JUVENILE CASELAW UPDATE 2016

Pat Garza
Associate Judge
386TH District Court
Bexar County, Texas
patgarza386@sbcglobal.net

Justice Antonin Scalia
Judging Judges

State v. Wachtendorf
Tex.Crim.App., 11/18/2015

TWENTY-DAY PERIOD TO FILE NOTICE OF APPEAL STARTED ON DATE ORDER WAS SIGNED RATHER THAN DATE ON WHICH THE COURT CLERK ENTERED THE SIGNED ORDER INTO THE RECORD, EVEN IF STATE WAS AFFORDED NO NOTICE OF DISTRICT COURT'S SIGNING OF ORDER.

In the Matter of M.L.M.
Tex.App.-El Paso, 1/30/15

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

Hawkins v. State
Tex.App.-Tyler, 10/21/2015

APPELLANT'S STATEMENTS CONCERNING THE FINDING OF DELINQUENT CONDUCT MADE IN HIS APPLICATION FOR COMMUNITY SUPERVISION AND APPLICATION TO SEAL FILES AND RECORDS WERE NOT CONSIDERED JUDICIAL ADMISSIONS.

Gonzales v. State
Tex.App.-San Antonio, 5/6/15

WHERE JUVENILE WAS FREE TO LEAVE AT ANY TIME AND ELECTED TO CONTINUE SPEAKING TO DETECTIVE, NO ABUSE OF DISCRETION IN ALLOWING DETECTIVE TO TESTIFY REGARDING JUVENILE'S STATEMENT AND TO ADMIT A VIDEO-RECORDING OF THE STATEMENT.

Stanley v. State
Tex.App.-San Antonio, 1/28/15

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

Maza v. State
Tex.App.-Corpus Christi, June 11, 2015

ONCE A LAWYER HAS BEEN APPOINTED, BASED ON INDIGENCY, THE TRIAL COURT CANNOT THEN ASSESS ATTORNEY'S FEES UNLESS EVIDENCE SHOWS THAT THERE HAS BEEN A MATERIAL CHANGE IN FINANCIAL CIRCUMSTANCES.*

TEXAS CODE OF CRIMINAL PROCEDDURE
Art. 26.05 (g)

If the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided,… …the court shall order the defendant to pay during the pendency of the charges or, if convicted, as court costs the amount that it finds the defendant is able to pay.

In the Matter of R.F.
Tex.App.—Fort Worth, 10/8/2015

THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL WHERE IT WAS PROBABLE THAT THE END RESULT WOULD HAVE BEEN THE SAME EVEN WITHOUT THE EVIDENCE REGARDING EXTRANEOUS OFFENSES THAT COUNSEL FAILED TO OBJECT TO.

In re N.T.
Tex.App.-Hous. (14th Dist.), 11/25/2015

IN DETENTION ORDER APPEAL, JUVENILE MUST REQUEST THAT THE DETENTION HEARINGS BE RECORDED IF HE IS TO CONTEND THAT THE TRIAL JUDGE ABUSED HIS DISCRETION IN SIGNING DETENTION ORDER.

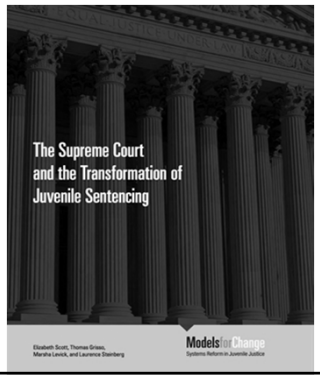
In the Matter of N.G.-D.
Tex.App.-Austin, 1/8/2016

IN A DETERMINATE SENTENCE TRANSFER TO TJJD, THE FAMILY CODE CONTAINS NO REQUIREMENT THAT THE JUVENILE COURT MAKE SPECIFIC FINDINGS STATING THE REASONS FOR ITS DECISION OR EVEN TO PUT THEM IN THE TRANSFER ORDER.

Montgomery v. Louisiana
U.S. Sup.Ct., 1/25/16

THE HOLDING IN *MILLER V. ALABAMA*, (NO MANDATORY LIFE SENTENCE WITHOUT PAROLE FOR JUVENILES) IS <u>RETROACTIVE</u> AND STATES MUST ALLOW JUVENILE OFFENDERS WHO WERE PREVIOUSLY SENTENCED TO MANDATORY LIFE WITHOUT PAROLE, BE CONSIDERED FOR PAROLE .

http://www.modelsforchange.net/publications/778



Kuol v. State
Tex.App.-Hou. (14th Dist.), 12/15/2015

MISDEMEANOR CONVICTIONS FOR PROSTITUTION CANNOT BE USED TO ENHANCE A SUBSEQUENT PROSECUTION AS A FELONY IF THE DEFENDANT WAS A JUVENILE AT THE TIME OF THE ORIGINAL MISDEMEANOR CONVICTIONS.

U.S. v. Sealed Juvenile
U.S. 5th Cir., 3/16/15

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

In the Matter of J.M.D.D.L.C.
Tex.App.-El Paso, 1/29/15

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

In the Matter of M.O.
Tex.App.-El Paso, 12/3/15

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

In the Matter of R.J.
Tex.App.-Austin, 11/6/2015

THE FAILURE TO PROVIDE TIMELY NOTICE (14 days) OF THE INTENTION TO CALL THE OUTCRY WITNESS WAS CONSIDERED HARMLESS WHERE THE DEFENDANT HAD ACTUAL NOTICE OF THE IDENTITY OF THE WITNESS, THE VICTIM TESTIFIED AND WAS SUBJECT TO CROSS-EXAMINATION, AND THE DEFENDANT DID NOT DEMONSTRATE HOW THE LACK OF TIMELY NOTICE IMPEDED HIS DEFENSE.

Villarreal v. State
Tex.App.—Austin, July 17, 2015

NO ABUSE OF DISCRETION FOUND WHERE EVIDENCE OF EXTRANEOUS BAD ACTS BY DEFENDANT WERE ADMITTED DURING THE GUILT AND INNOCENCE PORTION OF TRIAL. RECORD DID NOT SHOW THAT THE DEFENDANT WAS SURPRISED BY EVIDENCE.

Lumsden v. State
Tex.App.-Dallas, June 11, 2015

NO ERROR FOUND DURING GUILT/INNOCENCE PHASE OF ADULT TRIAL, WHERE JURY CHARGE WHICH INCLUDED PRIOR BAD ACT WHEN DEFENDANT WAS THIRTEEN YEARS OLD WAS ALLOWED, EVEN THOUGH DEFENDANT COULD NOT HAVE BEEN CONVICTED OF OFFENSE AS A THIRTEEN YEAR OLD.

In the Matter of C.Z.S.
Tex.App.-Beaumont, May 28, 2015

IN AN INDECENCY WITH A CHILD PROSECUTION, EXPERT WHO HAD NOT EXAMINED THE CHILD VICTIM WAS ALLOWED TO TESTIFY BECAUSE THEIR TESTIMONY HELPED THE JURY TO ASSESS THE CREDIBILITY OF THE VICTIM MORE FAIRLY.

In re I.G.
Tex.App.—Austin, July 17, 2015

WHILE SERVICE ON A JUVENILE CANNOT BE WAIVED, DEFECTS IN SERVICE OR DEFECTS IN THE RETURN OF SERVICE MAY BE.

In re: The State of Texas
Tex.App.-El Paso, July 8, 2015

AUTHORIZATION AGREEMENT FROM PARENT TO AUNT GAVE AUNT ENOUGH CARE, CUSTODY, AND CONTROL OVER CHILD WITNESS TO HAVE TO PRODUCE HER IN COURT UNDER SUBPOENA.

G.C. v. Owensboro Public Schools
U.S. 6th Cir., 2013

USING A CELL PHONE ON SCHOOL GROUNDS DOES NOT AUTOMATICALLY TRIGGER AN ESSENTIALLY UNLIMITED RIGHT ENABLING A SCHOOL OFFICIAL TO SEARCH ANY CONTENT STORED ON THE PHONE.

In the Matter of R.A.
Ct.App.—Houston (14th Dist.), April 30, 2015

JUVENILE COURT DOES NOT LOSE JURISDICTION TO DETERMINE WHETHER A PERSON SHOULD BE REQUIRED TO REGISTER AS A SEX OFFENDER AFTER PROBATION TERM EXPIRES.

In the Matter of B.S.,
Tex.App.-Amarillo, 11/17/2015

A UNIFORMED OFFICER INVESTIGATING A DISPATCHED CALL IN HIS PATROL UNIT WOULD BE CONSIDERED TO BE LAWFULLY DISCHARGING HIS DUTIES AS A PUBLIC SERVANT.

In the Matter of M.E.D.
Tex.App.-Corpus Christi-Edinburg, 11/24/2015

WHILE MERE PRESENCE IS NOT ENOUGH, PRESENCE ALONG WITH KNOWLEDGE, UNDERSTANDING, AND THE ACCEPTANCE OF THE "COMMON DESIGN" TO COMMIT AN OFFENSE, MAY WARRANT AN ADJUDICATION FOR AN OFFENSE AS A PARTY.

In the Matter of J.G.
Tex.App.-Waco, Oct. 22, 2015

IN TRANSFER OF TRUANCY CASE TO JUVENILE COURT, JUVENILE COURT DID NOT ABUSE ITS DISCRETION BY FINDING THAT JUVENILE HAD ENGAGED IN DELINQUENT CONDUCT BY COMMITTING CONDUCT THAT VIOLATES A LAWFUL ORDER OF A COURT UNDER CIRCUMSTANCES WHICH WOULD CONSTITUTE CONTEMPT OF COURT.

In the Matter of N.G.-D.
Tex.App.-Austin, 1/8/2016

IN A DETERMINATE SENTENCE TRANSFER HEARING, JUVENILE'S FAILURE TO OBJECT TO THE TRIAL JUDGE'S EXPRESSED INTENTION TO NOT ALLOW ARGUMENT FAILED TO PRESERVE ERROR.

In the Matter of T.L.R.
Tex.App.-San Antonio, 9/2/15

TO OBTAIN A JURY INSTRUCTION UNDER ARTICLE 38.23(A) (EVIDENCE NOT TO BE USED), THE DISPUTED FACT PROPOSED TO THE JURY MUST BE ONE THAT AFFECTS THE DETERMINATION OF THE LEGAL ISSUE.*

Tex.Code Crim. Proc. Ann. art. 38.23(a)

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

Randall v. State
Tex.App.-Beaumont, 3/25/15

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

Moon v. State
Tex.Crim.App., 12/10/2014

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

Rodriguez v. State
Tex.App.-San Antonio, 9/16/2015

IN THIS DISCRETIONARY TRANSFER ORDER THE EVIDENCE IN THE RECORD AND THE SPECIFIC FACTUAL FINDINGS OF THE JUVENILE COURT WERE SPECIFIC ENOUGH THAT THE APPELLATE COURT COULD NOT CONCLUDE THAT THE JUVENILE COURT'S DETERMINATION TO MOVE THE PROCEEDINGS TO CRIMINAL COURT WERE ARBITRARY OR UNREASONABLE.

[Good example after "Moon."]

Quary to Think About From Moon v. State

Since Moon's original certification reversal and remand, he has aged out of the juvenile system. He has, however, now been re-certified under the different (over 18) standard. The requirements under TFC §§ 54.02(a) and (f) to which Moon was originally entitled, and which formed the basis of the reversal and remand, are not applicable under the TFC§ 54.02(j) (over 18) provisions. What should be done to be fair to both sides?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JUVENILE CASELAW UPDATE
2016

29th ANNUAL JUVENILE LAW CONFERENCE
February 22-24, 2016
Sponsored by the Juvenile Law Section
Of the State Bar of Texas
San Antonio, Texas

Pat Garza
Associate Judge/Referee
386TH District Court
Bexar County, Texas
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PAT GARZA

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386th District Court
235 E. Mitchell St.
San Antonio, Texas 78210

EDUCATION

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

PROFESSIONAL

2009 – 2015: Texas Board of Legal Specialization Juvenile Law Exam Commissioner
Life Fellow of the Texas Bar Foundation
Editor – State Bar Juvenile Law Section Report.
2007 Franklin Jones Best Continuing Legal Education Article Award by the State Bar College Board of Directors. Police Interactions with Juveniles.
2004 Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation. Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent.
1999 - Present, Juvenile Court Associate Judge/Referee, 386th Judicial District Court.
1997 - 1999, Juvenile Court Associate Judge/Referee, 73rd Judicial District Court.
1989 - 1997, Juvenile Court Master (Associate Judge)/Referee, 289th Judicial District Court.
Fall 1997, Adjunct Professor of Law (Juvenile Law), St. Mary's Law School, San Antonio, Texas.

SPEECHES AND PRESENTATIONS

- Juvenile Law: Caselaw Update; Fourth Annual Juvenile Law Seminar, Sponsored by the San Antonio Bar Association, San Antonio, Texas, October, 2015.
- Juvenile Law Update: Caselaw Update, Legislation, and other Things; 52nd Annual Criminal Law Institute, Sponsored by the San Antonio Bar Association, San Antonio, Texas, April, 2015.
- Caselaw Updates; 28th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Ft. Worth, Texas, February, 2015.
- Juvenile Law: Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; Third Annual Juvenile Law Seminar, Sponsored by the San Antonio Bar Association, San Antonio, Texas, October, 2014.
- Caselaw Update; Fifth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2014.
- Arrest, Confessions, and Search and Seizure; Fifth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2014.
- Caselaw Updates; Nuts and Bolts of Juvenile Law, Sponsored by the Texas Juvenile Justice Department and the Juvenile Law Section of the State Bar of Texas, August, 2014.
- Police Interactions with Juveniles; Nuts and Bolts of Juvenile Law, Sponsored by the Texas Juvenile Justice Department and the Juvenile Law Section of the State Bar of Texas, August, 2014.
- Juvenile Law; 2014 State Bar College Summer School, Sponsored by the Texas State Bar College, Galveston, Texas, July, 2014.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 51st Annual Criminal Law Institute, Sponsored by the San Antonio Bar Association, San Antonio, Texas, April, 2014.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 27th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Corpus Christi, Texas, February, 2014.
- Caselaw Updates; 27th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Corpus Christi, Texas, February, 2014.
- Caselaw Update; Fourth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2013.

- Arrest, Confessions, and Search and Seizure; Fourth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2013.
- Juvenile Law; 2013 State Bar College Summer School, Sponsored by the Texas State Bar College, Galveston, Texas, July, 2013.
- Caselaw Updates; Juvenile Delinquency Boot Camp and Advanced Topics, Sponsored by the Juvenile Justice Committee of the Dallas Bar Association, Dallas, Texas, June, 2013.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 26th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, San Antonio, Texas, February, 2013.
- Caselaw Updates; 26th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, San Antonio, Texas, February, 2013.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; Juvenile Law CLE, Sponsored by the San Antonio Bar Association, San Antonio, Texas, September, 2012.
- Arrest, Confessions, and Search and Seizure; Third Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2012.
- Juvenile Law; 2012 State Bar College Summer School, Sponsored by the Texas State Bar College, Galveston, Texas, July, 2012.

PUBLICATIONS

- Caselaw Update. Sixth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2015.
- Privacy Policy, Riley v. California and Cellphone Searches in Schools. Texas Bar Journal, Volume 78, Number 2, February, 2015. An article discussing the Supreme Court's holding in Riley v. California and its impact on school cell phone searches.
- Riley v. California and Cell Phone Searches in School. Texas Juvenile Law Reporter, Volume 28, Number 3, September, 2014. An article discussing the Supreme Court's holding in Riley v. California and its impact on school cell phone searches.
- "Any Detectable Amount of Alcohol": Taking a Breath or Blood Specimen of a Juvenile. Texas Bar Journal, Volume 75, Number 2, February, 2012. A legal article analyzing the taking of a Breath or Blood Specimen of a Juvenile.
- Police Interactions with Juveniles. 20th Annual Juvenile Law Conference Article, February, 2007. This article won the Franklin Jones Best Continuing Legal Education Article for 2007, as voted on by the State Bar College Board of Directors, February 2, 2008.
- Juvenile Legislation. The San Antonio Lawyer, Sept–October 2007. An article hi-lighting the 2007 legislative changes in juvenile law.
- TYC and Proposed Legislation. State Bar Section Report Juvenile Law, Volume 21, Number 2, June 2007. An article discussing the proposed juvenile legislative changes from the 2007 legislative session.
- Mandatory Drug Testing of All Students, It's Closer Than You Think. State Bar Section Report Juvenile Law, Volume 20, Number 3, September 2006. An article discussing the Supreme Court's decisions on mandatory drug testing in schools.
- Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent. The San Antonio Lawyer, July–August 2003. An article discussing the requirements of parental presence during juvenile confessions. This article received a 2004 Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation.
- Juvenile Law: 2003 Legislative Proposals. The San Antonio Defender, Volume IV, Issue 9, April 2003. An early look at proposed Juvenile Legislation for this 2003 session.
- A Synopsis of Earls. The San Antonio Defender, Volume IV, Issue 9, April 2003. A synopsis of the Supreme Court's decision in *Board of Education v. Earls* and the random drug testing of students involved in extracurricular activities.

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CASELAW UPDATE

APPEALS—

State v. Wachtendorf, No. PD-0280-15, --- S.W.3d ----, 2015 WL 7306398, Tex.Juv.Rep. Vol. 30, No. 1 ¶ 16-1-8 (Tex.Crim.App., 11/18/2015).

TWENTY-DAY PERIOD TO FILE NOTICE OF APPEAL STARTED ON DATE ORDER WAS SIGNED RATHER THAN DATE ON WHICH THE COURT CLERK ENTERED THE SIGNED ORDER INTO THE RECORD, EVEN IF STATE WAS AFFORDED NO NOTICE OF DISTRICT COURT'S SIGNING OF ORDER.

Facts: Defendant who was charged with felony driving while intoxicated (DWI) filed motion to suppress results of test for blood alcohol concentration following extraction of blood at time of his arrest. The District Court, Williamson County, 368th Judicial District, Rick J. Kennon, J., orally granted motion and thereafter signed order to that effect. State filed notice of appeal more than 20 days later. The Austin Court of Appeals recognized the appeal as untimely and dismissed State's appeal for want of jurisdiction 2015 WL 894731 State's petition for discretionary review was granted.

Appellee was charged with the felony offense of Driving While Intoxicated. According to the district clerk's file-mark, on January 16, 2014, Appellee filed a motion to suppress the results of a test for blood alcohol concentration following the extraction of blood at the time of his arrest.FN1 At the conclusion of a hearing conducted on February 14, 2014, the trial court took the motion to suppress under advisement. On July 7, 2014, the hearing reconvened, and the trial court orally announced that it intended to grant Appellee's motion. The docket sheet reflects that the trial court actually signed an order to that effect on the same day. The State maintains, however, that the trial court did not sign the order in open court, and the Reporter's Record does not clearly indicate that it did. Rather, the Reporter's Record shows that, in response to the State's request for written findings of fact and conclusions of law,FN2 the trial court directed Appellee to prepare proposed findings and conclusions and adjourned the hearing. Appellee did not immediately file the requested findings and conclusions.

FN1. Appellee's motion to suppress included a proposed order for the trial court to sign. The trial court did not sign this originally proffered version of the order, which appears on page 29 of the Clerk's Record.

FN2. See State v. Cullen, 195 S.W.3d 696 (Tex.Crim.App.2006) (at the request of the losing party in a motion to suppress, the trial court is required to enter express findings of fact and conclusions of law).

Held: Affirmed.

Opinion: Article 44.01(d) of the Texas Code of Criminal Procedure currently requires the State to file notice of appeal within twenty days after an appealable order "is entered by the court." TEX.CODE CRIM. PROC. art. 44.01(d). This Court has held that the triggering event to begin the running of the period within which the State must file its notice of appeal is when the trial judge signs the order. State v. Rosenbaum, 818 S.W.2d 398, 402 (Tex.Crim.App.1991); State ex rel. Sutton v. Bage, 822 S.W.2d 55, 57 (Tex.Crim.App.1992). Rather than file a notice of appeal within twenty days of the date the trial court signed the order granting the motion to suppress in this case, however, the State waited until August 19, 2014, well over twenty days after the date the order was signed. At that time the State filed, not a notice of appeal, but a motion asking the trial court to reconsider its ruling on Appellee's motion to suppress.FN3

FN3. See Black v. State, 362 S.W.3d 626, 635 (Tex.Crim.App.2012) (a ruling on a motion to suppress is interlocutory, and the trial court may reconsider its ruling at any time before the end of trial).

The trial court entertained the State's motion to reconsider on September 25, 2014, and heard additional evidence. At the conclusion of this hearing, the trial court announced that it was "inclined to just continue with [its]

ruling[.]" The trial court then reminded Appellee that it had requested him to prepare proposed findings of fact and conclusions of law. Appellee responded that proposed findings and conclusions were no longer needed because the State had "waived" its right of appeal by failing to timely file its notice of appeal. The trial judge denied any memory of having signed the order granting the motion to suppress, but almost immediately thereafter he re-discovered the signed order—apparently in the clerk's file. The trial judge noted, however, that the signed order was "not file-marked." The prosecutor replied that "it's still not entered of record if it's not file-stamped." FN4 The trial court asked the parties to supply case law regarding the State's ability to appeal under the circumstances, and Appellee directed the trial court's attention to State v. Cowsert, 207 S.W.3d 347, 351–52 (Tex.Crim.App.2006), a case in which this Court held that a ruling on a motion to reconsider the granting of a motion to suppress is not itself an appealable order under Article 44.01(a)(5) of the Texas Code of Criminal Procedure. See TEX.CODE CRIM. PROC. art. 44.01(a)(5) (permitting the State to appeal an order that grants a motion to suppress). The trial court reset the case for a future "status hearing" and adjourned without ruling on the State's motion to reconsider. At some point—the record does not clearly indicate how or on whose impetus—the signed order granting the motion to suppress was stamped as "FILED" in the district clerk's office with a filing date of September 25, 2014.FN5

FN4. The entire colloquy reads:

THE COURT: Well, I don't see an order signed, either, so unless you've got a copy of it—and, again, I'm kind of—

[PROSECUTOR]: And I would object to anything that's not the original in the Court's file.

THE COURT: Okay. I lied. There it is. It's not file–marked.

[PROSECUTOR]: Then it's not—then it's not entered of record.

THE COURT: Well, this is on the Motion to Suppress Blood Specimen heard on February 14th and signed July 7th, 2014.

[PROSECUTOR]: Then it's still not entered of record if it's not file-stamped.

FN5. An identical copy of the proposed order that was attached to Appellee's motion to suppress appears on page 43 of the Clerk's Record. On this copy, however, the word "GRANTED" is circled, the word "DENIED" is scratched out, and a handwritten notation indicates that it was "[s]igned the 7th day of July, 2014." The judge's signature appears on the signature line. It is file-stamped at 3:15 p.m. on September 25, 2014, however—the same date as the hearing on the State's motion for reconsideration, which had commenced at 1:55 p.m.

The State eventually filed its notice of appeal on September 30, 2014, five days after the date on which the trial court's order granting the motion to suppress was ultimately file-marked. On November 6, 2014, the trial court conducted the promised status hearing. In the interim, Appellee had filed a motion in the court of appeals to dismiss the State's purported appeal for lack of jurisdiction. The State complained that it had not been privy to the trial court's July 7th signing of the order granting the motion to suppress. Because the trial court's oral representation on July 7th that it intended to grant the motion was not an appealable order, the State maintained, it could not have known or been expected to file a notice of appeal within twenty days of that date. The State argued that "the question now becomes whether or not the Court's signing of the order versus the entering of it by the district clerk is the date of—the effective date." The trial court observed that "you two can fight out that in the Court of Appeals, right?" The parties agreed, and, with that, the trial court adjourned the status hearing, again without having ultimately ruled on the State's motion to reconsider.

The court of appeals dismissed the appeal for want of jurisdiction on the strength of Rosenbaum and Bage, observing that, "[d]espite the criticisms expressed [by the State] against the holding in Rosenbaum, the [Court of Criminal Appeals] has recently sanctioned that holding again." State v. Wachtendorf, 2015 WL 894731, at *2 (citing State v. Sanavongxay, 407 S.W.3d 252, 258–59 (Tex.Crim.App.2012)). In its petition for discretionary review, the State renews its criticism of our holdings in Rosenbaum and Bage, arguing that they are unjust to the State, at least in

cases in which it has received no notice of the signing of an order granting a motion to suppress. The State complains that "[e]xisting precedent, as currently interpreted by, at least, the Third Court of Appeals, allows a [trial] court to sign an order [granting a motion to suppress], wait twenty[-]one or more days before filing the order with the district or county clerk or otherwise giving the State notice of the existence of said order, and thereby effectively strip altogether from the State its ability to appeal." State's Brief at 13. We granted the State's petition to address this complaint.

ANALYSIS

The Statute, the Rule, and the Case Law

The State has not always enjoyed a right to appeal in Texas, and that right is "a statutorily created one." State v. Sellers, 790 S.W.2d 316 (Tex.Crim.App.1990). Article 44.01 of the Code of Criminal Procedure currently permits the State to appeal, among other things, "an order of a court in a criminal case if the order ... grants a motion to suppress evidence [.]" TEX.CODE CRIM. PROC. art. 44.01(a)(5). But the State "may not make an appeal" under Article 44.01"later than the 20th day after the date on which the order ... to be appealed is entered by the court." TEX.CODE CRIM. PROC. art. 44.01(d).

This Court was first called upon to construe what "entered by the court" meant for purposes of Article 44.01(d), in 1991. Rosenbaum, 818 S.W.2d at 402. There we noted that then-Rule 41(b)(1) of the Texas Rules of Appellate Procedure (since re-codified as Rule 26.2(b)) generally provided that an appeal was perfected with respect to an appealable order when notice of appeal is filed within fifteen days (now twenty) from "the day [the] appealable order is signed by the trial judge[.]" Id. at 400 (emphasis added). We recognized that "this Court has long held that the signing of a[n] ... order is a function of the court separate and distinct from the entry of said ... order into the records of the court." Id. at 401. "Entry into the records of the court is merely ministerial in nature." Id. "As a practical matter," we observed in Rosenbaum,"a judge may never really know when a signed order ... is physically entered into the record. There are no consistent deadlines for clerical entry into the record in the courts throughout Texas." Id. at 402. In order to avoid the anomaly of tying the inception of the period for filing a notice of appeal to such an indefinite date, we chose to construe the phrase "entered by the court" in Article 44.01(d) to mean the same as the general provision for perfecting an appeal in former Rule 41(b)(1), holding that "the term 'entered by the court' encompasses the signing of an order by the trial judge." Id. FN6 "Establishing a definite starting date for calculating appellate timetables[,]" we concluded, "serves the interests of all parties." Id. And we held that the "definite starting date" should be the date the appealable order was signed. Id. We cemented this holding less than a year later in a mandamus proceeding, in State ex rel. Sutton v. Bage, 822 S.W.2d at 57.

FN6. When the Texas Rules of Appellate Procedure were redrafted, effective in 1997, former Rule 41(b)(1) was rewritten. Ironically, under current Rule 26.2(b), now specifically governing the State's perfection of appeal, a State's notice of appeal from an appealable order must be filed within a certain period of time "after the day the trial court enters the order ... to be appealed." TEX.R.APP. P. 26.2(b). Thus, the actual language of Article 44.01(d) ("entered by the court") now corresponds to the actual language in Rule 26.2(b) ("the trial court enters the order"), and neither provision speaks explicitly in terms of when the trial court signs the order. Still, the commentary following Rule 26 makes clear that the 1997 revision was not meant to be substantive. See id. Notes and Comments, at 221 (Vernon's 2003); see also, 60 TEX. B.J. 900 (1997) ("Nonsubstantive changes are made in the rule for criminal cases."). We must presume that the construction that we gave to the phrase "entered by the court" in Rosenbaum has been carried over into Rule 26.2(b)—namely, that a trial judge "enters" an appealable order under Article 44.01 on the date that he signs it.

Both Presiding Judge McCormick and Judge Baird took issue with the Court's construction of Article 44.01(d) in these cases. Rosenbaum, 818 S.W.2d at 403–05 (Baird, J., joined by McCormick, P.J., concurring); Bage, 822 S.W.2d at 57 (McCormick, P.J., dissenting); id. at 58 (Baird, J., dissenting). They argued that the phrase "entered by the court" in Article 44.01(d) is a legal term of art that typically refers, not to the signing of an appealable order, but "to the ministerial act of the clerk spreading the court's [order] in the minutes of the court." Bage, 822 S.W.2d at 59 (Baird, J., dissenting) (citing Wilson v. State, 677 S.W.2d 518, 522 (Tex.Crim.App.1984), which in turn cited Moore v. State, 156 Tex.Crim. 615, 245 S.W.2d 491(1952)).FN7 Moreover, they argued, to the extent that the provision in former Rule 41(b)(1) generally fixes the commencement of the time for filing any notice of appeal to the date an

appealable order is signed, Article 44.01(d) should trump it, for two reasons. First, whenever a statute and a rule irreconcilably conflict, the statute—the legislative act—always controls. Second, specific provisions govern over general. Because Article 44.01(d) specifically fixes the beginning of the time for the State to file a notice of appeal from an adverse appealable order under Article 44.01(a), it is more specific than the general, and inferior (because court-made), provision in Rule 41(b)(1). Bage, 822 S.W.2d at 59 (Baird, J., dissenting).

FN7. "In a criminal proceeding, a clerk of the district ... court shall ... receive and file all papers ... and ... perform all other duties imposed on the clerk by law." TEX.CODE CRIM. PROC. art. 2.21(a)(1) & (6). "The clerk of a district court shall ... record the acts and proceedings of the court[.]" TEX. GOV'T CODE § 51.303(b)(1).

But the majority's holding that the notice-of-appeal period begins with the trial court's signing of the appealable order carried the day, and it has been ingrained in the law now for twenty-five years. This is not to say, of course, that starting the period for filing a State's notice of appeal on the date the appealable order is signed (rather than the date when the clerk enters it into the record) is not without its own potential for indefiniteness. Bage itself illustrates as much. In Bage, as in the instant case, the State did not even learn that the trial court had signed an appealable order granting a motion to quash the indictment until the then fifteen-day period for filing its notice of appeal under Article 44.01(d) had already expired. 822 S.W.2d at 58 (McCormick, P.J., dissenting). This Court nevertheless chose to adhere to Rosenbaum's construction of the phrase "entered by the court" in Article 44.01(d), and refused to mandamus the district clerk to accept the State's untimely notice of appeal, reasoning that the clerk had "no ministerial duty to file the State's appeal." Id. at 57. On the strength of the holdings in Rosenbaum and Bage, and because "[a] timely notice of appeal is necessary to invoke a court of appeals' jurisdiction[,]"Olivo v. State, 918 S.W.2d 519, 522 (Tex.Crim.App.1996), the court of appeals in this case regretfully dismissed the State's appeal. Wachtendorf, 2015 WL 894731, at *2.

The State's Complaint

The State does not now reiterate the argument it made at the September 25th hearing on its motion for reconsideration; it does not urge us to revisit the phrase "entered by the court" under Article 44.01(d), and ask us to re-construe it to mean the date the appealable order was file-stamped. Nor does the State ask us to embrace the view of Presiding Judge McCormick and Judge Baird, that "entered" means spread on the minutes of the court—and for good reason. As the facts of this very case demonstrate, a district clerk's file mark will not always constitute definitive evidence of when a document was actually "filed," much less spread on the minutes of the court.

"In a long line of cases," the Texas Supreme Court has held that a document is "filed," not when it is file-stamped, but "when it is tendered to the clerk, or otherwise put under the custody or control of the clerk." Jamar v. Patterson, 868 S.W.2d 318, 319 (Tex.1994).FN8 Here, the unsigned order (as it was attached to Appellee's motion to suppress) was originally "filed"—that is, tendered to the district clerk—at least as of January 16, 2014, when the motion to suppress itself was file-stamped. But, though this proposed order was in the district clerk's file, no such order was signed until July 7, 2014. The signed copy of the order was apparently tendered to the district clerk at some point between July 7th, when the docket sheet indicates it was signed, and September 25th, when the trial court discovered it, signed and dated but not file-stamped, in the district clerk's file. But (as anticipated in Rosenbaum), the record does not reveal a particular date between July 7th and September 25th when the district clerk actually acquired custody or control of the signed order, much less when the signed order might have been entered of record. That is to say, we cannot know when the district clerk performed its ministerial function of spreading the trial court's signed order in the minutes of the court. It therefore does not behoove the State to urge us to proceed upon Presiding Judge McCormick's and Judge Baird's construction of "entered by the court." The record in this case simply does not reveal a date certain upon which it may be said that the district clerk entered the court's order in the minutes of the court. In fact, the only date-certain in the present case is the date the order was signed.FN9

FN8. See Williams v. State, 767 S.W.2d 868, 871 (Tex.App.–Dallas 1989, pet. ref'd) ("In civil cases, an instrument is generally deemed filed when it is left with the clerk regardless of whether a file mark is placed on the instrument. [citation omitted.] We see no reason why the same rule should not apply in criminal cases, and we hold that it does."); Perkins v. State, 7 S.W.3d 683, 686 (Tex.App.–Texarkana 1999, pet. ref'd) ("An information is filed when it is delivered to or left with the clerk, despite the absence of a file stamp on the document."); In re Smith, 270 S.W.3d

783, 786 (Tex.App.–Waco 2008, no pet. h.) (a document is "generally considered to have been 'filed' " when tendered to the clerk, whether or not it is file-marked).

FN9. The only other date certain in this case is the date the signed order was ultimately filed-stamped, on September 25th. But that was obviously not the date on which the signed order was tendered to the district clerk, and thus "filed," much less when it may have been spread on the minutes of the court. To treat September 25th as the operative date to begin the notice-of-appeal timetable would be tantamount to allowing the State to appeal, not the granting of the motion to suppress, but the refusal of the trial court to rule in the State's favor on its motion for reconsideration of the granting of Appellee's motion to suppress, which was the motion that was actually heard on September 25th. But, as Appellee pointed out to the trial court, we have unanimously held that any ruling on such a State's motion for reconsideration does not constitute an appealable order under Article 44.01. State v. Cowsert, 207 S.W.3d 347, 351 (Tex.Crim.App.2006). If, by file-stamping the order on September 25th, the trial court meant it to count as an order overruling the State's motion to reconsider, that order was simply not appealable under Cowsert.

The fact of the matter is that, in any given case, there will be a potential notice problem for the State regardless of whether the date for beginning the period for filing its notice of appeal is the date that the order was signed or the date that it was spread on the minutes of the court. Whichever of these events is deemed to trigger the appellate timetable, the State may not become actually aware of that event before the time has run out to file its notice of appeal. Accordingly, the State does not now vigorously argue that Rosenbaum and Bage should be overruled; it simply argues that these precedents should not be slavishly followed in any case in which it has not received notice, or otherwise acquired knowledge, that an appealable order granting a motion to suppress has in fact been signed. It urges us to begin its notice-of-appeal timetable on September 25th—not necessarily because that was the date the trial court's order was eventually file-stamped, but because the State lacked any actual awareness of the existence of the signed order sooner than the trial court's discovery of it in the district clerk's file on that date. The State argues that, absent notice or actual knowledge of the signed order, it would simply be unfair to hold the State to the date the order was signed.

Judicially Required Notice

In essence, what the State would have us do is to adopt a rule—as a matter of decisional law—similar to Rule 306a of the Texas Rules of Civil Procedure. Like Article 44.01 of the Code of Criminal Procedure and Rule 26.2(b) of the Rules of Appellate Procedure, Rule 306a provides that the timetables for various procedural requirements begins on "[t]he date [the] order is signed as shown of record[.]" TEX.R. CIV. PROC. 306a(1). But unlike Article 44.01 or Rule 26.2(b), Rule 306a provides that, when an appealable order is signed, the court's clerk "shall immediately give notice to the parties ... that the ... order was signed." Id. (3). If a party can prove to the trial court that it failed to receive such notice or acquire actual notice within twenty days of the signed order, then the beginning of the procedural timetables is postponed until the date of notice or actual knowledge, "whichever occurred first[.]" Id.(4) & (5); John v. Marshall Health Services, Inc., 58 S.W.3d 738, 740–41 (Tex.2001). The State urges us to adopt a similar rule that would delay the inception of the period within which its notice of appeal is due until such time as it becomes aware that the order granting the motion to suppress has been signed.

Rule 306a is more or less an omnibus provision, intended to apply equally to all parties and to numerous procedural timetables in civil practice. Here, the State would have us carve out a unique rule that applies to only one party (the State) and to one particular procedural timetable (interlocutory notice of appeal). We are hesitant to fashion such a specific procedural rule by judicial fiat and out of whole cloth. We recognize that the Texas Supreme Court has cautioned the lower appellate courts "to construe the Rules of Appellate Procedure reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule." Verburgt v. Dorner, 959 S.W.2d 615, 616–17 (Tex.1997). But the Supreme Court has reciprocally recognized that this Court's "approach to the perfection of appeals in criminal cases has differed significantly from [its own] more liberal approach." Id. at 616 (citing Olivo v. State, 918 S.W.2d 519 (Tex.Crim.App.1996)—the very case that the court of appeals relied upon in this case to dismiss the State's appeal). We shall not import into Article 44.01(d) and Rule 26.2(b) an elaborate notice requirement that the Legislature itself did not see fit to impose. We think that the State's suggestion that we append a notice provision not currently in either provision is more appropriately addressed to this Court's Rules Committee, as an exercise of our limited but legislatively endowed rulemaking authority—

perhaps to revise current Rule 26.2(b) to add such a notice requirement. See Acts 1985, 69th Leg., ch. 685, § 1, p. 2472, eff. June 1, 1985 (granting this Court "rulemaking power to promulgate rules of post trial, appellate, and review procedure in criminal cases except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant"); TEX. GOV'T CODE § 22.108(a) (same).FN10 We certainly cannot fault the court of appeals for declining to manufacture such a notice rule, sua sponte, simply to avoid the jurisdictional ramifications of the State's tardy notice of appeal in this case.

FN10. "Inherent in the [C]ourt of [C]riminal [A]ppeals's final appellate jurisdiction ... is the authority to adopt or make [as a matter of decisional law] procedural requirements for the trial, appeal, and review of criminal cases. These rules must not conflict with any statutory or constitutional provisions, and they must be 'reasonable.' " George E. Dix & John M. Schmolesky, 40 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 1:3, at 5 (3rd ed.2011). For example, State v. Cullen, 195 S.W.3d 696 (Tex.Crim.App.2006), see note 2, ante, "probably reflects [this Court's] exercise of an inherent power to make procedural rules by decisional law." Dix & Schmolesky at 6. Nevertheless, since the Legislature conferred rulemaking authority on the Court in 1985, that "rulemaking power may require the [C]ourt of [C]riminal [A]ppeals to make some changes in the law by exercising that [rulemaking] authority rather than construing [as a matter of decisional law] a rule as adopted." Id. § 1:10, at 13. And "substantive changes in court rules should arguably be made by exercise of the [C]ourt's authority to amend or modify its rules rather than by judicial construction. Such modification often affects the interests of persons not parties to particular litigation. The rule-amending process provides those parties a fairer opportunity for input." Id. § 2:35, at 76. Moreover, "[r]ulemaking authority is almost certainly granted [by the Legislature] to the courts with the understanding it—rather than judicial construction—will be used for general modification of rules once promulgated." Id. at 77. We will not "construe" either Article 44.01 or Rule 26.2(b) to contain an elaborate notice requirement that finds no source whatsoever, explicit or implicit, in the actual language of either provision.

In any event, the State was not entirely powerless to preserve its interests in this case. There are actions it could have taken to ensure a timely notice of appeal. First of all, it is uncontested that the signed order was placed in the clerk's record at some point between July 7th and September 25th. From that (albeit undisclosed) point on, the State was placed on constructive notice that the order granting Appellee's motion to suppress had been signed.FN11 At the conclusion of the hearing on July 7th, the trial court plainly announced its intention to grant the motion, and the State could have exercised diligence to monitor the district clerk's record for the filing of a signed order from that point forward. Instead, the State filed its motion for reconsideration of Appellee's motion to suppress without (by its own implicit admission) first checking the district clerk's record for a signed order. Indeed, for all that the appellate record suggests, the State was simply unaware of the holdings of Rosenbaum and Bage,FN12 which plainly and consistently identify the signing of the order as the event that commences the timetable for filing its notice of appeal.

FN11. "A person has notice of a fact ... if that person [among other things] is considered as having been able to ascertain it by checking an official filing or recording." Black's Law Dictionary 1227 (10th ed.2014). Indeed, the State seems to concede that filing of the signed order would suffice to provide adequate notice when it complained that a trial court could thwart its right to appeal by waiting more than twenty days to file its signed order or "otherwise giv[e] the State notice of the existence of said order[.]" State's Brief at 15 (emphasis added).

FN12. As we have already observed, see text at page 5–6, ante, as late as the hearing on November 6th, the State argued that "the question now becomes whether or not the Court's signing of the order versus the entering of it by the district clerk is the date of—the effective date."

What is more, the State could have been far more proactive in protecting its right to appeal in this case. In addition to monitoring the district clerk's record, the State could have filed its notice of appeal at any time after the trial court announced its intention to grant the motion to suppress—or even after the trial court first took the motion under advisement on February 14th, signaling that it was taking the motion seriously. It is true, of course, that the trial court's oral pronouncements on the record do not constitute appealable orders. State v. Sanavongxay, 407 S.W.3d at 258. And, in any event, the State was apparently waiting for Appellee to provide the proposed findings of fact and conclusions of law that the trial court had requested on July 7th. Had the State filed its notice of appeal before the order was signed, it would certainly have been deemed premature. But the Rules of Appellate Procedure

do not prohibit the filing of a premature notice of appeal; in fact, they expressly recognize the premature filing of a notice of appeal, specifically making it "effective and deemed filed on the same day, but after ... the appealable order [was] signed by the trial court." TEX.R.APP. P. 27.1(b). The State exercised no such diligence in this case.FN13

FN13. The State complains that an unscrupulous trial court could insulate its ruling from appellate review and altogether rob the State of its right to interlocutory appeal of a motion to suppress by deliberately signing an order granting the motion and then withholding the order from the district clerk for twenty days. There is no suggestion of such conduct in this case. And even if we shared the State's point of view, we would observe that it is wholly within the State's ability to obviate such machinations by filing a premature notice of appeal as we have suggested in the text.

Conclusion: For the reasons given, we cannot conclude that the court of appeals erred to follow our precedents and dismiss the State's appeal for lack of jurisdiction. We affirm its judgment.

In the Matter of M.L.M., No. 08-13-00250-CV, --- S.W.3d ----, 2015 WL 400562, Tex.Juv.Rep. Vol. 29, No. 1 ¶ 15-1-9 (Tex.App.-El Paso, 1/30/15).

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

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

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

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

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

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

A search showed that Surrell had six items of clothing that had been stuffed inside of several girdles that she was wearing. A police officer testified that girdles are often used by shoplifters to compress items of clothing they are stealing. The officers doing the search were amazed at how tight the girdles fit on Surrell, which led the lead

investigating officer to believe that she must have had assistance in putting the girdles on over the stolen items. The police recovered a total of $829.99 worth of stolen clothing on Surrell.

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

PROCEDURAL BACKGROUND

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

The disposition hearing was held sixteen days later. The referee stated that: "I found you had engaged in delinquent conduct on basically a shoplifting charge." He recommended a "no disposition" outcome which was adopted by the district court. The disposition order recites that M.L.M. had engaged in delinquent conduct which is the focus of this appeal.

ISSUES FOR REVIEW

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

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

Held: Affirmed.

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

C.S.S.B.1901 adds a new offense entitled 'Organized Retail Theft' to the theft provisions of the Penal Code and provides specific criminal penalties for persons charged with engaging in these activities. This bill also increases the penalty for those supervising one or more individuals engaged in organized retail theft. This bill authorizes an organized retail theft case to be prosecuted in any county in which an underlying theft could have been prosecuted as a separate offense. House Comm. on Criminal Jurisprudence, Bill Analysis, C.S.H.B. 3584, 80th Leg., R.S. (2007)(available at http:// www.lrl.state.tx.us/scanned/srcBillAnalyses/80–0/SB1901RPT.PDF). We have found no cases substantively construing the provisions of the Organized Retail Theft statute since it was enacted.

M.L.M. contends that because both of these enactments address the same conduct and the goods taken were "retail merchandise," only the Organized Retail Theft enactment can apply here because it is the more specific

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

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

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

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

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

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

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

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

CONFESSIONS—

Hawkins v. State, MEMORANDUM, No. 12-13-00394-CR, 2015 WL 6166583, Tex.Juv.Rep. Vol. 30, No. 1 ¶ 16-1-2A (Tex.App.-Tyler, 10/21/2015).

APPELLANT'S STATEMENTS CONCERNING THE FINDING OF DELINQUENT CONDUCT MADE IN HIS APPLICATION FOR COMMUNITY SUPERVISION AND APPLICATION TO SEAL FILES AND RECORDS WERE NOT CONSIDERED JUDICIAL ADMISSIONS.

Facts: Appellant was charged by indictment with aggravated robbery. The indictment further alleged that Appellant was, as a juvenile, found to have engaged in delinquent conduct,FN1 for which he was committed to the Texas Youth Commission for an indeterminate period. Appellant pleaded "not guilty," and the matter proceeded to a jury trial.

FN1. The delinquent conduct was alleged to have been the commission of robbery in violation of penal law.

The jury found Appellant "guilty" as charged, and the matter proceeded to a trial on punishment. At the outset of the punishment proceedings, Appellant stipulated and pleaded "true" to the enhancement allegation in the indictment. Ultimately, the jury assessed Appellant's punishment at imprisonment for seventy years. The trial court sentenced Appellant accordingly, and this appeal followed.

LIMITATIONS ON VOIR DIRE CONCERNING RANGE OF PUNISHMENT

In his fifth issue, Appellant argues that the trial court committed reversible error by preventing him from conducting voir dire on the full range of punishment by refusing to permit him to question the venire panel about Appellant's possibly receiving community supervision.

We review the trial court's determination concerning the propriety of a voir dire question for abuse of discretion. See Barajas v. State, 93 S.W.3d 36, 38 (Tex.Crim.App.2002). The trial court abuses its discretion only when a proper question concerning a proper area of inquiry is prohibited. See Dinkins v. State, 894 S.W.2d 330, 345 (Tex.Crim.App.1995).

Held: Affirmed and modified.

Opinion: The purposes of voir dire are to (1) develop a rapport between the officers of the court and the jurors; (2) expose juror bias or interest warranting a challenge for cause; and (3) elicit information necessary to intelligently use peremptory challenges. Dhillon v. State, 138 S.W.3d 583, 587 (Tex.App.–Houston [14th Dist.] 2004, pet. struck). However, a trial judge may not restrict proper questions that seek to discover a juror's views on issues relevant to the case. Id. The scope of permissible voir dire examination is necessarily broad to enable litigants to discover bias or prejudice so that they may make challenges for cause or peremptory challenges. Zavala v. State, 401 S.W.3d 171, 175 (Tex.Crim.App.2011).

Both parties are entitled to jurors who can consider the entire range of punishment for the particular statutory offense, i.e., from the maximum to the minimum and all points in between. See Cardenas v. State, 325 S.W.3d 179, 184 (Tex.Crim.App.2010). Jurors must be able to consider both a situation in which the minimum penalty would be appropriate and a situation in which the maximum penalty would be appropriate. Id. Therefore, both sides may question the panel on the range of punishment and may commit jurors to consider the entire range of punishment for the statutory offense. Id. A question committing a juror to consider the minimum punishment is both proper and permissible. Id.

In the case at hand, the State argues that Appellant was not eligible for community supervision because he judicially admitted that he previously was "given an indeterminate sentence for a juvenile finding of having engaged in delinquent conduct for the charge of robbery." FN4

FN4. For Appellant to have been considered ineligible for community supervision, the State was required to prove the enhancement pursuant to Texas Penal Code, Sections 12.42(c)(1) and (f). The enhancement under Section 12.42(c)(1), if proven, would raise Appellant's minimum sentence to imprisonment for fifteen years. SeeTEX. PENAL CODE ANN. 12.42(c)(1) (West Supp.2014). Thus, if the enhancement were proven, the jury could not consider community supervision as punishment because Appellant's minimum sentence would be greater than ten

years. SeeTEX. CODE CRIM. PROC. ANN. art. 42.12 § 4(d)(1) (West Supp.2014). To prove the enhancement, the State could rely on the finding that Appellant was found to have committed delinquent conduct by committing robbery, for which he was committed to the Texas Juvenile Justice Department or to a postadjudication secure correctional facility. SeeTEX. PENAL CODE ANN. 12.42(f) (West Supp.2014); TEX. FAM. CODE ANN. § 54.04(d)(2), (l) (West 2014).

Judicial Admissions

A judicial admission or stipulation may be used in a criminal case to prove up a prior conviction. See Beck v. State, 719 S.W.2d 205, 209 (Tex.Crim.App.1986); Davis v. State, No. 06–07–00209–CR, 2008 WL 3914966, at *2 (Tex.App.–Texarkana Aug. 18, 2008, no pet.)(mem. op., not designated for publication). A judicial admission is not evidence. See Bryant v. State, 187 S.W.3d 397, 400 (Tex.Crim.App.2005). Rather, it is a formal concession in the pleadings in the case or a stipulation by a party or his counsel that has the effect of withdrawing a fact from issue and dispensing wholly with the need for proof thereof. See id.

The source of a judicial admission may be facts alleged in a pleading, an agreed upon statement of facts, a stipulation, or a formal declaration made in open court by a party or counsel. Davidson v. State, 737 S.W.2d 942, 948 (Tex.App.–Amarillo 1987, pet. ref'd). As long as the source of the admission remains unretracted, it must be taken as true by the court and the jury. Davidson, 737 S.W.2d at 948.FN5 It is binding on the declarant, and he cannot introduce evidence to contradict it. Id.

FN5. In a civil context, the elements for establishing that a statement is a judicial admission are (1) the statement must be made in the course of a judicial proceeding; (2) it must be contrary to an essential fact or defense asserted by the party; (3) it must be deliberate, clear, and unequivocal; (4) it cannot be destructive of the opposing party's theory of recovery or defense; and (5) enforcing the statement as a judicial admission must be consistent with public policy. See Khan v. GBAK Properties, Inc., 371 S.W.3d 347, 357 (Tex.App.–Houston [1st Dist.] 2012, no pet.).

However, to qualify as a judicial admission, the accused's statement should be "clear and intentional." Taulung v. State, 979 S.W.2d 854, 857 (Tex.App.–Waco 1998, no pet.); Avila v. State, 954 S.W.2d 830, 835 (Tex.App.–El Paso 1997, pet. ref'd). The "intention" as it relates to a judicial admission is the intention to make "an act of waiver." Griffin v. Superior Ins. Co., 338 S.W.2d 415, 420 (Tex.1960). In other words, the party must intend to relinquish the right to have the State prove its case. Cf. Wappler v. State, 138 S.W.3d 331, 333 (Tex.Crim.App.2004) (waiver requires intentional relinquishment or abandonment of known right); see Bryant, 187 S.W.3d at 400.

In the instant case, Appellant filed an Application for Community Supervision, in which he asserted as follows:

RAY HAWKINS, JR. has never before been convicted of a felony in the State of Texas or any other state as the term "conviction" is defined by the Texas Code of Criminal Procedure in regard to probation eligibility.

RAY HAWKINS, JR. has been given an indeterminate sentence for a juvenile finding of having engaged in delinquent conduct for the charge of robbery.

Appellant also filed an application to seal files and records, in which he stated as follows:

Applicant was charged with the felony offense of robbery. He was not transferred to a criminal court for prosecution pursuant to Section 54.02 of the Texas Family Code. He was placed on juvenile probation for a period of 12 months.

In each of these pleadings, Appellant made clear, unequivocal statements of facts during the course of a judicial proceeding. However, there is no indication from the context of these statements or elsewhere in the record that Appellant intended the statements to be an act of waiver of his right to have the State prove these facts its case against him. Indeed, Appellant made one of these statements in an application for community supervision. It would be counterintuitive for this court to conclude that Appellant, in seeking to have the jury consider community supervision, would make a statement with the intent that such a statement should foreclose that option. Moreover, in

attempting to seal records pertaining to the previous court finding concerning his delinquent conduct, it makes little sense that Appellant intended to dispense wholly with the need for the State to prove the facts he was attempting to seal.

Conclusion: Accordingly, we conclude that Appellant's statements concerning the finding of delinquent conduct made in his application for community supervision and application to seal files and records were not judicial admissions. Therefore, Appellant was entitled to conduct voir dire examination on the venire panel concerning the entire range of punishment, including community supervision, and the trial court abused its discretion by restricting Appellant's examination on that subject.

Harm Analysis

The court of criminal appeals recently held that the proper analysis is not to apply a per se harm analysis rule to a voir dire error, but rather to determine if the error is substantial enough to warrant a Rule 44.2(a) harm analysis; if not, then the error is reviewed under Rule 44.2(b). See Easley v. State, 424 S.W.3d 535 (Tex.Crim.App.2014); see also TEX. R. APP. P. 44.2. More specifically, the court held as follows:

Under Rule 44.2(b), which applies to nonconstitutional error, we will affirm a judgment unless the error affects the appellant's substantial rights or deprives him of a fair trial. SeeTEX. R. APP. P. 44.2(b); Easley, 424 S.W.3d at 539, 541–42 (citing Johnson v. State, 43 S.W.3d 1, 4 (Tex.Crim.App.2001)). But under Rule 44.2(a), if the error is a constitutional violation, we must reverse the judgment unless we determine "beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a); see Easley, 424 S.W.3d at 540–41.

A juror must be able to consider the full range of punishment for an offense, and a defendant's voir dire question about a juror's ability to do so is generally proper. Cardenas v. State, 325 S.W.3d 179, 184 (Tex.Crim.App.2010); see TEX. CODE CRIM. PROC. art. 35.16(c)(2) (West 2006). If a juror cannot consider an offense's full range of punishment, the juror is challengeable for cause. Cardenas, 325 S.W.3d at 184–85; see also Standefer v. State, 59 S.W.3d 177, 181 (Tex.Crim.App.2001); Banda v. State, 890 S.W.2d 42, 55 (Tex.Crim.App.1994) (explaining that a "person who testifies unequivocally that he could not consider the minimum sentence as a proper punishment for [an] offense ... is properly the subject of a challenge for cause").

In the instant case, the trial court refused to allow Appellant to question the venire panel about whether it could consider community supervision because it erroneously concluded that Appellant had judicially admitted the enhancement allegations. In light of Easley, we must determine if this error is a constitutional error or a nonconstitutional error. Id. at 541.

In reviewing the record, we note that at the outset of his trial on punishment, Appellant stipulated to the enhancement allegations and pleaded "true" thereto. The jury ultimately found the enhancement allegation to be "true." As a result, the jury could not properly consider sentencing Appellant to community supervision.FN7 Therefore, because the jury could not legally consider community supervision in determining Appellant's punishment, we hold that the record supports beyond a reasonable doubt that Appellant suffered no harm from the trial court's erroneous ruling. Cf. Hart v. State, 173 S.W.3d 131, 143 (Tex.App.–Texarkana 2005, no pet.)(no error where trial court refused to permit the appellant to question venire panel on range of punishment if state failed to prove enhancement because enhancements found to be "true" and the appellant was sentenced under range of punishment about which panel was questioned).FN8 Appellant's fifth issue is overruled.

FN7. See n.3.

FN8. In conjunction with Appellant's stipulating to the enhancement allegations, Appellant's counsel told the trial court that because of the trial court's ruling, Appellant had to change his trial strategy. This statement was made in the context of informing the trial court that Appellant did not intend to waive his previous objections concerning the trial court's limiting his voir dire examination. However, Appellant's counsel did not elaborate on this change of trial strategy and there is no evidence of record that would allow us to determine what that change was or whether Appellant was harmed thereby.

Gonzales v. State, No. 04-14-00352-CR, --- S.W.3d ----, 2015 WL 2124773, Tex.Juv.Rep. Vol. 29, No. 1 ¶ 15-2-2B (Tex.App.-San Antonio, May 6, 2015).

BECAUSE THE EVIDENCE SUPPORTED THAT JUVENILE WAS FREE TO LEAVE AT ANY TIME AND THAT HE ELECTED TO CONTINUE SPEAKING TO DETECTIVE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING DETECTIVE TO TESTIFY REGARDING JUVENILE'S STATEMENT AND TO ADMIT A VIDEO-RECORDING OF HIS STATEMENT.

Facts: On August 13, 2012, David Estrada and Appellant Gonzales went to an apartment complex to purchase marijuana from James Whitley. Gonzales was fifteen-years-old at the time. Gonzales exchanged several phone calls with Whitley regarding the purchase of the marijuana. Before going to the apartment complex, Gonzales and Estrada decided to rob Whitley of the marijuana. Gonzales brought his Smith & Wesson .40 caliber semi-automatic firearm for purposes of the robbery.

Estrada and Gonzales were driven to the apartment complex by a third individual who did not know of their plans and did not know Gonzales brought a firearm to the meeting. When they arrived at the apartment complex, Estrada and Gonzales met Whitley and an-other individual, Pablo Pecina, by the washroom. Gonzales asked for the drugs and Whitley asked for the money. Estrada stalled and Gonzales lifted his shirt and pulled out his fire-arm. To Gonzales's surprise, Whitley also pulled a weapon and both men fired.

Whitley was struck in the thigh and died from his injuries; the bullet that struck Gonzales grazed his head, requiring a couple of staples. Gonzales and Estrada ran back to the vehicle and Gonzales asked the driver to take him to the hospital. Instead, the driver pulled into a gas station a short distance away. The driver called 911, told the dispatch, "Hey, my friend's been shot. Here he is," and he and Estrada left. Before leaving, Gonzales gave Estrada the firearm and told him to get rid of it.

While the San Antonio police officers were investigating Whitley's shooting, they received the call of Gonzales's shooting. It was not until later that the officers realized the two gunshot victims were connected. When officers arrived at the gas station, Gonzales reported "We were walking down the street, somebody drives by and shoots me." While they were investigating, Gonzales's mother arrived. His mother told him to tell the officers the truth. Gonzales finally told them "I was at the apartment complex, the guy shoots me and I shot him back." By all accounts, at that point in the evening, the officers were investigating the incident as a case of self-defense.

Gonzales was originally handcuffed and taken to the juvenile facility. However, shortly after arriving, the officers transported Gonzales to the Santa Rosa Children's Hospital to be treated for his injuries. While Gonzales was at the emergency room, San Antonio Police Detective Raymond Roberts interviewed Estrada. Estrada told the officer that Whitley shot first; however, when confronted by the officer, Estrada confessed their plan to rob Whitley and identified Gonzales as possessing and firing the weapon. Detective Roberts requested Detective Kim Bower proceed to Santa Rosa Children's Hospital to check on Gonzales's condition and to tell his mother that Detective Roberts would like to speak to him. Detective Bowers testified she gave Gonzales's mother a card with her phone number and asked to her contact them when Gonzales was released.

Gonzales arrived at the police station between 2:30 a.m. and 3:00 a.m. Detective Roberts told both Gonzales and his mother "If y'all don't want to do it tonight, we don't have to do it tonight." The record shows Detective Roberts insisted Gonzales was not under arrest, and that Gonzales and his mother came in on their own, and they were both free to leave. In fact, Detective Roberts told both Gonzales and his mother that Gonzales would be leaving at the end of the interview. Detective Roberts did not Mirandize Gonzales and did not take him before a magistrate.

Detective Roberts asked Gonzales if he knew what was going on, if he was in pain, and how he felt. Gonzales responded, "I feel fine." Detective Roberts testified that Gonzales was able to answer all of his questions and did not appear to be in any distress. Gonzales originally told Detective Roberts that Whitley fired first and that he returned

fire; Detective Roberts confronted him with Estrada's version of events and Gonzales ultimately told Detective Roberts their plan was to steal the marijuana from Whitley. Gonzales also told Roberts that he always takes a gun with him whenever he goes to buy weed.

When asked to relay what transpired, Detective Roberts described Gonzales's demeanor to the court. He "kind of chuckled, smiled and he said, 'That was my first mistake. My second was letting him stand up.' " When Detective Roberts asked Gonzales to explain what he meant, Gonzales explained that he should have pointed his weapon directly at Whitley instead of pointing it down.

Before leaving the police station, Detective Roberts gave Gonzales an opportunity to tell his mother the version of events he had relayed to the officer. Detective Roberts told Gonzales and his mother that the information would be presented to a magistrate and, if the magistrate determined the facts satisfied the elements set forth in the murder statute, then a warrant would issue. He also explained that if Gonzales ran, it would make matters worse. Later that morning, the magistrate issued an arrest warrant and Gonzales was arrested for the murder of James Whitley. On September 26, 2012, the State filed its original petition for waiver of jurisdiction and discretionary transfer to criminal court.

After a hearing, the juvenile trial court found probable cause to believe that Gonzales committed the offense. The court concluded that due to the nature of the offense, Gonzales's use of a deadly weapon, the psychiatric evaluation, the probation officer's certification and transfer report, and the recommendations from the probation officers, the State's petition should be granted.

Held: Affirmed

Opinion: The State was adamant that Gonzales was not in custody when he gave his statement to Detective Roberts. Both he and his mother were told they could leave and did not have to talk to the officers. They were both told that no matter what Gonzales relayed to the officer, his mother would be taking him home that night. And, in fact, as the officer promised, Gonzales left with his mother and the case was presented to a magistrate.

Texas Family Code section 51.09

When a defendant is a juvenile at the time of his arrest, the provisions of the Texas Family Code control issues involving his substantive rights. Roquemore v. State, 60 S.W.3d 862, 866 (Tex.Crim.App.2001). Gonzales contends his interrogation by Detective Roberts constituted a custodial interrogation and that his confession should have been suppressed under Texas Family Code section 51.095 because he was not brought before a magistrate. See Tex. Fam.Code Ann. § 51.095 (West 2014); Meadoux v. State, 307 S.W.3d 401, 408 (Tex.App.–San Antonio 2009), aff'd, 325 S.W.3d 189 (Tex.Crim.App.2010).

Gonzales's Interrogation

In determining whether an individual is in custody, an appellate court examines all of the circumstances surrounding the interrogation to determine if there was a formal arrest or "restraint on freedom of movement to the degree associated with a formal arrest." Stansbury v. California, 511 U.S. 318, 322 (1994) (internal quotation marks omitted); In re D.J.C., 312 S.W.3d 704, 712 (Tex.App.–Houston [1st Dist.] 2009, no pet.). This de-termination focuses on the objective circumstances of the interrogation and not on the subjective views of either the interrogating officers or the person being questioned. See Stansbury, 511 U.S. at 323; In re D.J.C., 312 S.W.3d at 712. Our review focuses on whether, in light of the particular circumstances, a reasonable person would have felt that he was at liberty to terminate the interrogation and leave. Thompson v. Keohane, 516 U.S. 99, 112 (1995); In re D.J.C., 312 S.W.3d at 712.

In Dowthitt v. State, 931 S.W.2d 244, 255 (Tex.Crim.App.1996), the Court of Criminal Appeals set forth four factors relevant to the determination of whether an individual is in custody: (1) Was the suspect "physically deprived of his freedom of action in any significant way"?; (2) Did "a law enforcement officer tell the suspect that he cannot leave"?; (3) Did the "law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted"?; or (4) Was there "probable cause to arrest and law

enforcement officers [did] not tell the suspect that he [was] free to leave"? Id.; see also In re D.J.C., 312 S.W.3d at 713. We remain mindful that because the custody determination is based entirely on objective circumstances, whether the law enforcement official had the subjective intent to arrest is irrelevant unless that intent is somehow communicated to the suspect. Stansbury, 511 U.S. at 323–24; Dowthitt, 931 S.W.2d at 254; In re D.J.C., 312 S.W.3d at 713. We, therefore, turn to an analysis of each of the Dowthitt factors.

1. Was Gonzales Physically Deprived of His Freedom of Action?

"[O]rdinarily, when a person voluntarily accompanies a law enforcement officer to a certain location, even though the person knows or should know that the officer suspects that he or she may have committed or may be implicated in the commission of a crime, the person is not restrained or 'in custody.' " Garcia v. State, 237 S.W.3d 833, 836 (Tex.App.–Amarillo 2007, no pet.)(citing Miller v. State, 196 S.W.3d 256, 264 (Tex.App.–Fort Worth 2006, pet. ref'd)). "When the circumstances show that the individual acts upon the invitation or request of the police and there are no threats, express or implied, that he will be forcibly taken, then that person is not in custody at that time." In re D.J.C., 312 S.W.3d at 713; Garcia, 237 S.W.3d at 836 (citing Shiflet v. State, 732 S.W.2d 622, 628 (Tex.Crim.App.1985)).

Here, the only testimony before the juvenile court was that Gonzales and his mother were told they did not have to speak to the officers and that they could leave at any time. Gonzales's mother did testify that Detective Bowers told her that the officers "thought it was self-defense and that if I would take him back that they could clear it all up." However, that does not rebut the officer's testimony that Gonzales and his mother knew they could leave the interrogation if they chose to do so.

2. Did Detective Roberts Communicate that Gonzales Was Not Free to Leave?

There is no indication, and Gonzales does not allege, that at any point during his conversation with Detective Roberts that Detective Roberts, or any other individual, told Gonzales that he was not free to leave. All evidence contained within the record supports the contrary proposition.

3. Would a Reasonable Person Believe His Freedom of Movement Was Restricted?

At several points prior to the interview, and at several points during the interview, Detective Roberts told Gonzales that he would be leaving the police station after giving his statement. Detective Roberts testified he did not consider Gonzales in custody and did not plan to arrest Gonzales prior to seeking an arrest warrant from a magistrate. Detective Roberts clearly articulated his subjective intent to Gonzales and his mother. See Stansbury, 511 U.S. at 323 (communicating subjective intent affects objective circumstances); Dowthitt, 931 S.W.2d at 254 (same); In re D.J.C., 312 S.W.3d at 713 (same).

Although Gonzales contends that his age and the events earlier that evening would lead a reasonable person to believe he was in custody, the record simply does not support such an allegation. At no time following the doctor's examination at the hospital was Gonzales in handcuffs. Gonzales left the hospital with his mother and his mother took him to the police station. Nothing compelled either Gonzales or his mother to be at the police station. When they arrived, Gonzales and his mother were informed they were free to leave at any time and did not have to talk to the officers. After Gonzales finished speaking to Detective Roberts, he and his mother voluntarily left the police station.

4. Was There Probable Cause to Arrest and Detective Roberts Failed to Tell Gonzales He Was Free to Leave?

By the time Detective Roberts interviewed Gonzales, he had already interviewed Estrada and knew Gonzales was involved in Whitley's death. However, Detective Roberts testified that although Estrada claimed the firearm belonged to Gonzales and that Gonzales was the individual who shot Whitley, he anticipated Gonzales could reasonably point the finger at Estrada as the shooter. It was not until Gonzales told the officer that the gun used during the robbery was his firearm, that he brought the weapon to the apartment complex, and that he fired at Whitley that Detective Roberts was able to confirm Estrada's statement.

Although Detective Roberts may well have possessed probable cause to arrest Gonzales at some point during the interview, there is no controverting evidence that Detective Roberts instructed Gonzales that he was free to leave and Gonzales left. Detective Roberts also clearly articulated his intent to present the evidence to the magistrate and that

he anticipated a warrant would issue for Gonzales's arrest. The concern that an officer has established probable cause to arrest and does not tell the defendant that he is free to leave, as outlined in Dowthitt and its progeny, is not present in this case. See Dowthitt, 931 S.W.2d at 255; Aguilera v. State, 425 S.W.3d 448, 456 (Tex.App.–Houston [1st Dist.] 2011, pet. ref'd).

Application

Because this case turns on the trial court's determination of credibility and demeanor, we give almost total deference to the trial court's factual findings. Montanez, 195 S.W.3d at 106; Guzman, 955 S.W.2d at 89. Although the evidence supports Gonzales was originally handcuffed at the gas station, and when he was transported to the juvenile facility and Santa Rosa Children's Hospital, he was never in handcuffs or restrained in any manner when he spoke to Detective Roberts. Detective Roberts' s testimony that he specifically told both Gonzales and his mother that she would be taking Gonzales home that evening was supported by Detective Bowers's testimony as well as the video recording of Gonzales's statement. Merely being questioned by an officer, even when the officer has reason to believe the juvenile is involved in a criminal activity, does not constitute custody. Dowthitt, 931 S.W.2d at 255; In re D.J.C., 312 S.W.3d at 713. Gonzales was present with his mother, both Gonzales and his mother agreed for Gonzales to speak to Detective Roberts, Gonzales was told that he was not under arrest, and he left the police station after his statement.

Conclusion: Because the evidence supports that Gonzales was free to leave at any time and that he elected to speak to Detective Roberts, we conclude that a reasonable person would have believed he was at liberty to terminate the interrogation and leave. See Thompson, 516 U.S. at 112; Stansbury, 511 U.S. at 323; Dowthitt, 931 S.W.2d at 254–55. Accordingly, the trial court did not abuse its discretion in allowing Detective Roberts to testify regarding Gonzales's statement and to admit a video-recording of the same statement into testimony. We, therefore, overrule Gonzales's second issue.

Stanley v. State, No. 04-13-00663-CR, MEMORANDUM, 2015 WL 358524, Tex.Juv.Rep. Vol.29, No. 1 ¶ 15-1-12 (Tex.App.-San Antonio, 1/28/15).

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

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

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

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

Detective Omungo testified he conferred with Detective Angell about the conversation with Stanley. Thereafter,

Detective Omungo prepared a warrant for Stanley's arrest. The police arrested Stanley the next morning and took him to a police substation where Detective Omungo interviewed him.

Detective Omungo testified that when he arrived at the substation, Stanley was in an interview room. Detective Omungo also testified he removed Stanley's handcuffs, introduced himself, and asked Stanley if he was "okay." Thereafter, the detective read Stanley his Miranda rights. According to Detective Omungo, after he asked Stanley if he understood his rights, Stanley nodded affirmatively. Detective Omungo then asked Stanley to share his side of the story. Stanley replied, stating his mother had told him to wait for a lawyer. Detective Omungo testified he told Stanley he could not force him to talk. Stanley then asked if he could call his mother to see if she was obtaining a lawyer. Detective Omungo testified he told Stanley he could call his mother if he wanted or he could talk to him about what happened. Stanley remained quiet for a moment and then proceeded to tell Detective Omungo how he and Ramirez robbed Fernandez and during the robbery, Ramirez murdered Fernandez.

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

ANALYSIS

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

Held: Affirmed

Memorandum Opinion: Post Arrest Statement to Detective Omungo

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

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

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

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

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

Invocation of Right to Counsel

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

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

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

The DVD recording shows Stanley told Detective Omungo that his mother told him not to speak to anyone unless he had an attorney. Detective Omungo informed eighteen-year-old Stanley that it was up to him whether he wanted to discuss what happened. Stanley then asked if he could call his mother to ask if she was bringing an attorney, and Detective Omungo told Stanley he could call his mother, but he was old enough to decide if he wanted to speak to the detective. Moreover, at the suppression hearing, Detective Omungo testified he told Stanley he was an adult and could make the decision on his own whether to speak to the detective without an attorney. Stanley paused, and Detective Omungo asked him what he would like to do. Stanley then proceeded to provide Detective Omungo with a statement regarding the robbery and murder.

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

When considering the totality of the circumstances, we hold Stanley's request to speak to his mother with regard to her obtaining an attorney for him was not a clear invocation of his right to counsel. Texas case law holds that an invocation of the right to counsel must be clear and unambiguous. See, e.g., Davis, 313 S.W.3d at 341 (holding that

defendant's statement "Should I have an attorney?" was not clear request for counsel); Dalton, 248 S.W.3d at 873 (holding that defendant's statement to officer to tell his friends to get lawyer was not direct, unequivocal request for attorney); Mbugua v. State, 312 S.W.3d 657, 665 (Tex.App.—Houston [1st Dist.] 2009, pet. ref d) (holding that "Can I wait until my lawyer gets here?" was not clear and unambiguous invocation of right to counsel).

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

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

COURT ORDERED FEES—

Maza v. State, MEMORANDUM, No. 13-14-00128-CR, 2015 WL 3637821, Tex.Juv.Rep. Vol. 29 No. 2 ¶15-2-8 (Tex.App.-Corpus Christi, June 11, 2015).

ONCE A LAWYER HAS BEEN APPOINTED BY THE TRIAL COURT, THAT COURT MUST HEAR EVIDENCE AND DETERMINE WHETHER A MATERIAL CHANGE IN THE DEFENDANT'S FINANCIAL CIRCUMSTANCES HAS OCCURRED (SINCE HIS INITIAL DECLARATION OF INDIGENCE) BEFORE ASSESSING ATTORNEY'S FEES.

Facts: Maza was indicted on two counts of child molestation. Pursuant to a plea agreement, Maza pleaded guilty to aggravated sexual assault of a child, and the State abandoned an indecency with a child charge. On August 27, 2007, the trial court placed Maza on deferred-adjudication community supervision for seven years and assessed a $1000.00 fine. The State filed a motion to revoke Maza's community supervision on September 20, 2013. At the revocation hearing, after Maza pleaded true to all of the alleged violations, the trial court found all allegations to be true, adjudicated Maza's guilt, revoked his community supervision, and assessed punishment at confinement for thirty-five years in the Institutional Division of the Texas Department of Criminal Justice. See id. § 12.32(a) ("An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years."). The trial court also assessed attorney's fees of $1600.00 against Maza. This appeal followed.

Held: Affirmed as modified

Memorandum Opinion: Maza argues, by his second issue, that the trial court abused its discretion when it assessed attorney's fees against him, an indigent offender. Although the record does not reflect an express finding of Maza's indigence, the trial court appointed counsel to represent him. See TEX.CODE CRIM. PROC. Ann. art. 1.051 (West, Westlaw through 2013 3d C.S.).

Article 26.05(g) of the code of criminal procedure provides trial courts with discretionary authority to order reimbursement of appointed attorney's fees when the "defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided[.]" See id. art. 26.05(g) (West, Westlaw through 2013 3d C.S.). Before doing so, however, the trial court must hear evidence and determine whether a material change in the

defendant's financial circumstances has occurred since his initial declaration of indigence. See Mayer v. State, 309 S.W.3d 552, 556 (Tex.Crim.App.2010). The trial court made no such determination in this case. See id.

In the absence of evidence demonstrating Maza's financial resources to offset the costs of legal services, the State concedes, and we agree, that the trial court erred in assessing attorney's fees against Maza, who presumably remained indigent. See id. We sustain Maza's second issue.

Conclusion: We modify the trial court's judgment to delete the $1600.00 in attorney's fees assessed against Maza. We affirm the trial court's judgment as modified.

DEFENSE COUNSEL—

In the Matter of R.F., MEMORANDUM, No. 02-14-00345-CV, 2015 WL 5893465, Tex.Juv.Rep. Vol. 29 No. 3 ¶15-3-6 (Tex.App.—Fort Worth, 10/8/2015).

THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL WHERE IT WAS PROBABLE THAT THE END RESULT WOULD HAVE BEEN THE SAME EVEN WITHOUT THE EVIDENCE REGARDING EXTRANEOUS OFFENSES THAT COUNSEL FAILED TO OBJECT TO.

Facts: R.F. was twelve years old when he committed two counts of aggravated sexual assault of a child. After pleading "True" to the charges, R.F. was found to have engaged in delinquent conduct in violation of penal code section 22.021, and the trial court sentenced him to a period of two years' probation with placement in a residential sexual offender treatment facility and boot camp program.

On June 23, 2014, the State petitioned to modify R.F.'s disposition on the grounds that he had violated his conditions of probation by (1) committing the further offense of recklessly exposing his genitals with the intent to arouse or gratify his sexual desire; (2) failing to complete the Boot Camp's programs, follow all of the facility's rules, and not leave the facility without permission; and (3) failing to attend, participate in, and successfully complete a sex offender counseling program and an aftercare program with a registered sex offender treatment therapist.

At the modification hearing, the state called three witnesses: Karla Doster, Jonathan Neece and Scott Gieger. Doster, R.F.'s case manager, testified that almost immediately after R.F. began the Boot Camp program on September 6, 2013, he started accumulating behavior citations for breaking the rules.2 According to Doster, R.F. exhibited defiance toward staff and authority figures, cursed at and threatened staff, and refused to participate in the program. During his nine-month stay at the Boot Camp, R.F. received 113 violations for misbehavior, ranging from using profanity, disrupting group therapy sessions, making inappropriate sexual comments, gestures, and overtures toward peers and staff, and making false allegations towards staff, to exposing his genitals. Doster also testified generally about R.F.'s disrespect for authority and refusal to take personal responsibility for his choices.

Neece, R.F.'s sex offender treatment therapist, testified that the Boot Camp program consisted of three phases, and that most program participants completed the first phase within four to five months. After nine months in the program, R.F. remained in phase one. Neece testified that, while in early 2014 R.F. began to apply himself and succeed in school, R.F.'s defiant and disrespectful behavior toward the rules and authority never waned.

Both Doster and Neece testified that on June 11, 2014, R.F. exposed his genitals to another resident. R.F admitted that he did this.

Gieger, R.F.'s juvenile probation officer, testified that the June 11 incident, in combination with his ongoing concerns regarding R.F.'s overall lack of progress in the program, was the last straw. R.F. was discharged from the Boot Camp two days later.

The trial court found that R.F.'s act of exposing himself to other program participants on June 11 and his subsequent discharge from Boot Camp constituted violations of the conditions of his probation and ordered that R.F. be committed to Texas Juvenile Justice Department (TJJD) for a period of time "not to exceed the time when he shall be 19 years of age." See Tex. Fam.Code Ann. § 54.05 (West 2014); Tex. Hum. Res.Code Ann. § 245.151 (West 2013).

R.F. complains in one issue of ineffective assistance of counsel. His complaint focuses on Gieger's testimony that in reviewing R.F.'s progress and making the decision to remove R.F. from the program, "the fact that there was another offense that basically was a sexual act," was "kind of [the] straw that broke the camel's back." He also complains about Doster's testimony that "several other recruits were providing statements that [R.F.] was touching them, rubbing against them, et cetera, during the POD and in class," that "other inmates wrote statements" and that "there 'were allegations made by the other residents that he was engaged in ... sexual impropriety'." R.F. contends that by failing to object to the testimony regarding these extraneous offenses under the Confrontation Clause, his counsel provided ineffective assistance of counsel.

Held: Affirmed

Memorandum Opinion: The effectiveness of counsel's representation in a juvenile proceeding is to be reviewed under the two prong Strickland v. Washington standard. 466 U.S. 668, 687–88, 104 S.Ct. 2052, 2064 (1984). To establish ineffective assistance of counsel, the appellant must show by a preponderance of the evidence that his counsel's representation was deficient and that the deficiency prejudiced the defense. Id. at 687; Nava v. State, 415 S.W.3d 289, 307 (Tex.Crim.App.2013); Hernandez v. State, 988 S.W.2d 770, 771 (Tex.Crim.App.1999). An ineffective-assistance claim must be "firmly founded in the record," and "the record must affirmatively demonstrate" the meritorious nature of the claim. Thompson v. State, 9 S.W.3d 808, 813 (Tex.Crim.App.1999).

Direct appeal is usually an inadequate vehicle for raising an ineffective-assistance-of-counsel claim because the record is generally undeveloped. Menefield v. State, 363 S.W.3d 591, 592–93 (Tex.Crim.App.2012); Thompson, 9 S.W.3d at 813–14. In evaluating the effectiveness of counsel under the deficient-performance prong, we look to the totality of the representation and the particular circumstances of each case. Thompson, 9 S.W.3d at 813. The issue is whether counsel's assistance was reasonable under all the circumstances and prevailing professional norms at the time of the alleged error. See Strickland, 466 U.S. at 688–89, 104 S.Ct. at 2065; Nava, 415 S.W.3d at 307. Review of counsel's representation is highly deferential, and the reviewing court indulges a strong presumption that counsel's conduct was not deficient. Nava, 415 S.W.3d at 307–08.

It is not appropriate for an appellate court to simply infer ineffective assistance based upon unclear portions of the record or when counsel's reasons for failing to do something do not appear in the record. Menefield, 363 S.W.3d at 593; Mata v. State, 226 S.W.3d 425, 432 (Tex.Crim.App.2007). Trial counsel "should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." Menefield, 363 S.W.3d at 593. If trial counsel is not given that opportunity, we should not conclude that counsel's performance was deficient unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." Nava, 415 S.W.3d at 308.

The prejudice prong of Strickland requires a showing that counsel's errors were so serious that they deprived the defendant of a fair trial, i.e., a trial with a reliable result. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. In other words, the appellant must show there is a reasonable probability that, without the deficient performance, the result of the proceeding would have been different. Id. at 694, 104 S.Ct. at 2068; Nava, 415 S.W.3d at 308. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068; Nava, 415 S.W.3d at 308. The ultimate focus of our inquiry must be on the fundamental fairness of the proceeding in which the result is being challenged. Strickland, 466 U.S. at 697, 104 S.Ct. at 2070.

No record was developed of counsel's reasons for failing to lodge a Confrontation Clause objection to the testimony regarding these extraneous offenses. Our scrutiny of his performance "must be highly deferential, and every effort must be made to eliminate the distorting effects of hindsight." Lopez v. State, 80 S.W.3d 624, 630

(Tex.App.—Fort Worth 2002), aff'd, 108 S.W.3d 293 (Tex.Crim.App.2003). Because the record is silent, R.F. has failed to rebut the presumption that his counsel acted reasonably. See, id. ("Where the record is silent as to counsel's reasons for failing to object, the appellant fails to rebut the presumption that counsel acted reasonably.").3

Even if the Confrontation Clause would render the statements by Doster and Neece inadmissible, the second prong of Strickland requires that the failure to object be so serious that it deprived R.F. of a fair trial, i.e., a trial with a reliable result. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

Doster and Neece testified that R.F. admitted to them that he had exposed his genitals to another resident, and as a result, he was expelled from the program. Doster listed in her summary of his placement stay that this occurred on June 11, 2014, and the trial court admitted her summary as part of Gieger's supplemental case history at the hearing. Notwithstanding whether R.F. engaged in any other extraneous offenses, proof by a preponderance of the evidence of any one of the alleged violations of the probation conditions is sufficient to support the revocation order. Moore v. State, 605 S.W.2d 924, 926 (Tex.Crim.App. [Panel Op.] 1980) (proof by a preponderance of the evidence of any one of the alleged violations of the conditions of community supervision is sufficient to support a revocation order).

Therefore, this evidence of the June 11 incident, standing alone, was sufficient to support the revocation of R.F.'s probation. See, e.g., In re R.L.R. Ill, No. 14–06–00926–CV, 2008 WL 323758, at *4 (Tex.App.—Houston [14th Dist] Feb. 7, 2008, no pet.) (counsel was not ineffective when appellant had admitted to his probation officer that he violated the conditions of his probation); Bennett v. State, 705 S.W.2d 806, 807 (Tex.App.—San Antonio 1986, no writ) ("In the light of appellant's admission [to violating three conditions of his probation], it is difficult to see how his attorney's conduct could effect a different result."); Herrera v. State, 656 S.W.2d 148, 149 (Tex.App.—Waco 1983, no writ) ("[A]n oral admission of a violation of the probation terms, made by probationer to his probation officer, is sufficient to revoke probation.").

Conclusion: Therefore, there is no reasonable probability that the proceeding's result would have been different even without the evidence regarding extraneous offenses. See Strickland, 466 U.S. at 694, 104 S.Ct. at 2068; Nava, 415 S.W.3d at 308. Thus, counsel's failure to object to this testimony did not deprive R.F. of a fair trial. We overrule R.F.'s sole issue.

DETENTION—

In re N.T., MEMORANDUM, No. 01-15-00970-CV, 2015 WL 7738709, Tex.Juv.Rep. Vol. 30 No. 1 ¶16-1-4 [Tex.App.-Hous. (14th Dist.), 11/25/2015].

REQUEST THAT DETENTION HEARINGS BE RECORDED MUST BE MADE IF RELATOR IS TO CONTEND THAT THE TRIAL JUDGE ABUSED HIS DISCRETION IN SIGNING DETENTION ORDER.

Facts: Original Proceeding on Petition for Writ of Mandamus. Relator, N.T., has filed a petition for a writ of mandamus, challenging an Order for Detention in a juvenile proceeding. In two issues, relator contends that respondent, the Honorable John Phillips, abused his discretion by signing a void order for detention without making any of the statutorily required findings to support detention. See TEX. FAM. CODE ANN. § 54.01(e) (Vernon 2014) (providing child shall be released from detention unless juvenile court finds one of five listed circumstances supports detention); In re Hall, 286 S.W.3d 925, 929 (Tex. 2009) (citing TEX. FAM. CODE ANN. § 54.01(e)) (stating, following detention hearing, court must release child unless it finds one of five listed circumstances supports detention).

Within the petition, relator asserts that after his counsel requested a record of the detention hearing, respondent replied, " 'you don't have a right to a record' " and no record would be made.

Held: Petition denied.

Memorandum Opinion: The Family Code requires that all juvenile judicial proceedings be recorded, "except detention hearings." TEX. FAM. CODE ANN. § 54.09 (Vernon 2014); see In re M.R.R., Jr., 2 S.W.3d 319, 327 (Tex.App.—San Antonio 1999, no pet.). However, "[u]pon request of any party, a detention hearing shall be recorded." TEX. FAM. CODE ANN. § 54.09 (emphasis added). From the petition, we cannot tell whether the trial court conducted an evidentiary hearing. See id. § 54.01(c) (Vernon 2014) (providing, at detention hearing, court may consider "written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses"). Nor can we tell whether relator timely and properly requested that the detention hearing be recorded. See Benjamin v. Benjamin, No. 01–10–01003–CV, 2013 WL 4507848, at *2 (Tex.App.—Houston [1st Dist.] Aug. 22, 2013, no pet.) (mem.op.) (citing Nabelek v. Dist. Attorney of Harris Cnty., 290 S.W.3d 222, 231 (Tex.App.—Houston [14th Dist.] 2005, pet. denied)).

Conclusion: We deny the petition.

DETERMINATE SENTENCE TRANSFER—

In the Matter of N.G.-D., MEMORANDUM, No. 03-14-00437-CV, 2016 WL 105948, Tex.Juv.Rep. Vol. 30 No. 1 ¶16-1-9A (Tex.App.-Austin, 1/8/2016).

THE FAMILY CODE SECTION 54.11, WHICH GOVERNS POST-ADJUDICATION TRANSFERS TO TDCJ, CONTAINS NO REQUIREMENT THAT THE JUVENILE COURT MAKE SPECIFIC FINDINGS STATING THE REASONS FOR ITS DECISION TO TRANSFER THE JUVENILE TO TDCJ OR TO PUT THEM IN THE TRANSFER ORDER.

Facts: In June 2011, the district court, sitting as a juvenile court, adjudicated appellant delinquent of two counts of aggravated sexual assault of a child for sexually assaulting an eight-year-old neighbor boy.2 See Tex. Fam.Code § 54.03(f); Tex. Penal Code § 22.021(a)(1), (2)(B). The court placed appellant on determinate-sentence probation for ten years for one of the counts. See Tex. Fam.Code §§ 53.045(a), 54.04(d)(3), (q). The court severed out the second count, postponing disposition pending appellant's progress on the probated count. In April 2012, after appellant absconded from a halfway house, the court assessed a determinate sentence of 30 years on the previously severed out count and placed appellant in the custody of TJJD. See id. §§ 53.045(a)(5), 54.04(d)(3). In January 2014, 21 months into appellant's determinate sentence, TJJD requested a transfer hearing and recommended that appellant, now almost 19 years old, be transferred to TDCJ. See Tex. Hum. Res.Code § 244.014. After a two-day transfer hearing, the juvenile court ordered appellant to serve the remainder of his 30–year determinate sentence in the custody of TDCJ. See Tex. Fam.Code § 54.11(a), (i).

In his sole issue on appeal, appellant asserts that the juvenile court abused its discretion by failing to make explicit findings explaining the reasons for its decision to transfer him to TDCJ, by failing to consider his best interests when making the decision, and by failing to allow him to present argument at the transfer hearing.

Held: Affirmed.

Memorandum Opinion: Appellant first contends that the juvenile court erred in not making findings, orally or in writing, to explain the basis for its decision to transfer him to TDCJ. However, the record demonstrates that appellant never requested that the juvenile court make such findings nor did he object to the failure of the court to do so.

Juvenile proceedings are governed by the Juvenile Justice Code, Title 3 of the Texas Family Code, see id. §§ 51.01–61.107, and, although quasi-criminal in nature, are considered civil cases and are generally governed by the Texas Rules of Civil Procedure, see id. § 51.17 (subject to certain exceptions, or when in conflict with provisions of Juvenile Justice Code, Texas Rules of Civil Procedure govern proceedings under Juvenile Justice Code); In re Hall, 286 S.W.3d 925, 927 (Tex.2009) (noting that juvenile proceedings are civil cases "although [they are] quasi-criminal in nature"); In re R.J.H., 79 S.W.3d 1, 6 (Tex.2002) ("The Family Code, which governs juvenile delinquency proceedings in Texas, requires that they be conducted under the Texas Rules of Civil Procedure[.]"); see also In re

Dorsey, 465 S.W.3d 656, 657 (Tex.Crim.App.2015) (Richardson, J., concurring) ("Except when in conflict with a provision of the Family Code, the Texas Rules of Civil Procedure govern juvenile proceedings.") (citing Tex. Fam.Code § 51.17(a) and In re M.R., 858 S.W.2d 365, 366 (Tex.1993)). Accordingly, the Texas Rules of Civil Procedure regarding district court findings govern this issue.

Rule of Civil Procedure 296 requires a formal request to be filed within 20 days of the judgment before a district court is obligated to make written findings of fact and conclusions of law. See Tex.R. Civ. P. 296. Appellant did not file a proper and timely request. In fact, the record reflects that appellant never requested, orally or in writing, that the juvenile court make findings at any time. Thus, appellant has failed to preserve this complaint for review. See Stangel v. Perkins, 87 S.W.3d 706, 709 (Tex.App.—Dallas 2002, no pet.) (trial court was not obligated to make written findings of fact and conclusions of law because no timely request was filed; failure to timely and properly request findings and conclusions does not preserve error); see also Tex.R.App. P. 33.1(a) (to preserve complaint for appellate review, party must have presented to trial court a timely request, objection, or motion that states the specific grounds for desired ruling and complies with requirements of Texas Rules of Civil Procedure).

Appellant relies on Moon v. State, 451 S.W.3d 28 (Tex.Crim.App.2014), to support his contention that the juvenile court abused its discretion in ordering his transfer to TDCJ without stating the reasons for its decision to transfer. In Moon, the Court of Criminal Appeals addressed the specificity required in a juvenile court's transfer order under section 54.02 of the Juvenile Justice Code—the statute governing the juvenile court's waiver of jurisdiction and transfer of a juvenile offender for prosecution in adult criminal court—as well as the standard of appellate review applicable in an appeal from that order. See Moon, 451 S.W.3d at 44–48; see also Tex. Fam.Code § 54.02. The Court observed that, before a juvenile court may exercise its discretion to waive jurisdiction over an alleged juvenile offender, the court must consider the non-exclusive statutory factors of section 54.02(f) to facilitate the juvenile court's balancing of the "potential danger to the public" posed by the particular juvenile offender "with the juvenile offender's amenability to treatment." Moon, 451 S.W.3d at 38; see Tex. Fam.Code § 54.02(f). If the juvenile court decides to waive jurisdiction over the juvenile, then the statute directs it to "state specifically" in a written order "its reasons for waiver and [to] certify its action, including the written order and findings of the court." Moon, 451 S.W.3d at 38 (quoting Tex. Fam.Code § 54.02(h)).

Appellant's reliance on Moon is misplaced. In Moon, the Court analyzed the juvenile court's abuse of discretion in connection with a statute that mandated the juvenile court—after considering certain required factors—to specifically explain its decision and explicitly state those reasons in the transfer order. See id. at 38, 49; Tex. Fam.Code § 54.02(h). The statute at issue here, section 54.11 of the Family Code, which governs post-adjudication transfers to TDCJ, contains no requirement that the juvenile court make findings stating the reasons for its decision to transfer the juvenile to TDCJ or to put them in the transfer order. See Tex. Fam.Code § 54.02. Unlike Moon, the juvenile court here did not fail to comply with the applicable statutory requirements. Consequently, we find no abuse of discretion in the juvenile court's failure to make explicit findings explaining its decision to transfer, particularly when not requested to do so.

Failure to Consider Appellant's Best Interests

Appellant also maintains that the juvenile court abused its discretion "in transferring appellant into the adult prison system when it failed to consider the best interest of appellant."

When a juvenile is given a determinate sentence, upon TJJD's request to transfer the juvenile to TDCJ, the trial court is required to hold a hearing. See id. § 54.11; see also Tex. Hum. Res. Code § 244.014. Following the hearing, the court may either (1) order the return of the juvenile to TJJD or (2) order the transfer of the juvenile to the custody of TDCJ for the completion of his sentence.3 See Act of May 27, 1987, 70th Leg., R.S., ch. 385, § 13, 1987 Tex. Gen. Laws 1896, 1897 (current version at Tex. Fam.Code § 54.11(i)). When conducting the transfer or release hearing, the juvenile court

may consider the experiences and character of the person before and after commitment to [TJJD], the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the

victim's family, the recommendations of [TJJD] and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided.

Tex. Fam.Code § 54.11(k) (emphasis added). Consideration of this non-exclusive list of statutory factors is discretionary. See Tex. Gov't Code § 311.016(1) (" 'May' creates discretionary authority or grants permission or a power."). The juvenile court is not obliged to consider all of the factors listed, and it may consider relevant factors not listed. In re N.K.M., 387 S.W.3d 859, 864 (Tex.App.—San Antonio 2012, no pet.); In re J.J., 276 S.W.3d 171, 178 (Tex.App.—Austin 2008, pet. denied). Moreover, the juvenile court can assign different weights to the factors considered. In re N.K.M., 387 S.W.3d at 864; In re J.J., 276 S.W.3d at 178.

In this case, the juvenile court heard evidence at the transfer hearing about the nature of the underlying offense, appellant's traumatic childhood, his criminal history, his substance abuse history, his ongoing behavioral problems, his continued inappropriate sexual conduct, his failure to successfully complete a sexual-behavior treatment program, and his commission of a new felony offense while committed to TJJD.4

Katherine Hallmark, a psychologist at the Giddings State School, testified that she conducted a forensic risk assessment on appellant, and her report of the assessment was admitted into evidence for consideration by the juvenile court. She testified about appellant's various mental health diagnoses based on several psychological evaluations, including those from the Travis County probation department and subsequent TJJD evaluations. Appellant's diagnoses included sexual abuse of a child/perpetrator, conduct disorder, and poly-substance dependence. Dr. Hallmark also reported that appellant displays several antisocial traits, such as failure to conform to social norms, deceitfulness, impulsivity, irresponsibility, disregard for others, and lack of remorse. The psychological evaluations reflect that appellant has between low average and borderline intellectual functioning and has low academic skills. Dr. Hallmark explained that appellant's performance regarding intellectual functioning, academic functioning, and cognitive deficit are "more consistent with a suboptimal educational background than with his cognitive deficits." His problems are "more related [to] a culturally impoverished environment."5

In her testimony, Dr. Hallmark described appellant's childhood—characterized by abandonment by his mother, the death of his primary caregiver (his grandmother), physical abuse by his father, and juvenile gang involvement—as "extremely traumatic," "really stressful," and "extremely chaotic." As a child he suffered "exposure to violence, parental criminality, poor role models, attachment problems, [and] poor school achievement." Consequently, while at TJJD, appellant received services to address his issues, including ESL (English as a second language) services, specialized reading classes, a vocational certification course, psychiatry services for medication, extensive treatment by a psychologist, a sex-offender treatment program, and an alcohol and drug treatment program. While she empathized with his traumatic history and recognized its impact on appellant, the doctor testified that appellant has not responded to the interventions offered and has not progressed in his treatment. In her testimony, Dr. Hallmark said that appellant does not have a motivation for change, does not appear to try to interrupt his inappropriate sexual behavior, has an external focus of control, lacks empathy for others, uses cognitive distortions, demonstrates attitudes reflective of reoffending, and exhibits "risky, impulsive behavior." "[Appellant] knows that his behavioral choices are wrong, and yet he doesn't try to change his thinking to interrupt his behaviors." Dr. Hallmark acknowledged that appellant is in need of further sex offender treatment, substance abuse treatment, and mental health treatment but testified that he is "not appropriate for treatment completion" because he has "a problem with poor compliance to treatment." She observed that his new felony sexual offense reflects that appellant is not using any of the skills that he learned from treatment in his daily life, and she expressed concern about appellant's lack of progress while at TJJD: "he currently thinks in the same manner that he did before[,] suggesting that he hasn't made any changes in thought process that supports criminal offending."

In support of TJJD's recommendation to the juvenile court that appellant be transferred to TDCJ, Dr. Hallmark indicated in her testimony that appellant could not safely be transitioned into the community because he has not demonstrated sufficient risk reduction, has not achieved the necessary skills and protective factors, and does not understand his pattern of offending enough to develop a safe risk-management-transition plan. She noted that "[h]is behavior continues to be problematic" and conveyed that appellant's pattern of behavior put society at risk. Specifically, his pattern of non-compliance with both probation services and TJJD services—a pattern in which he committed felony offenses under both types of intervention—suggests that if he was placed on additional

intervention on parole "he is at risk for committing another felony offense just as he did on probation and at TJJD." Dr. Hallmark summarized, "[Appellant's] risk factors are really quite notable, and his pattern of behavior and lack of internalization [of] treatment concepts justifies the recommendation to protect the community."

Dr. Enrique Covarrubias, a psychologist at the Giddings State School who provided therapy to appellant, also testified at the transfer hearing. Regarding appellant's intellectual capacities or abilities, Dr. Covarrubias agreed that appellant has low average to borderline IQ. Concerning appellant's mental health issues, the doctor testified that appellant was not a "high need mental health kid" but instead was "relatively stable." He indicated that appellant's actions were disruptive, "seemed somewhat premeditated," and could be "accounted for by the conduct disorder." When asked about a previous psychological evaluation indicating that appellant "present[ed] as an angry, impulsive, aggressive, lonely young boy, who has very little insight into the issues in his life that have contributed to his current problems and difficulties," Dr. Covarrubias agreed with the accuracy of the description except that he did not believe that appellant was very impulsive. He attributed appellant's behavior to his "negative thinking, his criminal thinking"—his belief that "[he] could get away with it." Dr. Covarrubias testified that in his sessions with appellant, he focused on problem solving, stress management, dealing with situations, and coping with uncomfortable feelings. He also addressed "elementary" concerns such as medication compliance, understanding basic rules, and doing class work and homework, and gave appellant "psycho-education" about gangs and drugs. In addition, he encouraged appellant to know his risk factors and protective factors and to use his coping skills. Dr. Covarrubias testified that in appellant's therapy there was "a lot about decision making." Although the doctor tried to remind appellant to be aware of his distorted and criminal thinking patterns, "it just didn't seem to be enough." Dr. Covarrubias testified that during the course of his treatment of appellant, he did not observe any desire by appellant to modify his "defiant, dangerous, aggressive, and violent behavior," associate with positive peers, utilize and fully take advantage of available treatment programs and resources, refrain from illicit substance use, engage in "healthy and pro-social behaviors," or discontinue his gang involvement. The doctor indicated that he did not think that appellant "ha[d] gained any insight into the nature or origin of his psychological and behavioral problems."

Finally, Leonard Cucolo, TJJD's court liaison, testified for the State, and his report was admitted into evidence. Cucolo testified that appellant was reviewed for a possible transfer to TDCJ "as a result of basically meeting the entire policy criteria for return to court for possible transfer": he engaged in "chronic disruption of the program," meaning he was placed in security five or more times; he engaged in a new felony offense, for which he was charged and subsequently convicted; and he committed three or more major rule violations that were confirmed through a Level 2 hearing (appellant had six). Based on appellant's conduct while committed to TJJD, every member of the special services committee, the body making TJJD's recommendation, "unanimously agreed that [appellant] should be returned to court for the purpose of transfer [to TDCJ]." Cucolo reported that appellant had 97 documented incidents of misconduct and was "placed on security" on 46 occasions. His report detailed several incidents that demonstrated appellant's "aggressive and disruptive behaviors," which included assaulting another student (he struck the boy in the face repeatedly with both fists until he was physically restrained by TJJD personnel), possessing prohibited items (on separate occasions, a razor, a handcuff key, and a needle), and threatening another boy with assault if he did not perform oral sex on appellant. Cucolo expressed concern because, despite being in the program for almost 21 months, appellant continued to engage in major rule violations, including the commission of new offenses, fleeing apprehension, fighting (on one occasion the fight was gang related), possessing prohibited items, exposure, and assault. In offering TJJD's recommendation that appellant be transferred to TDCJ to complete his determinate sentence, Cucolo's report concluded that [appellant] committed the very serious offense of aggravated sexual assault in which he sexually assaulted a nine year old male neighbor. [Appellant] has not benefitted from his participation in the treatment programs offered during his assignment to TJJD. Instead, his overall behavior and progress in the treatment program[s] have been poor despite continued, varied attempts at intervention to facilitate his progress.

Appellant concedes in his brief that "the evidence does weigh heavily against [him]." Yet, he maintains that the juvenile court abused its discretion "in determining that it was in appellant's best interest to transfer him to [TDCJ]" because he is "an individual in need of treatment that cannot be addressed in the adult penitentiary system." He contends that "a primary factor listed [by appellate courts] to support the decision to transfer [a juvenile into the adult prison system] is the juvenile's volitional acts" (emphasis added) and asserts that he should not be transferred to

TDCJ because "[his] behavior was that of an individual suffering from addiction (as well as someone with low mental capacity) who was unable to control his impulsive behavior." Nothing in the record supports this assertion. The evidence at the transfer hearing demonstrated that in spite of being provided multiple interventions and treatments to facilitate behavioral changes, appellant chose to persist in his disruptive and sexually inappropriate behavior. There is no evidence suggesting that he was unable to control his behavior, merely that he was unwilling to do so.

In sum, there was extensive testimony at the transfer hearing about appellant's conduct and performance in TJJD. The record reveals that appellant was committed to TJJD for a 30–year determinative sentence for repeatedly sexually assaulting an eight-year-old boy. Although there was evidence of appellant's traumatic childhood as well as evidence that appellant made some progress, though minimal, in the sex-offender treatment program at TJJD, there was other evidence that his sexually inappropriate behavior continued, culminating in his commission of a new felony sexual offense. In support of TJJD's recommendation for transfer, there was evidence that appellant had not internalized or implemented what he had learned in the various programs and treatments to effect positive changes in his behavior. Thus, he posed a risk to the community. In making the decision to transfer or release appellant, the juvenile court had discretion to consider the listed statutory factors as well as other relevant factors not listed and to assign different weights to the factors considered. Appellant's best interest was just one of those factors. Given the evidence presented at the transfer hearing, we cannot conclude that the juvenile court abused its discretion in determining that the relevant factors weighed in favor of transferring appellant to TDCJ to complete his determinate sentence.6

Failure to Allow Argument at Transfer Hearing

Finally, appellant complains, for the first time on appeal, that the juvenile court abused its discretion by not allowing oral argument at the release or transfer hearing.7 See Tex. Fam.Code § 54.11(e) ("At the hearing, the person to be transferred or released under supervision is entitled to an attorney, to examine all witnesses against him, to present evidence and oral argument, and to previous examination of all reports on and evaluations and examinations of or relating to him that may be used in the hearing.") (emphases added).

At the close of the release or transfer hearing, immediately after appellant had rested and closed, the juvenile court made its ruling:

Having heard this case for a day and a half, I'm not going to allow closing arguments. I'm ready to make a decision. [N. G.-D.], would you please stand?

Based on the evidence before the Court, [N. G.-D.], I'm going to transfer you to TDCJ to serve the remainder of your sentence concurrent with your current sentence. In addition to that, I am requiring public registration upon your release from custody. I wish you the very best of luck. You are excused.

Appellant did not object when the court announced its intention to rule without hearing argument nor did he object when the court pronounced its ruling.

As previously noted in this opinion, juvenile delinquency proceedings on appeal are to be governed by the civil rules of appellate procedure as far as practicable. In re D.I.B., 988 S.W.2d 753, 756 (Tex.1999); see Tex. Fam.Code § 56.01(b) (in juvenile proceeding, "[t]he requirements governing an appeal are as in civil cases generally"). Generally, in order to preserve a complaint for appellate review, a party must make a timely, specific request, objection, or motion in the trial court. Tex.R.App. P. 33.1(a)(1); In re C.O.S., 988 S.W.2d 760, 765 (Tex.1999) (Rule of Appellate Procedure 33.1 applies to both civil and criminal cases). However, because a juvenile proceeding is quasi-criminal, the general rules governing error preservation in civil cases cannot be applied across the board in juvenile proceedings. In re L.D.C., 400 S.W.3d 572, 574 (Tex.2013) (citing In re C.O.S., 988 S.W.2d at 765). The Texas Supreme Court has noted that it is "unwise and problematic to apply one preservation rule in adult, criminal proceedings and another, stricter rule in juvenile cases." In re C.O.S., 988 S.W.2d at 767; see In re State ex rel. Tharp, No. 03–15–00223–CV, 2015 WL 1905959, at *1 (Tex.App.—Austin Apr. 24, 2015, orig. proceeding). Therefore, precedent from analogous adult criminal proceedings may be instructive in juvenile cases. In re C.O.S., 988 S.W.2d at 767; In re I.L., 389 S.W.3d 445, 452 (Tex.App.—El Paso 2012, no pet.); see, e.g., In re D.I.B., 988

S.W.2d at 756 (looking to jurisprudence from Texas Court of Criminal Appeals to determine when harm analysis should be performed in juvenile delinquency proceedings).

The record here establishes that appellant lodged no objection to the juvenile court's expressed intention not to allow argument nor did he object to the court's ruling based on the lack of opportunity to present argument. Appellant, then, must address the issue of preservation of error and convince this Court that the error of which he complains is properly before this Court. Appellant maintains that he was not required to object at the hearing because such an objection would have been futile since the juvenile court had already expressed its intent not to allow argument. Alternatively, he appears to argue that the error is fundamental error to which no objection is necessary. We disagree and conclude the error alleged here is not immune from the requirement that it be preserved for our review.

The Texas Court of Criminal Appeals has consistently held that the failure to object in a timely and specific manner during trial forfeits a complaint, even when the error may concern a defendant's constitutional rights. Yazdchi v. State, 428 S.W.3d 831, 844 (Tex.Crim.App.2014), cert. denied, 135 S.Ct. 1158 (2015); see Saldano v. State, 70 S.W.3d 873, 887 (Tex.Crim.App.2002) ("All but the most fundamental rights may be forfeited if not insisted upon by the party to whom they belong." (quoting Marin v. State, 851 S.W.2d 275, 279 (Tex.Crim.App.1993), overruled on other grounds by Cain v. State, 947 S.W.2d 262 (Tex.Crim.App.1997))). An exception applies to two "relatively small categories of errors:" (1) violations of waivable-only rights; and (2) denials of absolute, systemic requirements. Aldrich v. State, 104 S.W.3d 890, 895 (Tex.Crim.App.2003); see Bessey v. State, 239 S.W.3d 809, 812 (Tex.Crim.App.2007) ("Errors may be raised for the first time on appeal if the complaint is that the trial court disregarded an absolute or systemic requirement or that the appellant was denied a waivable-only right that he did not waive."); Neal v. State, 150 S.W.3d 169, 175 (Tex.Crim.App.2004) ("Except for complaints involving systemic (or absolute) requirements, or rights that are waivable only ... all other complaints, whether constitutional, statutory, or otherwise, are forfeited by failure to comply with Rule 33.1(a).").

"Waivable-only" rights are "rights of litigants which must be implemented by the system unless expressly waived." Mendez v. State, 138 S.W.3d 334, 340 (Tex.Crim.App.2004) (citing Marin, 851 S.W.2d at 279–80); Saldano, 70 S.W.3d at 888; Johnson v. State, No. 03–12–00006–CR, 2012 WL 1582236, at *2 (Tex.App.—Austin May 4, 2012, no pet.) (mem. op., not designated for publication). Examples of "waivable-only" rights include the right to effective assistance of counsel, the right to a jury trial, and a right conferred by a statute that affirmatively states the right is waivable only. Saldano, 70 S.W.3d at 888; Aldrich, 104 S.W.3d at 895. A waivable-only right cannot be forfeited by a party's inaction alone; a defendant must take affirmative action to waive such a right. See Bessey, 239 S.W.3d at 812 ("A law that puts a duty on the trial court to act sua sponte, creates a right that is waivable only. It cannot be a law that is forfeited by a party's inaction." (quoting Mendez, 138 S.W.3d at 342)). While no precise rule has been announced for determining if a right is waivable only instead of forfeitable, it is important to be reminded of the reasons for requiring preservation of errors. "[O]bjections promote the prevention and correction of errors. When valid objections are timely made and sustained, the parties may have a lawful trial." Saldano, 70 S.W.3d at 887. Here, if the juvenile court had been reminded of appellant's statutory entitlement to present argument, the court could have corrected its oversight and cured any error. We find that the statutory right at issue is not a right that is waivable only, but one that may be forfeited.

Systemic requirements—also known as absolute requirements or prohibitions—are laws that a trial court has a duty to follow even if the parties wish otherwise. Mendez, 138 S.W.3d at 340 (citing Marin, 851 S.W.2d at 280); Johnson, 2012 WL 1582236, at *2; see Cook v. State, 390 S.W.3d 363, 368 n.11 (Tex.Crim.App.2013). "Any party that is entitled to appeal may complain on appeal that such a requirement was violated, even if the party failed to complain about the failure or waived the application of the law." Mendez, 138 S.W.3d at 340 (citing Marin, 851 S.W.2d at 280). Examples of systemic requirements include jurisdiction of the person or subject matter and whether a penal statute is in compliance with the separation of powers section of the Texas Constitution. Aldrich, 104 S.W.3d at 895; see Saldano, 70 S.W.3d at 888.

In this case, the error alleged here, even though characterized by appellant as "fundamental" in nature, does not fall within the exceptions that would excuse the failure to lodge an objection in the juvenile court. The juvenile court

neither disregarded an absolute requirement nor denied appellant a waivable-only right. There is simply no authority that would suggest that the type of error alleged here—the failure to grant a statutory right to present argument at a juvenile transfer hearing under section 54.11—is in the nature of a systemic defect or a right that is waivable only. Accordingly, appellant's complaint must have been raised in the juvenile court to preserve the issue for our review. The only issue is whether appellant complied with Rule 33.1(a). He did not.

As already noted, at the conclusion of the transfer hearing appellant did not object to the juvenile court's expressed intent to disallow argument or to its failure to allow argument when it pronounced its ruling. Nor did appellant raise the issue in a motion for new trial. Accordingly, appellant has forfeited his right to complain about it on appeal. See Tex.R.App. P. 33.1(a); Neal, 150 S.W.3d at 175; see also Ex parte J.L.R., No. 05–12–01289–CV, 2013 WL 4041554, at *1–3 (Tex.App.—Dallas Aug. 9, 2013, no pet.) (mem.op.) (juvenile forfeited his right to complain on appeal about trial court's dismissal of his application for writ of habeas corpus with prejudice because he did not object to court's ruling at hearing that writ was dismissed with prejudice nor raise issue in his motion for new trial).

Conclusion: Based on the record in this case, we cannot say that the juvenile court's decision to transfer appellant to TDCJ to complete his 30–year determinate sentence was made without reference to guiding rules or principles or that the court acted in an arbitrary or unreasonable manner. Thus, we conclude that the court did not abuse its discretion. Accordingly, we affirm the juvenile court's transfer order.

In the Matter of M.J.-M., MEMORANDUM, No. 02-14-00367-CV, 2015 WL 4663978, Tex.Juv.Rep. Vol. 29 No. 3 ¶15-3-3 (Tex.App.-Fort Worth, 8/6/15).

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

Facts: In two points, appellant M.J.-M. appeals the trial court's order transferring him from the Texas Juvenile Justice Department (TJJD) to the Texas Department of Criminal Justice (TDCJ) to complete his determinate ten-year sentence for aggravated assault on a public servant while in TJJD's custody.FN2 See Tex. Penal Code Ann. § 22.02(b)(2)(B) (West 2011) (aggravated assault on a public servant is a first-degree felony); Tex. Fam.Code Ann. § 53.045(a)(6) (West 2014) (aggravated assault offense is eligible for determinate sentence). We affirm.

FN2. M.J.-M. was fourteen years old when he was committed to TJJD in April 2011 after his community supervision was revoked. He pleaded "true" to committing an aggravated assault on a public servant in 2012 while in TJJD's custody (after the State gave notice that it sought a determinate sentence for the offense). See Tex. Fam.Code Ann. § 54.04(d)(3)(A)(ii) (West 2014) (providing for possible transfer from TJJD to TDCJ for a term of not more than forty years for a first-degree felony). M.J.-M.'s stipulation to the evidence reflected that he struck a TJJD officer in the face while she was supervising the juvenile inmates in TJJD custody and fractured her cheek bone and the bone around her left eye (left orbital). Her injuries necessitated medical treatment from an eye specialist and caused her to miss more than a month of work.

In 2014, after M.J.-M. turned eighteen years old, the State moved to transfer M.J.-M.'s determinate sentence to TDCJ. At the November 7, 2014 hearing, the State's sole witness was Leonard Cucolo, TJJD's court liaison. The trial court took judicial notice of the court's file and the TJJD records and Cucolo's report without objection. It also admitted without objection Petitioner's Exhibit 1, a November 3, 2014 incident report from TJJD that documented an incident that had occurred four days prior to the transfer hearing wherein M.J.-M. exposed his penis to female staff members and masturbated in front of them. M.J.-M. raised no objections during Cucolo's testimony.

Cucolo testified that M.J.-M. met all of the criteria for transfer to TDCJ to complete his sentence by: committing new felony offenses and Class A misdemeanors, engaging in chronic disruption, violating twenty-six major rules, resulting in sixteen Level II hearings, and failing to progress in treatment despite having been provided with services to help remediate his behavior, including individual counseling, group counseling, and specialized treatment

programs. In total, the evidence of M.J.-M.'s behavioral history reflected more than 200 documented incidents of misconduct, 131 referrals to the security unit, and 86 security placements.FN3

FN3. These numbers include misconduct occurring prior to M.J.-M.'s receiving his determinate sentence.

Cucolo stated that M.J.-M. was chronically disruptive and engaged in violent, aggressive behavior with staff and youth, "making it very difficult—an unsafe environment for the staff, unsafe environment for the kids, and it's making it difficult for the other youth that are there for similar offenses, determinate sentences as well, to engage in the program." According to Cucolo, M.J.-M. had continued to engage in serious misconduct, assaults, "major disruption[s] of facility," fleeing from apprehension, and exposure, even after he was warned in February 2014 that his psychological evaluation would be shared with the special services committee to make a decision about a return to court. Cucolo described M.J.-M. as a danger to any community to which he might be released.

M.J.-M. and his paternal aunt S.M. both testified, seeking leniency, and the trial court permitted S.M. to testify about hearsay statements over the State's objection. During M.J.-M.'s testimony, he admitted that while incarcerated he had committed unprovoked assaults on other youths on numerous occasions and agreed that many of his fights and major rule violations were a direct result of gang violence, either his own fighting for other gang members or his "being run up on by other members." FN4 M.J.-M. said that he was 5'4" tall and that all of his fights had been with people bigger than him. He stated that if he refused to beat people up as directed by his gang, there would be consequences, such as being assaulted himself. After hearing testimony from the State's sole witness and M.J.-M. and his aunt, the trial court granted the motion.

FN4. The offense for which M.J.-M. had received the determinate sentence involved his attempt to get into a gang.

In his two points, M.J.-M. challenges the sufficiency of the evidence to support the trial court's finding that he was a threat or danger to himself or others and complains that the only evidence presented by the State was "unreliable and non-credible hearsay testimony" in violation of his right to confrontation under the Sixth Amendment.

In his second point, M.J.-M. asks us to adopt the dissenting opinion in In re M.P., 220 S.W.3d 99, 115 (Tex.App.–Waco 2007, pet. denied) (Vance, J., dissenting) (concluding that a juvenile should be afforded the Sixth Amendment confrontation right in the disposition phase of a juvenile proceeding). Doing so would require a departure from our conclusion in In re S.M., 207 S.W.3d 421, 425 (Tex.App.–Fort Worth 2006, pet. denied), that Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), does not apply in juvenile transfer hearings. We decline this invitation.

Held: Affirmed

Memorandum Opinion: We review a trial court's decision to transfer a juvenile under family code section 54.11 for an abuse of discretion. In re J.M., No. 02–05–00180–CV, 2005 WL 3081648, at *3 (Tex.App.–Fort Worth Nov. 17, 2005, no pet.)(mem.op.). If some evidence exists to support the trial court's decision, there is no abuse of discretion. Id. As set out above, some evidence supports the trial court's decision; therefore, we overrule this portion of M.J.-M.'s two points.

Because he did not lodge any objections to any of the evidence admitted in the transfer hearing, M.J.-M. failed to preserve the remainder of his points for our review. See Tex.R.App. P. 33.1. Therefore, we overrule the remainder of his two points as unpreserved.

Conclusion: Having overruled both of M.J.-M.'s points, we affirm the trial court's order of transfer.

DISPOSITION PROCEEDINGS—

Montgomery v. Louisiana, No. 14-280, 577 U. S. ____, Tex.Juv.Rep. Vol. 30 No. 1 ¶16-1-10 (U.S. Sup.Ct., 1/25/16).

U.S. SUPREME COURT DECIDES TO MAKE THE HOLDING IN *MILLER V. ALABAMA*, (NO MANDATORY LIFE SENTENCE WITHOUT PAROLE FOR JUVENILES) RETROACTIVE.

Facts: Petitioner Montgomery was 17 years old in 1963, when he killed a deputy sheriff in Louisiana. The jury returned a verdict of "guilty without capital punishment," which carried an automatic sentence of life without parole. Nearly 50 years after Montgomery was taken into custody, this Court decided that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on " 'cruel and unusual punishments.' " Miller v. Alabama, 567 U. S. ___, ___.

Montgomery sought state collateral relief, arguing that Miller rendered his mandatory life-without-parole sentence illegal. The trial court denied his motion, and his application for a supervisory writ was denied by the Louisiana Supreme Court, which had previously held that Miller does not have retroactive effect in cases on state collateral review. The question is does the U.S. Supreme Court's decision in Miller v. Alabama, which held that the Eighth Amendment prohibits mandatory sentencing schemes that require children convicted of homicide to be sentenced to life in prison without parole, apply retroactively?

Held: Reversed and remanded

Opinion: This leads to the question whether Miller's prohibition on mandatory life without parole for juvenile offenders indeed did announce a new substantive rule that, under the Constitution, must be retroactive.

As stated above, a procedural rule "regulate[s] only the manner of determining the defendant's culpability." Schriro, 542 U. S., at 353. A substantive rule, in contrast, forbids "criminal punishment of certain primary conduct" or prohibits "a certain category of punishment for a class of defendants because of their status or offense." Penry, 492 U. S., at 330; see also Schriro, supra, at 353 (A substantive rule "alters the range of conduct or the class of persons that the law punishes"). Under this standard, and for the reasons explained below, Miller announced a substantive rule that is retroactive in cases on collateral review.

The "foundation stone" for Miller's analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles. 567 U. S., at ___, n. 4 (slip op., at 8, n. 4). Those cases include Graham v. Florida, supra, which held that the Eighth Amendment bars life without parole for juvenile nonhomicide offenders, and Roper v. Simmons, 543 U. S. 551, which held that the Eighth Amendment prohibits capital punishment for those under the age of 18 at the time of their crimes. Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence. See Graham, supra, at 59 ("The concept of proportionality is central to the Eighth Amendment"); see also Weems v. United States, 217 U. S. 349, 367 (1910); Harmelin v. Michigan, 501 U. S. 957, 997–998 (1991) (KENNEDY, J., concurring in part and concurring in judgment).

Miller took as its starting premise the principle established in Roper and Graham that "children are constitutionally different from adults for purposes of sentencing." 567 U. S., at ___ (slip op., at 8) (citing Roper, supra, at 569–570; and Graham, supra, at 68). These differences result from children's "diminished culpability and greater prospects for reform," and are apparent in three primary ways: "First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and

heedless risk-taking. Second, children 'are more vulnerable to negative influences and outside pressures,' including from their family and peers; they have limited 'control over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievable depravity.'" 567 U. S., at ___ (slip op., at 8) (quoting Roper, supra, at 569–570; alterations, citations, and some internal quotation marks omitted).

As a corollary to a child's lesser culpability, Miller recognized that "the distinctive attributes of youth diminish the penological justifications" for imposing life without parole on juvenile offenders. 567 U. S., at ___ (slip op., at 9). Because retribution "relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." Ibid. (quoting Graham, supra, at 71; internal quotation marks omitted). The deterrence rationale likewise does not suffice, since "the same characteristics that render juveniles less culpable than adults— their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." 567 U. S., at ___–___ (slip op., at 9–10) (internal quotation marks omitted). The need for incapacitation is lessened, too, because ordinary adolescent development diminishes the likelihood that a juvenile offender "'forever will be a danger to society.'" Id., at ___ (slip op., at 10) (quoting Graham, 560 U. S., at 72). Rehabilitation is not a satisfactory rationale, either. Rehabilitation cannot justify the sentence, as life without parole "forswears altogether the rehabilitative ideal." 567 U. S., at ___ (slip op., at 10) (quoting Graham, supra, at 74).

These considerations underlay the Court's holding in Miller that mandatory life-without-parole sentences for children "pos[e] too great a risk of disproportionate punishment." 567 U. S., at ___ (slip op., at 17). Miller requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Ibid. The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of "children's diminished culpability and heightened capacity for change," Miller made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Ibid.

Miller, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." Id., at ___ (slip op., at 9). Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects " 'unfortunate yet transient immaturity.'" Id., at ___ (slip op., at 17) (quoting Roper, 543 U. S., at 573). Because Miller determined that sentencing a child to life without parole is excessive for all but "'the rare juvenile offender whose crime reflects irreparable corruption,'" 567 U. S., at ___ (slip op., at 17) (quoting Roper, supra, at 573), it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. Penry, 492 U. S., at 330. As a result, Miller announced a substantive rule of constitutional law. Like other substantive rules, Miller is retroactive because it "'necessarily carr[ies] a significant risk that a defendant'"—here, the vast majority of juvenile offenders— "'faces a punishment that the law cannot impose upon him.'" Schriro, 542 U. S., at 352 (quoting Bousley v. United States, 523 U. S. 614, 620 (1998)).

Louisiana nonetheless argues that Miller is procedural because it did not place any punishment beyond the State's power to impose; it instead required sentencing courts to take children's age into account before condemning them to die in prison. In support of this argument, Louisiana points to Miller's statement that the decision "does not categorically bar a penalty for a class of offenders or type of crime—as, for example,

we did in Roper or Graham. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." Miller, supra, at ___ (slip op., at 20). Miller, it is true, did not bar a punishment for all juvenile offenders, as the Court did in Roper or Graham. Miller did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, Miller is no less substantive than are Roper and Graham. Before Miller, every juvenile convicted of a homicide offense could be sentenced to life without parole. After Miller, it will be the rare juvenile offender who can receive that same sentence. The only difference between Roper and Graham, on the one hand, and Miller, on the other hand, is that Miller drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right. To be sure, Miller's holding has a procedural component. Miller requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence. See 567 U. S., at ___ (slip op., at 20). Louisiana contends that because Miller requires this process, it must have set forth a procedural rule. This argument, however, conflates a procedural requirement necessary to implement a substantive guarantee with a rule that "regulate[s] only the manner of determining the defendant's culpability." Schriro, supra, at 353. There are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish. See Mackey, 401 U. S., at 692, n. 7 (opinion of Harlan, J.) ("Some rules may have both procedural and substantive ramifications, as I have used those terms here"). For example, when an element of a criminal offense is deemed unconstitutional, a prisoner convicted under that offense receives a new trial where the government must prove the prisoner's conduct still fits within the modified definition of the crime. In a similar vein, when the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class. See, e.g., Atkins v. Virginia, 536 U. S. 304, 317 (2002) (requiring a procedure to determine whether a particular individual with an intellectual disability "fall[s] within the range of [intellectually disabled] offenders about whom there is a national consensus" that execution is impermissible). Those procedural requirements do not, of course, transform substantive rules into procedural ones.

The procedure Miller prescribes is no different. A hearing where "youth and its attendant characteristics" are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. 567 U. S., at ___ (slip op., at 1). The hearing does not replace but rather gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.

Louisiana suggests that Miller cannot have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because Miller did not require trial courts to make a finding of fact regarding a child's incorrigibility. That this finding is not required, however, speaks only to the degree of procedure Miller mandated in order to implement its substantive guarantee. When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems. See Ford v. Wainwright, 477 U. S. 399, 416–417 (1986) ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences"). Fidelity to this important principle of federalism, however, should not be construed to demean the substantive character of the federal right at issue. That Miller did not impose a formal fact-finding requirement does not leave States free to sentence a

child whose crime reflects transient immaturity to life without parole. To the contrary, Miller established that this punishment is disproportionate under the Eighth Amendment.

For this reason, the death penalty cases Louisiana cites in support of its position are inapposite. See, e.g., Beard v. Banks, 542 U. S. 406, 408 (2004) (holding nonretroactive the rule that forbids instructing a jury to disregard mitigating factors not found by a unanimous vote); O'Dell v. Netherland, 521 U. S. 151, 153 (1997) (holding nonretroactive the rule providing that, if the prosecutor cites future dangerousness, the defendant may inform the jury of his ineligibility for parole); Sawyer v. Smith, 497 U. S. 227, 229 (1990) (holding nonretroactive the rule that forbids suggesting to a capital jury that it is not responsible for a death sentence). Those decisions altered the processes in which States must engage before sentencing a person to death. The processes may have had some effect on the likelihood that capital punishment would be imposed, but none of those decisions rendered a certain penalty unconstitutionally excessive for a category of offenders.

The Court now holds that Miller announced a substantive rule of constitutional law. The conclusion that Miller states a substantive rule comports with the principles that informed Teague. Teague sought to balance the important goals of finality and comity with the liberty interests of those imprisoned pursuant to rules later deemed unconstitutional. Miller's conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution.

Giving Miller retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. §6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of Miller's central intuition—that children who commit even heinous crimes are capable of change.

Petitioner has discussed in his submissions to this Court his evolution from a troubled, misguided youth to a model member of the prison community. Petitioner states that he helped establish an inmate boxing team, of which he later became a trainer and coach. He alleges that he has contributed his time and labor to the prison's silkscreen department and that he strives to offer advice and serve as a role model to other inmates. These claims have not been tested or even addressed by the State, so the Court does not confirm their accuracy. The petitioner's sub- missions are relevant, however, as an example of one kind of evidence that prisoners might use to demonstrate rehabilitation.

Conclusion: Henry Montgomery has spent each day of the past 46 years knowing he was condemned to die in prison. Perhaps it can be established that, due to exceptional circumstances, this fate was a just and proportionate punishment for the crime he committed as a 17-year-old boy. In light of what this Court has said in Roper, Graham, and Miller about how children are constitutionally different from adults in their level of culpability, however, prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.

The judgment of the Supreme Court of Louisiana is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.
It is so ordered.

Kuol v. State, No. 14-14-01008-CR, --- S.W.3d ----, 2015 WL 9240885, Tex.Juv.Rep. Vol. 30 No. 1 ¶16-1-3B [Tex.App.-Hou. (14th Dist.), 12/15/2015]

MISDEMEANOR CONVICTIONS FOR PROSTITUTION CANNOT BE USED TO ENHANCE A SUBSEQUENT PROSECUTION AS A FELONY IF THE DEFENDANT WAS A JUVENILE AT THE TIME OF THE ORIGINAL MISDEMEANOR CONVICTIONS.

Facts: Appellant was arrested for prostitution by the Houston Metropolitan Transit Authority. She was charged by information—waiving her right to a grand jury indictment—with felony prostitution. The indictment alleged that she had previously been convicted of prostitution five times in Dallas County. After pleading guilty to the offense of felony prostitution, appellant was placed on deferred adjudication community supervision. Appellant violated numerous terms of her community supervision, and the State filed a motion to adjudicate her guilt. The trial court found appellant guilty of felony prostitution and sentenced her to three years' confinement in the Texas Department of Criminal Justice, Institutional Division.

Within 30 days of judgment, appellant filed a "Motion in Arrest of Judgment/Motion for New Trial," in which she alleged that her current felony prostitution charge was void for lack of subject matter jurisdiction. She asserted that the criminal district court lacked subject matter jurisdiction because all five of the prostitution convictions used to enhance her current felony prostitution charge were also void. She claimed that the five prior prostitution convictions involved judgments that were entered when she was a juvenile, and the county and district courts entering those judgments lacked jurisdiction over her. Specifically, she asserted that, of the five enhancing allegations, the three misdemeanor offenses occurred when she was 14 years old and that the two felony prostitution offenses relied on misdemeanor offenses that occurred when she was 14 and 16 years old. She urged that these prior convictions were void because all of them occurred in courts lacking subject matter jurisdiction, i.e., only a juvenile court had jurisdiction over her when she was that age.

The trial court conducted a hearing on her motion. She presented the trial court with all of the prior judgments, as well as a certified copy of her driver's license to establish her current age. After hearing the arguments of counsel, the trial court overruled her motion. This appeal timely followed.

Held: Reversed and remanded.

Opinion: Appellant makes a two-fold argument about the trial court's lack of subject matter jurisdiction in this case. First, she asserts that a district court only has jurisdiction over prostitution when the accused has been convicted three previous times of prostitution. Second, appellant asserts that, although she has been convicted five times previously for prostitution, those convictions are void because the trial courts convicting her lacked jurisdiction over the cases. According to appellant, the trial courts lacked jurisdiction to convict her of the enhancing offenses because appellant was either a juvenile at the time of the conviction or the conviction arose from prior juvenile convictions. First, we conclude that the trial court had subject matter jurisdiction over appellant's case. We then determine that appellant was illegally sentenced and reverse for a new punishment determination.1

A. Subject Matter Jurisdiction

The Texas Constitution requires that the State must obtain a grand-jury indictment in a felony case, unless this requirement is waived by the defendant. Tex. Const. art. I, § 10. Absent an indictment or valid waiver, a district court does not have jurisdiction over the case. Teal v. State, 230 S.W.3d 172, 174–75 (Tex.Crim.App.2007); Martin v. State, 346 S.W.3d 229, 230–31 (Tex.App.—Houston [14th Dist.] 2011, no pet.). An indictment or information

provides a defendant with notice of the offense and allows the defendant to prepare a defense. Teal, 230 S.W.3d at 175; Martin, 346 S.W.3d at 231.

Article 1.14 of the Texas Code of Criminal Procedure provides that:
[i]f the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding. Tex. Code Crim. Proc. art. 1.14(b).

Indictments—or informations—charging a person with committing an offense, once presented, invoke the jurisdiction of the trial court, and jurisdiction is not contingent on whether the charging instrument contains defects of form or substance. See Teal, 230 S.W.3d at 177. Thus, Texas law "requires the defendant to object to any error in the [charging instrument] before the day of trial and certainly before the jury is empaneled." Id.

Nevertheless, for the trial court to have jurisdiction, there still must be a charging instrument. See Martin, 346 S.W.3d at 232. A charging instrument must allege that (1) a person (2) committed an offense. Teal, 230 S.W.3d at 179; see also Tex. Const. art. V, § 12(b) (defining "indictment" and "information" as written instruments presented to the court "charging a person with the commission of an offense"). Accordingly, a defendant may challenge for the first time on appeal an instrument that fails to charge the commission of an offense or does not charge a particular person with the crime. See Teal, 230 S.W.3d at 178–80.

When determining whether an instrument is so flawed that it does not constitute an actual charging instrument and thus does not vest the trial court with jurisdiction, the critical determination is whether the court and the defendant can identify what penal-code provision is alleged and whether that provision vests the trial court with jurisdiction. Kirkpatrick v. State, 279 S.W.3d 324, 328 (Tex.Crim.App.2009) (citing Teal, 230 S.W.3d at 180). We look to the charging instrument as a whole, not just to its specific formal requisites. Id. If we conclude that the trial court and the defendant can determine that the instrument intends to charge a felony or other offense for which the trial court has jurisdiction, then the instrument charges the commission of an offense, even if the instrument fails to allege an element of the offense or contains additional information indicating the person charged is innocent. Teal, 230 S.W.3d at 181–82; Martin, 346 S.W.3d at 232.

Here, examining the charging instrument at issue, the State alleged that appellant committed prostitution by agreeing to engage in sexual conduct for a fee on or about July 21, 2011. As noted above, the State alleged five prior convictions of appellant for prostitution in the charging instrument. Further, prostitution may be a misdemeanor or felony offense. See Tex. Penal Code Ann. § 43.02(c) (providing that prostitution is generally a Class B misdemeanor, unless enhanced by prior convictions, which may elevate the offense to a felony). Thus, based on the allegations in the information, both appellant and the trial court could determine that the instrument intended to charge a felony offense for which the trial court has jurisdiction. Teal, 230 S.W.3d at 181–82; Martin, 346 S.W.3d at 232. Accordingly, we determine that the trial court had subject matter jurisdiction in this case. See, e.g., Pomier v. State, 326 S.W.3d 373, 382–84 (Tex.App.—Houston [14th Dist.] 2010, no pet.) ("However, even though the indictment included language that would have properly charged appellant with a misdemeanor rather than a felony, the trial court still had jurisdiction."). Accordingly, we overrule appellant's issue.

B. Illegal Sentence

As discussed above, prostitution may be a felony offense; it is elevated to a state jail felony "if the actor has previously been convicted three or more times" of prostitution. Tex. Penal Code Ann. § 43.02(c)(2). Here, of the five previous prostitution convictions alleged in the information, three occurred in October and November 1999 in a county court at law. According to the information, appellant's date of birth is "06–12–1985." Further, the State conceded in the trial court that there was no "factual dispute" that the defendant was "a juvenile at the time of those convictions in Dallas County."4 Thus, these three enhancing convictions occurred when appellant was only 14 years old.

Generally, "[a] person may not be prosecuted for or convicted of any offense that the person committed when younger than 15 years of age." Tex. Penal Code Ann. § 8.07(a). And the juvenile court has exclusive original jurisdiction over children under seventeen years of age. See Tex. Fam. Code Ann. § 51.04(a) (discussing jurisdiction of juvenile courts). In certain circumstances, a juvenile court may waive jurisdiction and transfer a child to a district court or criminal district court. Id. § 54.02. There is no such provision for transferring a child to a county court; in fact, the only situations in which a juvenile may be transferred to a district or criminal district court is if the juvenile "is alleged to have violated a penal law of the grade of felony." See id. § 54.02(a). Thus, three of the five alleged enhancing offenses are void because the county court at law lacked subject matter jurisdiction to convict appellant of them. See Tex. Penal Code Ann. § 8.07(a); Tex. Fam. Code Ann. §§ 51.04(a), 54.02(a); see also Nix v. State, 65 S.W.3d 664, 668 (Tex.Crim.App.2001) (stating that a void judgment is a "nullity" and can be attacked at any time and explaining that a judgment is void only in very rare situations, usually due to a lack of jurisdiction).

Because the information contains only two possibly valid enhancing offenses, appellant's plea of guilty was, at most, to a Class A misdemeanor offense. See Tex. Penal Code Ann. § 43.02(c)(1) (providing that prostitution is enhanced to "a Class A misdemeanor if the actor has previously been convicted one or two times of an offense under this section"); cf. Pomier, 326 S.W.3d at 384 (determining that defendant was convicted of misdemeanor stalking under a previous statute even though he was charged with felony stalking). The maximum sentence for a Class A misdemeanor is a jail term not to exceed one year and/or a fine not to exceed $4,000. Tex. Penal Code Ann. § 12.21.

Here, appellant pleaded guilty and was sentenced as though convicted of a state jail felony enhanced to a third degree felony and received three years' confinement. Appellant's sentencing for a felony offense was outside the maximum range available for a misdemeanor and therefore illegal. See Pomier, 326 S.W.3d at 384 (citing Mizzell v. State, 119 S.W.3d 804, 806 (Tex.Crim.App.2003) for the proposition that a sentence outside the maximum range of punishment for that offense is illegal, and Speth v. State, 6 S.W.3d 530, 532–33 (Tex.Crim.App.1999) for the proposition that a defendant has an "absolute and nonwaiveable right to be sentenced within the proper range of punishment established by the Legislature"). We conclude that her sentence is void because it was above the statutory maximum for a Class A misdemeanor. See id.; Baker v. State, 278 S.W.3d 923, 927 (Tex.App.—Houston [14th Dist.] 2009, pet. ref'd) ("Any court with jurisdiction can notice and take action upon an illegal or void sentence at any time, even sua sponte."); see also Ex parte Hernandez, 698 S.W.2d 670, 670–71 (Tex.Crim.App.1985) (determining sentence void and remanding for new sentencing because defendant was illegally sentenced).

Conclusion: We conclude that the trial court had jurisdiction over appellant's case. However, we reform the judgment adjudicating guilt to reflect that appellant was convicted of a Class A misdemeanor, and affirm that portion of the judgment as reformed. We reverse the portion of the trial court's judgment sentencing appellant to three years' confinement and remand for a new punishment determination.

U.S. v. Sealed Juvenile, No. 14-30357, __ F3 __, Tex.Juv.Rep. Vol. 29 No. 1 ¶15-1-15 (5th Cir., 3/16/15).

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

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

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

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

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

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

Held: Affirmed as modified.

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

E. Computer and Internet Conditions

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

> **(13) The juvenile shall not possess or use a computer with access to any "on-line computer service" at any location without the prior written approval of the probation office. The defendant must allow the Probation Officer to install appropriate software to monitor the use of the Internet.**
>
> **(14) The juvenile must submit to search of person, property, vehicles, business, computers and residence to be conducted in a reasonable manner and at a reasonable time, for the purpose of detecting sexually explicit material at the direction of the Probation Officer. He must inform any residents that the premises may be subject to a search.**
>
> **(15) The juvenile shall consent to the United States Probation Office conducting periodic unannounced examinations of his computer, hardware, and software which may include retrieval and copying of all data from his computer. This also includes the removal of such equipment, if necessary, for the purpose of conducting a more thorough inspection.**

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

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

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

The Juvenile contends that these conditions are not reasonably related to the factors in § 3553(a) because his offense did not involve the use of a computer or the Internet. He relies on United States v. Salazar, 743 F.3d 445 (5th Cir. 2014), and United States v. Tang, 718 F.3d 476 (5th Cir. 2013) (per curiam), cases in which this Court found that Internet restrictions were not reasonably related to the § 3553(a) factors for defendants convicted of failing to register as sex offenders. We find that both cases are distinguishable from this one. Salazar is distinguishable because, in that case, there was "[n]othing in [the defendant's] history [that] suggest[ed] that sexually stimulating materials fueled his past crimes," 743 F.3d at 452, whereas here the record shows that the Juvenile's obsession with sex was probably fueled by what he found on the Internet. In Tang, this Court found that an Internet ban was not reasonably related to the § 3553(a) factors because it was not related to the offense of failing to register as a sex offender, and because the defendant's prior conviction for assault with intent to commit sexual abuse did not involve the use of a computer. 718 F.3d at 484. The Juvenile seeks to rely on the latter reason in Tang to argue that the special condition imposed here is also not reasonably related to the § 3553(a) factors. While it is true that, like in Tang, the Juvenile did not use the Internet to carry out the offense, it is nevertheless not difficult to infer that the sexually explicit materials accessed by the Juvenile online influenced his subsequent behavior. Because of this, we conclude that the conditions are reasonably related to the circumstances of the offense and the Juvenile's history.

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

In arguing that the restrictions are overbroad in substantive scope, the Juvenile argues that "[r]equiring prior written approval for everyday functions that use the internet[] will entomb Juvenile Appellant and prevent him from job hunting, conducting class assignments, or even emailing with his doctors and psychiatrists." We must recognize that access to computers and the Internet is essential to functioning in today's society. The Internet is the means by which information is gleaned, and a critical aid to one's education and social development. To the extent these conditions require the Juvenile to request permission every time he needs to use a computer, or every time he needs to access the Internet, we find them to be unreasonably restrictive. Moreover, the important interest underlying these computer and Internet restrictions is in preventing access to sexually explicit materials. There is already a separate condition that restricts access to sexually explicit materials, and that has not been challenged. Concluding that Special Condition 13 is unreasonably restrictive, the district court is instructed that Special Condition 13 is not to be

construed or enforced in such a manner that the Juvenile would be required to seek prior written approval every single time he must use a computer or access the Internet. We intend this to allow for oversight of the Juvenile's computer and Internet usage, but not with the heavy burden of requiring prior written approval every time he must use a computer or access the Internet for school, health, work, recreational, or other salutary purposes. Accordingly, we AFFIRM subject to our interpretation and determination set out herein.

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

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

Finally, the Juvenile complains generally that the special conditions are overbroad insofar as they require him to provide his financial records, and that this constitutes an extreme and unreasonable deprivation of liberty and property. While his objections are not detailed and provide little argument, we assume that they relate to Special Conditions 17 and 18. We reject his contentions with regard to Special Condition 17 as this condition relates to the monitoring of his computer and Internet use, which we upheld above. With respect to Special Condition 18, we have already interpreted Special Condition 13 so as not to be unreasonably restrictive on the Juvenile's use of the Internet. Because he may use the Internet, it only follows that he should be able to make payments for the proper use of the Internet. Because Special Condition 18's purpose is to verify that there have been no payments to an internet service provider, and payment for proper use should be made by the Juvenile, and because there is no other basis to justify the restriction imposed by Special Condition 18, Special Condition 18 is unreasonably restrictive. We MODIFY the special conditions by striking Special Condition any probation officer in the lawful discharge of the officer's supervision functions.

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

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

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

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

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

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

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

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

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

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

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

Held: Affirmed

Opinion: Appellant argues that the trial court abused its discretion by imposing a more restrictive probation condition when a spectrum of other probation options were available. However, there is no requirement that the juvenile court "exhaust all possible alternatives" prior to committing a juvenile to an out-of-home placement. See In re J.A.M., No. 04–07–00489–CV, 2008 WL 723327, at *2 (Tex.App.–San Antonio Mar. 19, 2008, no. pet.)(mem.op.). Here, the record shows that the juvenile court did not abuse its discretion in placing Appellant in the Challenge Academy. Although Appellant was never placed into a Level 4 or Level 5 program prior to being sentenced to the Challenge Academy, nor was he placed into CAAP or APECs, Officer Lozano testified that ISP and the Drug Court both recommended that Appellant be placed at the Challenge Academy.

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

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

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

In the Matter of M.O., No. 08-13-00148-CV, --- S.W.3d ----, 2014 WL 6865451, Tex.Juv.Rep. Vol. 29 No. 1 ¶15-1-2 (Tex.App.-El Paso, 12/3/15).

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

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

In March 2013, the State moved a second time to modify M.O.'s disposition. The State alleged that M.O. had violated the terms and conditions of his supervised probation by: (1) committing arson and aggravated assault with a deadly weapon; (2) using, consuming, or possessing marijuana; (3) twice leaving electronic-monitoring premises without the court's permission; and (4) committing school-related infractions resulting in his suspension and expulsion from public school. M.O. entered into an agreed modification order committing him to TJJD. M.O. then filed a motion for new trial contending he had agreed to the disposition to TJJD by mistake, believing he had no other

option and could not contest the disposition. The trial court granted M.O.'s motion and set a modification-disposition hearing for May 3, 2013.

At the modification-disposition hearing, the trial court admitted into evidence a modification-disposition report prepared by Juvenile Probation Department Officer Oscar Miranda. Miranda's report noted that from January 2012 to February 2013, M.O. had been charged with aggravated assault against a public servant, had committed arson at his public school, had used or possessed marijuana, had absconded from his home for several days, and had been suspended and then expelled from school. In February 2013, M.O. was placed in detention, and while there attempted to assault and twice assaulted other juveniles, flooded his room, and was caught in possession of a utensil he intended to make into a shank. The report indicated that in April 2013, the SHOCAP team, the "staffing committee," and the Chief Juvenile Probation Officer all unanimously recommended M.O. be committed to TJJD due to his referral history, his continued commission of serious felony offenses while on probation in the community, and because he constituted a danger to himself and others. The report noted M.O. had received psychological assessments, Emotional Regulation Group Counseling, and services from the El Paso Emergence Health Network and MRT, from which he was discharged due to non-attendance. The report concluded and recommended that M.O. be committed to TJJD because despite being given the opportunity to correct his behavior through ISP under SHOCAP and being afforded counseling services in the community, M.O. continued to violate the terms of his probation by committing felony offenses, abusing drugs, failing to attend school, and leaving his home premises.FN1TJJD was recommended not only for the safety of M.O. and the community, but also because TJJD would provide a secure, structured setting that would restrict M.O.'s interactions with negative peers and ensure he received educational services, vocational training, therapeutic services, and independent living skills. The report noted that reasonable efforts had been made to avoid removing M.O. from his home, as he had been afforded community-based counseling services, community-based supervision through two intensive programs, and out-of-home placement in the local Challenge Academy program. The report stated that M.O's mother was the subject of on-going contempt hearings and concluded that M.O's home could not provide the level of support needed to complete probation as shown by M.O's continued disregard for the conditions of his probation.

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

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

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

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

At the conclusion of the modification-disposition hearing, the trial court committed M.O. to TJJD. The trial court found that (1) it was in M.O.'s best interest to be placed outside his home; (2) reasonable efforts were made to prevent or eliminate the need for M.O.'s removal from the home and to make it possible for him to return to his home; and (3) M.O could not be provided the quality of care and level of support in his home necessary to meet the standards of his probation. In particular, the trial court found that reasonable efforts had been made to prevent M.O.'s removal from his mother's home, including previously placing M.O. on probation, previously referring him to the Intensive Supervised Probation program under SHOCAP, previously referring him to counseling or psychological services with El Paso Emergence Health Network, Emotional Regulation Group, and MRT, and providing him psychological evaluations and assessments. The trial court also found that it was contrary to M.O.'s welfare to remain in his mother's home and in his best interest to be placed outside of his home, because M.O. had a history of running away, a history of aggression, had been on probation previously, and was a known gang member, and because his mother lacked sufficient skills to provide adequate supervision and had refused to cooperate with court orders. The court also found that M.O. needed to be held accountable for his delinquent behavior, that he posed a risk to the safety and protection of the community, that no community-based intermediate sanction was available to adequately address M.O.'s needs or to adequately protect the needs of the community, and that the gravity of the offense and M.O's prior juvenile record required he be confined to a secure facility.

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

Held: Affirmed

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

First, we note that despite the trial court's finding, it was not required to determine that no community-based intermediate sanction was available to adequately address M.O.s' needs, before modifying M.O.'s disposition and committing him to TJJD. The applicable standard is contained in section 54.05 of the Family Code, which governs modifications to dispositions. Under section 54 .05 the trial court was required to determine, in pertinent part, that "reasonable efforts were made to prevent or eliminate the need for the child's removal from the child's home and to make it possible for the child to return home[.]"TEX. FAM.CODE ANN. § 54.05(m)(l)(B). Finding that "reasonable efforts were made" is a different and lesser standard from a determination that "no community-based intermediate sanction is available." The exhaustion of all possible alternatives to commitment is not required before a court modifies a disposition and commits a juvenile to TJJD. In re M.A.S., 438 S.W.3d at 807; In re J.R.C., 236 S.W.3d

870, 875 (Tex.App.-Texarkana 2007, no pet.). Nor is a court required to consider alternative dispositions in a modification hearing regarding a juvenile adjudicated delinquent based on conduct that would constitute a felony. In re A.T.M., 281 S.W.3d at 72; see TEX. FAM.CODE ANN. § 54.05(f). Further, the trial court is permitted to decline third or fourth chances to a juvenile who has abused a second chance. In re M.A.S., 438 S.W.3d at 807. Rather, the trial court was required to find that reasonable efforts had been made to prevent removal from and to permit M.O. to remain in his home. See TEX. FAM.CODE ANN. § 54.05(m)(l)(B).

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

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

EVIDENCE—

In the Matter of R.J., MEMORANDUM, No. 03-14-00389-CV, 2015 WL 6830674, Tex.Juv.Rep. Vol. 30 No. 1 ¶ 16-1-7 (Tex.App.-Austin, 11/6/2015).

THE FAILURE TO PROVIDE TIMELY NOTICE OF THE INTENTION TO CALL THE OUTCRY WITNESS WAS CONSIDERED HARMLESS WHERE THE DEFENDANT HAD ACTUAL NOTICE OF THE IDENTITY OF THE WITNESS, THE VICTIM TESTIFIED AND WAS SUBJECT TO CROSS-EXAMINATION, AND THE DEFENDANT DID NOT DEMONSTRATE HOW THE LACK OF TIMELY NOTICE IMPEDED HIS DEFENSE.

Facts: Appellant was adjudicated delinquent for committing sexual offenses when he was twelve years old with girls who were less than ten years old. The first occurred on July 13, 2013, with S.M., T.D., and T.D.'s sister, Z.D. The second episode occurred on July 15, 2013 with Q.K. and A.C.

The mother of T.D. and Z.D. testified that T.D. reported that appellant "touched between her legs" under her clothes and Z.D. said he "rubbed her butt." The girls' mother called police and took them for an examination at the hospital. Swabs of the areas reportedly touched showed two DNA contributors—neither of which was appellant. Angie Jones, the police detective who interviewed the girls testified that S.M. reported assaults only on the other girls. The girls were later interviewed at the Center for Child Protection. Interviewer Marisa Dubose testified at trial that, during her interview, S.M. asked for a bathroom break and, on her way, whispered something that Dubose said made S.M.'s mother develop " a look of shock." Dubose testified that S.M. said that she told her mother that appellant had "put his dingaling in my butt." Dubose also testified that S.M. reported that appellant had the girls take off their clothes, after which he put his penis into their anuses and touched the inside of her vagina with his hand. Dubose testified that Z.D. reported that appellant touched S.M. on her bottom under her clothes. Forensic interviewer Jennifer Findley Murphy testified that T.D. reported that appellant touched the outside of her middle part over her

clothes, touched her vagina and anus with his fingers, and "humped" her so fast that her underwear came down. She said that T.D. also reported that "the same thing happened" to S.M. and Z.D. and that appellant "put his finger in [S.M.'s] butt." Murphy also testified that T.D. said that a female cousin touched her "middle part."

Less than a week later, A.C., a five-year-old child who lived near where the July 13 episode occurred, reported that appellant had touched her inappropriately. Her mother testified that A.C. and her friend, Q.K., were acting strangely—the normally loud and happy girls were quiet and secretive—and that A.C. abruptly did not want her mother's help to bathe. A.C. told her mother that "something had happened" and that her vaginal area hurt. A.C.'s mother testified that A.C.'s vagina looked very red, swollen, and maybe a little torn.

Austin Police Department Detective Angie Jones interviewed appellant and testified that he denied the girls' accusations, was mad that they lied, and said "he would kick them in the teeth for lying." She said that appellant admitted spending time in the apartment with the girls and said that one of the girls watched him use the restroom. The detective also testified that appellant told her that one of his accusers "spreads her legs for everybody" and that sex offenders were "being 'their selves.' "

At trial, appellant objected to the admission of testimony by the forensic interviewers of T.D. and S.M., arguing that each girl made an outcry to a relative first. The trial court overruled the objection, and the interviewers related the girls' description of the episodes. T.D. testified, but did not provide information about the events alleged here. Z.D. first testified that a boy touched her, but then said she was scared to say if someone touched her and that she did not know if someone had touched her. S.M. flatly denied that appellant touched her improperly and that she ever was interviewed about whether he touched her. She nevertheless stated that appellant is "not a safe person" and that he does "nasty stuff," including making T.D. take off her clothes.

The trial court adjudicated appellant to have committed delinquent conduct by committing nine offenses. Six offenses involved S.M., the first four of which were aggravated sexual assault of a child and the latter two of which were indecency with a child by contact: penetrating her sexual organ with his finger, penetrating her anus with his sexual organ and his finger, contacting her anus with his sexual organ, and contacting her genitals and anus. The other three offenses were indecency with a child by contact with the genitals of T.D., Q.K., and A.C.

UNDISPUTED ISSUES

None of appellant's issues addresses the adjudication of delinquency regarding his conduct involving Q.K. and A.C. We affirm his adjudication for conduct involving those girls.

The State concedes that the three contact-based offenses involving S.M. are lesser-included offenses of three penetration-based offenses for which he was adjudicated delinquent.1 See Tex. Penal Code §§ 21.11, 22.021; see also Aekins v. State, 447 S.W.3d 270, 280–81 (Tex.Crim.App.2014) (citing Ex parte Pruitt, 233 S.W.3d 338, 348 (Tex.Crim.App.2007)). As such, the State asks that we vacate the adjudication concerning the lesser-included offenses to avoid double jeopardy. See Bigon v. State, 252 S.W.3d 360, 372 (Tex.Crim.App.2008). We vacate the following segment of the Judgment of Delinquency with respect to the three lesser-included offenses:

To wit: on or about the 13th day of July, 2013, in Travis County, State of Texas, the said Respondent violated a penal law of this State punishable by imprisonment, to-wit: Section 22.021 of the Texas Penal Code (Aggravated Sexual Assault of a Child), in that he did then and there knowingly and intentionally cause the anus of [S.M.], a child younger than 14 years of age, to contact the sexual organ of the said [Respondent]. To wit: on or about the 13th day of July, 2013, in Travis County, State of Texas, the said Respondent violated a penal law of this State punishable by imprisonment, to-wit: Section 21.11 of the Texas Penal Code (Indecency with a Child by Contact), in that he did then and there, with intent to arouse and gratify his sexual desire, knowingly and intentionally engage in sexual contact by touching the genitals of [S.M.], a child younger than 17 years of age. To-wit: on or about the 13th day of July, 2013, in Travis County, State of Texas, the said Respondent violated a penal law of this State punishable by imprisonment, to-wit: Section 21.11 of the Texas Penal Code (Indecency with a Child by Contact), in that he did then and there, with intent to arouse and gratify his sexual desire, knowingly and intentionally engage in sexual contact by touching the anus of [S.M.], a child younger than 17 years of age.

DISPUTED ISSUES

Appellant's remaining challenges attack the admission of outcry evidence concerning appellant's conduct with S.M. and T.D. and the sufficiency of the evidence to support the adjudication concerning the conduct involving S.M.

Held: Affirmed in part, remanded in part of disposition.

Memorandum Opinion: Appellant asserts that the admission of testimony from forensic interviewers Dubose and Murphy violated the hearsay rule because they were designated untimely and were not the proper outcry witnesses. The family code permits admission of testimony that would otherwise be excluded as hearsay in a juvenile case under the following circumstances:

(b) This section applies only to statements that describe the alleged violation that:

(1) were made by the child or person with a disability who is the alleged victim of the violation; and

(2) were made to the first person, 18 years of age or older, to whom the child or person with a disability made a statement about the violation.

(c) A statement that meets the requirements of Subsection (b) is not inadmissible because of the hearsay rule if:

(1) on or before the 14th day before the date the hearing begins, the party intending to offer the statement:

(A) notifies each other party of its intention to do so;

(B) provides each other party with the name of the witness through whom it intends to offer the statement; and

(C) provides each other party with a written summary of the statement;

(2) the juvenile court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and

(3) the child or person with a disability who is the alleged victim testifies or is available to testify at the hearing in court or in any other manner provided by law. Tex. Fam.Code § 54.031.

We apply this statute the same way as the similar statute governing outcry witnesses in criminal law. In re Z.L.B., 102 S.W.3d 120, 123 (Tex.2003). We will overturn the trial court's determination of who is a proper outcry witness only when the record shows that the trial court clearly abused its discretion. Garcia v. State, 792 S.W.2d 88, 90–92 (Tex.Crim.App.1990) (interpreting the outcry-witness statute from the criminal law, Tex.Code Crim. Proc. art. 38.072); see also In re J.G., 195 S.W.3d 161, 169 (Tex.App.—San Antonio 2006, no pet.). The appellant has the burden to show the abuse of discretion, which requires showing that trial court made a decision without reference to any guiding principles such that the decision falls outside the zone in which reasonable minds could differ. See Montgomery v. State, 810 S.W.2d 372, 391 (Tex.Crim.App.1990).

Appellant contends and the State concedes that the State provided only twelve days notice of its intention to call outcry witnesses concerning his actions with S.M. and T.D. rather than the fourteen days set out in the statute. See Tex. Fam.Code § 54.031(c)(1). The notice requirement is intended to prevent surprise to the defendant regarding the outcry-witness testimony. Fetterolf v. State, 782 S.W.2d 927, 930 (Tex.App.—Houston [14th Dist.] 1989, pet. ref'd) (interpreting Tex.Code Crim. Proc. art. 38.072). Appellant argues that noncompliance with the mandatory notice period should have prevented the State from using this exception to the rule excluding hearsay. See Tex. Fam.Code § 54.031(c)(1); Tex.R. Evid. 802. However, admission of outcry testimony despite failure to provide timely notice of the intention to call the witness is harmless error if the defendant had actual notice of the identity of the outcry witness, the victim testified and was subject to cross-examination, and the defendant does not demonstrate how the lack of timely notice impeded his defense. See Fetterolf, 782 S.W.2d at 930; see also Upton v. State, 894 S.W.2d 426, 429 (Tex.App.—Amarillo 1995, pet. ref'd). In this case, the State argued that it made the offense reports mentioning the interviewers available to appellant three months before trial, and the video recordings of the interviews by the outcry witnesses were available two months before trial. Appellant did not at trial and does not here argue that he was surprised by the outcry witnesses or their testimony. Both S.M. and T.D. testified and were available for cross-examination. Appellant has not demonstrated harm in the admission of the outcry testimony despite the State's late notice of intention to call the outcry witnesses.

Appellant next argues that the testimony of Murphy and Dubose was unreliable because they were not the first adults to whom T.D. and S.M. spoke about appellant's actions. See Tex. Fam.Code § 54.031(b). The record shows that T.D. spoke to her mother about the incident before speaking to Murphy and that S.M. spoke to her aunt about it before speaking to Dubose. The court of criminal appeals has held that, to fit within the outcry exception to hearsay exclusion, the child's statement to the adult "must be more than words which give a general allusion that something in the area of child abuse was going on." Garcia, 792 S.W.2d at 91; Villanueva v. State, 209 S.W.3d 239, 247 (Tex.App.—Waco 2006, no pet.). The proper outcry witness is the adult to whom the complainant first tells how, when, and where she was assaulted. Villanueva, 209 S.W.3d at 247; see also Sims v. State, 12 S.W.3d 499, 500 (Tex.App.—Dallas 1999, pet. ref'd). In Sims, the child told her mother she did not want to visit Sims because he touched her private parts, but that disclosure did not make the mother the outcry witness. 12 S.W.3d at 500. Though the mother did not believe the child's claim, she reported it to a family services counselor who then talked with the child. Id. The court of appeals concluded that, because the child first described the details of where and how she was touched to the counselor, the trial court did not abuse its discretion by designating the counselor as the outcry witness. Id.

We cannot say that the trial court abused its discretion by concluding that T.D.'s forensic interviewer was the outcry witness. T.D.'s mother testified that T.D. said that he touched her between her legs under her clothes. While T.D.'s initial report may allude to sexual assault, it lacks detail and does not lock in T.D.'s mother as the outcry witness. See id. The Austin police officer who responded to the scene testified that T.D.'s mother told him that her two daughters were touched on the vagina, but that does not prove that T.D. provided the key details said to her mother. By contrast, the forensic interviewer Murphy testified that T.D. told her that appellant touched her middle part and then demonstrated with dolls that the male pushed his finger into the female's vagina and anus. Based on the testimony, we cannot say that the trial court abused its discretion by concluding that T.D. first provided details describing an offense to the forensic interviewer. See id.

The same is true for S.M.'s outcry witness. The record shows that S.M. spoke to her aunt about appellant's actions before speaking with Dubose, but that S.M. reported only his assaults on the other girls. There is no evidence that S.M. made an outcry to anyone about appellant touching her before she spoke to Dubose. There is testimony that, before telling Dubose that appellant assaulted her, S.M. whispered something that Dubose said made S.M.'s mother develop " a look of shock." However, there is no testimony about what that statement was that would show that it was sufficiently detailed to qualify as an outcry statement. See id.

We conclude that the trial court did not abuse its discretion by admitting the testimony from Murphy and Dubose about the offenses involving T.D. and S.M. as outcry-witness testimony excepted from the hearsay exclusion.

Sufficiency of the evidence

Appellant contends that the evidence is legally insufficient to support the adjudication for the three offenses of aggravated sexual assault of S.M.2 We review adjudications of delinquency in juvenile cases by applying the same standards applicable to sufficiency of the evidence challenges in criminal cases. See Tex. Fam.Code § 54.03(f). See also In re M.C.L., 110 S.W.3d 591, 594 (Tex.App.—Austin 2003, no pet.). We view all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. See id. (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). The trier of fact is the sole judge of the weight and credibility of witness testimony, and therefore, on appeal we must give deference to the fact finder's determinations. In re M.L.M., 459 S.W.3d 120, 126 (Tex.App.—El Paso 2015, no pet.) (citing Brooks v. State, 323 S.W.3d 893, 899 (Tex.Crim.App.2010)). If the record contains conflicting inferences, we must presume the fact finder resolved those facts in favor of the verdict and defer to that resolution. Id. (citing Clayton v. State, 235 S.W.3d 772, 778 (Tex.Crim.App.2007)). On appeal, we serve only to ensure that the fact finder reached a rational verdict, and we may not reevaluate the weight and credibility of the evidence produced at trial and in so doing substitute our judgment for that of the fact finder. Id. (citing King v. State, 29 S.W.3d 556, 562 (Tex.Crim.App.2000)).

Appellant relies heavily on S.M.'s repeated denials in trial that appellant touched her. There was other somewhat confusing testimony from S.M.:
Q. [Appellant], okay. Had you ever told anyone that [appellant] did something to you?
A. (Nods affirmatively.)
Q. Yes, okay. What did you say that [appellant] did?
A. He didn't do nothing to me.

Appellant cites the absence of DNA or other physical evidence that he sexually assaulted S.M. He points to other testimony from Dubose that S.M. said that the assault occurred in a church and that she said something about killing everybody as being inconsistent and undermining S.M.'s credibility. He also recites the repeated testimony that he denied committing these offenses.

The trial court had to decide which evidence was credible. We cannot say that the trial court could not have reasonably found credible Dubose's account of S.M.'s accusations against appellant. She testified that S.M. told her that appellant put his penis in her anus and touched her vagina on the inside. Dubose also testified that Z.D. reported that appellant touched S.M. on her anus under her clothes. The trial court resolved credibility choices between statements attributed to S.M. and appellant as well as conflicts within S.M. various statements—including her denials at trial, her silence before the forensic interview, and her accusatory statements to the forensic interviewer. Viewed in the light most favorable to the verdict, the evidence is sufficient to support the trial court's conclusion beyond a reasonable doubt that appellant committed the actions that constitute the offenses underlying the court's adjudication of his delinquency.

Conclusion: We vacate that part of the Judgment of Delinquency concerning the three lesser-included offenses involving S.M. as set out above, affirm the judgment with respect to the remainder of the delinquency adjudication, and remand this cause so that the trial court may revisit and revise its disposition if necessary based on the revised adjudication.

Villarreal v. State, No. 03-14-00095-CR, --- S.W.3d ----, 2015 WL 4448130, Tex.Juv.Rep. Vol. 29 No. 2 ¶ 15-2-9 (Tex.App.—Austin, July 17, 2015).

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING EVIDENCE OF EXTRANEOUS BAD ACTS BY DEFENDANT DURING THE GUILT AND INNOCENCE PORTION OF THE TRIAL WHERE THE RECORD DID NOT SHOW THAT THE DEFENDANT WAS SURPRISED.

Facts: Charles G. Villarreal was charged with aggravated sexual assault of a child. See Tex. Penal Code § 22.021(a) (setting out elements of offense), .021(e) (specifying that offense is first-degree felony). Specifically, the indictment alleged that Villarreal "on or about the 1st day of March, 2008, ... intentionally or knowingly cause[d] the penetration of the female sexual organ of Crystal Ann [pseudonym]; a child younger than 14 years of age, with [his] finger." Crystal Ann is Villarreal's cousin and is six years younger than Villarreal.

During the trial, Crystal Ann testified that she moved into a home with her family when she was six years old and later moved into another home with her family when she was ten or eleven years old. In her testimony, Crystal Ann explained that Villarreal lived with her family for several years at the first home and that he moved with them to the second home. When discussing the time that Villarreal lived with her at both houses, she said that he repeatedly sexually abused her. More specifically regarding the first home, Crystal Ann testified that on multiple occasions, Villarrreal "put his fingers inside of my vagina," that he "forced me to have sex with him" by forcing "his penis into my vagina" on more than three occasions, that Villarreal also put his penis into "my mouth," and that Villarreal grabbed her hand and made her stroke his penis. When describing these incidents, Crystal Ann stated that she sometimes told him to stop and that on other times, she did not say anything. Similarly, Crystal Ann testified that when her family moved to the second home, Villarreal on multiple occasions put his fingers inside her vagina and raped her by putting his penis inside her vagina. In addition, she testified that Villarreal performed these acts throughout the whole time that he was living with her family at the second home and that Villarreal moved out of the

second home approximately one month after he celebrated his eighteenth birthday at their house. When describing the number of times that those assaults occurred at the second home, she specified that they happened "[a] lot," that it was more than five times, that she was "not sure" if it was more than ten times, and that the assaults occurred approximately once a month until he moved out. Furthermore, Crystal Ann testified that the abuse stopped after Villarreal moved out of the second house and that although she could not remember when the last assault occurred, the assault occurred when she was "[p]robably about 11" years old.

After Crystal Ann finished her testimony, her mother, E.Z., testified that Villarreal lived with them at both homes and that he moved out after he turned eighteen years old. Moreover, E.Z. explained that when the family was living at the first home, Crystal Ann started experiencing nightmares and would often ask to sleep in the bedroom with her and her husband and would try to bring her younger sister into the room as well. Furthermore, E.Z. stated that around the time that the family moved into the second home, she noticed a change in the relationship between Crystal Ann and Villarreal. In particular, she testified that Crystal Ann no longer wanted to be around Villarreal and asked her why he was living with them. E.Z. also explained that when they moved to the second home, Crystal Ann was "always covered up, never wanted to do anything, just be with her little sister." When describing her daughter's demeanor, E.Z. said that Crystal Ann was depressed. Furthermore, she recalled that she did not learn about any allegations of sexual abuse until after Villarreal moved out. Regarding how she learned of the alleged abuse, E.Z. explained that her other daughter called her and said that Crystal Ann was "just crying and crying and crying and she wouldn't come out of the bathroom." Moreover, E.Z. revealed that she tried to get Crystal Ann to explain what was wrong but that Crystal Ann would not talk about it. In addition, she testified that when she learned what had happened between Crystal Ann and Villarreal, she went to the police and filed a report.

During the trial, Detective David Schroeder testified that he interviewed Villarreal after a complaint was made to the police and that during the interview, Villarreal stated that he could not remember if he had abused Crystal Ann because he was using drugs and alcohol at that point in his life. Detective Schroeder also explained that Villarreal never denied the allegations. Moreover, Detective Schroeder mentioned that Villarreal stated that if he committed the acts that Crystal Ann alleged, he did not do them on purpose. A recording of the interview was played during Detective Schroeder's testimony. Initially on the recording, Villarreal denied the accusations generally and asserted that it would not have been possible for that to have happened while he was living at either home. However, later in the interview, Villarreal stated that he does not remember any of the events, that he was often drunk or high when he was living with Crystal Ann and her family, that he did not like that part of his life, that he was adamant that he did not do anything on purpose, and that if he hurt her on accident, he was sorry.

At the conclusion of the trial, the jury found Villarreal guilty and imposed a sentence of 16 years' imprisonment. See id. § 12.32 (setting out permissible punishment range for first-degree felony). In three issues on appeal, Villarreal asserts that the evidence supporting his conviction is legally insufficient, that the district court erred by failing to grant his motion for a directed verdict, and that the district court erred by admitting evidence of his extraneous bad acts. We will affirm the district court's judgment of conviction.

Held: Affirmed

Opinion: Villarreal contends that the district court erred by admitting evidence regarding alleged extraneous instances of sexual assault. In particular, Villarreal contends that it was error to allow in the testimony of Crystal Ann regarding sexual assaults other than the one at issue in this case that he allegedly committed against her because he did not receive sufficient notice of the State's intention to use that evidence.

As support for this issue, Villarreal principally relies on article 38.37 of the Code of Criminal Procedure and on recent amendments that were made to that provision. See Tex.Code Crim. Proc. art. 38.37. In both the prior and the current version, the statute provides that, notwithstanding Rules of Evidence 404 and 405, for certain offenses, including aggravated sexual assault of a child, "evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including: (1) the state of mind of the defendant and the child; and (2) the previous and subsequent relationship between the defendant and the child." Id. art. 38.37, § 1(a)(1)(B), (b). In the amendments, the legislature added a

provision providing that, notwithstanding Rules of Evidence 404 and 405, "evidence that the defendant has committed a separate offense described" by the provision, including aggravated sexual assault, "may be admitted in the trial of an alleged offense" similarly described by the provision "for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant." Id. § 2(a)(1)(E), (b). However, the amendments also added the requirements that the State "shall give the defendant notice of the state's intent to introduce" the evidence in the case in chief "not later than the 30th day before the date of the defendant's trial" and that before this type of evidence is admitted, the trial court must "conduct a hearing out of the presence of the jury" for the purpose of determining whether "the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt." Id. §§ 2–a, 3. The prior version of the statute only required the State to provide notice regarding its intention to use evidence concerning extraneous crimes committed by the defendant if the defendant made a request for notice. See Act of May 28, 1995, 74th Leg., R.S., ch. 318, § 48, 1995 Tex. Gen. Laws 2734, 2748–49, amended by Act of May 24, 2005, 79th Leg., R.S., ch. 728, § 4.004, 2005 Tex. Gen. Laws 2188, 2192, amended by Act of April 7, 2011, 82d Leg., R.S., ch. 1, § 2.08, 2011 Tex. Gen. Laws 1, 6 (current version at Tex.Code Crim. Proc. art. 38.37); see also Lopez v. State, No. 05–13–01137–CR, 2015 Tex.App. LEXIS 955, at *2 n. 2 (Tex.App.—Dallas Feb. 2, 2015, pet. ref'd) (mem.op.) (explaining that amendment removed requirement that defendant request notice).

In light of the fact that the current statute now obligates the trial court to conduct a hearing to consider the adequacy of the evidence, requires the State to provide notice of its intent to use the evidence 30 days before trial without a request by the defendant, and expands the permissible uses of the evidence to include establishing the character of the defendant, Villarreal insists that the 30–day notice requirement must be strictly complied with. See Tex.Code Crim. Proc. art. 38.37, § 3. Moreover, Villarreal asserts that he was not given the required notice. Although Villarreal acknowledges that the State did provide notice months before trial of its intent to use evidence of extraneous bad acts, he highlights that the notice did not explain that the evidence would be used to establish character or character conformity as permitted under the new version of article 38.371; on the contrary, Villarreal notes that the notice provided that the State intended to offer the evidence under Rules of Evidence 404(b) and 609 (f) and subsection 3(a)(5) of article 38.22 and subsection 3(g) of article 37.07 of the Code of Criminal Procedure but asserts that those provisions do not authorize the evidence to be used to show character or character conformity, particularly during the guilt or innocence portion of the trial. See Tex.R. Evid. 404(b) (prohibiting evidence of crime or bad act to prove person's character to show action in conformity with character but allowing in that evidence for other purposes, including establishing intent, motive, or absence of mistake), 609(f) (allowing evidence of prior conviction to be used to attack witness's credibility); Tex.Code Crim. Proc. arts. 38.22, § 3(a)(5) (requiring State to provide copy of recording of prior statement made by defendant during custodial interrogation before statement may be admitted against him), 37.07, § 3 (allowing State to introduce during punishment phase evidence of extraneous crimes or bad acts that have not resulted in final conviction); see also Hitt v. State, 53 S.W.3d 697, 704–05 (Tex.App.—Austin 2001, pet. ref'd) (explaining interplay between Rules of Evidence and evidentiary statutes and how prior version of article 38.37 superseded requirements of various rules in certain sexual-abuse cases). Moreover, Villarreal insists that a proper notice must reference not only the evidence that will be offered but must also set out the purpose for which the evidence will be introduced.2

"[A] trial court's ruling on the admissibility of extraneous offenses is reviewed under an abuse-of-discretion standard." Devoe v. State, 354 S.W.3d 457, 469 (Tex.Crim.App.2011). "A trial court does not abuse its discretion if its decision falls within the 'zone of reasonable disagreement.' " Beam v. State, 447 S.W.3d 401, 403 (Tex.App.—Houston [14th Dist.] 2014, no pet.) (quoting Montgomery v. State, 810 S.W.2d 372, 391 (Tex.Crim.App.1991) (op. on reh'g)). "If the trial court's decision on the admission of evidence is supported by the record, there is no abuse of discretion, and the trial court will not be reversed." Marsh v. State, 343 S.W.3d 475, 478 (Tex.App.—Texarkana 2011, pet. ref'd). Reviewing courts should not substitute their judgment for that of the trial court. Id.

During the hearing before the district court regarding whether the evidence of other instances of sexual assault would be sufficient to allow the jury to conclude beyond a reasonable doubt that Villarreal committed those acts, see Tex.Code Crim. Proc. art. 38.37, § 2–a, Villarreal presented the same arguments that he presents on appeal. As with his arguments on appeal, Villarreal did not argue before the district court that he did not actually receive notice of an

intent to use evidence regarding those acts, nor did Villarreal argue that he was unaware of the alleged acts at issue. On the contrary, he argued that the State's notice did not comply with the 30–day requirement from the recently amended article 38.37 and that the statutes and rules listed in the State's notice do not allow evidence of extraneous acts to be used to establish character or character conformity during the guilt or innocence portion of the trial. See id. § 3; cf. Hayden v. State, 66 S.W.3d 269, 272–73 (Tex.Crim.App.2001) (noting when determining that trial court did not abuse its discretion that defendant did not claim that he did not receive actual notice of State's intent to use evidence and instead simply asserted that notice did not comply with provisions of Rule 404(b)).

In response, the State argued that its notice did not include a reference to article 38.37 because the recent amendments to that provision allowing for the use of the type of evidence at issue for character purposes became effective a few months after the notice was sent out. Moreover, the State argued that one of the rules listed in its notice, Rule 404, allows evidence of prior bad acts during the guilt or innocence portion of the trial as well as the punishment phase. In addition, the State asserted that months before the trial, it provided Villarreal with copies of evidence that it obtained regarding the other assaults, including the offense report detailing the other acts, a summary of Crystal Ann's statements in an interview before the Children's Advocacy Center, and videos of interviews of Villarreal and potential witnesses.

Moreover, the State mentioned that "as an extra precaution," it provided Villarreal with an additional notice five days before the trial started setting out the State's intent to introduce extraneous offenses, crimes, wrongs, and bad acts. The amended notice specifically mentioned article 38.37 and also listed the particular extraneous sexual assaults allegedly committed by Villarreal against Crystal Ann that the State planned to introduce during trial. In addition, the State noted that around the same time that the revised notice was sent to Villarreal, Villarreal filed a motion to suppress regarding any evidence concerning his alleged abuse of Crystal Ann prior to his seventeenth birthday. Cf. Dusek v. State, 978 S.W.2d 129, 136 (Tex.App.—Austin 1998, pet. ref'd) (concluding that record showed that defendant was given notice required under Rule 404(b) because he filed motion seeking to suppress evidence at issue and showing knowledge of evidence as well as State's intent to use it one week before trial).

After listening to the parties' arguments, the district court determined that it would allow in the evidence concerning the other sexual assaults. When explaining its ruling, the district court stated that although the prior notice did not list article 38.37, the prior notice was given to Villarreal months before the trial started and that, therefore, Villarreal "was on actual notice of the State's general intent to introduce pursuant, at the very least, 404(b) and other things." However, the district court also limited the State's ability to introduce evidence "to those acts that were described in the notice in excess of 30 days ago." Specifically, the district court prohibited the State from introducing evidence regarding an additional allegation listed in the amended notice that Villarreal penetrated Crystal Ann's anus with his penis.

Villarreal asserts that he was harmed because he was unprepared to defend against the use of the evidence to establish his character during the guilt or innocence portion of the trial. As mentioned above, Villarreal contends that the notice that the State gave to him regarding the prior offenses did not list article 38.37 and instead listed statutory provisions and Rules of Evidence that would not have allowed the State to use evidence of extraneous acts during the guilt or innocence phase to establish his character. Accordingly, Villarreal insists that on the day of trial, he did not know that the State's case rested mostly on prior acts allegedly committed by him and was unprepared to defend himself against those accusations.

Although Villarreal asserts that he was harmed because he was unprepared to defend against the use of the allegations of extraneous offenses to establish his character and his actions in conformity with that character, as summarized above, Villarreal was given notice of the State's intent to use that evidence months before the trial started, and it is hard to imagine how his defense against the use of the evidence for character purposes would have differed from his defense against the State's use of that evidence for the purposes identified in Rule 404(b) or for punishment purposes. Cf. Hernandez v. State, 176 S.W.3d 821, 826 (Tex.Crim.App.2005) (noting that defendant "failed to make any showing of how his defense strategy might have been different had the State explicitly notified him" that it intended to use evidence at issue). Moreover, Villarreal had the opportunity to cross-examine Crystal Ann and E.Z. during trial regarding the alleged misconduct and regarding the time that Villarreal lived with them,

and Villarreal was also able to cross-examine them during the hearing held outside the presence of the jury for the purpose of determining whether evidence of extraneous offenses would be admitted. Furthermore, the record reveals that Villarreal's strategy was to undermine Crystal Ann's testimony by challenging her ability to recall or explain when the alleged misconduct occurred. More specifically, Villarreal repeatedly asserted throughout the trial that any allegation of misconduct that occurred before he turned seventeen years old could not serve as the basis for a conviction in this case and urged that the State's evidence failed to establish that any assault occurred after he turned seventeen.

Conclusion: Accordingly, assuming there was error, we would conclude that any "error did not influence the jury or had but slight effect." See McDonald, 179 S.W.3d at 578–79. For all of these reasons, we overrule Villarreal's last issue on appeal. Having overruled all of Villarreal's issues on appeal, we affirm the district court's judgment of conviction.

Lumsden v. State, MEMORANDUM, No. 05-14-01338-CR, 2015 WL 3632093, Tex.Juv.Rep. Vol. 29 No. 2 ¶ 15-2-4 (Tex.App.-Dallas, June 11, 2015).

THERE WAS NO ERROR DURING GUILT/INNOCENCE PHASE OF ADULT TRIAL, WHERE JURY CHARGE WHICH INCLUDED PRIOR BAD ACT WHEN DEFENDANT WAS THIRTEEN YEARS OLD WAS ALLOWED, EVEN THOUGH DEFENDANT COULD NOT HAVE BEEN CONVICTED OF OFFENSE AS A THIRTEEN YEAR OLD.

Facts: H.P. was born in 2003. After her mother, Misty, and father, Brian, split up, Misty dated and lived with appellant. Brian began dating and later married Tashia. H.P. lived with Brian and Tashia and, until she was about four years old, visited her biological mother, Misty, and appellant every other weekend and on Wednesdays. After several visits when H.P. came home with bruises and scrapes from "playing" with appellant, Brian and Tashia called CPS. Although CPS staff was able to talk to Misty, they could not reach appellant and subsequently closed the investigation. Nevertheless, Brian and Tashia decided it was in H.P.'s best interest to stop visiting Misty and appellant.

Three years later, the couple decided to reach out to Misty, in large part because H.P. began asking where Misty was and why she was not around. At some point, Misty told Tashia she was taking her children to the circus and suggested Tashia and H.P. meet them there. When they arrived, Tashia and H.P. realized appellant was there with Misty. H.P. told Tashia she did not want to be there because of appellant, so they left.

In the summer of 2013, H.P. told Tashia she needed to tell her a secret, that "when she was about five years old," appellant "stuck his penis in her." Tashia, who was "shell-shocked," called the crisis center who in turn contacted CPS and the police. Charlene Green, a forensic interviewer, interviewed H.P. As a result of the investigations by CPS and the police, appellant was arrested and charged with aggravated sexual assault of a child.

Before trial, the State gave notice of its intent to (1) use H.P.'s statement to an outcry witness, naming both Tashia and Green as the potential outcry witness, and (2) introduce an extraneous event that occurred in 1998 involving the then thirteen-year-old appellant and his four-year-old stepbrother. In the first pretrial hearing, the trial court considered whether, under article 38.37 of the code of criminal procedure, the State could introduce evidence that appellant "committed a separate offense" when he was thirteen years old: specifically, that he and his stepbrother "took their clothes off ... [the little boy] was down on his hands and knees, and ... [appellant] put his penis on top of the little boy's butt ... [and when] the little boy realized that it was wrong [he] ran out of the room to his mother." After concluding section 2(b) of article 38.37 specifically provided for the admission of such evidence, the trial court allowed it at trial during guilt/innocence.

Held: Affirmed

Memorandum Opinion: In his second issue, appellant claims the trial court erred by allowing the jury to hear and consider the article 38.37 evidence of the prior incident with his then-four-year old stepbrother. Appellant argues the evidence was not admissible for a variety of reasons, including that, at the time, he was thirteen years old and could not have been convicted of any offense.

At the pretrial article 38.37 hearing, appellant's father testified about the events in 1998 involving appellant and his stepbrother that led the father to contact CPS. In addition, the CPS worker assigned to investigate the allegations testified. At the conclusion of the hearing, appellant did not voice any objections.

At trial, when the State called appellant's father to testify, the trial court admonished the jury that any evidence heard regarding appellant committing a separate offense, other than the one he was on trial for, could only be considered if the jury found the evidence beyond a reasonable doubt and then, it could only be considered as evidence "bearing on relevant matters, including the character of the defendant and the acts performed with and in conformity with the character of the defendant." Appellant then said, "I'd like to urge my objection to his testimony." He did not, however, give any legal ground or basis for his objection. His objection did not state, with sufficient specificity, what his complaint was or what relief he sought. See Ford v. State, 305 S.W.3d 530, 533 (Tex.Crim.App.2009) (objection must be sufficiently clear to provide trial court and opposing counsel opportunity to address and, if necessary, correct purported error). Furthermore, the complaint he raises on appeal, that he could not have been prosecuted for or convicted of any offense in 1998 because he was thirteen years old, does not comport with the general objection lodged at trial. See Guevara v. State, 97 S.W.3d 579, 583 (Tex.Crim.App.2003) (appellant failed to preserve any error regarding admission of evidence because objection at trial did not comport with complaint raised on appeal). We conclude appellant waived any complaint regarding the trial court's decision to admit the evidence. We overrule appellant's second issue.

In his third issue, appellant claims the trial court erred by instructing the jury regarding the 1998 incident. The charge instructed the jury:

You are further instructed that if there is any testimony before you in this case regarding the defendant having committed a separate offense of intentionally or knowingly causing the touching of the body of [his four-year-old stepbrother], including touching through clothing, with the defendant's genitals, with the intent to arouse and gratify the defendant's sexual desire [,] [y]ou cannot consider said evidence for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offense, if any. Even then, this evidence may only be considered by you for any bearing that this evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.

Under this issue, appellant's entire legal analysis is as follows: At the Court Charge stage of the case, Penal Code Article 8.07 and the 1998 version of the indecency with a child offense would both have been independent grounds for excluding an [sic] reference to the prior alleged offense from the jury charge. That exclusion would have been a proper application of the law of the case as discussed in Taylor and Alberty supra. The trial judge is ultimately responsible for the accuracy of the jury charge and accompanying instructions. Article 36.14, T.C.C.P. Delgado v. State 235 SW3d 244 (Tex.Crim.App.2007)[.]

Texas Rule of Appellate Procedure 38 provides a brief shall contain, among other things, a concise, nonargumentative statement of the facts of the case, supported by record references, and a clear and concise argument for the contention made with appropriate citations to authorities and the record. TEX.R.APP. P. 38.1(h), (i). It is unclear from appellant's brief what his precise complaint is. Appellant does not discuss the standard of review for purported jury charge error, and although appellant cites three cases as authority, he does not analyze these three cases or other substantive law to support his contentions. See Salazar v. State, 38 S.W.3d 141, 147 (Tex.Crim.App.2001). Nor does he show was harmed by the purported erroneous jury charge. Given appellant's complete failure to analyze the cases cited or any other law, we question whether appellant has adequately briefed this issue.

Regardless, even if we consider Taylor v. State, 332 S.W.3d 483 (Tex.Crim.App.2011) and Alberty v. State, 250 S.W.3d 115 (Tex.Crim.App.2008), appellant has not shown reversible error because neither case applies to the facts here. In Taylor and Alberty, each defendant was charged with sexually abusing their respective victims over a period of years. During a portion of this time, each defendant was younger than seventeen years of age. Taylor, 332 S.W.3d at 48586; Alberty, 250 S.W.3d at 11617. Because the law did not allow a person to be convicted of acts committed while younger than 17 years of age, the defendants complained on appeal that the jury was allowed to convict them for acts committed when they were younger than seventeen, in violation of section 8.07 of the penal code, rather than limiting the conduct to when they were 17 years of age or older.FN1 Taylor, 332 S.W.3d at 488; Alberty, 250 S.W.3d at 118.

FN1. Under section 8.07 of the penal code, unless a juvenile court waives jurisdiction under section 54.02 of the family code, "[a] person may not be prosecuted for or convicted of any offense that the person committed when younger than 17 years of age" except for specific offenses detailed in subsections (a)(1) through (5) of that section. TEX. PENAL CODE ANN. § 8.07 (West Supp.2014).

In contrast to these cases, appellant did not begin abusing H.P when he was a juvenile; rather, he was an adult at the time of all the alleged misconduct. And he was not being charged with any incident involving his stepbrother. The concerns addressed in Taylor and Alberty are absent here.

Conclusion: We overrule appellant's final issue.

In the Matter of C.Z.S., MEMORANDUM, No. 09-14-00480-CV, 2015 WL 3407250, Tex.Juv.Rep. Vol. 29 No. 2 ¶ 15-2-3 (Tex.App.-Beaumont, May 28, 2015).

IN AN INDECENCY WITH A CHILD PROSECUTION, EXPERT WHO HAS NOT EXAMINED THE CHILD VICTIM, MAY TESTIFY WHERE THEIR TESTIMONY WOULD ALLOW THE JURY TO ASSESS THE CREDIBILITY OF THE VICTIM MORE FAIRLY BY EXPLAINING THE EMOTIONAL ANTECEDENTS UNDERLYING THE "TYPICAL" VICTIM'S BEHAVIOR.

Facts: The State's petition alleged that C.Z.S. engaged in delinquent conduct by committing indecency with a child against R.S. R.S. testified that she wanted to play with C.Z.S. and C.Z.S. told her he would play if R.S. touched his private parts. R.S. testified that she touched C.Z.S.'s penis with her fingers. R.S.'s mother testified that R.S. told her different stories before she admitted that C.Z.S. had abused her. R.S. testified that she was initially untruthful because she thought she had done something wrong and did not want to get in trouble. She denied seeing anything "nasty" at her father's house and testified that no one told her what to say at trial.

Susan Odhiambo, a forensic interviewer, testified that when she interviewed R.S., R.S. initially denied any abuse. However, after Odhiambo asked R.S. if she had told her mother about being made to touch someone, R.S. told Odhiambo that C.Z.S. made her touch his "pee." R.S.'s mother did not believe that C.Z.S. abused R.S., but she believed that R.S. saw something at her father's house and that her father had prompted R.S. to accuse C.Z.S. so as to clear himself from any wrongdoing. R.S.'s father testified that he had no reason to lie to the court or to encourage R.S. to lie. C.Z.S.'s mother testified that C.Z.S. told her, in a letter, that nothing physical occurred, but that he "maybe [he] said some-thing stupid[ ]" to R.S. She did not believe that C.Z.S. had anything to do with the allegations against him.

Dr. Lawrence Thompson, a psychologist, testified that it is not unusual for child abuse victims to give a delayed disclosure. Thompson testified that he has witnessed times when children have recanted allegations of sexual abuse for various reasons, such as the abuse did not happen or the child is being pressured to recant. He explained that when a child knows the perpetrator, the child can be reluctant to disclose abuse and can be manipulated. Thompson testified that it is not uncommon for some family members to believe the abuse occurred, while others believe there was no abuse. He stated that it is not unusual for abused children to act normal or to fear getting into trouble if they

disclose the abuse. As an example of grooming, Thompson identified an instance when the perpetrator tells the child to "[d]o this sexual act, and I'll play with you."

In this case, the State alleged that C.Z.S. committed indecency with a child by (1) engaging in sexual contact with R.S.; and (2) with intent to arouse or gratify the sexual desire of any person, exposed his anus or any part of his genitals, knowing R.S. was present. See Tex. Penal Code Ann. § 21.11(a)(1), (2)(A) (West 2011). The jury heard R.S. testify that C.Z.S. said he would play with her if she touched his penis, which she did. She eventually disclosed the abuse to her mother and to Odhiambo. R.S. explained that she initially failed to disclose what occurred because she was afraid she had done something wrong and would be in trouble if she told the truth. The jury heard Thompson explain that it is not uncommon for child victims to delay a disclosure or to be afraid of getting into trouble for disclosing the abuse. Thompson's testimony also demonstrated that an example of grooming includes a perpetrator promising to play with the child in exchange for the child engaging in a sexual act.

Held: Affirmed

Memorandum Opinion: In issue two, C.Z.S. contends that the trial court abused its discretion by allowing Thompson to testify because, according to C.Z.S., Thompson's testimony was not relevant to whether C.Z.S. had committed the offense. Outside the jury's presence, Thompson testified that he had not reviewed documents or interviewed witnesses in connection with C.Z.S.'s case and had no specific knowledge of the facts. He explained that the purpose of his testimony was "[t]o provide information to the jury from my clinical experience, from the research related to child sexual abuse so that they can apply [it] to this case as they see fit." Thompson testified that he would be discussing what an outcry is, that disclosure of sexual abuse is a process, the effects of child abuse on the victim, how the child victim might testify, and grooming. C.Z.S. argued that Thompson's testimony was irrelevant to the facts of the case. The trial court overruled C.Z.S.'s objections.

Relevant evidence is that which "has any tendency to make a fact more or less probable than it would be without the evidence" and is a fact of consequence in determining the action. Tex.R. Evid. 401. "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Tex.R. Evid. 702. Expert testimony regarding the characteristics commonly displayed by child victims of sexual abuse is admissible. Tillman v. State, 354 S.W.3d 425, 440 (Tex.Crim.App.2011); Cohn v. State, 849 S.W.2d 817, 818–19 (Tex.Crim.App.1993). This type of testimony satisfies Rule 702 because it allows the jury to "assess the credibility of a particular complainant more fairly by explaining the emotional antecedents underlying the typical victim's behavior[.]" Kirkpatrick v. State, 747 S.W.2d 833, 836 (Tex.App.—Dallas 1987, pet. ref'd).

Conclusion: Because Thompson's testimony was intended to explain the traits of child sexual abuse victims, we conclude that the trial court did not abuse its discretion by allowing Thompson to testify. See Tillman, 354 S.W.3d at 440; see also Cohn, 849 S.W.2d at 818–19; Kirkpatrick, 747 S.W.2d at 836; Tex.R. Evid. 702. We overrule issue two.

JURISDICTION—

Kuol v. State, No. 14-14-01008-CR, --- S.W.3d ----, 2015 WL 9240885, Tex.Juv.Rep. Vol. 30 No. 1 ¶ 16-1-3A [Tex.App.-Hou. (14th Dist.), 12/15/2015]

OFFENSE OF PROSTITUTION WHERE STATE ALLEGED FIVE PRIOR CONVICTIONS GIVES FELONY COURT JURISDICTION OF CASE.

Facts: Appellant was arrested for prostitution by the Houston Metropolitan Transit Authority. She was charged by information—waiving her right to a grand jury indictment—with felony prostitution. The indictment alleged that she had previously been convicted of prostitution five times in Dallas County. After pleading guilty to the offense of

felony prostitution, appellant was placed on deferred adjudication community supervision. Appellant violated numerous terms of her community supervision, and the State filed a motion to adjudicate her guilt. The trial court found appellant guilty of felony prostitution and sentenced her to three years' confinement in the Texas Department of Criminal Justice, Institutional Division.

Within 30 days of judgment, appellant filed a "Motion in Arrest of Judgment/Motion for New Trial," in which she alleged that her current felony prostitution charge was void for lack of subject matter jurisdiction. She asserted that the criminal district court lacked subject matter jurisdiction because all five of the prostitution convictions used to enhance her current felony prostitution charge were also void. She claimed that the five prior prostitution convictions involved judgments that were entered when she was a juvenile, and the county and district courts entering those judgments lacked jurisdiction over her. Specifically, she asserted that, of the five enhancing allegations, the three misdemeanor offenses occurred when she was 14 years old and that the two felony prostitution offenses relied on misdemeanor offenses that occurred when she was 14 and 16 years old. She urged that these prior convictions were void because all of them occurred in courts lacking subject matter jurisdiction, i.e., only a juvenile court had jurisdiction over her when she was that age.

The trial court conducted a hearing on her motion. She presented the trial court with all of the prior judgments, as well as a certified copy of her driver's license to establish her current age. After hearing the arguments of counsel, the trial court overruled her motion. This appeal timely followed.

Held: Reversed and remanded.

Opinion: Appellant makes a two-fold argument about the trial court's lack of subject matter jurisdiction in this case. First, she asserts that a district court only has jurisdiction over prostitution when the accused has been convicted three previous times of prostitution. Second, appellant asserts that, although she has been convicted five times previously for prostitution, those convictions are void because the trial courts convicting her lacked jurisdiction over the cases. According to appellant, the trial courts lacked jurisdiction to convict her of the enhancing offenses because appellant was either a juvenile at the time of the conviction or the conviction arose from prior juvenile convictions. First, we conclude that the trial court had subject matter jurisdiction over appellant's case. We then determine that appellant was illegally sentenced and reverse for a new punishment determination.1

A. Subject Matter Jurisdiction

The Texas Constitution requires that the State must obtain a grand-jury indictment in a felony case, unless this requirement is waived by the defendant. Tex. Const. art. I, § 10. Absent an indictment or valid waiver, a district court does not have jurisdiction over the case. Teal v. State, 230 S.W.3d 172, 174–75 (Tex.Crim.App.2007); Martin v. State, 346 S.W.3d 229, 230–31 (Tex.App.—Houston [14th Dist.] 2011, no pet.). An indictment or information provides a defendant with notice of the offense and allows the defendant to prepare a defense. Teal, 230 S.W.3d at 175; Martin, 346 S.W.3d at 231.

Article 1.14 of the Texas Code of Criminal Procedure provides that:
[i]f the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding. Tex. Code Crim. Proc. art. 1.14(b).

Indictments—or informations—charging a person with committing an offense, once presented, invoke the jurisdiction of the trial court, and jurisdiction is not contingent on whether the charging instrument contains defects of form or substance. See Teal, 230 S.W.3d at 177. Thus, Texas law "requires the defendant to object to any error in the [charging instrument] before the day of trial and certainly before the jury is empaneled." Id.

Nevertheless, for the trial court to have jurisdiction, there still must be a charging instrument. See Martin, 346 S.W.3d at 232. A charging instrument must allege that (1) a person (2) committed an offense. Teal, 230 S.W.3d at 179; see also Tex. Const. art. V, § 12(b) (defining "indictment" and "information" as written instruments presented to

the court "charging a person with the commission of an offense"). Accordingly, a defendant may challenge for the first time on appeal an instrument that fails to charge the commission of an offense or does not charge a particular person with the crime. See Teal, 230 S.W.3d at 178–80.

When determining whether an instrument is so flawed that it does not constitute an actual charging instrument and thus does not vest the trial court with jurisdiction, the critical determination is whether the court and the defendant can identify what penal-code provision is alleged and whether that provision vests the trial court with jurisdiction. Kirkpatrick v. State, 279 S.W.3d 324, 328 (Tex.Crim.App.2009) (citing Teal, 230 S.W.3d at 180). We look to the charging instrument as a whole, not just to its specific formal requisites. Id. If we conclude that the trial court and the defendant can determine that the instrument intends to charge a felony or other offense for which the trial court has jurisdiction, then the instrument charges the commission of an offense, even if the instrument fails to allege an element of the offense or contains additional information indicating the person charged is innocent. Teal, 230 S.W.3d at 181–82; Martin, 346 S.W.3d at 232.

Here, examining the charging instrument at issue, the State alleged that appellant committed prostitution by agreeing to engage in sexual conduct for a fee on or about July 21, 2011. As noted above, the State alleged five prior convictions of appellant for prostitution in the charging instrument. Further, prostitution may be a misdemeanor or felony offense. See Tex. Penal Code Ann. § 43.02(c) (providing that prostitution is generally a Class B misdemeanor, unless enhanced by prior convictions, which may elevate the offense to a felony). Thus, based on the allegations in the information, both appellant and the trial court could determine that the instrument intended to charge a felony offense for which the trial court has jurisdiction. Teal, 230 S.W.3d at 181–82; Martin, 346 S.W.3d at 232.

Conclusion: Accordingly, we determine that the trial court had subject matter jurisdiction in this case. See, e.g., Pomier v. State, 326 S.W.3d 373, 382–84 (Tex.App.—Houston [14th Dist.] 2010, no pet.) ("However, even though the indictment included language that would have properly charged appellant with a misdemeanor rather than a felony, the trial court still had jurisdiction."). Accordingly, we overrule appellant's issue.

PETITION AND SUMMONS—

In re I.G., No. 03-13-00765-CV, --- S.W.3d ----, 2015 WL 4448836, Tex.Juv.Rep. Vol. 29 No. 2 ¶ 15-2-8 (Tex.App.—Austin, July 17, 2015).

WHILE SERVICE ON A JUVENILE CANNOT BE WAIVED, DEFECTS IN SERVICE OR DEFECTS IN THE RETURN OF SERVICE MAY BE.

Facts: On October 2, 1998, I.G., then eight days shy of his sixteenth birthday, was arrested for the murder of a gun shop owner during a robbery I.G. participated in with three other people. After a magistrate advised him of his rights, I.G. gave a statement to police admitting his involvement in the incident. Shortly thereafter, I.G. retained counsel to represent him. According to the State, the prosecuting attorney and I.G., represented by counsel, reached an agreement that the State would forego seeking to have I.G. transferred to criminal court to be tried as an adult in exchange for I.G.'s agreement to plead true to the allegations in a Determinate Sentence Petition and testify for the prosecution in proceedings against the other three individuals involved in the robbery and murder. On January 7, 1999, I.G. was formally charged by a Determinate Sentence Petition with the offense of capital murder. On January 30, 1999, I.G., his attorney, and the Bell County Attorney executed an "Agreement for Testimony" memorializing I.G.'s agreement to enter a plea of true and judicially confess to the offense of capital murder and to appear at any proceedings involving the three other people involved in the gun-shop murder and provide truthful testimony regarding the incident. On February 2, 1999, I.G. appeared in juvenile court with his mother and his attorney and pleaded true to the allegations in the Determinate Sentence Petition. At the disposition hearing, I.G. and his attorney signed a "Waiver of Right to Appeal" in which each acknowledged that they knowingly, voluntarily, and intelligently waived the right to appeal. The court followed the county attorney's recommendation that I.G. be given a 40–year determinate sentence. I.G. was then committed to the care, custody, and control of the Texas Youth Commission until his 21st birthday, when he was transferred to the Texas Department of Criminal Justice–Institutional Division.

In July 2012, I.G. filed a petition for writ of habeas corpus in Bell County district court. See M.B. v. State, 905 S.W.2d 344, 346 (Tex.App.—El Paso 1995, no pet.) ("A juvenile, just as any other person, may challenge a restraint upon his or her liberty by filing an application for writ of habeas corpus in the proper court."); Ex parte Hargett, 819 S.W.2d 866, 857 (Tex.Crim.App.1991) (Article V, section 8 of Texas Constitution gives district court plenary power to issue writ of habeas corpus); see also Tex. Fam.Code § 56.01(o) (appeal procedures in Juvenile Justice Code do "not limit a child's right to obtain writ of habeas corpus"). The district court denied the petition in August 2012. In April 2013, I.G. filed a notice of appeal from the trial court's order denying his petition. This Court dismissed the appeal for lack of subject-matter jurisdiction due to I.G.'s failure to timely file a notice of appeal. See Griffin v. State, No. 03–13–00263–CR, 2013 WL 2631617, at * 1 (Tex.App.—Austin June 6, 2013, no pet.) (mem. op., not designated for publication). I.G. then filed a bill of review in the Bell County district court. In his bill of review, I.G. challenged both the 1999 adjudication of delinquency and the 2012 denial of his writ of habeas corpus. The trial court denied the bill of review by order dated November 4, 2013. I.G. timely perfected this appeal.

Held: Affirmed

Opinion: A bill of review is an equitable proceeding brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal. Caldwell v. Barnes, 154 S.W.3d 93, 96 (Tex.2004). 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." Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 927 (Tex.1999). A bill of review, when properly brought, is a direct attack on a judgment. Fender v. Moss, 696 S.W.2d 410, 412 (Tex.App.—Dallas 1985, writ ref'd, n.r.e.). A direct attack is a proceeding brought to correct a former judgment and to secure rendition of a single, proper judgment. Austin Indep. Sch. Dist. v. Sierra Club, 495 S.W.2d 878, 881 (Tex.1973).

Because I.G. waived his right to appeal, a direct attack seeking to alter or correct the adjudication of delinquency is unavailable, whether by regular appeal or by bill of review. See Tex. Fam.Code § 56.01 (if court makes disposition in accordance with agreement between state and child, child may not appeal unless court gives child permission to appeal or appeal is based on matter raised by written motion filed before proceeding in which child entered plea). However, in his bill of review, I.G. contends that because he was not properly served with a summons the juvenile court did not have jurisdiction over the case and, as a consequence, the adjudication of delinquency is void. Thus, I.G. does not seek to alter or correct the prior adjudication of delinquency but rather to set it aside as void. We will therefore review the merits of I.G.'s bill of review.

A direct attack on a judgment by bill of review must be brought within a definite time period—i.e., within four years of rendition of the judgment complained of. PNS Stores, Inc. v. Rivera, 379 S.W.3d 267, 271 (Tex.2012); see also Caldwell v. Barnes, 975 S.W.2d 535, 538 (Tex.1998) ("The residual four-year statute of limitations applies to bills of review."). The only exception to the statute of limitations is when the petitioner proves extrinsic fraud. Defee v. Defee, 966 S.W.2d 719, 722 (Tex.App.—San Antonio 1998, no pet.); Law v. Law, 792 S.W.2d 150, 153 (Tex.App.—Houston [1st Dist.] 1990, writ denied). Extrinsic fraud is fraud that denied a party the opportunity to fully litigate at trial all the rights or defenses that the party was entitled to assert. Tice v. City of Pasadena, 767 S.W.2d 700, 702 (Tex.1989). It is fraud that occurs in the procurement of a judgment. Lambert v. Coachmen Indus. of Tex., Inc., 761 S.W.2d 82, 87 (Tex.App.—Houston [14th Dist.] 1988, writ denied). The Texas Supreme Court has described extrinsic fraud as occurring when a party "has been misled by his adversary by fraud or deception, did not know of the suit, or was betrayed by his attorney." Alexander v. Hagedorn, 226 S.W.2d 996, 1001 (Tex.1950).

Because he has filed his bill of review outside the four-year limitations period, I.G. must establish extrinsic fraud. The extrinsic fraud I.G. identified in his petition for bill of review of the adjudication of delinquency was that, in his view, the return of service filed in Juvenile Court to reflect service of the summons and the Determinate Sentence Petition was "incomplete." Specifically, I.G. complains of the Officer's Return, which recites:

Came to hand on 13 Jan 99 at 8:55 o'clock a.m. Executed by delivering a copy of this summons to the within-named _____ in person at Juvenile Center in Bell County, Texas, on the 13 day of Jan 1999 at 3:30 o'clock p.m.

The body of the summons commands the sheriff to "summon [I.G.]" to appear in Juvenile Court on a date and time certain. I.G. contends that the return of service is "incomplete" because his name is not written in the blank space in the Officer's Return. I.G. argues that "because of the incomplete officer's return of service and the non-completion of the service itself, the juvenile court has failed to establish its jurisdiction over the appellant—rendering his entire proceedings, including the charge and its punishment, void for lack of jurisdiction." I.G. asserts that this alleged defect in service amounts to "extrinsic fraud" that tolled the four-year statute of limitations for filing his bill of review. We are not persuaded that an incomplete return of service, without more, constitutes extrinsic fraud that tolls commencement of the time period for I.G. to file a bill of review. Cf. Lambert, 761 S.W.2d at 87 (observing that fraudulent failure to serve defendant with personal service, in order to obtain judgment against him without actual notice, has been held to be extrinsic fraud). I.G. has failed to demonstrate any other "extrinsic fraud" that would toll the limitations period for filing his bill of review. The trial court properly denied I.G.'s request to vacate the adjudication of delinquency by bill of review. We overrule I.G.'s first issue.

Challenge to Denial of Petition for Writ of Habeas Corpus by Bill of Review

In his second issue, I.G. complains that he was "extrinsically defrauded in the review of his petition for habeas corpus" because the trial court incorrectly handled the petition as though it were a post-conviction petition for writ of habeas corpus filed pursuant to article 11.07 of the Texas Code of Criminal Procedure. See Tex.Code Crim. Proc. art 11.07 (establishing procedures for application for writ of habeas corpus in which applicant seeks relief from felony judgment). I.G. argues that his petition was a "pre-trial petition" as opposed to a "post-conviction application" and that it should have been handled in accordance with articles 11.10, 11.11, and 11.15. See id. arts. 11.10 (judge shall appoint time when he will examine applicant's cause and issue writ returnable at that time), 11.11 (time for hearing shall be earliest day judge can devote to hearing), 11.15 (writ shall be granted without delay unless it is manifest from petition itself or from attached documents that party is entitled to no relief). Instead, I.G. complains, the court permitted the State to file a response and then denied relief without a hearing or considering his reply to the State's response.

I.G. maintains that the petition for writ of habeas corpus was meritorious because it was a collateral attack on a void adjudication of delinquency. Specifically, I.G. contends that the adjudication of delinquency is void because the service of the summons ordering him to appear was "incomplete" and consequently the record does not contain evidence demonstrating that he was served. The record in this case includes a summons with an officer's return. A return of service has long been considered prima facie evidence of the facts recited regarding service. See, e.g., Pleasant Homes, Inc. v. Allied Bank of Dallas, 776 S.W.2d 153, 154 (Tex.1989) (per curiam). We do not agree that the officer's return ceases to be prima facie evidence of service on I.G. because of the officer's failure to write I.G.'s name in the blank after the words "within-named." The summons is plainly directed to I.G., and it is apparent that I.G. is the "within-named" person. The officer's return thus sufficiently recites that the summons was served on I.G. At most, the failure to write I.G.'s name in the blank after "within-named" might constitute a defect in the officer's return.

Texas courts have determined that certain defects in the notice process may be waived. See e.g., Hildalgo v. State, 945 S.W.2d 313, 318 (Tex.App.—San Antonio 1997), aff'd, 983 S.W.2d 746 (Tex.Crim.App.1999) (order authorizing service of summons to juvenile directed summons to incorrect name, and summons itself failed to (1) state date petition was filed, or (2) name attorney for petitioner); R.A.G. v. State, 870 S.W.2d 79, 82–83 (Tex.App.—Dallas) (record indicated that clerk, not juvenile court, directed issuance of summons), rev'd on other grounds, 866 S.W.2d 199 (Tex.1993); In the Matter of K.P.S., 840 S.W.2d 706, 709 (Tex.App.—Corpus Christi 1992, no writ) (trial judge's oral summons and in-court service of petition on juvenile sufficient to satisfy section 53.06); Sauve v. State, 638 S.W.2d 608, 610 (Tex.App.—Dallas 1982, pet. ref'd) (no written order directing issuance of summons to juvenile). Thus, a juvenile may waive the right to complain about defects in the summons by appearing voluntarily at the hearing, indicating that he was aware of the nature of the proceedings, and failing to object to defects in the summons. See D.A.W. v. State, 535 S.W.2d 21, 22 (Tex.Civ.App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.); see also Sauve, 638 S.W.2d at 610 (defects in officer's return must be attacked in juvenile court).

Here, the record shows that summons was issued to I.G. directing him to appear at the date, time, and place set for the adjudication hearing. Although the officer's return did not include I.G.'s name in the blank, the officer signed the return indicating it had been delivered to the person named in the summons. I.G. appeared at the hearing and was admonished regarding the nature and consequences of the proceedings. The juvenile court made a specific finding in its adjudication order that I.G. was summoned in accordance with Family Code section 53.06. Therefore, we conclude that the juvenile court record, as a whole, affirmatively shows appellant was served with summons. See In re C.C.G., 805 S.W.2d 10, 12–13 (Tex.App.—Tyler 1991, writ denied). Further, we conclude that by voluntarily appearing at the hearing and failing to challenge the return, I.G. waived the right to complain about the defects, if any, in the officer's return.

As set forth above, we disagree that the alleged defect in service identified by I.G. meant that he was not served with a summons to appear in the Juvenile Court and, consequently, that the adjudication of delinquency is void. Moreover, articles 11.10, 11.11, and 11.15 govern petitions for writ of habeas corpus filed pursuant to articles 11.08 and 11.09. See Tex.Code Crim. Proc. arts. 11.08 (writ of habeas corpus available to person confined after indictment on charge of felony); 11.09 (writ of habeas corpus available to person confined on charge of misdemeanor). These writs apply to persons confined on charges of criminal offenses, not to a person who has been adjudicated delinquent. I.G.'s right to petition for a writ of habeas corpus arises out of article V, section 8 of the Texas Constitution, not from the Texas Code of Criminal Procedure. See In re Brian Dwayne Dorsey, No. WR–80, 357–04, slip op. ¶¶ 3–5 (Tex.Crim.App. July 1, 2015) (Richardson, J., concurring statement) (explaining manner in which juvenile offender who has been transferred to TDCJ may seek writ of habeas corpus); M.B. v. State, 905 S.W.2d 344, 346 (Tex.App.—El Paso 1995, no writ) (juvenile may challenge restraint on liberty by filing application for writ of habeas corpus in proper court); In re Torres, 476 S.W.2d 883, 884 (Tex.Civ.App.—El Paso 1972, no writ) (article V, section 8 of Texas Constitution grants Texas district courts plenary power to grant writs of habeas corpus).

Conclusion: Proceedings instituted under the Juvenile Justice Code are governed by the Texas Rules of Civil Procedure, not the Texas Code of Criminal Procedure. In re M.R., 858 S.W.2d 365, 366 (Tex.1993) (except when in conflict with provision of Family Code, Texas Rules of Civil Procedure govern juvenile proceedings). Consequently, the trial court did not, as I.G. maintains, abuse its discretion by not setting an early hearing to consider his petition for writ of habeas corpus or by permitting the State to file a response. I.G.'s bill of review challenging the denial of the petition for writ of habeas corpus was properly denied. We overrule I.G.'s second appellate issue. Having overruled I.G.'s two appellate issues, we affirm the trial court's order denying his bill of review.

In re: The State of Texas, No. 08-15-00165-CR, 2015 WL 4133793, Tex.Juv.Rep. Vol. 29 No. 2 ¶ 15-2-7 (Tex.App.-El Paso, July 8, 2015).

AUTHORIZATION AGREEMENT FROM PARENT TO AUNT GAVE AUNT ENOUGH CARE, CUSTODY, AND CONTROL OVER CHILD WITNESS TO HAVE TO PRODUCE HER IN COURT UNDER SUBPOENA.

Facts: The real party in interest, Eduardo Magana, is charged with misdemeanor family violence assault. The information alleges that he caused bodily to Irene Jaquez by striking her head and body with his hand. Irene's ten-year-old daughter, D.G., witnessed the assault. Respondent set the case for jury trial on May 13, 2015. Approximately nine days before trial, Irene advised the District Attorney's Office that she did not want to prosecute the case because Magana had not assaulted her and she had made a false report. On May 12, 2015, an investigator with the District Attorney's Office served Irene with a subpoena compelling her attendance as a witness and another subpoena compelling her to produce D.G. in court. Irene told the investigator that he might as well arrest her because she was not going to appear for trial. True to her word, Irene did not appear for trial the following day. The State obtained an attachment for Irene individually and another attachment for her "along with" her daughter.

The District Attorney's Office discovered that D.G. lives with her aunt, Melissa Jacquez, and that Irene and Melissa had executed an "Authorization Agreement for Nonparent Relative or Voluntary Caregiver" on May 11, 2015. This agreement was executed pursuant to Section 34.001 of the Texas Family Code. See TEX.FAM.CODE ANN. § 34.001 (West 2014). On May 13, 2015, Melissa was served with a subpoena directing her to produce D.G. for trial. Melissa appeared on May 13 and produced D.G., but Magana objected on the grounds that D.G. had not been properly subpoenaed and the authorization agreement did not authorize Melissa to accept the subpoena to produce D.G. He argued that under the Family Code only Irene had that authority. Respondent ruled in Magana's favor, finding that D.G. was not properly before the court and she would not be allowed to testify. The State filed this mandamus petition and Respondent voluntarily stayed the jury trial.

OBTAINING PRESENCE OF CHILD WITNESS IN A CRIMINAL TRIAL

In its sole issue, the State contends that Respondent's order prohibiting D.G. from testifying in the criminal trial because she was not properly subpoenaed is clearly erroneous and subject to mandamus correction because Magana lacks standing to challenge the subpoena process and Respondent's decision is contrary to the plain language of Article 24.011(a) of the Code of Criminal Procedure.

Held: Conditional relief granted

Opinion: Section 34.001 of the Texas Family Code provides for an authorization agreement between a parent of a child and a grandparent, adult sibling, or adult aunt or uncle. See TEX.FAM.CODE ANN. § 34.001 (West 2014). Section 34.002 specifies the acts which the relative can be authorized to perform. See TEX.FAM.CODE ANN. § 34.002. Melissa and Irene entered into such an authorization agreement. The agreement specified it is valid until revoked in writing by either party and it will continue in effect after Irene's death or any period of incapacity.

Consistent with Section 34.002, the agreement empowered Melissa to:

(1) authorize medical, dental, psychological, or surgical treatment and immunization of D.G.;
(2) obtain medical and maintain health insurance coverage for D.G.;
(3) enroll D.G. in school;
(4) authorize D.G.'s participation in age-appropriate extracurricular, civic, social, recreational, and athletic activities;
(5) authorize D.G. to obtain a learner's permit, driver's license, or state-issued identification card;
(6) authorize employment of D.G.; and
(7) apply for and receive public benefits on behalf of D.G.

As provided for by Section 34.002(c), the agreement specifically stated that it did confer on Melissa the right to authorize an abortion on the child or the administration of emergency contraception. The authorization agreement contains several warnings and disclosures, including that the agreement does not confer on Melissa the rights of a managing or possessory conservator.FN1 See TEX.FAM.CODE ANN. § 34.007(b) ("The authorization agreement does not affect the rights of the child's parent or legal guardian regarding the care, custody, and control of the child, and does not mean that the relative has legal custody of the child.").

FN1. Unless limited by court order, a parent appointed as a conservator of a child has during the parent's period of possession the right to consent for the child to medical and dental care not involving an invasive procedure and the right to direct the moral and religious training of the child. TEX.FAM.CODE ANN. § 153.074(3), (4)(West 2014).

The Code of Criminal Procedure

The procedures set forth in the Code of Criminal Procedure govern all criminal proceedings. See TEX.CODE CRIM.PROC.ANN. art. 1.02 (West 2005). Article 24.01(a)(1) provides that a subpoena may summon one or more persons to appear before a court to testify in a criminal action. TEX.CODE CRIM.PROC.ANN. art. 24.01(a)(1)(West 2009). If a witness is younger than eighteen years of age, the court may issue a subpoena directing a person having custody, care, or control of the child to produce the child in court. TEX.CODE CRIM.PROC.ANN. art. 24.011 (West Supp. 2014).FN2

FN2. The Juvenile Justice Code contains a provision for the issuance of a subpoena to the child named in the petition. See TEX.FAM.CODE ANN. § 53.06. Subsection (c) further provides that the court may endorse on the summons an order directing the person having the physical custody or control of the child to bring the child to the hearing. TEX.FAM.CODE ANN. § 53.06(c). Section 53.06 does not apply to child witnesses and there is no provision comparable to Article 24.011 in the Family Code or the Rules of Civil Procedure. See In the Interest of Z.A.T., 193 S.W.3d 197, 207 (Tex.App.–Waco 2006, pet. denied).

Magana argued in the trial court that Melissa could not accept the subpoena for D.G. because the authorization agreement did not expressly give her that power and she does not have the rights of a managing or possessory conservator. He further asserted that the only person who could accept the subpoena is the person who has the right to act as the child's next friend in a legal proceeding. Magana interpreted Article 24.011 as requiring service of the subpoena on the next friend of the child. Respondent agreed with Magana's argument and ruled that D.G. would not be allowed to testify.

Magana's argument and Respondent's order are contrary to the plain language of Article 24.011. The statute provides that the subpoena may be issued to the person who has "custody, care, or control of the child". While the authorization agreement did not give Melissa "legal custody" of D.G., Article 24.011 does not speak in terms of "legal custody". Even if Melissa did not have "legal custody" of D.G., the child was living with Melissa and was certainly in her care or control.

Magana additionally argues that mandamus relief is not available because Respondent had discretion under Article 24.011 to determine "that the best person to bring the child before the court was in fact the person through whom the child was initially subpoenaed, the parent of the child." The statute does not instruct the trial court or give the trial court discretion to consider who is "the best person to bring the child before the court." Consequently, the question is not whether Irene was better-suited than Melissa to produce D.G. in court. The child witness was under Melissa's custody, care, or control when the subpoena was served upon her and she produced D.G. in court as required by the subpoena. Respondent did not have discretion under Article 24.011 to exclude D.G.'s testimony in the criminal trial. Accordingly, we find that Relator has a clear right to relief under the controlling legal principles.

Adequate Remedy at Law

Magana argues that Relator has an adequate remedy for Respondent's exclusion of D.G.'s testimony in the criminal trial because Respondent issued orders for attachment of Irene individually and for Irene "along with" the child witness. The attachments provide nothing more than a potential remedy in the event Irene can be located. Given that the issue arose during the middle of a jury trial and Irene had purposefully absented herself from the trial after recanting her original statement to police, the remedy is uncertain at best. Magana additionally argues that Relator has a right to raise the issue on appeal in the event Magana is convicted and he appeals. See TEX.CODE CRIM.PROC.ANN. art. 44.01(c)(West Supp. 2014)("The state is entitled to appeal a ruling on a question of law if the defendant is convicted in the case and appeals the

judgment"). The conditional right to appeal afforded the State by Article 44.01(c) is far too speculative and uncertain to constitute an adequate remedy. We conclude that Relator does not have an adequate remedy.

Conclusion: Having found that Relator has established its entitlement to mandamus relief, we sustain the issue presented and conditionally grant the petition for writ of mandamus. Respondent is directed to withdraw his order excluding D.G.'s testimony. The writ of mandamus will issue only if Respondent fails to comply.

Ex parte Rodriguez, No. WR-58,474-02, --- S.W.3d ----, 2015 WL 3764508, Tex.Juv.Rep. Vol. 29 No. 2 ¶ 15-2-6 (Tex.Crim.App, June 17, 2015).

IN COLLATERAL ATTACK (WRIT OF HABEAS CORPUS) REGARDING A DEFECT IN SERVICE ON A JUVENILE, THE BURDEN IN ON THE APPLICANT TO AFFIRMATIVELY SHOW THAT A PROPER WAIVER DID NOT TAKE PLACE.

Facts: We have no court reporter's record from any of the juvenile proceedings. Therefore, with respect to those proceedings, our recitation of facts is derived solely from the clerk's record in the juvenile case. Although there is some evidence that a court reporter may have recorded juvenile proceedings relating to applicant on August 1 and August 4, 1995, we cannot definitively ascertain whether those proceedings were recorded.FN2 With that caveat in mind, we outline the relevant procedural facts of this case.

FN2. In an affidavit, Rita Anderson stated that the Auditor's Office database revealed that Marilee Anderson was paid for court-reporter services in the 315th District Court of Harris County, Texas, on August 1, 1995, and August 4, 1995. Database entries showing the payments are included in the habeas record. In an affidavit, Marilee Anderson stated that she could not locate anything that would indicate whether she was the court reporter who reported applicant's juvenile proceedings on those dates and she had no independent recollection on the matter. Applicant's attorney from the transfer hearing also provided an affidavit stating that she had no recollection of having represented applicant, no longer possessed the file, and did not recall whether she ever obtained a copy of the court reporter's record in the proceedings.

On or about March 25, 1995, applicant shot and killed Alexander Lopez. Applicant was sixteen years of age at the time. As a result of that incident, the State filed a juvenile-delinquency petition. No one disputes that applicant was properly served with a summons and appeared for the initial hearing with respect to that petition.FN3

FN3. Applicant was served with the summons on April 7 and appeared in accordance with that summons on April 13. The case was then reset for April 27.

On April 26, the State filed a motion to waive jurisdiction in the juvenile court and a petition to certify applicant to be tried as an adult. The next day, the case was reset for magistrate warnings to be given to applicant on May 4 and for a transfer hearing to be held on June 7. Applicant received magistrate warnings on May 4, but the transfer hearing was subsequently reset to July 27. On July 27, both parties announced "ready," and the parties and witnesses were sworn to return at 10:00 a.m. on August 1 for "trial."

On August 1, the parties appeared, and the case was reset for August 4. Also on August 1, applicant was served with a summons for the transfer hearing. The summons stated that the hearing would be on August 1, 1995, at 9:30 a.m. The return on the summons shows that applicant was served at the courthouse on August 1, 1995, at 11:45 a.m., a little more than two hours after the summons specified that the hearing would start. The August 1 summons does not refer to the August 4 hearing, and the clerk's record contains no summons listing an August 4 hearing date.

On August 4, the parties appeared and tried the issue of whether applicant should be transferred to adult court. After hearing testimony and receiving exhibit evidence, the juvenile court granted the State's motion to waive

jurisdiction and transferred applicant to district court. The docket entries for August 4 also note that applicant was sworn and admonished and that a State's motion to amend the petition to show a slight name change was granted. In addition, the August 4 docket entries contain the notations, "Any further notice waived by Resp." and "Right to Appeal."

Although applicant had the right to immediately appeal the transfer decision, there is no indication that he ever did so. Applicant was subsequently tried as an adult in district court, convicted of murder, and sentenced to life in prison. He appealed his conviction but did not raise any claim regarding the juvenile court's transfer decision. The court of appeals affirmed the judgment. Applicant did not file a petition for discretionary review, and mandate issued on June 26, 1998.

On November 24, 2003, applicant filed his first habeas application. In that application, he claimed that the district court lacked jurisdiction because the juvenile court lacked jurisdiction to transfer due to a failure to properly serve him with a summons to the transfer hearing. The habeas court made findings consistent with the facts recited above and concluded that applicant was not entitled to relief because he received the summons in accordance with the applicable statutes. Applicant also made other claims, including the claim that his appellate attorney failed to timely inform him of the court of appeals' decision so as to allow him to file a petition for discretionary review. On April 7, 2004, we granted relief on that latter claim—giving applicant the opportunity to file an out-of-time petition for discretionary review. He never filed one.

On May 18, 2011, applicant filed his second (current) habeas application. He raises, among other things, the jurisdictional claim that he raised in his first application. The habeas court in the current proceedings made findings consistent with the facts recited above but concluded that applicant was entitled to relief because the summons failed to comply with the applicable statute. In one of its conclusions, the habeas court stated that "the record does not show positively or affirmatively that a valid, or timely summons was ever served upon any party the court deemed necessary to the proceeding pursuant to the prevailing mandatory notice requirements."

Held: Affirmed

Opinion: Juvenile transfer proceedings are governed by the Family Code. Family Code § 54.02(b) provides that the notice requirements of certain other sections of the Family Code must be satisfied and that "the summons must state that the hearing is for the purpose of considering discretionary transfer to criminal court." Some of the notice requirements contained in the referenced sections of the Family Code are: (1) a summons must be served on the juvenile and various other interested persons, (2) the summons "must require the persons served to appear before the court at the time set to answer the allegations of the petition," and (3) the summons must be personally served at least two days before the transfer hearing if the person is in Texas and can be found. Family Code § 53.06(e) further provides, "A party, other than the juvenile, may waive service of summons by written stipulation or by voluntary appearance at the hearing."

This Court and the Texas Supreme Court have held that the failure to comply with § 54.02(b) deprives the juvenile court of jurisdiction to transfer the case. Referring to § 53.06(e), we and our sister court have also held that the juvenile cannot waive the service of the summons for the transfer hearing, even if the juvenile attends the transfer hearing. These holdings are in accordance with the common-law rule that a minor does not possess the legal capacity to waive service of summons, nor can anyone waive it for him.

While it is clear that a juvenile cannot waive service of the summons, the question that arises in this case is whether a juvenile may waive a defect in the service of the summons. Applicant was personally served with a summons for a transfer hearing, but the timing of that service, in combination with the hearing time and date listed on the summons, rendered the service defective. Several courts of appeals have held that, once a juvenile has been properly served with a summons for a transfer hearing, the case may be continued to a later date without issuing a new summons. Had the summons in this case been served on applicant on July 29, the parties could have appeared and reset the case for August 1 under the rationale of those court-of-appeals decisions. But the summons was served on August 1, which violated the requirement that the summons be served at least two days in advance of the hearing

date specified on the summons. And the summons was not revised to reflect an August 4 hearing date, which might also have cured any defect in the summons. So the question is whether the juvenile may waive the defect in the summons, either by waiving the failure to receive at least two days advance notice of the hearing listed in the summons or by waiving the failure of the summons to specify the correct date and time for the hearing that actually took place.

Under Family Code § 51.09, a juvenile may waive any right granted under the Family Code or any other law in juvenile proceedings "[u]nless contrary intent clearly appears elsewhere" in Title 3 of the Family Code. For a waiver under § 51.09 to be valid, the following conditions must be met:

(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.

In one case, we recognized the possibility that a defect in the summons for a transfer hearing may be waivable under § 51.09, but we did not resolve the question. Two courts of appeals have indicated that a defect in the summons might be waivable under § 51.09.

In construing a statute, we give effect to the plain meaning of its language unless the language is ambiguous or the plain meaning leads to absurd results that the legislature could not possibly have intended. Under the procedure outlined in § 51.09, a juvenile may waive any right "unless contrary intent clearly appears elsewhere." Contrary intent clearly appears elsewhere with respect to "service of [the] summons"—§ 53.06(e) explicitly provides that a juvenile cannot waive service. But § 53.06(e) does not say that a juvenile cannot waive a defect in the wording of the summons or in the timing of its service, and the context of the statute does not otherwise make it clear that such a waiver would be prohibited. Because contrary intent does not clearly appear elsewhere with respect to such defects in service, the unambiguous language of § 51.09 permits a waiver of such defects.

B. Direct Versus Collateral Attack

In the civil default-judgment context, the Texas Supreme Court has explicitly articulated the rule for service-based jurisdictional claims raised in a direct attack. For the judgment to survive a direct attack, "strict compliance with the rules for service of citation [must] affirmatively appear on the record." Possibly indicating that it would apply a similar approach in direct attacks in juvenile-transfer cases, the Supreme Court in W.L.C. stated, "[A]bsent an affirmative showing of service of summons in the record, the juvenile court is without jurisdiction to transfer the juvenile to district court." In that case, the judge of the juvenile court had ordered the clerk of the court to serve the juvenile in open court but the "only documentary evidence of service in the appellate record [was] an instrument" whose return was left blank. In K.W.S., the court of appeals emphasized that there was "no record showing" that the requirements for waiver under § 51.09 had been met. Both W.L.C. and K.W.S. were direct attacks because they were direct appeals from juvenile transfer decisions.

But the rule for collateral attacks is the opposite of the rule for direct attacks. For a judgment to be overturned on collateral attack, the record must affirmatively establish the absence of jurisdiction. In Ex parte Johnson, a juvenile-delinquency case, we explained this to be the rule that applied in habeas corpus:

[R]elator insists that the judgment of delinquency is void because of the erroneous recital aforesaid and therefore may be attacked in a habeas corpus proceeding. Such proceeding is a collateral attack and is available only in event that the judgment is absolutely void. In other words, the attack will prevail only when the record affirmatively reveals that the court which rendered the judgment had no jurisdiction.FN33

Elsewhere, we have stated that it is "the settled law of this State that the judgment of a court of competent jurisdiction cannot be collaterally attacked unless the record affirmatively shows lack of jurisdiction." Our cases have consistently characterized habeas corpus as a collateral attack on a judgment of conviction. Similarly, the Texas Supreme Court has explained that a jurisdictional challenge will succeed on collateral attack only if the "record affirmatively reveals a jurisdictional defect." Moreover, the Supreme Court has suggested in the default-judgment context that "mere technical defects" in service that would result in reversal on direct attack should not result in overturning a judgment on collateral attack: "But the cases on which [the party] relies simply reiterate the strict compliance requirement in the context of a direct attack on a default judgment. Extending these stringent standards to collateral attacks involving mere technical defects in service would pose a serious threat to the finality of judgments."

Our own cases in the juvenile-transfer context are not inconsistent with the rule that the record must affirmatively show the absence of jurisdiction to justify relief on habeas corpus. The cases in which we have granted relief on a juvenile-transfer claim did so on direct appeal from the criminal conviction, not habeas corpus. An argument could be made that the cases do not involve direct attacks because the juvenile could have immediately appealed the transfer decision rather than waiting for the direct appeal from the criminal conviction. For that reason, we will assume, without deciding, that the cases should be treated as collateral attacks. In Grayless, "the record reflect[ed] that no summons ever was issued" on the transfer petition, so the record affirmatively reflected the absence of jurisdiction. In Perry Johnson, we stated, "The record does not show that a summons was ever issued," but we also explained that we had "a full and complete record of the juvenile proceedings," and we concluded that "the instant case shows on its face that the juvenile court did not have jurisdiction." In Michael Johnson, we found that the summons was defective for failing to state that the hearing was for the purpose of discretionary transfer, and we said that "there is nothing in the record to show that" the waiver requirements of § 51.09 were met. As we have explained above, one of the requirements of § 51.09 is that the waiver be in writing or in court proceedings that are recorded. The Michael Johnson opinion quoted from portions of the reporter's record in the juvenile proceedings and did not state that any portion of the reporter's record was missing. Because the reporter's record was available, and it did not reflect a waiver as § 51.09 requires, this Court's observation that the record did not show compliance with § 51.09 was tantamount to saying that the record affirmatively showed non-compliance.

In the present case, however, we have no reporter's record from the juvenile proceedings. While service of the summons was defective, applicant might have waived any defect in service on the record at the hearing on either August 1 or August 4, and the reporter's record showing such a waiver may no longer exist. In fact, on August 1, applicant was served with the summons at the courthouse just two hours and fifteen minutes after the start time listed in the summons, and just an hour and forty-five minutes after the start time listed on the July 27 entry in the juvenile court's docket sheet. The possibility exists that applicant was served during the August 1 hearing and waived the lateness of service on the record at that time. The more likely scenario, however, appears to be a waiver on August 4, given the docket-sheet entry for that date that any further notice was waived by respondent. This entry may relate to a waiver on the record at the August 4 hearing of defects in service.

And we point out that nothing in the record suggests that applicant was deprived of actual notice of the transfer hearing. Quite the contrary; the record is littered with evidence that applicant had actual notice. The State filed its motion to waive jurisdiction in the juvenile court on May 26, and on May 27 the juvenile court initially set the case for a transfer hearing on June 7. That hearing was reset several times, but on July 27, the parties were informed that a transfer hearing would occur on August 1. The transfer hearing was reset once more on August 1 to August 4, and the parties appeared at the August 4 hearing and litigated the issue of transfer.

Applicant contends that the waiver notation on the August 4 docket sheet is "almost illegible, and certainly unintelligible." He says that it is not clear "what was being waived, nor who it was who was waiving whatever it was which was waived." Applicant reads the notation as "Ay (sic) further notice waived by Reip (sic)," but our reading of the docket sheet is that the notation is "Any further notice waived by Resp." Regardless, the record that we do have is consistent with applicant having waived defects in the summons in accordance with the requirements of § 51.09 at the August 4 hearing, or even at the August 1 hearing.

Applicant further suggests that, even if a waiver would have been valid if the August 4 hearing had been recorded, "the hearing was not recorded." But the record in the present case does not establish that the August 4 hearing was not recorded. All that can be established is that we do not currently have—and cannot obtain—a recording of the August 4 hearing. Any uncertainty about whether either the August 1 hearing or the August 4 hearing was recorded must be held against applicant, as the party attempting to disturb the juvenile court's disposition in a collateral attack.

Applicant further argues that there was no "affirmative showing" as required by W.L.C. that applicant was waiving proper service. But W.L.C. was a direct attack, where affirmative showing of the requisite waiver would be required. As we explained above, the opposite rule applies on collateral attack, where the record must affirmatively show that the proper waiver did not take place.

Applicant contends that "if he had waived proper service at the August 1st hearing, there would have been no need to reschedule the hearing, thus indicating that there was no waiver." This surmise on applicant's part is not sufficient to affirmatively show that a proper waiver did not take place. Even with a waiver, the juvenile court may have thought it prudent to satisfy the two-day notice rule by delaying the hearing to August 4, or applicant or his attorney may have insisted on the two days as a condition of executing the waiver. Or the hearing may have been rescheduled to August 4 for reasons unrelated to the lateness of service.

Conclusion: Applicant was served with a summons for a transfer hearing. Any defects associated with that service were waivable under § 51.09. Although § 51.09 requires that the waiver be in writing or occur in a hearing that was recorded, such a waiver could have occurred at a recorded hearing on August 1 or August 4, with the record of the relevant hearing no longer being in existence. Consequently, the record does not affirmatively establish that the juvenile court lacked jurisdiction to transfer the case, and therefore does not affirmatively establish the absence of jurisdiction in the district court. We deny relief.

SEARCH & SEIZURE—

G.C. v. Owensboro Public Schools, No. 11-6476, 711 F.3d 623, Tex.Juv.Rep. Vol. 29 No. 3 ¶ 15-3-2 (6th Cir., 2013).

USING A CELL PHONE ON SCHOOL GROUNDS DOES NOT AUTOMATICALLY TRIGGER AN ESSENTIALLY UNLIMITED RIGHT ENABLING A SCHOOL OFFICIAL TO SEARCH ANY CONTENT STORED ON THE PHONE.

Facts: During his freshman year at Owensboro High School, G.C. began to have disciplinary problems. Shortly thereafter, he communicated with school officials that he used drugs and was disposed to anger and depression. The relevant incidents and discussions are as follows. On September 12, 2007, the first incident in the record, G.C. was given a warning for using profanity in class. R. 69-7 (Referral at 1) (Page ID #466). In February 2008, G.C. visited Smith's office and expressed to Smith "that he was very upset about an argument he had with his girlfriend, that he didn't want to live anymore, and that he had a plan to take his life." R. 69-8 (Smith Aff. at ¶ 4) (Page ID #467). In this same meeting, G.C. told Smith "that he felt a lot of pressure because of football and school and that he smoked marijuana to ease the pressure." Id. ¶ 5. As a result of this interaction, Smith met with G.C.'s parents and suggested that he be evaluated for mental health issues. Id. ¶ 6. G.C.'s parents took him to a treatment facility that day. Id.; R. 69-28 (Bio-Psycho Social Assessment) (Page ID #536–48).

On November 12, 2008, G.C. was given a warning for excessive tardies, and on November 17, 2008, G.C. was disciplined for fighting and arguing in the boys locker room. R. 69-12 (Referrals at 1) (Page ID #490). On March 5, 2009, G.C. walked out of a meeting with Summer Bell, the prevention coordinator at the high school, and left the building without permission. R. 69-8 (Smith Aff. at ¶ 7) (Page ID #468); R. 69-10 (Bell Tr. at 40:19–21) (Page ID #484). G.C. made a phone call to his father and was located in the parking lot at his car, where there were tobacco products in plain view. R. 69-8 (Smith Aff. at ¶ 8) (Page ID #468). G.C. then went to Smith's office, and Smith

avers that G.C. "indicated he was worried about the same things we had discussed before when he had told me he was suicidal." Id. She states that she "was very concerned about [G.C.'s] well-being because he had indicated he was thinking about suicide again. I, therefore, checked [G.C.'s] cell phone to see if there was any indication he was thinking about suicide." Id. ¶ 9. The record also indicates that G.C. visited a treatment center that day, and the counselor recommended that he be admitted for one to two weeks. R. 69-28 (Bio-Psycho Social Assessment) (Page ID #560–61).

On September 2, 2009, G.C. violated the school cell-phone policy when he was seen texting in class. R. 69-4 (Brown Aff. at ¶ 4) (Page ID #384). G.C.'s teacher confiscated the phone, which was brought to Brown, who then read four text messages on the phone. Id. ¶¶ 4–6 (Page ID #384–85). Brown stated that she looked at the messages "to see if there was an issue with which I could help him so that he would not do something harmful to himself or someone else." Id. ¶ 6 (Page ID #385). Brown explained that she had these worries because she "was aware of previous angry outbursts from [G.C.] and that [he] had admitted to drug use in the past. I also knew [he] drove a fast car and had once talked about suicide to [Smith]. . . . I was concerned how [he] would further react to his phone being taken away and that he might hurt himself or someone else." Id. ¶ 5 (Page ID #384–85).

After this incident, Burnette recommended to Vick that G.C.'s out-of-district privilege be revoked, and this time Vick agreed. R. 69-17 (Vick Aff. at ¶ 16) (Page ID #501). G.C.'s parents were contacted and told that they could appeal the decision if desired. Id. ¶¶ 17–19. (Page ID #501–02). On October 15, 2009, Vick, Burnette, and other school officials met with G.C.'s parents and their attorney. Id. ¶ 21 (Page ID #502). Vick explained that G.C. "had violated the condition of his out-of-district privilege to attend Owensboro High School by texting in class." Id. Despite the revocation, Vick avers that G.C. continued to have the right to attend high school in Daviess County. Id. ¶ 22 (Page ID #503).

On October 21, 2009, G.C. filed an action for declaratory and injunctive relief, as well as compensatory and punitive damages, in the U.S. District Court for the Western District of Kentucky. R. 1 (Compl.) (Page ID #1). G.C. alleged violations of his First, Fourth, and Fifth Amendment rights as well as violations of the Kentucky Constitution. Id. at ¶¶ 18–37 (Page ID #1–5). G.C. moved for a temporary restraining order and preliminary injunction, seeking to enjoin the defendants from denying G.C. his right to an education, which the district court denied on November 16, 2009. R. 6 (Pl.'s Mot. at 1) (Page ID #36); R. 20 (Order Denying Preliminary Injunctive Relief at 1) (Page ID #123). G.C. then amended his complaint to include a Rehabilitation Act claim. R. 36 (First Am. Compl. at ¶¶ 39–48) (Page ID #195–96). On June 2, 2011, the defendants filed a motion for summary judgment on all of G.C.'s claims, which the court granted as to G.C.'s federal claims. R. 69-1 (Defs.' Mot. for Summ. J. at 1) (Page ID #315); R. 85 (Order at 25) (Page ID #767). The court declined to exercise supplemental jurisdiction over G.C.'s state-law claims. R. 85 (Order at 25) (Page ID #767). In the same order, the district court denied G.C.'s motion requesting a Daubert hearing on the qualifications of the defendants' Rehabilitation Act expert witness. Id. at 19–21.

Held: Reversed

Opinion: G.C. argues that the district court erred when it granted summary judgment to the defendants on his Fourth Amendment claim. G.C. conceded at oral argument that the March 2009 search of his cell phone was justified in light of the surrounding circumstances, yet maintains that the September 2009 search was not supported by a reasonable suspicion that would justify school officials reading his text messages. The defendants respond that reasonable suspicion existed to search his phone in September 2009 given his documented drug abuse and suicidal thoughts, particularly under the lower standard applied to searches in a school setting. Appellees Br. at 21–26. They argue that the searches were limited and "aimed at uncovering any evidence of illegal activity" or any indication that G.C. might hurt himself. Id. at 28.

The Supreme Court has implemented a relaxed standard for searches in the school setting:
[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the action was justified at its inception; second, one must determine whether the search as actually

conducted was reasonably related in scope to the circumstances which justified the interference in the first place. New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985) (internal quotation marks, citation, and alterations omitted). "A student search is justified in its inception when there are reasonable grounds for suspecting that the search will garner evidence that a student has violated or is violating the law or the rules of the school, or is in imminent danger of injury on school premises." Brannum v. Overton Cnty. Sch. Bd., 516 F.3d 489, 495–96 (6th Cir. 2008). "Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." T.L.O., 469 U.S. at 342. "In determining whether a search is excessive in its scope, the nature and immediacy of the governmental concern that prompted the search is considered." Brannum, 516 F.3d at 497 (internal quotation marks omitted). "In order to satisfy the constitutional requirements, the means employed must be congruent to the end sought." Id.

Because this court has yet to address how the T.L.O. inquiry applies to the search of a student's cell phone, the parties point to two district court cases that have addressed this issue. In J.W. v. DeSoto County School District, No. 2:09-cv-00155-MPM-DAS, 2010 WL 4394059 (N.D. Miss. Nov. 1, 2010), the case relied upon by the defendants and cited by the district court, a faculty member observed a student using his cell phone in class, took the cell phone from the student, and "opened the phone to review the personal pictures stored on it and taken by [the student] while at his home." Id. at *1. The district court found the faculty member's actions reasonable, explaining that "[i]n assessing the reasonableness of the defendants' actions under T.L.O., a crucial factor is that [the student] was caught using his cell phone at school." Id. at *4. The court further reasoned that "[u]pon witnessing a student improperly using a cell phone at school, it strikes this court as being reasonable for a school official to seek to determine to what end the student was improperly using that phone." Id.

Such broad language, however, does not comport with our precedent. A search is justified at its inception if there is reasonable suspicion that a search will uncover evidence of further wrongdoing or of injury to the student or another. Not all infractions involving cell phones will present such indications. Moreover, even assuming that a search of the phone were justified, the scope of the search must be tailored to the nature of the infraction and must be related to the objectives of the search. Under our two-part test, using a cell phone on school grounds does not automatically trigger an essentially unlimited right enabling a school official to search any content stored on the phone that is not related either substantively or temporally to the infraction. Because the crux of the T.L.O. standard is reasonableness, as evaluated by the circumstances of each case, we decline to adopt the broad standard set forth by DeSoto and the district court.

G.C. directs the panel to Klump v. Nazareth Area School District, 425 F. Supp. 2d 622 (E.D. Pa. 2006), a case in which a student was seen using his cell phone, followed by two school officials accessing the student's text messages and voice mail; searching the student's contacts list; using the phone to call other students; and having an online conversation with the student's brother. Id. at 630. The court initially determined that the school officials were "justified in seizing the cell phone, as [the student] had violated the school's policy prohibiting use or display of cell phones during school hours." Id. at 640. The court found that the school officials were not, however, justified in calling other students, as "[t]hey had no reason to suspect at the outset that such a search would reveal that [the student] himself was violating another school policy." Id. The court further discussed the text messages read by the school officials, concluding that although the school officials ultimately found evidence of drug activity on the phone, for the purposes of a Fourth Amendment claim, the court must consider only that which the officials knew at the inception of the search: "the school officials did not see the allegedly drug-related text message until after they initiated the search of [the] cell phone. Accordingly, . . . there was no justification for the school officials to search [the] phone for evidence of drug activity." Id. at 640–41. We conclude that the fact-based approach taken in Klump more accurately reflects our court's standard than the blanket rule set forth in DeSoto.

G.C.'s objection to the September 2009 search centers on the first step of the T.L.O. inquiry—whether the search was justified at its inception. G.C. argues that the school officials had no reasonable grounds to suspect that a search of his phone would result in evidence of any improper activity. The defendants counter that the search was justified because of G.C.'s documented drug abuse and suicidal thoughts. Appellees Br. at 26. Therefore, they

argue, the school officials had reason to believe that they would find evidence of unlawful activity on G.C.'s cell phone or an indication that he was intending to harm himself or others. Id. at 26–27.
We disagree, though, that general background knowledge of drug abuse or depressive tendencies, without more, enables a school official to search a student's cell phone when a search would otherwise be unwarranted. The defendants do not argue, and there is no evidence in the record to support the conclusion, that the school officials had any specific reason at the inception of the September 2009 search to believe that G.C. then was engaging in any unlawful activity or that he was contemplating injuring himself or another student. Rather, the evidence in the record demonstrates that G.C. was sitting in class when his teacher caught him sending two text messages on his phone. R. 69-4 (Brown Aff. at ¶ 4) (Page ID #384). When his phone was confiscated by his teacher pursuant to school policy, G.C. became upset. Id. ¶ 3. The defendants have failed to demonstrate how anything in this sequence of events indicated to them that a search of the phone would reveal evidence of criminal activity, impending contravention of additional school rules, or potential harm to anyone in the school. On these facts, the defendants did not have a reasonable suspicion to justify the search at its inception.

The defendants further argue that G.C.'s claim must fail because he did not suffer any harm as a result of the search; specifically, they point to the fact that he "was not disciplined based on the contents of his phone." Appellees Br. at 28. However, the issue of injury and compensable damages has not been developed before us. Even if G.C. cannot establish compensable damages, he may be entitled to nominal damages. See Carey v. Piphus, 435 U.S. 247, 266 (1978) ("[W]e believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury."); Slicker v. Jackson, 215 F.3d 1225, 1231 (11th Cir. 2000) ("We have held unambiguously that a plaintiff whose constitutional rights are violated is entitled to nominal damages even if he suffered no compensable injury."); Briggs v. Marshall, 93 F.3d 355, 360 (7th Cir. 1996) (recognizing that nominal damages are available for Fourth Amendment claims). Moreover, punitive damages sometimes attach to an award comprised solely of nominal damages. See Romanski v. Detroit Entm't, L.L.C., 428 F.3d 629, 645 (6th Cir. 2005) ("But this is a § 1983 case in which the basis for the punitive damages award was the plaintiff's unlawful arrest and the plaintiff's economic injury was so minimal as to be essentially nominal."). Therefore, we remand to the district court to address the issue of injury and damages in the first instance.

Conclusion : We therefore REVERSE the district court's grant of summary judgment as to G.C.'s Fourth Amendment claim based on the September 2009 search.

SEX OFFENDER REGISTRATION—

In the Matter of R.A., No. 07-CJV-013620, __S.W.3d.___, 2015 WL 1956882. Tex.Juv.Rep. Vol. 29 No. 2 ¶ 15-2-1 [Ct.App.—Houston (14th Dist.), April 30, 2015].

JUVENILE COURT DOES NOT LOSE JURISDICTION TO DETERMINE WHETHER A PERSON SHOULD BE REQUIRED TO REGISTER AS A SEX OFFENDER AFTER PROBATION TERM EXPIRES.

Facts: Appellant R.A. was alleged to have engaged in delinquent conduct by committing the offenses of aggravated sexual assault and indecency with a child. At the time of these offenses, R.A. was fourteen years old and the victim was six years old. R.A. stipulated to the truth of the allegations in the petition. In March 2008, when R.A. was fifteen years old, the trial court, sitting as a juvenile court (hereinafter the "Juvenile Court"), signed an adjudication order in which it found that R.A. had engaged in delinquent conduct. On the same day, after a disposition hearing, the trial court signed a disposition order in which the Juvenile Court found that R.A. was in need of rehabilitation and that the protection of the public and of R.A. required a disposition to be made. The Juvenile Court placed R.A. on probation for two years, subject to various conditions.

On the same day the Juvenile Court signed the disposition order, the Juvenile Court also signed an "Order Deferring Sex Offender Registration." In this order, the Juvenile Court deferred its decision as to whether R.A. should be required to register as a sex offender under Chapter 62 of the Code of Criminal Procedure.1 The Juvenile Court stated that the period of deferment would expire upon R.A.'s completion of probation or release or parole by

the Texas Youth Commission.2 The record indicates that R.A.'s probation ended in March 2010, when he was seventeen years old.

In October 2010, the State filed a motion in which it requested that the Juvenile Court order R.A. to register as a sex offender pursuant to subchapter H of Chapter 62. The State asserted that registration protects the public and that any potential increase in protection of the public resulting from registration of R.A. is not clearly outweighed by the anticipated substantial harm to R.A. and R.A.'s family resulting from registration. R.A. objected to and opposed the State's motion, asserting that the Juvenile Court's jurisdiction over R.A. ended when he completed probation in March 2010, and that the State waived its right to request registration by failing to request an order requiring registration until seven and a half months after R.A. completed probation.

The Juvenile Court held a hearing on the State's motion in February 2011. At the hearing, the State called as witnesses R.A.'s probation officer, the probation department's psychology supervisor, and a therapist who ran a treatment group that R.A. attended. The probation department recommended that R.A. be required to register. R.A. called as witnesses his mother, grandmother, grandfather, and his private therapist. His relatives testified that he had made marked improvements in his behavior and that registration would be harmful. His therapist testified that R.A. had made lots of changes and that he was not a threat to society. His therapist recommended that he not be required to register.

In June 2011, when R.A. was eighteen years old, the Juvenile Court signed an order in which it found as follows:

- The protection of the public would be increased by R.A. registering under Chapter 62;
- Any potential increase in protection of the public resulting from registration of R.A. is not clearly outweighed by any anticipated substantial harm to R.A. and R.A.'s family that would result from registration under Chapter 62;
- R.A. did not successfully participate in or complete the required sex-offender-treatment program; and
- The interests of the public require R.A. to register as a sex offender under Chapter 62.

The Juvenile Court ordered that R.A. register as a sex offender under Chapter 62 and that this sex-offender registration be private. In addition, the trial court ordered that "said registration shall be reconsidered by this Court 12 months from the date of this Order." R.A. appealed this order (the "First Order"), generating this appeal.3

While R.A.'s appeal was pending in this court, the trial court, acting sua sponte, held a hearing to consider whether it should change the registration requirement in the First Order. The second hearing occurred in March 2013, twenty months after the Juvenile Court signed the First Order. In April 2013, when R.A. was twenty years old, the Juvenile Court signed an order (the "Second Order") in which the court ordered R.A. to continue to register privately as a sex offender. R.A. has not filed a notice of appeal from the Second Order.

Before the Juvenile Court issued the Second Order, this court granted the State and R.A.'s request that this appeal be abated pending the trial court's second hearing and order, given that the Second Order might moot this appeal. After the trial court signed the Second Order, this appeal was reinstated. The State and R.A. have filed supplemental briefing. In his supplemental briefing, R.A. continues to assert his prior challenges to the First Order. In addition, R.A. challenges the Second Order, arguing that the Juvenile Court abused its discretion in admitting certain evidence at the second hearing and in ordering that R.A. continue with the private sex-offender registration.

Held: Affirmed

Opinion: Before addressing R.A.'s issues, we first must address this court's jurisdiction over the appeal. R.A. filed a notice of appeal in June 2011. Two days later, the trial court signed the First Order. In that order, the trial court stated that in twelve months it would reconsider its order requiring private registration by R.A. Consistent with this statement, the trial court, acting sua sponte, held a hearing in March 2013, to consider whether it should change the registration requirement in the First Order. In April 2013, the trial court signed the Second Order, declining to change the registration requirement in the First Order. Neither R.A. nor the State filed a notice of appeal from the Second Order.

R.A. asserts that the Juvenile Court lacked jurisdiction over the First Order. If the Juvenile Court lacked jurisdiction over the First Order, this court lacks jurisdiction over this appeal from the First Order. See Curry v. Harris County Appraisal District, 434 S.W.3d 815, 820 & n.2 (Tex.App.—Houston [14th Dist.] 2014, no pet.). A juvenile adjudicated of delinquent conduct based on the offense of aggravated sexual assault or the offense of indecency with a child generally is required to register as a sex offender. See Tex.Code Crim. Proc. Ann. arts. 62.001(5), 62.051 (West, Westlaw through 2013 3d C.S.). But, the person adjudicated of such delinquent conduct may move the juvenile court in which he was adjudicated for an exemption from the registration requirement. Tex.Code Crim. Proc. Ann. art. 62.351(a) (West, Westlaw through 2013 3d C.S.). If such a motion is filed, the juvenile court shall conduct a hearing to determine whether the interests of the public require registration under Chapter 62. Tex.Code Crim. Proc. Ann. art. 62.351(a) (West, Westlaw through 2013 3d C.S.). After such a hearing, the juvenile court shall enter an order exempting the movant from registration under Chapter 62 if the court determines that (1) the protection of the public would not be increased by registration of the movant under this chapter; or (2) any potential increase in protection of the public resulting from registration of the respondent is clearly outweighed by the anticipated substantial harm to the movant and the movant's family that would result from registration under Chapter 62. Tex.Code Crim. Proc. Ann. art. 62.352(a) (West 2006). After this hearing, the juvenile court also may enter an order in which the court (1) defers a decision on requiring registration under Chapter 62 until the movant has completed treatment for the movant's sexual offense as a condition of probation or while committed to the Texas Youth Commission; or (2) requires the movant to register as a sex offender but provides that the registration information is not public information and is restricted to use by law enforcement and criminal justice agencies, the Council on Sex Offender Treatment, and public or private institutions of higher education. See id. art. 62.352(b).

If the juvenile court enters an order in which it defers a decision on requiring registration, the court retains discretion and jurisdiction to require, or exempt the movant from, registration under Chapter 62 "at any time during the treatment or on the successful or unsuccessful completion of the treatment," except that during the period of deferral, registration may not be required. Id. art. 62.352(c). Following successful completion of treatment, the movant is exempted from registration under this chapter unless a hearing under this subchapter is held on motion of the state, regardless of whether respondent is eighteen years of age or older, and the court determines the interests of the public require registration. See id. On the same day the Juvenile Court signed the disposition order, the Juvenile Court also signed a deferral order, stating that the State and R.A. both agreed that the court should defer its decision as to whether R.A. should be required to register as a sex offender under Chapter 62 until after R.A. had participated in or completed a sex-offender treatment program while on court-ordered probation. The Juvenile Court deferred its decision as to whether R.A. should be required to register as a sex offender under Chapter 62 until R.A. had participated in or completed a sex-offender treatment program while on probation or while committed to the Texas Youth Commission, if ever so committed. The Juvenile Court stated that the period of deferment would expire upon R.A.'s completion of probation or release or parole by the Texas Youth Commission. In the order, the Juvenile Court also stated that it retained discretion to require or excuse registration at any time during the treatment program or upon its successful or unsuccessful completion. We conclude that the trial court had jurisdiction to render this order, which was a valid order under article 62.352(b)(1), in which the Juvenile Court deferred consideration of this issue until R.A.'s completion of probation or release or parole by the Texas Youth Commission. Id. art. 62.352(b)(1). R.A. was not committed to the Texas Youth Commission, and the record indicates that he completed probation in March 2010. R.A. does not contend otherwise; rather, he argues that the Juvenile Court lost jurisdiction because the State did not move the Juvenile Court to decide whether R.A. should be required to register as a sex offender under Chapter 62 until seven and a half months after R.A. completed probation and the deferral period ended.

We conclude that the State filed its motion under article 62.352(c). Id. art. 62.352(b)(1).

First Order Opinion:

We now address whether the Juvenile Court had jurisdiction to rule on this motion and to decide whether R.A. should be required to register as a sexoffender under Chapter 62 in June 2011, more than fifteen months after R.A. completed probation and after R.A. had turned eighteen years old.

Before we address this specific issue, we consider the decision of the Supreme Court of Texas in In re N.J.A. and general principles regarding the jurisdiction of a juvenile court. See In re N.J.A., 997 S.W.2d 554 (Tex.1999). In In re N.J.A., the high court concluded that a juvenile court is not a court of general jurisdiction. See id. at 555. The N.J.A. court construed the version of Family Code section 54.05(b) that was applicable to that case to mean that a juvenile court lacked jurisdiction to conduct a disposition or adjudication hearing after the respondent is eighteen years old. See id. The N.J.A. court concluded that, when a respondent turns eighteen, the juvenile court's jurisdiction is limited to transferring the case to the appropriate district court or criminal district court or dismissing the case. See id. at 555–56. The N.J.A. court did not address Family Code section 51.042, which then, as now, provided that if a child does not object to the juvenile court's lack of jurisdiction due to the child's age at the adjudication hearing or discretionary-transfer hearing, the child waives the right to object to the juvenile court's lack of jurisdiction based on the child's age at a later hearing, or on appeal. See id. The In re N.J.A. court held that, because the respondent in that case turned eighteen before the disposition hearing, the juvenile court's jurisdiction was limited to transferring the case to the appropriate district court or criminal district court or to dismissing the case but that the court lacked jurisdiction to render an adjudication or disposition order. See id.

It might appear that the In re N.J.A. court concluded that once a respondent turns eighteen, the juvenile court only has jurisdiction to transfer the case to the appropriate district court or criminal district court or to dismiss the case. See id. The better reading of this precedent, however, is that the high court concluded that (1) juvenile courts are courts of limited jurisdiction, rather than general jurisdiction; (2) therefore, their jurisdiction must be based on an applicable statute; and (3) under the statutes applicable in In re N.J.A., the juvenile court only had jurisdiction to transfer the case to the appropriate district court or criminal district court or to dismiss the case. See id.

Subsequent cases support this view of In re N.J.A. See In re B.R.H., 426 S.W.3d 163, 166–68 (Tex.App.—Houston [1st Dist.] 2012, orig. proceeding); In re T.A.W., 234 S.W.3d 704, 705 (Tex.App.—Houston [14th Dist.] 2007, pet. denied). In In re T.A.W., the adjudication hearing did not begin until after the respondent had turned eighteen. See In re T.A.W., 234 S.W.3d at 705. This court cited In re N.J.A. for the proposition that, although a juvenile court does not lose jurisdiction when a juvenile turns eighteen, such jurisdiction is generally limited to either transferring the case under Family Code section 54.02(j) or dismissing the case. See id. Although the juvenile court in In re T.A.W. conducted the adjudication hearing after the respondent had turned eighteen, this court did not conclude, as the In re N.J.A. court did, that the juvenile court lacked jurisdiction to conduct an adjudication hearing or render an adjudication order; rather, this court affirmed the trial court's adjudication order after concluding that the respondent had waived any objection to the trial court's lack of jurisdiction by failing to object at the adjudication hearing, as required by Family Code section 51.042. See Tex. Family Code Ann. § 51.042 (West, Westlaw through 2013 3d C.S.). Thus, the In re T.A.W. court interpreted In re N.J.A. as requiring that the applicable statutes be construed to determine whether the trial court's order could be reversed for lack of jurisdiction. See In re T.A.W., 234 S.W.3d at 705.

Likewise, in In re B.R.H., the court of appeals held that the juvenile court did not abuse its discretion in refusing to dismiss, and retaining for adjudication, a petition alleging delinquent conduct against a respondent who had turned eighteen. See In re B.R.H., 426 S.W.3d at 166–68. The court based its ruling on Family Code section 51.0412, which was enacted after In re N.J.A. was decided. See Tex. Family Code Ann. § 51.0412 (West, Westlaw through 2013 3d C.S.) (providing that a juvenile court retains jurisdiction over a person, without regard to the age of the person, who is a respondent in an adjudication proceeding, a disposition proceeding, a proceeding to modify disposition, a proceeding for waiver of jurisdiction and transfer to criminal court under section 54.02(a), or a motion for transfer of determinate sentence probation to an appropriate district court under certain circumstances). The In re B.R.H. court correctly concluded that to the extent In re N.J.A. indicates that a juvenile court lacks jurisdiction to conduct a disposition or adjudication hearing that falls within the scope of section 51.0412 after the respondent turns eighteen, Family Code section 51.0412 supersedes that decision. See Tex. Family Code Ann. § 51.0412; In re B.R.H., 426 S.W.3d at 167.

A juvenile adjudicated of delinquent conduct based on one of the offenses listed in article 62.001(5) (including the offenses of aggravated sexual assault and indecency with a child) is required to register as a sex offender unless exempted from registration under subchapter H of Chapter 62. See Tex.Code Crim. Proc. Ann. arts. 62.001(5),

62.051, 62.351, et seq. Under Texas Family Code section 54.05(a), various dispositions, including R.A.'s disposition, may not be modified on or after the child's eighteenth birthday. See Tex. Family Code Ann. § 54.05(a), 54.05(a) (West, Westlaw through 2013 3d C.S.). Under Texas Family Code section 54.05(b), various dispositions, including R.A.'s disposition, automatically terminate on the child's eighteenth birthday. See Tex. Family Code Ann. § 54.05(b). Nonetheless, the duty to register as a sex offender arises from Chapter 62, and R.A.'s duty to register or any exemption therefrom is not part of the disposition that terminated on R.A.'s eighteenth birthday.4

Though it may be unusual for the Legislature to expand the jurisdiction of a juvenile court by enacting new provisions of the Code of Criminal Procedure, that is what has occurred in subchapter H of Chapter 62. See Tex.Code Crim. Proc. Ann. art. 62.351, et seq.; In re J.M., 2011 WL 6000778, at *1–3. The Legislature enacted these statutes after the Supreme Court of Texas's decision in In re N.J.A. See In re N.J.A., 997 S.W.2d at 555–56. Thus, if the Juvenile Court acted under the authority of article 62.352 when it issued the First Order, the Juvenile Court had jurisdiction to do so. See Tex.Code Crim. Proc. Ann. art. 62.352; In re J.M., 2011 WL 6000778, at *1–3. To the extent In re N.J.A. indicated that after the respondent turns eighteen, a juvenile court lacks jurisdiction to determine whether a respondent should be required to register as a sex offender, subchapter H of Chapter 62 has superseded that decision. See Tex. Family Code Ann. § 51.0412; In re B.R.H., 426 S.W.3d at 167. To the extent subchapter H of Chapter 62 provides the juvenile court authority to act and In re N.J.A. indicates that the juvenile court lacks jurisdiction because the respondent is eighteen or older, subchapter H of Chapter 62 has superseded In re N.J.A. See Tex.Code Crim. Proc. Ann. art. 62.351, el seq.; In re B.R.H., 426 S.W.3d at 167; In re J.M., 2011 WL 6000778, at *1–3.

Thus, we must determine whether the Juvenile Court acted under the authority of article 62.352. This statute provides in pertinent part as follows:
(b) After a hearing under Article 62.351 or under a plea agreement described by Article 62.355(b), the juvenile court may enter an order:
(1) deferring decision on requiring registration under this chapter until the respondent has completed treatment for the respondent's sexual offense as a condition of probation or while committed to the Texas Juvenile Justice Department; or
(2) requiring the respondent to register as a sex offender but providing that the registration information is not public information and is restricted to use by law enforcement and criminal justice agencies, the Council on Sex Offender Treatment, and public or private institutions of higher education.
(c) If the court enters an order described by Subsection (b)(1), the court retains discretion and jurisdiction to require, or exempt the respondent from, registration under this chapter at any time during the treatment or on the successful or unsuccessful completion of treatment, except that during the period of deferral, registration may not be required. Following successful completion of treatment, the respondent is exempted from registration under this chapter unless a hearing under this subchapter is held on motion of the prosecuting attorney, regardless of whether the respondent is 18 years of age or older, and the court determines the interests of the public require registration. Not later than the 10th day after the date of the respondent's successful completion of treatment, the treatment provider shall notify the juvenile court and prosecuting attorney of the completion. Tex.Code Crim. Proc. Ann. art. 62.352.

We review the trial court's interpretation of applicable statutes de novo. See Johnson v. City of Fort Worth, 774 S.W.2d 653, 655–56 (Tex.1989). In construing a statute, our objective is to determine and give effect to the Legislature's intent. See Nat'l Liab. & Fire Ins. Co. v. Allen, 15 S.W.3d 525, 527 (Tex.2000). If possible, we must ascertain that intent from the language the Legislature used in the statute and not look to extraneous matters for an intent the statute does not state. Id. If the meaning of the statutory language is unambiguous, we adopt the interpretation supported by the plain meaning of the provision's words. St. Luke's Episcopal Hosp. v. Agbor, 952 S.W.2d 503, 505 (Tex.1997). We must not engage in forced or strained construction; instead, we must yield to the plain sense of the words the Legislature chose. See id.

Under the unambiguous language of article 62.352(c), the Juvenile Court had discretion and jurisdiction to require, or exempt R.A. from registration under Chapter 62 "on the successful or unsuccessful completion of treatment." Tex.Code Crim. Proc. Ann. art. 62.352. The statute provides that, following successful completion of treatment, the respondent is exempted from registration as a sex offender unless a hearing under subchapter H of

Chapter 62 is held on the motion of the prosecuting attorney. See id. Though article 62.352(c) provides jurisdiction to the juvenile court to require registration or exempt from registration on the successful or unsuccessful completion of treatment, the statute does not mention a presumed outcome or motion by the State if the respondent unsuccessfully completes treatment. See id. Nonetheless, a sister court has held that, even if the respondent unsuccessfully completes treatment, the State still may move for a hearing under article 62.352(c) and the juvenile court still may require registration under this statute. In re J.M., 2011 WL 6000778, at *1–3. We agree that, even if R.A. unsuccessfully completed treatment, the State still may move for a hearing under article 62.352(c) and the juvenile court still may require registration under this statute. See Tex.Code Crim. Proc. Ann. art. 62.352(c); In re J.M., 2011 WL 6000778, at *1–3.

On appeal, R.A. asserts that he successfully completed treatment and that under article 62.352(c) he was exempted from registration as a sex offender unless a hearing was held on motion of the prosecuting attorney. According to R.A, he successfully completed treatment on March 14, 2010. The State did not move for a hearing until October 29, 2010, seven and a half months later. R.A. asserts that the State's motion had to be filed "very soon after" March 14, 2010, for the Juvenile Court to have jurisdiction under article 62.352(c). Because seven and a half months later is not "very soon after," R.A. claims that the Juvenile Court no longer could exercise jurisdiction.

In the First Order, the Juvenile Court specifically found that R.A. "did not successfully participate in and/or complete the required sex-offender treatment program." R.A. has not challenged this finding on appeal. Even so, we need not decide whether R.A. successfully completed treatment because we conclude that, whether or not R.A. successfully completed treatment, the State still had the ability to file a motion requesting a hearing on the issue of whether R.A. should be required to register as a sex offender. See Tex.Code Crim. Proc. Ann. art. 62.352(c); In re J.M., 2011 WL 6000778, at *1–3.

As to the seven-and-a-half-month delay by the State in moving for a hearing, the interests of R.A. and of the public are best served by a motion by the State either during treatment or promptly thereafter. Nonetheless, the statute does not provide a specific deadline for the State to file a motion or for a hearing to be held.

Conclusion to First Order: We conclude that the seven-and-a-half month delay did not cause the Juvenile Court to lose jurisdiction to determine whether R.A. should be required to register as a sex offender. See Tex.Code Crim. Proc. Ann. arts. 62.351, 62.352(c); In re J.M., 2011 WL 6000778, at *1–3 (holding that juvenile court had jurisdiction to require respondent to register privately as a sex offender, in case in which State did not file motion for hearing until four and a half months after respondent unsuccessfully completed treatment). We conclude that, under articles 62.351 and 62.352(c) the Juvenile Court had jurisdiction to determine whether R.A. should be required to register as a sex offender and whether this registration should be public or private. See Tex.Code Crim. Proc. Ann. arts. 62.351, 62.352(c); In re J.M., 2011 WL 6000778, at *1–3.

The State has suggested that the appeal from the First Order may have become moot due to the issuance of the Second Order. As we explain below, the Second Order did not supersede the First Order. A determination by this court that the Juvenile Court erred in requiring R.A. to register privately as a sex offender would have a direct effect on R.A.'s potential criminal liability for failing to register. See Tex.Code Crim. Proc. Ann. arts. 62.102 (West, Westlaw through 2013 3d C.S.). R.A.'s appeal from the First Order is not moot.

Second Order Opinion: At the hearing in which the trial court issued the First Order, the Juvenile Court indicated it would revisit the issue in a year. Then, in the First Order, the Juvenile Court stated that its registration order would be "reconsidered" twelve months from the date of the First Order. R.A. timely appealed from the First Order. While R.A.'s appeal was pending in this court, the trial court, acting sua sponte, held a hearing to consider whether it should change the registration requirement in the First Order. The second hearing occurred in March 2013, twenty months after the Juvenile Court signed the First Order. In April 2013, the Juvenile Court signed the Second Order, in which the court ordered R.A. to continue to register privately as a sex offender. Before the Juvenile Court issued the Second Order, this court granted the State's and R.A.'s request to abate this appeal pending the trial court's second hearing and order. R.A. has not filed a notice of appeal from the Second Order. After the trial court signed the Second Order,

this court reinstated the appeal. A supplemental record relating to the Second Order has been filed with this court, and this court ordered the parties to file supplemental briefing.

R.A. filed a supplemental brief asserting issues challenging the Second Order. In its supplemental brief, the State questions whether this court has appellate jurisdiction to review the Second Order. R.A. asserts that this court has jurisdiction over the Second Order because he prematurely filed a notice of appeal or because the Second Order is a modification of the First Order under Texas Rule of Appellate Procedure 27.3.

R.A. argues that he did not need to file a second notice of appeal because his appeal from the First Order was a timely appeal of a final order. In the context of the procedures provided in subchapter H of Chapter 62, the First Order was a final order in which the Juvenile Court actually disposes of all claims and parties then before the court. See Lehmann v. Har–Con Corp., 39 S.W.3d 191, 192, 200 (Tex.2001) (providing that a judgment that issues without a conventional trial is final for purposes of appeal if it actually disposes of all claims and parties then before the court or states with unmistakable clarity that it is a final judgment). R.A. timely appealed from the First Order, and this court has jurisdiction over this appeal and R.A.'s challenges to the First Order.5

R.A. asserts that, if the First Order is interlocutory, then R.A. filed an effective premature notice of appeal under Texas Rule of Appellate Procedure 27.1(a), but the First Order is a final order and R.A. filed a notice of appeal from the First Order, not the Second Order. Though R.A. perfected an appeal from the First Order by filing a premature notice of appeal under Rule 27.1(a) two days before the Juvenile Court rendered the First Order, we cannot construe this notice of appeal as a premature notice of appeal from the Second Order, which the trial court rendered twenty-one months later. See Tex.R.App. P. 27.1(a).

Texas Rule of Appellate Procedure 27.3 provides:
After an order or judgment in a civil case has been appealed, if the trial court modifies the order or judgment, or if the trial court vacates the order or judgment and replaces it with another appealable order or judgment, the appellate court must treat the appeal as from the subsequent order or judgment and may treat actions relating to the appeal of the first order or judgment as relating to the appeal of the subsequent order or judgment. The subsequent order or judgment and actions relating to it may be included in the original or supplemental record. Any party may nonetheless appeal from the subsequent order or judgment. Tex.R.App. P. 27.3.

In the Second Order, the trial court found that the interests of the public required that R.A. continue to register privately as a sex offender under Chapter 62 and that R.A.'s Texas Juvenile Sex Offender Risk Assessment, previously determined to be "high risk," should be reduced to "moderate risk." In the Second Order, the Juvenile Court then ordered that R.A. continue to register privately as a sex offender under Chapter 62 and that R.A.'s Texas Juvenile Sex Offender Risk Assessment should be reduced to "moderate risk."

The Second Order did not vacate or replace the Juvenile Court's First Order, nor did the Second Order modify the First Order. In the Second Order, the Juvenile Court evaluated whether or not the interests of the public required that R.A. continue to register privately as a sex offender at the time of the Second Order. The Juvenile Court did not address whether the interests of the public required that R.A. register privately as a sex offender at the time of the First Order or whether the First Order should be modified, vacated, or replaced. In the First Order, the trial court ordered R.A. to register privately as a sex offender under Chapter 62 and did not address R.A.'s Texas Juvenile Sex Offender Risk Assessment. In the Second Order, the trial court ordered R.A. to continue to register privately as a sex offender under Chapter 62 and reduced R.A.'s Texas Juvenile Sex Offender Risk to "moderate risk." Though the trial court may have modified R.A.'s risk assessment, that risk assessment was not contained in the First Order; therefore, the order reducing the risk assessment did not modify the First Order. Because the Juvenile Court did not modify, vacate, or replace the First Order in the Second Order, we conclude that this court does not have jurisdiction over the Second Order under Rule 27.3. See Tex.R.App. P. 27.3.

Conclusion to Second Order: Because no notice of appeal has been filed from the Second Order and because there is no other basis for this court to exercise appellate jurisdiction, we conclude that we lack appellate jurisdiction over

the Second Order and R.A.'s issues challenging that order.6 See Overka v. Bauri, No. 14–06–00083–CV, 2006 WL 2074688 at *1 (Tex.App.—Houston [14th Dist.] Jul. 27, 2006, no pet.) (mem.op.).

SUFFICIENCY OF THE EVIDENCE—

In the Matter of B.S., MEMORANDUM, No. 07-15-00148-CV, 2015 WL 7271731, Tex.Juv.Rep. Vol. 30 No. 1 ¶ 16-1-6 (Tex.App.-Amarillo, 11/17/2015).

A UNIFORMED OFFICER INVESTIGATING A DISPATCHED CALL IN HIS PATROL UNIT WOULD BE CONSIDERED TO BE LAWFULLY DISCHARGING HIS DUTIES AS A PUBLIC SERVANT.

Facts: While on patrol in a marked vehicle, a uniformed Austin police officer received a dispatched call for assistance in locating J.M. a juvenile escapee from the county juvenile detention center. The call came after J.M.'s mother reported seeing her son within the past five minutes in the area of an apartment complex.

The officer spotted a juvenile he believed might be J.M. In fact, it was B.S. B.S. refused to provide his name when the officer asked. The officer attempted to handcuff and frisk B.S. As he placed his hand on B.S.'s arm, B.S. jerked away from the officer's grasp and attempted to pull away.

A second officer arrived and the two officers took B.S. to the ground. On the ground, B.S. continued resisting and struggling. When a third officer arrived B.S. was subdued, handcuffed, and frisked.

Officers noticed B.S.'s nose was bleeding. The first officer told B.S. he was under arrest for resisting the search. B.S. responded with profanity and racial slurs directed at the officer and other officers. A group of B.S.'s friends and apartment-complex residents gathered at the location. With concern for officer safety, and because EMS personnel will not respond to an unsecure location, officers placed B.S. in a patrol vehicle and transported him about a half-block away to a youth center.

At the youth center, EMS personnel examined B.S. while the officer stood some five to ten feet away. As the EMS evaluation concluded, B.S. looked directly at the officer and spit saliva and blood onto the officer's uniform, face, and arms. Afterward, B.S. remarked, "Hoped you liked that, f——a——cop." The officer then went to a local hospital for "blood-exposure precautions."

The State filed a petition alleging B.S. engaged in delinquent conduct by committing the offenses of harassment of a public servant and resisting arrest. At a contested adjudication hearing, tried to the bench, the court found the resisting-arrest allegation not true but it found the harassment of a public servant charge true. At the disposition hearing, the court placed B.S. under an order of probation.

Through his first issue, B.S. argues the State's evidence was legally insufficient because the State failed to prove that the officer was lawfully discharging an official duty at the time B.S. spit saliva on him.

Held: Affirmed.

Memorandum Opinion: As alleged in the State's petition, the elements of harassment of a public servant are that B.S. "with the intent to assault, harass, or alarm [the officer], cause the said [officer] (sic) [B.S.] knows to be a public servant to contact the blood and saliva of [B.S.] while the said [officer] is lawfully discharging an official duty and in retaliation and on account of an exercise of the said [officer's] official power and performance of an official duty." TEX. PENAL CODE ANN. § 22.11(a)(2).

An officer lawfully discharges his duties if the officer is "acting within his capacity as a peace officer." Johnson v. State, 172 S.W.3d 6, 11 (Tex.App.–Austin 2005, pet. refused) (quoting Guerra v. State, 771 S.W.2d 453, 461 (Tex.Crim.App.1988); Hughes v. State, 897 S.W.2d 285, 298 (Tex.Crim.App.1994)). Determining whether an officer acted within his capacity as a peace officer, we look to the details of the encounter, including whether the officer was in uniform, on duty, and whether he was on regular patrol at the time of the occurrence. Johnson, 172 S.W.3d at 11. An officer is lawfully discharging his duties if he is not "criminally or tortiously abusing his office as a public servant." Id.; Hall v. State, 158 S.W.3d 470, 474–75 (Tex.Crim.App.2005) ("the 'lawful discharge' of official duties in this context means that the public servant is not criminally or tortiously abusing his office as a public servant by acts of, for example, 'official oppression' or 'violations of the civil rights of a person in custody' or the use of unlawful, unjustified force") (footnotes omitted)).

B.S. spends much of his argument under this issue analyzing the detention and its rationale, and the officer's use of force. He concludes the use of force was not justified and "[t]he incident snowballed into an assault of [B.S.]." As such, he continues, actions of the officer were not a lawful discharge of official duty. We find no merit to this assessment.

B.S. chose not to testify at the adjudication hearing and the trial court found the officer's testimony credible. The officer's testimony and other evidence showed the officer was in uniform in a marked patrol unit investigating a call from dispatch of an escaped juvenile detainee in the area. Spotting B.S. the officer attempted to make contact but B.S. refused to provide his name. B.S. resisted the officer's attempt to handcuff and frisk him. B.S. was subdued only after a second and third officer arrived. In the occurrence, B.S. sustained a bloody nose. The officer then transported B.S. to the parking lot of a youth center for emergency medical evaluation of B.S. As the EMS worker concluded the examination, and while the officer stood beside his patrol vehicle, B.S. spat blood and saliva on the officer. We find a reasonable trier of fact could have found beyond a reasonable doubt that at the time B.S. spat on the officer, the officer was lawfully discharging his official duty. See Hughes, 897 S.W.2d at 298 ("Whether or not [a trooper's] stop of [the defendant] was constitutionally reasonable is not relevant to determining if [the trooper] was acting in the lawful discharge of his duties.... The record reflects that [the trooper] was acting within his capacity as a peace officer at the time of the offense. He was on duty, in uniform and patrolling Interstate 10 with his partner when they heard and responded to the dispatcher's report" (quotation marks and citation omitted)); see also Guerra, 771 S.W.2d at 461 (similar analysis). B.S.'s first issue is overruled

Through his second issue B.S. argues the State's evidence was factually insufficient to support his adjudication for harassment of a public servant because the State failed to prove that the officer was lawfully discharging an official duty at the time B.S. spit saliva on him. Appellate courts are authorized to conduct a factual sufficiency review only if the burden of proof is less than beyond a reasonable doubt. Moon v. State, 451 S.W.3d 28, 45 (Tex.Crim.App.2014) (citing In re C.H., 89 S.W.3d 17, 25 (Tex.2002)). In a juvenile adjudication hearing, the State's burden requires proof beyond a reasonable doubt. Id. (citing TEX. FAM.CODE ANN. § 54.30(f)). Therefore, under the criminal standard we apply for measuring the sufficiency of evidence supporting a juvenile adjudication, the strength of the evidence is not gauged by a separate factual sufficiency standard. In re R.A., 2012 Tex.App. LEXIS 5909, at *7, 2012 WL 2989224 ("In the criminal context, the factual-sufficiency standard has been eliminated, and the Jackson v. Virginia legal-sufficiency standard is 'the only standard that a reviewing court should apply in determining whether the evidence is sufficient' "); In re A.O., 342 S.W.3d 236, 239 (Tex.App.–Amarillo 2011, pet. refused) (refusing in light of Brooks v. State, to apply a factual sufficiency standard for reviewing a finding that a juvenile engaged in delinquent conduct). B.S.'s second issue is overruled.

Conclusion: Having overruled B.S.'s two issues, we affirm the judgment of the trial court.

In the Matter of M.E.D., MEMORANDUM, No. 13-15-00231-CV, 2015 WL 7567481, Tex.Juv.Rep. Vol. 30 No. 1 ¶ 16-1-5 (Tex.App.-Corpus Christi-Edinburg, 11/24/2015).

WHILE MERE PRESENCE IS NOT ENOUGH, PRESENCE ALONG WITH KNOWLEDGE, UNDERSTANDING, AND THE ACCEPTANCE OF THE "COMMON DESIGN" TO COMMIT AN OFFENSE, MAY WARRANT AN ADJUDICATION FOR AN OFFENSE AS A PARTY.

Facts: As of January 21, 2015, Paradise Auto Sales had a white Ford Windstar van in its inventory. R.A. and D.G., both juveniles, were together at Paradise Auto Sales when R.A. stole the key to the van. R.A. testified that he and D.G. went to M.E.D.'s house to wait for Paradise Auto Sales to close. Several hours later, R.A., D.G., and M.E.D. all began walking toward the dealership. While they were walking to the dealership, R.A. claims that he and D.G. informed M.E.D. of their plans to steal the van. R.A. stated that he and D.G. "knew that [M.E.D.] was on a monitor and we tried to talk him out of it but he still wanted to go." In response, M.E.D. removed the court-ordered GPS tracking unit he was wearing before they arrived at the dealership. R.A. testified that upon arriving at the dealership, "we made sure the dealership was closed." A car salesman that worked at Paradise Auto Sales was heading home when he noticed a couple of "youth[s]" standing next to the van. After he saw the van pull out of the dealership, he called 911. The police pulled over the vehicle and testified that R.A. was driving and M.E.D. was in the front passenger seat.

On February 10, 2015, M.E.D. was charged with theft of property of a value greater than $1,500 but less than $20,000. See id. M.E.D. elected to have a trial before the bench. The adjudication hearing was held on April 16, 2015. After hearing evidence and arguments, the trial court found the allegations of delinquent conduct to be "true" and decided that it was in M.E.D.'s best interest to place him in the custody of Texas Juvenile Justice Department. This appeal followed.

In his sole issue on appeal, M.E.D. argues that the evidence is legally insufficient to support his conviction for theft.

Held: Affirmed.

Memorandum Opinion: Although juvenile cases are civil cases, challenges to the sufficiency of the evidence in such cases are resolved utilizing the same standard of review applicable in adult criminal cases. In re R.R., 373 S.W.3d 730, 734 (Tex.App.—Houston [14th Dist.] 2012, pet. denied). Thus, we review the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Wise v. State, 364 S.W.3d 900, 903 (Tex.Crim.App.2012) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). We defer to the fact finder's determinations on the weight and credibility of evidence. Id. at 904. When the record supports conflicting inferences, we presume the fact finder resolved the conflict in the prosecution's favor and defer to that determination. See id. It is not the State's burden to disprove "every conceivable alternative to the defendant's guilt"; the State must simply prove the essential elements of the crime beyond a reasonable doubt. Temple v. State, 390 S.W.3d 341, 363 (Tex.Crim.App.2013). Thus, on appeal, we determine only if a reasonable fact finder could have found the essential elements of theft beyond a reasonable doubt. See Whatley v. State, 445 S.W.3d 159, 166 (Tex.Crim.App.2014).

The legal sufficiency of the evidence is measured against the elements of the offense as defined by a hypothetically correct jury charge. Malik v. State, 953 S.W.2d 234, 240 (Tex.Crim.App.1997). A person commits the offense of theft if the person unlawfully appropriates property with the intent to deprive the owner of the property without the owner's consent. TEX. PENAL CODE ANN. § 31.03 (West, Westlaw through 2015 R.S.). Under the law of parties, the State does not have to prove that a person physically committed the crime, but the evidence must be sufficient to show that even though the criminal conduct was performed by another, the defendant was still criminally

responsible for that other person's behavior. Id. § 7.01(b)(c) (West, Westlaw through 2015 R.S.). To be criminally responsible for another person's conduct, a person must have acted with the "intent to promote or assist the commission" of the offense by soliciting, encouraging, directing, aiding, or attempting to aid the other person to commit the offense. Id. § 7.02(a)(2) (West, Westlaw through 2015 R.S.).

Mere presence at a crime scene is insufficient to establish guilt under the law of parties. See Gross v. State, 380 S.W.3d 181, 186 (Tex.Crim.App.2012). However, presence at the crime scene can be sufficient when combined with evidence that the defendant encouraged the commission of the offense by his acts, words, or deeds. Burdine v. State, 719 S.W.2d 309, 315 (Tex.Crim.App.1986). To determine whether the defendant was a party to the offense, the fact finder may "look to events occurring before, during, and after the commission of the offense" that show an "understanding and common design to do the prohibited act." Ransom v. State, 920 S.W.2d 288, 302 (Tex.Crim.App.1994). Circumstantial evidence can assist the fact finder in establishing party status. See id.

M.E.D. argues that the evidence is legally insufficient to support his conviction of theft. Specifically, he argues that the evidence clearly established that he did not personally appropriate the van and that he did nothing to encourage or aid in the commission of the theft. The State agrees that M.E.D. did not physically appropriate the van. However, the State argues that the evidence is sufficient to show that M.E.D. was a party to the commission of the offense and did encourage and assist in the theft.

The evidence clearly established that R.A., D.G., and M.E.D. were all in the vehicle when it was pulled over by the local police officers. It further establishes that R.A. and D.G. told M.E.D. about their intentions to steal the car and that M.E.D. took off his GPS tracking unit before arriving at the dealership. M.E.D. argues that this is not enough to show that he encouraged the theft. In support of this proposition, M.E.D. cites a case in which J.W., a juvenile, was charged with aggravated assault. See In re J.W., No. 14–12–00675–CV, 2014 WL 708484, at *2 (Tex.App.—Houston [14th Dist.] 2014, no pet.) (mem.op.). J.W. and several of his friends were driving a vehicle they had stolen. Id. One of J.W.'s friends saw another car and decided he wanted to steal that one, too. Id. The driver of the stolen vehicle pulled over; J.W.'s friend held a shotgun to the other driver and ordered him out of the car. Id. The court of appeals found that J.W. was not a party to the aggravated assault because he did nothing to encourage his friend's independent actions to steal the other vehicle at gunpoint and did not know his friend's plans beforehand. Id.

However, J.W.'s case is materially different from the present case because there was evidence that M.E.D. knew that his friends intended to steal the van. J.W., on the other hand, was essentially a witness to his friend's aggravated robbery; J.W. did not know his friend was going to commit aggravated assault. See Id. That case was not about J.W.'s criminal responsibility as to the actual car theft. See Id. Here, M.E.D. knew R.A. and D.G.'s plans before arriving at the dealership. R.A. and D.G. actively tried to prevent M.E.D. from coming along, but M.E.D. persisted and came along regardless. Furthermore, M.E.D. removed his GPS tracking unit to accompany his friends in their theft. All of these facts support the inference that M.E.D. understood his friends' plans and intended to encourage his friends in the commission of the offense. See Ransom, 920 S.W.2d at 302. Also, R.A.'s statement that "we made sure the dealership was closed" suggests that all three secured the premises. Providing reconnaissance of the planned crime scene is enough to establish a defendant as a party to the offense. See Johnson v. State, 6 S.W.3d 709, 711 (Tex.App.—Houston [1st Dist.] 1999, pet. ref'd). But M.E.D. also entered the van with R.A. and D.G., further supporting the inference that M.E.D. understood and accepted the "common design" to do the prohibited act. See Ransom, 920 S.W.2d at 302. R.A. later testified that M.E.D. did "nothing" to assist in the theft, which conflicts with his earlier statement that M.E.D. helped secure the premises. However, the trial court presumably resolved this conflict in favor of the State. See Wise, 364 S.W.3d at 903. Looking at all the evidence in the light most favorable to the prosecution, we find that a reasonable fact finder could find beyond a reasonable doubt that M.E.D. was a party to the theft. See id.

Conclusion: We conclude that the evidence is legally sufficient to uphold M.E.D.'s adjudication. We overrule M.E.D.'s sole issue. We affirm the trial court's judgment.

In the Matter of G.L.R. Jr., MEMORANDUM, No. 04-14-00708-CV, 2015 WL 4478052, Tex.Juv.Rep. Vol. 29 No. 3 ¶ 15-3-1 (Tex.App.-San Antonio, July 22, 2015).

IT IS FOR THE TRIAL COURT, AS FACT FINDER, TO JUDGE THE CREDIBILITY OF WITNESSES AND THE WEIGHT TO BE GIVEN TO THEIR TESTIMONY, TO DRAW REASONABLE INFERENCES FROM THE TESTIMONY, AND TO RESOLVE ANY EVIDENTIARY CONFLICTS.

Facts: The evidence shows the complainant parked his vehicle, a Ford F–250 pickup truck, outside a hotel where he was staying. The next morning, the complainant discovered his truck was missing and called police.

Later that morning, at an apartment complex, a maintenance man, Nathaniel Ortiz, saw a truck idling in the parking lot. He testified he saw two men inside the truck. Because the men were wearing fluorescent work vests, Mr. Ortiz believed the men might be working on the property; he initially did not believe they were out of place. However, approximately thirty minutes later, he saw the same two men exiting the property. At that time, they were no longer wearing the vests; rather, one man was wearing a muscle shirt and the other was wearing a t-shirt. Mr. Ortiz informed Terry Gleason, a maintenance supervisor at the same apartment complex, about the men's actions.

Mr. Gleason testified he also saw the two men in the idling truck. He saw the men exit the vehicle and walk away. Suspicious, Mr. Gleason called Detective Richard Buchanan, a police officer Mr. Gleason had dealt with in the past. Detective Buchanan came to the complex at Mr. Gleason's request. When he arrived, the detective ran the truck's license plate number and discovered the truck had been reported stolen. The truck was the one reported stolen by the complainant. Detective Buchanan took a description of the two men from Mr. Gleason, which he recalled in court as two Hispanic males, one five-two and the other five-five, both approximately 120–125 pounds, with brown hair and brown eyes. During a search of the truck, Detective Buchanan found the stub of a "Black & Mild" cigar on the floorboard of the truck. He also found two fluorescent traffic vests, one in the back seat of the truck, the other on the ground near the truck.

While Detective Buchanan was conducting his investigation, Mr. Ortiz alerted Mr. Gleason that the two men who had been in the truck were walking along outside the gate of the complex, watching the officers. Mr. Gleason then saw the two men standing about a half a block away, still watching, and told Detective Buchanan. Mr. Gleason got in his vehicle and Detective Buchanan followed him, heading toward the two men. At that time, the men fled. Detective Buchanan pursued and arrested the two men. When he searched the men, Detective Buchanan found a two pack of "Black & Mild" cigars with one of the cigars missing. According to the detective, officers brought Mr. Ortiz to where the two men were being detained and he was able to positively identify them as the men who had been sitting in the idling truck.

Mr. Gleason affirmatively identified the fleeing men as those he saw sitting in the truck that morning. Mr. Gleason stated in court that the suspects were wearing a white t-shirt and a white muscle shirt, and they were both wearing khaki bottoms—one man was wearing pants, the other man, shorts.

In court, neither Mr. Gleason nor Mr. Ortiz could positively identify G.L.R. Jr. as the same man who had been sitting in the truck the day of the theft. However, they both positively stated that one of the persons who was arrested that day was one of the men they saw sitting in the truck. Detective Buchanan identified G.L.R. Jr. as the person he arrested for theft and as the person identified at the time by Mr. Gleason and Mr. Ortiz as one of the men who had been sitting in the truck the day of the theft.

Ultimately, the trial judge found G.L.R. Jr. engaged in delinquent conduct by commit-ting theft. After disposition, G.L.R., Jr. perfected this appeal.

As noted above, G.L.R. Jr. raises one point of error, challenging the sufficiency of the evidence. Specifically, he contends the evidence was insufficient to establish he was the perpetrator of the offense. In other words, G.L.R. Jr. claims the evidence is insufficient to prove identity.

Held: Affirmed

Opinion: As detailed above, the evidence established two witnesses—Mr. Ortiz and Mr. Gleason—saw G.L.R. Jr. in the vehicle soon after it was stolen. Although neither witness was able to identify G.L.R. Jr. in court, Detective Buchanan specifically testified Mr. Gleason told him on the day of the theft that earlier that day, he had seen two men sitting in the truck, but they had left the property. Mr. Gleason also informed the detective the men were nearby and watching while officers processed the truck; he pointed them out to the detective. When the detective caught up to the men, G.L.R. Jr. was one of the men who had been pointed out by Mr. Gleason. Moreover, after he apprehended G.L.R. Jr. and his companion, Detective Buchanan testified Mr. Ortiz was able to identify G.L.R. Jr. at the scene as one of the men he had seen that morning in the stolen truck. In court, Detective Buchanan identified G.L.R. Jr. as one of the men he apprehended and arrested. Additionally, G.L.R. Jr. matched the general description provided by Mr. Gleason—Hispanic male, between 5'2"> and 5'5", approximately 120–125 pounds, with brown hair and brown eyes. Mr. Ortiz's description in court included a recollection that the men were wearing fluorescent vests, and two such vests were found in or near the truck.

In addition, the evidence establishes G.L.R. Jr. fled when he noticed Mr. Gleason and the detective looking at him and his companion. See Devoe v. State, 354 S.W.3d 457, 470 (Tex.Crim.App.2011) (quoting Alba v. State, 905 S.W.2d 581, 586 (Tex.Crim.App.1995) (holding that flight is admissible as circumstance from which inference of guilt may be drawn)); Clayton v. State, 235 S.W.3d 772, 780 (Tex.Crim.App.2007) (holding that fact finder may draw inference of guilt from circumstance of flight). Finally, Detective Buchanan found the stub of a "Black & Mild" cigar in the stolen truck. When the detective apprehended G.L.R. Jr. and his companion, a two-pack of "Black & Mild" cigars was found on G.L.R. Jr.'s companion; the pack was missing a single cigar.

Based on the evidence—viewed in the light most favorable to the verdict—we hold the evidence is legally sufficient to support the trial court's finding that G.L.R. Jr. committed the offense of theft. See Mayberry, 351 S.W.3d at 509. It was for the trial court, as fact finder, to judge the credibility of witnesses and the weight to be given to their testimony, to draw reasonable inferences from the testimony, and to resolve any evidentiary conflicts. See Orellana, 381 S.W.3d at 653. Given the testimony, we hold the trial court had sufficient evidence to find G.L.R. Jr. committed theft, i.e., stole the truck. Accordingly, we overrule G.L.R. Jr.'s sole point of error.

Conclusion: Based on our analysis of the evidence within the prism of the applicable standard of review, we hold the evidence was sufficient to support the trial court's finding of delinquency based on the offense of theft. We therefore affirm the trial court's judgment.

In the Matter of R.D., MEMORNADUM, No. 04-13-00876-CV, 2014 WL 5837543, Tex.Juv.Rep. Vol. 29 No. 1 ¶ 15-1-1 (Tex.App.-San Antonio, 11/12/14).

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

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

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

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

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

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

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

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

Held: Affirmed

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

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

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

As to Mr. Correa, however, he specifically testified he was one hundred percent certain R.D. was one of the young men who left the Medellin house through the window. He testified to close contact with R.D., struggling with him at the back of the house. Admittedly, there are some discrepancies in his testimony when compared with his wife's, but on whole, these discrepancies are not such that a jury could not rationally resolve them in favor of a finding that R.D. was one of the men who entered the Medellin home and then attempted to escape when the Correas arrived. See Gonzales, 330 S.W.3d at 694. That the young men were wearing different clothes when Mr. Correa located them does not impugn the testimony provided by the Correas. The jury could have reasonably inferred the young men changed clothes to avoid identification. See Orellana, 381 S.W.3d at 653.

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

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

TRANSFER FROM JUSTICE OF THE PEACE COURT—

In the Matter of J.G., MEMORANDUM, No. 10-14-00298-CV, 2015 WL 6437829, Tex.Juv.Rep. Vol. 30 No. 1 ¶16-1-1 (Tex.App.-Waco, Oct. 22, 2015).

IN TRANSFER OF TRUANCY CASE TO JUVENILE COURT, JUVENILE COURT DID NOT ABUSE ITS DISCRETION BY FINDING THAT JUVENILE HAD ENGAGED IN DELINQUENT CONDUCT BY COMMITTING CONDUCT THAT VIOLATES A LAWFUL ORDER OF A COURT UNDER CIRCUMSTANCES WHICH WOULD CONSTITUTE CONTEMPT OF COURT.

J.G. appeals from an order adjudicating him as a child who engaged in delinquent conduct for contempt of a court order. TEX. FAM.CODE ANN. § 53.01(a)(2)(A) (West 2014). The basis for the court order was failure to attend school, for which J.G. had pled guilty in justice court and had been placed on probation pending a compliance hearing. Prior to the date of the compliance hearing, the justice court transferred the proceeding to the juvenile court. After a hearing, the juvenile court found that J.G. was a child who had engaged in delinquent conduct because he had continued to fail to attend school after the entry of the justice court's order, which the trial court found was conduct that violates a lawful court order under circumstances which would constitute contempt of that order.

In this appeal, J.G. complains that the trial court improperly overruled his oral objection to the petition filed by the State because it was not sufficiently specific as to the dates of J.G.'s alleged contemptuous acts and that the trial court erred by holding J.G. in contempt for violating the justice court's order after the case was transferred to the juvenile court. Because we find no reversible error, we affirm the judgment of the trial court.

On March 20, 2014, in the justice court sitting as a truancy court, J.G. pled guilty to failing to attend school on multiple dates prior to his plea. On that date, the justice court entered an order entitled "Order for Suspension of Sentence and Deferral of Final Disposition (ATT)—Failure to Attend School" which required J.G. to attend school every day unless he had a doctor's excuse. That order also required that J.G. appear before the justice court on April 30, 2014 for a compliance hearing. However, after the justice court was informed that J.G. had failed to attend school on multiple occasions, a hearing was conducted on April 24, 2014 at which time the justice court gave J.G.'s mother the option of paying a fine or having the proceeding sent to juvenile court. J.G.'s mother declined to pay the fine and the justice court transferred the proceedings to the juvenile court by order signed on April 24, 2014.

The State's petition was filed on May 7, 2014 alleging that J.G. had engaged in delinquent conduct. J.G. entered a plea of not true to the allegations and a bench trial was conducted by the juvenile court. The juvenile court found the allegations to be true and made a finding that J.G. had engaged in delinquent conduct by failing to attend school which was conduct in violation of a lawful order of a court under circumstances that would constitute contempt. The State and J.G. entered into an agreement regarding disposition, and the juvenile court accepted the agreement of six months of probation. On appeal, J.G. complains that the adjudication order was erroneously entered.

Specificity of Allegations

In his first issue, J.G. complains that the juvenile court abused its discretion by overruling his oral objection to the petition filed by the State because it did not allege specific dates that J.G. failed to attend school. The petition filed by the State stated only that "on or about April 30, 2014" J.G. engaged in conduct that violated an order of the justice court by failing to attend school which would constitute contempt of court. J.G. objected to the State's petition at the beginning of the bench trial, and the juvenile court overruled his objection.

Held: Affirmed.

Memorandum Opinion: We review the juvenile court's rulings regarding the sufficiency of juvenile pleadings, including whether to grant or deny a motion to quash the pleadings or a ruling on special exceptions, for an abuse of discretion. See In the Matter of B.P.H., 83 S.W.3d 400, 405 (Tex.App.–Fort Worth 2002, no pet.). The juvenile court

abuses its discretion if it acts arbitrarily or unreasonably. In the Matter of K.J.N., 103 S.W.3d 465, 466 (Tex.App.–San Antonio 2003, no pet.).

J.G. complains that the State's pleading of "on or about April 30, 2014" was insufficient pursuant to section 53.04(d) of the Family Code which requires that a petition must state "with reasonable particularity the time, place, and manner of the acts alleged." TEX. FAM.CODE ANN. § 53.04(d)(1) (West 2014). Additionally, in this issue J.G. contends that he could not be found in contempt until the compliance hearing that was to be conducted on April 30, 2014. He further argues that because the proceeding was transferred to the juvenile court prior to that date, there was no finding of contempt made by the justice court. J.G. also argues that there was no conviction in the justice court which is "a precursor to making a finding of contempt."

Initially, we note that although the justice court deferred the final disposition, the order entered did include a finding of guilt against J.G. for failing to attend school. Additionally, in his brief to this Court, J.G. has presented no authority in support of his position that a finding of contempt cannot be made prior to a compliance hearing or that a conviction is required prior to making a finding of contempt. The only case to which J.G. cites in his brief regarding this issue is a general reference to the standard of review and the only statute to which J.G. refers is section 53.04(d) of the Family Code. Citations to authority to support his contentions are required to properly present an issue to this Court. Therefore, these complaints are inadequately briefed, and therefore waived. See TEX.R.APP. P. 38.1(i). Further, we have found no authority to support J.G.'s contention that the justice court was required to defer a determination on the transfer until the date set for the compliance hearing. Because of this, even if J.G.'s issue were properly presented, we cannot say that the juvenile court's ruling is outside of the zone of reasonable disagreement.

J.G. also presents no authority in support of his argument that the allegations in the State's petition relating to the dates of J.G.'s alleged conduct which would constitute contempt were not sufficiently specific pursuant to section 53.04(d)(2). We find also that this complaint is inadequately briefed, but also note that J.G. did not file a motion to quash or special exceptions to the State's petition. A written motion complaining of defects of pleading is necessary to preserve error, and J.G.'s failure to do so waived any objection to the form of the pleadings. See TEX.R. CIV. P. 90; TEX.CODE CRIM. PROC. ANN. art. 27.10. In his brief to this Court, J.G. does not complain that he did not receive adequate notice of the allegations against him or that the evidence was insufficient for the juvenile court to have found that any of the multiple dates between March 20, 2014 and the date of the filing of the State's petition that J.G. did not attend school were true. We find that the trial court did not abuse its discretion by overruling J.G.'s oral objection to the State's petition. We overrule issue one.

Transfer to Juvenile Court

In his second issue, J.G. complains that the trial court erred by finding that he could be held in contempt for violating the justice court's order because the proceeding had been transferred to the juvenile court as a Conduct Indicating a Need for Supervision (CINS) case. Also, J.G. contends that the transfer order in effect extinguished the justice court's order entirely, which would mean that he could not be held in contempt for an order that he argues did not exist after the proceeding was transferred. Additionally, J.G. argues that because the proceeding was transferred to the juvenile court prior to the date of the compliance hearing, he was not afforded an opportunity to be heard as a CINS offense in a truancy case rather than as a child who engaged in delinquent conduct. J.G. does not argue that he did not in fact violate the justice court's order between the dates the order was entered and the proceeding was transferred.

The statutes relating to truancy in the Education Code, Family Code, and Code of Criminal Procedure have been amended or abolished effective September 1, 2015. See, e.g., TEX. EDUC.CODE ANN. § 25.094, TEX. FAM.CODE ANN. § 51.03(b)(2), TEX.CODE CRIM. PROC. ANN. Art. 54.054, repealed by Act of June 18, 2015, 84th Leg., ch. HB2398 (H.B.2398), § 41, effective September 1, 2015; see also, generally, Act of June 18, 2015, 84th Leg., ch. HB2398 (H.B.2398), effective September 1, 2015. However, the abolished provisions remain in effect for

offenses that occurred prior to the effective date of the amendments; therefore, we will analyze J.G.'s issue pursuant to the versions of the statutes prior to the amendments. See Act of June 18, 2015, 84th Leg., ch. HB2398 (H.B.2398), § 41(2), effective September 1, 2015.

Section 25.094(c) of the Education Code authorized a justice court to make a finding that a child has failed to attend school and to enter an order requiring that the child attend school without unexcused absences. TEX. EDUC.CODE ANN. § 25.094(c), TEX.CODE CRIM. PROC. ANN. Art. 45.054(a)(1)(A), repealed by Act of June 18, 2015, 84th Leg., ch. HB2398 (H.B.2398), § 41(1), (2). Thereafter, if the justice court believed that a child had violated that order, the justice court had the option to refer the child to the juvenile court for delinquent conduct for contempt of court or to retain the proceeding and assess a fine of not more than $500. TEX. EDUC.CODE ANN. § 25.094(d), TEX.CODE CRIM. PROC. ANN. Art. 45.050(c)repealed by Act of June 18, 2015, 84th Leg., ch. HB2398 (H.B.2398), § 41(1), (2), effective September 1, 2015.

J.G.'s mother testified at the adjudication hearing that she and J.G. appeared before the justice court on April 24, 2014, at which time a hearing was conducted. At that hearing, after J.G.'s mother declined the option to pay a fine, the justice court decided to transfer the proceeding to the juvenile court. The justice court's order states that it was transferring the case to be handled as a CINS case pursuant to section 51.03(b)(1)(A) of the Family Code.FN1 Other documentation provided by the justice court indicates that the case was transferred as a contempt of court proceeding. In accordance with section 53.012 of the Family Code, the prosecuting attorney reviewed the allegations and chose to file a petition alleging contempt of the justice court's March 20, 2014 order. See TEX. FAM.CODE ANN. §§ 51.03; 53.012.

FN1. Family Code Section 51.03(b)(1)(A) describes fine-only misdemeanor offenses other than traffic offenses and does not relate to truancy, which is set forth in section 51.03(b)(2).

J.G. has provided this Court with no authority in support of his argument that the truancy court order was not in effect after the proceeding was transferred to the juvenile court. We believe that the relevant statutes do not support J.G.'s contention. Rather, the juvenile court was required to determine whether or not J.G. had committed conduct that would constitute contempt of the justice court's order, and the juvenile court made that determination based on J.G.'s failure to attend school after the entry of the justice court's order on March 20, 2014. We find that the trial court did not abuse its discretion by finding that J.G. had engaged in delinquent conduct by committing conduct that violates a lawful order of a court under circumstances which would constitute contempt of court. We overrule issue two.

Conclusion: Having found no reversible error, we affirm the judgment of the trial court.

TRIAL PROCEDURE—

In the Matter of N.G.-D., MEMORANDUM, No. 03-14-00437-CV, 2016 WL 105948, Tex.Juv.Rep. Vol. 30 No. 1 ¶16-1-9B (Tex.App.-Austin, 1/8/2016).

IN DETERMINATE SENTENCE TRANSFER HEARING, JUVENILE'S FAILURE TO OBJECT TO THE TRIAL JUDGE'S EXPRESSED INTENTION TO NOT ALLOW ARGUMENT FAILED TO PRESERVE ERROR.

Facts: In June 2011, the district court, sitting as a juvenile court, adjudicated appellant delinquent of two counts of aggravated sexual assault of a child for sexually assaulting an eight-year-old neighbor boy.2 See Tex. Fam.Code § 54.03(f); Tex. Penal Code § 22.021(a)(1), (2)(B). The court placed appellant on determinate-sentence probation for ten years for one of the counts. See Tex. Fam.Code §§ 53.045(a), 54.04(d)(3), (q). The court severed out the second

count, postponing disposition pending appellant's progress on the probated count. In April 2012, after appellant absconded from a halfway house, the court assessed a determinate sentence of 30 years on the previously severed out count and placed appellant in the custody of TJJD. See id. §§ 53.045(a)(5), 54.04(d)(3). In January 2014, 21 months into appellant's determinate sentence, TJJD requested a transfer hearing and recommended that appellant, now almost 19 years old, be transferred to TDCJ. See Tex. Hum. Res. Code § 244.014. After a two-day transfer hearing, the juvenile court ordered appellant to serve the remainder of his 30–year determinate sentence in the custody of TDCJ. See Tex. Fam.Code § 54.11(a), (i).

In his sole issue on appeal, appellant asserts that the juvenile court abused its discretion by failing to make explicit findings explaining the reasons for its decision to transfer him to TDCJ, by failing to consider his best interests when making the decision, and by failing to allow him to present argument at the transfer hearing.

Held: Affirmed.

Memorandum Opinion: Appellant first contends that the juvenile court erred in not making findings, orally or in writing, to explain the basis for its decision to transfer him to TDCJ. However, the record demonstrates that appellant never requested that the juvenile court make such findings nor did he object to the failure of the court to do so.

Juvenile proceedings are governed by the Juvenile Justice Code, Title 3 of the Texas Family Code, see id. §§ 51.01–61.107, and, although quasi-criminal in nature, are considered civil cases and are generally governed by the Texas Rules of Civil Procedure, see id. § 51.17 (subject to certain exceptions, or when in conflict with provisions of Juvenile Justice Code, Texas Rules of Civil Procedure govern proceedings under Juvenile Justice Code); In re Hall, 286 S.W.3d 925, 927 (Tex.2009) (noting that juvenile proceedings are civil cases "although [they are] quasi-criminal in nature"); In re R.J.H., 79 S.W.3d 1, 6 (Tex.2002) ("The Family Code, which governs juvenile delinquency proceedings in Texas, requires that they be conducted under the Texas Rules of Civil Procedure[.]"); see also In re Dorsey, 465 S.W.3d 656, 657 (Tex.Crim.App.2015) (Richardson, J., concurring) ("Except when in conflict with a provision of the Family Code, the Texas Rules of Civil Procedure govern juvenile proceedings.") (citing Tex. Fam.Code § 51.17(a) and In re M.R., 858 S.W.2d 365, 366 (Tex.1993)). Accordingly, the Texas Rules of Civil Procedure regarding district court findings govern this issue.

Rule of Civil Procedure 296 requires a formal request to be filed within 20 days of the judgment before a district court is obligated to make written findings of fact and conclusions of law. See Tex.R. Civ. P. 296. Appellant did not file a proper and timely request. In fact, the record reflects that appellant never requested, orally or in writing, that the juvenile court make findings at any time. Thus, appellant has failed to preserve this complaint for review. See Stangel v. Perkins, 87 S.W.3d 706, 709 (Tex.App.—Dallas 2002, no pet.) (trial court was not obligated to make written findings of fact and conclusions of law because no timely request was filed; failure to timely and properly request findings and conclusions does not preserve error); see also Tex.R.App. P. 33.1(a) (to preserve complaint for appellate review, party must have presented to trial court a timely request, objection, or motion that states the specific grounds for desired ruling and complies with requirements of Texas Rules of Civil Procedure).

Appellant relies on Moon v. State, 451 S.W.3d 28 (Tex.Crim.App.2014), to support his contention that the juvenile court abused its discretion in ordering his transfer to TDCJ without stating the reasons for its decision to transfer. In Moon, the Court of Criminal Appeals addressed the specificity required in a juvenile court's transfer order under section 54.02 of the Juvenile Justice Code—the statute governing the juvenile court's waiver of jurisdiction and transfer of a juvenile offender for prosecution in adult criminal court—as well as the standard of appellate review applicable in an appeal from that order. See Moon, 451 S.W.3d at 44–48; see also Tex. Fam.Code § 54.02. The Court observed that, before a juvenile court may exercise its discretion to waive jurisdiction over an alleged juvenile offender, the court must consider the non-exclusive statutory factors of section 54.02(f) to facilitate the juvenile court's balancing of the "potential danger to the public" posed by the particular juvenile offender "with the juvenile offender's amenability to treatment." Moon, 451 S.W.3d at 38; see Tex. Fam.Code § 54.02(f). If the juvenile court decides to waive jurisdiction over the juvenile, then the statute directs it to "state specifically" in a written order "its reasons for waiver and [to] certify its action, including the written order and findings of the court." Moon, 451 S.W.3d at 38 (quoting Tex. Fam.Code § 54.02(h)).

Appellant's reliance on Moon is misplaced. In Moon, the Court analyzed the juvenile court's abuse of discretion in connection with a statute that mandated the juvenile court—after considering certain required factors—to specifically explain its decision and explicitly state those reasons in the transfer order. See id. at 38, 49; Tex. Fam.Code § 54.02(h). The statute at issue here, section 54.11 of the Family Code, which governs post-adjudication transfers to TDCJ, contains no requirement that the juvenile court make findings stating the reasons for its decision to transfer the juvenile to TDCJ or to put them in the transfer order. See Tex. Fam.Code § 54.02. Unlike Moon, the juvenile court here did not fail to comply with the applicable statutory requirements. Consequently, we find no abuse of discretion in the juvenile court's failure to make explicit findings explaining its decision to transfer, particularly when not requested to do so.

Failure to Consider Appellant's Best Interests

Appellant also maintains that the juvenile court abused its discretion "in transferring appellant into the adult prison system when it failed to consider the best interest of appellant."

When a juvenile is given a determinate sentence, upon TJJD's request to transfer the juvenile to TDCJ, the trial court is required to hold a hearing. See id. § 54.11; see also Tex. Hum. Res. Code § 244.014. Following the hearing, the court may either (1) order the return of the juvenile to TJJD or (2) order the transfer of the juvenile to the custody of TDCJ for the completion of his sentence.3 See Act of May 27, 1987, 70th Leg., R.S., ch. 385, § 13, 1987 Tex. Gen. Laws 1896, 1897 (current version at Tex. Fam.Code § 54.11(i)). When conducting the transfer or release hearing, the juvenile court

> may consider the experiences and character of the person before and after commitment to [TJJD], the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of [TJJD] and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided.

Tex. Fam.Code § 54.11(k) (emphasis added). Consideration of this non-exclusive list of statutory factors is discretionary. See Tex. Gov't Code § 311.016(1) (" 'May' creates discretionary authority or grants permission or a power."). The juvenile court is not obliged to consider all of the factors listed, and it may consider relevant factors not listed. In re N.K.M., 387 S.W.3d 859, 864 (Tex.App.—San Antonio 2012, no pet.); In re J.J., 276 S.W.3d 171, 178 (Tex.App.—Austin 2008, pet. denied). Moreover, the juvenile court can assign different weights to the factors considered. In re N.K.M., 387 S.W.3d at 864; In re J.J., 276 S.W.3d at 178.

In this case, the juvenile court heard evidence at the transfer hearing about the nature of the underlying offense, appellant's traumatic childhood, his criminal history, his substance abuse history, his ongoing behavioral problems, his continued inappropriate sexual conduct, his failure to successfully complete a sexual-behavior treatment program, and his commission of a new felony offense while committed to TJJD.4

Katherine Hallmark, a psychologist at the Giddings State School, testified that she conducted a forensic risk assessment on appellant, and her report of the assessment was admitted into evidence for consideration by the juvenile court. She testified about appellant's various mental health diagnoses based on several psychological evaluations, including those from the Travis County probation department and subsequent TJJD evaluations. Appellant's diagnoses included sexual abuse of a child/perpetrator, conduct disorder, and poly-substance dependence. Dr. Hallmark also reported that appellant displays several antisocial traits, such as failure to conform to social norms, deceitfulness, impulsivity, irresponsibility, disregard for others, and lack of remorse. The psychological evaluations reflect that appellant has between low average and borderline intellectual functioning and has low academic skills. Dr. Hallmark explained that appellant's performance regarding intellectual functioning, academic functioning, and cognitive deficit are "more consistent with a suboptimal educational background than with his cognitive deficits." His problems are "more related [to] a culturally impoverished environment."5

In her testimony, Dr. Hallmark described appellant's childhood—characterized by abandonment by his mother, the death of his primary caregiver (his grandmother), physical abuse by his father, and juvenile gang involvement—as "extremely traumatic," "really stressful," and "extremely chaotic." As a child he suffered "exposure to violence,

parental criminality, poor role models, attachment problems, [and] poor school achievement." Consequently, while at TJJD, appellant received services to address his issues, including ESL (English as a second language) services, specialized reading classes, a vocational certification course, psychiatry services for medication, extensive treatment by a psychologist, a sex-offender treatment program, and an alcohol and drug treatment program. While she empathized with his traumatic history and recognized its impact on appellant, the doctor testified that appellant has not responded to the interventions offered and has not progressed in his treatment. In her testimony, Dr. Hallmark said that appellant does not have a motivation for change, does not appear to try to interrupt his inappropriate sexual behavior, has an external focus of control, lacks empathy for others, uses cognitive distortions, demonstrates attitudes reflective of reoffending, and exhibits "risky, impulsive behavior." "[Appellant] knows that his behavioral choices are wrong, and yet he doesn't try to change his thinking to interrupt his behaviors." Dr. Hallmark acknowledged that appellant is in need of further sex offender treatment, substance abuse treatment, and mental health treatment but testified that he is "not appropriate for treatment completion" because he has "a problem with poor compliance to treatment." She observed that his new felony sexual offense reflects that appellant is not using any of the skills that he learned from treatment in his daily life, and she expressed concern about appellant's lack of progress while at TJJD: "he currently thinks in the same manner that he did before[,] suggesting that he hasn't made any changes in thought process that supports criminal offending."

In support of TJJD's recommendation to the juvenile court that appellant be transferred to TDCJ, Dr. Hallmark indicated in her testimony that appellant could not safely be transitioned into the community because he has not demonstrated sufficient risk reduction, has not achieved the necessary skills and protective factors, and does not understand his pattern of offending enough to develop a safe risk-management-transition plan. She noted that "[h]is behavior continues to be problematic" and conveyed that appellant's pattern of behavior put society at risk. Specifically, his pattern of non-compliance with both probation services and TJJD services—a pattern in which he committed felony offenses under both types of intervention—suggests that if he was placed on additional intervention on parole "he is at risk for committing another felony offense just as he did on probation and at TJJD." Dr. Hallmark summarized, "[Appellant's] risk factors are really quite notable, and his pattern of behavior and lack of internalization [of] treatment concepts justifies the recommendation to protect the community."

Dr. Enrique Covarrubias, a psychologist at the Giddings State School who provided therapy to appellant, also testified at the transfer hearing. Regarding appellant's intellectual capacities or abilities, Dr. Covarrubias agreed that appellant has low average to borderline IQ. Concerning appellant's mental health issues, the doctor testified that appellant was not a "high need mental health kid" but instead was "relatively stable." He indicated that appellant's actions were disruptive, "seemed somewhat premeditated," and could be "accounted for by the conduct disorder." When asked about a previous psychological evaluation indicating that appellant "present[ed] as an angry, impulsive, aggressive, lonely young boy, who has very little insight into the issues in his life that have contributed to his current problems and difficulties," Dr. Covarrubias agreed with the accuracy of the description except that he did not believe that appellant was very impulsive. He attributed appellant's behavior to his "negative thinking, his criminal thinking"—his belief that "[he] could get away with it." Dr. Covarrubias testified that in his sessions with appellant, he focused on problem solving, stress management, dealing with situations, and coping with uncomfortable feelings. He also addressed "elementary" concerns such as medication compliance, understanding basic rules, and doing class work and homework, and gave appellant "psycho-education" about gangs and drugs. In addition, he encouraged appellant to know his risk factors and protective factors and to use his coping skills. Dr. Covarrubias testified that in appellant's therapy there was "a lot about decision making." Although the doctor tried to remind appellant to be aware of his distorted and criminal thinking patterns, "it just didn't seem to be enough." Dr. Covarrubias testified that during the course of his treatment of appellant, he did not observe any desire by appellant to modify his "defiant, dangerous, aggressive, and violent behavior," associate with positive peers, utilize and fully take advantage of available treatment programs and resources, refrain from illicit substance use, engage in "healthy and pro-social behaviors," or discontinue his gang involvement. The doctor indicated that he did not think that appellant "ha[d] gained any insight into the nature or origin of his psychological and behavioral problems."

Finally, Leonard Cucolo, TJJD's court liaison, testified for the State, and his report was admitted into evidence. Cucolo testified that appellant was reviewed for a possible transfer to TDCJ "as a result of basically meeting the entire policy criteria for return to court for possible transfer": he engaged in "chronic disruption of the program,"

meaning he was placed in security five or more times; he engaged in a new felony offense, for which he was charged and subsequently convicted; and he committed three or more major rule violations that were confirmed through a Level 2 hearing (appellant had six). Based on appellant's conduct while committed to TJJD, every member of the special services committee, the body making TJJD's recommendation, "unanimously agreed that [appellant] should be returned to court for the purpose of transfer [to TDCJ]." Cucolo reported that appellant had 97 documented incidents of misconduct and was "placed on security" on 46 occasions. His report detailed several incidents that demonstrated appellant's "aggressive and disruptive behaviors," which included assaulting another student (he struck the boy in the face repeatedly with both fists until he was physically restrained by TJJD personnel), possessing prohibited items (on separate occasions, a razor, a handcuff key, and a needle), and threatening another boy with assault if he did not perform oral sex on appellant. Cucolo expressed concern because, despite being in the program for almost 21 months, appellant continued to engage in major rule violations, including the commission of new offenses, fleeing apprehension, fighting (on one occasion the fight was gang related), possessing prohibited items, exposure, and assault. In offering TJJD's recommendation that appellant be transferred to TDCJ to complete his determinate sentence, Cucolo's report concluded that [appellant] committed the very serious offense of aggravated sexual assault in which he sexually assaulted a nine year old male neighbor. [Appellant] has not benefitted from his participation in the treatment programs offered during his assignment to TJJD. Instead, his overall behavior and progress in the treatment program[s] have been poor despite continued, varied attempts at intervention to facilitate his progress.

Appellant concedes in his brief that "the evidence does weigh heavily against [him]." Yet, he maintains that the juvenile court abused its discretion "in determining that it was in appellant's best interest to transfer him to [TDCJ]" because he is "an individual in need of treatment that cannot be addressed in the adult penitentiary system." He contends that "a primary factor listed [by appellate courts] to support the decision to transfer [a juvenile into the adult prison system] is the juvenile's volitional acts" (emphasis added) and asserts that he should not be transferred to TDCJ because "[his] behavior was that of an individual suffering from addiction (as well as someone with low mental capacity) who was unable to control his impulsive behavior." Nothing in the record supports this assertion. The evidence at the transfer hearing demonstrated that in spite of being provided multiple interventions and treatments to facilitate behavioral changes, appellant chose to persist in his disruptive and sexually inappropriate behavior. There is no evidence suggesting that he was unable to control his behavior, merely that he was unwilling to do so.

In sum, there was extensive testimony at the transfer hearing about appellant's conduct and performance in TJJD. The record reveals that appellant was committed to TJJD for a 30–year determinative sentence for repeatedly sexually assaulting an eight-year-old boy. Although there was evidence of appellant's traumatic childhood as well as evidence that appellant made some progress, though minimal, in the sex-offender treatment program at TJJD, there was other evidence that his sexually inappropriate behavior continued, culminating in his commission of a new felony sexual offense. In support of TJJD's recommendation for transfer, there was evidence that appellant had not internalized or implemented what he had learned in the various programs and treatments to effect positive changes in his behavior. Thus, he posed a risk to the community. In making the decision to transfer or release appellant, the juvenile court had discretion to consider the listed statutory factors as well as other relevant factors not listed and to assign different weights to the factors considered. Appellant's best interest was just one of those factors. Given the evidence presented at the transfer hearing, we cannot conclude that the juvenile court abused its discretion in determining that the relevant factors weighed in favor of transferring appellant to TDCJ to complete his determinate sentence.6

Failure to Allow Argument at Transfer Hearing

Finally, appellant complains, for the first time on appeal, that the juvenile court abused its discretion by not allowing oral argument at the release or transfer hearing.7 See Tex. Fam.Code § 54.11(e) ("At the hearing, the person to be transferred or released under supervision is entitled to an attorney, to examine all witnesses against him, to present evidence and oral argument, and to previous examination of all reports on and evaluations and examinations of or relating to him that may be used in the hearing.") (emphases added).

At the close of the release or transfer hearing, immediately after appellant had rested and closed, the juvenile court made its ruling:

Having heard this case for a day and a half, I'm not going to allow closing arguments. I'm ready to make a decision. [N. G.-D.], would you please stand?

Based on the evidence before the Court, [N. G.-D.], I'm going to transfer you to TDCJ to serve the remainder of your sentence concurrent with your current sentence. In addition to that, I am requiring public registration upon your release from custody. I wish you the very best of luck. You are excused.

Appellant did not object when the court announced its intention to rule without hearing argument nor did he object when the court pronounced its ruling.

As previously noted in this opinion, juvenile delinquency proceedings on appeal are to be governed by the civil rules of appellate procedure as far as practicable. In re D.I.B., 988 S.W.2d 753, 756 (Tex.1999); see Tex. Fam.Code § 56.01(b) (in juvenile proceeding, "[t]he requirements governing an appeal are as in civil cases generally"). Generally, in order to preserve a complaint for appellate review, a party must make a timely, specific request, objection, or motion in the trial court. Tex.R.App. P. 33.1(a)(1); In re C.O.S., 988 S.W.2d 760, 765 (Tex.1999) (Rule of Appellate Procedure 33.1 applies to both civil and criminal cases). However, because a juvenile proceeding is quasi-criminal, the general rules governing error preservation in civil cases cannot be applied across the board in juvenile proceedings. In re L.D.C., 400 S.W.3d 572, 574 (Tex.2013) (citing In re C.O.S., 988 S.W.2d at 765). The Texas Supreme Court has noted that it is "unwise and problematic to apply one preservation rule in adult, criminal proceedings and another, stricter rule in juvenile cases." In re C.O.S., 988 S.W.2d at 767; see In re State ex rel. Tharp, No. 03–15–00223–CV, 2015 WL 1905959, at *1 (Tex.App.—Austin Apr. 24, 2015, orig. proceeding). Therefore, precedent from analogous adult criminal proceedings may be instructive in juvenile cases. In re C.O.S., 988 S.W.2d at 767; In re I.L., 389 S.W.3d 445, 452 (Tex.App.—El Paso 2012, no pet.); see, e.g., In re D.I.B., 988 S.W.2d at 756 (looking to jurisprudence from Texas Court of Criminal Appeals to determine when harm analysis should be performed in juvenile delinquency proceedings).

The record here establishes that appellant lodged no objection to the juvenile court's expressed intention not to allow argument nor did he object to the court's ruling based on the lack of opportunity to present argument. Appellant, then, must address the issue of preservation of error and convince this Court that the error of which he complains is properly before this Court. Appellant maintains that he was not required to object at the hearing because such an objection would have been futile since the juvenile court had already expressed its intent not to allow argument. Alternatively, he appears to argue that the error is fundamental error to which no objection is necessary. We disagree and conclude the error alleged here is not immune from the requirement that it be preserved for our review.

The Texas Court of Criminal Appeals has consistently held that the failure to object in a timely and specific manner during trial forfeits a complaint, even when the error may concern a defendant's constitutional rights. Yazdchi v. State, 428 S.W.3d 831, 844 (Tex.Crim.App.2014), cert. denied, 135 S.Ct. 1158 (2015); see Saldano v. State, 70 S.W.3d 873, 887 (Tex.Crim.App.2002) ("All but the most fundamental rights may be forfeited if not insisted upon by the party to whom they belong." (quoting Marin v. State, 851 S.W.2d 275, 279 (Tex.Crim.App.1993), overruled on other grounds by Cain v. State, 947 S.W.2d 262 (Tex.Crim.App.1997))). An exception applies to two "relatively small categories of errors:" (1) violations of waivable-only rights; and (2) denials of absolute, systemic requirements. Aldrich v. State, 104 S.W.3d 890, 895 (Tex.Crim.App.2003); see Bessey v. State, 239 S.W.3d 809, 812 (Tex.Crim.App.2007) ("Errors may be raised for the first time on appeal if the complaint is that the trial court disregarded an absolute or systemic requirement or that the appellant was denied a waivable-only right that he did not waive."); Neal v. State, 150 S.W.3d 169, 175 (Tex.Crim.App.2004) ("Except for complaints involving systemic (or absolute) requirements, or rights that are waivable only ... all other complaints, whether constitutional, statutory, or otherwise, are forfeited by failure to comply with Rule 33.1(a).").

"Waivable-only" rights are "rights of litigants which must be implemented by the system unless expressly waived." Mendez v. State, 138 S.W.3d 334, 340 (Tex.Crim.App.2004) (citing Marin, 851 S.W.2d at 279–80); Saldano, 70 S.W.3d at 888; Johnson v. State, No. 03–12–00006–CR, 2012 WL 1582236, at *2 (Tex.App.—Austin

May 4, 2012, no pet.) (mem. op., not designated for publication). Examples of "waivable-only" rights include the right to effective assistance of counsel, the right to a jury trial, and a right conferred by a statute that affirmatively states the right is waivable only. Saldano, 70 S.W.3d at 888; Aldrich, 104 S.W.3d at 895. A waivable-only right cannot be forfeited by a party's inaction alone; a defendant must take affirmative action to waive such a right. See Bessey, 239 S.W.3d at 812 ("A law that puts a duty on the trial court to act sua sponte, creates a right that is waivable only. It cannot be a law that is forfeited by a party's inaction." (quoting Mendez, 138 S.W.3d at 342)). While no precise rule has been announced for determining if a right is waivable only instead of forfeitable, it is important to be reminded of the reasons for requiring preservation of errors. "[O]bjections promote the prevention and correction of errors. When valid objections are timely made and sustained, the parties may have a lawful trial." Saldano, 70 S.W.3d at 887. Here, if the juvenile court had been reminded of appellant's statutory entitlement to present argument, the court could have corrected its oversight and cured any error. We find that the statutory right at issue is not a right that is waivable only, but one that may be forfeited.

Systemic requirements—also known as absolute requirements or prohibitions—are laws that a trial court has a duty to follow even if the parties wish otherwise. Mendez, 138 S.W.3d at 340 (citing Marin, 851 S.W.2d at 280); Johnson, 2012 WL 1582236, at *2; see Cook v. State, 390 S.W.3d 363, 368 n.11 (Tex.Crim.App.2013). "Any party that is entitled to appeal may complain on appeal that such a requirement was violated, even if the party failed to complain about the failure or waived the application of the law." Mendez, 138 S.W.3d at 340 (citing Marin, 851 S.W.2d at 280). Examples of systemic requirements include jurisdiction of the person or subject matter and whether a penal statute is in compliance with the separation of powers section of the Texas Constitution. Aldrich, 104 S.W.3d at 895; see Saldano, 70 S.W.3d at 888.

In this case, the error alleged here, even though characterized by appellant as "fundamental" in nature, does not fall within the exceptions that would excuse the failure to lodge an objection in the juvenile court. The juvenile court neither disregarded an absolute requirement nor denied appellant a waivable-only right. There is simply no authority that would suggest that the type of error alleged here—the failure to grant a statutory right to present argument at a juvenile transfer hearing under section 54.11—is in the nature of a systemic defect or a right that is waivable only. Accordingly, appellant's complaint must have been raised in the juvenile court to preserve the issue for our review. The only issue is whether appellant complied with Rule 33.1(a). He did not.

As already noted, at the conclusion of the transfer hearing appellant did not object to the juvenile court's expressed intent to disallow argument or to its failure to allow argument when it pronounced its ruling. Nor did appellant raise the issue in a motion for new trial. Accordingly, appellant has forfeited his right to complain about it on appeal. See Tex.R.App. P. 33.1(a); Neal, 150 S.W.3d at 175; see also Ex parte J.L.R., No. 05–12–01289–CV, 2013 WL 4041554, at *1–3 (Tex.App.—Dallas Aug. 9, 2013, no pet.) (mem.op.) (juvenile forfeited his right to complain on appeal about trial court's dismissal of his application for writ of habeas corpus with prejudice because he did not object to court's ruling at hearing that writ was dismissed with prejudice nor raise issue in his motion for new trial).

Conclusion: Based on the record in this case, we cannot say that the juvenile court's decision to transfer appellant to TDCJ to complete his 30–year determinate sentence was made without reference to guiding rules or principles or that the court acted in an arbitrary or unreasonable manner. Thus, we conclude that the court did not abuse its discretion. Accordingly, we affirm the juvenile court's transfer order.

In the Matter of T.L.R., MEMORANDUM, No. 04-14-00596-CV, 2015 WL 5157031, Tex.Juv.Rep. Vol. 29 No. 3 ¶15-3-4 (Tex.App.-San Antonio, 9/2/15).

TO OBTAIN A JURY INSTRUCTION UNDER ARTICLE 38.23(A) (EVIDENCE NOT TO BE USED), THE DISPUTED FACT PROPOSED TO THE JURY MUST BE ONE THAT AFFECTS THE DETERMINATION OF THE LEGAL ISSUE.

Facts: Jonathan Tamayo, a security guard, was in his car patrolling The Vineyard Shopping Center when he saw two juvenile males walking from behind Gabriel's Liquor. Tamayo said he was wearing a blue polyester uniform, with a security badge and his name tag on his chest, and a patch on each arm. A placard on Tamayo's car read Texas Lawman Security.

Tamayo testified he identified himself as security, approached the boys in a casual, nonconfrontational manner, and asked what they were doing. He said both boys were cordial, and responded that they were passing through to "do some tricks." One of the boys (later identified as appellant) had a bicycle, and both carried backpacks. Tamayo said he told the boys they could not do tricks on the property. According to Tamayo, the boys were courteous and compliant; they said thank you; and then they walked away. Tamayo stated he continued his patrol around the property, and about an hour later he saw the two boys again. This time, Tamayo saw appellant doing tricks on his bike in a small drainage culvert behind Target. Tamayo said he asked the boys for identification. He testified the boys were not required to respond and they were free to leave. Tamayo said the other boy was calm, but appellant was "fidgety ... kind of moving side to side [and] pacing back and forth." After appellant handed Tamayo his school identification, Tamayo asked both boys to sit on the curb. Because appellant was acting nervous, Tamayo asked the boys whether "they had anything that would be considered illegal to any Texas peace officer on them." According to Tamayo, appellant asked for "clarification," and Tamayo told him "in layman's terms if he had anything illegal on him that a cop would think that—you know, a police officer would think was illegal." Appellant responded that he had a knife in his backpack, and he began to reach for the backpack. Tamayo said he told appellant not to reach for the backpack, and appellant then admitted he also had brass knuckles in the backpack. Tamayo said he told appellant he would retrieve the item(s) from the backpack and he asked appellant if he had a problem with that, to which appellant responded "no."

Tamayo said he retrieved the brass knuckles, which contained a concealed switchblade. Tamayo said he then called the San Antonio Police Department and asked that the patrol officer assigned to the area call him. Tamayo testified that when Officer James Van Kirk called him, he told the officer he had informed the boys they could not do tricks and had to leave the property, and about the knife/brass knuckles. Tamayo said the officer told him to "[g]o ahead and hook them up." Tamayo said he then handcuffed the boys, placed appellant's backpack on the hood of his car, and placed the knife/brass knuckles on the passenger seat of his car. A few minutes later, Officer Van Kirk arrived at the scene, and Tamayo said he gave the officer the knife/brass knuckles.

Officer Van Kirk testified he was dispatched to a location where a security officer had detained two juvenile males who had been asked to leave the property, but refused to do so. Van Kirk said that, without knowing more, this was a call for criminal trespass, which is an arrestable offense. Van Kirk thought he saw both backpacks in front of the boys, within their immediate physical control. Van Kirk testified he placed both boys under arrest for criminal trespass, and then he asked both boys what was inside their backpacks. Officer Van Kirk said the boys "freely admitted ... that inside of their backpacks were illegal items such as drug paraphernalia, marijuana and brass knuckles with a knife." Van Kirk stated he asked the boys what was inside their backpacks because Tamayo had told him the boys made the statement about the weapon to him. Van Kirk said he conducted a search incident to arrest, and found the knife/brass knuckles inside appellant's backpack. Van Kirk said he handcuffed both boys, but he could not remember whether they were already handcuffed when he arrived at the scene and he did not remember telling Tamayo to handcuff them.

The last witness to testify was D.T., the other boy who was with appellant. D.T. testified he had marijuana with him at the time, but he did not know if appellant had anything with him. D.T. said Tamayo asked them what they were doing, but he did not ask them to leave during the first encounter.FN1 D.T. said Tamayo asked them to leave during the second encounter, and began to question them. According to D.T., appellant was acting "normal" and he was not nervous. However, D.T. later said appellant was acting nervous and fidgeting around. D.T. could not remember what appellant said when Tamayo asked what was in his backpack, but he admitted Tamayo found "like paraphernalia and a weapon." D.T. said he did not feel free to leave prior to being handcuffed. D.T. said Officer Van Kirk also searched the backpacks, which were on the hood of Tamayo's car. D.T. did not see where Tamayo put the knife/brass knuckles after retrieving them from the backpack, but he remembered that Officer Van Kirk pulled them from the backpack.

FN1. On cross-examination, D.T. said Tamayo did ask them to leave during the first encounter.

Held: Affirmed

Memorandum Opinion: In his second and final issue on appeal, appellant asserts the trial court erred by denying his request for the following jury charge:

> You are instructed that under our law as applicable to this case any search of [appellant] or his property without a search warrant or the voluntary consent of [appellant] to such search without probable cause or other legal justification would not be lawful. Therefore, in this case, should you fail to find from the evidence beyond a reasonable doubt or if you have a reasonable doubt thereof, that consent to search [appellant] and his property was granted voluntarily and understandingly given or that there was other legal justification for such search then such search would be unlawful and you would wholly disregard the same and any evidence obtained as a result thereof.
>
> Do you find, from the evidence, beyond a reasonable doubt, that the search of [appellant] and the seizure of the knuckles was lawful?

"No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." Tex.Code Crim. Proc. Ann. art. 38.23(a) (West 2005).

"In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained." Id.

A defendant's right to the submission of jury instructions under article 38.23(a) is limited to disputed fact issues that are material to his claim of a constitutional or statutory violation which would render evidence inadmissible. Madden v. State, 242 S.W.3d 504, 509–10 (Tex.Crim.App.2007). The terms of the statute are mandatory, and when an issue of fact is raised, a defendant has a statutory right to have the jury charged accordingly. Id. at 510. A defendant must satisfy the following three requirements before he is entitled to the submission of a jury instruction under article 38.23(a): (1) the evidence heard by the jury must raise an issue of fact; (2) the evidence on that fact must be affirmatively contested; and (3) the contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the evidence. Id. If there is no disputed factual issue, the legality of the conduct is determined by the trial court as a question of law. Id. Also, if other undisputed facts are sufficient to support the lawfulness of the challenged conduct, then the disputed fact issue is not submitted to the jury because it is not material to the ultimate admissibility of the evidence. Id. The disputed fact must be an essential one in deciding the lawfulness of the challenged conduct. Id. at 511.

During the charge conference and on appeal, appellant asserts he was entitled to the requested instruction because he satisfied the three requirements. First, appellant contends the fact issue raised by the evidence is whether the knife/brass knuckles was still in appellant's backpack (as stated by Officer Van Kirk) or was it out of appellant's reach on the passenger seat of Tamayo's car (as stated by Tamayo). Second, appellant asserts the evidence on this fact was affirmatively contested based on defense counsel's two objections to the admission of the weapon on the grounds that testimony about the weapon's location was in conflict. Third, appellant contends the contested fact issue was material because appellant's confession was not voluntarily made; therefore, Tamayo had no right to seize the weapon. As to this final requirement, appellant asserts that if Tamayo's version of events is true, then the weapon was illegally placed in his car and it posed no threat to anyone's safety. On the other hand, appellant asserts that if Officer Van Kirk's version is true, then the weapon was in appellant's backpack and within appellant's reach; therefore, Van Kirk had the right to conduct a search incident to the criminal trespass arrest.

In this case, although Tamayo's testimony and Officer Van Kirk's testimony about the location of the backpack when it was searched conflicted, this factual issue was not material to the lawfulness of the search of the backpack and seizure of the knife/brass knuckles. Appellant does not contest the voluntariness of his statement that he had a knife in his backpack, and we have already concluded his statement regarding the brass knuckles was voluntary. Even if appellant's statement about the brass knuckles should have been excluded, appellant makes no argument on appeal that Tamayo was not justified in searching the backpack based on appellant's voluntary statement that there was a knife in the backpack.

As to Officer Van Kirk, he testified the backpack was in front of and within appellant's immediate control, and he testified he conducted a search of the backpack incident to the arrest of appellant. The justification for permitting [a warrantless search incident to arrest] is (1) the need for officers to seize weapons or other things which might be used to assault [a]n officer or effect an escape, and (2) the need to prevent the loss or destruction of evidence. State v. Granville, 423 S.W.3d 399, 410 (Tex.Crim.App.2014) (internal quotations omitted). A search is incident to arrest only if it is "substantially contemporaneous" with the arrest and is confined to the area within the immediate control of the arrestee. Id. Therefore, even if appellant's statement about the brass knuckles should have been excluded, under Officer Van Kirk's version of events, he was justified in conducting a warrantless search of the backpack incident to appellant's arrest based on appellant's voluntary statement that there was a knife in the backpack and the backpack was within appellant's immediate control.

"[T]o obtain a jury instruction under Article 38.23(a), the disputed fact must be one that affects the determination of the legal issue." Madden, 242 S.W.3d at 517. The legal question here is whether there was probable cause or justification to search appellant's backpack and, therefore, to seize the knife/brass knuckles. If the justification for the search of the backpack—conducted by either Tamayo or Officer Van Kirk—rested solely on the backpack's location, then a dispute about that fact would require a jury instruction. But, if the search was justified under either version of events, then the dispute over the location of the backpack when it was searched need not be submitted to the jury. Here, the latter is the case; therefore, no fact issue material to whether the search was justified was raised. Accordingly, the trial court did not err by refusing appellant's requested instruction. See id. at 517–18 ("Of course, a trial judge might err on the side of caution and submit a jury instruction even when the disputed fact does not appear to be outcome determinative, because appellate courts might disagree on the legal question of sufficient facts to support reasonable suspicion. But it would be absurd to say that a factual dispute about whether the defendant was wearing green socks or red socks, or whether he was going 61 m.p.h. or 65 m.p.h. in a 55 m.p.h. zone, requires a jury instruction. Neither of these disputed facts are material, much less crucial, to the determination of the legal question [of whether the officer had reasonable suspicion to detain defendant].").

Conclusion: We overrule appellant's issues on appeal and affirm the trial court's judgment.

In the Matter of J.G.M., MEMORANDUM, No. 13-13-00704-CV, 2015 WL 124177, Tex.Juv.Rep. Vol. 29 No. 1 ¶15-1-7 (Tex.App.-Corpus Christi, 1/8/15).

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

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

court struck the two sentences from the report, stated that it would disregard the statements, and admitted the remainder of the report.

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

Held: Affirmed

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

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

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

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

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

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

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

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT—

Rodriguez v. State, No. 04-15-00108-CR, --- S.W.3d ----, 2015 WL 5438997, Tex.Juv.Rep. Vol. 29 No. 3 ¶15-3-5 (Tex.App.-San Antonio, 9/16/15).

A DISCRETIONARY TRANSFER ORDER WILL BE CONSIDERED FACTUALLY AND LEGALLY SUFFICIENT WHEN THE EVIDENCE IN THE RECORD AND THE SPECIFIC FACTUAL FINDINGS OF THE JUVENILE COURT ARE SPECIFIC ENOUGH THAT THE APPELLATE COURT CANNOT CONCLUDE THAT THE JUVENILE COURT'S DETERMINATION TO MOVE THE PROCEEDINGS TO CRIMINAL COURT WERE ARBITRARY OR UNREASONABLE

Facts: Rodriguez was born June 1, 1996, and was living with the victim, Adriana Terry, at the time she was murdered. Although Terry and Rodriguez were not biologically related, Rodriguez's mother had dated Terry's son. Terry was a grandmother figure to Rodriguez, and even had temporary conservatorship at one point during his childhood.

As a result of his mother's drug habit, and the accompanying unstable family life, Rodriguez lived with Terry at several points in his life. During those times, Terry enrolled Rodriguez in four different schools. On the day she was murdered, Terry had withdrawn Rodriguez from Premier Academy and was enrolling him at Madison High School. Gema Ramirez, Terry's niece, explained that as a result of Terry moving back to Benavides, Texas, Rodriguez was moving back to his mother's house.

Around 2:00 p.m. on September 12, 2012, Ramirez, who also lived at Terry's home, found a damaged bathroom door, partially off the hinges, and Terry in the bathroom bleeding profusely from a skull fracture. Terry also had multiple abrasions, contusions, and stab wounds to her abdomen. Terry was still alive, but could not speak and was experiencing trouble breathing. EMS was contacted and Terry was transported to hospital where she died several hours later from cranial cerebral injuries, or skull fractures.

When police arrived to investigate, they found an aluminum baseball bat near the entry to the bathroom, along with a knife blade and knife handle. The bat and the knife blade were both bloody and located approximately three feet from where Terry was found. Rodriguez arrived while police were investigating the crime scene. Witnesses reported Rodriguez walked up the middle of the street and straight toward the house, disregarding the obvious chaos of the scene. Ramirez approached him and asked him where he had been. Rodriguez simply responded that he "went to eat." Officer Teresa Martin stopped Rodriguez from entering the house. She questioned him, but he was unresponsive. Rodriguez looked at the front door of Terry's home, and stated "I did it."

Rodriguez was detained following his statement. Officer Tim Bowen drove Rodriguez to youth services, to the magistrate's office to be magistrated, and then returned Rodriguez to youth services. While on a restroom break, Rodriguez asked Officer Bowen if he could talk to him. Rodriguez again confessed, "I did it," telling the officer that he wanted to make his father proud. After further questions, Officer Bowen asked Rodriguez "if he was talking about

what happened to his grandmother, and [Rodriguez] said, 'I did it because I love my daddy.' " Officer Bowen inquired whether his father told him to do it, and Rodriguez responded in the negative.

Rodriguez was charged with murder. On October 24, 2012, the State filed its original petition for waiver of jurisdiction and discretionary transfer to criminal court. In the time leading up to the transfer hearing, Bexar County Juvenile Probation Officer Traci Geppert attempted to obtain a psychological evaluation of Rodriguez. However, based on the advice of counsel, Rodriguez refused to participate in the evaluation.

After a hearing, the juvenile trial court found probable cause to believe that Rodriguez committed the offense. The court concluded that due to the serious nature of the offense and for protection of the public, the State's petition for transfer to criminal court should be granted.

After his motion to suppress was overruled by the trial court, Rodriguez entered a plea of guilty to murder in district court. He was sentenced to thirty years' confinement in the Institutional Division of the Texas Department of Criminal Justice and assessed a fine in the amount of $1,000.00.

On appeal, Rodriguez contends that the juvenile court had insufficient evidence to transfer his case to criminal court.

Rodriguez argues the evidence was factually insufficient. He also contends the court's transfer order used boilerplate language, without the required case-specific findings, to support the juvenile court's waiver of jurisdiction.

Held: Affirmed

Opinion: Texas Family Code section 54.02(a)(3) provides that prior to transferring a juvenile to criminal court for prosecution, and after a full investigation and a hearing, the juvenile court must determine (1) probable cause exists to believe the juvenile committed the alleged offense and (2) the seriousness of the offense, the background of the child, and the welfare of the community require criminal prosecution. See TEX. FAM.CODE ANN. § 54.02(a)(3) (West 2014); see also Gonzales v. State, No. 04–14–00352–CR, ––S.W.3d ––––, ––––, 2015 WL 2124773, at *3 (Tex.App.–San Antonio May 6, 2015, pet. ref'd).

At the juvenile court, the State bears the burden of proving, by a preponderance of the evidence, that waiver of the juvenile court's jurisdiction is appropriate. Moon v. State, 451 S.W.3d 28, 40–41 (Tex.Crim.App.2014); Faisst v. State, 105 S.W.3d 8, 11 (Tex.App.–Tyler 2003, no pet.). The juvenile court's order must show that the 54.02(f) factors were considered in making the determination. Moon, 451 S.W.3d at 41–42. "If the juvenile court waives jurisdiction, it is required to 'state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court.' " Guerrero v. State, No. 14–13–00101–CR, ––S.W.3d ––––, ––––, 2014 WL 7345987, at *2 (Tex.App.–Houston [14th Dist.] Dec. 23, 2014, no pet.)(mem.op.) (quoting TEX. FAM.CODE ANN. § 54.02(h)); accord Moon, 451 S.W.3d at 38.

Standard of Review

In Moon, 451 S.W.3d at 47, the Court of Criminal Appeals set forth two questions in determining whether the juvenile court abused its discretion:

(1) did the [juvenile] court have sufficient information upon which to exercise its discretion; and

(2) did the [juvenile] court err in its application of discretion? A traditional sufficiency of the evidence review helps answer the first question, and we look to whether the [juvenile] court acted without reference to any guiding rules or principles to answer the second.

Id. (alterations in original); accord Gonzales, –– S.W.3d at ––––, 2015 WL 2124773, at *4.

The court warned, “As long as the appellate court can determine that the juvenile court's judgment was based upon facts that are supported by the record, it should refrain from interfering with that judgment.” Moon, 451 S.W.3d at 46

Facts Presented Before the Juvenile Court

Our review begins with an analysis of the factors outlined in section 54.02(f) of the Texas Family Code. See TEX. FAM.CODE ANN. § 54.02(f).

1. Whether Alleged Offense Was Against a Person or Property

We first look at “whether the alleged offense was against person or property.” Id. § 54.02(f)(1). Here, the alleged offense was the murder of Adriana Terry, a first-degree felony.

At the crime scene, prior to any questions asked by the officer, Rodriguez told Officer Martin, “I did it.” Officer Martin explained that he understood Rodriguez to be saying he caused Terry's injuries. We note Rodriguez volunteered this information prior to being identified as a suspect and while staring at the front door of Terry's home in the midst of the crime scene investigation.

After Rodriguez was magistrated, Rodriguez requested to speak to Officer Bowen and Rodriguez again made the statement, “I did it.” Officer Bowen confirmed Rodriguez was confessing to the injuries suffered by Terry. See Gonzales, —— S.W.3d at ——, 2015 WL 2124773, at *4 (holding defendant's confession to murder met factor 54.02(f)(1)); see also Bleys v. State, 319 S.W.3d 857, 860 (Tex.App.–San Antonio 2010), abrogated by Moon v. State, 451 S.W.3d 28 (Tex.Crim.App.2014) (confessing to aggravated assault).

Rodriguez struck Terry with a baseball bat and inflicted stab wounds to her abdomen. The use of multiple weapons is an indication of the seriousness of the offense. See Garcia v. State, No. 09–10–00020–CR, 2011 WL 379117, at *7 (Tex.App.–Beaumont Feb. 2, 2011, pet. ref'd) (mem. op., not designated for publication) (finding a beating that led to death was extremely brutal due in part to the use of both a knife and chair spindles). This was an offense against the person and as such should be given greater weight in favor of transfer. See TEX. FAM. CODE ANN. § 54.02(f); Moon, 451 S.W.3d at 38.

2. Sophistication and Maturity of the Child

The second factor is “the sophistication and maturity of the child.” TEX. FAM. CODE ANN. § 54.02(f)(2); Faisst, 105 S.W.3d at 11.

Probation Officer Traci Geppert met with Rodriguez twice a week for three months leading up to his transfer hearing. In creating her Discretionary Transfer Hearing Report, Geppert interviewed Rodriguez's parents, school officials, Texas Department of Criminal Justice officials, Texas Juvenile Justice Department officials, and detention officials; she also reviewed the police reports and district attorney's file. Rodriguez's case was also re-viewed by Geppert's supervisor and by the staffing committee.

Rodriguez was sixteen and a half years old at the time of his detention, and he dis-played behavior in line with his age. Geppert testified Rodriguez was sophisticated and mature and, at times, even felt he was manipulating the conversation. Rodriguez was able to understand the seriousness of the charge against him and the difference between a juvenile and a criminal proceeding. See Gonzales, —— S.W.3d at ——, 2015 WL 2124773, at *4 (citing understanding of proceedings and charge as evidence of sophistication and maturity). Geppert relayed Rodriguez was able to communicate with the employees, teachers, and other detainees at the detention center. See Matter of S.E.C., 605 S.W.2d 955, 958 (Tex.Civ.App.–Houston [1st Dist.] 1980, no writ) (holding psychiatrist's description of appellant as “cooperative, candid, and very articulate” supported finding that appellant was sophisticated). Geppert explained,

I believe that he is sophisticated and mature enough. That he understands the information that has been provided to him. He understands the differences between the adult and the juvenile system regarding the allegations that have been made against him. I do believe [that] he's sophisticated and mature enough to stand trial as an adult.

Finally, Geppert opined Rodriguez's ability to understand and follow his attorney's direction not to participate in the psychological examination was further evidence that he was sophisticated and mature enough to capably assist his counsel.

3. Record and Previous History of the Child

We turn to the third factor—"the record and previous history of the child." TEX. FAM. CODE ANN. § 54.02(f)(3); Faisst, 105 S.W.3d at 11.

This was Rodriguez's first referral to the juvenile system in Bexar County. However, "a court does not abuse its discretion by finding the community's welfare requires transfer due to the seriousness of the crime alone, despite the child's background." Faisst, 105 S.W.3d at 11; accord McKaine v. State, 170 S.W.3d 285, 291 (Tex.App.–Corpus Christi 2005, no pet.)(op. on reh'g); see also In re M.A., 935 S.W.2d 891, 897 (Tex.App.–San Antonio 1996, no writ) (finding sufficient evidence to transfer the case from juvenile court to district court due to seriousness of the crime even absent a previous criminal record).

Although Rodriguez had no juvenile record, his previous history substantiates years fraught with problems. Rodriguez began abusing alcohol as early as seven years of age and started using marijuana at the age of nine. Geppert reported, due to his moving around between family members, Rodriguez attended at least twelve schools throughout his childhood. At his most recent school, Rodriguez was in trouble for not following directions, sleeping in class, not being redirected, and being unresponsive toward the teachers. When the principal at this school intervened on one occasion, Rodriguez very nonchalantly responded, "I don't know what you're talking about." Rodriguez's troubling history, and lack of response to authority figures, support a finding that the juvenile system is not prepared to adequately protect the public and rehabilitate him.

4. Adequate Protection of the Public and Likelihood of Rehabilitation

The fourth factor we consider is "the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court." TEX. FAM.CODE ANN. § 54.02(f)(4); Faisst, 105 S.W.3d at 11.

Geppert testified that although the resources of the juvenile system would be helpful to Rodriguez, he would soon "age out" of the system. Rodriguez was sixteen and a half at the time of the transfer hearing and the juvenile probation system would only retain jurisdiction until he turned nineteen. The only option besides adult sentencing would be determinate sentencing. Given the serious nature of the offense, and the short time available to the juvenile system, Geppert testified,

I don't feel that the juvenile probation department has the time nor the resources to work with [Rodriguez] based on his nature of the offense.

She explained that there was a huge need for rehabilitation and two and a half years simply was not sufficient. Geppert continued she also did not believe the public would be adequately protected if Rodriguez were left in the juvenile system. See Gonzales, —— S.W.3d at ——, 2015 WL 2124773, at *5 (finding that the severity of the crime and the short time available to the juvenile system supported the trial court's transfer order); Faisst, 105 S.W.3d at 15 (finding that maintaining the jurisdiction of the juvenile system was not appropriate due to the severity of the offense which required a long period of supervision and probation).

5. Specific Factual Findings

Not only must the record substantiate the juvenile court's findings, but the juvenile court must make "case-specific findings of fact" with respect to the 54.02(f) factors. See Moon, 451 S.W.3d at 51. Here, after careful consideration of all the evidence presented, the juvenile court made the following findings:

1. Rodriguez was alleged to have committed murder under Section 19.02 of the Texas Penal Code.

2. Rodriguez was sixteen years old at the time of the transfer hearing.

3. Rodriguez was fourteen years or older but under seventeen years old at the time he is alleged to have committed the offense.

4. Rodriguez's mother resides in Bexar County.

5. No adjudication hearing has been conducted to this point.

6. The notice requirements of Sections 53.04, 53.05, 53.06, and 53.07 were satisfied.

7. Prior to the hearing, the Court ordered a psychological examination, complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense; although Rodriguez refused to cooperate in the psychological examination, all other studies were completed.

8. The Court considered whether the offense was against person or property and found the offense was against a person.

9. The Court considered Respondent's sophistication and maturity and found him sophisticated and mature enough to be transferred into the criminal justice system; he understands the allegations, court proceedings, and possible consequences.

10. After considering the record and previous history of the child, the prospects of adequate protection of the public, and the likelihood of rehabilitation of the child by use of the procedures, services, and facilities currently available to the Juvenile Court, the Court found the Juvenile Court inadequate for the rehabilitation of the child while also protecting the public.

11. Following a full investigation and hearing, the Court found probable cause to believe the child committed the offense and that the seriousness of the offense, background of the child, and welfare of the community requires that the criminal proceedings move to Criminal District Court.

Conclusion: Based on a review of the entire record, we conclude the transfer order is factually and legally sufficient to uphold the juvenile court's finding that the case should be transferred to criminal court. After a hearing, with extensive cross-examination by defense counsel, the juvenile court's order clearly substantiates that the 54.02(f) factors were considered in the juvenile court's determination. See Moon, 451 S.W.3d at 40–41; Gonzales, ––S.W.3d at ––––, 2015 WL 2124773, at *5; see also TEX. FAM.CODE ANN. § 54.02(h); Moon, 451 S.W.3d at 38.

Given the evidence in the record and the specific factual findings of the juvenile court, we cannot conclude that the juvenile court's determination to move the proceedings to criminal court was arbitrary or unreasonable. See Faisst, 105 S.W.3d at 12. To the contrary, the juvenile court provided a "sure-footed and definite basis" for its decision. Moon, 451 S.W.3d at 49.

Accordingly, we affirm the juvenile court's order and overrule Rodriguez's sole issue on appeal.

Gonzales v. State, No. 04-14-00352-CR, --- S.W.3d ----, 2015 WL 2124773, Tex.Juv.Rep. Vol. 29 No. 1 ¶15-2-2A (Tex.App.-San Antonio, May 6, 2015).

A DISCRETIONARY TRANSFER TO ADULT COURT WAS PROPER, WHERE THE JUVENILE TRIAL COURT PROVIDED A SURE-FOOTED AND DEFINITE BASIS FROM WHICH AN APPELLATE COURT COULD DETERMINE THAT ITS DECISION WAS IN FACT APPROPRIATELY GUIDED BY THE STATUTORY CRITERIA, PRINCIPLED, AND REASONABLE.

Facts: On August 13, 2012, David Estrada and Appellant Gonzales went to an apartment complex to purchase marijuana from James Whitley. Gonzales was fifteen-years-old at the time. Gonzales exchanged several phone calls with Whitley regarding the purchase of the marijuana. Before going to the apartment complex, Gonzales and Estrada decided to rob Whitley of the marijuana. Gonzales brought his Smith & Wesson .40 caliber semi-automatic firearm for purposes of the robbery.

Estrada and Gonzales were driven to the apartment complex by a third individual who did not know of their plans and did not know Gonzales brought a firearm to the meeting. When they arrived at the apartment complex, Estrada and Gonzales met Whitley and an-other individual, Pablo Pecina, by the washroom. Gonzales asked for the drugs and Whitley asked for the money. Estrada stalled and Gonzales lifted his shirt and pulled out his fire-arm. To Gonzales's surprise, Whitley also pulled a weapon and both men fired.

Whitley was struck in the thigh and died from his injuries; the bullet that struck Gonzales grazed his head, requiring a couple of staples. Gonzales and Estrada ran back to the vehicle and Gonzales asked the driver to take him to the hospital. Instead, the driver pulled into a gas station a short distance away. The driver called 911, told the dispatch, "Hey, my friend's been shot. Here he is," and he and Estrada left. Before leaving, Gonzales gave Estrada the firearm and told him to get rid of it.

While the San Antonio police officers were investigating Whitley's shooting, they received the call of Gonzales's shooting. It was not until later that the officers realized the two gunshot victims were connected. When officers arrived at the gas station, Gonzales reported "We were walking down the street, somebody drives by and shoots me." While they were investigating, Gonzales's mother arrived. His mother told him to tell the officers the truth. Gonzales finally told them "I was at the apartment complex, the guy shoots me and I shot him back." By all accounts, at that point in the evening, the officers were investigating the incident as a case of self-defense.

Gonzales was originally handcuffed and taken to the juvenile facility. However, shortly after arriving, the officers transported Gonzales to the Santa Rosa Children's Hospital to be treated for his injuries. While Gonzales was at the emergency room, San Antonio Police Detective Raymond Roberts interviewed Estrada. Estrada told the officer that Whitley shot first; however, when confronted by the officer, Estrada confessed their plan to rob Whitley and identified Gonzales as possessing and firing the weapon. Detective Roberts requested Detective Kim Bower proceed to Santa Rosa Children's Hospital to check on Gonzales's condition and to tell his mother that Detective Roberts would like to speak to him. Detective Bowers testified she gave Gonzales's mother a card with her phone number and asked to her contact them when Gonzales was released.

Gonzales arrived at the police station between 2:30 a.m. and 3:00 a.m. Detective Roberts told both Gonzales and his mother "If y'all don't want to do it tonight, we don't have to do it tonight." The record shows Detective Roberts insisted Gonzales was not under arrest, and that Gonzales and his mother came in on their own, and they were both free to leave. In fact, Detective Roberts told both Gonzales and his mother that Gonzales would be leaving at the end of the interview. Detective Roberts did not Mirandize Gonzales and did not take him before a magistrate.

Detective Roberts asked Gonzales if he knew what was going on, if he was in pain, and how he felt. Gonzales responded, "I feel fine." Detective Roberts testified that Gonzales was able to answer all of his questions and did not appear to be in any distress. Gonzales originally told Detective Roberts that Whitley fired first and that he returned fire; Detective Roberts confronted him with Estrada's version of events and Gonzales ultimately told Detective Roberts their plan was to steal the marijuana from Whitley. Gonzales also told Roberts that he always takes a gun with him whenever he goes to buy weed.

When asked to relay what transpired, Detective Roberts described Gonzales's demeanor to the court. He "kind of chuckled, smiled and he said, 'That was my first mistake. My second was letting him stand up.' " When Detective Roberts asked Gonzales to explain what he meant, Gonzales explained that he should have pointed his weapon directly at Whitley instead of pointing it down.

Before leaving the police station, Detective Roberts gave Gonzales an opportunity to tell his mother the version of events he had relayed to the officer. Detective Roberts told Gonzales and his mother that the information would be presented to a magistrate and, if the magistrate determined the facts satisfied the elements set forth in the murder statute, then a warrant would issue. He also explained that if Gonzales ran, it would make matters worse. Later that morning, the magistrate issued an arrest warrant and Gonzales was arrested for the murder of James Whitley. On September 26, 2012, the State filed its original petition for waiver of jurisdiction and discretionary transfer to criminal court.

After a hearing, the juvenile trial court found probable cause to believe that Gonzales committed the offense. The court concluded that due to the nature of the offense, Gonzales's use of a deadly weapon, the psychiatric evaluation, the probation officer's certification and transfer report, and the recommendations from the probation officers, the State's petition should be granted.

Gonzales contends the juvenile court erred when it found that the protection of the public and rehabilitation of Gonzales could not be served with the juvenile probation's resources and programs. At the hearing, defense counsel maintained that a Texas Juvenile Justice Department commitment would have adequately protected the public and rehabilitated Gonzales. Gonzales argued he was not a violent person by nature and exhibited excellent behavior throughout both the proceedings and all meetings with the probation officers. Defense counsel argued that Gonzales was the picture of someone who could be rehabilitated. He acknowledged the wrongfulness of Gonzales's delinquent behaviors and expressed his beliefs that Gonzales had improved because "he grew up."

On appeal, Gonzales further argues the trial court erred by failing to focus on the individual child. Instead, Gonzales contends the juvenile court focused solely on the severity of the allegations. Gonzales was cooperative with law enforcement and there were no reports of behavior issues during his incarceration. Gonzales suffers from cerebral palsy and epilepsy and requires services available through the juvenile system. Finally, counsel argues that determinate sentencing is a good option and would provide adequate protection to the community at large.

The State contends the factors weigh heavily in favor of transferring jurisdiction. Although the individual factors are subject to review, the ultimate determination is based on a review of the entire record. The State acknowledged Gonzales's cerebral palsy and epilepsy; yet, the State pointed out neither diagnosis prevented him from committing either this offense or previous offenses which invoked the juvenile justice system. Moreover, this was not just a murder—but felony murder. Gonzales went to the scene intending to steal drugs from a drug dealer. He took his own weapon to the drug deal and murdered the dealer. This was the third time in four years that Gonzales was involved in the legal system and, although he was not classified as a gang member, he did claim membership in YTC (Young Texas Click), a "tagging crew."

Held: Affirmed

Opinion: The transfer of a juvenile offender from juvenile court to criminal court for prosecution as an adult should be regarded as the exception, not the rule; the operative principle is that, whenever feasible, children and adolescents below a certain age should be "protected and rehabilitated rather than subjected to the harshness of the criminal system[.]" Moon v. State,451 S.W.3d 28, 36 (Tex.Crim.App.2014) (alteration in original) (quoting Hidalgo v. State, 983 S.W.2d 746, 754 (Tex.Crim.App.1999)).

The State bears the burden to convince the juvenile court, by a preponderance of the evidence, that "the welfare of the community requires transfer of jurisdiction for criminal proceedings, either because of the seriousness of the offense or the background of the child (or both)." Id. at 40–41 (citing Faisst, 105 S.W.3d at 11). The juvenile court's order must provide that the section 54.02(f) factors were taken into account in making the de-termination. Id. at 41–42. An appellate court may only set aside the juvenile court's de-termination upon a finding the trial court abused its discretion. Id. at 42.

C. Standard of Review

Until recently, the appellate courts applied different guidelines for the abuse of discretion standard. Compare In re M.D.B., 757 S.W.2d 415, 417 (Tex.App.–Houston [14th Dist.] 1988, no writ) ("In reviewing the [juvenile] court's action for an abuse of discretion, this court must determine if the [juvenile] court acted without reference to any guiding rules and principles.") with Bleys v. State, 319 S.W.3d 857, 862–63 (Tex.App.–San Antonio 2010, no pet.), abrogated by Moon, 451 S.W.3d at 47. (reviewing the factual sufficiency of the evidence to support the juvenile court's finding under Section 54.02(f)(4)). In Moon, 451 S.W.3d at 47, the Court of Criminal Appeals explained that in evaluating a juvenile court's decision to waive its jurisdiction, an appellate court should first review the juvenile court's specific findings of fact regarding the Section 54.02(f) factors under "traditional sufficiency of the evidence review." But it should then review the juvenile court's ultimate waiver decision under an abuse of discretion standard.

The court further explained, "In other words, was [the juvenile court's] transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria?" Id. Our review begins with an analysis of the factors outlined in Texas Family Code section 54.02(f).

D. Analysis under Texas Family Code section 54.02(f)
Gonzales's case was called before the juvenile court on October 19, 2012.

1. Whether Alleged Offense Was Against a Person or Property

The first factor listed in section 54.02(f) is "whether the alleged offense was against person or property." TEX. FAM.CODE. ANN. § 54.02(f)(1). The alleged offense was the capital murder of James Whitley. Detective Roberts testified as to his conversation with Gonzales and his admitted involvement in the offense. Gonzales admitted that he and Estrada planned to rob Whitley during a marijuana purchase. Gonzales brought his firearm to the planned robbery. Gonzales planned the robbery and fired the shot that killed Whit-ley.

2. Sophistication and Maturity of the Child

The second factor is "the sophistication and maturity of the child." Id. § 54.02(f)(2); Faisst, 105 S.W.3d at 11. Bexar County Juvenile Probation Officer Traci Geppert testified that she met with Gonzales and his family on multiple occasions and she considered him to be sophisticated and mature. She further relayed that he understood both the proceedings and the charges against him.

Also available to the trial court was the psychiatric evaluation requested by the juvenile probation office. Dr. Heather Holder's report provided that "[Gonzales] knows right from wrong in a general sense, and he is specifically aware of the wrongfulness of the charge of which he is currently accused." Additionally, she concluded "it is believed that [Gonzales] is mature and sophisticated in that he is responsible for his conduct and able to assist his attorney in his defense." See TEX. FAM.CODE ANN.. § 54.02(f)(2).

Gonzales's mother also testified before the juvenile court. She described her son as very much in control during the incident. When he originally lied to the officer, she directed him to tell the officers the truth and he did so.

3. Record and Previous History of the Child

The third factor to consider is "the record and previous history of the child." Id. § 54.02(f)(3); Faisst, 105 S.W.3d at 11. Gonzales had two prior juvenile probations. In 2008, he was placed on deferred probation for possession of a controlled substance, Xanax. In 2009, Gonzales was placed on formal probation for the charge of terroristic threats stemming from Gonzales threatening another student with a pair of scissors. See TEX. FAM.CODE ANN.. § 54.02(f)(3); Faisst, 105 S.W.3d at 11. He completed his probation in April of 2010. Both charges resulted in Gonzales being expelled from the school he was attending.

At the time of his arrest, Gonzales was a student at Robert E. Lee High School and several letters were presented to the trial court describing Gonzales as a nice student without any outward displays of violent behavior.

4. Adequate Protection of the Public and Likelihood of Rehabilitation

The fourth factor to consider is "the prospect of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court."

TEX. FAM.CODE ANN. § 54.02(f)(4); Faisst, 105 S.W.3d at 11. At the time of the offense, Gonzales was living with his mother and two sisters. When his mother was notified of the shooting, her initial reaction was that it could not be Gonzales because he was at home. She was unaware that he had left the residence and did not know that he owned a firearm. Geppert further addressed Gonzales's cerebral palsy and epilepsy diagnoses. He had a special education distinction based on his orthopedic impairment and a reading disorder. He was mainstreamed at the high school and had not exhibited behavioral issues while in detention. During cross-examination, Gonzales's mother conceded that Gonzales had recently run away from home because he did not like "living by the rules." However, after living on the streets for a period of time, he had returned to their home.

Geppert testified the juvenile court system's probation jurisdiction would end when Gonzales turned eighteen and the jurisdiction for Texas Youth Commission would end when Gonzales turned nineteen. Geppert explained the only other option, besides adult sentencing, was determinate sentencing. She did not believe determinate sentencing was proper because of the allegations: the charge was murder, Gonzales was carrying his weapon, and Gonzales was purchasing marijuana. Additionally, Geppert testified that she did not believe the juvenile probation system had sufficient time to work with Gonzales given the severity of the allegations. See TEX. FAM.CODE ANN.. § 54.02(f)(3); Faisst, 105 S.W.3d at 11. Her supervisor agreed, and so did a staffing committee, consisting of two supervisors and a Child Protective Services representative.

5. Specific Factual Findings

Not only must the record substantiate the court's findings, but the juvenile court must make "case-specific findings of fact" with respect to the 54.02(f) factors. See Moon, 451 S.W.3d at 51. Here, the juvenile court judge made the following findings:

1) Gonzales was alleged to have committed murder under Texas Penal Code section 19.02;

2) Gonzales was sixteen at the time of the hearing;

3) Gonzales was fifteen at the time of the offense;

4) Gonzales's mother resides in Bexar County;

5) no adjudication hearing had yet been conducted;

6) the parties were properly notified of the hearing;

7) prior to the hearing, the trial court obtained a psychological assessment including a psychological examination, a complete diagnostic study, a social evaluation, full investigation of Gonzales, Gonzales's circumstances, and the circumstances of the alleged offense;

8) the offense was against a person;

9) Gonzales is sophisticated and mature enough to be transferred into the criminal justice system and he understands the allegations, the court proceedings, and their possible consequences;

10) the procedures, services, and facilities available to the Juvenile Court are inadequate for rehabilitation of Gonzales while also protecting the public; and

11) after a full investigation and hearing, Gonzales's circumstances, and the circumstances of the offense, there is probable cause to believe that Gonzales committed the offense and, because of the seriousness of the offense and the background of Gonzales, the welfare of the community required that criminal proceedings proceed in Criminal District Court.

Conclusion: Here, the juvenile court's findings are substantially more case-specific than the findings analyzed in Moon. See Moon, 451 S.W.3d at 51 (concluding the trial court's findings were superfluous because it only considered fact that offense was against another person). The juvenile court made specific findings as to Gonzales. Cf. id. Based on a review of the record, including the trial court's findings of fact, we conclude the trial court provided "a sure-footed and definite basis from which an appellate court can determine that its decision was in fact appropriately guided by the statutory criteria, principled, and reasonable." Id. at 49; cf. Guerrero v. State, No. 14–13–00101–CR, 2014 WL 7345987, at *3 (Tex.App.–Houston [14th Dist.] Dec. 23, 2014, no pet.)(mem. op., not designated for publication) (concluding the trial court's order was deficient under Moon). Accordingly, we overrule Gonzales's first issue.

Randall v. State, MEMORANDUM, No. 09-13-00322, 2015 WL 1360115, Tex.Juv.Rep. Vol. 29 No. 1 ¶15-1-14 (Tex.App.-Beaumont, 3/25/15).

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

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

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

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

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

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

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

Held: Affirmed

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

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

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

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

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

We also consider the arguments of counsel in assessing whether the charge at issue caused Randall to suffer egregious harm. During closing, the prosecutor pointed to the evidence that established the sexual assaults occurred when Randall was fourteen or older. Additionally, Randall's attorney explained the State was required to prove that

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

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

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