Erroneous ruling in restricting juvenile’s voir dire examination concerning the entire range of punishment held harmless where juvenile stipulated to the enhancement allegations and pleaded “true” thereto.[Hawkins v. State](16-1-2B)

On October 21, 2015, the Tyler Court of Appeals held that the record supported beyond a reasonable doubt that Appellant suffered no harm from the trial court's erroneous ruling regarding voir dire examination considering community supervision because the jury could not legally consider community supervision in determining Appellant's punishment.

¶ 16-1-2B. **Hawkins v. State**, MEMORANDUM, No. 12-13-00394-CR, 2015 WL 6166583 (Tex.App.-Tyler, 10/21/2015).

**Facts:** Appellant was charged by indictment with aggravated robbery. The indictment further alleged that Appellant was, as a juvenile, found to have engaged in delinquent conduct,FN1 for which he was committed to the Texas Youth Commission for an indeterminate period. Appellant pleaded “not guilty,” and the matter proceeded to a jury trial.

FN1. The delinquent conduct was alleged to have been the commission of robbery in violation of penal law.

 The jury found Appellant “guilty” as charged, and the matter proceeded to a trial on punishment. At the outset of the punishment proceedings, Appellant stipulated and pleaded “true” to the enhancement allegation in the indictment. Ultimately, the jury assessed Appellant's punishment at imprisonment for seventy years. The trial court sentenced Appellant accordingly, and this appeal followed.

LIMITATIONS ON VOIR DIRE CONCERNING RANGE OF PUNISHMENT

 In his fifth issue, Appellant argues that the trial court committed reversible error by preventing him from conducting voir dire on the full range of punishment by refusing to permit him to question the venire panel about Appellant's possibly receiving community supervision.

 We review the trial court's determination concerning the propriety of a voir dire question for abuse of discretion. See Barajas v. State, 93 S.W.3d 36, 38 (Tex.Crim.App.2002). The trial court abuses its discretion only when a proper question concerning a proper area of inquiry is prohibited. See Dinkins v. State, 894 S.W.2d 330, 345 (Tex.Crim.App.1995).

**Held:** Affirmed and modified.

**Opinion:** The purposes of voir dire are to (1) develop a rapport between the officers of the court and the jurors; (2) expose juror bias or interest warranting a challenge for cause; and (3) elicit information necessary to intelligently use peremptory challenges. Dhillon v. State, 138 S.W.3d 583, 587 (Tex.App.–Houston [14th Dist.] 2004, pet. struck). However, a trial judge may not restrict proper questions that seek to discover a juror's views on issues relevant to the case. Id. The scope of permissible voir dire examination is necessarily broad to enable litigants to discover bias or prejudice so that they may make challenges for cause or peremptory challenges. Zavala v. State, 401 S.W.3d 171, 175 (Tex.Crim.App.2011).

 Both parties are entitled to jurors who can consider the entire range of punishment for the particular statutory offense, i.e., from the maximum to the minimum and all points in between. See Cardenas v. State, 325 S.W.3d 179, 184 (Tex.Crim.App.2010). Jurors must be able to consider both a situation in which the minimum penalty would be appropriate and a situation in which the maximum penalty would be appropriate. Id. Therefore, both sides may question the panel on the range of punishment and may commit jurors to consider the entire range of punishment for the statutory offense. Id. A question committing a juror to consider the minimum punishment is both proper and permissible. Id.

 In the case at hand, the State argues that Appellant was not eligible for community supervision because he judicially admitted that he previously was “given an indeterminate sentence for a juvenile finding of having engaged in delinquent conduct for the charge of robbery.” FN4

FN4. For Appellant to have been considered ineligible for community supervision, the State was required to prove the enhancement pursuant to Texas Penal Code, Sections 12.42(c)(1) and (f). The enhancement under Section 12.42(c)(1), if proven, would raise Appellant's minimum sentence to imprisonment for fifteen years. SeeTEX. PENAL CODE ANN. 12.42(c)(1) (West Supp.2014). Thus, if the enhancement were proven, the jury could not consider community supervision as punishment because Appellant's minimum sentence would be greater than ten years. SeeTEX. CODE CRIM. PROC. ANN. art. 42.12 § 4(d)(1) (West Supp.2014). To prove the enhancement, the State could rely on the finding that Appellant was found to have committed delinquent conduct by committing robbery, for which he was committed to the Texas Juvenile Justice Department or to a postadjudication secure correctional facility. SeeTEX. PENAL CODE ANN. 12.42(f) (West Supp.2014); TEX. FAM. CODE ANN. § 54.04(d)(2), (l) (West 2014).

Judicial Admissions

 A judicial admission or stipulation may be used in a criminal case to prove up a prior conviction. See Beck v. State, 719 S.W.2d 205, 209 (Tex.Crim.App.1986); Davis v. State, No. 06–07–00209–CR, 2008 WL 3914966, at \*2 (Tex.App.–Texarkana Aug. 18, 2008, no pet.)(mem. op., not designated for publication). A judicial admission is not evidence. See Bryant v. State, 187 S.W.3d 397, 400 (Tex.Crim.App.2005). Rather, it is a formal concession in the pleadings in the case or a stipulation by a party or his counsel that has the effect of withdrawing a fact from issue and dispensing wholly with the need for proof thereof. Seeid.

 The source of a judicial admission may be facts alleged in a pleading, an agreed upon statement of facts, a stipulation, or a formal declaration made in open court by a party or counsel. Davidson v. State, 737 S.W.2d 942, 948 (Tex.App.–Amarillo 1987, pet. ref'd). As long as the source of the admission remains unretracted, it must be taken as true by the court and the jury. Davidson, 737 S.W.2d at 948.FN5 It is binding on the declarant, and he cannot introduce evidence to contradict it. Id.

FN5. In a civil context, the elements for establishing that a statement is a judicial admission are (1) the statement must be made in the course of a judicial proceeding; (2) it must be contrary to an essential fact or defense asserted by the party; (3) it must be deliberate, clear, and unequivocal; (4) it cannot be destructive of the opposing party's theory of recovery or defense; and (5) enforcing the statement as a judicial admission must be consistent with public policy. See Khan v. GBAK Properties, Inc., 371 S.W.3d 347, 357 (Tex.App.–Houston [1st Dist.] 2012, no pet.).

 However, to qualify as a judicial admission, the accused's statement should be “clear and intentional.” Taulung v. State, 979 S.W.2d 854, 857 (Tex.App.–Waco 1998, no pet.); Avila v. State, 954 S.W.2d 830, 835 (Tex.App.–El Paso 1997, pet. ref'd). The “intention” as it relates to a judicial admission is the intention to make “an act of waiver.” Griffin v. Superior Ins. Co., 338 S.W.2d 415, 420 (Tex.1960). In other words, the party must intend to relinquish the right to have the State prove its case. Cf. Wappler v. State, 138 S.W.3d 331, 333 (Tex.Crim.App.2004) (waiver requires intentional relinquishment or abandonment of known right); see Bryant, 187 S.W.3d at 400.

 In the instant case, Appellant filed an Application for Community Supervision, in which he asserted as follows:

**RAY HAWKINS, JR. has never before been convicted of a felony in the State of Texas or any other state as the term “conviction” is defined by the Texas Code of Criminal Procedure in regard to probation eligibility.**

**RAY HAWKINS, JR. has been given an indeterminate sentence for a juvenile finding of having engaged in delinquent conduct for the charge of robbery.**

 Appellant also filed an application to seal files and records, in which he stated as follows:

**Applicant was charged with the felony offense of robbery. He was not transferred to a criminal court for prosecution pursuant to Section 54.02 of the Texas Family Code. He was placed on juvenile probation for a period of 12 months.**

 In each of these pleadings, Appellant made clear, unequivocal statements of facts during the course of a judicial proceeding. However, there is no indication from the context of these statements or elsewhere in the record that Appellant intended the statements to be an act of waiver of his right to have the State prove these facts its case against him. Indeed, Appellant made one of these statements in an application for community supervision. It would be counterintuitive for this court to conclude that Appellant, in seeking to have the jury consider community supervision, would make a statement with the intent that such a statement should foreclose that option. Moreover, in attempting to seal records pertaining to the previous court finding concerning his delinquent conduct, it makes little sense that Appellant intended to dispense wholly with the need for the State to prove the facts he was attempting to seal.

 Accordingly, we conclude that Appellant's statements concerning the finding of delinquent conduct made in his application for community supervision and application to seal files and records were not judicial admissions. Therefore, Appellant was entitled to conduct voir dire examination on the venire panel concerning the entire range of punishment, including community supervision, and the trial court abused its discretion by restricting Appellant's examination on that subject.

Proof Required for Enhancement

 Even assuming arguendo that Appellant's statements amounted to judicial admissions, the outcome would not differ. Under Section 12.42(f), an adjudication by a juvenile court that a child engaged in delinquent conduct constituting a felony offense is considered a final felony conviction for purposes of enhancement, but only if it resulted in the child's being committed to the Texas Juvenile Justice Department or to a postadjudication secure correctional facility. SeeTEX. PENAL CODE. ANN. § 12.42(f). In the instant case, neither of the documents the State argues are judicial admissions indicate that Appellant was so committed. Rather, according to Appellant's application to seal files and records, he was placed on juvenile probation for twelve months. Therefore, we conclude that even if the documents in question were, in fact, judicial admissions, without more, they are insufficient to enable the State to prove up the enhancement.

Harm Analysis

 The court of criminal appeals recently held that the proper analysis is not to apply a per se harm analysis rule to a voir dire error, but rather to determine if the error is substantial enough to warrant a Rule 44.2(a) harm analysis; if not, then the error is reviewed under Rule 44.2(b). See Easley v. State, 424 S.W.3d 535 (Tex.Crim.App.2014); see also TEX. R. APP. P. 44.2. More specifically, the court held as follows:

[W]e overrule Plair FN6 to the extent it holds that erroneously limiting an accused's or counsel's voir dire presentation is constitutional error because the limitation is a per se violation of the right to counsel. This, of course, is different from holding that such an error may never rise to the level of constitutional magnitude. There may be instances when a judge's limitation on voir dire is so substantial as to warrant labeling the error as constitutional error subject to a Rule 44.2(a) harm analysis. Easley, 424 S.W.3d at 541.

FN6. See Plair v. State, 279 S.W. 267 (Tex.Crim.App.1926).

 Under Rule 44.2(b), which applies to nonconstitutional error, we will affirm a judgment unless the error affects the appellant's substantial rights or deprives him of a fair trial. SeeTEX. R. APP. P. 44.2(b); Easley, 424 S.W.3d at 539, 541–42 (citing Johnson v. State, 43 S.W.3d 1, 4 (Tex.Crim.App.2001)). But under Rule 44.2(a), if the error is a constitutional violation, we must reverse the judgment unless we determine “beyond a reasonable doubt that the error did not contribute to the conviction or punishment.” TEX. R. APP. P. 44.2(a); see Easley, 424 S.W.3d at 540–41.

 A juror must be able to consider the full range of punishment for an offense, and a defendant's voir dire question about a juror's ability to do so is generally proper. Cardenas v. State, 325 S.W.3d 179, 184 (Tex.Crim.App.2010); see TEX. CODE CRIM. PROC. art. 35.16(c)(2) (West 2006). If a juror cannot consider an offense's full range of punishment, the juror is challengeable for cause. Cardenas, 325 S.W.3d at 184–85; see also Standefer v. State, 59 S.W.3d 177, 181 (Tex.Crim.App.2001); Banda v. State, 890 S.W.2d 42, 55 (Tex.Crim.App.1994) (explaining that a “person who testifies unequivocally that he could not consider the minimum sentence as a proper punishment for [an] offense ... is properly the subject of a challenge for cause”).

 In the instant case, the trial court refused to allow Appellant to question the venire panel about whether it could consider community supervision because it erroneously concluded that Appellant had judicially admitted the enhancement allegations. In light of Easley, we must determine if this error is a constitutional error or a nonconstitutional error. Id. at 541. In so doing, we are guided by the analysis of a similar issue by one of our sister courts. In Hill v. State, the court considered the level of harm analysis to be applied when the trial court refused to permit the appellant from questioning the venire panel on the full range of punishment in the event enhancements were proved. See Hill, 426 S.W.3d 868, 877 (Tex.App.–Eastland 2014, pet. ref'd). In holding that this error is a constitutional violation, the court explained as follows:

 Defense counsel is entitled to ask the venire members the question of whether they could consider the full range of punishment, and if the trial court prevents counsel from doing that, then defense counsel may not be able to discern if a juror should be struck for cause because he is unqualified. A venire member is disqualified if he has prejudged the case or cannot follow the court's instructions. To have such an unqualified venire member ... on the jury is a violation of the defendant's right to an impartial jury. Id. (citations omitted). We agree with the analysis of our sister court and hold that the error in the instant case is subject to harm analysis pursuant to Rule 44.2(a).

 Thus, we next consider whether the error here did not, beyond a reasonable doubt, contribute to the punishment as assessed by the jury. See id. In so doing, we must take into account any and every circumstance apparent in the record that logically informs us on the determination of whether, beyond a reasonable doubt, the error in question did not contribute to the conviction or punishment. See Snowden v. State, 353 S.W.3d 815, 822 (Tex.Crim.App.2011).

**Conclusion:** In reviewing the record, we note that at the outset of his trial on punishment, Appellant stipulated to the enhancement allegations and pleaded “true” thereto. The jury ultimately found the enhancement allegation to be “true.” As a result, the jury could not properly consider sentencing Appellant to community supervision.FN7 Therefore, because the jury could not legally consider community supervision in determining Appellant's punishment, we hold that the record supports beyond a reasonable doubt that Appellant suffered no harm from the trial court's erroneous ruling. Cf. Hart v. State, 173 S.W.3d 131, 143 (Tex.App.–Texarkana 2005, no pet.)(no error where trial court refused to permit the appellant to question venire panel on range of punishment if state failed to prove enhancement because enhancements found to be “true” and the appellant was sentenced under range of punishment about which panel was questioned).FN8 Appellant's fifth issue is overruled.

FN7. See n.3.

FN8. In conjunction with Appellant's stipulating to the enhancement allegations, Appellant's counsel told the trial court that because of the trial court's ruling, Appellant had to change his trial strategy. This statement was made in the context of informing the trial court that Appellant did not intend to waive his previous objections concerning the trial court's limiting his voir dire examination. However, Appellant's counsel did not elaborate on this change of trial strategy and there is no evidence of record that would allow us to determine what that change was or whether Appellant was harmed thereby.

MOTION FOR NEW TRIAL

 In his sixth issue, Appellant argues that the trial court erred in denying his motion for new trial based on the same grounds raised in his fifth issue. The standard of review for a trial court's ruling on a motion for new trial is abuse of discretion. Dunklin v. State, 194 S.W.3d 14, 19 (Tex.App.–Tyler 2006, no pet.) In reviewing for an abuse of discretion, an appellate court will reverse the trial court's ruling only when that decision is so clearly wrong as to lie outside the zone within which reasonable persons might disagree. Id.

 In his motion for new trial, Appellant argued that the facts were legally and factually insufficient to support his conviction and sentence. He did not make any argument in his motion related to the trial court's limiting his voir dire examination.FN9 Therefore, because the trial court did not have the opportunity to rule on this complaint, its ruling denying the motion could not have been erroneous based on the limitation of voir dire. See Brewer v. State, No. 03–10–00076–CR, 2014 WL 709549, at \*16 (Tex.App.–Austin Feb. 21, 2014, no pet.)(mem. op., not designated for publication). Further still, we have overruled Appellant's fifth issue because the error caused Appellant no harm. Therefore, even assuming arguendo that Appellant properly raised this issue in his motion for new trial, we conclude that the trial court did not abuse its discretion in denying Appellant's motion for new trial on these grounds. Seeid.(court of appeals determined that because error was harmless, trial court did not abuse its discretion in overruling motion for new trial on that ground). Appellant's sixth issue is overruled.

FN9. At the outset of the hearing on his motion for new trial, Appellant reiterated that his argument concerned legal and factual insufficiency. In his argument to the trial court, Appellant made reference to the voir dire proceedings. However, it is apparent that his argument concerning voir dire was premised on the notion that the juvenile conviction could not be used to support the enhancement. When the prosecuting attorney responded that Appellant ultimately had stipulated to the enhancement and cited to Texas Penal Code Section 12.42(f) in support of her argument, Appellant replied that he had no response. Appellant made no reference to judicial admissions. To the extent that Appellant raised any argument concerning the trial court's actions during voir dire at the hearing on Appellant's motion for new trial, those arguments do not comport with Appellant's argument on appeal. See Santellan v. State, 939 S.W.2d 155, 171 (Tex.Crim.App.1997) (to preserve error for review on appeal, defendant's complaint on appeal must comport with objection raised at trial).