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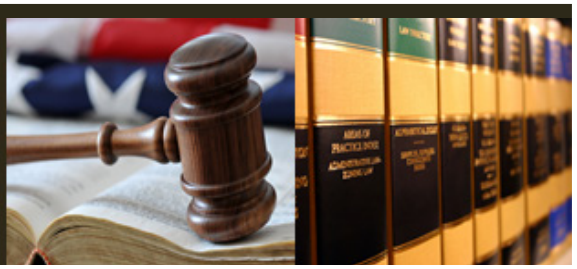

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Dear Juvenile Law Section Members:

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

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

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EDITOR'S FOREWORD By Associate Judge Pat Garza

Oh my goodness! My youngest child is going off to college. I'm not sure why, but this one leaving has given both my wife and myself much more anxiety than the rest. Maybe it's because she's our baby, or maybe it's because we won't know what to do with ourselves once she's gone. Either way, it certainly feels different.

If you're a dad, you know as I do, that somewhere in the book of fatherhood there's a chapter all about giving our kids advice before they embark on far away adventures. You know what I'm talking about. It's the chapter that reminds us that all dads are provided with knowledge and intelligence that is second to none, once our children are old enough to ask questions. It's in the chapter "Dad Knows Everything." I think it's right before the chapter "Children Now Know it All at 15."

Anyway, having studied the book of Fatherhood for some 33 years now, I knew it was time to step up again. So, I sat down and wrote a letter to Krystal. Most of the letter was me expressing my pride and admiration for all she has already accomplished and how proud I am of her. It was part congratulations, part inspiration, part support, but mostly love.

If you too have one getting ready to go off to college, let them know how you feel. Tell them how proud you are and how much you love them. Give them some of that elderly advice you've been hoarding all these years and let them know that they are as ready as they'll ever be for their new adventure. Here is a portion of my words to Krystal:

The next four years will be a different kind of adventure for you. It will be a time when, for the most part, your mom and I will stop making the day to day choices for you and you start making them for yourself. Don't be shocked when opportunities appear from nowhere. In the next four years you will grow by leaps and bounds. And there is no doubt you will have challenges along the way, both personal and professional and handling those challenges and making tough decisions will be mostly on you. But a part of growing up is learning to handle challenges and making tough decisions. I want you to know that I think you are as prepared as any person can be to meet those next challenges.

So here's a little advice for when you meet those challenges. Remember what we have taught you. How to stay calm. How to work through the problem. How to find the best solution, for you. Remember your morals, your values, and your integrity. Take responsibility. Be a leader. Be a friend. Don't blame others. Help others when they need it most. Be true to yourself. The person you have become is exactly who you were supposed to be. And as always… be good, be smart!

Dorm move-in date is August 21. It's going to be a tough one.

29th Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's Juvenile Law Institute will be held on February 22-24, at the Wyndham Riverwalk Hotel in San Antonio, Texas. Chair-Elect Riley Shaw and the planning committee are already working on putting together an excellent and practical conference. Registration information will be sent out and available online at www.juvenilelaw.org in October.

What lies behind us and what lies before us are tiny matters compared to what lies within us.

Oliver Wendell Holmes

CHAIR'S MESSAGE By Kevin Collins

Texas has done a remarkable job with its juvenile jurisprudence. It continues to show thoughtful progress in many difficult areas. The modification of statutes allowing discretion in juvenile sex offender registration has significantly reduced the number of juveniles who are required to register on public websites. Another law that shows keen understanding of juvenile behavior, is that of sexting. It is a class C misdemeanor, not a felony, in most situations involving juveniles and it can also be expunged by statute. The recent decriminalization of truancy has also been very important in addressing issues within the system.

There are many other areas where changes are happening, but I mention two more in closing. The first is that, where possible, juveniles who are incarcerated are placed in facilities in their own communities. The second is the continued discussion concerning raising the juvenile age to younger than 18, from the current younger than 17. All of these changes seem to advance the goals of helping youthful offenders become productive members of society. I hope you all have a great summer, as we all continue to be a part of thought leading juvenile jurisprudence.

REVIEW OF RECENT CASES

CONFESSIONS

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

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

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

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

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

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

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

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

Detective Roberts asked Gonzales if he knew what was going on, if he was in pain, and how he felt. Gonzales responded, "I feel fine." Detective Roberts testified that Gonzales was able to answer all of his questions and did not appear to be in any distress. Gonzales originally told Detective Roberts that Whitley fired first and that he returned fire; Detective Roberts confronted him with Estrada's version of events and Gonzales ultimately told Detective Roberts their plan was to steal the marijuana from Whitley. Gonzales also told Roberts that he always takes a gun with him whenever he goes to buy weed.

When asked to relay what transpired, Detective Roberts described Gonzales's demeanor to the court. He "kind of chuckled, smiled and he said, 'That was my

first mistake. My second was letting him stand up.' " When Detective Roberts asked Gonzales to explain what he meant, Gonzales explained that he should have pointed his weapon directly at Whitley instead of pointing it down.

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

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

Gonzales contends the juvenile court erred when it found that the protection of the public and rehabilitation of Gonzales could not be served with the juvenile probation's resources and programs. At the hearing, defense counsel maintained that a Texas Juvenile Justice Department commitment would have adequately protected the public and rehabilitated Gonzales. Gonzales argued he was not a violent person by nature and exhibited excellent behavior throughout both the proceedings and all meetings with the probation officers. Defense counsel argued that Gonzales was the picture of someone who could be rehabilitated. He acknowledged the wrongfulness of Gonzales's delinquent behaviors and expressed his beliefs that Gonzales had improved because "he grew up."

On appeal, Gonzales further argues the trial court erred by failing to focus on the individual child. Instead, Gonzales contends the juvenile court focused solely on the severity of the allegations. Gonzales was cooperative with law enforcement and there were no reports of behavior issues during his incarceration. Gonzales suffers from cerebral palsy and epilepsy and requires services available through the juvenile system. Finally, counsel argues that determinate sentencing is a good option and would provide adequate protection to the community at large.

The State contends the factors weigh heavily in favor of transferring jurisdiction. Although the individual factors are subject to review, the ultimate determination is based on a review of the entire record. The State acknowledged Gonzales's cerebral palsy and epilepsy; yet, the State pointed out neither diagnosis prevented him from committing either this offense or previous offenses which invoked the juvenile justice system. Moreover, this was not just a murder—but felony murder. Gonzales went to the scene intending to steal drugs from a drug dealer. He took his own weapon to the drug deal and murdered the dealer. This was the third time in four years that Gonzales was involved in the legal system and, although he was not classified as a gang member, he did claim membership in YTC (Young Texas Click), a "tagging crew."

Held: Affirmed

Opinion: At trial and on appeal, defense counsel argued Gonzales was a scared fifteen-year old and that any reasonable individual in his position would have believed that he was not free to leave. The interrogation was, therefore, custodial and the officer was required to take Gonzales before a magistrate prior to obtaining a statement.

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

B. Standard of Review

When an appellate court reviews a trial court's ruling on a motion to suppress, we apply a bifurcated standard. State v. Kelly, 204 S.W.3d 808, 818–19 (Tex.Crim.App.2006); Guzman v. State, 955 S.W.2d 85, 89 (Tex.Crim.App.1997). When a question turns on credibility and demeanor, an appellate court views the evidence in the light most favorable to the trial court's ruling and gives "almost total deference to a trial court's determination of the historical facts that the record supports." Guzman, 955 S.W.2d at 89; accord Montanez v. State, 195 S.W.3d 101, 106 (Tex.Crim.App.2006) (quoting Guzman). We give the same deference to the trial court's rulings on mixed questions of law and fact "if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor." Guzman, 955 S.W.2d at 89; accord Montanez, 195 S.W.3d at 106.

We review other mixed questions of law and fact and questions of law de novo. Guzman, 955 S.W.2d at 89; accord Montanez, 195 S.W.3d at 106. When custody attaches is a mixed question of law and fact. Herrera v. State, 241 S.W.3d 520, 526 (Tex.Crim.App.2007); Garza v. State, 34 S.W.3d 591, 593 (Tex.App.–San Antonio 2000, pet. ref d).

B. Texas Family Code section 51.09

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

C. Gonzales's Interrogation

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

In Dowthitt v. State, 931 S.W.2d 244, 255 (Tex.Crim.App.1996), the Court of Criminal Appeals set forth four factors relevant to the determination of whether an individual is in custody: (1) Was the suspect "physically deprived of his freedom of action in any significant way"?; (2) Did "a law enforcement officer tell the suspect that he cannot leave"?; (3) Did the "law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted"?; or (4) Was there "probable cause to arrest and law enforcement officers [did] not tell the suspect that he [was] free to leave"? Id.; see also In re D.J.C., 312 S.W.3d at 713. We remain mindful that because the custody determination is based entirely on objective circumstances, whether the law enforcement official had the subjective intent to arrest is irrelevant unless that intent is somehow communicated to the suspect. Stansbury, 511 U.S. at 323–24; Dowthitt, 931 S.W.2d at 254; In re D.J.C., 312 S.W.3d at 713. We, therefore, turn to an analysis of each of the Dowthitt factors.

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

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

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

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

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

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

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

Although Gonzales contends that his age and the events earlier that evening would lead a reasonable person to believe he was in custody, the record simply does not support such an allegation. At no time following the doctor's examination at the hospital was Gonzales in handcuffs. Gonzales left the hospital with his mother and his mother took him to the police station. Nothing compelled either Gonzales or his

mother to be at the police station. When they arrived, Gonzales and his mother were informed they were free to leave at any time and did not have to talk to the officers. After Gonzales finished speaking to Detective Roberts, he and his mother voluntarily left the police station.

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

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

Although Detective Roberts may well have possessed probable cause to arrest Gonzales at some point during the interview, there is no controverting evidence that Detective Roberts instructed Gonzales that he was free to leave and Gonzales left. Detective Roberts also clearly articulated his intent to present the evidence to the magistrate and that he anticipated a warrant would issue for Gonzales's arrest. The concern that an officer has established probable cause to arrest and does not tell the defendant that he is free to leave, as outlined in Dowthitt and its progeny, is not present in this case. See Dowthitt, 931 S.W.2d at 255; Aguilera v. State, 425 S.W.3d 448, 456 (Tex.App.–Houston [1st Dist.] 2011, pet. ref'd).

D. Application

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

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

COURT ORDERED FEES

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

¶ 15-2-5. **Maza v. State**, MEMORANDUM, No. 13-14-00128-CR, 2015 WL 3637821 (Tex.App.-Corpus Christi, June 11, 2015).

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

Held: Affirmed as modified

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

Article 26.05(g) of the code of criminal procedure provides trial courts with discretionary authority to order reimbursement of appointed attorney's fees when the "defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided[.]" See id. art. 26.05(g) (West, Westlaw through 2013 3d C.S.). Before doing so, however, the trial court must hear evidence and determine whether a material change in the defendant's financial circumstances has occurred since his initial declaration of indigence. See Mayer v. State, 309 S.W.3d 552, 556 (Tex.Crim.App.2010). The trial court made no such determination in this case. See id.

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

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

EVIDENCE

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

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

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

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

Dr. Lawrence Thompson, a psychologist, testified that it is not unusual for child abuse victims to give a delayed disclosure. Thompson testified that he has witnessed times when children have recanted allegations of sexual abuse for various reasons, such as the abuse did not happen or the child is being pressured to recant. He explained that when a child knows the perpetrator, the child can be reluctant to disclose abuse and can be manipulated. Thompson testified that it is not uncommon for some family members to believe the abuse occurred, while others believe there was no abuse. He stated that it is not unusual for abused children to act normal or to fear getting into trouble if they disclose the abuse. As an example of grooming, Thompson identified an instance when the perpetrator tells the child to "[d]o this sexual act, and I'll play with you."

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

Held: Affirmed

Memorandum Opinion: In issue two, C.Z.S. contends that the trial court abused its discretion by allowing Thompson to testify because, according to C.Z.S., Thompson's testimony was not relevant to whether C.Z.S. had committed the offense. Outside the jury's presence, Thompson testified that he had not reviewed documents or interviewed witnesses in connection with C.Z.S.'s case and had no specific knowledge of the facts.

He explained that the purpose of his testimony was "[t]o provide information to the jury from my clinical experience, from the research related to child sexual abuse so that they can apply [it] to this case as they see fit." Thompson testified that he would be discussing what an outcry is, that disclosure of sexual abuse is a process, the effects of child abuse on the victim, how the child victim might testify, and grooming. C.Z.S. argued that Thompson's testimony was irrelevant to the facts of the case. The trial court overruled C.Z.S.'s objections.

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

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

EVIDENCE OF PRIOR BAD ACTS WHEN DEFENDANT WAS THIRTEEN YEARS OLD, DEEMED ADMISSIBLE DURING GUILT/INNOCENCE PHASE OF ADULT TRIAL, EVEN THOUGH HE COULD NOT HAVE BEEN CONVICTED OF ANY OFFENSE AS A THIRTEEN YEAR OLD.

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

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

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

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

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

Held: Affirmed

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

At the pretrial article 38.37 hearing, appellant's father testified about the events in 1998 involving appellant and his stepbrother that led the father to contact CPS. In addition, the CPS worker assigned to

investigate the allegations testified. At the conclusion of the hearing, appellant did not voice any objections.

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

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

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

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

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

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

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

In contrast to these cases, appellant did not begin abusing H.P when he was a juvenile; rather, he was an adult at the time of all the alleged misconduct. And he was not being charged with any incident involving his

stepbrother. The concerns addressed in Taylor and Alberty are absent here.

Conclusion: We overrule appellant's final issue.

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

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

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

During the trial, Crystal Ann testified that she moved into a home with her family when she was six years old and later moved into another home with her family when she was ten or eleven years old. In her testimony, Crystal Ann explained that Villarreal lived with her family for several years at the first home and that he moved with them to the second home. When discussing the time that Villarreal lived with her at both houses, she said that he repeatedly sexually abused her. More specifically regarding the first home, Crystal Ann testified that on multiple occasions, Villarrreal "put his fingers inside of my vagina," that he "forced me to have sex with him" by forcing "his penis into my vagina" on more than three occasions, that Villarreal also put his penis into "my mouth," and that Villarreal grabbed her hand and made her stroke his penis. When describing these incidents, Crystal Ann stated that she sometimes told him to stop and that on other times, she did not say anything. Similarly, Crystal Ann testified that when her family moved to the second home, Villarreal on multiple occasions put his fingers inside her vagina and raped her by putting his penis inside her vagina. In addition, she testified that Villarreal performed these acts throughout the whole time that he was living with her family at the second home and that Villarreal moved out of the second home approximately one month after he celebrated his eighteenth birthday at their house. When describing the number of times that those assaults occurred at the second home, she specified that they happened "[a] lot," that it was more than five times, that she was "not sure" if it was more than ten times, and that the assaults occurred approximately once a month until he moved out. Furthermore, Crystal Ann testified that the abuse stopped after Villarreal moved out of the second house and that although she could not remember when the last assault occurred, the assault occurred when she was "[p]robably about 11" years old.

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

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

At the conclusion of the trial, the jury found Villarreal guilty and imposed a sentence of 16 years'

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

Held: Affirmed

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

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

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

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

During the hearing before the district court regarding whether the evidence of other instances of sexual assault would be sufficient to allow the jury to conclude beyond a reasonable doubt that Villarreal committed those acts, see Tex.Code Crim. Proc. art. 38.37, § 2–a, Villarreal presented the same arguments that he presents on appeal. As with his arguments on appeal, Villarreal did not argue before the district court that he did not actually receive notice of an intent to use evidence regarding those acts, nor did Villarreal argue that he was unaware of the alleged acts at issue. On the contrary, he argued that the State's notice did not comply with the 30–day requirement from the recently amended article 38.37 and that the statutes and rules listed in the State's notice do not allow evidence of extraneous acts to be used to establish character or character conformity during the guilt or innocence portion of the trial. See id. § 3; cf. Hayden v. State, 66 S.W.3d 269, 272–73 (Tex.Crim.App.2001) (noting when determining that trial court did not abuse its discretion that defendant did not claim that he did not receive actual notice of State's intent to use evidence and instead simply asserted that notice did not comply with provisions of Rule 404(b)).

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

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

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

Unquestionably, the original notice of intent to use other offenses that the State provided to Villarreal did not reference article 38.37; however, Villarreal has referred to no authority and we are not aware of any authority requiring the State to specifically list in its notice pertaining to evidence of extraneous offenses the statutes or rules under which that evidence will be introduced. Even assuming for the sake of argument that the State's notice must provide the type of notice suggested by Villarreal, under the unique circumstances of this case, including the fact that the new law became effective after the original notice was provided to Villarreal, we would not be able to conclude that the district court abused its discretion by allowing in the evidence at issue during the guilt or innocence portion of the trial. See Webb v. State, 36 S.W.3d 164, 178 (Tex.App.—Houston [14th Dist.] 2000, pet. ref'd) (explaining that reasonableness of notice under other provisions depends on circumstances of case); cf. Scott v. State, 57 S.W.3d 476, 481–83 (Tex.App.—Waco 2001, pet. ref'd) (determining that although notice was only received six days before trial, "under the unique facts presented" defense counsel was not surprised or disadvantaged because offenses were going to be tried together and only became extraneous when State decided not to prosecute those crimes). The purpose of

requiring the State to provide notice regarding its intent to use evidence of other crimes is to prevent the defense from being surprised, cf. Hayden, 66 S.W.3d at 271 (discussing Rules of Evidence), and to allow the "defendant adequate time to prepare for the State's introduction of the extraneous offenses at trial," cf. Hernandez v. State, 914 S.W.2d 226, 234 (Tex.App.—Waco 1996, no pet.) (describing purpose of notice under Rule 404). As set out above, Villarreal was provided notice months before the trial started regarding the State's intent to use evidence of other assaults committed by Villarreal against Crystal Ann. Moreover, that notice specified that the State would be seeking to introduce the evidence under rules and statutes authorizing, albeit for limited purposes, use of that type of evidence during the guilt or innocence phase of the trial or the punishment phase. Perhaps most significantly, the notice explained that the State intended to use the evidence under Rule of Evidence 404(b), which allows evidence of other crimes or bad acts to be admitted for the purpose of establishing, among other things, "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Tex.R. Evid. 404(b)(2). Accordingly, months before the trial began, Villarreal was on notice that he needed to marshal a defense against the use of this type of evidence. Moreover, five days before trial, the State amended its notice to include a reference to article 38.37 and to set out more specifically the exact extraneous crimes that the State intended to introduce during trial.3 In addition, the district court expressly prohibited the State from introducing evidence regarding an additional allegation that was listed in the amended notice. Furthermore, the lack of surprise to Villarreal is further evidenced by the fact that his trial attorney thoroughly cross-examined Crystal Ann regarding the other instances of alleged abuse.

Even assuming that the district court did abuse its discretion by admitting the evidence of other assaults, we would be unable to conclude that Villarreal was harmed by that error. Under the Rules of Appellate Procedure, a non-constitutional error does not provide grounds for reversal unless it affects the defendant's substantial rights. Tex.R.App. P. 44.2(b); see Barshaw v. State, 342 S.W.3d 91, 93 (Tex.Crim.App.2011). A substantial right is not affected "when, after examining the record as a whole, the reviewing court has a fair assurance that the error did not influence the jury or had but a slight effect." McDonald v. State, 179 S.W.3d 571, 578 (Tex.Crim.App.2005). As evidenced by the record and by his brief, Villarreal is not challenging the admissibility of the evidence itself and is instead asserting that the notice regarding the State's use of that evidence was insufficient. In these circumstances, reviewing courts "look only at the harm that may have been caused by the lack of notice and the effect the lack of notice had on the appellant's ability to mount an adequate defense." Id.

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

Although Villarreal asserts that he was harmed because he was unprepared to defend against the use of the allegations of extraneous offenses to establish his character and his actions in conformity with that character, as summarized above, Villarreal was given notice of the State's intent to use that evidence months before the trial started, and it is hard to imagine how his defense against the use of the evidence for character purposes would have differed from his defense against the State's use of that evidence for the purposes identified in Rule 404(b) or for punishment purposes. Cf. Hernandez v. State, 176 S.W.3d 821, 826 (Tex.Crim.App.2005) (noting that defendant "failed to make any showing of how his defense strategy might have been different had the State explicitly notified him" that it intended to use evidence at issue). Moreover, Villarreal had the opportunity to cross-examine Crystal Ann and E.Z. during trial regarding the alleged misconduct and regarding the time that Villarreal lived with them, and Villarreal was also able to cross-examine them during the hearing held outside the presence of the jury for the purpose of determining whether evidence of extraneous offenses would be admitted. Furthermore, the record reveals that Villarreal's strategy was to undermine Crystal Ann's testimony by challenging her ability to recall or explain when the alleged misconduct occurred. More specifically, Villarreal repeatedly asserted throughout the trial that any allegation of misconduct that occurred before he turned seventeen years old could not serve as the basis for a conviction in this case and urged that the State's evidence failed to establish that any assault occurred after he turned seventeen.

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

PETITION AND SUMMONS

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

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

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

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

Held: Affirmed

Opinion: A bill of review is an equitable proceeding brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal. Caldwell v. Barnes, 154 S.W.3d 93, 96 (Tex.2004). Although a bill of review is an equitable proceeding, "the fact that an injustice has occurred is not sufficient to justify relief by bill of review." Wembley Inv. Co. v. Herrera, 11 S.W.3d 924, 927 (Tex.1999). A bill of review, when properly brought, is a direct attack on a judgment. Fender v. Moss, 696 S.W.2d 410, 412 (Tex.App.—Dallas 1985, writ ref'd, n.r.e.). A direct attack is a proceeding brought to correct a former judgment and to secure rendition of a single, proper judgment. Austin Indep. Sch. Dist. v. Sierra Club, 495 S.W.2d 878, 881 (Tex.1973).

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

A direct attack on a judgment by bill of review must be brought within a definite time period—i.e., within four years of rendition of the judgment complained of. PNS Stores, Inc. v. Rivera, 379 S.W.3d 267, 271 (Tex.2012); see also Caldwell v. Barnes, 975 S.W.2d 535, 538 (Tex.1998) ("The residual four-year

statute of limitations applies to bills of review."). The only exception to the statute of limitations is when the petitioner proves extrinsic fraud. Defee v. Defee, 966 S.W.2d 719, 722 (Tex.App.—San Antonio 1998, no pet.); Law v. Law, 792 S.W.2d 150, 153 (Tex.App.—Houston [1st Dist.] 1990, writ denied). Extrinsic fraud is fraud that denied a party the opportunity to fully litigate at trial all the rights or defenses that the party was entitled to assert. Tice v. City of Pasadena, 767 S.W.2d 700, 702 (Tex.1989). It is fraud that occurs in the procurement of a judgment. Lambert v. Coachmen Indus. of Tex., Inc., 761 S.W.2d 82, 87 (Tex.App.—Houston [14th Dist.] 1988, writ denied). The Texas Supreme Court has described extrinsic fraud as occurring when a party "has been misled by his adversary by fraud or deception, did not know of the suit, or was betrayed by his attorney." Alexander v. Hagedorn, 226 S.W.2d 996, 1001 (Tex.1950).

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

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

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

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

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

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

Texas courts have determined that certain defects in the notice process may be waived. See e.g., Hildalgo v. State, 945 S.W.2d 313, 318 (Tex.App.—San Antonio 1997), aff'd, 983 S.W.2d 746 (Tex.Crim.App.1999) (order authorizing service of summons to juvenile directed summons to incorrect name, and summons itself failed to (1) state date petition was filed, or (2) name attorney for petitioner); R.A.G. v. State, 870

S.W.2d 79, 82–83 (Tex.App.—Dallas) (record indicated that clerk, not juvenile court, directed issuance of summons), rev'd on other grounds, 866 S.W.2d 199 (Tex.1993); In the Matter of K.P.S., 840 S.W.2d 706, 709 (Tex.App.—Corpus Christi 1992, no writ) (trial judge's oral summons and in-court service of petition on juvenile sufficient to satisfy section 53.06); Sauve v. State, 638 S.W.2d 608, 610 (Tex.App.—Dallas 1982, pet. ref'd) (no written order directing issuance of summons to juvenile). Thus, a juvenile may waive the right to complain about defects in the summons by appearing voluntarily at the hearing, indicating that he was aware of the nature of the proceedings, and failing to object to defects in the summons. See D.A.W. v. State, 535 S.W.2d 21, 22 (Tex.Civ.App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.); see also Sauve, 638 S.W.2d at 610 (defects in officer's return must be attacked in juvenile court).

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

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

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

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

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

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

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

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

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

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

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

On August 4, the parties appeared and tried the issue of whether applicant should be transferred to adult court. After hearing testimony and receiving exhibit evidence, the juvenile court granted the State's motion to waive jurisdiction and transferred applicant to district court. The docket entries for August 4 also note that applicant was sworn and admonished and that a State's motion to amend the petition to show a slight name change was granted. In addition, the August 4 docket entries contain the notations, "Any further notice waived by Resp." and "Right to Appeal."

Although applicant had the right to immediately appeal the transfer decision, FN4 there is no indication that he ever did so. Applicant was subsequently tried as an adult in district court, convicted of murder, and sentenced to life in prison. He appealed his conviction but did not raise any claim regarding the juvenile court's transfer decision.FN5 The court of appeals affirmed the judgment.FN6 Applicant did not file a petition for discretionary review, and mandate issued on June 26, 1998.

FN4. See Moon v. State, 451 S.W.3d 28, 39–40 (Tex.Crim.App.2014) (observing that, prior to January 1, 1996, a juvenile could immediately appeal a juvenile court's waiver of jurisdiction, but effective January 1, 1996, appeal of that decision could occur only after the criminal conviction). See also Acts 2015, 84 th Leg., S.B. 888, eff. September 1, 2015 (making a juvenile court's waiver of jurisdiction immediately appealable).

FN5. Rodriguez v. State, 968 S.W.2d 554 (Tex.App.-Houston [14th Dist.] 1998, no pet.).

FN6. Id.

On November 24, 2003, applicant filed his first habeas application. In that application, he claimed that the district court lacked jurisdiction because the juvenile court lacked jurisdiction to transfer due to a failure to properly serve him with a summons to the transfer hearing. The habeas court made findings consistent with the facts recited above and concluded that applicant was not entitled to relief because he received the summons in accordance with the applicable statutes.FN7 Applicant also made other claims, including the claim that his appellate attorney failed to timely inform him of the court of appeals' decision so as to allow him to file a petition for discretionary review. On April 7, 2004, we granted relief on that latter claim—giving applicant the opportunity to file an out-of-time petition for discretionary review.FN8 He never filed one.

FN7. Findings and Conclusions, dated February 20, 2004, Findings 5–6 and Conclusion 2.

FN8. Because applicant's first application was resolved solely on the out-of-time-PDR claim, there was no final disposition of a claim that challenged the conviction, so the current application is not barred under TEX.CODE CRIM. PROC. art. 11.07 § 4. See Ex parte Torres, 943 S.W.2d 469, 474 (Tex.Crim.App.1997) (because out-of-time appeal was sole basis for disposing of prior application, there was no final disposition of other claims raised therein, and those other claims were not barred by § 4); Ex parte Santana, 227 S.W.3d 700, 703–04 (Tex.Crim.App.2007) (request for out-of-time appeal does not constitute a challenge to the conviction for purpose of § 4); Ex parte McPherson, 32 S.W.3d 860, 861 (Tex.Crim.App.2000) (same). See also Ex parte Wilson, 956 S.W.2d 25 (Tex.Crim.App.1997).

On May 18, 2011, applicant filed his second (current) habeas application. He raises, among other things, the jurisdictional claim that he raised in his first application. The habeas court in the current proceedings made findings consistent with the facts recited above FN9 but concluded that applicant was entitled to relief because the summons failed to comply with the applicable statute.FN10 In one of its conclusions, the habeas court stated that "the record does not show positively or affirmatively that a valid, or timely summons was ever served upon any party the court deemed necessary to

the proceeding pursuant to the prevailing mandatory notice requirements." FN11

FN9. Findings and Conclusions, dated June 23, 2014, Ground for Relief 1, Findings of Fact 1–11. Finding 3 states that the waiver of jurisdiction hearing scheduled for August 1 "did not take place." We construe this to be a finding, supported by the record, that there was no transfer hearing at that time. We do not construe this finding to mean that no hearing of any sort took place on August 1. A finding that no hearing of any sort took place would not be supported by the record.

FN10. Id., Conclusion of Law 6. The habeas judge who made findings and conclusions in connection with the second application was not the judge who made findings and conclusions in connection with the first application.

FN11. Id., Conclusion of Law 4.

Held: Affirmed

Opinion: Juvenile transfer proceedings are governed by the Family Code.FN12 Family Code § 54.02(b) provides that the notice requirements of certain other sections of the Family Code must be satisfied and that "the summons must state that the hearing is for the purpose of considering discretionary transfer to criminal court." FN13 Some of the notice requirements contained in the referenced sections of the Family Code are: (1) a summons must be served on the juvenile and various other interested persons,FN14 (2) the summons "must require the persons served to appear before the court at the time set to answer the allegations of the petition," FN15 and (3) the summons must be personally served at least two days before the transfer hearing if the person is in Texas and can be found.FN16 Family Code § 53.06(e) further provides, "A party, other than the juvenile, may waive service of summons by written stipulation or by voluntary appearance at the hearing." FN17

FN12. See TEX. FAM.CODE § 54.02 (Vernon 1986).

FN13. Id. § 54.02(b) (requiring that petition and notice requirements of §§ 53.04, 53.05, 53.06, and 53.07 be satisfied).

FN14. Id. § 53.06(a) (requiring service on juvenile, his parent (or guardian or custodian), his guardian ad litem, and "any other person who appears to the court to be a proper or necessary party to the proceeding").

FN15. Id. § 53.06(b).

FN16. Id. § 53.07(a).

FN17. Id. § 53.06(e).

This Court and the Texas Supreme Court have held that the failure to comply with § 54.02(b) deprives the juvenile court of jurisdiction to transfer the case.FN18 Referring to § 53.06(e), we and our sister court have also held that the juvenile cannot waive the service of the summons for the transfer hearing, even if the juvenile attends the transfer hear-ing.FN19 These holdings are in accordance with the common-law rule that a minor does not possess the legal capacity to waive service of summons, nor can anyone waive it for him.FN20

FN18. Grayless v. State, 567 S.W.2d 216, 219 (Tex.Crim.App.1978); In re D.W.M., 562 S.W.2d 851, 852 (Tex.1978).

FN19. Grayless, 567 S.W.2d at 219–20; D.W.M., 562 S.W.2d at 853; In re W.L.C., 562 S.W.2d 454, 455 (Tex.1978).

FN20. D.W.M., 562 S.W.2d at 853; W.L.C., 562 S.W.2d at 455; Johnson v. State, 551 S.W.2d 379, 381 & n. 3 (Tex.Crim.App.1977).

While it is clear that a juvenile cannot waive service of the summons, the question that arises in this case is whether a juvenile may waive a defect in the service of the summons. Applicant was personally served with a summons for a transfer hearing, but the timing of that service, in combination with the hearing time and date listed on the summons, rendered the service defective. Several courts of appeals have held that, once a juvenile has been properly served with a summons for a transfer hearing, the case may be continued to a later date without issuing a new summons.FN21 Had the summons in this case been served on applicant on July 29, the parties could have appeared and reset the case for August 1 under the rationale of those court-of-appeals decisions. But the summons was served on August 1, which violated the requirement that the summons be served at least two days in advance of the hearing date specified on the summons. And the summons was not revised to reflect an August 4 hearing date, which might also have cured any defect in the summons. So the question is whether the juvenile may waive the defect in the summons, either by waiving the failure to receive at least two days advance notice of the hearing listed in the summons or by waiving the failure of the summons to specify the correct date and time for the hearing that actually took place.

FN21. In re C.C.G., 805 S.W.2d 10, 12–13 (Tex.App.-Tyler 1991, writ denied); In re R.M., 648 S.W.2d 406, 407 (Tex.App.-San Antonio 1983, no writ); In the Matter of B.Y., 585 S.W.2d 349, 351 (Tex.Civ.App.-El Paso 1979, no writ).

Under Family Code § 51.09, a juvenile may waive any right granted under the Family Code or any other law in juvenile proceedings "[u]nless contrary intent

clearly appears elsewhere" in Title 3 of the Family Code.FN22 For a waiver under § 51.09 to be valid, the following conditions must be met:

(1) the waiver is made by the child and the attorney for the child;

(2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it;

(3) the waiver is voluntary; and

(4) the waiver is made in writing or in court proceedings that are recorded.FN23

In one case, we recognized the possibility that a defect in the summons for a transfer hearing may be waivable under § 51.09, but we did not resolve the question.FN24 Two courts of appeals have indicated that a defect in the summons might be waivable under § 51.09.FN25

FN22. TEX. FAM.CODE § 51.09(a) (Vernon 1986) ("Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if...."). See also TEX. FAM.CODE § 51.09 (current).

FN23. TEX. FAM.CODE § 51.09(a) (Vernon 1986). See also TEX. FAM.CODE § 51.09 (current).

FN24. Johnson v. State, 594 S.W.2d 83, 86 (Tex.Crim.App.1980), overruled on other grounds by Hardesty v. State, 659 S.W.2d 823 (Tex.Crim.App.1983).

FN25. D.A.W. v. State, 535 S.W.2d 21, 22 (Tex.App.-Houston [14th Dist.] 1976, writ ref'd n.r.e.) ("Although § 53.06(e) prohibits the child's waiving of service of summons, ... there is apparently nothing to prevent a child from waiving a defect in the summons.") (emphasis in original); In re K.W.S., 521 S.W.2d 890, 894 (Tex.App.-Beaumont 1975, no writ) ("We would face an entirely different question if our record showed an explanation by the trial judge of the rights of the child and the possible consequences of a waiver; and, that the child, after such explanation and understanding, voluntarily (with concurrence of his attorney) waived the defects in the summons."). Both the Texas Supreme Court and this Court have cited K.W.S. with respect to the jurisdictional effect of failing to comply with § 54.02(b). See D.W.M., 562 S.W.2d at 852; Grayless, 567 S.W.2d at 219.

In construing a statute, we give effect to the plain meaning of its language unless the language is ambiguous or the plain meaning leads to absurd results that the legislature could not possibly have intended.FN26 Under the procedure outlined in § 51.09, a juvenile may waive any right "unless contrary intent clearly appears elsewhere." FN27 Contrary intent clearly appears elsewhere with respect to "service of [the] summons"—§ 53.06(e) explicitly provides that a juvenile cannot waive service. But § 53.06(e) does not say that a juvenile cannot waive a defect in the wording of the summons or in the timing of its service, and the context of the statute does not otherwise make it clear that such a waiver would be prohibited. Because contrary intent does not clearly appear elsewhere with respect to such defects in service, the unambiguous language of § 51.09 permits a waiver of such defects.

FN26. Boykin v. State, 818 S.W.2d 782, 785 (Tex.Crim.App.1991).

FN27. TEX. FAM.CODE § 51.09(a) (Vernon 1986) (emphasis added).

B. Direct Versus Collateral Attack

In the civil default-judgment context, the Texas Supreme Court has explicitly articulated the rule for service-based jurisdictional claims raised in a direct attack. For the judgment to survive a direct attack, "strict compliance with the rules for service of citation [must] affirmatively appear on the record." FN28 Possibly indicating that it would apply a similar approach in direct attacks in juvenile-transfer cases, the Supreme Court in W.L.C. stated, "[A]bsent an affirmative showing of service of summons in the record, the juvenile court is without jurisdiction to transfer the juvenile to district court." FN29 In that case, the judge of the juvenile court had ordered the clerk of the court to serve the juvenile in open court but the "only documentary evidence of service in the appellate record [was] an instrument" whose return was left blank.FN30 In K.W.S., the court of appeals emphasized that there was "no record showing" that the requirements for waiver under § 51.09 had been met.FN31 Both W.L.C. and K.W.S. were direct attacks because they were direct appeals from juvenile transfer decisions.FN32

FN28. Ins. Co. of State of Pennsylvania v. Lejeune, 297 S.W.3d 254, 255 (Tex.2009); Primate Constr. v. Silver, 884 S.W.2d 151, 152 (Tex.1994).

FN29. 562 S.W.2d at 455.

FN30. Id.

FN31. 521 S.W.2d at 894 & n. 9 (emphasis in original).

FN32. See W.L.C., 562 S.W.2d at 454; K.W.S., 521 S.W.2d at 891.

But the rule for collateral attacks is the opposite of the rule for direct attacks. For a judgment to be overturned on collateral attack, the record must affirmatively establish the absence of jurisdiction. In Ex

parte Johnson, a juvenile-delinquency case, we explained this to be the rule that applied in habeas corpus:

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

Elsewhere, we have stated that it is "the settled law of this State that the judgment of a court of competent jurisdiction cannot be collaterally attacked unless the record affirmatively shows lack of jurisdiction." FN34 Our cases have consistently characterized habeas corpus as a collateral attack on a judgment of conviction.FN35 Similarly, the Texas Supreme Court has explained that a jurisdictional challenge will succeed on collateral attack only if the "record affirmatively reveals a jurisdictional defect." FN36 Moreover, the Supreme Court has suggested in the default-judgment context that "mere technical defects" in service that would result in reversal on direct attack should not result in overturning a judgment on collateral attack: "But the cases on which [the party] relies simply reiterate the strict compliance requirement in the context of a direct attack on a default judgment. Extending these stringent standards to collateral attacks involving mere technical defects in service would pose a serious threat to the finality of judgments." FN37

FN33. 131 Tex.Crim. 438, 440, 99 S.W.2d 598, 599 (1936).

FN34. Douglas v. State, 58 Tex.Crim. 122, 125, 124 S.W. 933, 935–36 (1910).

FN35. See Garza v. State, 435 S.W.3d 258, 261–62 (Tex.Crim.App.2014) (contrasting direct appeal with habeas case, calling the latter "a collateral proceeding" and quoting from an opinion that termed habeas corpus a "collateral attack"); Ex parte Denton, 399 S.W.3d 540, 545 (Tex.Crim.App.2013) (referring to habeas corpus as a "collateral attack"); Ex parte Baker, 185 S.W.3d 894, 897 (Tex.Crim.App.2006) (referring to "the collateral procedure of habeas corpus").

FN36. Alfonso v. Skadden, 251 S.W.3d 52, 55 (Tex.2008) (In former husband's proceedings to enforce divorce decree, former wife collaterally attacked the decree. Record affirmatively showed jurisdictional defect in original proceedings.).

FN37. PNS Stores v. Rivera, 379 S.W.3d 267, 274 (Tex.2012).

Our own cases in the juvenile-transfer context are not inconsistent with the rule that the record must affirmatively show the absence of jurisdiction to justify relief on habeas corpus. The cases in which we have granted relief on a juvenile-transfer claim did so on direct appeal from the criminal conviction, not habeas corpus.FN38 An argument could be made that the cases do not involve direct attacks because the juvenile could have immediately appealed the transfer decision rather than waiting for the direct appeal from the criminal conviction.FN39 For that reason, we will assume, without deciding, that the cases should be treated as collateral attacks. In Grayless, "the record reflect[ed] that no summons ever was issued" on the transfer petition, FN40 so the record affirmatively reflected the absence of jurisdiction. In Perry Johnson, we stated, "The record does not show that a summons was ever issued," FN41 but we also explained that we had "a full and complete record of the juvenile proceedings," FN42 and we concluded that "the instant case shows on its face that the juvenile court did not have jurisdiction." FN43 In Michael Johnson, we found that the summons was defective for failing to state that the hearing was for the purpose of discretionary transfer, and we said that "there is nothing in the record to show that" the waiver requirements of § 51.09 were met.FN44 As we have explained above, one of the requirements of § 51.09 is that the waiver be in writing or in court proceedings that are recorded.FN45 The Michael Johnson opinion quoted from portions of the reporter's record in the juvenile proceedings and did not state that any portion of the reporter's record was missing.FN46 Because the reporter's record was available, and it did not reflect a waiver as § 51.09 requires, this Court's observation that the record did not show compliance with § 51.09 was tantamount to saying that the record affirmatively showed non-compliance.

FN38. See Grayless, 567 S.W.2d at 219; Johnson v. State, 551 S.W.2d 379, 380 (Tex.Crim.App.1977) ("Perry Johnson"); Johnson, 594 S.W.2d at 84 ("Michael Johnson").

FN39. The ability to make an earlier appeal arguably makes the situation analogous to an appeal from the revocation of regular or deferred adjudication probation, where we prohibit challenges to the imposition of probation (an earlier proceeding from which an appeal could have been taken) unless the challenge falls within the "void judgment exception." See Nix v. State, 65 S.W.3d 664, 667–68 (Tex.Crim.App.2001).

FN40. 567 S.W.2d at 219.

FN41. 551 S.W.2d at 380.

FN42. Id. at 380 n. 1.

FN43. Id. at 382.

FN44. 594 S.W.2d at 86.

FN45. See this opinion at n.23 and accompanying text.

FN46. 594 S.W.2d at 85.

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

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

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

Applicant further suggests that, even if a waiver would have been valid if the August 4 hearing had been recorded, "the hearing was not recorded." But the record in the present case does not establish that the August 4 hearing was not recorded. All that can be established is that we do not currently have—and cannot obtain—a recording of the August 4 hearing. Any uncertainty about whether either the August 1 hearing or the August 4 hearing was recorded must be held against applicant, as the party attempting to disturb the juvenile court's disposition in a collateral attack.FN47

FN47. Applicant also contends, for reasons detailed in this opinion at n.50, that it is "extremely doubtful that there was any court reporter's record to be obtained." Given our response in n.50 and the payment vouchers for court-reporter services on August 1 and August 4, we disagree with applicant's "extremely doubtful" assessment, but, in any event, applicant's concerns do not affirmatively establish that neither the August 1 nor August 4 proceedings were recorded.

Applicant further argues that there was no "affirmative showing" as required by W.L.C. that applicant was waiving proper service. But W.L.C. was a direct attack, where affirmative showing of the requisite waiver would be required.FN48 As we explained above, the opposite rule applies on collateral attack, where the record must affirmatively show that the proper waiver did not take place.

FN48. See this opinion at n.32, accompanying text, and associated paragraph.

Applicant contends that "if he had waived proper service at the August 1st hearing, there would have been no need to reschedule the hearing, thus indicating that there was no waiver." FN49 This surmise on applicant's part is not sufficient to affirmatively show that a proper waiver did not take place. Even with a waiver, the juvenile court may have thought it prudent to satisfy the two-day notice rule by delaying the hearing to August 4, or applicant or his attorney may have insisted on the two days as a condition of executing the waiver. Or the hearing may have been rescheduled to August 4 for reasons unrelated to the lateness of service.FN50¿

FN49. Emphasis in applicant's brief.

FN50. In the portion of applicant's brief devoted to laches, applicant says, "[I]t is undisputed that the case was reschedule[d] from August 1st to August 4th due to a lack of time service on [a]pplicant." Although the record may support an inference that the hearing was rescheduled because of the late service, the record does not definitively establish why the hearing was rescheduled.

Conclusion: Applicant was served with a summons for a transfer hearing. Any defects associated with that service were waivable under § 51.09. Although § 51.09 requires that the waiver be in writing or occur in a hearing that was recorded, such a waiver could have occurred at a recorded hearing on August 1 or August

4, with the record of the relevant hearing no longer being in existence. Consequently, the record does not affirmatively establish that the juvenile court lacked jurisdiction to transfer the case, and therefore does not affirmatively establish the absence of jurisdiction in the district court. We deny relief.

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

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

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

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

OBTAINING PRESENCE OF CHILD WITNESS IN A CRIMINAL TRIAL

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

Held: Conditional relief granted

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

Consistent with Section 34.002, the agreement empowered Melissa to:

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

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

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

The Code of Criminal Procedure

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

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

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

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

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

Adequate Remedy at Law

Magana argues that Relator has an adequate remedy for Respondent's exclusion of D.G.'s testimony in the criminal trial because Respondent issued orders for attachment of Irene individually and for Irene "along with" the child witness. The attachments provide nothing more than a potential remedy in the event Irene can be located. Given that the issue arose during the middle of a jury trial and Irene had purposefully absented herself from the trial after recanting her original statement to police, the remedy is uncertain at best. Magana additionally argues that Relator has a right to raise the issue on appeal in the event Magana is convicted and he appeals. See TEX.CODE CRIM.PROC.ANN. art. 44.01(c)(West Supp. 2014)("The state is entitled to appeal a ruling on a question of law if the defendant is convicted in the case and appeals the judgment"). The conditional right to appeal afforded the State by Article 44.01(c) is far too speculative and uncertain to constitute an adequate remedy. We conclude that Relator does not have an adequate remedy.

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

SEX OFFENDER REGISTRATION

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

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

Facts: Appellant R.A. was alleged to have engaged in delinquent conduct by committing the offenses of aggravated sexual assault and indecency with a child. At the time of these offenses, R.A. was fourteen years old and the victim was six years old. R.A. stipulated to the truth of the allegations in the petition. In March 2008, when R.A. was fifteen years old, the trial court, sitting as a juvenile court (hereinafter the "Juvenile Court"), signed an adjudication order in which it found that R.A. had engaged in delinquent conduct. On the

same day, after a disposition hearing, the trial court signed a disposition order in which the Juvenile Court found that R.A. was in need of rehabilitation and that the protection of the public and of R.A. required a disposition to be made. The Juvenile Court placed R.A. on probation for two years, subject to various conditions.

On the same day the Juvenile Court signed the disposition order, the Juvenile Court also signed an "Order Deferring Sex Offender Registration." In this order, the Juvenile Court deferred its decision as to whether R.A. should be required to register as a sex offender under Chapter 62 of the Code of Criminal Procedure.1 The Juvenile Court stated that the period of deferment would expire upon R.A.'s completion of probation or release or parole by the Texas Youth Commission.2 The record indicates that R.A.'s probation ended in March 2010, when he was seventeen years old.

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

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

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

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

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

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

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

Held: Affirmed

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

R.A. asserts that the Juvenile Court lacked jurisdiction over the First Order. If the Juvenile Court lacked jurisdiction over the First Order, this court lacks jurisdiction over this appeal from the First Order. See Curry v. Harris County Appraisal District, 434 S.W.3d

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

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

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

First Order Opinion:

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

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

court's lack of jurisdiction based on the child's age at a later hearing, or on appeal. See id. The In re N.J.A. court held that, because the respondent in that case turned eighteen before the disposition hearing, the juvenile court's jurisdiction was limited to transferring the case to the appropriate district court or criminal district court or to dismissing the case but that the court lacked jurisdiction to render an adjudication or disposition order. See id.

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

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

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

A juvenile adjudicated of delinquent conduct based on one of the offenses listed in article 62.001(5) (including the offenses of aggravated sexual assault and indecency with a child) is required to register as a sex offender unless exempted from registration under subchapter H of Chapter 62. See Tex.Code Crim. Proc. Ann. arts. 62.001(5), 62.051, 62.351, et seq. Under Texas Family Code section 54.05(a), various dispositions, including R.A.'s disposition, may not be modified on or after the child's eighteenth birthday. See Tex. Family Code Ann. § 54.05(a), 54.05(a) (West, Westlaw through 2013 3d C.S.). Under Texas Family Code section 54.05(b), various dispositions, including R.A.'s disposition, automatically terminate on the child's eighteenth birthday. See Tex. Family Code Ann. § 54.05(b). Nonetheless, the duty to register as a sex offender arises from Chapter 62, and R.A.'s duty to register or any exemption therefrom is not part of the disposition that terminated on R.A.'s eighteenth birthday.4

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

act and In re N.J.A. indicates that the juvenile court lacks jurisdiction because the respondent is eighteen or older, subchapter H of Chapter 62 has superseded In re N.J.A. See Tex.Code Crim. Proc. Ann. art. 62.351, el seq.; In re B.R.H., 426 S.W.3d at 167; In re J.M., 2011 WL 6000778, at *1–3.

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

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

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

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

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

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

deadline for the State to file a motion or for a hearing to be held.

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

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

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

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

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

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

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

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

The Second Order did not vacate or replace the Juvenile Court's First Order, nor did the Second Order

modify the First Order. In the Second Order, the Juvenile Court evaluated whether or not the interests of the public required that R.A. continue to register privately as a sex offender at the time of the Second Order. The Juvenile Court did not address whether the interests of the public required that R.A. register privately as a sex offender at the time of the First Order or whether the First Order should be modified, vacated, or replaced. In the First Order, the trial court ordered R.A. to register privately as a sex offender under Chapter 62 and did not address R.A.'s Texas Juvenile Sex Offender Risk Assessment. In the Second Order, the trial court ordered R.A. to continue to register privately as a sex offender under Chapter 62 and reduced R.A.'s Texas Juvenile Sex Offender Risk to "moderate risk." Though the trial court may have modified R.A.'s risk assessment, that risk assessment was not contained in the First Order; therefore, the order reducing the risk assessment did not modify the First Order. Because the Juvenile Court did not modify, vacate, or replace the First Order in the Second Order, we conclude that this court does not have jurisdiction over the Second Order under Rule 27.3. See Tex.R.App. P. 27.3.

Conclusion to Second Order: Because no notice of appeal has been filed from the Second Order and because there is no other basis for this court to exercise appellate jurisdiction, we conclude that we lack appellate jurisdiction over the Second Order and R.A.'s issues challenging that order.6 See Overka v. Bauri, No. 14–06–00083–CV, 2006 WL 2074688 at *1 (Tex.App.—Houston [14th Dist.] Jul. 27, 2006, no pet.) (mem.op.).

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

A DISCRETIONARY TRANSFER TO ADULT COURT WAS PROPER, WHERE THE JUVENILE TRIAL COURT PROVIDED A SURE-FOOTED AND DEFINITE BASIS FROM WHICH AN APPELLATE COURT COULD DETERMINE THAT ITS DECISION WAS IN FACT APPROPRIATELY GUIDED BY THE STATUTORY CRITERIA, PRINCIPLED, AND REASONABLE.

¶ 15-2-2A. **Gonzales v. State**, No. 04-14-00352-CR, --- S.W.3d ----, 2015 WL 2124773 (Tex.App.-San Antonio, May 6, 2015).

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

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

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

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

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

Gonzales arrived at the police station between 2:30 a.m. and 3:00 a.m. Detective Roberts told both Gonzales and his mother "If y'all don't want to do it tonight, we don't have to do it tonight." The record shows Detective Roberts insisted Gonzales was not

under arrest, and that Gonzales and his mother came in on their own, and they were both free to leave. In fact, Detective Roberts told both Gonzales and his mother that Gonzales would be leaving at the end of the interview. Detective Roberts did not Mirandize Gonzales and did not take him before a magistrate.

Detective Roberts asked Gonzales if he knew what was going on, if he was in pain, and how he felt. Gonzales responded, "I feel fine." Detective Roberts testified that Gonzales was able to answer all of his questions and did not appear to be in any distress. Gonzales originally told Detective Roberts that Whitley fired first and that he returned fire; Detective Roberts confronted him with Estrada's version of events and Gonzales ultimately told Detective Roberts their plan was to steal the marijuana from Whitley. Gonzales also told Roberts that he always takes a gun with him whenever he goes to buy weed.

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

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

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

Gonzales contends the juvenile court erred when it found that the protection of the public and rehabilitation of Gonzales could not be served with the juvenile probation's resources and programs. At the hearing, defense counsel maintained that a Texas Juvenile Justice Department commitment would have adequately protected the public and rehabilitated Gonzales. Gonzales argued he was not a violent person by nature and exhibited excellent behavior throughout both the proceedings and all meetings with the probation officers. Defense counsel argued that Gonzales was the picture of someone who could be rehabilitated. He acknowledged the wrongfulness of Gonzales's delinquent behaviors and expressed his beliefs that Gonzales had improved because "he grew up."

On appeal, Gonzales further argues the trial court erred by failing to focus on the individual child. Instead, Gonzales contends the juvenile court focused solely on the severity of the allegations. Gonzales was cooperative with law enforcement and there were no reports of behavior issues during his incarceration. Gonzales suffers from cerebral palsy and epilepsy and requires services available through the juvenile system. Finally, counsel argues that determinate sentencing is a good option and would provide adequate protection to the community at large.

The State contends the factors weigh heavily in favor of transferring jurisdiction. Although the individual factors are subject to review, the ultimate determination is based on a review of the entire record. The State acknowledged Gonzales's cerebral palsy and epilepsy; yet, the State pointed out neither diagnosis prevented him from committing either this offense or previous offenses which invoked the juvenile justice system. Moreover, this was not just a murder—but felony murder. Gonzales went to the scene intending to steal drugs from a drug dealer. He took his own weapon to the drug deal and murdered the dealer. This was the third time in four years that Gonzales was involved in the legal system and, although he was not classified as a gang member, he did claim membership in YTC (Young Texas Click), a "tagging crew."

Held: Affirmed

Opinion: The transfer of a juvenile offender from juvenile court to criminal court for prosecution as an adult should be regarded as the exception, not the rule; the operative principle is that, whenever feasible, children and adolescents below a certain age should be "protected and rehabilitated rather than subjected to the harshness of the criminal system[.]" Moon v. State,451 S.W.3d 28, 36 (Tex.Crim.App.2014) (alteration in original) (quoting Hidalgo v. State, 983 S.W.2d 746, 754 (Tex.Crim.App.1999)).

The State bears the burden to convince the juvenile court, by a preponderance of the evidence, that "the welfare of the community requires transfer of jurisdiction for criminal proceedings, either because of the seriousness of the offense or the background of the child (or both)." Id. at 40–41 (citing Faisst, 105 S.W.3d at 11). The juvenile court's order must provide that the section 54.02(f) factors were taken into account in making the de-termination. Id. at 41–42. An appellate court may only set aside the juvenile court's de-

termination upon a finding the trial court abused its discretion. Id. at 42.

C. Standard of Review

Until recently, the appellate courts applied different guidelines for the abuse of discretion standard. Compare In re M.D.B., 757 S.W.2d 415, 417 (Tex.App.–Houston [14th Dist.] 1988, no writ) ("In reviewing the [juvenile] court's action for an abuse of discretion, this court must determine if the [juvenile] court acted without reference to any guiding rules and principles.") with Bleys v. State, 319 S.W.3d 857, 862–63 (Tex.App.–San Antonio 2010, no pet.), abrogated by Moon, 451 S.W.3d at 47. (reviewing the factual sufficiency of the evidence to support the juvenile court's finding under Section 54.02(f)(4)). In Moon, 451 S.W.3d at 47, the Court of Criminal Appeals explained that in evaluating a juvenile court's decision to waive its jurisdiction, an appellate court should first review the juvenile court's specific findings of fact regarding the Section 54.02(f) factors under "traditional sufficiency of the evidence review." But it should then review the juvenile court's ultimate waiver decision under an abuse of discretion standard.

The court further explained, "In other words, was [the juvenile court's] transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria?" Id. Our review begins with an analysis of the factors outlined in Texas Family Code section 54.02(f).

D. Analysis under Texas Family Code section 54.02(f)
Gonzales's case was called before the juvenile court on October 19, 2012.

1. Whether Alleged Offense Was Against a Person or Property

The first factor listed in section 54.02(f) is "whether the alleged offense was against person or property." TEX. FAM.CODE. ANN. § 54.02(f)(1). The alleged offense was the capital murder of James Whitley. Detective Roberts testified as to his conversation with Gonzales and his admitted involvement in the offense. Gonzales admitted that he and Estrada planned to rob Whitley during a marijuana purchase. Gonzales brought his firearm to the planned robbery. Gonzales planned the robbery and fired the shot that killed Whit-ley.

2. Sophistication and Maturity of the Child

The second factor is "the sophistication and maturity of the child." Id. § 54.02(f)(2); Faisst, 105 S.W.3d at 11. Bexar County Juvenile Probation Officer Traci Geppert testified that she met with Gonzales and his family on multiple occasions and she considered him to be sophisticated and mature. She further relayed that he understood both the proceedings and the charges against him.

Also available to the trial court was the psychiatric evaluation requested by the juvenile probation office. Dr. Heather Holder's report provided that "[Gonzales] knows right from wrong in a general sense, and he is specifically aware of the wrongfulness of the charge of which he is currently accused." Additionally, she concluded "it is believed that [Gonzales] is mature and sophisticated in that he is responsible for his conduct and able to assist his attorney in his defense." See TEX. FAM.CODE ANN.. § 54.02(f)(2).

Gonzales's mother also testified before the juvenile court. She described her son as very much in control during the incident. When he originally lied to the officer, she directed him to tell the officers the truth and he did so.

3. Record and Previous History of the Child

The third factor to consider is "the record and previous history of the child." Id. § 54.02(f)(3); Faisst, 105 S.W.3d at 11. Gonzales had two prior juvenile probations. In 2008, he was placed on deferred probation for possession of a controlled substance, Xanax. In 2009, Gonzales was placed on formal probation for the charge of terroristic threats stemming from Gonzales threatening another student with a pair of scissors. See TEX. FAM.CODE ANN.. § 54.02(f)(3); Faisst, 105 S.W.3d at 11. He completed his probation in April of 2010. Both charges resulted in Gonzales being expelled from the school he was attending.

At the time of his arrest, Gonzales was a student at Robert E. Lee High School and several letters were presented to the trial court describing Gonzales as a nice student without any outward displays of violent behavior.

4. Adequate Protection of the Public and Likelihood of Rehabilitation

The fourth factor to consider is "the prospect of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court." TEX. FAM.CODE ANN. § 54.02(f)(4); Faisst, 105 S.W.3d at 11. At the time of the offense, Gonzales was living with his mother and two sisters. When his mother was notified of the shooting, her initial reaction was that it could not be Gonzales because he was at home. She was unaware that he had left the residence and did not know that he owned a firearm. Geppert further addressed Gonzales's cerebral palsy and epilepsy diagnoses. He had a special education distinction based on his orthopedic impairment and a reading disorder. He was mainstreamed at the high school and had not exhibited behavioral issues while in detention. During cross-examination, Gonzales's mother conceded that Gonzales had recently run away from home because he did not like "living by the rules." However, after living

on the streets for a period of time, he had returned to their home.

Geppert testified the juvenile court system's probation jurisdiction would end when Gonzales turned eighteen and the jurisdiction for Texas Youth Commission would end when Gonzales turned nineteen. Geppert explained the only other option, besides adult sentencing, was determinate sentencing. She did not believe determinate sentencing was proper because of the allegations: the charge was murder, Gonzales was carrying his weapon, and Gonzales was purchasing marijuana. Additionally, Geppert testified that she did not believe the juvenile probation system had sufficient time to work with Gonzales given the severity of the allegations. See TEX. FAM.CODE ANN.. § 54.02(f)(3); Faisst, 105 S.W.3d at 11. Her supervisor agreed, and so did a staffing committee, consisting of two supervisors and a Child Protective Services representative.

5. Specific Factual Findings

Not only must the record substantiate the court's findings, but the juvenile court must make "case-specific findings of fact" with respect to the 54.02(f) factors. See Moon, 451 S.W.3d at 51. Here, the juvenile court judge made the following findings:

1) Gonzales was alleged to have committed murder under Texas Penal Code section 19.02;

2) Gonzales was sixteen at the time of the hearing;

3) Gonzales was fifteen at the time of the offense;

4) Gonzales's mother resides in Bexar County;

5) no adjudication hearing had yet been conducted;

6) the parties were properly notified of the hearing;

7) prior to the hearing, the trial court obtained a psychological assessment including a psychological examination, a complete diagnostic study, a social evaluation, full investigation of Gonzales, Gonzales's circumstances, and the circumstances of the alleged offense;

8) the offense was against a person;

9) Gonzales is sophisticated and mature enough to be transferred into the criminal justice system and he understands the allegations, the court proceedings, and their possible consequences;

10) the procedures, services, and facilities available to the Juvenile Court are inadequate for rehabilitation of Gonzales while also protecting the public; and

11) after a full investigation and hearing, Gonzales's circumstances, and the circumstances of the offense, there is probable cause to believe that Gonzales committed the offense and, because of the seriousness of the offense and the background of Gonzales, the welfare of the community required that criminal proceedings proceed in Criminal District Court.

Conclusion: Here, the juvenile court's findings are substantially more case-specific than the findings analyzed in Moon. See Moon, 451 S.W.3d at 51 (concluding the trial court's findings were superfluous because it only considered fact that offense was against another person). The juvenile court made specific findings as to Gonzales. Cf. id. Based on a review of the record, including the trial court's findings of fact, we conclude the trial court provided "a sure-footed and definite basis from which an appellate court can determine that its decision was in fact appropriately guided by the statutory criteria, principled, and reasonable." Id. at 49; cf. Guerrero v. State, No. 14–13–00101–CR, 2014 WL 7345987, at *3 (Tex.App.–Houston [14th Dist.] Dec. 23, 2014, no pet.)(mem. op., not designated for publication) (concluding the trial court's order was deficient under Moon). Accordingly, we overrule Gonzales's first issue.