Failure by a juvenile court to comply with sections 54.03(c) and 51.09 of the Family Code is subject to a harm analysis. [In the Matter of A.F.](16-4-4)

On September 8, 2016, the Houston (14th Dist.) Court of Appeals held that the failure to follow the procedure for a juvenile jury waiver is subject to a harm analysis under Rule 44.2(b) of the Texas Rules of Appellate Procedure, reasoning that “a court’s failure to follow statutory procedures for waiving a defendant’s right to a jury trial is not structural error.”

¶ 16-4-4. **In the Matter of A.F.**, MEMORANDUM, No. 14-15-00709-CV, 2016 WL 4705165 [Tex.App.—Houston (14th Dist), 9/8/2016].

**Facts:** The State petitioned for A.F.’s commitment to the Texas Juvenile Justice Department, alleging that A.F. engaged in delinquent conduct by committing an aggravated robbery. After a bench trial, the court found that A.F. engaged in delinquent conduct as alleged, and the court ordered A.F. committed to the Department for ten years.

Section 54.03(c) states that an adjudication trial “shall be by jury unless jury is waived in accordance with Section 51.09.” Tex. Fam. Code Ann. § 54.03(c). Section 51.09 states that any right granted by the Juvenile Justice Code or the Texas or United States Constitution may be waived if “(1) the waiver is made by the child and the attorney for the child; (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it; (3) the waiver is voluntary; and (4) the waiver is made in writing or in court proceedings that are recorded.” Id. § 51.09. The parties agree that the fourth requirement has not been met in this case. The record does not contain a written or recorded waiver of a jury trial.

It is also undisputed that the trial court’s judgment, which A.F. signed, states that all parties waived a jury trial:

Be it remembered that this cause being called for trial, came on to be heard before the above Court with the above numbered and entitled cause and came the State of Texas by her Assistant District Attorney ... and came in person the Respondent, [A.F.], with his/her defense attorney ... and the Respondent’s parent(s), guardian(s), or custodian(s), and pursuant to the Texas Family Code all parties waived a jury ....

**Held:** Affirmed

**Memorandum Opinion:** A.F. contends he did not “affirmatively waive” his right to a jury trial guaranteed by the Texas Constitution, resulting in structural error immune from a harm analysis. A.F. acknowledges that this court held in In re R.R. a juvenile does not have a constitutional right to a jury trial: “The Family Code—not the Texas constitution—creates a juvenile’s right to a jury trial.” 373 S.W.3d at 737. A.F. has not cited any controlling authority or statutory change to undermine In re R.R., and as noted above, we are bound by the In re R.R. decision under these circumstances. See Chase Home Fin., 309 S.W.3d at 630.

Further, as this court held in In re R.R., a recitation in a judgment that “all parties waived a jury” is “binding in the absence of direct proof of its falsity.” 373 S.W.3d at 738 (citing Breazeale v. State, 683 S.W.2d 446, 450 (Tex. Crim. App. 1985) (op. on reh’g)). Acknowledging that a defendant’s waiver of a jury trial must be shown in the record, Breazeale held that a recitation in the judgment that the defendant waived his right to a jury trial carried “the presumption of regularity and truthfulness,” and “the burden is then on the accused to establish otherwise, if he claims that the contrary is true.” 683 S.W.2d at 451–51.

A.F. has not met this burden to overcome the presumption that he waived any right to a jury trial because the record contains nothing to refute the judgment’s recitation that “all parties waived a jury.” See id. at 450; In re R.R., 373 S.W.2d at 738. Thus, even if A.F. had a constitutional right to a jury trial, he waived it.

Failure to Comply with Sections 54.03(c) and 51.09 of the Family Code Subject to a Harm Analysis

A.F. contends that the failure to comply with Section 54.03(c), and by reference Section 51.09, is “immune from a harmless error analysis.” A.F. attempts to distinguish In re R.R., claiming that unlike the juvenile in that case, A.F. “was never admonished of his right to a jury trial and he did nothing to affirmatively waive that right.”

In In re R.R., the record showed that the trial court informed the juvenile of his right to a jury trial and the juvenile waived that right in open court. See 373 S.W.2d at 733. However, those facts were immaterial to the court’s holding that the failure to follow the procedure for waiver in Sections 54.03(c) and 51.09 was subject to a harm analysis under Rule 44.2(b) of the Texas Rules of Appellate Procedure. See id. at 737. Instead, this court relied on Johnson v. State, reasoning that “a court’s failure to follow statutory procedures for waiving a defendant’s right to a jury trial is not structural error.” In re R.R., 373 S.W.3d at 736–37 (citing Johnson v. State, 72 S.W.3d 346, 348 (Tex. Crim. App. 2002)). In Johnson, the Court of Criminal Appeals presumed that the defendant understood his right to a jury trial because the judgment recited the defendant “waived trial by jury.” 72 S.W.3d at 349.

Accordingly, consistent with In re R.R., the trial court’s failure to comply with Sections 54.03(c) and 51.09 is subject to a harmless-error analysis under Rule 44.2(b).

Harmless Error: Failure to Make Waiver in Writing or Open Court

Because the judgment recites that A.F. and his attorney “came on to be heard” and that “all parties waived a jury,” we presume that A.F. and his attorney knew about his right to a jury trial and knowingly relinquished that right. See Johnson, 72 S.W.3d at 349; see also In re R.R., 373 S.W.3d at 738. Thus, in the absence of direct proof of the falsity of the recitation in the judgment, we presume that A.F. and his attorney voluntarily waived the right to a jury trial with information and understanding of that right and the possible consequences as required by Section 51.09(1)–(3). See Johnson, 72 S.W.3d at 349; In re R.R., 373 S.W.3d at 738.

The State concedes error regarding Section 51.09(4), however, because the waiver was not made in writing or in court proceedings that are recorded. A.F. contends he was harmed because the evidence at trial was “unconvincing” and “it is probable that other reasonable fact finders would have found the evidence factually insufficient.”

In conducting a harm analysis of this error, we must determine whether A.F.’s substantial rights were affected. See In re R.R., 373 S.W.3d at 737 (citing Tex. R. App. P. 44.2(b)). “In a non-jury case, an error does not affect substantial rights if the error does not deprive the complaining party of some right to which he was legally entitled.” Id. “A substantial right is affected when the error has a substantial and injurious effect or influence.” Mason v. State, 322 S.W.3d 251, 255 (Tex. Crim. App. 2010). In making this determination, we consider the entire record. In re R.R., 373 S.W.3d at 737–38.

This case fits squarely within Johnson. Adult defendants may waive a jury trial, but according to statute, the waiver must be made in person by the defendant in writing and in open court. Johnson, 72 S.W.3d at 347 (citing Tex. Code Crim. Proc. Ann. art. 1.13(a)). Johnson held that a defendant is not harmed under Rule 44.2(b) from the lack of a written waiver when (1) the judgment recites that the defendant waived a jury trial, and (2) there is no direct proof of the falsity of the recitation. See id. at 349. Under these circumstances, the court presumes that the defendant was aware of his right to a jury trial and opted for a bench trial, and the failure to comply with the statute is harmless. Id.

**Conclusion:** The rationale from Johnson applies to this case. The failure of the waiver to be in writing or recorded did not deprive A.F. of a substantial right when the record otherwise indicates that he and his attorney in fact waived the right to a jury trial. See Johnson, 72 S.W.3d at 349; In re R.R., 373 S.W.3d at 738. The strength of the evidence is not a factor that either this court or the Court of Criminal Appeals has considered for similar error. See Johnson, 72 S.W.3d at 349; In re R.R., 373 S.W.3d at 738. Thus, although a reasonable fact finder could have reached a different conclusion in this case, the record as a whole does not show that the error had a substantial and injurious effect or influence on the proceedings. Having overruled both of A.F.’s issues, we affirm the trial court’s judgment.