Juvenile Law Section
STATE BAR OF TEXAS

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NEWSLETTER EDITOR

Associate Judge Pat Garza
386th District Court
San Antonio, Texas

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Juvenile Law Section Website
Nuts and Bolts of Juvenile Law
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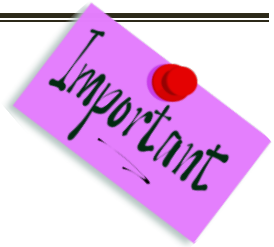
Dear Juvenile Law Section Members:

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

Krystal, my daughter turned 11 on the 23rd of February. It just doesn't seem that long ago that I was speaking at the Juvenile Law Conference worried about my wife going into labor with her. I will turn more years than I care to count this month. They say you lose three things when you get old. The first thing is your memory...and I just can't remember the other two things. You know, I always thought that by the time I got this old, I would be thoughtful, wise and nostalgic. But it's hard to be thoughtful, wise, and nostalgic when you can't remember anything. OK everyone, I'll stop. Enjoy the spring and enjoy your newsletter.

I wrote those words 10 years ago, in 2008. This February Krystal, my little girl, turns 21. A full-fledged adult!? You know how people always ask about mile-stone birthdays. How did you feel when you turned 40, or 50, or 60? The thing is, my birthdays never really affected me. What affected me was when my kids hit mile-stone birthdays. My oldest is 35 now, so I've had a few of those mile-stone birthdays. First, it's when they hit 10. Then 18. Followed closely by 21. I had 14 years between my oldest turning 21 and my youngest hitting that mile-stone. There were a lot of birthdays in between. And while some affected me more than others, they all had an impact. But as time went on, I adjusted. Now, 10 years after writing that piece at the top of the page, I do feel more thoughtful, older and wiser. I take more pride in my children and in what they are accomplishing. I've learned that growing up today is hard. That stress and anxiety is quite prevalent, especially in young people. And while we may look at their worries and angst as unnecessary and needless, I know for them, it couldn't be more real and incapacitating. That is something that time and experience has taught me.

So, to my latest adult I say this:

First, don't be afraid to dream, and to go after that dream. Be who you were meant to be. Fear and anxiety are real emotions that we all experience. But we can't and must not allow these emotions to dictate to us what we can and cannot do. Everything we do has risk and everything we do has rewards. If you fall, you get up. If you fall again, you get up again. You never quit! Fear is not your enemy. Complacency is. Find something you love to do and push yourself to do it. You see, if you love what you do for a living, you will never work a day in your life.

Secondly, no matter what you decide to do, work hard at it, strive to be the very best you can be. Don't be afraid to take charge and to be a leader. If you can do that, you can make others better at what they do as well.

Thirdly, take care of yourself. Eat right. Exercise regularly. Take care of your teeth. Treat everyone you meet with respect. Help others when you can. Love and cherish your family and be there when they need you.

Finally, be happy. Remember, happiness is not a matter of good fortune or worldly possessions. It's a mental attitude. It comes from appreciating what you have, instead of being miserable about what you don't have. And while success is a good thing, it is not the key to happiness. Happiness is the key to success. I can't help but feel that you, like me, have found the words of Franklin Roosevelt so appropriate, "that happiness lies in the joy of achievement and in the thrill of a creative effort." Never lose that. Smile every day. Laugh every day. And think every day. You have a wonderful world out there that can't wait to have you make it better.

31st Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's 31st Annual Juvenile Law Conference will be held February 25 thru February 28, 2018, at the Horseshoe Bay Resort in Horseshoe Bay, Texas. Horseshoe Bay Resort is an expansive hotel with golf, tennis, and restaurants plus a marina and a landing strip. The theme is "Current Trends in Juvenile Justice," and Chair-Elect Kaci Singer and her planning committee have been working hard to create an agenda with a plethora of topics for all juvenile justice practitioners. Keynote speakers include Dr. Rita Cameron-Wedding, a professor at Sacramento State University, who will be speaking about how implicit biases impact the decisions we make, and Michael Nerney from Long Lake, New York, who will be speaking about the adolescent brain. This conference will also feature a nuts and bolts mini-conference on Sunday for anyone interested in learning more about juvenile law basics. There will be no extra cost associated with the mini-conference, but only those registered to attend the conference may attend the mini-conference and space will be limited on a first come, first-served basis. The conference flyer has been sent electronically and is available online at www.juvenilelaw.org.

Child Protection Law Section. The State Bar of Texas has approved the formation of the Child Protection Law Section. The State Bar of Texas Board of Directors formed the new section by unanimous vote on January 26, 2018. I have included an article by Debra H. Lehrmann, who posted it on January 31, 2018, regarding the formation of the new section.

Officer and Council Nominees. The Annual Juvenile Law Section meeting will be held in Horseshoe Bay, Texas on February 26, 2018, in conjunction with the Juvenile Law Conference. The Juvenile Law Section's nominating committee submitted the following slate of nominations:

Officers
Kaci Singer, Chair (not a nomination because automatic)
Mike Schneider, Chair Elect
Patrick Gendron, Treasurer
Bill Cox, Secretary
Kameron Johnson, Immediate Past Chair (not a nomination because automatic)

Council Positions Ending 2021
Patricia Cummings, Round Rock, Texas
John Gaunt, Belton, Texas
Jenna Reblin, Austin, Texas

Council Position Ending 2018
Patricia Cummings, Bill Cox, and Michael O'Brien

Nominations from the floor during the meeting will be accepted. If you have someone that you would like to nominate from the floor, contact the Chair of the Nominations Committee, Riley Shaw at (817)838-4613 or rshaw@tarrantcounty.com.

A truly rich man is one whose children run into his arms when his hands are empty.

Unknown

Juvenile Law Section www.juvenilelaw.org Volume 32, Number 1

CHAIR'S MESSAGE By Kameron Johnson

Once upon a time in a place far away children were kept in rural towns in large facilities where "effective rehabilitation treatment" was "impossible." The children went to a wizard and ask that all the rural places be closed. The wizard after listening to everyone involved held that expert witness testimony showed that it would be impossible to eradicate the brutality and indifference without complete abandonment of the institutions because the juvenile delinquents were brutally punished, assaulted, raped, and subjected to other various forms of violence with great frequency."

Notwithstanding the fictional prose, in 1974 a federal judge ordered the closing of juvenile state facilities in the landmark case Morales v. Turman. A review of recent headlines finds that "our" state juvenile facilities are still facing some challenges. When I hear of the challenges facing our juvenile justice system I think more about what our community has accomplished in just the last decade. Implementation of treatment programs that are nationally recognized; evidenced based programs that have impacted and reduced recidivism; implementation of educational and vocational programs that are providing real employment opportunities for our youth. The Texas Juvenile Justice Department is here to stay…we may change the name from time to time however we will always have youth who will be removed from their homes after being involved in delinquent conduct. The challenges we are faced with is what to do with these youth. What is meant by "least restrictive" environment? What is meant by juvenile, rehabilitation, treatment and punishment? There are so many topics and issues that are relevant to juvenile justice and are vital to the future and direction of our juvenile justice system in Texas.

We are coming together as a community February 25th through the 28th in Horseshoe Bay, Texas, to do what we do best, shape juvenile justice. Please join us. A program full of outstanding presenters and advocates from the vast spectrum of juvenile justice will be waiting. For me, even more valuable than the great presentations is the opportunity to meet and relax with so many friends and colleagues. Come join us. Recharge and recommit to being the best you can be for the children of Texas. Besides, it's Horseshoe Bay!

A NEW DAY FOR CHILDREN By Debra H. Lehrmann

It is a new day for our most precious resource—our children. The creation of the State Bar of Texas Child Protection Law Section became a reality on January 26, when the State Bar of Texas Board of Directors voted unanimously to form the new section. Both the Family Law and Juvenile Law sections enthusiastically supported this effort. This significant accomplishment represents decades of hard work on the part of many legal professionals throughout the state who are committed to improving the lives of children.

The history of child welfare protection law is relatively brief. Traditionally, children had few rights, with full authority over their lives being vested in their parents. A paradigm shift began in the 1960s with the help of several Supreme Court decisions extending certain constitutional rights to children. During the 1960s, the Department of Public Welfare began to deal head-on with abuse and neglect in Texas. In 1962, the U.S. Congress defined abuse and neglect in the child welfare provisions of the Public Welfare Amendments to the Social Security Act. And in 1974, the federal movement to prevent child abuse and neglect began in earnest with the creation of the Child Abuse Prevention and Treatment Act, or CAPTA. This act created the National Center on Child Abuse and Neglect, or NCCAN, and provided federal funding to state child-protection agencies.

Thankfully, the historical treatment of children as chattel has given way to our current recognition that children are individuals entitled to protection and respect. Today society realizes that children are frequently innocent participants in events over which they have no control and from which they must be sheltered. Two competing realities present real challenges in this area of the law: (1) children frequently lack the maturity and knowledge necessary to protect themselves and to make appropriate decisions, and (2) children are worthy individuals entitled to varying degrees of independence, deference, and respect depending upon their maturity levels.

As a jurist who has devoted much of my professional career to helping children, I am proud beyond words of this meaningful action taken by the State Bar. The willingness of the bar to create and support this section reflects society's move toward recognition of children as autonomous beings with individual needs, desires, feelings, and concerns. I admire the State Bar of Texas for rising to the challenge—our children deserve it.

Debra H. Lehrmann is a justice of the Supreme Court of Texas and the inaugural chair of the State Bar of Texas Child Protection Law Section.

REVIEW OF RECENT CASES

By Subject Matter

By Case

APPEALS

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

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

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

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

Held: Affirmed. Motion to Withdraw Denied

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

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

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

COLLATERAL ATTACK

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

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

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

Held: Writ Dismissed

Memorandum Opinion: Except when in conflict with a provision of the Texas Family Code, the Texas Rules of Civil Procedure govern juvenile proceedings. See TEX. FAM. CODE ANN. § 51.17(a) (West, Westlaw through 2017 1st C.S.); In re Dorsey, 465 S.W.3d 656, 657 (Tex. Crim. App. 2015) (orig. proceeding) (Richardson, J. concurring); In re M.R., 858 S.W.2d 365, 366 (Tex. 1993) (per curiam). A person confined pursuant to an adjudication and disposition in juvenile court may seek habeas corpus relief. See TEX. FAM. CODE ANN. § 56.01(o) (West, Westlaw through 2017 1st C.S.). Juveniles may file applications for writs of habeas corpus pursuant to Article V, Section 8 of the Texas Constitution, which gives "[d]istrict [c]ourt judges ... the power to issue writs necessary to enforce their jurisdiction." TEX. CONST. art. V, § 8; see Ex parte Valle,

104 S.W.3d 888, 890 (Tex. Crim. App. 2003). Thus, to the extent that relator seeks relief from confinement resulting from his juvenile adjudication, relator may file an application for writ of habeas corpus pursuant to Article V, Section 8 of the Texas Constitution with the district court where he was adjudicated. We lack jurisdiction over such a proceeding. See TEX. CONST. art. V, § 6; TEX. GOV'T CODE ANN. § 22.221 (West, Westlaw through 2017 1st C.S.). And, because proceedings in juvenile court are considered civil cases, the Texas Supreme Court, rather than the Texas Court of Criminal Appeals, is the court of last resort for such matters. In re Dorsey, 465 S.W.3d at 656; In re Hall, 286 S.W.3d 925, 927 (Tex. 2009) (orig. proceeding).

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

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

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

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

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

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

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

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

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

granted the State's motion for nunc pro tunc judgment by signing an "Order on Motion to Dismiss for Lack of Jurisdiction and Motion for Entry Nunc Pro Tunc."

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

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

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

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

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

Held: Writ of Mandamus conditionally granted

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

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

This Court has summarized the distinction between judicial and clerical errors:
A clerical error is a discrepancy between the entry of a judgment in the record and the judgment that was actually rendered. Barton [v. Gillespie, 178 S.W.3d 121, 126 (Tex. App.—Houston [1st Dist.] 2005, no pet.)]. Rendition occurs when the trial court's decision is officially announced either by a signed memorandum filed with the clerk of the court or orally in open court. Id.
Unlike with clerical errors, the trial court cannot correct a judicial error after the expiration of plenary power by entering a judgment nunc pro tunc. Escobar, 711 S.W.2d at 231. A judicial error is one that arises from a mistake of law or fact that requires judicial reasoning to correct and it occurs in the rendering, rather than the entering of the judgment. Barton, 178 S.W.3d at 126. "Thus, even if the court renders incorrectly, it cannot alter a written judgment which precisely reflects the incorrect rendition." Escobar, 711 S.W.2d at 232. Stated another way, if the judgment entered is the same as the judgment rendered, regardless of whether the rendition was incorrect, a trial court has no nunc pro tunc power to correct or modify the entered judgment after its plenary [power] expires. Hernandez v. Lopez, 288 S.W.3d 180, 187 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (op. on rehearing) [(emphasis in original)]. A judgment rendered to correct a judicial error after plenary power has expired is void. Id. at 185 (citing Dikeman v. Snell, 490 S.W.2d 183, 186 (Tex. 1973)).
*4 In re D & KW Family, L.P., No. 01-11-00276-CV, 2012 WL 3252683, at *5 (Tex. App.—Houston [1st Dist.] Aug. 9, 2012, orig. proceeding) (mem. op.) (internal quotation marks omitted).

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

662246, at *1 (Tex. App.—San Antonio Apr. 4, 2002, pet. denied) (citation omitted). When deciding whether an error in a judgment is clerical or judicial, the court must look to the judgment actually rendered and not the judgment that should have been rendered. A.M.R., 528 S.W.3d at 123 (citing, inter alia, Escobar, 711 S.W.2d at 232). "Evidence may be in the form of oral testimony of witnesses, written documents, previous judgments, docket entries, or the judge's personal recollection." Hernandez, 288 S.W.3d at 185 (citation omitted).

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

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

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

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

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

B. Relator Lacks an Adequate Appellate Remedy

As discussed above, mandamus relief is proper when the trial court issues a void order, and the relator need not demonstrate the lack of an adequate remedy by appeal. See In re Sw. Bell Tel., 35 S.W.3d at 605; In re Flores, 111 S.W.3d at 818. In any event, a party can

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

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

CRIMINAL PROCEEDINGS

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

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

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

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

Held: Judgment modified, Affirmed as modified.

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

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

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

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

DETERMINATE SENTENCE TRANSFER

IN DETERMINATE SENTENCE TRANSFER HEARING TO TDCJ, JUVENILE FAILED TO OVERCOME THE STRONG PRESUMPTION THAT HIS TRIAL COUNSEL'S CONDUCT WAS DEFICIENT FOR FAILING TO REQUEST THE APPOINTMENT OF A MENTAL HEALTH EXPERT.

¶ 18-1-6. **In the Matter of T.C.**, MEMORANDUM, No. 02-17-00007-CV, 2018 WL 283785 (Tex. App.—Fort Worth, 1/4/2018).

Facts: On October 23, 2014, the trial court adjudicated then fifteen-year-old Appellant T.C. as having engaged in delinquent conduct by committing the offense of indecency with a child by contact. See Tex. Penal Code Ann. § 21.11(a)(1) (West Supp. 2017). A jury heard evidence concerning what disposition should be made

and sentenced him to twenty years in the Texas Juvenile Justice Department (TJJD). The trial court, accordingly, committed him to the TJJD's care, custody, and control for a determinate sentence of twenty years, with a possible transfer to the Institutional Division of the Texas Department of Criminal Justice (TDCJ). A little more than two years later, on November 2, 2016, the TJJD's executive director sent a referral to the trial court requesting it to conduct a hearing under family code section 54.11 to determine whether T.C. should be transferred to the TDCJ. See Tex. Fam. Code Ann. § 54.11 (West Supp. 2017) (governing juvenile court's decision to transfer juvenile offender); Tex. Hum. Res. Code Ann. § 244.014 (West Supp. 2017) (authorizing the TJJD to refer juvenile offender between age 16 and 19 for transfer to the TDCJ). After conducting a section-54.11 hearing on December 29, 2016, the trial court ordered T.C. transferred to the TDCJ to serve the remainder of his twenty-year sentence.

In a single issue, T.C. contends he received ineffective assistance of counsel at the transfer hearing in violation of the federal and state constitutions because his appointed trial counsel failed to request an independent medical examination to determine the nature of the underlying psychological and psychiatric issues that caused his problematic behavior at the TJJD prior to the hearing.

Held: Affirmed

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

T.C.'s transfer hearing took place on December 29, 2016, and the evidence presented at the hearing consisted of (1) the testimony of the TJJD's court liaison, Leonard Cucolo; (2) Cucolo's written report recommending that the court transfer T.C. to the TDCJ; (3) the testimony of T.C.; and (4) a stipulation to a summary of the testimony that T.C.'s mother, grandmother, and grandfather—all of whom were in the courtroom—would give if they were called to testify.

Cucolo testified that upon entering the TJJD's custody, T.C. was placed in an orientation and assessment unit to undergo a battery of evaluations, including medical, psychiatric, and educational to determine what T.C.'s particular treatment needs were. Cucolo stated that based on those evaluations, it was determined that T.C. had a high need for the TJJD's sexual-behavior treatment program, and T.C. was thus placed in that program. Cucolo averred that the TJJD provided T.C. with a variety of services, including the sexual-behavior treatment program, psychiatric services, and an anger-management program. Cucolo further testified that T.C. had been with the TJJD for more than twenty-four months and that over that time, T.C. had done poorly in most of the areas in which he had been involved. Specifically, Cucolo stated that T.C. had more than 200 documented incidents of misconduct and that many of those constituted major rule violations.2 Cucolo also said that T.C. had failed his anger-management program and had refused to participate in, and accept his medication during, his sexual-behavior treatment program.

In addition, Cucolo testified that T.C. continued to have difficulty accepting responsibility for his offense. Cucolo indicated that the TJJD had performed a psychological examination of T.C. for the purpose of the hearing and to help the TJJD in forming a recommendation to the court. That examination, according to Cucolo, showed that there had not been any significant change in T.C.'s risk of committing another sexual offense. Cucolo also said that in addition, T.C.'s problematic behavior while confined in the TJJD's highly structured setting during the prior twenty-four months demonstrated that he was not amenable to the treatments the TJJD had offered and provided to him. Cucolo stated that when a juvenile who has been committed to the TJJD repeatedly violates the rules and does not participate in the treatment programs offered to him, that behavior has a negative impact on other juveniles who are in the TJJD's treatment programs and reduces their chance at a positive outcome. Ultimately, Cucolo testified that the TJJD's recommendation was that the trial court transfer T.C. to the TDCJ

T.C. testified that he had attended educational classes while in the TJJD. Specifically, he had attended science, algebra, reading, and world geography classes; he had completed a welding class; and he had taken photo-shop and "GD-prep" classes. T.C. agreed with Cucolo's assessment in his written report that T.C. was at a sixth-grade reading level. T.C. also stated that he was improving in his math classes.

T.C. also stated that he "get[s] to meet with a psychiatrist or psychologist" while in the TJJD and that they teach him ways to control his emotions and prescribe him medications, including Trazadone, Geodon, melatonin, and Zoloft. T.C. said, however, that those medications made him sick, so he stopped taking them. T.C. averred that he had had problems with

depression while in the TJJD and that he had to be placed on suicide watch. With regard to his being placed on suicide watch, T.C. testified that he got "tired of dealing with the same thing every day," so he would say something to somebody about suicide. T.C. stated that when that happened, somebody had to watch him and that every ten minutes, that person had to write down what T.C. was feeling. T.C. said that he had been on that kind of watch on and off about ten times during the prior twenty-four months.

With regard to his anger-management program, T.C. stated that he had to take that program several times. The first time he took it, he was kicked out because he got in a fight. He failed to complete the anger-management program the second time he took it because he got kicked out of his sex-offender treatment program and was consequently removed out of the dorm where the anger-management classes were given. T.C. said he passed his anger-management program the third time he took it. T.C. stated that he was the smallest person in his unit and that he did not want to be transferred to an adult facility. He said he believed that if he were given more time in the TJJD, he could do better than he had previously and that he could successfully complete more of the treatment programs.

Following T.C.'s testimony, his attorney told the trial court that he would call T.C.'s family to testify but that "they would just say that they think he's too immature to be sent to the adult facility. That's a summary of their testimony." T.C.'s counsel further stated that his family's preference is that T.C. "stay in the Waco area."3 The trial court accepted counsel's statements as a summary of what T.C.'s family would otherwise testify to.

In arguing that his trial counsel's failure to request an independent medical examination amounted to ineffective assistance, T.C. principally relies upon the Texarkana court of appeals' decision in R.D.B., in which it held, under the facts of that case, that the failure of the appellant's trial counsel to seek the court-appointed assistance of a mental-health professional in connection with the appellant's section-54.11 transfer hearing constituted ineffective assistance of counsel. See 20 S.W.3d at 261. T.C. argues that the facts of this case are so similar to the facts in R.D.B. as to compel the same result here. We conclude, however, that T.C.'s reliance on R.D.B. is misplaced.

The State observes that T.C.'s argument that his trial counsel rendered ineffective assistance by failing to request an independent medical examination assumes that Ake is applicable to a section-54.11 transfer proceeding. And the State further asserts that unlike our sister court in R.D.B., this court has never held that Ake applies to a section-54.11 transfer proceeding. For purposes of our analysis here, we assume, without deciding, that Ake applies to a section-54.11 transfer proceeding. See In re A.A.L., No. 14-06-00027-CV, 2007 WL 704958, at *1 (Tex. App.—Houston [14th Dist.] Mar. 8, 2007, no pet.) (mem. op.) ("For the purposes of our analysis, we presume, without deciding, that the Ake analysis applies to a transfer hearing under section 54.11 of the Texas Family Code.").

Under Ake, to be entitled to the appointment of an expert, a defendant must make a threshold showing that he has a particularized need for such an expert to address a significant issue at trial. See Griffith v. State, 983 S.W.2d 282, 286–87 (Tex. Crim. App. 1998); A.A.L., 2007 WL 704958, at *2; see also Maldonado v. State, No. 14-03-00074-CR, 2004 WL 234377, at *2 (Tex. App.—Houston [14th Dist.] Feb. 10, 2004, pet. ref'd) (mem. op., not designated for publication) (holding appellant was not entitled to appointment of mental-health expert under Ake because he failed to demonstrate his sanity "was likely to be a significant factor at trial"). That showing was made in R.D.B., where there was evidence indicating that R.D.B.'s mental health was likely to be a significant factor at trial: (1) R.D.B. had suffered an organic brain injury resulting from a self-inflicted gunshot wound; (2) R.D.B. had been placed on medication to control a seizure disorder that resulted from the brain injury; and (3) a psychological evaluation of R.D.B. had indicated that R.D.B.'s underlying brain injury may have contributed to his delinquent behavior. R.D.B., 20 S.W.3d at 256–58; see Maldonado, 2004 WL 234377, at *2. Based on the record before us, none of these things is true of T.C.'s case.

Having reviewed the record, we conclude that, assuming Ake applies to a section-54.11 transfer hearing, T.C. did not meet his threshold burden under Ake to show that his mental health was likely to be a significant issue at his transfer hearing such that he was entitled to the appointment of a mental-health expert to perform an independent psychological or psychiatric examination on him. See Maldonado, 2004 WL 234377, at *2 (concluding appellant was not entitled to appointment of mental health expert where he failed to demonstrate "his sanity was likely to be a significant factor at trial"). There was no evidence and no contention at trial that any mental-health condition caused T.C.'s behavioral problems or repeated failures in the TJJD. Consequently, on the record before us, T.C. has failed to overcome the strong presumption that his trial counsel's conduct was not deficient. See Nava, 415 S.W.3d at 307–08; Maldonado, 2004 WL 234377, at *2 (holding counsel's performance was not deficient for failing to request the appointment of a mental health expert where appellant was not entitled such an expert under Ake). Additionally, we note that our record does not show T.C.'s trial counsel was ever afforded an opportunity to explain his trial strategy or his reasons for not requesting an expert to perform an independent psychological or psychiatric examination. See Menefield, 363 S.W.3d at 593; Mata, 226 S.W.3d at 432.

Conclusion: Because T.C. has not shown that his trial counsel's representation was deficient, we overrule his sole issue. See Strickland, 466 U.S. at 687; Nava, 415

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S.W.3d at 307; Williams, 301 S.W.3d at 687. Having overruled T.C.'s sole issue, we affirm the trial court's transfer order. See Tex. R. App. P. 43.2(a).

DISPOSITION PROCEEDINGS

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

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

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

At the disposition hearing, the State presented the testimony of Renee Mora, a juvenile probation officer familiar with the facts of the case and Appellant's probation history. Further, the State introduced into evidence the pre-disposition report which sets forth Appellant's juvenile record. The record shows that Appellant was first referred to the El Paso County Juvenile Probation Department in 2013 for four burglary of a vehicle offenses. The juvenile court adjudicated Appellant for two of those offenses and placed him on supervised probation without a curfew. Appellant committed technical violations of the probation order in 2014 and 2015, and these violations resulted in an increase in the level of probation. He was placed on supervised probation with an electronic monitor in January 2014. Following another technical violation, the trial court placed him outside of the home in APECS Challenge Academy. He was successfully discharged from APECS in July 2014 and placed on intensive supervised probation (ISP) under the Drug Court program. In January 2015, the trial court sustained a motion to modify based on a technical violation and placed Appellant on SHOCAP1 Probation. In April 2015, the trial court adjudicated Appellant for two new offenses, evading arrest and failure to identify, and Appellant was placed in the Challenge Academy. After Appellant was successfully discharged from the Challenge Academy, the court placed him back on SHOCAP. Appellant committed a new technical violation in January 2016 and he was "recycled" back into the Challenge program. Appellant did not successfully complete the Challenge aftercare program. In September 2016, Appellant was referred to the Department again based on the offense involved in this case, possession of more than four but less than 200 grams of heroin.

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

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

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

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

Held: Affirmed

Opinion:

Standard of Review

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

Under Section 54.04(i), a court must make the following statutory findings before it commits a juvenile to TJJD: (A) it is in the child's best interests to be placed outside his home; (B) reasonable efforts were made to prevent or eliminate the need for his removal from the home and to make it possible for the child to return to his home; and (C) the child cannot be provided the quality of care and level of support and supervision in his home that he needs to meet the conditions of probation. See TEX.FAM.CODE ANN. § 54.04(i)(1)(A)-(C)(West Supp. 2017). The trial court made each of the required findings and included them in the disposition order. Appellant's brief challenges only the second of the required findings. See TEX.FAM.CODE ANN. § 54.04(i)(1)(B).

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

Reasonable Efforts Made to Prevent Removal

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

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

Appellant bases his second argument on Section 51.20 of the Family Code. This statute authorizes a juvenile court to order a child who is alleged by a petition to have engaged in delinquent conduct to be examined by a disinterested expert to determine whether the child has a mental illness, is a person with mental retardation, or suffers from chemical dependency. See TEX.FAM.CODE ANN. § 51.20(a)(West 2014). If the examination reveals that the child has a mental illness or mental retardation, or suffers from chemical dependency, the probation department shall refer the child to the local mental health or mental retardation authority or to another appropriate agency or provider for evaluation and services. See TEX.FAM.CODE ANN. § 51.20(b). The statute also requires the probation department to refer the child for evaluation and services if a qualified professional determines that the child has a mental illness, mental retardation, or suffers from chemical dependency while the child is under

court-ordered probation and is not currently receiving treatment for the mental illness, mental retardation, or chemical dependency. See TEX.FAM.CODE ANN. § 51.20(c).

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

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

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

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

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

EVIDENCE

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

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

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

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

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

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

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

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

As part of the investigation, Detective Barett observed and heard Joe Zimmerly conduct a forensic interview with the child at the advocacy center. Detective Barett's purpose in witnessing forensic interviews is to

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

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

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

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

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

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

The child testified as a defense witness. During his testimony, the child verbally answered some questions

posed to him, however many of his answers were non-verbal. During examination, defense counsel, and sometimes the State's attorney would often follow the child's non-verbal response by stating "Yes" or "No." Because of the nature of the questions and the form of answers presented in the record, we find it necessary to set out the relevant testimony in the context of the colloquy that occurred between the child and counsel:
[DEFENSE]: Okay. I'm going to ask you a couple of questions. Okay? It's real simple. Do you remember talking to Greg last week?1
[F.H.]: (No verbal response.)
[DEFENSE]: Okay. And what day was that? Do you remember what day it was?
[F.H.]: (No verbal response.)
[DEFENSE]: No. Okay. Do you remember telling Greg that you had taken showers before in the past with your brother?
[F.H.]: (No verbal response.)
[DEFENSE]: With [P.M.]?
[F.H.]: (No verbal response.)
[DEFENSE]: Yes. Okay. And that he never did pee on you. Right? That's what you told Greg last week. Right?
[F.H.]: (No verbal response.)
[DEFENSE]: Okay. But rather that your brother peed in between you. Right?
[F.H.]: (No verbal response.)
[DEFENSE]: Is that what you told Greg?
[F.H.]: (No verbal response.)
[DEFENSE]: Yes. And that was last Thursday. Right?
[F.H.]: (No verbal response.)
[DEFENSE]: Yes. Okay. You and your brother used to take showers together. Is that correct?
[F.H.]: (No verbal response.)
[DEFENSE]: Okay. And when you took showers together, he would clean you first and then you would get out of the shower, wouldn't you?
[F.H.]: (No verbal response.)
[DEFENSE]: Yes?
[F.H.]: (No verbal response.)
[DEFENSE]: And when you would get out of the shower, would you stay in the bathroom?
[F.H.]: (No verbal response.)
[DEFENSE]: No. You would leave?
[F.H.]: (No verbal response.)
*4 [DEFENSE]: Okay. And who would take you out of the bathroom usually, was it mommy, daddy or both?
[F.H.]: Mommy.
[DEFENSE]: Okay. Did your brother ever put his pee-pee in your mouth?
[F.H.]: (No verbal response.)
[DEFENSE]: No.
Under cross-examination, the State was able to elicit more verbal responses from F.H:
[STATE]: All right. Now, [F.H.], whenever I see you do this—
[F.H.]: Uh-huh.
[STATE]: —that means yes. Right?
[F.H.]: (No verbal response.)
[STATE]: And I think these people back here, I don't know if they can quite see you so could you just say yes or no on some of those?
[F.H.]: Uh-huh.
...
[STATE]: Let me ask you a question. You see all these people in the courtroom here?
[F.H.]: (No verbal response.)
[STATE]: Do you know them?
[F.H.]: (No verbal response.)
[STATE]: Do you know some of them?
[F.H.]: (No verbal response.)
[STATE]: Okay. Could I ask you. This gentleman right here at the very end of the table, who is this young man?
[F.H.]: [P.M.].
[STATE]: [P.M.]. Who is [P.M.]? Who is he? How—how are you—are you guys related? Is he your family?
[F.H.]: (No verbal response.)
[STATE]: Is that a yes or no?
[F.H.]: Yes.
[STATE]: He's your family. And what is he in your family? Is he your mom?
[F.H.]: No.
[STATE]: No. What is he?
[F.H.]: My brother.
[STATE]: Your brother. Do you love your brother?
[F.H.]: Yes.
[STATE]: Would you do anything for your brother?
[F.H.]: (No verbal response.)
[STATE]: No. That's how I know you're brothers. Well, how about these two guys, have you ever met these two guys?
[F.H.]: No.
[STATE]: You don't know these two guys. All right. What about this lady back here, who is that nice lady?
[F.H.]: My mom.
[STATE]: She's your mom. And in the very back there, who is that guy with the shirt? Well, they all have shirts. The guy on the far left.
[F.H.]: My dad.
[STATE]: Your dad. Is your family here?
[F.H.]: (No verbal response.)
[STATE]: Okay. [F.H.], did we talk about you and your brother sometime last week?
[F.H.]: (No verbal response.)
[STATE]: We did. And when you talked with me, did you tell—did everything you tell [sic] me, was that all the truth?
[F.H.]: Yes.
[STATE]: Okay. Now, let me ask you then. So have you and [P.M.] ever taken showers together?
[F.H.]: (No verbal response.)
[STATE]: Was that a yes or a no?
[F.H.]: Yes.
[STATE]: Okay. And when you take a shower, who washes your hair?
[F.H.]: My mom.
[STATE]: Your mom washes your hair. Is she in there with you and [P.M.]?
[F.H.]: No.
[STATE]: No. How about when you and [P.M.] take showers, who washes your hair?
[F.H.]: My mom.
[STATE]: Your mom.
[F.H.]: Yeah.
[STATE]: Okay. So is she in there with you and [P.M.]?

[F.H.]: (No verbal response.)
[STATE]: No. Okay.
[F.H.]: She stays outside and then me and [P.M.] is in—inside the shower.
[STATE]: Okay. So she waits in the bathroom—she's in the bathroom while both of you guys are in there?
[F.H.]: Uh-huh.
[STATE]: Okay. Who told you to say that?
[F.H.]: Nobody.
[STATE]: Nobody told you to say that? Did you talk to anybody else? When did you talk to your mom about what you were going to say? Do you remember? You don't remember?
[F.H.]: (No verbal response.)
[STATE]: Did you talk to your mom about what you were going to say?
*5 [F.H.]: (No verbal response.)
...
[STATE]: Now, has [P.M.] ever peed in the shower?
[F.H.]: (No verbal response.)
[STATE]: He has?
[F.H.]: (No verbal response.)
[STATE]: I'm sorry. Is that a yes or a no?
[F.H.]: Yes.
[STATE]: Yes. And when he peed, what color was that pee?
[F.H.]: Gray or green.
[STATE]: So was it gray one time?
[F.H.]: (No verbal response.)
[STATE]: Now, was it green another time?
[F.H.]: (No verbal response.)
[STATE]: Okay. But was it ever gray and green at the same time?
[F.H.]: No.
[STATE]: Okay. So one time it's gray. Right?
[F.H.]: (No verbal response.)
[STATE]: And the other time it's green.
[F.H.]: (No verbal response.)
[STATE]: And this is when you were in the shower with him?
[F.H.]: (No verbal response.)
...
[STATE]: Now, whenever [P.M.] would pee in the shower, did you ever touch it?
[F.H.]: No.
[STATE]: No, you never touched it. Did it ever—did you ever—what happened when he peed, where did it go?
[F.H.]: In the middle.
[STATE]: In the middle. And then it just stayed there?
[F.H.]: (No verbal response.)
[STATE]: Then what did it do?
[F.H.]: It went into the drain.
[STATE]: Into the drain. Now, let me ask you. The gray pee—
[F.H.]: Uh-huh.
[STATE]: —and the green pee—
[F.H.]: Uh-huh.
[STATE]: —which one went to the drain faster?
[F.H.]: The green.
[STATE]: The green pee went into the drain faster. Okay. How did the gray pee go into the drain?
[F.H.]: Slow.
...
[STATE]: All right. So do you remember going to a room with a big rainbow on it and talking to a man?
[F.H.]: Yes.
[STATE]: You do. And do you remember talking to him about your brother [P.M.]?
[F.H.]: Yes.
[STATE]: Okay. Do you remember telling him that [P.M.] pees on you?
[F.H.]: Yes.
[STATE]: Okay. Were you lying to the man in the rainbow room at that time?
[F.H.]: No.
[STATE]: You weren't lying to him?
[F.H.]: Uh-uh.
[STATE]: Okay. So you were telling the truth?
[F.H.]: Yeah.
[STATE]: All right. Well—all right. [F.H.], thank you for talking to me.
The following colloquy occurred when defense counsel re-examined the child:
[DEFENSE]: Okay, buddy, so what you told this jury here today, these nice 12 people over here, that was the truth. Right?
[F.H.]: (No verbal response.)
[DEFENSE]: And your brother didn't put his pee-pee in your mouth. Right?
[F.H.]: (No verbal response.)
[DEFENSE]: And when he peed, he peed in between you. Right? Is that—
[JUROR]: I'm sorry. Can he say "yes" or "no"?
...
THE COURT: Right, yeah, because he's shaking and nodding. Okay. So say "yes" or "no." If you want to start again.
[DEFENSE]: Sure.... And when he would pee, he would pee in between you. Right?
...
[DEFENSE]: Is that right?
[F.H.]: (No verbal response.)
[DEFENSE]: Because that's what you told Greg last week, your buddy here. Right?
[F.H.]: (No verbal response.)
THE COURT: Is that a yes?
[DEFENSE]: Is that a yes?
[F.H.]: Yes.

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

stated that while in the shower, his penis was never erect and he never physically gratified himself.

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

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

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

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

Held: Reversed and remanded

Opinion:
Preservation of Error
We first determine whether the alleged Sixth Amendment confrontation-clause error has been preserved. To preserve a complaint for appellate review, the record must show that a defendant made a timely and specific objection to the trial court in compliance with the rules of evidence or the rules of appellate procedure, that the objection was sufficiently specific to make the trial court aware of the complaint unless the specific grounds were apparent from the context, and that the trial court ruled on the objection, either expressly or implicitly, or refused to rule and the complaining party objected. TEX. R. APP. P. 33.1(a)(1)(A), (a)(2)(A-B); Lovill v. State, 319 S.W.3d 687, 691–92 (Tex. Crim. App. 2009). Failure to properly preserve error for appellate review may also waive constitutional error. See Holland v. State, 802 S.W.2d 696, 700 (Tex. Crim. App. 1991)(en banc); Briggs v. State, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990). In making the objection, terms of legal art are not required, but a litigant should at least "let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." Lankston v. State, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992). An objection stating one legal basis may not be used to support a different legal theory on appeal. See Heidelberg v. State, 144 S.W.3d 535, 537 (Tex. Crim. App. 2004)(objection based on Fifth Amendment did not preserve state constitutional ground). The two-fold purpose of requiring a specific objection in the trial court is: (1) to inform the trial judge of the basis of the objection and give him the opportunity to rule on it; (2) to give opposing counsel the opportunity to respond to the complaint. Resendez v. State, 306 S.W.3d 308, 312 (Tex. Crim. App. 2009).

We initially note that the juvenile filed a motion "pursuant to Article 38.071 (Section 6) of the Texas Code of Criminal Procedure and the Sixth and Fourteenth Amendments to the United States Constitution as well as Article I Sections 10 and 19 of the Texas Constitution" that the child victim be required to testify. During the outcry hearing, and as a component of his post-testimony argument, the juvenile objected to Zimmerly's testimony, in part because "[a]llowing this statement in, [Zimmerly's] statement, would be a violation of my client's Sixth Amendment rights to confront and cross-examine

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witnesses on statements that they have made." Before ruling, the trial court heard the State's responsive arguments and received cases from counsel. Having heard testimony and argument, the trial court ruled that M.H. and Zimmerly were proper outcry witnesses.

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

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

Applicable Law

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

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

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

use of his prior testimonial statements."). Sanchez, 354 S.W.3d at 486 n.26.

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

Sixth Amendment Analysis

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

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

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

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

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

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

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

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

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

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When the State proffers an out-of-court statement of a child witness pursuant to Article 38.072, supra, it is incumbent upon the accused to object on the basis of confrontation and/or due process and due course of law. At that point the State can respond by following either one of two courses. First the State can announce its intention to call the child declarant to the stand to allow confrontation without the accused having to call the child to the stand himself. See Buckley v. State, supra, at 360–61; Briggs v. State, supra, at 922. Alternatively the State can make a showing both that 1) the out-of-court statement is one that is reliable under the totality of circumstances in which it was made, Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), which Article 38.072, § 2(b)(2) already requires; and 2) use of the out-of-court statement in lieu of the child's testimony at trial "is necessary to protect the welfare of the particular child witness" in that particular case. Maryland v. Craig, 497 U.S. 836, [855], 110 S.Ct. 3157, 3169, 111 L.Ed.2d 666, 685 (1990); see also Buckley v. State, supra, at 360; Long v. State, supra, at 312. If the State follows either of these two courses, the accused's objection on confrontation grounds should be overruled. Otherwise, the confrontation objection is a valid one and should be sustained, irrespective of whether the State has satisfied all of the statutory predicate for admissibility of hearsay under Article 38.072, supra.
Holland, 802 S.W.2d at 699–700 (emphasis added). In Holland, the State had failed to call the child witness to testify and did not make a particularized showing of its necessity for failing to do so, but because the appellant had failed to preserve its confrontation-clause complaint in the trial court for review on appeal, the Court did not directly address the State's failure to call the child to testify. Holland, 802 S.W.2d at 700. The Court observed, however, that the United States Supreme Court had acknowledged in California v. Green, 399 U.S. 149, 155-56, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489, 495 (1970), that confrontation-clause values may be abridged despite the admission of statements admitted under a recognized hearsay exception. Holland, 802 S.W.2d at 699. In constructing its analytical framework regarding outcry witness testimony under article 38.072, Holland also drew from the Supreme Court's two-part test in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Holland, 802 S.W.2d at 699. Under Roberts, the statement of an unavailable witness could be admitted against the defendant in a criminal trial if it bore adequate "indicia of reliability," meaning generally that the statement fell under a "firmly rooted hearsay exception" or showed "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66, 100 S.Ct. at 2539.

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

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

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

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

Constitutional Error Standard of Review
The trial court's error of allowing M.H. and Zimmerly to testify as to the child's statements absent the State's showing the admission of this hearsay was necessary to protect the welfare of the child is of constitutional dimension. The test for determining whether a federal constitutional error is harmless is whether it appears "beyond a reasonable doubt that the error complained

of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). Under Chapman, a federal constitutional error "did not contribute to the verdict obtained" if the verdict "would have been the same absent the error[.]" Neder v. United States, 527 U.S. 1, 15–18, 119 S.Ct. 1827, 1837-38, 144 L.Ed.2d 35 (1999). The Chapman test is codified in Texas Rule of Appellate Procedure 44.2(a), and provides that if the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, we must reverse a judgment of conviction or punishment unless we determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. P. 44.2(a).

Harmless Error Analysis

In assessing the likelihood that the jury verdicts dispensing appellant's conviction and punishment would have been the same absent the trial court's admission of M.H. and Zimmerly's outcry testimony, we must consider the entire record. Neder, 527 U.S. at 15–16, 119 S.Ct. at 1837. In determining whether the error was harmless, we consider the importance of the hearsay statement to the State's case, whether the hearsay evidence was cumulative of other evidence, the absence or presence of evidence either contradicting or corroborating the hearsay statement on material points, and the overall strength of the case against the defendant. Woodall v. State, 336 S.W.3d 634, 639 n.6 (Tex. Crim. App. 2011), citing Davis v. State, 203 S.W.3d 845, 852 (Tex. Crim. App. 2006). We may also consider other factors contained in the record that shed light on the likely impact of the error on the mind of an average juror. Davis, 203 S.W.3d at 852. The error is harmless when the reviewing court is convinced beyond a reasonable doubt that the barred statement would probably not have had a significant impact on the mind of an average juror in making their determination. Id.

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

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

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

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

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

Conclusion: A reasonable possibility exists that the error moved the jury from a state of non-persuasion to one of persuasion, and we are unable to conclude beyond a reasonable doubt that the particular error did not contribute to the juvenile's conviction or punishment. Chapman, 386 U.S. at 24, 87 S.Ct. at 828. Issue Three is sustained. The trial court's judgment is reversed and the case is remanded for a new trial.

JURISDICTION

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

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

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

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

Held: Affirmed

Memorandum Opinion: On appeal, Redmond argues that (1) the juvenile court had exclusive jurisdiction over the proceedings because a motion to transfer proceedings to the district court was never filed, (2) the trial court erred in refusing Redmond's request that his status as a juvenile had already been established in the juvenile proceeding, and (3) the trial court violated his "SIXTH AMENDMENT RIGHTS TO CONFRONTATION AND PRODUCTION OF EVIDENCE" by excluding the records of the juvenile proceeding "WHICH WOULD HAVE SHOWN BIAS ON BEHALF OF THE STATE'S WITNESSES." Because Redmond was not a juvenile when he was arrested, indicted, or tried, the district court had jurisdiction over these proceedings.

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

SUFFICIENCY OF THE EVIDENCE

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

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

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

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

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

The truck left the restaurant's parking lot. The officers followed and engaged the patrol car's overhead lights and sirens. At that point, the truck began speeding. The truck entered an apartment complex. The police pursued the truck through the complex at speeds up to

sixty miles per hour for four to six minutes. The truck eventually hit a transformer and stopped. All three youths fled the truck. The police officers apprehended D.L., but failed to apprehend the other two youths.

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

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

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

Held: Reversed and dismissed with prejudice

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

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

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

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

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

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

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

came to a stop. Officer Flores searched the truck and recovered two stolen firearms.

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

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

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

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

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

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

Though Munns does not present an identical factual scenario, we find the court's reasoning instructive. As in Munns, "the issue is not whether [D.L.] had a legal right to be on the premises, but whether [D.L.] entered while knowing [ ]he did not have a legal right to be on the premises." Id. at 100 (emphasis added). Although a locked car, like a house, would provide a naked trespasser sufficient notice that entry was forbidden, it is undisputed here that the driver of Lezama's truck operated the vehicle with a key. Accord id. ("While a locked door would certainly qualify as notice to a naked trespasser, a locked door is not notice that entry is forbidden to a person who is provided a key by one with apparent authority to authorize his entry into the residence."). D.L. was not the driver and there was no evidence that D.L. was present when the car was stolen, that the driver told D.L. that the car was stolen, or that D.L. otherwise knew that the car was stolen. Accord id. at 102 ("The record contains no communication that informed Munns her entry was forbidden.").

Although notice of forbidden entry can be implicit,4 we hold, on this record, that a reasonable juror could not

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

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

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

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

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

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

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

Held: Affirmed

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

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

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

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