JUVENILE CASELAW UPDATE 2018

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

In the Matter of A.A.R.
Tex.App—El Paso, 4/28/2017

NO ABUSE OF DISCRETION SHOWN WHERE THE RECORD SHOWS THAT JUVENILE WAS ADMONISHED, AND HE WAS AWARE AND UNDERSTOOD THE CONSEQUENCES OF ENTERING A PLEA OF TRUE.

In the Matter of D.W.
Tex.App.—Ft. Worth, 10/26/2017

APPOINTED COUNSEL CONTINUES TO REPRESENT THE CHILD "UNTIL THE CASE IS TERMINATED, THE FAMILY RETAINS AN ATTORNEY, OR A NEW ATTORNEY IS APPOINTED BY THE JUVENILE COURT.*

Family Code
Sec. 51.101
APPOINTMENT OF ATTORNEY AND CONTINUATION OF REPRESENTATION.

(a) If an attorney is appointed under Section 54.01(b-1) or (d) to represent a child at the initial detention hearing and the child is detained, the attorney shall continue to represent the child until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court. Release of the child from detention does not terminate the attorney's representation.

In re J.B.H.
Tex.App.—Houston (14th Dist.), 8/17/2017

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.

In re Bell
Tex.App.—Houston (1st. Dist) 6/13/17

ONCE A JUVENILE CERTIFICATION AND TRANSFER CASE IS REINSTATED BY THE COURT OF CRIMINAL APPEALS, ARTICLE 44.04(B) TCCP REQUIRES THE IMMEDIATE ARREST OF THE JUVENILE.

In re J.A.
Tex. App.—Houston (1st Dist.), 12/12/2017

TRIAL JUDGE ABUSED HIS DISCRETION IN SIGNING THE "NUNC PRO TUNC ORDER TO CORRECT JUDGMENT" AND THE "ORDER ON MOTION TO DISMISS FOR LACK OF JURISDICTION AND MOTION FOR ENTRY NUNC PRO TUNC."

Boyd v. State
Tex.App.—Dallas, 8/18/2017

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.

Agers v. State
Tex. App.—Dallas, 1/22/2018

AGGRAVATED SEXUAL ASSAULT COMMITTED BY A JUVENILE DOES NOT QUALIFY AS SEXUALLY VIOLENT OFFENSE FOR AFFIRMATIVE FINDINGS PURPOSES IN ADULT COURT.

TCCP Art. 42.015. FINDING OF AGE OF VICTIM

(b) In the trial of a sexually violent offense, as defined by Article 62.001, the judge shall make an affirmative finding of fact and enter the affirmative finding in the judgment in the case if the judge determines that the victim or intended victim was younger than 14 years of age at the time of the offense.

TCCP Art. 62.001

(6) "Sexually violent offense" means any of the following offenses committed by a person 17 years of age or older:

(A) an offense under Section 21.02 (Continuous sexual abuse of young child or children), 21.11(a)(1) (Indecency with a child), *22.011 (Sexual assault)*, or 22.021 (Aggravated sexual assault), Penal Code;

Eguade v. State
Tex.App.—El Paso, 7/31/2017

IN TRIAL AFTER DISCRETIONARY TRANSFER TO ADULT COURT, NO ERROR COMMITTED BY FAILING TO INSTRUCT THE JURY THAT JUVENILE COULD NOT BE CONVICTED FOR CONDUCT COMMITTED BEFORE HIS FOURTEENTH BIRTHDAY.

DeLaCruz v. State

Tex.App.—Corpus Christi-Edinburg, 6/22/2017

A FELONY JUVENILE ADJUDICATION WITH A COMMITMENT TO TJJD IS NOT CONSIDERED FINAL FELONY CONVICTION FOR HABITUAL FELONY OFFENDER. TPC §12.42(f)*

TEXAS PENAL CODE

§12.42(f)

(f) For the purposes of Subsections (a), (b), and (c)(1),* an *adjudication* by a juvenile court under Section 54.03, Family Code , that a child engaged in delinquent conduct on or after January 1, 1996, constituting a *felony offense* for which the child is *committed to the Texas Juvenile Justice Department*… …, is a final felony conviction.

Specifically excludes Subsection (d) (habitual offender provision in the Penal Code)

In the Matter of R.R.S.

Tex.App.—El Paso, 8/25/2017 (with dissent)

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. See *In re B.W.**

In the Matter of R.R.S.

Majority Opinion

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.

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.

Sex Offenders and Social Media

A North Carolina law made it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages."

A registered sex offender, after having a traffic ticket dismissed, posted the following on Facebook:

"Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent..... Praise be to GOD, WOW! Thanks JESUS!"

The registered sex offender was charged with a felony as per the statute!

N.C. Ct of App.: Struck down the conviction on constitutional grounds.
N.C. Sup Ct.: Reversed the lower court ruling, upholding the conviction.
On to the Supreme Court. *

In the Matter of J.C.C.

Tex. App.—El Paso, 1/5/2017

THE MANDATORY LANGUAGE OF SECTION 51.20(C), STANDING ALONE, MAY NOT PRECLUDE A COMMITMENT TO THE TEXAS JUVENILE JUSTICE DEPARTMENT.*

Texas Family Code

Sec. 51.20. PHYSICAL OR MENTAL EXAMINATION

(c) If, while a child is under deferred prosecution supervision or court-ordered probation, a qualified professional determines that the child has a mental illness or mental retardation or suffers from chemical dependency and the child is not currently receiving treatment services for the mental illness, mental retardation, or chemical dependency, the probation department *shall* refer the child to the local mental health or mental retardation authority or to another appropriate and legally authorized agency or provider for evaluation and services.

Packingham v. North Carolina

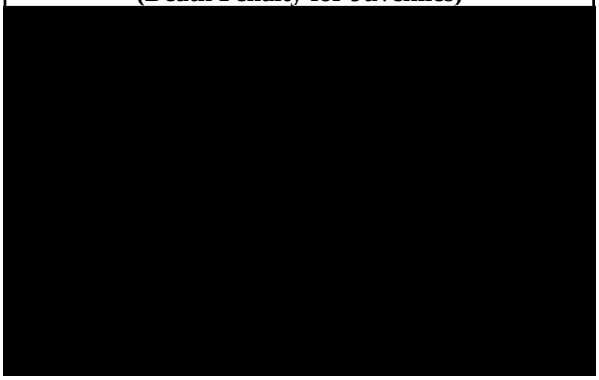
U.S. Sup. Ct., 2/27/2017

UNITED STATES SUPREME COURT HELD A NORTH CAROLINA STATUTE MAKING IT A FELONY FOR A REGISTERED SEX OFFENDER TO ACCESS A SOCIAL NETWORKING WEBSITES UNCONSTITUTIONAL, BECAUSE THE STATUTE FORECLOSED ACCESS TO SOCIAL MEDIA ALTOGETHER, PREVENTING THE USER FROM ENGAGING IN THE LEGITIMATE EXERCISE OF THEIR FIRST AMENDMENT RIGHTS.

Kennedy, delivered opinion, in which Ginsberg, Breyer, Sotomayor, and Kagan, joined. Alito, Roberts, and Thomas concurred in the judgement only. Gorsuch, took no part.

Supreme Court: Roper v. Simmons

(Death Penalty for Juveniles)



In the Matter of P.M.
Tex. App.—El Paso, 1/12/2018

JUVENILE'S CONFRONTATION RIGHTS UNDER THE SIXTH AMENDMENT WERE VIOLATED WHEN JUVENILE WAS REQUIRED TO CALL THE CHILD/COMPLAINANT TO TESTIFY BECAUSE THE STATE DID NOT CALL THE CHILD TO TESTIFY AFTER CALLING OUT-CRY WITNESSES TO TESTIFY.*

T.C.C.P. Art. 38.072
HEARSAY STATEMENT OF CERTAIN ABUSE VICTIMS

Sec. (a) This article applies only to statements that:

(2) were made by the child against whom the charged offense or extraneous crime, wrong, or act was allegedly committed; and

(3) were made to the first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense or extraneous crime, wrong, or act.

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

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

(A) notifies the adverse party of its intention to do so;

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

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

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

(3) the child or person with a disability *testifies or is available to testify* at the proceeding in court or in any other manner provided by law.

When the State proffers the outcry statement under article 38.072 TCCP:

It is incumbent upon the accused to object on the basis of confrontation and/or due process (think *Crawford v. Washington*).

State has two choices:

1. Announce its intention to call the child declarant to the stand, or

2. make a showing both that 1) the out-of-court statement is one that is reliable under the totality of circumstances in which it was made, and 2) use of the out-of-court statement in lieu of the child's testimony at trial "is necessary to protect the welfare of the particular child witness" in that particular case. *In the Matter of M.P.**

In the Matter of P.M. cont'd

If the State follows either of these two courses, the accused's objection on confrontation grounds should be overruled. Otherwise, the confrontation objection is a valid one and should be sustained, irrespective of whether the State has satisfied all of the statutory predicate for admissibility of hearsay under Article 38.072…

Because the State did not call the child to testify nor showed that the outcry testimony was necessary to protect the welfare of the child, we conclude the trial court should have sustained the juvenile's confrontation objections as valid, regardless of the State's compliance with the article 38.072 predicates for the admissibility of hearsay, and erred in failing to do so.

Fact Situation
Professional Reports

During juvenile's disposition hearing, juvenile's attorney offers into evidence a letter prepared by a psychiatrist who was appointed by the trial court as an expert to assist in the preparation of the juvenile's defense. Juvenile's attorney did not call the psychiatrist to testify. The letter, which was addressed to the juvenile's attorney, contained the psychiatrist's findings based upon his initial consultation with the juvenile.

The trial court sustained the state's hearsay objection, and juvenile's attorney later made an informal bill of exception or offer of proof as to the excluded exhibit. Juvenile's attorney explained to the trial court that the exhibit was admissible because it was authenticated by the probation officer and because she had a copy of it in her file.

Is the psychiatrist's letter admissible?*

Texas Family Code
Sec. 54.04. Disposition Hearing

(b) At the disposition hearing, the juvenile court, notwithstanding the Texas Rules of Evidence or Chapter 37, Code of Criminal Procedure, may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses… *

In the Matter of A.V.
Tex. App.—Eastland, 6/8/2017

WHEN MAKING AN OFFER OF PROOF, "THE PARTY MUST SPECIFY THE PURPOSE FOR WHICH THE EVIDENCE IS OFFERED AND GIVE THE TRIAL JUDGE REASONS WHY THE EVIDENCE IS ADMISSIBLE" AND THE REASONS MUST COMPORT WITH THE ARGUMENTS ASSERTED ON APPEAL.

Redmond v. State
Tex. App.—Texarkana, 12-21-2017

JURISDICTION LIES IN ADULT COURT WHEN A DEFENDANT HAS TURNED 20 YEARS OF AGE BEFORE HE IS ARRESTED, INDICTED, AND TRIED.

Garcia v. State
Tex.App.—Dallas, 6/23/2017

JUVENILE PROBATION OFFICER'S TESTIMONY ABOUT CRIMES OF OTHER JUVENILE'S BECAME RELEVANT WHEN JUVENILE'S COUNCIL CHOOSE TO QUESTION HER ABOUT COMPARISONS BETWEEN THIS JUVENILE AND OTHER JUVENILES SHE HAD SUPERVISED.

In the Matter of A.V.
Tex. App.—Eastland, 6/8/2017

WHEN A PROSPECTIVE JUROR EXPRESSES BIAS OR PREJUDICE IN FAVOR OF OR AGAINST THE DEFENDANT (AS OPPOSED TO A BIAS OR PREJUDICE AGAINST THE LAW), IT IS NOT ORDINARILY DEEMED POSSIBLE FOR THE PROSPECTIVE JUROR TO BE QUALIFIED BY STATING THAT THEY CAN LAY ASIDE SUCH PREJUDICE OR BIAS.

In the Matter of D.M.
Tex. App.—Corpus Christi-Edinburg, 1/18/2018

IN A WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT HEARING, TAKING JUDICIAL NOTICE OF ALL OF THE DOCUMENTS IN THE TRIAL COURT'S FILE IS PERMITTED BY STATUTE.*

Texas Family Code
Sections 54.02(d) & 54.02(e)

Section 54.02(d):
prior to the hearing, the juvenile court shall *order and obtain* a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.

Section 54.02(e):
at the transfer hearing the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses.

DISCRETIONARY WAIVER TO ADULT COURT VS. DETERMINATE SENTENCE

THE STATE FILES A PETITION FOR DISCRETIONARY TRANSFER TO ADULT COURT.

THE STATE'S OWN WITNESSES AGREE THAT THE JUVENILE SYSTEM HAS PROGRAMS AVAILABLE THAT COULD APPROPRIATELY ADDRESS THE JUVENILE'S ALLEGED SEXUAL MISCONDUCT AND HIS ADMITTED SUBSTANCE ABUSE.

THE STATE DID NOT ARGUE THAT DETERMINATE SENTENCING WOULD BE INSUFFICIENT TO MEET THE NEEDS OF THE JUVENILE AND THE COMMUNITY. RATHER, THE STATE CONTENDS THAT THE PROSECUTOR HAS THE SOLE DISCRETION TO PURSUE A DETERMINATE SENTENCE AND SIMPLY CHOSE NOT TO DO SO.

IN THIS CASE THE DISCRETIONARY TRANSFER TO ADULT COURT WAS UPHELD. *In the Matter of E.H.

In the Matter of E.H.

Tex.App.—Houston (1st Dist.), 8/17/2017

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

In the Matter of E.H.

Concurring Opinion

WHEN THE FACTS OF A CASE REFLECT THAT A DETERMINATE SENTENCE MAY BE FEASIBLE, 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.

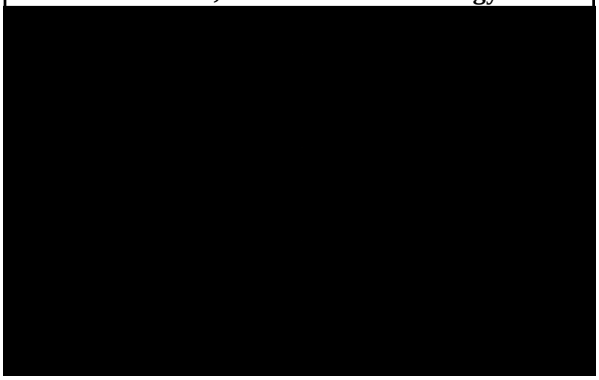
In the Matter of J.G.M.
Tex.App.—Houston (1st Dist.), 7/18/2017

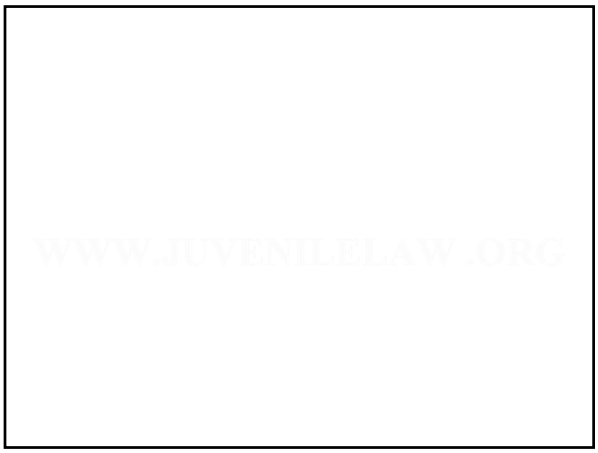
IN A DISCRETIONARY TRANSFER HEARING, THE AGE OF JUVENILE AT THE TIME OF THE OFFENSE MAY BE DETERMINED THROUGH TESTIMONY OF VICTIM'S AGE AT THE TIME OF THE OFFENSE.

In the Matter of D.L.C.
Tex.App.—Texarkana, 3/21/2017

IN DISCRETIONARY TRANSFER PROCEEDING, THE APPLICATION OF TFC § 54.02(A) [UNDER 18 CERTIFICATION] OR §54.02(J) [OVER 18 CERTIFICATION] IS BASED ON A PERSON'S AGE AT THE TIME THE DISCRETIONARY TRANSFER HEARING BEGINS NOT WHEN IT IS FILED BY THE STATE.

Elizabeth Cauffman, Ph.D, Professor
UC Irvine, School of Social Ecology





JUVENILE CASELAW UPDATE

31st ANNUAL JUVENILE LAW CONFERENCE
February 26-28, 2017
Sponsored by the Juvenile Law Section
Of the State Bar of Texas
Horseshoe Bay, Texas

Pat Garza
Associate Judge/Referee
386TH District Court
Bexar County, Texas
(210)335-1154

PAT GARZA

Associate Judge
386th District Court
600 Mission Rd.
San Antonio, Texas 78210

EDUCATION

2001: Juvenile Law: Board Certified – by the Texas Board of Legal Specialization
1980: Admitted to the Texas Bar.
1980: Jurist Doctor, South Texas College of Law, Houston, Texas.
1977: B.A., University of Texas at Austin, Texas.

PROFESSIONAL

Life Fellow of the Texas Bar Foundation
2017 – Present: Texas Board of Legal Specialization Juvenile Law Exam Commissioner
2005 – Present: Editor, State Bar of Texas Juvenile Law Section Newsletter.
2009 – 2015: Texas Board of Legal Specialization Juvenile Law Exam Commissioner
2007: Franklin Jones Best Continuing Legal Education Article Award by the State Bar College Board of Directors. Police Interactions with Juveniles.
2004: Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation. Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent.
2001 – 2006: Texas Board of Legal Specialization Juvenile Law Advisory Commissioner
1999 – Present: Juvenile Court Associate Judge/Referee, 386th Judicial District Court.
1997 – 1999: Juvenile Court Associate Judge/Referee, 73rd Judicial District Court.
1989 – 1997: Juvenile Court Master (Associate Judge)/Referee, 289th Judicial District Court.
Fall 1997: Adjunct Professor of Law (Juvenile Law), St. Mary's Law School, San Antonio, Texas.

In his 29 years as an Associate Judge and Referee, Judge Garza has presided over 59,000 juvenile hearings and has been published 27 times. Judge Garza is a regular speaker on juvenile law issues, having delivered over 100 juvenile law presentations.

SPEECHES AND PRESENTATIONS
(last two years only)

- Juvenile Law: Caselaw Update; Fifth Annual Juvenile Law Seminar, Sponsored by the San Antonio Bar Association, San Antonio, Texas, December, 2017.
- Caselaw Updates; 30th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Horseshoe Bay, Texas, February, 2017.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 30th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Horseshoe Bay, Texas, February, 2017.
- Juvenile Law: Caselaw Update; Fifth Annual Juvenile Law Seminar, Sponsored by the San Antonio Bar Association, San Antonio, Texas, December, 2016.
- Caselaw Update; Juvenile Delinquency Advanced Topics Seminar, Presented by the DBA Juvenile Justice Committee, Dallas, Texas, October 6, 2016.
- Caselaw Update; Seventh Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2016.
- Arrest, Confessions, and Search and Seizure; Seventh Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2016.
- Juvenile Law; 2016 State Bar College Summer School, Sponsored by the Texas State Bar College, Galveston, Texas, July, 2016.
- Caselaw Updates; 29th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, San Antonio, Texas, February, 2016.

- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 29th Annual Juvenile Law Conference , Sponsored by the Juvenile Law Section of the State Bar, San Antonio, Texas, February, 2016.
- Juvenile Law: Caselaw Update; Fourth Annual Juvenile Law Seminar, Sponsored by the San Antonio Bar Association, San Antonio, Texas, October, 2015.
- Juvenile Law Update: Caselaw Update, Legislation, and other Things; 52nd Annual Criminal Law Institute, Sponsored by the San Antonio Bar Association, San Antonio, Texas, April, 2015.
- Caselaw Updates; 28th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Ft. Worth, Texas, February, 2015.
- Juvenile Law: Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; Third Annual Juvenile Law Seminar, Sponsored by the San Antonio Bar Association, San Antonio, Texas, October, 2014.
- Caselaw Update; Fifth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2014.
- Arrest, Confessions, and Search and Seizure; Fifth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2014.
- Caselaw Updates; Nuts and Bolts of Juvenile Law, Sponsored by the Texas Juvenile Justice Department and the Juvenile Law Section of the State Bar of Texas, August, 2014.
- Police Interactions with Juveniles; Nuts and Bolts of Juvenile Law, Sponsored by the Texas Juvenile Justice Department and the Juvenile Law Section of the State Bar of Texas, August, 2014.
- Juvenile Law; 2014 State Bar College Summer School, Sponsored by the Texas State Bar College, Galveston, Texas, July, 2014.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 51st Annual Criminal Law Institute, Sponsored by the San Antonio Bar Association, San Antonio, Texas, April, 2014.

PUBLICATIONS

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

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CASELAW UPDATE

ADJUDICATION PROCEEDINGS—

In the Matter of A.A.R., No. 08-15-00051-CV, --- S.W.3d ----, 2017 WL 1533993, Vol. 31 No. 3 ¶17-3-1 (Tex.App—El Paso, 4/28/2017).

NO ABUSE OF DISCRETION SHOWN WHERE THE RECORD SHOWS THAT JUVENILE WAS ADMONISHED, AND HE WAS AWARE AND UNDERSTOOD THE CONSEQUENCES OF ENTERING A PLEA OF TRUE.

Facts: At the beginning of the adjudication hearing, the trial court first inquired whether A.A.R. understood the accusations against him, and stated its understanding that A.A.R. intended to admit to them. A.A.R. responded affirmatively to the question and statement. The trial court then explained to A.A.R. in the presence of his father, A.R., and mother, S.G.:

THE COURT: But before we go on with your hearing, I need to go over your rights and some other matters so that you understand the consequences of your decision. So as I go along if you don't understand something make sure you stop me and we'll go back over it again. All right. I want you to make sure you understand what you are doing here.
...
You have the right to have Judge Gutierrez hear your case, she is the juvenile court judge for El Paso County or you can have me hear the case today. I am the juvenile court referee for the County. My understanding is you want to go ahead and proceed today, is that correct?
[A.A.R.]: Yes.
THE COURT: You also have the right to remain silent. You don't have to say anything if you don't want to. You have the right to be represented by an attorney, Ms. Reyes is right there with you. If you need to talk to her during the hearing, just go ahead and do so. And you have a right through your attorney to cross-examine any witness called by the State.
You have a right to have ten days to prepare for trial. You need to know that as you sit there right now you are presumed innocent. So that means legally at this stage of your case you haven't done anything wrong. Because of that you don't have to prove anything. The State is the one that's brought the allegation against you. They have to prove it and they have to prove it by bringing enough evidence into court to satisfy the jury or the judge that you did what you are accused of. So if they can't do that for some reason you'll be found not delinquent. But keep in mind that even though you don't have to do anything, if you do want to submit evidence in your defense you are free to do that, just make sure you discuss that with your attorney.
And then I'll tell you one of your most important rights is to have a jury decide your case, that's a jury trial. That is what you are scheduled for next week, so if you want to deny the allegations, we would come back next Friday or a week from this Friday and so that day we bring in a group of citizens from the community, we talk to them, eventually we would select 12 people out of that group to be your jury. They would sit here in the jury box. We start taking the evidence on Friday probably continue on until the following week. All the evidence is presented to the jury during the trial and then at the end of the trial, the jury decides if you did what you are accused of.
But my understanding is you do not want to have a jury trial, is that correct?
[A.A.R.]: Yes.
THE COURT: All right. Now, if you admit to the allegation here today there is a consequence for your actions that will be decided at the next hearing on October 7th and the options available to the court will be to place you on some kind of probation up to the age of 18, it can be either in home or out-of-home or commit you, that means send you away to the Texas Juvenile Justice Department up to the age of 19. We'll make that decision at the next hearing.
And then also you need to know you have a juvenile record now and this record can be used against you as an adult if you get in trouble as an adult. So from 17 on in Texas you are considered an adult in the criminal system. If you go out after that date and you commit a crime and you are convicted then during that indication they can find out about

this case here today. If they do it's probably going to have some negative impact on them. So as long as you stay out of trouble [, you] don't need to worry. But if you do get in trouble as an adult [,] it will come back on you.
The last thing you need to know is if you are not a U.S. citizen it could jeopardize your status in this country. That only applies if you are not a U.S. citizen. Do you understand?
[A.A.R.]: Yes.
THE COURT: Do you have any questions about anything I went over?
[A.A.R.]: No.
THE COURT: All right. Ms. Reyes, you concur with your client's waivers?
MS. REYES: I do, Your Honor.

The State then recited its petition in which it alleged that A.A.R. "intentionally or knowingly damage[d] and destroy[ed] tangible property, to-wit: windows, by breaking said windows with a hammer, without the effective consent of ... the owner," and thereby caused a pecuniary loss in the amount of $20,000 or more but less than $100,000. The following colloquy then occurred:

THE COURT: All right. Now, did you understand the allegation?
[A.A.R.]: Yes.
THE COURT: Is that allegation true or not true?
[A.A.R.]: It's true.
THE COURT: And then I am going to show you what I just marked as exhibit one. Its entitled waiver, stipulation and admission. Do you recognize that document?
[A.A.R.]: Yes, sir.
THE COURT: Did you just sign this?
[A.A.R.]: Yes.
THE COURT: Before you signed it, did you go over the contents with your attorney?
[A.A.R.]: Yes, sir.
THE COURT: You understood everything?
[A.A.R.]: Yes.
THE COURT: Do you understand you have admitted to the offense in here?
[A.A.R.]: Yes, sir.
THE COURT: Did anybody force you in any way or promise you anything to sign it?
[A.A.R.]: No.
THE COURT: You are telling me you signed it voluntarily because you did commit the offense?
[A.A.R.]: Yes.
THE COURT: All right. The Court will accept your plea of true then.

After A.A.R.'s counsel stated "No objection," the trial court admitted into evidence a document titled "Waiver, Stipulation and Admission" in which A.A.R. waived his right to a jury trial, stipulated to the State's evidence, admitted all of the allegations in the State's petition, confessed that he committed the charged offense, waived his rights to which he was entitled under Section 51.09 of the Texas Family Code, and admitted that those rights had been explained fully and that he understood those rights, particularly the right to require sufficient evidence to support the judgment of the trial court. The document bears the signatures of A.A.R. and his counsel. Based on the evidence presented, A.A.R.'s plea of true, and its finding of true, the trial court adjudicated A.A.R. delinquent, and scheduled a disposition hearing.

A.A.R. was initially represented by one attorney, and then by another prior to and at the adjudication hearing when he entered his plea of true. However, at the disposition hearing, A.A.R. was represented by his third attorney, Lerma, who had filed a motion to withdraw A.A.R.'s previous plea of true. At the disposition hearing, the trial court first took up the motion to withdraw A.A.R.'s plea. The trial court heard testimony from A.A.R.'s mother and father.

In support of the motion to withdraw, A.A.R.'s mother, S.G., a registered nurse, testified that prior to A.A.R. signing the waiver, stipulation, and admission, and entering his plea of true, she requested but was never shown or

given access to the evidence against her son. She testified that A.A.R.'s second attorney met with them twice, including the day of the plea, and explained her son pleaded true because his counsel advised they really had no choice, and it was "either a felony or maybe if we go to trial[,] he could end up in jail." According to S.G., her son's counsel did not explain the State's burden of proof, but S.G. knew that a jury trial could be sought on the date of the plea. Although she felt her son never had a chance for a fair trial, S.G. acknowledged her awareness that if A.A.R. had proceeded to a jury trial, the outcome was not guaranteed. She also admitted she was aware that by entry of the plea of true, the right to a jury trial was waived, and acknowledged her son's counsel indicated if A.A.R pleaded true, punishment would consist of probation. Regarding the legal consequences of the plea, S.G. stated she did not realize how a felony plea would affect A.A.R.'s future because she believed "it would be sealed[.]" She did not believe A.A.R.'s plea of true was made knowingly or intelligently, but conceded it was made voluntarily. S.G. admitted that, during the adjudication hearing, the judge admonished her son, and she did not request the plea to be withdrawn because she was afraid her son would be sentenced to jail if the case proceeded to trial.

S.G. conceded her son had confessed to a deputy at the scene of his participation in the offense, and had also written to his mother seeking her forgiveness. S.G. agreed A.A.R.'s second attorney had read the case file; had spoken with her in advance of A.A.R.'s adjudication hearing, and had informed her A.A.R. had confessed to the deputy. A.A.R.'s attorney had also told her, before and while at court, the issue of the amount of restitution would be addressed after her son was "sentenced" but counsel did not explain to her that she could be responsible for the full amount of restitution ordered by the court.

A.A.R.'s father, A.R., a hairdresser, also testified that he met his son's second attorney a few weeks before the plea, and during the adjudication hearing, counsel very briefly explained, "All [the] opportunity he had was to plead guilty[.]" A.R. stated he did not know of his son's right to a jury trial, the right to confront witnesses, or to review evidence prior to trial. Further, he did not review any evidence prior to the entry of his son's plea, and testified that his review of the evidence would have made a difference because "it would have been better for us to know what ... the consequences [were.]" A.R., too, admitted that by proceeding to trial, the outcome is determined by a jury which could find A.A.R. guilty or not guilty. He explained that counsel had informed them that A.A.R. would subsequently have a restitution hearing, and he expected the restitution amount to be divided between the co-defendants, and did not feel that it would be fair for his son to be solely responsible for the total amount of restitution. A.R. explained that he was seeking withdrawal of the plea because he wanted his son to get a fair trial and a different outcome. Although he was present when the trial court admonished his son at the adjudication hearing, A.R. did not indicate to the trial court that he did not want to proceed with the plea because he trusted counsel who had told him it was the only and best option, despite the fact that he did not believe his son's plea was made knowingly, intelligently, or voluntarily.

A.R. knew that A.A.R. had admitted his acts to Sheriff's deputies, and acknowledged his son had pleaded true in the absence of offers, promises, or threats. Despite witnessing his son sign the plea papers, A.R. did not recall that one page of the documents waived a jury trial, and stated that he did not know that A.A.R. was entitled to a jury trial because counsel informed him that his son did not have another option. A.R. admitted that counsel met with him briefly and explained that his son would be waiving his rights to a trial, and had informed him that although his son had pleaded true, a hearing would be conducted to determine the restitution amount. A.R. did not know what a stipulation was, and asserted counsel had not explained the stipulation or admission, but had informed him his son's only option was to enter a "guilty" plea. He recalled his son's mother had asked counsel for the evidence, and was informed she could not "get it." A.A.R. signed the plea papers as directed by counsel, whom they trusted, and A.R. admitted that he did not inform the trial judge at the adjudication hearing that his son's plea was involuntary or was not fair because he had been told there was no other option, and S.G. had not objected to their son's plea.

During examination of S.G., the State also elicited testimony that the idea of seeking withdrawal of A.A.R.'s plea was originally suggested by the father of a co-defendant after her son had pleaded true but before the co-defendant was scheduled to go to trial. The co-defendant's father informed S.G. that the co-defendant's attorney often tried cases with Veronica Lerma. Subsequently, Lerma, whom S.G. had previously consulted with but did not hire for the adjudication proceeding, ended up representing her son at his motion-to-withdraw-plea and disposition

hearing. S.G. testified that the co-defendant's father, who was a police officer, had not told S.G. the State had issued a subpoena to have her son testify against the co-defendant. S.G. was also completely unaware the State had filed and sent notice to the co-defendant's attorney days before her son's disposition hearing identifying S.G. and her son as witnesses in the co-defendant's case. S.G. freely acknowledged she had not requested Lerma to file a motion to quash the subpoena for her son to testify against the co-defendant, and was never informed that Lerma had done so in the co-defendant's case for and on behalf of S.G. and her son. S.G. understood that if her son failed to testify, the co-defendant had a greater chance of not being held responsible for any restitution amount, and her son could possibly be responsible for the total amount of restitution, which she did not believe would be fair. She ultimately acknowledged there was a possible conflict between her son's interest and the co-defendant. She also agreed that if her son withdrew his plea, did not testify against the co-defendant, and if the co-defendant was found not responsible, it would not be fair for her son to be held financially responsible for the total amount of restitution ordered by the court.

A.R. was also completely unaware his son had been subpoenaed to testify against the co-defendant until the day of his son's disposition hearing, and further, had not requested Lerma to file, nor was he aware that Lerma had filed, a motion to prevent his son from testifying against the co-defendant. He also told the trial court he was unaware the co-defendant's father had called S.G. and suggested to her that his son withdraw his plea. A.R. did not understand that his son's best interest could be adverse to the interests of the co-defendant or that the co-defendant could benefit if his son was unable to testify against the co-defendant. He did, however, believe it was unfair for his son to be solely financially responsible for the total amount of restitution.

After considering the testimony and concluding arguments, the trial court observed that the case was set for a jury trial and could have proceeded to trial, however, A.A.R. had pled true and signed the plea documents. Further, the plea documents explained A.A.R.'s rights and the fact that he was giving up those rights by pleading true to the offense, and that by his signature A.A.R. was deemed to have read the plea documents. The court also noted that it always admonishes a juvenile regarding his rights and the waiver of trial, and specifically asks the juvenile whether he understands them, and in this instance, the trial court was never made aware of any questions or concerns on the part of A.A.R. or his parents regarding A.A.R.'s plea. Satisfied that A.A.R. entered a "knowing and voluntary" plea, the trial court denied the motion to withdraw the plea. At the subsequent disposition hearing, A.A.R. was placed on probation.

In his sole issue on appeal, A.A.R. asserts the trial court erred in denying his motion to withdraw his plea of true on the basis that it was not knowingly, intelligently, and voluntarily made because his adjudication counsel purportedly failed to review the evidence with him prior to the plea stipulation and misinformed him regarding the consequences of waiving trial and pleading true.

Held: Affirmed

Opinion: We review a trial court's denial of a motion to withdraw a plea under an abuse of discretion standard. In re E.J.G.P., 5 S.W.3d 868, 873 (Tex.App.–El Paso 1999, no pet.). The trial court abuses its discretion if it acts without reference to any guiding rules or principles. In re C.J.H., 79 S.W.3d 698, 702 (Tex.App.–Fort Worth 2002, no pet.). That is, we consider whether the trial court acted in an arbitrary or unreasonable manner. Id. That a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate an abuse of discretion. In re L.R., 67 S.W.3d 332, 339 (Tex.App.–El Paso 2001, no pet.).

The assertion that A.A.R. did not have a full understanding of the proceedings and of the possible consequences of a finding of delinquent conduct is not supported by the record. During the adjudication hearing, and before accepting his plea, the court established A.A.R. had discussed the allegations with his attorney and that he fully understood the allegations made against him. There is no dispute as to whether A.A.R. and his parents were properly admonished as required by Section 54.03(b) of the Texas Family Code. TEX. FAM. CODE ANN. § 54.03(b)(West 2014). A.A.R. also signed a "Waiver, Stipulation and Admission" form indicating that he understood

the consequences of his plea of true. The court asked A.A.R. if he had gone over this form with his attorney before it was signed. A.A.R. specifically stated to the court that he voluntarily signed the plea papers because he had committed the offense.

The record shows that A.A.R. was admonished, and he was aware and understood the consequences of entering a plea of true. It is apparent from the record A.A.R. entered a plea of true voluntarily and of his own free will, without any assurances or promises by the trial court or anyone else.

Conclusion: Based on our review of the record, A.A.R.'s plea of true was entered intelligently, knowingly, and voluntarily, and A.A.R. has failed to show the trial court abused its discretion in denying the motion to withdraw the plea of true. We overrule the sole issue on appeal.

APPEALS—

In the Matter of D.W., MEMORANDUM, No. 02-16-00468-CV, 2017 WL 4819399, Tex.Juv.Rep. Vol. 32 No. 1 ¶18-1-1 (Tex.App.—Ft. Worth, 10/26/2017).

APPOINTED COUNSEL CONTINUES TO REPRESENT THE CHILD "UNTIL THE CASE IS TERMINATED, THE FAMILY RETAINS AN ATTORNEY, OR A NEW ATTORNEY IS APPOINTED BY THE JUVENILE COURT.

Facts: The trial court adjudicated Appellant D.W. delinquent for the felony offense of aggravated assault with a deadly weapon and, after a disposition hearing, ordered her committed to the Texas Juvenile Justice Department for an indeterminate sentence.

D.W.'s court-appointed appellate attorney has filed a motion to withdraw as counsel and a brief in support of that motion, averring that after diligently reviewing the record, he believes that this appeal is frivolous. See Anders v. California, 386 U.S. 738, 744–45, 87 S. Ct. 1396, 1400 (1967). The brief meets the requirements of Anders by presenting a professional evaluation of the record and demonstrating why there are no arguable grounds to be advanced on appeal. Although given the opportunity, D.W. did not file a response, and the State did not submit a brief.

Held: Affirmed. Motion to Withdraw Denied

MEMORANDUM OPINION: Having carefully reviewed the record and the Anders brief, we agree that this appeal is frivolous. We find nothing in the record that might arguably support D.W.'s appeal. See Bledsoe v. State, 178 S.W.3d 824, 827 (Tex. Crim. App. 2005). Therefore, we affirm the trial court's judgment.

Ordinarily, upon finding that the appeal is frivolous, we would grant counsel's motion to withdraw. But in In re P.M., a termination of parental rights appeal, the supreme court held—in reliance on family code section 107.013, which provides that appointed counsel continues to serve in that capacity until the date all appeals are exhausted or waived—that the mere filing of an Anders brief in the court of appeals does not warrant the withdrawal of that counsel for purposes of proceeding in the supreme court. 520 S.W.3d 24, 26–27 (Tex. 2016). The Juvenile Justice Code contains a similar provision: when, as in this case, the trial court finds a child's family indigent and appoints counsel, that counsel must continue to represent the child "until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court." Tex. Fam. Code Ann. § 51.101(a) (West Supp. 2016).

Conclusion: The record does not show that either of the latter two events have occurred here, and under the reasoning in P.M., this case has not "terminated" because not all appeals have been exhausted. See 520 S.W.3d at 26–27. Accordingly, even though we have affirmed the trial court's judgment, we deny counsel's motion to withdraw. See In re A.H., No. 02-16-00320-CV, 2017 WL 1573735, at *1 (Tex. App.—Fort Worth Apr. 27, 2017, no pet.) (holding similarly).

Ortiz v. State, No. 08-15-00344-CR, 2017 WL 3667829, Tex.Juv.Rep. Vol. 31 No. 4 ¶17-4-5 (Tex.App.—El Paso, 8/25/2017).

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

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 unadjudicated. 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 kneeing 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 scaring 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.

In re J.B.H., MEMORANDUM, No. 14-17-00657, 2017 WL 3569626, Tex.Juv.Rep. Vol. 31 No. 4 ¶17-4-3 [Tex.App.—Houston (14th Dist.), 8/17/2017].

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.

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.

In re Bell, No. 01-17-00373-CR, --- S.W.3d ----, 2017 WL 2545079, Tex.Juv.Rep. Vol. 31 No. 3 ¶17-3-5 [Tex.App.—Houston (1st. Dist) 6/13/17].

ONCE A JUVENILE CERTIFICATION AND TRANSFER CASE IS REINSTATED BY THE COURT OF CRIMINAL APPEALS, ARTICLE 44.04(B) TCCP REQUIRES THE IMMEDIATE ARREST OF THE JUVENILE.

Facts: Petition for writ of mandamus challenging the trial court's issuance of alias capias and setting of no bail.

In December 2016, this Court reversed Bell's transfer from juvenile court to criminal district court based upon Moon v. State, 451 S.W.3d 28 (Tex. Crim. App. 2014). Bell v. State, 512 S.W.3d 553, 560 (Tex. App.—Houston [1st Dist.] 2016), rev'd,– S.W.3d –, No. PD-0052-17, 2017 WL 1067892 (Tex. Crim. App. March 22, 2017). In its first ground in its petition for discretionary review to the Court of Criminal Appeals from this Court's opinion, the State raised a jurisdictional challenge for the first time. The Court of Criminal Appeals granted the petition on this ground, vacated this Court's judgment, and remanded the case so that the jurisdictional issue could be "fully vetted ... in the first instance." Bell, 2017 WL 1067892, at *1.

Bell had been released on bail while the petition was pending in the Court of Criminal Appeals. But the criminal district court issued an alias capias for Bell's arrest shortly after the mandate issued from the Court of Criminal Appeals. Bell filed a motion in his appeal asking this Court to set bail under article 44.04(h) of the Code of Criminal Procedure and a separate motion to stay the alias capias.

However, article 44.04(h) permits this court to set bail only when a conviction is reversed and a petition has not yet been filed with the Court of Criminal Appeals. See TEX. CODE CRIM. PROC. art. 44.04(h). Moreover, under article 44.04, after conviction and pending determination of an appeal, the trial court is empowered to increase or decrease the amount of bail, either on its own motion or the motion of any party. See id. 44.04(d). Further, because our judgment has been vacated and Bell's conviction has thus been reinstated, he may not be released on bail under the express terms of article 44.04(b) of the Code of Criminal Procedure, which provides that a defendant may not be released on bail pending the appeal from, among other things, a felony conviction for aggravated robbery, Bell's convicted offense. See id. 44.04(b). Accordingly, we denied the motions.

Bell has now filed this petition for writ of mandamus contending that the trial court did not have jurisdiction to issue the alias capias and set no bail. Bell argues that the trial court's actions violate Texas Rule of Appellate

Procedure 25.2(g), which provides that all trial court proceedings are suspended once the record is filed in the appellate court except those permitted by law or rules:

Effect of Appeal. Once the record has been filed in the appellate court, all further proceedings in the trial court—except as provided otherwise by law or by these rules—will be suspended until the trial court receives the appellate-court mandate.

Held: Petition for Writ Denied.

Opinion: Once the record has been filed in the appellate court, all further proceedings in the trial court—except as provided otherwise by law or by these rules—will be suspended until the trial court receives the appellate-court mandate.TEX. R. APP. P. 25.2(g).

However, Bell does not address the fact that article 44.04 permits the trial court to alter bail while an appeal is pending. See TEX. CODE CRIM. PROC. art. 44.04(d). Nor does he address the fact that, because his conviction was reinstated upon issuance of the mandate from the Court of Criminal Appeals, article 44.04(b) required him to be "immediately ... placed in custody" by the trial court. See TEX. CODE CRIM. PROC. art. 44.04(b) (defendant convicted of felony aggravated robbery may not be released on bail pending appeal and must be taken into custody). In short, there is no support for Bell's claim that the trial court's actions violated Rule 25.2(g).

Conclusion: We deny the petition for writ of mandamus. Any pending motions are dismissed as moot.

COLLATERAL ATTACK—

In re J.A., MEMORNADUM, No. 01-17-00645-CV, 2017 WL 6327356, Tex.Juv.Rep. Vol. 32 No 1 ¶ 18-1-2 [Tex. App.—Houston (1st Dist.), 12/12/2017].

TRIAL JUDGE ABUSED HIS DISCRETION IN SIGNING THE "NUNC PRO TUNC ORDER TO CORRECT JUDGMENT" AND THE "ORDER ON MOTION TO DISMISS FOR LACK OF JURISDICTION AND MOTION FOR ENTRY NUNC PRO TUNC."

Facts: J.A. was born on November 29, 1998, and was to turn nineteen on November 29, 2017. Real party in interest, The State of Texas, alleged in a grand-jury approved, determinate sentence petition that J.A. had committed delinquent conduct, namely first-degree aggravated robbery with a pellet gun, on September 27, 2015. On July 19, 2016, J.A., with counsel, signed a stipulation of evidence judicially confessing to aggravated robbery and entered a plea without an agreed recommendation, roughly four months shy of J.A.'s 18th birthday. When discussing possible sentences, J.A.'s counsel reminded the respondent, the Honorable Michael Schneider, that a determinate probation could continue in the juvenile court until J.A. reached the age of 19, and the court agreed, stating that it may have incorrectly stated 18 earlier at the hearing.

At the end of the July 19, 2016 hearing, the respondent orally ruled that the "[d]isposition will be an 8-year determinate probation, ... and we're going to return every four to six months while this court has jurisdiction of [J.A.] to see if you know how to follow the rules or not." The court's oral ruling did not mention whether it would have jurisdiction of J.A. until J.A.'s 18th or 19th birthday. However, the sentence-portion of the judgment actually stated that J.A. "now comes under the jurisdiction of said Court and shall continue its care, guidance, and control from 7/19/2016 or until said Respondent becomes eighteen (18) years of age unless discharged prior to and subject to subsequent and additional proceedings. ..."

On December 1, 2016, two days after J.A.'s 18th birthday on November 29, 2016, the State filed a petition to modify disposition alleging that J.A. had committed a terroristic threat on November 11, 2016, before J.A. turned 18. On June 13, 2017, J.A. filed a motion to dismiss the modification for want of jurisdiction, claiming that the probation terminated on J.A.'s 18th birthday. The juvenile court held a hearing on J.A.'s motion to dismiss on June 15, 2017. The parties made legal arguments over whether the court retained jurisdiction, and the State argued that the judgment contains clerical errors that can be corrected via a nunc pro tunc order. The court took the motion under consideration.

On June 16, 2017, the State filed a motion for nunc pro tunc claiming that clerical errors in the original judgment did not comport with the oral pronouncement of the disposition. On June 29, 2017, the juvenile court held an evidentiary hearing on J.A.'s motion to dismiss and the State's motion for nunc pro tunc. The State noted that J.A. had continued to appear throughout the probationary period including after J.A.'s 18th birthday, indicating that J.A. understood that the court would continue supervision until J.A.'s 19th birthday.

The State called Claudia Marquez, a district court clerk, as the only witness. Marquez testified that she had not read the reporter's record of the sentence, the judge had not told her to put the probation ends at "18 years" on the judgment, that their office used an outdated form judgment database, which had a 2013 revision date, and that the individual clerk has no power to change the judgment beyond adding certain information. Marquez also testified that their software had recently been updated due to this case, and that determinate judgments now show that the court has jurisdiction until a juvenile's 19th birthday.

At the end of the hearing, the respondent stated his personal recollections of his rendition that he understood he would supervise J.A. until J.A.'s 19th birthday, and the inclusion of "18 years" on the judgment was merely a clerical error because the judgment was generated by the individual clerk, not the judge. On June 23, 2017, the respondent signed a "Nunc Pro Tunc Order to Correct Judgment" that replaced the relevant references in the judgment from "18th birthday" with "19th birthday." On July 28, 2017, the respondent denied J.A.'s motion to dismiss and granted the State's motion for nunc pro tunc judgment by signing an "Order on Motion to Dismiss for Lack of Jurisdiction and Motion for Entry Nunc Pro Tunc."

On August 16, 2017, J.A. filed this mandamus petition contending, among other things, that the juvenile court's nunc pro tunc orders in a modification proceeding brought after J.A.'s probation period expired, when J.A. turned 18, should be vacated as void. J.A. further claims that, if this Court denies this petition, J.A. will have an inadequate remedy on appeal because the juvenile court may proceed on the State's petition to modify for the alleged violation of J.A.'s probationary terms, incarcerate J.A., and then the continuation of the modification action will be in the adult district court while the void orders would be from the juvenile court that no longer has jurisdiction.

With his petition, J.A. also filed a motion to stay all proceedings pending this Court's disposition of this petition because J.A. could have been subject to additional void orders or incarceration. This Court's August 22, 2017 Order granted J.A.'s motion to stay and requested a response from the State.

On September 11, 2017, the State filed its response, primarily contending that J.A. had an adequate appellate remedy for the nunc pro tunc judgment. The State also alleged that there was no abuse of discretion because the respondent's personal recollections supported the finding of clerical error.

On September 21, 2017, David R. Dow, of the Juvenile and Capital Advocacy Project of the University of Houston Law Center, filed an amicus brief. The amicus contends that, because the juvenile court lost jurisdiction over J.A. when the probation ended, it was without jurisdiction to modify the judgment because that was judicial error.

On November 10, 2017, the State filed a motion to reconsider this Court's grant of temporary relief, contending that the juvenile court will lose jurisdiction on November 28, 2017, because J.A. turns 19 the next day. This Court's November 20, 2017 Order granted the State's motion and lifted the stay to allow the juvenile court to conduct all proceedings, if any.

Held: Writ of Mandamus conditionally granted

Memorandum Opinion:

A. The Respondent Clearly Abused His Discretion

The respondent clearly abused his discretion by signing the June 23, 2017 "Nunc Pro Tunc Order to Correct Judgment" and the July 28, 2017 "Order on Motion to Dismiss for Lack of Jurisdiction and Motion for Entry Nunc Pro Tunc." These nunc pro tunc orders were void because they corrected a substantive error that required judicial interpretation, which was a judicial error, not a clerical one.

A trial court generally retains jurisdiction over a case for thirty days after it signs a final judgment, during which time the trial court has plenary power to change its judgment. In re Patchen, No. 01-16-00947-CV, 2017 WL 976077, at *2 (Tex. App.—Houston [1st Dist.] Mar. 14, 2017, orig. proceeding) (per curiam) (mem. op.) (citing, inter alia, TEX. R. CIV. P. 329b(f)). "Nevertheless, a trial court may always correct clerical errors by using a judgment nunc pro tunc." In the Interest of A.M.R., 528 S.W.3d 119, 122 (Tex. App.—El Paso 2017, no pet.) (citing TEX. R. CIV. P. 316; 329b(f)). "A judgment nunc pro tunc allows a trial court to correct a clerical error, but not a judicial error, in the judgment after the court's plenary power has expired." Id. (citing, inter alia, Escobar v. Escobar, 711 S.W.2d 230, 231 (Tex. 1986) and TEX. R. CIV. P. 316).

This Court has summarized the distinction between judicial and clerical errors:

A clerical error is a discrepancy between the entry of a judgment in the record and the judgment that was actually rendered. Barton [v. Gillespie, 178 S.W.3d 121, 126 (Tex. App.—Houston [1st Dist.] 2005, no pet.)]. Rendition occurs when the trial court's decision is officially announced either by a signed memorandum filed with the clerk of the court or orally in open court. Id.

Unlike with clerical errors, the trial court cannot correct a judicial error after the expiration of plenary power by entering a judgment nunc pro tunc. Escobar, 711 S.W.2d at 231. A judicial error is one that arises from a mistake of law or fact that requires judicial reasoning to correct and it occurs in the rendering, rather than the entering of the judgment. Barton, 178 S.W.3d at 126. "Thus, even if the court renders incorrectly, it cannot alter a written judgment which precisely reflects the incorrect rendition." Escobar, 711 S.W.2d at 232. Stated another way, if the judgment entered is the same as the judgment rendered, regardless of whether the rendition was incorrect, a trial court has no nunc pro tunc power to correct or modify the entered judgment after its plenary [power] expires. Hernandez v. Lopez, 288 S.W.3d 180, 187 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (op. on rehearing) [(emphasis in original)]. A judgment rendered to correct a judicial error after plenary power has expired is void. Id. at 185 (citing Dikeman v. Snell, 490 S.W.2d 183, 186 (Tex. 1973)).

In re D & KW Family, L.P., No. 01-11-00276-CV, 2012 WL 3252683, at *5 (Tex. App.—Houston [1st Dist.] Aug. 9, 2012, orig. proceeding) (mem. op.) (internal quotation marks omitted).

The party claiming clerical error must show, by clear and convincing evidence, that "the trial judge intended the requested result at the time the original judgment was entered." A.M.R., 528 S.W.3d at 122 (citation omitted). "This high burden insures that trial judges can correct their clerical mistakes" and prevents using a judgment nunc pro tunc as "a vehicle to circumvent the general rules regarding the trial court's plenary power if the court changes its mind about its judgment." Id. "The determination as to whether an error is clerical is a question of law, and the trial court's finding in this regard is not binding on an appellate court." In the Matter of M.A.V., No. 04-01-00533-CV, 2002 WL 662246, at *1 (Tex. App.—San Antonio Apr. 4, 2002, pet. denied) (citation omitted). When deciding whether an error in a judgment is clerical or judicial, the court must look to the judgment actually rendered and not the judgment

that should have been rendered. A.M.R., 528 S.W.3d at 123 (citing, inter alia, Escobar, 711 S.W.2d at 232). "Evidence may be in the form of oral testimony of witnesses, written documents, previous judgments, docket entries, or the judge's personal recollection." Hernandez, 288 S.W.3d at 185 (citation omitted).

Here, because the respondent's June 23, 2017 "Nunc Pro Tunc Order to Correct Judgment" and corresponding July 28, 2017 "Order on Motion to Dismiss for Lack of Jurisdiction and Motion for Entry Nunc Pro Tunc" were both signed beyond the juvenile court's plenary power, which ended thirty days after the determinate sentencing judgment/order was signed on July 19, 2016, they were void unless they corrected clerical, not judicial, error. See Escobar, 711 S.W.2d at 231; Dikeman, 490 S.W.2d at 186 (judgment rendered to correct judicial error after plenary power has expired is void); see also In the Matter of R.G., 388 S.W.3d 820, 826 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (granting habeas relief because "juvenile court abused its discretion and exceeded its plenary power when it vacated its order granting relator habeas corpus relief more than six months after granting the relief").

At the nunc pro tunc hearing, the court heard testimony from Marquez, the individual district clerk that had generated the judgment, that the judge had not told her to put the probation ends at 18 on the judgment, that their office used an outdated form judgment database, that their software had recently been updated due to this case, and that determinate judgments now show the court's jurisdiction until the juvenile's 19th birthday. The respondent also stated his personal recollections of his rendition that he understood he would supervise J.A. until J.A.'s 19th birthday, and the inclusion of age 18 on the judgment was merely a clerical error because the judgment was generated by the individual clerk, not the judge. However, we are not bound by the trial court's clerical-error finding. See M.A.V., 2002 WL 662246, at *1.

As noted above, a "judicial error is one that arises from a mistake of law or fact that requires judicial reasoning to correct and it occurs in the rendering, rather than the entering of the judgment." Barton, 178 S.W.3d at 126. "Thus, even if the court renders incorrectly, it cannot alter a written judgment which precisely reflects the incorrect rendition." Escobar, 711 S.W.2d at 232. Here, the judgment changed the length of the court's supervisory term of J.A.'s probation, which is a substantive rather than a clerical change. See, e.g., Hernandez, 288 S.W.3d at 185, 188 (finding judgment nunc pro tunc's change of year of child support arrearage was substantive change, and thus judicial error, because it resulted in extra year of interest). A disposition with a probated sentence can extend supervision to any date within the range of the juvenile court's jurisdiction. Thus, a discussion that a juvenile court's jurisdiction to supervise probation can extend to age 19 is not a determination that jurisdiction to supervise that probation would extend to that duration.

Here, the trial court did not orally pronounce that the supervisory term of probation would conclude on J.A.'s 19th birthday during its rendering of the ruling, but if it had, then the judgment stating 18th birthday would have been a clerical error. See Barton, 178 S.W.3d at 126 (stating that clerical error is discrepancy between entry of judgment in record and judgment that was actually rendered). Instead, the juvenile court stated that the: "disposition will be an 8-year determinate probation, ... and we're going to return every four to six months while this court has jurisdiction of [J.A.] to see if you know how to follow the rules or not." That statement requires interpretation in light of the original judgment—the court was to exercise its jurisdiction to the juvenile's 18th birthday. The State argues that the trial court meant "jurisdiction" in its most complete sense—that the juvenile court meant to impose a supervisory term coextensive with all the time it could have to exercise it. But neither the judgment nor the oral ruling clarify this meaning. The correction in the nunc pro tunc order changed the length of the term of supervision of probation rather than conforming it to any earlier oral pronouncement of sentence. To make that change in the length of the supervisory term of probation required judicial interpretation about what the judge meant by "jurisdiction"—an interpretation not found in the oral ruling of the disposition. See Barton, 178 S.W.3d at 126 (stating that judicial error is one that arises from mistake of law or fact that requires judicial reasoning to correct and it occurs in rendering, rather than entering, of judgment). Thus, the error was judicial and not clerical. Cf. A.M.R., 428 S.W.3d at 123 (finding trial court properly corrected clerical error in judgment nunc pro tunc because "trial judge did not, in its oral

rendition of the judgment, stipulate the restriction would only remain in place if [parent] remained in El Paso County, Texas").

Consequently, because the two nunc pro tunc orders improperly corrected judicial errors in the July 19, 2016 determinate sentencing judgment/order, by changing the 18th-birthday-references to 19th-birthday-ones, they were void. Thus, the respondent clearly abused his discretion in signing these void orders.

B. Relator Lacks an Adequate Appellate Remedy

As discussed above, mandamus relief is proper when the trial court issues a void order, and the relator need not demonstrate the lack of an adequate remedy by appeal. See In re Sw. Bell Tel., 35 S.W.3d at 605; In re Flores, 111 S.W.3d at 818. In any event, a party can seek mandamus relief from a void judgment even if there is an adequate remedy by appeal. See Dikeman, 490 S.W.2d at 186 ("In view of our policy for at least a decade of accepting and exercising our mandamus jurisdiction in cases involving void or invalid judgments of district courts, Relator had every reason to expect relief from the void judgment in this case without first attempting an appeal."). Thus, even after J.A. turned nineteen on November 29, 2017, the juvenile court will continue to have jurisdiction to vacate any void orders that it may have signed. Here, because the respondent's June 23, 2017 "Nunc Pro Tunc Order to Correct Judgment" and July 28, 2017 "Order on Motion to Dismiss for Lack of Jurisdiction and Motion for Entry Nunc Pro Tunc" were void, J.A. need not demonstrate the lack of an adequate appellate remedy. See In re Sw. Bell Tel., 35 S.W.3d at 605; Dikeman, 490 S.W.2d at 186; In re Flores, 111 S.W.3d at 818.

Conclusion: We hold that the respondent abused his discretion in signing the "Nunc Pro Tunc Order to Correct Judgment" and the "Order on Motion to Dismiss for Lack of Jurisdiction and Motion for Entry Nunc Pro Tunc," and J.A. need not demonstrate an inadequate remedy by appeal because they were void. Accordingly, we conditionally grant the petition for writ of mandamus and order the respondent to vacate the June 23, 2017 "Nunc Pro Tunc Order to Correct Judgment," and the July 28, 2017 "Order on Motion to Dismiss for Lack of Jurisdiction and Motion for Entry Nunc Pro Tunc". We are confident the trial court will promptly comply, and our writ will issue only if it does not comply within 20 days of the date of this opinion.

In re D.G., MEMORANDUM, No. 13-17-00300-CV, 2017 WL 6047554, , Tex.Juv.Rep. Vol. 32 No 1 ¶ 18-1-3 (Tex. App.—Corpus Christi-Edinburg, 12/7/2017).

APPLICATION FOR WRIT OF HABEAS CORPUS FROM DETERMINATE SENTENCE DISPOSITION MAY NOT BE FILED IN THE TEXAS COURT OF APPEALS.

Facts: Relator D.G., proceeding pro se, filed a petition for writ of habeas corpus in the above cause through which he contends that he has been wrongfully imprisoned. Relator asserts that he was adjudicated delinquent in 1997 and ordered committed to the Texas Youth Commission. Relator contends that he was transferred to the Texas Department of Criminal Justice without the benefit of a court-ordered transfer hearing and has been incarcerated since that time.2 This Court requested and received a response to the petition from the State of Texas, acting by and through the County and District Attorney for Cameron County, Texas. The State asserted that relator was found delinquent, committed to the Texas Youth Commission for a period of twenty years, discharged from the Texas Youth Commission upon "aging out," and was released to adult parole on September 26, 2000. The State further stated that an application for writ of habeas corpus arising from a juvenile proceeding should be presented in the first instance to the trial court, and accordingly requested that we abate and remand this matter to the trial court for a determination on the merits after due consideration. We abated and remanded this matter to the trial court, who has now appointed the Honorable Traci L. Evans as counsel to represent relator in the pursuit of habeas relief.

Held: Writ Dismissed

Memorandum Opinion: Except when in conflict with a provision of the Texas Family Code, the Texas Rules of Civil Procedure govern juvenile proceedings. See TEX. FAM. CODE ANN. § 51.17(a) (West, Westlaw through 2017 1st C.S.); In re Dorsey, 465 S.W.3d 656, 657 (Tex. Crim. App. 2015) (orig. proceeding) (Richardson, J. concurring); In re M.R., 858 S.W.2d 365, 366 (Tex. 1993) (per curiam). A person confined pursuant to an adjudication and disposition in juvenile court may seek habeas corpus relief. See TEX. FAM. CODE ANN. § 56.01(o) (West, Westlaw through 2017 1st C.S.). Juveniles may file applications for writs of habeas corpus pursuant to Article V, Section 8 of the Texas Constitution, which gives "[d]istrict [c]ourt judges ... the power to issue writs necessary to enforce their jurisdiction." TEX. CONST. art. V, § 8; see Ex parte Valle, 104 S.W.3d 888, 890 (Tex. Crim. App. 2003). Thus, to the extent that relator seeks relief from confinement resulting from his juvenile adjudication, relator may file an application for writ of habeas corpus pursuant to Article V, Section 8 of the Texas Constitution with the district court where he was adjudicated. We lack jurisdiction over such a proceeding. See TEX. CONST. art. V, § 6; TEX. GOV'T CODE ANN. § 22.221 (West, Westlaw through 2017 1st C.S.). And, because proceedings in juvenile court are considered civil cases, the Texas Supreme Court, rather than the Texas Court of Criminal Appeals, is the court of last resort for such matters. In re Dorsey, 465 S.W.3d at 656; In re Hall, 286 S.W.3d 925, 927 (Tex. 2009) (orig. proceeding).

Conclusion: The Court, having examined and fully considered the petition for writ of habeas corpus, the State's response, and the trial court's findings and orders on abatement, is of the opinion that we are without jurisdiction to consider this matter. Therefore, we reinstate this matter. We dismiss this petition for writ of habeas for lack of jurisdiction without reference to the merits and without prejudice to any other habeas corpus relief that may be pursued by relator, and we dismiss all pending motions and outstanding orders as moot.

CONFESSIONS—

Boyd v. State, MEMORANDUM, No. 05-16-00106-CR, 2017 WL 3574799, Tex.Juv.Rep. Vol. 31 No 4 ¶ 17-4-1 (Tex.App.—Dallas, 8/18/2017).

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.

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—

Agers v. State, MEMORANDUM, No. 05-16-01419-CR, No. 05-16-01420-CR, No. 05-16-01421-CR, No. 05-16-01422-CR, No. 05-16-01423-CR, 2018 WL 494800, Tex.Juv.Rep. Vol. 32 No. 1 ¶ 18-1-8 (Tex. App.—Dallas, 1/22/2018).

AGGRAVATED SEXUAL ASSAULT COMMITTED BY A JUVENILE DOES NOT QUALIFY AS SEXUALLY VIOLENT OFFENSE FOR AFFIRMATIVE FINDINGS PURPOSES IN ADULT COURT.

Facts: Appellant was convicted of four aggravated assault of a child offenses (the KG offenses)1 and one indecency with a child offense (the LM offense)2, and was sentenced to seven years imprisonment for each offense.

In ten issues, appellant argues that all judgments should be reformed to: (i) reflect that he pled no contest and (ii) provide credit for the 167 days he served in juvenile custody. In eight additional issues, he argues that the judgments for the KG offenses should be modified to delete the affirmative finding concerning the victim's age and that the evidence is insufficient to support the finding that KG was ten years old when appellant committed the offense. The State agrees with all of appellant's modification arguments.

Held: Judgment modified, Affirmed as modified.

Memorandum Opinion: The judgments for the KG offenses include an affirmative finding that "The age of the victim at the time of the offense was 10 years."

The code of criminal procedure requires an affirmative finding that the victim of a sexually violent offense was younger than fourteen years of age. See TEX. CODE CRIM. PROC. ANN. art. 42.015(b). A "sexually violent offense" includes aggravated sexual assault "committed by a person 17 years of age or older." Id. art. 62.001(6); see also Munday v. State, Nos. 09-15-00277-78-CR, 2017 WL 3082136, at * 6 n.5 (Tex. App.—Beaumont Apr. 24, 2017, no pet.) (mem. op., not designated for publication) (for affirmative finding to apply, state must prove defendant was seventeen or older when he committed the qualifying offense).

Appellant was born on September 25, 1996, and was sixteen when the KG offenses were reported to the police. Although he was over the age of seventeen when he was convicted, nothing in the record shows that he was seventeen or older when he committed the offenses. Thus, the KG offenses did not qualify as sexually violent offenses and no affirmative age finding was required. Therefore, we sustain issues eleven through fourteen and modify the KG judgments to omit the finding providing "The age of the victim at the time of the offense was ten years." Our resolution of these issues obviates the need to consider appellant's remaining issues. See TEX. R. APP. P. 47.1.

Conclusion: We sustain issues one through fourteen and modify all judgments to reflect appellant's no contest plea and to include credit for juvenile custody time served from November 22-May 8, 2014. We modify the KG judgments (trial court cause numbers F14-15514-Y, F14-15515-Y, F14-15516-Y, and F14-1557-Y) to omit the affirmative finding providing "The age of the victim at the time of the offense was 10 years." As modified, all judgments are affirmed.

Lewis v. State, MEMORANDUM, No. 01-16-00485-CR, 2017 WL 4545865, Tex.Juv.Rep. Vol. 31 No. 4 ¶ 17-4-7 [Tex. App.—Houston (1st Dist.), 10/12/2017].

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.

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 (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, 1015, 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).

Eguade v. State, No. 08-15-00268-CR, 2017 WL 3224863, Tex.Juv.Rep. Vol. 31 No. 3 ¶ 17-3-12B (Tex.App.—El Paso, 7/31/2017).

IN TRIAL AFTER DISCRETIONARY TRANSFER TO ADULT COURT, NO ERROR COMMITTED BY FAILING TO INSTRUCT THE JURY THAT JUVENILE COULD NOT BE CONVICTED FOR CONDUCT COMMITTED BEFORE HIS FOURTEENTH BIRTHDAY.

Facts: The Eguade and De La Rosa families lived next door to each other in the San Elizario community. Appellant's mother is L.D.R.'s godmother and according to L.D.R., the two families had a family-like relationship.

On January 31, 2010, when L.D.R. was in the fifth grade, she told her brother, Hector De La Rosa that Appellant had sexually abused her when she was getting ready to enter the first grade. Hector immediately told their mother, who called the police. El Paso Sheriff's Deputy Sergio Juarez responded to the call at the De La Rosa residence and created an initial report which he turned over to a detective for further investigation. On February 9, 2010, Detective Joe Zimmerly interviewed L.D.R. at a child advocacy center.

At the time of trial, L.D.R. was sixteen years old and a sophomore in high school. She testified that Appellant raped her when she was five years old, going into the first grade at Borrego Elementary, and her teacher during this time was Mrs. De Leon. L.D.R. related that the first time occurred at Appellant's house in his mother's bathroom. When L.D.R. went to use the bathroom, Appellant was at the door when she was finished. He touched her, pulled down his shorts, and inserted his penis into her vagina while she was lying on her back on the floor. While she and Appellant were in the bathroom, Appellant's sister knocked on the door and Appellant told L.D.R. to be quiet. When he left, he told her to stay in the bathroom for a while.

The next occasion occurred in the Eguade's hallway bathroom. Again, she went to the bathroom and Appellant was waiting for her at the door when she was finished. He put his penis in her vagina, and then he sat

down on the toilet and forced L.D.R. to put her mouth on his penis by putting his hand on the back of her neck. She testified that she saw a white substance come out of his penis. L.D.R. never told anyone because once she learned that what had happened was wrong, she felt guilty and was afraid that the two families would part ways.

On cross-examination, L.D.R. testified that she felt pain, but did not remember whether she bled. One of the reasons she never told anyone was because Appellant made her feel as though it was her fault. Even after her mother learned of the abuse, L.D.R. did not speak extensively because she does not like talking about what happened. After she made her outcry, no other incidents occurred.

The State rested its case and moved to dismiss Count II given that there was no evidence regarding anal penetration. Appellant moved for directed verdicts on Counts I and III, which the trial court denied.

Mrs. De La Rosa testified as the first defense witness. On January 31, 2010, Deputy Juarez responded to her call and she informed him of L.D.R.'s outcry. Mrs. De La Rosa began taking L.D.R. to counseling because she was having emotional problems and difficulty at night. She did not recall informing law enforcement officials that L.D.R.'s abuse occurred during mutual cookouts with the Eguades. She also did not remember giving officers the five dates of occurrence for the abuse, but did recall that the two families spent significant time together, including traveling together.

On cross-examination, Mrs. De La Rosa explained that she had known the Eguade family for 25 years, and that before the abuse, the two families were extremely close. L.D.R. is shy, suffers from weight problems, and becomes very angry whenever she has to talk about the abuse. L.D.R.'s outcry made her feel helpless and angry. She then recalled that she did in fact give law enforcement the dates of abuse which were an approximation because the child was too young to give precise dates. Mrs. De La Rosa remembered that L.D.R. told her she was around five or six years old when the events at issue occurred.

Detective Gil, a twenty-one year veteran of the sheriff's department, testified that she took Mrs. De La Rosa's and Hector's statements in 2010 after L.D.R. made her outcry. She did not recall reading the statement back to Mrs. De La Rosa, but explained that Mrs. De La Rosa initialed each paragraph in her statement to verify its contents.

L.D.R.'s counselor, Martha Dominguez, testified that she had seen L.D.R. approximately nineteen times. She observed that L.D.R. was generally a happy person, and during counseling, Dominguez helped her focus on reducing the anxiety she experienced about having to testify. L.D.R. only opened up to her once concerning the abuse. Dominguez has thirty years of practice as a licensed social worker and has treated approximately three hundred sex-abuse victims. She opined that family support is one the most important factors in how a child copes with sexual abuse. She also indicated that during her time with L.D.R., she never recanted her statement.

Mrs. Eguade testified that she was aware of the charges against her son and confirmed that he was fourteen years old at the time and L.D.R. was five years old. As L.D.R.'s godmother, she cared for L.D.R., but she never noticed that anything was bothering the child. On cross-examination, she minimized her family's relationship with the De La Rosas. They rarely went to each other's homes and when the De La Rosas did come over, they stayed outside. She acknowledged that L.D.R. had been at her home while Appellant was present. When Appellant was much younger, she supervised him but was unable to monitor him all of the time and it was impossible for her to know everything that he did outside of her presence. She acknowledged the seriousness of the charges and while she would do anything for her son, she would not lie.

Finally, Appellant testified. At the time of trial, he was twenty-five years old. He claimed that L.D.R. was lying, he would never abuse her, and he was never alone with her. Initially, Appellant attended Texas A & M

University on scholarship, but he returned to El Paso after losing the scholarship due to low grades. He was placed on academic suspension at El Paso Community College and was finishing his engineering degree at The University of Texas at El Paso. He had lost two jobs and was unable to join the Air Force because of his pending charges.

Held: Affirmed.

Opinion: Appellant complains that the trial court committed erred by failing to instruct the jury that he could not be convicted for conduct committed before his fourteenth birthday pursuant to Section 8.07(a)(6) of the Texas Penal Code. We disagree.

Appellate courts review charge error under a two-pronged test. Almanza v. State, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984). First, we must determine whether error exists; second, if error exists, we then must evaluate the harm caused by the error. Ngo v. State, 175 S.W.3d 738, 743 (Tex.Crim.App. 2005). The degree of harm required for reversal depends on whether the error was preserved at trial. Almanza, 686 S.W.2d at 171; Neal v. State, 256 S.W.3d 264, 278 (Tex.Crim.App. 2008). If the error was preserved, we review for "some harm" whereas unpreserved errors are reversible only for egregious harm. Almanza, 686 S.W.2d at 171. Appellant acknowledges that he did not object at trial. Therefore, we reverse only for egregious harm. Alamanza, 686 S.W.2d at 171. An egregious harm determination must be based on a finding of action rather than theoretical harm. See Cosio v. State, 353 S.W.3d 766, 777 (Tex.Crim.App. 2010). For harm to be egregious, the error must have affected the very basis of the case, deprived Appellant of a valuable right, or vitally affected a defensive theory. Id.

Article 36.14 of the Texas Code of Criminal Procedure details the requirements and procedures for the delivery of the court's charge to the jury. TEX.CODE CRIM.PROC.ANN. art. 36.14 (West 2007). "[The] judge shall ... deliver to the jury ... a written charge distinctly setting forth the law applicable to the case." Id. A judge has a duty to instruct the jury on the law applicable to the case at hand even when defense counsel fails to object to inclusions or exclusions in the charge. Taylor v. State, 332 S.W.3d 483, 486 (Tex.Crim.App. 2011). Appellant contends that Section 8.07(a)(6) of the Texas Penal Code was applicable. Section 8.07(a) provides that a person may not be prosecuted for or convicted of any offense that the person committed when younger than fifteen years of age. See TEX.PEN.CODE ANN. § 8.07(a)(West Supp. 2016). However, the exception contained in Section 8.07(a)(6) permits a person fourteen or older to be convicted if the person committed a first-degree felony and the juvenile is transferred pursuant to Section 54.02 of the Texas Family Code. Id. at § 8.07(a)(6). Appellant asserts that the trial court committed egregious error by failing to include a Section 8.07(a)(6) instruction informing the jury that it was not permitted to convict Appellant if it did not find that he was fourteen years or older when the offenses were committed. He relies upon Taylor v. State, 332 S.W.3d 483, 486 (Tex.Crim.App. 2011), to support his argument. The defendant in Taylor was charged by three separate indictments with aggravated sexual assault. Id. at 485. The complainant testified to sexually assaultive conduct committed by the defendant both before and after the defendant's seventeenth birthday. Id. at 485–86. Although the indictments alleged the offenses were committed on dates that followed the defendant's seventeenth birthday, the charge instructed the jurors that the State was not bound by the specific dates alleged and that they could convict the defendant if the offenses were committed at any time within the period of limitations. Id. at 487–88. Further, the charge did not contain a Section 8.07(b) instruction; that is, the jurors were not told that the defendant could not be convicted for conduct committed before his seventeenth birthday. Id. at 486; see TEX.PEN.CODE ANN. § 8.07(b).

The court of criminal appeals found that, under the circumstances, Section 8.07(b) was law applicable to the case on which the trial court had a duty to instruct the jury even in the absence of a request or objection by the defendant. Taylor, 332 S.W.3d at 488–49. The Taylor court concluded "that a jury charge is erroneous if it presents the jury with a much broader chronological perimeter than is permitted by law." Id. at 488. The court thus held that the absence of a Section 8.07(b) instruction, when combined with evidence of the defendant's conduct while he was a

juvenile and the instruction that a conviction could be based on any conduct within the limitations period, "resulted in inaccurate charges that omitted an important portion of the law applicable to the case." Id. at 489.

In response, the State directs our attention to Randall v. State, Nos. 09–13–00322–CR, 09–13–00323–CR, 09–13–00324–CR, 09–13–00325–CR, 2015 WL 1360115, at *1 (Tex.App.–Beaumont Mar. 25, 2015, no pet.)(not designation for publication), for comparison. In Randall, the appellant similarly argued that by failing to instruct the jury that he could not be prosecuted or convicted for any offenses that he committed before attaining the age of fourteen, the jury was improperly allowed to use the evidence of his delinquent conduct to find him guilty of the crimes with which he was charged in the indictment. Id. The jury in Randall also heard testimony that appellant engaged in sexual misconduct before his fourteenth birthday and the Beaumont court held it was error for the trial court to have omitted the 8.07(a)(6) instruction. Id. at *2. However, after reviewing the testimony, the arguments of counsel, and the charge as a whole, the Randall court ultimately held that while charge error occurred, the trial court's failure to include the instruction did not cause any egregious harm because all of the evidence and other information in the record made it clear to the jury that it was required to find that the conduct relevant to the crimes occurred after the appellant turned fourteen years old. Id. at *3.

We find both Taylor and Randall distinguishable. In Taylor, the absence of a Section 8.07(b) instruction was "problematic" where the jury "received evidence upon which they were statutorily prohibited from convicting Appellant," i.e., "repeated testimony regarding Appellant's pre-seventeen conduct." Id. at 487. Similarly, in Randall, there was also extensive evidence presented to jury that appellant engaged in sexual misconduct prior to his fourteenth birthday. Randall, 2015 WL 1360115, at *2.

No such evidence exists here. L.D.R.'s testimony concerning her abuse focused on two incidents that she was certain occurred when she entered the first grade at Borrego Elementary and her teacher was Mrs. DeLeon. Her school records established that this time period coincided with the 2005–06 school year, placing Appellant over fourteen years old based on his November 6, 1989, birthdate. See Several other witnesses, including Appellant himself, testified that at the time of the alleged offenses, Appellant was fourteen or fifteen years old. Moreover, even though L.D.R. testified that she was five years old when the abuse occurred, her testimony that she was entering the first grade, coupled with her school records, reflect that her age at the time of the incidents would be closer to six years old instead of five. In fact, Appellant's entire defense focuses on incidents already detailed in the juvenile transfer order and that had occurred after Appellant had already turned fourteen years of age.

Additionally, he trial court was aware that Appellant was only prepared to defend against the 2005 allegations set out in the juvenile transfer order and contained in the State's file because he initially objected to the lack of information contained in the State's file regarding a 2003 act detailed in the State's notice of extraneous offenses. Appellant's counsel informed the trial court that after reviewing the State's file, only allegations from 2005 forward were at issue. The State confirmed that it had no information regarding any 2003 allegations and no intentions of introducing such evidence. The State again assured the trial court that its case would focus on the acts that occurred in 2005 despite the 2003 indictment date.

Conclusion: Because no evidence supports a rational inference that Appellant was not fourteen years old at the time of offenses, the trial court did not err when it failed to include a Section 8.07(a)(6) instruction to the jury. We overrule Issue Two. Judgment Affirmed.

DeLaCruz v. State, MEMORANDUM, No. 13-15-00384-CR, 2017 WL 2705037, Tex.Juv.Rep. Vol. 31 No. 3 ¶17-3-9 (Tex.App.—Corpus Christi-Edinburg, 6/22/2017).

JUVENILE ADJUDICATION NOT CONSIDERED FINAL FELONY CONVICTION FOR HABITUAL FELONY OFFENDER.

Facts: The State charged DeLaCruz with assault family violence after his girlfriend, Stephanie Acosta, called 911 to report that DeLaCruz assaulted her. Acosta testified at trial, as did the police officer who responded to the 911 call.

At trial, Acosta recanted her allegation that DeLaCruz assaulted her. However, Acosta admitted that she told the responding officer at the scene that DeLaCruz assaulted her. The responding officer testified that, at the scene, Acosta provided the following explanation regarding the assault:

[Acosta] said that her and her boyfriend or ex were in a vehicle. He wanted to go somewhere else and she wanted to come home. She had kids that she needed to tend to. Apparently, he wanted to go somewhere else. They were in an argument over that, over whether or not they were going to go home once she demanded to be taken home. At that point, he became upset with her and he struck her. She said he struck her once across the face with a closed fist. She had slight redness to her face when we initially made contact with her. She said at that point, she tried to fend him off because he was being aggressive with her. In the midst of the altercation....her right pinkie fingernail came off. So she was bleeding.

The State proffered and the trial court admitted a recording of Acosta's 911 call, during which Acosta stated that DeLaCruz hit her. The State also admitted a picture of Acosta's bloody fingernail. DeLaCruz testified in his own defense and denied the assault allegation.

After hearing all the evidence, the trial court found DeLaCruz guilty of third-degree assault family violence. The offense was a third-degree felony because DeLaCruz committed a misdemeanor assault against Acosta, a dating partner, and had previously been convicted of an offense involving family violence. See id. § 22.01(b)(2)(B).

By his sole issue, DeLaCruz contends that his trial counsel was ineffective at the guilt-innocence phase of trial. Specifically, DeLaCruz complains of the following alleged omissions by trial counsel, which we have taken directly from his appellate brief:

(1) [DeLaCruz] was improperly identified by the State without object[ion] by counsel; (2) Counsel failed to object to State's leading questions to [Acosta]; (3) Counsel failed to object to State introducing the 911 tape without proper predicate; (4) Counsel failed to thoroughly cross examine [Acosta] about the assault; (5) Counsel failed to impeach Acosta; (6) Counsel failed to object to the State recalling Acosta; (7) Counsel failed to object to the State invoking the rule after trial ha[d] commenced; (8) Counsel failed to object to 'prejudicial' photographs being introduce[d] without proper predicate; (9) Counsel failed to object [sic] State's prejudicial and leading questions [to Acosta]; (10) Counsel failed to object to evidence "outside the record" being offered by the State; (11) Counsel failed to object to State's repetitive questioning [of Acosta]; (12) Counsel failed to object to narratives and hearsay from State's police witness; (13) Counsel failed to object to State's police witness being used for expert testimony without proper predicate; (14) Counsel failed to object on relevance grounds to the State questions on prior convictions; (15) Counsel failed to object to State's highly prejudicial line of questioning [to DeLaCruz]; (16) Counsel failed to object to State introducing plea deal information; (17) Counsel failed to [object to the] State introducing convictions records ...; [and] (18) Counsel failed to call additional defense witnesses.

Held: Affirmed, in part, and reversed and remanded, in part, for a new punishment trial.

Memorandum Opinion: Strickland sets forth a two-prong test for reviewing a claim of ineffective assistance of counsel. See 466 U.S. 668, 687 (1984). Under Strickland's first prong, a defendant must demonstrate that her counsel's performance was deficient in that it fell below an objective standard of reasonableness. See id. To make this showing, the defendant must identify the "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. at 690. The reviewing court must then determine "whether, in light of all

the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

Generally, if the record is silent as to why trial counsel engaged in the action being challenged as ineffective, there is a "strong presumption" that counsel's conduct was the result of sound trial strategy, falling within the wide range of reasonable professional assistance. Thompson v. State, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing Ingham v. State, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984)). To overcome this presumption, a claim of ineffective assistance must be firmly demonstrated in the record. Id. at 814.

Direct appeal is usually an inadequate vehicle for raising an ineffective-assistance claim because the record is frequently undeveloped. See Menefield v. State, 363 S.W.3d 591, 592–93 (Tex. Crim. App. 2012). Counsel usually must be afforded an opportunity to explain his challenged actions before a court concludes that his performance was deficient. Id. at 593. If trial counsel has not had such an opportunity, we will not find deficient performance unless the conduct "was so outrageous that no competent attorney would have engaged in it." Goodspeed v. State, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

Under Strickland's second prong, the defendant must demonstrate that counsel's deficient performance was so prejudicial that it deprived him of a fair trial—i.e., a trial whose result is reliable. See 466 U.S. at 687. To demonstrate prejudice, the defendant must show that but for his trial counsel's deficient performance, there is a "reasonable probability" that the outcome of the trial would have been different. Id. at 694. A "reasonable probability" in this context refers to a "probability sufficient to undermine confidence in the outcome." Id.

While Strickland sets forth this two-prong test for reviewing a claim of ineffective assistance, "there are a few situations in which prejudice under [Strickland's] second prong will be presumed." Ex parte McFarland, 163 S.W.3d 743, 752 (Tex. Crim. App. 2005); see Strickland, 466 U.S. at 692. One such situation arises when trial counsel "entirely fail[es] to subject the prosecution's case to meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 659 (1984). Though few and far between, it does happen. For example, in Cannon v. State, trial counsel declared at the outset of trial that he was "not ready for this trial" and that he would "be unable to effectively represent [his] client." 252 S.W.3d 342, 350 (Tex. Crim. App. 2008). The case proceeded to a jury trial, at which [trial] counsel declined to participate in jury selection, declined to enter a plea for his client, declined to make an opening or closing argument to the jury, declined to cross-examine any of the State's witnesses, declined to make any objections, declined to offer any defense, declined to request any special jury instructions, and declined to offer any evidence or argument with respect to punishment.

The Texas Court of Criminal Appeals held that trial counsel's inaction, considered as a whole, constructively denied the defendant effective assistance of counsel. Id. The Court stated:

> [Trial] counsel, although physically present in the courtroom at all the requisite times, effectively boycotted the trial proceedings and entirely failed to subject the prosecution's case to meaningful adversarial testing. By his refusal to participate, [trial] counsel abandoned his role as advocate for the defense and caused the trial to lose its character as a confrontation between adversaries. Prejudice to the defense is legally presumed.

Id.

B. Analysis

Here, DeLaCruz argues that trial counsel's representation calls for a presumption of prejudice because he entirely failed to subject the prosecution's case to meaningful adversarial testing. We disagree.

Unlike the record in Cannon, trial counsel gave no indication at the outset of trial that he was unprepared or that he would be unable to effectively represent DeLaCruz. Id. The case was tried to the bench, and the State and DeLaCruz waived opening statement. The State then called two witnesses: Acosta and the responding officer. The

record shows that the trial court sustained DeLaCruz's trial counsel's objections to the State eliciting speculation and hearsay testimony from these witnesses on direct examination. The record also shows that trial counsel cogently cross-examined Acosta and the responding officer in an attempt to advance the defensive theory that Acosta was a scorned lover who falsely accused DeLaCruz of assault because DeLaCruz had cheated on her. The record further shows that DeLaCruz testified in his own defense after being admonished by trial counsel on the potential risks of doing so. Finally, the record shows that trial counsel gave a forceful closing statement, which implored the trial court to hold the prosecution to its heavy burden to prove its case beyond a reasonable doubt.

After reviewing the record, we cannot say that trial counsel abandoned his role as advocate for DeLaCruz and entirely failed to subject the prosecution's case to meaningful adversarial testing. Id. Therefore, we are not persuaded by DeLaCruz's argument that trial counsel's representation calls for a presumption of prejudice. Having rejected DeLaCruz's presumed-prejudice argument, we will now determine whether DeLaCruz has satisfied his burden to demonstrate ineffective assistance of counsel under Strickland's traditional two-prong test. Strickland, 466 U.S. at 687.

DeLaCruz's claim of ineffective assistance is raised on direct appeal, and trial counsel has not been afforded an opportunity to respond to the laundry list of alleged omissions set out above. Because DeLaCruz's ineffective-assistance claim comes to us on a silent record, we must apply a strong presumption that trial counsel's conduct was the result of sound trial strategy and that it fell within the wide range of reasonable professional assistance. See Thompson, 9 S.W.3d at 813. To overcome this presumption, DeLaCruz shoulders the burden to demonstrate that trial counsel's conduct was "so outrageous that no competent attorney would have engaged in [it]." See Goodspeed, 187 S.W.3d at 392. Although DeLaCruz lists various omissions that he contends constituted ineffective assistance, he fails to explain why any omission was so outrageous that no competent attorney would have engaged in it. Although we liberally construe DeLaCruz's brief, we cannot make his arguments for him. See Jordan v. Jefferson Cty., 153 S.W.3d 670, 676 (Tex. App.–Amarillo 2004, pet. denied). Accordingly, we conclude that DeLaCruz has not met his appellate burden to demonstrate ineffective assistance. See Strickland, 466 U.S. at 687. We overrule DeLaCruz's sole issue.

III. ILLEGAL SENTENCE

By one cross-point, the State contends that DeLaCruz received an illegal sentence, which calls for a new punishment trial.

Texas Penal Code section 12.42(d) provides that a defendant found guilty of a felony other than a state jail felony must be sentenced to at least twenty-five years in prison if the defendant had previously been finally convicted of two felony offenses. TEX. PENAL CODE ANN. § 12.42(d). DeLaCruz was sentenced to twenty-five years in prison under section 12.42(d) based on the State's allegation that he had previously been finally convicted of two felony offenses, the earliest of which occurred when DeLaCruz was a juvenile. On appeal, the State now concedes that DeLaCruz's juvenile conviction does not qualify as a felony conviction for purposes of section 12.42(d), and therefore, he was sentenced in excess of the maximum authorized by law. We agree. See id.; see also Vaughns v. State, No. 04–10–00364–CR, 2011 WL 915700, at (Tex. App.–San Antonio Mar. 16, 2011, pet. ref'd) (not designated for publication) ("It is clear the Texas Legislature did not intend for juvenile adjudications to be final felony convictions in order to enhance a sentence under [section 12.42(d)] as a habitual offender"); 43A TEX. PRAC., CRIMINAL PRACTICE AND PROCEDURE § 46:100 (3d ed.) (same). We sustain the State's cross-point.

Conclusion: We affirm the portion of the trial court's judgment convicting DeLaCruz of a third-degree felony. However, we reverse the portion of the trial court's judgment sentencing him to twenty-five years in prison and remand the case for a new punishment trial.

In the Matter of D.Y., MEMORANDUM, No. 02-16-00294-CV, 2017 WL 2178877, Tex.Juv.Rep. Vol. 31 No. 3 ¶17-3-4 (Tex.App.—Ft. Worth, 5/18/2017).

STATUTE WHICH PROHIBITS A PERSON FROM TAKING A PICTURE OF ANOTHER IN A BATHROOM OR CHANGING ROOM WITHOUT THAT PERSON'S CONSENT AND WITH THE INTENT TO INVADE THE PERSON'S PRIVACY WAS NOT CONSIDERED OVERBROAD.

Facts: Juvenile Appellant D.Y. and the State stipulated to the evidence supporting the State's allegation that she had violated penal code section 21.15(b)(2) by intentionally or knowingly "photograph[ing] or by videotape or other electronic means, namely a cell phone, record[ing], broadcast[ing] or transmit[ting], at a location that is a bathroom or private dressing room, a visual image of [another female minor] without [that minor's] consent and with the intent to invade [her] privacy." The trial court found the allegations true, adjudicated Appellant delinquent, and placed Appellant on probation for one year. In her sole issue, Appellant contends that the statute is "void for overbreadth" under the Free Speech Clause of the First Amendment.

Held: Affirmed.

Memorandum Opinion: We review the issue of a statute's facial constitutionality de novo. Ex parte Lo, 424 S.W.3d 10, 14 (Tex. Crim. App. 2014).

Generally, we presume that the statute is valid, and the challenger has the burden to prove that the statute is unconstitutional. Id. at 15. However, when a law criminalizes speech or expression based on its content, we presume that the law is unconstitutional, and the State then has the burden to prove that the statute is valid. Id.

We apply intermediate scrutiny to content-neutral statutes, but content-based statutes receive strict scrutiny. Ex parte Thompson, 442 S.W.3d 325, 345 (Tex. Crim. App. 2014).

The statute at issue provides that "[a] person commits an offense if, without the other person's consent and with intent to invade the privacy of the other person, the person ... photographs or by videotape or other electronic means records, broadcasts, or transmits a visual image of another in a bathroom or changing room." Tex. Penal Code Ann. § 21.15(b)(2) (West Supp. 2016). While the parties agree that photographs and visual recordings, as well as the acts of creating them, are inherently expressive and protected by the First Amendment, see Thompson, 442 S.W.3d at 336–37, they disagree about which level of scrutiny we should apply to determine whether the statute is facially constitutional. Appellant argues that strict scrutiny applies because section 21.15(b)(2) is content-based; the State argues that intermediate scrutiny applies because the statute is content-neutral.

We do not need to resolve the parties' disagreement about the appropriate level of scrutiny to apply because the Texas Court of Criminal Appeals has already concluded that the statute satisfies the strict scrutiny test. See id. at 348–49. When strict scrutiny applies, we may uphold a statute against a First Amendment challenge "only if it is narrowly drawn to serve a compelling government interest. In this context, a regulation is narrowly drawn if it uses the least restrictive means of achieving the government interest." Id. at 344 (citations and internal quotation marks omitted). In analyzing and ultimately striking down the former improper photography and visual recordings statute2 because it failed the strict scrutiny test, the Texas Court of Criminal Appeals pointed to the statute at issue before us as an example of a statute that would satisfy that test. Id. The Thompson court stated,

• "Privacy constitutes a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner",
• "[S]ubstantial privacy interests are invaded in an intolerable manner when a person is photographed without consent in a private place, such as the home," and
• Section 21.15(b)(2) is "narrowly drawn to protect substantial privacy interests."

Id. at 348–49 (citations omitted).

While we agree with Appellant that section 21.15(b)(2) was not the focus of Thompson and we are not compelled to follow it, we nevertheless find the Texas Court of Criminal Appeals's assessment of the statute persuasive and choose to follow it. Accordingly, we hold that the privacy interests protected by the statute are compelling, but the statute is narrowly drawn to protect those interests. Thus, section 21.15(b)(2) satisfies the strict scrutiny test and does not unlawfully restrict Appellant's rights to free expression. See id.; see also Ex parte Houston, No. 02-16-00359-CR, 2016 WL 6277408, at *2–3 (Tex. App.—Fort Worth Oct. 27, 2016, no pet.) (mem. op., not designated for publication) (affirming denial of habeas relief for conviction under section 21.15(b)(2) when application was based only on Thompson's holding former subsection (b)(1) unconstitutional).

As the Texas Court of Criminal Appeals has explained, the overbreadth doctrine allows a court to invalidate a statute on its face despite its legitimate reach and regardless of whether a party's constitutional rights were violated. Ex parte Ellis, 309 S.W.3d 71, 90–91 (Tex. Crim. App. 2010). "The overbreadth doctrine is strong medicine that should be employed sparingly and only as a last resort." Id. (citations and internal quotation marks omitted). In State v. Johnson, the Texas Court of Criminal Appeals set out the test:
*The overbreadth of a statute must be "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." The statute must prohibit a substantial amount of protected expression, and the danger that the statute will be unconstitutionally applied must be realistic and not based on "fanciful hypotheticals." The person challenging the statute must demonstrate from its text and from actual fact "that a substantial number of instances exist in which the Law cannot be applied constitutionally." The Supreme Court "generally do[es] not apply the strong medicine of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law." Moreover, the overbreadth doctrine is concerned with preventing the chilling of protected speech and that concern "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct." "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct that is necessarily associated with speech (such as picketing or demonstrating)."*475 S.W.3d 860, 865 (Tex. Crim. App. 2015) (citations omitted).

Conclusion: Section 21.15(b)(2) prohibits a person from taking a picture of another in a bathroom or changing room without that person's consent and with the intent to invade the person's privacy; the emphasis of the statute is on the prohibited conduct. The sweep of the statute is limited by place (bathroom or changing room) and the actor's requisite intent (to invade the subject's privacy). Section 21.15(b)(2) does not implicate conduct in public places, unlike former section 21.15(b)(1), which was held to be overbroad. See Thompson, 442 S.W.3d at 350–51. Accordingly, we hold that section 21.15(b)(2) is not overbroad. We overrule Appellant's sole issue. Having overruled Appellant's sole issue, we affirm the trial court's judgment.

Davis v. State, No. 01-16-00079-CR, __SW3d.__, 2017 WL 1281426, Tex.Juv.Rep. Vol. 31 No. 2 ¶17-2-4 [Tex.App.—Houston (1st Dist.), 4/6/2017].

A DELINQUENCY ADJUDICATION BASED ON CONDUCT THAT CONSTITUTES A FELONY OFFENSE FOR WHICH THE CHILD WAS COMMITTED TO THE JUVENILE JUSTICE DEPARTMENT IS A FINAL FELONY CONVICTION.

Facts: The State charged Frederick Anthony Davis with aggravated assault. He pleaded guilty to the charge and "true" to one enhancement paragraph without a recommendation as to punishment. The State proffered the PSI report, which the trial court admitted into evidence. That report reflects that, in the prior juvenile delinquency adjudication alleged to enhance his evading arrest offense, Davis initially received 12 months' probation. When Davis failed to comply with the terms of his probation, the juvenile court revoked it and committed Davis to a juvenile detention facility. The trial court assessed Davis's punishment at 17 years' confinement. On appeal, Davis contends that the 17-year sentence is outside the statutory range because his earlier juvenile adjudication cannot

apply to enhance his sentence. We conclude that the trial court applied the appropriate sentencing range.

Held: Affirmed

Opinion: Davis next contends that the trial court improperly used his juvenile adjudication to enhance his conviction, and without the enhancement, 17 years' confinement exceeds the proper sentencing range of 2 to 10 years.

Davis was convicted of aggravated assault while evading arrest. See TEX. PENAL CODE ANN. § 38.04(a) (a person who intentionally flees from a peace officer commits the offense of evading arrest); TEX. PENAL CODE ANN. § 38.04(b)(2) (a person who causes serious bodily injury to another as a result of fleeing from arrest commits the offense of aggravated assault in the third degree). As a third-degree felony, aggravated assault while evading arrest is subject to enhancement by a prior felony conviction. See TEX. PENAL CODE ANN. § 12.42 (West 2015) (a person who commits a third-degree felony with a prior felony conviction may be assessed a punishment within the range for a second-degree felony with exception of certain state jail felonies.). The felony enhancement that the trial court applied in this case increased Davis's possible punishment from a range of 2 to 10 years to a range of 2 to 20 years. See TEX. PENAL CODE ANN. §§ 12.33–34 (West 2009).

Whether the trial court was correct in applying Davis's juvenile adjudication to increase the sentencing range turns on the application of the penal code provisions that govern juvenile offenses. At the time of Davis's conviction, a delinquency adjudication based on conduct that constitutes a felony offense and results in commitment to juvenile detention counted as a felony conviction for sentencing enhancement purposes. See TEX. PENAL CODE ANN. § 12.42(f) (West 2015) ("[A]n adjudication by a juvenile court ... that a child engaged in delinquent conduct ... constituting a felony offense for which the child is committed to the Juvenile Justice Department ... is a final felony conviction"). Davis was adjudicated delinquent for committing a burglary of a habitation, which is conduct that constitutes a felony offense. See TEX. PENAL CODE ANN. § 30.02 (West 1999).

In his reply brief, Davis argues that he was not convicted of felony burglary of a habitation as charged in the indictment; instead, he was adjudicated delinquent for burglary of a habitation, and thus, the State failed to prove the enhancement as charged. Davis, however, did not object to the form of the indictment, which charged the offense of burglary of a habitation and stated the juvenile court cause number. Rather, he pleaded "true" to the felony enhancement paragraph. The reporter's record filed in this cause number supports Davis's plea.

The PSI report reflects that, after receiving probation for burglary of a habitation in 2006, Davis's probation was revoked in 2007 and he was committed to a juvenile detention facility. When Davis was convicted, Texas law considered his delinquency adjudication was considered "a final felony conviction." See Act of May 31, 1995, 74th Leg. R. S., ch. 262 § 78, 1995 Tex. Sess. Law Serv. 2581 (West) (to be codified at TEX. PENAL CODE § 12.42(j)) (adding section).

Conclusion: Because the record contains evidence supporting Davis's plea of "true" to the enhancement paragraph, and the adjudicated delinquency constituted a "felony conviction" for enhancement purposes, we hold that the trial court did not impose an unlawful sentence outside the statutory range.

DEFENSES—

In the Matter of R.R.S., No. 08-16-00042-CV, --- S.W.3d ----, 2017 WL 3676374, Tex.Juv.Rep. Vol. 31 No. 4 ¶17-4-4 (Tex.App.—El Paso, 8/25/2017). (**with dissent**)

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.

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 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 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 CODEANN. § 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).

DETERMINATE SENTENCE TRANSFER—

In the Matter of L.C., MEMORANDUM, No. 02-16-00262-CV, 2017 WL 370959, Tex.Juv.Rep. Vol. 31 No. 2 ¶ 17-2-6 (Tex.App.—Fort Worth, 1/26/2017).

TRIAL COURT'S ORDER TRANSFERRING APPELLANT TO TDCJ TO SERVE THE REMAINDER OF HIS DETERMINATE SENTENCE UPHELD.

Facts: Appellant was born in July 1999. From 2011 through 2013, he was charged with committing several offenses, including burglary, theft, and assault causing bodily injury. During that time period, appellant also had several school disciplinary issues.

In 2013, when appellant was thirteen years old, he killed a five-year-old boy by striking his head with a bowling ball. After appellant struck the boy's head with the ball once, the boy fell to the ground and was still alive. Appellant then hit the boy again, killing him. According to appellant, he did so because the "boy was bothering him" and because appellant had taken a drug that had caused him to become violent. After killing the boy, appellant told his friends what he had done and took them to see the body.

The State filed a petition alleging that appellant had engaged in delinquent conduct by committing capital murder. A grand jury approved the petition. The trial court adjudicated appellant delinquent for committing capital murder and assessed a determinate sentence of twenty-three years' confinement to be served in the Texas Juvenile Justice Department (TJJD) "with a possible transfer to [TDCJ]."

During his confinement in TJJD, which began in late 2013, appellant continued to engage in troubling behavior. He assaulted and threatened staff and other youth. He had "criminally minded" responses to questions about moral

dilemmas in a psychological evaluation. He had "412 documented incidents of misbehavior resulting in 278 referrals to the [s]ecurity [u]nit and 95 [s]ecurity admissions." He engaged in inappropriate sexual behavior and vandalism. He fled apprehension and "[c]hunk[ed] [b]odily [f]luids." He tended to be impulsive, failed to plan ahead, demonstrated irritability, disregarded others' safety, and had a lack of remorse for aggressive behavior. Appellant "appear[ed] to be unconcerned" about the possibility of his transfer to TDCJ. He "exhibit[ed] an absence of internal motivation to conform and follow prosocial standards set within a controlled environment." He was placed in the agency's most restrictive programs "designed to manage and rehabilitate youth with highly aggressive behaviors and ... failed to demonstrate a reduction in aggression or advancement in the program[s]."

TJJD evaluated appellant's rehabilitative treatment progress on a monthly basis using a scale of one to four, with four signifying the highest level of rehabilitation. With the exception of two months toward the beginning of 2015, appellant remained on stage one during the entirety of his years-long confinement in TJJD. He did so despite receiving services that included medication and programs related to anger management and behavior management. Although enrollment in a capital and violent offender treatment program could have helped him, his ongoing behavioral issues impeded his participation in it. Appellant is involved in a gang and does not appear to have any intent to leave it.

A report by Leonard Cucolo, a TJJD court liaison, that the trial court admitted as an exhibit states, "It appears that staff and treatment providers have worked diligently to provide interventions and opportunities for [appellant] to make progress and succeed in the TJJD program, though [appellant] has not demonstrated [any] benefit from these interventions." The report also states, "There is little evidence to suggest that [appellant] would choose to benefit from rehabilitative treatment in the future."

In May 2016, a representative from TJJD wrote a letter to the trial court that asked the court to transfer appellant to TDCJ.6 The letter stated in part, "[Appellant] has not yet completed his 23 year sentence. . . [H]e is 16 years of age. We believe his conduct within the [TJJD] has indicated that the welfare of the community requires his transfer." After holding an evidentiary hearing in June 2016, the trial court signed an order transferring appellant to TDCJ. Appellant brought this appeal.

Held: Affirmed

Memorandum Opinion: PER CURIAM

In one point, appellant contends that the trial court abused its discretion by transferring him to TDCJ. When TJJD refers a juvenile who is serving a determinate sentence to a trial court for a possible transfer to TDCJ, the court must set a hearing. Tex. Fam. Code Ann. § 54.11(a) (West Supp. 2016). At the conclusion of the hearing, the court may either order the juvenile's return to TJJD or transfer the juvenile to TDCJ's custody for the completion of the sentence. Id. § 54.11(i). In making the decision of return or transfer, the court
may consider the experiences and character of the person before and after commitment to [TJJD] or post-adjudication secure correctional facility, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of [TJJD], county juvenile board, local juvenile probation department, and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided. Id. § 54.11(k); see In re H.C., No. 02-15-00149-CV, 2016 WL 354297, at *2 (Tex. App.—Fort Worth Jan. 28, 2016, no pet.) (mem. op.) (explaining that under section 54.11(k), "the trial court may assign different weights to the factors it considers, and the court need not consider every factor").

We review a transfer under section 54.11 for an abuse of discretion. ln re K.Y., 392 S.W.3d 736, 737 (Tex. App.—Dallas 2012, no pet.); In re J.D.P., 149 S.W.3d 790, 792 (Tex. App.—Fort Worth 2004, no pet.). "We are to review the entire record to determine whether the trial court acted without reference to any guiding rules and principles. We may not reverse a trial court's decision merely because we disagree with that decision, so long as the trial court acted within its discretionary authority." J.D.P., 149 S.W.3d at 792 (citation omitted). An abuse of discretion does not occur when some evidence of substantive and probative character supports the trial court's decision. See K.Y., 392 S.W.3d at 737.

In addition to the facts recited above, the evidence at the transfer hearing established that when appellant was first confined in TJJD, Cucolo explained to him that his release, parole, or transfer to TDCJ would be based on his

progress and behavior. Appellant completed a psychological evaluation that showed that he did not have a serious mental disease or defect. While confined, he earned some credits toward a high school diploma.

Concerning the capital and violent offender treatment program that appellant did not participate in, Cucolo testified,

> [I]t is a residential program for kids -- for youths that are committed to us with violent offenses ....
> It is an intensive program that is at the Giddings Unit. It's led by a master level and Ph.D. therapist. It is a closed group. So all the kids are housed in one dorm and they're in one group and they move through their treatment together. They focus on their committing offense, the nature of it, as well as, the manner in which it was committed. They explore, examine their life history through a life story component for the purpose of understanding different life events that may have contributed to their personality development and certainly how they became the individual who committed the offense they committed.
>
> They also have another major component called the crime story or what is called the crime reenactment, and youth will reenact their offenses for the purpose of understanding the steps, stages that they took in the commission of their offense, understanding the thoughts and feelings that led to their offense, as well as, being exposed to hopefully an understanding of the impact of that offense. They reenact it both ways; from a victim perspective, as well as, their -- as their offender, and they will role play within other youths' committing offenses and, again, it's to understand ways, I mean, they were able to commit the offense and ways to intervene with different steps, different stages to prevent offenses from occurring again.
>
> One of the things in the offense aspect of it, they also examine their entire history of any kind of delinquent conduct, criminal offenses as well, to understand where that pattern began, how it began. So it's a very important program, and it's a very successful program with kids with these types of offenses.

Cucolo acknowledged that the capital and violent offender program is the "Cadillac" of TJJD's programs and that appellant had a high need for it. But Cucolo explained that because of appellant's "[e]xtremely poor" and disruptive behavior (including the acts described above) and his poor response to programs offered to him, he could not adequately and safely be managed in TJJD. Cucolo testified that to be eligible for the program, appellant would have to "establish a fairly stable behavior record."

Cucolo testified that appellant's behavior had negatively impacted TJJD's ability to provide services to other children; he explained that appellant had "hurt a lot of kids." Cucolo recommended appellant's transfer to TDCJ.

Appellant's mother also testified. She explained that appellant's father had spent most of appellant's life in prison and that when appellant's father was not in prison, he ignored appellant's attempts to cultivate a parent-child relationship. Appellant's mother testified that appellant's limited relationship with his father caused appellant to become angry. According to appellant's mother, appellant has remorse for killing the five-year-old boy.

Appellant testified that the trouble he had caused since being confined in TJJD was because he could not control his anger. With regard to the murder he committed, appellant testified that at the time, he was upset about school and family and just wanted to hurt or kill someone. He also testified,

> I have a journal that I write in every day, two to three hours a day or every time I feel myself getting the urge to get upset. I write ... in my journal and say what I say to my victim and how I'm sorry and what things be on my mind when I think about him and how I have dreams about him and what that does to me inside my mind.
> ....
> ... It make[s] me feel sorry because I ... took his life just because I was upset.

When appellant's counsel asked him why the court should delay a decision to send him to TDCJ, he responded,

> I'm trying to make a change. When I get upset I'm not ... impulsive as I was before. ... When I get upset first thing come to my mind is my mama. Like I need to get out there to help her .... And I don't want to go to [TDCJ]. If I go I'll be an old man when I get out. I want to do something better. I don't want to be living my life in here, growing up in here. ... So I'm trying to do something different like go to college, start me a business, do everything that I want to do but do it in a different way so it's successful to me.
> ....
> ... If the Court decides to send me back, I'm going to do what I got to do to ... complete my treatment, do

everything that I'm supposed to do in TJJD and avoid going to [TDCJ], and, like, due to my negative behavior, I know different things can happen to me. So it shouldn't take for me to come back. I understand that. For me to come back to realize, hey, man you're doing too much. Like -- I want to, like, be good. I don't want everybody to know my reputation. Oh, you got to watch him, he like to assault people and hurt people. I want people to be like, oh, yeah, I can allow him to help me around. You know what I'm saying? And when I get mad, I just walk away or I use my coping skills. I get my journal and I write in my journal. That's all I do.

On cross-examination, appellant acknowledged that he had been told several times while confined that if his behavior did not improve, he would be transferred to TDCJ and that he had nonetheless not changed his behavior.

Although a factfinder could have weighed some evidence such as appellant's expression of remorse and his asserted desire to improve his behavior in favor of returning appellant to TJJD, in light of the violent, malicious character of appellant's capital murder offense, his continuing pattern of aggressive criminal acts before and after committing that offense, his failures to change this pattern while knowing that a transfer to TDCJ was possible, his disruption of TJJD services that could benefit other juveniles, and the recommendation of TJJD and the prosecutor that transfer was warranted, we cannot conclude that the trial court acted without guiding rules and principles by transferring appellant to TDCJ. See K.Y., 392 S.W.3d at 737; J.D.P., 149 S.W.3d at 792; see also Tex. Fam. Code Ann. § 54.11(k); In re J.B.C., No. 02-07-00431-CV, 2008 WL 4531701, at *4 (Tex. App.—Fort Worth Oct. 9, 2008, no pet.) (mem. op.) (upholding a transfer to TDCJ when a juvenile had been adjudicated for murdering his grandmother and the juvenile was assaultive and threatening during his confinement in the juvenile system).

Appellant contends that that the trial court could not transfer him to TDCJ without allowing him an opportunity to participate in the capital and violent offender program. But "Texas courts have ... held that a trial court does not abuse its discretion in transferring a juvenile to TDCJ even when evidence suggests that the possibility of more specialized treatment would be obtained by a juvenile's return to [TJJD]." J.B.C., 2008 WL 4531701, at *3; see also J.R.W. v. State, 879 S.W.2d 254, 258 (Tex. App.—Dallas 1994, no writ) (upholding a trial court's transfer of a juvenile to TDCJ even though a state psychologist recommended that he be sent back for participation in a specialized program); In re C.D.R., 827 S.W.2d 589, 592–93 (Tex. App.—Houston [1st Dist.] 1992, no writ) (rejecting a juvenile's claim that he should have been returned for a specialized sex offender program). We cannot conclude, as appellant argues, that appellant's participation in the capital and violent offender program was a prerequisite to his transfer to TDCJ. See J.B.C., 2008 WL 4531701, at *4 (affirming a juvenile's transfer to TDCJ even though one of the juvenile's case managers testified that the juvenile would benefit from specialized treatment in the juvenile system). The trial court could have reasonably found that appellant's success in the capital and violent offender program was unlikely given his numerous assaultive and criminal acts while confined and that his presence in the program could have jeopardized the success of other participants.

Conclusion: Considering all of the evidence presented in the trial court, we cannot conclude that the court abused its discretion by granting TJJD's request to transfer appellant to TDCJ. See Tex. Fam. Code Ann. § 54.11(i)(2), (k); K.Y., 392 S.W.3d at 737. We overrule appellant's point.

Having overruled appellant's sole point, we affirm the trial court's order transferring appellant to TDCJ to serve the remainder of his sentence.

In the Matter of R.O., MEMORANDUM, No. 06-16-00040-CV, 2017 WL 382420, Tex.Juv.Rep. Vol. 31 No. 2 ¶ 17-2-1 (Tex.App.—Texarkana, 1/27/2017).

IN DETERMINATE SENTENCE TRANSFER HEARING, RECITALS OF "DUE NOTICE ISSUED ON ALL PARTIES AS REQUIRED…" IN THE JUDGMENT ARE PRESUMED TRUE UNLESS THERE IS A CONFLICT BETWEEN THE JUDGMENT AND RECORD.

Facts: Two witnesses differed in their perspectives during the hearing to decide whether to transfer the sixteen-year-old R.O. to the Texas Department of Criminal Justice (TDCJ) as an adult to complete his twenty-year sentence on two counts of aggravated robbery. Both witnesses were from the Texas Juvenile Justice Department (TJJD). One of them, Leonard Cuccolo, had a number of TJJD records related to R.O. and testified in favor of the transfer; the other, Jamal Richardson, had personal contact with R.O. and testified in favor of retaining him in the TJJD. Appealing from the trial court's order transferring R.O. to the TDCJ, R.O. claims that victims of his offense were improperly not

notified of the hearing and that the trial court abused its discretion in ordering the transfer.

Held: Affirmed

Memorandum Opinion: R.O. complains that there was error in the failure to give notice of the transfer hearing to the three victims of R.O.'s offenses. He argues that this issue may be raised for the first time on appeal without express preservation in the trial court. The State claims R.O. failed to preserve any such error and that the record does not support a finding of lack of notice. Because this record does not establish a lack of statutory notice, we will overrule this issue without addressing preservation.

When considering the transfer of a juvenile to the TDCJ, there is to be a hearing, notice of which shall be given to certain individuals, including "the victim of the [underlying] offense." TEX. FAM. CODE ANN. § 54.11(b)(5) (West 2014). Although R.O. did not raise this issue with the trial court, he cites authority suggesting that he may complain on appeal for the first time. See In re J.L.S., 47 S.W.3d 128, 130 (Tex. App.—Waco 2001, no pet.) (citing In re C.O.S., 988 S.W.2d 760, 767 (Tex. 1999)). On the other hand, we recently questioned whether preservation is required of failure to notify a victim of a transfer hearing. See In re D.B., 457 S.W.3d 536, 538 (Tex. App.—Texarkana 2015, no pet.). In D.B., we did not decide whether the issue may be raised for the first time on appeal, but decided the issue of alleged lack of notice on its merits. Id. Here, we can decide this issue on the merits as well, since there is no evidence in the record that notice was not given to R.O.'s victims.

R.O. argues that his three victims were demonstrably absent from the transfer hearing, according to the record, and that there is nothing in the record showing notice to them. While nothing demonstrates the victims' presence and there is no separate proof of notice, the order of transfer recites that "due notice [of the transfer hearing was] issued on all parties as required by" Section 54.11 of the Texas Family Code.

Recitals contained in the judgment are presumed true unless there is a conflict between the judgment and record. See Parks v. Developers Sur. & Indem. Co., 302 S.W.3d 920, 923 (Tex. App.—Dallas 2010, no pet.); MJR Fin., Inc. v. Marshall, 840 S.W.2d 5, 9 (Tex. App.—Dallas 1992, no writ). When someone challenges a recitation contained in a judgment, he or she must overcome the normal presumption that recitals in the written judgment are correct and are binding unless proven false by the record. See State v. Guerrero, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013) (citing Breazeale v. State, 683 S.W.2d 446, 450 (Tex. Crim. App. 1984) (op. on reh'g)).

Conclusion: This record does not establish the lack of notice to R.O.'s victims. Also, contrary to R.O.'s argument, the lack of victims at the hearing does not demonstrate a lack of notice to them and does not overcome the recitation of notice in the order. See D.B., 457 S.W.3d at 539.

DISPOSITION PROCEEDINGS—

In the Matter of J.C.C., No. 08-16-00306-CV, --- S.W.3d ----, 2018 WL 300243, Tex.Juv.Rep. Vol. 32 No. 1 ¶ 18-1-5 (Tex. App.—El Paso, 1/5/2017).

THE MANDATORY LANGUAGE OF SECTION 51.20(C), STANDING ALONE, MAY NOT PRECLUDE A COMMITMENT TO THE TEXAS JUVENILE JUSTICE DEPARTMENT.

Facts: The State alleged in its petition that Appellant possessed more than four but less than 200 grams of heroin. See TEX.HEALTH & SAFETY CODE ANN. §§ 481.102(2), 481.115(a)(West 2017 and West Supp. 2017). Appellant waived his right to a jury trial and entered a plea of true to this allegation. Appellant's plea is supported by a judicial confession and stipulation. The trial court accepted the plea and found that Appellant had engaged in delinquent conduct, and it entered an adjudication order.

At the disposition hearing, the State presented the testimony of Renee Mora, a juvenile probation officer familiar with the facts of the case and Appellant's probation history. Further, the State introduced into evidence the pre-disposition report which sets forth Appellant's juvenile record. The record shows that Appellant was first referred to the El Paso County Juvenile Probation Department in 2013 for four burglary of a vehicle offenses. The juvenile court adjudicated Appellant for two of those offenses and placed him on supervised probation without a curfew. Appellant

committed technical violations of the probation order in 2014 and 2015, and these violations resulted in an increase in the level of probation. He was placed on supervised probation with an electronic monitor in January 2014. Following another technical violation, the trial court placed him outside of the home in APECS Challenge Academy. He was successfully discharged from APECS in July 2014 and placed on intensive supervised probation (ISP) under the Drug Court program. In January 2015, the trial court sustained a motion to modify based on a technical violation and placed Appellant on SHOCAP1 Probation. In April 2015, the trial court adjudicated Appellant for two new offenses, evading arrest and failure to identify, and Appellant was placed in the Challenge Academy. After Appellant was successfully discharged from the Challenge Academy, the court placed him back on SHOCAP. Appellant committed a new technical violation in January 2016 and he was "recycled" back into the Challenge program. Appellant did not successfully complete the Challenge aftercare program. In September 2016, Appellant was referred to the Department again based on the offense involved in this case, possession of more than four but less than 200 grams of heroin.

The State also introduced evidence regarding Appellant's substance abuse and mental health history. Appellant began using marihuana daily when he was twelve years of age. He has also used alcohol, spice, cocaine, and heroin. He was referred to substance abuse counseling in 2013 and 2014, but did not complete it. The Probation Department referred Appellant to Aliviane from September 2013 to March 2014 and he received substance abuse counseling as well as individual and family therapy. He underwent two weeks of partial hospitalization at University Behavioral Health (UBH) from March 17, 2014 through April 14, 2014.

On May 1, 2014, Appellant underwent a psychological evaluation from Amanecer. Amanecer diagnosed Appellant with conduct disorder, moderate cannabis use disorder, parent/child relational problems, child physical abuse, academic or educational problems, and problems related to the legal system, and it recommended a physically-oriented behavior modification program. Appellant was referred to the Challenge program based on this recommendation. On June 2, 2014, Appellant was referred to Texas Tech University for a psychiatric evaluation, and he was diagnosed with ADHD, anxiety, and Post-Traumatic Stress Disorder (PTSD). There is evidence that both Appellant and his mother were physically abused by Appellant's father. Appellant was also evaluated by Dr. Shiva Mansourkhani and diagnosed, with ADHD, PTSD, anxiety disorder, depressive disorder, cannabis use disorder, and conduct disorder. Dr. Mansourkhani recommended that Appellant receive trauma-focused therapy in a structural therapeutic environment and emphasized that Appellant might benefit from long-term placement in a facility that provided trauma focused-cognitive behavior therapy (TF-CBT). Based on this report, the Juvenile Probation Department recommended to the trial court that Appellant be committed to TJJD. According to Ms. Mora, TJJD could provide trauma-focused therapy in a structural therapeutic environment.

In the disposition order committing Appellant to TJJD, the trial court expressly found that it is in Appellant's best interests to be placed outside of his home, reasonable efforts were made to prevent or eliminate the need for Appellant's removal from the home, and Appellant, in his home, cannot be provided the quality of care and level of support and supervision that he needs to meet the conditions of probation.

In his sole issue, Appellant contends that the trial court abused its discretion by committing him to the Texas Juvenile Justice Department because the trial court failed to provide him with any treatment for Post-Traumatic Stress Disorder in violation of Section 51.20 of the Texas Family Code.

Held: Affirmed

Opinion:

Standard of Review

A juvenile court possesses broad discretion to determine a suitable disposition for a child who has been adjudicated as having engaged in delinquent behavior. See TEX.FAM.CODE ANN. § 54.04 (West Supp. 2017); In re E.F.Z.R., 250 S.W.3d 173, 177 (Tex.App.—El Paso 2008, no pet.). Absent an abuse of discretion, we will not disturb the juvenile court's disposition or modification of a disposition. See In re E.F.Z.R., 250 S.W.3d at 176. The juvenile court's exercise of discretion regarding disposition is guided by Section 54.04 of the Texas Family Code. See TEX.FAM.CODE ANN. § 54.04; In re E.F.Z.R., 250 S.W.3d at 177.

Under Section 54.04(i), a court must make the following statutory findings before it commits a juvenile to TJJD: (A) it is in the child's best interests to be placed outside his home; (B) reasonable efforts were made to prevent or

eliminate the need for his removal from the home and to make it possible for the child to return to his home; and (C) the child cannot be provided the quality of care and level of support and supervision in his home that he needs to meet the conditions of probation. See TEX.FAM.CODE ANN. § 54.04(i)(1)(A)-(C)(West Supp. 2017). The trial court made each of the required findings and included them in the disposition order. Appellant's brief challenges only the second of the required findings. See TEX.FAM.CODE ANN. § 54.04(i)(1)(B).

In conducting our review, we engage in a two-pronged analysis: (1) did the trial court have sufficient information upon which to exercise its discretion; and (2) did the trial court err in its application of discretion? In re E.F.Z.R., 250 S.W.3d at 176. We employ the traditional sufficiency of the evidence standards of review when considering the first question. Id. We then proceed to determine whether, based on the evidence, the trial court made a reasonable decision or whether it was arbitrary and unreasonable. Id. In evaluating the legal sufficiency of the evidence to support the trial court's findings, we consider evidence favorable to the finding if a reasonable fact finder could and disregard evidence contrary to the finding unless a reasonable fact finder could not. See City of Keller v. Wilson, 168 S.W.3d 802, 807, 827 (Tex. 2005). Anything more than a scintilla of evidence is legally sufficient to support the challenged finding. In re C.J.H., 79 S.W.3d 698, 703 (Tex.App.—Fort Worth 2002, no pet.). When reviewing the factual sufficiency of the evidence to support a finding, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to the finding, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the finding should be set aside. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); see In re E.F.Z.R., 250 S.W.3d at 176.

Reasonable Efforts Made to Prevent Removal

Appellant argues that the trial court's affirmative finding under Section 54.04(i)(1)(B) is precluded by the evidence showing that Appellant was not provided with treatment for PTSD as required by Section 51.20 of the Texas Family Code. As part of this argument, Appellant asserts that the Probation Department made "[n]o efforts of any kind" to provide treatment for PTSD based on Dr. Mansourkhani's recommendations. Appellant also contends that the trial court's finding is contrary to Section 51.01 of the Texas Family Code. Appellant does not expressly state his arguments in terms of a sufficiency challenge, but we have construed his brief as challenging the legal and factual sufficiency of the evidence supporting the trial court's finding that reasonable efforts were made to prevent or eliminate the need for Appellant's removal from the home and to make it possible for Appellant to return to his home. See TEX.FAM.CODE ANN. § 54.04(i)(1)(B).

Citing Section 51.01(5) of the Family Code, Appellant first argues that the trial court abused its discretion by committing him to TJJD because his removal from the home was not necessary. Section 51.01 requires that the Juvenile Justice Code (Title 3) be construed to effectuate a list of public purposes, including but not limited to the following: to provide for the protection of the public and public safety; to provide for the care, protection, and wholesome moral, mental, and physical development of children coming within the provisions of Title 3; and to protect the welfare of the community. See TEX.FAM.CODE ANN. § 51.01 (West 2014). Subsection (5) further provides that these purposes should be achieved in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety. See TEX.FAM.CODE ANN. § 51.01(5). This statute guides the construction of Title 3, but it does not provide Appellant with an independent mechanism or ground for establishing that the trial court abused its discretion by removing him from his home.

Appellant bases his second argument on Section 51.20 of the Family Code. This statute authorizes a juvenile court to order a child who is alleged by a petition to have engaged in delinquent conduct to be examined by a disinterested expert to determine whether the child has a mental illness, is a person with mental retardation, or suffers from chemical dependency. See TEX.FAM.CODE ANN. § 51.20(a)(West 2014). If the examination reveals that the child has a mental illness or mental retardation, or suffers from chemical dependency, the probation department shall refer the child to the local mental health or mental retardation authority or to another appropriate agency or provider for evaluation and services. See TEX.FAM.CODE ANN. § 51.20(b). The statute also requires the probation department to refer the child for evaluation and services if a qualified professional determines that the child has a mental illness, mental retardation, or suffers from chemical dependency while the child is under court-ordered probation and is not currently receiving treatment for the mental illness, mental retardation, or chemical dependency. See TEX.FAM.CODE ANN. § 51.20(c).

We have found no cases holding that a probation department's failure to comply with Section 51.20(c), standing alone, precludes a finding that reasonable efforts were made to prevent or eliminate the need for the juvenile's removal from the home and to make it possible for the juvenile to return to his home. Further, we are unable to find that the record shows a complete failure to provide Appellant with treatment for PTSD. The record before us reflects that the Juvenile Probation Department attempted to address the constellation of mental health and chemical dependency issues likely arising from Appellant's physical abuse as a child by referring him for evaluation and services with various providers. In May 2014, Amanecer diagnosed Appellant with conduct disorder, moderate cannabis use disorder, parent/child relational problems, and child physical abuse. Based on Amanecer's recommendation for a physically-oriented behavior modification program, the Probation Department referred Appellant to the Challenge program. In June 2014, Appellant underwent a psychiatric evaluation, and he was diagnosed with ADHD, anxiety, and Post-Traumatic Stress Disorder (PTSD). The provider recommended that Appellant continue with the prescribed medications for PTSD-related depression and anxiety, and he further recommended that Appellant be referred for individual psychotherapy and counseling to address trauma-related issues as well as depression. Ms. Mora testified that the probation records did not indicate whether Appellant was referred to individual psychotherapy and counseling for PTSD. There is also evidence in the record that Appellant has been provided with individual and family counseling while on probation. Further, Ms. Mora testified that TJJD offers therapy for PTSD and the records indicated that Appellant generally responded better when he was in a restrictive environment rather than in the local community. Thus, there is evidence in the record that Appellant has been provided with some treatment for his mental health issues and additional services are available in TJJD. There is also evidence that Appellant has been provided with treatment for chemical dependency while on juvenile probation. Further, he received substance abuse counseling as well as individual therapy and family therapy. Appellant's mother admitted that she did not take Appellant to some mental health appointments as directed by the Probation Department.

In determining whether reasonable efforts were made to prevent or eliminate the need for Appellant's removal from the home and to make it possible for Appellant to return to his home, we must also consider the evidence that Appellant has multiple referrals to the Juvenile Probation Department and he has been subjected to increasing levels of probationary supervision over a three-year period. When Appellant was first referred to the Probation Department in 2013 for four burglary offenses, he was placed on supervised probation without a curfew, but the court incrementally increased the level of supervision in 2014 and 2015 in response to technical violations committed by Appellant. During this time, Appellant was on supervised probation with an electronic monitor, intensive supervised probation (ISP) under the Drug Court program, and SHOCAP probation. In 2014, the trial court also placed Appellant outside of the home in the APECS Challenge Academy. Despite this level of supervision, Appellant committed two new offenses, evading arrest and failure to identify, and the trial court placed Appellant in the Challenge Academy. After Appellant was successfully discharged from the Challenge Academy, the court placed him back on SHOCAP. Appellant committed a new technical violation in January 2016 and he was "recycled" back into the Challenge program. Appellant did not successfully complete the Challenge aftercare program. In September 2016, Appellant was referred to the Department again based on his commission of a new offense, possession of more than four but less than 200 grams of heroin. In summary, the evidence in favor of the challenged finding shows that the trial court placed Appellant on juvenile probation and the court steadily increased the level of supervision in response to Appellant's technical violations and commission of new offenses. Further, the Probation Department provided Appellant with services designed to address his mental health, family dynamic, and chemical dependency issues. Despite this supervision and the services provided, Appellant continued to violate the conditions of probation and to commit new offenses, including the possession of heroin offense. The trial court could have determined from the evidence that reasonable efforts had been made to prevent Appellant's removal from the home, but these efforts were unsuccessful. See In re J.D, Nos. 04-01-00748-CV, 04-01-00749-CV, 2002 WL 31174477, at *2 (Tex.App.—San Antonio Oct. 2, 2002, no pet.)(reasonable efforts had been made to prevent the need for removal because the juvenile had been allowed to remain in his home on electronic monitoring; however, those efforts were unsuccessful because he committed an assault while on the electronic monitoring). We conclude that the evidence is legally sufficient to support the trial court's finding that reasonable efforts were made to prevent or eliminate the need for Appellant's removal from the home and to make it possible for Appellant to return to his home.

We have also considered whether this finding is supported by factually sufficient evidence. The facts related above show that Appellant did not succeed on probation despite being closely supervised and provided with treatment and counseling services for his mental health and chemical dependency issues. There is evidence that Appellant was not provided with the specific TF-CBT treatment recommended by Dr. Mansourkhani for PTSD, but

there is no evidence that if this specific treatment had been provided there is even a reasonable possibility that it would have prevented or eliminated the need to remove Appellant from his home. We conclude that the evidence is factually sufficient to establish that reasonable efforts were made to prevent or eliminate the need for Appellant's removal from the home.

Conclusion: Having found that the evidence is legally and factually sufficient to support the challenged finding, we conclude that the trial court had sufficient information on which to base its decision. Further, we find that the trial court's decision to commit Appellant to TJJD does not constitute an abuse of discretion. Accordingly, we overrule Appellant's sole issue and affirm the judgment of the trial court.

Packingham v. North Carolina, No. 15-1194, --- S.Ct. ----, 2017 WL 2621313, Tex.Juv.Rep. Vol. 31 No. 3 ¶ 17-3-7 (U.S. Sup. Ct., 2/27/2017).

UNITED STATES SUPREME COURT HELD A NORTH CAROLINA STATUTE MAKING IT A FELONY FOR A REGISTERED SEX OFFENDER TO ACCESS A SOCIAL NETWORKING WEBSITES UNCONSTITUTIONAL, BECAUSE THE STATUTE FORECLOSED ACCESS TO SOCIAL MEDIA ALTOGETHER, PREVENTING THE USER FROM ENGAGING IN THE LEGITIMATE EXERCISE OF THEIR FIRST AMENDMENT RIGHTS.

Facts: North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N.C. Gen. Stat. Ann. §§ 14–202.5(a), (e). According to sources cited to the Court, the State has prosecuted over 1,000 people for violating this law.

In 2002, petitioner Lester Gerard Packingham—then a 21–year–old college student—had sex with a 13–year–old girl. He pleaded guilty to taking indecent liberties with a child. Because this crime qualifies as "an offense against a minor," petitioner was required to register as a sex offender—a status that can endure for 30 years or more. See § 14–208.6A; see § 14–208.7(a). As a registered sex offender, petitioner was barred under § 14–202.5 from gaining access to commercial social networking sites.

In 2010, a state court dismissed a traffic ticket against petitioner. In response, he logged on to Facebook.com and posted the following statement on his personal profile:
"Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent..... Praise be to GOD, WOW! Thanks JESUS!" App. 136.

At the time, a member of the Durham Police Department was investigating registered sex offenders who were thought to be violating § 14–202.5. The officer noticed that a " 'J.R. Gerrard' " had posted the statement quoted above. 368 N.C. 380, 381, 777 S.E.2d 738, 742 (2015). By checking court records, the officer discovered that a traffic citation for petitioner had been dismissed around the time of the post. Evidence obtained by search warrant confirmed the officer's suspicions that petitioner was J.R. Gerrard.

Petitioner was indicted by a grand jury for violating § 14–202.5. The trial court denied his motion to dismiss the indictment on the grounds that the charge against him violated the First Amendment. Petitioner was ultimately convicted and given a suspended prison sentence. At no point during trial or sentencing did the State allege that petitioner contacted a minor—or committed any other illicit act—on the Internet.

Petitioner appealed to the Court of Appeals of North Carolina. That court struck down § 14–202.5 on First Amendment grounds, explaining that the law is not narrowly tailored to serve the State's legitimate interest in protecting minors from sexual abuse. 229 N.C.App. 293, 304, 748 S.E.2d 146, 154 (2013). Rather, the law

"arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal." Ibid. The North Carolina Supreme Court reversed, concluding that the law is "constitutional in all respects." 368 N.C., at 381, 777 S.E.2d, at 741. Among other things, the court explained that the law is "carefully tailored ... to prohibit registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors." Id., at 389, 777 S.E.2d, at 747. The court also held that the law leaves open adequate alternative means of communication because it permits petitioner to gain access to websites that the court believed perform the "same or similar" functions as social media, such as the Paula Deen Network and the website for the local NBC affiliate. Id., at 390, 777 S.E.2d, at 747. Two justices dissented. They stated that the law impermissibly "creates a criminal prohibition of alarming breadth and extends well beyond the evils the State seeks to combat." Id., at 401, 777 S.E.2d, at 754 (opinion of Hudson, J.) (alteration, citation, and internal quotation marks omitted).

Held: Reversed and remanded.
The North Carolina statute held unconstitutional. It impermissibly restricts lawful speech in violation of the First Amendment.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C.J., and THOMAS, J., joined. GORSUCH, J., took no part in the consideration or decision of the case.

Opinion: A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. See Ward v. Rock Against Racism, 491 U.S. 781, 796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.

While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, Reno v. American Civil Liberties Union, 521 U.S. 844, 868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), and social media in particular. Seven in ten American adults use at least one Internet social networking service. Brief for Electronic Frontier Foundation et al. as Amici Curiae 5–6. One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited to the Court in this case, Facebook has 1.79 billion active users. Id., at 6. This is about three times the population of North America.

Social media offers "relatively unlimited, low-cost capacity for communication of all kinds." Reno, supra, at 870, 117 S.Ct. 2329. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. See Brief for Electronic Frontier Foundation 15–16. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought." Reno, supra, at 870, 117 S.Ct. 2329 (internal quotation marks omitted).

This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.

It is necessary to make two assumptions to resolve this case. First, given the broad wording of the North Carolina statute at issue, it might well bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com. See post, at —— – ——; see also Brief for Electronic Frontier Foundation 24–27; Brief for Cato Institute et al. as Amici Curiae 10–12, and n. 6. The Court need not decide the precise scope of the statute. It is enough to assume that the law applies (as the State concedes it does) to social networking sites "as commonly understood"—that is, websites like Facebook, LinkedIn, and Twitter. See Brief for Respondent 54; Tr. of Oral Arg. 27.

Second, this opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue. Specific criminal acts are not protected speech even if speech is the means for their commission. See Brandenburg v. Ohio, 395 U.S. 444, 447–449, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (per curiam). Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor. Cf. Brief for Respondent 42–43. Specific laws of that type must be the State's first resort to ward off the serious harm that sexual crimes inflict. (Of importance, the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court.)

Even with these assumptions about the scope of the law and the State's interest, the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. Supra, at ––––. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox." Reno, 521 U.S., at 870, 117 S.Ct. 2329.

In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.

The primary response from the State is that the law must be this broad to serve its preventative purpose of keeping convicted sex offenders away from vulnerable victims. The State has not, however, met its burden to show that this sweeping law is necessary or legitimate to serve that purpose. See McCullen, 573 U.S., at ——, 134 S.Ct., at 2540.

It is instructive that no case or holding of this Court has approved of a statute as broad in its reach. The closest analogy that the State has cited is Burson v. Freeman, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). There, the Court upheld a prohibition on campaigning within 100 feet of a polling place. That case gives little or no support to the State. The law in Burson was a limited restriction that, in a context consistent with constitutional tradition, was enacted to protect another fundamental right—the right to vote. The restrictions there were far less onerous than those the State seeks to impose here. The law in Burson meant only that the last few seconds before voters entered a polling place were "their own, as free from interference as possible." Id., at 210, 112 S.Ct. 1846. And the Court noted that, were the buffer zone larger than 100 feet, it "could effectively become an impermissible burden" under the First Amendment. Ibid.

The better analogy to this case is Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987), where the Court struck down an ordinance prohibiting any "First Amendment activities" at Los Angeles International Airport because the ordinance covered all manner of protected, nondisruptive behavior including "talking and reading, or the wearing of campaign buttons or symbolic clothing," id., at 571, 575, 107 S.Ct. 2568. If a law prohibiting "all protected expression" at a single airport is not constitutional, id., at 574, 107 S.Ct. 2568 (emphasis deleted), it follows with even greater force that the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.

Conclusion: It is well established that, as a general rule, the Government "may not suppress lawful speech as the means to suppress unlawful speech." Ashcroft v. Free Speech Coalition, 535 U.S., at 255, 122 S.Ct. 1389. That is what North Carolina has done here. Its law must be held invalid.

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

Justice ALITO, with whom THE CHIEF JUSTICE and Justice THOMAS join, concurring in the judgment.

The North Carolina statute at issue in this case was enacted to serve an interest of "surpassing importance." New York v. Ferber, 458 U.S. 747, 757, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)—but it has a staggering reach. It makes it a felony for a registered sex offender simply to visit a vast array of websites, including many that appear to provide no realistic opportunity for communications that could facilitate the abuse of children. Because of the law's extraordinary breadth, I agree with the Court that it violates the Free Speech Clause of the First Amendment.

I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks. Ante, at ——— – ———. And this language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers. I am troubled by the implications of the Court's unnecessary rhetoric.

The North Carolina law at issue makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N.C. Gen. Stat. Ann. §§ 14–202.5(a), (e) (2015). And as I will explain, the statutory definition of a "commercial social networking Web site" is very broad.

Packingham and the State debate the analytical framework that governs this case. The State argues that the law in question is content neutral and merely regulates a "place" (i.e., the internet) where convicted sex offenders may wish to engage in speech. See Brief for Respondent 20–25. Therefore, according to the State, the standard applicable to "time, place, or manner" restrictions should apply. See Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Packingham responds that the challenged statute is "unlike any law this Court has considered as a time, place, or manner restriction," Brief for Petitioner 37, and he advocates a more demanding standard of review, id., at 37–39.

Like the Court, I find it unnecessary to resolve this dispute because the law in question cannot satisfy the standard applicable to a content-neutral regulation of the place where speech may occur.

A content-neutral "time, place, or manner" restriction must serve a "legitimate" government interest, Ward, supra, at 798, 109 S.Ct. 2746 and the North Carolina law easily satisfies this requirement. As we have frequently

noted, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." Ferber, supra, at 757, 102 S.Ct. 3348. "Sex offenders are a serious threat," and "the victims of sexual assault are most often juveniles." McKune v. Lile, 536 U.S. 24, 32, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002) (plurality opinion); see Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 4, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003). "[T]he ... interest [of] safeguarding the physical and psychological well-being of a minor ... is a compelling one," Globe Newspaper Co. v. Superior Court, County of Norfolk, 457 U.S. 596, 607, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), and "we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights," Ferber, supra, at 757, 102 S.Ct. 3348.

Repeat sex offenders pose an especially grave risk to children. "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." McKune, supra, at 33, 122 S.Ct. 2017 (plurality opinion); see United States v. Kebodeaux, 570 U.S. ——, —— – —, 133 S.Ct. 2496, 2503–2504, 186 L.Ed.2d 540 (2013).

The State's interest in protecting children from recidivist sex offenders plainly applies to internet use. Several factors make the internet a powerful tool for the would-be child abuser. First, children often use the internet in a way that gives offenders easy access to their personal information—by, for example, communicating with strangers and allowing sites to disclose their location. Second, the internet provides previously unavailable ways of communicating with, stalking, and ultimately abusing children. An abuser can create a false profile that misrepresents the abuser's age and gender. The abuser can lure the minor into engaging in sexual conversations, sending explicit photos, or even meeting in person. And an abuser can use a child's location posts on the internet to determine the pattern of the child's day-to-day activities—and even the child's location at a given moment. Such uses of the internet are already well documented, both in research and in reported decisions.

Because protecting children from abuse is a compelling state interest and sex offenders can (and do) use the internet to engage in such abuse, it is legitimate and entirely reasonable for States to try to stop abuse from occurring before it happens.

It is not enough, however, that the law before us is designed to serve a compelling state interest; it also must not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward, 491 U.S., at 798–799, 109 S.Ct. 2746; see also McCullen v. Coakley, 573 U.S. ——, —— – ——, 134 S.Ct. 2518, 2535, 189 L.Ed.2d 502 (2014). The North Carolina law fails this requirement.

A straightforward reading of the text of N.C. Gen. Stat. Ann. § 14–202.5 compels the conclusion that it prohibits sex offenders from accessing an enormous number of websites. The law defines a "commercial social networking Web site" as one with four characteristics. First, the website must be "operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site." § 14–202.5(b)(1). Due to the prevalence of advertising on websites of all types, this requirement does little to limit the statute's reach.

Second, the website must "[f]acilitat[e] the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges." § 14–202.5(b)(2). The term "social introduction" easily encompasses any casual exchange, and the term "information exchanges" seems to apply to any site that provides an opportunity for a visitor to post a statement or comment that may be read by other visitors. Today, a great many websites include this feature.

Third, a website must "[a]llo[w] users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal

information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site." § 14–202.5(b)(3) (emphasis added). This definition covers websites that allow users to create anything that can be called a "personal profile," i.e., a short description of the user. Contrary to the argument of the State, Brief for Respondent 26–27, everything that follows the phrase "such as" is an illustration of features that a covered website or personal profile may (but need not) include.

Fourth, in order to fit within the statute, a website must "[p]rovid[e] users or visitors ... mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger." § 14–202.5(b)(4) (emphasis added). This requirement seems to demand no more than that a website allow back-and-forth comments between users. And since a comment function is undoubtedly a "mechanis[m] to communicate with other users," ibid., it appears to follow that any website with such a function satisfies this requirement.

The fatal problem for § 14–202.5 is that its wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child. A handful of examples illustrates this point.

Take, for example, the popular retail website Amazon.com, which allows minors to use its services and meets all four requirements of § 14–202.5' s definition of a commercial social networking website. First, as a seller of products, Amazon unquestionably derives revenue from the operation of its website. Second, the Amazon site facilitates the social introduction of people for the purpose of information exchanges. When someone purchases a product on Amazon, the purchaser can review the product and upload photographs, and other buyers can then respond to the review. This information exchange about products that Amazon sells undoubtedly fits within the definition in § 14–202. It is the equivalent of passengers on a bus comparing notes about products they have purchased. Third, Amazon allows a user to create a personal profile, which is then associated with the product reviews that the user uploads. Such a profile can contain an assortment of information, including the user's name, e-mail address, and picture. And fourth, given its back-and-forth comment function, Amazon satisfies the final statutory requirement.

Many news websites are also covered by this definition. For example, the Washington Post's website gives minors access and satisfies the four elements that define a commercial social networking website. The website (1) derives revenue from ads and (2) facilitates social introductions for the purpose of information exchanges. Users of the site can comment on articles, reply to other users' comments, and recommend another user's comment. Users can also (3) create personal profiles that include a name or nickname and a photograph. The photograph and name will then appear next to every comment the user leaves on an article. Finally (4), the back-and-forth comment section is a mechanism for users to communicate among themselves. The site thus falls within § 14–202.5 and is accordingly off limits for registered sex offenders in North Carolina.

Or consider WebMD—a website that contains health-related resources, from tools that help users find a doctor to information on preventative care and the symptoms associated with particular medical problems. WebMD, too, allows children on the site. And it exhibits the four hallmarks of a "commercial social networking" website. It obtains revenue from advertisements. It facilitates information exchanges—via message boards that allow users to engage in public discussion of an assortment of health issues. It allows users to create basic profile pages: Users can upload a picture and some basic information about themselves, and other users can see their aggregated comments and "likes." WebMD also provides message boards, which are specifically mentioned in the statute as a "mechanis[m] to communicate with other users." N.C. Gen. Stat. Ann. § 14–202.5(b)(4).

As these examples illustrate, the North Carolina law has a very broad reach and covers websites that are ill suited for use in stalking or abusing children. The focus of the discussion on these sites—shopping, news, health—

does not provide a convenient jumping off point for conversations that may lead to abuse. In addition, the social exchanges facilitated by these websites occur in the open, and this reduces the possibility of a child being secretly lured into an abusive situation. These websites also give sex offenders little opportunity to gather personal details about a child; the information that can be listed in a profile is limited, and the profiles are brief. What is more, none of these websites make it easy to determine a child's precise location at a given moment. For example, they do not permit photo streams (at most, a child could upload a single profile photograph), and they do not include up-to-the minute location services. Such websites would provide essentially no aid to a would-be child abuser.

Placing this set of websites categorically off limits from registered sex offenders prohibits them from receiving or engaging in speech that the First Amendment protects and does not appreciably advance the State's goal of protecting children from recidivist sex offenders. I am therefore compelled to conclude that, while the law before us addresses a critical problem, it sweeps far too broadly to satisfy the demands of the Free Speech Clause.

While I thus agree with the Court that the particular law at issue in this case violates the First Amendment, I am troubled by the Court's loose rhetoric. After noting that "a street or a park is a quintessential forum for the exercise of First Amendment rights," the Court states that "cyberspace" and "social media in particular" are now "the most important places (in a spatial sense) for the exchange of views." Ante, at ——— – ———. The Court declines to explain what this means with respect to free speech law, and the Court holds no more than that the North Carolina law fails the test for content-neutral "time, place, and manner" restrictions. But if the entirety of the internet or even just "social media" sites16 are the 21st century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders. May a State preclude an adult previously convicted of molesting children from visiting a dating site for teenagers? Or a site where minors communicate with each other about personal problems? The Court should be more attentive to the implications of its rhetoric for, contrary to the Court's suggestion, there are important differences between cyberspace and the physical world.

I will mention a few that are relevant to internet use by sex offenders. First, it is easier for parents to monitor the physical locations that their children visit and the individuals with whom they speak in person than it is to monitor their internet use. Second, if a sex offender is seen approaching children or loitering in a place frequented by children, this conduct may be observed by parents, teachers, or others. Third, the internet offers an unprecedented degree of anonymity and easily permits a would-be molester to assume a false identity.

The Court is correct that we should be cautious in applying our free speech precedents to the internet. Ante, at ———. Cyberspace is different from the physical world, and if it is true, as the Court believes, that "we cannot appreciate yet" the "full dimensions and vast potential" of "the Cyber Age," ibid., we should proceed circumspectly, taking one step at a time. It is regrettable that the Court has not heeded its own admonition of caution.

EVIDENCE—

In the Matter of P.M., No. 08-15-00038-CV, --- S.W.3d ----, 2018 WL 388006, Tex.Juv.Rep. Vol. 32 No. 1 ¶ 18-1-7 (Tex. App.—El Paso, 1/12/2018).

JUVENILE'S CONFRONTATION RIGHTS UNDER THE SIXTH AMENDMENT WERE VIOLATED WHEN JUVENILE WAS REQUIRED TO CALL THE CHILD/COMPLAINANT TO TESTIFY BECAUSE THE STATE DID NOT CALL HIM AFTER CALLING THE OUT-CRY WITNESS TO TESTIFY.

Facts: P.M. (the juvenile) and F.H. (the child) are half-brothers through their biological mother, T.H. M.H. is the father of the child, who was six-years old at the time of the adjudication hearing in October 2014, and five-years old at the time the alleged offenses occurred in October 2013. The juvenile was fifteen at the time of the alleged offense, and sixteen at the time of trial. M.H. considered himself a father to the juvenile. In October 2013, T.H., M.H., the

child, and the juvenile lived together in a two-bedroom apartment. The boys slept together in a single bed, and showered together on Sundays.

During the adjudication hearing, M.H. testified that on October 29, 2013, while returning home from buying cupcakes for school, the child informed his father, M.H., that he liked grapes. M.H. informed the child that he should have told him that he liked grapes, and he could have bought some. M.H. then asked his son whether he liked oranges, and M.H., replied, "No, because they taste like sex." When M.H. asked the child who discusses sex with him, the child replied, "[P.M.]" The child informed his father that the discussions occurred in the shower, then mentioned "wee-wee," and said that while in the shower "his wee-wees would go in [my] mouth[.]" The boys had last showered together on October 27, 2013.

After arriving home, and in T.H.'s presence, M.H. picked up the child, and asked, "[W]ho does pee-pees in your face?" to which the child answered, "[P.M.]" When M.H. asked where and how often this had occurred, the child responded, "A lot," and "In my hair, in my face and in my body." M.H. informed the juvenile that he should sleep with his mother that evening. After futile attempts to discuss the matter with T.H., M.H. called police out of concern for his son's safety.

Under cross-examination, M.H. acknowledged that he had informed police that evening that he and his wife had not spoken in several days due to marital difficulties. He agreed that pee-pee and wee-wee were different terms, and when asked whether F.M. said that the juvenile had "put his wee-wee in the mouth or was it pee-pee[,]" H.M. acknowledged that F.M. had stated that the juvenile had put his pee-pee in F.M.'s mouth, on his face, and all over his body while the boys showered together. M.H. did not discuss these matters with the child after October 29, 2013, nor did the child inform M.H. between that date and the adjudication hearing that these events did not happen. M.H. recalled informing a domestic relations social worker, Gwendolyn McClure, that he was concerned because of the time that had passed since the incident and noted that F.M. was changing his story, but M.H. testified that the child had not stated that the events did not occur. When asked on cross-examination whether the child had changed his story, H.M. replied, "No, I changed the story, he didn't." H.M. denied that he had ever told the child to make allegations of sexual abuse.

Under re-direct examination, and in relation to his comments to Gwendolyn McClure, M.H. was asked whether the child was saying the alleged acts had not occurred or was just saying he did not remember. M.H. clarified that the child had stated that he did not want to remember. When asked what the child had said since the allegations had been reported to police, M.H., replied, "The similar story, sir, to myself and to our counselor, Mary Beaver[.]"

Detective Patrick Barett of the El Paso County Sheriff's Office investigated the child's allegations and identified the juvenile as the suspect. He explained that although DNA or trace evidence is sometimes procured, when the exact date of incident is unknown, such evidence is not always obtained because the examinations for securing the evidence are very intrusive and traumatic for the victim, and because force may be used to conduct the exam, a parent's release of liability must be obtained. A forensic sexual assault examination for the purpose of attempting to recover biological evidence such as sperm and saliva may be conducted within four days of an occurrence. In this case, no photographs, DNA, or medical evidence was obtained because the date of the last incident was unclear. The juvenile informed Detective Barett that nothing had happened, and stated that he and his brother had not showered in a long time.

As part of the investigation, Detective Barett observed and heard Joe Zimmerly conduct a forensic interview with the child at the advocacy center. Detective Barett's purpose in witnessing forensic interviews is to determine whether a child provides information sufficient to constitute probable cause or acts that meet the elements of an offense based on what the child says and describes. He noted that children sometimes use language that is not age-appropriate, which may indicate their comments have been directed or coached. M.H. and T.H. were present at the advocacy center during the interview, and as the interview was concluding, Detective Barett heard a commotion and a female voice screaming. As Detective Barett exited, T.H. approached and began yelling at him, and informed him that she knew her rights and could take her child out of the interview. He spoke with T.H. in another room. When he asked T.H. whether she would like to give a statement, T.H. declined. Upon conclusion of the child's forensic interview, Detective Barett determined that the child had knowledge of events and that sufficient probable cause existed to proceed with the case.

Joe Max Zimmerly is a neutral fact finder at the advocacy center, and is unaffiliated with law enforcement or child protective services. As a forensic interviewer, Zimmerly's function is to attempt to have the child explain what has occurred through the use of non-leading and non-threatening questions, with no expected result. A few minutes prior to an interview, Zimmerly receives basic facts about the child and the case, such as how the outcry occurred, family relationships, and any special needs the child may have. A rainbow on a wall is used as a color reference.

Over objection, Zimmerly testified that during his interview of the child, the child had stated that while in the shower, the juvenile would pee on his face a lot of times, that the pee would get in his mouth and tasted oily and that he would make the "pee" come out. Using an anatomical doll, the child demonstrated to Zimmerly how the juvenile would hit his penis in a spanking or slapping manner and in a thrusting motion, and described the "pee" that would come out on the wall as sticky. The child stated his own pee was like green water, but showed how the juvenile would breathe differently, and although initially describing the color of the sticky "pee" as dark green, the child later pointed to a beige-colored lamp shade in the interview room as reflective of the color of the juvenile's pee. The child also said that the juvenile put the juvenile's "wee-wee" or penis in the child's mouth "a lot of times," and after Zimmerly clarified that "wee-wee" was the child's description of the penis, and the "pee" is what comes out of the "wee-wee," the child stated that the juvenile would put his wee-wee on the child's forehead, his eye, on his nose, the belly button, and in his mouth. Zimmerly described how the child put the doll on his forehead and on his mouth. When Zimmerly asked, "Did it go on your mouth or in your mouth?" the child replied, "In my mouth." When asked on several occasions whether he had seen the juvenile's pee-pee or somebody's "wee-wee," the child said, "No." The child described the juvenile's wee-wee as being "a little straight" when he peed on him. Zimmerly then asked the child whether each of the incidents had occurred "[o]ne time, two times, [or] a lot of times." Zimmerly believed the child had responded one or two times regarding his forehead and eyes, "but a lot of times in the mouth."

Zimmerly agreed that during the interview, the child answered a qualifying question incorrectly, but noted that the child had not lied when he was asked a question about a "kitty cat" and a fish and pointed to the wrong animal, and answered the next qualification question correctly. He also agreed that the child originally stated that his brother had not touched him, and when the child used the anatomical dolls, Zimmerly did not recall whether the child actually articulated that his brother "put his wee-wee in my mouth." Zimmerly sought clarification from the child by following up on statements the child made by asking about the frequency of the events. While the child was drawing, Zimmerly left the room to speak with agency personnel situated behind a glass to determine whether anything needed to be clarified, and although uncertain, initially stated that he believed comments regarding oral penetration had occurred after this time, but then stated that he believed that the child had used the word "wee-wee" prior to being asked to draw and in advance of Zimmerly's break. Zimmerly asked the child to describe his drawing, and Zimmerly wrote his notes on the drawing. In addition to labeling the top and bottom of the drawing, Zimmerly also noted the child's comments, "Water comes out," and "He always pees in my face."

The child had initially demonstrated his brother flicking him, but also described or demonstrated the juvenile striking the juvenile's penis. When asked if someone had ever touched him, the child stated, "boys and girls are touching me." Zimmerly testified that he had no information regarding whether the child had recanted before trial.

When the State sought to introduce the video recording of the child's interview, the trial court heard arguments in the jury's absence, and although defense counsel objected on the basis that the recording should not be admitted under Code of Criminal Procedure article 38.071 because the child was available to testify in the jury's presence, the State argued that during opening statements, the defense opened the door to permit the video recording to be admitted under the optional completeness exception to the hearsay rule. See TEX. R. EVID. 107; TEX. CODE CRIM. PROC. ANN. art. 38.071, § 1(5), (8), § 2(a)(West Supp. 2017). Noting that the child was available to testify, the trial court sustained the objection. After the State rested its case, the trial court denied the juvenile's motion for directed verdict.

The child testified as a defense witness. During his testimony, the child verbally answered some questions posed to him, however many of his answers were non-verbal. During examination, defense counsel, and sometimes the State's attorney would often follow the child's non-verbal response by stating "Yes" or "No." Because of the nature of the questions and the form of answers presented in the record, we find it necessary to set out the relevant testimony in the context of the colloquy that occurred between the child and counsel:
[DEFENSE]: Okay. I'm going to ask you a couple of questions. Okay? It's real simple. Do you remember talking to Greg last week?1
[F.H.]: (No verbal response.)

[DEFENSE]: Okay. And what day was that? Do you remember what day it was?
[F.H.]: (No verbal response.)
[DEFENSE]: No. Okay. Do you remember telling Greg that you had taken showers before in the past with your brother?
[F.H.]: (No verbal response.)
[DEFENSE]: With [P.M.]?
[F.H.]: (No verbal response.)
[DEFENSE]: Yes. Okay. And that he never did pee on you. Right? That's what you told Greg last week. Right?
[F.H.]: (No verbal response.)
[DEFENSE]: Okay. But rather that your brother peed in between you. Right?
[F.H.]: (No verbal response.)
[DEFENSE]: Is that what you told Greg?
[F.H.]: (No verbal response.)
[DEFENSE]: Yes. And that was last Thursday. Right?
[F.H.]: (No verbal response.)
[DEFENSE]: Yes. Okay. You and your brother used to take showers together. Is that correct?
[F.H.]: (No verbal response.)
[DEFENSE]: Okay. And when you took showers together, he would clean you first and then you would get out of the shower, wouldn't you?
[F.H.]: (No verbal response.)
[DEFENSE]: Yes?
[F.H.]: (No verbal response.)
[DEFENSE]: And when you would get out of the shower, would you stay in the bathroom?
[F.H.]: (No verbal response.)
[DEFENSE]: No. You would leave?
[F.H.]: (No verbal response.)
*4 [DEFENSE]: Okay. And who would take you out of the bathroom usually, was it mommy, daddy or both?
[F.H.]: Mommy.
[DEFENSE]: Okay. Did your brother ever put his pee-pee in your mouth?
[F.H.]: (No verbal response.)
[DEFENSE]: No.

Under cross-examination, the State was able to elicit more verbal responses from F.H:

[STATE]: All right. Now, [F.H.], whenever I see you do this—
[F.H.]: Uh-huh.
[STATE]: —that means yes. Right?
[F.H.]: (No verbal response.)
[STATE]: And I think these people back here, I don't know if they can quite see you so could you just say yes or no on some of those?
[F.H.]: Uh-huh.
...
[STATE]: Let me ask you a question. You see all these people in the courtroom here?
[F.H.]: (No verbal response.)
[STATE]: Do you know them?
[F.H.]: (No verbal response.)
[STATE]: Do you know some of them?
[F.H.]: (No verbal response.)
[STATE]: Okay. Could I ask you. This gentleman right here at the very end of the table, who is this young man?
[F.H.]: [P.M.].
[STATE]: [P.M.]. Who is [P.M.]? Who is he? How—how are you—are you guys related? Is he your family?
[F.H.]: (No verbal response.)
[STATE]: Is that a yes or no?
[F.H.]: Yes.
[STATE]: He's your family. And what is he in your family? Is he your mom?
[F.H.]: No.
[STATE]: No. What is he?
[F.H.]: My brother.

[STATE]: Your brother. Do you love your brother?
[F.H.]: Yes.
[STATE]: Would you do anything for your brother?
[F.H.]: (No verbal response.)
[STATE]: No. That's how I know you're brothers. Well, how about these two guys, have you ever met these two guys?
[F.H.]: No.
[STATE]: You don't know these two guys. All right. What about this lady back here, who is that nice lady?
[F.H.]: My mom.
[STATE]: She's your mom. And in the very back there, who is that guy with the shirt? Well, they all have shirts. The guy on the far left.
[F.H.]: My dad.
[STATE]: Your dad. Is your family here?
[F.H.]: (No verbal response.)
[STATE]: Okay. [F.H.], did we talk about you and your brother sometime last week?
[F.H.]: (No verbal response.)
[STATE]: We did. And when you talked with me, did you tell—did everything you tell [sic] me, was that all the truth?
[F.H.]: Yes.
[STATE]: Okay. Now, let me ask you then. So have you and [P.M.] ever taken showers together?
[F.H.]: (No verbal response.)
[STATE]: Was that a yes or a no?
[F.H.]: Yes.
[STATE]: Okay. And when you take a shower, who washes your hair?
[F.H.]: My mom.
[STATE]: Your mom washes your hair. Is she in there with you and [P.M.]?
[F.H.]: No.
[STATE]: No. How about when you and [P.M.] take showers, who washes your hair?
[F.H.]: My mom.
[STATE]: Your mom.
[F.H.]: Yeah.
[STATE]: Okay. So is she in there with you and [P.M.]?
[F.H.]: (No verbal response.)
[STATE]: No. Okay.
[F.H.]: She stays outside and then me and [P.M.] is in—inside the shower.
[STATE]: Okay. So she waits in the bathroom—she's in the bathroom while both of you guys are in there?
[F.H.]: Uh-huh.
[STATE]: Okay. Who told you to say that?
[F.H.]: Nobody.
[STATE]: Nobody told you to say that? Did you talk to anybody else? When did you talk to your mom about what you were going to say? Do you remember? You don't remember?
[F.H.]: (No verbal response.)
[STATE]: Did you talk to your mom about what you were going to say?
*5 [F.H.]: (No verbal response.)
...
[STATE]: Now, has [P.M.] ever peed in the shower?
[F.H.]: (No verbal response.)
[STATE]: He has?
[F.H.]: (No verbal response.)
[STATE]: I'm sorry. Is that a yes or a no?
[F.H.]: Yes.
[STATE]: Yes. And when he peed, what color was that pee?
[F.H.]: Gray or green.
[STATE]: So was it gray one time?
[F.H.]: (No verbal response.)
[STATE]: Now, was it green another time?

[F.H.]: (No verbal response.)
[STATE]: Okay. But was it ever gray and green at the same time?
[F.H.]: No.
[STATE]: Okay. So one time it's gray. Right?
[F.H.]: (No verbal response.)
[STATE]: And the other time it's green.
[F.H.]: (No verbal response.)
[STATE]: And this is when you were in the shower with him?
[F.H.]: (No verbal response.)
...
[STATE]: Now, whenever [P.M.] would pee in the shower, did you ever touch it?
[F.H.]: No.
[STATE]: No, you never touched it. Did it ever—did you ever—what happened when he peed, where did it go?
[F.H.]: In the middle.
[STATE]: In the middle. And then it just stayed there?
[F.H.]: (No verbal response.)
[STATE]: Then what did it do?
[F.H.]: It went into the drain.
[STATE]: Into the drain. Now, let me ask you. The gray pee—
[F.H.]: Uh-huh.
[STATE]: —and the green pee—
[F.H.]: Uh-huh.
[STATE]: —which one went to the drain faster?
[F.H.]: The green.
[STATE]: The green pee went into the drain faster. Okay. How did the gray pee go into the drain?
[F.H.]: Slow.
...
[STATE]: All right. So do you remember going to a room with a big rainbow on it and talking to a man?
[F.H.]: Yes.
[STATE]: You do. And do you remember talking to him about your brother [P.M.]?
[F.H.]: Yes.
[STATE]: Okay. Do you remember telling him that [P.M.] pees on you?
[F.H.]: Yes.
[STATE]: Okay. Were you lying to the man in the rainbow room at that time?
[F.H.]: No.
[STATE]: You weren't lying to him?
[F.H.]: Uh-uh.
[STATE]: Okay. So you were telling the truth?
[F.H.]: Yeah.
[STATE]: All right. Well—all right. [F.H.], thank you for talking to me.
The following colloquy occurred when defense counsel re-examined the child:
[DEFENSE]: Okay, buddy, so what you told this jury here today, these nice 12 people over here, that was the truth. Right?
[F.H.]: (No verbal response.)
[DEFENSE]: And your brother didn't put his pee-pee in your mouth. Right?
[F.H.]: (No verbal response.)
[DEFENSE]: And when he peed, he peed in between you. Right? Is that—
[JUROR]: I'm sorry. Can he say "yes" or "no"?
...
THE COURT: Right, yeah, because he's shaking and nodding. Okay. So say "yes" or "no." If you want to start again.
[DEFENSE]: Sure.... And when he would pee, he would pee in between you. Right?
...
[DEFENSE]: Is that right?
[F.H.]: (No verbal response.)
[DEFENSE]: Because that's what you told Greg last week, your buddy here. Right?

[F.H.]: (No verbal response.)
THE COURT: Is that a yes?
[DEFENSE]: Is that a yes?
[F.H.]: Yes.

At the conclusion of the child's testimony, the State again sought, and the trial court again denied, admission of the video recording of the child's forensic interview. The juvenile then testified that he was a sixteen-year-old high school freshman, and acknowledged that he and his little brother had taken showers together at their apartment. He stated that he never did anything sexual to his brother in the shower and never peed on his brother in the shower. The juvenile explained that he and his brother would get into the shower, he would "shower [F.H.] first," take him out, and either his stepfather or his mother would take the child, and then he would take his shower. He stated that while in the shower, his penis was never erect and he never physically gratified himself.

On cross-examination, P.M. agreed that there were moments when he and the child were alone together in the shower, and that he washed the child's hair and body when their mother was not in the bathroom. He again explained that he would typically call his mother when he finished washing the child. He admitted that he had sometimes urinated in the shower in front of the child, and then stated that he would urinate away from the child. He did not recall the child saying anything about what he was doing, and sometimes the child peed in the shower also. They would change places to use the drain. When the juvenile was asked whether the child's testimony that the juvenile would turn and pee in the middle was the truth or a lie, the juvenile declared it to be a lie. The juvenile also stated that his brother's testimony that P.M.'s pee was green was not true and also stated that his pee was never gray. He clarified the child's testimony that their mother waited "in the shower," and explained that she waited outside the door while the boys would shower, and sometimes their mother would bathe the child by himself, but not while the boys were showering together.

On redirect examination, the juvenile denied ever discussing sex or sexual things with his brother, and on recross-examination agreed that his relationship with his stepfather was good and that he and his brother were not having any fights or disagreements prior to the child's outcry. During rebuttal, M.H. testified that he had personal knowledge that the juvenile and the child had showered together on October 27, 2013, and the trial court judicially noticed that the date occurred on a Sunday, two days before the child made his outcry. M.H. testified that the child had never informed him that the alleged acts did not occur.

The jury deliberated, and as requested was read a portion of M.H.'s testimony. The jury then returned verdicts that the juvenile had engaged in delinquent conduct consisting of aggravated sexual assault of a child and indecency with a child. All jury members were polled and affirmed their verdicts, and the trial court entered an order of adjudication. At the conclusion of the disposition hearing, the trial court found the juvenile to be in need of rehabilitation and that the protection of the community and the juvenile required that disposition be made. The court ordered the juvenile to complete sex offender treatment, deferred imposing registration as a sex offender, and entered a judgment of intensive supervised probation until the juvenile's eighteenth birthday, imposing terms and conditions of probation.

In Issue Three, the juvenile argues the outcry witness testimony was improperly admitted in violation of the Sixth Amendment's confrontation clause because the State failed to call the child as a witness, failed to show the inherent reliability of the child's statements, and failed to show that the State's failure to call the child to testify was necessary to protect the child's welfare. The State counters that the juvenile has not properly preserved error because he failed to make a timely, contemporaneous confrontation-clause objection and he failed to obtain a ruling from the trial court as required by Rule 33.1. TEX. R. APP. P. 33.1(a). It also argues that no confrontation-clause violation occurred. The State presents no constitutional harmless-error analysis.

Held: Reversed and remanded

Opinion:
Preservation of Error

We first determine whether the alleged Sixth Amendment confrontation-clause error has been preserved. To preserve a complaint for appellate review, the record must show that a defendant made a timely and specific objection to the trial court in compliance with the rules of evidence or the rules of appellate procedure, that the

objection was sufficiently specific to make the trial court aware of the complaint unless the specific grounds were apparent from the context, and that the trial court ruled on the objection, either expressly or implicitly, or refused to rule and the complaining party objected. TEX. R. APP. P. 33.1(a)(1)(A), (a)(2)(A-B); Lovill v. State, 319 S.W.3d 687, 691–92 (Tex. Crim. App. 2009). Failure to properly preserve error for appellate review may also waive constitutional error. See Holland v. State, 802 S.W.2d 696, 700 (Tex. Crim. App. 1991)(en banc); Briggs v. State, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990). 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 may not be used to 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). The two-fold purpose of requiring a specific objection in the trial court is: (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).

We initially note that the juvenile filed a motion "pursuant to Article 38.071 (Section 6) of the Texas Code of Criminal Procedure and the Sixth and Fourteenth Amendments to the United States Constitution as well as Article I Sections 10 and 19 of the Texas Constitution" that the child victim be required to testify. During the outcry hearing, and as a component of his post-testimony argument, the juvenile objected to Zimmerly's testimony, in part because "[a]llowing this statement in, [Zimmerly's] statement, would be a violation of my client's Sixth Amendment rights to confront and cross-examine witnesses on statements that they have made." Before ruling, the trial court heard the State's responsive arguments and received cases from counsel. Having heard testimony and argument, the trial court ruled that M.H. and Zimmerly were proper outcry witnesses.

After the child's father testified at the disposition hearing, and in advance of Zimmerly being called to testify, the juvenile asked that the trial court reconsider his objection to the outcry testimony of Zimmerly on the basis that "it is a violation of my client's right to confront, cross-examine witnesses that'll come in and testify against him, specifically accusers." In addition to other objections and arguments, the juvenile also argued, "We believe that this is a violation of my client's right to confront and cross-examine witnesses under the Sixth Amendment, specifically in article 1, section 10 of the Texas Constitution." The State's prosecutor responded that the child was present and available to testify, and argued, "[S]o that would remedy that situation right from the outgo." The arguments and discussions then addressed the video recording of the forensic interview. The State argued that the juvenile could address the specific techniques and methods of the advocacy center and the interview by cross-examining Zimmerly, but the juvenile countered that if he did that, the State would argue that he had opened the door to allowing the video in, and therefore, his cross-examination of Zimmerly would be limited. The juvenile clarified that his objection was "to the violation of confrontation.... It is a violation of the Constitution of the United States and the State of Texas." In response to the juvenile's Sixth Amendment objections, the State noted that the outcry witness statute is a well-settled exception to the hearsay rule in Texas, reminded the court that it had already found Zimmerly to be a credible outcry witness, and informed the trial court, "The child witness is here available to testify should they want to call him as a witness." The trial court declared that it would wait and "take it as it comes," and the juvenile asked that the trial court note its objection.

The juvenile's Sixth Amendment confrontation-clause objections were timely and specific during the outcry and disposition hearings. At the outcry hearing, the trial court implicitly overruled the juvenile's confrontation-clause objection, and at the disposition hearing the trial court refused to rule. The juvenile then objected to the trial court's refusal to rule on his confrontation-clause objection. For these reasons, we find the juvenile complied with the requirements of Rule 33.1, and the alleged error in permitting Zimmerly to testify has been preserved for our consideration on appeal. TEX. R. APP. P. 33.1.

Applicable Law

Rule 801(d) defines "hearsay" as a statement that a declarant does not make while testifying at the current trial and which a party offers in evidence to prove the truth of the matter asserted in the statement. TEX. R. EVID. 801(d). The admissibility of hearsay is determined by the Texas Rules of Evidence and the Sixth Amendment to the U.S. Constitution. See Sanchez v. State, 354 S.W.3d 476, 484 (Tex. Crim. App. 2011). In Texas, unless hearsay is allowed by a statute, Rules 803 or 804, or other rules prescribed pursuant to statutory authority, it is rendered inadmissible. TEX. R. EVID. 802, 803, 804.

Article 38.072 of the Texas Code of Criminal Procedure provides for the admission of hearsay evidence if its provisions are satisfied. TEX. CODE CRIM. PROC. ANN. art. 38.072 (West Supp. 2017). In the prosecution of certain offenses committed against a child younger than 14 years of age, including indecency with a child by exposure and aggravated sexual assault of a child, article 38.072 allows a complainant's out-of-court hearsay statement to be admitted into evidence if the statement describes the charged offense and is offered by the first adult other than the defendant to whom the child described the offense, commonly known as the outcry witness. TEX. CODE CRIM. PROC. ANN. art. 38.072, § 1, § 2(a)(1)(A)(West Supp. 2017); TEX. PENAL CODE ANN. § 21.11(a)(2)(A)(West Supp. 2017)(indecency with a child by exposure); TEX. PENAL CODE ANN. §§ 22.021(a)(1)(B)(ii), (a)(2)(B)(West Supp. 2017) (aggravated sexual assault of a child); Sanchez, 354 S.W.3d at 484. The admissibility of the statement is conditioned upon the State providing timely notice and a written summary of the witness's statement to the adverse party, the trial court's finding that the statement is reliable based on time, content, and circumstances of the statement, and the child testifying, or being available to testify, at the court proceeding or in any other manner provided by law. TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(West Supp. 2017).

The admission of hearsay evidence is limited by the Sixth Amendment to the United States Constitution, which bestows on a defendant the right to be confronted with the witnesses against him. U.S. CONST. amend. VI. To overcome a Sixth Amendment objection to testimonial hearsay, the State is required to show that the declarant of the out-of-court statement is unavailable, and that the defendant had a prior opportunity to cross-examine the declarant.2 See Crawford v. Washington, 541 U.S. 36, 51–52, 68-69, 124 S.Ct. 1354, 1364, 1374, 158 L.Ed.2d 177 (2004) (at a minimum, the term "testimonial" applies to prior testimony at a preliminary hearing, before a grand jury, or at a former trial); Sanchez, 354 S.W.3d at 485. The Court of Criminal Appeals has held that outcry testimony admitted under article 38.072 comports with the guarantees of the Sixth Amendment because the child declarant is available for cross-examination or to testify at trial. Buckley v. State, 786 S.W.2d 357, 359–60 (Tex. Crim. App. 1990); see also Crawford, 541 U.S. at 59–60, 124 S.Ct. at 1369 n.9 ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."). Sanchez, 354 S.W.3d at 486 n.26.

At an adjudication hearing, the juvenile is guaranteed the same constitutional rights as an adult in a criminal proceeding. See In re Winship, 397 U.S. 358, 359, 365, 90 S.Ct. 1068, 1070, 1073, 25 L.Ed.2d 368 (1970). Neither the protections afforded by the Fourteenth Amendment nor the Bill of Rights are limited to adults. In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967); State v. C.J.F., 183 S.W.3d 841, 847 (Tex.App.—Houston [1st Dist.] 2005, pet. denied) (citations omitted). The United States Supreme Court determined in Gault that juveniles are entitled to notice of charges, defense counsel, the privilege against self-incrimination, and confrontation of and cross-examination of witnesses. In re Gault, 387 U.S. at 49-57, 87 S.Ct. at 1455-59; Hidalgo v. State, 983 S.W.2d 746, 751 (Tex. Crim. App. 1999); In re M.H.V.-P., 341 S.W.3d 553, 557 (Tex.App.—El Paso 2011, no pet.).

Sixth Amendment Analysis

The Texas Court of Criminal Appeals has recognized that "Virtually all courts that have reviewed the admissibility of forensic child-interview statements or videotapes ... [are] 'testimonial' and inadmissible unless the child testifies at trial or the defendant had a prior opportunity for cross-examination." Coronado v. State, 351 S.W.3d 315, 324 (Tex. Crim. App. 2011); see Crawford, 541 U.S. at 68, 124 S.Ct. at 1374 (in order to introduce testimonial hearsay over a Sixth Amendment objection, State must show that the declarant who made the out-of-court statement is unavailable, and that defendant had prior opportunity to cross-examine that declarant); Sanchez, 354 S.W.3d at 485. More recently, the Texas Court of Criminal Appeals has held that the State, as a proponent of outcry evidence, bears the burden to satisfy each stringent predicate to admission of that evidence as statutorily prescribed by article 38.072. See Bays v. State, 396 S.W.3d 580, 591 (Tex. Crim. App. 2013)(hearsay exception for outcry testimony applies only if statute's stringent procedural requirements are met), citing Long v. State, 800 S.W.2d 545, 547-48 (Tex. Crim. App. 1990)(as evidence proponent, State must satisfy each element of predicate for admission of outcry testimony under article 38.072 or invoke other hearsay rule exception).

Under the first article 38.072 predicate to admission of the outcry witness's testimony, the State was required to provide the juvenile timely notice of its intent to use outcry testimony, the name of the outcry witness and a written summary of the witness's statement. TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(1)(A-C)(West Supp. 2017). As we have acknowledged, the State satisfied these requirements.

The second predicate requires that the trial court find, in a hearing conducted outside the jury's presence, that the statement is reliable based on the time, content, and circumstances of the statement. TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(2)(West Supp. 2017). This provision does not charge the trial court with determining the reliability of the statement based on the credibility of the outcry witness. Sanchez, 354 S.W.3d at 488 (also noting that outcry witness bias and ability to remember are not matters given by legislature to trial court).

The juvenile challenged the reliability of the statement during the outcry hearing and prior to Zimmerly's testimony at the disposition hearing. Although not expressly ruling on the specific issue of reliability, at the outcry hearing conducted in the absence of a jury, the trial court openly declared Zimmerly to be a proper outcry witness for the aggravated sexual assault by penetration and admitted his testimony at the disposition hearing. In light of the record and the trial court's rulings, we conclude the trial court's rulings encompassed an implied finding that the statement was reliable under article 38.072.

The last predicate for admissibility of an outcry witness's testimony under article 38.072 requires that the child testify or be available to testify at the proceeding in court or in any other manner provided by law. TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(3). Article 38.072 does not expressly require that the State call the child to testify.

In Briggs v. State, the Court of Criminal Appeals examined earlier versions of articles 38.071 (admissibility of video recording of child victim's statement) and 38.072, which also included the requirement that "the child testifies or is available to testify at the proceeding in court." Briggs v. State, 789 S.W.2d 918, 922 (Tex. Crim. App. 1990); see TEX. CODE CRIM. PROC. ANN. art. 38.071; Act of May 27, 1985, 69th Leg., R.S., ch. 590, § 1, sec. 2(b)(3), 1985 Tex. Gen. Laws 2222, 2223 (H.B. 579)(amended 2001) (current version at TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(3)). In Briggs, the Court determined the statutory provisions were not facially unconstitutional but may be unconstitutional as applied:

In some cases the accused may well be forced to call the child to the stand himself, or else forgo his right to crossexamine the principal witness against him. But not every defendant would be put to this unconstitutional choice. In the instant case, for example, the State called M.T. to the stand during its case in chief, permitting appellant the opportunity to crossexamine her without appearing himself to violate the apparent purpose of the statute.4 In the event the State merely makes the child "available," but forces appellant to call her to the stand, the statute may indeed function to deprive the accused of due process and due course of law.

Briggs, 789 S.W.2d at 922. In footnote four of this passage, the Court declared, "Thus, in order to utilize the statute in a constitutional manner the State would have to call its child witness to the stand during its case in chief." Briggs, 789 S.W.2d at 922 n.4.

After deciding Briggs, the Court addressed a similar situation in Holland v. State, 802 S.W.2d 696, 699-700 (Tex. Crim. App. 1991). There the Court explained:

> *When the State proffers an out-of-court statement of a child witness pursuant to Article 38.072, supra, it is incumbent upon the accused to object on the basis of confrontation and/or due process and due course of law. At that point the State can respond by following either one of two courses. First the State can announce its intention to call the child declarant to the stand to allow confrontation without the accused having to call the child to the stand himself. See Buckley v. State, supra, at 360–61; Briggs v. State, supra, at 922. Alternatively the State can make a showing both that 1) the out-of-court statement is one that is reliable under the totality of circumstances in which it was made, Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), which Article 38.072, § 2(b)(2) already requires; and 2) use of the out-of-court statement in lieu of the child's testimony at trial "is necessary to protect the welfare of the particular child witness" in that particular case. Maryland v. Craig, 497 U.S. 836, [855], 110 S.Ct. 3157, 3169, 111 L.Ed.2d 666, 685 (1990); see also Buckley v. State, supra, at 360; Long v. State, supra, at 312. If the State follows either of these two courses, the accused's objection on confrontation grounds should be overruled. Otherwise, the confrontation objection is a valid one and should be sustained, irrespective of whether the State has satisfied all of the statutory predicate for admissibility of hearsay under Article 38.072, supra.Holland, 802 S.W.2d at 699–700 (emphasis added).*

In Holland, the State had failed to call the child witness to testify and did not make a particularized showing of its necessity for failing to do so, but because the appellant had failed to preserve its confrontation-clause complaint in the trial court for review on appeal, the Court did not directly address the State's failure to call the child to testify. Holland, 802 S.W.2d at 700. The Court observed, however, that the United States Supreme Court had acknowledged

in California v. Green, 399 U.S. 149, 155-56, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489, 495 (1970), that confrontation-clause values may be abridged despite the admission of statements admitted under a recognized hearsay exception. Holland, 802 S.W.2d at 699. In constructing its analytical framework regarding outcry witness testimony under article 38.072, Holland also drew from the Supreme Court's two-part test in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Holland, 802 S.W.2d at 699. Under Roberts, the statement of an unavailable witness could be admitted against the defendant in a criminal trial if it bore adequate "indicia of reliability," meaning generally that the statement fell under a "firmly rooted hearsay exception" or showed "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66, 100 S.Ct. at 2539.

Since issuing its Holland opinion in 1991, the Supreme Court has rejected the Ohio v. Roberts standard in favor of the standard declared in Crawford v. Washington, 541 U.S. 36, 68-69, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004). Under Crawford, "Where testimonial evidence is at issue, ... the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Crawford, 541 U.S. at 68, 124 S.Ct. at 1374. The Court of Criminal Appeals has recognized that Crawford "[makes] clear that, in order to be constitutionally sufficient, any system of ensuring the reliability of testimonial statements must include a defendant's ability to confront the witness." See Ex parte Keith, 202 S.W.3d 767, 768 (Tex. Crim. App. 2006).

Here, the State made the child available to testify at trial in compliance with Section 2(b)(3) of article 38.072, and after the State failed to call the child as a witness, Appellant called the child to testify. Compare Soto v. State, 736 S.W.2d 823, 828 (Tex.App.—San Antonio 1987, pet. ref'd)(holding appellant was not denied right to confront and cross-examine child witness where State made child available to testify, and defendant refused to call child to testify). In this case, the State did not call the child to testify nor did it establish that the use of the outcry testimony was necessary to protect the welfare of the child.

Relying on Holland, the juvenile contends his confrontation rights under the Sixth Amendment were violated because the State did not call the child to testify as required, did not establish that its failure to call the child as a witness was necessary to protect the child's welfare, and failed to show that the outcry statement was inherently reliable. See Holland, 802 S.W.2d at 699-700. The juvenile argues that the very harm sought to be avoided in Holland resulted in this case because he was required to call the child to testify under direct examination.

Because the State did not call the child to testify nor showed that the outcry testimony of M.H. and Zimmerly was necessary to protect the welfare of the child, we conclude the trial court should have sustained the juvenile's confrontation objections as valid, regardless of the State's compliance with the article 38.072 predicates for the admissibility of hearsay, and erred in failing to do so. Holland, 802 S.W.2d at 699–700; see also Briggs v. State, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990)(where child was available and in fact did testify during the State's case in chief, appellant was afforded a full and fair opportunity to cross-examine her, thus vindicating his confrontation rights without being forced to call the child himself for the purpose of securing those rights), citing Buckley v. State, 786 S.W.2d 357, 360 (Tex. Crim. App. 1990).

Constitutional Error Standard of Review

The trial court's error of allowing M.H. and Zimmerly to testify as to the child's statements absent the State's showing the admission of this hearsay was necessary to protect the welfare of the child is of constitutional dimension. The test for determining whether a federal constitutional error is harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). Under Chapman, a federal constitutional error "did not contribute to the verdict obtained" if the verdict "would have been the same absent the error[.]" Neder v. United States, 527 U.S. 1, 15–18, 119 S.Ct. 1827, 1837-38, 144 L.Ed.2d 35 (1999). The Chapman test is codified in Texas Rule of Appellate Procedure 44.2(a), and provides that if the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, we must reverse a judgment of conviction or punishment unless we determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. P. 44.2(a).

Harmless Error Analysis

In assessing the likelihood that the jury verdicts dispensing appellant's conviction and punishment would have been the same absent the trial court's admission of M.H. and Zimmerly's outcry testimony, we must consider the entire record. Neder, 527 U.S. at 15–16, 119 S.Ct. at 1837. In determining whether the error was harmless, we

consider the importance of the hearsay statement to the State's case, whether the hearsay evidence was cumulative of other evidence, the absence or presence of evidence either contradicting or corroborating the hearsay statement on material points, and the overall strength of the case against the defendant. Woodall v. State, 336 S.W.3d 634, 639 n.6 (Tex. Crim. App. 2011), citing Davis v. State, 203 S.W.3d 845, 852 (Tex. Crim. App. 2006). We may also consider other factors contained in the record that shed light on the likely impact of the error on the mind of an average juror. Davis, 203 S.W.3d at 852. The error is harmless when the reviewing court is convinced beyond a reasonable doubt that the barred statement would probably not have had a significant impact on the mind of an average juror in making their determination. Id.

The question to be resolved is not whether the verdict was supported by the evidence but, rather, the likelihood that the constitutional error was a contributing factor in the jury's deliberations in arriving at their decision, that is, whether the error adversely affected the integrity of the process leading to the decision. Langham v. State, 305 S.W.3d 568, 582 (Tex. Crim. App. 2010), citing Scott v. State, 227 S.W.3d 670, 690-91 (Tex. Crim. App. 2007). We also consider other constitutional harm factors, if relevant, such as the nature of the error, whether or to what extent it was emphasized by the State, probable implications of the error, and the weight a juror would probably place on the error. Snowden v. State, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011). We then consider whether there is a reasonable possibility that the Crawford error moved the jury from a state of non-persuasion to one of persuasion on a particular issue. Scott, 227 S.W.3d at 690; Davis, 203 S.W.3d at 852–53, quoting Wesbrook v. State, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000). "At bottom, an analysis for whether a particular constitutional error is harmless should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment.' " Snowden, 353 S.W.3d at 822, quoting TEX. R. APP. P. 44.2(a); see also Langham, 305 S.W.3d at 582; Scott, 227 S.W.3d at 690-91.

The State's outcry evidence presented through Zimmerly was vital because it presented details about the nature and extent of the offensive exposure and contact that were not presented through the testimonies of M.H. and other witnesses. Although heavily laden with non-verbal responses or no responses, the child was available to testify, and did testify, as a defense witness under direct examination. The child's testimony provided some evidence regarding the alleged offenses, portions of which corroborated or contradicted the erroneously-admitted outcry witness testimony. The juvenile presented contradictory evidence on material points, asserting that he did not commit the alleged offenses. Overall, the State's case was of moderate strength, partly as a result of the State's decision not to call the child as a witness.

However, that defense counsel was required to call the child to testify cannot be said to have had no or but a negligible effect on the jury. Defense counsel called the child to testify and answer questions about showers, touching, and "pee," when the State had not first presented the child's testimony. Average jurors may have viewed defense counsel's direct examination of the child as a victimization of the young, largely inarticulate alleged victim. We consider this to be a significant factor that increases the likelihood that the error was a contributing factor in the jury's deliberation.

It is possible that the juvenile's testimony lessened the probable negative impact of the error on the jurors. Through his testimony, the juvenile provided the jury the opportunity to consider his demeanor and credibility, thus permitting the jury to fully gauge the erroneously admitted outcry testimony in light of the juvenile's testimony as well as that of the child and the child's father. This opportunity may reduce to some degree the likelihood that the constitutional error was a contributing factor in the jury's deliberations.

In considering other constitutional harm factors, we note that both the State and the juvenile emphasized the erroneously-admitted outcry testimony of M.H. and Zimmerly during closing argument during the guilt-innocence phase, but made no reference to any of Zimmerly's testimony during the punishment phase of trial. However, because the child testified under defense counsel's direct examination at trial, the probable implications of the error in admitting the outcry testimony were significant, and as a result, a juror would probably place great weight on the error.

Conclusion: A reasonable possibility exists that the error moved the jury from a state of non-persuasion to one of persuasion, and we are unable to conclude beyond a reasonable doubt that the particular error did not contribute to

the juvenile's conviction or punishment. Chapman, 386 U.S. at 24, 87 S.Ct. at 828. Issue Three is sustained. The trial court's judgment is reversed and the case is remanded for a new trial.

In the Matter of A.P., No. 08-15-00089-CV, --- S.W.3d ----, 2017 WL 382948, Tex.Juv.Rep. Vol. 31 No. 2 ¶ 17-2-5 (Tex.App.—El Paso, 1/27/2017).

AFFIRMATIVE LINK TO DRUGS CAN BE MADE BY INFERENCES MADE FROM CIRCUMSTANCES SURROUNDING ARREST.

Facts: On the morning of October 14, 2014, El Paso Police Officer Luis Soto and several other officers were conducting surveillance of a mobile home. Officer Soto observed two individuals leaving the residence that morning. Subsequent searches of these individuals revealed that one had over $1,000 in cash on his person while another was found in possession of crack cocaine. Officer Soto obtained a search warrant for the mobile home, which he and several other officers executed later that afternoon.

Upon entering the mobile home, Officer Soto observed A.P., who was 15 years old at the time, sitting at a small kitchen table with two adults. The officer saw three cell phones on the table, as well as a locked safe, which was within arm's length of A.P., and in closest in proximity to A.P. Inside the safe, the officers found a passport, some currency, and individually packaged bindles of crack cocaine. None of the occupants of the mobile home claimed ownership of the safe.

The officers also found two individually packaged bindles of cocaine under the table in plain view. One of the bindles contained four smaller packaged bindles of powdered cocaine, and the other contained five smaller packaged bindles of crack cocaine. Officer Soto described the bindles as being on the floor a few inches from where A.P. was sitting, well within his reach, and in closest proximity to him in comparison to the two other individuals. Subsequent forensic testing revealed that the contents of the bindles weighed more than one gram but less than four.[1] In its closing argument, the prosecutor explained that the possession charge against A.P. was based primarily on the bindles of cocaine that were found at his feet.

While executing the search warrant, the police searched the five individuals who were at the residence. One had a packaged bindle of cocaine in his pants pocket, while two others were found to each have over $1,000 on their persons. A.P. had approximately $140 on his person. The search revealed the presence of two mini Ziploc bags containing powdered cocaine in a backpack in the bedroom, a glass pipe used to smoke crack cocaine with narcotic residue on it in the living room, and individually-packed bindles of cocaine hidden in a stereo in the living room.

At trial, Officer Soto expressed his opinion that the occupants of the mobile home had been involved in an ongoing drug delivery operation at the time of the search. In part, his opinion was based on the fact that he had previously purchased narcotics at the mobile home, and the fact that the narcotics he had previously purchased were packaged in a similar manner to the narcotics that were found in the home at the time of the search, which he described as being "ready for distribution."

The jury found that A.P. had engaged in the delinquent conduct as alleged in the petition, by possessing a controlled substance in an amount over one gram, with the intent to deliver. At the disposition hearing, the trial court determined that A.P. was a juvenile in need of rehabilitation and that it was in his best interest to be removed from his home and committed to a secure facility, as his parents, who lived in Mexico, were unable to supervise him.

Held: Affirmed

Opinion: A person commits an offense if he knowingly possesses, with intent to deliver, a controlled substance such as cocaine. See TEX. HEALTH & SAFETY CODE ANN. § 481.112(A); 481.102(3)(D) (West 2010). The Texas Health & Safety Code defines "possession" as meaning "actual care, custody, control, or management." Id. § 481.002(38) (West Supp. 2016). In a case involving possession with intent to deliver, the State must prove that the defendant "(1) exercised care, custody, control, or management over the controlled substance, (2) intended to deliver the controlled substance to another, and (3) knew that the substance in his possession was a controlled substance." Cadoree v. State, 331 S.W.3d 514, 524 (Tex.App.–Houston [14th Dist.] 2011, pet. ref'd); see also Blackman v. State,

350 S.W.3d 588, 594 (Tex.Crim.App. 2011) (citing see Poindexter v. State, 153 S.W.3d 402, 405 (Tex.Crim.App. 2005)). The State is required to establish the same elements in a juvenile case involving possession of a controlled substance. See, e.g., In re J.M.C.D., 190 S.W.3d 779, 781 (Tex.App.–El Paso 2006, no pet.) (citing King v. State, 895 S.W.2d 701, 703 (Tex.Crim.App. 1995)) (recognizing that in juvenile case involving possession of a controlled substance, the State was required to prove beyond a reasonable doubt that the juvenile exercised care, control and management over the substance).

Possession of contraband need not be exclusive, and it is sufficient if the evidence shows that an accused jointly possessed the contraband with another. See Martin v. State, 753 S.W.2d 384, 387 (Tex.Crim.App. 1988); Whitworth v. State, 808 S.W.2d 566, 569 (Tex.App.–Austin 1991, pet. ref'd). When a defendant is not in exclusive possession or control of a residence where controlled substances are found, the State is required to provide independent facts and circumstances affirmatively linking the defendant to the contraband. In re J.M.C.D., 190 S.W.3d at 781 (citing Brown v. State, 911 S.W.2d 744, 747 (Tex.Crim.App. 1995)). This so–called "affirmative links" rule is intended to "protect the innocent bystander from conviction based solely upon his fortuitous proximity to someone else's drugs." Blackman, 350 S.W.3d at 594 (citing Poindexter, 153 S.W.3d at 406); see also Ramirez–Memije v. State, 444 S.W.3d 624, 627 (Tex.Crim.App. 2014)(noting that the affirmative links requirement protects "innocent bystanders, relatives, roommates, or friends from being convicted for possession due merely to their proximity to another's contraband"). An affirmative link generates a reasonable inference that the accused knew of the contraband's existence and exercised control over it. In re J.M.C.D., 190 S.W.3d at 781 (citing Brown v. State, 911 S.W.2d 744, 747 (Tex.Crim.App. 1995)). Absent an affirmative link, a defendant's mere presence at a location where drugs are found is insufficient, standing alone, to establish the requisite degree of control to support a conviction. Evans v. State, 202 S.W.3d 158, 162 (Tex.Crim.App. 2006).

In Evans, the Court of Criminal Appeals cited with approval the following list compiled by our sister court, which sets forth several non–exclusive factors that an appellate court may consider in determining whether an affirmative link has been established:

> the defendant's presence when a search is conducted; (2) whether the contraband was in plain view; (3) the defendant's proximity to and the accessibility of the narcotic; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband or narcotics when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of contraband; (10) whether other contraband or drug paraphernalia were present; (11) whether the defendant owned or had the right to possess the place where the drugs were found; (12) whether the place where the drugs were found was enclosed; (13) whether the defendant was found with a large amount of cash; and (14) whether the conduct of the defendant indicated a consciousness of guilt. Evans, 202 S.W.3d at 162 n.12 (citing Olivarez v. State, 171 S.W.3d 283, 291 (Tex.App.–Houston [14th Dist.] 2005, no pet.)).

The court noted that this list was not intended to be dispositive, and that it should not be considered as a litmus test for determining a defendant's guilt; instead, the list was intended to simply set forth some of the factors that a court may consider as circumstantially establishing the legal sufficiency of the evidence to prove a knowing "possession." Id. Moreover, we note that the number of factors linking an accused to the contraband is not as important as their logical force in establishing the elements of the offense. In re J.M.C.D., 190 S.W.3d at 781 (citing Jenkins v. State, 76 S.W.3d 709, 713 (Tex.App.–Corpus Christi 2002, pet. ref'd)). Therefore, "[t]he absence of various links does not constitute evidence of innocence to be weighed against the links present." Satchell v. State, 321 S.W.3d 127, 134 (Tex.App.–Houston [1st Dist.] 2010, pet. ref'd) (citing Hernandez v. State, 538 S.W.2d 127, 131 (Tex.Crim.App. 1976)).

The evidence establishing a link to the defendant may be either direct or circumstantial, and need not be so strong that it excludes every other outstanding reasonable hypothesis except the defendant's guilt. See Brown v. State, 911 S.W.2d 744, 747 (Tex.Crim.App. 1995); see also Poindexter v. State, 153 S.W.3d 402, 405–06 (Tex.Crim.App. 2005) (whether the State's evidence is direct or circumstantial, "it must establish, to the requisite level of confidence, that the accused's connection with the drug was more than just fortuitous"). Ultimately, the question of whether the evidence is sufficient to affirmatively link the accused to the contraband must be answered on a case–by–case basis. In re J.M.C.D., 190 S.W.3d at 781 (citing Whitworth v. State, 808 S.W.2d 566, 569 (Tex.App.–Austin 1991, pet. ref'd)).

Analysis

A.P. contends that the State failed to fulfill its burden of affirmatively linking him to the cocaine found in the mobile home, and that he was merely present with no evidence to establish that he exercised any control over the cocaine found in the home. In support of his argument, he relies primarily on Allen v. State, 249 S.W.3d 680 (Tex.App.–Austin 2008, no pet.). That case is inapposite to A.P.'s situation.

In Allen, the defendant was babysitting in an apartment that was under surveillance for approximately 30 to 60 minutes, during which a police officer observed two individuals coming and going from the apartment. The officer believed this conduct was indicative of narcotic activity. Id. at 684. However, no search of those individuals was conducted. Id. A subsequent search of the apartment revealed, among other things, the presence of several small baggies of cocaine that were located on a platter on top of the refrigerator, along with a razor blade and a plastic knife. Id. There was no evidence that the defendant lived in the apartment, that she had any cocaine on her person, or that she was under the influence of cocaine at the time of the search. Id. at 685. On appeal from her conviction, our sister court noted that the State had the burden to establish more than just the defendant's mere presence in the location where the cocaine was found, and that the State had failed to meet its burden of providing sufficient evidence to affirmatively link the defendant to the cocaine. In particular, the court noted that none of the cocaine was in plain view and that the only other link was the fact that the defendant's fingerprints were found on the underside of the platter on which the cocaine was found. Id. at 694–96. However, the court held that the fingerprint evidence, standing alone, was insufficient to establish the defendant's connection to the contraband, as there was no way of knowing when the fingerprints were placed on the platter and because there was no evidence of her fingerprints on the contraband itself. Id. at 703–04. In the absence of any other evidence affirmatively linking the defendant to the contraband, the court concluded that the jury's verdict finding that she was in possession of the cocaine was not supported by sufficient evidence. Id. at 704.

A.P. contends that like the defendant in Allen, the State admittedly found no evidence that he was living in the searched residence and/or that he had any ownership or other interest in the residence, making his presence in the mobile home simply "fortuitous." The resemblance between the two cases begins and ends with the fact that, like the defendant in Allen, A.P. did not reside at the location where the cocaine was found. But A.P. was observed to be in the mobile home for several hours, during a time when much more than just suspicious "foot traffic" was occurring, and when instead, confirmed drug–distribution activity was taking place. A police officer had purchased drugs at the mobile home on a prior occasion. During the time the home was under surveillance, two individuals left the residence in possession of large quantities of money and controlled substances. Large quantities of currency and narcotics—packaged and ready for distribution—were found in the mobile home. In fact, even A.P. acknowledges that he was present in a "suspicious place under suspicious circumstances" at the time the search warrant was executed. We conclude that this evidence supported a reasonable inference that A.P. was involved in, or at the very least aware of, the ongoing activity that was admittedly taking place at the mobile home.

We also find it significant that A.P. was found sitting at a table in close proximity to at least two large bindles of cocaine which were packaged for distribution, both of which were in plain view. A.P. counters that the State failed to present any direct evidence that he could see the bindles from his vantage point at the table. But even he admits that the contraband was in plain view to the police when they entered the residence. While the State may not have presented direct evidence to establish that the contraband was in A.P.'s direct line of vision when the search took place, the evidence presented was sufficient to allow a jury to reasonably infer that the contraband was in a location visible to A.P., or in other words, in a location that was not hidden or secreted away. See, e.g., Allen, 249 S.W.3d at 694 (recognizing that contraband, which was clearly "secreted" in another room in a house, could not be considered to have been in plain view when search took place). We find these two factors among the most important in determining whether a reasonable jury could have inferred that A.P. maintained custody and control over the cocaine. See, e.g., Earvin v. State, 632 S.W.2d 920, 924 (Tex.App.–Dallas 1982, pet. ref'd) (recognizing that, among the most important factors in establishing a defendant's possession of contraband, are the accessibility and proximity of the contraband to the defendant, as well as whether the contraband was in plain view); see also Evans, 202 S.W.3d at 163 (finding it significant that defendant was found sitting directly in front of fourteen grams of cocaine located on a coffee table less than a foot away from him within "arm's reach").

The State's evidence clearly supported a finding that A.P. did not find himself in the midst of this ongoing drug operation by mere happenstance; he was instead an active participant in the ongoing drug distribution activities. He was found with $140 on his person, despite the fact that he appeared to have been unemployed at the time of the

search, which suggested that A.P. was participating in, and profiting from, the drug operation. He was not only in close proximity to the contraband found at his feet, but was also found in close proximity to the safe that was located on the table, which contained not only additional amounts of cocaine, but currency and passports as well. More importantly, the officers conducting the search noted that there were three cell phones on the table—one for each individual. When combined with the undisputable fact that ongoing drug deliveries were being made from the home, a reasonable jury could have inferred the cell phones were being utilized as part of this drug–distribution scheme, and that A.P. was part of this scheme.

A.P. argues that none of these factors, standing alone, was sufficient to raise a reasonable inference that he was involved in the criminal activity that he admits was taking place at the home, or that he maintained any control over the narcotics found in the home. Our role is not to view each factor in isolation, and we must instead view all of these factors in their totality, and consider all of the State's evidence, in determining whether the State met its burden of establishing that A.P. maintained care and control over the cocaine found in the residence. See, e.g., Evans, 202 S.W.3d at 164, 166 (court of appeals erred by viewing each factor in isolation in determining whether defendant maintained custody and control over contraband, explaining that the court was instead required to view the evidence presented at trial in "its sum total" in making that determination); see also In re J.M.C.D., 190 S.W.3d at 782 (where accused was one of several individuals who were carrying backpacks containing narcotics, and no particular item of evidence directly linked the accused to the backpacks or the contraband, the evidence was nonetheless sufficient, when taken together, to support the jury's determination that the accused was guilty of possession).

Conclusion: We conclude that the logical force of the State's evidence was clearly sufficient to affirmatively connect A.P to the actual care, custody, control or management of the individually-packaged cocaine that was found at his feet, and to allow the jury to reasonably infer that he had the requisite intent to deliver the cocaine. The jury was therefore free to reject A.P.'s claim that he was simply an innocent bystander at the mobile home at the time the search warrant was executed. We overrule the sole issue for review and affirm the judgment of the trial court.

In the Matter of A.V., MEMORANDUM, No. 11-16-00078-CV, 2017 WL 2484348, Tex.Juv.Rep. Vol. 31 No. 3 ¶17-3-6A (Tex. App.—Eastland, 6/8/2017).

WHEN MAKING AN OFFER OF PROOF, "THE PARTY MUST SPECIFY THE PURPOSE FOR WHICH THE EVIDENCE IS OFFERED AND GIVE THE TRIAL JUDGE REASONS WHY THE EVIDENCE IS ADMISSIBLE" AND THE REASONS MUST COMPORT WITH THE ARGUMENTS ASSERTED ON APPEAL.

Facts: This is an appeal from a judgment of disposition in a juvenile delinquency matter involving determinate-sentence offenses. See TEX. FAM. CODE ANN. §§ 53.045(a), 54.04 (West Supp. 2016). After the grand jury approved the juvenile court petition, A.V. pleaded true to allegations that he had engaged in delinquent conduct by engaging in organized criminal activity and by committing the offenses of aggravated robbery, and the trial court adjudicated A.V. See id. § 53.045. Several weeks later, a jury was empaneled for the disposition hearing. The jury found that A.V. was in need of rehabilitation or that disposition was required to protect either A.V. or the public. See id. § 54.04(a), (c). The jury sentenced A.V. to commitment in the Texas Juvenile Justice Department with a possible transfer to the Texas Department of Criminal Justice for a term of thirty years, and the trial court entered a judgment of disposition based on the jury's verdict. See id. § 54.04(d)(3). We affirm.

In his first issue, A.V. complains that the trial court erred when it sustained the State's objection and refused to admit an expert report into evidence.

Held: Affirmed

Memorandum Opinion: During A.V.'s disposition hearing, A.V. offered into evidence a letter prepared by a psychiatrist who was appointed by the trial court as an expert to assist in the preparation of A.V.'s defense. A.V. did

not call the psychiatrist to testify at trial but, instead, offered the psychiatrist's letter into evidence during the testimony of the chief juvenile probation officer. The letter, which was addressed to A.V.'s attorney, contained the psychiatrist's findings based upon his initial consultation with A.V. The trial court sustained the State's hearsay objection, and A.V. later made an informal bill of exception or offer of proof as to the excluded exhibit. A.V. explained to the trial court that the exhibit was admissible because it was authenticated by the probation officer and because she had a copy of it in her file.

A.V. argues on appeal that the letter constitutes an expert report of a professional consultant under Section 54.04(b) and that, therefore, the hearsay rules do not apply.3 As a prerequisite to presenting a complaint for appellate review, the record must show that the appealing party "stated the grounds for the ruling that [he] sought from the trial court with sufficient specificity to make the trial court aware of the complaint." TEX. R. APP. P. 33.1(a)(1)(A). To complain on appeal about the trial court's exclusion of evidence, the proponent "must have told the judge why the evidence was admissible" and must have brought to the trial court's attention the same complaint that is being made on appeal. Reyna v. State, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005). To have evidence admitted under a hearsay exception, the proponent of the evidence must specify at trial the exception upon which he is relying. Willover v. State, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002). Additionally, to properly preserve an issue, the arguments asserted by the proponent of the evidence at trial must comport with the arguments asserted on appeal. In re C.Q.T.M., 25 S.W.3d 730, 738 (Tex. App.–Waco 2000, pet. denied). And, when making an offer of proof, "the party must specify the purpose for which the evidence is offered and give the trial judge reasons why the evidence is admissible." Id. at 737 (quoting Cont'l Coffee Prods. Co. v. Cazarez, 903 S.W.2d 70, 80 (Tex. App.–Houston [14th Dist.] 1995), rev'd in part on other grounds, 937 S.W.2d 444 (Tex. 1996)).

Conclusion: Because A.V. did not at any point explain to the trial court why the hearsay rule did not apply in this case or state that it was A.V.'s position that the exhibit was admissible under Section 54.04(b), he has not preserved this issue for review. We overrule A.V.'s first issue.

JURISDICTION—

Redmond v. State, MEMORANDUM, No. 06-17-00075-CR, 2017 WL 6542839, Tex.Juv.Rep. Vol. 32 No. 1 ¶ 18-1-4 (Tex. App.—Texarkana, 12-21-2017).

JURISDICTION LIES IN ADULT COURT WHEN A DEFENDANT HAS TURNED 20 YEARS OF AGE BEFORE HE IS ARRESTED, INDICTED, AND TRIED.

Facts: A jury convicted Dontavious Terrell Redmond of aggravated sexual assault of a child and assessed a sentence of twenty-five years' imprisonment, which the trial court imposed. Redmond appeals.1

Initially, the State believed that the offense was committed in 2012 when Redmond was a juvenile. However, due to a delayed outcry, Redmond was already twenty years old at the time of his apprehension. Nevertheless, the State filed a motion for detention of a juvenile in Cass County. The juvenile court held a hearing on the State's motion, found that Redmond had engaged in delinquent conduct, and ordered him detained in the Cass County Jail for ten days "until the filing of [a] petition to transfer [the matter to the district court] or until further order of the Juvenile Court." Yet, the record does not establish that the State ever filed a petition to adjudicate juvenile conduct in the juvenile court. Instead, because Redmond was an adult, and additional information suggested that the offense could have occurred after Redmond was an adult, he was indicted and tried in district court.

Held: Affirmed

Memorandum Opinion: On appeal, Redmond argues that (1) the juvenile court had exclusive jurisdiction over the proceedings because a motion to transfer proceedings to the district court was never filed, (2) the trial court erred in refusing Redmond's request that his status as a juvenile had already been established in the juvenile proceeding, and

(3) the trial court violated his "SIXTH AMENDMENT RIGHTS TO CONFRONTATION AND PRODUCTION OF EVIDENCE" by excluding the records of the juvenile proceeding "WHICH WOULD HAVE SHOWN BIAS ON BEHALF OF THE STATE'S WITNESSES." Because Redmond was not a juvenile when he was arrested, indicted, or tried, the district court had jurisdiction over these proceedings.

Conclusion: Consequently, we overrule Redmond's first two points of error. We further find that Redmond's third point of error on appeal is not preserved. As a result, we affirm the trial court's judgment.

SUFFICIENCY OF THE EVIDENCE—

In the Matter of D.L., No. 14-17-00058-CV, --- S.W.3d ----, 2018 WL 456424, Tex.Juv.Rep. Vol. 32 No.13 ¶ 18-1-10 [Tex. App.—Houston (14th Dist.), 1/18/2018].

PRESENCE AND FLIGHT ARE THEMSELVES INSUFFICIENT TO SUSTAIN A JURY'S VERDICT FOR CRIMINAL TRESPASS OF A VEHICLE.

Facts: The Harris County District Attorney filed a petition in juvenile court seeking an adjudication of delinquency. The State alleged that D.L., a minor at the time, had engaged in delinquent conduct. Specifically, the State alleged that D.L. had committed the offenses of (1) criminal trespass of a motor vehicle while carrying a deadly weapon and (2) unlawful possession of a firearm. D.L. pleaded "not true" to both allegations, and the case proceeded to a jury trial.

Sebastian Lezama owned the vehicle in question. Lezama parked his truck outside his apartment one afternoon and went inside, leaving the keys in the truck and the truck unlocked. A few minutes later, Lezama heard a noise outside and, upon investigating, saw someone driving his truck away. He could not identify the driver or describe any identifying features of the driver.

Approximately twelve hours later, at around 4:00 a.m., Houston Police Officer Derrick Dexter and his partner, Officer Julio Flores, attempted to order coffee at a McDonald's restaurant drive-through lane. Because no employee responded over the speaker, Officer Dexter suspected something might be amiss inside the restaurant. The officers drove around the side of the restaurant and stopped next to a green truck, which was idling at the drive-through window. Three males occupied the truck, and all of them appeared to be minors. D.L. sat in the front passenger seat. According to Officer Dexter, the individuals in the truck "looked over at [the officers] and their eyes got like deer in headlights ... like, you know, caught red-handed." Because the youths were violating Houston's midnight curfew, Officer Flores ran a computer check on the truck's license plate. The search results indicated that the truck was Lezama's and had been reported stolen.

The truck left the restaurant's parking lot. The officers followed and engaged the patrol car's overhead lights and sirens. At that point, the truck began speeding. The truck entered an apartment complex. The police pursued the truck through the complex at speeds up to sixty miles per hour for four to six minutes. The truck eventually hit a transformer and stopped. All three youths fled the truck. The police officers apprehended D.L., but failed to apprehend the other two youths.

After placing D.L. in the patrol car's back seat, Officer Flores searched the truck. He found a pistol between the driver's seat and passenger seat and a loaded shotgun near "where one of the passengers was sitting." Officer Flores did not specify whether he found the shotgun in the front or back seat. Officer Flores testified over objection that a records search revealed that the guns had been reported stolen.

When the truck was returned to Lezama, he discovered it had been damaged, costing him $1,000 in repairs.

The jury found that D.L. did not commit the weapons possession offense, but found that D.L. committed the offense of trespass of a motor vehicle. The trial court placed D.L. on probation and imposed a $1,000 fine in restitution. D.L. appeals the judgment.

Held: Reversed and dismissed with prejudice

Opinion: In his first issue, D.L. argues that there is legally insufficient evidence of one of the elements of the alleged offense—namely, whether he had notice that entry into the truck was forbidden.

A. Standard of Review and Governing Law

Delinquent conduct is conduct other than a traffic offense that violates a penal law of Texas or of the United States and that is punishable by imprisonment or confinement in jail. Tex. Fam. Code § 51.03(a)(1). Proceedings in juvenile court are quasi-criminal in nature but classified as civil cases. In re Hall, 286 S.W.3d 925, 927 (Tex. 2009) (orig. proceeding); In re J.S.R., 419 S.W.3d 429, 432-33 (Tex. App.—Amarillo 2011, no pet.). Generally, juvenile proceedings are governed by the rules of civil procedure and the Family Code. Tex. Fam. Code § 51.17(a); In re R.J.H., 79 S.W.3d 1, 6 (Tex. 2002).

In a juvenile proceeding, the trial court must conduct an adjudication hearing for the fact-finder to determine whether the juvenile engaged in delinquent conduct. Tex. Fam. Code § 54.03(a). If the fact-finder determines that the juvenile engaged in delinquent conduct, the trial court then must conduct a disposition hearing. Id. § 54.03(h). Disposition is akin to sentencing and is used to honor the non-criminal character of the juvenile proceedings. See In re B.D.S.D., 289 S.W.3d 889, 893 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). The burden of proof at the adjudication hearing is the beyond-a-reasonable-doubt standard applicable to criminal cases. See Tex. Fam. Code § 54.03(f). Therefore, we review the sufficiency of the evidence to support a finding that a juvenile engaged in delinquent conduct using the standard applicable to criminal cases. See In re G.A.T., 16 S.W.3d 818, 828 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Under this legal-sufficiency standard, we examine all the evidence adduced at trial in the light most favorable to the verdict to determine whether a jury was rationally justified in finding guilt beyond a reasonable doubt. Temple v. State, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); Criff v. State, 438 S.W.3d 134, 136-37 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd); see Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This standard applies to both direct and circumstantial evidence. Criff, 438 S.W.3d at 137. Accordingly, we will uphold the jury's verdict unless a rational factfinder must have had a reasonable doubt as to any essential element. Laster v. State, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009); West v. State, 406 S.W.3d 748, 756 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). In carrying out our task, "we remain cognizant that 'proof beyond a reasonable doubt' means proof to a high degree of certainty." Lane v. State, 151 S.W.3d 188, 192 (Tex. Crim. App. 2004) (internal quotations omitted).

The State alleged that D.L. committed criminal trespass of a vehicle. We measure the sufficiency of the evidence supporting the essential elements as defined by the hypothetically correct jury charge. See Cada v. State, 334 S.W.3d 766, 773 (Tex. Crim. App. 2011). A person commits the offense of criminal trespass if he enters or remains on or in another's property, including a vehicle, without effective consent and, as relevant here, the person had notice that entry was forbidden. Tex. Penal Code § 30.05(a).1 The statute does not specify a culpable mental state, so the State must prove that D.L. acted intentionally, knowingly, or recklessly. Id. § 6.02(b), (c). Because the State alleged, and the jury charge asked, only whether D.L. "intentionally or knowingly enter[ed]" Lezama's truck, we consider the evidence applying the lesser of the two alleged mental states, i.e., knowingly. Id. § 6.02(d) (knowing is a lesser-degree mental state than intentional); Howard v. State, 333 S.W.3d 137, 139 (Tex. Crim. App. 2011) ("Because the jury could have found the appellant guilty for either of these culpable mental states, we need only address the less-culpable mental state of knowingly."). A person acts knowingly, or with knowledge, when he is aware of the nature of his conduct or that the circumstances exist. Tex. Penal Code § 6.03(b).

On appeal, D.L. challenges only the sufficiency of the evidence supporting the jury's finding that he had notice that entry into the truck was forbidden.

B. Application

Viewed most favorably to the verdict, the evidence reveals the following. At trial, Officer Dexter testified that D.L. was a passenger in the stolen truck. When the police officers first saw the truck's occupants, D.L. and the other youths looked as though they had been "caught red-handed." According to Officer Dexter, the youths were violating Houston's midnight curfew. Once the officers engaged the patrol car's lights, the truck sped away and evaded the pursuing officers. According to the officers, D.L. fled from the police once the truck came to a stop. Officer Flores searched the truck and recovered two stolen firearms.

On appeal, the State contends that the following circumstantial evidence supports the jury's verdict that D.L. was aware that entry into the vehicle was forbidden: (1) D.L. "acted guilty" when he first saw police; (2) D.L. was "riding around in a pickup truck with other juveniles at 4 [o'clock] in the morning;" and (3) D.L. fled from police when the vehicle came to a stop.

As to the State's first two points, neither circumstance is sufficient to support a reasonable inference—to the required degree beyond a reasonable doubt—that D.L. had notice that entry into the truck was forbidden. The State identifies no authority for the notion that acting startled at the appearance of a police officer or riding in a vehicle in public after curfew are circumstances from which a jury may reasonably infer a consciousness of guilt for the specific element of the charged offense here at issue.

As to the State's third point—D.L.'s flight from police—we agree that presence at or near a crime scene, and flight from a crime scene, are circumstances from which the jury may draw an inference of guilt. See Thomas v. State, 645 S.W.2d 798, 800 (Tex. Crim. App. 1983) (presence); Morales v. State, 389 S.W.3d 915, 922 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (flight). But presence and flight are themselves insufficient to sustain the jury's verdict. See King v. State, 638 S.W.2d 903, 904 (Tex. Crim. App. 1982) (mere presence at the scene or even flight from the scene, either standing alone or combined, is insufficient to sustain a conviction); Valdez v. State, 623 S.W.2d 317, 321 (Tex. Crim. App. 1979) (op. on reh'g) (flight alone is insufficient to support guilty verdict, but is circumstance raising inference of guilt); Miller v. State, 83 S.W.3d 308, 314 (Tex. App.—Austin 2002, pet. ref'd) ("[M]ere presence at the scene, or even flight, is not enough to sustain a conviction."). D.L. may have fled because he was violating curfew, or because he was a passenger in a vehicle that had just evaded police, or because he wanted to distance himself from weapons in the vehicle. None of those motivations for fleeing suggest that D.L. knew the truck was stolen.

The State offered no other incriminating evidence that would, considered with the above circumstances, support the jury's verdict. See, e.g., Garcia v. State, 486 S.W.3d 602, 612 (Tex. App.—San Antonio 2015, pet. ref'd) (presence or flight, if combined with other incriminating evidence, may be sufficient to sustain a conviction). For instance, the State offered no obvious indicia of theft from which a reasonable jury could infer D.L. was on notice that the truck was stolen, and thus his entry was forbidden. See Anderson v. State, 871 S.W.2d 900, 902 (Tex. App.—Houston [1st Dist.] 1994, no pet.) ("There is evidence to support the inference that the appellant knew the car was stolen because it was obvious the steering column had been broken, he did not have the keys to the car, and the trunk had been jimmied."). Here, the truck's locks, windows, steering column, and ignition were not broken or tampered with, and Officer Dexter testified that the truck was recovered with the key in the ignition.

There is no question that D.L. had no legal right to be in Lezama's truck.3 But proof that D.L. lacked the legal right to enter the truck is not sufficient to prove criminal trespass; the State must also prove notice that entry was forbidden. Tex. Penal Code § 30.05(a).

We have found no cases in which courts have held that a person is on notice that entry is forbidden under these circumstances. In the real property context, the Texarkana Court of Appeals held the evidence legally insufficient to support a defendant's conviction for criminal trespass. Munns v. State, 412 S.W.3d 95 (Tex. App.—Texarkana 2013, no pet.). There, Munns had a key to a friend's recently vacated apartment, and she used the key to enter the apartment. Id. at 99-100. Munns was subsequently arrested for trespass. Id. at 99. Munns claimed her friend had granted Munns permission to stay at the apartment, and there was no evidence that Munns knew that her friend had terminated the lease. Id. at 99, 101. While the presence of locks on a residence normally would provide sufficient notice to a trespasser that entry was forbidden, the court noted that Munns, who entered with a key, was not a naked trespasser. Id. at 100. Based on, among other facts, Munns's possession of the key and the lack of evidence as to Munns's knowledge that her friend had terminated the lease, the court concluded that a reasonable juror could not have found beyond a reasonable doubt that Munns had notice that her entry was forbidden. Id. at 102.

Though Munns does not present an identical factual scenario, we find the court's reasoning instructive. As in Munns, "the issue is not whether [D.L.] had a legal right to be on the premises, but whether [D.L.] entered while knowing [ ]he did not have a legal right to be on the premises." Id. at 100 (emphasis added). Although a locked car, like a house, would provide a naked trespasser sufficient notice that entry was forbidden, it is undisputed here that the driver of Lezama's truck operated the vehicle with a key. Accord id. ("While a locked door would certainly qualify

as notice to a naked trespasser, a locked door is not notice that entry is forbidden to a person who is provided a key by one with apparent authority to authorize his entry into the residence."). D.L. was not the driver and there was no evidence that D.L. was present when the car was stolen, that the driver told D.L. that the car was stolen, or that D.L. otherwise knew that the car was stolen. Accord id. at 102 ("The record contains no communication that informed Munns her entry was forbidden.").

Although notice of forbidden entry can be implicit,4 we hold, on this record, that a reasonable juror could not have found beyond a reasonable doubt that D.L. had notice that his entry into the vehicle was forbidden. The State (and the jury) might speculate that D.L. knew that Lezama's truck was stolen, but we cannot sustain a conviction on speculation or conjecture. Gross v. State, 380 S.W.3d 181, 188 (Tex. Crim. App. 2012). Accordingly, the evidence is legally insufficient to support the jury's finding that D.L. committed the offense of criminal trespass of a vehicle. We sustain D.L.'s first issue.5

Conclusion: Having determined that the evidence is legally insufficient to support the trial court's adjudication that D.L. engaged in delinquent conduct, we reverse the trial court's adjudication and disposition order, render the judgment that the trial court should have rendered, and dismiss with prejudice the State's petition for adjudication of delinquency. Tex. R. App. P. 43.2(c); In re Garza, 984 S.W.2d at 347; Tex. Fam. Code § 54.03(g).

TRIAL PROCEDURE—

Garcia v. State, MEMORANDUM, NO. 05-16-00920-CR, 2017 WL 2705673, Tex.Juv.Rep. Vol. 31 No. 3 ¶ 17-3-8 (Tex.App.—Dallas, 6/23/2017).

JUVENILE PROBATION OFFICER'S TESTIMONY ABOUT CRIMES OF OTHER JUVENILE'S BECAME RELEVANT WHEN JUVENILE'S COUNCIL CHOOSE TO QUESTION HER ABOUT COMPARISONS BETWEEN THIS JUVENILE AND OTHER JUVENILES SHE HAD SUPERVISED.

Facts: On October 11, 2015, Garcia, who was fifteen years old at the time, and two other individuals robbed a Dollar General store in Mesquite, Texas. One of the other robbers had a gun and fired one shot during the course of the robbery and another shot as the robbers were fleeing the Dollar General. After Garcia was certified to stand trial as an adult, he pleaded guilty to aggravated robbery and requested that a jury determine the punishment.

The jury heard evidence that, approximately two weeks before the robbery of the Dollar General, Garcia participated in a robbery of the Dennis Water, Beer, and Wine store in Dallas, Texas. During this robbery, Garcia threw items at the store clerk and hit the clerk in the face with his hand, breaking the clerk's glasses and cutting his face. The jury also heard evidence of Garcia's membership in the Sureños 13 gang in Wichita, Kansas, and of his adjudication in Kansas as a juvenile for burglary and criminal damage to property. The jury was shown photographs, Facebook postings, and a video in which Garcia demonstrated his affiliation with the Sureños 13 gang.

Garcia testified he had been a member of the Sureños 13 gang since he was eleven years old. He believed he was "seeking a father figure type of love" from the older members of the gang and was accorded "respect" as a result of his gang membership. After he completed his probation on the juvenile offenses, two friends convinced him to drive from Wichita to Dallas to take another friend to the home of the friend's older brother. Garcia believed they were going to immediately return to Kansas, but they stayed with his friend's brother, who paid for their food and other expenses. The brother ultimately told them that, if they wanted to continue to stay with him, they were going to have to "make some money." The brother provided them with a gun.

Garcia and his three friends robbed the Dennis Water, Beer, and Wine store while the brother remained outside in a truck. Garcia received approximately $200 of the money stolen from the store. The brother held the money for Garcia and spent it on food. Garcia declined to participate in a second robbery of an individual, but agreed to rob the Dollar General after he was told he did not have any money remaining. Garcia testified he did not expect

his friend to fire the gun during the robbery and did not know why his friend did so. After the Dollar General robbery, Garcia was given a bus ticket by a woman living with the brother and returned to Kansas.

According to Garcia, prior to the two robberies in Dallas and Mesquite, he had "never done anything this serious," and he had "learned his lesson." He was sorry for his actions and would never do "anything like that again." Garcia was being held in the juvenile detention center in Dallas and was "rated" on his daily behavior in the facility. According to Garcia, he had received high ratings on his behavior. He requested the jury recommend that he be placed on community supervision.

After closing arguments, the trial court instructed the jury to find Garcia guilty and to assess punishment anywhere within the range of punishment contained in the court's charge. The jury returned a guilty verdict and assessed punishment of twenty years' imprisonment.

Admission of Evidence

In one issue, Garcia argues the trial court erred by overruling his relevance objection and admitting testimony from Marritta Claudio, Garcia's juvenile supervision officer in Wichita, Kansas, regarding other juvenile offenders.

Applicable Facts

Claudio testified Garcia was adjudicated as a juvenile for burglary and criminal damage to property and was on probation from January 22, 2013, until March 9, 2015. Garcia was originally placed on probation for a period of one year and was required to comply with certain conditions, including attending school, remaining drug-free, following a curfew, not engaging in gang activity, reporting for office visits, and participating in "groups" that were offered for cognitive behavior. His probation was extended due to noncompliance with these conditions.

According to Claudio, Kansas has (1) juvenile detention centers, which are locked facilities, and (2) residential facilities, which are not locked facilities. A juvenile detention center may be used only as a holding facility for a juvenile pending a placement in a residential facility. Because a residential facility is not a locked facility, the juvenile has the ability to leave the residential facility, but is not permitted to do so. The purpose of a residential facility is to allow a juvenile who is not successfully complying with the terms of his probation while at home to take a "step out" and be placed into a more structured environment. At a residential facility, the juvenile can receive treatment for substance abuse and assistance with anger management. The juvenile will also attend school at the facility. Garcia was placed into the juvenile detention center a total of four times and "did not have problems" while he was in detention.

Due to some "issues" while he was on probation, Garcia was placed at the Lakeside Academy residential facility in May 2013. Garcia's behavior was monitored at this facility and he was "written up" for both positive and negative behavior. Between May 2013 and October 2013, when he was returned to his home, Garcia was "written up" over fifty times. Garcia failed to comply with the terms of his probation following his release from the Lakeside Academy and was suspended from school based on writing "gang stuff" on his "agenda," disrespecting teachers, and not following directions. After Claudio was notified that Garcia had gone onto the premises of a school he did not attend and instigated a fight, Garcia was again removed from his home.

Garcia was placed at the Salvation Army residential facility. After approximately one month, the facility requested his removal. Generally, a facility will request the removal of a juvenile for noncompliant behavior, such as failing to adhere to the rules of the program. Garcia was next placed at the Clarence Kelly residential facility, but ran away the same day he arrived. After Garcia was "picked up on his warrants," he was again placed at the Lakeside Academy in June 2014. During his second stay at the Lakeside Academy, Garcia was "written up" approximately forty times. Two of the "write ups" were positive; the others were for infractions ranging from aggression to

noncompliance. At Lakeside Academy, Garcia completed anger management and substance abuse treatment. He was returned to his home on October 31, 2014, and released from probation on March 9, 2015.

Garcia was charged with a new offense of misdemeanor possession of marijuana in August 2015. In Claudio's opinion, a person who is committing new offenses within a year of completing probation "did not gain from our services." Claudio indicated it was "very frustrating" when a juvenile commits a robbery and an aggravated robbery in another state after completing probation "because we invest a lot of time, effort, and money from the state to provide every kind of program we have available to rehabilitate someone."

On cross-examination, Claudio testified that Garcia was not the "worst kid" she had supervised in her eleven years as a juvenile probation officer. Although Garcia did not comply with the terms of his probation, he was always respectful to her, and she did not encounter the issues that he had with authority in a school or residential placement setting. Claudio agreed with Garcia's counsel that it was not unusual for a juvenile to complete a residential facility placement and then get into trouble after being returned to the home. Claudio also agreed with Garcia's counsel that "you have some kids that are just bad," who could not "make a full session in a placement" and could not "follow the rules in the detention center."

On redirect examination, the prosecutor asked Claudio about the number of other juveniles she had supervised who committed aggravated robbery within six months after being released from probation. Garcia's counsel objected the evidence was not relevant. The prosecutor indicated he was seeking to respond to the information elicited on cross-examination that Garcia was not one of the worst juveniles supervised by Claudio. The prosecutor stated he was "trying to get into more on – into more of where on the spectrum [Garcia] falls." The trial court overruled the objection, and Claudio responded that "one or maybe two possibly" of the juveniles she had supervised had committed aggravated robbery within six months of completing probation. She was not aware of any juvenile she had supervised, other than Garcia, who committed "these crimes" in another state.

Held: Affirmed.

Memorandum Opinion: We review the trial court's decision to admit evidence for an abuse of discretion. Henley v. State, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). Questions of relevance should be left largely to the trial court, relying on its own observations and experience, and will not be reversed absent an abuse of discretion. Moreno v. State, 858 S.W.2d 453, 463 (Tex. Crim. App. 1993). The trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. Henley, 493 S.W.3d at 83.

Section 3(a)(1) of article 37.07 of the code of criminal procedure allows evidence during the punishment phase of a criminal trial about "any matter the court deems relevant to sentencing." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (West Supp. 2016).2 However, "the trial judge must still restrict the admission of evidence to that which is 'relevant to sentencing'—in other words, a trial judge must operate within the bounds of Texas Rules of Evidence 401, 402, and 403." Ellison v. State, 201 S.W.3d 714, 722 (Tex. Crim. App. 2006).

Although rule of evidence 4013 is "helpful" in determining relevancy under section 3(a)(1), id. at 718, it is not a perfect fit in the punishment context. Ex parte Lane, 303 S.W.3d 702, 714 (Tex. Crim. App. 2009); Sunbury v. State, 88 S.W.3d 229, 233 (Tex. Crim. App. 2002). Rather, "determining what evidence should be admitted at the punishment phase of a non-capital felony offense is a function of policy rather than a question of logical relevance." Sunbury, 88 S.W.3d at 233. The issue is whether the evidence would be "helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case." Ex parte Lane, 303 S.W.3d at 714 (quoting Rogers v. State, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999)). "Some of the policy reasons that should be considered when determining whether to admit punishment evidence include, but are not limited to: giving complete

information for the jury to tailor an appropriate sentence for a defendant; the policy of optional completeness; and admitting the truth in sentencing." Sunbury, 88 S.W.3d at 233–34.

Further, "[e]vidence that is otherwise inadmissible may become admissible when a party opens the door to such evidence." Williams v. State, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); see also Fuentes v. State, 991 S.W.2d 267 (Tex. Crim. App. 1999) ("It is well established that the evidence which is used to fully explain a matter opened up by the other party need not ordinarily be admissible." (quoting STEVEN GOODE, OLIN GUY WELBORN, II, & M. MICHAEL SHARLOT, 1 TEXAS PRACTICE GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 107.1 at 41 (West 1993))). "A party opens the door by leaving a false impression with the jury that invites the other side to respond." Hayden v. State, 296 S.W.3d 549, 554 (Tex. Crim. App. 2009).

Garcia asserts the trial court erred by allowing Claudio to testify about the number of other juveniles she had supervised who committed robbery or aggravated robbery within six months after completing their probation. However, Garcia requested the jury recommend that he be placed on community supervision. To establish community supervision was not the appropriate punishment, the State offered evidence that Garcia had difficulty complying with the terms of his juvenile probation in Kansas. Garcia's counsel then questioned Claudio about whether Garcia was the "worst kid" she ever supervised, whether it was unusual for a juvenile to complete a residential facility placement and then get into trouble after being returned to the home, and whether "you have some kids that are just bad," who could not "make a full session in a placement" and could not "follow the rules in the detention center." The State sought to respond to this testimony by questioning Claudio about any other juveniles she had supervised who committed robbery or aggravated robbery within six months after completing probation.

Conclusion: Claudio's testimony about the small number of juveniles she had supervised who had subsequently committed robbery or aggravated robbery was relevant for the jury to have a complete understanding of whether Garcia was a good candidate to receive probation for the aggravated robbery of the Dollar General. Further, even if we assume the evidence about other individuals Claudio supervised was not relevant in this case, Garcia opened the door by deliberately choosing to question Claudio about comparisons between Garcia and other juveniles Claudio had supervised. Accordingly, the trial court did not abuse its discretion by admitting the complained-about testimony. We resolve Garcia's sole issue against him and affirm the trial court's judgment.

In the Matter of A.V., MEMORANDUM, No. 11-16-00078-CV, 2017 WL 2484348, Tex.Juv.Rep. Vol. 31 No. 3 ¶ 17-3-6B (Tex. App.—Eastland, 6/8/2017).

WHEN A PROSPECTIVE JUROR EXPRESSES BIAS OR PREJUDICE IN FAVOR OF OR AGAINST THE DEFENDANT (AS OPPOSED TO A BIAS OR PREJUDICE AGAINST THE LAW), IT IS NOT ORDINARILY DEEMED POSSIBLE FOR THE PROSPECTIVE JUROR TO BE QUALIFIED BY STATING THAT THEY CAN LAY ASIDE SUCH PREJUDICE OR BIAS.

Facts: This is an appeal from a judgment of disposition in a juvenile delinquency matter involving determinate-sentence offenses. See TEX. FAM. CODE ANN. §§ 53.045(a), 54.04 (West Supp. 2016). After the grand jury approved the juvenile court petition, A.V. pleaded true to allegations that he had engaged in delinquent conduct by engaging in organized criminal activity and by committing the offenses of aggravated robbery, and the trial court adjudicated A.V. See id. § 53.045. Several weeks later, a jury was empaneled for the disposition hearing. The jury found that A.V. was in need of rehabilitation or that disposition was required to protect either A.V. or the public. See id. § 54.04(a), (c). The jury sentenced A.V. to commitment in the Texas Juvenile Justice Department with a possible transfer to the Texas Department of Criminal Justice for a term of thirty years, and the trial court entered a judgment of disposition based on the jury's verdict. See id. § 54.04(d)(3). We affirm.

In his second issue, A.V. contends that the trial court erred when it overruled his challenge for cause to one of the members of the venire panel.

Held: Affirmed

Memorandum Opinion: A.V. argues that the trial court erred when it overruled his challenge for cause to Veniremember No. 30. A.V. contends that this prospective juror was disqualified because she was biased and prejudiced. See TEX. GOV'T CODE ANN. § 62.105 (West 2013); TEX. CODE CRIM. PROC. ANN. art. 35.16 (West 2006). The record shows that Veniremember No. 30 had twice been a victim of a crime similar to the one committed by A.V. She stated during voir dire that she knew how it felt to be a victim of such a crime: "Worse than horrible." When questioned further at the bench, Veniremember No. 30 first said that she thought A.V. needed some jail time but then said that she could consider probation if the facts showed that probation "would do him good." She then indicated that, given her history, her judgment could possibly be a little cloudy but that A.V. is "a different person than who robbed me, and it would be probably completely different circumstances than what happened to me." A.V. moved to excuse Veniremember No. 30 for cause, and the trial court overruled that motion. A.V. properly preserved this issue for our review. See Green v. State, 934 S.W.2d 92, 105 (Tex. Crim. App. 1996).

We review a trial court's ruling on a challenge for cause with considerable deference because the trial court is in the best position to evaluate the demeanor and responses of a prospective juror. Gardner v. State, 306 S.W.3d 274, 295–96 (Tex. Crim. App. 2009). We may reverse a trial court's ruling on a challenge for cause only if the trial court clearly abused its discretion. Id. at 296. When the answers of the challenged veniremember are vacillating, unclear, or contradictory, we accord particular deference to the trial court's decision. Id. at 295; In re M.R., No. 11–08–00155–CV, 2010 WL 1948286, at *2 (Tex. App.–Eastland May 13, 2010, pet. denied) (mem. op.).

A veniremember is challengeable for cause if she has (1) a bias or prejudice for or against a party or (2) a bias or prejudice against the law upon which the parties are entitled to rely. Gardner, 306 S.W.3d at 295; M.R., 2010 WL 1948286, at *1. A veniremember is not challengeable for cause merely because she has a bias against the crime committed. M.R., 2010 WL 1948286, at *3.

When a prospective juror expresses bias or prejudice in favor of or against the defendant (as opposed to a bias or prejudice against the law), it is not ordinarily deemed possible for the prospective juror to be qualified by stating that she can lay aside such prejudice or bias. Id. at *1 (citing Smith v. State, 907 S.W.2d 522, 530 (Tex. Crim. App. 1995)). When a prospective juror expresses a bias for or against the law, the question is whether the bias or prejudice would substantially impair the prospective juror's ability to carry out her oath and instructions in accordance with the law. Gardner, 306 S.W.3d at 295; M.R., 2010 WL 1948286, at *2. Before a veniremember may be excused for cause, the law must be explained to her, and she must be asked whether she can follow that law regardless of her personal views. Gardner, 306 S.W.3d at 295; M.R., 2010 WL 1948286, at *2. The proponent of a challenge for cause carries the burden of establishing that the challenge is proper. Gardner, 306 S.W.3d at 295. The proponent does not meet this burden until the proponent shows that the veniremember understood the requirements of the law and could not overcome her prejudice well enough to follow the law. Id.

Conclusion: Veniremember No. 30 did not express a bias or prejudice against A.V. but, rather, against the crime he committed. Veniremember No. 30 vacillated somewhat with respect to any bias or prejudice as it related to the law—specifically, probation. However, we defer to the trial court's determination and hold that A.V. did not meet his burden to show that Veniremember No. 30 understood the law but could not overcome her prejudice well enough to follow the law. A.V.'s second issue is overruled.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT—

In the Matter of D.M., MEMORANDUM, No. 13-17-00319-CV, 2018 WL 460811, Tex.Juv.Rep. Vol. 32 No.14 ¶ 18-1-9 (Tex. App.—Corpus Christi-Edinburg, 1/18/2018).

TAKING JUDICIAL NOTICE OF ALL OF THE DOCUMENTS IN THE TRIAL COURT'S FILE FOR DISCRETIONARY TRANSFER HEARING ALLOWED.

Facts: D.M. was charged with the capital murder of M.A. and the aggravated assault of F.R. On March 29, 2016, the State filed its Petition for Discretionary Transfer to Criminal Court, asking the trial court to waive its jurisdiction and transfer D.M.'s case to the adult criminal courts. See TEX. FAM. CODE ANN. § 54.02 (West, Westlaw through 2017 1st C.S.). D.M. subsequently filed a motion to determine whether he was unfit to proceed, as a result of mental illness or mental retardation. The trial court ordered a social study to be conducted by the juvenile probation department and appointed Dr. David Moron and Dr. Gregorio Pina to conduct evaluations of D.M. under chapter 55 of the Texas Family Code. See TEX. FAM. CODE ANN. ch. 55 (West, Westlaw through 2017 1st C.S.) (proceedings concerning children with mental illness or intellectual disabilities).

A two-day jury trial was held to determine if D.M. was competent to proceed with the charges filed against him, with the jury finding D.M. fit to proceed. Approximately three months later, the trial court conducted a hearing regarding the State's motion to transfer D.M. to an adult criminal court.

Held: Affirmed

Memorandum Opinion: D.M. alleges the trial court improperly considered the social study and addendum created by Arispe in making its determination. Prior to the beginning of the hearing, the State asked the trial court to take judicial notice of all of the documents in the trial court's file, specifically, Drs. Martinez and Pina's reports, as well as the social study and addendum prepared by Arispe. D.M. had no objections and asked to include the doctors' reports that had been offered during the prior competency hearing. The State then clarified that it was specifically pointing out the documents prepared by order of the trial court that were statutorily required. Again, D.M. failed to object. The trial court then took judicial notice of the court's file.

Section 54.02(c) states "the juvenile court shall conduct a hearing without a jury to consider transfer of the child for criminal proceedings." See TEX. FAM. CODE ANN. § 54.02(c). Section 54.02(d) states "prior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense." Id. § 54.02(d). Section 54.02(e) states that "at the transfer hearing the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses." Id. § 54.02(e).

"Section 54.02(e) allows the court to consider a probation officer's written report." Matter of K.B.H., 913 S.W.2d 684, 686 (Tex. App.—Texarkana 1995, no pet.). Any complaint that the State improperly introduced the social evaluation through Arispe is "misplaced because the court could consider her report even if the State had not formally offered it into evidence." Id. at 687–88; see L.M. v. State, 618 S.W.2d 808, 818 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

Conclusion: Here, the trial court was permitted to consider the statutorily required social study and addendum Arispe completed even though it had not formally been entered into evidence as an exhibit during the hearing. Additionally, by D.M. not objecting to the trial court taking judicial notice of the court's file, with a specific request from the State to include the social study and addendum, any issue that could be raised was waived. See TEX. R. APP. P. 33.1. We overrule D.M's first issue.

In the Matter of E.H., MEMORNADUM, No. 01-16-00802-CV, 2017 WL 3526717, Tex.Juv.Rep. Vol. 31 No. 4 ¶ 17-4-2 [Tex.App.—Houston (1st Dist.), 8/17/2017].

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

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 facilitates 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 is 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.

Eguade v. State, No. 08-15-00268-CR, 2017 WL 3224863, Tex.Juv.Rep. Vol. 31 No. 3 ¶ 17-3-12A (Tex.App.—El Paso, 7/31/2017).

IN DISCRETIONARY TRANSFER MOTION, ON OR ABOUT LANGUAGE ALLOWS THE STATE TO PROVE A DATE OTHER THAN THE DATE PROVEN IN COURT, AS LONG AS IT IS ANTERIOR TO THE PRESENTMENT OF THE INDICTMENT AND WITHIN THE STATUTORY LIMITATION PERIOD.

Facts: The Eguade and De La Rosa families lived next door to each other in the San Elizario community. Appellant's mother is L.D.R.'s godmother and according to L.D.R., the two families had a family-like relationship.

On January 31, 2010, when L.D.R. was in the fifth grade, she told her brother, Hector De La Rosa that Appellant had sexually abused her when she was getting ready to enter the first grade. Hector immediately told their mother, who called the police. El Paso Sheriff's Deputy Sergio Juarez responded to the call at the De La Rosa residence and created an initial report which he turned over to a detective for further investigation. On February 9, 2010, Detective Joe Zimmerly interviewed L.D.R. at a child advocacy center.

At the time of trial, L.D.R. was sixteen years old and a sophomore in high school. She testified that Appellant raped her when she was five years old, going into the first grade at Borrego Elementary, and her teacher during this time was Mrs. De Leon. L.D.R. related that the first time occurred at Appellant's house in his mother's bathroom. When L.D.R. went to use the bathroom, Appellant was at the door when she was finished. He touched her, pulled down his shorts, and inserted his penis into her vagina while she was lying on her back on the floor. While she and Appellant were in the bathroom, Appellant's sister knocked on the door and Appellant told L.D.R. to be quiet. When he left, he told her to stay in the bathroom for a while.

The next occasion occurred in the Eguade's hallway bathroom. Again, she went to the bathroom and Appellant was waiting for her at the door when she was finished. He put his penis in her vagina, and then he sat down on the toilet and forced L.D.R. to put her mouth on his penis by putting his hand on the back of her neck. She testified that she saw a white substance come out of his penis. L.D.R. never told anyone because once she learned that what had happened was wrong, she felt guilty and was afraid that the two families would part ways.

On cross-examination, L.D.R. testified that she felt pain, but did not remember whether she bled. One of the reasons she never told anyone was because Appellant made her feel as though it was her fault. Even after her mother

learned of the abuse, L.D.R. did not speak extensively because she does not like talking about what happened. After she made her outcry, no other incidents occurred.

The State rested its case and moved to dismiss Count II given that there was no evidence regarding anal penetration. Appellant moved for directed verdicts on Counts I and III, which the trial court denied.

Mrs. De La Rosa testified as the first defense witness. On January 31, 2010, Deputy Juarez responded to her call and she informed him of L.D.R.'s outcry. Mrs. De La Rosa began taking L.D.R. to counseling because she was having emotional problems and difficulty at night. She did not recall informing law enforcement officials that L.D.R.'s abuse occurred during mutual cookouts with the Eguades. She also did not remember giving officers the five dates of occurrence for the abuse, but did recall that the two families spent significant time together, including traveling together.

On cross-examination, Mrs. De La Rosa explained that she had known the Eguade family for 25 years, and that before the abuse, the two families were extremely close. L.D.R. is shy, suffers from weight problems, and becomes very angry whenever she has to talk about the abuse. L.D.R.'s outcry made her feel helpless and angry. She then recalled that she did in fact give law enforcement the dates of abuse which were an approximation because the child was too young to give precise dates. Mrs. De La Rosa remembered that L.D.R. told her she was around five or six years old when the events at issue occurred.

Detective Gil, a twenty-one year veteran of the sheriff's department, testified that she took Mrs. De La Rosa's and Hector's statements in 2010 after L.D.R. made her outcry. She did not recall reading the statement back to Mrs. De La Rosa, but explained that Mrs. De La Rosa initialed each paragraph in her statement to verify its contents.

L.D.R.'s counselor, Martha Dominguez, testified that she had seen L.D.R. approximately nineteen times. She observed that L.D.R. was generally a happy person, and during counseling, Dominguez helped her focus on reducing the anxiety she experienced about having to testify. L.D.R. only opened up to her once concerning the abuse. Dominguez has thirty years of practice as a licensed social worker and has treated approximately three hundred sex-abuse victims. She opined that family support is one the most important factors in how a child copes with sexual abuse. She also indicated that during her time with L.D.R., she never recanted her statement.

Mrs. Eguade testified that she was aware of the charges against her son and confirmed that he was fourteen years old at the time and L.D.R. was five years old. As L.D.R.'s godmother, she cared for L.D.R., but she never noticed that anything was bothering the child. On cross-examination, she minimized her family's relationship with the De La Rosas. They rarely went to each other's homes and when the De La Rosas did come over, they stayed outside. She acknowledged that L.D.R. had been at her home while Appellant was present. When Appellant was much younger, she supervised him but was unable to monitor him all of the time and it was impossible for her to know everything that he did outside of her presence. She acknowledged the seriousness of the charges and while she would do anything for her son, she would not lie.

Finally, Appellant testified. At the time of trial, he was twenty-five years old. He claimed that L.D.R. was lying, he would never abuse her, and he was never alone with her. Initially, Appellant attended Texas A & M University on scholarship, but he returned to El Paso after losing the scholarship due to low grades. He was placed on academic suspension at El Paso Community College and was finishing his engineering degree at The University of Texas at El Paso. He had lost two jobs and was unable to join the Air Force because of his pending charges.

Held: Affirmed.

Opinion: In his first point of error, Appellant maintains that the order waiving juvenile court jurisdiction was defective and deprived the district court of jurisdiction over Count III. He has waived error by failing to object in the trial court. See TEX.R.APP.P. 33.1(a). Nothing in the record indicates Appellant filed a written motion objecting to the trial court's assumption of jurisdiction, as required by Article 4.18(a) of the Texas Code of Criminal Procedure, which states:

> A claim that a district court or criminal district court does not have jurisdiction over a person because jurisdiction is exclusively in the juvenile court and that the juvenile court could not waive jurisdiction under Section 8.07(a), Penal Code, or did not waive jurisdiction under Section 8.07(b), Penal Code, must be made by written motion in bar of prosecution filed with the court in which criminal charges against the person are filed.
>
> TEX.CODE CRIM.PROC.ANN. art. 4.18(a)(West Supp. 2016).

Even had he properly preserved this issue, it is without merit. Appellant complains that the January 1, 2003, aggravated sexual assault offense of which he was convicted in Count III was not a criminal act encompassed within the juvenile court's transfer order.

It is well-settled that a juvenile court waives jurisdiction only with respect to conduct, and a criminal court has jurisdiction to adjudicate only the same conduct for which the juvenile court transferred jurisdiction. Livar v. State, 929 S.W.2d 573, 574 (Tex.App.–Fort Worth 1996, pet. ref'd); Ex parte Allen, 618 S.W.2d 357, 361 (Tex.Crim.App. 1981)(op. on reh'g). Appellant argues that the juvenile court waived its jurisdiction based on the five allegations that occurred in 2005 (June 10, July 16, September 9, November 12, and December 2) but that the jury was told it could convict Appellant based on 2003 allegations alleged in the indictment issued after juvenile jurisdiction was waived. He relies on Ex parte Allen, 618 S.W.2d 357, 361 (Tex.Crim.App. 1981)(op. on reh'g), for his claim that the State acquired a transfer order relating to one criminal act of a juvenile and then sought indictment for a separate criminal act allegedly committed by the same juvenile. However, the State may, in a criminal court, charge the juvenile with an offense that can be proven if it is based on conduct for which the juvenile court has ordered the juvenile transferred. See Brosky v. State, 915 S.W.2d 120, 126 (Tex.App.–Fort Worth 1996, pet. ref'd).

The State readily acknowledges that the date of the conduct alleged in the State's indictment is on or about January 1, 2003, and that it is different than any of the dates set out in the juvenile transfer record. It directs us to the Court of Criminal Appeals' decisions that it need not allege a specific date in an indictment. Mitchell v. State, 168 Tex.Crim. 606, 330 S.W.2d 459, 462 (1959); Sledge v. State, 953 S.W.2d 253, 256 (Tex.Crim.App. 1997). The "on or about" language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory limitation period. Sanchez v. State, 400 S.W.3d 595, 600 (Tex.Crim.App. 2013); Sledge, 953 S.W.2d at 256; Scoggan v. State, 799 S.W.2d 679, 680 n.3 (Tex.Crim.App. 1990)("The State is not bound by the date alleged in the indictment ... so long as the date proved is a date anterior to the presentment of indictment and the crime's occurrence is not so remote as to be barred by limitation."); Thomas v. State, 753 S.W.2d 688, 692 (Tex.Crim.App. 1988) ("Where an indictment alleges that some relevant event transpired 'on or about' a particular date, the accused is put on notice to prepare for proof that the event happened at any time within the statutory period of limitations.").

The indictment alleged that the offense occurred on or about January 1, 2003, but all of the allegations in the record focus on acts that allegedly occurred in 2005. This on or about language allows the State to prove a date other than the 2003 date as long as it is anterior to the presentment of the indictment and within the statutory limitation period, which had not expired in this instance.

Moreover, courts remain cognizant of the difficulty children often have in remembering specific dates or ages, and that they frequently relate the time of the occurrence of an event to other significant dates or events, such as holidays, or seasons, or the grade they are in at school at the time of the event, as L.D.R. did in this instance. See,

e.g., Michell v. State, 381 S.W.3d 554, 561 (Tex.App.–Eastland 2012, no pet.)(child victim could not give specific dates of instances of sexual abuse, but was able to give details of where they took place, the grade she was in, or what the season of the year was at the time of the abuse); see also, e.g., Lane v. State, 357 S.W.3d 770, 773–74 (Tex.App.–Houston [14th Dist.] 2011, pet. ref'd); Smith v. State, 340 S.W.3d 41, 48–49 (Tex.App.–Houston [1st Dist.] 2011, no pet.).

Conclusion: Appellant has failed to show that the offense for which he was prosecuted and convicted, as alleged in Count III of the indictment, did not arise out the same conduct for which the juvenile court waived and transferred its jurisdiction. The "on or about" allegations in both the juvenile court's certification proceedings and in the indictment cover the time of the occurrence of the offense described by L.D.R. in her testimony at trial. Because Appellant has not demonstrated any jurisdictional defect to his prosecution and conviction, we overrule Issue One. Judgment Affirmed.

In the Matter of S.L., III, MEMORANDUM, No. 04-17-00087-CV, 2017 WL 3159444, Tex.Juv.Rep. Vol. 31 No. 3 ¶ 17-3-2 (Tex.App.—San Antonio, 7/26/2017).

JUVENILE COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THE WELFARE OF THE COMMUNITY REQUIRED CRIMINAL PROCEEDINGS BECAUSE OF THE JUVENILE'S BACKGROUND AND THE WELFARE OF THE COMMUNITY.

Facts: S.L., III is charged with attempted capital murder, aggravated robbery, burglary, and aggravated assault. After the State filed an original petition for discretionary transfer to district court, the juvenile court signed an order requiring the juvenile probation office to "perform a complete diagnostic study, social evaluation and full investigation of [S.L., III], his circumstances and the circumstances of the alleged offense" in preparation for the hearing on his discretionary transfer.1

After a two-day hearing, the juvenile court signed an order waiving its jurisdiction and transferring S.L., III to district court. In addition to the findings contained in its written order, the juvenile court also signed additional findings of fact in support of its order. S.L., III appeals.

Held: Affirmed

Memorandum Opinion: "[I]in evaluating a juvenile court's decision to waive its jurisdiction, an appellate court should first review the juvenile court's specific findings of fact regarding the Section 54.02(f) factors under 'traditional sufficiency of the evidence review.' " Moon v. State, 451 S.W.3d 28, 47 (Tex. Crim. App. 2014). Under a legal sufficiency challenge, we credit evidence favorable to the challenged finding if a reasonable fact finder could and disregard contrary evidence unless a reasonable fact finder could not. City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005). If there is more than a scintilla of evidence to support the finding, a legal sufficiency challenge fails. BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 795 (Tex. 2002); Faisst v. State, 105 S.W.3d 8, 12 (Tex. App.—Tyler 2003, no pet.). Under a factual sufficiency challenge, we consider all of the evidence presented to determine if the court's finding is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Moon, 451 S.W.3d at 46 n.75 (internal citations omitted); C.M. v. State, 884 S.W.2d 562, 563 (Tex. App.—San Antonio 1994, no writ). Our review of the sufficiency of the evidence supporting waiver is limited to the facts the juvenile court expressly relied on in its transfer order. Moon, 451 S.W.3d at 50.

We must then review the juvenile court's ultimate waiver decision under an abuse of discretion standard. Id. at 47. "That is to say, in deciding whether the juvenile court erred to conclude that the seriousness of the offense alleged and/or the background of the juvenile called for criminal proceedings for the welfare of the community, the appellate court should simply ask, in light of its own analysis of the sufficiency of the evidence to support the Section 54.02(f) factors and any other relevant evidence, whether the juvenile court acted without reference to guiding rules or principles." Id. We must, however, remain mindful that "not every Section 54.02(f) factor must weight in favor of

transfer to justify the juvenile court's discretionary decision to waive its jurisdiction." Id. A juvenile court does not abuse its discretion if its transfer decision "represent[s] a reasonably principled application of the legislative criteria." Id. The juvenile court must, however, "show its work" and specifically state the reasons for waiver. Id. at 49. "The juvenile court that shows its work should rarely be reversed." Id.

ANALYSIS

In his brief, S.L., III concedes each of the following requirements for transfer have been met: (1) he is alleged to have violated a penal law of the grade of felony; (2) he was 15 years of age or older at the time he is alleged to have committed the offense which is a felony of the first or second degree and no adjudication hearing has been conducted concerning that offense; and (3) probable cause exists to support a determination that he committed the alleged offense. See TEX. FAM. CODE ANN. § 54.02(a). The only requirement S.L., III challenges is whether the welfare of the community requires criminal proceedings because of the seriousness of the offense alleged or his background. As previously noted, in determining whether this requirement is met, the juvenile court must consider the following non-exhaustive factors:

(1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
(2) the sophistication and maturity of the child;
(3) the record and previous history of the child; and
(4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

Id. at § 54.02(f).

Under the applicable standard of review, we first examine the sufficiency of the evidence to support the trial court's findings regarding the Section 54.02(f) factors. Moon, 451 S.W.3d at 47.

1. Nature of the Offense

In his brief, S.L., III contends the juvenile court failed to "show its work" with regard to its finding that the welfare of the community required criminal proceedings based on the seriousness of the offense. See Moon, 451 S.W.3d at 49 (stating juvenile could must "show its work"). In making this assertion, S.L., III only refers to the findings contained in the juvenile court's order and does not make reference to the additional findings of fact made by the juvenile court that relate to the seriousness of the offense.

The juvenile court's order specifically finds the alleged offenses are against a person, were of a serious nature, and involved the use of a deadly weapon. In its additional findings, the juvenile court also found S.L., III and another juvenile, R.E.J., burglarized the victim's home. During the course of the burglary, the victim was stabbed multiple times in the back. When S.L, III and R.E.J. fled the scene after the victim was stabbed, S.L., III was driving the vehicle. S.L., III was pulled over by a police officer but then sped off, leading law enforcement on a high speed chase reaching speeds in excess of 100 mph. A pursuing officer saw the juveniles throw an item from their car during the chase which was recovered. The item was a truck key that connected the juveniles to another burglary. S.L., III was taken into custody after he collided with another car on the highway. While waiting to be transported to a juvenile facility, S.L., III and R.E.J. were recorded discussing the burglary and stabbing. In that recording, S.L., III admitted participating in the burglary and arming himself with a metal stake before entering the home. A law enforcement officer testified the pointed metal stake S.L., III possessed and the ten inch blade knife R.E.J. used to stab the victim were deadly weapons. The victim's treating physician described the victim's injuries as serious bodily injuries.

The following summarizes some of the evidence presented at trial which supports the juvenile court's findings.

Officer Evan Downey testified he was dispatched to the victim's residence for an aggravated burglary in progress. In his 911 call, the victim provided a description of the vehicle in which S.L., III and R.E.J. fled. When

Officer Downey spotted the vehicle and initiated a traffic stop, the vehicle ran a stop sign and almost hit another vehicle. Officer Downey exited his vehicle and instructed the occupants to exit their vehicle, but the vehicle sped off. During the subsequent high-speed chase, the vehicle had no regard for other drivers. Officer Downey stated the vehicle drove on the wrong side of the road, cut cars off, weaved in and out of traffic, and was going 100 miles per hour as they approached an elementary school. At one intersection, the vehicle ran a red light and almost t-boned an 18-wheeler and a truck. The vehicle entered a highway, sideswiped a few cars, and ran into a vehicle before coming to a stop almost twelve miles from the start of the chase. Photographs of the vehicle S.L., III was driving and the vehicle into which he collided and a videotape of the chase were admitted into evidence. Officer Downey testified S.L., III was driving the vehicle, but he did not have a driver's license. The vehicle belonged to S.L., III's mother. A second videotape of a conversation that occurred between S.L., III and R.E.J. while being detained in Officer Downey's vehicle also was admitted into evidence. In this videotape, S.L., III and R.E.J. laughed about the offense.

Dr. Victor Vela, the victim's treating physician, stated the victim had three wounds approximately two inches wide and an inch-and-a-half deep. Dr. Vela testified the victim was extremely fortunate that the wounds did not penetrate his chest cavity or hit an artery.

Officer Matthew Schultz was dispatched to the victim's residence. Upon arriving, he located the victim, who was heavily bleeding and almost incoherent, and began applying pressure to the wounds to stop the bleeding. Officer Schultz continually changed the bandages as they became soaked with blood. Officer Schultz stated the wounds were very close to vital organs.

Investigator Richard Davila testified officers in pursuit of S.L., III during the chase observed items being thrown from the car. One of the items that was recovered was a Ford key which was later identified as a key taken from another house that had previously been burglarized. On cross-examination, Investigator Davila stated he was not aware that R.E.J.'s fingerprints were found at the other house but S.L., III's were not. Investigator Davila stated the key was thrown from the passenger side of the vehicle.

Deputy James Whitt identified two weapons recovered at the scene. The first was a ten-and-a-half inch knife. The second was a forty-eight inch metal yard stake with a sharp pointed end. On the videotape of the conversation between S.L., III and R.E.J., S.L., III admits he took the stake into the house.

The victim testified he had dressed and was preparing to leave his house. When he passed the study, he saw an iron stake on the couch that was generally stored in the garage. When the victim entered the study and walked toward the couch, he felt a severe blow from behind that pushed him onto the couch. He then felt very rapid hard blows to his right shoulder area. When the victim turned to fight the attacker, he saw the attacker holding a knife and then saw the attacker and another individual run from the room.2 The victim chased the two individuals through his garage and saw them get into a car in his driveway. The victim then called 911 while pushing his back against the wall to try to stop the bleeding. The victim was taken to the hospital. To avoid infection, the wounds in his back were not closed, but had to be packed with gauze twice a day for five weeks. The victim described the pain he experienced in packing the wounds as the most excruciating he had felt in his life. The victim also described the mental trauma of no longer feeling safe in his home.

Gary Manitzas, the mayor of the community where the victim lived, testified violence against a person was not common in their community. Manitzas stated the people of the community expressed shock and concern that such a serious crime in which the victim could have been killed was committed by juveniles.

Having reviewed all of the evidence, we hold the evidence is legally and factually sufficient to support the juvenile court's findings that the offense was committed against a person and was of a serious nature.

2. S.L., III's Sophistication and Maturity

S.L., III was fifteen when the offense was committed and sixteen at the time of the hearing. In its order, the juvenile court found S.L., III "is sufficiently sophisticated and mature enough to be transferred into the criminal

justice system and he understands the allegations, the court proceedings, and their possible consequences." The juvenile court also found S.L., III "is able to assist his attorney in his defense." In its additional findings of fact, the juvenile court cited the following evidence to support its finding that S.L., III is sophisticated and mature enough to stand trial as an adult:

5 a) Dr. Lisa Watts, a clinical psychologist, tested and evaluated [S.L., III] and concluded that he was able to understand the allegations and court proceedings.
b) Dr. Joann Murphey believed [S.L., III] was capable of understanding the psychologist's role in his evaluation and the limits on confidentiality. She believed he has a limited ability to assist his attorney.
c) Juvenile Probation Officer Debbie Gilbert believed [S.L., III] fully understood the seriousness of the allegations against him as well as the legal consequences.
d) [S.L., III] admitted his role in the burglary to Dr. Joann Murphey and demonstrated that he knew right from wrong.
e) Dr. Watts and Dr. Murphey did not believe [S.L., III] has any serious mental health issues that would prevent him from understanding the legal proceedings and the difference between right and wrong.
f) Judge Debby Hudson gave [S.L., III] the required warnings pursuant to Tex. Fam. Code § 51.095 and she believed he fully understood the warnings. [S.L., III] refused to waive his constitutional rights.

Judge Debby Henson is the magistrate judge who gave S.L., III the required juvenile warnings. Judge Henson testified she believed S.L., III understood his rights. Judge Henson believed S.L., III's immediate decision not to make any statement after he was given his warnings was an indication of his maturity and sophistication.

The trial court took judicial notice of the discretionary transfer hearing report and the clinical psychologist report prepared by Dr. Lisa Watts. See TEX. FAM. CODE ANN. § 54.02(e) ("At the transfer hearing the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses."). The discretionary transfer hearing report made reference to S.L., III's psychological evaluation with Dr. Watts. The report stated S.L., III's attorney was present at the evaluation and, on advice from his attorney, S.L., III refused to answer many questions that were asked. Dr. Watts's report stated S.L., III's achievement functions did not fall significantly below his cognitive abilities.

Deborah Gilbert, the probation officer who prepared the discretionary hearing transfer report, testified she was aware R.E.J. made a full confession while S.L., III did not. Gilbert agreed this demonstrated S.L., III was exercising more self-preservation. In response to whether S.L., III had made a sophisticated decision, Gilbert responded that she thought "he's smart enough."

Dr. Joann Murphey was retained by defense counsel to conduct an evaluation of S.L., III. Dr. Murphey did not believe S.L., III should be certified as an adult. Dr. Murphey testified S.L., III was doing well in juvenile detention and was progressing academically. Dr. Murphey stated S.L., III was cognitively functioning at the level of a twelve-year-old at the time of the offense, and was currently functioning almost at the level of a fourteen-year-old. Dr. Murphey did not believe S.L., III had the sophistication and maturity to assist in his defense. On cross-examination, Dr. Murphey agreed Dr. Watts believed S.L., III understood the legal proceedings he was facing.

Having reviewed all the evidence, we hold the evidence is legally and factually sufficient to support the juvenile court's finding that S.L., III was sophisticated and mature enough to be transferred into the criminal justice system.

3. S.L., III's Record and Previous History

In its transfer order, the juvenile court specifically found S.L., III had no prior referrals to the juvenile system but his previous history supported that he should stand trial as an adult. In its additional findings of fact, the juvenile court cited the following evidence as support for its finding that S.L., III's record and referral history supported transfer to adult court:

a) [S.L., III] was removed from Edison high school by his mother due to excessive absenteeism.
b) [S.L., III] had several school violations dating back to 2012. He had been suspended for marijuana usage.

c) [S.L., III] was not in any school environment at the time of the offense.
d) [S.L., III's] mother expressed concern that her son was using drugs, associating with known gang members, refusing to go to school, and not coming home at night.
e) [S.L., III's] mother admitted she sometimes let [S.L., III] drive her car despite the fact he was not licensed to do so. She also stated that he took her car on other occasions without her permission.
f) [S.L., III] drove in an excessively high speed chase on busy public roads, during a school day, endangering the lives of many other drivers while fleeing from the police.
g) [S.L., III's] cell phone pictures showed [S.L., III] posing with a gun. His text messages demonstrated that he was close friends with known gang member Jacob "Enzo" McCumber.

Investigator Tony Kobryn examined S.L., III's cell phone. A report listing the content of the cell phone and photographs recovered from the cell phone were admitted into evidence, including photographs of S.L., III holding a gun.

Deputy Whitt, who recovered the weapons from the victim's home, also did research into the DATK gang mainly through social media and Facebook. Postings from two DATK members, John Serros and Jacob "Enzo" McCumber, were admitted into evidence. Serros posted a photograph of the scene where R.E.J. and S.L., III were arrested with the comment, "Free the savages [R.E.J.] and [S.L., III]. Keep it DATK." In response to a question posted about the reason R.E.J. and S.L., III were in Fair Oaks where the robbery occurred, Serros responded, "They were hitting houses." Enzo posted photographs of the crash site from a news report with a comment to "free my boyss [sic]." Enzo's Facebook page also contained photographs of S.L., III and R.E.J. together, including a video of them using narcotics together. Deputy Whitt also researched S.L., III's Facebook page. Deputy Whitt described the Facebook page as making references to narcotics, drug dealing, guns, and gang activity. The page contained a video of a drive-by shooting in which S.L., III was a passenger in the back seat of the car. On cross-examination, Deputy Whitt testified he was not certain if S.L., III was a documented gang member. Lieutenant Thomas Matjeka also reviewed S.L., III's Facebook page and stated S.L., III's postings show that he associates and interacts with known gang members.

Lieutenant Matjeka also reviewed the cell phone records from S.L., III's phone. Lieutenant Matjeka testified several text messages referred to S.L., III's drug use and to his committing crimes with R.E.J. and Enzo. He also testified the text messages S.L., III exchanged with his mother demonstrated that she allowed him to drive her car and knew about his drug use. The phone also contained several photographs showing S.L., III using drugs.

The discretionary transfer hearing report stated S.L., III's mother and father reported S.L., III was a good and respectful boy until eighth grade when he no longer wanted to play football and started hanging out with the wrong people. S.L., III began using marijuana when he was fourteen, but he did not believe his drug use caused any problems. S.L., III's mother was aware that S.L., III used marijuana. Although S.L., III is not a documented gang member, two of his friends are confirmed gang members. Because S.L., III was not attending school, his mother unenrolled him from school on February 1, 2016, with the intention of enrolling him in a different school. S.L., III had not been enrolled in school for almost two months when the offense occurred on March 23, 2016. S.L., III had a history of school-related violations for marijuana and fighting. S.L., III had participated well in detention and was being attentive and respectful to detention staff.

S.L., III's mother testified S.L., III began changing toward the end of eighth grade when he began hanging out with R.E.J. S.L., III lost interest in school and began skipping classes. When S.L., III was written up in school for marijuana, S.L., III's mother sought help through an employee assistance program at her work., and S.L., III began counseling. He had attended three counseling sessions during the month of February before the offense occurred. S.L., III's mother stated she unenrolled him from school with the intention of enrolling him in a different school away from the people who were influencing him. S.L., III's mother knew he continued to hang out with the same people after she unenrolled him, but she stated she took measures to punish him. S.L., III's mother testified she was not aware S.L., III would drive her car. She stated she was having difficulty re-enrolling S.L., III in a new school because he would not come home, and she did not know where he was.

Having reviewed all of the evidence, we hold the evidence is legally and factually sufficient to support the juvenile court's finding that S.L., III's prior history supports that he should stand trial as an adult.

4. Prospects of Adequate Protection and Likelihood of S.L., III's Rehabilitation

In its transfer order, the juvenile court found the procedures, services, and facilities available to the juvenile court are inadequate to rehabilitate S.L., III while also protecting the public because of S.L., III's previous history and the extreme and severe nature of the alleged offenses. In its additional findings of fact, the juvenile court cited the following evidence in support of its finding that the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child require transfer to adult court:

a) Licensed clinical social worker Maria Mejia diagnosed [S.L., III] with oppositional defiance disorder. She explained this meant he refused to comply with rules and was defiant with authority figures.

b) Mejia believed his prognosis was at best guarded because [S.L., III] did not believe his behaviors - truancy, drug abuse, and negative peer associations - were problematic.

*8 c) [S.L., III] abused narcotics and presented with a substance abuse problem.

d) [S.L., III] attended only three session [sic] of counseling despite the counselor's recommendation for at least eight to ten months of therapy. This was despite the fact that his mother's insurance would cover the therapy.

e) Dr. Murphey testified that [S.L., III] possesses less energy than most adolescents and is not inclined to alter his life or to find new peer activities or directions.

f) Dr. Murphey found that "he may be so indifferent as to fail to heed recommendations or to comply to agreed[-]upon decisions for action and change."

[g]) A video recording of [S.L., III] showed he lacked remorse for the offense.

[h]) [S.L., III] associated with other known gang members.

[i]) [S.L., III] lacked adequate supervision in the home as demonstrated by staying away from home on numerous occasions without his mother's permission; using narcotics repeatedly, refusing to attend school, and lying to his mother. [S.L., III's]s mother failed to enroll [S.L., III] in school for two months. She also failed to continue [S.L., III's] recommended counseling and encouraged his illegal driving. Text messages showed [S.L., III's] father as possibly providing drugs to [S.L., III].

[j]) The victim and other members of the community expressed an ongoing fear of [S.L., III].

[k]) [S.L., III] is currently 16 years and approximately four months old. A probation in juvenile court would only last until age 18. A placement in TJJD would end at age 19.

The discretionary hearing transfer report noted if S.L., III was not transferred to adult court, he would only be under direct supervision for less than two years unless he was committed to TJJD on a determinate sentence. The probation department recommended that S.L., III not be transferred to adult court. Instead, the probation department recommended that S.L., III be committed to TJJD on a determinate sentence. Deborah Gilbert, the probation officer who prepared the discretionary hearing transfer report, testified she recommended that S.L., III not be certified as an adult. On cross-examination, Gilbert testified she was not aware that TJJD would make the decision whether S.L., III would be placed on parole or go to an adult prison if S.L., III was given a determinate sentence. Gilbert was also not aware that TJJD would not consider the seriousness of the offense in making that decision.

Dr. Murphey testified Texas has a very good system for dealing with juveniles. Dr. Murphey believed S.L., III's participation in the juvenile program would provide adequate protection for the community. On cross-examination, Dr. Murphey stated she had not reviewed the police reports regarding he offense or the information obtained from S.L., III's cell phone. Dr. Murphey also had not watched the videotape of the conversation between S.L., III and R.E.J. while they were detained. Dr. Murphey agreed S.L., III required a structured setting to avoid problems like gangs and drugs and to ensure that he attended school.

Maria del Carmen Mejia-Desatnik is the licensed counselor who saw S.L., III for three counseling sessions. Mejia diagnosed S.L., III as having Oppositional Defiant Disorder which involves a pattern of noncompliance to authority figures. S.L., III's mother brought S.L., III for treatment based on his failure to attend school, hanging out with the wrong people, and using drugs; however, Mejia stated S.L., III had limited realization or acceptance that his

behaviors were problematic. Mejia believed S.L., III would have required therapy for eight to ten months, but the therapy ended when S.L., III was placed in juvenile detention after the three sessions.

Although both Gilbert and Dr. Murphey believed S.L, III should not be transferred, after reviewing all of the evidence, we hold the evidence is legally and factually sufficient to support the juvenile court's finding that the procedures, services, and facilities available to the juvenile court are inadequate to rehabilitate S.L., III while also protecting the public.

Having held the evidence is sufficient to support the juvenile court's findings as to each of the section 54.02(f) factors, we next decide whether the juvenile court abused its discretion in determining both the seriousness of the alleged offenses and S.L., III's background required criminal proceedings for the welfare of the community. Moon, 451 S.W.3d at 47.

As previously detailed, the offense involved a violent attack on a homeowner during the course of a burglary. S.L., III entered the home armed with a forty-eight inch metal yard stake with a sharp pointed end. The garage door was open and two vehicles were parked in the garage, indicating a person was inside the house. Several witnesses testified to the amount of blood the victim lost and the treatment he had to undergo. In addition, several witnesses testified the victim was fortunate that his chest cavity, an artery, or another vital organ was not punctured. Given the juvenile court's detailed findings regarding the seriousness of the offense and the sufficiency of the evidence to support those findings, we hold the juvenile court did not abuse its discretion in concluding the welfare of the community required criminal proceedings because of the seriousness of the alleged offense.

Although S.L., III did not have a previous referral to the juvenile system, the evidence established a history of criminal behavior, including drug use and gang activity. S.L., III had several school disciplinary referrals, including referrals for drug possession or use, and had not been enrolled in school for almost two months. Dr. Murphey testified S.L., III would require a structured environment. Because of his age, however, S.L., III might only be under the direct supervision of the juvenile justice system for two years.

Conclusion: Given the juvenile court's detailed findings regarding S.L., III's background and the sufficiency of the evidence to support those findings, we hold the juvenile court did not abuse its discretion in concluding the welfare of the community required criminal proceedings because of S.L., III's background. The juvenile court's order is affirmed.

In the Matter of J.G.M., MEMORANDUM, No. 01-17-00049-CV, Tex.Juv.Rep. Vol. 31 No. 3 ¶ 17-3-3 [Tex.App.—Houston (1st Dist), 7/18/ 2017]

THE UNCORROBORATED TESTIMONY OF A COMPLAINING WITNESS AS TO THE AGE OF THE JUVENILE IN AN AGGRAVATED SEXUAL ASSAULT MOTION FOR DISCRETIONARY TRANSFER WAS CONSIDERED LEGALLY SUFFICIENT.

Facts: J.G.M. was 23 years old at the time that the State petitioned the juvenile court for discretionary transfer to criminal court to charge him with an aggravated sexual assault that he allegedly committed at age 14. The complaining witness made her first outcry about the offense after J.G.M. had turned 18.

The State requested that the juvenile court waive its jurisdiction and transfer J.G.M.'s case to criminal district court pursuant to section 54.02(j) of the Texas Family Code. See TEX. FAM. CODE ANN. § 54.02(j) (West 2014); see also TEX. PENAL CODE ANN. § 22.021 (West Supp. 2016) (defining aggravated sexual assault as a first-degree felony). The State contended in its petition that the case qualified for transfer under subsection (j) because: (1) J.G.M. was 14 years of age or older and under 17 years of age when he committed the offense; and (2) the State did not have probable cause to proceed in juvenile court until new evidence was found after his 18th birthday.

At the hearing, the complainant testified that J.G.M. had sexually assaulted her while she was inside the chapel of the church that her family and J.G.M.'s family attended. Concerning her age at the time of the offense, she testified:

THE STATE: How old were you when that [sexual assault] happened?
THE COMPLAINANT: I was 7 years old. I know that because it was before I was baptized.
....
THE STATE: This happened to you when you were 7 years old, correct?
THE COMPLAINANT: Yes, ma'am.

Tracy Taylor, a detective with the Sugar Land Police Department, testified that she investigated the sexual assault charge and had interviewed both the complainant and J.G.M. in the course of her investigation. She testified:

THE STATE: Did [J.G.M.] seem familiar with that victim?
TAYLOR: Yes.
THE STATE: And how did he indicate he was familiar?
TAYLOR: Knew her from church.
THE STATE: And then in the course of your conversation, the specific victim you identified was [the complainant]?
TAYLOR: Yes.
THE STATE: Did [J.G.M.] provide or did you provide his age at the time of that incident ...?
TAYLOR: I believe I did.
THE STATE: Okay. Did he seem to be aware of how old [the complainant] was at the time?
TAYLOR: Yes.
THE STATE: And how old did you determine she was?
TAYLOR: She was 7.
THE STATE: And how old would he have been?
TAYLOR: 14.

Detective Taylor also testified that J.G.M. was born in November 1990.

The complainant's mother testified that the complainant was born in June 1998 and was seven years old when the assault occurred. Focusing on that time frame, in 2005, the mother testified that she remembered an occasion at the church when she had asked J.G.M. to watch the complainant while her parents attended ecclesiastical interviews. The mother remembered that occasion when the complainant revealed to her mother in 2013 that J.G.M. had assaulted her. At the conclusion of the hearing, the juvenile court waived its jurisdiction and ordered that the case be transferred to criminal district court. The juvenile court made findings in support of its order.

Held: Affirmed

Memorandum Opinion: This appeal concerns whether the State met its burden to show that the juvenile court's transfer of this case is appropriate under section 54.02(j) of the Family Code. According to that provision, a juvenile court may waive its jurisdiction and transfer a case to criminal court if it finds that (1) the accused is alleged to have committed an offense that would otherwise constitute a first-degree felony; (2) the accused is 18 years of age or older at the time of the hearing; (3) the accused was 14 years of age or older at the time of the alleged offense; (4) no adjudication concerning the alleged offense has been made and no adjudication hearing concerning the offense has been conducted; (5) the State has shown by a preponderance of the evidence that it was not practicable to proceed in juvenile court before the accused's 18th birthday because of reasons beyond the State's control or because of new evidence; and (6) probable cause exists to believe the accused committed the offense. Id. § 54.02(j). J.G.M. challenges whether legally sufficient evidence supports the third finding, that he was 14 years old at the time of the offense.

When reviewing the legal sufficiency of the evidence in a juvenile certification case, we credit the proof favorable to the trial court's findings and disregard contrary proof unless a reasonable fact finder could not reject it. Moon v. State, 410 S.W.3d 366, 371 (Tex. App.—Houston [1st Dist.] 2013), aff'd, 451 S.W.3d 28 (Tex. Crim. App. 2014). If there is more than a scintilla of evidence supporting a finding, then the proof is legally sufficient. Id. More than a scintilla of evidence exists if the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 751 (Tex. 2003). If the evidence does no more than create a mere surmise or suspicion of fact, then it is legally insufficient. Id.

The fact finder determines the weight to place on contradictory testimonial evidence because that determination depends an evaluation of credibility and demeanor. Cain v. State, 958 S.W.2d 404, 408–09 (Tex. Crim. App. 1997). The fact finder may choose to believe all, some, or none of the testimony presented. Id. at 407 n.5. An appellate court may not re-weigh the evidence or substitute its judgment for that of the fact finder. Johnson v. State, 967 S.W.2d 410, 412 (Tex. Crim. App. 1998); see also King v. State, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000); Wilson v. State, 863 S.W.2d 59, 65 (Tex. Crim. App. 1993).

J.G.M. contends that no evidence supports the juvenile court's finding that he was at least 14 years of age at the time of the offense. The complaining witness, however, testified that she was seven years old when J.G.M. assaulted her, at which time J.G.M. would have been 14. The uncorroborated testimony of a complaining witness is legally sufficient as to this element of aggravated sexual assault. See TEX. CODE CRIM. PROC. ANN. art. 38.07 (West Supp. 2016) (conviction of aggravated sexual assault is "supportable on the uncorroborated testimony of the victim of the sexual offense"); TEX. PENAL CODE ANN. § 22.021(a)(2)(B) (West Supp. 2016) (complainant's age is element of aggravated sexual assault).

J.G.M. was born in November 1990. The complainant was born in June 1998 and did not turn seven until after J.G.M.'s 14th birthday. The complainant's testimony in conjunction with the undisputed evidence of J.G.M.'s birthdate supports the juvenile court's finding that J.G.M. was 14 years old when the assault occurred.

J.G.M. contends that the following portion of the complainant's cross-examination undermines the testimony elicited on direct examination concerning her age:
DEFENSE COUNSEL: ... [Y]ou were baptized when you were 8?
THE COMPLAINANT: Yes.
DEFENSE COUNSEL: And all you know is that this offense occurred before you were eight?
THE COMPLAINANT: Yes, ma'am.

We defer to the trial court's determination of the weight to accord this testimony as well as its reconciliation of the complainant's response with her earlier testimony. A reasonable fact finder could interpret the complainant's response as consistent with her testimony that she was seven and not yet eight years old when the assault occurred.

Conclusion: Viewing the evidence in the light favorable to the juvenile court's findings, we hold that legally sufficient evidence supports the finding that J.G.M. was 14 years old at the time of the charged offense. We affirm the juvenile court's order waiving jurisdiction and transferring the case to a criminal district court.

In the Matter of G.B., No. 02-17-00055-CV, --- S.W.3d ----, 2017 WL 2871619, Tex.Juv.Rep. Vol. 31 No. 3 ¶ 17-3-10 (Tex.App.—Ft. Worth, 7/6/2017).

JUVENILE COURT'S WRITTEN TRANSFER ORDER CONTAINED SUFFICIENT FACTS TO SUPPORT ITS ORDER TRANSFERRING JUVENILE TO ADULT COURT.

Facts: Appellant G.B. was fourteen years old when he allegedly got high and participated in an aggravated robbery that resulted in the shooting death of Eusebio Bernardo-Fernando, known as Chevo. During the early morning hours of March 6, 2016, nineteen-year-old Antonio Segura entered Chevo's store and shot him in the back of the head. Segura then let G.B. and another nineteen-year-old, Fernando Marines, inside the store, and the trio then began to loot the place. Several months later, in August, the murder's lead investigator located G.B. while he was in custody and added capital murder to an unrelated burglary charge already pending against him.

On September 13, 2016, the State filed a petition requesting that the juvenile court waive its jurisdiction and transfer G.B. to the district court to be tried as an adult for violating penal code section 19.03(a)(2).9 See Tex. Penal Code Ann. § 19.03(a)(2) (West Supp. 2016) (defining capital murder as intentionally committing the murder in the course of, among other offenses, committing or attempting to commit a burglary or robbery); Tex. Fam. Code Ann. § 54.02 (West 2014). The juvenile court issued an order for a diagnostic study, social evaluation, and full investigation of G.B., his circumstances, and the circumstances surrounding the alleged offense. See Tex. Fam. Code Ann. § 54.02(d).

As of September 2016, G.B. was assessed with a high risk of re-offending criminally. During the assessment process, G.B. had reported using marijuana, alcohol, and Xanax, primarily at parties on the weekend, and he had admitted to past behavioral problems in school related to skipping, being disrespectful, and being disruptive. The substance abuse assessment on G.B. was completed in October 2016, and it recommended intensive residential treatment. In December 2016, G.B. was released to his aunt and grandmother on an electronic ankle monitor conditioned at least in part on no access to social media. In the meantime, Detective Anderson had obtained a search warrant for G.B.'s DNA. At the time the warrant was executed, G.B. volunteered to the detective that his attorney was trying to get the charge dropped to aggravated robbery because G.B. did not enter the building until after the shot was fired.

At the February 2017 certification hearing, Shahan, who worked in the placement unit of the Tarrant County Juvenile Probation Department, testified that he supervised adolescents who had been court-ordered into residential treatment. He conducted a placement search for G.B. but was unable to locate a secure private facility that was willing to accept him. Shahan was able to locate an unsecure placement, but the only facility willing to accept him—Glen Mills school in Concordville, Pennsylvania—was unable to meet G.B.'s need for psychotherapy.

After the State rested, G.B. presented evidence from Michael Flores, a licensed professional counselor at Brighter Possibilities Family Counseling, which offered in-home family counseling if there was a mental health component but did not require a mental health component for office treatment. He testified that Brighter Possibilities could offer outpatient drug treatment for those trying to stop drug use, but if addiction was an issue, it would make a referral to a treatment facility.

G.B. also presented the testimony of Frank Minikon, the court intake supervisor for Juvenile Services. Minikon had stepped in for G.B.'s regular probation officer, Maria Rojas, who was on leave. Minikon testified that G.B. was living at home with his aunt and was on an electronic ankle monitor. He was enrolled at JJAEP, an alternative school for juvenile justice, and attended counseling every Tuesday. Minikon stated that there had been no reported issues while G.B. was out on the monitor.

The evaluation reflected an opinion that G.B.'s risk for dangerousness was low because there was insufficient evidence that he had actively engaged in physical violence toward others. His sophistication rating was "in the high range," but according to the report, this was "attributable to his sophistication rather than his emotional maturity." His amenability to treatment was low because his established history and his interview both supported an inference that he did not perceive himself to have any mental health or drug abuse problems and he was thereby unmotivated to engage in services available to treat them. The licensed psychologist who performed the diagnosis

stated, "It is unclear how successful [G.B.] would be in detaching from older individuals or those who are in a criminal [lifestyle], with whom he has engaged in prior criminal activity."

G.B.'s psychological evaluation reflected that his overall intellectual functioning was within the below average range and his scores allowed for the inference that his cognitive reasoning abilities were less developed than those not requiring verbal reasoning or those needed for memory of verbal and pictorial stimuli. His academic ability scores were within the average range. His evaluation also reflected a propensity for being an immature conformist, i.e., "one who may conform to the mores of whatever group they value or associate with in order to be accepted." It also reflected "one who is likely to be self-satisfied, prone to manipulation, and is at risk to engage in property crimes."

Additional assessment of G.B. reflected that he had admitted committing illegal activities for profit and spent time in risky social settings that at times involved firearms. He also reported using Xanax, marijuana, and alcohol heavily three to four times a week for around two years, although he denied any Xanax use since March 5, 2016. He admitted using marijuana and alcohol heavily prior to his detention on August 4, 2016, and admitted that he had used Xanax and alcohol to the point of "losing control" and experiencing "blackouts." The assessment recommended intensive residential substance abuse treatment for G.B. and a more structured living environment where G.B. could learn drug refusal skills, peer-pressure refusal skills, and other important coping skills.

G.B.'s maternal aunt was willing to have G.B. live with her because his grandparents were concerned that they could no longer take care of him.

Tarrant County Juvenile Services reported that based on the severity of G.B.'s current alleged offenses, his criminal history, the risk he presented to the community, and his lack of motivation for change, G.B. needed a more secure and structured setting than Juvenile Services had available. It was also reported that G.B. admired or emulated his anti-social peers, that he was hyper, excited, or stimulated when committing crimes, and that he rarely resisted going along with anti-social peers. However, his evaluation also listed that he accepted responsibility for his anti-social behavior, believed he could change, had empathy for his victims, and understood there were consequences to his actions and that he was not physically violent or aggressive.

The juvenile court granted the State's petition. In the written order, the juvenile court made the following findings of fact:

• The alleged offense is both a capital felony and a first-degree felony if committed by an adult and was committed against the person of another;

• There is probable cause to believe that G.B. committed the offense;

• G.B. is of sufficient sophistication and maturity to be tried as an adult;

• The likelihood of G.B.'s reasonable rehabilitation by the use of procedures, services, and facilities currently available to the juvenile court is low and, after considering all the testimony, diagnostic study, social evaluation, and full investigation, it is contrary to the best interests of the public to retain jurisdiction;

• Because of the seriousness of the alleged offense and G.B.'s background, the welfare of the community requires criminal proceedings;

• In making this determination, the juvenile court considered the details above and among other matters:

(1) Whether the alleged offenses were against person or property, with the greater weight in favor of the offense against the person;

(2) The sophistication and maturity of the child;

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

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

The juvenile court stated that it based its findings

on evidence presented by the State in support of its motion; specifically, that prior to the act alleged in Paragraph III of the Petition, [G.B.] received a referral for Engaging in Organized Crime/Theft of Property/Criminal Mischief for which [G.B.] received supervision and services from Tarrant County Juvenile Services ... and Possession of Marihuana Under Two Ounces, and, that after the act alleged in Paragraph III of the Petition, [G.B.] received referrals for Possession of Marihuana Under Two Ounces, Failure to Identify to a Peace Officer, and multiple accusations of Burglary of a Habitation, and, that [G.B.] previously violated the Court's conditions of release by cutting off his electronic monitor.

The Court also bases its findings on evidence presented by the State in support of its motion regarding [G.B.'s] actions and conduct as a principal or a party in the commission of the act alleged in Paragraph III of the Petition; specifically, the heinous nature of these actions and conduct, the manner in which they were allegedly committed by [G.B.], and [G.B.'s] alleged conduct of covering up the offense and evading detention by law enforcement.

This appeal followed.

Held: Affirmed.

Opinion: As pertains to the case before us, to waive its jurisdiction and transfer G.B. to be tried as an adult, the juvenile court had to find that G.B. was alleged to have committed a felony, that he was fourteen years old or older at the time he committed the alleged offense (a capital felony for which no adjudication hearing has been conducted), that—after a full investigation and a hearing—there was probable cause to believe that G.B. committed the alleged offense, and that the welfare of the community requires criminal proceedings because of the alleged offense's seriousness or G.B.'s background.12 See Tex. Fam. Code Ann. § 54.02(a)(1)–(3).

In making the determination required in subsection (a), the juvenile court had to consider, among other matters: (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person; (2) G.B.'s sophistication and maturity; (3) G.B.'s record and previous history; and (4) the prospects of adequate protection of the public and the likelihood of G.B.'s rehabilitation by use of procedures, services, and facilities currently available to the juvenile court. See id. § 54.02(f). These are nonexclusive factors that serve to facilitate the juvenile court's balancing of the potential danger to the public posed by the particular juvenile offender with his or her amenability to treatment. Moon, 451 S.W.3d at 38 (citing Hidalgo v. State, 983 S.W.2d 746, 754 (Tex. Crim. App. 1999)). Family code section 54.02(h) requires that if the juvenile court waives jurisdiction, "it shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court." Tex. Fam. Code Ann. § 54.02(h); Moon, 451 S.W.3d at 38.

> With regard to our review of that order, our court of criminal appeals has instructed us as follows:
> [I]n evaluating a juvenile court's decision to waive its jurisdiction, an appellate court should first review the juvenile court's specific findings of fact regarding the Section 54.02(f) factors under "traditional sufficiency of the evidence review."[13] But it should then review the juvenile court's ultimate waiver decision under an abuse of discretion standard. That is to say, in deciding whether the juvenile court erred to conclude that the seriousness of the offense alleged and/or the background of the juvenile called for criminal proceedings for the welfare of the community, the appellate court should simply ask, in light of its own analysis of the sufficiency of the evidence to support the Section 54.02(f) factors and any other relevant evidence, whether the juvenile court acted without reference to guiding rules or principles. In other words, was its transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria? And, of course, reviewing courts should bear in mind that

not every Section 54.02(f) factor must weigh in favor of transfer to justify the juvenile court's discretionary decision to waive its jurisdiction.
Moon, 451 S.W.3d at 47.

Further, a reviewing court should measure sufficiency of the evidence to support the juvenile court's stated reasons for transfer by considering the sufficiency of the evidence to support the facts as they are expressly found by the juvenile court in its certified order. The appellate court should not be made to rummage through the record for facts that the juvenile court might have found, given the evidence developed at the transfer hearing, but did not include in its written transfer order. We therefore hold that, in conducting a review of the sufficiency of the evidence to establish the facts relevant to the Section 54.02(f) factors and any other relevant historical facts, which are meant to inform the juvenile court's discretion whether the seriousness of the offense alleged or the background of the juvenile warrants transfer for the welfare of the community, the appellate court must limit its sufficiency review to the facts that the juvenile court expressly relied upon, as required to be explicitly set out in the juvenile transfer order under Section 54.02(h).
Id. at 49–50.

IV. Discussion

Because both G.B. and the State rely on Moon, we will review this case before applying the standards set out by the court of criminal appeals.

A. Moon v. State

In Moon, the court of criminal appeals reviewed whether the intermediate appellate court had conducted an appropriate review of a transfer order for a juvenile accused of first degree murder. 451 S.W.3d at 31, 34. The State called as its single witness the police officer who had investigated the alleged murder and then introduced evidence of the juvenile's previous referral for criminal mischief between $500 and $1,499.99 resulting from the juvenile's keying of a fellow student's vehicle, the juvenile's probation certification report and his academic history while under observation in the juvenile justice system, and the findings of the juvenile's physical—but not psychological or behavioral—exam. Id. at 32. In contrast, the juvenile elicited testimony from witnesses—various family members, friends, and acquaintances—about his disadvantaged upbringing and fractured family life, and actors in the juvenile justice system testified about his constructive conduct and positive progression through the system along with the recommendation of a forensic psychiatrist about his likelihood of rehabilitation if placed in a therapeutic environment for adolescent offenders. Id. at 32–33.

The juvenile court entered a written order that closely followed the statutory language, affirming that it had determined that there was probable cause to believe that the juvenile committed the alleged offense and that because of the offense's seriousness, the welfare of the community required a criminal proceeding. Id. at 33. It then recited from the statute that in making the determination, it had considered, "among other matters," the subsection (f) factors. Id.

The juvenile court also found in its written order that the juvenile was "of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights" and to have aided in the preparation of his defense and to be responsible for his conduct; that the alleged offense was against the person of another; and that there was little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of the juvenile "by use of procedures, services, and facilities currently available to the Juvenile Court." Id.

On appeal, the juvenile complained that the stated reasons for waiver were supported by insufficient evidence and that the juvenile court had therefore abused its discretion. Id. at 34. The intermediate court agreed, concluding that no evidence supported the juvenile court's sophistication-and-maturity finding, as it was based on his

ability to waive his rights and assist in his defense and not an appreciation of the nature of his actions, and that the evidence was factually insufficient to support its adequate-protection-and-likelihood-of-rehabilitation finding, as it was based on a sole misdemeanor conviction for keying a car and four infractions while confined in a juvenile facility, which was legally sufficient but not factually sufficient in comparison to the rest of the evidence presented at the hearing. Id. at 34–35. The intermediate court also concluded that the fact that the offense constituted a crime against another person, without more, was inadequate justification for a transfer because, otherwise, transfer would be automatically authorized for serious crimes like murder, rendering the remaining factors under subsection (f) superfluous. Id. at 35–36.

After reviewing the evolution of the law applicable to juvenile transfer cases, the court of criminal appeals agreed that legal and factual sufficiency of the evidence under the standard applicable to civil cases should apply to the juvenile court's specific findings of fact regarding the subsection (f) factors. See id. at 36–46, 47. But it further stated that a sufficiency review should not be applied to the ultimate question as to whether the seriousness of the offense alleged or the child's background required criminal proceedings for the welfare of the community because this was a question left to the juvenile court's discretion based on those fact findings. Id. at 46–47 (explaining that "[t]he discretion of the juvenile court is at its apex when it makes this largely normative judgment").

The court further explained that in conducting this review, appellate courts should follow the approach as outlined by the El Paso Court of Appeals in In re J.R.C.S.:

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

Id. at 47 (quoting In re J.R.C.S., 393 S.W.3d 903, 914 (Tex. App.—El Paso 2012, no pet.)).

The court then noted the distinction between (1) a finding that the offense alleged to have been committed had occurred, as substantiated by evidence at the transfer hearing showing its sufficiently egregious character, which would support the transfer, and (2) a finding that the mere category of the alleged offense is sufficient, which would not support the transfer. Id. at 48 (explaining that if the only consideration informing the decision to waive jurisdiction is the category of the crime rather than its specifics, then the transfer decision "would almost certainly be too ill-informed to constitute anything but an arbitrary decision"). And it required measuring the sufficiency of the evidence to support the explicit facts expressly found by the juvenile court in the written transfer order instead of "rummag[ing] through the record for facts that the juvenile court might have found" but that it did not include in its written transfer order. Id. at 50.

Because the transfer order in Moon made no findings about the specifics of the capital murder other than (1) that there was probable cause to believe that the juvenile had committed "the offense alleged"; (2) that the offense's seriousness required criminal proceedings for the welfare of the community; and (3) that the offense alleged was committed against the person of another, the court upheld the intermediate court's conclusion that the juvenile court had abused its discretion in granting the transfer. Id. at 48–50. And because the juvenile court did not cite the juvenile's background as a reason in the written order for the transfer, its sophistication-and-maturity finding of fact—which the court of criminal appeals agreed was unsupported by legally sufficient evidence—and its protection-and-rehabilitation finding of fact were superfluous. Id. at 50–51. The court of criminal appeals affirmed the intermediate court's reversal of the transfer order, restating that with no case-specific findings of fact as to the offense's seriousness, the evidence failed to support that reason as a basis for the transfer. Id. at 51.

B. Application

Relying on Moon, G.B. argues that we should examine whether the trial court's transfer decision was essentially arbitrary given the evidence upon which it was based and that the juvenile court did not " 'show its work'

in the transfer order" by failing to specify any facts to justify its decision to waive its jurisdiction. The State disagrees, responding that the transfer order contains sufficient facts specific to G.B.'s case to support the juvenile court's findings and that G.B.'s reliance on Moon is misplaced because unlike the single, vague finding in Moon, the juvenile court here made several findings that were specific to G.B.

In the transfer order before us, the juvenile court found that the alleged offense was a capital and first-degree felony and was committed against the person of another; that there was probable cause to believe that G.B. had committed the offense; that G.B. was of sufficient sophistication and maturity to be tried as an adult; that the likelihood of his reasonable rehabilitation by using procedures, services, and facilities currently available to the juvenile court was low; that—after considering all of the testimony, the diagnostic study, the social evaluation, and the full investigation—it was therefore contrary to the public's best interests to retain jurisdiction; and that because of the seriousness of the alleged offense and G.B.'s background, the welfare of the community required criminal proceedings.

The juvenile court stated in the order that it based these findings on the State's evidence, specifically, G.B.'s pre-offense referrals for engaging in organized crime, theft, criminal mischief, and possession of marijuana under two ounces, which he had received supervision and services from Tarrant County Juvenile Services for some of these offenses, and G.B.'s post-offense referrals for possession of marijuana, failure to identify, and multiple accusations of burglary of a habitation, in addition to his having previously violated his conditions of release by cutting off his electronic ankle monitor. And it stated in its transfer order that it also based its findings on evidence presented by the State regarding G.B.'s actions and conduct as a principal or party to the commission of the offense, "specifically, the heinous nature of these actions and conduct, the manner in which they were allegedly committed by [G.B.], and [G.B.'s] alleged conduct of covering up the offense and evading detention by law enforcement."

As guided by the court of criminal appeals in Moon, we first review the legal and factual sufficiency of the evidence to support the juvenile court's findings of fact on the subsection (f) factors. See 451 S.W.3d at 46–47.

1. The Alleged Offense

G.B. contends that as to his alleged actions in Paragraph II14 of the State's petition, the juvenile court made no case specific findings of fact. But the court referenced evidence presented by the State with regard to G.B.'s actions and conduct during the murder and made a specific finding that G.B.'s actions and conduct were of a "heinous nature." The court also specifically referenced G.B.'s conduct in allegedly covering up the offense and evading detention, all of which is supported by Detective Anderson's testimony.

The record provides ample evidentiary support for these findings. The State presented evidence about the investigation of the offense and the considerable lag time involved in locating G.B. without his electronic ankle monitor. The evidence showed that G.B. allegedly accompanied Segura and Marines to the tire shop of his former employer for an illegal purpose—alternatively to buy some cocaine or to commit a robbery—and that G.B. waited outside with Marines until he heard a pop—which was Segura's shooting of Chevo in the back of the head. G.B. was described as "excited" when he heard the pop and "happy" when he entered the building. According to Segura, G.B. then stepped onto Chevo's body en route to the grandfather clock where he removed the cash that was hidden there.

G.B. then made several trips to and from the building to steal money, drugs, watches, car stereos, tires, and other items—including Chevo's own vehicle—all the while tracking Chevo's blood throughout the store. According to G.B.'s brother, G.B. rifled through Chevo's pockets while Chevo lay dead or dying at the scene. During the crime spree, under these grisly circumstances, he managed to remain sufficiently focused and cool-headed to successfully remove all of their fingerprints. The DVR security video that would have evidenced the murder was destroyed, as was the phone that G.B. stole and then disposed of so that it could not be used to find him. Later he used the ill-gotten gains to buy more drugs.

Based on the above, we conclude that there is both legally and factually sufficient evidence to support the trial court's findings that G.B. was a principal or party to the offense and that his alleged actions and conduct were indeed heinous.

2. Sophistication and Maturity

G.B. argues that the juvenile court did not cite any facts to support its finding that he is of sufficient sophistication and maturity to be tried as an adult. However, as referenced by the juvenile court with regard to G.B.'s criminal referrals prior to and after the murder, the record reflects that G.B. had received his first referral for organized crime, theft of property, and criminal mischief two years before, when he was only twelve years old. He was put on deferred prosecution probation, which he violated by refusing to attend a drug abuse program, by using drugs, by receiving an additional referral for possession of marijuana, and by cutting off his electronic ankle monitor. That is, he was given the opportunity to rehabilitate with the services available to him but instead of using that opportunity, he chose to escalate his criminal behaviors and demonstrate indifference to his conduct and its potential consequences. At the time of the hearing, he faced more than one accusation of burglary of a habitation, and his fingerprints had been found at the scene of one of those burglaries.

The trial court likewise considered G.B.'s behavior in the commission of the murder in determining whether he was sophisticated and mature enough to stand trial as an adult.

Additionally, G.B. demonstrated his sophistication and maturity when he explained to the detective the possibility that his charge might be dropped to aggravated robbery because he did not enter the building until after the shot was fired. And the record affirmatively demonstrates that the trial court gave particular consideration to the question of G.B.'s sophistication and maturity, stating in open court:

> Sophistication and maturity, that's a tough one. You're 15 now, 14 at the time. For someone though at the time who was 14 you already had a couple years of trouble with the law. I'm going to have to decide whether that amounts to maturity or immaturity. I also understand that you've been through supervision. It was deferred prosecution but it was still supervision. So again that's one of the issues I've got to satisfy in my own mind is whether—how sophisticated I feel like you are compared to most 14 or even 15 year[ ] old[s]. The offense is particularly disturbing. The allegations of how it was committed, the length of time it took to commit the offense, all the activities around it concerning the property and destruction of evidence and such. Very complicated offense. But this is not your first rodeo so to speak. This is not your first time being involved in criminal activity. If it had been, it may make this case a little bit easier to decide. It's just made it harder to decide at this point.

In light of G.B.'s behavior after the murder—stealing merchandise and reselling it on the street and getting rid of Chevo's phone to avoid being tracked—the trial court could have determined that there was sufficient evidence to support the likelihood that G.B. deliberately chose to continue his criminal activities after the murder, to profit from them, and to avoid punishment and that these decisions were more sophisticated and mature than the decisions made by most fourteen-year-old children. We conclude that there is legally and factually sufficient evidence to support the trial court's finding that G.B. was sufficiently sophisticated and mature to stand trial as an adult.

3. Record and Previous History

As set out above, G.B.'s record and previous history—as recited by the trial court in its written order—revealed an escalation of criminal behavior. G.B. contends that the order addressed in a single paragraph G.B.'s previous referrals without citing any facts about whether he had been adjudicated on them, but the order references his having "received supervision and services from Tarrant County Juvenile Services" and that his "conditions of

release" were violated when he cut off his ankle monitor. We conclude that these references are amply sufficient because they are adequately supported by the record and directly pertain to G.B.'s actions.

4. Protection of the Public and Likelihood of Rehabilitation

G.B. complains that the juvenile court did not elaborate or indicate any facts to support its findings that the likelihood of G.B.'s reasonable rehabilitation was low based on resources currently available to the juvenile court and that retaining jurisdiction is contrary to the public's best interest. But as set out above, G.B.'s continued escalation of criminal behavior and his callous disregard for Chevo, whom he had worked for, after Segura shot him support the trial court's finding that the public could not be adequately protected, particularly in light of G.B.'s having cut off his electronic ankle monitor when he had an earlier chance at rehabilitation for a significantly less severe offense. Because there is more than a scintilla of evidence that the public would not be adequately protected from G.B.'s future conduct and that G.B. was unlikely to be rehabilitated by the juvenile justice system, we conclude that the evidence is legally sufficient to support the trial court's finding. Likewise, based on all of the evidence, particularly Shahan's testimony that there was no secure private facility willing to accept G.B. and the information in G.B.'s evaluation about his frequency of leaving home, we conclude that the evidence is also factually sufficient to support that transferring G.B. to be tried as an adult would adequately protect the public from his future conduct, particularly in light of G.B.'s prior experiences involving rehabilitation—and his lack thereof—through the juvenile justice system's resources.

Conclusion: Based on the above, we agree with the State that the written transfer order contains sufficient facts specific to G.B.'s case to support the juvenile court's findings. After considering the testimony and the twenty-six-page document containing all of G.B.'s evaluations, the trial court granted the motion to transfer. In light of the trial court's explicit findings and our own review of the record, which supports those findings, we conclude that the juvenile court did not abuse its discretion by waiving jurisdiction and transferring G.B. for trial as an adult. We overrule G.B.'s sole issue. Having overruled G.B.'s sole issue, we affirm the juvenile court's transfer order.

In the Matter of J.G.S., MEMORANDUM, No. 03-16-00556-CV, 2017 WL 562693, Tex.Juv.Rep. Vol. 31 No. 2 ¶ 17-2-3 (Tex.App.—Austin, 2/10/17).

DISCRETIONARY TRANSFER ORDER TO ADULT COURT VACATED AFTER TRIAL COURT DID NOT STATE, WITH ADEQUATE SPECIFICITY, THE FACTUAL UNDERPINNINGS OF THE COURT'S CONCLUSIONS AND GROUNDS FOR TRANSFER.

Facts: The State filed a motion for discretionary transfer in the juvenile court requesting that the court waive its exclusive jurisdiction over J.G.S., a minor, and transfer him to criminal district court to be tried as an adult for the offense of murder. The juvenile court ordered the statutorily required social evaluation and investigation and set the motion for a hearing. Following the hearing, the court granted the motion, waived its exclusive jurisdiction, and transferred the case to district court. This accelerated appeal followed.

Held: Discretionary Transfer Order Vacated, Remand to Juvenile Court

Opinion: Applicable law and standard of review

Section 54.02(a) of the Juvenile Justice Code provides that the juvenile court may waive its exclusive original jurisdiction and transfer a child to the criminal district court for criminal proceedings if the following is determined:
(1) the child is alleged to have violated a penal law of the grade of felony;
(2) the child was ...14 years of age or older at the time [of the alleged] offense, if the offense is a capital felony, an aggravated controlled substance felony, or a felony of the first degree[;] ... and
(3) after a full investigation and a hearing, the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings.

Tex. Fam. Code § 54.02(a).

When determining the seriousness of the offense alleged or the background of the child pursuant to the third requirement, section 52.04(f) requires the juvenile court to consider the following non-exclusive factors:
(1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
(2) the sophistication and maturity of the child;
(3) the record and previous history of the child; and
(4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.
Id. § 54.02(f).

As the petitioner seeking waiver of the juvenile court's jurisdiction, the State has the burden "to produce evidence to inform the juvenile court's discretion as to whether waiving its otherwise-exclusive jurisdiction is appropriate in the particular case." Moon v. State, 451 S.W.3d 28, 40 (Tex. Crim. App. 2014). The State must "persuade the juvenile court, by a preponderance of the evidence, that the welfare of the community requires transfer of jurisdiction for criminal proceedings, either because of the seriousness of the offense or the background of the child (or both)." Id. at 40-41. When exercising its discretion to waive jurisdiction, the juvenile court must consider all four of the factors listed in section 54.02(f). Id. at 40. Although it makes its final determination from the evidence concerning the section 54.02(f) factors, the juvenile court "need not find that each and every one of those factors favors transfer before it may exercise its discretion to waive jurisdiction." Id.

In Moon v. State, the court of criminal appeals recently elaborated upon the statutory requirement that, if the juvenile court waives jurisdiction, it must "state specifically" in its order its reasons for waiver:
Section 54.02(h) obviously contemplates that both the juvenile court's reasons for waiving its jurisdiction and the findings of fact that undergird those reasons should appear in the transfer order. In this way the Legislature has required that, in order to justify the broad discretion invested in the juvenile court, that court should take pains to "show its work," as it were, by spreading its deliberative process on the record, thereby providing a sure-footed and definite basis from which an appellate court can determine that its decision was in fact appropriately guided by the statutory criteria, principled, and reasonable ....
Id. at 49.

The court emphasized that a reviewing court "should not be made to rummage through the record for facts that the juvenile court might have found, given the evidence developed at the transfer hearing, but did not include in its written transfer order." Id. at 50.

The court also clarified the standard of review when a juvenile court waives its exclusive jurisdiction pursuant to section 54.02: "[I]n evaluating a juvenile court's decision to waive its jurisdiction, an appellate court should first review the juvenile court's specific findings of fact regarding the Section 54.02(f) factors under 'traditional sufficiency of the evidence review.' " Id. at 47. Under a legal sufficiency challenge, we credit evidence favorable to the challenged finding and disregard contrary evidence unless a reasonable fact finder could not reject the evidence. Moon v. State, 410 S.W.3d 366, 371 (Tex. App.—Houston [1st Dist.] 2013), aff'd, 451 S.W.3d 28. If there is more than a scintilla of evidence to support the finding, the no-evidence challenge fails. Id. Under a factual sufficiency challenge, we consider all of the evidence presented to determine if the court's finding is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Id. Our review of the sufficiency of the evidence supporting waiver is limited to the facts the juvenile court expressly relied on in its transfer order. Moon, 451 S.W.3d at 50.

We must also review the juvenile court's ultimate waiver decision under an abuse of discretion standard. Id. at 47. We must consider, in light of our analysis of the sufficiency of the evidence to support the statutory factors—and as limited by the express fact findings contained in the transfer order—whether the juvenile court acted without reference to guiding rules or principles. Id. at 47, 50.

The order waiving jurisdiction in the present case lacked the case-specific findings of fact required under Moon

In his third issue, J.G.S. argues that the juvenile court's order waiving jurisdiction lacks the case-specific fact findings necessary to support transfer to the criminal district court. We agree.

In its transfer order, the juvenile court noted that it was considering the factors mandated by section 54.02(f) and made the following determinations relevant to this appeal:

1. [J.G.S.] is alleged to have violated a penal law of the State of Texas of the grade of a First Degree felony, to wit: that on or about the 2nd day of April, 2016, the said child violated a penal law of this State punishable by imprisonment or confinement in jail, to-wit: Murder § 19.02 of the Texas Penal Code.

2. The alleged offense was committed against ... the decedent.

3. [J.G.S.] is a male child who was born on the 12th day of August, 1999, and who is seventeen (17) years of age at the time of this hearing but sixteen (16) years at the time of the offense.
* * *

8. Prior to the hearing ... the Court ordered the Hays County Juvenile Probation Department complete a Social Evaluation and full investigation of the child, his circumstances, and the circumstances of the alleged offense. The Court ordered a study concerning [J.G.S.] as required in Texas Family Code § 54.02(d), and said study was performed by Dr. David Landers. The entire study is credible, along with all the oral testimony offered by Dr. David Landers. Additionally, Dr. Eric Frey testified as an expert witness for [J.G.S.]. Dr. Frey's oral testimony and written report are found credible.

9. The Court has considered written reports from the probation officer, professional court employees, and professional consultants in addition to the testimony of witnesses and finds that the Court has complied with the five day requirement prior to hearing [sic] in making available to Jeremiah Williams, attorney of record, all written materials to be considered by the Court in making this transfer decision.

10. The Court considered the sophistication and maturity of the child and finds the Respondent is sophisticated and mature under the code. [J.G.S.'s] sophistication and maturity is normal as compared to other juveniles of this age. [J.G.S.] posess[es] the cognitive abilities and academic skills to understand court proceedings and to participate in his own defense.

11. Notwithstanding the current charge of murder and possession of marijuana in this cause,[1] [J.G.S.'s] juvenile history is limited to one charge of Unlawful Carry of a Weapon (Class A misdemeanor) alleged to be committed on November 23, 2015. [J.G.S.] received no services through Hays County Juvenile Probation, or any other Juvenile Department, before the current charge and detention of Murder. The Unlawful Carry of a Weapon is currently pending in the Hays County Court at Law.

12. The Court considered the record and previous history of the child and the prospects of adequate protection of the public and the likelihood of rehabilitation of the child by use of procedures, services and facilities currently available to the juvenile court will not likely adequately [sic] to rehabilitate Respondent.
* * *

14. The Court has considered the seriousness of the offense and the background of the child and finds that because of the seriousness of the offense, the sophistication and maturity of the child which is sufficient to assist in his own defense, among other things, and because the offense was committed against an individual ... the welfare of the community requires that criminal proceedings proceed in criminal court concerning the aforementioned felony offense and all criminal conduct occurring in said criminal episode.

The juvenile court's order indicated two reasons for waiver: (1) the seriousness of the offense and (2) J.G.S.'s background. In support of the former, the order cites the fact that the offense was committed against a person. In support of the latter, the order cites the sophistication and maturity of appellant and that rehabilitation is unlikely. As instructed by Moon, before reaching the question of whether sufficient evidence supports transfer, we conclude that the order lacks the case-specific findings of fact necessary to support the court's reasons for waiving jurisdiction under Moon. See Moon, 451 S.W.3d at 48-51.

A. The offense was committed against a person

The first reason for transfer cited in the order was the seriousness of the offense. But the only finding in support of that reason contained in the order was the fact that the offense was committed against a person. Although that finding is relevant to a transfer determination, it alone does not justify transfer. See id. at 48 (transfer order that cites category of case without providing specifics of offense will not support transfer). Absent from the order are case-specific facts regarding the charged offense or J.G.S.'s role in it that would provide a reviewing court a basis for deference regarding the juvenile court's conclusion that the welfare of the community required criminal proceedings because of the seriousness of the offense. See id.; see also Bell v. State, ___ S.W.3d ____, No. 01-15-00510-CR, 2016 WL 7369204, at *4-5 (Tex. App.—Houston [1st Dist.] Dec. 15, 2016, no pet. h.) (order deficient because lacked case-specific findings regarding seriousness of offense, and child's background not cited as reason for transfer); cf. In re S.G.R., 496 S.W.3d 235, 240 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (court found that juvenile participated in gang-related murder in which 14-year-old child sustained 46 injuries from machete); In re K.J., 493 S.W.3d 140, 143-33 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (order detailed "egregious and aggravating" facts of multiple offenses).

B. J.G.S.'s background

Turning then to the second cited reason supporting transfer—J.G.S.'s background—we conclude that the order again fails to provide case-specific findings of fact that support transfer on that basis. See Moon, 451 S.W.3d at 49.

i. Sophistication and maturity

The order states that J.G.S. is "sophisticated and mature under the code," explaining (1) his "sophistication and maturity is normal as compared to other juveniles of his age," and (2) he "posess[es] the cognitive abilities and academic skills to understand court proceedings and participate in his own defense." First, it is unclear how a finding that J.G.S.'s sophistication and maturity is normal for his age, without more, justifies transfer from a system designed to adjudicate individuals his age absent additional fact findings favoring transfer.2

Second, the Moon court indicated that a determination as to whether a juvenile is able to assist in his own defense is an improper application of that statutory factor.3 Id. at 50, n.87. The court observed that "it is doubtful that the Legislature meant for the sophistication-and-maturity factor to embrace the juvenile's ability to waive his constitutional rights and assist in his defense." Id. Rather, the court opined, the purpose of that consideration is to determine whether the juvenile "appreciates the nature and effect of his voluntary actions and whether they were right or wrong." Id. (quoting In re E.D.N., 635 S.W.2d 798, 800 (Tex. App.—Corpus Christi 1982, no writ); see also Matthews v. State, ___ S.W.3d ___, Nos. 14-15-00452-CR, 14-15-00577-CV, 14-15-00616-CV, 2016 WL 6561467, at *7, n.4 (Tex. App.—Houston [14th Dist.] Nov. 6, 2016, no pet. h.) (noting that juvenile court may have misapplied that factor in finding that juvenile possessed sufficient sophistication and maturity to aid in his defense but concluding that other findings were sufficient to support waiver). It is thus unclear from the order that the court properly applied that statutory criterion. Moon, 451 S.W.3d at 49 (findings must provide "a sure-footed and definite basis from which an appellate court can determine that its decision was in fact appropriately guided by the statutory criteria, principled, and reasonable").

ii. Record and previous history

The order indicates that J.G.S.'s criminal history is limited to one unlawful-carry charge that was then pending and that he had received no services from any juvenile department before the current charges. The State does not contend, and we do not find, that one pending misdemeanor charge would support transfer.

iii. Protection of the public and rehabilitation of the child

Finally, the order states that rehabilitation of J.G.S. is not likely.4 Again, however, the order provides no case-specific information underpinning that conclusion. Cf. K.J., 493 S.W.3d at 145 (order cited numerous case-specific facts supporting conclusion that defendant posed risk to public and was unlikely to be rehabilitated).

In sum, the order in this case essentially recites the statutory language setting forth the criteria applicable to a transfer determination, but it fails to provide the case-specific findings of fact necessary to permit a reviewing court to determine whether the court properly applied that criteria as required under Moon. Moon, 451 S.W.3d at 49 (concluding that statute requires more than "merely an adherence to printed forms" and instead requires a true delineation of reasons supporting the court's decision). Although the order indicates that the court heard extensive evidence regarding the propriety of transfer and that the court found such evidence credible, the order contains no case-specific findings or recitation of that evidence that would provide "a sure-footed and definite basis from which" we can determine that its decision was properly reached. See id.

The State cites evidence in the record that it contends supports the court's transfer determination, including evidence regarding the specifics of the offense and of J.G.S.'s background. But none of the details of that evidence were incorporated into the order, and the Moon court expressly rejected the State's argument that the appellate court could simply review the record—irrespective of the fact findings set forth in the order—to determine whether evidence introduced at the transfer hearing supported the court's transfer determination. See id. at 48, 50 (despite that evidence in record "painted a much more graphic picture of the appellant's charged offense," appellate court is not required "to rummage through the record for facts that the juvenile court might have found ... but did not include in its written transfer order"); see also Bell, 2016 WL 7369204, at *6 (declining to review record to find facts supporting waiver when written order did not provide adequate fact findings).

The Moon court observed that "the juvenile court that shows its work should rarely be reversed" because that court's discretion "is at its apex when it makes this largely normative judgment" as to whether a child should be transferred to the criminal court. Moon, 451 S.W.3d at 46, 49. When, however, the juvenile court enters an order that is devoid of case-specific findings of fact supporting the statutory criteria for transfer, as in Moon, the juvenile court is not entitled to such deference. Id. at 51. Given the absence of case-specific fact findings supporting transfer from the juvenile court's transfer order in this case, Moon compels us to conclude that the court abused its discretion in waiving its jurisdiction and sustain J.G.S.'s third issue. Accordingly, we need not reach J.G.S.'s first and second issues challenging the sufficiency of the evidence produced at the transfer hearing to support the reasons for transfer cited in the order and take no position as to those issues. See id. at 51.

Conclusion: We vacate the juvenile court's transfer order, dismiss the criminal-district-court case, and remand this case to the juvenile court for further proceedings consistent with this opinion.5

Footnotes

1 The State sought waiver of the juvenile court's jurisdiction only over the murder charge.

2 A determination that such a finding supports transfer would also seem to impermissibly shift the burden to the defense to demonstrate below-average sophistication and maturity to avoid transfer to the adult criminal-justice system. See Moon v. State, 451 S.W.3d 28, 40 (Tex. Crim. App. 2014) (State has burden to demonstrate propriety of transfer).

3 We note that the Moon court observed that a sophistication-and-maturity finding "would have been relevant to support transfer," but concluded that, because the order did not cite Moon's background as a reason for transfer, that finding was "superfluous." Id. at 50-51. Therefore, the court's comments regarding proper application of that factor are not binding, but the court's analysis is instructive of that issue.

4 Although the wording of the order is unclear, it appears that the only finding the court made with respect to those statutory factors concerned the likelihood of rehabilitation and not J.G.S.'s record and previous history or protection of the public:
The Court considered the record and previous history of the child and the prospects of adequate protection of the public and the likelihood of rehabilitation of the child by use of procedures, services and facilities currently available to the juvenile court will not likely adequately [sic] to rehabilitate Respondent.
See Tex. Fam. Code § 54.02(f)(3), (4).

5 The case remains "pending in the juvenile court" where "at least one legislatively provided alternative would seem to be for the juvenile court to conduct a new transfer hearing and enter another order transferring the appellant

to the jurisdiction of the criminal court, assuming that the State can satisfy the criteria under Section 54.02(j) of the Juvenile Justice Code," if applicable. See Moon, 451 S.W.3d at 52 n.90 (citing Tex. Fam. Code § 54.02(j)); Bell v. State, ___ S.W.3d ____, No. 01-15-00510-CR, 2016 WL 7369204, at *6 (Tex. App.—Houston [1st Dist.] Dec. 15, 2016, no pet. h.) (noting same); see also In re J.G., 495 S.W.3d 354, 365-66 (Tex. App.—Houston [1st Dist.] 2016, pet. filed) (holding that, because conviction reversed for trial error and not insufficient evidence, double jeopardy did not preclude recertification proceedings).

In the Matter of D.L.C., MEMORANDUM, No. 06-16-00058-CV, 2017 WL 1055680, , Tex.Juv.Rep. Vol. 31 No. 2 ¶17-2-2A (Tex.App.—Texarkana, 3/21/2017).

IN DISCRETIONARY TRANSFER PROCEEDING, THE APPLICATION OF TFC § 54.02(A) [UNDER 18 CERTIFICATION] OR §54.02(J) [OVER 18 CERTIFICATION] IS BASED ON A PERSON'S AGE AT THE TIME THE DISCRETIONARY TRANSFER HEARING BEGINS NOT WHEN IT IS FILED BY THE STATE.

Facts: On November 4, 2015, Cindy and Joe Black arrived at the Hunt County Sheriff's Office and spoke with Joel Gibson, an investigator. The purpose of the Blacks' visit was to file a report alleging that D.L.C. had sexually assaulted their daughter, Jane, in July 2014. During their meeting, the Blacks provided Gibson with D.L.C.'s contact information, and Cindy prepared and signed an affidavit. Less than two weeks later, Jane met with Charlene Green, a forensic interviewer at the Hunt County Child Advocacy Center (CAC). Jane's account of the incident was consistent with the facts contained in Cindy's affidavit.

On December 2, Jane met with Kim Bassinger, a sexual assault nurse examiner, and she submitted to a sexual assault medical forensic examination. On that same day, Gibson attempted to contact D.L.C. for the purpose of interviewing him about the incident. Gibson also attempted to contact D.L.C. on December 11. After failing to contact D.L.C. by telephone, Gibson went to D.L.C.'s home to make contact and schedule an appointment with him. On January 6, 2016, Gibson spoke with D.L.C. at Gibson's office. During the conversation, D.L.C. admitted he had had sexual relations with Jane but he claimed it was consensual.

On that same day, Gibson spoke with Seth Stevens, the young man who had received Jane's text message explaining she had been sexually and physically assaulted. Stevens prepared an affidavit and provided it to Gibson on January 11. In addition to speaking with Stevens, Gibson interviewed Chad Cline on January 12, who also prepared an affidavit. Gibson concluded his investigation and, on January 14, submitted a paper referral to the Hunt County Juvenile Probation Office, alleging that D.L.C. had committed aggravated sexual assault. On January 27, the paperwork, along with a request for an adjudication petition, was sent to the County Attorney's Office of Hunt County. Gibson conceded that he was aware at the time he began his investigation that D.L.C. was seventeen years old and would turn eighteen in three months.

On February 18, 2016, the State filed its original adjudication petition against D.L.C., alleging that he had committed the offense of aggravated sexual assault. The petition stated that D.L.C. was sixteen years of age at the time of the alleged offense, but that he was seventeen years of age at the time the petition was filed. About a week later, the State filed its original adjudication petition seeking a determinate sentence setting forth substantially the same allegations as it had in its first petition; however, the offense charged was sexual assault. On April 16, 2016, the State filed its petition for discretionary transfer to criminal court, alleging that D.L.C. had committed aggravated sexual assault. The trial court then issued an order to complete a diagnostic study, a social evaluation, and a full investigation.

Approximately one month later, the trial court received the report of Robert Lackey, Ph.D., who had conducted a psychological evaluation of D.L.C. Lackey's report stated, among other things,

> With respect to [D.L.C.]'s Risk of Dangerous [sic], data collected in this evaluation revealed he is likely in the Moderate range of Risk as compared to other juvenile offenders. Results of this evaluation indicated [D.L.C] does not have a history of severe antisocial behavior. He noted that he has previously received "two or three" speeding tickets, a ticket for Disorderly Conduct –Fighting and was recently charged with possession of Alcohol and a "Marijuana pipe." He noted that when he was younger, approximately twelve years of age, that he was

placed in detention for "Assault. ... "
[D.L.C] did not report a history of engaging in unprovoked violent behavior; however, records provided by Glen Oaks, a local psychiatric facility, noted [D.L.C.] was hospitalized for assaulting his father's pregnant girlfriend by kicking her in the stomach. Throughout the psychiatric records are indications of "out of control behaviors, outbursts of anger, agitation and damage to property, reportedly "punching the walls of the home."
....
[D.L.C.] appears to have demonstrated less serious violence toward individuals, noting the previous physical fight he was cited for and the previous "assault" which caused him to be placed in detention at twelve years of age. Reportedly these encounters were not serious and did not result in serious bodily injury. [D.L.C.] also appears to have previous minor criminal acts. Records revealed a history of reported suicidal and homicidal ideation and accompanying psychiatric hospitalization due to these thoughts of self [-]harm and intentions of harming others.
....
As compared to same aged peers who are also juvenile offenders or are also involved with the juvenile judicial system in some manner, [D.L.C.] is at the High range of Sophistication and Maturity.
....
As compared to other juvenile offenders, [D.L.C.] appears to be in the Low range as to his treatment amenability. [D.L.C.]'s responses to various questionnaires and other psychological tools revealed he currently is not reporting symptoms of any mental health disorder. ...
....
[D.L.C.]'s responses to the PAI-A revealed an interest in and motivation for treatment which is below average in comparison to adolescents who are not being seen in a therapeutic setting and his treatment motivation is a great deal lower than is typical of individuals being seen in treatment settings. His responses suggest that he is satisfied with himself as he is, that he is not experiencing marked distress, and that, as a result, he sees little need for changes in his behavior. However, [D.L.C.] does report a number of strengths, namely his family and boss; that augur well for a relatively smooth treatment process if he were willing to make a commitment to treatment. His responses revealed he may not be experiencing sufficient distress to feel that treatment is warranted.

On July 7, 2016, the State filed its first amended petition for discretionary transfer to criminal court alleging one count of aggravated sexual assault and one count of the lesser-included offense of sexual assault. On July 22, 2016, approximately six weeks after D.L.C.'s eighteenth birthday, the trial court held a hearing on the State's first amended petition for discretionary transfer. The trial court considered, among other things, "written reports from the probation officer, professional court employees and professional consultants in addition to the testimony of witnesses ...." At the conclusion of the transfer hearing, the trial court granted the State's amended petition, finding that, among other things, (1) "there [was] probable cause to believe that [D.L.C.] committed the offense as alleged based on testimony of Joel Gibson and Isaac Neal[10] and all the other evidence admitted during the hearing" and (2) "[f]or a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of [D.L.C.]." This appeal followed.

Held: Affirmed

Memorandum Opinion: Despite the fact that he was eighteen years of age at the time of the hearing, D.L.C. maintains that the juvenile court was required to consider the factors contained in Section 54.02(f) of the Family Code. Kent v. United States, 383 U.S. 541 (1966); Moon v. State, 451 S.W.3d 28 (Tex. Crim. App. 2014). The State responds that the juvenile court was not required to consider the factors listed in Section 54.02(f) and that it properly considered the factors contained in Section 54.02(j). We agree.

Section 54.02 establishes two procedures for discretionary transfer of juvenile proceedings to district court. TEX. FAM. CODE ANN. § 54.02 (West 2014). Section 54.02(a) applies where the juvenile is less than eighteen years of age at the time of the transfer hearing. See TEX. FAM. CODE ANN. § 54.02(a). Section 54.02(j) applies where the juvenile is eighteen years old at the time of the transfer hearing. The factors listed in Section 54.02(f) are not applicable to a discretionary transfer under Section 54.02(j). TEX. FAM. CODE ANN. § 54.02(f) (In making the determination required by Subsection (a) of this section, the court shall consider ....").

When an individual turns eighteen years of age pending resolution of a petition for discretionary transfer for a crime allegedly committed when he was sixteen years of age, the State is required to proceed under the statutory

subsection applicable when the person to be certified is eighteen years of age or older (Section 54.02(j)), and not the subsection applicable when the person is under the age of eighteen (Section 54.02(a)). Matter of M.A.V., 954 S.W.2d 117, 118 (Tex. App.—San Antonio 1997, pet. denied). This is so whether or not the first petition for waiver of jurisdiction was brought when the person was under eighteen because the application of either subsection is not expressly tied to the age of the person at the time the State filed its petition for discretionary transfer. Id. at 119.

Section 54.02(j) allows transfer of a case to criminal court of a person who, as in this case, although eighteen years of age or older, committed an applicable felony between the ages of ten and seventeen. Section 54.02(j) states, (j) The juvenile court may waive its exclusive original jurisdiction and transfer a person to the appropriate district court or criminal district court for criminal proceedings if:
(1) the person is 18 years of age or older;
(2) the person was:
(A) 10 years of age or older and under 17 years of age at the time the person is alleged to have committed a capital felony or an offense under Section 19.02, Penal Code [murder];
(B) 14 years of age or older and under 17 years of age at the time the person is alleged to have committed an aggravated controlled substance felony or a felony of the first degree other than an offense under Section 19.02, Penal Code [murder]; or
(C) 15 years of age or older and under 17 years of age at the time the person is alleged to have committed a felony of the second or third degree or a state jail felony;
(3) no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted;
(4) the juvenile court finds from a preponderance of the evidence that:
(A) for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person; or
(B) after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because:
(i) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person;
(ii) the person could not be found; or
(iii) a previous transfer order was reversed by an appellate court or set aside by a district court; and
(5) the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged.
TEX. FAM. CODE ANN. § 54.02(j).

Conclusion: Because D.L.C. was sixteen years of age at the time the offenses were alleged to have occurred, seventeen years of age at the time the State filed its petition for discretionary transfer, and eighteen years of age at the time of the hearing on the State's petition for discretionary transfer, the transfer was governed by Section 54.02(j), not Section 54.02(a). Accordingly, the factors listed in Section 54.02(f) did not apply, and the juvenile court considered the appropriate factors under Section 54.02(j).

In the Matter of D.L.C., MEMORANDUM, No. 06-16-00058-CV, 2017 WL 1055680, Tex.Juv.Rep. Vol. 31 No. 2 ¶17-2-2B (Tex.App.—Texarkana, 3/21/2017).

IN WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT, JUVENILE TRIAL COURT DID PROVIDE "A SURE-FOOTED AND DEFINITE BASIS FROM WHICH APPELLATE COURT COULD DETERMINE THAT ITS DECISION WAS IN FACT APPROPRIATELY GUIDED BY THE STATUTORY CRITERIA, PRINCIPLED, AND REASONED."

Facts: On November 4, 2015, Cindy and Joe Black arrived at the Hunt County Sheriff's Office and spoke with Joel Gibson, an investigator. The purpose of the Blacks' visit was to file a report alleging that D.L.C. had sexually assaulted their daughter, Jane,2 in July 2014. During their meeting, the Blacks provided Gibson with D.L.C.'s contact information, and Cindy prepared and signed an affidavit.3 Less than two weeks later, Jane met with Charlene Green, a forensic interviewer at the Hunt County Child Advocacy Center (CAC). Jane's account of the incident was consistent with the facts contained in Cindy's affidavit.

On December 2, Jane met with Kim Bassinger, a sexual assault nurse examiner, and she submitted to a sexual assault medical forensic examination. On that same day, Gibson attempted to contact D.L.C. for the purpose of interviewing him about the incident. Gibson also attempted to contact D.L.C. on December 11. After failing to contact D.L.C. by telephone, Gibson went to D.L.C.'s home to make contact and schedule an appointment with him. On January 6, 2016, Gibson spoke with D.L.C. at Gibson's office. During the conversation, D.L.C. admitted he had had sexual relations with Jane but he claimed it was consensual.

On that same day, Gibson spoke with Seth Stevens, the young man who had received Jane's text message explaining she had been sexually and physically assaulted.4 Stevens prepared an affidavit and provided it to Gibson on January 11. In addition to speaking with Stevens, Gibson interviewed Chad Cline on January 12, who also prepared an affidavit.5 Gibson concluded his investigation and, on January 14, submitted a paper referral to the Hunt County Juvenile Probation Office, alleging that D.L.C. had committed aggravated sexual assault. On January 27, the paperwork, along with a request for an adjudication petition, was sent to the County Attorney's Office of Hunt County. Gibson conceded that he was aware at the time he began his investigation that D.L.C. was seventeen years old and would turn eighteen in three months.6

On February 18, 2016, the State filed its original adjudication petition against D.L.C., alleging that he had committed the offense of aggravated sexual assault.7 The petition stated that D.L.C. was sixteen years of age at the time of the alleged offense, but that he was seventeen years of age at the time the petition was filed. About a week later, the State filed its original adjudication petition seeking a determinate sentence setting forth substantially the same allegations as it had in its first petition; however, the offense charged was sexual assault.8 On April 16, 2016, the State filed its petition for discretionary transfer to criminal court, alleging that D.L.C. had committed aggravated sexual assault.9 The trial court then issued an order to complete a diagnostic study, a social evaluation, and a full investigation.

Approximately one month later, the trial court received the report of Robert Lackey, Ph.D., who had conducted a psychological evaluation of D.L.C. Lackey's report stated, among other things,

With respect to [D.L.C.]'s Risk of Dangerous [sic], data collected in this evaluation revealed he is likely in the Moderate range of Risk as compared to other juvenile offenders. Results of this evaluation indicated [D.L.C] does not have a history of severe antisocial behavior. He noted that he has previously received "two or three" speeding tickets, a ticket for Disorderly Conduct –Fighting and was recently charged with possession of Alcohol and a "Marijuana pipe." He noted that when he was younger, approximately twelve years of age, that he was placed in detention for "Assault. ... "
[D.L.C] did not report a history of engaging in unprovoked violent behavior; however, records provided by Glen Oaks, a local psychiatric facility, noted [D.L.C.] was hospitalized for assaulting his father's pregnant girlfriend by kicking her in the stomach. Throughout the psychiatric records are indications of "out of control behaviors, outbursts of anger, agitation and damage to property, reportedly "punching the walls of the home."
....
[D.L.C.] appears to have demonstrated less serious violence toward individuals, noting the previous physical fight he was cited for and the previous "assault" which caused him to be placed in detention at twelve years of age. Reportedly these encounters were not serious and did not result in serious bodily injury. [D.L.C.] also appears to have previous minor criminal acts. Records revealed a history of reported suicidal and homicidal ideation and accompanying psychiatric hospitalization due to these thoughts of self [-]harm and intentions of harming others.
....
As compared to same aged peers who are also juvenile offenders or are also involved with the juvenile judicial system in some manner, [D.L.C.] is at the High range of Sophistication and Maturity.
....
As compared to other juvenile offenders, [D.L.C.] appears to be in the Low range as to his treatment amenability. [D.L.C.]'s responses to various questionnaires and other psychological tools revealed he currently is not reporting symptoms of any mental health disorder. ...
....
[D.L.C.]'s responses to the PAI-A revealed an interest in and motivation for treatment which is below average in comparison to adolescents who are not being seen in a therapeutic setting and his treatment motivation is a great deal lower than is typical of individuals being seen in treatment settings. His responses suggest that he is satisfied with himself as he is, that he is not experiencing marked distress, and that, as a result, he sees little need for changes in his behavior. However, [D.L.C.] does report a number of strengths, namely his family and boss; that augur well for a

relatively smooth treatment process if he were willing to make a commitment to treatment. His responses revealed he may not be experiencing sufficient distress to feel that treatment is warranted.

On July 7, 2016, the State filed its first amended petition for discretionary transfer to criminal court alleging one count of aggravated sexual assault and one count of the lesser-included offense of sexual assault. On July 22, 2016, approximately six weeks after D.L.C.'s eighteenth birthday, the trial court held a hearing on the State's first amended petition for discretionary transfer. The trial court considered, among other things, "written reports from the probation officer, professional court employees and professional consultants in addition to the testimony of witnesses ...." At the conclusion of the transfer hearing, the trial court granted the State's amended petition, finding that, among other things, (1) "there [was] probable cause to believe that [D.L.C.] committed the offense as alleged based on testimony of Joel Gibson and Isaac Neal[10] and all the other evidence admitted during the hearing" and (2) "[f]or a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of [D.L.C.]." This appeal followed.

Held: Affirmed

Memorandum Opinion: D.L.C. contends that the trial court failed to state in its order the specific reasons for waiving its jurisdiction and transferring this case to district court. Not only must the record substantiate the juvenile court's findings, but the court must make "case specific findings of fact" with respect to the appropriate factors. See Moon, 451 S.W.3d at 51.14 "With respect to the adequacy of the written order mandated by Section 54.02(h), the courts of appeals have generally agreed, first of all, that the written order must reflect the juvenile court's 'reasons' for waiving jurisdiction." Id. at 41 (citing In re J.R.C., 522 S.W.2d 579, 584 (Tex. App.—Texarkana 1975, writ ref'd n.r.e.) ("The reasons motivating the Juvenile Court's waiver of jurisdiction must expressly appear.")). "In addition to specifying 'reasons,' the order should also expressly recite that the juvenile court actually took [the appropriate] factors into account in making this determination." Id. at 41–42 (citing In re W.R.M., 534 S.W.2d 178, 182 (Tex. Civ. App.—Eastland 1976, no writ)).

In cases under Section 54.02(a) where the trial court is required to consider the factors in Section 54.02(f), the courts have held that a juvenile court's order may be adequate if it "discloses that the matters listed in Subsection (f) were considered." In re W.R.M., 534 S.W.2d 178, 182 (Tex. Civ. App.—Eastland 1976, no writ). In fact, there may be no reversible error even when the juvenile court's order seemingly restates the factors contained in Section 54.02, as long as the enumerated reasons were supported by the evidence. Appeal of B.Y., 585 S.W.2d 349, 351 (Tex. Civ. App.—El Paso 1979, no writ). "As long as the appellate court can determine that the juvenile court's judgment was based upon facts that are supported by the record, it should refrain from interfering with that judgment." Moon, 451 S.W.3d at 46.

Here, the juvenile court made the following findings:

1. There was probable cause to believe that D.L.C. violated penal laws of the State of Texas, to-wit, sexual assault, a second degree felony;

2. D.L.C. was sixteen years of age at the time the alleged offense(s) occurred, and at the time of the hearing, he was eighteen years of age;

3. No adjudication hearing had been conducted concerning the alleged offenses;

4. Prior to the hearing, the juvenile "Court obtained a Clinical Evaluation, complete Diagnostic Study, Social Evaluation, and full investigation of the child, his/her circumstances[,] and the circumstances of the alleged offense(s)";

5. For a reason beyond the State's control, it was not practicable for the State to proceed in juvenile court prior to the person attaining the age of eighteen;

6. The juvenile court considered written reports from the probation officer, professional court employees, and professional consultants, as well as the testimony of witnesses;

7. There was "probable cause to believe that [D.L.C.] committed the offense as alleged based on the testimony of Joel Gibson and Isaac Neal and all other evidence admitted during the hearing."

D.L.C. contends that the trial court's findings were inadequate due to their lack of specificity. We disagree.

Conclusion: The juvenile court provided "a sure-footed and definite basis from which [we] can determine that its decision was in fact appropriately guided by the statutory criteria, principled, and reasoned." Moon, 451 S.W.3d at 49. We overrule D.L.C.'s second point of error