

Juvenile Law Section

STATE BAR OF TEXAS



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Dear Juvenile Law Section Members:

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

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



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EDITOR'S FOREWORD By Associate Judge Pat Garza

This past June, I celebrated my 28th year of hearing juvenile cases. And while I wasn't sworn in as a full time Associate Judge until 1998 (19 years ago), there is no doubt I've seen a few things since I first started. I've been through fourteen election cycles, worked for five different district judges (three democrats and two republicans) and am approaching my fifth decade in the juvenile system. In that time I have presided over 59,000 juvenile cases, including almost 44,000 detention hearings. I have had the pleasure of traveling around our great State doing something I love almost as much as being a juvenile judge, speaking and teaching. I have delivered over 100 legal presentations and have been published 27 times.

While the numbers sound amazing and for me a bit surreal, it's really more of a reflection of longevity than anything else. Or for those of you who are, or have been, involved in politics, you know it as survival.

At any rate, reflection is a good thing. Or at least today we are making it a good thing. So what do you remember about 1989? Here are a few of the momentous events of that year:

- George H. Bush succeeded Ronald Reagan as the 41st President of the United States of America.
- Nintendo began selling the Game Boy.
- The Loma Prieta earthquake, measuring 7.1 on the Richter scale, struck the San Francisco-Oakland region during the warm up for the third game of the 1989 World Series (Oakland Athletics vs. San Francisco Giants), killing 63.
- East Germany opened checkpoints in the Berlin Wall, allowing its citizens to freely travel to West Germany for the first time in decades. That's when celebrating Germans began tearing down the wall.

Are you a movie buff? These movies were released in 1989:

- Driving Miss Daisy
- Dead Poets Society
- The Little Mermaid
- Field of Dreams
- Batman (the one with Michael Keaton and Jack Nicholson).

In 1989, some of the top songs according to Billboard Magazine included:

- "Look Away" by Chicago
- "Every Rose Has Its Thorn" by Poison
- "Straight Up" by Paula Abdul
- "Wind Beneath My Wings" by Bette Midler
- "Giving You the Best That I Got" by Anita Baker.

In wrapping up, I wanted to impart a little wisdom for our sometimes cynical juvenile community. All I can say is this. In the coming years your lives will be filled with many big happenings, historical events, special sporting events (congratulations to the World Champion Houston Astros), and even some national or world tragedies. But when it comes down to it, here's the thing. You must enjoy the little things in life because one day you'll look back and realize that they were the big things. Have a wonderful and blessed Thanksgiving and a happy and safe holiday season.

31st Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's 31st Annual Juvenile Law Conference will be held February 25 thru February 28, 2018, at the Horseshoe Bay Resort in Horseshoe Bay, Texas. Horseshoe Bay Resort is an expansive hotel with golf, tennis, and restaurants plus a marina and a landing strip. The theme is "Current Trends in Juvenile Justice," and Chair-Elect Kaci Singer and her planning committee have been working hard to create an agenda with a plethora of topics for all juvenile justice practitioners. This conference will also feature a nuts and bolts mini-conference on Sunday for anyone interested in learning more about juvenile law basics. There will be no extra cost associated with the mini-conference, but only those registered to attend the conference may attend the mini-conference and space will be limited on a first come, first-served basis. The conference flyer has been sent electronically and is available online at www.juvenilelaw.org.

Robert O. Dawson Visionary Leadership Award. The Juvenile Law Section is seeking nominations for the 2018 Robert O. Dawson Visionary Leadership Award. This award goes to an individual who has unselfishly devoted time to the cause of juvenile justice in Texas. Persons deserving nomination are those who advocate for justice for Texas' juveniles; those who promote legislation advancing the juvenile justice system in the state; and those who advance the development and/or expansion of juvenile justice programs, funding, and/or access to other innovative options or approaches designed to improve the state's juvenile justice system and benefit the youth it serves. Nominees may include employees of public, private, or non-profit organizations, elected or appointed officials, or private citizens. The 2018 Robert O. Dawson Visionary Leadership Award will be presented at the 31st Annual Robert O. Dawson Juvenile Law Seminar, which will be held at the Horseshoe Bay Resort in Horseshoe Bay, Texas, in February. To nominate an individual for consideration, please submit the Robert O. Dawson Visionary Leadership Award Nomination Form found online at www.juvenilelaw.org to wcox@epcounty.com, on or before November 28, 2017.

Officer and Council Nominees. The Annual Juvenile Law Section meeting will be held in Horseshoe Bay, Texas, on Monday, February 26, 2018, in conjunction with the Juvenile Law Conference. The Juvenile Law Section's nominating committee will soon be submitting a slate of nominations for Council members for a term to expire 2021 and for Officers for the 2018-2019 term. While nominations from the floor will be taken during the meeting, we encourage you to submit nominations in advance. If you would like to nominate an individual for consideration, please contact the Chair of the Nominations Committee, Riley Shaw, at 817.838.4613 or rshaw@tarrantcounty.com by November 28, 2017.

Everyone is a genius. If you judged a fish on its ability to climb a tree, it would live its whole life believing it is stupid.

Albert Einstein

CHAIR'S MESSAGE By Kameron Johnson

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As 2017 comes to an end, I can assure you that work and preparations are already underway for the next legislative session. Throughout the State juvenile practitioners have been asked by our legislators to do more with less. Amazingly, but not surprisingly, when the call for action was placed, many of you responded by committing time, resources and expert assistance toward our goal of improving the juvenile justice system. Because of the hard work of many of you a complete revision of our juvenile justice records system became effective September 1, 2017. These revisions will provide more protections and more privacy for juveniles going through our system. As the 2018-2019 biennium approaches we must continue to forge forward by developing policies and practices that improve juvenile justice in Texas.

As a group, our community celebrated the 50th anniversary of *In re Gault*. It is important to always remember the lessons of *Gault*, and never stop working towards improving our juvenile justice system.

Sometimes I can't help but think of our juvenile heroes, like David Hazelwood, who we lost this year. David always showed a true commitment and dedication to juvenile advocacy and was a true warrior for children throughout the State of Texas, and will truly be missed. To Anne, and his family, I send my condolences and prayers on behalf of myself and the Juvenile Law Section of the State Bar of Texas.

Preparations and work have already begun for our next Robert Dawson conference and I look forward to having each one of you join us at the Horseshoe Bay Resort in February.



SAVE THE DATE
31st Annual
Juvenile Law Conference
Robert O. Dawson Juvenile Law Institute
February 26-28, 2018
Horseshoe Bay Resort | Horseshoe Bay, Texas

SPONSORS AND EXHIBITORS
This conference brings together over 400 juvenile justice professionals statewide. This year, the Juvenile Law Section is offering a variety of opportunities for your organization to take part in the 31st Annual Juvenile Law Conference through exhibiting at or sponsoring of this great event. If you are interested and/or needing additional information, please contact Susan Clevenger at gtclevenger@yahoo.com or (218) 580-4501.
For more information, contact Monique Mendoza, Professional Development Events Specialist, at (512) 490-7913 or monique.mendoza@texas.tjtd.gov.

Conference details and registration information will be distributed and posted on juvenilelaw.org in late September.

REVIEW OF RECENT CASES

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APPEALS

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IN A CASE WHERE THE DEFENDANT HAS BEEN CERTIFIED AND TRANSFERRED TO ADULT COURT, ORIGINAL JURISDICTION TO GRANT WRITS OF HABEAS CORPUS IS VESTED IN THE TEXAS COURT OF CRIMINAL APPEALS, THE DISTRICT COURTS, THE COUNTY COURTS, OR A JUDGE IN THOSE COURTS, BUT NOT IN THE TEXAS COURTS OF APPEAL.

¶ 17-5-3. **In re J.B.H.**, MEMORANDUM, No. 14-17-00657, 2017 WL 3569626 [Tex.App.—Houston (14th Dist.), 8/17/2017].

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

On August 10, 2017, relator J.B.H filed a petition for writ of habeas corpus in this court. See Tex. Gov't Code Ann. § 22.221 (West 2004); see also Tex. R. App. P. 52. In the petition, relator challenges the juvenile court's order transferring the case to a district court and requests that this court vacate the transfer order, dismiss his conviction, and remand the case to the juvenile court.

Held: Petition for Writ of Habeas Corpus Dismissed

Memorandum Opinion: The courts of appeals have no original habeas-corpus jurisdiction in criminal matters. In re *Ayers*, 515 S.W.3d 356, 356 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding). Original jurisdiction to grant a writ of habeas corpus in a criminal case is vested in the Texas Court of Criminal Appeals, the district courts, the county courts, or a judge in those courts. Tex. Code Crim. Proc. Ann. art. 11.05 (West 2015); *Ayers*, S.W.3d at 356.

Conclusion: This court is without jurisdiction to consider relator's petition requesting habeas corpus relief. Accordingly, we dismiss relator's petition for writ of habeas corpus.

HEARSAY OBJECTION AT TRIAL DOES NOT PRESERVE SIXTH AMENDMENT OBJECTIONS ON APPEAL.

¶ 17-5-5. **Ortiz v. State**, No. 08-15-00344-CR, 2017 WL 3667829 (Tex.App.—El Paso, 8/25/2017).

Facts: A jury convicted Appellant David Matthew Ortiz of aggravated assault of a family member or person in a dating relationship while using a deadly weapon (alleged here as his teeth, hand, leg, and knee). In the punishment phase of the trial, the jury assessed a forty-year sentence and the maximum possible fine (\$10,000.00). In this appeal, Appellant raises three challenges to the evidence admitted in the punishment phase of the trial. The challenges focus on whether the admission of a juvenile probation file violated Appellant's Sixth Amendment right to confront witnesses and whether the file was admissible under an exception to the hearsay rule.

In the punishment phase, the State called Appellant's juvenile probation officer. Through her, the State introduced as a business record Exhibits 42 and 43 which collectively comprise Appellant's juvenile probation file. Those exhibits, and the probation officer's testimony, evidenced two prior bad acts and Appellant's failure to complete his juvenile probation.

A police report in the probation file detailed how Appellant, then aged ten, hit another ten-year old (F.E.) while in class, and that later, on the playground, Appellant pushed F.E. down, struck him with his fist, and then kneed him in the head. The blows caused F.E.'s face to swell and loosened a tooth. Based on this incident, the State filed a petition alleging delinquent conduct. Appellant participated in a six-month deferred adjudication program for that charge which he successfully completed.

The probation file also contains a second petition asserting delinquent conduct in November 2010 when Appellant was found in possession of less than two ounces of marijuana. He was adjudicated delinquent of that charge and placed on an ankle monitor until his eighteenth birthday. A "Predisposition Report" recites Appellant's history of first using marijuana in the 8th grade, and that by the 10th grade, he was using the drug on a daily basis. The Predisposition report and other entries in the juvenile probation file reflect considerable discord between Appellant and his mother.

Appellant would run away to avoid parental rules. On one home visit, he became upset and kicked in a dresser, calling his mother "menopause and f---ing bitch." A psychiatric evaluation reported "severe aggressive behavior towards mother, episodes of running away and also drug and alcohol abuse." He was verbally and physically aggressive with his siblings.

Appellant anticipated that the juvenile probation would end upon his graduation from high school, but the probation was extended when he failed to complete all

of his counseling sessions as required. While on probation, he also failed four drug tests, testing positive for marijuana. Shortly before his eighteenth birthday, a juvenile judge had him detained overnight, and then admitted to the Challenge Attitude Adjustment Program (a ten-day boot camp). He aged out while in that camp, and was released without successfully completing his juvenile probation.

Held: Affirmed

Opinion: Appellant's first issue challenges admission of the probation file because it violates the Sixth Amendment's Confrontation Clause. U.S. Const. Amend VI ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him"); *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1373, 158 L.Ed.2d 177 (2004)(holding that an out-of-court testimonial statement by a witness, who does not testify at trial, is barred by the Sixth Amendment's Confrontation Clause unless the witness is unavailable to testify and the accused has a prior opportunity to cross-examine the witness); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310, 129 S.Ct. 2527, 2532, 174 L.Ed.2d 314 (2009)(holding that a chemical analysis report was improperly admitted without the live testimony from the forensic analyst who prepared the report). The State first contends the issue is forfeited, as there was no Sixth Amendment objection made below.² We agree.

In general, to preserve a complaint for appellate review, a defendant must make a timely and specific objection to the trial court. TEX.R.APP.P. 33.1(a); *Lovill v. State*, 319 S.W.3d 687, 691–92 (Tex.Crim.App. 2009). In making the objection, terms of legal art are not required, but a litigant should at least "let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App. 1992). An objection stating one legal basis cannot support a different legal theory on appeal. See *Heidelberg v. State*, 144 S.W.3d 535, 537 (Tex.Crim.App. 2004)(objection based on Fifth Amendment did not preserve state constitutional ground); *Goff v. State*, 931 S.W.2d 537, 551 (Tex.Crim.App. 1996)(variance in charge objection with contention on appeal waived error); *Bell v. State*, 938 S.W.2d 35, 54 (Tex.Crim.App. 1996), cert. denied, 522 U.S. 827, 118 S.Ct. 90, 139 L.Ed.2d 46 (1997)(objection at trial regarding illegal arrest did not preserve claim of illegal search and seizure on appeal). "The purpose of requiring a specific objection in the trial court is twofold: (1) to inform the trial judge of the basis of the objection and give him the opportunity to rule on it; (2) to give opposing counsel the opportunity to respond to the complaint." *Resendez v. State*, 306 S.W.3d 308, 312 (Tex.Crim.App. 2009).

Texas employs a three-tiered classification of error outlined in *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). A litigant's rights are classified either as: (1) "absolute requirements and prohibitions;" (2) "rights of litigants which must be implemented by the system unless expressly waived;" or (3) "rights of litigants which are to be implemented upon request." *Marin*, 851 S.W.2d at 279. The Court of Criminal Appeals has several times treated Confrontation Clause complaints under the third tier as a right that a litigant must affirmatively invoke. See *Paredes v. State*, 129 S.W.3d 530, 535 (Tex.Crim.App. 2004); *Wright v. State*, 28 S.W.3d 526, 536 (Tex.Crim.App. 2000); *Dewberry v. State*, 4 S.W.3d 735, 752 & n.16 (Tex.Crim.App. 1999); *Briggs v. State*, 789 S.W.2d 918, 924 (Tex.Crim.App. 1990)("We hold that in failing to object at trial, appellant waived any claim that admission of the videotape violated his rights to confrontation and due process/due course of law."), overruled on other grounds by, *Karanev v. State*, 281 S.W.3d 428, 434 (Tex.Crim.App. 2009). We and several other intermediate courts have done the same. *Thomas v. State*, No. 08–14–00095–CR, 2015 WL 6699226, at *3 (Tex.App.–El Paso Nov. 3, 2015, pet. ref'd)(not designated for publication)(authentication, chain of custody, and Rule 702 objections did not preserve Confrontation Clause objection); *Deener v. State*, 214 S.W.3d 522, 527 (Tex.App.–Dallas 2006, pet. ref'd)("We conclude the right of confrontation is a forfeitable right—not a waivable-only right—and must be preserved by a timely and specific objection at trial."); *Robinson v. State*, 310 S.W.3d 574, 577–78 (Tex.App.–Fort Worth 2010, no pet.)(failure to object waived Confrontation Clause claim). In each of these cases, a litigant who failed to raise a proper objection forfeited any right of review.

After carefully reviewing the objections that Appellant made to the juvenile probation file, we find no mention of the Sixth Amendment or the Confrontation Clause. The closest objection complained that the file contained hearsay. A number of courts have held that hearsay objections, however, are not synonymous with an objection raising Sixth Amendment issues. *Paredes*, 129 S.W.3d at 535; *Wright*, 28 S.W.3d at 536; *Rios v. State*, 263 S.W.3d 1, 6–7 (Tex.App.–Houston [1st Dist.] 2005, pet. ref'd, untimely filed). As the United States Supreme Court has said, " 'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' " *United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993), quoting *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 677, 88 L.Ed. 834 (1944). We conclude Issue One is forfeited and accordingly overrule it.

HEARSAY OBJECTIONS AND LEADING QUESTIONS

Appellant's second issue challenges admission of the same juvenile probation file as hearsay. He adds to that issue a complaint about how the prosecutor questioned

the probation officer over the file. Again, the issue suffers from preservation problems.

After the probation file was admitted, the prosecutor went through the file with Appellant's probation officer. At times, the prosecutor read aloud various passages from the file, asking the probation officer to agree that the file contained the particular file entry. Often, the prosecutor then went on to ask the probation officer to explain or comment on the file entry. Appellant now contends these questions were leading, but Appellant never made that objection below. The lack of any objection to the leading form of a question waives that complaint. *Cheng v. Wang*, 315 S.W.3d 668, 672 (Tex.App.–Dallas 2010, no pet.); *Myers v. State*, 781 S.W.2d 730, 733 (Tex.App.–Fort Worth 1989, pet. ref'd); TEX.R.APP.P. 33.1(a).

Our evidence rules provide that “[l]eading questions should not be used on direct examination except as necessary to develop the witness’s testimony.” TEX.R.EVID. 611(c). Here, the prosecutor often read a sentence or passage from the file as a way to introduce a topic area he then explored with the witness. The manner of the presenting documentary evidence to a jury is left to the trial court’s discretion. *Wheatfall v. State*, 882 S.W.2d 829, 838 (Tex.Crim.App. 1994)(holding there was no abuse of discretion in allowing prosecutor to read aloud portions of pen packets and probation records that had already been admitted). Absent some objection calling a problem to the trial court’s attention, we could hardly say the trial court abused that discretion.

Appellant did object to the juvenile probation file as hearsay. The State elicited the proper predicate to prove up the file as a “business record” of the probation department, which is an exception to the hearsay rule. TEX.R.Evid. 803(6). We review a trial court’s ruling on whether a statement meets an exception to the hearsay prohibition under an abuse-of-discretion standard. See *Taylor v. State*, 268 S.W.3d 571, 579 (Tex.Crim.App. 2008).

Appellant’s specific complaint is that while some of the file meets the business records exception, other entries in the file are “hearsay within hearsay” for which there is no secondary hearsay exception. And true enough, not everything found within a “business record” automatically becomes admissible. As the Texas Court of Criminal Appeals notes:

When a business receives information from a person who is outside the business and who has no business duty to report or to report accurately, those statements are not covered by the business records exception. Those statements must independently qualify for admission under their own hearsay exception—such as statements made for medical diagnosis or treatment, statements concerning a present sense impression, an excited utterance, or an admission by a party opponent. [Footnotes omitted].

Garcia v. State, 126 S.W.3d 921, 926–27 (Tex.Crim.App. 2004); see also *Sanchez v. State*, 354 S.W.3d 476, 485–86 (Tex.Crim.App. 2011)(“When hearsay contains hearsay, the Rules of Evidence require that each part of the combined statements be within an exception to the hearsay rule.”).³

At trial, however, Appellant never identified which portions of the probation file contained inadmissible hearsay within hearsay. That failing is problematic here because many of the entries from the file were made by the sponsoring witness. Others entries were made by other juvenile probation personnel. Still others were made by police officers, third party witnesses, and court officials. “When an exhibit contains both admissible and inadmissible evidence, the objection must specifically refer to the challenged material to apprise the trial court of the exact objection.” *Sonnier v. State*, 913 S.W.2d 511, 518 (Tex.Crim.App. 1995)(so holding for videotape, of which only some of portions were objectionable); *Brown v. State*, 692 S.W.2d 497, 501 (Tex.Crim.App. 1985)(same for pen packet); *Williams v. State*, 927 S.W.2d 752, 760 (Tex.App.–El Paso 1996, pet ref’d)(same for various court filings, and orders); *Thompson v. State*, No. 08–99–00144–CR, 2000 WL 1476629, at *2 (Tex.App.–El Paso Oct. 5, 2000, no pet.)(not designated for publication)(same for nursing notes).

While we do not discount that some argument might have been made urging that some parts of the probation file were hearsay within hearsay, none were made below. And without any specific argument about some specific objectionable document, the trial court was never focused on whether a particular document was generated by someone without a duty to accurately report a matter. Nor was the State accorded any opportunity to offer another hearsay exception. We accordingly overrule Issue Two.

VICTIM IMPACT TESTIMONY FOR OTHER BAD ACTS

In his third issue, Appellant complains that the State admitted victim impact evidence for one of the “other bad acts.” Specifically, the State put on evidence that when Appellant was ten years’ old, he assaulted F.E., a schoolmate. He hit F.E. with his fist in the classroom, and later when on the playground, he knocked F.E. down, and kneed him in the face. The juvenile probation file contains a police report of the incident, and the witness statements of F.E. and his father. The State called the father to testify at trial, and through him admitted three photographs of F.E.’s swollen face that the father took a few days after the assault. During the father’s testimony, Appellant objected that: (1) the father lacked any personal knowledge of the fight; (2) that what his son told him was hearsay; (3) that because the son was not there to testify, Appellant’s Sixth Amendment right was violated; and (4) that some of the father’s answers were non-responsive. Appellant’s complaint on appeal does not carry forward any of these arguments. Instead, Appellant complains

about the father's testimony that F.E. was distraught, and that he pulled F.E. out of that school the next school year and sent the boy elsewhere. Appellant directs us to this testimony:

[PROSECUTOR]: When you say that 'he was distraught,' can you tell us exactly a little bit more about what his demeanor was like?

[FATHER]: When I got there, he was sitting down in the lobby. He had an ice pack on his face. His face was swollen and he was crying pretty much hysterically, crying pretty bad.

...

[PROSECUTOR]: Okay. And because of this incident, did your son stay at Zach White Elementary School?

[FATHER]: He stayed the remainder of the year.

[PROSECUTOR]: Okay. And did he stay there—did he go to the regular matriculation?

[FATHER]: We ended up sending him to St. Patrick's private school.

[PROSECUTOR]: And may I ask why?

[FATHER]: Just—I wanted a safer, better environment, better education for him.

[PROSECUTOR]: And so you didn't feel safe with the defendant?

[FATHER]: Not really.

Appellant contends this was improper "victim impact" testimony concerning an extraneous offense. He grounds the argument on TEX.R.EVID. 401 (relevance) and 403 (more prejudicial than probative) and cites us to *Haley v. State*, 173 S.W.3d 510, 518 (Tex.Crim.App. 2005) and *Cantu v. State*, 939 S.W.2d 627, 637 (Tex.Crim.App. 1997).

Appellant never made a Rule 401 or 403 objection below. He never argued that the above quoted questions were impermissible victim impact testimony. Nor did he object to the above quoted questions at all. Under these circumstances, we view the objection as waived. *Mays v. State*, 318 S.W.3d 368, 391–92 (Tex.Crim.App. 2010) ("Appellant failed to preserve this issue for review because he did not object to the admission of the victim-impact or character evidence at trial."); *Guevara v. State*, 97 S.W.3d 579, 583 (Tex.Crim.App. 2003) (defendant failed to preserve error regarding admission of victim-impact evidence by objecting to the "form" of the question); TEX.R.APP.P. 33.1(a)(1). Appellant argues that the hearsay, Confrontation Clause, and lack of personal knowledge objections sufficiently put the trial court and the State on notice that the witness should be excluded from testifying as he did. But hitting all around a target is not the same as hitting the target. The trial court no doubt understood that Appellant did not want the father to testify, but Appellant still had to provide a proper rationale for excluding the testimony.

Appellant likens the objection here to the objection we found sufficient in *Lefew v. State*, No. 08–06–00105–CR, 2008 WL 162809 (Tex.App.–El Paso Jan. 17, 2008, no pet.) (not designated for publication). In that case, we reversed the punishment assessed based on

improper victim impact testimony. *Lefew*, 2008 WL 162809, at *10. The defendant there had objected to the State going into a murder for which the defendant was never charged. *Id.* at *3–*4. Counsel argued that the extraneous bad act was "unrelated," based on "speculation," "extremely prejudicial," and later renewed the objection "to going into the impact" of the murder. *Id.* at *3–*4. We concluded the victim impact objection, which is a species of a relevance objection, was made known to the trial court. *Lefew*, 2008 WL 162809, at *4. The same is simply not the case here. Appellant never lodged a relevance objection, or anything close to a relevance objection.

Even were we wrong about the preservation issue, we doubt there to be error, much less harmful error. During the punishment phase of a trial, "evidence may be offered ... as to any matter the court deems relevant" TEX.CODE CRIM.PROC.ANN. art. 37.07, § 3(a)(1) (West Supp. 2016). That evidence may include extraneous offenses, even those that are adjudicated. *Id.* Such evidence is relevant, and therefore admissible, if it will assist the trier of fact in assessing an appropriate sentence. *Haley*, 173 S.W.3d at 513–15.

The State contends that most of the "victim impact" at issue is admissible. We agree. In the context of extraneous bad acts testimony for victims not named in the indictment, the Texas Court of Criminal Appeals has drawn a distinction between testimony about the impact to the victim, and impacts to the family members of the victim. In *Cantu v. State*, the mother of a murdered girl (not named in the indictment) testified to the impacts of the girl's murder on the family. 939 S.W.2d at 636. The court held that was error (though not reversible in that case). *Id.* at 637. Conversely, in *Roberts v. State*, 220 S.W.3d 521, 531 (Tex.Crim.App. 2007), the court permitted the victim of a robbery (admitted as an extraneous offense to a murder charge) to testify to the impact of the robbery on her. She had to quit her job, had nightmares, and difficulty sleeping. Distinguishing *Cantu*, the court wrote that "[v]ictim impact" evidence is evidence of the effect of an offense on people other than the victim. The evidence presented here was evidence of the effect of a different offense on the victim (of the extraneous offense), and thus is distinguishable from the situation presented in *Cantu*. [Emphasis in original]. *Roberts*, 220 S.W.3d at 531.

Applying that distinction here, the evidence of the impact on F.E.—including his injury and his immediate reaction—would be admissible. The only possible third party victim impact would be the parents' cost or inconvenience in having F.E. change schools. It might also include emotional impact of the father, who kept the photos depicting his son's injuries for a decade after the assault. In the context of the evidence in this case, however, that third party family impact is not harmful error.

Any error, other than constitutional error, that does not affect the substantial rights of the accused must be disregarded. TEX.R.APP.P. 44.2(b). A substantial right is affected when the error had “a substantial and injurious effect or influence in determining the jury’s verdict.” *Whitaker v. State*, 286 S.W.3d 355, 363 (Tex.Crim.App. 2009), quoting *King v. State*, 953 S.W.2d 266, 271 (Tex.Crim.App. 1997). If the error had no influence, or only a slight influence on the verdict, it is harmless. *Whitaker*, 286 S.W.3d at 362–63. In assessing the likelihood that the jury’s decision was adversely affected by the error, we consider the entire record. *Id.* at 363. This court must calculate, to the extent possible, the probable impact of the error on the jury in light of the existence of other evidence. *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex.Crim.App. 2000).

Appellant’s harm analysis focuses on the several references to the schoolyard assault in the State’s closing. The State’s prosecutor mentioned the incident several times, but the emphasis was on this event as part of a pattern of Appellant’s conduct that made him a danger to society, and not on the fact that the victim changed schools. The act of kneeling another in the face, for instance, was repeated in Appellant’s attack on Jocelyn. Nor did Appellant ever object to how the State used of the assault on F.E. in its closing.

Conclusion: Looking at the record as a whole, we conclude on this record that the act for which Appellant was charged was itself sufficiently egregious that it would have overshadowed the victim impact testimony complained of here. Appellant maimed Jocelyn by biting her ear off. Even with the efforts to reattach the ear, she showed permanent scarring and wore her hair to hide the injury. The photos taken at the time of her hospital admission document the several bite marks on her person, as well the extensive bruising and swelling from the blows. Appellant’s attitude, as reflected in the recorded jail calls, could also explain the sentence. Appellant denied his own responsibility for the assault, and attempted to influence the complaining witness’s testimony. Finally, the jury may well have accepted the State’s theme in the punishment phase of the trial. Appellant was given several chances to alter his course of conduct, such as probation, but he mostly rebuffed those opportunities. The single effect of one family having to put their child in a different school more than ten years ago simply pales in comparison to the other punishment testimony. We overrule Issue Three and affirm the conviction.

Footnotes

1 In one statement, he told his girlfriend that Jocelyn “started talking shit to me and I kicked her ass.” In another he states “I couldn’t stop myself. I couldn’t stop myself.”

2 Appellant objected to these exhibits on the basis of relevance, hearsay, and TEX.CODE CRIM.PROC.ANN. art. 37.07 (West Supp. 2016).

3 The State cites us to *Simmons v. State*, 564 S.W.2d 769, 770 (Tex.Crim.App. 1978) which upheld a trial court’s ruling that allowed a probation unit supervisor to testify that the defendant had admitted a drug use problem. The supervisor gained that knowledge from an entry in the file made by another probation officer who had personal knowledge of what was reported. *Id.* Subsequent cases have also allowed probation files to be admitted when “a proper predicate” has been laid. E.g. *Dodson v. State*, 689 S.W.2d 483, 485 (Tex.App.—Houston [14th Dist.] 1985, no pet.). We do not perceive that *Simmons* makes some special rule for probation files. The witness in *Simmons* testified from an entry in a part of the probation department’s file that was made by one of its own employees and was shown to be part of its own business.

CONFESSIONS

AN EXPRESS WAIVER OF MIRANDA IS NOT REQUIRED IN A MOTION TO SUPPRESS A CONFESSION, ONLY THAT THE TRIAL COURT’S CUSTODY ANALYSIS INCLUDES REVIEW OF ALL RELEVANT CIRCUMSTANCES, INCLUDING THE SUSPECT’S AGE.

¶ 17-4-1. **Boyd v. State**, MEMORANDUM, No. 05-16-00106-CR, 2017 WL 3574799 (Tex.App.—Dallas, 8/18/2017).

Facts: Appellant and RW dated in high school in an on-again, off-again relationship. After their last break-up, appellant pleaded with RW to meet him at his friend’s house. RW finally agreed. At the friend’s house, appellant and RW began arguing and RW tried to leave. The argument led to a fight during which appellant strangled RW. Appellant told the Irving police officer who responded to the 911 call that he “choked” RW.

At the police station, two detectives interviewed appellant and recorded the interrogation. Before the detectives asked questions of appellant, one of the detectives read to him the rights afforded under *Miranda v. Arizona*, 384 U.S. 436 (1966). The detective asked appellant if he understood these rights; appellant nodded and said “yes.” The officer said, “Yes?” Appellant nodded again. The detective asked appellant for his full name, date of birth, home address, and work history, and they talked about school and appellant’s work at Braum’s. Then the detective asked appellant about his relationship to the deceased. The detective did not ask appellant to expressly waive his rights under *Miranda* before he started questioning appellant about the murder.

The State offered the recording of this custodial interrogation into evidence at trial, and appellant objected on the basis that appellant “was not properly Mirandized at the time of giving his statement and we feel like that because the nature of his age at the time he was giving the statement that they didn’t follow the constitutional requirements.” The trial court held an evidentiary hearing outside the jury’s presence during which the court watched the beginning of the recorded statement and asked appellant’s age at the time the statement was given. At the conclusion of the hearing, appellant argued that the statement was not admissible under Supreme Court jurisprudence because “when interrogating individuals under ... 18 years of age ... police detectives need to take special precautions.” He said failure to take “these special precautions” does not “per se, violate[] their constitutional rights,” but in this case the officers did not take “these special precautions.” The trial court overruled appellant’s objection and admitted the statement into evidence.

In issue three, appellant contends that the trial court abused its discretion by admitting his statement into evidence because he was 17 years old at the time he gave the statement and was “a juvenile under Supreme Court jurisprudence” and “entitled to be treated as a juvenile, with all the additional protections that pertain thereto.” His specific complaint is that Supreme Court jurisprudence requires more than reading the rights under *Miranda* to a suspect under age 18; he contends it requires police to obtain an express waiver of those rights before questioning can begin. He argues that in this case, the police “just explained the rights and then started talking to [him].”

Held: Affirmed

Memorandum Opinion: The case appellant relies on most heavily, *J.D.B. v. North Carolina*, involved a failure to provide the warnings required by *Miranda*. In that case, a 13-year-old student was removed from his class and questioned by police about a crime. 564 U.S. at 265. The police did not read the child his *Miranda* warnings, did not allow him to speak with his grandmother, and did not inform him he was free to leave the room. *Id.* at 266. The child sought suppression of his statements arguing he was interrogated without having been warned under *Miranda*. *Id.* at 267. The trial court concluded the child was not in custody at the time he gave the statements and denied the motion. *Id.* at 268. The North Carolina Court of Appeals and the North Carolina Supreme Court agreed with the trial court, expressly declining to consider the child’s age when conducting the custody analysis. *Id.* After examining the purpose of *Miranda* and reviewing its prior decisions about how children are different from adults, the Supreme Court held “that so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer,” age is a factor to be considered in determining whether a child was in custody such that *Miranda* warnings were required to

be read before questioning. *Id.* at 277. The Court concluded that it was “beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.” *Id.* at 264–65. The Court remanded the case to the state courts to address the custody determination, “this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.’s age at the time.” *Id.* at 281.

Here, it is undisputed that appellant received *Miranda* warnings before making a statement. Consequently, J.D.B.’s facts are different. As additional support for his argument, however, appellant compares the method of interrogation used by the detective in this case to the “question-first tactic” used by the police in *Missouri v. Seibert*, 542 U.S. 600 (2004). In *Seibert*, the police had a “protocol for custodial interrogation” in which they did not give *Miranda* warnings until after they got a confession, then they would provide the warnings and “lead[] the suspect to cover the same ground a second time.” *Id.* at 604. Appellant contends that the detective’s tactic here of reading the *Miranda* warnings to him and then immediately talking to him without getting an express waiver had the same effect as the tactic used in *Seibert*. We disagree that the facts in this case are similar to those in *Seibert* or that *Seibert* supports appellant’s argument for the requirement of an express waiver of *Miranda* for suspects under age 18. In *Seibert*, the Supreme Court condemned the “question-first tactic” because it “effectively threatens to thwart *Miranda*’s purpose of reducing the risk that a coerced confession would be admitted” and “reveal[ed] a police strategy adapted to undermine the *Miranda* warnings.” *Id.* at 616–17 (footnote omitted). But the Court did not require an express waiver of those warnings. See *id.*

More applicable to the issue here, in *North Carolina v. Butler*, the Court “rejected the rule” that would have required police officers to obtain an express waiver of *Miranda* rights before interrogation began. 441 U.S. 369, 379 (1979). The Court saw “no reason” to require such “an inflexible per se rule.” *Id.* at 375. And the Court reaffirmed this ruling in *Berghuis v. Thompkins*, 560 U.S. 370, 387 (2010) (“The *Butler* Court ... rejected the rule ... which would have ‘requir[ed] the police to obtain an express waiver of [*Miranda* rights] before proceeding with interrogation.’ ”) (quoting *Butler*, 441 U.S. at 379). As the Court stated, the primary “purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel.” *Id.* at 383. In determining whether a defendant has waived the rights under *Miranda*, a court examines whether the waiver was “ ‘voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,’ and ‘made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.’ ” *Id.* at 381 (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). And this determination does not necessarily turn on whether there was an express oral or written

waiver. See *Butler*, 441 U.S. at 373 (“An express written or oral statement of waiver of the right to remain silent ... is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case.”).

Whether a particular defendant has waived his rights under *Miranda* is determined by a review of “the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *Id.* at 374–75 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 454 (1938)). One of the “facts and circumstances surrounding [the] case” would include a suspect’s age. See *id.*; see also *J.D.B.*, 564 U.S. at 281 (requiring custody analysis to include review of all relevant circumstances, including suspect’s young age); *Berghuis*, 560 U.S. at 388 (waiver based on review of “the whole course of questioning”).

Appellant does not argue that his statement was involuntary or that he was unaware of the nature of the right or the consequences of his decision to answer the detective’s questions. He also does not argue that the trial court refused to consider his age in ruling on his objection to the admission of his statement. Instead, he asks this Court to draw a bright line and create a rule that suspects under age 18 must expressly waive rights under *Miranda* before being questioned about their involvement in a crime or else the custodial statement is inadmissible. But the Supreme Court has not drawn this bright line. See *id.* And we decline to create this “inflexible rule” when the Supreme Court has chosen not to do so. See *Berghuis*, 560 U.S. at 387; *Butler*, 441 U.S. at 376.

Conclusion: In this case, the record shows that the trial court asked about appellant’s age and was aware appellant was 17 years old at the time he gave his statement. There is nothing in the record to indicate the trial court did not factor appellant’s age in determining the admissibility of appellant’s statement. Based on our review of Supreme Court jurisprudence, we conclude that the trial court did not abuse its discretion by admitting the statement into evidence. We resolve issue three against appellant and affirm the trial court’s judgment.

CRIMINAL PROCEEDINGS

EVIDENCE OF A JUVENILE MISDEMEANOR ADJUDICATION PUNISHABLE BY CONFINEMENT IN JAIL IS ADMISSIBLE IN AN ADULT PUNISHMENT HEARING, ONLY IF THE CONDUCT UPON WHICH THE ADJUDICATION IS BASED OCCURRED ON OR AFTER JANUARY 1, 1996.

¶ 17-5-7. **Lewis v. State**, MEMORANDUM, No. 01-16-00485-CR, 2017 WL 4545865 [Tex. App.—Houston (1st Dist.), 10/12/2017].

Facts: After he pleaded not guilty, a jury found appellant, LT Lewis, guilty of the offense of assault of a family member, causing bodily injury, and assessed punishment at 365 days’ confinement and a \$2,000 fine. During the punishment phase of the trial, the State admitted three exhibits as evidence of appellant’s prior criminal record: (1) Exhibit 9, a DWI offense from 1992; (2) Exhibit 10, a misdemeanor resisting arrest offense from 1995; and (3) Exhibit 11, a misdemeanor resisting detention offense from 1995.

Appellant contends that these admissions were in violation of article 37.07, section 3(i), which provides that:

Evidence of an adjudication for conduct that is a violation of a penal law of the grade of misdemeanor punishable by confinement in jail is admissible only if the conduct upon which the adjudication is based on or after January 1, 1996.

TEX. CODE CRIM. PROC. ANN. art. 37.07, § (3)(i) (West 2017).

Held: Affirmed

Memorandum Opinion: Appellant contends that the admissions were in violation of article 37.07, section 3(i), which provides that:

Evidence of an adjudication for conduct that is a violation of a penal law of the grade of misdemeanor punishable by confinement in jail is admissible only if the conduct upon which the adjudication is based on or after January 1, 1996.

TEX. CODE CRIM. PROC. ANN. art. 37.07, § (3)(i) (West 2017).

This provision, however, applies to juvenile adjudications of delinquency; it does not apply to adult convictions. *Hooks v. State*, 73 S.W.3d 398, 402 (Tex. App.—Eastland 2002, no pet.); *Rodriguez v. State*, 975 S.W.2d 667, 687 (Tex. App.—Texarkana 1998, pet. ref’d); see also *Bailey v. State*, Nos. 05-14-00885/86-CR, 2015 WL 3488886, at *6 (Tex. App.—Dallas June 2, 2015, per. ref’d)(mem. op., not designated for publication) (holding article 37.07, § (3)(i) applies only to juvenile adjudications); *Barker v. State*, No. 05-03-01495-CR, 2004 WL 2404540, at *3 (Tex. App.—Dallas Oct. 28, 2004, no pet.) (mem. op., not designated for publication) (section 3(i) of article 37.07 of the Code of Criminal Procedure “applies to juvenile adjudications; it does not apply to adult convictions”); *Cunningham v. State*, No. 06-05-00215-CR, 2006 WL 2671626, at *6 (Tex. App.—Texarkana Sept. 19, 2006, pet. ref’d) (mem. op., not designated for publication) (under section 3(i) or article 37.07 of code of criminal procedure, juvenile adjudication of delinquency which occurred before January 1, 1996 is not admissible as prior adjudication

of delinquency unless adjudication was for felony-grade offense).

Conclusion: Appellant was not a juvenile when the crimes enumerated in Exhibits 9, 10, and 11 occurred, thus the trial court did not abuse its discretion by admitting those misdemeanor offenses during punishment.

Article 37.07(a) of the Texas Code of Criminal Procedure states that:

“evidence may be offered by the state [as] to any matter the court deems relevant to sentencing, including the prior criminal record of the defendant.”
TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1).

SUFFICIENCY OF THE EVIDENCE

DEFENSES—

IT WAS ERROR FOR TRIAL COURT TO REFUSE TO ALLOW THIRTEEN YEAR OLD TO WITHDRAW HIS PLEA OF TRUE BECAUSE THE THIRTEEN YEAR OLD HAD NOT BEEN INFORMED OF THE POTENTIAL DEFENSE OF LACK OF CAPACITY TO CONSENT TO SEX AS A MATTER OF LAW.

¶ 17-5-4. **In the Matter of R.R.S.**, No. 08-16-00042-CV, - -- S.W.3d ----, 2017 WL 3676374 (Tex.App.—El Paso, 8/25/2017). (with dissent)

Facts: The State filed a petition of delinquent conduct alleging Appellant intentionally and knowingly committed two counts of aggravated sexual assault of his twin sibling brothers in violation of section 22.021 of the Texas Penal Code. The petition described Appellant as being thirteen years old at the time of the conduct alleged, he was residing with his mother, and his father was listed as deceased. Appellant’s mother requested that Appellant receive a court appointed attorney and she provided financial information to qualify. Thereafter, the trial court entered an order of appointment and scheduled a pretrial hearing.

On the day of his pretrial, Appellant appeared with his mother, maternal grandfather, and appointed attorney, and the court proceeded to an adjudication hearing. At the hearing, the State abandoned two paragraphs of the petition and the Appellant then pled true to the remaining two counts of aggravated sexual assault. The prosecutor presented and the court admitted without objection a form titled “Waiver, Stipulation and Admission” signed by Appellant and his attorney. In the stipulation, Appellant admitted the allegations of the petition, confessed that he committed the offense charged, and waived his constitutional rights. The court then ordered the El Paso County Juvenile Probation Department to prepare a pre-disposition report due prior to the later scheduled disposition hearing. Based on the plea and the written stipulation, the court entered an order of adjudication finding that Appellant, described in the order’s caption as a juvenile with a date of birth as September 3, 2001, engaged in

delinquent conduct on January 1, and 17, 2015, as alleged in counts 1(a) and 2(b) of the State’s petition.

A month following his plea, Appellant retained new counsel and filed a motion to withdraw stipulation and motion for new trial. The motion asserted that Appellant wanted to withdraw his stipulation and plea “to challenge the factual and legal sufficiency of the evidence in a Jury Trial.” At the hearing that followed, Appellant’s attorney stated to the court that there were “mitigating factors that were not presented at the adjudication hearing[,]” and further explained that he was referring to information revealed in the pre-disposition report prepared for the court by Appellant’s probation officer. The trial court denied Appellant’s motions.

A few weeks later, the court held a disposition hearing receiving testimony from Appellant’s probation officer and his mother. Additionally, the State admitted without objection the probation officer’s pre-disposition report. After finding Appellant in need of rehabilitation and protection, the court placed Appellant on intensive probation and ordered treatment measures and other delineated conditions. Among other terms and conditions, Appellant’s disposition included supervised contact with his siblings as described by a child safety plan, electronic monitoring, and an order to later register as a sex offender in accordance with Article 62 of the Code of Criminal Procedure, unless otherwise deferred. In concluding the hearing, the court advised Appellant in open court and in writing of his right to appeal both the adjudication and disposition of his case. Appellant thereafter filed this timely appeal. See TEX. FAM. CODE ANN. § 56.01(n)(1) (West Supp. 2016).

Held: Reversed and remanded

Opinion: In his only issue on appeal, Appellant asserts the trial court abused its discretion in denying his motions to withdraw stipulation and for new trial on the basis that the record as a whole fails to show by legally sufficient evidence that Appellant entered a knowing, intelligent, and voluntary plea. The State responds that Appellant entered his plea voluntarily and his request to withdraw his stipulation and for new trial was based solely on the impermissible ground of “buyer’s remorse.”

Appellant contends that he was denied due process because his plea of true was entered without adequate understanding of any defenses available to him. He asserts moreover that he was a victim of sexual abuse by his father and during the time of the alleged conduct he was thinking of the time his father had abused him. Thus, he contends “a factual dispute arises when the record as a whole suggests his intentions during the commission of the offense negates the element of his culpable mental state.”

As a preliminary matter, we note that Appellant brings forth no challenge on the issue of whether he was

properly admonished. See TEX. FAM. CODE ANN. § 54.03(b). Nonetheless, because Appellant's challenge, in part, includes questions as to the voluntariness of his plea, we must first review the record to determine whether Appellant was duly admonished such that there is a prima facie showing that his plea of true was entered knowingly and voluntarily. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex.Crim.App. 1998).

Here, the record reflects that after the parties announced ready, the trial court informed Appellant of his right to remain silent, his right to be represented by a lawyer, his right to confront and cross-examine any of the State's witnesses, and his right to a jury trial. TEX. FAM. CODE ANN. § 54.03(b)(3) – (6). When the court asked Appellant whether he understood what a jury did, he gave a short answer saying, "[w]here you have people decide for like if you're guilty or not." The court then added a short explanation that twelve people would sit and listen to his case and decide whether he was delinquent. Next, the court verbally confirmed with Appellant that he did not want a jury trial and his attorney concurred.

Proceeding then to an explanation of the nature and possible consequences of the proceedings, the court advised Appellant that "once you do plea[d] true to these allegations, you will receive some type of sanction as a result of your plea." TEX. FAM. CODE ANN. § 54.03(b)(2). The court further stated, "[i]t could be anything from probation all the way to commitment at the Texas Juvenile Justice Department." Next, the court advised him that his juvenile record may be used in the punishment phase of an adult trial if he were accused of a crime when he became an adult. TEX. FAM. CODE ANN. § 54.03(b)(2). The court then inquired of Appellant whether he understood his rights and he politely responded, "Yes, ma'am."

At this juncture, the court addressed Appellant stating, "I want you to listen as [the prosecutor] reads the allegations against you." Then, when asked whether he understood the allegation, Appellant replied, "Yes, Your honor." TEX. FAM. CODE ANN. § 54.03(b)(1). The court then asked Appellant about each of the two counts of the petition and Appellant confirmed he was pleading true to both counts because it was true. Appellant also confirmed that he was not being forced to plead true nor was he promised anything in return. Appellant's attorney then confirmed his own agreement with Appellant's plea. We find that Appellant was duly admonished as required by section 54.03(b) of the Family Code. TEX. FAM. CODE ANN. § 54.03(b).

Having been duly admonished, the burden shifted to Appellant to show that a misunderstanding resulted in him entering a plea that was not a voluntary, knowing, and intelligent waiver of his rights. *Martinez*, 981 S.W.2d at 197. A defendant may show he entered a plea without understanding the consequences of his actions and that he was harmed by the plea. *Id.* Here,

Appellant argues that he was not informed by his prior attorney about the nature of the culpable mental state required of the charges brought against him and how his intent during the charged conduct applied to his case. He further contends that the trial court's refusal to withdraw his plea caused him harm because he may be subject to a requirement to register as a sex offender upon reaching adulthood.

We construe the essence of Appellant's argument as an assertion that his plea was involuntary due to a misunderstanding and this misunderstanding caused him harm. See *Martinez*, 981 S.W.2d at 197. To meet his burden, Appellant relies on the testimony and report of his probation officer, as well as testimony given by his mother. The report provides background information from both Appellant and his mother. Appellant revealed to his probation officer sexual abuse he experienced that was on his mind at the time of his alleged misconduct. The report states:

"[Appellant] further reported that when he thought about sexual [sic] abusing his brothers, he was thinking about his own sexual abuse that his father imposed upon him for approximately two years when he was between the ages of 5 and 7, and he was curious."

Appellant's mother described his father as having suffered from PTSD and depression after returning from Afghanistan and that he committed suicide by shooting himself in October of 2012. The report also includes, "[s]he further reported during their marriage the juvenile's father had told her that he had been sexually abused by a family friend at the age of 5." Appellant's mother described Appellant as having been very close to his father before his death. In July of 2015, she reported taking Appellant to El Paso Behavioral Health Hospital as he was depressed.

Regarding the adjudication proceeding itself, the report states Appellant's mother hired a new attorney because "their decision to appeal the juvenile's adjudication, is not because they are denying the offense, or the need for the juvenile to get help to address his sexual behaviors, but because of the long term effects this type of adjudication is going to have on her son." The report further states, "[f]amily also reported they believe the legal system should have taken into account the juvenile was also victim of sexual abuse when charging him with the offenses."

At the hearing on Appellant's post-adjudication motion, Appellant argued he was not informed of the different ways that the law provides regarding how children could testify, or how they could present evidence, when they have been alleged to be a victim of a sex offense. Appellant argued that his status as a victim of abuse presented "defensive issues" that a jury should have been able to hear to decide "whether or not ... the offense that's being alleged ... support[s] a finding of what [Appellant's] intent was because that is relevant, that is material." Appellant wanted to withdraw his

plea as neither he nor his mother were aware of things that could have been done on his case to present a defense or to mitigate the charges brought against him when he entered his plea and waived his jury trial rights.

At the later disposition hearing, the record includes testimony from Appellant's mother wherein she described that she spoke with Appellant's prior attorney during his representation and was never informed of trial presentation for children alleged to be a victim of a sex offense. She only learned of these issues after she met with Appellant's new attorney. She would not have advised Appellant to proceed with a stipulation had she known of this additional information. She also testified to her concerns about not being informed of future consequences stating, "[a]ccording to what he had told us we believed that that was the best option. We were not fully informed of what would, I guess, the consequences would be in the future. We were not in full understanding."

Appellant brings forth two cases illustrating how a misunderstanding regarding an essential element of an offense may undermine the sufficiency of evidence supporting a plea. Both cases involve aggravated robbery charges, wherein the use of a real gun, as opposed to a toy gun, comes to light only after a defendant enters his plea. First, in *Payne v. State*, 790 S.W.2d 649, 652 (Tex.Crim.App. 1990), the Court of Criminal Appeals held that the trial court committed reversible error in refusing a timely request to withdraw a plea. In *Payne*, the defendant revealed he had used a toy gun and not a real gun in the commission of his robbery offense and had not understood the significance of the difference when he entered his plea. *Id.* at 650. Because defendant's revelation undermined the factual validity of his signed confession to an aggravated robbery, the Court of Criminal Appeals remanded to the trial court to allow the defendant to again answer the indictment filed against him.² *Id.* at 652 ("testimony served to raise an issue of the voluntariness of the signed confessions made pursuant to [defendant's] guilty plea").

In Appellant's second case, a juvenile defendant charged with aggravated robbery likewise revealed after his plea of true that he used a toy gun and not a real gun in the commission of his offense. *Matter of J.B.*, No. 01-13-00844-CV, 2014 WL 6998068, at *2 (Tex. App.--Houston [1st Dist.] Dec. 11, 2014, no pet.) (mem. op.). Unlike the defendant in *Payne*, however, the juvenile failed to timely request a withdrawal of his plea from the trial court. *Id.*, at *3 On that procedural distinction, the Houston court of appeals found that error was not preserved as the trial court was not required to act on the misunderstanding sua sponte. *Id.*

Here, Appellant timely requested withdrawal of his stipulation of evidence, and argues that he misunderstood the nature of the charges and defenses he could raise. This misunderstanding, he explains, undermined the legal sufficiency of the evidence

regarding the "intentionally or knowingly" component of his plea. Because Appellant questions the legal sufficiency of an essential element of the offense charged, we construe his argument as placing at issue his own intent in committing the offense.³ Within Appellant's larger contention of lack of voluntariness, he also challenges the legal sufficiency of the evidence in supporting the "knowing" element of the sexual assault charge. "[W]hen the defensive theory of consent is raised in a prosecution for sexual assault, the defendant necessarily disputes his intent to engage in the alleged conduct without the complainant's consent and [thereby] places his [own] intent to commit sexual assault at issue." *Casey v. State*, 215 S.W.3d 870, 880 (Tex.Crim.App. 2007) (citing *Rubio v. State*, 607 S.W.2d 498, 501 (Tex.Crim.App. 1980)); *Brown v. State*, 96 S.W.3d 508, 512 (Tex. App.--Austin 2002, no pet.); see *Martin v. State*, 173 S.W.3d 463, 466 n.1 (Tex.Crim.App. 2005)). A defendant's own intent cannot be inferred from the mere act of sexual conduct with the complainant. *Rubio*, 607 S.W.2d at 501; *Brown*, 96 S.W.3d at 512.

As we consider the intent element of the charges brought against Appellant, we are particularly guided by *In re B.W.*, 313 S.W.3d 818 (Tex. 2010), as the case directly construes Penal Code section 22.021, the same provision at issue here. In *In re B.W.*, a thirteen-year-old girl pled true to the offense of prostitution and thereafter filed a motion for new trial contesting the sufficiency of evidence to support the intent element of her plea. *Id.* at 819. Mirroring this case, in *In re B.W.*, the record merely included the young girl's plea and stipulation to evidence, and a report from her probation officer. *In re B.W.*, 274 S.W.3d 179, 180 (Tex. App.--Houston [1st Dist.] 2008), rev'd, 313 S.W.3d 818 (Tex. 2010).

In challenging the legal sufficiency of her plea, *B.W.* argued that her age under fourteen precluded as a matter of law her ability to form the necessary intent to commit the offense of prostitution. *Id.* In support of her argument, *B.W.* cited to section 22.021 of the Penal Code as her primary authority supporting her argument that she was not able to form intent as a matter of law as required by the offense. *In re B.W.*, 313 S.W.3d at 820 (citing TEX. PENAL CODE ANN. § 22.021) ("criminalizing sex with a child irrespective of consent"). Although charged with prostitution, *B.W.* argued that section 22.021 applied to her generally as she was less than fourteen at the time of her alleged offense, and thus, she was deemed unable to "knowingly" consent to sex for a fee as a matter of law.⁴ *Id.*; see TEX. PENAL CODE ANN. § 43.02(a)(1) (West 2016). Moreover, she argued that the Texas Legislature did not intend for children under the age of fourteen to be prosecuted for an offense such as prostitution in that an essential element of the offense required knowing agreement to engage in sex for a fee and children under fourteen were not legally capable of such consent. *Id.*

Signaling a strong shift in doctrine as applied to the youngest of offenders, the Supreme Court found that the underlying rationale of Texas' sexual assault scheme established that "younger children lack the capacity to appreciate the significance or the consequences of agreeing to sex, and thus cannot give meaningful consent." *Id.* at 820-21 (citing see, e.g., *State v. Hazelton*, 915 A.2d 224, 234 (Vt. 2006); *Collins v. State*, 691 So.2d 918, 924 (Miss. 1997); *Coates v. State*, 50 Ark. 330, 7 S.W. 304, 304-06 (1888); see also *Anschicks v. State*, 6 Tex.App. 524, 535 (Tex.Ct.App. 1879); cf. *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 1195, 161 L.Ed.2d 1 (2005) (holding that as compared to adults, juveniles have a "'lack of maturity and an underdeveloped sense of responsibility'... [they] are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure") (quoting *Johnson v. Tex.*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993)); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (confirming the Court's observations in *Roper* about the difference between juvenile and adult minds)).

In *In re B.W.*, the Supreme Court held "in Texas, 'a child under fourteen cannot legally consent to sex.'" 313 S.W.3d at 821 (quoting *May v. State*, 919 S.W.2d 422, 424 (Tex.Crim.App. 1996)). The Court also stated, "[t]he Legislature has determined that children thirteen and younger cannot consent to sex." *Id.* at 824; see TEX. PENAL CODE ANN. § 22.021(a)(2)(B). The court further explained, "legal capacity to consent ... is necessary to find that a person 'knowingly agreed' to engage in sexual conduct for a fee." *Id.* at 824. "Courts, legislatures, and psychologists around the country have recognized that children of a certain age lack the mental capacity to understand the nature and consequences of sex, or to express meaningful consent in these matters." *Id.* at 826 (citing *Hazelton*, 915 A.2d at 234; *Collins*, 691 So.2d at 924; *Jones v. Florida*, 640 So.2d 1084, 1089 (Fla. 1994); *Payne*, 623 S.W.2d 867; *Goodrow v. Perrin*, 119 N.H. 483, 403 A.2d 864 (N.H. 1979) (citation omitted)). "The State has broad power to protect children from sexual exploitation without needing to resort to charging those children with prostitution and branding them offenders." *Id.* at 825 (citing TEX. FAM. CODE ANN. § 261.101). A bright line has been established regarding the age of consent, "[b]y unequivocally removing the defense of consent to sexual assault, the Texas Legislature has drawn this line at the age of fourteen." *Id.* at 823. With the Legislature determining that children under fourteen cannot consent to sex, the rationale then follows that the state may not adjudicate such a young offender for an offense that includes consent to sex as one of its essential elements. *Id.* at 824.

Regarding crimes of this nature and children under fourteen, the Supreme Court also explained that the State has broad power to protect these children without resorting to the juvenile justice system or

considering it the only portal to providing services. *Id.* at 825. "Section 261.101 of the Family Code requires a person to report to a law enforcement agency or the Department of Family and Protective Services if there is cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect." *Id.* (citing TEX. FAM. CODE ANN. § 261.101). Just because a young offender may not be adjudicated for certain offenses due to age-related incapacity, it does not then mean that the State will not become involved in providing necessary protection and services. Once aware of a child's circumstances, "[t]he department or agency must then conduct an investigation during which the investigating agency may take appropriate steps to provide for the child's temporary care and protection." *Id.*; see TEX. FAM. CODE ANN. §§ 261.301, 261.302, 262.001-.309 (West Supp. 2016 & West 2014).

Although we recognize that *In re B.W.* involved an offense different from the underlying offense here, nonetheless, we find *In re B.W.* implicated as section 22.021 is central to the holding finding that the Legislature did not intend to prosecute children under fourteen for offenses that include legal capacity to consent to sex. We also note that the holding of *In re B.W.* reiterates an earlier recognition of age-related incapacity by the Court of Criminal Appeals when it stated that section 22.021 is aimed at adult offenders:

The statutory prohibition of an adult having sex with a person who is under the age of consent serves to protect young people from being coerced by the power of an older, more mature person. The fact that the statute does not require the State to prove mens rea as to the victim's age places the burden on the adult to ascertain the age of a potential sexual partner and to avoid sexual encounters with those who are determined to be too young to consent to such encounters. *Fleming v. State*, 455 S.W.3d 577, 582 (Tex.Crim.App. 2014) [emphasis added].

As for the question of whether *In re B.W.* extends beyond the offense of prostitution, the Corpus Christi court of appeals nearly decided the issue but the procedural posture of the case did not allow the court to reach the issue. In *In re O.D.T.*, the state brought a petition of delinquency against an eleven-year-old boy based on two counts of aggravated sexual assault of a child under fourteen years of age. In *In re O.D.T.*, No. 13-12-00518-CV, 2013 WL 485754, at *1 (Tex. App.--Corpus Christi Feb. 7, 2013, no pet.) (mem. op.); see TEX. PENAL CODE ANN. § 22.021(a)(1)(B), (a)(2)(B). Citing *In re B.W.* as support, the juvenile offender applied for pretrial habeas relief contending that the state's prosecution was "fundamentally invalid as a matter of law." *Id.* *O.D.T.* argued a child under the age of fourteen lacked the capacity to act with the mental state required of the charge. *Id.*, at *1. Specifically, he argued that a child under fourteen years of age could not be prosecuted for the offense of aggravated sexual

assault because “a child under fourteen cannot legally consent to sex.” *Id.* (quoting *In re B.W.*, 313 S.W.3d at 821) (citation omitted). The trial court denied the application for relief. *Id.* On appeal, the Corpus Christi court of appeals found that the trial court’s denial constituted an interlocutory order and the court lacked appellate jurisdiction. *Id.*, at *2.

In a second case discussing *In re B.W.* involving charges other than prostitution, the state alleged that a thirteen-year-old boy engaged in conduct consisting of both sexual assault and unlawful restraint of another against a victim described as a “high functioning” autistic fifteen-year-old boy. *In re H.L.A.*, No. 01-12-00912-CV, 2014 WL 1101584, at *1 (Tex. App.–Houston [1st Dist.] Mar. 20, 2014, no pet.) (mem. op.). In *In re H.L.A.*, the state voluntarily dismissed the sexual assault charges during the charge conference and a jury then adjudged the defendant as delinquent on the remaining charge of unlawful restraint. *Id.* Among other treatment terms and conditions, the court then ordered the juvenile offender to register as a sex offender. *Id.*, at *5; see TEX. PENAL CODE ANN. § 20.02(a) (West 2011); TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(E)(ii) (West Supp. 2016).⁵ On appeal, the juvenile argued that he lacked the experience and mental capacity to appreciate that his conduct would require him to register as a sex offender and, therefore, “he [could not] be said to have intentionally or knowingly restrained another person.” *Id.* (citing *In re B.W.*, 313 S.W.3d at 820). The Houston court of appeals, however, distinguished *In re B.W.* finding the intent element of the unlawful restraint charge was distinct from the mens rea element required of prostitution.⁶ *Id.*, at *6.

In this case, given the age of Appellant and the charged offense, we find that he met his burden of showing there is legally insufficient evidence to support a knowing and voluntary plea of true to delinquent conduct as alleged by the State. See *Martinez*, 981 S.W.2d at 197; *In re B.W.*, 313 S.W.3d at 824 (“The Legislature has determined that children thirteen and younger cannot consent to sex.”). We disagree with the State that this is a case of buyer’s remorse or a situation where a defendant chose to voluntarily waive defenses and later changed his mind as was rejected in *Ulloa v. State*, 370 S.W.3d 766, 769 (Tex. App.–Houston [14th Dist.] 2011, pet. ref’d). Being a child of only thirteen years old at the time of the offense, Appellant here misunderstood defenses he could assert that he nonetheless waived when he pled true and judicially confessed to committing the underlying sexual assault offense. Other than his plea, no other evidence was provided in support of his plea. To enable Appellant to make a voluntary, knowing, and informed waiver of his constitutional rights, Appellant should have been informed prior to the entry of his plea of true of the potential defense of lack of capacity to consent to sex as a matter of law, and other pertinent defensive theories applicable to his circumstances. See *In re B.W.*, 313 S.W.3d at 824.

Conclusion: Withdrawal of Appellant’s plea of true and stipulation of evidence, and a new trial, will enable the parties to address directly, in the first instance, the question of whether the holding of *In re B.W.* extends to the offense of aggravated sexual assault. Trial presentation will yield a developed record of Appellant’s circumstances and evidence of his and his siblings’ need for services. Thus, we find in these circumstances, it was error for the trial court to refuse to withdraw the plea of true and stipulation of evidence and to order a new trial. Issue One is sustained. Accordingly, we reverse the trial court’s judgment and remand for a new trial.

Dissent: The majority opinion holds that Appellant’s plea of true to the petition was involuntary because he misunderstood the defenses available to him and his attorney did not inform him prior to the entry of his plea regarding the potential defense of lack of capacity to consent to sex as matter of law. I disagree with this decision for four reasons. First, the majority opinion finds the plea involuntary due to faulty legal advice, but it does not review counsel’s performance under the standard required by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See *In re R.D.B.*, 102 S.W.3d 798, 800 (Tex.App.–Fort Worth 2003, no pet.) (holding that a juvenile is entitled to the effective assistance of counsel and that the effectiveness of counsel’s representation must be analyzed under the *Strickland* standard). Second, Appellant did not raise the ineffective assistance of counsel/involuntariness claim in his motion to withdraw the plea or at the hearing. Third, the appellate record does not contain evidence to support the majority opinion’s factual and legal conclusions. Fourth, the majority errs by concluding that *In re B.W.*, 313 S.W.3d 818 (Tex. 2010) is applicable to this aggravated sexual assault case. I respectfully dissent.

The State filed a petition alleging Appellant engaged in delinquent conduct by committing two counts of aggravated sexual assault of a child under the age of fourteen. Counts I and II each contain two paragraphs. Paragraph A of Count I alleged that Appellant intentionally or knowingly caused his sexual organ to penetrate the anus of V.S., a child under the age of fourteen, and Paragraph B alleged that he intentionally or knowingly caused the sexual organ of V.S. to contact or penetrate Appellant’s mouth. Paragraph A of Count II alleged that Appellant intentionally or knowingly caused his sexual organ to penetrate the anus of R.S., a child younger than fourteen years of age, and Paragraph B alleges that Appellant caused the sexual organ of R.S. to contact or penetrate Appellant’s mouth.

Paragraph A of Counts I and II allege aggravated sexual assault of a child under Section 22.021(a)(1)(B)(i) of the Penal Code. TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i) (West Supp. 2016). Under this section, a person commits aggravated sexual assault of a child if he intentionally or knowingly causes the penetration of the anus of a child by any means. TEX. PENAL CODE

ANN. § 22.021(a)(1)(B)(i). Paragraph B of Counts I and II allege aggravated sexual assault of a child under Section 22.021(a)(1)(B)(iii). TEX.PENAL CODE ANN. § 22.021(a)(1)(B)(iii)(West Supp. 2016). Under Section 22.021(a)(1)(B)(iii), a person commits aggravated sexual assault of a child if he intentionally or knowingly causes the sexual organ of a child to contact or penetrate the mouth of another person, including the actor. TEX.PENAL CODE ANN. § 22.021(a)(1)(B)(iii). In contrast with aggravated sexual assault under Section 22.021(a)(1)(A), the State is not required to prove that the sexual contact occurred without the child victim's consent.

In a document titled, "WAIVER, STIPULATION AND ADMISSION," Appellant waived his rights to a jury trial and to confront the witnesses against him, and he judicially confessed to Count I-Paragraph A and Count II-Paragraph B set forth in the State's petition.¹ Appellant expressly agreed that the document containing his waivers and judicial confession could be introduced in support of the juvenile court's judgment. At the adjudication hearing, the juvenile court admonished Appellant in accordance with the requirements of the Texas Family Code, and he informed the court that he understood those rights and confirmed that he had signed the waiver and stipulation document of his own free will. Appellant waived his rights in open court and he entered a plea of true to Count I-Paragraph A and Count II-Paragraph B. At the conclusion of the hearing, the juvenile court accepted the plea of true and set the case for a disposition hearing approximately one month later.

Prior to the disposition hearing, Appellant retained a different attorney, and he filed a "Motion to Withdraw Stipulation and Motion for New Trial" which alleged the following: "The Court has not entered a judgment against the Respondent and desires to withdraw his stipulation to challenge the factual and legal sufficiency of the evidence in a Jury Trial." Significantly, the motion did not allege ineffective assistance of counsel as a basis for finding the plea involuntary. At the hearing on the juvenile Appellant's motion to withdraw his plea of true and stipulation, Appellant's attorney argued that his client wanted to exercise his right to a jury trial and test the sufficiency of the State's evidence before a jury. Counsel directed the juvenile court's attention to the pre-disposition report in the court's file which contained evidence that Appellant had been sexually abused by his father when he was between five and seven years of age. Counsel argued that Appellant would like for a jury to hear this evidence and then decide whether Appellant had committed aggravated sexual assault of a child. The juvenile court engaged in the following exchange with Appellant's attorney: *[The Court]: I guess what I'm missing is the reason why he stipulated to something. Did he just change his mind?* *[Defense counsel]: Yes, Your Honor, he changed his mind.*

Near the conclusion of the hearing, Appellant's attorney added that he did not believe that Appellant had been sufficiently informed "on every single aspect of this case to be able to make a sufficient and adequate, voluntary decision that led to a stipulation." Counsel did not, however, specify who had failed to sufficiently inform Appellant -- the court or prior counsel -- and he did not present any evidence in support of this claim. The juvenile court denied the motion to withdraw the plea and gave counsel additional time to prepare for the disposition hearing.

Appellant argues for the first time on appeal that his plea is involuntary because it was made "without adequate understanding of any defenses available to him." Appellant identifies the defense as his state of mind and explains that he had been sexually abused by his father, and at the time he committed the offenses he "was thinking of the time his father was abusing him." Appellant relies on his mother's testimony presented at the disposition hearing that Appellant's first attorney did not advise her that Appellant could present evidence he was the victim of sexual abuse. This argument relates exclusively to the advice Appellant was given, or not given, by his first attorney. Although Appellant does not state his issue in terms of "ineffective assistance of counsel," the standard of review is dictated by the nature of the issue presented on appeal. Consequently, Appellant's involuntariness claim, which is based on an allegation of deficient legal advice, must be examined under the standards applicable to ineffective assistance of counsel claims. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Ex parte Moody*, 991 S.W.2d 856, 857-58 (Tex.Crim.App. 1999). The standard requires Appellant to show that his attorney's advice was not within the range of competence demanded of attorneys in juvenile proceedings, and there is a reasonable probability that, but for counsel's error, Appellant would not have pled true to the petition and would have insisted on going to trial. See *Ex parte Moody*, 991 S.W.2d at 857-58. The appellate court is required to presume that the attorney's representation fell within the wide range of reasonable and professional assistance. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex.Crim.App. 2001). Ineffective assistance claims must be firmly founded in the record to overcome this presumption. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex.Crim.App. 1999). An appellate court must also bear in mind that when the record is silent and does not provide an explanation for the attorney's conduct, the strong presumption of reasonable assistance is not overcome. *Rylander v. State*, 101 S.W.3d 107, 110-11 (Tex.Crim.App. 2003).

A review of Appellant's motion to withdraw his plea and the reporter's record of the hearing shows that Appellant did not inform the trial court that his plea was involuntary due to the faulty advice of counsel. His attorney instead told the court that Appellant had

changed his mind and he wanted to exercise his right to a jury trial. When presented with claims of ineffective assistance of counsel, the State typically responds by presenting the testimony of counsel.² The State could not do so here because it had no notice that Appellant was alleging that his plea was involuntary because counsel failed to make him aware of certain defenses. More significantly, Appellant did not present any evidence at the hearing on his motion to withdraw the plea regarding the advice given to him by counsel. It was not until the disposition hearing that Appellant's mother testified that when she met with Appellant's first attorney he did not explain to her that Appellant could present evidence, including his own testimony, that he had been the victim of sexual abuse. She stated that if she had known this, she would not have recommended to Appellant that he enter a plea of true. There is no evidence that Appellant was present when his mother had this meeting with counsel or what legal advice counsel provided to Appellant in their discussions. Given the lack of evidence regarding the legal advice given to Appellant and the fact that Appellant's attorney has not been given an opportunity to explain his actions, the Court should find that Appellant has not carried his burden of rebutting the presumption of reasonably effective assistance of counsel. See *Rylander*, 101 S.W.3d at 110-11 ("[T]rial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.").

I also disagree with the majority's holding that lack of capacity to consent to sex is an available defense in this case. The majority opinion relies on *In re B.W.*, 313 S.W.3d 818 (Tex. 2010) in support of its holding. In that case, a thirteen-year-old juvenile was adjudicated delinquent for committing the offense of prostitution based on evidence that she had waved over an undercover police officer who was driving by in an unmarked car and offered to engage in oral sex with him for twenty dollars. *In re B.W.*, 313 S.W.3d at 819. B.W. entered a plea of true to the allegation that she had knowingly agreed to engage in sexual conduct for a fee. *Id.*, 313 S.W.3d at 819. On appeal, B.W. challenged the validity of her adjudication of delinquency for prostitution and argued that "... the Legislature cannot have intended to apply the offense of prostitution to children under fourteen because children below that age cannot legally consent to sex." *Id.*, 313 S.W.3d at 820. The Supreme Court agreed with this argument.

A person commits the offense of prostitution if he or she knowingly offers to engage, agrees to engage, or engages in sexual conduct for a fee. TEX. PENAL CODE ANN. § 43.02(a)(1)(West 2016). Under the Penal Code's definition of "knowingly", a person acts knowingly, or with knowledge, with respect to the nature of his conduct when he is aware of the nature of his conduct. TEX. PENAL CODE ANN. § 6.03(b)(West 2011). Thus, the Supreme Court observed that a person who agrees to engage in sexual conduct for a fee must have an understanding of what one is agreeing to do. See *In re*

B.W., 313 S.W.3d at 819-20. In reversing the adjudication order, the Supreme Court held as follows: Given the longstanding rule that children under fourteen lack the capacity to understand the significance of agreeing to sex, it is difficult to see how a child's agreement could reach the "knowingly" standard the statute requires. Because a thirteen-year-old child cannot consent to sex as a matter of law, we conclude B.W. cannot be prosecuted as a prostitute under section 43.02 of the Penal Code. *In re B.W.*, 313 S.W.3d at 822.

The instant case is distinguishable because the offense of aggravated sexual assault of a child does not require proof that the defendant knowingly agreed to engage in sexual conduct. The petition alleged that Appellant committed aggravated sexual assault of a child under Section 22.021(a)(1)(B)(i) and (iii) of the Penal Code. Under Section 22.021(a)(1)(B)(i), a person commits aggravated sexual assault of a child if he intentionally or knowingly causes the penetration of the anus of a child by any means. TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i). A person acts intentionally, or with intent, with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct. TEX. PENAL CODE ANN. § 6.03(a)(West 2011). Thus, the State was required to prove that Appellant had a conscious objective or desire to cause his sexual organ to penetrate the child victim's anus. Under Section 22.021(a)(1)(B)(iii), a person commits aggravated sexual assault of child if he intentionally or knowingly causes the sexual organ of a child to contact or penetrate the mouth of another person, including the actor. TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(iii). To obtain a finding of delinquent conduct based on this section, the State was required to prove that Appellant had a conscious objective or desire to cause the child victim's sexual organ to contact or penetrate Appellant's mouth. Section 22.021 does not require proof that Appellant knowingly agreed to engage in sexual conduct. In my opinion, the Supreme Court's holding in *B.W.* is inapplicable here.

Further, the adjudication hearing record shows that the trial judge dutifully followed the dictates of Section 54.03(b). TEX. FAM. CODE ANN. § 54.03(b)(1) – (6)(West 2014). Appellant, in a seemingly well-coached, rehearsed recitation, affirmatively testified he understood the allegations against him, the rights he was waiving and the possible consequences of his plea of true. Appellant informed the trial court he was pleading true because the allegations were true, that he was not forced to plea true nor was he promised anything in return for his plea of true. Appellant was fourteen years old on the date of the adjudication hearing and thirteen years old when the alleged offenses were committed. Clearly, based on the record before us, Appellant's plea of true was legally executed by the trial court.

However, putting aside Appellant's suggestion of ineffective assistance of counsel, I firmly believe Section 54.03(b) does not go far enough to protect

juveniles. Children, who legally lack the ability to consent, in a six minute hearing, as in this case, can irrevocably commit themselves to a decision that may affect them lifelong. I am strongly encouraging the legislature to review the child's ability to withdraw or change their plea of true to afford him more procedural protections.

It is in the realm of possibility that Appellant's first attorney gave him faulty legal advice, but the record before this Court is insufficiently developed to permit a finding that this actually occurred here. Appellant is not left without a remedy because he may pursue a petition for writ of habeas corpus in the trial court. See TEX.CONST. art. V, § 8 (district courts have "exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court"); see also *Ex parte Williams*, 239 S.W.3d 859, 861 (Tex.App.--Austin 2007, no pet.). That will give the parties an opportunity to fully develop the record and the trial court can decide the issue under the appropriate legal standard. In the event the trial court denies Appellant's writ application, he may pursue a direct appeal from that ruling to this Court.

Footnotes

- 1 See TEX. PENAL CODE ANN. § 22.021 (West Supp. 2016).
- 2 Compare TEX. PENAL CODE ANN. § 29.03(a)(2) (West 2011) (uses or exhibits a deadly weapon), and TEX. PENAL CODE ANN. § 29.02(a)(2)(West 2011) (threaten or place another in fear of imminent bodily injury or death) .
- 3 "[P]oints of error should be liberally construed to fairly and equitably adjudicate the rights of litigants." *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 863 (Tex. 2005) (citing TEX.R.APP.P. 38.9) (briefs are meant to acquaint the court with the issues in a case).
- 4 Section 43.02(a)(1) of the penal code provides that a person commits an offense if, in return for receipt of a fee, the person "knowingly ... offers to engage, agrees to engage, or engages in sexual conduct[.]" TEX. PENAL CODE ANN. § 43.02(a)(1).
- 5 Article 62.001(5)(E)(ii) provides that unlawful restraint (Section 20.02) qualifies as a reportable conviction or adjudication for purposes of sex offender registration programs. See TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(E)(ii) (West Supp. 2016).
- 6 At least one legal commentator considered the holding of *In re H.L.A.* as an extension of the rationale of *In re B.W.* to prohibited activities beyond prostitution: "By basing its decision on these grounds, the court inadvertently reaffirmed Justice Wainwright's assertion that the precedent of *In re B.W.* applies in all cases where an element of the offense requires a child to knowingly engage in an activity to which they cannot consent." Tara Schiraldi, *For They Know Not What They Do: Reintroducing Infancy Protections for Child Sex Offenders in Light of In re B.W.*, 52 AM. CRIM.L.REV. 679, 692 (2015) (citing *In re H.L.A.*, 2014 WL 1101584, at *1 addressing an argument based upon *In re B.W.*, 313 S.W.3d at 836 (Wainwright, J., dissenting)).
- 1 At the adjudication hearing, the State abandoned Count I-Paragraph B and Count II-Paragraph A. The majority opinion states

that Appellant's plea of true is not supported by any evidence, but this is incorrect. Appellant judicially confessed to Count I-Paragraph A and Count II-Paragraph B, and the judicial confession was admitted into evidence at the adjudication hearing pursuant to Appellant's agreement.

- 2 When a defendant raises an ineffective assistance of counsel claim, he waives the attorney-client privilege and the attorney may testify regarding his actions and representation of the defendant. See *State v. Thomas*, 428 S.W.3d 99, 106 (Tex.Crim.App. 2014).

TRIAL PROCEDURE

TRIAL COURT BEARS THE RESPONSIBILITY TO INSTRUCT A JURY ON THE PROPER BURDEN OF PROOF FOR EXTRANEIOUS OFFENSES (REASONABLE-DOUBT INSTRUCTION), BUT FOR REVERSIBLE ERROR THE TRIAL COURT'S FAILURE TO PROVIDE THAT INSTRUCTION MUST BE SO EGREGIOUS THAT APPELLANT WAS DENIED A FAIR AND IMPARTIAL TRIAL.

¶ 17-5-6. **Smith v. State**, No. 01-15-00841-CR, 2017 WL 3634247 [Tex.App.—Houston (1st Dist.), 8/24/2017].

Facts: During the new punishment hearing, Ned White, a maintenance man and resident at the Apache Springs apartment complex, testified that on May 30, 2009, he saw, while walking through the apartment complex, the complainant, Daniel Sepeda, and the complainant's younger brother, Gregory Ramos, washing the complainant's car near the dumpster. After speaking with the complainant and Ramos, White returned to his friend's apartment to sit outside and watch television. While sitting in a breezeway, White saw two "young black guys" walk past him and into the apartment complex's parking lot. One of the men was wearing a blue bandana, while the other man was putting his bandana on as they walked past White. About thirty minutes later, White heard one or two gunshots and ran inside his friend's apartment. As White looked out the apartment's window, he saw "two young black guys" holding firearms and running. White then exited his friend's apartment, ran toward the dumpster, and saw the complainant lying on the ground, bleeding extensively from his throat and face.

Ramos testified that on May 30, 2009, when he was eleven years old, he helped the complainant wash his car near the dumpster in the Apache Springs apartment complex. At one point, while they were washing the car, the complainant asked Ramos to tell Laura, his girlfriend, who lived in the apartment complex with them, "to go get his gun." The complainant told Ramos that he had seen "two guys watching him." A few minutes later, Laura brought the complainant his firearm, which he then put in his waistband.

As Ramos and the complainant finished washing the car, two black men began walking "side by side" toward them. When the men aggressively yelled "[h]old still,"

“[d]on’t move,” or “something [of] that nature,” the complainant stood up and Ramos “eased up behind him.” (Internal quotations omitted.) The complainant then told Ramos to “get back,” and Ramos “duck[ed]” down in the backseat of the complainant’s car in order to protect himself. Subsequently, Ramos heard two gunshots, “[o]ne followed right after the other, almost at the same time.” When he looked up, he saw the two black men running away. The complainant was lying on the ground and “bleeding a lot” from his neck, and the complainant’s firearm was “missing.”

Harris County Constable’s Office (“HCCO”), Precinct 4, Deputy K. Massey, Jr. testified that on May 30, 2009, while on patrol, he was dispatched to the Apache Springs apartment complex in response to a call that “shots [had been] fired.” When he arrived at the scene, he saw the complainant, who had been shot, lying on the ground.

Houston Police Department (“HPD”) Officer T. Winn testified that on May 30, 2009, he was dispatched to the Doctors Hospital after the hospital’s staff reported a “shooting victim.” When Winn arrived at the hospital, he met with appellant, who had been shot in the shoulder, and Marqueth Jackson. Appellant told Winn that he had been outside Orlando’s, a convenience store, when a black man approached him, demanded money, shot him, and drove away in a black car.⁵

After speaking with appellant, Officer Winn then went to Orlando’s, but he did not find any evidence of blood, shell casings, or firearm use. While at the store, Winn spoke to the security guard, who told him that he had not seen or heard any commotion or gunshots that day. And when Winn viewed the videotape footage from the store’s security camera, he saw no evidence that a shooting had occurred.

Bobby Williams testified that on May 30, 2009, he rode in a car with his cousin, Roderick Brooks, to an apartment complex to pick up appellant. When they arrived at appellant’s apartment, he and his friend, whose name Williams did not know, got into Brooks’s car, and the four men drove to the Apache Springs apartment complex. Brooks parked the car, and appellant and his friend exited, while Williams and Brooks remained in the car. When appellant exited the car, Williams saw that he had “a little bulge” on “the back side of his kidney area.” He then saw appellant and his friend walk through a breezeway.

After about three or four minutes, Williams heard a gunshot, and “a minute later,” appellant and his friend ran up to Brooks’s car. Once appellant was inside the car, Williams saw that there was blood “coming out of [appellant’s] shirt.” Williams also saw that appellant’s friend had a firearm with him that he had not seen before. Appellant, who had a wound to his shoulder, told Williams that “some guy [had] shot him.” As Brooks drove the car out of the Apache Springs apartment complex, Williams saw “a man ... l[ying] on the ground.”

Williams explained that although he wanted to take appellant to the nearest hospital, appellant wanted to go to another hospital, the Doctors Hospital, which was “quite a ways away.” When they finally arrived at the Doctors Hospital, Williams and Brooks carried appellant inside. They then left to go home.

Williams noted that he spoke with law enforcement officers about a month after the shooting. At first, he was not “completely honest” because appellant had wanted him to say that Brooks had picked up appellant “by Orlando’s or some store like that.” Although Williams initially told the officers that Brooks had picked appellant up from Orlando’s, “two or three minutes” later, during the same interview, Williams told them the truth, namely that the four men had gone to the Apache Springs apartment complex “where [appellant] had been shot and [had] shot someone.”

Harris County Sheriff’s Office (“HCSO”) Deputy C. Pool testified that on May 30, 2009, he went to the Apache Springs apartment complex to investigate the shooting of the complainant. At the time, law enforcement officers were looking for two black males. Later on that evening, Pool spoke about the shooting with an “unidentified individual” who told him that a man named “Cornell” had “possibly [been] shot during the incident,” had been taken to a hospital, and had subsequently “gone to Atlanta, Georgia.” When Pool later returned to the scene of the shooting, he found “[a] drop of blood” belonging to appellant.⁶ During his investigation, Pool also discovered that on the day that the complainant had been shot, an HPD report showed that appellant had also been shot, had arrived at the Doctors Hospital, and had reported a robbery. Pool noted that appellant’s whereabouts after the shooting were initially unknown, and he was arrested in Atlanta, Georgia several months later.

Deputy Pool further opined that the shooting involving the complainant was not related to “a drug deal,” nor was it “a simple fight that had gone wrong between” appellant and the complainant. Rather, appellant and his friend had “just walked up” to the complainant in a threatening manner, and appellant and the complainant had “shot each other” at close range “simultaneously.”

Dr. Darshaw Phatak, an assistant medical examiner at the Harris County Institute of Forensic Sciences, testified that the complainant suffered a gunshot wound to his neck. He opined that the complainant had been shot by an individual standing approximately one foot to three feet away. As a result of the gunshot wound, the complainant suffered brain swelling, hemorrhages inside of the brain, epidural, subdural, and subarachnoid hemorrhages surrounding his spinal cord, blood in his respiratory tract and lungs, and a fracture to his left hyoid bone. According to Phatak, the gunshot wound was fatal and the complainant would have collapsed immediately, been unable to move his extremities because his spinal cord had been

perforated, and asphyxiated because of “the hole in his respiratory tract.” Phatak opined that the cause of death was a “gunshot wound of the neck through the larynx, cervical spine, spinal cord, and into the right side of the back” and the manner of death was homicide. Phatak also noted that the complainant would have been able to shoot a firearm either before or at the same time that he sustained his injuries, but not after he had been shot.

Appellant testified that he was in a gang, and at a certain point, he began selling narcotics for his cousin, Brooks, who had given him a firearm and would “drop off drugs to [him] so [that he] could sell [them] for [Brooks] at anytime.” Whenever there was “supposed to ... be[] a deal done, [Brooks] would come pick [appellant] up ... and [he] would do a deal for [Brooks].”

On May 30, 2009, Brooks and Williams picked up appellant and Jackson so that appellant could “make a sale” for Brooks. Appellant explained that on that day, he was supposed to “see some girls” at the Apache Springs apartment complex in order to “drop off some marijuana.” After “mak[ing] the deal,” appellant and Jackson started walking in the apartment complex’s parking lot toward the complainant and Ramos. Jackson was walking behind appellant, who was talking to Brooks on his cellular telephone. At the time, appellant had his firearm in his back pocket. The complainant and Jackson then engaged in a confrontation and began “swinging at each other.” As appellant walked quickly toward Jackson and the complainant, the complainant “pulled out a gun” from his waistband and fired it. Appellant was hit in his right shoulder, and he, acting on “reflex,” “pulled out [his] gun and fired back” at the complainant. Appellant then ran away toward Brooks’s car. Appellant noted that at the time he shot the complainant, he knew him because of a previous “fight in the neighborhood.”

Appellant further testified that Brooks did not drive him to the nearest hospital, but instead took him to the Doctors Hospital. And it was Brooks’s idea to tell law enforcement officers that he had been shot at Orlando’s. After appellant arrived home from the hospital, his father came to pick him up, and they drove to Atlanta, Georgia.

In regard to appellant’s extraneous offenses and bad acts, HPD Sergeant J. Salazar testified that on May 14, 2009, while on patrol, he was dispatched in response to a call from Glenn Bowie, who had “observed [the] males that had robbed him the night before.” Salazar obtained a description of the suspects, i.e., “three black males,” and a description of the car that they were driving. Later that day, Salazar saw appellant driving the suspects’ car, and he initiated a traffic stop. Bowie, who had been brought to the scene of the traffic stop, then identified two of the men in the car as the ones that had robbed him. Bowie also identified appellant from a photographic array as one of the men that had robbed

him, stating, “I never will forget his face. That’s him.” (Internal quotations omitted.) The State subsequently filed robbery charges against appellant.

Darren O’Neal, a juvenile probation officer for the Harris County Juvenile Probation Department, testified that in 2006, he supervised appellant while he was “on probation for assault and bodily injury and burglary of a habitat[ion] with the intent to commit theft.” O’Neal noted that during the time that appellant was under his supervision, appellant “[r]eceived a ticket and [had] some fighting issues at school.” Appellant was “suspended from [his] alternative school” because of fighting, “skipping classes,” suspicion of marijuana use, and “gang affiliation.” He also, while on probation, received a “new charge of evading arrest.” And appellant told O’Neal that he was a member of the 5–Deuce Hoover Crips gang, which O’Neal noted was “violent.”

Karol Davidson, an attorney with the Texas Youth Commission (“TYC”),⁷ testified that appellant spent time in two TYC facilities from April 24, 2007 to January 24, 2008. While at the TYC facilities, he was required to follow their rules which involved “not assaulting others, complying with the facility [] ... [and its] programming, not having contraband, [and] not disrupting the routines of the program.” Davidson explained during his 275–day stay in the facilities, appellant had a “consistent pattern of referrals” and was cited for seventy-nine disciplinary incidents. She further noted that appellant had “behavior issues.”

Former TYC Correctional Officer A. Hyman testified that she issued several citations to appellant while he was in the TYC facilities. For instance, on July 10, 2007, she cited appellant for disruption of the program and being a danger to others because he “swung at [her]” and continued to struggle with her as she attempted to restrain him. On August 7, 2007, Hyman cited appellant for disruption of the program, refusal to follow staff instructions, and being in an undesignated area. And on August 23, 2007 and November 5, 2007, Hyman cited appellant for disruption of the program, failure to abide by the dress code, and refusal to follow staff instructions.

Harris County Juvenile Justice Center Officer J. Watson testified that on March 14, 2010, another officer alerted him to a problem with appellant. Appellant “seemed to be aggravated” and “threatening someone for some reason.” Watson explained that appellant wanted to “run out of his cell” and “attack staff.” He would not calm down, did not want to hear what the officers were saying to him, and would not comply with the building supervisor’s request to sit on his bed so that his food could be delivered to him.

HCSO Deputy T. Vaughn testified that on February 5, 2011, when he was a detention officer at the Harris County Jail, he saw appellant standing in an

unauthorized area, near an emergency exit, and he gave appellant a verbal warning. On February 6, 2011, he again saw appellant in the same unauthorized area. When Vaughn asked appellant to come over to him, appellant did not initially respond. When appellant did eventually walk over to Vaughn, he was agitated and “started making little threats.” Specifically, he told Vaughn: “I’ma beat your ass, nigga. I’ll kill you. You better check my records. I did it before, nigga, and I’ll do it again, bitch ass nigga. Fuck you and Harris County.” (Internal quotations omitted.) Appellant continued to act aggressively toward Vaughn and verbally assaulted him. When Vaughn attempted to restrain appellant, he “jerked away,” pushed Vaughn, and struck him in his left eye with a closed fist. Vaughn felt pain in his eye, which became swollen and bruised.

Texas Department of Criminal Justice (“TDCJ”) Correctional Officer A. McCoy testified that on April 21, 2013, while working at the Holliday Unit in Huntsville, Texas, she heard someone, who she believed to be appellant, “banging on the door” in the cellblock. When McCoy told appellant to stop, he “cursed [her] out” and called her “a dumb ass bitch.” Specifically, appellant stated: “I don’t give a damn about a ho-ass case. Write it, bitch. I hate dumb ass bitches.” (Internal quotations omitted.) McCoy then cited appellant for using abusive, indecent, and vulgar language.

TDCJ Correctional Officer B. Jackson testified that on June 18, 2013, while working in the Education Department at the Holliday Unit, she asked appellant, who was in a line outside the Education Department’s building, to tuck in his shirt, pull up his pants, and move up in line. He refused to comply with the previous orders that Jackson had given him. And he, using vulgar language, told her that “he didn’t have to do a mother fucking thing” and “he had 40 years.” Jackson cited appellant for the incident.

HCSO Detention Officer D. Isbell testified that while he was working at the Harris County Jail on June 23, 2014, appellant refused to follow his instructions. Appellant then “got into an aggressive stance” and then said to Isbell and his partner that “[i]t look[ed] like someone needs an ass whooping.” (Internal quotations omitted.) He further stated: “I’m here for murder. I already caught a case for assault on one of you all. Look that shit up.” (Internal quotations omitted.) Once appellant was restrained, he continued to threaten the detention officers as they took him to a “separation cell.” Isbell then cited appellant for threatening staff and refusing to obey orders.

The trial court admitted into evidence records from the Harris County Jail Disciplinary Committee, State’s Exhibit 282,⁹ which show that the committee found appellant guilty of the major offense of fighting on July 22, 2010; the major offense of “poss[ession]/manuf[acturing] of any weapon” on September 5, 2010; the minor offense of refusing to obey an order on September 29, 2010; the major offense of “assault on inmate” on October 24, 2010;

the major offense of “engaging in sexual acts” on December 28, 2010; the major offense of “engaging in sexual acts” on October 9, 2011; the major offense of “engaging in sexual acts” on October 22, 2011; the minor offense of “conduct which disrupts” on March 9, 2012; the major offense of threatening staff on June 23, 2014; the major offense of tampering on July 15, 2014; and the major offense of trafficking on September 20, 2014.¹⁰

The trial court also admitted into evidence appellant’s disciplinary records from the TDCJ, which document appellant’s wrongdoings and rule violations while he was in the custody of the TDCJ. The records show that appellant was found guilty of the offense of masturbation on July 12, 2012; the offense of “out of place” on July 24, 2012; the offense of failure to obey orders on August 21, 2012; the offense of failure to obey orders on September 14, 2012; the offense of “[u]sing vulgar language” on April 23, 2013; the offense of failure to obey orders on June 18, 2013; the offense of “fail[ure] to turn out for work assignment” on June 24, 2013; the offense of “[o]ut of place” on June 30, 2013; the offense of fighting on October 21, 2013; the offense of “masturbat[i]on in public” on November 20, 2013; and the offense of “masturbat[i]on in public” on December 4, 2013.

In regard to his extraneous offenses and bad acts, appellant testified that when he was in the custody of TDCJ and Harris County, he continuously “caus[ed] problems,” acted violently, and threatened the employees. Further, he stated that he did not “deny any of that” which the other witnesses had testified to about his actions while in custody. And he agreed that he had committed the offenses listed in the records of the Harris County Jail Disciplinary Committee, State’s Exhibit 282. Appellant also admitted to committing the following criminal offenses as a juvenile: “assault, bodily injury, assault, bodily injury, burglary of a habitation, possession of marijuana, evading arrest, possession of marijuana, [and] burglary of a habitation.” He further stated that he had committed infractions while he was in the custody of the TYC and Harris County. And he had committed various criminal offenses in the past. Specifically, appellant noted that while in the TYC facilities, he had been cited for seventy-nine incidents during his 275-day stay.

Appellant further acknowledged that he had been involved with a gang, the 5–Deuce Hoover Crips, since he was twelve years old, and he had committed criminal offenses with members of the gang. Although appellant did not admit to robbing Bowie, he did state that he had gotten into an altercation with Bowie. Appellant also noted that he began selling marijuana when he was fifteen or sixteen years old. And he had lied to law enforcement officers about being shot at Orlando’s. Appellant further admitted to lying under oath and noted that he was arrested in this case after he was stopped for jaywalking while he was in living Atlanta, Georgia.

In his first issue, appellant argues that the trial court erred in not sua sponte instructing the jury on the proper burden of proof for extraneous offenses and bad acts because “[t]he State introduced extraneous offense and bad acts evidence during the punishment hearing” and he was “denied a fair trial.” See TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (Vernon Supp. 2016).

Held: Affirmed as Modified (The written judgment was modified because it reflected a sentence of 40 yrs when the oral pronouncement was 45 yrs.)

Memorandum Opinion: In regard to the admissibility of evidence of extraneous offenses and bad acts in non-capital cases during the punishment phase of trial, the Texas Code of Criminal Procedure provides, in pertinent part, as follows:

Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act. Id. (emphasis added); see also Huizar v. State, 12 S.W.3d 479, 483–84 (Tex. Crim. App. 2000) (article 37.07, section 3(a)(1) governs admissibility of evidence at punishment phase in all non-capital cases).

While extraneous-offense and bad-act evidence is generally admissible under article 37.07, section 3(a)(1), a trier-of-fact may not consider such evidence in assessing punishment unless it first concludes beyond a reasonable doubt that the defendant committed the offenses or acts. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1); see also Huizar, 12 S.W.3d at 484; Fields v. State, 1 S.W.3d 687, 688 (Tex. Crim. App. 1999); Burks v. State, 227 S.W.3d 138, 149–50 (Tex. App.—Houston [1st Dist.] 2006, pet. ref’d). If the trier-of-fact determines beyond a reasonable doubt that the defendant committed the extraneous offenses or bad acts, it may then use the evidence however it chooses in assessing punishment. Huizar, 12 S.W.3d at 484; Fields, 1 S.W.3d at 688.

When evidence of extraneous offenses or bad acts is admitted during the punishment phase of a trial, the trial court must instruct the jury that the evidence may only be considered if the State proves the commission of the extraneous offenses or bad acts beyond a reasonable doubt. See TEX. CRIM. PROC. CODE ANN. art. 36.14 (Vernon 2007) (trial court shall instruct jury

on law applicable to case); Huizar, 12 S.W.3d at 483–84 (article 37.07, section 3(a)(1), “law applicable” in non-capital punishment cases and trial courts must sua sponte instruct juries on reasonable-doubt standard (internal quotations omitted)); Burks, 227 S.W.3d at 150 (when evidence of extraneous offenses or bad acts introduced in punishment phase of non-capital trial, trial court has independent duty to charge jury pursuant to article 37.07, section 3(a)(1)). Without a reasonable-doubt instruction contained in the trial court’s charge to the jury, the possibility exists that a “jury might apply a standard of proof less than reasonable doubt in its determination of the defendant’s connection to such offenses and bad acts, contrary to [article 37.07,] section 3(a)[(1)].” Huizar, 12 S.W.3d at 484. Because a trial court bears the responsibility to so instruct a jury, a defendant is not required to make an objection to preserve error, and the failure to so instruct the jury constitutes error. Huizar, 12 S.W.3d at 484; Burks, 227 S.W.3d at 150 (“The responsibility to instruct the jury lies with the trial court: the defendant is not required to request the instruction or object to its omission to preserve a claim of article 37.07, section []3[](a)(1) error”).

As noted in his brief by appellant, the State introduced the following evidence of extraneous offenses and bad acts during the punishment phase of trial: the “alleged robbery of Bowie” by appellant; his prior “juvenile adjudications”; his “alleged criminal street gang membership”; and his “alleged disciplinary violations and criminal offenses while he was in the custody of various Juvenile Justice Institutions, the Harris County Sheriff’s Office, and the Texas Department of Criminal Justice.” And the trial court should have instructed the jury that it “must first find that the alleged offenses and bad acts were true beyond a reasonable doubt before [it] could consider them in assessing [his] punishment.”

Here, it is undisputed that the trial court did not provide the jury with the required reasonable-doubt instruction. Accordingly, we hold that it erred in not instructing the jury regarding the evidence of adjudicated extraneous offenses and bad acts introduced by the State at trial.¹³ See TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1); Huizar, 12 S.W.3d at 484; Zarco v. State, 210 S.W.3d 816, 821–23 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

In regard to harm, however, appellant did not request an article 37.07, section 3(a)(1) instruction or object to its omission from the trial court’s charge to the jury. Under such circumstances, jury charge error does not require reversal unless the record shows that it was so egregious that appellant was denied a fair and impartial trial. Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); Graves v. State, 176 S.W.3d 422, 435 (Tex. App.—Houston [1st Dist.] 2004, pet. struck); see also Zarco, 210 S.W.3d at 821 (“[T]he failure to object increases [defendant]’s burden on appeal, imposing a higher hurdle [he] must overcome—namely egregious

harm—before we can reverse.”). In determining the degree of harm, we look to the entire jury charge, the state of the evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole. *Almanza*, 686 S.W.2d at 171; see also *Zarco*, 210 S.W.3d at 823. Appellant must show that he suffered actual rather than theoretical harm. *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011).

During the punishment phase of trial, the State introduced evidence about the primary offense and certain unadjudicated extraneous offenses and bad acts committed by appellant. Notably, however, appellant also testified extensively about his extraneous offenses and bad acts. Specifically, he testified that while he was in the custody of TDCJ and Harris County, he continuously “caus [ed] problems,” acted violently, and threatened the employees. And he agreed that he had committed the offenses listed in the records from the Harris County Jail Disciplinary Committee, State’s Exhibit 282. Appellant also admitted to committing infractions while he was in the custody of the TYC and Harris County. And that he had committed various criminal offenses in the past. Appellant further noted that while he was in the TYC facilities, he was cited for seventy-nine incidents during his 275-day stay.

Appellant also testified that he was a member of a gang, the 5–Deuce Hoover Crips, and had committed criminal offenses with members of the gang. He also admitted to engaging in an altercation with Bowie, although he denied robbing Bowie, selling narcotics, lying to law enforcement officers, and lying under oath. See *Johnson v. State*, 181 S.W.3d 760, 766 (Tex. App.—Waco 2005, pet. ref’d) (“Texas courts have concluded that egregious harm has not been shown because of the omission of a reasonable doubt instruction when ... the evidence connecting the defendant to the extraneous conduct is ‘clear-cut’”); see also *Lopez v. State*, No. 2–07–033–CR, 2008 WL 4052955, at *1–3 (Tex. App.—Fort Worth Aug. 29, 2008, pet. ref’d) (mem. op., not designated for publication) (no egregious harm where defendant testified about his cocaine use); *Moore v. State*, 165 S.W.3d 118, 126 (Tex. App.—Fort Worth 2005, no pet.) (no egregious harm where defendant testified on direct examination to his narcotics use and “drunk driving”).

Additionally, although the State, during its closing argument, certainly discussed certain unadjudicated extraneous offenses and bad acts committed by appellant, appellant’s counsel, during his closing argument, repeatedly referenced such evidence as well. For instance, appellant’s counsel told the jury that appellant had “commit[ted] a whole lot of offenses” since the age of twelve years old and he had seventy-nine “disciplinary issues” while in the custody of TYC. He acknowledged that appellant had committed the major offense of trafficking while in the Harris County Jail. He also stated that appellant did not deny that he had sold narcotics or that he was involved in a gang.

And appellant’s counsel noted that appellant had lied and fought while in jail.

In regard to the trial court’s charge to the jury, although the trial court did not to instruct the jury that it could not consider evidence of extraneous offenses or bad acts unless proven beyond a reasonable doubt, the charge did include an instruction that “[t]he burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant.”¹⁴ See *Gonzalez v. State*, No. 13–15–00166–CR, 2016 WL 2854288, at *5–6 (Tex. App.—Corpus Christi July 6, 2016, no pet.) (mem. op., not designated for publication); *Garcia v. State*, No. 01–08–00057–CR, 2009 WL 566523, at *1–3 (Tex. App.—Houston [1st Dist.] Mar. 5, 2009, pet. ref’d) (mem. op., not designated for publication) (although jury charge on punishment did not contain instruction on burden of proof for extraneous offense, it did contain general instruction “[t]he burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant” (internal quotations omitted)); *Escovedo v. State*, 902 S.W.2d 109, 114 (Tex. App.—Houston [1st Dist.] 1995, pet. ref’d) (jury charge included instruction “[t]he burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant” (internal quotations omitted)). Further, during voir dire, the trial court explained to the jury:

[I]f there are other things that the State wishes to prove ... to make [the] assessment of punishment go up or down, they have to prove those things to [the jury] ... beyond a reasonable doubt, okay? If there is another instance for which—that they want [the jury] to consider, which [it is] allowed to consider when assessing the punishment for the murder, they have to prove that other instance beyond a reasonable doubt.... The State still has a legal obligation to prove to [the jury] anything they bring to [it] in the punishment phase of the trial that will be important when ... assessing punishment, they have to prove those things beyond a reasonable doubt.

See *Tucker v. State*, 456 S.W.3d 194, 213 (Tex. App.—San Antonio 2014, pet. ref’d) (during voir dire “prosecutor told the jury that the burden never shifted to the defendant and the State had to prove its case beyond a reasonable doubt”).

Finally, we note that the State did not seek the maximum punishment available and the punishment assessed by the jury is well below that which the State had requested and the maximum sentence allowed by law.¹⁵ See *Johnson*, 181 S.W.3d at 766 (“Texas courts have concluded that egregious harm has not been shown because of the omission of a reasonable doubt instruction when ... the punishment assessed is at the low end or in the middle of the available punishment range and/or significantly less than sought by the prosecution”); *Graves*, 176 S.W.3d at 435–36 (error not harmful where State discussed extraneous offenses during closing argument, but did not seek, and jury did not assess, maximum punishment); *Tabor v. State*, 88

S.W.3d 783, 788–89 (Tex. App.–Tyler 2002, no pet.) (court’s failure to sua sponte give reasonable-doubt instruction about extraneous offenses offered during punishment phase harmless error because sentence imposed was well within punishment range and State asked for greater sentence). Here, the jury assessed appellant’s punishment at confinement for forty-five years, and it did not impose a fine. Cf. TEX. PENAL CODE ANN. § 12.32(a)–(b) (Vernon 2011).

Conclusion: After reviewing the record in this case in its totality, we hold that the trial court’s failure to provide the jury with an article 37.07, section 3(a)(1) reasonable-doubt instruction did not deprive appellant of a fair and impartial punishment hearing. We overrule appellant’s first issue.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

SHOULD THE VIABILITY OF A DETERMINATE SENTENCE DISPOSITION BE A FACTOR IN A MOTION FOR DISCRETIONARY TRANSFER TO ADULT COURT?

¶ 17-4-2. **In the Matter of E.H.**, MEMORANDUM, No. 01-16-00802-CV, 2017 WL 3526717 [Tex.App.–Houston (1st Dist.), 8/17/2017].

Facts: The charges against E.H. stem from his young niece’s allegations that he exposed himself to her and sexually abused her when she was 7 years’ old and he was almost 17 years’ old. The Brazoria County District Attorney’s Office filed a Petition for Discretionary Transfer to Criminal Court seeking to have proceedings against E.H. for indecency with a child and sexual assault of a child transferred from juvenile court to district court.

Held: Affirmed

Memorandum Opinion: In light of our analysis of the sufficiency of the evidence to support the Section 54.02(f) factors and any other relevant evidence, we must next review the trial court’s ultimate waiver decision under an abuse-of-discretion standard, i.e., we must determine whether the juvenile court acted without reference to guiding rules or principles. In re K.J., 493 S.W.3d 140, 154 (Tex. App.–Houston [1st Dist.] 2016, no pet.) (citing Moon, 451 S.W.3d at 47). “In other words, was its transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria?” Id.

Applying this standard, we conclude that the juvenile court did not abuse its discretion in waiving jurisdiction and transferring appellant’s case to criminal district court. Section 54.02(d) of the Texas Family Code mandates the court “order and obtain a complete diagnostic study, social evaluation, and full

investigation of the child, his circumstances, and the circumstances of the alleged offense.” The court must hold a hearing, § 54.02(c), during which the court may consider “written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses.” § 54.02(e). Finally, the court must state specifically in any transfer order the reasons for waiver.

Here, the court compiled and comprehensively reviewed all the materials required under section 54.02(d) & (e) and conducted the hearing as required under section 54.02(c). It was presented with evidence of sexual crimes, committed more than once, against a 7-year-old victim, when E.H. was almost 17 years’ old. Dr. Fuller testified that E.H. has the sophistication and maturity to participate in an adult trial, and E.H.’s juvenile probation officer testified that she did not believe the juvenile court system could rehabilitate E.H.

Conclusion: Based on our review of the entire record, summarized in the background section of this opinion, we conclude that E.H. has not established that the court “acted without reference to guiding rules or principles,” or that its transfer was “arbitrary, given the evidence on which it was based,” Moon, 451 S.W.3d at 47. Accordingly, we hold that the juvenile court’s waiver of jurisdiction and transfer to criminal district court was within the court’s discretion. We overrule E.H.’s sole point of error.

Concurring Opinion: This case involves a juvenile charged with sexually molesting his 7-year-old niece. In its petition to transfer the proceedings to criminal court, the State alleged that “the prospects of adequate protection of the public and likelihood of reasonable rehabilitation of the child by the use of the procedures, services, and facilities currently available to the Juvenile Court” were “in serious doubt.”

The evidence at the hearing established that E.H. was 16 years old at the time of the alleged offenses. There was evidence of a history of sexual abuse in his immediate family, as E.H.’s sister testified that their father was in prison for molesting her. E.H. does not have a criminal record. He has a history of some marijuana use and acting out while confined in juvenile detention for the underlying offenses. He has exhibited an uncooperative attitude toward officials. He operates at a low average intellectual range and, possibly because of ADHD, he has had problems with school. He laughs when he is nervous, even in situations in which that reaction is inappropriate, demonstrating immaturity.

There was testimony at his transfer hearing that the juvenile probation department believes that participation in available rehabilitative programs for a minimum of two years is necessary for a “person to get what they need for a sexual charge.” Significantly, E.H.’s probation officer testified that general juvenile

sex-offender probation conditions, coupled with participating in a drug-treatment program, would be appropriate for E.H.

But the juvenile probation office can only confine or supervise E.H. until he turns 18. Accordingly, by the time of the adult-certification hearing, there were only five months left until E.H.'s 18th birthday. Thus, E.H.'s probation office further testified that E.H. should be certified as an adult, as the period for which the juvenile probation office would continue to have jurisdiction over E.H. was far short of the minimum two years needed to provide rehabilitative services.

The juvenile court's order waiving its jurisdiction recites that E.H. "is of sufficient sophistication and maturity to be tried as an adult," and that "because of the records and previous history of the child and because of the extreme and severe nature of the alleged offense(s), the prospects of adequate protection of the public and likelihood of reasonable rehabilitation of the child by use of the procedure, services and facilities which are currently available to the Juvenile Court are in doubt." But a review of the record actually reflects that the primary evidence supporting the juvenile court's decision is the probation officer's testimony that E.H. does not have time to complete appropriate juvenile rehabilitation services before his 18th birthday.

There are provisions in the Family Code, however, that can extend the jurisdiction of the juvenile court beyond the age 18. Specifically, a habitual juvenile offender, or a juvenile accused of a laundry list of offenses (including sexual assault and aggravated sexual assault, the offenses for which E.H. was charged), may be referred by the prosecuting attorney to the grand jury for a determinate sentence. TEX. FAM. CODE § 53.045. Determinate sentences allow the juvenile courts to maintain jurisdiction beyond a juvenile's 18th birthday, resulting in several possible outcomes, including release before completion of the juvenile's sentence, supervised release at the age of 19, transfer to the Texas Department of Criminal Justice (TDCJ) to serve the remainder of a sentence, or transfer to TDCJ jurisdiction to serve a remaining sentence on parole. See, e.g., *In re J.H.*, 150 S.W.3d 477, 480 n.1 (Tex. App.—Austin 2004, pet. denied) ("A determinate sentence places a juvenile under the custody and control of the Texas Youth Commission with several possible outcomes."). "In enacting the determinate sentencing statutes, the legislature has furthered a compelling state interest by striking a balance between the state's interest in providing for the care, protection and development of its children and its interest in providing protection and security for its general citizenry." *In re S.B.C.*, 805 S.W.2d 1, 4 (Tex. App.—Tyler 1991, writ denied) (citation omitted).

Unlike in many adult certification cases, the State's own witnesses agreed in this case that the juvenile system has programs available that could appropriately address E.H.'s alleged sexual misconduct and his admitted substance abuse. E.H. thus argues that the

juvenile court abused its discretion by waiving jurisdiction because determinate sentencing could extend the juvenile court's jurisdiction so he could avail himself of those services and because the time constraints were the only circumstance supporting adult certification. In response, the State does not argue that determinate sentencing would be insufficient to meet the needs of E.H. and the community. Rather, the State contends that the prosecutor had the discretion to pursue a determinate sentence and simply chose not to do so. Thus, the State argues that the availability of a determinate sentence to rehabilitate E.H. and to protect the community is irrelevant to this Court's analysis of whether the juvenile court abused its discretion in waiving jurisdiction.

This argument is troubling because it is the State's burden to prove that the prospects of adequate protection of the public and likelihood of reasonable rehabilitation of the child by the use of the procedures, services, and facilities currently available to the juvenile court are in serious doubt. *Moon*, 451 S.W.3d at 40. Perhaps there is a reason that a determinate sentence would not be appropriate here, but the record does not reflect one. The testimony that E.H. would turn 18 before he could adequately avail himself of services under the juvenile court system is sufficient to support the trial court's waiver under the applicable standard of review. But when the facts of a case reflect that a determinate sentence may be feasible, and the juvenile argues that feasibility defeats the State's burden of proof in a waiver-of-juvenile-court-jurisdiction proceeding, the policies behind preserving juvenile court jurisdiction over children when possible are not served by allowing a prosecutor discretion to not avail itself of a procedure and offer no explanation for that decision.

While the State is the only party that can seek a determinate sentence, that does not mean that the State's decision not to do so when it would be appropriate should insulate it from inquiry. The State should seek a determinate sentence if aging out of the system is the only barrier to a juvenile's adequate punishment and rehabilitation. If the State chooses not to, it should be put to the burden—at a minimum—of establishing why such a choice is not appropriate unless it is otherwise obvious on the record that a determinative sentence and reasonable rehabilitation are not viable options in the case. Putting such information in the record will enable juvenile courts to make more informed decisions, decreasing the risk of juveniles being forced into criminal court simply because of their age in contravention of laws requiring that they be served in juvenile court when possible.

