging his prosecution in adult court subjected him to double jeopardy. Id. at 525 26. The Supreme Court agreed with Breed, holding jeopardy attaches:

> at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years.

Id. at 529. The Court determined jeopardy attaches at the point in a juvenile proceeding where the juvenile is "put to trial before the trier of facts." Id. at

531. The court recognized its holding will require that a decision to transfer a juvenile be made prior to

peal of a transfer order was to be taken to the court of appeals with possible further review by the supreme court. See id. The requirement governing an appeal of the transfer order was "as in civil cases generally." Tex. Fam.Code Ann. § 56.01(b) (Vernon 1996). Accordingly, legal and factual sufficiency review was performed under the standards applicable to civil cases generally. See e.g. A.T.S. v. State, 694 S.W.2d 252, 253 54 (Tex.App.—Fort Worth 1985, writ dism'd).

We recognize that the Legislature amended the Family Code and Code of Criminal Procedure in 1995 to permit an appeal of a transfer order only in conjunction with an appeal of the conviction of the offense for which a juvenile was transferred. See Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 48, 1995 Tex. Gen. Laws 2517, 2584. The 1995 legislative change in the law applies to conduct occurring on or after January 1, 1996. See Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 106(a), 1995 Tex. Gen. Laws 2517, 2591. Under the new amendments, an appeal of a transfer order is a criminal matter, governed by the Code of Criminal Procedure and the Rules of Appellate Procedure applicable to criminal cases. See Tex.Code Crim. Proc. Ann. art. 44.47(c) (Vernon Supp.2002). Because this case concerns conduct occurring before January 1, 1996, we conducted our review under the standards applicable to civil cases. Nevertheless, were we to apply the standards of review applicable to criminal cases in this instance, our holding would not change.

Under section 54.02 of the Texas Family Code, the juvenile court must determine whether probable cause exists to believe the child committed the alleged offense before certifying the child as an adult. See Tex. Fam.Code Ann. § 54.02(a)(3) (Vernon 1996). Probable cause is shown by facts and circumstances sufficient to warrant a prudent person to believe the child committed the alleged offense. In re A.A., 929 S.W.2d 649, 653 (Tex.App.—San Antonio 1996, no writ). "The probable cause standard of proof embraces a practical, common sense approach rather than the more technical standards applied in the burdens of proof of either beyond a reasonable doubt or a preponderance of the evidence." Id.

As alleged by the State, a person is criminally responsible for burglary when, without the effective consent of the owner, he enters a habitation and commits or attempts to commit a felony or theft. Tex. Penal Code Ann. § 30.02(a)(3) (Vernon Supp. 2002). A person commits "theft" when he unlawfully appropriates property with the intent to deprive the owner of it. Tex. Penal Code Ann. § 31.03(a) (Vernon 1994). A person commits "robbery" when in the course of committing theft and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. Tex. Penal Code Ann. § 29.02(a)(1), (2) (Vernon 1994). A person commits a "criminal attempt" if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended. Tex. Penal Code Ann. § 15.01(a) (Vernon 1994).

Of the eleven counts of burglary with which M.A.V. was charged, three charges were based on the commission of murder, a felony; two charges were based on felony conduct directed toward James Smiley; and two charges were based on felony conduct of theft and robbery, but with no victim identified. M.A.V. does not present evidentiary challenges to any of these seven charges. The remaining four charges contested by M.A.V. charge that he entered a habitation without the effective consent of the owner and "did attempt to commit and committed" theft of Duenez (Paragraph IXc); theft of Martinez (Paragraph IXd); robbery of Duenez (Paragraph Xc); and robbery of Martinez (Paragraph Xd). See Tex. Penal Code Ann. § 30.02(a)(3) (Vernon Supp.2002) (burglary includes entering a building or habitation and committing or attempting to commit a felony, theft, or an assault). Since the State alleged the specific conduct of theft and robbery directed toward two specific individuals, it had the burden to produce evidence of theft and robbery directed toward the two individual victims identified in the petition. Cf., Roberts v. State, 513 S.W.2d 870, 871 (Tex.Crim. App.1974) (recognizing all essential averments in an indictment must be proved as alleged).

In this case, there is nothing in the record to indicate that M.A .V. committed or attempted to commit a theft or robbery of either Duenez or Martinez. At the certification hearing, Officer Jesus Torres, Abdon Ibarra, Ramon Rodriguez, and Officer Norberto Cardenas testified regarding the items allegedly taken by M.A.V. Officer Torres testified he was in charge of M.A.V.'s investigation. According to Torres, his investigation led him to the conclusion that the only items taken on the night in question were a television, watch, and automobile. [FN3] Torres further testified all of these items belonged to James Smiley.

FN3. Investigators found Smiley's watch and car keys at M.A.V.'s residence. Smiley's abandoned automobile was found in Nuevo Laredo, Mexico. His television was found at the residence of Abdon Ibarra.

Abdon Ibarra testified he purchased a television from M.A.V. and was with M.A.V. when M.A.V. abandoned an automobile in Mexico. Ibarra further testified M.A.V. had confessed to murdering the owner of the vehicle, although M.A.V. never specifically stated who the owner was. Ramon Rodriguez testified M.A.V. had confessed to murdering three people for their car. Rodriguez also testified M.A.V. had a television with him when the boys went driving in the stolen vehicle. Lastly, Officer Norberto Cardenas testified the car keys recovered from M.A.V.'s home were the keys to the automobile he abandoned in Mexico.

From this testimony it is evident that the only items taken on the night in question (a watch, television, and automobile) belonged to James Smiley. No items were taken from Duenez or Martinez. Further, nothing in the record suggests that M.A.V. formed a specific intent to steal a particular article of property from either of these individuals after he entered the residence. See Flores v. State, 902 S.W.2d 618, 620 (Tex.App. Austin 1995, pet. ref'd) (holding evidence was legally insufficient to prove attempted theft where record did not contain any evidence that appellant, after his burglarious entry, formed a specific intent to steal a particular article of property). Because there is legally insufficient evidence to support the juvenile court's probable cause findings regarding the above referenced offenses, we hold that the juvenile court abused its discretion by not dismissing these causes of action. [FN4] Therefore, we sustain M.A.V.'s second issue.

> FN4. See In re J.J., 916 S.W.2d at 535. In light of the evidence before us, a closer question would be presented had the charge been burglary with intent to commit theft under section 30.02(a)(1) of the Penal Code; however, M.A.V. was not charged under that section of the statute. See Tex. Penal Code Ann. § 30.02(a)(1) (Vernon Supp.2002).

C. Waiver of Jurisdiction

In his final issue, M.A.V. complains that the juvenile court failed to waive its jurisdiction over this matter because it failed to make a probable cause finding for all of the offenses alleged in the State's amended petition. We disagree.

We remanded this cause to the juvenile court for a hearing to determine whether the court's written order properly reflected its oral pronouncement at the certification hearing. [FN5] As with judgments, clerical errors in orders may be corrected. Wood v. Griffin & Brand of McAllen, 671 S.W.2d 125, 128 (Tex.App.—Corpus Christi 1984, no writ); Tex. Employers' Ins. Ass'n v. Pillow, 268 S.W.2d 716, 718 (Tex.Civ.App.—Fort Worth 1954, writ ref'd n.r.e.). A court can enter a judgment nunc pro tunc to correct a clerical error at any time, even after it has lost jurisdiction over the case. Tex.R. Civ. P. 316; Escobar v. Escobar, 711 S.W.2d 230, 231 (Tex.1986). An error is considered clerical when it is not the result of judicial reasoning. Wood, 671 S.W.2d at 128. The determination as to whether an error is clerical in nature is a question of law, and the trial court's finding in this regard is not binding on an appellate court. Id.

> FN5. See In re M.A.V., No. 04 01 00533 CV (Tex.App.—San Antonio Apr. 24, 2002, no pet. h.) (not designated for publication), 2002 WL 662246.

After thoroughly reviewing the record, we believe there is evidence to support the juvenile court's finding that its written order contained a clerical error. The court's order appears to duplicate pages three through thirteen of the State's amended petition in their entirety. Page eight of the State's petition contains the final sentences of Paragraph VIIc (capital murder), Paragraph VIIIa (burglary) in its entirety, and the first several sentences of Paragraph VIIIb (burglary). Paragraph 1j of the court's written order appears to combine the beginning of Paragraph VIIc, which appears on page seven of the State's petition, with the remainder of Paragraph VIIIb, which begins on page nine of the State's petition. The order omits any reference to Paragraph VIIIa of the petition and fails to incorporate the parts of Paragraph VIIc and VIIb appearing on page eight of the State's petition. Moreover, at the nunc pro tunc hearing, Judge Mireles stated that he: (1) intended to transfer all of the offenses alleged in the State's petition to criminal district court; and (2) had inadvertently omitted from his order the charges found on pages eight and nine of the State's petition. Accordingly, we hold that the juvenile court's omission was the result of a clerical error. M.A.V.'s third issue is overruled.

Conclusion

Because we hold the evidence is legally insufficient to demonstrate probable cause, we reverse the juvenile court's order transferring the following offenses and render judgment dismissing these offenses:

> (1) burglary by entering a habitation and attempting to commit and committing a theft from Daniel Duenez, Jr.;
>
> (2) burglary by entering a habitation and attempting to commit and committing a theft from Ruben Martinez, Jr.;

(3) burglary by entering a habitation and attempting to commit and committing a robbery from Daniel Duenez, Jr.; and

(4) burglary by entering a habitation and attempting to commit and committing a robbery from Ruben Martinez, Jr.

---

2. NOT INEFFECTIVE ASSISTANCE FOR DEFENSE COUNSEL TO PREVENT DIAGNOSTIC EXAMINATION

Montgomery v. State, UNPUBLISHED, No. 07-00-0574-CR, 2002 WL 31778661, 2002 Tex. App. Lexis 8878 (Tex.App.—Amarillo 12/12/02) *Texas Juvenile Law* (5th Ed. 2000).

Facts: Appellant Michael Lee Montgomery was convicted of capital murder and sentenced to life imprisonment. In four points, he contends 1) he was denied effective assistance of counsel at trial, 2) the trial court abused its discretion in denying his motion for continuance, 3) he was denied effective assistance of counsel when his juvenile counsel failed to obtain a psychiatric and psychological examination of him, and 4) the evidence is legally and factually insufficient to sustain his conviction.

On the night of December 27, 1999, appellant, who was 14 years old, and his friends Juan Perez, Miguel Juarez, Miguel's brother Felipe Juarez, and Felipe's wife Marissa Juarez gathered at the home of Miguel and Felipe. Around 9:00 p.m., they left the residence to go cruising in two cars with Juan, Miguel, and appellant in the first car and Felipe and Marissa in the second car. Miguel carried a gun but gave it to appellant sometime during the drive. The occupants of the first car spotted another car they wished to car jack and told the driver Juan to follow it. The car was driven by Rosa Martinez. They followed Rosa into the parking lot of her apartment, and Miguel and appellant went to the driver's side of her car. Miguel tried to take the keys from her, and they struggled as she sat in the driver's seat. Appellant then shot Rosa, and the bullet entered through her shoulder and went into her chest. She was later pronounced dead at the hospital. Rosa was nine months pregnant at the time of her death.

Held: Affirmed.

Opinion Text: *Issue Three--Failure to Obtain a Psychiatric Exam*

In his third issue, appellant complains of having received inadequate representation by his counsel during the juvenile proceeding as a result of the failure of his counsel to obtain a complete psychiatric and psychological examination to which he was entitled under the Family Code.

The record shows that the State filed a motion seeking to have psychiatric and psychological examinations performed on appellant including an examination for "competency and fitness to proceed." The court had ordered a diagnostic study, social evaluation, and full investigation of appellant, his circumstances and the circumstances of the alleged offense to be performed which is required prior to a waiver of original jurisdiction by the juvenile court. *See* Tex. Fam.Code Ann. § 54.02 (Vernon 2002). That report indicates that psychiatric and psychological examinations were not performed at the request of appellant's counsel. A letter from appellant's counsel requesting that no such testing be conducted was also attached to the report. Thus, it appears that counsel considered the situation and made an affirmative decision to forego testing. He may well have had a legitimate reason for deciding as he did. Indeed, the decision could have been made to prevent appellant from having an opportunity to make incriminating statements or to add fodder to the State's argument that appellant had the mental faculty of an adult. Yet, we are left to simply guess about those reasons. And, most importantly, counsel was not afforded an opportunity to explain them. So, the record does not show on its face that the decision of counsel was something other than reasonable trial strategy.

V. CRIMINAL PROCEEDINGS

STATUTE REQUIRING PRE-TRIAL OBJECTION FOR FAILURE TO CERTIFY FROM JUVENILE COURT IS CONSTITUTIONAL

Rushing v. State, 85 S.W.3d 283 (Tex.Crim.App. 9/11/02) *Texas Juvenile Law* 327 (5th Ed. 2000).

Facts: We granted the State's petition to determine whether the Court of Appeals erred in declaring Texas Code of Criminal Procedure, Article 4.18 unconstitutional as a violation of the Separation of Powers provision of the Texas Constitution. We hold that the statute is constitutional.

Appellant was convicted of capital murder. Because he was under the age of seventeen when the offense was committed, the State was statutorily prohibited from seeking the death penalty, and appellant was sentenced to life in prison. On appeal, he complained that the convicting court lacked jurisdiction because the record did not reflect that a juvenile court had waived jurisdiction and certified him to be tried as an adult. However, because Article 4.18 purports to bar this type of claim unless it is timely raised before the convicting court--and appellant had failed to do so--appellant complained on appeal that Article 4.18 was an unconstitutional violation of the Separation of Powers provision of the Texas Constitution.

The State responded that Article 4.18 was constitutional and barred appellant's complaint. However, the State also responded by supplementing the appellate record. As it turns out, the juvenile court had waived jurisdiction, and the record in the criminal case simply failed to reflect that fact at the time of conviction, because the transfer order had not been filed in the criminal case and no one had otherwise referred to it. Nevertheless, the trial judge was undoubtedly aware of the transfer order because he presided over both the juvenile proceedings and the criminal trial. In keeping with our holding in Ellis v. State, the State caused records from the juvenile cause to be transferred to the adult criminal case (after appeal was filed) "in order that the true facts might be shown and the record speak the truth." [FN3] Appellant objected to the supplementation of the appellate record, but the Court of Appeals overruled his objection.

> FN3. 543 S.W.2d 135, 137 (Tex.Crim.App.1976).

In its opinion, the Court of Appeals first addressed whether Article 4.18 prevented review of appellant's jurisdictional claim. [FN4] Invalidating the statute under the Texas Separation of Powers provision, the court held that appellate courts have inherent power to review jurisdictional errors regardless of whether error has been preserved. As a result, the statute could not bar presentation of the claim on appeal. The Court of Appeals then reviewed the merits of the jurisdictional claim. Relying upon Ellis, the Court of Appeals held that the record, as supplemented, showed that the juvenile court had indeed waived jurisdiction and transferred the case to adult criminal court.

> FN4. Rushing v. State, 50 S.W.3d 715, 721 (Tex.App.—Waco 2001) [Juvenile Law Newsletter ¶¶ 01-3-19, -24].

Appellant filed a petition for discretionary review, complaining, among other things, that supplementation of the appellate record with records from the juvenile proceeding was improper. The State filed a cross-petition, complaining that the Court of Appeals erred in ruling Article 4.18 unconstitutional. We granted the State's petition to address the constitutional issue.

Held: Judgment affirmed.

Opinion Text: The Separation of Powers portion of the Texas Constitution provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted. [FN5]
>
> FN5. TEX. CONST., Art. II, § 1

This provision may be violated in either of two ways: (1) "when one branch of government assumes, or is delegated, to whatever degree, a power that is more properly attached to another branch," and (2) "when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers." [FN6]

FN6. State v. Williams, 938 S.W.2d 456, 458 (Tex.Crim.App.1997); Armadillo Bail Bonds v. State, 802 S.W.2d 237, 239 (Tex.Crim.App.1990).

The statute in question places limitations upon the courts' ability to review certain types of claims. [FN7] The question presented is whether the Legislature, by creating these limitations, has assumed a power more properly attached to the judicial branch or has unduly interfered with the judicial branch's exercise of its constitutionally assigned powers. The watershed case of error-preservation is Marin v. State. [FN8] Marin addressed two issues relevant to our discussion: (1) the nature of the right to appeal, and (2) the nature of error preservation. Marin repeated the well-settled proposition that the right to appeal is not of constitutional magnitude, but is derived entirely from statute. [FN9] Marin further stated that the ability to confer or withhold jurisdiction in its entirety also entailed the ability to place limits upon that jurisdiction: "And that which the Legislature may withhold altogether, it may withhold in part. Thus our lawmakers may deny the right to appeal entirely or the right to appeal only some things or the right to appeal all things only under some circumstances." [FN10]

FN7. Article 4.18 provides in relevant part:

(a) A claim that a district court or criminal district court does not have jurisdiction over a person because jurisdiction is exclusively in the juvenile court and that the juvenile court could not waive jurisdiction under Section 8.07(a), Penal Code, or did not waive jurisdiction under Section 8.07(b), Penal Code, must be made by written motion in bar of prosecution filed with the court in which criminal charges against the person are filed.

(b) The motion must be filed and presented to the presiding judge of the court:

(1) if the defendant enters a plea of guilty or no contest, before the plea;

(2) if the defendant's guilt or punishment is tried or determined by a jury, before selection of the jury begins; or

(3) if the defendant's guilt is tried by the court, before the first witness is sworn.

(c) Unless the motion is not contested, the presiding judge shall promptly conduct a hearing without a jury and rule on the motion. The party making the motion has the burden of establishing by a preponderance of the evidence those facts necessary for the motion to prevail.

(d) A person may not contest the jurisdiction of the court on the ground that the juvenile court has exclusive jurisdiction if:

(1) the person does not file a motion within the time requirements of this article; or

(2) the presiding judge finds under Subsection (c) that a motion made under this article does not prevail.

FN8. 851 S.W.2d 275 (Tex.Crim.App.1993); see Saldano v. State, 70 S.W.3d 873, 888 (Tex.Crim. App.2002)(characterizing Marin as "a watershed decision in the law of error-preservation").

FN9. Marin, 851 S.W.2d at 278; see also Galitz v. State, 617 S.W.2d 949, 951 (Tex.Crim.App.1981); Ex Parte Paprskar, 573 S.W.2d 525, 528 (Tex.Crim. App.1978); Savage v. State, 237 S.W.2d 315, 317 (Tex.Crim.App.1950); TEX. CONST., Art. V, § 6 ("Said Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law").

FN10. Marin, 851 S.W.2d at 278.

The fact that the right to appeal is legislatively conferred has a direct bearing on the application of Article 4.18 in the appeal context. The Legislature could have denied entirely any right to appeal the absence of a juvenile court waiver of jurisdiction. It therefore follows that the Legislature could, instead of denying an appeal in its entirety, place limitations upon the ability to raise this type of claim on appeal. But Article 4.18 goes beyond simply prescribing a limitation on the right to appeal. The statute prevents a claim from being raised in any context if the statute's preservation requirements are not met. If a written objection is not timely filed before trial, the trial judge is deprived of the ability to decide the claim. Likewise, a failure to comply with Article 4.18's requirements would prevent consideration of the claim on habeas corpus. Nevertheless, the fact that the statute might be unconstitutional in other contexts does not make it unconstitutional as applied to appeals. The Legislature has the power to place limitations upon the right to appeal, and to the extent that Article 4.18 constitutes such a limitation, it falls squarely within the Legislature's power to enact.

However, Marin 's discussion of the nature of error preservation persuades us that Article 4.18 does not violate the Separation of Powers provision in any respect. We recognized that Rules of Appellate Procedure, and former Rule 52(a) in particular, could not trump legislatively fashioned rules of error preservation. Although Rule 52(a) stated in general terms that an objection is required to preserve error, we held that the rule did not control where the statute involved, Texas Code of Criminal Procedure, Article 1.051(e), specified that the error was waiv-

able only, as the defendant could waive the ten-day preparation rule only by giving consent in writing or on the record in open court. We also recognized that Rule 52(a) was designed to reaffirm, not to amend or repeal, basic principles of adversary litigation. These basic principles include the division of procedural requirements into the three Marin categories: (1) forfeitable rights, (2) waivable-only rights, and (3) absolute requirements and prohibitions. While we did not state expressly that the Legislature could amend or repeal "basic principles of adversary litigation" as it relates to error-preservation, the opinion implicitly suggests that it can--at least for procedural requirements that it creates. The ten-day preparation rule, although not inherently the kind of right "so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection," was created and given waivable-only status by legislative command. Similarly, the Legislature could amend the traditional method for treating jurisdictional error to require an objection to preserve a particular kind of jurisdictional claim of legislative creation. It is the Legislature, after all, that established the juvenile court system, and ultimately it is up to that body to determine what procedures guide the movement of cases from that system to the adult criminal court system. Article 4.18 does not violate the Separation of Powers Clause of the Texas Constitution.

VI. APPEALS AND BILLS OF REVIEW

1. MUST COMPLY WITH SPECIAL APPEAL NOTICE RULE TO CHALLENGE CERTIFICATION IN APPEAL FROM PLEA BARGAINED SENTENCE

Woods v. State, 68 S.W.3d667 (Tex.Crim.App. 2/20/02) [*Texas Juvenile Law* 328 (5th Edition 2000).

Facts: We granted review in this case to determine the proper time to appeal an order certifying a juvenile as an adult when the defendant has been placed on deferred adjudication probation. This, however, is a plea bargain case, and Rule of Appellate Procedure 25.2(b)(3) must be followed. [FN1] Because the appellant did not comply with Rule 25.2(b)(3), the Court of Appeals should not have reviewed the merits of the appellant's adult certification issue. We will reverse the Court of Appeals.

> FN1. All references to "rule" refer to the Texas Rules of Appellate Procedure and all references to "article" refer to the Texas Code of Criminal Procedure unless otherwise noted.

In 1998, the appellant was arrested for aggravated robbery and was a juvenile at the time of the offense. The appellant was later certified to stand trial as an adult and transferred to a criminal court. In the criminal court, the appellant pled guilty pursuant to a plea bargain. The criminal court followed the plea agreement and placed the appellant on deferred adjudication probation for a period of ten years. As part of the plea bargain, the appellant waived her right to appeal. After less than one year, however, the criminal court found that the appellant had violated the terms of her deferred adjudication probation. The criminal court then adjudicated the appellant guilty of aggravated robbery and sentenced her to fifty years confinement.

On appeal, the appellant requested a new trial because the record from the certification hearing was inaudible and, therefore, unavailable. Woods v. State, No. 13-99-372-CR, slip op. at 2 (Tex.App.—Corpus Christi 2000) (not designated for publication). The Court of Appeals held that it could review the adult certification order through Code of Criminal Procedure article 44.47(b), [FN2] agreed with the appellant's assessment of the record as inaudible, and granted the appellant's request for a new trial. Id. at 2-3 (citing Tex.R.App. P. 34.6(f)). We granted review to determine whether the Court of Appeals properly considered an issue involving an adult certification order after deferred adjudication probation had been revoked. [FN3] We will reverse on a different basis.

> FN2. The State did not raise the Rule 25.2(b)(3) requirements below, and the Court of Appeals did not address the issue.

> FN3. The actual grounds for review are: 1) Did the Court of Appeals err in holding that the appropriate time for appeal of an order certifying a juvenile to stand trial as an adult was after appellant's deferred adjudication probation was revoked? 2) Is the record in a certification hearing necessary for the resolution of an appeal from the revocation of deferred adjudication probation which is revoked eleven months after appellant is placed on probation?

Held: Reversed and remanded.

Opinion Text: The legislature has provided the specific framework for appeals concerning adult certification orders. Tex.Code Crim. Proc. art. 44.47. A defendant may appeal the order of a juvenile court certifying the defendant to stand trial as an adult and transferring her to a criminal court "only in conjunction with the appeal of a conviction of the offense for which the defendant was transferred to criminal court." [FN4] Tex.Code Crim. Proc. art. 44.47(b).

> FN4. Article 44.47(b) reads in full: "A defendant may appeal a transfer under Subsection (a) only in conjunction with the appeal of a conviction of the offense for which the defendant was transferred to criminal court."

To invoke an appellate court's jurisdiction over an appeal, however, the appellant must give timely and proper notice of appeal. White v. State, 61 S.W.3d 424, 428 (Tex.Crim.App.2001). If an appellate court's jurisdiction is not properly invoked, that court's power to act is "as absent as if it did not exist." Id. Accordingly, dismissal of an issue, or the entire matter, is appropriate if the form of the notice of appeal is improper. Id.

A defendant who pleads guilty or nolo contendere pursuant to a plea bargain and is sentenced in accordance with that plea bargain must comply with the notice provisions of Rule 25.2(b)(3) to perfect her appeal. Tex.R.App. P. 25.2(b)(3); Cooper v. State, 45 S.W.3d 77, 78-79 (Tex.Crim.App.2001). Rule 25.2(b)(3) requires such a defendant in her notice of appeal to: 1) specify that the appeal is for a jurisdictional defect; 2) specify that the substance of the appeal was raised by written motion and ruled on before trial; or 3) state that the trial court granted permission to appeal. Tex.R.App. P. 25.2(b)(3). The failure of an appellant to follow Rule 25 .2(b)(3) deprives an appellate court of jurisdiction over the appeal. See White, 61 S.W.3d at 428-29 (holding that the failure to follow Rule 25.2(b)(3)(A) was jurisdictional).

Furthermore, Rule 25.2(b)(3)'s notice provisions apply to defendants who are placed on deferred adjudication probation. Vidaurri v. State, 49 S.W.3d 880, 884-85 (Tex.Crim.App.2001); Kirk v. State, 942 S.W.2d 624, 625 (Tex.Crim.App.1997); Watson v. State, 924 S.W.2d 711, 713-14 (Tex.Crim.App. 1996); [FN5] Dillehey v. State, 815 S.W.2d 623, 626 (Tex.Crim.App.1990). [FN6] For Rule 25.2(b)(3) purposes, "when a prosecutor recommends deferred adjudication in exchange for a defendant's plea of guilty or nolo contendere, the trial judge does not exceed that recommendation if, upon proceeding to an adjudication of guilt, he later assesses any punishment within the range allowed by law." Vidaurri, 49 S.W.3d at 885 (quoting Watson, 924 S.W.2d at 714). Thus, Rule 25.2(b)(3) controls an appeal, made either before or after an adjudication of guilt, by a defendant placed on deferred adjudication who challenges an issue relating to his conviction. Tex.R.App. P. 25.2(b)(3); Tex.Code Crim. Proc. art. 42.12 § 5(b); Tex.Code Crim. Proc. art. 44.01(j); Viduarri, 49 S.W.3d at 884- 85; Kirk, 942 S.W.2d at 625; Watson, 924 S.W.2d at 713-15.

> FN5. Watson was limited by Viduarri v. State, 49 S.W.3d 880, 884-85 (Tex.Crim.App.2001) and Feagin v. State, 967 S.W.2d 417, 420 (Tex.Crim.App.1998).

> FN6. Even though Kirk, Watson, and Dillehey all involved the predecessors to Rule 25.2(b)(3), we may look to these decisions for guidance in interpreting Rule 25.2(b)(3). See Davis v. State, 870 S.W.2d 43, 46 (Tex.Crim.App.1994) (noting that Rule 40(b)(1) was passed with the understanding that "the body of case law construing the proviso [to article 44.02] would prevail and still control."); cf. Vidaurri, 49 S.W.3d at 883-85 (discussing and relying on cases dealing with old Rule 40(b)(1) to construe the effects of Rule 25.2(b)(3)).

In this case, the appellant pled guilty to the first degree felony of aggravated robbery. The trial court followed the prosecutor's recommendation and placed the appellant on deferred adjudication for ten years. The trial court later adjudicated the appellant guilty and sentenced her to fifty-years' confinement. Since the fifty-year sentence falls within the punishment range for aggravated robbery, the trial court followed the plea bargain, and the appellant was required to comply with Rule 25.2(b)(3) in order to appeal her conviction. [FN7] Vidaurri, 49 S.W.3d at 885; Watson, 924 S.W.2d at 714.

> FN7. The punishment range for aggravated robbery, a first degree felony, is life imprisonment or imprisonment for any term not more than ninety-nine years or less than five years, plus a fine of up to $10,000. Tex. Penal Code § 12.32.

The appellant, however, filed a general notice of appeal. The notice does not specify that the appeal is for a jurisdictional defect, that it concerns a ruling on a pre-trial motion, or that the appellant received the trial court's permission.

In order to appeal the adult certification order, the appellant had to raise the issue "in conjunction with the appeal of a conviction for which the defendant was transferred." Tex.Code Crim. Proc. art. 44.47(b). To appeal her conviction for aggravated robbery, the appellant was required to comply with Rule 25.2(b)(3). Vidaurri, 49 S.W.3d at 884-85; Watson, 924 S.W.2d at 714.. Because the appellant's

general notice of appeal does not comply with Rule 25.2(b)(3), she cannot appeal her conviction for aggravated robbery. Watson, 924 S.W.2d at 714-15. It follows, therefore, that the appellant also cannot appeal her adult certification order in conjunction with that conviction. See Tex.Code Crim. Proc. art. 44.47(b), (c) ("An appeal under this section is a criminal matter and is governed by this code and the Texas Rules of Appellate Procedure that apply to a criminal case."); Vidaurri, 49 S.W.3d at 885; Watson, 924 S.W.2d at 714. Accordingly, the Court of Appeals had no jurisdiction to review the issue concerning the adult certification order.

The Court of Appeals addressed the merits of the appellant's appeal. Because the appellant failed to follow Rule 25.2(b)(3), the Court of Appeals was without jurisdiction to address the merits of her claims. The judgment of the Court of Appeals is reversed, and this case is remanded to that court for further proceedings consistent with this opinion.

WOMACK, J., filed a concurring opinion.

I agree that the court of appeals should have dismissed this appeal, but for reasons different from those this court gives today.

The appellant pleaded guilty and was placed on deferred-adjudication probation, which did not exceed the plea-bargain recommendation of punishment. If she wanted to appeal the validity of her transfer from juvenile court to criminal court, she should have raised the question before she entered her plea, so that she could have appealed at that time. Because she did not, it is too late to raise the question by appeal. (I do not imply any view about her raising this issue by habeas corpus.)

Today the Court says that the requirement of Rule of Appellate Procedure 25.2(b)(3) still applies to the appellant in an appeal from the revocation of her probation, adjudication of guilt, and sentence to fifty years in prison because "this is a plea bargain case." Her being placed on probation was plea-bargained; the revocation and fifty-year sentence was not. I have elsewhere expressed my view that Rule 25.2(b)(3) should not apply to such an appeal. [FN2] I am still of that view.

> FN2. See Vidaurri v. State, 49 S.W.3d 880, 887 (Tex.Cr.App.2001) (concurring opinion).

I therefore, respectfully, join the judgment of the Court but not its opinion.

---

2. APPEAL FROM MODIFICATION DISMISSED AS MOOT WHEN RESPONDENT DISCHARGED FROM PROBATION UPON BECOMING 18 YEARS OLD

In the Matter of N.N.D.W., UNPUBLISHED, No. 08-01-00244-CV, 2002 WL 1341108 (Tex.App.—El Paso 6/20/02) [*Texas Juvenile Law* 335 (5th Edition 2000).

Facts: Appellant brings this appeal alleging ineffective assistance of counsel. Because the juvenile reached her eighteenth birthday prior to submission of the cause and issuance of an opinion, and because no other relief is available to the juvenile through this appeal, we dismiss as moot.

On September 13, 2000, Appellant, a juvenile then sixteen years old, was adjudicated a delinquent child for the offense of assault. She was placed on supervised probation with electronic monitoring until her eighteenth birthday. The juvenile violated her probation on several occasions, including leaving the electronic monitoring premises. The State filed a motion to modify the disposition but it was dismissed after the juvenile completed an attitude adjustment program. Shortly thereafter, the juvenile again violated her probation by leaving the electronic monitoring premises and the juvenile court sustained the State's motion to modify the disposition. The State filed another motion to modify the disposition and it was sustained by the juvenile court. A disposition hearing was held and the record of that hearing is the basis of this appeal.

Tracy Gorman of the El Paso County Juvenile Probation Department testified about the modification-disposition report she prepared for the court. Gorman recommended that the juvenile be removed from her present home and placed in the care, custody, and control of the Challenge Program of El Paso County until her eighteenth birthday. Gorman discussed the problems between the juvenile and her mother while living together, the juvenile's performance in school, and her history of substance abuse. The juvenile's mother no longer wanted the juvenile in the house. Gorman also included in her disposition report the statement that the juvenile mentioned she wanted to have her case heard by a particular judge because she heard he was "easy ." Counsel for the juvenile asked Gorman whether her inclusion of this statement in the report was an attempt to influence the presiding judge to follow her recommendation. Gorman denied the allegation. Counsel also questioned Gorman about the possibility of an alternative program, the Serious Habitual Offenders Comprehension Act Program (S.H.O.C.A.P.). Gorman responded that she believed the juvenile would not have benefited from that program because the juvenile had indicated that she could not complete it,

and the program involved in-home counseling, which had already been attempted. Gorman explained that her main reason for recommending the Challenge Program was the fact that the juvenile had problems in the home with her mother and that sending her back into the home would not address her needs. The trial court followed the probation department's recommendation and found that it was in the juvenile's best interest that she be removed from her mother's home and sent to the Challenge boot camp. Counsel for the juvenile made no argument urging an alternative arrangement.

Following the judge's finding, counsel for the juvenile made the following statement to the court:

> Yes, sir, if you wouldn't mind let me just make a comment for the record. I think it is necessary that I do this possibly because there is such a departure in the sanction level in the recommendation of the department, of the probation department. Normally, as you know, the policy of the juvenile system is to be the least restrictive as possible, and S.H.O.C.A.P. and Project Spotlight probably would have been the least restrictive in this case. However, the reason that I don't argue for that, and didn't argue for that, and basically going along and give consent with the recommendation of the department is that we are quickly running out of time for this young juvenile. She's going to be 18 here pretty quick and she's got some problems at home that I think require immediacy to give her some skills that will allow her to live on her own. I think she has some anger problems that this Court can see from the report that was given, that I think can be addressed by Challenge and I think Challenge is a very good program.... So in the sense I'm telling the Court that I don't want the Court to believe that I'm being faulty in my duty representing the juvenile, I do believe that this recommendation is in the best interest, even though it is quite a jump up.

Following the hearing, the juvenile filed a grievance form stating that she wanted a new attorney. She also inquired whether it was possible for her to join the Army reserves rather than attend boot camp. The juvenile filed a notice of appeal on June 25, 2001.

Held: Appeal dismissed as moot.

Opinion Text: MOOTNESS

In her sole point of error, the juvenile contends that she was provided ineffective assistance of counsel at her disposition hearing. She claims that counsel failed to adequately represent her when he acquiesced in the probation department's recommendation that she be sent to the Challenge Program. Because the juvenile preferred to enter the military, counsel should have argued in accordance with her preference instead of acting on his personal belief that the program was in her best interest. Appellant also complains that defense counsel failed to object to the admission of the modification-disposition report that contained prejudicial statements concerning the juvenile's request to have her case heard by a specific judge because he was an "easy" judge.

Because of the timing of this appeal, we cannot address the merits. The issues for review are moot since the trial court's order expired on March 12, 2002, prior to submission and issuance of this opinion. Appellate courts do not have authority under the Texas Constitution or by statute to render advisory opinions. See Tex. Const. art. II, 1; Speer v. Presbyterian Children's Home and Service Agency, 847 S.W.2d 227, 229 (Tex.1993); In re Salgado, 53 S.W.3d 752, 757 (Tex.App.—El Paso 2001, orig. proceeding). The mootness doctrine limits courts to deciding cases in which an actual controversy exists. Federal Deposit Insurance Corporation v. Nueces County, 886 S.W.2d 766, 767 (Tex.1994); Salgado, 53 S.W.3d at 757. When there has ceased to be a controversy between the litigating parties due to events occurring after judgment has been rendered by the trial court, the decision of an appellate court would be a mere academic exercise and the court may not decide the appeal. Olson v. Commission for Lawyer Discipline, 901 S.W.2d 520, 522 (Tex. App.—El Paso 1995, no writ); Salgado, 53 S.W.3d at 757. If a judgment cannot have a practical effect on an existing controversy, the case is moot. Olson, 901 S.W.2d at 522; Salgado, 53 S.W.3d at 757.

The judgment entered by the juvenile court ordered that the juvenile be placed on probation under various terms and conditions, including attendance in the Challenge Program, until her eighteenth birthday. At the entry of judgment, the juvenile was seventeen years old. Appellant perfected appeal on June 25, 2001. She was born on March 12, 1984 and March 12, 2002 marked her 18th birthday. The order that placed the juvenile in the Challenge Program was not suspended by reason of the filing of this appeal and remained in effect during the appellate process. The Texas Family Code provides:

> An appeal does not suspend the order of the juvenile court, nor does it release the child from the custody of that court or of the person, institution, or agency to whose care the child is committed, unless the juvenile court so orders. However, the appellate court may provide for a personal bond.

Tex.Fam.Code Ann. 56.01(g)(Vernon Supp.2002). The juvenile has completed her probationary period. Because the prayer for relief requested only that the judgment be set aside and the case remanded for a new disposition, the issues presented for review are moot.

---

3. JUVENILE'S FATHER LACKS STANDING TO APPEAL A PLEA BARGAINED DISPOSITION; HOME REMOVAL FINDINGS SUPPORTED BY RECORD

In the Matter of A.E.E., 89 S.W.3d 250 (Tex.App.—Texarkana 10/17/02) *Texas Juvenile Law* 328, 180 (5th Ed. 2000).

Facts: A.E.E., born January 7,1986, was declared by juvenile court as a child who had engaged in delinquent conduct. She was placed on probation until age eighteen, and as a condition of probation, was ordered to live in the home of a maternal aunt. Billy Emmons, the child's father, appeals asserting three grounds of error: (1) that the State presented no evidence to satisfy the statutory requirements of Tex. Fam.Code Ann. § 54.04(i) (Vernon 2002); (2) that the court's decision to remove A.E.E. from his home was an unconstitutional infringement on his fundamental right as a parent to make decisions as to the care, custody, and control of his child, in violation of the Fourth Amendment to the United States Constitution; and (3) that the trial court erred in not specifically stating in its order the reasons for the disposition, as required by Tex. Fam.Code Ann. § 54.04(f) (Vernon 2002).

Because this case stems from a juvenile proceeding, the record offers only spotty details of the background events leading to this proceeding. It is apparent from the record that A.E.E. did not know Emmons during the early part of her life. When she was approximately eleven years old, Emmons was ordered to take a paternity test, which apparently resulted in Emmons being adjudged A.E.E.'s father. Emmons was granted visitation rights with A.E.E. and was eventually appointed A.E.E.'s managing conservator. A.E.E.'s mother did not attend the hearing at which Emmons was appointed managing conservator, and her whereabouts were unknown during this juvenile proceeding.

A.E.E. had lived with Emmons at his home in Panola County for more than two years when she ran away. She was found at the Sabine Valley Mental Health Mental Retardation Center in Harrison County. A.E.E. told the doctors at Sabine Valley she would kill herself if she was forced to return to her father's home, but the doctors did not believe A.E.E. was really suicidal.

Emmons was called to Sabine Valley, and two police officers were also called to assist in getting A.E.E. to leave with her father. Because A.E.E. refused to cooperate and used force against the officers to keep from going with her father, she was arrested and charged with delinquent conduct.

During the juvenile proceedings, A.E.E. offered testimony that her home environment with Emmons was not emotionally supportive. She testified she did not feel Emmons encouraged her with her schoolwork. She also complained about her household chores and about having to assist Emmons in his fence-building business after school and on weekends. A.E.E. testified that her father did not take her to the dentist when she had cavities and that, in her opinion, he did not take her to the doctor soon enough when she was experiencing pain with a condition that eventually required surgery.

A.E.E. pled true to the charge against her in juvenile court and was adjudicated a child who had engaged in delinquent behavior. She was placed on probation until age eighteen and ordered to attend counseling. As a condition of probation, A.E.E. was ordered to live with her mother's sister. Emmons appeals the court's decision to remove A.E.E. from his home.

Held: Appeal dismissed.

Opinion Text: We first address the question of Emmons' standing to bring this appeal. The State did not initially raise this issue, but an appellate court can question, on its own motion, the standing of a party to appeal from a juvenile court's order. See In re P.C., 970 S.W.2d 576, 577 (Tex.App.—Dallas 1998, no pet.). In a presubmission order, we requested the parties to address this issue.

Tex. Fam.Code Ann. § 56.01 (Vernon 2002) [FN1] controls the right to appeal an order from a juvenile court. Accordingly, an appeal may be taken by or on behalf of a child from an order disposing of the case entered under Section 54.04, unless Section 56.01(n) applies. Tex. Fam.Code Ann. § 56.01(c)(1)(B). Section 56.01(n) provides as follows:

FN1. Tex. Fam.Code Ann. § 56.01 (Vernon 2002) provides in part as follows:

> (c) 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 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 for the mentally ill or mentally retarded;....
>
> (n) 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 54.04 ... 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.

The disposition in this juvenile proceeding was under Section 54.04, and that disposition was pursuant to an agreement between the State and the child. The agreement was that, if A.E.E. pled true to the charge, she would be placed on probation and, as a condition of that probation, she would be placed in the home of her maternal aunt. Because the juvenile court disposed of the case in accordance with this agreement, Section 56.01(n) is applicable. Further, the court did not give the child permission to appeal and this appeal is not based on a matter raised by written motion filed before the proceeding. It is clear A.E.E. could not appeal from this juvenile proceeding. The issue then is whether Emmons has standing to appeal the disposition of his child under these circumstances.

Tex. Fam.Code Ann. § 56.01(c)(1) provides that an appeal may be brought "by or on behalf of a child." However, Emmons is attempting to assert his parental rights through this appeal. Nowhere does he claim to be appealing on behalf of A.E.E.

The State, in its supplemental brief, stated it found no Texas case on point for this issue. However, the State cited two cases from other jurisdictions. In Arizona, a mother had standing to appeal the restitution order of a juvenile disposition because the mother was required by Arizona law to pay the restitution. The court held that, even though the only named parties to the action were the state and the juvenile, the mother was also an aggrieved party who had standing because the order from the juvenile proceeding was imposed on the mother. In re Kory L., 979 P.2d 543, 545 (Ariz.Ct.App.1999). In California, a mother did not have standing to bring an appeal when the juvenile court placed her son on probation in her home. In re Almalik S., 68 Cal.App. 4th 851, 854 (Cal.Ct.App.1998). Under a previous statute, California courts had allowed parents to appeal from juvenile orders; however, the court concluded in Almalik S. that a newly-enacted statute no longer granted parental standing to appeal because the statute stated a judgment may be appealed "by the minor." Id.

By using the language "by or on behalf of a child" in Section 56.01, the Texas Legislature has also limited those who may appeal from a juvenile proceeding. By the plain wording of the statute, the child has the right to appeal and the right of anyone else to appeal is derivative from the child's right, because such appeal must be on the child's behalf.

Emmons contends that he participated in this proceeding as the guardian of A.E.E. and that he has standing to bring this appeal in that capacity. However, the statute only authorizes an appeal "by or on behalf of a child," and in this case, the child does not have a right to appeal. See Tex. Fam.Code Ann. § 56.01(c)(1). Because Emmons' right to appeal, as guardian or in any other capacity, derives from A.E.E.'s right, neither does he have a right to appeal. Therefore, this Court lacks jurisdiction over this appeal. But, even if Emmons did have standing, we would affirm the trial court's judgment.

In his first point of error, Emmons contends the State presented no evidence to satisfy the statutory requirements of Tex. Fam.Code Ann. § 54.04(i), which provides as follows:

> If the court places the child on probation outside the child's home ... the court:
>
> (1) shall include in its order its determination that:
>
> (A) it is in the child's best interests to be placed outside the child's home;
>
> (B) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and
>
> (C) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation;....

When deciding a no-evidence point, we must consider all of the evidence in the record in the light most favorable to the party in whose favor the verdict has been rendered, and we must apply every reasonable inference that could be made from the evidence in that party's favor. Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex.1997). In this review, we disregard all evidence and inferences to the contrary. Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex.1995); Best v. Ryan Auto Group, Inc., 786 S.W.2d 670, 671 (Tex.1990). A no-evidence point will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 334 (Tex.1998). More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. Crye, 907 S.W.2d at 499.

To support the trial court's judgment, we must find, under the statute quoted above, evidence of the following: that it is in the child's best interests to be placed outside the child's home; that reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and that the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.

The record contains home evaluation reports compiled by the juvenile probation office. The probation officer noted that Emmons works most days, including weekends. Additionally, these reports made the recommendation that A.E.E. be placed with her aunt, considering "[s]he would likely run away from home again if she were to be placed with her father which would appear to pose a risk to her safety and well-being."

The trial court ordered A.E.E. to attend counseling during the approximate one-month period of time between the preliminary hearing and the adjudication and disposition hearings. The person who counseled A.E.E. testified, "If the decision is made that she [A.E.E.] lives with her dad, I'm afraid she may make some irrational decisions." When asked to explain what he meant by "irrational decisions," the counselor replied, "Harming herself. Potential maybe for harming her dad. Potential for running away. That puts her at another risk."

The home study evaluations and the counselor's testimony constitute some evidence supporting the trial court's judgment that it is in A.E.E.'s best interests to be placed outside Emmons' home.

Section 54.04(i) also requires reasonable efforts to eliminate the need for removal of the child from the child's home and to make it possible for the child to return to the child's home. As noted above, the trial court ordered A.E.E. to attend counseling for approximately one month. The court later found that both the father and the child resisted participation in counseling. Emmons contends there is no basis in the record for this finding. However, the counselor testified the family failed to come in for follow-up counseling. He further stated, "[N]obody had any valid reason for why she [A.E.E.] did not come in and see me for follow-up." The counselor later talked about a lack of information because of "noncompliance with getting the family in individual counseling,...." This testimony is more than a scintilla of evidence supporting the trial court's finding that reasonable efforts were made to prevent removal of A.E.E. from Emmons' home and to make it possible for the child to return to that home.

Section 54.04(i) requires a showing that the child, in the child's home, cannot be provided the quality of care and level of support and supervision the child needs to meet the conditions of probation. The trial court entered findings that the father's limited insight into his daughter's emotional problems would prevent him from providing the quality of care and level of support and supervision the child needs to meet the conditions of probation. A.E.E.'s testimony about Emmons' lack of interest in her schoolwork and his inattentiveness to her medical needs, as well as her testimony that she would run away again if required to return to Emmons' home, support the trial court's findings. The home study evaluations stating the amount of time Emmons spends at work, including weekends, also support the trial court's findings, as does the counselor's testimony related above.

Considering all of the evidence in the light most favorable to the trial court's decision, and disregarding all evidence and inferences to the contrary, we hold there is more than a scintilla of evidence to support the trial court's finding that Section 54.04(i) had been satisfied.

As his second point of error, Emmons contends the trial court's decision to remove A.E.E. from his home is an unconstitutional infringement on his fundamental right as a parent to make decisions as to care, custody, and control of his child, in violation of the Fourth Amendment to the United States Constitution. Because he alleges the court's decision affected a fundamental right, Emmons con-

tends that the proof adduced and the court's decision should be strictly scrutinized by this Court and that the State's burden of proof in this case should be proven by clear and convincing evidence. He reiterates his contention there is very little in the record for the trial court to find that the requisites of Section 54.04(i) have been met.

Nonetheless, the focus of the trial court's proceedings was the delinquent behavior of A.E.E., not the parental rights or capabilities of Emmons. Emmons has not had his parental rights terminated. In fact, he still has visitation rights. Because A.E.E. has been adjudicated as a child who has engaged in delinquent behavior, she is now ultimately under the court's supervision which, admittedly, usurps some of Emmons' authority over his child. However, when any child is adjudicated delinquent, the parent of that child loses some of his or her control over the child to the courts.

When a child has been adjudicated to have engaged in delinquent conduct, the trial court has broad discretion to determine a suitable disposition of the child. In re T.A.F., 977 S.W.2d 386, 387 (Tex.App.—San Antonio 1998, no pet.); In re A.S., 954 S.W.2d 855, 861 (Tex.App.—El Paso 1997, no pet.). Absent an abuse of discretion, we will not disturb the juvenile court's findings. A.S., 954 S.W.2d at 861. Under an abuse of discretion standard, legal and factual insufficiency are relevant factors in assessing whether the trial court abused its discretion. In re J.S., 993 S.W.2d 370, 372 (Tex.App.—San Antonio 1999, no pet.); Doyle v. Doyle, 955 S.W.2d 478, 479 (Tex.App.—Austin 1997, no pet.). In reviewing the factual sufficiency of the evidence, we consider and weigh all the evidence in the case, and set aside the judgment and remand for a new trial only where we conclude the finding is so against the great weight and preponderance of the evidence as to be manifestly unjust. J.S., 993 S.W.2d at 372; In re K.L.C., 972 S.W.2d 203, 206 (Tex.App.—Beaumont 1998, no pet.). An abuse of discretion occurs when the trial court's actions are arbitrary and unreasonable and without reference to any guiding rules or principles of law. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex.1985).

Although Section 54.04 clearly makes it preferable for a child who is given probation to remain in the child's home, there are also provisions for a child placed on probation to be removed from the home, namely Section 54.04(i). The trial court followed Section 54.04(i) in determining A.E.E. should be removed from Emmons' home. Because the trial court followed these guidelines, and because the court's findings are not so against the great weight and preponderance of the evidence, it was not an abuse of discretion to remove A.E.E. from her home and place her with her aunt.

Emmons contends in his third point of error the trial court erred in not specifically stating in the order its reasons for the disposition, as required by Tex. Fam.Code Ann. § 54.04(f). [FN2] This appeal was abated, and the trial court was ordered to enter an order in compliance with Section 54.04(f). We have received such as a supplemental clerk's record. However, Emmons contends in his supplemental brief the new order does not state factual findings, and the rationale underlying those findings, which would justify removal of a child from the custody of the child's parent.

> FN2. Tex. Fam.Code Ann. § 54.04(f) (Vernon 2002) states: "The court shall state specifically in the order its reasons for the disposition and shall furnish a copy of the order to the child. If the child is placed on probation, the terms of probation shall be written in the order."

One of the many reasons underlying the Section 54.04(f) requirement that the trial court specifically state its reasons for the disposition ordered is that it furnishes a basis for the appellate court to determine whether the reasons recited are supported by the evidence and whether they are sufficient to justify the order of disposition. In re L.G., 728 S.W.2d 939, 944-45 (Tex.App.—Austin 1987, writ ref'd n.r.e.).

In the new disposition order, the trial court made the following findings:

> 1. The child engaged in conduct that involved the use of force to resist the efforts of a law enforcement officer who was attempting to lawfully detain her;
>
> 2. The child engaged in conduct indicating she is emotionally or psychologically unstable; she has run away from home, forcefully resisted a peace officer who was attempting to detain her, threatened to commit suicide and chosen incarceration over return to her father's home;
>
> 3. The child was not raised by her father and lacks an emotional bond with him; she states she will not stay with her father, she will continue to run away and would prefer to be incarcerated;
>
> 4. Both the father and child could use psychological counseling to improve their parent child relationship;
>
> 5. Both the father and child were offered psychological counseling to improve their parent child relationship;

6. Both the father and child demonstrated to this court a resistance to participate in such counseling;

7. The father's limited insight into his daughter's emotional problems prevents him from providing the quality of care and level of support and supervision the child needs to meet the conditions of probation;

8. The child's father has demonstrated a present inability to adequately supervise the child, to prevent her from absconding or from causing harm to herself and others;

9. The present situation between the father and child makes placement of the child in the home contrary to the child's welfare;

10. It is in the child's best interest to be placed outside the child's home; and

11. Reasonable efforts have been made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return home.

Emmons contends the above findings are only "boilerplate" language and are not specific to the court's factual basis for its decision. However, we find that the trial court has sufficiently stated its reasons for its disposition and that those findings are sufficiently supported by the record.

Because Emmons lacked standing to bring this appeal, we dismiss for want of jurisdiction. But even if he had standing, we would find against him and affirm the judgment.

---

4. STATE HAS NO RIGHT TO APPEAL FROM DISMISSAL RESULTING FROM PRE-TRIAL SUPPRESSION ORDER

In the Matter of S.N., ___ S.W.3d ___, No. 01-02-00367-CV, 2002 WL 31724082, 2002 Tex.App. Lexis 8609 (Tex.App.--Houston [1st Dist.] 12/5/02) *Texas Juvenile Law* (5th Ed. 2000).

Facts: In what appears to be a case of first impression, we must decide whether article 44.01 of the Code of Criminal Procedure confers upon the State the right to appeal in a juvenile-delinquency case. S.N., a juvenile, was charged with engaging in delinquent conduct by committing theft of firearms. On appeal, the State complains about the trial court's order granting S.N.'s motion to suppress evidence. As a result of the suppression, the State's case was dismissed, and the State timely filed a notice of appeal. See Tex.Code Crim. Proc. Ann. art. 44.01(a)(5) (Vernon Supp.2002). S.N. has filed a motion to dismiss the appeal for want of jurisdiction, alleging that the State does not have authority to appeal in a juvenile-delinquency case. We conclude that the State lacks standing to bring this appeal, and we dismiss the appeal for want of jurisdiction.

Held: Appeal dismissed.

Opinion Text: The State has presented us with no authority supporting its standing to appeal in juvenile-delinquency cases. [FN1] The State has the right to appeal certain orders in criminal cases, including the granting of motions to suppress evidence. See Tex. Const. Art. V, § 26; see Tex.Code Crim. Proc. Ann. art. 44.01(a)(5) (Vernon Supp.2002). However, the legislature has mandated certain different statutory protections for juveniles. The right of appeal in juvenile proceedings is specifically controlled by the Family Code, which only allows for appeals by or on behalf of a child. Tex. Fam.Code Ann. § 56.01 (Vernon 1997). It does not expressly grant the State the right to appeal in juvenile-delinquency cases.

> FN1. Although we have previously ruled on an appeal by the State in a juvenile-delinquency proceeding, the State's standing to appeal was not raised as an issue and was not discussed in the opinion. See In re J.W.G., 988 S.W.2d 318 (Tex.App.-Houston [1st Dist.] 1999, no pet.).

In construing whether the State may appeal in a juvenile-delinquency case, we must determine the intent of the legislature. See In Re P.C., 970 S.W.2d 576, 577 (Tex.App.-Dallas 1998, no writ). The State argues that article 44.01 of the Code of Criminal Procedure is a specific statute and that it is in pari materia with section 56.01 of the Family Code, thereby requiring this court to harmonize and give effect to both statutes. Article 44.01 is the general statute granting the State the right to appeal in limited circumstances in criminal proceedings. Section 56.01 is the specific statute relating to appeals in juvenile proceedings. General and specific statutes may be in pari materia. Burke v. State, 28 S.W.3d 545, 546-47 (Tex.Crim.App.2000). The most important factor in determining whether two statutes are in pari materia is whether they are similar in purpose or object. Id. at 547. The Family Code and the Code of Criminal Procedure were designed to serve different purposes. The Code of Criminal Procedure regulates criminal appeals, whereas the Family Code controls appeals of juvenile-delinquency cases and affords greater statutory protections to juveniles. Moreover, although juvenile-delinquency cases are quasi-criminal in nature, they are in fact civil proceedings, and juveniles are afforded additional rights to those enjoyed by adults in criminal proceedings. Because

article 44.01 of the Code of Criminal Procedure and section 56.01 of the Family Code are not similar in purpose, we hold that they are not in pari materia.

The omission of the State's right to appeal in section 56.01 is particularly significant, considering its predecessor statute, Revised Statutes article 2338-1, section 21, which specifically granted the right of appeal to "any party aggrieved." See Act of Apr. 21, 1943, 48th Leg., R.S., ch. 204, § 21, 1943 TEX. GEN. LAWS 313, 318 (former TEX.REV.CIV. STAT. ANN. art. 2338- 1, § 21, since repealed); see C.L.B. v. State, 567 S.W.2d 795, 796 (Tex.1978). The State's right to appeal was omitted in the 1973 passage of the Family Code. See Act of May 25, 1973, 63d Leg., R .S., sec. 1, § 56.01(c)(1), 1973 TEX. GEN. LAWS 1460, 1483 (former TEX. FAM. CODE ANN. § 56.01(c)(1), since repealed) ("An order may be taken by or on behalf of the child...."). Therefore, we must presume that the legislature intended the changed wording to bar the State's right to appeal adverse judgments in juvenile-delinquency proceedings. C.L.B. v. State, 567 S.W.2d at 796. Although the holding in C.L.B. was determined before the 1980 constitutional amendment and 1981 amendment to the Code of Criminal Procedure, granting the State a limited right of appeal in criminal cases, we may not expand our civil jurisdiction beyond that conferred by the legislature. See Xeller v. Locke, 37 S.W.3d 95, 99 (Tex.App.-Houston [14th Dist.] 2000, writ denied).

We do not have the authority to give the State the right of limited appeals in juvenile cases, and we hold that the State lacks standing to bring this appeal. We dismiss this appeal for want of jurisdiction. All other pending motions in this appeal are overruled as moot.

---

5. NO EVIDENCE OF EXTRENSIC FRAUD IN BILL OF REVIEW PROCEEDINGS WHEN COMPLAINANT RECANTED TESTIMONY

In the Matter of M.P.A., --- S.W.3d ----, No. 03-02-00068-CV, 2002 WL 31833562, 2002 Tex.App.Lexis 8952 (Tex.App.—Austin 12/19/02) *Texas Juvenile Law* (5th Ed. 2000).

Facts: On October 13, 1999, appellant M.P.A., a juvenile at the time, was adjudicated delinquent on two counts of aggravated sexual assault of a child. The juvenile court sentenced him to a determinate sentence of twenty years and remanded him to the custody of the Texas Youth Commission. This Court affirmed the adjudication on November 30, 2000. *In re M.P.A.,* No. 03-00-00211-CV (Tex.App. --Austin Nov. 30, 2000, no pet.) (not designated for publication). Claiming to have discovered new, expansive, and convincing evidence, unavailable at the time of the adjudication trial, that establishes appellant's innocence beyond a reasonable doubt, appellant filed with the trial court a petition for bill of review. Following a bench trial, the trial court denied appellant's bill of review. By twelve issues, appellant challenges the trial court's judgment denying the bill of review. We hold that M.P.A. has not met the requirements to obtain relief by bill of review.

Held: Affirmed.

Opinion Text: BILLS OF REVIEW

A bill of review is an equitable proceeding by a party to a former action who seeks to set aside a judgment that is no longer appealable or subject to challenge by a motion for new trial. *Wembley Inv. Co. v. Herrera,* 11 S.W.3d 924, 926-27 (Tex.1999). A bill-of-review plaintiff must prove three elements: (1) a meritorious defense to the cause of action alleged to support the judgment, or a meritorious claim, (2) which he or she was prevented from making by the fraud, accident, or wrongful act of the opposing party or by official mistake, which is (3) unmixed with the fault or negligence of the plaintiff. *Hanks v. Rosser,* 378 S.W.2d 31, 34-35 (Tex.1964); *Alexander v. Hagedorn,* 226 S.W.2d 996, 998 (Tex. 1950). Bill-of-review relief is available only if a party has exercised due diligence in pursuing all adequate legal remedies. *Herrera,* 11 S.W.3d at 927. If legal remedies were available but ignored, relief by bill of review is unavailable. *Id.* Although a bill of review is an equitable proceeding, the fact that an injustice has occurred is not sufficient to justify relief by bill of review. *Id.*

The procedure for conducting a bill-of-review proceeding is set out in *Baker v. Goldsmith,* 582 S.W.2d 404 (Tex.1979). First, the bill-of-review plaintiff must file a petition alleging with particularity the facts establishing the three elements of a bill of review. *Id.* at 408. The plaintiff must then present, as a pretrial matter, prima facie proof to support the meritorious defense alleged in the petition. *Id.* 408-09. If the court determines that the plaintiff has presented a prima facie meritorious defense, the court may then conduct a trial, during which the plaintiff must prove, by a preponderance of the evidence: (1) whether the he was prevented from asserting the meritorious defense due to fraud, accident, or wrongful conduct by the opposing party or by official mistake (2) unmixed with the fault or negligence of the plaintiff. *Id.* If the plaintiff satis-

fies this burden, the underlying controversy between the parties is retried. *Id.* The district court may try these remaining two elements in conjunction with the retrial of the underlying case or may conduct a separate trial on the elements. *Id.; Martin v. Martin,* 840 S.W.2d 586, 591 (Tex.App.--Tyler 1992, writ denied). The plaintiff may demand a jury trial on the two remaining elements. *Martin,* 840 S.W.2d at 592.

BACKGROUND

The State alleged in two counts that on or about May 1, 1997, appellant, who was fourteen at the time, committed aggravated sexual assault of S.A., his seven-year-old cousin. Appellant's brother was accused of similar conduct involving the same victim; he, however, pleaded true to the allegations, received a five-year determinate sentence, and was not a part of appellant's trial. S.A. testified at appellant's trial and was subjected to cross- examination by appellant's counsel. Her testimony was consistent with the allegations made against appellant. Following the trial, the jury found that appellant had committed aggravated sexual assault and affixed punishment at twenty years. Appellant appealed the judgment to this Court, and we affirmed.

Subsequently, appellant filed a petition for bill of review in the trial court, based on "expansive, striking, persuasive and convincing epiphany of new evidence." This evidence, according to appellant, consisted of the complaining witness's recantation of her previous allegations, along with other evidence suggesting that S.A. was influenced by her mother when she accused appellant of aggravated sexual assault. The trial court conducted an evidentiary hearing, providing appellant with an opportunity to present prima facie proof of a meritorious defense. During this hearing, S.A. testified that appellant had never "molested" her and that she had testified otherwise only because her mother put her up to it. At the conclusion of this hearing, the trial court determined that appellant had presented prima facie evidence of a meritorious defense and proceeded to conduct a full trial on the merits of appellant's bill of review.

During the trial, appellant presented evidence and testimony from a number of witnesses, many of whom had testified during appellant's initial adjudication trial. Throughout the trial, appellant maintained his theory that S.A. had accused him of sexual assault because her mother had put her up to it. Appellant posited that S.A.'s parents were going through a divorce, and S.A.'s mother convinced S.A. to fabricate the allegations against appellant in order to gain an advantage in pending custody proceedings. Following a trial to the court, the court denied appellant's bill of review. The court filed findings of fact and conclusions of law, in which it found that S.A. was subjected to manipulation by both her mother and her father, and concluded that appellant had failed to sustain his burden of establishing that the State's extrinsic fraud prevented appellant from asserting his meritorious defense. This appeal followed.

DISCUSSION

Third Amended Petition

By his first issue, appellant asserts that the trial court erred in refusing to consider his third amended petition. Appellant filed his second amended petition for bill of review and application for writ of habeas corpus on July 20, 2001; appellant, however, informed the trial court that he had no intention of pursuing the writ of habeas corpus, and that he had inadvertently kept it in the heading. The trial court held a hearing on appellant's second amended petition on July 31 and August 1. The proceedings were then postponed until October 31. In the interim, appellant filed a third amended petition for bill of review on August 29. This third amended petition removed the writ of habeas corpus language from the title of the pleading. It also added that S.A. had testified in open court that she was not assaulted by appellant and that S.A. and her mother had committed extrinsic or intrinsic fraud by lying to the police and lying at appellant's adjudication trial. The trial court struck appellant's third amended petition as beillanas bwerehru.099 Tw05(a)-7.71rer mf thrrit oTex4.4Rrer m]TJ0C

(citing *Hardin v. Hardin,* 597 S.W.2d 347, 349 (Tex. 1980); *Clade v. Larsen,* 838 S.W.2d 277, 280 (Tex. App.--Dallas 1992, writ denied)). We will not disturb the trial court's ruling unless the complaining party shows an abuse of discretion. *Id.* (citing *Hardin,* 597 S.W.2d at 349-50; *Clade,* 838 S.W.2d at 280).

Parties may amend their pleadings only with the trial court's permission within seven days of a trial date or afterward. Tex.R. Civ. P. 63. The trial court has no discretion to refuse an amended pleading unless (1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment presents a substantive change that would alter the nature of the trial and is thus prejudicial on its face. *Chapin & Chapin, Inc. v. Texas Sand & Gravel Co.,* 844 S.W.2d 664, 665 (Tex.1992) (quoting *Greenhalgh v. Service Lloyds Ins. Co.,* 787 S.W.2d 938, 939 (Tex.1990)).

The trial court stated that it was striking appellant's third amended petition because it was untimely filed. Because an amendment to a pleading may be allowed even after the verdict, we conclude it was error for the trial court to strike the third amended petition on this basis. *See Chambless,* 667 S.W.2d at 601. Moreover, because the State offered no showing of surprise or prejudice, the trial court had no discretion to refuse the amended pleading on this basis either.

Our review of the record, however, also reveals that appellant failed to request leave of the trial court before filing his third amended petition, after the hearing on the bill of review had already begun. A trial court does not abuse its discretion in striking an amended petition that is filed without leave of court. *Forest Lane Porsche Audi Assocs. v. G & K Servs., Inc.,* 717 S.W.2d 470, 473 (Tex.App.--Fort Worth 1986, no writ).

Even if appellant had sought leave of the court before filing his third amended petition, appellant has shown no harm as a result of the trial court's refusal to consider the third amended petition. *See* Tex.R.App. P. 44.1(a); *Chambless,* 667 S.W.2d at 601. Through his third amended pleading, appellant sought to delete the writ of habeas corpus language from the heading, but appellant had already informed the court that he was abandoning the writ action, and the trial court had acquiesced. Furthermore, as appellant concedes, his third amended petition added only an additional manner and means by which fraud was committed--S.A. and her mother lied to the police about the sexual assault allegations against appellant and S.A. lied during appellant's adjudication trial. Although the trial court struck the amended pleading, the trial court heard S.A. testify that she had lied to the police about appellant sexually assaulting her and had lied during his adjudication trial. And although S.A.'s mother was not a witness during the bill of review trial, evidence of her dishonesty was before the court. Indeed, in its findings of fact and conclusions of law, the trial court found that S.A. had been manipulated by her mother. Nevertheless, the trial court concluded that appellant failed to establish that the *State* committed extrinsic fraud, which prevented appellant from asserting his meritorious defense during his adjudication trial. We conclude that if the trial court erred in striking appellant's third amended petition, appellant has failed to show how this error probably caused the rendition of an improper judgment. Appellant's first issue is overruled.

Motion for Discovery

By his second issue, appellant argues that the trial court committed error by ruling that a discovery order requiring the State to disclose witnesses applied only if the bill of review were granted and the petition for delinquent conduct (the underlying case) were retried, but did not apply to the preliminary portion of the bill of review proceedings. Appellant filed a motion for discovery in his bill of review action on March 6, 2000, requesting among other things, a "list of the names and addresses of all witnesses the prosecution intends to call at trial." The trial court held a pretrial hearing on the discovery motion on July 19, 2001. During the hearing, the State objected to appellant's request. Initially, the court appeared confused as to which witnesses appellant was requesting be disclosed. The court inquired as to whether appellant sought a list of witnesses the State intended to call during a retrial of the underlying juvenile case should the bill of review be granted, or whether appellant sought a list of all witnesses the State intended to call during the entire bill of review proceeding. Appellant answered that he requested a list of all witnesses that the State intended to call both during the bill of review portion of the proceeding and the retrial of the juvenile case should the bill of review be granted. The court then ruled: "All right, [the State's] objections's [sic] denied. You're granted the list of witnesses."

Later, after appellant presented prima facie evidence of his meritorious defense, the State asked the court for leave to present rebuttal evidence. Appellant objected, arguing that a bill of review defendant is not allowed to present rebuttal evidence during the meritorious defense portion of the bill of review proceeding and furthermore that the State failed to identify any witnesses that it intended to call during the bill of review proceeding. The trial court apparently failed to remember its prior ruling and responded to appellant's objections as follows:

"No, sir. You continue to mischaracterize what The Court has ordered [the State] to do, Mr. Lavin. Your Motion for Discovery asked for a list of witnesses at the trial of this case. You did not say at the bill of review. And as I understand it, [the State] provided you with a list of witnesses that he would anticipate that he would have to recall if this case was re-tried." The trial court nevertheless denied the State's request to present rebuttal evidence and found that appellant made a prima facie showing of a meritorious defense.

Afterwards, when the trial court was attempting to gauge the amount of time needed by the parties to conduct the bill of review trial, the State informed the court that it intended to call three witnesses during the presentation of its defense. Appellant once again objected based on the State's failure to list any witnesses. The trial court again recollected that it had ruled that the State only had to provide a witness list if the bill of review were granted and the underlying juvenile case were retried. The court explained that appellant's request for discovery was not very specific, and that it was "not going to penalize, did not, have not and will not penalize The State for the lack of specificity in your request for discovery."

Later, after appellant concluded his presentation of evidence during the bill of review proceeding, the State called two witnesses. Appellant reurged his objection to the State presenting any witnesses because it had failed to list them in response to discovery requests. The trial court overruled appellant's objection, again stating that its understanding of its prior ruling was that the State would only have to provide a list of witnesses it intended to call during the retrial of the juvenile case should the bill of review be granted. The State then called two witnesses.

Under Texas Rule of Civil Procedure 193.6, if a party fails to make a discovery response in a timely manner, that party may not introduce in evidence the information that was not disclosed or offer the testimony of a witness who was not properly identified. Tex.R. Civ. P. 193.6. The sanction is automatic. *See Gee v. Liberty Mut. Fire Ins. Co.,* 765 S.W.2d 394, 395 (Tex.1989). The exception is when the party seeking to introduce the evidence shows good cause for the failure to timely respond and that the failure to timely respond will not unfairly surprise or prejudice the other party. Tex.R. Civ. P. 193.6. Determination of good cause is within the sound discretion of the trial court. *Morrow v. H.E.B., Inc.,* 714 S.W.2d 297, 297- 98 (Tex.1986). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules and principles, or equivalently, whether under all the circumstances of the particular case the trial court's action was arbitrary or unreasonable. *Koslow's v. Mackie,* 796 S.W.2d 700, 704 (Tex.1990); *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241-42 (Tex. 1985).

The record reflects that the trial court ordered the State to produce a list of all witnesses it intended to call during the entire bill of review proceeding and did not limit the list to those witnesses that would be called only during a retrial of the juvenile case. There is no indication in the record that the State attempted to show good cause for its failure to respond to the discovery request. Thus, the trial court erred in admitting the testimony of the undisclosed witnesses.

When a trial court errs by allowing the testimony of an undisclosed witness without a showing of good cause, we must determine whether the trial court's action constituted reversible error. Tex.R. App. P. 44.1; *Gee,* 765 S.W.2d at 396. To obtain reversal of a judgment based upon error of the trial court in admitting or excluding evidence, appellant must show that (1) the trial court did in fact commit error, and (2) the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. Tex.R.App. P. 44.1; *Gee,* 765 S.W.2d at 396. The erroneous admission of testimony that is merely cumulative of other testimony and is not controlling on a material issue dispositive of the case is harmless error. *Gee,* 765 S.W.2d at 396. We will review the entire record to determine whether the judgment was controlled by the testimony that should have been excluded. *Id.*

While the failure to designate witnesses can undoubtedly prejudice a party, for example when there are a great number of possible witnesses, the State in this case called only two witnesses. The first of those two witnesses was Erika Jordan, a police officer with the City of Harker Heights. Officer Jordan was the investigating officer in the underlying juvenile case against appellant. Through this witness, the State offered and the trial court admitted the written confession of appellant's brother, who admitted to the delinquent conduct for which he was charged. It appears from the record that appellant had intended to call Officer Jordan as a witness during his case in chief, but chose not to. Officer Jordan's testimony neither confirmed nor disputed the existence of extrinsic fraud that prevented appellant from asserting his meritorious defense. Ultimately, it was appellant's failure to establish extrinsic fraud that resulted in the trial court's denial of his bill of review. Because Officer Jordan's testimony was not controlling on this material issue, which was dispositive of the case, we conclude that the erroneous admission of her testimony was harmless.

The second witness called by the State was Loretta Lewis Matthews, an evidence researcher hired by S.A.'s father. It appears from the record that appellant intended to call Matthews as a witness during his case in chief as well, but chose not to. Matthews administered a "scan questionnaire" to S.A. in an effort to determine S.A.'s truthfulness regarding the sexual assault allegations she made against appellant. It was after the administration of this scan questionnaire that S.A. first confided that she had lied about the sexual assault allegations. Before Matthews was called to testify on behalf of the State, S.A.'s father, Stephen Arena, had already testified without objection about this exact same evidence when he was cross-examined by the State. Improper admission of evidence does not constitute reversible error when the same evidence is already in the record. Because Matthews's testimony was merely cumulative of other evidence in the record, we hold the trial court's erroneous admission of her testimony constituted harmless error. We overrule appellant's second issue.

Arlene Stoddard's Testimony

By his third issue, appellant claims the trial court committed error by sustaining a hearsay objection to the testimony of a licensed professional counselor concerning S.A.'s statements to the counselor refuting a sexual assault allegation. Appellant called Arlene Stoddard, a licensed professional counselor, to testify about her counseling of S.A.. When appellant asked, "Did [S.A.] tell you anything about her mom, as it relates to her testimony," the State objected based on hearsay. The trial court sustained the objection.

When appellant again attempted to elicit the same information from the witness, the trial court sustained an objection based on privilege. In response, appellant recalled S.A. to the witness stand, and S.A. waived any testimonial privilege. The State then withdrew its assertion of privilege, and appellant again asked Stoddard: "Can you tell The Court, ... what it is that [S.A.] told you about her mom--her mom's involvement in her testimony?" The State once again raised a hearsay objection, which the trial court sustained. Appellant then perfected a bill of exception, during which Stoddard testified: "[S.A.] said that her mother influenced her in what she said about the abuse." Appellant claims this statement fell within two exceptions to the hearsay rule: it was a statement for medical diagnosis or treatment, *see* Tex.R. Evid. 803(4), and it was a statement made against interest, *see id.* 803(24).

This Court has recognized that a child's statements to a physician or other health care professional describing sexually abusive acts or the abuser can be admissible under the medical diagnosis or treatment exception. *Fleming v. State,* 819 S.W.2d 237, 247 (Tex.App.--Austin 1991, pet. ref'd); *see also Moore v. State,* 82 S.W.3d 399, 403-05 (Tex.App.--Austin 2002, pet. ref'd). Appellant has not established that Stockard is a physician or other health care professional, or that the excluded out-of-court statement satisfies the pertinency requirement. *United States v. Renville,* 779 F.2d 430, 436 (8th Cir.1985) ("[T]he content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis."). The medical diagnosis or treatment exception does not encompass every statement made by a child victim of sexual abuse to a therapist, or support the blanket conclusion that all statements made to a therapist by a victim of sexual abuse are admissible as having been made for the purposes of treatment. *Jones v. State,* No. 03-02- 00022-CR, slip op. at __, 2002 Tex.App. LEXIS 8545, at *9-10 (Tex.App.-- Austin December 5, 2002, no pet. h.); *Moore,* 82 S.W.3d at 413 (Patterson, J., concurring).

Likewise, appellant has not established that the statement was sufficiently against his interest to qualify for the exception provided by rule 803(24). That rule creates an exception to the hearsay rule for a statement that at the time of its making so far tended to subject the declarant to civil or criminal liability that a reasonable person in the declarant's position would not have made the statement unless she believed it to be true. Tex.R. Evid. 803(24). All hearsay exceptions require a showing of trustworthiness. *Robinson v. Harkins & Co.,* 711 S.W.2d 619, 621 (Tex.1986). The rule is founded on the principle that the ramifications of making a statement is so contrary to the declarant's interest that she would not make the statement unless it were true. *Id.* Appellant suggests that S.A.'s statements to Stoddard subjected her to criminal liability for perjury, thus making the statement trustworthy. We disagree. According to Stoddard, S.A. stated that "her mother influenced her in what she said about the abuse." This statement is not one that so far tended to subject S.A. to criminal liability so as to render it trustworthy. She merely stated that she was influenced by her mother, not that she lied while under oath. *See* Tex. Pen.Code Ann. § 37.02 (West 1994).

Even if the proffered statement fell within an exception to the hearsay rule, any error in excluding it would not be harmful because the same information had already been admitted into evidence. Before Stoddard was called to the witness stand, S.A. herself had already testified that her mother told her to lie at appellant's adjudication trial. Ordinarily this Court will not reverse a judgment because a trial court erroneously excluded evidence that is cumula-

tive of other evidence admitted in the record. *Texas Dep't of Transp. v. Able,* 35 S.W.3d 608, 617 (Tex.2000). We overrule appellant's third issue.

Report of Dr. Charles Pierce

By his fourth issue, appellant argues that the trial court erred by refusing to admit a psychological report on the basis of confidentiality/privilege. Dr. Charles Pierce, a psychologist, testified on behalf of appellant. Dr. Pierce examined S.A.'s mother and prepared a report at the direction of a Bell County trial court during the 1994 divorce and custody proceedings involving S.A.'s mother. Appellant sought to introduce the report to demonstrate that S.A.'s mother had a history of making false allegations of sexual misconduct in custody disputes. The State objected to the introduction of the report based on relevance, hearsay, and privilege. The trial court sustained the State's privilege assertion.

Texas Rule of Evidence 510 addresses the confidentiality of mental health records. It defines a confidential communication as one that is

> not intended to be disclosed to third persons other than those present to further the interest of the patient in the diagnosis, examination, evaluation, or treatment, or those reasonably necessary for the transmission of the communication, or those who are participating in the diagnosis, examination, evaluation, or treatment under the direction of the professional, including members of the patient's family.

Tex.R. Evid. 510(a)(4). The general rule of privilege provides that communications between a patient and a professional or records of a patient maintained by a professional shall not be disclosed during civil cases. *Id.* 510(b)(1).

The report was prepared for the 1994 divorce case and was included in that file. The file had been sealed; however, the file could be viewed by other judges. Appellant claimed he obtained the report from the Department of Protective and Regulatory Services and not from the sealed divorce file. Assuming that this report was not intended to be disclosed to third persons and was indeed confidential, rule 510 provides that only two people may claim the confidentiality privilege: (1) the patient or the patient's representative and (2) the professional, who may claim the privilege on behalf of the patient. *Id.* 510(c). In this case, Dr. Pierce did not claim the privilege, and the patient, S.A.'s mother, was not available to claim the privilege. The privilege was asserted by the State. It appears that the trial court erred in relying on the State's claim of privilege to deny admission of Dr. Pierce's report.

Notwithstanding the court's erroneous reliance on the State's claim of privilege, it appears that the exclusion of the report was harmless. *See* Tex.R.App. P. 44.1. After the trial court sustained the State's objection, appellant perfected a bill of exception containing the following exchange between appellant's counsel and Dr. Pierce:

> Q Now, it [the report] does indicate that Mrs. Arena [S.A.'s mother] accused Danny Profett [Mrs. Arena's former husband] of sexual assault, is that correct?
>
> A No.
>
> Q Of some type of sexual misconduct.
>
> A No.
>
> Q Let me see it, sir.
>
> A The only information that I had was that Mr. Profett had been accused of some type of sexual misconduct. If I remember correctly, I did not know that that had been--that that had originated with Mrs. Profett or Mrs. Arena, excuse me.
>
> Q Page Three of the report says as far as you can tell, it's been reported to you as having been officially dismissed as unsubstantiated, is that right?
>
> A That entire sentence is "Allegations of sexual and/or physical abuse have been made against Mr. Profett in thna th[(dtho1.5([ugh1.5([[4(et)6t)6(ic])-

S.A.'s parents. The divorce had been filed before S.A.'s allegations of sexual assault. The State objected on the basis of relevancy. Appellant argued to the trial court that the file would reflect that S.A.'s mother was involved in a custody dispute with S.A.'s father at about the same time that S.A. accused appellant of sexual misconduct. Appellant further alleged that S.A.'s mother was ordered to submit to a psychological evaluation, but failed to do so. He argued that the timing of the custody dispute, coupled with the order for a psychological evaluation, bore some relevance to S.A.'s allegations of sexual misconduct by appellant. Appellant offered the file into evidence two more times during the proceeding, and the trial court sustained the State's relevancy objection both times.

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tex.R. Evid. 401. All relevant evidence is admissible unless prohibited by the Constitution, statute, or rules. *Id.* 402. The trial court determines preliminary questions about admitting or excluding evidence. *Id.* 104(a). To obtain reversal of a judgment based upon error of the trial court in exclusion of evidence, the following must be shown: (1) that the trial court did in fact commit error; and (2) that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. Tex.R.App. P. 44.1(a)(1); *City of Brownsville v. Alvarado,* 897 S.W.2d 750, 753 (Tex.1995). A trial court has broad discretion in determining the admissibility of evidence, and its ruling should not be reversed absent an abuse of discretion. *Alvarado,* 897 S.W.2d at 753; *Gee,* 765 S.W.2d at 396. A trial court abuses its discretion when it acts without regard to any guiding rules or principles. *Downer,* 701 S.W.2d at 241-42. Whether a trial court abused its discretion in making an evidentiary ruling is a question of law. *Jackson v. Van Winkle,* 660 S.W.2d 807, 810 (Tex.1983).

The file that appellant sought to admit into evidence did not include any allegation of sexual assault or abuse against anyone. Its only relevance, according to appellant, was the fact that S.A.'s parents were going through a divorce at about the same time that S.A. accused appellant of molesting her. We cannot say that the trial court acted without regard to any guiding rules or principles in deciding to exclude this evidence based on its lack of relevance to the bill of review proceeding.

Even if we were to agree that the file had some relevance to the bill of review proceeding and the trial court erred in excluding it, appellant has not established that this error was harmful. The fact that S.A.'s parents were divorcing when S.A. accused appellant had been presented to the court. For example, appellant called Vicky O'Dell to testify during his case in chief. O'Dell was an acquaintance of both of S.A.'s parents. During direct examination of O'Dell, appellant asked, without objection: "Do you know whether or not she [S.A.'s mother] was in the process of getting a divorce at that time?" Over the State's objection, O'Dell testified that S.A.'s mother told O'Dell that "her and Stevie were--Stephen, was getting divorced, getting separated, and she was mad about that." The divorce file, therefore, was merely cumulative of other evidence in the record, and any error in excluding it was harmless. Appellant's fifth issue is overruled.

Brother's Confession

By his sixth issue, appellant argues that the trial court committed error by admitting the contents of a court file involving his brother, including his brother's written confession and other irrelevant hearsay evidence. After appellant rested, the State requested that the trial court take judicial notice of the contents of the court file relating to appellant's brother who had pleaded true to the allegation of aggravated sexual assault on S.A. and was committed to the Texas Youth Commission. Appellant objected based on relevance; the trial court overruled appellant's objection and took judicial notice of the file. In the file was a written statement by appellant's brother in which he admitted to committing the offense, but denied that appellant was guilty of the same charge.

Appellant's theory throughout the bill of review hearing was that S.A. fabricated the sexual assault charge she made against appellant and his brother at the behest of her vindictive mother, who sought to punish her former husband's family members and gain an advantage in a custody dispute. Indeed, S.A. testified during the bill of review hearing that neither appellant nor his brother ever hurt her. She testified that the reason she recanted her story was because "it's not right that they're behind bars for something they didn't do."

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence. Tex.R. Evid. 401. The fact that appellant's brother confessed to having sexually assaulted S.A. bears some relevance to whether S.A. fabricated the sexual assault allegations made against appellant and his brother. We cannot say that the trial court's admission of this evidence constituted an abuse of discretion. We therefore hold that the trial

court did not err in taking judicial notice of the file, and we overrule appellant's sixth issue.

Carolyn Martin's Report

By his seventh issue, appellant claims the trial court committed error by excluding testimony from witness Carolyn Martin and by threatening to choke appellant's counsel. [FN2] Carolyn Martin is a child protective service worker employed by the Texas Department of Protective and Regulatory Services. Through this witness, appellant offered into evidence Martin's summary disposition report, and the trial court admitted it. Appellant then offered into evidence a report that was identical to the one the trial court had already admitted, except that the second report included handwritten notes on it. Appellant offered the second document, not "to prove the truth of the matter asserted," but to show that there "is some question about the credibility of [the Department of Protective and Regulatory Services'] record keeping because the record that they sent to us did not have those specific notations." The State objected based on hearsay, and the trial court sustained the objection. Later in the hearing, however, appellant reoffered the same document, and the trial court admitted it without objection. Thus, any error alleged by appellant was rendered moot and harmless when the trial court admitted the document into evidence. We overrule the seventh issue.

> FN2. We discuss the portion of appellant's seventh issue regarding the trial court's threat to choke appellant's counsel under our discussion of appellant's eighth issue.

Judicial Misconduct

By his eighth issue, appellant alleges that the trial court threatened appellant's counsel using intimidating tactics and embarrassed appellant's counsel in open court. By his eleventh issue, appellant alleges that the "trial court committed error by making rulings indicating a pattern that calls into question the court's fairness and impartiality." [FN3] The portion of the record cited to us by appellant reveals a disagreement between the trial court and appellant's counsel concerning the manner in which appellant's counsel was questioning his witness, Martin. When appellant's counsel offered the second document into evidence, the trial court sustained the State's hearsay objection. The disagreement ensued when appellant's counsel attempted to "prove up" the document, with the court's permission:

> FN3. Appellant fails to cite any authority in support of his eleventh issue. Nevertheless, we will consider it along with his eighth issue.

> Q All right. Do you notice the distinction between that paper and this paper (indicating)?
>
> A Yes.
>
> Q And what is the distinction?
>
> A The distinction is this (indicating) has notes at the bottom and this one (indicating) does not.
>
> Q Can you explain why there would be notes on a copy *that my client had in his possession* and no notes on this one (indicating)?

(Emphasis added.) Before this exchange occurred, there had been no evidence that the document at issue had been in appellant's possession. The trial court, apparently incensed by the reference to facts not yet in evidence, scolded appellant's counsel:

> THE COURT: If you don't stay within the record in this trial I'm going to choke you, instead of hold you in contempt. There is no evidence about what your client has in his possession and you've just asked her a question to testify under oath based upon supposedly something that your client has in his possession.
>
> Now, stay within the record, Mr. Lavin. Do you understand my ruling? And do you understand my admonishment, yes or no?
>
> MR. LAVIN: Yes, sir.
>
> THE COURT: Last warning.
>
> MR. LAVIN: Yes, sir.
>
> Q [by Lavin] Would you please finish your answer, ma'am?
>
> THE COURT: Mr. Lavin, your question is improper -
>
> MR. LAVIN: I'll ask another one, judge.
>
> THE COURT:--because it was based on a premise of a fact that is outside the record as it currently exists in this proceeding. Now, if you want to rephrase your question or ask another question, do so.
>
> MR. LAVIN: Yes, sir.
>
> THE COURT: But I'm instructing this witness not to attempt to answer the question that you just asked because The Court finds that it's an improper question.

Appellant's counsel continued questioning Martin about the distinction between the two documents, and during the course of the questioning, the trial court became confused in attempting to follow along:

Q Let's start again, ma'am. Do you see a distinction between those two pages?
A Yes, I do.
Q And do you have an explanation--
THE COURT: What two pages, Mr. Lavin?
MR. LAVIN: Judge, she understood my question.
THE COURT: I don't understand your question and I'm the one that has to make the decision, Mr. Lavin.
MR. LAVIN: Yes, sir. The page that she's referring to in her document that she's already identified and the document that I have marked as Plaintiff's Exhibit 21. And I apologize if The Court didn't understand the question. The witness did and I'm sorry.
THE COURT: Well, I'll tell you what, Mr. Lavin, since I'm the one that ultimately has to make a decision, if I don't understand it it's not going to do you much good if it comes into evidence, is it?
MR. LAVIN: Judge--
THE COURT: No, Mr. Lavin, I don't want any response from my remark. I just want to know what you're talking about.
MR. LAVIN: Judge, you may have to hold me in contempt.
THE COURT: I'm fixing to.
MR. LAVIN: I'm a Christian and I'm a professional and I'm a gentleman and I am going to continue to be a Christian and a professional and a gentleman, no matter what you say.

Now, I would like an opportunity to examine this witness in my own way and if you don't like the way I'm doing it you can tell me so, but there's no reason to be discourteous. I'm begging The Court to please allow me to get this trial underway.

THE COURT: Mr. Lavin, if you'd like to stay within the rules we will proceed much faster.
MR. LAVIN: Yes, sir. I am trying to stay in the rules, judge, and if I don't--
THE COURT: Well, you're not being very successful at it in my opinion.

Appellant directs this Court to other similar exchanges in the record, in which appellant's counsel and the trial court disagreed about the manner in which the evidence should be presented.

To reverse a judgment on the ground of judicial misconduct, we must find judicial impropriety, *i.e.,* error coupled with probable prejudice to the complaining party. *Silcott v. Oglesby,* 721 S.W.2d 290, 293 (Tex.1986); *Erskine v. Baker,* 22 S.W.3d 537, 539 (Tex.App.--El Paso 2000, pet. denied); *Pitt v. Bradford Farms,* 843 S.W.2d 705, 706 (Tex.App.--Corpus Christi 1992, no writ). The trial judge is responsible for the general conduct of the trial and has considerable discretion in expressing himself while he controls the trial; however, he should refrain from verbally confronting or displaying displeasure towards counsel. *Food Source, Inc. v. Zurich Ins. Co.,* 751 S.W.2d 596, 600 (Tex. App.--Dallas 1988, writ denied). We examine the record as a whole to determine whether the trial court's impropriety harmed appellant. *Brown v. Russell,* 703 S.W.2d 843, 847 (Tex.App.--Fort Worth 1986, no writ).

Our review of the record reveals that while it was inappropriate for the trial judge to suggest that he would choke appellant's counsel if he failed to stay within the rules, the comment was not prejudicial to the outcome of the trial. The threat to counsel was clearly ill-advised and inappropriate. It apparently arose from the court's frustration because the trial judge was forced repeatedly to admonish appellant's counsel to stay within the record. Nevertheless, the judge should have restrained himself. While we do not sanction the judge's comments, because the trial judge was the trier of fact in this case, it was not an abuse of discretion for him to ensure that he understood the testimony and evidence that appellant's counsel was attempting to elicit.

As further evidence of judicial misconduct, appellant directs this Court to two separate exchanges between his counsel and the trial judge. In both instances, appellant's counsel asked a witness a question that called for hearsay, and the court initially sustained the State's objection. In both instances, appellant's counsel argued to the trial court that the testimony fell within an exception to the hearsay rule, but would not disclose to the trial court which exception he believed applied. Appellant's counsel argued, on both occasions, that the trial judge should first listen to the proffered testimony, and then appellant's counsel would identify the appropriate hearsay exception for the trial court to consider. In both instances, the trial judge suggested to

record and injected facts not yet in evidence. On those occasions, unlike the earlier threat to counsel, the court's admonishments were appropriate and no stronger than necessary.

Moreover, appellant has failed to show how he was prejudiced by the trial judge's conduct. Throughout the bill of review proceeding, the trial judge appears to have made thoughtful and impartial rulings and, in most instances, explained the reasoning behind his rulings to the parties. This was not a jury trial; the judge was the sole fact finder. The trial judge's comments were heard only by the parties and their counsel. We overrule appellant's eighth issue.

Testimony of Loretta Lewis Matthews

By his ninth issue, appellant combines numerous complaints regarding Loretta Lewis Matthews's testimony. He alleges that the trial court committed error by admitting the testimony of Loretta Lewis Matthews and by finding that she was not an "expert" [FN4] and that she was involved in a conspiracy to manipulate S.A. into recanting her testimony. Appellant's issue is multifarious. If a court concludes that argument under an issue is multifarious, the court can refuse to review the issue, or it may consider the arguments if it can determine, with reasonable certainty, the basis of the alleged error. *Shull v. United Parcel Serv.,* 4 S.W.3d 46, 51 (Tex.App.--San Antonio 1999, pet. denied); *Bell v. Texas Dep't of Crim. Justice-Inst'l Div.,* 962 S.W.2d 156, 157 n. 1 (Tex.App.--Houston [14th Dist.] 1998, pet. denied).

> FN4. We note that neither appellant nor the State offered Matthews as an expert witness.

Moreover, although appellant included references to facts in the record, he failed to cite any authority showing his burden of proof or the standard of review to be applied on appeal. Although courts generally construe the briefing rules liberally, an issue unsupported by citation to authority presents nothing for this Court to review. *Raitano v. Texas Dep't of Pub. Safety,* 860 S.W.2d 549, 554 (Tex.App.--Houston [1st Dist.] 1993, writ denied); *BLS Limousine Serv., Inc. v. Buslease, Inc.,* 680 S.W.2d 543, 547 (Tex.App.--Dallas 1984, writ denied). This Court has no duty to search for pertinent authority. *Raitano,* 860 S.W.2d at 554. Thus, appellant has waived the alleged error.

Extrinsic Fraud

By his tenth issue, appellant contends the trial court committed error by concluding that the fraud committed by S.A. and her mother constituted intrinsic fraud. The conclusion of law about which appellant complains states: "S.A.'s recantation of her prior testimony, standing alone and if now believed, constitutes 'intrinsic fraud' only." We review a trial court's conclusions of law de novo. *Anderson v. City of Sever Points,* 806 S.W.2d 791, 794 (Tex.1991); *Black v. City of Killeen,* 78 S.W.3d 686, 691 (Tex.App.--Austin 2002, pet. denied).

In order to prevail on his bill of review, appellant had to establish (1) a meritorious defense to the cause of action alleged to support the judgment, or a meritorious claim, (2) which he was prevented from making by the fraud, accident, or wrongful act of the opposing party or by official mistake, and (3) unmixed with the fault or negligence of the complainant. *Hanks,* 378 S.W.2d at 34-35; *Alexander,* 226 S.W.2d at 998. The opposing party in appellant's underlying juvenile case was the State. Thus, appellant's burden was to establish that the *State,* as the opposing party, committed the fraud that prevented appellant from asserting his meritorious defense. Whether S.A. committed fraud is of no consequence.

Appellant did not establish the existence of extrinsic fraud. Extrinsic fraud is fraud that denies the party an opportunity to know about his rights or defenses or to present them at trial. *Alexander,* 226 S.W.2d at 1001. Intrinsic fraud, on the other hand, includes matters that were actually presented to and considered by the trial court in rendering its judgment, such as perjured testimony. *Id.* Thus, if S.A. committed fraud by fabricating the sexual assault allegations, the fraud was intrinsic fraud. S.A.'s credibility was an issue before the court during the juvenile adjudication trial. The trial court committed no error in concluding that S.A. had committed intrinsic fraud.

By his final issue appellant urges a similar complaint, that the "trial court committed error by denying appellant the relief of a new trial based on newly discovered evidence and sufficient proof to sustain the bill of review." Appellant challenges the court's failure to find that the State's fraud prevented him from asserting a meritorious defense: "That Plaintiff failed to prove that he was prevented from making a meritorious defense at time of trial based upon any act, attributable to the State, of fraud, accident, wrongful act or official mistake." The court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them, under the same standard we review jury findings. *Catalina v. Blasdel,* 881 S.W.2d 295, 297 (Tex.1994). In considering legal sufficiency, we consider all of the evidence in the light most favorable to the prevailing party, indulging every inference in that party's favor. *Associated Indem. Corp. v. CAT Contracting, Inc.,* 964 S.W.2d 276, 285-86 (Tex.1998). In reviewing

factual sufficiency, we consider all of the evidence and uphold the finding unless the evidence is too weak to support it or the finding is so against the overwhelming weight of the evidence as to be manifestly unjust. *Westech Eng'g, Inc. v. Clearwater Constructors, Inc.,* 835 S.W.2d 190, 196 (Tex.App. --Austin 1992, no writ).

We need not review the trial court's findings of fact here because even if we were to agree with appellant's argument and determine that S.A. had indeed lied about the sexual assault allegations during appellant's juvenile adjudication trial, S.A.'s conduct constitutes intrinsic fraud only, not extrinsic fraud. Moreover, S.A. was not the opposing party in the juvenile case, and so her conduct is not relevant to establish appellant's right to bill of review relief. Appellant presented no evidence indicating that the State had committed extrinsic fraud, which prevented him from asserting his meritorious defense during the underlying juvenile adjudication trial. Accordingly, we hold that the trial court did not err in denying appellant's bill of review, as appellant failed to produce sufficient facts to sustain his bill of review burden. We overrule issues ten and twelve.

CONCLUSION

Having overruled all of appellant's issues on appeal, we affirm the trial court's denial of the bill of review.

VII. JUSTICE/MUNICIPAL COURT PROCEEDINGS

1. JUSTICE COURT CANNOT ORDER THREE DAYS' DETENTION IN JUVENILE FACILITY FOR CONTEMPT OF COURT

Attorney General Opinion No. JC-0454, 2002 WL 124368 (1-28-02) [*Texas Juvenile Law* 410 (5th Edition 2000)].

Re: Authority of a justice of the peace to sentence a juvenile to detention for contempt, and related questions (RQ-0408-JC)

The Honorable John F. Healy, Jr.
Fort Bend County District Attorney
309 South Fourth Street, Suite 258
Richmond, Texas 77469

Dear Mr. Healy:

You ask a series of questions regarding the proper construction of several provisions of the Juvenile Justice Code, title 3 of the Family Code, regarding the authority of a justice court to detain a child for contempt. Specifically, you ask:

- May a Justice Court order a juvenile held for a term of detention for the offense of contempt?
- What are the liabilities for the county for detaining juveniles ordered to serve a term of detention for contempt by a Justice Court?
- If a juvenile is referred to detention for the offense of contempt, is the juvenile's detention hearing to be conducted as that for a child who has engaged in delinquent conduct, as a status offender or as a non-offender?
- Can the county, through the Juvenile Board and the Juvenile Probation Department, maintain a non-secure facility to house juveniles pursuant to a contempt finding by a Justice of the Peace and if so what type of facility would be proper?

We conclude, first, that a justice court may not order a child to be confined for a term of detention for contempt for a violation of a justice court order. Second, if suit is brought as a result of a justice of the peace ordering confinement of a child for contempt, the county could invoke immunity with respect to state claims, but, depending on the facts, could be subject to suit under federal claims brought under 42 U.S.C. § 1983. Third, a hearing for a child referred to juvenile court for contempt must be conducted as that for a child who has engaged in delinquent conduct. And fourth, based on our understanding of your last question, we conclude that neither status offenders nor nonoffenders may be detained in nonsecure detention facilities.

Justice courts are expressly authorized by statute to impose a term of confinement, a fine, or both, on adults determined to be in contempt of a justice court order. See Tex. Gov't Code Ann. § 21.002(c) (Vernon Supp. 2002). Your questions, however, relate to the authority of a justice court to detain a juvenile for contempt.

You inform us that, when the justice court finds that a juvenile is in contempt of a justice court order, "at least one" justice of a justice court in your

county sends the juvenile to the county detention facility under orders finding the juvenile in contempt of court and assessing a term of confinement of three days in the juvenile detention facility. Request Letter, supra note 1, at 2. You express concern regarding whether such a practice is authorized by state law. Thus, you first ask: "May a Justice Court order a juvenile held for a term of detention for the offense of contempt?" We answer your first question in the negative.

The relevant statutory provisions, previously set forth in the Family Code and now set forth in the Code of Criminal Procedure, specify the options from which justices of the peace may choose in imposing contempt on a child for violation of a justice court order. Such options do not include confinement for a period of three days in the county juvenile detention center. Moreover, the relevant provisions expressly declare that a justice court may not order a child to a term of confinement or imprisonment for contempt. We note that the 77th Legislature enacted two bills that significantly affected the relevant Family Code sections that governed this issue prior to September 1, 2001, as well as amending, repealing, or adding various other juvenile justice provisions. Because you ask about possible tort liability and do not limit expressly your questions to events that occurred after September 1, 2001, we address the statutory provisions that are relevant both prior to and after September 1, 2001.

Prior to its amendment by one bill and repeal by another later-enacted bill during the 77th Legislative session, section 52.027 of the Family Code set forth the procedures governing children taken into custody and brought before justice or municipal courts for offenses over which those courts have jurisdiction, specifically traffic offenses, other fineable-only offenses, and offenses involving the child as a status offender. With respect to a justice court holding a child in contempt, section 52.027 provided in pertinent part that:

> (h) If a child intentionally or knowingly fails to obey a lawful order of disposition after an adjudication of guilt of an offense that a justice or municipal court has jurisdiction of under Article 4.11 or 4.14, Code of Criminal Procedure, the municipal court or justice court may:
>
> (1) except as provided by Subsection (j), hold the child in contempt of the municipal court or justice court order and order the child to pay a fine not to exceed $500; or
>
> (2) refer the child to the appropriate juvenile court for delinquent conduct for contempt of the municipal court or justice court order.
>
> . . . .
>
> (j) A municipal or justice court may not order a child to a term of confinement or imprisonment for contempt of a municipal or justice court order under Subsection (h).

See Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 17, 1995 Tex. Gen. Laws 2517, 2524-26, repealed by Act of May 27, 2001, 77th Leg., R.S., ch. 1514, § 19(b), 2001 Tex. Sess. Law Serv. 5092, 5105. Thus, prior to September 1, 2001, under section 52.027 of the Family Code, a justice court had discretion in holding a child in contempt to either one of two options - either holding the child in contempt and imposing a fine not to exceed $500 or referring the child to a juvenile court. And, not only did the section not confer authority to order confinement in a county's juvenile detention center, the section expressly prohibited the imposition of a term of confinement for contempt.

As stated earlier, the 77th Legislature enacted

mit of the child or, if the child does not have a license or permit, to deny the issuance of a license or permit to the child and, if the child has a continuing obligation under the court's order, require that the suspension or denial be effective until the child fully discharges the obligation.

. . . .

(c) A justice or municipal court may hold a person in contempt and impose a remedy authorized by Subsection (a)(2) if:

(1) the person as a child was placed under an order of the justice or municipal court;

(2) the person failed to obey the order while the person was 17 years of age or older; and

(3) the failure to obey occurred under circumstances that constitute contempt of court.

(d) A justice or municipal court may hold a person in contempt and impose a remedy authorized by Subsection (a)(2) if the person, while younger than 17 years of age, engaged in conduct in contempt of an order of the justice or municipal court but contempt proceedings could not be held before the child's 17th birthday.

(e) A justice or municipal court may not order a child to a term of confinement or imprisonment for contempt of a justice or municipal court order under this section.

Tex. Fam. Code Ann. § 54.023 (Vernon Supp. 2002). Thus, new section 54.023, like its predecessor, section 52.027, permits justice courts options in imposing contempt not including confinement for a period of three days and, moreover, expressly prohibits such confinement. [FN2]

[FN2]. Specifically, the new section permits a justice or municipal court to retain jurisdiction and to "order the child to be held in a place of nonsecure custody designated under section 52.027 for a single period not to exceed six hours." Tex. Fam. Code Ann. § 54.023(a)(2)(B) (Vernon Supp. 2002). However, Senate Bill 1432, a subsequently passed and therefore controlling bill, repeals section 52.027 in its entirety. You do not ask and therefore we do not address whether the express repeal of section 52.027 effectively vitiates the new section 54.023(a)(2)(B).

In addition to House Bill 1118, the 77th Legislature enacted Senate Bill 1432, which, inter alia, repealed in its entirety section 52.027 of the Family Code and amended article 45.050 of the Code of Criminal Procedure, to include language substantially similar to the relevant language set forth in the repealed section 52.027. See Act of May 27, 2001, 77th Leg., R.S., ch. 1514, §§ 8, 19, 2001 Tex. Sess. Law Serv. 5092, 5105. Article 45.050 of the Code of Criminal Procedure, as amended, now provides:

(a) In this Article, "child" has the meaning assigned by Article 45.045(h).

(b) A justice or municipal court may not order the confinement of a child for:

(1) the failure to pay all or any part of a fine or costs imposed for the conviction of an offense punishable by fine only; or

(2) contempt of another order of a justice or municipal court.

(c) If a child fails to obey an order of a justice or municipal court under circumstances that would constitute contempt of court, the justice or municipal court:

(1) has jurisdiction to refer the child to the appropriate juvenile court for delinquent conduct for contempt of the justice or municipal court order; or

(2) may retain jurisdiction of the case and:

(A) hold the child in contempt of the justice or municipal court order and impose a fine not to exceed $500; or

(B) order the Department of Public Safety to suspend the child's driver's license or permit or, if the child does not have a license or permit, to deny the issuance of a license or permit to the child until the child fully complies with the orders of the court.

(d) A court that orders suspension or denial of a driver's license or permit under Subsection (c)(2)(B) shall notify the Department of Public Safety on receiving proof that the child has fully complied with the orders of the court.

Tex. Code Crim. Proc. Ann. art. 45.050 (Vernon Supp. 2002). Thus, under the amendments to article 45.050 of the Code of Criminal Procedure and the newly added section 54.023 of the Family Code, a justice court may not order confinement of a child for contempt of a justice court order for a period of three days in the county juvenile detention facility. Rather, a justice court is limited to referring the case to a juvenile court, holding the child in contempt and imposing a fine not to exceed $500, or ordering the Department of Public Safety to suspend the child's driver's license.

We note that, in the event that the legislature amends the same statute during the same session, the

amendments will be harmonized, if possible. If the amendments are irreconcilable, the latest in date of enactment prevails, with the date of enactment being the date on which the last legislative vote is taken. Tex. Gov't Code Ann. § 311.025 (Vernon 1998). In this instance, we need not determine whether the provisions of House Bill 1118 and Senate Bill 1432 are in conflict and, if so, which prevails. None of the amendatory provisions in the two bills authorize a justice court to impose three-day confinement in the county juvenile detention facility for contempt for violating a justice court order, and both specifically prohibit such confinement. Moreover, section 53.02 of the Family Code specifies the reasons for which a child may be detained prior to a detention hearing and contempt is not one of them. Tex. Fam. Code Ann. § 53.02 (Vernon Supp. 2002). Section 54.01 of the Family Code sets forth the reasons that a child may be detained at a detention hearing, and, again, contempt is not one of them. Id. § 54.01. In fact, only after a child has been adjudicated by a juvenile court as engaging in delinquent conduct for violating a court order and is held to be in contempt, may the child be confined if the court so orders at the later disposition hearing. Id. §§ 51.03(a)(2) (defining delinquent conduct to include "conduct that violates a lawful order of a municipal court or justice court under circumstances that would constitute contempt of that court"); 54.03 (adjudication hearing); 54.04 (disposition hearing).

That the legislature has adopted such a public policy is not surprising in light of the fact that the original jurisdiction of a justice court in criminal cases is limited, basically, to offenses punishable by a fine only or punishable by a fine and an additional sanction not consisting of confinement or imprisonment. Tex. Code Crim. Proc. Ann. art 4.11 (Vernon Supp. 2002). Therefore, we answer your first question in the negative. A justice court may not impose on a child confinement for three days for contempt for violating a justice court order.

You next ask: "What are the liabilities for the county for detaining juveniles ordered to serve a term of detention for contempt by a Justice Court?" Request Letter, supra note 1, at 3. We do not understand you to ask about any possible tort liability on the part of the justice of the peace, rather, we understand you to ask only about the possible tort liability of the county. See generally Mireles v. Waco, 502 U.S. 9, 11-12 (1991) (under 42 U.S.C. § 1983, doctrine of judicial immunity is not overcome by allegations of bad faith or malice; it is overcome in only two sets of circumstances: a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity; and a judge is not immune for actions, though judicial in nature taken in complete absence of all jurisdiction). See generally Turner v. Pruitt, 342 S.W.2d 422, 423 (Tex. 1961); Delcourt v. Silverman, 919 S.W.2d 777, 781 (Tex. App.-Houston [14th Dist.] 1996, writ ref'd) ("It is well established that judges are absolutely immune from liability for judicial acts that are not performed in the clear absence of all jurisdiction, no matter how erroneous the act or how evil the motive."). In order to determine whether a person or political subdivision may be liable in tort, we would have to make findings of fact, in addition to making determinations of law, something that only a court of competent jurisdiction can do. We are not empowered to make determinations of fact in the opinion process.

Therefore, we understand you to ask, not whether the county might be liable, but whether the county can invoke any doctrines of immunity from suit in the situation you describe. You do not specify what cause of action you believe may be brought, nor do you indicate whether you are concerned about a possible state and/or federal cause of action. For purposes of this opinion, we will assume that the cause of action about which you inquire is false imprisonment and that you ask about possible state and federal causes of action.

With respect to a state cause of action, we note that Texas adopted the English common law when it became a republic and later a state, and Texas courts have recognized the English common-law doctrine of sovereign immunity. See Taber Chamberlain, State Sovereign Immunity: No More King's X?, 52 Tex. L. Rev. 100 (1973); John R. Greenhill & Thomas V. Murto, III, Governmental Immunity, 49 Tex. L. Rev. 462 (1971); Glen A. Majure, W.T. Minich, & David Snodgrass, Governmental Immunity Doctrine in Texas - An Analysis and Some Proposed Changes, 23 Sw. L. J. 341 (1960). And in the absence of a statute or constitutional provision waiving governmental immunity, immunity remains the rule. Dallas County Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339, 341 (Tex. 1998); State Dep't of Highways and Transp. v. Dopyera, 834 S.W.2d 50, 52 (Tex. 1992).

Chapter 101 of the Texas Civil Practice and Remedies Code (the Texas Tort Claims Act) serves as a limited waiver of sovereign immunity. Tex. Civ. Prac. & Rem. Code Ann. ch. 101 (Vernon 1997 & Supp. 2002). But, section 101.057 of the Civil Practice and Remedies Code expressly provides that immunity is not waived if the claim arises "out of assault, battery, false imprisonment, or any other intentional tort." Id. § 101.057 (Vernon 1997). Therefore, chapter 101 does not serve as a waiver of sovereign immunity in such instance. Nor have we found any other Texas statute that would waive immunity in

the situation you describe. Therefore, we believe that no cause of action arising under state law will lie for false imprisonment.

With respect to a federal cause of action, title 42 U.S.C. § 1983 creates a cause of action against any person who, under color of state law, causes another to be deprived of a federally protected constitutional right. Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (1994). Section 1983 was enacted to prevent a governmental official's "[m]isuse of power, possessed by virtue of state law and made possible only because the [official] is clothed with the authority of state law." Johnston v. Lucas, 786 F.2d 1254, 1257 (5th Cir. 1986). Section 1983, however, does not create a cause of action for every action taken by a state official. Whitley v. Albers, 475 U.S. 312 (1986).

As long ago as 1978, the United States Supreme Court held that municipalities and other local governmental units are included among those "persons" to whom section 1983 applies. Monell v. Dep't of Social Servs. of City of New York, 436 U.S. 658 (1978) (overruling Monroe v. Pape, 365 U.S. 167 (1961)). However, "[u]nder Monell v. Department of Social Services, a county cannot be held liable under section 1983 on a theory of respondeat superior, but it can be held liable when conduct depriving a person of constitutional rights was pursuant to county policy." Brown v. Lyford, 243 F.3d 185, 191 (5th Cir. 2001), cert. denied, 122 S.Ct. 46 (2001) (footnote omitted). Based upon your request letter, it appears that the practice of justice courts imposing confinement for three days in the county detention facility on minors held in contempt is not a practice of the county, but rather the practice of an individual judge. Request Letter, supra note 1, at 2. We cannot, of course, determine in the opinion process whether and under what circumstances a county may be liable under section 1983 in the situation you describe. As we noted earlier, only a court of competent jurisdiction can make any such determination.

With your third question, you ask: "If a juvenile is referred to detention for the offense of contempt, is the juvenile's detention hearing to be conducted as that for a child who has engaged in delinquent conduct, as a status offender or as a nonoffender?" Request Letter, supra note 1, at 3.

We conclude that, in the event a child is referred to a juvenile court for contempt of a justice court order, the juvenile's detention hearing is conducted in the manner as that for a child who has engaged in delinquent conduct.

Section 51.02(8) of the Family Code defines "nonoffender" to mean a child who:

> (A) is subject to jurisdiction of a court under abuse, dependency, or neglect statutes under Title 5 [Tex. Fam. Code Ann. § 101.001 et seq.] for reasons other than legally prohibited conduct of the child; or
>
> (B) has been taken into custody and is being held solely for deportation out of the United States.

Tex. Fam. Code Ann. § 51.02(8) (Vernon Supp. 2002). Thus, a "nonoffender" is a child who is subject to the jurisdiction of a court, either because the child has been taken into custody in order to be deported out of the United States or because of improper conduct, not by the child but by someone else who "victimized" the child. Not included in the definition of "nonoffender" is a child whose conduct violates a lawful order of a justice court under circumstances that would constitute contempt of that court.

Section 51.02(15) of the Family Code defines "status offender" to mean:

> a child who is accused, adjudicated, or convicted for conduct that would not, under state law, be a crime if committed by an adult, including:
>
> (A) truancy under Section 51.03(b)(2);
>
> (B) running away from home under Section 51.03(b)(3);
>
> (C) a fineable only offense under Section 51.03(b)(1) transferred to the juvenile court under Section 51.08(b), but only if the conduct constituting the offense would not have been criminal if engaged in by an adult;
>
> (D) failure to attend school under Section 25.094, Education Code;
>
> (E) a violation of standards of student conduct as described by Section 51.03(b)(5);
>
> (F) a violation of a juvenile curfew ordinance or order;
>
> (G) a violation of a provision of the Alcoholic Beverage Code applicable to minors only; or

(H) a violation of any other fineable only offense under Section 8.07(a)(4) or (5), Penal Code, but only if the conduct constituting the offense would not have been criminal if engaged in by an adult.

Id. § 51.02(15). Most of the violations listed above are found in subsection 51.03(b) of the Family Code, which sets forth the definition of "conduct indicating a need for supervision." Not included in the definitions of "status offender," "conduct indicating a need for supervision," or in any of the remaining provisions listed in section 51.02(15) of the Family Code, is a child whose conduct violates a lawful order of a justice court under circumstances that would constitute contempt of that court. However, such a child is included within the definition of "delinquent conduct."

Section 51.03 of the Family Code, as amended, defines "delinquent conduct" and "conduct indicating a need for supervision" and provides in pertinent part:

> Delinquent conduct is:
>
> (1) conduct, other than a traffic offense, that violates a penal law of this state or of the United States punishable by imprisonment or by confinement in jail;
>
> (2) conduct that violates a lawful order of a municipal court or a justice court under circumstances that would constitute contempt of that court.

Id. § 51.03(a). Therefore, we conclude that, in the event a child is referred to a juvenile court for contempt of a justice court order, the juvenile's detention hearing is conducted in the manner as that for a child who has engaged in delinquent conduct under section 54.01 of the Family Code.

With your final question, you ask: "Can the county, through the Juvenile Board and the Juvenile Probation Department, maintain a non-secure facility to house juveniles pursuant to a contempt finding by a Justice of the Peace and if so what type of facility would be proper?" Request Letter, supra note 1, at 3. We answered your first question by declaring that a justice of the peace is without authority to order confinement of a child for three days for contempt. When a justice court holds a child in contempt for violating a justice court order, the court has several options, as provided by the new section 54.023 of the Family Code or by the amended article 45.050 of the Code of Criminal Procedure, none of which include ordering the child's confinement in a child detention facility, whether "secure" or not. However, in the text of your request letter relating to your fourth question, you state:

> If the child is a non-offender or a status offender, then the conditions of Section 54.011 of the Texas Family Code must be considered. Section 54.011 states that status offenders and non-offenders shall be released from secure detention after 24 hours, excluding hours of a weekend or holiday, and such time may only be extended on the demand of the defense or in order to return the child to his home, if the home is out of state. There is, however, no prohibition from detaining status offenders or non-offenders in non-secure detention facilities. Then, it would seem, that there would be no prohibition for the Juvenile Board or Juvenile Probation to operate non-secure facilities for such offenders.

Id. We believe your fourth question asks whether the county may operate nonsecure detention facilities to house nonoffenders or status offenders, presumably for all purposes relating to detention. We conclude that the county may operate a nonsecure juvenile detention facility, however, we believe that the place and conditions of detention will vary, depending upon the circumstances surrounding the taking of the child into custody.

Nonsecure detention facilities are mentioned only in four provisions - section 51.12 of the Family Code, which governs the place and conditions of detention; newly-enacted article 45.058 of the Code of Criminal Procedure, which governs children taken into custody before a justice or municipal court and which largely replaces section 52.027 of the Family Code; newly-enacted section 54.023 of the Family Code, which effectively replaces the subsections (h) and (j) of section 52.027; and section 52.027 of the Family Code, which, as we noted earlier was amended by one bill and repealed in its entirety in another later-enacted bill. In section 51.12, the legislature has provided that a nonsecure detention facility may be used only in compliance with article 45.058 of the Code of Criminal Procedure. [FN5] Article 45.058 sets forth conditions under which nonsecure detention facilities may be used in the detention of children taken into custody for offenses over which only justice and municipal courts have jurisdiction; unlike its predecessor statute, section 52.027, article 45.048 does not govern status offenders and nonoffenders. Tex. Code Crim. Proc. Ann. art. 45.058 (Vernon Supp. 2002).

> [FN5]. Subsection 51.12, Family Code, provides the following:

(a) Except as provided by Subsection (h), a child

Re: Whether chapter 57 of the Government Code requires the appointment of licensed court interpreters in certain circumstances, and related questions (RQ-0558-JC)

The Honorable Florence Shapiro, Chair
Senate Committee on State Affairs
Texas State Senate
P.O. Box 12068
Austin, Texas 78711-2068

Dear Senator Shapiro:

You ask about chapter 57 of the Government Code, a recently enacted statute that establishes qualifications for court interpreters for hearing-impaired individuals (interpreters for the deaf) and individuals who do not communicate in English (spoken-language interpreters) and requires courts to appoint qualified court interpreters. Your questions focus on the appointment of spoken-language interpreters and the payment of their fees in justice court proceedings.

We conclude that chapter 57 applies to a plea in a misdemeanor case in justice court, but that a court clerk who merely converses with a defendant in a language other than English does not "act as a licensed court interpreter" within the meaning of chapter 57. In either a civil or criminal proceeding, whether a party has filed a motion for or a witness has requested the appointment of an interpreter will depend upon the facts and is a question for the trial court in the first instance. The court may grant or deny such a motion or request. In a criminal proceeding, a court must also take into account the defendant's constitutional right to an interpreter and article 38.30 of the Code of Criminal Procedure. Chapter 57 establishes qualifications for interpreters appointed in criminal cases under the authority of article 38.30. If the only person who is licensed to interpret in a particular language resides in a distant location, a court in a populous county would be required to appoint that person. On the other hand, if there is no interpreter licensed to interpret in a particular language, the appointment of an unlicensed person may be within a court's inherent power. Finally, we conclude that chapter 57 does not alter preexisting law on the payment of appointed court interpreters. It does not require counties to pay for spoken-language interpreters in civil cases. Courts retain their authority under the Rules of Civil Procedure and the Civil Practice and Remedies Code to fix an interpreter's compensation and to direct how an interpreter will be paid in civil cases. A county may not require a court to select an interpreter from an interpreter service under contract with the county, although a court may choose to select such an interpreter.

I. Legal Framework

A. Statutes Predating Government Code Chapter 57 [omitted]

B. Government Code Chapter 57

Now we turn to chapter 57 of the Government Code, the new law that is the focus of your query. It generally requires the appointment of a certified or licensed court interpreter, see Tex. Gov't Code Ann. § 57.002 (Vernon Supp. 2002), and provides for certification and licensing. It does not address the payment of interpreters.

For purposes of chapter 57, a "certified court interpreter" is an interpreter for the deaf "who is a qualified interpreter as defined in Article 38.31, Code of Criminal Procedure, or Section 21.003, Civil Practice and Remedies Code, or certified under Subchapter B by the Texas Commission for the Deaf and Hard of Hearing to interpret court proceedings for a hearing-impaired individual." Id. § 57.001(1). A "licensed court interpreter" is a spoken-language interpreter who is "licensed under Subchapter C by the Texas Commission of Licensing and Regulation to interpret court proceedings for an individual who can hear but who does not comprehend English or communicate in English." Id. § 57.001(5). Subchapter B provides for the certification of court interpreters to interpret court proceedings for hearing-impaired individuals by the Texas Commission for the Deaf and Hard of Hearing. See id. §§ 57.021-.025. And subchapter C provides for the Commission of Licensing and Regulation to license spoken-language court interpreters to interpret court proceedings for individuals who do not communicate in English. See id. §§ 57.041-.048. A person who was practicing as a court interpreter prior to chapter 57's effective date may be licensed or certified without examination by submitting to the relevant commission the required fees and proof of the person's experience. See Act of May 28, 2001, 77th Leg., R.S., ch. 1139, § 5, 2001 Tex. Gen. Laws 2537, 2541.

It is an offense under chapter 57 for an uncertified or unlicensed person to hold one's self out as or to act as a certified or licensed court interpreter. See Tex. Gov't Code Ann. §§ 57.026 (Vernon Supp. 2002) ("A person may not advertise, represent to be, or act as a certified court interpreter unless the person holds an appropriate certificate under this subchapter."), 57.049 ("A person may not advertise, represent to be, or act as a licensed court interpreter unless the person holds an appropriate license under

this subchapter."). A person who commits this offense is subject to administrative penalties and to prosecution for a Class A misdemeanor. See id. §§ 57.027(a) ("A person commits [a Class A misdemeanor] offense if the person violates this subchapter or a rule adopted under this subchapter."), (b) ("A person who violates this subchapter or a rule adopted under this subchapter is subject to an administrative penalty assessed by the [Commission for the Deaf and Hard of Hearing]."), 57.050(a) ("A person commits [a Class A misdemeanor offense] if the person violates this subchapter or a rule adopted under this subchapter."), (b) ("A person who violates this subchapter or a rule adopted under this subchapter is subject to an administrative penalty assessed by the [Commission of Licensing and Regulation] as provided by Subchapter F, Chapter 51, Occupations Code.").

Significantly, section 57.002 requires a court to appoint a certified or licensed court interpreter upon the motion of a party or the request of a witness:

> (a) A court shall appoint a certified court interpreter or a licensed court interpreter if a motion for the appointment of an interpreter is filed by a party or requested by a witness in a civil or criminal proceeding in the court.

Id. § 57.002(a). In addition, a court may, on its own motion, appoint a certified court interpreter or a licensed court interpreter. Id. § 57.002(b). Under subsection (c) of this provision, smaller counties have more flexibility with regard to the qualifications of spoken-language interpreters (but not with regard to interpreters for the deaf): "In a county with a population of less than 50, 000, a court may appoint a spoken language interpreter who is not a certified or licensed court interpreter and who: (1) is qualified by the court as an expert under the Texas Rules of Evidence; (2) is at least 18 years of age; and (3) is not a party to the proceeding." Id. § 57.002(c).

Although section 57.002 clearly modifies the authority of a court to determine the qualifications of an interpreter, we do not construe section 57.002 to strip a court of its authority to determine whether a party or witness is able to communicate in English and requires an interpreter. Section 57.002(a) provides that "[a] court shall appoint a certified court interpreter or a licensed court interpreter if a motion for the appointment of an interpreter is filed by a party or requested by a witness." Id. § 57.002(a) (emphasis added). The word "shall" generally imposes a mandatory duty, see id. § 311.016(c) (Vernon 1998) (Code Construction Act), but we must look at a statute as a whole to determine the nature of that duty. See D.R. v. J.A.R., 894 S.W.2d 91, 95 (Tex. App.-Fort Worth 1995, writ denied) (noting that while the word "shall" is generally construed to be mandatory, "[t]here is no absolute test by which it may be determined whether a statutory provision is mandatory or directory.... In determining whether the Legislature intended the particular provision to be mandatory or merely directory, consideration should be given to the entire act, its nature and object, and the consequences that would follow from each construction."). We construe section 57.002(a) to impose on a court the mandatory duty to appoint a certified or licensed interpreter when the court appoints an interpreter. See Tex. Gov't Code Ann. § 57.002(a) (Vernon Supp. 2002) ("[a] court shall appoint a certified court interpreter or a licensed court interpreter") (emphasis added). However, we believe section 57.002(a)'s conditional clause-"if a motion for the appointment of an interpreter is filed by a party or requested by a witness, " id. § 57.002(a) (emphasis added)-indicates that the legislature intended for courts to have discretion to determine whether the party or witness requires an interpreter. See D.R., 894 S.W.2d at 94-95 (in statute providing that "[i]f the court finds that a motion to modify under Section 14.081 ... is filed frivolously or is designed to harass a party, the court shall tax attorney's fees as costs against the offending party as provided by Section 11.18 of this code, " the word "shall" merely directs the trial court to award the attorney fees as costs under section 11.18 but does not make the awarding of attorney fees mandatory). Furthermore, it would not be reasonable to construe section 57.002 to require a court to grant every motion or request for an interpreter. For example, the legislature would not have intended to require courts to appoint interpreters when the witness or party clearly does not require one or has requested the appointment of an interpreter in bad faith. See Tex. Gov't Code Ann. § 311.021 (Vernon 1998) (in enacting a statute, it is presumed that "a just and reasonable result is intended" and "a result feasible of execution is intended") (Code Construction Act).

II. Questions [omitted]

A. Appointment of Interpreter for Plea in a Misdemeanor Case [omitted]

B. Appointment of Interpreter in Certain Juvenile Proceedings

You also ask about the appointment of interpreters for parents in proceedings involving juveniles under article 45.0215 and article 45.054 of the Code of Criminal Procedure. Under article 45.0215,

a justice of the peace must issue a summons to compel a juvenile defendant's parent, guardian, or managing conservator to be present during the taking of the defendant's plea and other proceedings. See Tex. Code Crim. Proc. Ann. art. 45.0215(a)(2) (Vernon Supp. 2002). If the court is not able to secure the appearance of the defendant's parent, guardian, or managing conservator, "the court may ... take the defendant's plea and proceed against the defendant." Id. art. 45.0215(b). Article 45.054 authorizes a justice court that makes a finding that an individual has failed to attend school under section 25.094 of the Education Code to enter an order that imposes certain conditions on the individual's parents and to require the parents' attendance at a hearing. See id. § 45.054(a)(3) (authorizing order that individual and parent attend class), (b) (providing that order under subsection (a)(3) enforceable by contempt), (c) (authorizing court to summon parent to hearing), (d) (parent who fails to attend hearing after receiving notice commits class C misdemeanor). In light of these two provisions you ask:

> If the parent or guardian, who may or may not be a witness but is required to be in attendance and subject to sanctions, cannot speak English must the court appoint a licensed interpreter before proceeding with the respondent juvenile's hearing?

Request Letter, supra note 1, at 2 (question 1(c)). Our answer to this question assumes that the parent cannot communicate in English and requires an interpreter.

Again, chapter 57 requires a justice court to appoint "a licensed court interpreter if a motion for the appointment of an interpreter is filed by a party or requested by a witness in a civil or criminal proceeding in the court." Tex. Gov't Code Ann. § 57.002(a) (Vernon Supp. 2002). A juvenile proceeding under chapter 45 of the Code of Criminal Procedure constitutes a criminal proceeding within the meaning of chapter 57. See Tex. Att'y Gen. Op. No. JC-0579 (2002) at 2-3.

A court must appoint a licensed interpreter for a parent who is a witness in a proceeding and who requests the appointment of a spoken-language interpreter. See Tex. Gov't Code Ann. § 57.002(a) (Vernon Supp. 2002). A court also must appoint a licensed interpreter for a parent under chapter 57 if the parent is a party to the proceeding and he or she files a motion for the appointment of a spoken-language interpreter. See id. Unless the court has specifically named the parent as a party, a parent does not appear to be a party to the proceedings about which you ask. Chapter 57 does not define the term "party." The term "party" is a technical legal term that refers to "[o]ne by or against whom a lawsuit is brought." Black's Law Dictionary 1144 (7th ed. 1999); see also Tex. Gov't Code Ann. § 311.011(b) (Vernon 1998) ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."). This office construed the term "party" in section 21.002 of the Civil Practice and Remedies Code, which requires the appointment of an interpreter in a civil case for a party who is deaf, to include only a person who has been named as a party by the court or who is deemed a party by statute. See Tex. Att'y Gen. Op. No. DM-411 (1996) at 9 (concluding that "[a] custodial relative not included within [Family Code] section 51.02(10)'s list of parties who is not a witness to the proceedings is not entitled as a matter of law to the services of an interpreter" under section 21.002 of the Civil Practice and Remedies Code).

Unlike the Family Code's juvenile justice provisions, which expressly define the term "party" to include a juvenile's parent, see Tex. Fam. Code Ann. § 51.02(10) (Vernon 2002), chapter 45 of the Code of Criminal Procedure does not define the term. And neither of the two provisions you ask about names a juvenile's parent as a party to the proceeding. However, while article 45.0215 merely requires that a court summon a parent to attend a proceeding involving his or her child, article 45.054 authorizes a court to impose conditions and sanctions against a parent. If a court contemplates imposing conditions or sanctions against a parent, then we believe the court should treat the parent as a witness or a party. As noted above, spoken-language interpreters appointed for parties or witnesses under article 38.30 of the Code of Criminal Procedure are paid with county funds. See Tex. Code Crim. Proc. Ann. art. 38.30(b) (Vernon Supp. 2002); see also id. art. 38.30(a) ("When a motion for appointment of an interpreter is filed by any party or on motion of the court, in any criminal proceeding, it is determined that a person charged or a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him.").

C. Appointment of Interpreter When there is No Person Licensed to Interpret in a Particular Language [omitted]

D. What Constitutes a Motion or Request for an Interpreter in a Civil Proceeding [omitted]

E. Appointment of Interpreter Requested by Parties in a Civil Case [omitted]

F. Payment of Interpreters [omitted]

SUMMARY

Chapter 57 of the Government Code applies to a plea in a misdemeanor case in justice court. A court clerk who merely converses with a defendant in a language other than English does not "act as a licensed court interpreter" within the meaning of chapter 57. In either a civil or criminal proceeding, whether a party has filed a motion for or a witness has requested the appointment of an interpreter will depend upon the facts and is a question for the trial court in the first instance. The court may grant or deny such a motion or request. In a criminal proceeding, a court must also take into account the defendant's constitutional right to an interpreter and article 38.30 of the Code of Criminal Procedure. Chapter 57 establishes qualifications for spoken-language interpreters appointed in criminal cases under the authority of article 38.30.

If the only person who is licensed to interpret in a particular language resides in a distant location, a court in a populous county would be required to appoint that person. On the other hand, if there is no interpreter licensed to interpret in a particular language, the appointment of an unlicensed person may be within a court's inherent power.

Chapter 57 does not alter preexisting law on the payment of appointed court interpreters. It does not require counties to pay for spoken-language interpreters in civil cases. Courts retain their authority under the Rules of Civil Procedure and the Civil Practice and Remedies Code to fix an interpreter's compensation and to direct how an interpreter will be paid in civil cases. A county may not require a court to select an interpreter from an interpreter service under contract with the county, although a court may choose to do so.

Yours very truly,

John Cornyn, Attorney General of Texas
Howard G. Baldwin, Jr., First Assistant Attorney General
Nancy Fuller, Deputy Attorney General-General Counsel
Susan Denmon Gusky, Chair
Opinion Committee
Mary R. Crouter, Assistant Attorney General
Opinion Committee

VIII. INTERSTATE COMPACT ON JUVENILES

TEXAS JUDGE UNDER DUTY TO HONOR ARIZONA REQUEST FOR RETURN OF A RUNAWAY

In re The State of Texas, Relator, ___ S.W.3d ____, No. 08-02-00468-CV, 2003 WL 124870, 2003 Tex.App.Lexis 354 (Tex.App.--El Paso 1/16/03) *Texas Juvenile Law* (5th Ed. 2000).

Facts: The State of Texas through the office of the Attorney General seeks mandamus ordering the trial court to return S.M.P. to Arizona under the Interstate Compact on Juveniles. We conditionally grant the mandamus.

On August 12, 2002, Gloria E. Paz petitioned the Juvenile Court of Maricopa County, Arizona, for a requisition to return her daughter S.M.P. to her under the Interstate Compact on Juveniles (ICJ). Both Arizona and Texas are parties to this agreement, as are all fifty states in the Union. See Tex. Fam.Code Ann. s 60.001 historical and statutory notes (Vernon 2002). The Arizona court issued the requisition to the Texas Interstate Compact on Juveniles with a finding that the juvenile had run away from home and should be returned. In turn, the Deputy Administrator of the Interstate Compact on Juveniles for the State of Texas forwarded the requisition, petition, and certified documents regarding S.M.P. to Judge Al Walvoord of the County Court at Law of Midland, Texas, with a request that the youth be ordered back to Arizona. Judge Marvin L. Moore of County Court at Law No. 2 denied the request "[a]fter a finding that the juvenile S.M.P. is not a runaway and that she is not endangering her own welfare or the welfare of others...."

This petition for mandamus of the judge to issue the order under the Interstate Compact on Juveniles was filed on November 4, 2002.

Judge of Asylum State Has Ministerial Duty to Return Child

Under the scheme set forth in section 60.002, article IV of the Texas version of the ICJ, "the parent, guardian, person, or agency entitled to legal custody of a juvenile who has not been adjudged delinquent but who has run away without the consent of such parent, guardian, person, or agency may petition the appropriate court in the demanding state

for the issuance of a requisition for his return." Tex. Fam.Code Ann. s 60.002, art. IV(a) (Vernon 2002). In this case, Gloria E. Paz, the mother of the child, filed Form A under the ICJ with the Arizona court. It is the duty of the demanding state, in this case Arizona, to hold the hearing to determine "whether for the purposes of this compact the petitioner is entitled to the legal custody of the juvenile, whether or not it appears that the juvenile has in fact run away without consent, whether or not he is an emancipated minor, and whether or not it is in the best interest of the juvenile to compel his return to the state." Id. Upon making such findings, a requisition was made to the authority of Texas as the asylum state. "Such requisition shall set forth the name and age of the juvenile, the determination of the court that the juvenile has run away without the consent of a parent, guardian, person, or agency entitled to his legal custody, and that it is in the best interest and for the protection of such juvenile that he be returned." Id. "If the judge of such [requisitioned] court shall find that the requisition is in order, he shall deliver such juvenile over to the officer whom the court demanding him shall have appointed to receive him. The judge, however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding." Id.

A proper requisition was issued by the Maricopa County Juvenile Court in Arizona on the usual

Following diagnostic testing, MHMR determined that Dixon was mildly retarded. MHMR also concluded that he was not dangerous to himself or others. After a hearing, the district court made similar findings and ordered Dixon committed to MHMR's custody for placement. MHMR selected Lakewood House in Nacogdoches, a facility owned and operated by Texas Home Management, Inc. (THM).

Lakewood House is an intermediate care facility, certified under state and federal law to provide services to persons with mental retardation who are eligible to receive medicaid benefits. 42 U.S.C. §§ 1396-1396v; 25 TEX. ADMIN. CODE § 419.207. Under the Medicaid program, the federal government provides matching funds at a percentage of state expenditures for individuals like Dixon, while requiring the provider to comply with federal regulations to qualify for these matching funds. See 42 U.S.C. § 1396r-3. Under this program, THM, doing business as Lakewood House, entered into a provider agreement with the State, under which THM agreed to provide for Dixon's care, training, and treatment, and further agreed to follow all applicable federal and state statutes and rules governing intermediate care facilities. See 42 C.F.R. §§ 483.410-.480; 25 TEX. ADMIN. CODE § 419.211.

From July 1991 until his arrest for murder in May 1994, Dixon lived at Lakewood House, attending Nacogdoches public schools. During this period, he frequently traveled by bus to Houston to visit his mother on weekends and holidays. Federal regulations encouraged these visits. See 42 C.F.R. 483.420(c)(5) ("The facility must promote frequent and informal leaves from the facility for visits, trips, or vacations."). His mother usually requested these visits, which were authorized by an interdisciplinary team at Lakewood House.

Dixon continued to have behavioral problems while living at Lakewood House. He was verbally and physically abusive to Lakewood House staff, other residents of the facility, and other students at his school. While at school, he was involved in seven separate assaults, resulting in penalties ranging from detention, alternative school, suspension, and referral to law enforcement. In one incident, a fellow student was taken to a hospital for stitches after Dixon cut him with a piece of glass. The record further suggests that Dixon also assaulted other residents at Lakewood House.

Dixon engaged in more extreme criminal conduct during his visits to Houston. During one Christmas vacation there, he was charged with burglary of a habitation. During his spring break vacation in 1993, he was charged with aggravated assault when he brandished a hand gun after being caught trespassing on a construction site by the project's supervisor. During the 1993 Thanksgiving holiday, he was apprehended after breaking into an apartment. The week before that, he had been caught shoplifting at a Wal-Mart store. Twice he took cars without the owner's permission. On one of these occasions, he was apparently involved in a high-speed chase. On the other, he damaged his mother's car, prompting her to ask THM to discontinue his home visitation "until she cooled off." Finally, on the weekend of May 15, 1994, just two months after he had damaged his mother's car, Dixon shot and killed Elizabeth Ann Peavy at a Houston convenience store, then stole her car. Although the evidence is conflicting, Dixon's mother testified that she was not expecting him to visit on the weekend of the murder.

After their daughter's tragic death, the Peavys sued THM, alleging that THM was negligent and grossly negligent in breaching its duty to supervise and control Dixon. THM moved for summary judgment, asserting that it owed no duty to prevent Dixon's criminal conduct. The trial court agreed and granted summary judgment, but the court of appeals reversed and remanded. 7 S.W.3d 795. It held that "a special relationship existed between THM and Dixon sufficient to impose a duty on THM to control Dixon's behavior." Id. at 800. The court of appeals further concluded that fact questions had been raised about THM's "duty to use reasonable care in determining whether Dixon was allowed to continue unsupervised home visits." Id.

Held: Court of Appeals affirmed in part; case remanded for trial.

Opinion Text:

II.

Whether a duty exists is a question of law for the court. Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex.1990). The question of legal duty is a multifaceted issue requiring us to balance a number of factors such as the risk and foreseeability of injury, the social utility of the actor's conduct, the consequences of imposing the burden on the actor, and any other relevant competing individual and social interests implicated by the facts of the case. Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex.1983); see also 1 EDGAR & SALES, TEXAS TORTS & REMEDIES § 1.03[2][b] (2000). Although the formulation and emphasis varies with the facts of each case, three categories of factors have emerged: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy considerations. See Graff v. Beard, 858 S.W.2d 918, 920 (Tex. 1993); Greater Houston Transp., 801 S.W.2d at 525.

A.

Generally, there is no duty to control the conduct of others. Greater Houston Transp., 801 S.W.2d at 525. This general rule does not apply when a special relationship exists between an actor and another that imposes upon the actor a duty to control the other's conduct. Id.

THM contends that it did not have sufficient control over Dixon to create a special relationship. THM submits that Dixon's only "relationship" was with MHMR, in whose care, custody, and control Dixon had been placed by the court. THM asserts that it agreed only to provide room, board, and treatment for Dixon and that it never agreed to assume responsibility for his behavior. Thus, THM concludes, it had no more right to control Dixon than did the doctor in Van Horn v. Chambers, 970 S.W.2d 542, 546-47 (Tex.1998), in which we concluded that no special relationship existed.

The Peavys allege, however, that through its contract with MHMR, THM agreed to train, treat, care for, and control Dixon, and that these responsibilities created a duty to certain members of the public. The Peavys further allege that THM was negligent in failing to supervise and discipline Dixon, specifically by allowing him "to continue to go on leave to Houston while experiencing increasing behavioral problems." The Peavys allege that THM knew that Dixon needed close supervision to keep him out of trouble, and yet it allowed him to visit his mother in Houston, where it knew such supervision was lacking.

THM asserts that it had limited authority to control Dixon because the State retained legal custody and both federal and state regulations encouraged his frequent visits to his mother's home in Houston. We agree that federal and Texas Department of Human Services regulations generally favor such visits, although they do not expressly require them. 42 C.F.R. § 483.420(c)(5) ("The facility must promote frequent and informal leaves from the facility for visits, trips, or vacations."); 16 Tex. Reg. 3525, 3527 (1991) (formerly 40 TEX. ADMIN. CODE § 27.201(c)(6)) ("No participating facility may engage in any of the following restrictive practices ... prohibiting an individual from leaving the facility at will except as provided by state law."). The fact that THM no longer had custody or control of Dixon at the time of the murder does not address whether THM negligently failed to exercise control over Dixon prior to his release to Houston.

THM's interdisciplinary team approved Dixon's visit to Houston. THM failed to produce summary judgment evidence that conclusively established that it had no choice but to release Dixon to Houston for a therapeutic visit. Although state and federal regulations encouraged therapeutic visits for Dixon to see his family in Houston, there is no summary judgment evidence that such state and federal regulations required THM to approve such visits when they presented an unreasonable risk to the safety of others. The dissent contends that state regulations mandated that facilities allow residents an unlimited number of therapeutic visits as well as some extended visits. However, the regulations that the dissent relies on apply only to the conditions for which the intermediate care facility will be reimbursed when the client patient is away from the facility. Moreover, these regulations clearly recognize that, rather than being "mandated," therapeutic visits require authorization by a mental retardation professional and physician approval. 16 Tex. Reg. 3525, 3534-35 (1991) (formerly 40 TEX. ADMIN. CODE § 27.519(b)(2)) ("The individual's qualified mental retardation professional (QMRP) must authorize and document each therapeutic and extended therapeutic visit, subject to the approval of the physician.").

Further, there is ample evidence to suggest that an intermediate care facility such as Lakewood House was not sufficient to control Dixon. The Texas Department of Human Services regulations address how a facility can permanently release an individual because of "maladaptive behavior(s) that the facility is unable to address successfully." 16 Tex. Reg. 3525, 3540 (1991) (formerly 40 TEX. ADMIN. CODE § 27.707(c)(3)). However, there is no summary judgment evidence that THM convened a special committee to review Dixon's maladaptive behaviors and recommend to the State of Texas his permanent discharge from its facility. Id. Although Lakewood House was designed and approved as an intermediate care facility, THM continued acceptance of Dixon in its program and continued accepting payments from the State rather than recommending that Dixon be placed in a more appropriate facility. [FN4]

> FN4. We note that THM is the only defendant before us in this case. The question of whether any state agency should be liable is not before us, and we express no opinion in that regard except to agree with the concern expressed in the concurring opinion that apparently no action was taken to remove Dixon from the facility after such an extensive criminal history.

THM's control over Dixon was greater than the control ordinarily exercised by a physician over a patient. Under its contract with MHMR, THM provided Dixon not only with room and board, but also with a plan for his training and treatment. Professionals employed by THM continually monitored

and reported on Dixon's progress to the State. This is a far cry from the limited and specific treatment provided by the defendant doctor in Van Horn.

In Van Horn, the defendant physician treated a seizure patient for a portion of one day before releasing the patient to a private hospital room. We held that there is no duty of reasonable care toward third parties stemming from the ordinary physician-patient relationship: "Any duty of reasonable care on Dr. Van Horn's part to avoid [negligent misdiagnosis] originates solely through the relationship with, and flows only to, his patient." Van Horn, 970 S.W.2d at 545. Here, however, we are not concerned with a physician's duty not to negligently misdiagnose a patient. Rather, we are concerned with the duty to control. As we noted in Van Horn, there is generally no relationship between the doctor and patient that would provide the type of control necessary to create a duty to third persons: "Aside from the fact that a physician- patient relationship is not 'special' so as to impose a duty to control, as we have discussed, there is nothing inherent in the relationship that gives a doctor the right to control his patient." Id. at 547. Thus, we concluded that Otis Engineering, in which we recognized a duty based on the right to control implicit in the master-servant relationship, does not apply to a case in which there is no inherent right to control another, such as in the ordinary physician-patient relationship. Id. But here, in contrast to Van Horn, there is a right to control that arises from THM's contract with the State, which incorporates applicable state and federal regulations and standards. As discussed above, these standards, which THM voluntarily contracted to follow, gave THM the right to control Dixon, and therefore a special relationship existed. [FN5]

> FN5. A number of jurisdictions have recognized that one who takes charge of a person who he knows or should know is likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control that person to prevent him from doing such harm. [citations omitted]

B.

Before imposing a duty of care, however, the risk of harm must be foreseeable. " '[T]here is neither a legal nor moral obligation to guard against that which cannot be foreseen....' " Houston Lighting & Power Co. v. Brooks, 336 S.W.2d 603, 606 (Tex. 1960) (quoting Texas & P. Ry. Co. v. Bigham, 38 S.W. 162, 163 (Tex.1896)). Thus, we have described foreseeability as the "foremost and dominant consideration" in the duty analysis. El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex.1987).

THM argues that it could not have foreseen that Dixon would commit murder while visiting his mother in Houston. THM submits that it had no reason to view Dixon as dangerous because the district court specifically found that he was neither a danger to himself or others when it granted custody to MHMR. However, the district court made that determination in 1991, when Dixon was fourteen. The finding does not establish as a matter of law that seventeen-year-old Dixon was not dangerous in 1994 or that THM should not have reasonably recognized that he had become dangerous by that time.

THM continuously assessed Dixon's social, psychological, and educational progress in quarterly reports filed with MHMR. THM employed a Qualified Mental Retardation Professional (QMRP), to prepare reports tracking Dixon's accomplishments and failures during the period. [FN6] These reports are at least some evidence that THM was aware of Dixon's dangerous propensities. The Peavys' summary judgment evidence, taken largely from testimony during Dixon's murder trial and THM's own records, documents that Dixon was involved in nineteen assaults, seven other instances of criminal conduct, and nine incidents of verbal threats while he resided at Lakewood House. The summary judgment evidence also indicated that Dixon's behavior was more manageable in a structured environment, and there is evidence that his mother's home was not such an environment. While Dixon engaged in criminal conduct both in Nacogdoches and Houston, there is evidence that the incidents were more serious in Houston. In Nacogdoches, Dixon's misconduct generally consisted of altercations with fellow students at school and with other residents at Lakewood House. His most serious offense involved cutting a fellow student with a piece of glass. On brief visits to Houston, however, Dixon burglarized an apartment and threatened its occupant, trespassed on private property, committed assault with a hand gun, and stole two cars. Viewing the evidence in the light most favorable to the nonmovant, see Nixon v. Mr. Property Mgmt. Co., 690 S.W.2d 546, 548-49 (Tex. 1985), these incidents suggest that Dixon was prone to theft and violence, especially during trips to Houston, where he lacked supervision, and that THM should have foreseen the danger inherent in these trips.

> FN6. In one of these reports, the QMRP noted the following activity:
>
> Documentation from the past quarter indicates four reports of aggression, stealing and cursing (both noted on two occasions), three reports of aggravating others and/or instigating arguments among peers and one report of disruptive behavior

> at school which resulted in [Dixon] being suspended.... Generally, activity remains at low monthly frequencies and considered to be manageable with the exception of occasional outbursts of aggression requiring implementation of physical restraint procedures. Occasional problems at school continue to be noted.
>
> During this reporting period, [Dixon] received 1 phone call from his mother. He went on 2 three day passes and 1 five day pass to his home.... [Dixon] has been on three home visits during the past month. While on Spring Break he was arrested and placed in detention due to aggravated assault. He was involved in a confrontation with an adult and [Dixon] had a gun. He was with his cousin who is in TYC. I have had frequent contact with his mother in regard to his programs. Also, met with his social worker from Harris County to discuss his behavior. House management techniques continue to be used to deal with his behaviors. Regular social work contacts have been made and no new needs have been identified.

Finally, THM argues that even if it owed some duty of care, that duty was limited to those groups about which THM had specific knowledge that Dixon posed a threat. Specifically, THM submits that he only exhibited violence towards those he knew, either classmates or other Lakewood House residents. Therefore, THM concludes that it could not have foreseen that he posed a danger to Ms. Peavy, a person he did not know.

But THM ignores other evidence suggesting that Dixon posed a danger to total strangers in Houston. The project manager at the Houston construction site where Dixon trespassed testified that he was "scared as hell" when Dixon pointed a gun at him during the 1993 spring break incident. Another stranger, the apartment resident who caught Dixon burglarizing his home, testified about his shock and fear at discovering Dixon hiding behind a shower curtain during Dixon's 1993 Thanksgiving holiday. While he did not have a weapon on that occasion, Dixon told the man that he had a friend with a gun hiding in a closet. Thus, while Dixon may not have accosted strangers in Nacogdoches as he did in Houston, his life at Lakewood House had more structure and less opportunity for mischief.

The circumstances here are similar to those in Dudley v. Offender Aid and Restoration of Richmond, Inc., 401 S.E.2d 878 (Va.1991). In that case, a private halfway house accepted a convicted felon for residence under a contract with the Virginia Department of Corrections. Inmates were permitted to leave during the day, but the halfway house was required to monitor their whereabouts. One night, an inmate left the house, broke into a nearby apartment, and strangled a woman to death. Holding that the halfway house owed a duty to the victim, the Virginia Supreme Court wrote that the scope of the duty varied with the circumstances of each case. If the defendant "takes charge" of a person who is dangerous only to a specific individual, the defendant's duty runs "only to that individual because the risk of injury from a breach of the duty would be foreseeable only as to that prospective victim." Id. at 883. But the court observed that the duty would more often run to all reasonably within the reach of the dangerous person. Id.

Our case is different from Bailor v. Salvation Army, 51 F.3d 678 (7th Cir.1995), in which the Seventh Circuit concluded that a halfway house had no ability and thus no duty to protect the victim of a crime committed by one of its residents. There, the victim lived in a city 150 miles away and was sexually assaulted three days after the prisoner's escape from the halfway house. Id. at 684. Here, Dixon did not escape from Lakewood House; THM released him to visit his mother in Houston, where he then murdered Elizabeth Peavy.

We agree, however, that we must analyze foreseeability in terms of the known danger and the ability to control the third party's conduct. Bailor, 51 F.3d at 684; see also Estates of Morgan v. Fairfield Fam. Counseling Ctr., 673 N.E.2d 1311, 1323 (Ohio 1997) ("[I]t is within the contemplation of the Restatement that there will be diverse levels of control which give rise to corresponding degrees of responsibility."); Perreira v. State, 768 P.2d 1198, 1209-16 (Colo.1989) (scope of duty should be commensurate with the defendant's degree of control and the extent of the danger); cf. Lefmark Mgmt. Co. v. Old, 946 S.W.2d 52, 53-54 (Tex.1997) (duty is "commensurate with the right of control"). If the party in charge of the dangerous person knew or reasonably should have known of the dangers that person posed, then persons foreseeably exposed to such danger may be owed a duty of care. Cf. Centeq Realty, Inc. v. Siegler, 899 S.W.2d 195, 197 (Tex.1995) (one in control of premises has duty of care to protect invitee from known, unreasonable, and foreseeable risk of criminal acts by third parties). This duty may extend only to a specific individual or it may extend to a large class of people, depending on the circumstances. See Restatement (Second) Torts § 281(b) (1965). Thus, in reversing a summary judgment for an individual allegedly responsible for allowing a drunk to operate a motor vehicle, the Supreme Court of Idaho observed:

> Clearly a duty can be owed ... to a class rather than a single individual. With a drunk driver on the highways, it is strictly a matter of chance who may become his victim. For cer-

tain, however, potential victims include those persons in the class of motorists on the same highway.

Sterling v. Bloom, 723 P.2d 755, 769 (Idaho 1986). We expressed a similar view in Otis Engineering v. Clark. Otis Eng'g, 668 S.W.2d at 311. There, we likewise did not know precisely who the intoxicated employee might injure, but instead focused on the "unreasonable and foreseeable risk of harm to others" created when an employer put its employee on the public roadways in a known drunken condition. See Greater Houston Transp ., 801 S.W.2d at 526 (discussing Otis Engineering). Here, THM fails to establish as a matter of law that Dixon's unsupervised visits to Houston did not present an unreasonable and foreseeable risk of harm to others.

C.

Finally, we must consider public policy implications when imposing a duty of care. THM argues that requiring it to control its residents imposes an unreasonable burden that may adversely affect the availability of services for the mentally retarded. To comply with such a duty, Lakewood House would have to be converted into a jail for the mentally retarded, a result contrary to the Legislature's intent. THM points to the Texas Health and Safety Code's statement that "[i]t is the public policy of this state that persons with mental retardation have the opportunity to develop to the fullest extent possible their potential for becoming productive members of society." Tex. Health & Safety Code § 591.002(a). The Code further states that a person receiving mental retardation services is entitled to a "facility that is the least confining for [his or her] condition" and to services and treatment "in the least intrusive manner reasonably and humanely appropriate to the person's needs." Id. § 591.005; see also § 592.032. Each individual committed to an intermediate care facility for the mentally retarded is also entitled "to a written, individualized habilitation plan developed by appropriate specialists" that is subject to annual or quarterly review depending on the level of services provided by MHMR. Id. §§ 592.033(a), 592.034.

Our public policy seeks to integrate persons with mental retardation into society and endeavors to free those individuals from the state's intrusion to the fullest appropriate extent. But there is also an important interest in protecting the public from dangerous individuals who are already subject to the state's supervision and control. See Perreira v. State, 768 P.2d 1198, 1218 (Colo.1989) (balancing goal of returning mentally ill persons to productive life against duty to protect public from danger posed by premature release). It is not unreasonable to expect a facility that takes charge of persons likely to harm others to "exercise reasonable care in its operation to avoid foreseeable attacks by its charges upon third persons." Nova Univ., Inc. v. Wagner, 491 So.2d 1116, 1118 (Fla.1986). While the state could retain sufficient control over the details of a facility's operations to excuse any duty the facility might owe, we conclude that THM's summary judgment evidence did not establish that degree of authority by MHMR or the court in this instance.

III.

THM failed to establish in the trial court that it lacked the authority or ability to prevent Dixon's release to Houston. THM further failed to establish that it should not have reasonably recognized the danger Dixon presented or that it was not foreseeable that a person like Ms. Peavy might be exposed to this danger. Because THM did not establish as a matter of law that it had no duty to reasonably exercise its right to control Dixon, the trial court erred in granting summary judgment. Accordingly, we affirm in part the judgment of the court of appeals.

Justice SCHNEIDER did not participate in the decision.

Justice OWEN, joined by Chief Justice PHILLIPS, concurring [omitted].

Justice HECHT, dissenting [omitted].