Juvenile Law Section
STATE BAR OF TEXAS

Volume 33, Number 4, November 2019

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NEWSLETTER EDITOR

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

OFFICERS AND COUNCIL MEMBERS

QUICK LINKS

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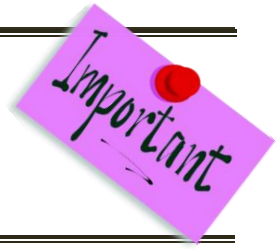
Dear Juvenile Law Section Members:

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

Please note that the August Issue of the Juvenile Law Reporter was substituted this year by the Legislative Issue published by TJJD. As a result, this issue contains select juvenile law related cases from May to the present.

This past summer there were three mass shootings in the United States that left 34 people dead and dozens more wounded. To the people in Dayton, Ohio, El Paso, Texas, and in Gilroy, California, the art of political rhetoric has a special significance.

Ever since the first televised debates during the 1960 presidential campaign between Richard Nixon and John Kennedy, politicians have used and abused the media to put forward their views on what they think is important to the American voter. Over the years, arguments have morphed into political ideologies, and political ideologies have morphed into "my opponent is un-American," and on and on it goes. Personal attacks against an opponent's character is always suspect and should be avoided when possible. Not that character is not important, but there is a distinction between attacking one's character and being a bully.

When politicians resort to fallacious argumentative media strategies to attack the character, motive, or other attribute of a person or group we all lose. And while some of these attacks are subtle and sophisticated, others are simply rude and abusive.

We know that improving mental health is a big part of this. For philosophies of hate fostered by political rhetoric can have devastating repercussions to a damaged or weak mind. We also know that gun control is a big part of this. But they are only a part. I believe political rhetoric is also a big part of this and we shouldn't pretend it isn't. This is not an all or nothing stance. It all matters.

There is no question that the process of assessing risk in the real world to these types of tragedies is much more complicated than saying, stop incendiary conduct. But the marketing of hate and divisiveness has consequences. Personal attacks to a person or group by an individual or group in authority has consequences.

As we head into the next political season be aware of obvious and subtle malicious personal attacks. If you're a politician, don't use them. If you're just a listener, don't make it acceptable. Call it out. Ask your candidate to refrain from doing it. If we don't say something, who will? Let's be smart in our listening. The collateral effects of doing nothing has simply become too horrifying to ignore.

Article on the Juvenile Law Associate Judge. I am including an article I wrote on the statutory procedures and requirements in employing and utilizing the Juvenile Law Associate Judge as outlined in the Family Code. It is an in-depth piece of the duties and limitations of the Juvenile Associate Judge. I hope you find it informative.

33rd Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's 33nd Annual Juvenile Law Conference will be held February 16 thru February 19, 2020, at the San Luis Resort Spa & Conference Center, in Galveston, Texas.

Robert O. Dawson Visionary Leadership Award. The Juvenile Law Section is seeking nominations for the 2020 Robert O. Dawson Visionary Leadership Award. This award goes to an individual who has unselfishly devoted time to the cause of juvenile justice in Texas. Persons deserving nomination are those who advocate for justice for Texas' juveniles; those who promote legislation advancing the juvenile justice system in the state; and those who advance the development and/or expansion of juvenile justice programs, funding, and/or access to other innovative options or approaches designed to improve the state's juvenile justice system and benefit the youth it serves. Nominees may include employees of public, private, or non-profit organizations, elected or appointed officials, or private citizens. To nominate an individual for consideration, please submit the Robert O. Dawson Visionary Leadership Award Nomination Form found online at www.juvenilelaw.org. The deadline for submission is November 30, 2019. Please submit nominations to Kaci Singer at kaci.singer@tjjd.texas.gov.

Officer and Council Nominees. The Annual Juvenile Law Section meeting will be held in Galveston, Texas, on Monday, February 17, 2020, in conjunction with the Juvenile Law Conference. The Juvenile Law Section's nominating committee will soon be submitting a slate of nominations for Council members for a term to expire 2023 and for Officers for the 2020-2021 term. If you would like to nominate an individual for consideration, including yourself, please submit your nominations to Chair of the Nominations Committee, Kaci Singer, at kaci.singer@tjjd.texas.gov. Please include an email address for your nominee and a brief description of your reasons for the nomination. The deadline for submission is November 30, 2019.

TJJD Seeking Attorneys for Parole Revocation Hearings. TJJD is in need of attorneys to represent youth facing hearings to determine if their parole should be revoked. If you are interested please review the letter from General Counsel Christian von Wupperfeld which explains the hearings, compensation, and method for entering a contract with the agency. The fee structure has recently increased to bring it in better alignment with appointed counsel fees in court.

We should soundly reject language coming out of the mouths of any of our leaders that feeds a climate of fear and hatred or normalizes racists sentiments; leaders who demonize those who don't look like us or suggest that other people, including immigrants, threaten our way of life, or refer to other people as sub-human, or imply that America belongs to just one certain type of people.

Barack Obama

TEXAS JUVENILE JUSTICE DEPARTMENT

TRANSFORMING YOUNG LIVES AND CREATING SAFER COMMUNITIES

July 1, 2019
Dear Juvenile Law Section Member:

The Texas Juvenile Justice Department (TJJD) is seeking to expand its network of attorneys retained to represent youth in parole revocation hearings. In fiscal year 2018, the Department conducted over 200 parole revocation hearings throughout the state. Given your interest in juvenile law, I am writing to invite your participation and service.

A significant portion of the youth in TJJD's care have experienced multiple adverse childhood experiences. Recognizing the impact that such trauma has on youths' cognitive development, TJJD has adopted a new paradigm: trauma-informed corrections. We call it the Texas Model. We believe this is the best way to achieve the goals that we all fundamentally share—keeping our communities safe while correcting behavior in the right way, thus providing our youth with the chance to lead better, more productive lives. One element of this approach is building trust in people and institutions. In support of this effort, the TJJD Office of General Counsel ensures that all youth are afforded due process.

By serving as counsel for youth facing parole revocation, you have an opportunity to positively influence the lives of future generations of Texans by offering your advice, counsel, and time. We have also updated our fee structure to bring it into alignment with county appointment rates.

Hourly rate of $100/hour up to five hours;
Travel hourly rate of $25.00/hour (pre-approval is required prior to travel); and
Mileage reimbursement at the IRS-allowable rate (currently 58 cents/mile)

If you are interested in serving as appointed counsel for our youth, please provide us with a current curriculum vitae. Please include your contact information and availability. You may fax or e-mail your correspondence to Becky Woodruff, Legal Assistant, at (512) 490-7930 fax or e-mail to Becky.Woodruff@tjjd.texas.gov. We look forward to working with you.

Sincerely,

Christian von Wupperfeld
General Counsel

The Honorable Wes Ritchey, Chairman I Camille Cain, Executive Director
11209 Metric Blvd. Bldg. H, Ste. A, Austin, Texas 78758 | Post Office Box 12757, Austin, Texas 78711

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CHAIR'S MESSAGE By Mike Schneider

I am honored to serve as the 2019-20 Chair of the Juvenile Law Section, alongside so many esteemed juvenile law colleagues from across Texas. The February 2019 32nd Annual Juvenile Law Conference, Robert O. Dawson Institute, in Austin, was a huge success, in terms of the quality of speakers, relevance of topics, and attendance. Was a pleasant change to hold a Dawson conference in Austin after several years in other Texas cities—in a legislative year, no less. And from Trivia Night to Casino Night, the section successfully stepped up its social events to encourage greater comradery.

This year the 33rd annual Dawson conference will be in Galveston, February 16-19th 2020, at the San Luis Resort Spa & Conference Center. There will be a Nuts and Bolts on Sunday before the full conference starts on Monday. We expect another round of relevant and interesting speakers and topics, ranging from players in the Central Park Five case to creative diversion programs being implemented in Texas' largest jurisdictions. This year Program Chair (and Chair-Elect) Patrick Gendron is scheduling caucuses during happy hour so that folks can relax, find food and drink at the end of the day, all the while meeting practitioners from around the state and receiving ethics credit.

Over the last few years, major systemic changes in juvenile justice have become the norm nationwide. There are, for example, fewer than five remaining states in which 17 year-olds are presumptively adults. In Texas, one of those states, word is that "raise the age" will again be a priority for many Texas legislators in 2021, as none of the many bills dealing with this issue made it out of committee in 2019. It is also expected that there will be major bipartisan efforts to move children with severe mental health issues out of TJJD and to provide those children intensive services in a more therapeutic environment. The large number of juvenile referrals from schools is also expected to be addressed in the coming session. Bottom line, the entire juvenile justice system seems finally headed to more trauma-based, root-cause addressing solutions than ever before.

For those who haven't yet read it, a great overview of the 2019 legislative changes in Texas written by Nydia D. Thomas can be found in the Special Legislative Issue at juvenilelaw.org. Thanks to Associate Judge Pat Garza from San Antonio for his overview of the associate judge framework in Texas and a caselaw update from May 2019 to the present in this issue.

We look forward to seeing everyone in Galveston next February.

THE JUVENILE ASSOCIATE JUDGE By Pat Garza

The Associate Judge in juvenile matters is a full-time or part-time judge that is appointed by a juvenile court to perform the duties authorized by the Juvenile Justice Code and Chapter 201 of the Family Code.[1] The appointment can only be made if the commissioners court of the county in which the court has jurisdiction has authorized the creation of an associate judge position.[2] Each Commissioners Court of a county are vested with the ultimate responsibility for the budgetary decisions of their county. And while they can establish the budgets for the district courts in their counties, they have no authority to appoint or monitor the actions of those courts. Each elected officer occupies a sphere of authority, which is delegated to that officer by the Constitution and laws, which another officer may not interfere with or usurp.[3] That authority generally includes the autonomy in hiring and firing its employees.[4]

When it comes to a juvenile associate judge, several different scenarios of who or whom they work for can occur. In some areas of the State a district court may have jurisdiction over more than one county. By contrast, you may also have an associate judge or judges that serve more than one court. Fortunately, the Family Code does address each of these scenarios, what the duties of the associate judge are, as well as how an associate judge is hired and fired in each situation.

If a court has jurisdiction in more than one county, an associate judge appointed by that court may serve only in the county in which the commissioners court has authorized the appointment.[5] If more than one court in a county has been designated as a juvenile court, the commissioners court may authorize the appointment of an associate judge for each court or may authorize one or more associate judges to share service with two or more courts.[6]

If an associate judge serves more than one court, the associate judge's appointment must be made as established by local rule, but in no event by less than a vote of two-thirds of the judges under whom the associate judge serves.[7] An associate judge who serves a single court serves at the will of the judge of that court.[8] In the single court scenario the statute recognizes every district court as an independent elected entity to hire and fire their own associate judge. Consequently, it prevents an associate judge who only works for one court to be terminated or released by any other judge or votes of judges who the associate judge does not work for. This is important because, by statute, the decision making of the associate judge is only a recommendation to the district judge, to be accepted or rejected by that judge. The judge of the court in which the associate judges works is ultimately responsible for any and all recommendations made by the associate judge and accepted by that district judge.

The employment of an associate judge who serves more than two courts may only be terminated by a majority vote of all the judges of the courts which the associate judge serves.[9] So, what if the associate judge is employed by two courts only? The employment of an associate judge who serves two courts may be terminated by either of the judges of the courts which the associate judge serves.[10]

Should an associate judge be terminated by a judge or judges who he is employed by, Chapter 201 sets out the procedure. To terminate an associate judge's employment, the appropriate judges must sign a written order of termination and the order must state: (1) the associate judge's name and state bare identification number; (2) each court ordering termination; and (3) the date the associate judge's employment ends.[11]

There is no restriction to an individual wearing two hats. An associate judge appointed under this subchapter may serve as a referee as provided by Sections 51.04(g) and 54.10.[12] A referee appointed under Section 51.04(g) may be appointed to serve as an associate judge under this subchapter.[13]

Section 54.10 of the Family Code designates the types of proceeding that a referee and associate judge can preside over. Except as limited by certain determinate sentence provisions, a referee or an associate judge may hold a hearing on Adjudication, Disposition or to Modify Disposition, including a jury trial, a hearing under the Child with Mental Illness Chapter, including a jury trial, or a hearing under the Interstate Compact for Juveniles.[14] The referee or associate judge can preside over these hearings provided: (1) the parties have been informed by the referee or associate judge that they are entitled to have the hearing before the juvenile court judge; and (2) after each party is given an opportunity to object, no party objects to holding the hearing before the referee or associate judge.[15] The Juvenile Justice Code defines "Party" as the state, a child who is the subject of proceedings under this subtitle, or the child's parent, spouse, guardian, or guardian ad litem.[16] Not only can the child object but so can the parents and the state.

While the statute articulates that a juvenile's waiver of a hearing before the designated juvenile court judge must be clear, unequivocal, and unambiguous,[17] attorneys should be aware that in order to preserve for appellate or collateral review the failure of the court to provide the child the explanations required by Section 54.10 (b), the attorney for the child must comply with Rule 33.1, of the Texas Rules of Appellate Procedure, before testimony begins or, if the adjudication is uncontested, before the child pleads to the petition or agrees to a stipulation of evidence.[18]

Previously, a referee or associate judge could not preside over Adjudication Hearings, Disposition Hearings or Hearings to Modify Dispositions if the grand jury had approved of the petition and the child was subject to a determinate sentence. That provision was changed in 2017. Now, when the state and a child who is subject to a determinate sentence agree to the disposition of the case, wholly or partly, a referee or associate judge may hold a hearing for the purpose of allowing the child to enter a plea or stipulation of evidence.[19] After the hearing, the referee or associate judge shall transmit the referee's or associate judge's written findings and recommendations regarding the plea or stipulation of evidence to the juvenile court judge for consideration. The juvenile court judge may accept or reject the plea or stipulation of evidence in accordance with Section 54.03(j) of the Family Code.[20] As previously stated, the juvenile court judge holds the ultimate responsibility of every decision made by their associate judge.

Texas Family Code Section 201.306, states that except as provided by Section 201.306, a judge of a juvenile court may refer to an associate judge any aspect of a juvenile matter brought: (1) under this title or Title 3; or (2) in connection with Rule 308a, Texas Rules of Civil Procedure.[21] While this provision allows the judge of a juvenile court to refer any aspect of a juvenile matter brought under Title 3, the more specific limitations that are provided for in Title 3 discussed above will control the associate judges authority to hear a case. Interestingly, Section 54.10(a)(2) provides that after each party is given an opportunity to object to the referee or associate judge, and if no party objects, the referee or associate judge may hold the hearing. The opportunity to object must be made at the onset of the proceedings. But if you compare that to Section 201.306(b), which states that unless a party files a written objection to the associate judge hearing a trial on the merits, the judge may refer the trial to the associate judge. While it appears that both provisions are in conflict, section 201,306(b) specifically applies to a "trial on the merits." A "trial on the merits" is any final adjudication from which an appeal may be taken to a court of appeals.[22] A scenario might be where at the first setting, all parties are admonished as to the associate judge hearing the case before the parties, and no party objects. The case is then set for jury trial or for a trial on the merits in all future settings. Since all parties have been notified and have agreed to allow the associate judge to hear the case on the first setting, for future settings whether a jury trial or trial on the merits, a party must file an objection not later than the 10th day after the date the party receives notice that the associate judge will conduct the jury trial or trial on the merits. If an objection is filed, the referring court shall hear the trial on the merits or preside at the jury trial.[23]

So, if the referee or associate judge admonishes the parties at the original setting that they have a right to object to the referee or associate judge from hearing the case, and there is no objection, if the case is reset for a future jury trial or trial on the merits, a party would have to file an objection to the associate judge not later than the 10th day after the date the party receives notice that the associate judge will hear the trial, which in this scenario would have been the original setting date.

Except as limited by an order of referral, an associate judge may:

(1) conduct a hearing;
(2) hear evidence;
(3) compel production of relevant evidence;
(4) rule on the admissibility of evidence;
(5) issue a summons for:
(A) the appearance of witnesses; and
(B) the appearance of a parent who has failed to appear before an agency authorized to conduct an investigation of an allegation of abuse or neglect of a child after receiving proper notice;
(6) examine a witness;
(7) swear a witness for a hearing;
(8) make findings of fact on evidence;
(9) formulate conclusions of law;
(10) recommend an order to be rendered in a case;
(11) regulate proceedings in a hearing;
(12) order the attachment of a witness or party who fails to obey a subpoena;
(13) order the detention of a witness or party found guilty of contempt, pending approval by the referring court; and
(14) take action as necessary and proper for the efficient performance of the associate judge's duties.[24]

An associate judge does have the option, in the interest of justice, to refer a case back to the referring court regardless of whether a timely objection to the associate judge hearing the trial on the merits or presiding at a jury trial has been made by any party.[25]

A witness appearing before an associate judge is subject to the penalties for perjury provided by law.[26] A referring court may fine or imprison a witness who: (1) failed to appear before an associate judge after being summoned; or (2) improperly refused to answer questions if the refusal has been certified to the court by the associate judge.[27]

The associate judge's report may contain the associate judge's findings, conclusions, or recommendations and may be in the form of a proposed order. The associate judge's report must be in writing and in the form directed by the referring court.[28] After a hearing, the associate judge shall provide the parties participating in the hearing notice of the substance of the associate judge's

report, including any proposed order.[29] Notice may be given to the parties: (1) in open court, by an oral statement or by providing a copy of the associate judge's written report, including any proposed order; (2) by certified mail, return receipt requested; or (3) by facsimile.[30] A rebuttable presumption exists that notice is received on the date stated on: (1) the signed return receipt, if notice was provided by certified mail; or (2) the confirmation page produced by the facsimile machine, if notice was provided by facsimile.[31] After a hearing conducted by an associate judge, the associate judge shall send the associate judge's signed and dated report, including any proposed order, and all other papers relating to the case to the referring court.[32]

An associate judge shall give all parties notice of the right to a de novo hearing to the judge of the referring court.[33] The notice may be given: (1) by oral statement in open court; (2) by posting inside or outside the courtroom of the referring court; or (3) as otherwise directed by the referring court.[34] Before the start of a hearing by an associate judge, a party may waive the right of a de novo hearing before the referring court in writing or on the record.[35]

Pending a de novo hearing before the referring court, a proposed order or judgment of the associate judge is in full force and effect and is enforceable as an order or judgment of the referring court, except for an order providing for the appointment of a receiver.[36] If a request for a de novo hearing before the referring court is not timely filed or the right to a de novo hearing before the referring court is waived, the proposed order or judgment of the associate judge becomes the order or judgment of the referring court only on the referring court's signing the proposed order or judgment.[37] An order by an associate judge for the temporary detention or incarceration of a witness or party shall be presented to the referring court on the day the witness or party is detained or incarcerated. The referring court, without prejudice to the right to a de novo hearing provided by Section 201.317, may approve the temporary detention or incarceration or may order the release of the party or witness, with or without bond, pending a de novo hearing. If the referring court is not immediately available, the associate judge may order the release of the party or witness, with or without bond, pending a de novo hearing or may continue the person's detention or incarceration for not more than 72 hours.[38]

Unless a party files a written request for a de novo hearing before the referring court, the referring court may: (1) adopt, modify, or reject the associate judge's proposed order or judgment; (2) hear additional evidence; or (3) recommit the matter to the associate judge for further proceedings.[39]

A party may request a de novo hearing before the referring court by filing with the clerk of the referring court a written request not later than the third working day after the date the party receives notice of the substance of the associate judge's report as provided by Section 201.313.[40] A request for a de novo hearing under this section must specify the issues that will be presented to the referring court. The de novo hearing is limited to the specified issues.[41] Notice of a request for a de novo hearing before the referring court shall be given to the opposing attorney in the manner provided by Rule 21a, Texas Rules of Civil Procedure.[42] If a request for a de novo hearing before the referring court is filed by a party, any other party may file a request for a de novo hearing before the referring court not later than the third working day after the date the initial request was filed.[43] The referring court, after notice to the parties, shall hold a de novo hearing not later than the 30th day after the date the initial request for a de novo hearing was filed with the clerk of the referring court.[44]

It should be noted that a “de novo hearing” before the juvenile court is not a “trial de novo” from a case heard by the associate judge, on the merits. The Supreme Court of Texas held that the “de novo hearing” under TFC 201.015 is not an entirely new and independent action before the referring court, but instead, is an extension of the original trial, heard by the associate judge, on the merits.[45] While the Supreme Court was interpreting TFC 201.015, TFC 201.317 has very similar language which relates to “de novo hearings” by the associate judge in juvenile matters.

In the de novo hearing before the referring court, the parties may present witnesses on the issues specified in the request for hearing. The referring court may also consider the record from the hearing before the associate judge, including the charge to and verdict returned by a jury, if the record was taken by a court reporter.[46] The denial of relief to a party after a de novo hearing under this section or a party's waiver of the right to a de novo hearing before the referring court does not affect the right of a party to file a motion for new trial, a motion for judgment notwithstanding the verdict, or other posttrial motions.[47] A party may not demand a second jury in a de novo hearing before the referring court if the associate judge's proposed order or judgment resulted from a jury trial.[48]

A party's failure to request a de novo hearing before the referring court or a party's waiver of the right to request a de novo hearing before the referring court does not deprive the party of the right to appeal to or request other relief from a court of appeals or the supreme court.[49] Except as provided by Subsection (c), the date an order or judgment by the referring court is signed is the controlling date for the purposes of appeal to or request for other relief from a court of appeals or the supreme court.[50] The date an agreed order or a default order is signed by an associate judge is the controlling date for the purpose of an appeal to, or a request for other relief relating to the order from, a court of appeals or the supreme court.[51]

If an associate judge appointed under this subchapter is temporarily unable to perform the judge's official duties because of absence or illness, injury, or other disability, a judge of a court having jurisdiction of a suit under this title or Title 1 or 4 may appoint a visiting associate judge to perform the duties of the associate judge during the period of the associate judge's

absence or disability if the commissioners court of a county in which the court has jurisdiction authorizes the employment of a visiting associate judge.[52] To be eligible for appointment under this section, a person must have served as an associate judge for at least two years.[53] Sections 201.001 through 201.017 apply to a visiting associate judge appointed under this section.[54]

THE JUVENILE REFEREE, The Same, but Different

The referee appointed under 51.04 of the Family Code is able to conduct many of the same duties as an associate judge appointed under subchapter D of the Family Code, but who appoints him is different. Also, an associate judge appointed under the subchapter D of the Family Code may serve as a referee as provided by Sections 51.04(g) and 54.10 and a referee appointed under Section 51.04(g) may be appointed to serve as an associate judge under subchapter D.[55]

The Family Code provides that "a referee appointed to conduct hearings under Title 3 (Juvenile Justice Code) of the Family Code may be appointed by the juvenile board."[56] Does the optional "may" language in the appointment of a referee by the juvenile board leave some wiggle room for an appointment of a referee by one or more of the juvenile judges of a county? I don't know the answer to that. And while a referee may be appointed as an associate judge, and an associate judge may be appointed as a referee, I have found nothing in the statute that authorizes an appointment of a referee by a juvenile judge.

The referee shall be an attorney licensed to practice law in this state. Such payment or additional payment as may be warranted for referee services shall be provided from county funds.[57] The juvenile board can also appoint a referee for the purposes of conducting detention hearings only.[58]

Before commencing the detention hearing, the referee shall inform the parties who have appeared that they are entitled to have the hearing before the juvenile court judge, or a substitute judge authorized by Section 51.04(f). If a party objects to the referee conducting the detention hearing, an authorized judge shall conduct the hearing within 24 hours.[59] At the conclusion of the hearing, the referee shall transmit written findings and recommendations to the juvenile court judge or substitute judge. The juvenile court judge or substitute judge shall adopt, modify, or reject the referee's recommendations not later than the next working day after the day that the judge receives the recommendations. Failure to act within that time results in release of the child by operation of law.[60] A recommendation that the child be released operates to secure the child's immediate release, subject to the power of the juvenile court judge or substitute judge to reject or modify that recommendation. The effect of an order detaining a child shall be computed from the time of the hearing before the referee.[61]

The duties under section 54.10 of the Family Code apply equally to the referee as they do to the associate judge. Like the associate judge, except as limited by certain determinate sentence provisions, a referee may hold a hearing on Adjudication, Disposition or to Modify Disposition, including a jury trial, a hearing under the Child with Mental Illness Chapter, including a jury trial, or a hearing under the Interstate Compact for Juveniles.[62] The referee can preside over these hearings provided: (1) the parties have been informed by the referee that they are entitled to have the hearing before the juvenile court judge; and (2) after each party is given an opportunity to object, no party objects to holding the hearing before the referee or associate judge.[63] The Juvenile Justice Code defines "Party" as the state, a child who is the subject of proceedings under this subtitle, or the child's parent, spouse, guardian, or guardian ad litem.[64] Not only can the child object but so can the parents and the state.

When the state and a child who is subject to a determinate sentence agree to the disposition of the case, wholly or partly, a referee may hold a hearing for the purpose of allowing the child to enter a plea or stipulation of evidence.[65] After the hearing, the referee or associate judge shall transmit the referee's written findings and recommendations regarding the plea or stipulation of evidence to the juvenile court judge for consideration. The juvenile court judge may accept or reject the plea or stipulation of evidence in accordance with Section 54.03(j) of the Family Code.[66] What is intriguing, is while the juvenile court judge still holds the ultimate responsibility of every decision made by the referee, the referee is not their appointment.

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[1] Tex. Fam. Code Sect. 201.302(a)
[2] Tex. Fam. Code Sect. 201.302(a)
[3] Tex. Atty. Gen. Op. GA-0126 (Tex.A.G.), 2003 WL 22896501, *Pritchard & Abbott v. McKenna*, 350 S.W.2d 333, 335 (Tex. 1961)).
[4] Tex. Atty. Gen. Op. GA-0126 (Tex. A.G.), 2003 WL 22896501, *Abbott v. Pollock*, 946 S.W.2d 513, 517 (Tex. App.-Austin 1997, writ denied); *Renken v. Harris County*, 808 S.W.2d 222, 224 (Tex. App.-Houston [14th Dist.] 1991, no writ).
[5] Tex. Fam. Code Sect. 201.302(b)
[6] Tex. Fam. Code Sect. 201.302(c)
[7] Tex. Fam. Code Sect. 201.302(d)
[8] Tex. Fam. Code Sect. 201.305(a)
[9] Tex. Fam. Code Sect. 201.305(b)
[10] Tex. Fam. Code Sect. 201.305(c)
[11] Tex. Fam. Code Sect. 201.305(d)

[12] Tex. Fam. Code Sect. 201.309(a)
[13] Tex. Fam. Code Sect. 201.309(b)
[14] Tex. Fam. Code Sect. 54.10(a)
[15] Tex. Fam. Code Sect. 54.10(a)
[16] Tex. Fam. Code Sect. 51.02(10)
[17] *Matter of E.B.S.,* 756 S.W.2d 852 (Tex. App.—Austin 1988).
[18] Tex. Fam. Code Sect. 54.03 (i), *In the Matter of M.S*., MEMORANDUM, No. 2019 WL 3928777, (Tex.App.—Dallas 8/20/2019)
[19] Tex. Fam. Code Sect. 54.10(f)
[20] Tex. Fam. Code Sect. 54.10(f)
[21] Tex. Fam. Code Sect. 201.306(a)
[22] Tex. Fam. Code Sect. 201.306(b)
[23] Tex. Fam. Code Sect. 201.306(c)
[24] Tex. Fam. Code Sect. 201.308(a)
[25] Tex. Fam. Code Sect. 201.308(b)
[26] Tex. Fam. Code Sect. 201.311(a)
[27] Tex. Fam. Code Sect. 201.311(b)
[28] Tex. Fam. Code Sect. 201.313(a)
[29] Tex. Fam. Code Sect. 201.313(b)
[30] Tex. Fam. Code Sect. 201.313(c)
[31] Tex. Fam. Code Sect. 201.313(d)
[32] Tex. Fam. Code Sect. 201.313(e)
[33] Tex. Fam. Code Sect. 201.314(a)
[34] Tex. Fam. Code Sect. 201.314(b)
[35] Tex. Fam. Code Sect. 201.314(c)
[36] Tex. Fam. Code Sect. 201.315(a)
[37] Tex. Fam. Code Sect. 201.315(b)
[38] Tex. Fam. Code Sect. 201.315(c)
[39] Tex. Fam. Code Sect. 201.316
[40] Tex. Fam. Code Sect. 201.317(a)
[41] Tex. Fam. Code Sect. 201.317(b)
[42] Tex. Fam. Code Sect. 201.317(c)
[43] Tex. Fam. Code Sect. 201.317(d)
[44] Tex. Fam. Code Sect. 201.317(e)
[45] *In the Interest of A.L.M.-F.*, --- S.W.3d ----, No. 17-0603, 2019 WL 1966623 (Tex.Sup.Ct., 5/3/2019).
[46] Tex. Fam. Code Sect. 201.317(f)
[47] Tex. Fam. Code Sect. 201.317(g)
[48] Tex. Fam. Code Sect. 201.317(h)
[49] Tex. Fam. Code Sect. 201.318(a)
[50] Tex. Fam. Code Sect. 201.318(b)
[51] Tex. Fam. Code Sect. 201.318(c)
[52] Tex. Fam. Code Sect. 201.320(a)
[53] Tex. Fam. Code Sect. 201.320(b)
[54] Tex. Fam. Code Sect. 201.320(c)
[55] Tex. Fam. Code Sect. 201.309
[56] Tex. Fam. Code Sect. 51.04(g)
[57] Tex. Fam. Code Sect. 51.04(g)
[58] Tex. Fam. Code Sect. 54.01(l)
[59] Tex. Fam. Code Sect. 54.01(l)
[60] Tex. Fam. Code Sect. 54.01(l)
[61] Tex. Fam. Code Sect. 54.01(l)
[62] Tex. Fam. Code Sect. 54.10(a)
[63] Tex. Fam. Code Sect. 54.10(a)
[64] Tex. Fam. Code Sect. 51.02(10)
[65] Tex. Fam. Code Sect. 54.10(f)
[66] Tex. Fam. Code Sect. 54.10(f)

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REVIEW OF RECENT CASES

By Subject Matter

By Case

RECENT CASES

APPEALS

IN ERRONEOUS ADMISSION OF PRISONER "TRAVEL CARD," AS EVIDENCE OF PRIOR JUVENILE RECORD, APPELLATE COURT CONSIDERING THE EVIDENCE AS A WHOLE, THE STRENGTH AND WEAKNESS OF THE CASE, AND THE VERDICT, AND CONCLUDED THAT THE ERRONEOUS ADMISSION PROBABLY LED TO THE RENDITION OF AN IMPROPER JUDGMENT.

¶ 19-4-6B. **In re Commitment of Hull**, MEMORANDUM, No. 13-17-00378-CV (Tex.App.—Corpus Christi-Edinburg, 7/18/2019)

Facts: The State presented evidence that Hull pleaded guilty and was convicted of the following sexually violent offenses: (1) a 1977 conviction for aggravated kidnapping with the intent to violate and abuse the victim sexually, see TEX. PENAL CODE ANN. § 20.04; and (2) two 2001 convictions for indecency with a child. See id. § 21.11. On the basis of these convictions, the trial court granted the State a directed verdict that Hull is a repeat sexually violent offender. See TEX. HEALTH & SAFETY CODE ANN. § 841.003(b).

Hull was released from prison in 1984 after serving seven years for the first conviction. He was arrested fifteen years later, when he committed the offenses forming the basis for his 2001 convictions. Hull spent sixteen years in prison for the 2001 convictions when the parole panel ordered his release at the age of sixty. All told, Hull has served twenty-three years in prison for his crimes. In ordering Hull's release, the parole panel necessarily determined that Hull "is able and willing to fulfill the obligations of a law-abiding citizen" and that his release is in the "best interest of society." See TEX. GOV'T CODE ANN. § 508.141(e)(2), (f). Anticipating Hull's release, the State's Special Prosecution Unit—Civil Division filed a petition seeking to commit Hull indefinitely as a sexually violent predator.

The State and Hull both presented expert opinion testimony regarding whether Hull suffered from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. The State's expert, Darrel B. Turner, Ph.D., concluded that Hull suffered from such a condition. Hull's expert, Marisa R. Mauro, Psy.D., concluded otherwise.

A critical difference in their testimony was the extent to which Drs. Turner and Mauro relied on a prisoner "travel card" notation indicating that Hull committed a sexual assault as a juvenile. Dr. Mauro described the travel card as a summary of an inmate's criminal history written by a prison employee. Without any available juvenile records to confirm the offense, Dr. Mauro determined that the information was unreliable and placed little emphasis on the allegation. On the other hand, Dr. Turner believed that the offense was "quite relevant" to his analysis and mentioned it extensively throughout his testimony. The trial court overruled Hull's objections to testimony referencing the travel card evidence.

The trial court granted a directed verdict that Hull was a repeat sexually violent offender. The jury found beyond a reasonable doubt that Hull is a sexually violent predator, and the trial court entered a final judgment on the jury's verdict. This appeal followed.

Because his third issue is dispositive, we address it next. See TEX. R. APP. P. 47.1. Hull contends the trial court abused its discretion in overruling its objections to Dr. Turner's testimony regarding a Texas Department of Criminal Justice travel card which, according to Dr. Turner, showed that Hull committed a sexual assault when he was a juvenile. Specifically, Hull argues that the travel card was unreliable and thus inadmissible and that any probative value it had was outweighed by its prejudicial effect. See TEX. R. EVID. 703, 705(a), (d). We conclude that the trial court's evidentiary ruling was both erroneous and harmful.

Held: Reversed and remanded

Memorandum Opinion: Dr. Turner testified that, after reviewing the travel card, he concluded Hull was convicted of rape when he was fifteen years old. Dr. Mauro described the travel card as "a summary written by a prison employee about what the inmate's criminal history is" and stated that the travel card contained no details regarding Hull's juvenile sexual offense. Dr. Turner clarified that "there was really a very limited amount of information on that offense ... we don't know a lot in terms of details there." There was no testimony regarding who prepared the travel card, when it was prepared, whether the travel card was kept in the regular course of business, and there was no other evidence substantiating the notation that Hull was convicted of rape when he was fifteen.

We conclude that, under these circumstances, Dr. Turner's reliance on the travel card was not reasonable, and therefore the information derived from the travel card should not have been disclosed to the jury as facts or data underlying Dr. Turner's opinion. See Leonard, 385 S.W.3d at 573 (holding that an expert's reliance on polygraph results was not reasonable and therefore the evidence could not by disclosed to the factfinder through expert testimony); see also E.I. du Pont de Nemours & Co., Inc. v. Robinson, 923 S.W.2d 549, 563 (Tex. 1995) (Cornyn, J. dissent) ("Rule 703 requires that if an expert intends to base an opinion solely on hearsay evidence, that it must be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."). Although

Dr. Turner testified that he relied on documents that are usually relied upon by experts in his field, he did not specifically state that experts in his field rely on travel cards for their analysis whether a person has a behavioral abnormality. Thus, under these circumstances, we conclude the trial court abused its discretion by admitting it.

Finding error, we must now perform a harm analysis by reviewing all of the evidence to determine if the error probably caused the rendition of an improper judgment. See TEX. R. APP. P. 44.1(a)(1); U-Haul Int'l, Inc., 380 S.W.3d at 132. We focus our harm analysis on the effect of the evidentiary error as it pertains to the jury's implicit finding that Hull suffered from a behavioral abnormality, while keeping in mind the constitutional implications of indefinite civil commitment.

The State first referenced the juvenile offense in its opening statement, describing "a sexual offense that [Hull] committed while he was a juvenile." Dr. Turner referenced the juvenile offense extensively as illustrated by the following excerpts from his testimony:

Q. And if we're looking at this case, big picture, what are your main reasons for finding that Mr. Hull suffers from a behavioral abnormality?
A. Well, the definition of a behavioral abnormality, in a paraphrased sense, is: Does he have a condition that makes him likely to re-offend? And when we look at Mr. Hull's life, his first offense is—occurs at the age of 15. That was a sexual offense. He was punished[.]
....
Q. Dr. Turner, if you can recall, you were giving your big picture, main reasons for finding that Mr. Hull suffers from a behavioral abnormality.
A. Sure. And in the course of my testimony—and there's lots of science and stats and everything; but it boils down to: Is there a condition that makes him likely to re-offend sexually? And when you look at his life, the sexual offending began at about age 15. He was punished.
....
Q. And so, I think you touched on this in your big picture, main reasons for finding that he has a behavioral abnormality; but going just kind of in chronological order to flush this out more, what was the first offense that you are aware of that Mr. Hull was accused of committing that is a sexual offense?
A. So, the first assault—or the first offense in the records is a rape that occurred when he was 15 years old of another 15-year-old female.
Q. Okay. And even though you indicated that there was limited amount of information regarding that, did you still take it into consideration in this case?
A. Yes. ... [I]t was another sexual offense; and according to records, it was the reason he was sent to a state school, Gatesville, for a period of time. So, what we know is that at an early age he was willing to violate someone else to satisfy his own sexual urges. He was punished for that and then went on to re-offend, actually multiple times. So, it's quite relevant.
....
Q. Do you find anything [un]usual about that, about Mr. Hull stating that he cannot remember why he was in this facility for nine months?
*10 A. Yes. ... Well, you know, generally things like[ ] that in life we tend to remember. I don't think he doesn't remember. I think he was there for the rape, as the records indicate. I think he didn't want to admit that. That's what I think.
Q. And so, what, if anything, is significant about Mr. Hull committing the sexual offense as a juvenile?
A. Well, to commit a sexual offense as a juvenile and then to go on to offend as an adult is more evidence of sexual deviance. It's more evidence of antisociality, and it increases the person's overall risk.
....
Q. And I guess—even if you were to set this juvenile offense aside and only look at the convictions for the sexual offenses that he got while he was an adult, would you still find him to have a behavioral abnormality?
A. Yes, I would.
....
Q. And with regard to poor behavioral controls, you scored Mr. Hull a 26 on that item; is that right?
A. Yes.
Q. And can you explain to the jury what evidence you found of that?
A. Well, we have evidence in his childhood, a lot of street fights and things like[ ] that that he talked about to me. He was suspended from school multiple times. He was sen[t] to the State school for—possibly for what we think is for the rape of a 15-year-old girl.
....
Q. And today, do you believe that Mr. Hull is a menace to the health and safety of another person?
A. Yes, I do. ... I think he still has sexual deviant interests. I think he's still quite antisocial; and I think, essentially, his entire life all he's done is commit sex offenses, be punished and commit more sex offenses.

During Hull's direct examination, Dr. Mauro explained that she placed little emphasis on the allegations in the travel card because she did not believe it was reliable. On cross-examination, the State pressed Dr. Mauro on the significance of the juvenile offense in relation to her conclusion that Hull was not a sexually violent predator as defined by the SVP Act:

Q. Okay. Would you consider Mr. Hull an average sex offender?
A. According to the stat[ist]ics and his risk, yes, I believe that he is no different than the average sex offender.
Q. Okay. Even though he raped for the first time when he was 15 years old?
A. Well, we don't really have the details on that. I considered that some type of sexual offense happened in his juvenile history, but I don't know the details of that.
....

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Q. And even though he recidivated after committing the offense at 15 years old, he still went on, after being punished, to commit the aggravated kidnapping? That still makes him average?
A. Well, again, we don't have the records on that juvenile history. I considered worst case scenario, that he did commit a sex offense as a teenager and that he was convicted for purposes of assessing his risk; but I can't say that he certainly did that and then certainly recidivated. So, the best I can say is that he—I considered that possibility.
....
Q. You also mentioned that sometimes if someone, maybe, acts out criminally or does things they shouldn't have been doing, as a way of survival, a survival mechanism?
A. Yes.
*11 Q. And is raping a 15-year-old girl when you are 15, is that a survival mechanism?
....
A. No. If somebody did that, no.
....
Q. And if a person sexually offends as a juvenile and continues to sexually offend as an adult, would that raise their risk to re-offend?
A. Yes.

The State continued to emphasize the juvenile offense in its closing argument:
He started as young as 15 years old when he had his first rape, when he raped a girl his similar age[.] ... Like I told you, after getting caught and punished the first time, when he was 15, he went on to re-offend sexually[.] ... Think about it. Mr. Hull committed a rape at the age of 15. He got punished. What did he do? He moved on. He kidnapped a woman, tried to rape her. Punished. What did he do? He went on to offend against two little girls[.]

The parties' respective trial strategies tasked the jury with considering whether Hull belonged to that small group of sexually violent predators contemplated by the Legislature or whether he was an "average" sex offender as proposed by Dr. Mauro. To prove that Hull fell into the former group, the State relied extensively on Hull's alleged juvenile offense, the sexual assault of a fifteen-year-old girl. The offense also formed the foundation for Dr. Turner's opinion that Hull suffered from a behavioral abnormality.

As reflected above, Dr. Turner cited the offense as the first indication that Hull was likely to commit future sexually violent acts. Dr. Turner continued to reference the offense throughout his testimony to support his contention that Hull committed sexually violent offenses throughout his life, even after facing punishment. Specifically, Dr. Turner noted that the juvenile offense was evidence of sexual deviance and "antisociality" and that it increased Hull's overall risk to reoffend. He maintained that the offense was "quite relevant" to his determination that Hull suffered from a behavioral abnormality, and he found it unusual that Hull would deny committing the offense.

Dr. Turner also relied on the juvenile offense when scoring the degree to which Hull could be considered a psychopath, a key part of Dr. Turner's overall risk assessment. Particularly, Dr. Turner referenced the juvenile offense as justification for his score regarding "poor behavioral controls." Finally, in concluding that Hull was a menace to the health and safety of others, Dr. Turner stressed that "his entire life all he's done is commit sex offenses[.]" The State continued this theme in its closing argument, citing the juvenile offense three times to support its position that Hull committed sexual offenses throughout his life.

We note that Dr. Turner maintained that his opinion would not have changed even were he to "set aside" Hull's juvenile offense. However, this assertion is incongruous with his belief that the offense was "quite relevant" to his opinion. The offense was baked into Dr. Turner's scoring of various risk factors and informed Dr. Turner's belief that Hull exhibited a lifetime pattern of sexually violent acts. Viewing the entirety of Dr. Turner's testimony, it is clear that the juvenile offense was critically important to his opinion that Hull suffered from a behavioral abnormality.

We also consider the fact that Hull presented contrary expert testimony. Dr. Mauro did not diagnose Hull as having antisocial personality or pedophilic disorder, and she placed very little weight on the travel card, believing it to be unreliable. Dr. Mauro concluded that Hull did not suffer from a behavioral abnormality or any other condition that would make him likely to commit a future act of sexual violence. Rather, she concluded that Hull fell into the class of "average" sex offenders. It is reasonable to presume that the State's repeated emphasis on the improperly admitted evidence was calculated to overcome a contrary expert opinion. See id.

In assessing the relative strengths and weaknesses of the case, it is also important to note that the two expert witnesses were diametrically opposed on their opinion of whether Hull suffered from a behavioral abnormality. The jury was therefore tasked with determining which expert reached the right conclusion. In such a situation, the repeated references to Hull having allegedly raped a fifteen-year-old girl must have necessarily impacted the jury's reconciliation of the conflicting testimony.

Conclusion: The information derived from the travel card was a focal point of the State's case and central in its efforts to persuade the jury that Hull was more than the "dangerous but typical recidivist" who is more properly dealt with through the criminal justice system. Crane, 534 U.S. at 413. In reviewing the entire case, considering the evidence as a whole, the strength or weakness of the case, and the verdict, we conclude that

the erroneous admission of evidence probably led to the rendition of an improper judgment. See TEX. R. APP. P. 44.1; Waldrip, 380 S.W.3d at 136. Therefore, we sustain Hull's third issue. We reverse the trial court's judgment and remand the case for a new trial.

ERROR WAS NOT PRESERVED AND THERE WAS NO ARGUABLE ISSUE ON APPEAL REGARDING PLEA WHERE THE RECORD SHOWED THAT THERE WAS NO COMPLAINT ABOUT THE JUVENILE'S FATHER NOT BEING PRESENT, OR ABOUT THE SUFFICIENCY OF THE STATUTORY ADMONISHMENTS PRIOR TO THE TAKING OF TESTIMONY.

¶ 19-4-9. **In the Matter of M.S.**, MEMORANDUM, No. 2019 WL 3928777, (Tex.App.—Dallas, 8/20/2019)

Facts: On June 28, 2018, the Dallas County District Attorney's Office filed a four-count petition regarding a child engaged in delinquent conduct against M.S., alleging she (1) intentionally or knowingly damaged or destroyed property (a motor vehicle) without the effective consent of the owner; (2) intentionally, knowingly, or recklessly caused bodily injury and used or exhibited a deadly weapon (a knife) during the commission of the assault; (3) intentionally, knowingly, or recklessly caused body injury to another; and (4) intentionally or knowingly used or exhibited a deadly weapon (a knife) to threaten another with imminent bodily injury.

The adjudication and disposition hearing was held on October 2, 2018. The State nonsuited counts 1, 3, and 4. The trial court accepted M.S.'s plea of true to the charge of assault causing bodily injury, found M.S. delinquent, and ordered M.S. placed on probation for a period of one year in the custody of the Chief Probation Officer of the Dallas County Juvenile Department for placement at Lake Granbury Youth Services.

The record of the adjudication and disposition hearing shows that, at the beginning of the hearing, after defense counsel announced ready, the trial court took notice of the presence of the M.S.'s aunt, and she told the trial court that M.S.'s father had asked her to be present because his truck had broken down. The trial court went on to admonish M.S., who indicated she understood the admonishments and that she wanted to give up her right to remain silent and enter a plea of true to the charge. Defense counsel joined in the waiver. Afterwards, the trial court heard evidence and several witnesses testified.

M.S. filed a notice of appeal. Her court-appointed counsel has filed an Anders brief on her behalf, concluding after a diligent review of the record that the appeal is frivolous and without merit. In reviewing an Anders brief, our duty is to determine whether there are any arguable grounds for reversal and, if there are, to remand the case to the trial court for the appointment of new counsel. Bledsoe v. State, 178 S.W.3d 824, 827 (Tex. Crim. App. 2005); In re D.D., 279 S.W.3d 849, 850 (Tex. App.—Dallas 2009, pet. denied). The Anders brief filed by M.S.'s appellate counsel presents a professional evaluation of the record and concludes there are no arguable grounds for reversal.

Held: Affirmed

Opinion: We note that section 54.03(b) of the Texas Family Code provides:
(b) At the beginning of the adjudication hearing, the juvenile court judge shall explain to the child and his parent, guardian, or guardian ad litem:
(1) the allegations made against the child;
(2) the nature and possible consequences of the proceedings, including the law relating to the admissibility of the record of a juvenile court adjudication in a criminal proceeding;
(3) the child's privilege against self-incrimination;
(4) the child's right to trial and to confrontation of witnesses;
(5) the child's right to representation by an attorney if he is not already represented; and
(6) the child's right to trial by jury.
TEX. FAM. CODE ANN. § 54.03(b) (emphasis added); In re M.C.S., 327 S.W.3d 802, 806 (Tex. App.—Ft. Worth 2010, no pet.); In re T.W.C., 258 S.W.3d 218, 220 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

However, subsection (i) of section 54.03 also provides: In order to preserve for appellate or collateral review the failure of the court to provide the child the explanation required by Subsection (b), the attorney for the child must comply with Rule 33.1, Texas Rules of Appellate Procedure, before testimony begins or, if the adjudication is uncontested, before the child pleads to the petition or agrees to a stipulation of evidence. TEX. FAM. CODE ANN. § 54.03(i).

The record of the adjudication and disposition hearing shows that, at the beginning of the hearing, after defense counsel announced ready, the trial court took notice of the presence of the M.S.'s aunt, and she told the trial court that M.S.'s father had asked her to be present because his truck had broken down. The trial court went on to admonish M.S., who indicated she understood the admonishments and that she wanted to give up her right to remain silent and enter a plea of true to the charge. Defense counsel joined in the waiver. Afterwards, the trial court heard evidence and several witnesses testified.

Conclusion: The record shows that there was no complaint about the juvenile's father not being present, or about the sufficiency of the statutory admonishments more generally, prior to the taking of testimony. Thus, based on section 54.03(i), any complaint regarding the adequacy of the admonishments was not preserved, and there is no arguable issue on appeal. See In re M.C.S., 327 S.W.3d at 806; In re T.W.C., 258 S.W.3d at 220; In re C.D.H., 273 S.W.3d 421, 424 n. 2 (Tex. App.—Texarkana 2008,

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no pet.). We affirm the trial court's judgment and the order of adjudication.

ASSOCIATE JUDGE

A "DE NOVO HEARING" FROM THE ASSOCIATE JUDGE TO THE REFERRING COURT IS NOT AN ENTIRELY NEW AND INDEPENDENT ACTION, BUT INSTEAD, IS AN EXTENSION OF THE ORIGINAL TRIAL ON THE MERITS.

¶ 19-4-1. **In the Interest of A.L.M.-F.**, --- S.W.3d ----, No. 17-0603, 2019 WL 1966623 (Tex.Sup.Ct., 5/3/2019).

Facts: The Department of Family and Protective Services filed a petition to terminate Mother's parental rights to her five children based on child endangerment and noncompliance with a court order establishing the terms for reunification. Without objection by either party, the trial court referred the case to an associate judge for adjudication on the merits, and the parties waived the right to a jury trial.

Following a two-day bench trial at which both sides called witnesses, the associate judge found sufficient evidence of grounds to terminate Mother's parental rights and that termination is in the children's best interests. The day after receiving the associate judge's report, Mother demanded a jury trial, and immediately following that, she timely requested a de novo hearing before the referring court on the issue of evidence sufficiency.

At a non-evidentiary hearing on Mother's jury-trial request, both the Department and the attorney ad litem for the children objected to the jury demand. The Department argued that (1) Mother had no right to a jury trial for the de novo hearing and (2) granting a jury demand at that juncture would prejudice both the Department and the children. Among other concerns, the Department cited the difficulty and expense of recalling all the witnesses to testify before a jury, including three expert witnesses and the interpreters required for several other witnesses. The attorney ad litem asserted that any delay occasioned by a jury trial would result in turmoil and uncertainty for the children. In response, Mother maintained that (1) section 201.015 of the Family Code grants the right to a jury trial in a de novo hearing so long as it is the first jury trial in the case, (2) it was theoretically possible for the referring court to hold a jury trial within the thirty-day window section 201.015 allows for conducting a de novo hearing, and (3) the expense of litigating the case to a jury after a previous bench trial is irrelevant to whether a jury trial is required when timely requested.

The referring court denied the jury request and set a de novo hearing date in compliance with the statutory deadline. At the hearing, the transcripts and exhibits from the associate-judge proceedings were admitted into evidence, but no witnesses were called to testify. After taking the matter under advisement, the court terminated Mother's parental rights and appointed the Department permanent managing conservator.

Mother appealed, asserting (1) the trial court abused its discretion in denying her jury demand and (2) the evidence was factually insufficient to support the best-interest finding. Rejecting both complaints, the court of appeals affirmed.

On petition for review to this Court, Mother challenges only the denial of her jury demand. As to that matter, the court of appeals assumed, without deciding, that Mother had a right to demand a jury trial at the de novo hearing and that her request was made within a reasonable time before trial. Even so, the court held that the trial court was not required to honor the request given the expense the Department would incur to relitigate the case to a jury and the harm that could befall the children if permanency were delayed. Mother argues that the Family Code protects her constitutional rights by guaranteeing that parties can demand at least one jury trial at any stage of the trial-court proceedings. Asserting a first-time jury trial is available in a de novo hearing as a matter of right, she complains that the lower courts failed to afford her a presumption that a timely jury demand must be granted.

Held: Affirmed

Opinion: Only five states in the country permit or require a jury trial in cases involving termination of parental rights. Recognizing the importance of the interests at stake in termination proceedings, Texas is one of them. Under our permissive statute, parties may demand a jury trial or elect to have a judge decide a termination case on the merits. As with other civil proceedings, the trial court may refer termination cases to an associate judge for myriad purposes, including adjudication on the merits in either a bench or jury trial.

Trial on the merits before an associate judge is not compulsory under our civil referral statutes and may be avoided if a party objects:
Unless a party files a written objection to the associate judge hearing a trial on the merits, the judge may refer the trial to the associate judge. A trial on the merits is any final adjudication from which an appeal may be taken to a court of appeals.

A party desiring a jury trial before the referring court need only object to the associate-judge referral and timely demand a jury trial:
A party must file an objection to an associate judge hearing a trial on the merits or presiding at a jury trial not later than the 10th day after the date the party receives notice that the associate judge will hear the

trial. If an objection is filed, the referring court shall hear the trial on the merits or preside at a jury trial.

Here, by failing to object to the referral, Mother declined the opportunity to have a jury trial before the referring court in the first instance. She then elected to waive her statutory right to a jury trial in the associate-judge proceedings. Despite these choices, Mother claims section 201.015 of the Family Code guarantees a third opportunity to demand a jury trial in a "de novo hearing" before the referring court.

A. De Novo Hearings

Section 201.015 applies to associate-judge referrals in child-protection, Title IV-D, and juvenile justice cases and has near equivalents applicable to associate-judge referrals in other civil cases and probate proceedings. Under section 201.015, when a case is referred to an associate judge for any authorized purpose—including disposition on the merits—"[a] party may request a de novo hearing before the referring court by filing with the clerk of the referring court a written request not later than the third working day after the date the party receives notice of [the substance of the associate judge's ruling or order]." De novo hearings are limited to the specific issues stated in the de novo hearing request, and the referring court must conduct the de novo hearing within thirty days of the request.

The parties may present witnesses at the de novo hearing, and the referring court "may also consider the record from the hearing before the associate judge, including the charge to and verdict returned by a jury." Notably, "[a] party may not demand a second jury in a de novo hearing before the referring court if the associate judge's proposed order or judgment resulted from a jury trial."

Neither section 201.015 nor any other provision of the Family Code expressly confers a right to a jury trial in a de novo hearing. Unlike the statutes authorizing referral to an associate judge, which explicitly refer to jury trials, the de novo hearing statutes are uniformly silent on the matter. In claiming a right to a jury trial under section 201.015, Mother homes in on two of its aspects—(1) the prohibition on a "second" jury trial in a de novo hearing and (2) the word "de novo," which modifies the term "hearing." Relying on these terms, Mother contends section 201.015 contemplates an entirely new and independent proceeding in which she may try her case anew to a jury so long as she previously tried her case to the bench. The Department urges that section 201.015 permits, but does not require, a referring court to grant a first-time request for a jury trial in a de novo proceeding.

As in all cases requiring us to construe a statute, we resolve this dispute by analyzing the statute's language to determine the Legislature's intent. We construe the statute "as a cohesive, contextual whole, accepting that [the] lawmaker-authors chose their words carefully, both in what they included and in what they excluded." Because we presume the Legislature intended for all the words in a statute to have meaning, we must harmonize statutory language when possible so that no terms are rendered useless.

By negative implication, section 201.015's prohibition on "second" jury trials gives rise to two alternative inferences: (1) a first jury trial is available as a matter of right in a de novo hearing or (2) the trial court is not prohibited from granting a first request for a jury trial in a de novo hearing and thus may allow one, in its discretion. Construing Chapter 201 as a whole, we conclude that the latter is a reasonable construction of the statute, but the former is not.

1. A "De Novo Hearing" is Not a "Trial De Novo"

A "trial de novo" is a new and independent action in the reviewing court with "all the attributes of an original action" as if no trial of any kind has occurred in the court below. But under Chapter 201, a hearing is not equivalent to a trial, and review under section 201.015 is not entirely independent of the proceedings before the associate judge. Accordingly, the term "de novo hearing," as used in Chapter 201, cannot reasonably be equated to a "trial de novo." Rather, the term "de novo hearing" appears to bear a special meaning that is relatively unique to the associate-judge referral statutes and governed by the procedures specified in the authorizing statutes.

In several provisions, Chapter 201 distinguishes between hearings and trials in relation to one another and with respect to jury and non-jury trials. On the front end, Chapter 201 explicitly allows for a "trial" before either the associate judge or, on timely objection, the referring court. Associate and referring judges may "hear" a non-jury trial on the merits or "preside" over a jury trial. Associate judges may also "conduct a hearing," as textually distinguished from "trials" that an associate judge can refer back to the referring court "in the interest of justice."

On the back end, the de novo hearing procedures in section 201.015 apply to all associate-judge rulings without making similar distinctions, describing the procedure only as a hearing, not a trial. When construing a statute, we "presume the Legislature selected statutory words, phrases, and expressions deliberately and purposefully and was just as careful in selecting the words, phrases, and expressions that were included or omitted." In that vein, the juxtaposition of word choice in the associate-judge referral statutes is compelling with regard to legislative intent.

The procedures applicable to a section 201.015 "de novo hearing" are also inconsistent with the established understanding of a trial de novo. As described by the referral statutes, a de novo hearing is not entirely independent of the proceedings before the associate judge. The defining characteristic of a trial de novo is that it is a complete retrial on all issues on which the judgment was founded. Consequently, in such proceedings, the judgment of the first tribunal is ordinarily vacated. Not merely suspended, but nullified.

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For example, in authorizing a "trial de novo" review of administrative-agency decisions, the Legislature has specified that the reviewing court shall try each issue of fact and law in the manner that applies to other civil suits in this state as though there had not been an intervening agency action or decision but may not admit in evidence the fact of prior state agency action or the nature of that action except to the limited extent necessary to show compliance with statutory provisions that vest jurisdiction in the court.

Notably, the statute is specific in stating that "[o]n demand, a party to a trial de novo review may have a jury determination of each issue of fact on which a jury determination could be obtained in other civil suits in this state."

Statutes enacted by the Legislature and rules adopted by this Court generally use the term "trial de novo" to trigger these consequences. Those who lose a truancy case, for example, may appeal to a juvenile court. An appeal of the "case must be tried de novo," and "[o]n appeal, the judgment of the truancy court is vacated." Likewise, cases first heard in justice courts may be appealed to a statutory county court for a full "trial de novo." The applicable rules are express in stating that trial de novo is "a new trial in which the entire case is presented as if there had been no previous trial."

A trial de novo is not what the Legislature enacted as the mechanism for reviewing an associate judge's merits adjudications. Not in word and not in attribute. Rather, the Legislature created a process that is mandatory when invoked but expedited in time frame and limited in scope. The associate judge's judgment is not vacated, but pending review, is "in full force and effect and is enforceable as an order or judgment of the referring court ...."

Nor is a de novo hearing a complete retrial on all issues—parties must specify the specific issues presented to the referring court. Issues not specified need not be reviewed. Witnesses may only be presented on the specified issues, but the referring court may also consider the record from the associate judge sua sponte. Participation in, or waiver of, a de novo hearing is without prejudice to "the right of a party to file a motion for new trial, motion for judgment notwithstanding the verdict, or other post-trial motion." In short, a de novo hearing is not an entirely new and independent action, but instead, is an extension of the original trial on the merits.

This construction of the statute accords not only with its language but also with the overall design of the associate-judge system, which serves to streamline and expedite review of cases, not multiply proceedings and increase costs.

2. Timelines Are Incompatible With A Jury-Trial Right

Proving the point, the deadlines for requesting and conducting a de novo hearing are inconsonant with Mother's construction of the statute as mandating a jury trial on timely demand. Under section 201.015, a de novo hearing is permitted only if requested within three working days after notice of the associate judge's decision54 and the hearing must be held within thirty calendar days after that, but under the rules of civil procedure, a jury demand must be made "a reasonable time" before a non-jury docket setting "but not less than thirty days in advance." If the statute said what Mother asserts, referring courts would be forced to fit jury trials within what would be at most a five-day window, presenting nearly insurmountable docket-management issues. We must afford the statute a meaning consistent with its plain language that is also workable for all the cases for which a de novo hearing is authorized, not just this one. Even if a single case could theoretically be accommodated for a jury trial in the referring court within the short statutory time frame, the totality of the cases referring courts would have to accommodate on an expedited basis renders Mother's interpretation of section 201.015 facially improbable. Associate judges were granted the right to conduct merits-based adjudications to alleviate burdens on the court, not add to them. Giving weight to an inference that would neuter the effectiveness of these statutes as a relief valve for crowded court dockets is not reasonable.

Though section 201.015 does not expressly authorize an extension of the thirty-day hearing deadline, some appellate courts have held that the deadline is not jurisdictional, so it is waivable when neither party objects. We express no opinion on that matter because the possibility of waiver and the availability of a continuance are immaterial to the statutory-construction issue presented here, which requires us to ascertain legislative intent from the language the Legislature enacted. Did the Legislature intend to grant a statutory right to a jury trial in a de novo hearing considering that (1) the thirty-day deadline for holding the hearing is couched in mandatory terms, (2) the statute does not expressly authorize an extension of any length under any condition, and (3) no right to a jury trial is expressly stated? We think not. We must give the statute a meaning that is reasonable when the statute is construed as a whole, and against this backdrop, an expectation that referring courts would be able to accommodate first-time jury demands in de novo hearings does not comport with the overall statutory scheme.

Referral to an associate judge—which is essentially voluntary—removes cases from crowded trial-court dockets and allows adjudication by specialized tribunals. Mother's construction of the statute would extend final disposition of cases and burden referring-court dockets with accelerated proceedings, a paradoxical result the Legislature could not have intended. The fallacy of this premise is even more

evident here, because the Legislature has mandated expediency, efficiency, and judicial economy in parental-rights termination cases.

Mother's attempt to analogize to master-in-chancery appointments under civil-procedure rule 171 falls flat. While Mother cites several cases as recognizing the right to a jury trial before the referring court after a master in chancery has issued a report, those cases are inapposite because, unlike Chapter 201, a jury trial is not an option in rule 171 proceedings. Participation in master-in-chancery proceedings does not preclude a jury trial in the referring court because that is the only opportunity for parties to claim one. Unlike rule 171, Chapter 201 provides other options for a jury trial, but Mother chose not to claim them.

Considering section 201.015's "de novo hearing" requirement and "second jury" prohibition in harmony with the statute in its entirety, we conclude that Chapter 201 neither prohibits nor grants a right to a first-time jury trial in a de novo hearing, but permits the referring court to grant one in its discretion.

B. Constitutional Right to A Jury Trial

The rights inherent in the parent–child relationship are among the oldest of the fundamental liberty interests, but the existence of a substantive right is distinct from the procedures constitutionally required to protect that right. Mother asserts she is entitled to a jury trial in parental-rights termination cases based on the Texas Constitution's assurance that the right to a jury trial is "inviolate." But Chapter 201 indisputably affords parties the right to demand a jury trial before either the referring court or the associate judge, and Mother has not explained—with either argument or authority—why the Constitution requires more than the robust right to a jury trial the statute already offers in termination cases, a right she voluntarily waived.

C. Standard of Review

We review the "denial of a jury demand for an abuse of discretion." A trial court abuses its discretion when a "decision is arbitrary, unreasonable, and without reference to guiding principles." The distinction between a jury trial that is permissive under the law and one that is available as a matter of right is more than mere semantics. When a jury trial is available as a matter of right, a timely request is presumptively reasonable and ordinarily must be granted absent evidence that granting the request would "(1) injure the adverse party, (2) disrupt the court's docket, or (3) impede the ordinary handling of the court's business." But because section 201.015 does not afford a right to a jury trial in a de novo hearing, no presumption arises. Though injury, disruption, and impediment remain useful factors guiding the court's decision to grant or deny a first-time jury demand, no presumption tips the scale one way or the other, leaving the ultimate decision within the trial court's sound discretion.

Here, we agree with the court of appeals that the referring court did not abuse its discretion in denying Mother's demand for a jury at the de novo hearing. Mother identified a three-day window before expiration of the statutorily mandated hearing deadline that—in theory—would be available for a jury setting, but the record bears no evidence that those dates were actually available for a jury setting or even when the next available jury setting would be.

Moreover, the jury request was opposed, and with a mere ten days between the hearing on Mother's jury demand and the de novo hearing deadline, the Department asserted that presentation of the merits would be hampered due to the difficulty and expense of recalling witnesses to testify live before the jury. While section 201.015(c) allows the referring court to "consider the record from the hearing before the associate judge," it is silent about whether prior testimony from those proceedings could be considered in a jury trial. Even assuming it could, and even assuming a case prepared for presentation to the bench would be adequate for a jury, the referring court could reasonably conclude the Department would be unfairly prejudiced if forced to rely on the cold written word in lieu of live testimony before the jury.

Conclusion: Chapter 201 of the Family Code fulfills the statutory promise of a jury trial on demand by allowing for a jury trial in either the referring court or before an associate judge. Associate judge proceedings do not occur by happenstance, nor are they compelled. So with a timely objection, parties can choose to have the referring court adjudicate the merits following a bench or jury trial. But once the parties elect a bench trial before the associate judge, Chapter 201 does not confer a right to demand a jury trial in a de novo hearing. If a de novo hearing is requested, the referring court has discretion to grant a first-time jury request, but the statute cannot reasonably be read as affording the parties a right to a jury trial at that juncture. And because we agree with the court of appeals that the trial court was not obligated to grant Mother's jury demand under the circumstances, we affirm the court of appeals' judgment.

CONFESSIONS

NO REVERSABLE ERROR WHERE THE RECORD ESTABLISHED BEYOND A REASONABLE DOUBT THAT THE IMPROPERLY OBTAINED CONFESSION OBTAINED IN RESPONSE TO LAW ENFORCEMENT'S QUESTIONING DID NOT CONTRIBUTE TO APPELLANT'S CONVICTION.

¶ 19-4-4A. **In the Matter of J.K.,** No. 14-18-00041-CV, 2019 WL 2426697 [Tex.App.—Houston (14th Dist.), 6/11/2019].

Facts: Appellant was arrested for aggravated robbery in connection with a stolen Xbox. Appellant pleaded "not true" to the allegations and proceeded to a bench trial.

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Complainant E.T., a seven-year-old girl, testified at Appellant's trial.2 E.T. was home alone at her family's apartment the afternoon of August 19, 2017, when an intruder "knocked a lot of times" on the apartment door before breaking in. E.T. testified the intruder was carrying a long black gun with "a little red on the top of the gun." E.T. said the intruder told her something in a "mean voice" before walking into her seventeen-year-old brother's bedroom and stealing her brother's Xbox. The intruder left the apartment shortly afterwards.

Describing the intruder, E.T. testified he was wearing black, blue, and red clothing, carrying a blue bag, and covering part of his face with a bandana. E.T. stated the intruder's skin was "kind of dark, but ... a little light," and said his skin color was "peach, but darker."

When the intruder broke into the apartment, E.T. was on the phone with her mother, Tina, who was at work. Testifying at Appellant's trial, Tina stated she could hear someone knocking on the door while she was on the phone with E.T. Tina then heard a "loud noise" and "a louder voice like someone broke in." E.T. ended the phone call and Tina called the apartment office, letting them know someone had broken into the apartment. Tina left her job and drove to the apartment.

Joshua Grice, an employee at the apartment complex, answered Tina's phone call and ran to the family's apartment. When Grice got to the apartment, the front door was cracked open and the door's locking mechanism was broken. Grice called out but no one responded. Grice walked away from the apartment building towards the complex's fence line and observed a "younger black man" with a black and blue backpack walking away from the complex. Grice testified the individual was wearing a black shirt and black shorts and that a "bat or stick" was protruding out of the backpack.

Grice walked back to the family's apartment and found E.T. hiding underneath a blanket in the master bedroom. E.T. told Grice that a man entered the apartment carrying a gun and repeatedly asked E.T., "Where is my weed?" E.T. told Grice the man was wearing all black and covering his face. Grice called 911 and two police officers, Deputy Christopher Arias and Detective Jessip Murphy, arrived at the family's apartment.

Before the officers' arrival, Tina picked up E.T. from the apartment and left to get her son, V.T., from his friend's house. Tina, E.T., and V.T. returned to the apartment approximately ten minutes after the officers' arrival. Tina and V.T. spoke to the officers and, at Appellant's trial, acknowledged they initially lied to the officers because they did not want to admit E.T. was home alone. Tina and V.T. testified that they eventually told the officers the "true version" of where they were when the apartment was broken into: Tina was at work and V.T. was staying at a friend's house.

Testifying at Appellant's trial, Deputy Arias stated that E.T. told him "a bad man had entered or came into the resident's apartment." Deputy Arias asked E.T. whether the intruder was carrying a weapon and E.T. indicated the intruder was carrying a gun "like the duty weapon [Deputy Arias] had on [his] hip at the time." Describing E.T.'s demeanor, Deputy Arias stated she "appeared as if a traumatic event had just occurred."

The officers also spoke to V.T. and asked him if he knew who may have been responsible for breaking into the apartment and taking the Xbox. V.T. told the officers about an incident several weeks before during which he and a friend were smoking marijuana in the apartment complex parking lot when they were approached by a young, African-American man. The young man identified himself as Appellant and the boys exchanged information about the high schools they attended. V.T. testified that he and Appellant attended the same school. V.T. said Appellant was acting "suspicious" that evening and was "just walking around in circles" at the apartment complex.

After speaking with the family, Detective Murphy contacted the Fort Bend school district to get Appellant's information and address. At 9:45 p.m. that evening, Detective Murphy and another detective arrived at Appellant's address. The detectives knocked at Appellant's front door for about 5-10 minutes before Appellant answered. Appellant said he was home alone and the detectives called Appellant's mother and "gave her a rundown of what was happening." Appellant's mother came home and gave the detectives consent to search the house. In an upstairs room, the detectives found marijuana and an Xbox with a serial number matching the system stolen from V.T.'s room. The detectives questioned Appellant about the Xbox and, according to Detective Murphy, Appellant gave different accounts for how he came to possess the Xbox before eventually admitting that he took it.

Appellant was the last witness to testify at his trial and stated that, the day before the robbery, V.T. had messaged him about buying marijuana. Appellant arrived at V.T.'s apartment on August 17, 2019 and knocked for 5-10 minutes. After nobody answered, Appellant testified that he kicked in the door and entered the apartment. Appellant said he carried a baseball bat in his bag but left the bat outside of the apartment when he entered.

Appellant saw E.T. on the phone when he entered the apartment and said he did not speak to her. Appellant walked into V.T.'s bedroom and took marijuana and an Xbox. Appellant left the apartment and walked away from the apartment complex. Appellant testified that he "probably" was the person Grice saw walking away from the complex.

During his testimony, Appellant did not deny that he entered the apartment. He stated his intent was to steal marijuana. Appellant said he did not carry a gun when he entered the apartment. Appellant stated he did not talk to E.T. or make any threats toward her. Appellant said he was wearing dark clothing and a bandana over his face when he entered the apartment.

After closing statements, the trial court found beyond a reasonable doubt the following allegation of aggravated robbery:
That [Appellant], on or about August 9, 2017, in Fort Bend County, Texas, did then and there while in the course of committing theft of property owned by [E.T.] and with intent to obtain and maintain control of the property, intentionally and knowingly threaten or place [E.T.] in fear of imminent bodily injury or death, and the [Appellant] did then and there use and exhibit a deadly weapon, to-wit: a firearm; and that this act is a violation of section 29.03 of the Penal Code. Appellant timely appealed.

Held: Affirmed

Memorandum Opinion: Appellant asserts the trial court erred by denying his motion to suppress the confession he made after the detectives discovered the marijuana and Xbox during their search of his home. Appellant argues this confession was inadmissible because it was made during a "custodial interrogation" and no procedural safeguards were used to secure Appellant's privilege against self-incrimination.

Appellant's motion to suppress was filed pre-trial and re-urged by Appellant's counsel during Detective Murphy's trial testimony. Both parties took Detective Murphy on voir dire and Detective Murphy recounted in detail the events that took place at Appellant's house.

According to Detective Murphy, he and the other detective were at Appellant's house for approximately 1.5 hours. Detective Murphy and his colleague were both wearing their "relaxed uniform" of a black polo shirt with tan pants and both detectives carried their service weapons. After Appellant's mother arrived at the house, the detectives entered the house and Detective Murphy interviewed Appellant in the kitchen. Appellant denied any involvement in the robbery and said he had been at his house all day. Appellant's mother signed a written form consenting to a search of her home and Detective Murphy asked Appellant if there was anything in his room the detectives needed to know about. Appellant told the detectives there was a pipe in his room.

The detectives found marijuana and the missing Xbox upstairs; Detective Murphy acknowledged that the investigation "focused" on Appellant after this point. Detective Murphy again questioned Appellant and Appellant told Detective Murphy a friend "had brought [the Xbox] to his house" but he "couldn't explain who the friend was or anything like that." Detective Murphy raised his voice and told Appellant that he and his mother "could go to jail for this." Detective Murphy described the scene as "kind of a fiasco" with both Detective Murphy and Appellant's mother "yelling" at Appellant. Appellant kept "hem hawing around" and Detective Murphy "finally just raised [his] voice and yelled at [Appellant], 'Tell me. Tell me where you got it from.' " Appellant responded: "Because I took it, sir."

Detective Murphy testified that Appellant was not read his Miranda warnings or any warnings under the Texas Family Code. Appellant was not told that he "was free to leave, or that he didn't have to answer any of the[ ] questions." Appellant also was not handcuffed during the questioning. According to Detective Murphy, Appellant did not indicate that he wanted to stop talking to the detectives.

We assume without deciding the trial court erred in denying Appellant's motion to suppress the confession he made during Detective Murphy's questioning. Because the improper admission of a juvenile's statement made during a custodial interrogation implicates the constitutional right against self-incrimination, it is constitutional error to admit the statement into evidence. Marsh v. State, 140 S.W.3d 901, 908 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd); see also Jeffley v. State, 38 S.W.3d 847, 858 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Accordingly, we reverse unless the record establishes beyond a reasonable doubt that the admission of Appellant's confession in response to Detective Murphy's questioning did not contribute to Appellant's conviction. See Jeffley, 38 S.W.3d at 858 (citing Tex. R. App. P. 44.2(a)).

In our application of this standard, we do not focus on the propriety of the outcome of Appellant's trial. See Wesbrook v. State, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000); see also Marsh, 140 S.W.3d at 908. We focus instead on the error and its possible impact in light of the existence of other evidence. Marsh, 140 S.W.3d at 908. We consider the following factors: (1) the source of the error; (2) the nature of the error; (3) whether the error was emphasized and its probable collateral implications; (4) the weight a factfinder would probably place on the error; and (5) whether declaring the error harmless encourages the State to repeat it with impunity. Id. at 908-09 (citing Wilson v. State, 938 S.W.2d 57, 61 (Tex. Crim. App. 1996)). "Though no one factor is dispositive, the existence and severity of these factors are indicative of the harm caused by the admission of the oral statements." Jeffley, 38 S.W.3d at 859. Having identified the source and nature of the error, we turn to the remaining factors.

Conclusion: Here, the substance of Appellant's confession to Detective Murphy was established by other testimony and evidence, including (1) E.T.'s and Grice's description of the intruder; (2) V.T.'s identification of Appellant as a "suspicious" person; and (most importantly) (3) the detectives' discovery of marijuana and the missing Xbox during their consensual

search of Appellant's house. Given this testimony and evidence, it is improbable the factfinder placed much weight on Detective Murphy's testimony regarding Appellant's confession. See Marsh, 140 S.W.3d at 909-10 (erroneous admission of juvenile's statement harmless error where other testimony and evidence "established the same facts as his unrecorded statement"); see also Jeffley, 38 S.W.3d at 858-60 (erroneous admission of juvenile's statement harmless error where the defendant's "written statement and other testimony" supported conviction).

Moreover, the State did not place significant emphasis on Appellant's confession to Detective Murphy. Referencing Appellant's testimony at trial, the prosecutor asserted there "really wasn't much issue" regarding Appellant's commission of the theft. The prosecutor's closing argument instead focused on E.T.'s testimony and her recollection regarding the intruder's gun. In light of the other evidence supporting the conviction as well as Appellant's testimony, the collateral implications of the erroneous admission of Appellant's confession were limited. See Marsh, 140 S.W.3d at 908.

Finally, "[g]iven the strict requirements upon law enforcement officers in the family code regarding interrogation of juveniles, it is unlikely that declaring the admission of the oral statements harmless would encourage the State to repeat the error with impunity." Jeffley, 38 S.W.3d at 860. Accordingly, we find the record establishes beyond a reasonable doubt that the admission of Appellant's confession to Detective Murphy did not contribute to his conviction. See Tex. R. App. P. 44.2(a). We overrule Appellant's first issue.

DISPOSITION PROCEEDINGS

CASE AFFIRMED UNDER DICTATES OF VERTICAL STARE DECISIS, WHERE THE SENTENCE OF LIFE WITH THE POSSIBILITY OF PAROLE AFTER 40 YEARS PRECLUDED THE SENTENCER FROM CONSIDERING THE OFFENDER'S YOUTH.

¶ 19-4-13. **Brooks v. State**, --- S.W.3d ----, 2019 WL 4620994 [Tex.App.—Houston (1st Dist.), 9/24/2019]

Facts: A jury convicted appellant, Celvin Brooks, of the offense of capital murder.1 Because the State did not seek the death penalty and because appellant was younger than eighteen years old at the time he committed the offense, the trial court automatically assessed appellant's punishment at confinement for life.2 In three issues, appellant contends that (1)…; and (3) Texas's statutory scheme of automatically sentencing juvenile defendants who have committed capital felonies to confinement for life with the possibility of parole after forty years is facially unconstitutional and denied him due process because the scheme does not allow for an individualized sentencing hearing or for any meaningful opportunity of release.

Held: Affirmed

Opinion: In his third issue, appellant contends that Texas's statutory sentencing scheme providing that juvenile defendants convicted of capital felonies are automatically sentenced to confinement for life with the possibility of parole after forty years is facially unconstitutional based on the United States Supreme Court's decision in Miller v. Alabama. Specifically, appellant argues that this sentencing scheme denies him procedural due process because he is not allowed an individualized sentencing hearing, nor is he allowed any meaningful opportunity for release from confinement.

In Miller v. Alabama, the United States Supreme Court addressed whether statutory sentencing schemes that mandated a sentence of confinement for life without the possibility of parole for juvenile defendants convicted of capital felonies violated the Eight Amendment's prohibition of cruel and unusual punishment. See 567 U.S. 460, 465 (2012). The Miller Court, relying on prior cases involving sentencing practices for juvenile defendants in capital felonies, noted that "children are constitutionally different from adults for purposes of sentencing" and that, because juvenile defendants "have diminished capacity and greater prospects for reform," they are "less deserving of the most severe punishments." Id. at 471 (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)). The Court stated:

[C]hildren have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." Id. (quoting Roper v. Simmons, 543 U.S. 551, 569–70 (2005)). "[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes," as "the case for retribution is not as strong with a minor as with an adult," and the goal of rehabilitation of a juvenile defendant "could not justify" a sentence of life without parole because it "reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change." Id. at 472–73 (quoting Graham, 560 U.S. at 71, 74).

The mandatory sentencing schemes at issue in Miller—requiring a juvenile defendant convicted of a capital felony to be sentenced to confinement for life without

the possibility of parole—prevented the sentencing authority from taking into account considerations such as the defendant's youth, which impermissibly prohibited the sentencing authority "from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." Id. at 474. The Court also noted that "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." Id. at 476. The Court stated:

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including a plea agreement) or his incapacity to assist his own attorneys.

Id. at 477–78. The Court therefore held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," noting that such a sentencing scheme, which "mak[es] youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence," poses "too great a risk of disproportionate punishment." Id. at 479.

Although Texas requires a sentence of life without parole for persons who are eighteen years of age or older when they commit capital felonies and the State has not sought the death penalty, it does not require this sentence for juvenile defendants. Instead, Penal Code section 12.31(a)(1) provides that a person convicted of a capital felony in a case in which the State does not seek the death penalty "shall be punished by imprisonment in the Texas Department of Criminal Justice for ... life, if the individual committed the offense when younger than 18 years of age." Compare TEX. PENAL CODE ANN. § 12.31(a)(1) (emphasis added) with id. § 12.31(a)(2) ("An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for ... life without parole, if the individual committed the offense when 18 years of age or older.") (emphasis added); see Ex parte Maxwell, 424 S.W.3d 66, 68 n.3 (Tex. Crim. App. 2014) (setting out history of section 12.31(a) and its amendments). Government Code section 508.145, which addresses an individual's eligibility for release on parole, provides that an individual serving a life sentence under Penal Code section 12.31(a)(1) for a capital felony, that is, an individual who was younger than eighteen years old at the time of the offense, "is not eligible for release on parole until the actual calendar time the inmate has served, without consideration of good conduct time, equals 40 calendar years." TEX. GOV'T CODE ANN. § 508.145(b).

The Court of Criminal Appeals has addressed whether Texas's statutory scheme—requiring that juvenile defendants convicted of capital felonies be sentenced to confinement for life with the possibility of parole after serving forty years—violates Miller because the Texas scheme does not allow for the individualized sentencing of juvenile defendants. In Lewis v. State, the Court of Criminal Appeals discussed Miller and stated that Miller's holding is "narrow" and that juvenile defendants "are still constitutionally eligible for life without parole, but Miller requires an individualized determination that a defendant is 'the rare juvenile offender whose crime reflects irreparable corruption.' " 428 S.W.3d 860, 863 (Tex. Crim. App. 2014) (quoting Miller, 567 U.S. at 479–80). The court then noted that Miller "does not forbid mandatory sentencing schemes." Id. It stated that the statutory schemes at issue in Miller were unconstitutional because they "denied juveniles convicted of murder all possibility of parole, leaving them no opportunity or incentive for rehabilitation," but a sentence of life in prison with the possibility for parole—required by Penal Code section 12.31(a)(1)—"leaves a route for juvenile offenders to prove that they have changed while also assessing a punishment that the Legislature has deemed appropriate in light of the fact that the juvenile took someone's life under specified circumstances." Id.

The Court of Criminal Appeals thus rejected Lewis's argument that Miller requires an individualized sentencing determination for all juvenile defendants convicted of capital felonies. Id. Instead, Miller "requires an individualized hearing only when a juvenile can be sentenced to life without the possibility of parole," which is no longer possible under Texas's sentencing scheme. Id. at 863–64. The court also rejected the argument that Miller should be read to apply to whatever the state legislature determines to be the "harshest possible penalty for juveniles," even if that is life with the possibility of parole, as is the case in Texas. Id. at 864. The court pointed to several statements in Miller indicating that when the Miller Court referred to "the harshest possible punishment," it was "referring to sentencing a juvenile to life without parole." Id. The court therefore held: "Because the holding in Miller is limited to a prohibition on mandatory life without parole for juvenile offenders, [the defendants in Lewis] are not entitled to punishment hearings." Id.

As appellant acknowledges, the Court of Criminal Appeals and intermediate appellate courts, including this Court, have followed Lewis and held that Texas's statutory sentencing scheme for juvenile defendants convicted of capital felonies does not violate Miller and is not unconstitutional. See Turner v. State, 443 S.W.3d 128, 129 (Tex. Crim. App. 2014) (per curiam) (following

Lewis and holding that juvenile defendant was not entitled to individualized punishment hearing but, because defendant was sentenced under prior version of Penal Code section 12.31(a) that required juvenile defendants in capital cases to be sentenced to life without possibility of parole, also reforming judgment to change sentence to life with possibility of parole); McCardle v. State, 550 S.W.3d 265, 269–70 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd) (following Lewis and also rejecting argument that requiring juvenile defendant convicted of capital felony to serve forty years before becoming eligible for parole is unconstitutional as "de facto life sentence"); Guzman v. State, 539 S.W.3d 394, 402–06 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (following Lewis and rejecting argument that Government Code section 508.145(b) is facially unconstitutional because requiring juvenile defendant to serve forty years before becoming parole-eligible does not equate to sentence of life without parole); Shalouei v. State, 524 S.W.3d 766, 769 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (noting that United States Supreme Court has held that states may remedy violation of Miller "by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them") (quoting Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016)).

Conclusion: "When the Court of Criminal Appeals has deliberately and unequivocally interpreted the law in a criminal matter, we must adhere to its interpretation under the dictates of vertical stare decisis." Guzman, 539 S.W.3d at 404 (quoting Mason v. State, 416 S.W.3d 720, 728 n.10 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd)). In Lewis, the Court of Criminal Appeals "deliberately and unequivocally" held that Texas's statutory sentencing scheme for juvenile defendants convicted of capital felonies does not violate Miller and is not unconstitutional. See 428 S.W.3d at 863–64. We are bound by stare decisis to follow this holding. See Matthews v. State, 513 S.W.3d 45, 61–62 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (rejecting argument that Penal Code section 12.31(a)(1) is facially unconstitutional because Court of Criminal Appeals has unequivocally spoken on and rejected argument). We therefore hold that Texas's statutory sentencing scheme for juvenile defendants convicted of capital felonies is not facially unconstitutional. We overrule appellant's third issue. We affirm the judgment of the trial court.

Concurring Opinion: (Gordon Goodman Justice) Relying on Miller v. Alabama, 567 U.S. 460 (2012), Celvin Brooks argues that the imposition of a mandatory life sentence without the possibility of parole until he has served 40 years of his sentence is unconstitutional, given that he committed the crime as a juvenile. As it must, our court rejects his argument. In Lewis v. State, 428 S.W.3d 860 (Tex. Crim. App. 2014), the Texas Court of Criminal Appeals held that the mandatory sentencing scheme at issue does not run afoul of the constitution as interpreted in Miller. See id. at 863–64. We are bound to follow and apply Lewis. Because Lewis was wrongly decided, however, I do so under protest.

In Miller, the United States Supreme Court held that the imposition of mandatory life imprisonment without the possibility of parole on juvenile defendants violates the Eighth Amendment's guarantee against cruel and unusual punishment. 567 U.S. at 479. As the Court explained, fundamental cognitive differences in juvenile offenders make them inherently less culpable than adults. See id. at 470–73. Owing to the Eighth Amendment's requirement that punishment be proportionate, the inherent differences between juveniles and adults make juveniles "constitutionally different from adults for purposes of sentencing." Id. at 471. Consequently, when sentencing juvenile offenders, the State may not impose its severest penalties without taking their youth into consideration. Id. at 474.

Lewis interprets Miller narrowly, holding that Miller forbids sentencing schemes that impose a mandatory life sentence without the possibility of parole and no more. 428 S.W.3d at 863–64. According to the Court of Criminal Appeals, Texas's statutory scheme thus passes constitutional muster because it allows juveniles subject to a mandatory life sentence the possibility of parole after 40 years. See id.

While Lewis correctly states Miller's holding, it gives insufficient weight to the rationale underlying that holding: that juvenile offenders are constitutionally different. Miller itself was an extension of prior decisions that turned on this constitutional difference. See 567 U.S. at 470–80 (relying on Roper v. Simmons, 543 U.S. 551 (2005) (Eighth Amendment bars capital punishment for juveniles), and Graham v. Florida, 560 U.S. 48 (2010) (Eighth Amendment bars life without possibility of parole for juveniles who commit nonhomicide offenses)). Instead of confining these prior decisions to their literal holdings, Miller relied on their "foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Id. at 474.

This foundational principle is as applicable to mandatory life imprisonment of a juvenile offender without the possibility of parole until he has served 40 years. A mandatory sentence of four decades minimum—one of the State's most severe criminal penalties—in all circumstances precludes the sentencer from considering the offender's youth and its hallmark features in assessing the juvenile offender's punishment, contrary to the Eighth Amendment. See Miller, 567 U.S. at 479–80, 489. Justice Goodman, concurring.

***MILLER V. ALABAMA* DOES NOT PROHIBIT LWOP, RATHER IT "REQUIRES A SENTENCER TO CONSIDER A JUVENILE OFFENDER'S YOUTH AND ATTENDANT CHARACTERISTICS BEFORE DETERMINING THAT LIFE WITHOUT PAROLE IS A PROPORTIONATE SENTENCE" AND FEDERAL PRISONERS HAVE THESE PROCEDURAL PROTECTIONS IN THE SENTENCING FACTORS IN 18 U.S.C. § 3553(A) AND THE ADVISORY SENTENCING GUIDELINES.**

¶ 19-4-15A. **U.S. v. Sparks**, No 18-50225, --- F.3d ----, 2019 WL 5445897 (U.S. 5th Cir., 10-24-2019)

Facts: Tony Sparks and his fellow gang members carjacked Todd and Stacie Bagley at gunpoint. The gang locked the Bagleys in the trunk for hours, emptied the Bagleys' bank account, and tried to pawn Stacie's wedding ring. During the gang's crime spree, the Bagleys sang gospel songs from the trunk and told their captors about Jesus. Eventually one of the gang members popped the trunk, cursed at the couple, and executed Todd in front of his wife. That same gang member shot Stacie in the face but failed to kill her. Others incinerated the car to destroy the evidence and burned Stacie alive.

For his role in this crime, Sparks received a below-Guidelines 35-year sentence. Sparks says that violates the Eighth Amendment.

Held: Affirmed

Opinion: Sparks's principal argument on appeal is that the district court violated Miller v. Alabama. That case held the Eighth Amendment prohibits mandatory LWOP sentences for juveniles. Miller, 567 U.S. at 465, 132 S.Ct. 2455. It's not clear from Sparks's briefs whether he thinks his below-Guidelines sentence violates the substantive or procedural aspects of the Miller decision. At argument, his counsel urged us to consider both. We do so.

Miller announced a substantive Eight Amendment rule: The Constitution prohibits sentencing a juvenile to mandatory LWOP because it "poses too great a risk of disproportionate punishment." 567 U.S. at 479, 132 S.Ct. 2455. But Miller did "not consider" whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles." Ibid.

Three corollaries follow from Miller's substantive rule. First, it "did not foreclose a sentencer's ability to impose life without parole" on a discretionary basis. Montgomery, 136 S. Ct. at 726; see also Miller, 567 U.S. at 483, 132 S.Ct. 2455. Our sister circuits' post-Miller decisions recognize as much. See Contreras v. Davis, 716 F. App'x 160, 163 (4th Cir. 2017); Kelly v. Brown, 851 F.3d 686, 687–88 (7th Cir. 2017); United States v. Jefferson, 816 F.3d 1016, 1019 (8th Cir. 2016); Davis v. McCollum, 798 F.3d 1317, 1320–21 (10th Cir. 2015); Croft v. Williams, 773 F.3d 170, 171 (7th Cir. 2014); Evans-Garcia v. United States, 744 F.3d 235, 241 (1st Cir. 2014); Bell v. Uribe, 748 F.3d 857, 869–70 (9th Cir. 2014); United States v. Reingold, 731 F.3d 204, 214 (2d Cir. 2013).2 Numerous state courts have reached the same conclusion. See, e.g., Lucero v. People, 394 P.3d 1128, 1132 (Colo. 2017); Conley v. State, 972 N.E.2d 864, 879 (Ind. 2012); State v. Russell, 299 Neb. 483, 908 N.W.2d 669, 676 (2018); Jones v. Commonwealth, 293 Va. 29, 795 S.E.2d 705, 722 (2017). Thus, if a sentencing court has the option to choose a sentence other than life without parole, it can choose life without parole without violating Miller.

Second, Miller has no relevance to sentences less than LWOP. See United States v. Walton, 537 F. App'x 430, 437 (5th Cir. 2013) (per curiam). This means that sentences of life with the possibility of parole or early release do not implicate Miller. See Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 197 (4th Cir. 2019); Goins v. Smith, 556 F. App'x 434, 440 (6th Cir. 2014); Lucero, 394 P.3d at 1132; Lewis v. State, 428 S.W.3d 860, 863–64 (Tex. Crim. App. 2014). Nor do sentences to a term of years. See Walton, 537 F. App'x at 437; United States v. Morgan, 727 F. App'x 994, 997 (11th Cir. 2018) (per curiam); United States v. Lopez, 860 F.3d 201, 211 (4th Cir. 2017); Lucero, 394 P.3d at 1133. All of these sentences can be imposed on a mandatory basis for juveniles without implicating Miller because they are not LWOP sentences.

Third, a term-of-years sentence cannot be characterized as a de facto life sentence. Miller dealt with a statute that specifically imposed a mandatory sentence of life. The Court distinguished that sentencing scheme from "impliedly constitutional alternatives whereby 'a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility of parole or a lengthy term of years.' " Lucero, 394 P.3d at 1133 (quoting Miller, 567 U.S. at 489, 132 S.Ct. 2455). Given Miller's endorsement of "a lengthy term of years" as a constitutional alternative to life without parole, it would be bizarre to read Miller as somehow foreclosing such sentences.

A panel of the Third Circuit nevertheless tried. See United States v. Grant, 887 F.3d 131 (3d Cir. 2018), reh'g en banc granted, opinion vacated, 905 F.3d 285 (3d Cir. 2018). In Grant, the panel sought to "effectuate" Miller by inventing a "rebuttable presumption" that a juvenile offender "should be afforded an opportunity for release before the national age of retirement." Id. at 152–53. The panel conceded it had no "principled basis" for drawing that line. Id. at 150. The panel further conceded it couldn't be sure what line it was drawing: "We cannot say with certainty what the precise national age of retirement is, as it is a figure that incrementally fluctuates over time." Id. at 151. It also admitted that reliance on a "national retirement age" would fail to account for "locality, state, gender, race, wealth, or other differentiating characteristics." Ibid. The panel went on to discuss the history of Social Security, Gallup polls, and one academic study before pronouncing a "national retirement age" of sixty-five. Id. at 151–52. But even in

its pronouncement of the rule, the panel appeared to recognize the arbitrariness of its decision: "Without definitively determining the issue, we consider sixty-five as an adequate approximation of the national age of retirement to date. However, district courts retain the discretion to determine the national age of retirement at sentencing, and remain free to consider evidence of the evolving nature of this estimate." Id. at 152. Such reasoning is not bound by law.

Sparks cannot show a substantive Miller violation. First, he received a discretionary sentence under § 3553(a) rather than a mandatory sentence. Second, he was sentenced to thirty-five years in prison rather than life without parole. Because Sparks did not receive a mandatory sentence of life without parole, he has failed to demonstrate a violation of Miller's substantive requirements.3

The procedural component of Miller "requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." Montgomery, 136 S. Ct. at 734. In Miller and Montgomery, the Supreme Court considered state laws in Alabama and Louisiana imposing mandatory LWOP sentences on juveniles. But federal prisoners have procedural protections that state prisoners do not have—namely, the sentencing factors in § 3553(a) and the advisory Sentencing Guidelines.

Under § 3553(a), a sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing. In choosing an appropriate sentence, the court must examine "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). It must also consider the policy statements of the Sentencing Commission, id. § 3553(a)(5), which expressly allow for consideration of the defendant's age, "including youth," U.S.S.G. § 5H1.1, p.s.

The § 3553(a) analysis satisfies Miller's procedural requirement that the court consider the defendant's youth and its attendant characteristics before imposing a sentence of life without parole. See Moore v. United States, 871 F.3d 72, 79 (1st Cir. 2017); Lopez, 860 F.3d at 211; Jefferson, 816 F.3d at 1018 n.3 (noting that the "Supreme Court has not yet applied its constitutional decision in Miller to a life sentence imposed by a federal court," and questioning Miller's applicability to a sentence imposed under the advisory Guidelines). Thus, a sentence that satisfies § 3553(a)'s procedural requirements cannot be challenged under the procedural component of the Miller decision.

Reflecting some confusion over the procedural requirements of Miller, the district court's opinion contains separate discussions of Miller and § 3553(a). Other courts have similarly treated the so-called "Miller factors" as separate from the § 3553(a) factors. See, e.g., United States v. Orsinger, 698 F. App'x 527, 527 (9th Cir. 2017) (per curiam) (noting that the district court considered the evidence in "light of the factors identified in Miller and in 18 U.S.C. § 3553(a)"); United States v. Garcia, 666 F. App'x 74, 78 (2d Cir. 2016) (per curiam) (referring to "Miller and § 3553(a) factors" as separate and distinct); United States v. Guzman, 664 F. App'x 120, 122 (2d Cir. 2016) (per curiam) (noting that the district court "gave ample consideration to each of the Miller factors, together with the sometimes-overlapping § 3553(a) factors"); United States v. Guerrero, 560 F. App'x 110, 112 (2d Cir. 2014) (per curiam) (holding that the "district court properly considered all of the Miller factors ... and other mitigating factors under 18 U.S.C. § 3553(a)"), aff'g United States v. Maldonado, No. 09-CR-339-02, 2012 WL 5878673, at *9 (S.D.N.Y. Nov. 21, 2012) (discussing "Miller factors" separately from § 3553(a) factors).

In a recent en banc opinion, the Ninth Circuit vacated a sentence imposed under § 3553(a) after hearing "evidence related to a number of the Miller factors" because the district court's "sentencing remarks focused on the punishment warranted by the terrible crime Briones participated in, rather than whether Briones was irredeemable." United States v. Briones, 929 F.3d 1057, 1066 (9th Cir. 2019) (en banc). Though the Ninth Circuit claimed not to hold that "the district court erred simply by failing to use any specific words," id. at 1067, that appears to be exactly what the court did, see id. at 1073 (Bennett, J., dissenting). We reject the view that a procedurally proper sentence imposed under § 3553(a) can be vacated merely because the district court failed to quote certain magic words from the Supreme Court's Miller decision. As the Court has clearly said, "Miller did not require trial courts to make a finding of fact regarding a child's incorrigibility." Montgomery, 136 S. Ct. at 735. The Court was "careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." Ibid. Hence, the Court reiterated, "Miller did not impose a formal factfinding requirement." Ibid.

In this case, the district court appointed taxpayer-funded experts for Sparks, held a lengthy five-day hearing, and wrote twenty-six pages explaining its sentence. This fulsome process gave Sparks far more than the minimum procedure necessary to conduct a proper § 3553(a) analysis. And we agree with the Government that Miller does not add procedural requirements over and above § 3553(a).

Sparks also argues that the district court erred in calculating the offense level under the Guidelines. The district court increased Sparks's offense level by two points for obstructing justice, U.S.S.G. § 3C1.1, and denied him a two-point reduction for accepting responsibility, id. § 3E1.1. Those decisions were based

on the court's finding that Sparks attempted to escape from his detention center. Sparks claims he was not involved in the attempt.

We review the district court's factual findings for abuse of discretion, which occurs when the court relies on "clearly erroneous facts." Gall, 552 U.S. at 51, 128 S.Ct. 586. "Generally, a PSR 'bears sufficient indicia of reliability to be considered as evidence by the sentencing judge in making factual determinations.' " United States v. Harris, 702 F.3d 226, 230 (5th Cir. 2012) (quoting United States v. Nava, 624 F.3d 226, 231 (5th Cir. 2010)). A district court may adopt facts contained in the PSR "without further inquiry" if those facts have an "adequate evidentiary basis with sufficient indicia of reliability." Ibid. (quoting United States v. Trujillo, 502 F.3d 353, 357 (5th Cir. 2007)).

Conclusion: Sparks's PSR contains reliable evidence that he tried to escape from his detention center. That evidence includes an interview with a witness who heard Sparks discussing the escape plan with another inmate, Christopher Kirvin. The witness said that when Kirvin attacked a prison guard, Sparks repeatedly flushed a toilet to mask the sound of her screams. Sparks also admitted to a probation officer that he participated in the escape attempt. The district court reasonably relied on the PSR. Sparks's sentence is AFFIRMED.

***MILLER V. ALABAMA* ASSERTED THAT A TERM-OF-YEARS SENTENCE IS A DISTINGUISHED CONSTITUTIONAL ALTERNATIVE A JUDGE OR JURY COULD CHOOSE, RATHER THAN A LIFE-WITHOUT-PAROLE SENTENCE, AND SUCH A SENTENCE CANNOT BE CHARACTERIZED AS A DE FACTO LIFE SENTENCE FOR A JUVENILE.**

¶ 19-4-15B. **U.S. v. Sparks**, No 18-50225, --- F.3d ----, 2019 WL 5445897 (U.S. 5th Cir., 10-24-2019)

Facts: Tony Sparks and his fellow gang members carjacked Todd and Stacie Bagley at gunpoint. The gang locked the Bagleys in the trunk for hours, emptied the Bagleys' bank account, and tried to pawn Stacie's wedding ring. During the gang's crime spree, the Bagleys sang gospel songs from the trunk and told their captors about Jesus. Eventually one of the gang members popped the trunk, cursed at the couple, and executed Todd in front of his wife. That same gang member shot Stacie in the face but failed to kill her. Others incinerated the car to destroy the evidence and burned Stacie alive.

For his role in this crime, Sparks received a below-Guidelines 35-year sentence. Sparks says that violates the Eighth Amendment.

Held: Affirmed

Opinion: Sparks's principal argument on appeal is that the district court violated Miller v. Alabama. That case held the Eighth Amendment prohibits mandatory LWOP sentences for juveniles. Miller, 567 U.S. at 465, 132 S.Ct. 2455. It's not clear from Sparks's briefs whether he thinks his below-Guidelines sentence violates the substantive or procedural aspects of the Miller decision. At argument, his counsel urged us to consider both. We do so.

Miller announced a substantive Eight Amendment rule: The Constitution prohibits sentencing a juvenile to mandatory LWOP because it "poses too great a risk of disproportionate punishment." 567 U.S. at 479, 132 S.Ct. 2455. But Miller did "not consider" whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles." Ibid.

Three corollaries follow from Miller's substantive rule. First, it "did not foreclose a sentencer's ability to impose life without parole" on a discretionary basis. Montgomery, 136 S. Ct. at 726; see also Miller, 567 U.S. at 483, 132 S.Ct. 2455. Our sister circuits' post-Miller decisions recognize as much. See Contreras v. Davis, 716 F. App'x 160, 163 (4th Cir. 2017); Kelly v. Brown, 851 F.3d 686, 687–88 (7th Cir. 2017); United States v. Jefferson, 816 F.3d 1016, 1019 (8th Cir. 2016); Davis v. McCollum, 798 F.3d 1317, 1320–21 (10th Cir. 2015); Croft v. Williams, 773 F.3d 170, 171 (7th Cir. 2014); Evans-Garcia v. United States, 744 F.3d 235, 241 (1st Cir. 2014); Bell v. Uribe, 748 F.3d 857, 869–70 (9th Cir. 2014); United States v. Reingold, 731 F.3d 204, 214 (2d Cir. 2013).2 Numerous state courts have reached the same conclusion. See, e.g., Lucero v. People, 394 P.3d 1128, 1132 (Colo. 2017); Conley v. State, 972 N.E.2d 864, 879 (Ind. 2012); State v. Russell, 299 Neb. 483, 908 N.W.2d 669, 676 (2018); Jones v. Commonwealth, 293 Va. 29, 795 S.E.2d 705, 722 (2017). Thus, if a sentencing court has the option to choose a sentence other than life without parole, it can choose life without parole without violating Miller.

Second, Miller has no relevance to sentences less than LWOP. See United States v. Walton, 537 F. App'x 430, 437 (5th Cir. 2013) (per curiam). This means that sentences of life with the possibility of parole or early release do not implicate Miller. See Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 197 (4th Cir. 2019); Goins v. Smith, 556 F. App'x 434, 440 (6th Cir. 2014); Lucero, 394 P.3d at 1132; Lewis v. State, 428 S.W.3d 860, 863–64 (Tex. Crim. App. 2014). Nor do sentences to a term of years. See Walton, 537 F. App'x at 437; United States v. Morgan, 727 F. App'x 994, 997 (11th Cir. 2018) (per curiam); United States v. Lopez, 860 F.3d 201, 211 (4th Cir. 2017); Lucero, 394 P.3d at 1133. All of these sentences can be imposed on a mandatory basis for juveniles without implicating Miller because they are not LWOP sentences.

Third, a term-of-years sentence cannot be characterized as a de facto life sentence. Miller dealt with a statute that specifically imposed a mandatory sentence of life. The Court distinguished that

sentencing scheme from "impliedly constitutional alternatives whereby 'a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility of parole or a lengthy term of years.' " Lucero, 394 P.3d at 1133 (quoting Miller, 567 U.S. at 489, 132 S.Ct. 2455). Given Miller's endorsement of "a lengthy term of years" as a constitutional alternative to life without parole, it would be bizarre to read Miller as somehow foreclosing such sentences.

A panel of the Third Circuit nevertheless tried. See United States v. Grant, 887 F.3d 131 (3d Cir. 2018), reh'g en banc granted, opinion vacated, 905 F.3d 285 (3d Cir. 2018). In Grant, the panel sought to "effectuate" Miller by inventing a "rebuttable presumption" that a juvenile offender "should be afforded an opportunity for release before the national age of retirement." Id. at 152–53. The panel conceded it had no "principled basis" for drawing that line. Id. at 150. The panel further conceded it couldn't be sure what line it was drawing: "We cannot say with certainty what the precise national age of retirement is, as it is a figure that incrementally fluctuates over time." Id. at 151. It also admitted that reliance on a "national retirement age" would fail to account for "locality, state, gender, race, wealth, or other differentiating characteristics." Ibid. The panel went on to discuss the history of Social Security, Gallup polls, and one academic study before pronouncing a "national retirement age" of sixty-five. Id. at 151–52. But even in its pronouncement of the rule, the panel appeared to recognize the arbitrariness of its decision: "Without definitively determining the issue, we consider sixty-five as an adequate approximation of the national age of retirement to date. However, district courts retain the discretion to determine the national age of retirement at sentencing, and remain free to consider evidence of the evolving nature of this estimate." Id. at 152. Such reasoning is not bound by law.

Sparks cannot show a substantive Miller violation. First, he received a discretionary sentence under § 3553(a) rather than a mandatory sentence. Second, he was sentenced to thirty-five years in prison rather than life without parole. Because Sparks did not receive a mandatory sentence of life without parole, he has failed to demonstrate a violation of Miller's substantive requirements.3

The procedural component of Miller "requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." Montgomery, 136 S. Ct. at 734. In Miller and Montgomery, the Supreme Court considered state laws in Alabama and Louisiana imposing mandatory LWOP sentences on juveniles. But federal prisoners have procedural protections that state prisoners do not have—namely, the sentencing factors in § 3553(a) and the advisory Sentencing Guidelines.

Under § 3553(a), a sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing. In choosing an appropriate sentence, the court must examine "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). It must also consider the policy statements of the Sentencing Commission, id. § 3553(a)(5), which expressly allow for consideration of the defendant's age, "including youth," U.S.S.G. § 5H1.1, p.s.

The § 3553(a) analysis satisfies Miller's procedural requirement that the court consider the defendant's youth and its attendant characteristics before imposing a sentence of life without parole. See Moore v. United States, 871 F.3d 72, 79 (1st Cir. 2017); Lopez, 860 F.3d at 211; Jefferson, 816 F.3d at 1018 n.3 (noting that the "Supreme Court has not yet applied its constitutional decision in Miller to a life sentence imposed by a federal court," and questioning Miller's applicability to a sentence imposed under the advisory Guidelines). Thus, a sentence that satisfies § 3553(a)'s procedural requirements cannot be challenged under the procedural component of the Miller decision.

Reflecting some confusion over the procedural requirements of Miller, the district court's opinion contains separate discussions of Miller and § 3553(a). Other courts have similarly treated the so-called "Miller factors" as separate from the § 3553(a) factors. See, e.g., United States v. Orsinger, 698 F. App'x 527, 527 (9th Cir. 2017) (per curiam) (noting that the district court considered the evidence in "light of the factors identified in Miller and in 18 U.S.C. § 3553(a)"); United States v. Garcia, 666 F. App'x 74, 78 (2d Cir. 2016) (per curiam) (referring to "Miller and § 3553(a) factors" as separate and distinct); United States v. Guzman, 664 F. App'x 120, 122 (2d Cir. 2016) (per curiam) (noting that the district court "gave ample consideration to each of the Miller factors, together with the sometimes-overlapping § 3553(a) factors"); United States v. Guerrero, 560 F. App'x 110, 112 (2d Cir. 2014) (per curiam) (holding that the "district court properly considered all of the Miller factors ... and other mitigating factors under 18 U.S.C. § 3553(a)"), aff'g United States v. Maldonado, No. 09-CR-339-02, 2012 WL 5878673, at *9 (S.D.N.Y. Nov. 21, 2012) (discussing "Miller factors" separately from § 3553(a) factors).

In a recent en banc opinion, the Ninth Circuit vacated a sentence imposed under § 3553(a) after hearing "evidence related to a number of the Miller factors" because the district court's "sentencing remarks focused on the punishment warranted by the terrible crime Briones participated in, rather than whether Briones was irredeemable." United States v. Briones, 929 F.3d 1057, 1066 (9th Cir. 2019) (en banc). Though the Ninth Circuit claimed not to hold that "the district court erred simply by failing to use any specific words,"

id. at 1067, that appears to be exactly what the court did, see id. at 1073 (Bennett, J., dissenting). We reject the view that a procedurally proper sentence imposed under § 3553(a) can be vacated merely because the district court failed to quote certain magic words from the Supreme Court's Miller decision. As the Court has clearly said, "Miller did not require trial courts to make a finding of fact regarding a child's incorrigibility." Montgomery, 136 S. Ct. at 735. The Court was "careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." Ibid. Hence, the Court reiterated, "Miller did not impose a formal factfinding requirement." Ibid.

In this case, the district court appointed taxpayer-funded experts for Sparks, held a lengthy five-day hearing, and wrote twenty-six pages explaining its sentence. This fulsome process gave Sparks far more than the minimum procedure necessary to conduct a proper § 3553(a) analysis. And we agree with the Government that Miller does not add procedural requirements over and above § 3553(a).

Sparks also argues that the district court erred in calculating the offense level under the Guidelines. The district court increased Sparks's offense level by two points for obstructing justice, U.S.S.G. § 3C1.1, and denied him a two-point reduction for accepting responsibility, id. § 3E1.1. Those decisions were based on the court's finding that Sparks attempted to escape from his detention center. Sparks claims he was not involved in the attempt.

We review the district court's factual findings for abuse of discretion, which occurs when the court relies on "clearly erroneous facts." Gall, 552 U.S. at 51, 128 S.Ct. 586. "Generally, a PSR 'bears sufficient indicia of reliability to be considered as evidence by the sentencing judge in making factual determinations.' " United States v. Harris, 702 F.3d 226, 230 (5th Cir. 2012) (quoting United States v. Nava, 624 F.3d 226, 231 (5th Cir. 2010)). A district court may adopt facts contained in the PSR "without further inquiry" if those facts have an "adequate evidentiary basis with sufficient indicia of reliability." Ibid. (quoting United States v. Trujillo, 502 F.3d 353, 357 (5th Cir. 2007)).

Conclusion: Sparks's PSR contains reliable evidence that he tried to escape from his detention center. That evidence includes an interview with a witness who heard Sparks discussing the escape plan with another inmate, Christopher Kirvin. The witness said that when Kirvin attacked a prison guard, Sparks repeatedly flushed a toilet to mask the sound of her screams. Sparks also admitted to a probation officer that he participated in the escape attempt. The district court reasonably relied on the PSR. Sparks's sentence is AFFIRMED.

DOUBLE JEOPARDY

CONVICTION FOR INDECENCY WITH A CHILD BY CONTACT AND AGGRAVATED SEXUAL ASSAULT OF A CHILD ARISING OUT OF A SINGLE INCIDENT CONSIDERED DOUBLE JEOPARDY.

¶ 19-4-11C. **Rios-Barahona v. State**, MEMORANDUM, 2019 WL 3952949 (Tex.App.—Corpus Christi-Edinburg, 8/22/2019)

Facts: A grand jury returned an indictment charging appellant with committing aggravated sexual assault and indecency with a child on or about February 14, 2014, when appellant was seventeen years old. With respect to the aggravated sexual assault charge, the indictment alleged that appellant caused the penetration of the female sexual organ of J.L., a child younger than fourteen years of age, with his finger or fingers. The indictment further alleged, under the indecency with a child count, that appellant engaged in sexual contact with J.L. by committing said acts and that he did so with the intent to arouse or gratify his sexual desire.

J.L. testified concerning an event occurring on the school bus in February of 2014 in Comal County, Texas. At the time, J.L. was twelve years old and in the sixth grade. J.L. usually sat next to her friend D.H., but D.H. was absent that day. During the bus ride home, appellant moved from the back of the bus and sat next to her. J.L. had minimal prior contact with appellant because he spoke only Spanish. Without saying anything to J.L., appellant reached over and put his hand inside the front of her pants. J.L. tried to pull appellant's hand out from her pants, but "he just—he just went in deeper," penetrating her vagina with his fingers. J.L. estimated that the assault lasted ten to fifteen minutes. J.L. described being in shock throughout the incident. When the bus arrived at appellant's stop, he removed his hand from J.L.'s pants and exited the bus. Later in her testimony, when prompted by the State, J.L. recalled that the assault took place on February 14, 2014, or Valentine's Day.

J.L. testified that she later told her friend D.H. about the assault, and D.H. responded that appellant had done the same thing to her. In May of 2014, J.L informed her mother what happened, and her mother contacted law enforcement. J.L. also stated that she talked to a school counselor at some point about the incident.

Robert Gardner, a New Braunfels Police Department detective, testified regarding his investigation into J.L.'s allegations. After his assignment to the case, Detective Gardner scheduled a forensic interview for J.L. with the Comal County Children's Advocacy Center. Detective Gardner viewed the interview through a live video feed from a nearby room. The trial court later admitted a video recording of the interview into evidence. Detective Gardner spoke with the transportation department for Comal Independent School District and learned that there were no cameras on the bus where

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the alleged assault took place. He recalled that the assault was alleged to have occurred on February 14, 2014. On cross-examination, appellant showed Detective Gardner a school calendar indicating that school was not in session on that date.3 Detective Gardner explained that this fact would not have affected his investigation:
[S]chools do celebrate holidays on different days, even before an early release or when they actually have a holiday. So they might have had a Valentine's Day going on at the school and celebrated on that Thursday. Children do associate things. They get dates mixed up. Sometimes they're not exact on it, so I wouldn't have ruled [the allegation] out because of that.

Appellant called multiple witnesses who attested to appellant's good character. The State responded by referencing appellant's school disciplinary history, which included inappropriately touching other female students.

D.H. testified in rebuttal for the State. She said J.L. told her that appellant had touched her, but she maintained that J.L. did not go into detail. D.H. stated that she did not personally have any interactions with appellant.

The jury returned a guilty verdict for aggravated sexual assault of a child, a first-degree felony, and indecency with a child by contact, a second-degree felony. The trial court assessed punishment of concurrent seven-year prison sentences. This appeal followed.

Held: Affirmed

Memorandum Opinion: By his fifth issue, appellant argues that his convictions for both indecency with a child by contact and aggravated sexual assault of a child arise from a single act and violate the Double Jeopardy Clause's guarantee against multiple punishments for the same offense. See U.S. CONST. amend. V; see also TEX. CONST. art. 1, § 14. The State agrees and requests that we vacate appellant's conviction for the lesser offense of indecency with a child by contact.

The Fifth Amendment to the United States Constitution protects against double jeopardy, providing that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Id. The Double Jeopardy Clause protects an accused against (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments for the same offense in a single prosecution. Ex parte Amador, 326 S.W.3d 202, 205 (Tex. Crim. App. 2010). A multiple-punishments double-jeopardy violation may arise in the context of lesser-included offenses when the same conduct is punished under both a greater and a lesser-included statutory offense. Aekins v. State, 447 S.W.3d 270, 274 (Tex. Crim. App. 2014). Indecency with a child is a lesser-included offense of aggravated sexual assault of a child when both offenses are predicated on the same act. Evans v. State, 299 S.W.3d 138, 143 (Tex. Crim. App. 2009). Here, the record establishes only a single act—appellant's penetration of J.L.'s sexual organ with his fingers. Accordingly, we agree with the parties that appellant's convictions for both indecency with a child by contact and aggravated sexual assault constitute multiple punishments for the same offense. See id. at 141 ("In [the multiple-punishments] context, the State may seek a multiple-count indictment based on violations of different statutes, even when such violations are established by a single act; but the defendant may be convicted and sentenced for only one offense."). We sustain appellant's fifth issue.

The remedy for a double jeopardy violation in the multiple-punishments context is to retain the conviction and sentence for the most serious offense, while setting aside the conviction and sentence for the lesser offense. Littrell v. State, 271 S.W.3d 273, 279 (Tex. Crim. App. 2008); Bigon v. State, 252 S.W.3d 360, 372 (Tex. Crim. App. 2008). The most serious offense is typically the offense in which the greatest sentence is assessed. Ex parte Cavazos, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006). Here, appellant received a seven-year sentence for each conviction. Therefore, we must look to other factors, such as the degree of felony for each offense. See Bigon, 252 S.W.3d at 373. Aggravated sexual assault of a child is a first-degree felony, while indecency with a child by contact is a second-degree felony. TEX. PENAL CODE ANN. §§ 21.11, 22.021.

Conclusion: Under these circumstances, we conclude that the "most serious" offense is aggravated sexual assault of a child. See Bigon, 252 S.W.3d at 372. Therefore, we must vacate the conviction for the lesser offense of indecency with a child by contact. See id. We affirm the judgment of conviction for aggravated sexual assault of a child. We reverse appellant's conviction for indecency with a child by contact and render a judgment of acquittal.

EVIDENCE

DOCTOR'S RELIANCE ON PRISONER "TRAVEL CARD" AS EVIDENCE OF JUVENILE RECORD WAS NOT REASONABLE AND ITS ADMISSION WAS AN ABUSE OF DISCRETION.

¶ 19-4-6A. **In re Commitment of Hull**, MEMORANDUM, No. 13-17-00378-CV (Tex.App.—Corpus Christi-Edinburg, 7/18/2019)

Facts: The State presented evidence that Hull pleaded guilty and was convicted of the following sexually violent offenses: (1) a 1977 conviction for aggravated kidnapping with the intent to violate and abuse the victim sexually, see TEX. PENAL CODE ANN. § 20.04; and (2) two 2001 convictions for indecency with a child. See id. § 21.11. On the basis of these convictions, the trial court granted the State a directed verdict that Hull

is a repeat sexually violent offender. See TEX. HEALTH & SAFETY CODE ANN. § 841.003(b).

Hull was released from prison in 1984 after serving seven years for the first conviction. He was arrested fifteen years later, when he committed the offenses forming the basis for his 2001 convictions. Hull spent sixteen years in prison for the 2001 convictions when the parole panel ordered his release at the age of sixty. All told, Hull has served twenty-three years in prison for his crimes. In ordering Hull's release, the parole panel necessarily determined that Hull "is able and willing to fulfill the obligations of a law-abiding citizen" and that his release is in the "best interest of society." See TEX. GOV'T CODE ANN. § 508.141(e)(2), (f). Anticipating Hull's release, the State's Special Prosecution Unit—Civil Division filed a petition seeking to commit Hull indefinitely as a sexually violent predator.

The State and Hull both presented expert opinion testimony regarding whether Hull suffered from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. The State's expert, Darrel B. Turner, Ph.D., concluded that Hull suffered from such a condition. Hull's expert, Marisa R. Mauro, Psy.D., concluded otherwise.

A critical difference in their testimony was the extent to which Drs. Turner and Mauro relied on a prisoner "travel card" notation indicating that Hull committed a sexual assault as a juvenile. Dr. Mauro described the travel card as a summary of an inmate's criminal history written by a prison employee. Without any available juvenile records to confirm the offense, Dr. Mauro determined that the information was unreliable and placed little emphasis on the allegation. On the other hand, Dr. Turner believed that the offense was "quite relevant" to his analysis and mentioned it extensively throughout his testimony. The trial court overruled Hull's objections to testimony referencing the travel card evidence.

The trial court granted a directed verdict that Hull was a repeat sexually violent offender. The jury found beyond a reasonable doubt that Hull is a sexually violent predator, and the trial court entered a final judgment on the jury's verdict. This appeal followed.

Because his third issue is dispositive, we address it next. See TEX. R. APP. P. 47.1. Hull contends the trial court abused its discretion in overruling its objections to Dr. Turner's testimony regarding a Texas Department of Criminal Justice travel card which, according to Dr. Turner, showed that Hull committed a sexual assault when he was a juvenile. Specifically, Hull argues that the travel card was unreliable and thus inadmissible and that any probative value it had was outweighed by its prejudicial effect. See TEX. R. EVID. 703, 705(a), (d). We conclude that the trial court's evidentiary ruling was both erroneous and harmful.

Held: Reversed and remanded

Memorandum Opinion: Dr. Turner testified that, after reviewing the travel card, he concluded Hull was convicted of rape when he was fifteen years old. Dr. Mauro described the travel card as "a summary written by a prison employee about what the inmate's criminal history is" and stated that the travel card contained no details regarding Hull's juvenile sexual offense. Dr. Turner clarified that "there was really a very limited amount of information on that offense ... we don't know a lot in terms of details there." There was no testimony regarding who prepared the travel card, when it was prepared, whether the travel card was kept in the regular course of business, and there was no other evidence substantiating the notation that Hull was convicted of rape when he was fifteen.

We conclude that, under these circumstances, Dr. Turner's reliance on the travel card was not reasonable, and therefore the information derived from the travel card should not have been disclosed to the jury as facts or data underlying Dr. Turner's opinion. See Leonard, 385 S.W.3d at 573 (holding that an expert's reliance on polygraph results was not reasonable and therefore the evidence could not by disclosed to the factfinder through expert testimony); see also E.I. du Pont de Nemours & Co., Inc. v. Robinson, 923 S.W.2d 549, 563 (Tex. 1995) (Cornyn, J. dissent) ("Rule 703 requires that if an expert intends to base an opinion solely on hearsay evidence, that it must be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."). Although Dr. Turner testified that he relied on documents that are usually relied upon by experts in his field, he did not specifically state that experts in his field rely on travel cards for their analysis whether a person has a behavioral abnormality.

Conclusion: Thus, under these circumstances, we conclude the trial court abused its discretion by admitting it.

Finding error, we must now perform a harm analysis by reviewing all of the evidence to determine if the error probably caused the rendition of an improper judgment. See TEX. R. APP. P. 44.1(a)(1); U-Haul Int'l, Inc., 380 S.W.3d at 132. We focus our harm analysis on the effect of the evidentiary error as it pertains to the jury's implicit finding that Hull suffered from a behavioral abnormality, while keeping in mind the constitutional implications of indefinite civil commitment.

SEARCH & SEIZURE

SEARCH WARRANT WAS CONSIDERED SOUGHT AND EXECUTED IN GOOD FAITH WHERE PRIOR LAW ENFORCEMENT CONDUCT THAT UNCOVERED EVIDENCE USED IN THE AFFIDAVIT FOR THE WARRANT WAS "CLOSE ENOUGH TO THE LINE OF VALIDITY" THAT THE OFFICER PREPARING THE AFFIDAVIT AND EXECUTING THE WARRANT BELIEVED THAT THE

INFORMATION SUPPORTING THE WARRANT WAS NOT TAINTED BY UNCONSTITUTIONAL CONDUCT.

¶ 19-4-5. **U.S. v. Fulton**, No. 17-41251, --- F.3d ----, 2019 WL 2636819 [U.S. Ct. App.—Fifth Cir., 6/27/2019]

Facts: In October 2014, a Galveston juvenile probation officer learned from the father of a juvenile she supervised that the girl was pictured in an online advertisement offering her services as an "escort" – in effect, a prostitute. The probation officer began to investigate and saw that the house where the girl had been arrested was a location where other young girls consistently were arrested. She began monitoring incoming police reports, spoke with some of the girls, compiled a list of names and ages, and gathered information from other probation officers. Her investigation revealed common links among the girls: Charles Fulton, Sr. and a residence on Avenue L. In February and early March 2015, the Galveston Police Department, in tandem with the FBI, began an investigation. Police discovered that Fulton acted as the girls' pimp, directing them to prostitution dates; providing them with food, condoms, housing, and drugs; and having sex with some of them as young as 15.

In May 2016, Fulton was indicted in the United States District Court for the Southern District of Texas on six counts of sex trafficking in violation of 18 U.S.C. § 1591(a)–(b) (2015), with a different minor victim identified in each count. Fulton was also charged with a seventh count for conspiracy to commit sex trafficking under 18 U.S.C. § 1594(c). He was found guilty after a jury trial on four of the substantive counts and on the conspiracy count. The district court sentenced him to prison for concurrent life terms.

In February 2015, Galveston police obtained a search warrant on the Avenue L house where the prostitution was based. The warrant, though, was due to a separate investigation into Fulton's narcotics activities. Fulton's cellphone was seized. Nine days later, police obtained a second warrant to examine its contents but were unable to bypass the phone's security features. Around this same time, the FBI agent assisting with the Fulton sex-trafficking investigation learned that the Galveston police had the phone. The agent acquired it to determine if the FBI could access the phone's data. Three weeks later, that agent obtained a federal warrant to search the phone. Still, it took a year before the data on the phone was accessed. The FBI discovered evidence that helped piece together Fulton's involvement with the minor victims. Fulton moved to suppress the evidence, but the district court denied the motion. At trial, the Government introduced evidence of the phone's contents through the testimony of the FBI agent and of minor victims. The district court also admitted evidence such as text messages, a photograph, and the results of searches of the phone's files, linking Fulton to five minor victims and revealing behaviors consistent with sex trafficking.

Fulton asserts the district court admitted evidence obtained from his cellphone in violation of the Fourth Amendment.

Held: Affirmed.

Opinion: On appeal, Fulton argues that the phone's seizure in the February 2015 raid violated the Fourth Amendment. He alternatively argues that even if the initial seizure had been lawful, the nine-day delay in obtaining a warrant to search it was unconstitutional. At oral argument, Fulton's counsel stated that those two arguments are the limit of the objections to the search and seizure. Thus, no issue is made about the FBI's obtaining the phone, procuring its own search warrant, and finally accessing the data on the phone a year later.

We start with whether the initial seizure of the phone was proper. Fulton contends "the warrant did not particularly describe the phone as one of the items to be seized." The Constitution states that a warrant should not issue without "particularly describing" what is to be seized. U.S. CONST. amend. IV. A warrant's particularity is sufficient if "a reasonable officer would know what items he is permitted to seize," which does not mean all items authorized to be taken must be specifically identified. United States v. Aguirre, 664 F.3d 606, 614 (5th Cir. 2011). "We have upheld searches as valid under the particularity requirement where a searched or seized item was not named in the warrant, either specifically or by type, but was the functional equivalent of other items that were adequately described." Id.

This narcotics warrant did not mention cellphones. The alleged equivalent was a reference to "ledgers," which is a "book ... ordinarily employed for recording ... transactions." Ledger, OXFORD ENGLISH DICTIONARY (2d ed. 1989). The government argues that is enough, because this court has held that a cellphone that is "used as a mode of both spoken and written communication and containing text messages and call logs, served as the equivalent of records and documentation of sales or other drug activity." Aguirre, 664 F.3d at 615. In that precedent, a warrant permitted seizure of a cellphone when it referred to "personal assets including computers, disks, printers and monitors utilized in the drug trafficking organization." Id. at 614–15. That is because what was seized were "the functional equivalents of several items listed" on the warrant. Id. at 615. We also held that if meaningful particularity is not possible, "generic language suffices if it particularizes the types of items to be seized." Id. at 614 (quoting Williams v. Kunze, 806 F.2d 594, 598 (5th Cir. 1986)).

We do not see the same factors involved in the present case. There was nothing in the Galveston warrant suggesting that anything similar to computers or even electronics was to be seized. Moreover, the officer in this case was a veteran of the Galveston Police Department's narcotics unit, and he indicated at the suppression hearing that he knew cellphones are used in the drug trade. Though a ledger can serve one of the myriad purposes of a cellphone, we do not extend the concept of "functional equivalency" to items so different, particularly one as specific, distinguishable, and anticipatable as a cellphone.

We now examine an exception to the exclusionary rule that nonetheless allows the introduction of the evidence from the phone.

An exception for good faith may allow the introduction of evidence unlawfully obtained "[w]hen police act under a warrant that is invalid for lack of probable cause." Herring v. United States, 555 U.S. 135, 142, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). Here, of course, we have held the initial seizure of the phone to be invalid because, regardless of probable cause, the phone was not covered by the warrant.

To constitute good faith, the "executing officer's reliance on the [deficient] warrant [must be] objectively reasonable and made in good faith." United States v. Massi, 761 F.3d 512, 525 (5th Cir. 2014) (citation omitted). The Government argues the FBI agent's reliance on the federal search warrant meets these requirements. Fulton argues we should the good faith exception should not apply "to situations where law enforcement unreasonably delays in obtaining a search warrant." The district court refused to consider this exception because it held the phone and its contents to be admissible on other grounds.

In Massi, law enforcement officers prolonged a proper investigatory stop based on reasonable suspicion well beyond the time permitted. Id. at 522–23. The officers detained the suspects for several hours "until evidence could be corroborated, an affidavit prepared, and the search warrant obtained." Id. at 523. We applied the following test to determine whether the invalid seizure of the suspects while evidentiary justification for a warrant was developed would nonetheless allow the introduction of evidence that was later obtained:
(1) the prior law enforcement conduct that uncovered evidence used in the affidavit for the warrant must be "close enough to the line of validity" that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct, and (2) the resulting search warrant must have been sought and executed by a law enforcement officer in good faith.
Id. at 528.

This same approach can be applied when, as here, the initial seizure of an object was without justification, but a later-obtained warrant led to the discovery of incriminating evidence.

We have already discussed the events that followed the seizure of the cellphone.

Conclusion: We conclude that viewed objectively, an FBI agent who obtained a search warrant in these circumstances would not have had reason to believe the seizure and continued possession of the cellphone by the Galveston police were unlawful. We so conclude because the question of whether the warrant applied to the cellphone does not lead to an easy negative answer, though that is the one we have given. Consequently, the seizure of the cellphone was "close enough to the line of validity" to permit the officer to prepare the second warrant that led to the search of the cellphone. The federal search warrant was "sought and executed by a law enforcement officer in good faith." Id. The cellphone evidence obtained was properly admitted.

SUFFICIENCY OF THE EVIDENCE

EVIDENCE WAS SUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDING REGARDING OWNERSHIP OF STOLEN PROPERTY, BECAUSE SIX YEAR OLD SISTER HAD "A GREATER RIGHT TO POSSESSION" OF PROPERTY THAN APPELLANT, WHO ADMITTEDLY BROKE INTO THE APARTMENT AND STOLE IT.

¶ 19-4-4B. **In the Matter of J.K.,** No. 14-18-00041-CV, 2019 WL 2426697 [Tex.App.—Houston (14th Dist.), 6/11/2019].

Facts: Appellant was arrested for aggravated robbery in connection with a stolen Xbox. Appellant pleaded "not true" to the allegations and proceeded to a bench trial.

Complainant E.T., a seven-year-old girl, testified at Appellant's trial.2 E.T. was home alone at her family's apartment the afternoon of August 19, 2017, when an intruder "knocked a lot of times" on the apartment door before breaking in. E.T. testified the intruder was carrying a long black gun with "a little red on the top of the gun." E.T. said the intruder told her something in a "mean voice" before walking into her seventeen-year-old brother's bedroom and stealing her brother's Xbox. The intruder left the apartment shortly afterwards.

Describing the intruder, E.T. testified he was wearing black, blue, and red clothing, carrying a blue bag, and covering part of his face with a bandana. E.T. stated the intruder's skin was "kind of dark, but ... a little light," and said his skin color was "peach, but darker."

When the intruder broke into the apartment, E.T. was on the phone with her mother, Tina, who was at work. Testifying at Appellant's trial, Tina stated she could hear someone knocking on the door while she was on the phone with E.T. Tina then heard a "loud noise" and

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"a louder voice like someone broke in." E.T. ended the phone call and Tina called the apartment office, letting them know someone had broken into the apartment. Tina left her job and drove to the apartment.

Joshua Grice, an employee at the apartment complex, answered Tina's phone call and ran to the family's apartment. When Grice got to the apartment, the front door was cracked open and the door's locking mechanism was broken. Grice called out but no one responded. Grice walked away from the apartment building towards the complex's fence line and observed a "younger black man" with a black and blue backpack walking away from the complex. Grice testified the individual was wearing a black shirt and black shorts and that a "bat or stick" was protruding out of the backpack.

Grice walked back to the family's apartment and found E.T. hiding underneath a blanket in the master bedroom. E.T. told Grice that a man entered the apartment carrying a gun and repeatedly asked E.T., "Where is my weed?" E.T. told Grice the man was wearing all black and covering his face. Grice called 911 and two police officers, Deputy Christopher Arias and Detective Jessip Murphy, arrived at the family's apartment.

Before the officers' arrival, Tina picked up E.T. from the apartment and left to get her son, V.T., from his friend's house. Tina, E.T., and V.T. returned to the apartment approximately ten minutes after the officers' arrival. Tina and V.T. spoke to the officers and, at Appellant's trial, acknowledged they initially lied to the officers because they did not want to admit E.T. was home alone. Tina and V.T. testified that they eventually told the officers the "true version" of where they were when the apartment was broken into: Tina was at work and V.T. was staying at a friend's house.

Testifying at Appellant's trial, Deputy Arias stated that E.T. told him "a bad man had entered or came into the resident's apartment." Deputy Arias asked E.T. whether the intruder was carrying a weapon and E.T. indicated the intruder was carrying a gun "like the duty weapon [Deputy Arias] had on [his] hip at the time." Describing E.T.'s demeanor, Deputy Arias stated she "appeared as if a traumatic event had just occurred."

The officers also spoke to V.T. and asked him if he knew who may have been responsible for breaking into the apartment and taking the Xbox. V.T. told the officers about an incident several weeks before during which he and a friend were smoking marijuana in the apartment complex parking lot when they were approached by a young, African-American man. The young man identified himself as Appellant and the boys exchanged information about the high schools they attended. V.T. testified that he and Appellant attended the same school. V.T. said Appellant was acting "suspicious" that evening and was "just walking around in circles" at the apartment complex.

After speaking with the family, Detective Murphy contacted the Fort Bend school district to get Appellant's information and address. At 9:45 p.m. that evening, Detective Murphy and another detective arrived at Appellant's address. The detectives knocked at Appellant's front door for about 5-10 minutes before Appellant answered. Appellant said he was home alone and the detectives called Appellant's mother and "gave her a rundown of what was happening." Appellant's mother came home and gave the detectives consent to search the house. In an upstairs room, the detectives found marijuana and an Xbox with a serial number matching the system stolen from V.T.'s room. The detectives questioned Appellant about the Xbox and, according to Detective Murphy, Appellant gave different accounts for how he came to possess the Xbox before eventually admitting that he took it.

Appellant was the last witness to testify at his trial and stated that, the day before the robbery, V.T. had messaged him about buying marijuana. Appellant arrived at V.T.'s apartment on August 17, 2019, and knocked for 5-10 minutes. After nobody answered, Appellant testified that he kicked in the door and entered the apartment. Appellant said he carried a baseball bat in his bag but left the bat outside of the apartment when he entered.

Appellant saw E.T. on the phone when he entered the apartment and said he did not speak to her. Appellant walked into V.T.'s bedroom and took marijuana and an Xbox. Appellant left the apartment and walked away from the apartment complex. Appellant testified that he "probably" was the person Grice saw walking away from the complex.

During his testimony, Appellant did not deny that he entered the apartment. He stated his intent was to steal marijuana. Appellant said he did not carry a gun when he entered the apartment. Appellant stated he did not talk to E.T. or make any threats toward her. Appellant said he was wearing dark clothing and a bandana over his face when he entered the apartment.

After closing statements, the trial court found beyond a reasonable doubt the following allegation of aggravated robbery:
That [Appellant], on or about August 9, 2017, in Fort Bend County, Texas, did then and there while in the course of committing theft of property owned by [E.T.] and with intent to obtain and maintain control of the property, intentionally and knowingly threaten or place [E.T.] in fear of imminent bodily injury or death, and the [Appellant] did then and there use and exhibit a deadly weapon, to-wit: a firearm; and that this act is a violation of section 29.03 of the Penal Code. Appellant timely appealed.

Held: Affirmed

Memorandum Opinion: In its "Judgment and Order of Adjudication," the trial court found Appellant "commit[ed] theft of property owned by [E.T.] ... with intent to obtain and maintain control of the property." Pointing out that the Xbox belong to V.T. and was not used by six-year-old E.T., Appellant argues the State "failed to prove Appellant stole property owned by [E.T.]."

The name of the appropriated-property's owner is not a substantive element of the theft offense. Byrd v. State, 336 S.W.3d 242, 251 (Tex. Crim. App. 2011). But the Code of Criminal Procedure requires the State to allege the name of the owner of property in its charging instrument. Id.; see also Tex. Code Crim. Proc. Ann. art. 21.08 (Vernon 2009).

Under Texas pleading rules, ownership may be alleged in either the actual owner or a special owner. Byrd, 336 S.W.3d at 251-52. "A special owner is a person who has actual custody or control of property that belongs to another." Id. at 252. To eliminate the distinction between actual and special ownership, the legislature expansively defined "owner" and included in the definition a person who has title to the property, possession of the property, or a greater right to possession of the property than the defendant. See Tex. Penal Code Ann. § 1.07(a)(35)(A) (Vernon Supp. 2018); see also Garza v. State, 344 S.W.3d 409, 413 (Tex. Crim. App. 2011).

Conclusion: The evidence, viewed in the light most favorable to the challenged finding, supports the trial court's conclusion that E.T. had a greater right to possession of the Xbox than Appellant. V.T. testified that he owned the missing Xbox that was recovered at Appellant's house. V.T. and E.T. testified that they lived together at the apartment with their mother. E.T.'s status as a resident at the apartment with her brother gives her "a greater right to possession" of the Xbox than Appellant, who admittedly broke into the apartment and stole it. The evidence is sufficient to support the trial court's finding regarding ownership of the stolen property.

EVIDENCE WAS SUFFICIENT TO ESTABLISH SEXUAL ASSAULT, WERE VICTIM WAS UNEQUIVOCAL IN HER TESTIMONY THAT APPELLANT ASSAULTED HER THREE MONTHS AFTER HE TURNED SEVENTEEN.

¶ 19-4-11A. **Rios-Barahona v. State**, MEMORANDUM, 2019 WL 3952949 (Tex.App.—Corpus Christi-Edinburg, 8/22/2019)

Facts: A grand jury returned an indictment charging appellant with committing aggravated sexual assault and indecency with a child on or about February 14, 2014, when appellant was seventeen years old. With respect to the aggravated sexual assault charge, the indictment alleged that appellant caused the penetration of the female sexual organ of J.L.,2 a child younger than fourteen years of age, with his finger or fingers. The indictment further alleged, under the indecency with a child count, that appellant engaged in sexual contact with J.L. by committing said acts and that he did so with the intent to arouse or gratify his sexual desire.

J.L. testified concerning an event occurring on the school bus in February of 2014 in Comal County, Texas. At the time, J.L. was twelve years old and in the sixth grade. J.L. usually sat next to her friend D.H., but D.H. was absent that day. During the bus ride home, appellant moved from the back of the bus and sat next to her. J.L. had minimal prior contact with appellant because he spoke only Spanish. Without saying anything to J.L., appellant reached over and put his hand inside the front of her pants. J.L. tried to pull appellant's hand out from her pants, but "he just—he just went in deeper," penetrating her vagina with his fingers. J.L. estimated that the assault lasted ten to fifteen minutes. J.L. described being in shock throughout the incident. When the bus arrived at appellant's stop, he removed his hand from J.L.'s pants and exited the bus. Later in her testimony, when prompted by the State, J.L. recalled that the assault took place on February 14, 2014, or Valentine's Day.

J.L. testified that she later told her friend D.H. about the assault, and D.H. responded that appellant had done the same thing to her. In May of 2014, J.L informed her mother what happened, and her mother contacted law enforcement. J.L. also stated that she talked to a school counselor at some point about the incident.

Robert Gardner, a New Braunfels Police Department detective, testified regarding his investigation into J.L.'s allegations. After his assignment to the case, Detective Gardner scheduled a forensic interview for J.L. with the Comal County Children's Advocacy Center. Detective Gardner viewed the interview through a live video feed from a nearby room. The trial court later admitted a video recording of the interview into evidence. Detective Gardner spoke with the transportation department for Comal Independent School District and learned that there were no cameras on the bus where the alleged assault took place. He recalled that the assault was alleged to have occurred on February 14, 2014. On cross-examination, appellant showed Detective Gardner a school calendar indicating that school was not in session on that date.3 Detective Gardner explained that this fact would not have affected his investigation:

[S]chools do celebrate holidays on different days, even before an early release or when they actually have a holiday. So they might have had a Valentine's Day going on at the school and celebrated on that Thursday. Children do associate things. They get dates mixed up. Sometimes they're not exact on it, so I wouldn't have ruled [the allegation] out because of that.

Appellant called multiple witnesses who attested to appellant's good character. The State responded by referencing appellant's school disciplinary history, which included inappropriately touching other female students.

D.H. testified in rebuttal for the State. She said J.L. told her that appellant had touched her, but she maintained that J.L. did not go into detail. D.H. stated that she did not personally have any interactions with appellant.

The jury returned a guilty verdict on both counts. For both convictions, appellant argues that the State failed to establish by legally sufficient evidence that appellant committed an offense after turning seventeen.

Held: Affirmed

Memorandum Opinion: When the defendant's age is an element of the offense, the State must establish the element with legally sufficient evidence. See Caston v. State, 549 S.W.3d 601, 606 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (reviewing whether there was legally sufficient evidence that the defendant was seventeen when he committed acts of sexual abuse as an element of continuous sexual abuse of a child under Texas Penal Code § 21.02); Villarreal v. State, 470 S.W.3d 168, 172 (Tex. App.—Austin 2015, no pet.) (reviewing whether there was legally sufficient evidence that the alleged abuse occurred when defendant was over the age of seventeen in appeal from an aggravated sexual assault of a child conviction). In addition, Texas Penal Code § 8.07(b) generally prohibits the prosecution or conviction of a person "of any offense committed before reaching 17 years of age" unless the juvenile court has waived its jurisdiction and certified the individual for criminal prosecution. TEX. PENAL CODE ANN. § 8.07(b).4

J.L. was unequivocal in her testimony that appellant sexually assaulted her in February of 2014, specifically February 14 or Valentine's Day. The record reflects that appellant turned seventeen on November 28, 2013. Accordingly, appellant would have been seventeen at the time of the offenses. Appellant maintains that the offense "could not have occurred on February 14, 2014, as the complainant testified" because the school was not in session on that day. However, we must presume that the jury resolved this conflicting evidence in favor of its verdict. See Clayton, 235 S.W.3d at 778. In that regard, Detective Gardner testified that "schools do celebrate holidays on different days, even before an early release or when they actually have a holiday. So they might have had a Valentine's Day going on at the school and celebrated on that Thursday." The jury could have reasonably inferred from the testimony that the offense occurred near February 14 when school was in session and not on some date prior to November 28, 2013. See id.

Conclusion: Accordingly, we conclude that the State established by legally sufficient evidence that appellant was seventeen years old when he committed the charged offenses. See Jackson, 443 U.S. at 319; Ramsey, 473 S.W.3d at 808. We overrule appellant's first issue.

TRIAL PROCEDURE

JUVENILE COURT DID NOT ERR WHEN IT DENIED JUVENILE'S REQUESTED MANSLAUGHTER INSTRUCTION BECAUSE THERE WAS NO AFFIRMATIVE EVIDENCE FROM WHICH A RATIONAL JUROR COULD INFER THAT THE JUVENILE WAS AWARE OF BUT CONSCIOUSLY DISREGARDED A SUBSTANTIAL AND UNJUSTIFIABLE RISK THAT DEATH WOULD OCCUR AS A RESULT OF JUVENILE'S STABBING OF VICTIM.

¶ 19-4-12. **In the Matter of A.M.**, MEMORANDUM, 2019 WL 4124381 (Tex.App.—Fort Worth, 8/29/2019)

Facts: A jury adjudicated A.M. delinquent after finding that she had engaged in delinquent conduct by committing the offense of murder when she stabbed and caused the death of N.L.1 The jury found that A.M. was in need of rehabilitation or that the protection of the public or A.M. required a disposition and did not find that A.M. had caused the death of N.L. under the immediate influence of sudden passion arising from an adequate cause. The jury sentenced A.M. to commitment for twenty-five years. The juvenile court adjudicated A.M. delinquent and sentenced her to commitment in accordance with the jury's disposition. The juvenile court also made an affirmative finding that A.M. had used or exhibited a deadly weapon, a knife, during the commission of the offense or during the immediate flight therefrom.

These events involve four girls. At the time of trial, S.B and J.D. were fourteen years old. On May 28, 2018, S.B., J.D., and A.M. went to N.L.'s house and planned to spend the night with her. A.M., N.L., and J.D. lived near each other, and it was a one-to two-minute walk between A.M.'s and N.L.'s apartments.

Earlier in the day, the girls went swimming in Fort Worth and returned to N.L.'s apartment where they listened to music and danced. In the evening, A.M. and N.L. had a petty argument. J.D. went home with A.M., and later they went to a nearby store for A.M.'s mother. During that time, S.B. and N.L. continued dancing and listening to music at N.L.'s apartment. A.M. and N.L. messaged each other, and S.B. observed that N.L. appeared to be angry.

After delivering groceries to her mother, A.M. and J.D. walked back to N.L.'s house for the purpose of

retrieving A.M.'s clothes. J.D. stayed outside. A.M. was angry when she left N.L.'s apartment. She slammed the door as she left and declared to J.D. that she was going to fight N.L. J.D. and A.M. walked back to A.M.'s apartment and arrived after midnight. J.D. tried to sleep, but A.M. was angry and continued using her phone to message someone. A.M. eventually told J.D. to get up and stated that N.L. was coming over. A.M. and J.D. began waiting outside A.M.'s apartment at about 2:30 a.m.

After N.L. informed S.B. that she had to exchange some clothes with A.M., they walked to A.M.'s apartment and arrived at about 3:00 a.m. A.M. walked up to N.L. S.B. was worried, and J.D. stayed on the sidewalk. According to S.B., N.L. handed A.M.'s bag of clothes to her. A.M. set the bag on the ground behind her and threw a bag of N.L.'s clothes at N.L.'s feet. S.B. observed that when N.L. attempted to pick up the bag, A.M. "ran up on her and hit [N.L.]" about her face. N.L. started to fight back. J.D. did not recall who started the fight. The two girls fought for about two minutes before S.B. and J.D. broke up the fight and pulled A.M. and N.L. off each other.

A.M. and N.L. remained angry and cussed at each other after the fight. J.D. told N.L. to go home. S.B. thought A.M. had finished fighting, but as A.M. walked back to her apartment, S.B heard A.M. say, "I'm going to kill this bitch." S.B. did not think A.M. was serious. As she and N.L. began to walk away, N.L. returned to retrieve her blanket from J.D. J.D. had stayed outside because she was worried about N.L. She returned the blanket to N.L. but then told S.B. and N.L. to run. S.B. saw A.M. running with a kitchen knife. J.D. was worried that A.M. was going to hurt N.L. J.D. struggled with A.M. for about thirty seconds and attempted to grab the knife from A.M.'s hand or make A.M. drop the knife. A.M. said, "Let go," began swinging the knife, and got away. During this time, J.D. heard N.L. say, "Let her kill me," "Let her stab me. I want to die any ways [sic]," and N.L. did not appear to be afraid. J.D., who was scared that A.M. was going to try to hurt her too, backed up and told S.B. and N.L. to run. S.B. also told N.L. to run. Although N.L. ran, she tripped over the curb. S.B. saw N.L. fall and saw A.M. stab N.L. in the neck. J.D. saw A.M. walk up to N.L., heard N.L scream, "[My] neck," and then saw blood.2 J.D. admitted that she had seen A.M. walk up to N.L. but had not seen the stabbing and explained that she had guessed that A.M. had stabbed N.L. According to S.B., when A.M. went to stab N.L., A.M. did not trip, was not playing around, joking, or trying to scare N.L. S.B. testified, "It was intentional." J.D. stated that A.M. was the only person with a knife and declared that A.M.'s act of stabbing was no accident, "[b]ecause the way she walked up on [N.L.], that's not no accident."

A.M. was not present when detectives first arrived at her apartment, but her mother and stepfather were. A.M.'s stepfather eventually brought A.M. to the police station where she was interviewed. After the interview, A.M. took police to the location where she had deposited the knife. Police located the twelve-inch knife, which had a seven and one-half inch blade, with a blanket on the patio of a vacant apartment 235 feet away from the area where the incident occurred. Testing confirmed the presence of N.L.'s DNA on the knife handle and blade. Based on his training and experience, Detective Matthew Barron opined that a knife like the one that was recovered could be a deadly weapon in the manner of its use or intended use and that the knife was a deadly weapon in this case.

Deputy medical examiner Marc Krouse performed N.L.'s autopsy. N.L. had several small injuries and a couple of hidden bruises under her scalp. Krouse concluded that the downward three-and-one-half or four-inch stab wound to the neck and chest had caused N.L.'s death and that the manner of her death was homicide. The autopsy revealed that the knife had cut through N.L.'s jugular vein and had penetrated her lung. Krouse opined that a stab wound to the neck like the one N.L. suffered was clearly dangerous to human life and that the injury to N.L.'s jugular vein was not survivable.

A.M. testified at trial and admitted that she had returned to her apartment after fighting N.L., had retrieved a knife, and had run back outside. A.M. explained that she did this to scare N.L. and claimed, "My intent was to never harm her." According to A.M., N.L. turned around; said, "You real bold"; and then walked up to A.M. and said, "Stick me, stick me. I ain't scared to die. I want to die any ways." A.M. claimed that she told N.L. to go home, and N.L. approached and swung at her. A.M. said she "reacted" by stabbing N.L. A.M. testified, "I made the most horrible mistake of my life and I wish I was thinking at the time but emotions were so high and we both [had] not fully calmed down yet." After A.M. withdrew the knife, she tried to stop N.L., who was panicking, from running. N.L. collapsed.

A.M. claimed that she went into her house and came back with towels to put on N.L.'s neck but did not tell her mother about the stabbing because she was only thinking of helping N.L. A.M. also claimed that after her mother ran outside to help N.L., she instructed A.M. to run. A.M. ran back to the apartment, grabbed N.L.'s blanket, wrapped the knife in it, and ran to another area of the apartment complex. A.M. placed the knife and the blanket "over [a] balcony." At about 4 a.m., A.M.'s mother informed her by message that N.L. was dead. Eventually, A.M. provided her location to her father, and he transported her to the police station.

A.M. claimed that she did not recall wiping the knife with the blanket. Barron was recalled during the State's rebuttal and testified that A.M.'s "I will kill you" message had been found on N.L.'s phone but had been deleted from the messages on A.M.'s phone. He also testified that during her police interview, A.M. had described wiping the blood off of the knife with a blanket.

The second paragraph of the petition alleged that A.M. had engaged in delinquent conduct on or about May

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29, 2018, in Tarrant County when she intentionally, with the intent to cause serious bodily injury to N.L., committed an act clearly dangerous to human life, namely, stabbing N.L. with a knife, and thereby caused N.L.'s death, thus violating Penal Code Section 19.02. Tex. Penal Code Ann. § 19.02(b)(2) (Murder) (establishing that a person commits the offense of murder if she intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual).

A person commits manslaughter if he recklessly causes the death of an individual. Id. § 19.04(a) (Manslaughter). "A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." Id. § 6.03(c). The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint. Id.

During the charge conference, A.M. requested that the juvenile court's charge instruct the jury on manslaughter. See Saunders v. State, 840 S.W.2d 390, 391 (Tex. Crim. App. 1992) (explaining that regardless of the strength or weakness of the evidence, if any evidence raises the issue that the defendant was guilty only of the lesser offense, a charge on the lesser offense must be given). The juvenile court recalled that no evidence was presented establishing that A.M. "was aware of the risk and consciously disregarded the risk" as would satisfy the reckless element of manslaughter and denied the requested manslaughter instruction. In her sole issue, A.M. contends that the juvenile court harmfully erred when it denied her requested instruction on manslaughter.

Held: Affirmed

Memorandum Opinion: In determining whether a defendant was entitled to have an instruction on a lesser offense included in the trial court's charge to the jury, we employ the two-step Aguilar/Rousseau test. See Tex. Code Crim. Proc. Ann. arts. 37.08 (Conviction of lesser included offense), 37.09 (Lesser included offense); Ritcherson v. State, 568 S.W.3d 667, 670–71 (Tex. Crim. App. 2018) (citing Rousseau v. State, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993)); see Cavazos v. State, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012). First, we compare the statutory elements of the alleged lesser offense and the statutory elements and any descriptive averments in the indictment. Ritcherson, 568 S.W.3d at 670–71; Cavazos, 382 S.W.3d at 382 (explaining that the first step of the test is a question of law that may be performed pre-trial or on appeal). Second, there must be evidence from which a rational jury could find the defendant guilty of only the lesser offense. Ritcherson, 568 S.W.3d at 671. This evidentiary requirement is met if there is (1) evidence that directly refutes or negates other evidence establishing the greater offense and raises the lesser-included offense or (2) evidence that is susceptible to different interpretations, one of which refutes or negates an element of the greater offense and raises the lesser offense. Id. (citing Saunders v. State, 840 S.W.2d 390, 391–92 (Tex. Crim. App. 1992)). The evidence raising the lesser offense must be affirmatively in the record. Ritcherson, 568 S.W.3d at 671. In other words, a defendant is not entitled to a lesser-included offense instruction based on the absence of evidence, and the evidence must be "directly germane to the lesser-included offense[.]" Skinner v. State, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997). In performing this analysis, we consider not just the evidence presented by the defendant, but all the evidence admitted at trial, and if there is more than a scintilla of evidence raising the lesser offense and negating or rebutting an element of the greater offense, the defendant is entitled to a lesser-offense instruction. Ritcherson, 568 S.W.3d at 671 (citing Roy v. State, 509 S.W.3d 315, 317 (Tex. Crim. App. 2017)). The evidence need not be controverted or even credible. Banda v. State, 890 S.W.2d 42, 60 (Tex. Crim. App. 1994).

The court of criminal appeals has concluded that manslaughter is a lesser-included offense of murder. See Cavazos, 382 S.W.3d at 384. We therefore proceed to the second step of the test and determine whether the requested instruction on manslaughter was warranted based on the evidence. Ritcherson, 568 S.W.3d at 671.

Relying on evidence of the knife length and the deputy medical examiner's testimony that a sharp object that penetrates the skin without striking bone "tends to go right through everything else," along with the inferences that may be drawn from that evidence, A.M. asserts that her acts and conduct provide more than a scintilla of evidence to show that her actions were reckless rather than intentional. A.M. also asserts that her testimony that she "reacted" in response to N.L.'s approaching and swinging at her allowed the jury to infer that A.M. was aware of the risk the knife posed and disregarded the risk by defending herself while holding the knife. A.M. asserts that this evidence also shows that she acted recklessly rather than intentionally. According to A.M., this inference is further supported by her testimony that she "unintentionally" stabbed N.L. and did not intend to harm N.L. She asserts that the evidence negates and refutes the "intentional" culpable mental state required for the offense of murder and that if believed, this evidence permitted the jury to determine that she engaged in delinquent conduct only by committing manslaughter. A.M. argues that this inference is further buttressed by additional inferences that the jury may have drawn from the evidence of the knife length and soft tissue injuries and establishes that she did not

intend to cause N.L. serious bodily injury "because [if she had so intended,] the knife would have continued to penetrate further into N.L.'s chest cavity." She concludes that the manslaughter instruction should have been given because the evidence negates or refutes an intent to cause serious bodily injury and supports a finding that she was aware of the risk of N.L.'s death but consciously disregarded the risk by attempting to defend herself with a knife.

In determining whether evidence exists to support a charge on recklessness, we cannot pluck from the record and examine in a vacuum the defendant's statement that she did not intend to kill. See Martinez v. State, 16 S.W.3d 845, 847 (Tex. App.—Houston [1st Dist.] 2000, pet ref'd). Having reviewed all of the evidence, including all of A.M.'s testimony, we conclude that the juvenile court did not err when it denied A.M.'s requested manslaughter instruction because there is no affirmative evidence from which a rational juror could infer that A.M. was aware of but consciously disregarded a substantial and unjustifiable risk that death would occur as a result of A.M.'s conduct. See Tex. Penal Code Ann. §§ 6.03(c), 19.04(a); Ritcherson, 568 S.W.3d at 671. We also disagree with A.M.'s assertion that because N.L. did not suffer other injuries beyond the injuries to her jugular vein and lung, a rational juror could infer that she did not intend to cause N.L. serious bodily injury. Although there is some evidence that A.M. did not intend to kill N.L., there must also be some affirmative evidence in the record that would permit a rational juror to infer that A.M. was aware of but consciously disregarded a substantial and unjustifiable risk that death would occur as a result of her conduct and that evidence must be sufficient to establish manslaughter as a valid, rational alternative to murder. See Ritcherson, 568 S.W.3d at 671; Cavazos, 382 S.W.3d at 385.

In this case, there is no evidence that A.M. was aware of a substantial and unjustifiable risk that N.L.'s death would occur as a result of her conduct and that she had consciously disregarded that risk. At trial, the State's prosecutor explicitly asked A.M. whether she thought there was a danger to stabbing N.L., and she answered, "No." When A.M. was asked whether she had thought "[it was] going to be more than just scaring somebody to plunge a knife" into that person's body, A.M. answered, "Yeah," but she explained that she had thought N.L. would run or go home. This is not evidence that A.M. was aware of a substantial and unjustifiable risk that N.L. would die as a result of her conduct—A.M. specifically stated that she thought her conduct would result in N.L. running or going home. See Nevarez v. State, 270 S.W.3d 691, 694 (Tex. App.—Amarillo 2008, no pet.) (holding that trial court did not err in refusing to instruct jury on lesser offense of manslaughter; defendant's testimony that he panicked, was scared, swung a knife while trying to protect himself, and accidentally stabbed the victim in the neck was not evidence that the defendant had been reckless). The evidence in this case shows that A.M. did not act recklessly.

Moreover, to be entitled to the manslaughter instruction, the evidence must be "directly germane" to the offense of manslaughter and must rise to a level to permit a jury to find that if A.M. is guilty, she is guilty only of manslaughter. Id. at 693. Evidence that A.M. first physically fought with N.L., left to obtain a knife, returned to scare N.L., and then stabbed N.L., and A.M.'s later declaration that she did not intend to harm N.L. but intended only to scare N.L. and thought N.L. would run or go home, is not evidence directly germane to recklessness, and in the absence of additional evidence, the evidence in this case does not rise to a level that would permit a juror to find that, if guilty, A.M. is guilty only of the lesser offense of manslaughter.

The State relies on Ritcherson for the proposition that we should reject A.M.'s "reaction" testimony because it fails to satisfy the second prong of our analysis. See 568 S.W.3d at 677. In Ritcherson, the court of criminal appeals considered testimony that the defendant had stabbed the victim "as a reflexive reaction to being struck on the head by a shoe." Id. at 677. The court concluded that even if the "reflexive" testimony meant that the defendant had been unable to physically control her act of stabbing the victim in response to being attacked, the jury could not have reasonably inferred that the defendant had stabbed the victim "only recklessly" because a jury cannot infer intent from a reflexive action—a person can only commit a criminal offense if she voluntarily engages in the conduct, and a reflexive reaction does not constitute a voluntary act. See Tex. Penal Code Ann. § 6.01(a); Ritcherson, 568 S.W.3d at 677.

Conclusion: In this case, there is no evidence that A.M.'s "reaction" was "reflexive" such that she was unable to physically control her stabbing action in response to an attack. We have determined that the evidence, including evidence that A.M. "reacted," does not permit a rational juror to find that if A.M. is guilty, she is guilty only of manslaughter. Thus, the juvenile court did not err by denying the requested instruction on the lesser offense of manslaughter, and we overrule A.M.'s sole issue. Having overruled A.M.'s sole issue on appeal, we affirm the juvenile court's adjudication and disposition orders.

A GENERAL VERDICT OF GUILTY WILL BE SET ASIDE WHEN THE JURY IS INCORRECTLY INSTRUCTED ON TWO DISJUNCTIVE THEORIES OF THE LAW OF PARTIES AND ONE THEORY IMPLIED THAT APPELLANT HAD A LEGAL DUTY TO PREVENT THE COMMISSION OF THE CRIME, WHICH SHE DID NOT.

¶ 19-4-8. **In the Matter of M.S.**, MEMORANDUM, No. 02-18-00099-CV, 2019 WL 3755768 (Tex.App.—Fort Worth, 8/8/2019).

Facts: M.S. was charged as a party to the capital murder and aggravated robbery that occurred on the evening of July 26, 2016, at the home of Zach Beloate (Beloate), which left Beloate wounded and his roommate Ethan Walker (Ethan) dead. M.S. had turned 16 years old the day before the incident. The testimony at trial revealed several juveniles3 and adults participated in the incident including Ariana Bharrat (Ariana), Megan Holt (Megan), M.S., T.K., J.B., Latharian Merritt (Larry), and Sean Robinson (Bankz). According to Megan, M.S. brought up the idea of stealing from Beloate because she was romantically involved with him and because Beloate and Ethan were drug dealers who often had drugs and cash on the premises. M.S. developed the plan and explained the layout of Beloate's apartment.

On the evening of July 26, Ariana drove Megan, M.S., T.K., and Bankz to Beloate's. Larry and J.B. were in another car driven by one of Larry's girlfriends. Larry and Bankz were armed with guns; J.B. had brass knuckles. The general plan was for M.S. to divert Beloate with sexual activity, Megan would keep the front door unlocked, and Bankz, J.B., and Larry would enter and threaten Beloate and Ethan while T.K. and Megan searched for drugs. Megan testified that she knew there was a plan to rob Ethan and she went to the house voluntarily.

The night of the incident, M.S. and Megan were the first to enter Beloate's house and then Ariana joined them. All three ended up in Beloate's bedroom, along with Victor Landes, to smoke marijuana. Within approximately 15 minutes, Larry, Bankz, J.B., and T.K. came into the house. Bankz entered Beloate's room pointing his gun at everyone while J.B. followed. The three girls left the room, and Megan helped T.K. look for drugs. Larry displayed his gun and entered a bedroom where Ethan and a minor, A.R., were located. Ethan and Beloate were questioned concerning the location of drugs, but no drugs were found. Both Beloate and Ethan were shot, and Ethan subsequently died from the gunshot. When the three girls heard gun shots they ran to Ariana's car where T.K. and Bankz ultimately joined them before leaving for T.K.'s apartment.

At trial, M.S. offered evidence to establish that she was the victim of human trafficking and that her participation in the incident had been the result of duress by Ariana, her groomer, and Tramon Jordan (Tramon), her pimp. M.S. first met Ariana when she was 12 and Ariana was a senior in high school. She hung out with Ariana who eventually introduced her to Tramon when M.S. was 14. Thereafter, Ariana and Tramon would take M.S. to strip at clubs in Fort Worth and ultimately Las Vegas. In addition to stripping, Tramon forced M.S. into prostitution when she was 15. M.S. testified that she was unable to escape from Ariana or Tramon because they threatened to harm her family and they physically assaulted her. At trial Texas Department of Public Safety Agent Coleman and Counselor Toni McKinley, an expert on human trafficking, both testified that M.S. was a victim of human trafficking.

In points one through four Appellant complains that the trial court improperly instructed the jury in the law of parties by including an incorrect "legal duty" law of parties instruction in the abstract portion of the jury charge. According to M.S., this error flowed into the capital-murder application paragraph as well as the aggravated-robbery application paragraphs relating to Beloate and Ethan.

Held: Reversed and remanded

Memorandum Opinion:
Charge Error
A trial court must instruct the jury on the law applicable to the case. Tex. Code Crim. Proc. Ann. art. 36.14. It is well-settled that "[j]ury charges which fail to apply the law to the facts adduced at trial are erroneous." See, e.g., Gray v. State, 152 S.W.3d 125, 128 (Tex. Crim. App. 2004) (citing Perez v. State, 537 S.W.2d 455, 456 (Tex. Crim. App. 1976); and Harris v. State, 522 S.W.2d 199, 200 (Tex. Crim. App. 1975)). This is so because if an issue is "law applicable to the case," "[t]he jury must be instructed 'under what circumstances they should convict, or under what circumstances they should acquit.' " Id. at 127–28 (quoting Ex parte Chandler, 719 S.W.2d 602, 606 (Tex. Crim. App. 1986) (Clinton, J., dissenting)). "It is not sufficient for the jury to receive an abstract instruction on the law and then to render a verdict according to a general conclusion on whether the law has been violated." Williams v. State, 547 S.W.2d 18, 20 (Tex. Crim. App. 1977).

The "abstract paragraphs [of a jury charge] serve as a glossary to help the jury understand the meaning of concepts and terms used in the application paragraphs of the charge." Arteaga v. State, 521 S.W.3d 329, 338 (Tex. Crim. App. 2017) (citing Crenshaw v. State, 378 S.W.3d 460, 466 (Tex. Crim. App. 2012)). "An abstract statement of the law that goes beyond the indictment allegations usually will not present reversible error unless 'the instruction is an incorrect or misleading statement of a law which the jury must understand in order to implement the commands of the application paragraph.' " Id. (citing Plata v. State, 926 S.W.2d 300, 302–03 (Tex. Crim. App. 1996)).

Was Inclusion of the "Legal-Duty" Theory Error?
We first address whether the inclusion of the legal-duty parties' instruction was error. M.S. argues that the trial court committed error by including a legal-duty parties' instruction in the abstract portion of the charge because there was no factual or legal basis to support a duty on M.S.'s part to prevent the offenses for which she was charged, adjudicated delinquent, and sentenced. The State argues that the inclusion of the "legal-duty" law of parties instruction was proper

because M.S. had a legal duty to prevent the commission of the offense because she created the danger.

A person is criminally responsible as a party to an offense "if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or both." Tex. Penal Code Ann. § 7.01(a). A person is criminally responsible for another's criminal conduct if:
(1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense;
(2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or
(3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.
Id. § 7.02(a).

The jury charge in this case contained three theories under which the jury could find M.S. criminally responsible for the offenses alleged in the petition: (1) that M.S. caused or aided an innocent or non responsible person to engage in conduct prohibited by the definition of the offense; (2) that M.S. solicited, encouraged, directed, aided, or attempted to aid another person in committing the offenses alleged; and (3) the theory in dispute in this appeal: that M.S. did not make a reasonable effort to prevent the commission of the offense when she had a legal duty to do so (the "legal-duty theory").

Specifically, the abstract portion of the charge provided:
A person is criminally responsible as a party to an offense if the offense is committed by her own conduct, by the conduct of another for which she is criminally responsible, or by both. Each party to an offense may be charged with commission of the offense. Each party to an offense may be charged and convicted without alleging that she acted as a principal or accomplice.
A person is criminally responsible for an offense committed by the conduct of another if acting with the kind of culpability required for the offense, she causes or aids an innocent or non-responsible person to engage in conduct prohibited by the definition of the offense; or acting with intent to promote or assist the commission of the offense, she solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; **or having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, she fails to make a reasonable effort to prevent commission of the offense.** If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy. [Emphasis added.]

1. Inclusion of the "legal-duty" theory in the charge

M.S. relies on Guevara v. State, 191 S.W.3d 203 (Tex. App.—San Antonio 2006, pet. ref'd), to support her argument that including the "legal duty" theory in the charge was error. In Guevara, Minnie, Guevara's mistress, shot and killed Guevara's wife, Velia. There was no allegation at trial that Guevera shot his wife. The State relied on section 7.02(a)(2) of the penal code to establish he was criminally responsible for his mistress's actions because they had plotted together to kill Velia. Guevara, 152 S.W.3d at 48. Similar to this case, the abstract portion of the Guevara charge included both the aiding language from section 7.02(a)(2) and the legal-duty language from section 7.02(a)(3) of the penal code.

At trial, the State did not present evidence to support the legal-duty theory. The charge did not define "legal duty" for the jury or "set forth the elements of any legal duty Guevara may have owed to Velia when such a duty attached." Guevara, 191 S.W.3d at 206. Neither party objected to the inclusion of the "legal-duty theory" in the abstract portion of the charge.

In its analysis, the San Antonio Court of Appeals noted first that as a general rule, a person has no legal duty to protect another from the criminal acts of third parties or to control the conduct of another. Id. at 207 (citing Walker v. Harris, 924 S.W.2d 375, 377 (Tex. 1996)). That general rule, absent extenuating circumstances, also extends to husbands and wives. Id. Consequently, the court held that "instructing the jury on the legal duty theory was error because Guevara did not have a legal duty to prevent the commission of the offense." Id. (citing Medrano v. State, 612 S.W.2d 576, 578 (Tex. Crim. App. [Panel Op.] 1981) (recognizing that without a legal duty arising to prevent the commission of an offense, there is no criminal conduct)); see also Tex. Penal Code Ann. § 6.01(c) (providing an omission or failure to perform an act is not an offense unless there is a legal duty to act).

In this case, the application paragraph was similar to that in Guevara, because it advised the jury that it could convict M.S. if she was acting as either a principal or a party with no further explanation. Specifically, the charge required conviction if the jury found M.S. intentionally caused the death of Ethan "by shooting Ethan Walker with a firearm, and [M.S.] was in the course of committing or attempting to commit the offense of robbery or burglary, as either a principal or a party ...." As in Guevara, faced with the phrase "as either a principal or a party" and nothing more, "it is entirely plausible that the jury would refer back to the charge's definition of when a person is criminally responsible for an offense committed by another person, a definition that included the legal duty theory." Guevara, 191 S.W.2d at 207. "[B]ecause

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Guevara had no duty to prevent Velia's death, his conviction for her murder could have been based on a legally insufficient ground." Id. at 208.

Did M.S. have a legal duty?

M.S. argues that charge error exists because as in Guevara, the legal-duty theory was a legally insufficient ground for conviction because M.S. owed no duty to prevent the offenses. The State responds that M.S.'s actions leading up to the offenses created a legal duty to prevent commission of the capital-murder and aggravated-robbery offenses. The State points out that section 6.01 of the Texas Penal Code provides that: "[a] person who omits to perform an act does not commit an offense unless a law as defined by section 1.07 provides that the omission is an offense or otherwise proves that he has a duty to perform the act." Tex. Penal Code Ann. § 6.01(c). The State then turns to section 1.07 to determine if there is a "law" that provides a legal duty to prevent the commission of the offenses.

Section 1.07 defines "law" as "the constitution or a statute of this state or of the United States, a written opinion of a court of record, a municipal ordinance, an order of a county commissioners court, or a rule authorized by and lawfully adopted under a statute." Tex. Penal Code Ann. § 1.07(a)(30) (emphasis added). Because there appears to be no constitutional provision, statute, or rule that creates a legal duty, the State relies on written opinions by appellate courts in civil cases that articulate a common-law duty to prevent injury to others that arises when a party negligently creates a dangerous situation. See El Chico Corp. v. Poole, 732 S.W.2d 306, 312 (Tex. 1987) (finding liability for El Chico based on negligently serving intoxicating beverages resulting in car accident). The State contends that evidence M.S. planned the robbery, chose the location and victims, and provided a layout of the scene to her co-defendants created a legal duty to prevent the commission of the offenses that supports a finding of criminal responsibility for another's conduct under section 7.02(b)(3).

Under the State's theory, a person who omits to perform an act commits an offense if there is a common law duty to perform the act articulated by a court of record such as the county, district, and appellate courts in Texas. The State does not refer us to any other Texas case or authority that has adopted a similar theory that imports the civil duty to prevent injury articulated in premises-liability and other negligence cases to support a finding of legal duty under section 7.02(b)(3) of the penal code.

The State relies on State v. Zascavage, 216 S.W.3d 495, 497 (Tex. App.—Fort Worth 2007, pet. ref'd) as a basis for its theory that a civil common-law duty may form the basis for a finding of legal duty under the law of parties. However, Zascavage is not supportive. In Zascavage, the court examined the constitutionality of the former hazing statute set forth in Texas Education Code section 37.152 that made it an offense to fail to report hazing. See Tex. Educ. Code Ann. § 37.152(a)(4). Of primary concern was whether the statute provided "sufficient notice of a particular charge to a particular defendant." Zascavage, 216 S.W.3d at 497 (citing Billingslea v. State, 780 S.W.2d 271, 275–76 (Tex. Crim. App. 1989)). After noting that "the legislature's 1993 amendment to section 6.01(c) of the penal code ... allow[s] common law duties to form the basis for criminal prosecution," the court emphasized that "penal provisions which criminalize a failure to act without informing those subject to prosecution that they must perform a duty to avoid punishment are unconstitutionally vague." Id. at 497–98 (citing Billingslea, 780 S.W.2d at 276). The Zascavage court ultimately rejected the State's reliance on various education codes and civil immunity cases to create a duty to prevent hazing and declared the hazing statute unconstitutional. The State's theory in this case, based on premises-liability cases that are intensely fact specific, is even more tenuous. We have found no cases that support the State's theory and we decline to adopt it in this case.

We hold that the submission of the legal-duty theory was erroneous because M.S. had no legal duty to prevent the offenses and, therefore, the charge allowed the jury to convict M.S. based on a legally insufficient ground. See Arteaga, 521 S.W.3d at 339 (holding "[i]t is reversible error when an abstract instruction is given that is an incorrect or misleading statement of the law that the jury must understand to implement the application paragraphs" and citing Plata, 926 S.W.2d at 301-02). Here, the jury had to understand the law of parties to implement the application paragraphs, and the section 7.02(b)(c) legal-duty theory was not "law applicable to the case." Tex. Code Crim. Proc. Ann. art. 36.14 ("[T]he judge shall, before the argument begins, deliver to the jury ... a written charge distinctly setting forth the law applicable to the case."). We now turn to a harm analysis to determine if the record shows that the error resulted in egregious harm.

Was the Charge Error Egregious?

When considering whether a defendant suffered egregious harm, we consider not only the erroneous portion of the charge, but also other relevant aspects of the trial. See Sanchez v. State, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006); Hutch v. State, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996); Almanza, 686 S.W.2d at 171. These include: (1) the entire jury charge; (2) the state of the evidence, including the contested issues and weight of probative evidence; (3) the argument of counsel; and (4) any other relevant information revealed by the record of the trial as a whole. Almanza, 686 S.W.2d at 171. The reviewing court must conduct this examination of the record to "illuminate the actual, not just theoretical, harm to the accused." Id. at 174. Charge error is egregiously harmful if it affects the very

basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. See Sanchez, 209 S.W.3d at 121.

Entire Charge.
In determining whether a charge error is egregiously harmful, we first consider whether a reasonable jury referring to other parts of the charge would find a correct statement of the law or would instead be confused or misled. Vasquez v. State, 389 S.W.3d 361, 371 (Tex. Crim. App. 2012); Ngo, 175 S.W.3d at 752 (examining whether error was "corrected or ameliorated in another portion of the charge" or "was compounded by [a] misleading statement" in the charge). "[O]mitting an element necessary to convict a defendant is less likely to be harmful if the elements are accurately set forth in another section of the charge." Uddin v. State, 503 S.W.3d 710, 717 (Tex. App.—Houston [14th Dist.] 2016, no pet.); see Riley v. State, 447 S.W.3d 918, 929 (Tex. App.—Texarkana 2014, no pet.) (citing Vasquez, 389 S.W.3d at 367; Dinkins v. State, 894 S.W.2d 330, 339 (Tex. Crim. App. 1995)).

In this case, the application paragraph instructed the jury that if it found that M.S. "intentionally caused the death of Ethan Walker, by shooting Ethan Walker with a firearm, and M.S. was in the course of committing or attempting to commit the offense of robbery or burglary, **as either a principal or a party**, then you will find that M.S. has engaged in delinquent conduct by committing the offense of capital murder as alleged in the Petition." [Emphasis added.]. Similar application paragraphs relating to the aggravated-robbery offenses referenced M.S.'s actions "as either a principal or party." The specific jury questions also asked the jury if M.S. committed the offenses as either a principal or a party. For further clarification, jurors would have referred back to the abstract portion of the charge which included all three modes of being criminally responsible under section 7.02(b).

We have already determined that M.S. did not have a legal duty to prevent the commission of the offense, but the jury could have convicted M.S. based on a legally inapplicable theory of criminal responsibility. Based on the legal-duty theory in the abstract portion of the charge, the jury could have concluded that M.S. "having a legal duty to prevent commission of the offense, and acting with intent to promote or assist its commission, ... fail[ed] to make a reasonable effort to prevent commission of the offense."

In addition to the wrongful inclusion of legal duty in the abstract portion of the charge, M.S. also complains about the poor wording of the application paragraphs that authorized the jury to adjudicate her delinquent only as a principal. The capital-murder application paragraph instructed the jurors to adjudicate M.S. delinquent if they believed beyond a reasonable doubt that she:
intentionally cause[d] the death of Ethan Walker, by shooting Ethan Walker with a firearm, and [M.S.] was in the course of committing or attempting to commit the offense of robbery or burglary, **as either a principal or party**, then you will find that [M.S.] has engaged in delinquent conduct by committing the offense of capital murder as alleged in the Petition. [Emphasis added.]

M.S. argues that this instruction asked the jury whether M.S. physically shot Ethan and caused his death as a principal and only applied the "principal or party" language to the robbery or burglary allegation. M.S. argues she should not have been convicted of capital murder because there was no evidence that she personally shot Ethan.

M.S. argues the aggravated-robbery application paragraphs were equally erroneous. The aggravated-robbery application paragraphs pertaining to Ethan instructed the jury to adjudicate M.S. delinquent if it believed beyond a reasonable doubt that she:
intentionally or knowingly, while in the course of committing theft of property and with intent to obtain or maintain control of said property, threaten[ed] or place[d] Ethan Walker in fear of imminent bodily injury or death, and the Respondent did then and there use or exhibit a deadly weapon, to wit, a firearm, as either a principal or a party, then you will find that [M.S.] has engaged in delinquent conduct by committing the offense of aggravated robbery as alleged in the Petition.

M.S. argues the aggravated-robbery application paragraph instructed the jurors to adjudicate her guilty if they believed beyond a reasonable doubt that she personally robbed Ethan, and the "as either a principal or a party" language applied only to the use of a deadly weapon. M.S. argues there was no evidence that M.S. personally robbed Ethan. According to M.S., the aggravated-robbery application paragraph relating to Beloate is equally problematic because it instructed jurors to adjudicate her delinquent if they believed beyond a reasonable doubt that she:
[i]ntentionally or knowingly, while in the course of committing theft of property and with the intent to obtain or maintain control of said property, cause[d] bodily injury to Zachary Beloate, by shooting him with a firearm and [M.S.] did then and there use or exhibit a deadly weapon, to wit, a firearm, **as either a principal or a party**, then you will find that [M.S.] has engaged in delinquent conduct by committing the offense of aggravated robbery as alleged in the Petition. [Emphasis added.]

M.S. argues that this aggravated-robbery application paragraph instructed the jurors to adjudicate M.S. guilty if they believed beyond a reasonable doubt that she personally robbed Beloate and that the "as either a principal or a party" language applied only to the use of a deadly weapon, and she asserts that there is no evidence that M.S. possessed a deadly weapon during the incident.

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The placement of the "principal or party" language does not appear to modify the entire offense, is confusing, and more importantly for this review compounds the error of including the legal-duty theory as a mode under the law of parties instruction in the abstract portion of the charge. Vasquez, 389 S.W.3d at 371. In parsing through the application paragraphs the jury would look to the abstract for an understanding of the law of parties and then try and apply the law to the poorly worded application paragraphs.

We conclude that the entirety of the jury charge weighs in favor of finding egregious harm. We next consider whether this harm was ameliorated by other relevant aspects of the trial.

The state of the evidence.
M.S. relies on Guevara, and points to the similarities in the nature of the evidence. As in Guevara, there was evidence and instructions that would properly allow the jury to convict M.S. under the aiding theory of section 7.02(b)(2). Guevara, 191 S.W.3d at 207. In Guevara there was no evidence Guevara had a legal duty, but the State repeatedly argued that he should be found guilty because he should have prevented the murder. Id. at 208. In this case, the State also argued that M.S. did nothing to stop the offense or warn the victims. Specifically, she did not stop to help her boyfriend Beloate or Ethan after they were shot. According to M.S., the jury was allowed and even encouraged to adjudicate her delinquent under the legal-duty theory that was not authorized in this case.

The State responds that this case is distinguishable from Guevara because it is reasonable from the evidence, argument, and instructions that the jury did not base its verdict on the "legal-duty" theory. Rather, the State argues that the evidence established M.S. "was an integral part of the offenses." She planned the robbery; chose the location and victims; and decided more manpower and guns were needed for the success of the plan. In closing, the State directed the jury to the second law of parties' instruction in the jury charge that mirrored section 7.02(b)(2). Further, although in closing the State criticized the failure of M.S. to stop the offenses and help the victims, the State argues these statements were in the context of disproving M.S.'s affirmative defense of duress. The State argues they showed that M.S. was not threatened or compelled to commit the offenses and could have left at any time. The State claims "it can be presumed the jury based its verdict on the aiding theory." We disagree. There was conflicting evidence regarding the ring leaders of the event and M.S.'s role in the incident. There was no evidence that M.S. tried to stop the incident. Reviewing the record in its entirety, it is just as likely that the jury based its verdict on an inapplicable legal-duty theory.

"When the jury is incorrectly instructed on disjunctive theories and it renders a general verdict of guilty, the harm analysis must take into account the type of error in the charge." Uddin, 503 S.W.3d at 720 (citing Guevara, 191 S.W.3rd at 207-08). A charge authorizing conviction on an improper legal theory is not free from egregious error simply because the evidence is sufficient to support the allegations of the indictment. Id.; see Lang v. State, 698 S.W.2d 223, 225 (Tex. App.—Dallas 1985, no pet.). When "jurors have been left the option of relying on a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." Griffin v. United States, 502 U.S. 46, 59, 112 S. Ct. 466, 474 (1991). In such cases, "the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." Yates v. United States, 354 U.S. 298, 312, 77 S. Ct. 1064, 1073 (1957); see also Griffin, 502 U.S. at 59, 112 S. Ct. at 474; Robinson v. State, 266 S.W.3d 8, 12 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd); Green v. State, 233 S.W.3d 72, 85 n.9 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd); Guevara, 191 S.W.3d at 208.

There is evidence in this case from which a rational juror could have found appellant guilty beyond a reasonable doubt based on the law of parties aiding section 7.02(b)(2). However, the charge also implied Appellant had a legal duty to prevent the commission of the crime: "having a legal duty to prevent commission of the event [she] acts with intent to promote or assist its commission, and fails to make a reasonable effort to prevent the commission of the offense." [Emphasis added.]. The entirety of the evidence weighs toward a neutral finding of egregious error.

Argument of Counsel.
Although the State did not mention the word "legal duty" in closing, it repeatedly criticized M.S. for her failure to prevent the incident or seek help for the victims. The prosecutor referred to the evidence and the fact that M.S. did not help her boyfriend: "She got up and walked out of that bedroom while her boyfriend was being beaten with brass knuckles and then shot. Did not stop it. Did not render first aid. Did not call 911." "She does not stop to help Zachary or Ethan when the gunshots start. She does not call 911 when Zach is bleeding. When Ethan … needed every second of life left to him, her response was to run out and get inside of a car …."

Although the State argues that the preceding comments were directed to the duress affirmative defense, the statements do not address the duress exercised by Ariana over M.S. The jury had been instructed by the court and the attorneys to follow the court's charge as written. It is doubtful they ignored the instruction. The argument of counsel weighs toward a finding of egregious error.

All Other Relevant Information in the Record.

We find no other information in the record relevant to harm. See, e.g., Wall v. State, No. 02-18-00065-CR, 2019 WL 2041839, at *7 (Tex. App—Fort Worth May 9, 2019, no pet.) (mem. op., not designated for publication).

Conclusion: Although there is evidence in the record that supports a conviction under the aiding section of the law of parties, it is equally likely the jury may have convicted M.S. under the legal-duty theory and exposed appellant to conviction under an invalid theory. The charge erroneously allowed the jury to convict M.S. of capital murder and aggravated robbery under an improper legal-duty theory. We hold that this charge error was egregiously harmful because it affected the very basis of the case and deprived M.S. of a valuable right to be tried and convicted under a correct theory. These errors effectively denied M.S. a fair and impartial trial; therefore, we sustain M.S.'s points one, two, three, and four. Having sustained these points, we do not reach appellant's fifth point regarding the wording of the application paragraphs. See Tex. R. App. P. 47.1 Accordingly, we reverse the trial court's judgment and remand the cause for a new trial.

IN ADULT TRIAL, COURT NEED NOT INSTRUCT JURY THAT OFFENSE OCCURRED AFTER 17TH BIRTHDAY WHERE THERE WAS NO TESTIMONY DISCUSSING ANY OFFENSES THAT APPELLANT MIGHT HAVE COMMITTED PRIOR TO TURNING SEVENTEEN.

¶ 19-4-11B. **Rios-Barahona v. State**, MEMORANDUM, 2019 WL 3952949 (Tex.App.—Corpus Christi-Edinburg, 8/22/2019)

Facts: A grand jury returned an indictment charging appellant with committing aggravated sexual assault and indecency with a child on or about February 14, 2014, when appellant was seventeen years old. With respect to the aggravated sexual assault charge, the indictment alleged that appellant caused the penetration of the female sexual organ of J.L.,2 a child younger than fourteen years of age, with his finger or fingers. The indictment further alleged, under the indecency with a child count, that appellant engaged in sexual contact with J.L. by committing said acts and that he did so with the intent to arouse or gratify his sexual desire.

J.L. testified concerning an event occurring on the school bus in February of 2014 in Comal County, Texas. At the time, J.L. was twelve years old and in the sixth grade. J.L. usually sat next to her friend D.H., but D.H. was absent that day. During the bus ride home, appellant moved from the back of the bus and sat next to her. J.L. had minimal prior contact with appellant because he spoke only Spanish. Without saying anything to J.L., appellant reached over and put his hand inside the front of her pants. J.L. tried to pull appellant's hand out from her pants, but "he just—he just went in deeper," penetrating her vagina with his fingers. J.L. estimated that the assault lasted ten to fifteen minutes. J.L. described being in shock throughout the incident. When the bus arrived at appellant's stop, he removed his hand from J.L.'s pants and exited the bus. Later in her testimony, when prompted by the State, J.L. recalled that the assault took place on February 14, 2014, or Valentine's Day.

J.L. testified that she later told her friend D.H. about the assault, and D.H. responded that appellant had done the same thing to her. In May of 2014, J.L informed her mother what happened, and her mother contacted law enforcement. J.L. also stated that she talked to a school counselor at some point about the incident.

Robert Gardner, a New Braunfels Police Department detective, testified regarding his investigation into J.L.'s allegations. After his assignment to the case, Detective Gardner scheduled a forensic interview for J.L. with the Comal County Children's Advocacy Center. Detective Gardner viewed the interview through a live video feed from a nearby room. The trial court later admitted a video recording of the interview into evidence. Detective Gardner spoke with the transportation department for Comal Independent School District and learned that there were no cameras on the bus where the alleged assault took place. He recalled that the assault was alleged to have occurred on February 14, 2014. On cross-examination, appellant showed Detective Gardner a school calendar indicating that school was not in session on that date.3 Detective Gardner explained that this fact would not have affected his investigation:
[S]chools do celebrate holidays on different days, even before an early release or when they actually have a holiday. So they might have had a Valentine's Day going on at the school and celebrated on that Thursday. Children do associate things. They get dates mixed up. Sometimes they're not exact on it, so I wouldn't have ruled [the allegation] out because of that.

Appellant called multiple witnesses who attested to appellant's good character. The State responded by referencing appellant's school disciplinary history, which included inappropriately touching other female students.

D.H. testified in rebuttal for the State. She said J.L. told her that appellant had touched her, but she maintained that J.L. did not go into detail. D.H. stated that she did not personally have any interactions with appellant.

The jury returned a guilty verdict on both counts. This appeal followed.

Held: Affirmed

Memorandum Opinion: By his second issue, Appellant further maintains that he was egregiously harmed by the error, which he did not object to at trial.

Appellant did not object to the jury charge in this case. Therefore, we may only reverse appellant's convictions if the charge error resulted in "egregious harm." Neal v. State, 256 S.W.3d 264, 278 (Tex. Crim. App. 2008). "Harm is egregious if it deprives the appellant of a fair and impartial trial." Id.; see Allen v. State, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008) ("[J]ury charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory."). Applying the egregious harm test requires considering (1) the jury charge, (2) the state of the evidence, (3) the parties' arguments, and (4) all other relevant information in the record. See Allen, 253 S.W.3d at 264.

Appellant complains that the following instruction, while a correct statement of law in most cases, improperly permitted the jury to convict appellant for conduct occurring before his seventeenth birthday: The State is not bound by the specific dates in the indictment that the offense is alleged to have been committed. A conviction may be had upon proof that the offense, if any, was committed at any time prior to the filing of the indictment that is within the period of limitations. The indictment in the instant case was filed on March 2, 2016. There is no period of limitations for the [charged offenses]. Therefore, proof that the offense, if any, occurred prior to the filing of the indictment on March 2, 2016 is sufficient.

Appellant argues that the instruction should have read, in part, as follows: "Therefore, proof that the offense, if any, occurred after November 28, 2013, and prior to the filing of the indictment on March 2, 2016, is sufficient."

In Taylor v. State, 332 S.W.3d 483 (Tex. Crim. App. 2011), the Texas Court of Criminal Appeals addressed a similar complaint of jury charge error. The defendant in Taylor was charged by three separate indictments with aggravated sexual assault. Id. at 485. The complainant testified regarding sexually assaultive conduct committed by the defendant both before and after the defendant's seventeenth birthday. Id. at 485–86. Although the indictments alleged the offenses were committed on dates that followed the defendant's seventeenth birthday, the charge instructed the jurors that the State was not bound by the specific dates alleged and that they could convict the defendant if the offenses were committed at any time within the period of limitations. Id. at 487–88. The defendant complained on appeal of the absence of a § 8.07(b) instruction; that is, the jurors were not told that the defendant could not be convicted for conduct committed before his seventeenth birthday. Id. at 486; see TEX. PENAL CODE ANN. § 8.07(b).

The court of criminal appeals reviewed whether such an instruction was law applicable to the case or an unrequested defensive issue. Taylor, 332 S.W.3d at 486–87. The court noted that "[d]ue to the repeated testimony regarding the [defendant's] pre-seventeen conduct, the absence of an 8.07(b) instruction in the jury charges is problematic[.]" Id. at 488. It also noted that the jury was instructed that it could ignore the dates cited in the indictments and could convict the defendant for any offenses committed within the period of limitations. Id. The court concluded that, under those specific circumstances, § 8.07(b) was law applicable to the case on which the trial court had a duty to instruct the jury even in the absence of a request or objection by the defendant. Id. at 488–49. Accordingly, the court held that the absence of a § 8.07(b) instruction, when combined with evidence of the defendant's conduct while he was a juvenile and the instruction that a conviction could be based on any conduct within the limitations period, "resulted in inaccurate charges that omitted an important portion of the law applicable to the case."6 Id. at 489.

We find Taylor controlling but distinguishable. Like Taylor, the jury charge in this case instructed that the State was not bound by the specific dates alleged and that the jury could convict the defendant if the offenses were committed at any time within the period of limitations. However, the absence of a § 8.07(b) instruction was "problematic" in Taylor because the jury "received evidence upon which they were statutorily prohibited from convicting [the defendant]," i.e., "repeated testimony regarding [the defendant's] pre-seventeen conduct." Id. at 487. There was no such evidence in this case. To the contrary, J.L.'s testimony focused entirely on an incident that occurred over two months after appellant turned seventeen. Unlike Taylor, there was no testimony in this case discussing any offenses that appellant might have committed prior to turning seventeen.

Conclusion: Under these circumstances, we conclude that neither the instruction proposed by appellant on appeal nor the more general § 8.07(b) instruction constituted law applicable to the case. Therefore, the trial court was not required to sua sponte include the instruction, and the jury charge was not erroneous for the omission. See id. at 486. We overrule appellant's second issue.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

NO ABUSE OF DISCRETION IN A DISCRETIONARY TRANSFER TO CRIMINAL COURT WERE APPELLANT AGREED TO THE TRANSFER.

¶ 19-4-2. **Davis v. State,** MEMORANDUM, No. 05-18-00379-CR, 2019 WL 2317111 (Tex.App.—Dallas, 5/31/2019).

Facts: On November 5, 2015, appellant's uncle, Tim Stanfield, approached appellant and appellant's older brother and told them he needed help moving clothes,

which appellant understood meant he needed help committing a robbery. Several people participated in the robbery. The target of the robbery was Cecil Williams and his home. During the course of the robbery, Williams was fatally shot.

Appellant was charged with delinquent conduct in connection with the robbery and murder of Williams. The State filed a Petition for Discretionary Transfer in the juvenile court. On March 29, 2016, the juvenile court held a hearing to consider the State's petition. *At the hearing, appellant was admonished and he, joined by his attorney, waived his right to a full transfer hearing and agreed to the transfer*. A stipulation of evidence was entered into the record during the hearing. Appellant confirmed that he signed the stipulation freely and voluntarily. The stipulation included a statement that "[appellant] wishes to freely and voluntarily waive the right to confront and cross examine witnesses and agrees that the Court may transfer him to the Criminal Court for the offense alleged in the Petition for Discretionary Transfer." The juvenile court granted the State's petition and entered an order that states, in part, that the court finds that "[appellant] and his attorney waived the discretionary transfer hearing and have agreed to the existence of the elements and considerations in favor of transfer to a Criminal Court for prosecution as an adult." Per the juvenile court's order, appellant's case was transferred to the jurisdiction of the 195th Judicial District Court in Dallas County, where he stood trial, certified as an adult, against the charge of first-degree felony aggravated robbery.

On March 26, 2018, appellant appeared before the district court to enter a plea on the offense of aggravated robbery. The trial court admonished appellant of his rights, appellant waived those rights, and entered an open plea of guilty. The State presented the juvenile court file for record purposes; appellant's signed, written, and voluntary judicial confession; and the State's compliance with the Michael Morton Act. Both sides rested on the issue of guilt and proceeded to the punishment phase of trial.

During the punishment phase, the State presented evidence of other crimes appellant had committed. Ed Bolton testified that on November 10, 2015, he was working at a 7-Eleven store. Around 3:45 a.m., a man entered the store holding a revolver, jumped the counter, and demanded that he open the register. A second man entered and demanded that Bolton open a second register. Bolton indicated that the robbers took cash, his cell phone, and lottery tickets. Appellant and his brother were subsequently arrested for that robbery.

Finally, appellant testified that he took full responsibility for the robbery and murder of Williams as well as the aggravated robberies of the convenience stores. He explained that in 2015 he lost his father and relied heavily on his older brother for support. He indicated that his mother used drugs and he often lived with his aunt, who also used drugs. He himself used marijuana, methamphetamine, and Xanax bars. He indicated that money for drugs and food came from fraudulent schemes and stealing. He dropped out of school in the seventh grade because he chose to support his drug habit rather than buy clothing for school. His first adjudication was for assault on a public servant when he was in the seventh grade. He acknowledged that he was not able to successfully complete probation for that charge, commenting that his mother did not participate in the required programs. While on juvenile probation, he failed a drug test, did not take drug classes as ordered, failed to report to his probation officer, and violated curfew. The district court sentenced appellant to ten years' confinement. This appeal followed.

Held: Affirmed

Memorandum Opinion: In his first issue, appellant claims the juvenile court abused its discretion when it waived jurisdiction and transferred him to the criminal district court for criminal proceeding. More particularly, appellant claims the transfer order lacks the specificity and analysis required by the family code. TEX. FAM. CODE ANN. § 54.02(h). As an initial matter, we note that we clearly have jurisdiction over appellant's appeal of his conviction. See TEX. CODE CRIM. PROC. ANN. art. 44.02. As to appellant's complaint concerning the transfer order, we recognize that over the years the Legislature has enacted various statutes that affect the timing of such a challenge.

Before January 1, 1996, the Juvenile Justice Code, which is part of the family code, provided for an immediate appeal from a juvenile court's transfer order. See Acts 1973, 63d Leg., ch. 544, § 1. p. 1483, eff. Sept. 1, 1973. To complain of non-jurisdictional error in the transfer process, the defendant had to appeal the transfer order immediately to the court of appeals. Adams v. State, 827 S.W.2d 31, 33 (Tex. App.—Dallas 1992, no writ). Failure to do so, waived any claim of non-jurisdictional error following final judgment.3 Id.

In 1995, the Legislature amended the Juvenile Justice Code, striking the provision that permitted a direct appeal of a transfer order, and revising the Texas Code of Criminal Procedure to provide, in article 44.47, that a person could appeal a transfer order only in conjunction with the appeal of a conviction of the offense for which the defendant was transferred to criminal court. Acts 1995, 74th Leg., ch. 262, § 48, p. 2546, § 85, p. 2584, eff. Jan. 1, 1996. Accordingly, a defendant could not file an interlocutory appeal of the transfer order and was required to wait until he was convicted to complain about error in the transfer process.

In 2015, the Legislature again amended the Juvenile Justice Code to reintroduce the interlocutory appeal from a juvenile court's transfer order, for orders issued on or after September 1, 2015, and repealed article 44.47 of the code of criminal procedure. See Act of May

12, 2015, 84th Leg., R.S., ch. 74, §§ 3–4, sec. 56.01(c)(1)(A), 2015 Tex. Sess. Law Serv. 1065, 1065.4 Section 56.01 of the Juvenile Justice Code now provides, in relevant part, "An appeal may be taken: except as provided by Subsection (n), [which is not applicable here] by or on behalf of a child from an order entered under: (A) Section 54.02 respecting transfer of the child for prosecution as an adult[.]" FAM. § 56.01(c)(1)(A) (emphasis added). The revised statute poses potentially difficult questions with respect to preservation of the right to appeal after final judgment. Of course, the statute uses the term "may," not "must," suggesting, perhaps, that an immediate appeal of a transfer order is optional, not mandatory, as is the case generally with interlocutory appeals. Likewise, allowing a party the option to await a final judgment promotes judicial economy, as cases where a defendant is later acquitted or placed on probation are likely to become moot in the interim avoiding the need for any appeal at all. On the other hand, the Legislature may have intended to revert back to the pre-1996 mandate that non-jurisdictional complaints be raised immediately and the court of criminal appeal's determination in the 1985 case of Ex parte Calvin that it will review juvenile proceedings only where a jurisdictional defect is raised. See Ex parte Calvin, 689 S.W.2d 460, 463 (Tex. Crim. App. 1985).

Conclusion: In any event, we need not determine whether an interlocutory appeal of a non-jurisdictional complaint concerning a transfer order is optional or mandatory because appellant agreed to the transfer foreclosing his right to complain about the transfer. See e.g. In re J.Z.B., No. 05-18-00887-CV, 2019 WL 1486913, at *2 (Tex. App.—Dallas Apr. 4, 2019, no pet. h.) (mem. op.) (mother waived any error by agreeing to the terms of SAPCR during a hearing); In re D.J., No. 07-18-00386-CV, 2019 WL 946919, at *3 (Tex. App.—Amarillo Feb. 26, 2019, pet. filed) (mem. op.) (party waived challenge to conservatorship terms by agreeing to terms during hearing); In re T.G., No. 09-16-00250-CV, 2016 WL 7157242, at *4 (Tex. App.—Beaumont Dec. 8, 2016, no pet.) (mem. op.) (by agreeing to terms of SAPCR order during hearing, mother waived error respecting those terms). We overrule appellant's first issue. We overrule appellant's issues and affirm the district court's judgment.

JUVENILE COURT DID NOT ABUSE ITS DISCRETION IN DISCRETIONARY TRANSFER TO CRIMINAL COURT WHERE THE EVIDENCE IN THE RECORD AND THE SPECIFIC FACTUAL FINDINGS OF THE JUVENILE COURT REPRESENTED A REASONABLY PRINCIPLED APPLICATION OF THE LEGISLATIVE CRITERIA FOR TRANSFER.

¶ 19-4-3. **In the Matter of E.O.**, MEMORANDUM, No. 02-18-00411-CV, 2019 WL 2293181 (Tex. App.—Fort Worth, 5/30/2019).

Facts: At approximately 6:30 a.m. on February 6, 2018, Joseph reported to the Cooke County Sheriff's Department that his five-year-old daughter, Madison, was missing from her home. She had last been seen the previous evening asleep in her bed. The Sheriff's Department began an investigation and conducted an exhaustive search for Madison but was unable to locate her. Sheriff's Department investigators sought assistance from the Texas Rangers, and Rangers James Holland and Jeremy Wallace responded to the scene.

Meanwhile, at approximately 10:15 a.m., several investigators from the Texas Department of Family and Protective Services (DFPS) arrived on scene, which by that time was filled with personnel from the Sheriff's Department, some of whom were interviewing the several individuals who occupied Madison's home. One of the DFPS investigators, Jason Foutch, was asked to assist the Sheriff's Department with those interviews but was prevented from doing so because the scene was still being processed. At approximately 12:00 p.m., after the Sheriff's Department had finished processing the scene, Foutch and the other DFPS investigators entered the home and began interviewing the residents inside, one of whom was Evan. Those interviews eventually led DFPS investigators to conduct their own search for Madison. Evan was involved in that additional search, and at his direction, the search team found Madison underneath a trailer that was two lots to the north of the one where she lived.

Foutch stated that it had been cold the day Madison was found, stating that the temperature "was in the twenties." When the search party discovered Madison, she was facedown under the trailer, was wearing a pink nightgown, was wet, and was in shock. There was also a plastic garbage bag wrapped around her. Foutch stated that when members of the search party got Madison out from underneath the trailer, he did not know whether she was alive or dead. Other individuals involved in the investigation noticed that Madison had a "chemical smell" such as bleach or some other solvent emanating from her person.

Madison underwent an evaluation by a sexual assault nurse examiner (SANE), who testified at the hearing by affidavit. The SANE averred that Madison's evaluation revealed that she had suffered acute hymenal tearing and vaginal tearing, and that those areas were actively bleeding at the time of the exam. The SANE further said that she had observed evidence of hemorrhage in Madison's eyes, bruising at various locations on her body, and red linear marks on Madison's neck. The SANE concluded that Madison had been sexually abused and had suffered serious bodily injury as a result of a sexual assault.

Also testifying by affidavit was a pediatric neurologist who treated Madison in the weeks after the assault. The neurologist averred that in the course of treating

Madison, he determined that she had suffered significant neurological injuries as a result of a severe beating of both sides of her head and strangulation. The neurologist stated that Madison suffered seizures throughout her stay in the hospital and that her motor and cognitive abilities were severely impaired because of the injuries she had sustained.

After Madison was found, Ranger Holland interviewed Evan and noticed what appeared to be bleach stains on his pants. Ranger Holland also smelled an odor of what he called a "Pine Sol type substance" emanating from Evan. During the interview, Evan stated that around 5:00 a.m., he went into Madison's bedroom, picked her up, and put a blanket over her head so that she could not see him. Evan said that he carried Madison to the residence next door, which he knew was unlocked. He then took her into the master bedroom, laid her on the couch, and inserted his penis into her vagina. Evan said that Madison was fighting and screaming and that he held her hands down. Evan stated that he did not speak to Madison during the assault

Evan stated that he stopped penetration after several minutes. Madison would not stop crying, so Evan punched her in the back of the head, which rendered her unconscious. Evan said that he then used water to clean her vagina, carried her to the abandoned trailer where she was found, placed her underneath it with her pink blanket, and left her there while she was still unconscious. Subsequent DNA testing revealed that the fly of Evan's underwear contained Madison's DNA along with Evan's semen.

The State filed a petition in the juvenile court alleging that on or about February 5, 2018, Evan, who was fourteen years old at the time, had committed an aggravated sexual assault of a child younger than six years of age; had committed aggravated kidnapping; and had attempted to commit capital murder. The State filed a motion asking the juvenile court to waive its exclusive jurisdiction over Evan and to transfer him to an appropriate criminal court to be tried as an adult. See Tex. Fam. Code Ann. § 54.02(a). Following a hearing, the juvenile court granted the motion and signed an order transferring Evan to the appropriate criminal court. Evan now appeals. See id. § 56.01(c)(1)(A) (permitting immediate appeal from an order transferring a juvenile for prosecution as an adult).

Held: Affirmed

Memorandum Opinion: In deciding to transfer this case to criminal court, the juvenile court was required to consider the four factors set forth in family code section 54.02(f). See Tex. Fam. Code Ann. § 54.02(f). Evan's sole argument for why the juvenile court abused its discretion was that its findings under section 54.02(f)(2)–(4) were not supported by factually sufficient evidence. "These are nonexclusive factors that serve to facilitate the juvenile court's balancing of the potential danger to the public posed by the particular juvenile offender with his or her amenability to treatment." In re G.B., 524 S.W.3d 906, 914 (Tex. App.—Fort Worth 2017, no pet.). The family code does not require the juvenile court to find any particular factor true, which leads us to conclude that these factors are merely nonexclusive guides to assist the court in deciding if either of the two reasons for transfer exist. Yet, as we explained above, we conclude that the evidence relating to these challenged factors weigh in favor of the juvenile court's decision to transfer this case to criminal court.

Additionally, the record shows the juvenile court carefully considered this matter. It held an extensive hearing, which included testimony from seven witnesses who were subject to extensive cross-examination. The juvenile court also considered thirteen exhibits, which included three separate psychological evaluations of Evan. Given the evidence in the record and the specific factual findings of the juvenile court, we cannot conclude that the juvenile court acted without reference to guiding rules or principles in its decision to move the proceedings to criminal court. See Moon, 451 S.W.3d at 47. To the contrary, that decision represented a reasonably principled application of the legislative criteria. See id. We therefore conclude that decision was not an abuse of discretion and overrule Evan's sole issue.

Conclusion: Having overruled Evan's sole issue, we affirm the juvenile court's order transferring Evan to an appropriate criminal court to be tried as an adult. See Tex. R. App. P. 43.2(a).

A JUVENILE COURT'S DECISION TO WAIVE JURISDICTION AND TRANSFER A JUVENILE FOR TRIAL AS AN ADULT IS NOT ARBITRARY OR MADE WITHOUT REFERENCE TO GUIDING RULES WHEN A REVIEW OF THE RECORD SUPPORTS THE JUVENILE COURT'S FINDINGS TO TRANSFER.

¶ 19-4-10. **In the Matter of H.F.**, MEMORADUM, No. 2019 WL 3986304 (Tex.App.—Dallas, 8/23/2019)

Facts: H.F. is a juvenile charged with one count of capital murder and two counts of aggravated robbery against three different complainants in three separate incidents, occurring on three consecutive days. TEX. PENAL CODE ANN. §§ 19.03, 29.03.

In November 2018, the State filed a petition for discretionary transfer asking the juvenile court to waive its jurisdiction and transfer H.F.'s case to adult criminal court. See TEX. FAM. CODE ANN. § 54.02. The juvenile court ordered the psychological evaluation and social study required by family code section 54.02(d). H.F. met with the probation officer assigned to conduct the social study but refused to meet the psychologist assigned to conduct the psychological evaluation. The juvenile court certified H.F. to be tried as an adult and transferred his case to a criminal district court.

Held: Affirmed

Memorandum Opinion: To waive its jurisdiction and transfer H.F. to adult criminal court, the juvenile court had to find (1) H.F. was alleged to have committed a felony, (2) he was fourteen years old or older at the time he committed the alleged offense, and (3) after a full investigation and a hearing there was probable cause to believe H.F. committed the alleged offenses, and that because of the seriousness of the offenses alleged or the background of H.F. the welfare of the community requires criminal proceedings. See TEX. FAM. CODE ANN. § 54.02(a)(1)–(3).

In making the determination required by section 54.02(a)(3), the juvenile court had to consider, among other matters:
(1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
(2) H.F.'s sophistication and maturity;
(3) H.F.'s record and previous history; and
(4) the prospects of adequate protection of the public and the likelihood of H.F.'s rehabilitation by use of procedures, services, and facilities currently available to the juvenile court.
See id. § 54.02(f). Family code section 54.02(h) requires that, if the juvenile court waives jurisdiction, "it shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court." FAM. § 54.02(h); Moon v. State, 451 S.W.3d 28, 38 (Tex. Crim. App. 2014).

With regard to our review of that order, the court of criminal appeals has instructed us as follows:
[I]n evaluating a juvenile court's decision to waive its jurisdiction, an appellate court should first review the juvenile court's specific findings of fact regarding the Section 54.02(f) factors under "traditional sufficiency of the evidence review." But it should then review the juvenile court's ultimate waiver decision under an abuse of discretion standard. That is to say, in deciding whether the juvenile court erred to conclude that the seriousness of the offense alleged and/or the background of the juvenile called for criminal proceedings for the welfare of the community, the appellate court should simply ask, in light of its own analysis of the sufficiency of the evidence to support the Section 54.02(f) factors and any other relevant evidence, whether the juvenile court acted without reference to guiding rules or principles. In other words, was its transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria? And, of course, reviewing courts should bear in mind that not every Section 54.02(f) factor must weigh in favor of transfer to justify the juvenile court's discretionary decision to waive its jurisdiction.
Moon, 451 S.W.3d at 47. Further, a reviewing court should measure sufficiency of the evidence to support the juvenile court's stated reasons for transfer by considering the sufficiency of the evidence to support the facts as they are expressly found by the juvenile court in its certified order. In re G.B., 524 S.W.3d 906, 914–15 (Tex. App.—Fort Worth 2017, no pet.). The appellate court should not be made to rummage through the record for facts that the juvenile court might have found, given the evidence developed at the transfer hearing, but did not include in its written transfer order. Id. Thus, in conducting a sufficiency review of the evidence to establish the facts relevant to section 54.02(f) factors and any other relevant historical facts, which are meant to inform the juvenile court's discretion whether the seriousness of the offense alleged or the background of the juvenile warrants transfer for the welfare of the community, the appellate court must limit its sufficiency review to the facts that the juvenile court expressly relied upon, as required to be explicitly set out in the juvenile court's transfer order under Section 54.02(h). Id.

However, while the order must show the juvenile court considered the four factors in section 54.02(f), the court "need make no particular findings of fact with respect to those factors." Moon, 451 S.W.3d at 41–42. Further, the court may order a transfer on the strength of any combination of the criteria listed in section 54.02(f). Hidalgo v. State, 983 S.W.2d 746, 754 n.16 (Tex. Crim. App. 1999).

In the juvenile court's transfer order the court states "the alleged offenses were against persons and property ... [H.F.'s] level of maturity is sufficient to be tried as an adult and to aid an attorney in his defense ... [H.F.] has not accepted or responded to supervision; [H.F.] has a pattern of refusing to remain at home; [H.F.] refuses to remain away from associates in the community who habitually violate the law; ... the background of [H.F.] indicates that the welfare of the community requires criminal prosecution; the previous history of [H.F.] indicates a present need for placement of the child in a controlled, structured facility; the public needs protection from [H.F.]; the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services and facilities currently available to the Juvenile Court is remote." Consequently, the order establishes the juvenile court considered all of the section 54.02(f) factors.

H.F. does not challenge the juvenile court's determinations concerning the first three section 54.01(f) factors; rather, he claims the juvenile court abused its discretion in ordering the transfer because, he claims, the evidence introduced at the hearing established there are sufficient safeguards in place for the public and a very high probability of rehabilitation for H.F. by use of procedures, services, and facilities currently available to the juvenile court. More particularly, H.F. contends because the department has a capital offender program, that is designed to meet

the need of offenders like H.F., and because he demonstrated he successfully completed structured programs, it was arbitrary for the court to choose not to retain jurisdiction to allow H.F. to participate in the capital offender program. For the following reasons, we disagree.

First, we note, that not every section 54.02(f) factor has to weigh in favor of transfer. Nevertheless, in this case they do. While it may be true that the department has a capital offender program, no evidence presented at the hearing establishes this placement would protect the public and rehabilitate H.F. In fact, the evidence presented indicates the opposite. The juvenile court judge was familiar with the complete ineffectiveness of the multiple types of juvenile rehabilitation measures already attempted with H.F.: probation, Juvenile Detention, the START program, and the drug treatment program. Notwithstanding these measures, when released from detention and on probation, H.F. violated numerous terms of his probation, and within a short period of time after being released from the drug treatment program, H.F. was on drugs again and committed several violent and egregious crimes, one resulting in the death of a man. At the time of the hearing, H.F. was almost 17-years old and he had been in the juvenile justice system for over four years without successfully having been rehabilitated.

Given the repeated failures of the prior rehabilitative measures and the increasingly violent nature of H.F.'s behavior, and the assessments and recommendations of Detective Rohack and Officer Jefferson, the evidence is legally and factually sufficient to support the juvenile court's determination that "the prospects of adequate protection of the public and the likelihood of rehabilitation of [H.F.] by use of procedures, services and facilities currently available to the Juvenile Court is remote." See In re Z.J., No. 05-19-00190-CV, 2019 WL 3491934, at *4 (Tex. App.—Dallas Aug. 1, 2019, no pet. h.); In re K.J., 493 S.W.3d 140, 154 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

Conclusion: In light of the juvenile court's findings regarding H.F.'s prior placements, violations of juvenile probation, propensity to run away, abuse drugs, commit criminal acts, and the lack of remorse for causing the death of Hearn and our review of the record, which supports those findings, we cannot say the trial court's decision was arbitrary or made without reference to guiding rules. See Moon, 451 S.W.3d at 47. Accordingly, we conclude the juvenile court did not abuse its discretion by waiving jurisdiction and transferring H.F. for trial as an adult. We overrule H.F.'s sole issue. We affirm the juvenile court's transfer order.

IN DISCRETIONARY TRANSFER TO ADULT COURT, TRIAL'S COURT DECISION TO TRANSFER JUVENILE WAS A REASONABLY PRINCIPLED APPLICATION OF THE LEGISLATIVE CRITERIA AND NOT AN ABUSE OF DISCRETION BY THAT COURT.

¶ 19-4-14. **In the Matter of T.L.** MEMORANDUM, No. 02-19-00200-CV, 2019 WL 4678565 (Tex.App.—Fort Worth, 9/26/2019)

Facts: This is an appeal from the juvenile court's order transferring appellant T.L. (Tom) to an appropriate district court or criminal district court (criminal court) to be tried as an adult. In a single issue,

The evidence presented at the May 29, 2019 transfer hearing consisted of testimony from several witnesses and multiple documentary and media exhibits. The evidence developed during the hearing revealed the following facts.

A. Factual Background
On September 3, 2018, Detective Daniel Koplin of the Fort Worth Police Department began investigating a robbery at a grocery store. Between September 3, 2018 and September 23, 2018, a total of nine robberies involving fifteen victims were committed at seven Fort Worth locations.

Although some of the robbers attempted to conceal their identities, the surveillance video recordings and witness descriptions indicated that the perpetrators of the nine robberies were young individuals of Asian descent. The recordings also showed that the perpetrators of the nine robberies appeared to be the same four or five individuals based on their height, weight, and clothing and revealed the guns used and backpacks carried during the commission of the robberies.

The robberies appeared to be preplanned and occurred quickly—in a matter of minutes. The robbers were very well-organized, with each seeming to know his exact role. Koplin explained that many convenience stores have a lock in the counter area that the store clerk can activate to prevent the exterior door from opening, and it appeared that the robbers understood this. One robber would open and hold the door to allow two to three others to enter the store with weapons—a gun and a BB gun—and would not allow the door to close during the robbery. Displaying or pointing one or both guns, the robbers would go directly to the store clerks and force them to attempt to remove money out of the cash register. During some robberies, there were as many as four victims, and one of the robbers stole a gold necklace from a store employee during the first robbery. One of the robbers awaited the others in a getaway vehicle located nearby but away from the front of the store. It appeared that the same vehicle was always used. During the last robbery, one of the robbers—not Tom—shot victim Bobby Weeks.

Officers observed that on one surveillance video, two robbers were seen entering the store without any type of mask. After learning that a significant population of persons of Asian descent lived in a particular apartment complex near the robberies, detectives showed still images of the unmasked robbers to the apartment

complex's employees. One employee identified a juvenile resident as one of the robbers. Officers spoke with that juvenile at his school, and he implicated Tom as also being involved in the robberies and advised that Tom probably had the guns. Tom also lived in the apartment complex.

Koplin conducted a noncustodial interview of Tom at his school. Tom initially denied any involvement in the robberies, but he eventually admitted that he had held the door during the first robbery at a Texaco, had wielded the BB gun in another instance, and on September 23, 2018—the last robbery date—had driven to one of the robbery locations and had been the getaway driver after the shooting. He was also implicated by other suspects for his role in the robberies.

Detectives obtained search warrants for several locations, including Tom's apartment. During the search of Tom's apartment, officers found items that were consistent with those seen on the surveillance videos—clothing (including the hoodie and shoes that Tom wore during some of the offenses), masks, and backpacks. One of the two backpacks found in Tom's bedroom closet contained a 9mm semiautomatic pistol, and the other backpack contained a long-barrel BB gun. These guns also appeared to match the guns that were seen on the surveillance videos.

After conducting other interviews and observing the surveillance videos, officers determined that Tom had held the door during the first robbery, had held the BB gun during several robberies, and in one of the robberies, had wielded the 9mm semiautomatic pistol—"the real gun." The relevant information for each offense as it relates to Tom is as follows:
(1) Date: September 3, 2018
Business: Texaco
Location: 5324 Trail Lake Drive
Victims: Robert Moreland and Kapugamage Wickremaratne
Property: cash, cigars, tobacco products, gold necklace
Role: held door
(2) Date: September 9, 2018
Business: Ark Grocery
Location: 1211 Seminary Drive
Victim: Jesus Aguiniga-Arroyo
Property: $2,500, cigarettes, beer, sweet tea
Role: wielded BB gun
(3) Date: September 9, 2018
Business: 7-Eleven
Location: 5300 Sycamore School Road
Victim: Phillip Darden
Property: $250 cash and Darden's wallet
Role: wielded BB gun
(4) Date: September 13, 2018
Business: Quick Way
Location: 5375 Granbury Road
Victims: Gagan Budhathoki and Tesfahun Anbessie
Property: cash
Role: wielded handgun
(5) Date: September 16, 2018
Business: JW Food Store
Location: 5001 East Berry Street
Victims: Mary Dudley and Roger Carter
Property: cash and Carter's wallet
Role: participant
(6) Date: September 17, 2018
Business: QuickTrip
Location: 5101 Granbury Road
Victims: Rodolfo Martinez, Tristan White, and Virginia Ramos
Property: cash
Role: wielded BB gun
(7) Date: September 19, 2018
Business: Number One Food Store
Location: 5356 Wedgmont Circle North
Victim: Surya Pun
Property: cash and tobacco products
Role: wielded BB gun
(8) Date: September 23, 2018
Business: Texaco
Location: 5324 Trail Lake Drive
Victims: Robert Moreland and Kapugamage Wickremaratne
Property: cash
Role: driver
(9) Date: September 23, 2018
Business: Ark Grocery
Location: 1211 West Seminary Drive
Victims: Chiran Rayamajhi, Bobby Weeks (shot during robbery), Andrew Lomba, Rosa Sanchez
Property: not specified
Role: driver

B. Procedural History
The State filed a petition in the juvenile court stating in eighteen paragraphs that Tom had committed the offense of aggravated robbery as alleged therein on September 3, 9, 13, 16, 17, 19, and 23, 2018, when he was fifteen years old and requested that the court waive its exclusive jurisdiction and transfer the cause to a criminal court so Tom could be tried as an adult in criminal proceedings. See Tex. Family Code Ann. § 54.02(a). Following a hearing, the juvenile court signed a waiver of jurisdiction and order transferring Tom to a criminal court.

Tom now appeals the transfer order. See id. § 56.01(c)(1)(A) (permitting immediate appeal from an order transferring a juvenile for prosecution as an adult). Tom argues that the juvenile court's decision to transfer him to a criminal court was an abuse of discretion.

Held: Affirmed

Memorandum Opinion: In evaluating a juvenile court's decision to waive its jurisdiction under Section 54.02(a), we first review the juvenile court's specific findings of fact regarding the Section 54.02(f) factors under

"traditional sufficiency of the evidence review." See Moon, 451 S.W.3d at 47. In this context, our sufficiency review is limited to the facts that the juvenile court expressly relied upon in its transfer order. Id. at 50.

We then review the juvenile court's ultimate waiver decision for an abuse of discretion. Id. at 47. That is to say, in deciding whether the juvenile court erred to conclude that the seriousness of the offense alleged or the background of the juvenile or both called for criminal proceedings for the welfare of the community, we simply ask, in light of our own analysis of the sufficiency of the evidence to support the Section 54.02(f) factors and any other relevant evidence, whether the juvenile court acted without reference to guiding rules or principles. Id. In other words, was the juvenile court's transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria? Id. In conducting our review, we bear in mind that not every Section 54.02(f) factor must weigh in favor of transfer to justify the juvenile court's discretionary decision to waive its jurisdiction. Id.

In its transfer order, the juvenile court states that because of the seriousness of the alleged offenses and Tom's background, the welfare of the community required criminal proceedings, and in making this determination, it considered the four factors set forth in Section 54.02(f). Tex. Fam. Code Ann. § 54.02(f). The juvenile court also announced at the hearing that it had considered the four factors in making its determination. See id. We consider each factor in turn.

1. Offenses against a person
Section 54.02(f)(1) requires the juvenile court to consider whether the alleged offenses were against person or property. Id. § 54.02(f)(1). The juvenile court found that the alleged offenses were committed against the person of another, and there was probable cause to believe that Tom committed the offenses alleged in the petition. Koplin testified regarding the nine aggravated robberies and identified Tom as a participant in the commission of each alleged offense. Koplin also identified by name fifteen persons against whom the alleged offenses were committed. Tom does not contest these findings and concedes that the juvenile court correctly found the alleged offenses were committed against a person. We conclude that the findings are supported by factually sufficient evidence.

2. Tom's sophistication and maturity
Section 54.02(f)(2) requires the juvenile court to consider the sophistication and maturity of the child. Id. § 54.02(f)(2). The juvenile court found that Tom was sixteen years old at the time the acts in the State's petition were alleged to have occurred and is of sufficient sophistication and maturity to be tried as an adult.

Tom does not challenge the juvenile court's findings regarding his sophistication and maturity and the manner in which he committed the alleged offenses. Although the psychological evaluations indicate that Tom would benefit from services afforded through the juvenile justice system, the record contains abundant evidence that supports the juvenile court's finding regarding Tom's sophistication and maturity. Considering the evidence under the appropriate standard, we conclude the juvenile court's findings related to Tom's sophistication and maturity are supported by factually sufficient evidence.

3. Tom's record and previous history
Section 54.02(f)(3) requires the juvenile court to consider the record and previous history of the child. Id. § 54.02(f)(3). Frank Minikon supervised Tom while he was in detention and testified that Tom was a pleasant resident, had demonstrated a single instance of unacceptable behavior, had spent most of his time on level one—the best level—after entering as others do on level two, had no violations, and had done everything asked of him. Minikon confirmed that Tom had no previous referral history to the department.

At the certification hearing, the juvenile court stated, "I'm going to do this having considered all four factors," and explained to Tom,
I understand you have no history with this Court. And it's not – I have to check off all the boxes. They're all just things I have to consider. Specifically, the reason for this transfer is going to be that I – there is – the severity and protection of the public and the likelihood of rehabilitation within the juvenile system.

The record-and-previous-history factor is one of the nonexclusive factors that serve to facilitate the juvenile court's balancing of the potential danger to the public posed by the particular juvenile offender with his amenability to treatment. Id. § 54.02(f)(3); Moon, 451 S.W.3d at 38. In this instance, evidence of Tom's record and previous history, or lack thereof, is not a fact that the juvenile court expressly relied upon in its transfer order, but it was a factor that the juvenile court considered in making its determinations. Moon, 451 S.W.3d at 40, 49–50. Tom does not challenge the juvenile court's determinations in relation to the record-and-previous-history factor, and because the juvenile court did not expressly rely upon Tom's record and previous history in its transfer order, it is not within the scope of our sufficiency review on appeal.

4. Protection of the public and likelihood of rehabilitation
Section 54.02(f)(4) requires the juvenile court to consider the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court. Id. § 54.02(f)(4). The juvenile court made findings regarding the protection of the public and the likelihood of Tom's rehabilitation. In its transfer order, the juvenile court declared,
As a result of all of the above, the Court finds that the likelihood of reasonable rehabilitation of [Tom] by the use of procedures, services, and facilities currently

available to the Juvenile Court is low. Because of his present age of 17 years and 6 months, [Tom] could only receive service from the Juvenile Probation Department or the Texas Juvenile Justice Department for a maximum of 18 months.

The Court, after considering all the testimony, diagnostic study, social evaluation, and full investigation, finds that it is contrary to the best interests of the public to retain jurisdiction.
The Court finds that because of the seriousness of the alleged offenses and the background of [Tom], the welfare of the community requires criminal proceedings.

Tom challenges these findings.

The juvenile court heard testimony from several witnesses and considered documentary evidence relating to the prospects of adequate protection of the public and the likelihood of Tom's rehabilitation by use of procedures, services, and facilities currently available to the court.

Factually sufficient evidence and the juvenile court's findings
Although there was a recommendation that Tom would benefit from juvenile justice services, and there is some evidence that Tom's behavior in detention had been outstanding and that he had no violations while on home monitoring, there was also evidence that because of his age, Tom would possibly age out before he could complete participation in beneficial programs and that he could not be placed in contracted TJJD residential treatment facilities because of the nature of the aggravated robberies in which he is alleged to have participated. There was also evidence that the nine robberies were sophisticated, well-planned, and repeated over the course of three weeks; that one of the fifteen victims was shot; that the robbers more often than not attempted to conceal their identities; that clothing, masks, backpacks and guns apparently used in the multitude of robberies were found in Tom's apartment; that he admitted—and denied—his involvement in the robberies; and that he participated in the robberies by holding doors, wielding a gun and a BB gun, and acting as a driver.

Considering the evidence under the appropriate standard of review, we conclude the juvenile court's findings regarding the prospects of adequate protection of the public and Tom's likelihood of rehabilitation by use of procedures, services, and facilities currently available to the juvenile court are supported by factually sufficient evidence.

No Abuse of Discretion
Tom's sole basis for his contention that the juvenile court abused its discretion is that its findings under section 54.02(f)(4) were not supported by factually sufficient evidence. See Tex. Fam. Code Ann. § 54.02(f)(4). The section 54.02(f) factors "are nonexclusive factors that serve to facilitate the juvenile court's balancing of the potential danger to the public posed by the particular juvenile offender with his or her amenability to treatment." In re G.B., 524 S.W.3d 906, 914 (Tex. App.—Fort Worth 2017, no pet.). The family code does not require the juvenile court to find any particular factor true, which leads us to conclude that these factors are merely nonexclusive guides to assist the court in deciding if the reasons for transfer exist. In re E.O., 2019 WL 2293181 at *10. Yet, as we explained above, we conclude that the evidence relating to these challenged factors weighs in favor of the juvenile court's decision to transfer this case to criminal court.

Additionally, the record shows that the juvenile court carefully considered all the evidence before it and the Section 54.02(f) factors. See Tex. Fam. Code Ann. § 54.02(f)(4). It held an extensive hearing, which included testimony from witnesses who were subject to cross-examination. The juvenile court also considered exhibits, which included separate psychological evaluations of Tom.

Conclusion: Given the evidence in the record and the specific findings of the juvenile court, we cannot conclude that the juvenile court acted without reference to guiding rules or principles in its decision to transfer the proceedings to criminal court. See Moon, 451 S.W.3d at 47. To the contrary, that decision represented a reasonably principled application of the legislative criteria. See id. We therefore conclude that the decision was not an abuse of discretion and overrule Tom's sole issue. Having overruled the sole issue on appeal, we affirm the juvenile court's transfer order.

IN DISCRETIONARY TRANSFER TO ADULT COURT, APPELLATE COURTS SHOULD REFRAIN FROM INTERFERING WITH THAT JUDGMENT ABSENT A SCENARIO IN WHICH THE FACTS IN THE TRANSFER ORDER, BASED ON EVIDENCE PRODUCED AT THE TRANSFER HEARING ... BEAR NO RATIONAL RELATION TO THE SPECIFIC REASONS THE ORDER GIVES TO JUSTIFY TRANSFER.

¶ 19-4-7. **In the Matter of Z.J.**, MEMORANDUM, No. 05-19-00190-CV, 2019 WL 3491934 (Tex.App.—Dallas, 8/1/2019).

Facts: The juvenile court certified Z.J., a sixteen year old, to be tried as an adult and transferred criminal proceedings to a criminal district court. In a single issue, Z.J. argues there was no testimony at the underlying hearing concerning the services available to Z.J. regarding a commitment to the Texas Juvenile Justice Department, and it was therefore "not possible for the court to conclude no services were available." We affirm.

In August 2018, the State filed a petition for discretionary transfer asking the juvenile court to waive its jurisdiction and transfer Z.J.'s case to adult criminal court. See TEX. FAM. CODE ANN. § 54.02. As required by family code section 54.02(d), the trial court ordered a complete diagnostic study, social evaluation, and full investigation of Z.J., his circumstances, and the circumstances of the alleged offenses.

After the evaluations were completed, the juvenile court conducted a hearing regarding the State's motion to transfer. Dallas police detective Adam Thayer testified he investigated "a series of robberies involving several youth" that occurred on July 22, 2018. Z.J. was one of the juvenile suspects, along with five other juveniles. The first robbery occurred on Pentagon Parkway in Dallas. The second robbery victim was Mauricio Hernandez. Hernandez was outside his residence when a black Chevy Impala pulled up, and six male suspects "jumped out of the car and punched him in the face." One of the assailants matched Z.J.'s description. Z.J. kept saying, "come on man, give me your wallet." Z.J. was "holding a black semiautomatic pistol and then struck the complainant Hernandez over the head with the pistol two or three times." Minutes after the Hernandez robbery, Z.J. and the other suspects arrived in the Impala and robbed Garrett and Caroline Scharton at gunpoint and stole Caroline's cell phone. Surveillance video of the robbery showed Z.J. using a pistol to commit the robbery. After the Scharton robbery, Z.J. and the other juveniles proceeded to a location on Crow Creek Drive where they committed "the same type of robbery" against Gerardo Rodriguez-Mata. The juveniles took cash that was in Rodriguez-Mata's hand and $80 worth of pizza that he was delivering. After D.T., the juvenile driving the Impala, wrecked the car and attempted to run away, Mesquite police found the Impala, and all the juveniles involved in the robberies were arrested and charged. One of the other juveniles, J.C., later testified at his plea hearing that Z.J. was "the leader" and was "in possession of the pistol during the entire crime spree." Another juvenile, T.J., also described Z.J. as the leader and said Z.J. had a pistol during all the offenses. Thayer testified there was probable cause to believe Z.J. committed the offenses that Thayer testified about; criminal proceedings were required in Z.J.'s case for the welfare of the community; Z.J.'s conduct was willful and violent, and he used a deadly weapon during the course of the offenses; personal injury resulted from the offenses to Hernandez and the Schartons; and the public needed protection from Z.J.

Dr. Leilani Hinton, assistant chief psychologist for the Dallas County Juvenile Department, testified she evaluated Z.J. and determined he was fit to proceed. Hinton testified that, in terms of criminal sophistication, Z.J. is "at least as sophisticated as peers his age." However, on "intellectual tests developmentally," he was lower than peers his age, and intellectually he fell in the "extremely low range." Hinton testified Z.J. had "very good knowledge of the legal system," he had "been through the system several times before," and he had "good knowledge of possible legal defenses." Hinton testified she was not surprised to hear Z.J. was the leader in the offense, and he did not show any empathy or sympathy for the victims. When questioned about the underlying offenses, Z.J. said he did not believe they were very serious because he did not kill or shoot anyone.

Kedrick Smith, a probation officer for the Dallas County Juvenile Department, testified concerning the social evaluation and investigative report he made in this case. According to Smith's report, Z.J. has been referred to the juvenile department eleven times. Z.J.'s first referral was on October 27, 2015 for criminal trespass, and he received deferred prosecution. Z.J. received two additional referrals for criminal trespass on October 29, 2015 and March 11, 2016, and he completed his deferred prosecution on August 9, 2016. On October 27, 2016, Z.J. received his fourth referral for theft of property. Z.J. was released but continued to reoffend. Between November 1, 2016 and February 17, 2017, Z.J. received five additional referrals for offenses including theft of property, possession of marijuana, aggravated robbery, aggravated sexual assault, and unauthorized use of a motor vehicle. On July 17, 2017, Z.J. was adjudicated for aggravated assault with a deadly weapon and theft of property and was ordered to placement at the Dallas County STARS (sex offender residential treatment center). Z.J. was admitted to the STARS program on July 21, 2017 and was successfully discharged from the program on May 24, 2018.

Upon Z.J.'s release, he was placed on Intensive Supervision Probation in the custody of his mother. However, Z.J. continued to fail to comply with the terms and conditions of his probation, and he was referred to the home detention program to help monitor his whereabouts and prevent him from further engaging in delinquent conduct. On June 1, 2018, Z.J.'s mother notified his probation officer that a runaway report was made because Z.J. had left home the previous night and had not returned. A judge signed a bench warrant on June 5, 2018, and Z.J. was arrested and released to the Community Alternative Initiative program where he completed the program but remained when his mother refused to sign an agreed order allowing Z.J. to reside with his aunt. On July 5, 2018, Z.J. was detained at the juvenile detention center for a violation of conditions of release. On July 10, 2018, Z.J. was released into his father's custody, but his father reported Z.J. left home without permission, violating the terms of his probation, on July 12, 2018. On July 20, 2018, a judge signed another bench warrant for Z.J., and Z.J. was detained for the underlying offenses in this case on July 22, 2018.

Smith testified that, while Z.J. was in detention, he did well for a time, was on "a Level 4," and was placed in the Honors Program for "maybe a month or two." Z.J.'s behavior "declined," and he was involved in a fight, aggressive toward staff, and had "lots of peer conflict." Smith testified Z.J. has a history of smoking marijuana daily and claims to be in a gang. Smith confirmed that

detention was a "highly structured environment" where Z.J.'s level was a 2.3 at the time Smith testified. Smith testified it was "correct" to say Z.J. "can't behave properly here in a high level of structure for juveniles" and "even the possibility of" the Texas Juvenile Justice Department was "not going to be enough" for Z.J. Smith also confirmed that "the prospects of adequate protection of the public and the likelihood of rehabilitation" by the use of procedures and services and facilities available to the juvenile court was "remote." Smith testified that, for the welfare of the community and the seriousness of the offenses and the background of Z.J., criminal proceedings were required, and Smith recommended Z.J. be transferred to criminal district court.

At the conclusion of the hearing, the juvenile court made oral findings on the record. On February 4, 2019, the court signed its waiver of jurisdiction and order of transfer to a criminal district court. The order stated the court considered "all the testimony, diagnostic study, social evaluation, and full investigation" and found "it is contrary to the best interest of the public to retain jurisdiction." This interlocutory appeal followed.

Held: Affirmed.

Memorandum Opinion: To waive its jurisdiction and transfer Z.J. to adult criminal court, the juvenile court had to find Z.J. was alleged to have committed a felony, he was fourteen years old or older at the time he committed the alleged offense, after a full investigation and a hearing there was probable cause to believe Z.J. committed the alleged offense, and the welfare of the community requires criminal proceedings because of the alleged offense's seriousness or Z.J.'s background. See TEX. FAM. CODE ANN. § 54.02(a)(1)–(3).

In making the determination required in subsection (a), the juvenile court had to consider, among other matters: (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person; (2) Z.J.'s sophistication and maturity; (3) Z.J.'s record and previous history; and (4) the prospects of adequate protection of the public and the likelihood of Z.J.'s rehabilitation by use of procedures, services, and facilities currently available to the juvenile court. See id. § 54.02(f). These are nonexclusive factors that serve to facilitate the juvenile court's balancing of the potential danger to the public posed by the particular juvenile offender with his amenability to treatment. Moon v. State, 451 S.W.3d 28, 38 (Tex. Crim. App. 2014) (citing Hidalgo v. State, 983 S.W.2d 746, 754 (Tex. Crim. App. 1999)). Family code section 54.02(h) requires that, if the juvenile court waives jurisdiction, "it shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court." TEX. FAM. CODE ANN. § 54.02(h); Moon, 451 S.W.3d at 38.

With regard to our review of that order, the court of criminal appeals has instructed us as follows:

[I]n evaluating a juvenile court's decision to waive its jurisdiction, an appellate court should first review the juvenile court's specific findings of fact regarding the Section 54.02(f) factors under "traditional sufficiency of the evidence review." But it should then review the juvenile court's ultimate waiver decision under an abuse of discretion standard. That is to say, in deciding whether the juvenile court erred to conclude that the seriousness of the offense alleged and/or the background of the juvenile called for criminal proceedings for the welfare of the community, the appellate court should simply ask, in light of its own analysis of the sufficiency of the evidence to support the Section 54.02(f) factors and any other relevant evidence, whether the juvenile court acted without reference to guiding rules or principles. In other words, was its transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria? And, of course, reviewing courts should bear in mind that not every Section 54.02(f) factor must weigh in favor of transfer to justify the juvenile court's discretionary decision to waive its jurisdiction.

Moon, 451 S.W.3d at 47. Further, a reviewing court should measure sufficiency of the evidence to support the juvenile court's stated reasons for transfer by considering the sufficiency of the evidence to support the facts as they are expressly found by the juvenile court in its certified order. In re G.B., 524 S.W.3d 906, 914–15 (Tex. App.—Fort Worth 2017, no pet.). The appellate court should not be made to rummage through the record for facts that the juvenile court might have found, given the evidence developed at the transfer hearing, but did not include in its written transfer order. Id. Thus, in conducting a sufficiency review of the evidence to establish the facts relevant to section 54.02(f) factors and any other relevant historical facts, which are meant to inform the juvenile court's discretion whether the seriousness of the offense alleged or the background of the juvenile warrants transfer for the welfare of the community, the appellate court must limit its sufficiency review to the facts that the juvenile court expressly relied upon, as required to be explicitly set out in the juvenile court's transfer order under Section 54.02(h). Id.

However, while the order must show the juvenile court considered the four factors in section 54.02(h), the court "need make no particular findings of fact with respect to those factors." Moon, 451 S.W.3d at 41–42. Further, the court may order a transfer on the strength of any combination of the criteria listed in section 54.02(f). Hidalgo, 983 S.W.2d at 754 n.16.

Z.J. argues there was not any testimony about the services available to Z.J. regarding a commitment to the Texas Juvenile Justice Department. Absent any

testimony regarding the juvenile prison and the services available to the court, Z.J. argues it was not possible for the court to conclude no services were available for Z.J. Z.J. also asserts generally that the "overwhelming weight of the evidence supported a finding of the juvenile court retaining jurisdiction and denying the State's petition."

Contrary to Z.J.'s assertions, the juvenile court heard Smith's testimony that it was "correct" to say Z.J. "can't behave properly here in a high level of structure for juveniles" and "even the possibility of" the Texas Juvenile Justice Department was "not going to be enough" for Z.J. Smith also confirmed that "the prospects of adequate protection of the public and the likelihood of rehabilitation" by the use of procedures and services and facilities available to the juvenile court was "remote." In the juvenile court's order of transfer, the court specifically stated among its reasons for its disposition that "the prospects of adequate protection of the public and the likelihood of rehabilitation of the child by use of procedures, services and facilities currently available to the Juvenile Court is remote."

The record shows further that Z.J. had been referred to the juvenile department eleven times between the ages of thirteen and sixteen. One of the offenses, Smith testified, was the aggravated sexual assault of "an adult grown woman." During the sexual assault, Z.J. had a deadly weapon and "pointed it at the victim." The evidence showed Z.J. was the "leader" of the crime spree on July 22, 2018 and used a pistol in committing the aggravated robberies at that time. Z.J. had been provided services available to the juvenile court, but as set forth in the juvenile court's transfer order, Z.J. "unsuccessfully completed juvenile probation and exhibited assaultive conduct while in juvenile placement and in detention." Thus, despite Z.J.'s history of receiving services available to the juvenile court, Z.J.'s criminal behavior continued and escalated over time. "As long as the appellate court can determine that the juvenile court's judgment was based upon facts that are supported by the record, it should refrain from interfering with that judgment absent a scenario in which the facts in the transfer order, based on evidence produced at the transfer hearing ... bear no rational relation to the specific reasons the order gives" to justify transfer. Moon, 451 S.W.3d at 46.

Conclusion: In light of the juvenile court's findings regarding Z.J.'s receipt of services and their inefficacy and our review of the record, which supports those findings, we conclude the juvenile court did not abuse its discretion by waiving jurisdiction and transferring Z.J. for trial as an adult. We overrule Z.J.'s sole issue. The juvenile court's certification and transfer order is affirmed.

Juvenile Law Section www.juvenilelaw.org Volume 33, Number 4