Do children thirteen and under, charged with aggravated sexual assault, lack the capacity to consent to sex as a matter of law?[In the Matter of R.R.S.](17-4-4)

On August 25, 2017, the El Paso Court of Appeals reversed and remanded a trial court’s decision to refuse to allow a juvenile to withdraw his plea of true because the juvenile had not been informed of the potential defense of lack of capacity to consent to sex as a matter of law.

¶ 17-4-4. **In the Matter of R.R.S.**, No. 08-16-00042-CV, --- S.W.3d ----, 2017 WL 3676374 (Tex.App.—El Paso, 8/25/2017). (**with dissent**)

**Facts:** The State filed a petition of delinquent conduct alleging Appellant intentionally and knowingly committed two counts of aggravated sexual assault of his twin sibling brothers in violation of section 22.021 of the Texas Penal Code. The petition described Appellant as being thirteen years old at the time of the conduct alleged, he was residing with his mother, and his father was listed as deceased. Appellant’s mother requested that Appellant receive a court appointed attorney and she provided financial information to qualify. Thereafter, the trial court entered an order of appointment and scheduled a pretrial hearing.

On the day of his pretrial, Appellant appeared with his mother, maternal grandfather, and appointed attorney, and the court proceeded to an adjudication hearing. At the hearing, the State abandoned two paragraphs of the petition and the Appellant then pled true to the remaining two counts of aggravated sexual assault. The prosecutor presented and the court admitted without objection a form titled “Waiver, Stipulation and Admission” signed by Appellant and his attorney. In the stipulation, Appellant admitted the allegations of the petition, confessed that he committed the offense charged, and waived his constitutional rights. The court then ordered the El Paso County Juvenile Probation Department to prepare a pre-disposition report due prior to the later scheduled disposition hearing. Based on the plea and the written stipulation, the court entered an order of adjudication finding that Appellant, described in the order’s caption as a juvenile with a date of birth as September 3, 2001, engaged in delinquent conduct on January 1, and 17, 2015, as alleged in counts 1(a) and 2(b) of the State’s petition.

A month following his plea, Appellant retained new counsel and filed a motion to withdraw stipulation and motion for new trial. The motion asserted that Appellant wanted to withdraw his stipulation and plea “to challenge the factual and legal sufficiency of the evidence in a Jury Trial.” At the hearing that followed, Appellant’s attorney stated to the court that there were “mitigating factors that were not presented at the adjudication hearing[,]” and further explained that he was referring to information revealed in the pre-disposition report prepared for the court by Appellant’s probation officer. The trial court denied Appellant’s motions.

A few weeks later, the court held a disposition hearing receiving testimony from Appellant’s probation officer and his mother. Additionally, the State admitted without objection the probation officer’s pre-disposition report. After finding Appellant in need of rehabilitation and protection, the court placed Appellant on intensive probation and ordered treatment measures and other delineated conditions. Among other terms and conditions, Appellant’s disposition included supervised contact with his siblings as described by a child safety plan, electronic monitoring, and an order to later register as a sex offender in accordance with Article 62 of the Code of Criminal Procedure, unless otherwise deferred. In concluding the hearing, the court advised Appellant in open court and in writing of his right to appeal both the adjudication and disposition of his case. Appellant thereafter filed this timely appeal. See TEX. FAM. CODE ANN. § 56.01(n)(1) (West Supp. 2016).

**Held:** Reversed and remanded

**Opinion:** In his only issue on appeal, Appellant asserts the trial court abused its discretion in denying his motions to withdraw stipulation and for new trial on the basis that the record as a whole fails to show by legally sufficient evidence that Appellant entered a knowing, intelligent, and voluntary plea. The State responds that Appellant entered his plea voluntarily and his request to withdraw his stipulation and for new trial was based solely on the impermissible ground of “buyer’s remorse.”

Appellant contends that he was denied due process because his plea of true was entered without adequate understanding of any defenses available to him. He asserts moreover that he was a victim of sexual abuse by his father and during the time of the alleged conduct he was thinking of the time his father had abused him. Thus, he contends “a factual dispute arises when the record as a whole suggests his intentions during the commission of the offense negates the element of his culpable mental state.”

As a preliminary matter, we note that Appellant brings forth no challenge on the issue of whether he was properly admonished. See TEX. FAM. CODE ANN. § 54.03(b). Nonetheless, because Appellant’s challenge, in part, includes questions as to the voluntariness of his plea, we must first review the record to determine whether Appellant was duly admonished such that there is a prima facie showing that his plea of true was entered knowingly and voluntarily. Martinez v. State, 981 S.W.2d 195, 197 (Tex.Crim.App. 1998).

Here, the record reflects that after the parties announced ready, the trial court informed Appellant of his right to remain silent, his right to be represented by a lawyer, his right to confront and cross-examine any of the State’s witnesses, and his right to a jury trial. TEX. FAM. CODE ANN. § 54.03(b)(3) – (6). When the court asked Appellant whether he understood what a jury did, he gave a short answer saying, “[w]here you have people decide for like if you’re guilty or not.” The court then added a short explanation that twelve people would sit and listen to his case and decide whether he was delinquent. Next, the court verbally confirmed with Appellant that he did not want a jury trial and his attorney concurred.

Proceeding then to an explanation of the nature and possible consequences of the proceedings, the court advised Appellant that “once you do plea[d] true to these allegations, you will receive some type of sanction as a result of your plea.” TEX. FAM. CODE ANN. § 54.03(b)(2). The court further stated, “[i]t could be anything from probation all the way to commitment at the Texas Juvenile Justice Department.” Next, the court advised him that his juvenile record may be used in the punishment phase of an adult trial if he were accused of a crime when he became an adult. TEX. FAM. CODE ANN. § 54.03(b)(2). The court then inquired of Appellant whether he understood his rights and he politely responded, “Yes, ma’am.”

At this juncture, the court addressed Appellant stating, “I want you to listen as [the prosecutor] reads the allegations against you.” Then, when asked whether he understood the allegation, Appellant replied, “Yes, Your honor.” TEX. FAM. CODE ANN. § 54.03(b)(1). The court then asked Appellant about each of the two counts of the petition and Appellant confirmed he was pleading true to both counts because it was true. Appellant also confirmed that he was not being forced to plead true nor was he promised anything in return. Appellant’s attorney then confirmed his own agreement with Appellant’s plea. We find that Appellant was duly admonished as required by section 54.03(b) of the Family Code. TEX. FAM. CODE ANN. § 54.03(b).

Having been duly admonished, the burden shifted to Appellant to show that a misunderstanding resulted in him entering a plea that was not a voluntary, knowing, and intelligent waiver of his rights. Martinez, 981 S.W.2d at 197. A defendant may show he entered a plea without understanding the consequences of his actions and that he was harmed by the plea. Id. Here, Appellant argues that he was not informed by his prior attorney about the nature of the culpable mental state required of the charges brought against him and how his intent during the charged conduct applied to his case. He further contends that the trial court’s refusal to withdraw his plea caused him harm because he may be subject to a requirement to register as a sex offender upon reaching adulthood.

We construe the essence of Appellant’s argument as an assertion that his plea was involuntary due to a misunderstanding and this misunderstanding caused him harm. See Martinez, 981 S.W.2d at 197. To meet his burden, Appellant relies on the testimony and report of his probation officer, as well as testimony given by his mother. The report provides background information from both Appellant and his mother. Appellant revealed to his probation officer sexual abuse he experienced that was on his mind at the time of his alleged misconduct. The report states:

*“[Appellant] further reported that when he thought about sexual [sic] abusing his brothers, he was thinking about his own sexual abuse that his father imposed upon him for approximately two years when he was between the ages of 5 and 7, and he was curious.”*

Appellant’s mother described his father as having suffered from PTSD and depression after returning from Afghanistan and that he committed suicide by shooting himself in October of 2012. The report also includes, “[s]he further reported during their marriage the juvenile’s father had told her that he had been sexually abused by a family friend at the age of 5.” Appellant’s mother described Appellant as having been very close to his father before his death. In July of 2015, she reported taking Appellant to El Paso Behavioral Health Hospital as he was depressed.

Regarding the adjudication proceeding itself, the report states Appellant’s mother hired a new attorney because “their decision to appeal the juvenile’s adjudication, is not because they are denying the offense, or the need for the juvenile to get help to address his sexual behaviors, but because of the long term effects this type of adjudication is going to have on her son.” The report further states, “[f]amily also reported they believe the legal system should have taken into account the juvenile was also victim of sexual abuse when charging him with the offenses.”

At the hearing on Appellant’s post-adjudication motion, Appellant argued he was not informed of the different ways that the law provides regarding how children could testify, or how they could present evidence, when they have been alleged to be a victim of a sex offense. Appellant argued that his status as a victim of abuse presented “defensive issues” that a jury should have been able to hear to decide “whether or not ... the offense that’s being alleged ... support[s] a finding of what [Appellant’s] intent was because that is relevant, that is material.” Appellant wanted to withdraw his plea as neither he nor his mother were aware of things that could have been done on his case to present a defense or to mitigate the charges brought against him when he entered his plea and waived his jury trial rights.

At the later disposition hearing, the record includes testimony from Appellant’s mother wherein she described that she spoke with Appellant’s prior attorney during his representation and was never informed of trial presentation for children alleged to be a victim of a sex offense. She only learned of these issues after she met with Appellant’s new attorney. She would not have advised Appellant to proceed with a stipulation had she known of this additional information. She also testified to her concerns about not being informed of future consequences stating, “[a]ccording to what he had told us we believed that that was the best option. We were not fully informed of what would, I guess, the consequences would be in the future. We were not in full understanding.”

Appellant brings forth two cases illustrating how a misunderstanding regarding an essential element of an offense may undermine the sufficiency of evidence supporting a plea. Both cases involve aggravated robbery charges, wherein the use of a real gun, as opposed to a toy gun, comes to light only after a defendant enters his plea. First, in Payne v. State, 790 S.W.2d 649, 652 (Tex.Crim.App. 1990), the Court of Criminal Appeals held that the trial court committed reversible error in refusing a timely request to withdraw a plea. In Payne, the defendant revealed he had used a toy gun and not a real gun in the commission of his robbery offense and had not understood the significance of the difference when he entered his plea. Id. at 650. Because defendant’s revelation undermined the factual validity of his signed confession to an aggravated robbery, the Court of Criminal Appeals remanded to the trial court to allow the defendant to again answer the indictment filed against him.2 Id. at 652 (“testimony served to raise an issue of the voluntariness of the signed confessions made pursuant to [defendant’s] guilty plea”).

In Appellant’s second case, a juvenile defendant charged with aggravated robbery likewise revealed after his plea of true that he used a toy gun and not a real gun in the commission of his offense. Matter of J.B., No. 01-13-00844-CV, 2014 WL 6998068, at \*2 (Tex. App.--Houston [1st Dist.] Dec. 11, 2014, no pet.) (mem. op.). Unlike the defendant in Payne, however, the juvenile failed to timely request a withdrawal of his plea from the trial court. Id., at \*3 On that procedural distinction, the Houston court of appeals found that error was not preserved as the trial court was not required to act on the misunderstanding sua sponte. Id.

Here, Appellant timely requested withdrawal of his stipulation of evidence, and argues that he misunderstood the nature of the charges and defenses he could raise. This misunderstanding, he explains, undermined the legal sufficiency of the evidence regarding the “intentionally or knowingly” component of his plea. Because Appellant questions the legal sufficiency of an essential element of the offense charged, we construe his argument as placing at issue his own intent in committing the offense.3 Within Appellant’s larger contention of lack of voluntariness, he also challenges the legal sufficiency of the evidence in supporting the “knowing” element of the sexual assault charge. “[W]hen the defensive theory of consent is raised in a prosecution for sexual assault, the defendant necessarily disputes his intent to engage in the alleged conduct without the complainant’s consent and [thereby] places his [own] intent to commit sexual assault at issue.” Casey v. State, 215 S.W.3d 870, 880 (Tex.Crim.App. 2007) (citing Rubio v. State, 607 S.W.2d 498, 501 (Tex.Crim.App. 1980)); Brown v. State, 96 S.W.3d 508, 512 (Tex. App.--Austin 2002, no pet.); see Martin v. State, 173 S.W.3d 463, 466 n.1 (Tex.Crim.App. 2005)). A defendant’s own intent cannot be inferred from the mere act of sexual conduct with the complainant. Rubio, 607 S.W.2d at 501; Brown, 96 S.W.3d at 512.

As we consider the intent element of the charges brought against Appellant, we are particularly guided by In re B.W., 313 S.W.3d 818 (Tex. 2010), as the case directly construes Penal Code section 22.021, the same provision at issue here. In In re B.W., a thirteen-year-old girl pled true to the offense of prostitution and thereafter filed a motion for new trial contesting the sufficiency of evidence to support the intent element of her plea. Id. at 819. Mirroring this case, in In re B.W., the record merely included the young girl’s plea and stipulation to evidence, and a report from her probation officer. In re B.W., 274 S.W.3d 179, 180 (Tex. App.--Houston [1st Dist.] 2008), rev’d, 313 S.W.3d 818 (Tex. 2010).

In challenging the legal sufficiency of her plea, B.W. argued that her age under fourteen precluded as a matter of law her ability to form the necessary intent to commit the offense of prostitution. Id. In support of her argument, B.W. cited to section 22.021 of the Penal Code as her primary authority supporting her argument that she was not able to form intent as a matter of law as required by the offense. In re B.W., 313 S.W.3d at 820 (citing TEX. PENAL CODE ANN. § 22.021) (“criminalizing sex with a child irrespective of consent”). Although charged with prostitution, B.W. argued that section 22.021 applied to her generally as she was less than fourteen at the time of her alleged offense, and thus, she was deemed unable to “knowingly” consent to sex for a fee as a matter of law.4 Id.; see TEX. PENAL CODE ANN. § 43.02(a)(1) (West 2016). Moreover, she argued that the Texas Legislature did not intend for children under the age of fourteen to be prosecuted for an offense such as prostitution in that an essential element of the offense required knowing agreement to engage in sex for a fee and children under fourteen were not legally capable of such consent. Id.

Signaling a strong shift in doctrine as applied to the youngest of offenders, the Supreme Court found that the underlying rationale of Texas’ sexual assault scheme established that “younger children lack the capacity to appreciate the significance or the consequences of agreeing to sex, and thus cannot give meaningful consent.” Id. at 820-21 (citing see, e.g., State v. Hazelton, 915 A.2d 224, 234 (Vt. 2006); Collins v. State, 691 So.2d 918, 924 (Miss. 1997); Coates v. State, 50 Ark. 330, 7 S.W. 304, 304–06 (1888); see also Anschicks v. State, 6 Tex.App. 524, 535 (Tex.Ct.App. 1879); cf. Roper v. Simmons, 543 U.S. 551, 569, 125 S.Ct. 1183, 1195, 161 L.Ed.2d 1 (2005) (holding that as compared to adults, juveniles have a “ ‘lack of maturity and an underdeveloped sense of responsibility’... [they] are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”) (quoting Johnson v. Tex., 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993)); Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (confirming the Court’s observations in Roper about the difference between juvenile and adult minds)).

In In re B.W., the Supreme Court held “in Texas, ‘a child under fourteen cannot legally consent to sex.’ ” 313 S.W.3d at 821 (quoting May v. State, 919 S.W.2d 422, 424 (Tex.Crim.App. 1996)). The Court also stated, “[t]he Legislature has determined that children thirteen and younger cannot consent to sex.” Id. at 824; see TEX. PENAL CODE ANN. § 22.021(a)(2)(B). The court further explained, “legal capacity to consent ... is necessary to find that a person ‘knowingly agreed’ to engage in sexual conduct for a fee.” Id. at 824. “Courts, legislatures, and psychologists around the country have recognized that children of a certain age lack the mental capacity to understand the nature and consequences of sex, or to express meaningful consent in these matters.” Id. at 826 (citing Hazelton, 915 A.2d at 234; Collins, 691 So.2d at 924; Jones v. Florida, 640 So.2d 1084, 1089 (Fla. 1994); Payne, 623 S.W.2d 867; Goodrow v. Perrin, 119 N.H. 483, 403 A.2d 864 (N.H. 1979) (citation omitted)). “The State has broad power to protect children from sexual exploitation without needing to resort to charging those children with prostitution and branding them offenders.” Id. at 825 (citing TEX. FAM. CODE ANN. § 261.101). A bright line has been established regarding the age of consent, “[b]y unequivocally removing the defense of consent to sexual assault, the Texas Legislature has drawn this line at the age of fourteen.” Id. at 823. With the Legislature determining that children under fourteen cannot consent to sex, the rationale then follows that the state may not adjudicate such a young offender for an offense that includes consent to sex as one of its essential elements. Id. at 824.

Regarding crimes of this nature and children under fourteen, the Supreme Court also explained that the State has broad power to protect these children without resorting to the juvenile justice system or considering it the only portal to providing services. Id. at 825. “Section 261.101 of the Family Code requires a person to report to a law enforcement agency or the Department of Family and Protective Services if there is cause to believe that a child’s physical or mental health or welfare has been adversely affected by abuse or neglect.” Id. (citing TEX. FAM. CODE ANN. § 261.101). Just because a young offender may not be adjudicated for certain offenses due to age-related incapacity, it does not then mean that the State will not become involved in providing necessary protection and services. Once aware of a child’s circumstances, “[t]he department or agency must then conduct an investigation during which the investigating agency may take appropriate steps to provide for the child’s temporary care and protection.” Id.; see TEX. FAM. CODE ANN. §§ 261.301, 261.302, 262.001–.309 (West Supp. 2016 & West 2014).

Although we recognize that In re B.W. involved an offense different from the underlying offense here, nonetheless, we find In re B.W. implicated as section 22.021 is central to the holding finding that the Legislature did not intend to prosecute children under fourteen for offenses that include legal capacity to consent to sex. We also note that the holding of In re B.W. reiterates an earlier recognition of age-related incapacity by the Court of Criminal Appeals when it stated that section 22.021 is aimed at adult offenders:

*The statutory prohibition of an adult having sex with a person who is under the age of consent serves to protect young people from being coerced by the power of an older, more mature person. The fact that the statute does not require the State to prove mens rea as to the victim’s age places the burden on the adult to ascertain the age of a potential sexual partner and to avoid sexual encounters with those who are determined to be too young to consent to such encounters.*

Fleming v. State, 455 S.W.3d 577, 582 (Tex.Crim.App. 2014) [emphasis added].

As for the question of whether In re B.W. extends beyond the offense of prostitution, the Corpus Christi court of appeals nearly decided the issue but the procedural posture of the case did not allow the court to reach the issue. In In re O.D.T., the state brought a petition of delinquency against an eleven-year-old boy based on two counts of aggravated sexual assault of a child under fourteen years of age. In re O.D.T., No. 13-12-00518-CV, 2013 WL 485754, at \*1 (Tex. App.--Corpus Christi Feb. 7, 2013, no pet.) (mem. op.); see TEX. PENAL CODE ANN. § 22.021(a)(1)(B), (a)(2)(B). Citing In re B.W. as support, the juvenile offender applied for pretrial habeas relief contending that the state’s prosecution was “fundamentally invalid as a matter of law.” Id. O.D.T. argued a child under the age of fourteen lacked the capacity to act with the mental state required of the charge. Id., at \*1. Specifically, he argued that a child under fourteen years of age could not be prosecuted for the offense of aggravated sexual assault because “a child under fourteen cannot legally consent to sex.” Id. (quoting In re B.W., 313 S.W.3d at 821) (citation omitted). The trial court denied the application for relief. Id. On appeal, the Corpus Christi court of appeals found that the trial court’s denial constituted an interlocutory order and the court lacked appellate jurisdiction. Id., at \*2.

In a second case discussing In re B.W. involving charges other than prostitution, the state alleged that a thirteen-year-old boy engaged in conduct consisting of both sexual assault and unlawful restraint of another against a victim described as a “high functioning” autistic fifteen-year-old boy. In re H.L.A., No. 01-12-00912-CV, 2014 WL 1101584, at \*1 (Tex. App.--Houston [1st Dist.] Mar. 20, 2014, no pet.) (mem. op.). In In re H.L.A., the state voluntarily dismissed the sexual assault charges during the charge conference and a jury then adjudged the defendant as delinquent on the remaining charge of unlawful restraint. Id. Among other treatment terms and conditions, the court then ordered the juvenile offender to register as a sex offender. Id., at \*5; see TEX. PENAL CODE ANN. § 20.02(a) (West 2011); TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(E)(ii) (West Supp. 2016).5 On appeal, the juvenile argued that he lacked the experience and mental capacity to appreciate that his conduct would require him to register as a sex offender and, therefore, “he [could not] be said to have intentionally or knowingly restrained another person.” Id. (citing In re B.W., 313 S.W.3d at 820). The Houston court of appeals, however, distinguished In re B.W. finding the intent element of the unlawful restraint charge was distinct from the mens rea element required of prostitution.6 Id., at \*6.

In this case, given the age of Appellant and the charged offense, we find that he met his burden of showing there is legally insufficient evidence to support a knowing and voluntary plea of true to delinquent conduct as alleged by the State. See Martinez, 981 S.W.2d at 197; In re B.W., 313 S.W.3d at 824 (“The Legislature has determined that children thirteen and younger cannot consent to sex.”). We disagree with the State that this is a case of buyer’s remorse or a situation where a defendant chose to voluntarily waive defenses and later changed his mind as was rejected in Ulloa v. State, 370 S.W.3d 766, 769 (Tex. App.--Houston [14th Dist.] 2011, pet. ref’d). Being a child of only thirteen years old at the time of the offense, Appellant here misunderstood defenses he could assert that he nonetheless waived when he pled true and judicially confessed to committing the underlying sexual assault offense. Other than his plea, no other evidence was provided in support of his plea. To enable Appellant to make a voluntary, knowing, and informed waiver of his constitutional rights, Appellant should have been informed prior to the entry of his plea of true of the potential defense of lack of capacity to consent to sex as a matter of law, and other pertinent defensive theories applicable to his circumstances. See In re B.W., 313 S.W.3d at 824.

**Conclusion:** Withdrawal of Appellant’s plea of true and stipulation of evidence, and a new trial, will enable the parties to address directly, in the first instance, the question of whether the holding of In re B.W. extends to the offense of aggravated sexual assault. Trial presentation will yield a developed record of Appellant’s circumstances and evidence of his and his siblings’ need for services. Thus, we find in these circumstances, it was error for the trial court to refuse to withdraw the plea of true and stipulation of evidence and to order a new trial. Issue One is sustained. Accordingly, we reverse the trial court’s judgment and remand for a new trial.

**Dissent:** The majority opinion holds that Appellant’s plea of true to the petition was involuntary because he misunderstood the defenses available to him and his attorney did not inform him prior to the entry of his plea regarding the potential defense of lack of capacity to consent to sex as matter of law. I disagree with this decision for four reasons. First, the majority opinion finds the plea involuntary due to faulty legal advice, but it does not review counsel’s performance under the standard required by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See In re R.D.B., 102 S.W.3d 798, 800 (Tex.App.--Fort Worth 2003, no pet.)(holding that a juvenile is entitled to the effective assistance of counsel and that the effectiveness of counsel’s representation must be analyzed under the Strickland standard). Second, Appellant did not raise the ineffective assistance of counsel/involuntariness claim in his motion to withdraw the plea or at the hearing. Third, the appellate record does not contain evidence to support the majority opinion’s factual and legal conclusions. Fourth, the majority errs by concluding that In re B.W., 313 S.W.3d 818 (Tex. 2010) is applicable to this aggravated sexual assault case. I respectfully dissent.

The State filed a petition alleging Appellant engaged in delinquent conduct by committing two counts of aggravated sexual assault of a child under the age of fourteen. Counts I and II each contain two paragraphs. Paragraph A of Count I alleged that Appellant intentionally or knowingly caused his sexual organ to penetrate the anus of V.S., a child under the age of fourteen, and Paragraph B alleged that he intentionally or knowingly caused the sexual organ of V.S. to contact or penetrate Appellant’s mouth. Paragraph A of Count II alleged that Appellant intentionally or knowingly caused his sexual organ to penetrate the anus of R.S., a child younger than fourteen years of age, and Paragraph B alleges that Appellant caused the sexual organ of R.S. to contact or penetrate Appellant’s mouth.

Paragraph A of Counts I and II allege aggravated sexual assault of a child under Section 22.021(a)(1)(B)(i) of the Penal Code. TEX.PENAL CODE ANN. § 22.021(a)(1)(B)(i)(West Supp. 2016). Under this section, a person commits aggravated sexual assault of a child if he intentionally or knowingly causes the penetration of the anus of a child by any means. TEX.PENAL CODE ANN. § 22.021(a)(1)(B)(i). Paragraph B of Counts I and II allege aggravated sexual assault of a child under Section 22.021(a)(1)(B)(iii). TEX.PENAL CODE ANN. § 22.021(a)(1)(B)(iii)(West Supp. 2016). Under Section 22.021(a)(1)(B)(iii), a person commits aggravated sexual assault of child if he intentionally or knowingly causes the sexual organ of a child to contact or penetrate the mouth of another person, including the actor. TEX.PENAL CODE ANN. § 22.021(a)(1)(B)(iii). In contrast with aggravated sexual assault under Section 22.021(a)(1)(A), the State is not required to prove that the sexual contact occurred without the child victim’s consent.

In a document titled, “WAIVER, STIPULATION AND ADMISSION,” Appellant waived his rights to a jury trial and to confront the witnesses against him, and he judicially confessed to Count I-Paragraph A and Count II-Paragraph B set forth in the State’s petition.1 Appellant expressly agreed that the document containing his waivers and judicial confession could be introduced in support of the juvenile court’s judgment. At the adjudication hearing, the juvenile court admonished Appellant in accordance with the requirements of the Texas Family Code, and he informed the court that he understood those rights and confirmed that he had signed the waiver and stipulation document of his own free will. Appellant waived his rights in open court and he entered a plea of true to Count I-Paragraph A and Count II-Paragraph B. At the conclusion of the hearing, the juvenile court accepted the plea of true and set the case for a disposition hearing approximately one month later.

Prior to the disposition hearing, Appellant retained a different attorney, and he filed a “Motion to Withdraw Stipulation and Motion for New Trial” which alleged the following: “The Court has not entered a judgment against the Respondent and desires to withdraw his stipulation to challenge the factual and legal sufficiency of the evidence in a Jury Trial.” Significantly, the motion did not allege ineffective assistance of counsel as a basis for finding the plea involuntary. At the hearing on the juvenile Appellant’s motion to withdraw his plea of true and stipulation, Appellant’s attorney argued that his client wanted to exercise his right to a jury trial and test the sufficiency of the State’s evidence before a jury. Counsel directed the juvenile court’s attention to the pre-disposition report in the court’s file which contained evidence that Appellant had been sexually abused by his father when he was between five and seven years of age. Counsel argued that Appellant would like for a jury to hear this evidence and then decide whether Appellant had committed aggravated sexual assault of a child. The juvenile court engaged in the following exchange with Appellant’s attorney:

*[The Court]: I guess what I’m missing is the reason why he stipulated to something.*

*Did he just change his mind?*

*[Defense counsel]: Yes, Your Honor, he changed his mind.*

Near the conclusion of the hearing, Appellant’s attorney added that he did not believe that Appellant had been sufficiently informed “on every single aspect of this case to be able to make a sufficient and adequate, voluntary decision that led to a stipulation.” Counsel did not, however, specify who had failed to sufficiently inform Appellant -- the court or prior counsel -- and he did not present any evidence in support of this claim. The juvenile court denied the motion to withdraw the plea and gave counsel additional time to prepare for the disposition hearing.

Appellant argues for the first time on appeal that his plea is involuntary because it was made “without adequate understanding of any defenses available to him.” Appellant identifies the defense as his state of mind and explains that he had been sexually abused by his father, and at the time he committed the offenses he “was thinking of the time his father was abusing him.” Appellant relies on his mother’s testimony presented at the disposition hearing that Appellant’s first attorney did not advise her that Appellant could present evidence he was the victim of sexual abuse. This argument relates exclusively to the advice Appellant was given, or not given, by his first attorney. Although Appellant does not state his issue in terms of “ineffective assistance of counsel,” the standard of review is dictated by the nature of the issue presented on appeal. Consequently, Appellant’s involuntariness claim, which is based on an allegation of deficient legal advice, must be examined under the standards applicable to ineffective assistance of counsel claims. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Ex parte Moody, 991 S.W.2d 856, 857-58 (Tex.Crim.App. 1999). The standard requires Appellant to show that his attorney’s advice was not within the range of competence demanded of attorneys in juvenile proceedings, and there is a reasonable probability that, but for counsel’s error, Appellant would not have pled true to the petition and would have insisted on going to trial. See Ex parte Moody, 991 S.W.2d at 857-58. The appellate court is required to presume that the attorney’s representation fell within the wide range of reasonable and professional assistance. Mallett v. State, 65 S.W.3d 59, 63 (Tex.Crim.App. 2001). Ineffective assistance claims must be firmly founded in the record to overcome this presumption. Thompson v. State, 9 S.W.3d 808, 813 (Tex.Crim.App. 1999). An appellate court must also bear in mind that when the record is silent and does not provide an explanation for the attorney’s conduct, the strong presumption of reasonable assistance is not overcome. Rylander v. State, 101 S.W.3d 107, 110-11 (Tex.Crim.App. 2003).

A review of Appellant’s motion to withdraw his plea and the reporter’s record of the hearing shows that Appellant did not inform the trial court that his plea was involuntary due to the faulty advice of counsel. His attorney instead told the court that Appellant had changed his mind and he wanted to exercise his right to a jury trial. When presented with claims of ineffective assistance of counsel, the State typically responds by presenting the testimony of counsel.2 The State could not do so here because it had no notice that Appellant was alleging that his plea was involuntary because counsel failed to make him aware of certain defenses. More significantly, Appellant did not present any evidence at the hearing on his motion to withdraw the plea regarding the advice given to him by counsel. It was not until the disposition hearing that Appellant’s mother testified that when she met with Appellant’s first attorney he did not explain to her that Appellant could present evidence, including his own testimony, that he had been the victim of sexual abuse. She stated that if she had known this, she would not have recommended to Appellant that he enter a plea of true. There is no evidence that Appellant was present when his mother had this meeting with counsel or what legal advice counsel provided to Appellant in their discussions. Given the lack of evidence regarding the legal advice given to Appellant and the fact that Appellant’s attorney has not been given an opportunity to explain his actions, the Court should find that Appellant has not carried his burden of rebutting the presumption of reasonably effective assistance of counsel. See Rylander, 101 S.W.3d at 110-11 (“[T]rial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.”).

I also disagree with the majority’s holding that lack of capacity to consent to sex is an available defense in this case. The majority opinion relies on In re B.W., 313 S.W.3d 818 (Tex. 2010) in support of its holding. In that case, a thirteen-year-old juvenile was adjudicated delinquent for committing the offense of prostitution based on evidence that she had waved over an undercover police officer who was driving by in an unmarked car and offered to engage in oral sex with him for twenty dollars. In re B.W., 313 S.W.3d at 819. B.W. entered a plea of true to the allegation that she had knowingly agreed to engage in sexual conduct for a fee. Id., 313 S.W.3d at 819. On appeal, B.W. challenged the validity of her adjudication of delinquency for prostitution and argued that “... the Legislature cannot have intended to apply the offense of prostitution to children under fourteen because children below that age cannot legally consent to sex.” Id., 313 S.W.3d at 820. The Supreme Court agreed with this argument.

A person commits the offense of prostitution if he or she knowingly offers to engage, agrees to engage, or engages in sexual conduct for a fee. TEX. PENAL CODE ANN. § 43.02(a)(1)(West 2016). Under the Penal Code’s definition of “knowingly”, a person acts knowingly, or with knowledge, with respect to the nature of his conduct when he is aware of the nature of his conduct. TEX. PENAL CODE ANN. § 6.03(b)(West 2011). Thus, the Supreme Court observed that a person who agrees to engage in sexual conduct for a fee must have an understanding of what one is agreeing to do. See In re B.W., 313 S.W.3d at 819-20. In reversing the adjudication order, the Supreme Court held as follows:

Given the longstanding rule that children under fourteen lack the capacity to understand the significance of agreeing to sex, it is difficult to see how a child’s agreement could reach the “knowingly” standard the statute requires. Because a thirteen-year-old child cannot consent to sex as a matter of law, we conclude B.W. cannot be prosecuted as a prostitute under section 43.02 of the Penal Code. In re B.W., 313 S.W.3d at 822.

The instant case is distinguishable because the offense of aggravated sexual assault of a child does not require proof that the defendant knowingly agreed to engage in sexual conduct. The petition alleged that Appellant committed aggravated sexual assault of a child under Section 22.021(a)(1)(B)(i) and (iii) of the Penal Code. Under Section 22.021(a)(1)(B)(i), a person commits aggravated sexual assault of a child if he intentionally or knowingly causes the penetration of the anus of a child by any means. TEX.PENAL CODE ANN. § 22.021(a)(1)(B)(i). A person acts intentionally, or with intent, with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct. TEX.PENAL CODE ANN. § 6.03(a)(West 2011). Thus, the State was required to prove that Appellant had a conscious objective or desire to cause his sexual organ to penetrate the child victim’s anus. Under Section 22.021(a)(1)(B)(iii), a person commits aggravated sexual assault of child if he intentionally or knowingly causes the sexual organ of a child to contact or penetrate the mouth of another person, including the actor. TEX.PENAL CODE ANN. § 22.021(a)(1)(B)(iii). To obtain a finding of delinquent conduct based on this section, the State was required to prove that Appellant had a conscious objective or desire to cause the child victim’s sexual organ to contact or penetrate Appellant’s mouth. Section 22.021 does not require proof that Appellant knowingly agreed to engage in sexual conduct. In my opinion, the Supreme Court’s holding in B.W. is inapplicable here.

Further, the adjudication hearing record shows that the trial judge dutifully followed the dictates of Section 54.03(b). TEX.FAM.CODE ANN. § 54.03(b)(1) – (6)(West 2014). Appellant, in a seemingly well-coached, rehearsed recitation, affirmatively testified he understood the allegations against him, the rights he was waiving and the possible consequences of his plea of true. Appellant informed the trial court he was pleading true because the allegations were true, that he was not forced to plea true nor was he promised anything in return for his plea of true. Appellant was fourteen years old on the date of the adjudication hearing and thirteen years old when the alleged offenses were committed. Clearly, based on the record before us, Appellant’s plea of true was legally executed by the trial court.

However, putting aside Appellant’s suggestion of ineffective assistance of counsel, I firmly believe Section 54.03(b) does not go far enough to protect juveniles. Children, who legally lack the ability to consent, in a six minute hearing, as in this case, can irrevocably commit themselves to a decision that may affect them lifelong. I am strongly encouraging the legislature to review the child’s ability to withdraw or change their plea of true to afford him more procedural protections.

It is in the realm of possibility that Appellant’s first attorney gave him faulty legal advice, but the record before this Court is insufficiently developed to permit a finding that this actually occurred here. Appellant is not left without a remedy because he may pursue a petition for writ of habeas corpus in the trial court. See TEX.CONST. art. V, § 8 (district courts have “exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court ....”); see also Ex parte Williams, 239 S.W.3d 859, 861 (Tex.App.--Austin 2007, no pet.). That will give the parties an opportunity to fully develop the record and the trial court can decide the issue under the appropriate legal standard. In the event the trial court denies Appellant’s writ application, he may pursue a direct appeal from that ruling to this Court.

Footnotes

1 See TEX. PENAL CODE ANN. § 22.021 (West Supp. 2016).

2 Compare TEX. PENAL CODE ANN. § 29.03(a)(2) (West 2011) (uses or exhibits a deadly weapon), and TEX. PENAL CODE ANN. § 29.02(a)(2)(West 2011) (threaten or place another in fear of imminent bodily injury or death) .

3 “[P]oints of error should be liberally construed to fairly and equitably adjudicate the rights of litigants.” Tittizer v. Union Gas Corp., 171 S.W.3d 857, 863 (Tex. 2005) (citing TEX.R.APP.P. 38.9) (briefs are meant to acquaint the court with the issues in a case).

4 Section 43.02(a)(1) of the penal code provides that a person commits an offense if, in return for receipt of a fee, the person “knowingly ... offers to engage, agrees to engage, or engages in sexual conduct[.]” TEX. PENAL CODEANN. § 43.02(a)(1).

5 Article 62.001(5)(E)(ii) provides that unlawful restraint (Section 20.02) qualifies as a reportable conviction or adjudication for purposes of sex offender registration programs. See TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(E)(ii) (West Supp. 2016).

6 At least one legal commentator considered the holding of In re H.L.A. as an extension of the rationale of In re B.W to prohibited activities beyond prostitution: “By basing its decision on these grounds, the court inadvertently reaffirmed Justice Wainwright’s assertion that the precedent of In re B.W. applies in all cases where an element of the offense requires a child to knowingly engage in an activity to which they cannot consent.” Tara Schiraldi, For They Know Not What They Do: Reintroducing Infancy Protections for Child Sex Offenders in Light of in Re B.W., 52 AM. CRIM.L.REV. 679, 692 (2015) (citing In re H.L.A., 2014 WL 1101584, at \*1 addressing an argument based upon In re B.W., 313 S.W.3d at 836 (Wainwright, J., dissenting)).

1 At the adjudication hearing, the State abandoned Count I-Paragraph B and Count II-Paragraph A. The majority opinion states that Appellant’s plea of true is not supported by any evidence, but this is incorrect. Appellant judicially confessed to Count I-Paragraph A and Count II-Paragraph B, and the judicial confession was admitted into evidence at the adjudication hearing pursuant to Appellant’s agreement.

2 When a defendant raises an ineffective assistance of counsel claim, he waives the attorney-client privilege and the attorney may testify regarding his actions and representation of the defendant. See State v. Thomas, 428 S.W.3d 99, 106 (Tex.Crim.App. 2014).