Juvenile Law Section
STATE BAR OF TEXAS

Volume 34, Number 2, May 2020

Visit us online at
www.juvenilelaw.org

NEWSLETTER EDITOR

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

OFFICERS AND COUNCIL MEMBERS

Mike Schneider, Chair
315th District Court
1200 Congress, Houston, TX 77002

Kaci Singer, Immediate Past Chair
Texas Juvenile Justice Department
P.O. Box 12757, Austin, TX 78711

Patrick Gendron, Treasurer
Law Office of Patrick Gendron
P.O. Box 6561, Bryan, TX 77805

William "Bill" Cox, Secretary
500 East San Antonio, Ste 501
El Paso, TX 79901

Terms Expiring 2020
Kim Hayes, Lubbock
Jana Jones, Decatur
Frank Adler, Arlington

Terms Expiring 2021
John Gauntt, Belton
Jenna Reblin, Austin
Terrance Windham, Houston

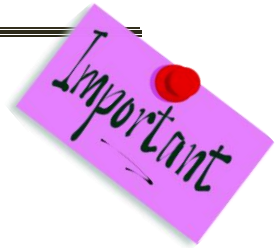
Terms Expiring 2022
Maggie Ellis, Austin
Elizabeth Henneke, Austin
Robin Houston, Waco

QUICK LINKS

Juvenile Law Section Website
Nuts and Bolts of Juvenile Law
State Bar of Texas Website
State Bar of Texas Annual Meeting
Texas Bar CLE
Texas Bar Circle
State Bar of Texas Facebook

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.

TABLE OF CONTENTS

EDITOR'S FOREWORD By Associate Judge Pat Garza

There is no question these are strange and difficult times. We are in the middle of both a health and employment pandemic. This has been so difficult for so many people and on so many levels. The joy and expectations of the new year have been overwhelmed by fear and trepidation. Many people are not only dealing with the stress of losing their jobs but also with the threat of serious illness within their families. At this writing (early May) there were over 33,382 confirmed cases and 926 deaths attributable to Covid-19 in Texas. This virus is killing people. It may not take your life, but you might be the carrier for the person it does take. Be smart. Wear masks. Respect social distancing and respect the boundaries of others. The life you save may be someone you love.

Adapting to a different world will be the rule of the day. I know these are tough times for many of you. Hang in there. Stay strong. Yes, we have to learn new technologies. Yes, we have to do things differently. Be patient with your family, the people around you, and yourself. Do not quit. Go forward one day at a time. If we can work together, I promise, we will get through this. Also, be aware of the young people around you. Stress and anxiety for kids is already off the charts. Keep an eye on your own kids. Assure them that things will be ok. They will need that from you.

My family and I are doing well and are healthy. Being an Associate Judge in Bexar County has been an honor and a privilege beyond words. I heard my first case in 1989, and for the past 31 years I have thoroughly enjoyed the ride. The people I have worked with have changed my life, and I hope I have had a positive impact on theirs. I am entering a new chapter in my life. The judge of my court has decided to eliminate my position. I have been let go, and it feels strange. I am not completely sure of my future plans, but I will be ok.

I do plan on continuing to be involved in the Juvenile Law Section and, for the time being, continue to be the editor of the Juvenile Law Newsletter. I am also working on a new project; a juvenile law website that I am designing to be an uncomplicated and straightforward juvenile resource. It will have general information to help individuals navigate the complexities of the juvenile justice system. It will also have more concise information to assist lawyers and judges in the more specialized areas of juvenile justice. It will of course have my juvenile caselaw updates, and if I can do this right, have them broken down by category. And because of everything going on, I plan to eventually include juvenile presentations that I am hopeful can be accessed for juvenile CLE credit. I know. It's a lot. But strange and difficult times inspires kindness and resilience.

33rd Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's 33rd Annual Juvenile Law Conference was held February 16-19, 2020, at the San Luis Resort Spa & Conference Center, in Galveston, Texas. Pat Gendron did an outstanding job of having a totally different type of conference. Topics included adverse childhood experiences and trauma-informed care, vaping, sexting, and other topical school offenses. Senator John Whitmire, the longest serving current member of the Texas State Senate gave an inspiring keynote address. The added feature of the conference was discussions regarding high profile cases and multiple perspectives from those involved with the Central Park Five rape case.

34th Annual Robert Dawson Juvenile Law Institute. Should things change, and we are all hoping it will, the 34th Annual Robert Dawson Juvenile Law Institute will be at the Omni San Antonio Hotel at the Colonnade in San Antonio on February 21-24, 2021. Any topic or speaker recommendations should be forwarded to Bill Cox at wcox@epcounty.com

Officers and New Council Members. The election of officers and council members was conducted at our February 17, 2020 meeting and the following constitute our officers and new board members.

Officers
Chair: Patrick Gendron (College Station)
Chair-Elect: Bill Cox (El Paso)
Treasurer: Cyndi Porter Gore (Allen)
Secretary: Kim Dayton (Lubbock)

Council Members with terms ending 2023:
Frank Adler (Arlington)
Jana Jones (Decatur)
Molly Davis (Fort Worth)

When wealth is lost, nothing is lost;
When health is lost, something is lost;
When character is lost, all is lost.

Billy Graham

CHAIR'S MESSAGE By Mike Schneider

The Juvenile Law Section held its 33rd annual conference in Galveston in February. Over 350 people attended from all juvenile law disciplines, including judges, legislators, elected District Attorneys, TJJD staff, probation, law enforcement, and defense – including a defense attorney for an exonerated juvenile defendant in the 1989 Central Park Five case. February, to many of us, seems like a lifetime ago. Since then, the juvenile systems in Texas and across the world have been coping with Covid-19 and its inherent complications. Governor Abbott declared a state of disaster in response to the pandemic for all 254 counties.

Locally, courts around Texas have since been using audio and video technology to assure social distancing in juvenile proceedings and interactions with youth and families.

Statewide, TJJD put a halt to admissions from counties where staff or youth tested positive for Covid-19 on April 2, 2020. By April 14, the agency decided to stop all admissions for several weeks, putting on hold transfers from across Texas. Additionally, TJJD implemented sweeping restrictions to limit access to their facilities by anyone other than attorneys and clergy. During these unprecedented times the agency has expanded virtual and telephonic visitation with youth and their loved ones.

The Supreme Court of Texas stepped up to the plate early on, having, at the time of this writing, released its Twelfth Emergency Order Regarding the Covid-19 State of Disaster. Until June 1, 2020, courts are directed to use all reasonable efforts to conduct proceedings remotely and may require all to participate remotely. Importantly, all non-essential in-person hearings must be delayed until June. The question then becomes, what is an essential juvenile hearing? We know juvenile detention hearings are considered essential. Those wishing to receive more specific guidance as to which juvenile or other hearings are "essential" are encouraged to contact their Regional Presiding Judge or to email coronavirus@txcourts.com.

Next month, the Chair of the Juvenile Law Section of the State Bar of Texas will be Patrick Gendron, who did an outstanding job of putting together this year's Dawson conference. I am honored to have had this opportunity to work with the section and its council for nearly a decade and look forward to further serving the bar and courts. Please be safe.

Juvenile Law Section www.juvenilelaw.org Volume 34, Number 2

REVIEW OF RECENT CASES

By Subject Matter

By Case

RECENT CASES

APPEALS

A COURT OF APPEALS HAS APPELLATE JURISDICTION OVER A DENIED PETITION FOR NON-DISCLOSURE REQUESTING AN ORDER PROHIBITING CRIMINAL-JUSTICE AGENCIES FROM DISCLOSING TO THE PUBLIC HIS CRIMINAL-HISTORY RECORD INFORMATION, SINCE APPELLANT TESTIFIED THAT HE HAS LOST A MINIMUM OF $80,000 IN INCOME OVER THE PAST THREE YEARS DUE TO HIS CRIMINAL-HISTORY INFORMATION, THUS ESTABLISHED AN AMOUNT IN CONTROVERSY THAT EXCEEDS THE JURISDICTIONAL MINIMUM OF $250.

Holland v. State, MEMORANDUM, No. 05-18-00933-CV, Tex. Juv. Rep. Vol 34 No. 2 ¶ 20-2-6A (Tex.App.—Dallas, 3/9/2020).

Facts: Appellant was charged with having committed the offense of aggravated sexual assault. Aggravated sexual assault is a first degree felony. TEX. PENAL CODE ANN. § 21.021(e). The offense was alleged to have occurred on January 3, 2001, when appellant was fourteen years old. Appellant's case was assigned to the juvenile court, where he pleaded no contest, was adjudicated guilty and placed on probation.1 Pursuant to section 54.051 of the family code, appellant's probation was transferred from juvenile court to adult court by order dated August 13, 2004, effective on appellant's eighteenth birthday, September 16, 2004. TEX. FAM. CODE ANN. § 54.051. On November 8, 2007, the district court judge modified the conditions of appellant's community supervision to require appellant to register as a sex offender. See id. § 54.051; TEX. CODE CRIM. PROC. ANN. art. 62.352. On November 5, 2008, appellant moved for discharge from sex offender registration. On May 20, 2009, the district court judge discharged appellant from registering as a sex offender. Thereafter, on January 20, 2010, the trial court approved of appellant changing his address and his community supervision to the State of Oklahoma and later to Henderson County, Texas. Appellant's community supervision was extended to March 15, 2013. On March 15, 2013, the trial court entered an order granting appellant discharge from community supervision.

On September 20, 2017, appellant filed his petition for non-disclosure requesting an order prohibiting criminal-justice agencies from disclosing to the public his criminal-history record information pursuant to former government code section 411.081. The trial court held a hearing on appellant's petition for non-disclosure on July 2, 2018. On July 25, 2018, the trial court denied appellant's petition. This appeal followed.

Held: Affirmed

Memorandum Opinion: We first consider the State's jurisdictional challenge. Article V, section 6 of the Texas Constitution gives this Court jurisdiction over all cases "of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law." TEX. CONST. art. V, § 6(a). In addition, the Texas Constitution vests courts of appeals with "such other jurisdiction, original and appellate, as may be prescribed by law." Id. Thus, an appellate court's jurisdiction must be based on (1) the general constitutional grant, subject to any regulations or restrictions imposed by the legislature; or (2) a specific statutory grant of jurisdiction. Id.; see also Tune v. Tex. Dep't of Pub. Safety, 23 S.W.3d 358, 361 (Tex. 2000).

We first look to the non-disclosure of criminal history statute itself to see whether it contains a specific grant of jurisdiction to the courts of appeals. See former TEX. GOV'T CODE ANN. § 411.081. This statute does not specifically provide this Court with jurisdiction. Accordingly, this Court's jurisdiction over this appeal, if any, must be based on the general constitutional grant as restricted by the legislature. General appellate jurisdiction of courts of appeals is limited to cases where the amount in controversy or the judgment rendered exceeds $250, exclusive of interests and costs. TEX. CIV. PRAC. & REM. CODE ANN. § 51.012; GOV'T § 22.220(a). While the amount in controversy is frequently determined by the damages sought, that is not always so. Brannon v. Pacific Employers Inc. Co., 224 S.W.2d 466, 468–69 (Tex. 1949). The subjective value of a privilege, if asserted in good faith, establishes jurisdiction if that value meets the requisite amount in controversy. Tune, 23 S.W.3d at 362 (citing Long v. Fox, 625 S.W.32d 376, 378 (Tex. App.—San Antonio 1981, writ ref'd n.r.e.)).

On December 18, 2019, this Court requested that appellant provide a supplemental factual explanation, consistent with Tune, as to the claimed good-faith subjective value to him of the relief requested in this case. See GOV'T § 22.220(c). On January 14, 2020, appellant provided this Court with his affidavit stating he has an engineering degree and that, because of the records concerning the sexual abuse of a child offense, he has been denied employment in the engineering field and has had to accept work at a salary that is much lower than his education warrants.

Conclusion: He indicates that he has lost a minimum of $80,000 in income over the past three years due to his criminal-history information. Appellant has thus established an amount in controversy that exceeds the jurisdictional minimum of $250. See e.g., Harris v. State, 402 S.W.3d 758, 763 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

CRIMINAL PROCEEDINGS

SINCE THE FAMILY CODE DOES NOT EXCLUDE STATE-JAIL FELONIES FROM THE WORDS "FELONY OFFENSE" THAT MAY LATER BE USED FOR SENTENCE-ENHANCEMENT PURPOSES, A JUVENILE

Juvenile Law Section www.juvenilelaw.org Volume 34, Number 2

ADJUDICATION, EVEN THOUGH BASED ON CONDUCT CLASSIFIED AS A STATE-JAIL FELONY IN THE PENAL CODE, COULD VALIDLY BE USED TO ENHANCE THE AVAILABLE PUNISHMENT RANGE UNDER SECTION 12.425(B) OF THE PENAL CODE.

Hestand v. State, No. 02-18-00334-CR, --- S.W.3d ----, 2020 WL 938153, Tex. Juv. Rep. Vol 34 No. 2 ¶ 20-2-5 (Tex.App.—Ft. Worth, 2/27/2020).

Facts: Appellant Dustin Wade Hestand appeals from his fifteen-year sentence arising from his conviction for possession of less than one gram of methamphetamine. In a single issue, he argues that the available punishment range was invalidly enhanced from a state-jail felony to a second-degree felony partially based on a prior juvenile adjudication. On original submission, we determined that Hestand had procedurally defaulted this issue; the Court of Criminal Appeals vacated our judgment, explaining that Hestand was raising an illegal-sentence claim that could be raised for the first time on appeal.

Held: Affirmed

Opinion on Remand: Under certain circumstances, an adjudication in juvenile court may be used as a prior felony conviction to enhance the available punishment range in later criminal proceedings. See Tex. Fam. Code Ann. § 51.13(d). If a child is adjudged to have engaged in conduct constituting "a felony offense" and if the child is committed to a TJJD facility, the juvenile adjudication "is a final felony conviction only for the purposes of ...Section 12.425, Penal Code." Id. Section 12.425, in turn, provides that a state-jail felony may be enhanced for punishment purposes to a second-degree felony if "the defendant has previously [and sequentially] been finally convicted of two felonies other than a state jail felony." Tex. Penal Code Ann. § 12.425(b).

Hestand asserts that because unauthorized use of a motor vehicle is classified as a state-jail felony in the Penal Code, his juvenile adjudication based on his commission of that offense cannot be used for sentencing-enhancement purposes. Hestand is not arguing that juvenile adjudications can never be used to enhance punishment; he asserts that his 2001 juvenile adjudication cannot be used to enhance his punishment for the primary offense because the prior adjudication was based on a state-jail felony, which cannot be used to enhance punishment. See id.; see also Hestand v. State, 587 S.W.3d 409, 410–11 (Tex. Crim. App. 2019) (Yeary, J., dissenting) ("Appellant has never argued that the use of his juvenile adjudication to enhance his punishment to a second-degree felony was improper because it was only a juvenile adjudication per se. His position on appeal has been, consistently, that even if a juvenile adjudication may count as a 'final felony conviction' for purposes of Section 12.425(b), a juvenile adjudication for what amounts to a state-jail felony does not.").

Statutory construction is an issue of law that we review de novo. Curry v. State, No. PD-0577-18, 2019 WL 5587330, at *4 (Tex. Crim. App. Oct. 30, 2019). We are guided by the language used and, if unambiguous, must "effectuate that plain language." Id.; see also Tex. Penal Code Ann. § 1.05(a) (providing construction of Penal Code must be according to terms' "fair import"); Arteaga v. State, 521 S.W.3d 329, 334 (Tex. Crim. App. 2017) (holding courts look first to plain language in statutory construction). Here, the Family Code clearly provides that a juvenile adjudication based on conduct constituting a "felony offense" may later be used for sentence-enhancement purposes under Section 12.425(b) if the adjudication resulted in a commitment to the TJJD. Tex. Fam. Code Ann. § 51.13(d). In the Penal Code, a felony is defined as "an offense so designated by law or punishable by death or confinement in a penitentiary," and state-jail felonies are expressly classified as felonies. Tex. Penal Code Ann. §§ 1.07(a)(23), 12.04(a); see Garrett v. State, 377 S.W.3d 697, 704 n.29 (Tex. Crim. App. 2012) (concluding state-jail felonies are governed by community-supervision provisions applicable to felonies); Tapps v. State, 294 S.W.3d 175, 178–79 (Tex. Crim. App. 2009) (holding prior state-jail felony may be used to secure later conviction for possession of a firearm by a felon and stating "state-jail felonies are felonies unless the language of the particular statute in question indicates otherwise").

As the State points out, portions of the Juvenile Justice Code do not differentiate between state-jail felonies and felonies of degree, instead referring to felony offenses generally. See, e.g., Tex. Fam. Code Ann. §§ 51.03(a)(1), 51.13(d), 54.0401(c)(2), 54.04013. Other sections indicate that when the legislature intended to exclude state-jail felonies from the operation of a particular provision, it clearly did so. See, e.g., id. §§ 51.031(a), 52.031(a), 53.045, 54.02(a). In the context of Section 51.13(d), nothing indicates that the legislature intended for the words "felony offense" to exclude state-jail felonies, especially given the inclusive definition and classification of felonies in the Penal Code. See Garrett, 377 S.W.3d at 704 n.29; see also Tex. Gov't Code Ann. § 311.011(a) (mandating statutory words and phrases to be construed in context); Tex. Penal Code Ann. § 1.05(b) (recognizing applicability of Government Code Section 311.011 to construction of Penal Code).

The only express prerequisites for juvenile adjudications to later qualify as a state-jail-felony sentencing enhancement are that the adjudication must have been based on a felony offense and must have resulted in the child's commitment to the TJJD under specified circumstances. See 29 Thomas S. Morgan & Harold C. Gaither Jr., Texas Practice: Juvenile Law and Practice § 13:27 (3d ed. 2019). Hestand's 2001 juvenile commitment order contained both. See Tex. Fam. Code Ann. § 54.04(d)(2). Under the plain language of Section 51.13(d), Hestand's 2001 juvenile adjudication, even though based on conduct classified as a state-jail felony in the Penal Code, could validly be

used to enhance the available punishment range under Section 12.425(b).

The State recognizes in its brief that the Amarillo Court of Appeals has reached an opposite conclusion. In Fortier v. State, Jody Lewis Fortier was charged with the second-degree felony offense of burglary of a habitation. 105 S.W.3d 697, 698 (Tex. App.—Amarillo 2003, pet. ref'd) (op. on reh'g). The indictment contained two enhancement paragraphs—Fortier's prior convictions for burglary of a building and for "unlawfully using a motor vehicle." Id. Fortier pleaded guilty to the charged offense, the State waived the burglary-of-a-building enhancement, Fortier pleaded true to the unlawful-use enhancement, and the trial court deferred adjudicating his guilt and placed him on community supervision. Id. The State later moved to adjudicate Fortier's guilt, and the trial court admonished Fortier that if his guilt were adjudicated, he would be subject to first-degree felony punishment based on the enhancement paragraph. Id. at 698–99. The trial court revoked Fortier's community supervision, adjudicated him guilty of burglary of a habitation, and sentenced him to seventeen years' confinement. Id. at 699. The court of appeals held that because the enhancement allegation involved a state-jail felony, it could not be used to enhance the punishment range available for the burglary offense under the plain language of Section 12.42(d). Id. at 699–700.

On the State's further motion for rehearing, the court of appeals clarified that the unlawful-use conviction arose in the context of a juvenile adjudication but rejected the State's argument that the juvenile adjudication was a final felony conviction under the Family Code that was eligible to be used for sentencing enhancement under Section 12.42(f). Id. at 701 (op. on further reh'g). The court concluded that because the adjudicated delinquent conduct involved the unauthorized use of a motor vehicle, a state-jail felony, it could not be used for enhancement purposes under Section 12.42(e). Id. at 701–02.

As Judge Kevin Yeary, joined by Judge Michelle Slaughter, noted in a dissent in the instant case, Fortier "did not speak to the enhancement of primary offenses that are state-jail felonies" as is at issue in the instant case. Hestand, 587 S.W.3d at 411 n.3 (Yeary, J., dissenting). Judge Yeary also recognized that Fortier was decided "before Section 12.425 even existed," and "largely relied upon former Section 12.42(e), which was repealed in 2011, in the same legislative act that created Section 12.425." Id. Further, the Amarillo Court of Appeals did not specifically address Section 51.13(d) or analyze its specific language allowing juvenile adjudications to be used as punishment enhancements in specified circumstances. We find Fortier to be unpersuasive here because we must focus on the plain language of the statutes at issue. See, e.g., Curry, 2019 WL 5587330, at *4. The court in Fortier was not asked to address the statutory language at issue today and was not presented with the same factual context that we look at today.

Conclusion: Although Hestand's 2001 juvenile adjudication was based on the commission of a state-jail felony, Section 51.13(d) of the Family Code allows juvenile adjudications based on "a felony offense," regardless of degree, to subsequently be used to enhance a state-jail felony offense's punishment range under Section 12.425(b) of the Penal Code. Accordingly, we conclude that Hestand's sentence was not illegally enhanced partially through the use of the 2001 juvenile adjudication, which arose from the commission of a felony offense and resulted in Hestand's indeterminate commitment to a TJJD facility. We overrule Hestand's appellate issue and affirm the trial court's judgment. See Tex. R. App. 43.2(a).

EVIDENCE

SINCE AN ERRONEOUS ADMISSION OF OUTCRY TESTIMONY IS CONSIDERED A NON-CONSTITUTIONAL ERROR, REVERSAL IS NOT APPROPRIATE IF, AFTER EXAMINING THE RECORD AS A WHOLE, THERE ARE FAIR ASSURANCES THAT THE ERROR EITHER DID NOT INFLUENCE THE JURY OR INFLUENCE THE JURY ONLY SLIGHTLY.

In the Matter of J.M.S., MEMORANDUM, No. 09-19-00086-CV, 2020 WL 1056935, Tex. Juv. Rep. Vol 34 No. 2 ¶ 20-2-7 (Tex.App.—Beaumont, 3/5/2020).

Facts: The State's petition alleged that J.M.S. engaged in delinquent conduct by committing indecency with a child against H.P. by touching H.P.'s genitals. H.P., who was four years old at the time of trial, testified that J.M.S. touched her "lulu," and the record reflects that H.P. made a gesture indicating a particular part of her body. Kim Hanks, forensic interview supervisor and multi-disciplinary team coordinator at Garth House Child Advocacy Center, testified that she interviewed H.P., and she explained that H.P. used the word "lulu" to refer to her vaginal area. According to Hanks, when she gave H.P. a doll, H.P. pulled the doll's underwear away and put her hand inside to show what had happened. Hanks explained that when H.P., who was three years old at the time of the interview, demonstrated on the doll, she was touching "[t]he place she calls a lulu." According to Hanks, H.P. stated that her clothes were on when the touching occurred.

H.P.'s grandmother, M.G., testified that she believed the accusation against J.M.S. was false. M.G. explained that she is also J.M.S.'s grandmother, and H.P. and J.M.S. are cousins. According to M.G., the only time J.M.S. was not in her sight on the day in question is when he was outside, "but there were adult eyes on him out there." H.P.'s father testified that J.M.S. and H.P. were never alone together on the date in question, and he explained that he had "[n]o hesitation at all[ ]" in telling the jury that the alleged conduct did not occur. On cross-examination, H.P.'s father testified that

Juvenile Law Section www.juvenilelaw.org Volume 34, Number 2

there were times when both J.M.S. and H.P. were not in his sight. J.M.S.'s father, R.S., testified that he believes H.P. was coached because H.P.'s mother and father were "going through a bad divorce[.]"

H.P.'s mother, B.L., testified that while she was bathing H.P., she noticed a rash on the inside of H.P.'s legs. B.L. explained that when she tried to examine the rash, H.P. locked her legs and became angry, and when B.L. asked H.P. whether someone had touched her, H.P. screamed J.M.S.'s name. B.L. testified that she did not question H.P. further about what had happened, and B.L. made a police report the next day and then took H.P. to the hospital for a sexual assault examination. B.L. testified that she also took H.P. to Garth House for an interview. B.L. explained that she has not tried to cut off H.P.'s relationship with her father, and she testified that she never told H.P. to say that J.M.S. touched her. Forensic nurse and certified sexual assault nurse examiner Rachel Thomas testified that during her physical examination of H.P.'s genital area, H.P. told her that J.M.S. touched her there with his hand, and H.P. pointed to her genitalia. The State rested at the conclusion of Thomas's testimony.

Psychiatrist Dr. Edward Gripon testified that he performed a standard psychiatric examination of J.M.S., who was almost fourteen years old at that time, and Gripon found "no evidence of a mental condition[.]" Gripon testified that he had seen the video recording of the interview of H.P. at Garth House, and he opined that H.P. appeared to be an "essentially normal" three-year-old child. According to Gripon, H.P. "was more interested in wiping the eraser on the board than ... the questions that were being asked[,]" and she sometimes gave contradictory answers. Gripon testified that the reliability of a child H.P.'s age is "low." J.M.S., who was fourteen years old at the time of the trial, testified that he was never alone with H.P. on the date in question. J.M.S. denied touching H.P.'s genitals.

Section 21.11 of the Texas Penal Code provides that a person commits the offense of indecency with a child when he engages in sexual contact with a child or causes the child to engage in sexual contact. Tex. Penal Code Ann. § 21.11(a)(1). The Penal Code defines "sexual contact" as, among other things, "any touching by a person, including touching through clothing, of ... any part of the genitals of a child[.]" Id. § 21.11(c)(1). The "sexual contact" must have been "committed with the intent to arouse or gratify the sexual desire of any person[.]" Id. § 21.11(c).

H.P. testified that J.M.S. touched her "lulu," and her gestures presumably indicated that area. See Wawrykow v. State, 866 S.W.2d 87, 90 (Tex. App.—Beaumont 1993, pet. ref'd); Gaona v. State, 733 S.W.2d 611, 613 n. 1 (Tex. App.—Corpus Christi 1987, pet. ref'd) (holding that when parties do not elicit for the record details explaining the meaning of demonstrations, the appellate court presumes the demonstrations supported the jury's verdict). Hanks testified that when she interviewed H.P. and gave her a doll, H.P. put her hand inside the doll's underwear to demonstrate what had happened. Hanks also explained that H.P. used the term "lulu" to refer to her vaginal area. In addition, B.L. testified that H.P. told her that J.M.S. had touched her.

In issue one, J.M.S. argues that the trial judge erred by ruling that Hanks was not a proper outcry witness and permitting outcry testimony from B.L. when the State had, by amending its pleadings, abandoned B.L. as an outcry witness. J.M.S. asserts that the trial judge's designation of B.L. as the outcry witness placed the judge "in an adversarial role and allowed for improper hearsay testimony."

Held: Affirmed

Memorandum Opinion: The record reflects that the State listed B.L. as an outcry witness on its amended discovery compliance dated December 26, 2018. However, the record also reflects that in its amended notice of intent to introduce the hearsay statements of a child abuse victim, filed on January 7, 2019, the State identified Hanks as the witness through whom it intended to introduce H.P.'s outcry. During a pretrial hearing, the trial court noted the State's intention to present Hanks as its outcry witness, and the State then took Hanks on voir dire examination. Hanks explained that she interviewed H.P., and Hanks acknowledged that the first person over age eighteen to whom H.P. made an outcry was her mother.

Defense counsel objected that under section 38.072 of the Texas Code of Criminal Procedure, the outcry witness can only be the first adult to whom the child made a statement regarding the abuse. See Tex. Code Crim. Proc. Ann. art. 38.072, § 2(a), (b)(1)(A); see also Tex. Fam. Code Ann. § 54.031 (parallel provision in the Juvenile Justice Code). The State asserted that B.L. is not the outcry witness because case law provides that the victim's statement about the abuse must give more than "a general allusion of sexual abuse[;]" rather, the victim must clearly describe the abuse. The State argued that H.P. "just made a general allusion saying that [J.M.S.] touched me there, and it hurt." Defense counsel contended that the victim made "a very specific statement[ ]" that J.M.S. had touched her vaginal area.

The trial judge stated, "I'm going to find that the statement to the mother was enough; and I will consider the mother to be the outcry witness, and I'll allow the State to call the mother as the outcry witness." Defense counsel then asserted that the State's amended notice, in which it had named Hanks as the outcry witness, superseded the prior notice that had named B.L. The trial judge stated, "I will rule that the mother should be the outcry witness. She was initially named as the outcry witness.... They may have amended it. I don't dispute that, but I'm not going to completely shut them out." The trial judge stated that defense counsel had "just argued for five minutes that you relied on their discovery that the mother was the

outcry witness." Defense counsel again objected to B.L. being allowed to testify as an outcry witness.

The erroneous admission of outcry testimony under article 38.072 is a non-constitutional error. Merrit v. State, 529 S.W.3d 549, 556 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). Therefore, we must disregard such an error unless it affected J.M.S.'s substantial rights. See Tex. R. App. P. 44.2(b); see also Tex. R. Evid. 103(a). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." King v. State, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Reversal is not appropriate if, after examining the record as a whole, we have fair assurance that the error either did not influence the jury or influenced the jury only slightly. Schutz v. State, 63 S.W.3d 442, 444 (Tex. Crim. App. 2001).

Conclusion: Assuming, without deciding, that the trial court abused its discretion by permitting B.L. to testify as an outcry witness, viewing the record as a whole, we cannot say that J.M.S.'s substantial rights were affected. H.P. testified that J.M.S. touched her vaginal area, and Hanks testified that H.P. pulled a doll's underwear away and put her hand inside to show what had happened to her. After examining the entire record, we have fair assurance that the admission of B.L.'s testimony as an outcry witness did not influence the jury or influenced the jury only slightly. See id. at 444. Accordingly, we overrule issue one. Having overruled each of J.M.S.'s issues, we affirm the trial court's judgment.

SEX OFFENDER REGISTRY

EVEN THOUGH DEFERRED ADJUDICATION IS NOT AVAILABLE AS A JUVENILE, APPELLANT WHO IS PLACED ON ORDINARY PROBATION IS NOT ENTITLED TO PETITION FOR AN ORDER OF NON-DISCLOSURE EVEN WHERE HE WAS NOT REQUIRED TO REGISTER AS A SEX OFFENDER.

Holland v. State, MEMORANDUM, No. 05-18-00933-CV, Tex. Juv. Rep. Vol 34 No. 2 ¶ 20-2-6B (Tex.App.—Dallas, 3/9/2020).

Facts: Appellant was charged with having committed the offense of aggravated sexual assault. Aggravated sexual assault is a first degree felony. TEX. PENAL CODE ANN. § 21.021(e). The offense was alleged to have occurred on January 3, 2001, when appellant was fourteen years old. Appellant's case was assigned to the juvenile court, where he pleaded no contest, was adjudicated guilty and placed on probation. Pursuant to section 54.051 of the family code, appellant's probation was transferred from juvenile court to adult court by order dated August 13, 2004, effective on appellant's eighteenth birthday, September 16, 2004. TEX. FAM. CODE ANN. § 54.051. On November 8, 2007, the district court judge modified the conditions of appellant's community supervision to require appellant to register as a sex offender. See id. § 54.051; TEX. CODE CRIM. PROC. ANN. art. 62.352. On November 5, 2008, appellant moved for discharge from sex offender registration. On May 20, 2009, the district court judge discharged appellant from registering as a sex offender. Thereafter, on January 20, 2010, the trial court approved of appellant changing his address and his community supervision to the State of Oklahoma and later to Henderson County, Texas. Appellant's community supervision was extended to March 15, 2013. On March 15, 2013, the trial court entered an order granting appellant discharge from community supervision.

On September 20, 2017, appellant filed his petition for non-disclosure requesting an order prohibiting criminal-justice agencies from disclosing to the public his criminal-history record information pursuant to former government code section 411.081.4 The trial court held a hearing on appellant's petition for non-disclosure on July 2, 2018. On July 25, 2018, the trial court denied appellant's petition. This appeal followed.

Held: Affirmed

Memorandum Opinion: Appellant urges this Court to reverse the trial court's order because the trial court did not (1) consider whether it is in the best interest of justice that he be granted non-disclosure, (2) make a finding on the record that the petition for non-disclosure was denied, and (3) consider that appellant was entitled to non-disclosure because he was not required to register as a sex offender. The State urges this Court to affirm the trial court's order asserting appellant was not entitled to petition for non-disclosure under former government code section 411.081(d), (e) because appellant was placed on ordinary probation, not deferred adjudication probation. For the reasons set forth herein, we agree with the State.

As identified by the State, the threshold issue presented in this case is whether appellant was entitled to petition for non-disclosure. That inquiry hinges on statutory construction, something we review de novo and with the primary objective being to ascertain and to give effect to the legislature's intent as expressed in the statute. See Liberty Mut. Ins. Co. v. Adcock, 412 S.W.3d 492, 494 (Tex. 2013). We read statutes according to their plain language and assume that each word used has a purpose. See Boston v. State, 410 S.W.3d 321, 325 (Tex. Crim. App. 2013). Former government code section 411.081(d) provided, if a person is placed on deferred adjudication community supervision for an offense for which an order of non-disclosure may be issued and subsequently receives a discharge and dismissal and satisfies various requirements, the person may petition the court for an order of nondisclosure. See former GOV'T § 411.081.

The record before us shows appellant received ordinary probation, not deferred adjudication. Appellant conceded this point in his petition, but urges that he

Juvenile Law Section www.juvenilelaw.org Volume 34, Number 2

should be entitled to petition for an order of non-disclosure because deferred adjudication was not available to him under juvenile law. Appellant cites no authority to support an extension of the legislature's express limitation of the statute's reach to persons who are placed on deferred adjudication to him and we have found none.

Conclusion: Because appellant was placed on ordinary probation and not deferred adjudication, he was not entitled to petition for an order of non-disclosure and his complaints concerning various findings and his assertion, contrary to the record, that he was entitled to non-disclosure because he was not required to register as a sex offender are moot. We overrule appellant's issues. We affirm the trial court's order denying appellant's petition for non-disclosure of criminal-history records.

SUFFICIENCY OF THE EVIDENCE

UNLIKE THE OFFENSE OF PROSTITUTION, WHICH REQUIRES PROOF THAT THE ACCUSED REACHED AN AGREEMENT WITH ANOTHER PERSON TO ENGAGE IN SEXUAL CONDUCT OR OFFERED TO REACH SUCH AN AGREEMENT, THE LEGAL INABILITY TO "CONSENT TO SEX" DOES NOT RENDER A PERSON ILLEGALLY INCAPABLE OF COMMITTING THE OFFENSE OF AGGRAVATED SEXUAL ASSAULT.

State v. R.R.S., No 17-0819, --- S.W.3d ----, 2020 WL 1482585, Juv. Rep. Vol 34 No. 2 ¶ 20-2-9 (Tex.Sup.Ct, 3/27/2020).

Facts: Under Texas law, a child younger than fourteen cannot legally "consent to sex" and thus, as a matter of law, cannot commit the offense of prostitution. In re B.W., 313 S.W.3d 818, 822 (Tex. 2010). But can a child under fourteen commit the offense of aggravated sexual assault? In this juvenile-delinquency case, R.R.S. pleaded "true" to allegations that he sexually assaulted his younger brothers when he was thirteen years old. Based on his admissions and plea, the trial court found him delinquent. But before the disposition hearing, R.R.S. filed a motion to withdraw his plea and requested a new trial. The trial court denied the motion. The court of appeals reversed, finding the trial court abused its discretion because R.R.S. was not adequately informed about his potential defenses when he entered his plea, particularly the defense that he could not have committed aggravated sexual assault because he could not legally "consent to sex." 536 S.W.3d 67, 80 (Tex. App.—El Paso 2017).

Relying on B.W., the court of appeals concluded here that, because "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." 536 S.W.3d at 78. The court then concluded that aggravated sexual assault qualifies as such an offense because the aggravated sexual assault statute was "central to [B.W.'s] holding ... that the Legislature did not intend to prosecute children under fourteen for offenses that include legal capacity to consent to sex." Id.4 The court thus concluded that R.R.S. did not "make a voluntary, knowing, and informed waiver of his constitutional rights" because he was not fully "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." Id. at 80.

Held: Reversed

Opinion: While we agree that section 22.021 (the aggravated sexual assault statute) was "central" to our decision in B.W., our reasoning in B.W. does not support the court of appeals' ultimate conclusion. We explained in B.W. that sections 22.021 (the aggravated sexual assault statute) and 22.011 (the sexual assault statute) confirm the legislature's recognition that children under fourteen cannot "consent to sex," but we never suggested that either of those statutes requires proof that the accused consented to sex. Rather, we explained that the statutes confirm the legislature's recognition that children under fourteen cannot consent to sex by providing no defense when the victim is younger than fourteen. B.W., 313 S.W.3d at 821. Whether a child's legal inability to consent to sex renders the child incapable of committing a particular offense depends on whether the accused's consent is an element of the offense,5 not whether the victim's consent may provide a defense.

Similar to the offense of prostitution, the offense of aggravated sexual assault requires that the accused acted "intentionally or knowingly." Compare TEX. PENAL CODE § 22.021 (requiring that the accused act "intentionally or knowingly" to commit aggravated sexual assault) with id. § 43.02 (requiring that the accused act "knowingly" to commit prostitution). A person acts "intentionally" when "it is his conscious objective or desire to engage in the conduct or cause the result," and acts "knowingly" when "he is aware of the nature of his conduct or that the circumstances exist ... [or] that his conduct is reasonably certain to cause the result." Id. § 6.03. Both offenses require a similar desire or awareness on the accused's part, but the distinction lies in what the offenses require the accused to be aware of.

As we explained in B.W., a person commits the offense of prostitution when the person "knowingly offers to engage, agrees to engage, or engages in sexual conduct for a fee." B.W., 313 S.W.3d at 820 (quoting TEX. PENAL CODE § 43.02(a)(1)).6 The offense requires not just that the person engaged in sexual conduct, but that the person engaged in sexual conduct, or offered or agreed to do so, as part of an agreed exchange with another ("for a fee"). As we repeatedly noted throughout our opinion in B.W., the offense of prostitution requires that the accused reached, or offered to reach, some form of "agreement" with the other person to engage in sexual conduct. See B.W., 313 S.W.3d at 819 (noting that B.W. admitted she had "knowingly agree[d] to

engage in sexual conduct ... for a fee") (emphasis added), 820 (explaining that " 'knowing agree[ment]' suggests agreement with an understanding of the nature of what one is agreeing to do" and that "younger children lack the capacity to appreciate the significance or the consequences of agreeing to sex") (emphasis added), 821–22 (rejecting idea that children under fourteen can "understand the nature and consequences of their conduct when they agree to commit a sex act for money") (emphasis added), 822 (relying on the "longstanding rule that children under fourteen lack the capacity to understand the significance of agreeing to sex") (emphasis added).

The requirement that the accused "agreed" or offered to "agree" with another person is what makes the accused's ability to "consent to sex" essential to the offense of prostitution. While proving consent (or a lack of consent) to sexual conduct is often difficult and may depend on a wide variety of circumstances,7 an agreement or mutual assent between two or more persons lies at the heart of what it means to "consent." See, e.g., Consent, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose...."). As we explained in B.W., younger children cannot commit the offense of prostitution because they "lack the capacity to appreciate the significance or the consequences of agreeing to sex, and thus cannot give meaningful consent." B.W., 313 S.W.3d at 820 (emphases added). Because they "lack the capacity to understand the significance of agreeing to sex," and thus "cannot consent to sex as a matter of law," the child's "agreement" required to commit prostitution cannot "reach the 'knowingly' standard the statute requires." Id. at 822 (emphasis added).

The offense of aggravated sexual assault, by contrast, does not require that the accused reach or offer to reach any kind of agreement with the other person. To the contrary, the offense only occurs if there is no agreement between the accused and the other person. TEX. PEN. CODE § 22.021. Under section 22.011, a person commits a sexual assault if the person intentionally or knowingly (A) "causes the penetration of the anus or sexual organ of another person by any means," (B) "causes the penetration of the mouth of another person by the sexual organ of the actor," or (C) "causes the sexual organ of another person ... to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor." Id. § 22.011(a)(1). If the other person is an adult, the conduct constitutes sexual assault if the accused acts "without that person's consent," id., but if the other person is a child under seventeen, the conduct constitutes sexual assault regardless of whether the other person consented, id. § 22.011(a)(2), (c)(1); see Hernandez v. State, 861 S.W.2d 908, 909 (Tex. Crim. App. 1993) (en banc) ("[C]onsent (or nonconsent) is not an element in proving [sexual assault under section 22.011(a)(2)]."). And if the other person is younger than fourteen, the accused cannot assert any consent-based defenses, and the offense is elevated to an aggravated sexual assault. Id. §§ 22.011(c), .021(a)(2)(B). In short, whether the accused committed a sexual assault or an aggravated sexual assault may depend on whether the other person agreed with the accused to engage in the conduct, but it does not depend on whether the accused agreed with the other person to do so.

Here, the State alleged, and R.R.S. admitted, that he caused his sexual organ to penetrate his five-year-old brother's anus and caused his other five-year-old brother's sexual organ to penetrate R.R.S.'s mouth. Such conduct constitutes aggravated sexual assault under section 22.021(a) regardless of whether either party consented or "agreed" to the conduct. All that the statute requires is that R.R.S. "desire[d] to engage in the conduct or cause the result" or was "aware that his conduct [was] reasonably certain to cause the result." Id. § 6.03(a), (b).

Conclusion: Unlike the offense of prostitution, which requires proof that the accused reached an agreement with another person to engage in sexual conduct or offered to reach such an agreement, R.R.S.'s legal inability to "consent to sex" did not render him illegally incapable of committing the offense of aggravated sexual assault. As a result, the court of appeals erred in holding that R.R.S.'s lack of knowledge of his inability to consent to sex required the trial court to grant his motion to withdraw his plea and for a new trial.

A PERSON CANNOT BE CONVICTED FOR THE OFFENSE OF COMPELLING-PROSTITUTION OR TRAFFICKING A CHILD BASED ON PROSTITUTION, IF THE PERSON BEING COMPELLED INTO PROSTITUTION IS YOUNGER THAN 14 YEARS OF AGE BECAUSE AS A MATTER OF LAW THEY CANNOT COMMIT THE OFFENSE OF PROSTITUTION.

Turley v. State, No. 14-18-00235-CR, No. 14-18-00236-CR, --- S.W.3d ----, 2020 WL 1183159, Juv. Rep. Vol 34 No. 2 ¶ 20-2-8 [Tex.App.—Houston (14th Dist.), 3/12/2020].

Facts: Appellant posted a Craigslist ad captioned "Play with Daddy's Little Girl." An undercover officer in the Houston Police Department's vice division came across the ad in the "male woman for male sex" category of the "casual encounter" section. The officer began to e-mail and later texted back and forth with appellant. Based on appellant's responses and the pictures he sent, the officer suspected that appellant "was pimping out a small girl" who appeared to be no older than six.

Appellant proposed a "meet up" for a sexual encounter with his daughter as long as the officer was "generous." The officer proposed "a thousand dollars for two hours." Appellant let the officer know that he would "host" "a safe apartment," the apartment of his daughter's mother. The officer assured appellant he would bring the "gift," meaning the cash payment.

Juvenile Law Section www.juvenilelaw.org Volume 34, Number 2

On the morning of November 12, 2015, appellant gave his daughter a "sleep aid" and told the officer to come over. Appellant met the officer in the parking lot, and they went to the apartment. Appellant took the officer into his daughter's bedroom, where she was sleeping on the bed, wearing only a pajama top. Once the officer saw the child, he used a prearranged code phrase to signal backup officers to enter the apartment. Police determined appellant's daughter was four-years old and arrested appellant.

Appellant's issues challenge the sufficiency of the evidence to support his convictions for (1) compelling prostitution of a child younger than 18 and (2) trafficking a child based on compelling prostitution.

Held: Reversed and Rendered

Majority Opinion by Justice Charles A. Spain:
At the time of the alleged offenses, November 2015, subsection (a)(2) of the compelling-prostitution statute provided: "A person commits an offense if the person knowingly ... causes by any means a child younger than 18 years to commit prostitution, regardless of whether the actor knows the age of the child at the time the actor commits the offense." We subsequently refer to this statute as the 2015 Compelling-Prostitution Statute.

Appellant's indictment alleged that on or about November 12, 2015, he knowingly caused by any means S.E.B., a person younger than 18 years of age, to commit prostitution. Appellant's jury charge tracked his indictment and the statute.

Appellant argues that "[b]ecause the complainant was four years old at the time of this incident, she could not commit prostitution, as a matter of law." Appellant therefore contends he could not commit the offense of compelling prostitution of a child under the 2015 Compelling-Prostitution Statute.

We certainly recognize that in prosecuting its case the State presented evidence of appellant's seriously disturbing conduct concerning his own very young daughter. But the legal issue is whether a rational jury could have found all the essential elements of the offense for which appellant was charged and tried—compelling prostitution of a child—beyond a reasonable doubt. Based on the plain and unambiguous language of the statute, we must agree with appellant that the evidence is insufficient to support a crucial element of his conviction for compelling prostitution of a child.

Here, the legal-sufficiency issue turns on the meaning of the statute under which appellant has been prosecuted. See Liverman v. State, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015) (citing Moore v. State, 371 S.W.3d 221, 227 (Tex. Crim. App. 2012)); Clinton v. State, 354 S.W.3d 795, 799 (Tex. Crim. App. 2011) (two steps in legal-sufficiency analysis are, first, determining essential elements of crime with appropriate statutory interpretation, and second, conducting sufficiency review). Statutory construction is a question of law that we review de novo. Ramos v. State, 303 S.W.3d 302, 306 (Tex. Crim. App. 2009). When interpreting statutes, "we seek to effectuate the collective intent or purpose of the legislators who enacted the legislation." Boykin v. State, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (internal quotation marks omitted). We focus our attention on the literal text of the statute in question and "attempt to discern the fair, objective meaning of that text at the time of its enactment." Id. When statutory language is clear and unambiguous, we give effect to its plain meaning unless to do so would lead to absurd consequences that the legislature could not possibly have intended. Id. We do not resort to extratextual factors unless the language is ambiguous, meaning it is not plain. Yazdchi v. State, 428 S.W.3d 831, 838 (Tex. Crim. App. 2014). In interpreting the literal text of a statute, we "presume that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible." State v. Hardy, 963 S.W.2d 516, 520 (Tex. Crim. App. 1997).

Subsection (a)(2) of the 2015 Compelling-Prostitution Statute plainly and expressly states that the offense of compelling prostitution is committed when (1) a person (2) knowingly (3) causes by any means (4) a child younger than 18 (5) to commit prostitution. Both appellant's indictment and jury charge on compelling prostitution essentially included all these elements.

Appellant contends that a child under the age of 14 cannot commit the offense of prostitution, focusing on S.E.B.'s legal inability as a four-year-old to commit that offense. In other words, appellant argues that in the case of a four-year-old, the State could never meet element (5) by proving the child "committed prostitution." We agree.

At the time of the alleged offenses, the prostitution statute provided:
(a) A person commits an offense if, in return for receipt of a fee, the person knowingly:
(1) offers to engage, agrees to engage, or engages in sexual conduct; or
(2) solicits another in a public place to engage with the actor in sexual conduct for hire.
(b) A person commit an offense if, based on the payment of a fee by the actor or another person on behalf of the actor, the person knowingly:
(1) offers to engage, agrees to engage, or engages in sexual conduct; or
(2) solicits another in a public place to engage with the actor in sexual conduct for hire.
We subsequently refer to this statute as the 2015 Prostitution Statute.11

As a practical matter, based on her age, S.E.B. could not have been prosecuted for or convicted of the criminal offense of prostitution. See Tex. Penal Code Ann. § 8.07.12 Likewise, based on her age, S.E.B. could not have been subjected to proceedings for delinquent

conduct for the offense of prostitution under the juvenile justice code. See Tex. Fam. Code Ann. § 51.03(a).

However, regardless of whether the State is barred by statute from bringing criminal or juvenile proceedings against a child complainant for the offense of prostitution, subsection (a)(2) of the 2015 Compelling-Prostitution Statute plainly indicates and requires the State prove as an essential element that the child "commit prostitution." When a statute uses an undefined term, we may consult dictionary definitions to determine the term's plain meaning. See Tex. Gov't Code Ann. § 311.011(a) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."); Clinton, 354 S.W.3d at 800. However, "words or phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Code Construction Act, Tex. Gov't Code Ann. § 311.011(b); see Yazdchi, 428 S.W.3d at 837. For purposes of Penal Code chapter 43, subchapter A ("Prostitution"), the legislature expressly has provided a definition of "prostitution"—" '[p]rostitution' means the offense defined in Section 43.02." Tex. Penal Code Ann. § 43.01(2) (emphasis added). In addition, when interpreting statutes, we presume that the legislature intended for the entire statutory scheme to be effective. See Tex. Gov't Code Ann. § 311.021(2); Mahaffey v. State, 364 S.W.3d 908, 913 (Tex. Crim. App. 2012). Therefore, construing the plain, unambiguous language of subsection (a)(2) of the 2015 Compelling-Prostitution Statute and the plain, unambiguous language of section 43.01(2), compelling prostitution of a child requires the State to prove that the child committed the offense of prostitution under Penal Code section 43.02.

It is not our place to enforce the 2015 Compelling-Prostitution Statute as it might have or should have been written. Nor can we ignore the legislatively-defined meaning of prostitution. Instead, we are to give effect to and harmonize the statutes, if possible. Accordingly, to meet its burden to prove that appellant committed the offense of compelling prostitution of a child, the State must have presented sufficient evidence that S.E.B. was caused to commit the offense of prostitution. This includes proving the underlying culpable-mental-state element of the offense of prostitution, which is "knowingly." 2015 Prostitution Statute; see Tex. Penal Code Ann. §§ 1.07(a)(22) ("element of offense" includes its "required culpability"), 6.02(a) ("[A] person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires."), 6.03(b). Both as a matter of law and fact, the State failed to meet its burden in appellant's case.

A person commits the offense of prostitution either by (1) "in return for receipt of a fee ... knowingly ... offer[ing] to engage, agree[ing] to engage, or engag[ing] in sexual conduct; or ... solicit[ing] another in a public place to engage with the actor in sexual conduct for hire" or (2) "based on the payment of a fee by the actor or another person on behalf of the actor ... knowingly ... offer[ing] to engage, agree[ing] to engage, or engag[ing] in sexual conduct; or ... solicit[ing] another in a public place to engage with the actor in sexual conduct for hire." 2015 Prostitution Statute. We conclude that S.E.B. could not have committed prostitution because she lacked the mental capacity to consent to sexual conduct as a matter of law.

There is no dispute that S.E.B. was four-years old at the time of the alleged offenses. Previously faced with a similar question involving a juvenile proceeding in which a 13-year-old pleaded "true" and was found to have engaged in delinquent conduct involving the offense of prostitution, the Supreme Court of Texas in B.W. considered the culpable-mental-state element of the offense of prostitution and held that "a child under the age of fourteen may not be charged with" prostitution. 313 S.W.3d at 826. As explained by the B.W. court, this is because children younger than 14 lack "the legal capacity to consent, which is necessary to find that a person 'knowingly agreed' to engage in sexual conduct for a fee." Id. at 822, 824 (discussing former 1993 Penal Code section 43.02). In other words, regardless of any factual agreement to sex, children younger than 14 years of age cannot as a matter of law possess the requisite culpable mental state of the offense of prostitution and "cannot be tried for prostitution." See id. at 822–24. According to the B.W. court, the legal incapacity of children under 14 to knowingly consent to sex entirely does away with the need to consider whether any particular child under 14 may have consented to sex as a factual matter. Id. at 823 ("To engage in an individualized determination of a child's capacity to knowingly consent to sex is contrary to the Legislature's pronouncement that all minors under fourteen lack the capacity to give that consent."). We find B.W. to be persuasive.

There is no dispute here that the trial evidence showed the child at issue, appellant's daughter S.E.B., to be four-years old at the time of appellant's alleged offenses. Accordingly, as a matter of law S.E.B. could not have committed prostitution as "the offense defined in Section 43.02" as an essential element of subsection (a)(2) of the 2015 Compelling-Prostitution Statute. See Tex. Penal Code Ann. § 43.01(2).

The State relies on Davis v. State, 635 S.W.2d 737 (Tex. Crim. App. 1982). The offense at issue in Davis was the attempt to compel prostitution of an adult, not compelling prostitution of a child. See id. at 738. The Davis court considered whether the defendant's indictment was required to allege the secondary culpable mental state required for the offense of prostitution. See id. at 739. The high court concluded: "As noted above, [defendant] was indicted for attempting to compel prostitution. Thus, only the elements of that offense, attempting to compel prostitution need be set out in the indictment." Id.

The State also relies on Waggoner v. State, 897 S.W.2d 510 (Tex. App.—Austin 1995, no pet.). The Third Court of Appeals in Waggoner affirmed the defendant's conviction for compelling prostitution of a 13-year-old under former 1973 Penal Code section 43.05. In doing so, the Waggoner court, citing Davis, simply stated that "the actual commission of the offense of prostitution is not a prerequisite to the commission of the offense of compelling prostitution." 897 S.W.2d at 513. Waggoner did not address, much less analyze, what committing prostitution meant in light of its statutory definition at the time. Nor did Waggoner (which pre-dated B.W.) directly consider a 13-year-old's capacity to knowingly offer or agree to receive a fee from another to engage in sexual conduct, thus committing the offense of prostitution under the Penal Code or the juvenile justice code. See In re B.D.S.D., 289 S.W.3d 889, 895 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) ("The Austin Court of Appeals in Waggoner interpreted the meaning of 'causing' a child 'by any means' to commit prostitution under subsection 43.05(a)(2).... The Waggoner court did not address the issue of whether a child could commit an act of prostitution or engage in delinquent conduct by committing the offense of prostitution.").

We cannot conclude, based on these cases, that the State was excused from proving that S.E.B. committed the offense of prostitution, including its knowing culpable-mental-state element, to prove that appellant committed the offense of compelling prostitution of a child.

The State also argues that even if it was required to prove an act of prostitution to support a conviction for compelling prostitution, the evidence showed that appellant made an offer, as well as reached an agreement with the officer, to exchange sexual contact for a fee, and that offer and agreement constituted the crime of prostitution. But no matter what the evidence showed as to appellant's own commission of the offense of prostitution either as a principal actor or as a party, such evidence could not prove the child's commission of the offense of prostitution, as required by subsection (a)(2) of the 2015 Compelling-Prostitution Statute. In other words, the statute requires a showing that the child committed the offense of prostitution, not that the person alleged to have compelled prostitution of that child committed the offense of prostitution.

Finally, regardless of B.W.'s pronouncements in a juvenile proceeding deliberately addressing and interpreting the law concerning the culpable-mental-state element of prostitution, here, the State did not prove that S.E.B. possessed the requisite knowing mental state to have committed the offense of prostitution. Appellant's communications with the officer indicated he planned to drug S.E.B. for the sexual encounter. In the apartment, the police recovered sleep aids together with a recent receipt from a local pharmacy. The child was asleep when the officer entered the bedroom, and she did not open her eyes when the officer touched her head. When asked by appellant's defense counsel whether the sleeping S.E.B. could have knowingly offered to engage, solicited, or agreed to engage in sexual conduct with the officer, the officer replied: "I don't know any 4-year-old who understands that, sir." The only evidence at trial was that S.E.B. did not possess a knowing culpable mental state. We sustain appellant's first issue.

Trafficking a child based on compelling prostitution

At the time of the alleged offenses, November 2015, subsection (a)(7)(H) of the trafficking statute provided: "[a] person commits an offense if the person knowingly ... traffics a child and by any means causes the trafficked child to engage in, or become the victim of, conduct prohibited by ... Section 43.05 (Compelling Prostitution)." In chapter 20A, "Trafficking of Persons," " '[c]hild' means a person younger than 18 years of age." Tex. Penal Code Ann. § 20A.01(1). " 'Traffic' means to transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means." Id. § 20A.01(4).

Appellant's indictment alleged that on or about November 12, 2015, he knowingly harbored, provided, and obtained S.E.B., a person younger than 18 years of age, and caused by any means S.E.B. to become the victim of conduct prohibited by section 43.05. Appellant's jury charge also essentially tracked his indictment and the statute. In addition, appellant's jury charge provided a definition for the offense of compelling prostitution that tracked the statute: "A person commits the offense of compelling prostitution if the person knowingly: (1) causes another by force, threat, or fraud to commit prostitution; or (2) causes by any means a child younger than 18 years to commit prostitution, regardless of whether the actor knows the age of the child at the time the actor commits the offense." See 2015 Compelling-Prostitution Statute.

In his second issue, appellant argues that "[b]ecause [he] could not commit the offense of compelling prostitution as a matter of law, and because the evidence did not support a conclusion that he did compel S.E.B. to commit prostitution, he also could not commit the offense of trafficking of a person." We agree.

Conclusion: Regardless of the disturbing nature of the evidence, the jury could not have found that S.E.B. became the victim of "conduct prohibited by Section 43.05" when as a matter of law the jury could not have found that the child S.E.B. committed prostitution as an essential element under section 43.05. We also sustain appellant's second issue.

THE TRADITIONAL SUFFICIENCY OF THE EVIDENCE ISSUES BECOME RELEVANT FACTORS IN ASSESSING WHETHER THE JUVENILE COURT ABUSED ITS DISCRETION IN DETERMINING A SUITABLE DISPOSITION OF A JUVENILE.

In the Matter of W.B.G., No. 06-19-00070-CV, --- S.W.3d ----, 2020 WL 718242, Tex. Juv. Rep. Vol 34 No. 2 ¶ 20-2-1 (Tex.App.—Texarkana, 2/13/2020).

Facts: W.B.G., a juvenile, was placed on probation after he was adjudged to have engaged in delinquent conduct that would constitute theft of property and unauthorized use of a motor vehicle. The terms and conditions of his probation were modified and extended after he violated the trial court's original terms and conditions. After hearing evidence that W.B.G. violated the modified terms and conditions of his probation, the trial court revoked his probation and entered a disposition order committing him to the Texas Juvenile Justice Department (TJJD) for an indeterminate period, not to exceed his nineteenth birthday. On appeal, W.B.G. challenges the trial court's finding that reasonable efforts were made to prevent or eliminate the need for his removal from his parents' homes.

Held: Affirmed

Opinion: It is uncontested that there was ample evidence, particularly from Spindle and Parker, proving W.B.G.'s violation of the terms and conditions of his modified probation. "[A] single violation of the conditions of the juvenile's probation is sufficient to support a trial court's order modifying a juvenile's disposition." J.M., 287 S.W.3d at 486 (citing TEX. FAM. CODE ANN. § 54.05(f); In re J.A.D., 31 S.W.3d 668, 671 (Tex. App.—Waco 2000, no pet.); In re S.G.V., No. 04-05-00605-CV, 2006 WL 923576, at *3 (Tex. App.—San Antonio Apr. 5, 2006, no pet.) (mem. op.)). Yet, "[t]he statutes do not require commitment to the [TJJD] for every probation violation; but they suggest that such placement is for serious offenders." J.R.C., 236 S.W.3d at 873 (citing J.P., 136 S.W.3d at 632). "The [TJJD] is the most severe form of incarceration in the juvenile justice system, and it is neither reasonable nor appropriate in the area of juvenile law to use the final, most restrictive form of detention in all situations." J.M.G., 2016 WL 9175816, at *2 (quoting J.R.C., 236 S.W.3d at 873). "Trial courts have discretion in this context ... to select the appropriate form of detention for juvenile offenders, and should exercise that discretion based on the facts of each case." Id. (quoting J.R.C., 236 S.W.3d at 873).

W.B.G. argues that the trial court abused its discretion because the evidence was insufficient to show that reasonable efforts were made to prevent or eliminate the need for W.B.G.'s removal from his parents' homes. We disagree.

W.B.G. and the family were initially referred to the First Refusal Program, counseling with Next Step Community Solutions, and Pruitt. These programs and the services the family had already received through the Texas Department of Family and Protective Services and MHMR did not adequately assist W.B.G. In an effort to allow W.B.G. to remain at home, the family signed a deferred prosecution agreement, and W.B.G. was placed on an ankle monitor. The evidence showed that W.B.G. refused to submit to the authority of either parent and that the threat of prosecution had no deterrent effect. Instead, W.B.G. stole a car while wearing the ankle monitor. He ran away when he was placed with the Azleway Substance Abuse Center.

In addition to the programs and services offered to W.B.G. prior to placement on probation, the trial court noted that his placements with the Academy and Department were both unsuccessful and that W.B.G. continuously refused their rehabilitation programs. The trial court had required W.B.G. to complete the Academy's 180 Good Day Conduct Offender program to prevent his placement into TJJD. W.B.G. did not complete the program and collected 107 incident reports for assault and vandalism, among other things. After the trial court found W.B.G. violated the trial court's probation terms and conditions, it gave W.B.G. another chance by sending him to the Department's boot camp program. Evidence from Spindle, Parker, and Leblanc showed that W.B.G. failed to comply with the terms and conditions of his modified probation. W.B.G. cursed, incited a riot, had inappropriate conversations with female residents, and prevented his admission into the program by manipulating a tuberculosis skin test and refusing alternate testing. W.B.G. concedes on appeal that "[c]ertainly past efforts to deal with W.B.G. appear to have been unsuccessful."

Titus County had already spent $59,612.00 in its unsuccessful efforts to rehabilitee W.B.G. "A trial court is not required to exhaust all possible alternatives before sending a juvenile to the [TJJD]." Id. at *4 (quoting J.R.C., 236 S.W.3d at 875). Here, the trial court had ample evidence to rely on in deciding the proper disposition for W.B.G. It was aware of W.B.G.'s history of noncompliance with local treatment programs and other efforts to rehabilitate him and return him to his parents. "Failure to complete a local treatment program successfully supports a finding that TJJD may be more appropriate than placing a juvenile into another local treatment program." Id. (citing J.R.C., 236 S.W.3d at 870). Nothing demonstrated that any alternative placement could provide treatment that had not already been provided to W.B.G. In light of Leblanc's testimony that she was unable to find a program that would accept W.B.G. and the long record of incident reports demonstrating W.B.G.'s disruption of the programs, neglect of therapy, power struggles with staff, and failure to follow directives, the trial court could reasonably find that W.B.G. would have similar problems in another residential treatment facility or boot camp.

Conclusion: In light of the evidence presented at the disposition hearing, we cannot conclude that the trial court abused its discretion in determining that the proper disposition for W.B.G. was to be sent to the TJJD. See id.; J.R.C., 236 S.W.3d at 874; In re M.A., 198 S.W.3d 388, 391–92 (Tex. App.—Texarkana 2006, no pet.). Accordingly, we overrule W.B.G.'s point of error.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

IN A DISCRETIONARY TRANSFER TO ADULT COURT, THERE WAS INSUFFICIENT EVIDENCE IN JUVENILE COURT'S FINDING THAT APPELLANT WAS SUFFICIENTLY SOPHISTICATED AND MATURE ENOUGH TO TRANSFER TO CRIMINAL COURT BECAUSE EVIDENCE OF INTELLECTUAL DISABILITY WAS NOT EXPLICITLY ADDRESSED IN THE JUVENILE COURT'S TRANSFER ORDER.

In the Matter of A.K., MEMORANDUM, No. 02-19-00385-CV, 2020 WL 1646899, Juv. Rep. Vol 34 No. 2 ¶ 20-2-11 (Tex.App.—Ft. Worth, 4/2/2020).

Facts: The evidence presented at the transfer hearing included (1) a prediagnostic evaluation with the report of Appellant's latest psychological evaluation attached; (2) his police interview; (3) photographs depicting the crime scene, other evidence of the crime, and the decedent's family; and (4) testimony of Appellant's probation officer and the Fort Worth Police Department detective in charge of the investigation.

Appellant was a fourteen-year-old seventh-grader when the offenses occurred. Despite his youth, Appellant, an alleged member of the 300 Mafia Crips gang, had already had several legal scrapes. He was on juvenile probation for burglary after having had three prior referrals to the juvenile court. After being on probation for burglary for less than a month, he received another referral for criminal trespass and was suspended from school for marijuana possession. On May 18, 2018, the day of his scheduled detention hearing for those two new referrals, Appellant did not appear at the 10:30 a.m. hearing.

A woman was killed by a gunshot to the head around noon that day in a west Fort Worth apartment complex. A nine-millimeter shell casing found by the woman's body had an "RP" headstamp. Viewing a nearby store's surveillance footage, cohorts identified Appellant and another boy as the two teenagers filmed running from that apartment complex that day.

On the night of May 18, 2018, police detained Appellant and three other young men for unrelated gang activity. Appellant carried a loaded magazine of Winchester nine-millimeter shells. The adult male in the group carried a loaded nine-millimeter gun that ballistics later showed fired the casing found by the woman's body. The gun's magazine contained shells with RP headstamps. The man told police the gun was Appellant's. The police learned that Appellant had tried to sell that gun after the murder.

Appellant admitted to the police that he had kicked in the woman's apartment door and had taken her phone, but he denied shooting her and claimed that he was outside the apartment when he heard gunshots inside. His accomplice told the police that Appellant brought the gun, kicked in the door, demanded items from the woman, including her phone, and shot her even after she had given him her phone. Police arrested Appellant two days after the murder, and he remained in custody at the juvenile detention center from the day of his arrest until his transfer hearing almost seventeen months later. Another youth confined in the detention center with Appellant reported that Appellant bragged about shooting the woman and showed no remorse for the murder.

The State filed its petition for discretionary transfer to a criminal court soon after Appellant's arrest. Appellant's latest psychological evaluation was completed in August 2019. It referred to his previously diagnosed ADD/ADHD disorder as well as his documented "physical or mental impairment" that "affected one or more major life activities," including communication, concentration, learning, and thinking. In the evaluation, Appellant was given the Kaufman Brief Intelligence Test. His composite IQ was 68. On the Wide Range Achievement Test, he performed under a second-grade level. The psychologist noted in the evaluation that he did not try to answer any questions that he thought were too hard. She opined, "Subsequently, his intellectual and academic functioning appear to be an underestimate of his ability." The psychologist concluded that he would benefit from juvenile services "such as a high level of structure and supervision." However, she also found that he was not mentally retarded, understood the legal implications of a discretionary transfer motion, and could assist his lawyer.

In the hearing, the probation officer spoke of Appellant's background. Before Appellant was involved with the juvenile department, he had lived at All Church Home for a time and had also been in foster care. While he was in foster care, he received counseling for behavioral issues at school. He also received an MHMR evaluation in which he was diagnosed with disruptive behavior disorder and ADHD. He was prescribed medication and had taken it "maybe a year or so." However, Appellant had not been on medication since the probation officer had been working with him despite the absence of evidence that he was "taken off of it." Also, the probation officer was not sure whether Appellant was receiving the accommodations in the detention center that his 504 plan1 would have required in a normal school setting.

The probation officer also testified that Appellant had behavioral issues at school in the 2017–18 school year, resulting in "manifestation determination"2 meetings to determine whether his misbehavior resulted from his diagnosed disorders or his choices. The probation officer testified that the school records indicated that Appellant's behavior was more of a choice than a sign of his disability. In that single school year, he held a female classmate in a headlock and pushed her; hit another female student in what he characterized as "a

playful way"; brought an air pistol to school; threatened a teacher; and made gang signs toward her.

The probation officer additionally testified about Appellant's time in detention. Even though he was on Level One—the best level—at the time of the hearing, for months at a time, and for a majority of the time, he had been written up during his first several months for making gang signs, not following instructions, not doing his school work, threatening staff members, being disruptive and disrespectful, and fighting. Nevertheless, his probation officer testified that for the most part, Appellant tried to follow the rules and tried to stay on Level One.

Appellant did not testify at the transfer hearing and his counsel did not call any witnesses. However, his counsel did cross-examine the State's witnesses. Regarding Appellant's not attempting to answer certain questions of the tests evaluating his intellectual ability, the probation officer testified that it "would seem logical[ ] that someone who struggles academically would be hesitant to try something [he does not] fully understand" because of risks of embarrassment or getting teased and that Appellant's refusal to try to answer the questions did not necessarily indicate misbehavior. The probation officer also admitted that a fourteen- or fifteen-year-old child who acts more like an eleven- or twelve-year-old child could be a child who struggles with interpreting social cues. The probation officer further testified that in his experience, "the adult system is not as equipped to deal with juveniles in the same way [as the juvenile system] because [the adult system] would treat everyone on the same level." The probation officer believed "that the juvenile system would be more successful in rehabilitating [Appellant] at this stage than sending him to the adult system."

The juvenile court decided to waive its jurisdiction and transfer the case to a criminal court, explaining its reasoning from the bench:

So the Court having reviewed the complete diagnostic study, the social evaluation and full investigation of the child and circumstances of the child and circumstances of the offense ha[s] come to a conclusion. The Court in coming to this conclusion, having heard the competent evidence provided to the Court, is considering various factors. The Court is considering whether this offense was against a person or property. The Court is considering the sophistication and the maturity of the child. The Court is considering the record and previous history of the child, and the Court is also considering the protection of the public and the likelihood of rehabilitation of the child within the juvenile system.

Court finds that the child was 14 years old at the time of the offense, a first-degree felony and capital offense, that there has not been an adjudication hearing yet, and that after a full investigation hearing, the juvenile court will find probable cause that the offense of capital murder and ... aggravated robbery has occurred and because of the seriousness of the offense as well as the background of the child, the welfare of the community requires criminal proceedings.

Specifically, the reason for this transfer, [Appellant], is I am genuinely concerned about all four factors that are presented to the Court. I've considered all four and all four are very significant to me in your particular case. I am particularly concerned about the safety of the public.

[Appellant], you had a history with the school system with behavior problems and criminal acts. You had a problem—a history with the law. You were supervisory cautioned out of this Court. You were on probation out of this Court. In fact, while you were supposed be in court on May 18th, you skipped court and it resulted in a death of a woman. There's probable cause to determine that it resulted in the death of a woman. Had you come to court, this would not have been an issue. That would have been the ultimate alibi for you had you just done what you were supposed to do. It's apparent to me that you planned the crime. You had a history of burglarizing buildings and homes. I also look at the testimony today and it seems apparent that you never really admitted to your involvement. Seems like you're passing the blame to [your accomplice] and you're creating space for yourself about your engagement in all these matters. It seems like after the offense that you attempt[ed] to hide and conceal your involvement whether it's by discarding your clothing or trying to get rid of the firearm that was used in this offense, and it seems like you were trying to blame someone else this entire time.

And I think what hits the hardest is even in the detention this whole time you were here ... you had the opportunity to show me that you're rehabilitated, that you're doing well, that you don't need to go to the adult system because everything that the juvenile system can offer, you're taking advantage of. Yet, ... your time here ... really indicates to me that the likelihood of rehabilitation in the juvenile system just isn't—there's nothing that we can do for you and this is a matter that simply the adult system needs to handle.

So I am waiving my jurisdiction as the judge of the 323rd District Court, and I'm going to transfer this to an appropriate adult criminal district court here in Tarrant County, Texas.

The juvenile court also issued a written order granting the transfer:

The Court finds that the acts alleged in Paragraphs III and IV of the First Amended Petition on file in this cause are felonies under the penal laws of the State of Texas if committed by an adult.

The Court finds that the offenses were against the person of another. The Court finds there is probable cause to believe that the Respondent committed the offenses alleged in Paragraphs III and IV of the First Amended Petition on file in this cause.

Juvenile Law Section www.juvenilelaw.org Volume 34, Number 2

The Court finds that the Respondent is of sufficient sophistication and maturity to be tried as an adult. A psychologist who examined the Respondent concluded that he appears capable of understanding the legal implications surrounding a discretionary transfer motion and assisting his attorney in his defense. The facts of the offenses themselves weigh towards the sophistication and maturity of the Respondent to carry out a collaborative scheme. The Respondent obtained and carried a loaded handgun. After the Respondent and his companion saw a video game system in the apartment window, the Respondent kicked in the apartment door. Both the Respondent and his companion entered the apartment, but the Respondent pointed the loaded handgun at the victim, and demanded her property. The Respondent himself not only wielded a firearm during this home invasion, but also shot and killed the victim, who was a mother of three children and cooperated with his demands. After the offenses, the Respondent disposed of the stolen cell phone[ ] and the clothing he wore during the commission of the offense[ ] and attempted to dispose of the handgun.

The Court finds that the prospects of adequate protection of the public and the likelihood of the rehabilitation of the Respondent by the use of procedures, services, and facilities currently available to the Juvenile Court is low. The Court finds that the Respondent had prior referrals to the juvenile system for Terroristic Threat, Burglary of a Habitation, Criminal Trespass, and Burglary of a Building, and that the Respondent has received supervision and services from the Tarrant County Juvenile Probation Department (a local Juvenile Probation Department) prior to these offenses. The Court finds that the Respondent has been documented as a member of the 300 Mafia, a criminal street gang. Further, the Court finds that the Respondent was on felony juvenile probation and had both a Motion to Modify that probation and new misdemeanor law violations pending in the Tarrant County Juvenile Court at the time that he is alleged to have committed these offenses. The Court finds that while under the supervision of the Tarrant County Juvenile Probation Department, the Respondent was often truant from school, regularly broke curfew, and committed new law violations. The Respondent had a court appearance to address probation violations scheduled for the same day as the offense. A psychologist who examined the Respondent stated[,] "[T]he community would be at a moderate to high level of risk were he to remain in it." His danger to the community is further demonstrated by the violent nature of the offenses he is accused of, including the fact that he used deadly force without hesitation against a victim in her own home. Finally, because of his present age of 15 years, 11 months, the Respondent could only receive services from the Juvenile Probation Department or the Texas Juvenile Justice Department for a maximum period of time of 37 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 the Respondent, the welfare of the community requires criminal proceedings.

In making that determination, the Court has considered, as detailed above, and among other matters:
1. Whether the alleged offenses were against person or property, with the greater weight in favor given to the offenses against person;
2. The sophistication and maturity of the child;
3. The record and previous history of the child; and
4. The prospects of adequate protection of the public and the likelihood of reasonable rehabilitation of the child by use of procedures, services, and facilities currently available to the Juvenile Court.
THEREFORE, by reasons of the foregoing, I ... hereby waive jurisdiction of this cause and transfer [Appellant] to the appropriate District Court or Criminal District Court of Tarrant County, Texas for criminal proceedings and do hereby certify said action.

In his first point, Appellant contends that the juvenile court's transferring him to a criminal court violated the constitutional prohibition against cruel and unusual punishment. Within his first point, Appellant argues that the juvenile court's decision was based on factually insufficient evidence, contending that "nothing in the transfer order ... indicates that the [juvenile] court considered or weigh[ ]ed A.K.'s intellectual disability."

Held: Reversed and Remanded

Memorandum Opinion: The transfer order states that the juvenile court determined that the welfare of the community required criminal proceedings because of both Appellant's background and the seriousness of the alleged offenses and that the juvenile court considered the four Section 54.02(f) factors listed above. The transfer order also details the facts the juvenile court found regarding each factor. With his sufficiency complaint that there is no evidence that the juvenile court considered his intellectual disability, Appellant challenges the factual sufficiency of the evidence supporting the juvenile court's finding that he is sufficiently sophisticated and mature to be tried as an adult and supporting the juvenile court's related determination that his background justifies the transfer. The order provides the following regarding the sophistication-and-maturity factor,

The Court finds that [Appellant] is of sufficient sophistication and maturity to be tried as an adult. A psychologist who examined [him] concluded that he appears capable of understanding the legal implications surrounding a discretionary transfer motion and assisting his attorney in his defense. The facts of the offenses themselves weigh towards the sophistication and maturity of [Appellant] to carry out a collaborative

scheme. [He] obtained and carried a loaded handgun. After [Appellant] and his companion saw a video game system in the apartment window, [Appellant] kicked in the apartment door. Both [he] and his companion entered the apartment, but [Appellant] pointed the loaded handgun at the victim[ ] and demanded her property. [Appellant] himself not only wielded a firearm during this home invasion, but also shot and killed the victim, who was a mother of three children and cooperated with his demands. After the offenses, [Appellant] disposed of the stolen cell phone[ ] and the clothing he wore during the commission of the offense[ ] and attempted to dispose of the handgun.

Thus, the facts the juvenile court expressly relied on in finding that Appellant is sufficiently sophisticated and mature are the psychologist's conclusion that he appears capable of understanding the legal ramifications of being transferred to criminal court and of helping his attorney with his defense and the facts of the offenses themselves. In light of all the evidence pertaining to Appellant's sophistication and maturity, we hold that these facts are not enough to support the finding.

First, the contents of the psychological evaluation provide prima facie evidence that Appellant meets the United States Supreme Court's test for intellectual disability, but the juvenile court does not address this fact. The Supreme Court's test for intellectual disability is

(1) intellectual-functioning deficits (indicated by an IQ score approximately two standard deviations below the mean—i.e., a score of roughly 70—adjusted for the standard error of measurement); (2) adaptive deficits (the inability to learn basic skills and adjust behavior to changing circumstances); and (3) the onset of these deficits while still a minor.

Moore v. Tex., 137 S. Ct. 1039, 1045 (2017) (citations and internal quotation marks omitted). Appellant satisfies all three elements. The psychologist did not testify. The juvenile court only had the psychologist's written evaluation. That evaluation shows that in August 2019, Appellant's composite IQ on the Kaufman Brief Intelligence Test was 68. He therefore meets the first element of the test. See id. Adaptive deficits, the subject of the second element of the Supreme Court's test, must be shown in one of the three adaptive areas: social, conceptual, or practical. Id. at 1050; see American Psychiatric Association, Diagnostic and Statistical Manual of Disorders 33 (5th ed. 2013) ("DSM-5"). The psychological evaluation references information from Appellant's school records recognizing that he "[h]as a physical or mental impairment that significantly impacts a major life activity and meets eligibility standards to be identified as having a Section 504 Disability." His impacted life activities listed were communication, concentration, learning, and thinking. Appellant therefore has adaptive deficits satisfying the second element of the Supreme Court's test. See Moore, 137 S. Ct. at 1045; DSM-5 at 33; see also 19 Tex. Admin. Code § 89.1040(c)(5)(B). Appellant was and is still a minor; the third and final element of the Supreme Court's test is therefore met. See Moore, 137 S. Ct. at 1045. We agree with Appellant that this evidence is a prima facie showing of intellectual disability.

Despite Appellant's meeting the Supreme Court's test for intellectual disability, the psychologist concluded in the evaluation that Appellant is not mentally retarded. Intellectual disability is another term for mental retardation. Brumfield v. Cain, 576 U.S. 305, 135 S. Ct. 2269, 2274 n.1 (2015). Neither the juvenile court's order nor the rendition addresses this conflict in the evaluation, nor does either mention intellectual disability.

The evaluation does not explicitly base the psychologist's conclusion that Appellant has no intellectual disability on any evidence, but presumably she reached that conclusion based on her unsupported opinion in the evaluation that Appellant's low IQ test scores "are likely an underestimate of his intellectual and academic ability due [to] his approach[ ] (i.e. lack of effort toward answering items that he perceived as difficult)." Just as the evaluation contains no explanation for that opinion, the State did not offer evidence supporting it at the hearing, although we note that in a similar case, it has explored the issue extensively with both documentary evidence and live witnesses. See In re E.O., No. 02-18-00411-CV, 2019 WL 2293181, at *4–5 (Tex. App.—Fort Worth May 30, 2019, no pet.) (mem. op.). There is no indication in the record that the psychologist tested Appellant for malingering his intellectual disability, although such tests do exist. See, e.g., Ex parte Wood, 568 S.W.3d 678, 680 (Tex. Crim. App. 2018), cert. denied, Wood v. Tex., 140 S. Ct. 213 (2019); Petetan v. State, No. AP-77,038, 2017 WL 915530, at *20 (Tex. Crim. App. Mar. 8, 2017), reh'g granted, 2017 WL 4678670 (Tex. Crim. App. Oct. 18, 2017) (order, not designated for publication). Thus, an "analytical gap" exists between the data relied on and the psychologist's opinion that Appellant could have done better on the test. See Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726–27 (Tex. 1998). This gap renders her opinion unreliable and no evidence. See Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 906 (Tex. 2004) (relying in part on Gammill, 972 S.W.2d at 726). Significantly, because the psychologist's opinion that Appellant could have done better on the IQ tests is the only basis in the record that we see for her conclusion that he is not intellectually disabled, that conclusion is likewise unreliable and no evidence because of an impermissibly wide analytical gap. See Ramirez, 159 S.W.3d at 906; Gammill, 972 S.W.2d at 726–27.

Second, although the psychological evaluation concludes that Appellant "appears capable of understanding the legal implications surrounding a discretionary transfer motion and of assisting his attorney in his defense," that conclusion is not tied to any evidence in the record. The juvenile court's like finding is therefore based on nothing but an unsupported conclusion. See Moon, 451 S.W.3d at 51

n.88. Again, the analytical gaps between the psychologist's conclusions and the facts she relied on render her conclusions unreliable and no evidence. See Ramirez, 159 S.W.3d at 906; Gammill, 972 S.W.2d at 726–27.

Third, even if the psychologist's unsupported opinion that Appellant understands the legal significance of a transfer hearing and can help his attorney with his defense had evidentiary support in the record, the Texas Court of Criminal Appeals has stated in persuasive dicta that whether a juvenile can assist in his defense is irrelevant to whether he should be transferred to adult court:

No case has ever undertaken to explain ... exactly how the juvenile's capacity (or lack thereof) to ... assist in his defense is relevant to whether the welfare of the community requires transfer, and we fail to see that it is. Other courts of appeals have rightly declared the purpose of an inquiry into the mental ability and maturity of the juvenile to be to determine whether he appreciates the nature and effect of his voluntary actions and whether they were right or wrong. In our view, [relying on] the juvenile's capacity to ... help a lawyer to effectively represent him is almost as misguided as the juvenile court's logic in the present case when it orally pronounced that the appellant should be transferred, inter alia, merely for the sake of judicial economy, so that his case could be consolidated with that of his already-certified-as-an-adult co-defendant. Such a notion is the very antithesis of the kind of individualized assessment of the propriety of waiver of juvenile jurisdiction that both Kent and our statutory scheme expect of the juvenile court in the exercise of its transfer discretion. Moon, 451 S.W.3d at 51 n.87 (citations and internal quotation marks omitted); see also In re J.G.S., No. 03-16-00556-CV, 2017 WL 672460, at *4 (Tex. App.—Austin Feb. 17, 2017, no pet.) (mem. op. on reh'g).

We note that the psychologist stated in the report that Appellant "is no more sophisticated or mature than his same aged peers." Fourteen-year-olds typically are neither sophisticated nor mature. How then could Appellant's transfer be "the exception not the rule"? Moon, 451 S.W.3d at 36 (quoting Hidalgo, 983 S.W.2d at 754).

Fourth, in light of the prima facie evidence of Appellant's intellectual disability in the record, the facts of the crime the juvenile court relied on in its order are an insufficient basis for the finding that Appellant has sufficient sophistication and maturity for transfer. We recognize that capital murder is among the most serious of crimes; however we also recognize that nothing in the execution of this murder demanded maturity or sophistication. That is, it is not clear to this court how the evidence that Appellant, accompanied by a thirteen-year-old, was able to carry a loaded gun, kick an apartment door open, convince an unarmed person to give him her cell phone, shoot her when her back was turned, and dispose of the cell phone and his clothes shows that he had sufficient sophistication and maturity to be transferred to criminal court. Significantly, the detective in charge of the investigation testified that during the investigation he "had a pretty good feel that th[ese offenses] ... probably involved juveniles" because

it's not real common that you see someone of the adults do something like this in just broad daylight in such a densely populated area where the chances of being seen are very high. Most of your adult burglars, by the time they get to that point, they're a lot more careful about it, where they go and how they approach things and ... to me it just seemed very juvenile.

The record also shows that Appellant was essentially caught red-handed by proxy when, on the night of the murder, police found the adult of his small group was carrying the murder weapon loaded with shells matching the casing found by the body. For all four reasons, we sustain this portion of Appellant's first point, and, because of this disposition, do not reach the rest of this point. See Tex. R. App. P. 47.1.

This court recognizes that Appellant does not challenge the juvenile court's findings on all the Section 54.02 factors. But in this case, the juvenile court relied on all four factors and based its decision on both Appellant's background and the seriousness of the offenses, and we do not know how much weight the juvenile court accorded to each factor or to each of the two reasons for the transfer decision. We do know that evidence of intellectual disability means the difference between life and death in death-penalty cases. Atkins v. Virginia, 536 U.S. 304, 321, 122 S. Ct. 2242, 2252 (2002). At minimum, the evidence of Appellant's intellectual disability should have been explicitly addressed in the juvenile court's transfer order. The psychological evaluation does not sufficiently support the psychologist's conclusions that Appellant is not intellectually disabled. It offers no evidence to support her conclusion that his IQ test scores would have been better if he had tried to answer questions he found difficult, and it offers no evidence of how much better those scores would have been. Thus, the juvenile court's finding that Appellant is sufficiently sophisticated and mature to transfer to criminal court rests on insufficient evidence.

Conclusion: Because intellectual disability may very well permeate Appellant's personal history, his criminal history, and the likelihood of his rehabilitation, the trial court abused its discretion by basing its order on Appellant's background. Because we cannot determine how much weight the trial court accorded Appellant's background versus how much weight it accorded the seriousness of the crimes in deciding to transfer him to criminal court, we must remand this case to the juvenile court. Having overruled Appellant's constitutional complaints but having also held factually insufficient evidence supports the transfer order, we reverse the juvenile court's transfer order and remand this case to that court for proceedings consistent with this opinion.

STATE FAILED TO SATISFY ITS BURDEN WITH SUFFICIENT EVIDENCE TO SUPPORT THE CONCLUSION THAT IT WAS IMPRACTICABLE TO PROCEED PRIOR TO APPELLANT'S EIGHTEENTH BIRTHDAY WHERE THE STATE ADMITTED MISTAKES, THEN INTENTIONALLY, FOR REASONS WITHIN ITS CONTROL, DECIDED TO PROCEED UNDER SECTION 54.02(J).

In the Matter of A.M.H., MEMORNADUM, No. 12-19-00284-CV, 2020 WL 2078412, Juv. Rep. Vol 34 No. 2 ¶ 20-2-12 (Tex.App.—Tyler, 4/30/2020).

Facts: On July 27, 2018, Hemphill Police Department Officer Travis Trexler received a call that two children made an outcry of sexual abuse against Appellant, alleging several years of sexual abuse, with the last events occurring on or about September 30, 2017. The children underwent forensic interviews and a sexual assault nurse examination three days after the outcries on July 30, 2018, in which they described the abuse committed against them by Appellant. Appellant was sixteen years old at the time of the most recent abuse, and seventeen years old at the time of the outcries.

Prior to the outcries, Appellant relocated with his family to Georgia. At the time of the outcries in July 2017, Appellant, while in Georgia, had just completed his term of community supervision on another case originating from Sabine County, Texas. A juvenile warrant was issued on September 5, 2018.

There was no further activity on the case until late November 2018 when the authorities contacted Appellant's mother requesting that Appellant return to Texas. Appellant returned to Sabine County on December 4, 2018, and turned himself in at the Sabine County Jail. He was erroneously booked and processed as an adult and bonded out the same day. Appellant then returned to Georgia. First Judicial District Juvenile Probation Department Officer Dan Reeves, who also oversaw Appellant's community supervision on his other case, was not notified of Appellant's return to Texas or the improper processing of his warrant and arrest until December 10.

On January 18, 2019, after Officer Reeves consulted with his supervisor, the Hemphill Police Department, the District Attorney's Office, and the Texas Juvenile Justice Department (TJJD), they collectively decided to allow Appellant to remain in Georgia and finish the school year, at which time they would proceed on the matter. Appellant turned eighteen on January 22.

On May 21, the State filed a petition for discretionary transfer in the juvenile court alleging that Appellant committed aggravated sexual assault on the two child victims under the age of fourteen when Appellant was sixteen years of age. Among other requirements in the discretionary transfer statute, the State also alleged that for reasons beyond its control, it was not practicable to proceed prior to Appellant's eighteenth birthday.1

The trial court held the waiver and transfer hearing on August 7, almost seven months after Appellant's eighteenth birthday. The juvenile court found that there had been no adjudication concerning the alleged offenses, there was probable cause to believe that Appellant committed the offenses, that he was over fourteen years of age but less than seventeen years of age at the time of the offenses, and for reasons beyond the State's control it was not practicable to proceed before Appellant's eighteenth birthday. Therefore, the court waived its exclusive original jurisdiction and ordered the case transferred to criminal district court. Because the juvenile court did not explain the basis for its findings in its order under the relevant statutory factors, Appellant requested findings of fact and conclusions of law, which the trial court subsequently issued. This appeal followed.

Appellant argues in his fourth issue that the trial court's decision to waive its juvenile jurisdiction and transfer the case to criminal district court was unsupported by legally and factually sufficient evidence. Specifically, in relevant part, Appellant contends that the State failed to satisfy its burden to show that, for reasons beyond its control, it was impracticable to proceed in juvenile court before his eighteenth birthday.

Held: Reversed and dismissed

Memorandum Opinion: The "state" includes the prosecutor, other lawyers and employees in his office, along with members of law enforcement connected to the investigation and prosecution of the case. Id. at 403–04. The failure to mitigate investigative or procedural delays is not outside the state's control to proceed to juvenile court before the juvenile's eighteenth birthday under Section 54.02(j). Matter of A.M., 577 S.W.3d at 672 n.10. Moreover, facts explaining delays occurring after the defendant turned eighteen are not relevant in this analysis. Collins v. State, 516 S.W.3d 504, 521 (Tex. App.—Beaumont 2017, pet. denied). Finally, the investigator's heavy caseload and clerical mistakes in his file as to the juvenile's age, when other documents in the file had the correct birthdate, are not reasons for delaying the prosecution beyond the state's control. See Moore v. State, 446 S.W.3d 47, 51-52 (Tex. App.—Houston [1st Dist.] 2014), aff'd, 532 S.W.3d 400, 402 (Tex. Crim. App. 2017).

Appellant contends that the State neglected its duty to be aware of Appellant's eighteenth birthday and that the evidence is legally and factually insufficient to support the findings that for reasons beyond the control of the State it was not practicable to proceed in juvenile court before Appellant's eighteenth birthday.

At the hearing, Officer Reeves testified that he knew Appellant because he supervised Appellant's community supervision for another offense. He explained that Appellant's supervision was transferred to Georgia when he moved there with his family and

that he successfully completed his supervision in July 2018, the same month as the outcries in this case. Hemphill Police Department Chief David West testified that the investigation was essentially complete in August 2018.3

Officer Reeves testified that he was informally notified of the investigation sometime in August 2018, and that he told a representative of the Hemphill Police Department what he knew regarding Appellant's whereabouts and provided the phone number of Appellant's mother. The warrant was issued on September 5, 2018, and the Hemphill Police Department officially provided a referral to the probation department of Appellant's case on September 20. Officer Reeves stated that he did not contact Appellant's mother at that time and could not remember whether he called her after receiving the official referral. Officer Reeves testified that his office had no further involvement in the case until December 2018.

Appellant's mother testified that the first time the family became aware of the warrant and the allegations was in late November 2018. When asked whether anyone at the Hemphill Police Department contacted Appellant prior to the end of November 2018, Chief West explained that Officer Travis Trexler, the investigating officer, had that information. However, Officer Trexler did not testify because he was not requested at the hearing and had the day off from work. Chief West speculated that Appellant was probably notified the day after the warrant was issued but admitted he could not refute Appellant's mother's testimony that they were not informed of the warrant until late November 2018.

During Appellant's mother's telephone conversation with the officer, she explained that due to the family's financial situation, and the fact that they lived in Georgia, it would be difficult to quickly return to Texas and resolve the matter. Nevertheless, shortly thereafter on December 4, 2018, Appellant returned to Texas and turned himself in at the jail. Officers at the jail erroneously booked and processed Appellant as an adult. Appellant bonded out, was released, and returned to Georgia that same day. Neither the Hemphill Police Department nor Appellant notified anyone at the probation department until Chief West alerted Officer Reeves of the error on December 10, 2018. Officer Reeves explained that his first contact with Appellant was sometime in December 2018.

Chief Juvenile Probation Officer Edeska Barnes, Jr., testified that his office was short-staffed during this investigation because they had two officers out, and an increased number of juvenile case referrals at the time. Chief Barnes further testified that it was his understanding that Officer Reeves initially became aware of the case in early August but did not have further involvement until approximately December 10, 2018. He testified that although it was unusual to deal with juvenile matters where the juvenile resides out of state at a considerable distance from Sabine County, it was not unusual for members of law enforcement to see each other at work or off duty and discuss cases. He testified that even though officers at the probation department may vaguely know of a particular case, they might not receive the official referral until several months later, which is the point in time at which they officially begin processing the case. But here, as we mentioned, the probation department received the referral in September 2018. Chief Barnes explained that the department allowed Appellant to turn himself in at his convenience because there was no immediate threat to the victims.

Officer Reeves testified that normally after a juvenile surrenders himself to the authorities, the juvenile probation department would be notified, and a staff member would meet with the juvenile and his family, conduct an "intake," and determine whether the child should be detained or released to the parents. After Chief Barnes and Officer Reeves conferred with the District Attorney, Chief West, and TJJD regarding the mistake, on January 18, 2019, they decided to wait to proceed on the matter. Four days later on January 22, Appellant turned eighteen.

At the hearing, Officer Reeves provided three reasons for the decision to intentionally delay the proceedings after learning of the mistakes: (1) they sought to accommodate Appellant's alleged hardship in traveling between Georgia and Texas; (2) they wanted to allow Appellant to complete the school year in Georgia; and (3) they intended to pursue adult certification irrespective of whether he was seventeen or eighteen years old because of the short time frame after the outcry and Appellant's eighteenth birthday, along with the seriousness of the offenses. Officer Reeves admitted on cross-examination that had the warrant been processed correctly as a juvenile warrant, it would have been possible to proceed in juvenile court provided that court dates were available and the schedules between defense counsel and the State aligned. On redirect examination, Officer Reeves reiterated that irrespective of the scheduling, they always intended to certify Appellant as an adult, even after he turned eighteen.

In relevant part, the trial court's order and findings of fact and conclusions of law state that "[Appellant] lives in Georgia," "[he] was arrested and bonded out on December [4], 2018," "Juvenile Probation was not notified when [Appellant] turned himself in," "[Appellant] returned to Georgia without ever meeting with Juvenile Probation," and "Juvenile Probation met with the District Attorney's office on or about January 18, 2019, and the decision was made to wait until the end of the school year to file since [Appellant] lived in Georgia." None of the other findings relate to the reasons for the delay. Accordingly, presumably based on these factors, the trial court concluded that for reasons beyond the State's control, it was impracticable to proceed in juvenile court prior to Appellant's eighteenth birthday. We defer to the trial

court on these findings and view them in the light most favorable to the court's decision to waive its juvenile jurisdiction and transfer the case to criminal district court. However, under this record, we conclude that we may not ignore other evidence because it would be unreasonable to do so in these circumstances. See In re J.G., 495 S.W.3d at 370; Moon, 410 S.W.3d at 371. For five reasons, we determine that this evidence is uncontroverted, conclusive, and leads to only one inference: it was within the State's control to practicably proceed prior to Appellant's eighteenth birthday. See id.

First, the fact that Appellant resided out of state does not reasonably explain the delay. Officer Reeves knew how to contact Appellant because he had just completed community supervision under Officer Reeves on another case at the time of the outcries, almost six months prior to Appellant's eighteenth birthday. Moreover, the probation department had an official referral on September 20, 2018, yet made no effort to contact Appellant until December after learning of the mistake in processing the warrant and his arrest. Chief West speculated that they attempted to contact Appellant or his mother shortly after the warrant was issued but admitted that Officer Trexler had that information. The State did not call Officer Trexler even though it had the burden to explain the delays. The record shows instead that despite Appellant's alleged hardship in traveling from Georgia to Texas, shortly after Appellant's mother was notified of the warrant in late November, they traveled to Texas and Appellant surrendered himself to the authorities. This is in contrast to another case, where there was an outcry within six months of the defendant's eighteenth birthday, and the investigating officers could not timely locate him, but testified in detail as to their active efforts to locate him. See Matter of B.C.B., No. 05-16-00207-CV, 2016 WL 3165595, at *5-6 (Tex. App.—Dallas June 7, 2016, pet. denied) (mem. op.). Here, there was no evidence that the State furthered the investigation between September 2018 and late November 2018. Chief Barnes's explanation that the department was short-staffed and referrals were up at the time is an insufficient reason for delay within the State's control. See Moore, 446 S.W.3d at 51-52.

Second, although the trial court found that Appellant was arrested and bonded out on December 4, 2018, and Juvenile Probation was not notified when Appellant turned himself in, this was due to a mistake within the State's control. Namely, in processing the warrant, which was clearly labeled as a juvenile warrant, Appellant was erroneously booked, processed, and bonded as an adult, which resulted in delayed notification to the juvenile department. The trial court also found that Appellant returned to Georgia without ever meeting with Juvenile Probation. However, the State did not cite any rule of law, condition of bond, or other document requiring Appellant to report to juvenile probation after he was erroneously processed and bonded as an adult at the Sabine County Jail. Instead, this was a mistake within the State's control. See Matter of A.M., 577 S.W.3d at 672 n.10 (explaining that failure to mitigate investigative or procedural delays is not outside the state's control, especially when delay was brought on by law enforcement's mistakes); see also Moore, 446 S.W.3d at 51-52 (holding clerical mistakes in investigator's file as to juvenile's age, when other documents in file had correct birthdate, was not valid reason for delaying prosecution beyond state's control).

Third, after discovering the mistake, Chief Barnes and Officer Reeves conferred with Chief West, the district attorney's office, and TJJD on the next course of action. On January 18, 2019, just a few days prior to Appellant's eighteenth birthday, they decided to intentionally delay proceeding on the matter. The primary reason for the intentional delay is the State's mistaken belief, which it maintains in its appellate brief, that the law allowed it to certify Appellant as an adult regardless of his age. See Matter of A.M., 577 S.W.3d at 671-72 (holding State's mistaken understanding of law that there was no rush to proceed because it could certify defendant as adult was insufficient reason for delay). Therefore, its mistake as to the law is an insufficient basis to support the delay. See id.

Fourth, Officer Reeves also stated that they delayed the proceeding because of the seriousness of the offense. We note that the seriousness of the offense, while relevant under Section 54.02(a), is not a relevant factor under Section 54.02(j). See id. (holding Section 54.02(a) and (f) factors have no relevance in Section 54.02(j) proceeding); Ex parte Arango, 518 S.W.3d 916, 920–21 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (holding order to transfer juvenile jurisdiction based solely on the seriousness of the offense is insufficient).

Finally, the State did not file its petition until May 21, 2019, and the hearing was not held until August 7, 2019, because they intentionally decided to allow Appellant to finish the school year after he turned eighteen. However, facts explaining delays occurring after the defendant turned eighteen are not relevant in this analysis. Collins, 516 S.W.3d at 521. In any event, this decision was within the State's control.

In summary, See Moore, 532 S.W.3d at 404-05; Matter of A.M., 577 S.W.3d at 671-72; Moon, 410 S.W.3d at 371.

Appellant's fourth issue is sustained. Because this issue is dispositive, we need not address Appellant's remaining issues.5 See TEX. R. APP. P. 47.1.

Conclusion: Because the State failed to meet its burden to show that for reasons beyond its control it was impracticable to proceed before Appellant's eighteenth birthday, its non-compliance with Texas Family Code Section 54.02 deprived the juvenile court of jurisdiction. We therefore hold that the juvenile court lacked jurisdiction to transfer the case to a criminal district court and, as a result, the criminal district court may not acquire jurisdiction. See Moore,

446 S.W.3d at 52. Accordingly, we proceed with the only available disposition: we reverse the trial court's order waiving jurisdiction and transferring the case to the criminal district court and we dismiss the case for lack of jurisdiction. See id.; Matter of A.M., 577 S.W.3d at 672.

THERE WAS NO ABUSE OF DISCRETION IN THE JUVENILE COURT'S DECISION TO WAIVE JURISDICTION AND TO TRANSFER APPELLANT TO THE ADULT DISTRICT COURT WHERE THE STATE PRESENTED LEGALLY AND FACTUALLY SUFFICIENT EVIDENCE FROM WHICH THE JUVENILE COURT COULD REASONABLY HAVE CONCLUDED THAT THERE WAS PROBABLE CAUSE TO BELIEVE THAT APPELLANT COMMITTED THE ALLEGED OFFENSE.

In the Matter of E.M.F., MEMORANDUM, No. 11-19-00278-CV, 2020 WL 868065, Tex. Juv. Rep. Vol 34 No. 2 ¶ 20-2-3 (Tex.App.—Eastland, 2/21/2020)

Facts: On March 11, 2019, Midland police were notified of an outcry made by the child complainant. Based on that outcry, a forensic interview was scheduled for March 18, 2019. During the March 18 interview, the complainant told Katherine Shores, a forensic interviewer at the Midland Children's Advocacy Center, about being "molested" by Appellant a few years earlier when the complainant was ten years old and her cousin Appellant was fourteen years old.

According to Shores, the complainant indicated that the first instance occurred during the summer while she was at her grandmother's house. The complainant told Shores that Appellant touched the complainant's vagina. The complainant explained that she and Appellant were watching a movie while lying on a bed in the back room of her grandmother's house when Appellant's hand began "feeling around" "on and in [the complainant's] vagina" under her clothing. When asked to clarify, the complainant explained: "Like she didn't put -- obviously, there's like a hole or whatever. She didn't go inside the hole, but she went inside my vagina." The complainant estimated that such touching had occurred about ten times. She said that Appellant told her not to tell anyone.

After the interview, Detective Jose Morales of the Midland Police Department attempted to contact Appellant about the allegations. Detective Morales contacted Appellant's parents and explained to Appellant's father that he was investigating a sexual assault case. Appellant's father said that he would try to "get ahold" of Appellant and "see what he could do." Four days later, Detective Morales received a fax from an attorney; the attorney indicated that he represented Appellant. Appellant "was processed at the police department" on April 3, 2019, approximately four weeks before her eighteenth birthday. The assistant district attorney indicated that the case was uploaded "to the DA's office tech-share program" on April 3 but that it "was not staffed" by the district attorney's office until May 7, 2019, a few days after Appellant turned eighteen. The State subsequently requested a setting from the juvenile court and, upon receiving a setting, filed its original petition on June 17, 2019. We note that the above-mentioned setting related to the waiver of jurisdiction and was originally scheduled for July 16, 2019.

The State moved for a transfer pursuant to Section 54.02(j). Section 54.02(j) sets out the requirements for the discretionary transfer of a person who was a juvenile at the time of the alleged offense but has turned eighteen prior to being adjudicated as a juvenile. See In re N.J.A., 997 S.W.2d 554, 556–57 (Tex. 1999). Section 54.02(j) provides in relevant part that a juvenile court may waive its jurisdiction and transfer a person to a district court for criminal proceedings if:
(1) the person is 18 years of age or older;
(2) the person was:
....
(B) 14 years of age or older and under 17 years of age at the time the person is alleged to have committed an aggravated controlled substance felony or a felony of the first degree other than an offense under Section 19.02, Penal Code;
....
(3) no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted;
(4) the juvenile court finds from a preponderance of the evidence that:
(A) for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person;
.... and
(5) the juvenile court determines that there is probable cause to believe that the [person] before the court committed the offense alleged.
FAM. § 54.02(j). The juvenile court made the requisite findings under Section 54.02(j).

In an appeal from an order in which a juvenile court waives its jurisdiction and enters a discretionary transfer order, an appellate court applies an abuse-of-discretion standard of review to the juvenile court's decision to transfer. In re S.G.R., 496 S.W.3d 235, 239 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing Moon v. State, 451 S.W.3d 28, 47 (Tex. Crim. App. 2014)). The juvenile court's findings may be reviewed under the traditional civil standards for sufficiency of the evidence. Moon, 451 S.W.3d at 47; S.G.R., 496 S.W.3d at 239. To review the legal sufficiency of the evidence in support of a finding, we review the record—crediting evidence favorable to the finding and disregarding contrary evidence unless a reasonable factfinder could not reject the evidence. In re J.G., 495 S.W.3d 354, 370 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); see City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005). To review the factual sufficiency of the evidence in support of a finding, we consider and weigh all the evidence in a neutral light and will set aside the finding only if the evidence is so weak or the

finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. See Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); J.G., 495 S.W.3d at 370.

In her first issue, Appellant challenges the finding made by the trial court pursuant to Section 54.02(j)(4). Appellant argues that the State failed to meet its burden to show by a preponderance of the evidence that, for reasons beyond the State's control, it was impractical to proceed in juvenile court before Appellant's eighteenth birthday.

Held: Affirmed

Memorandum Opinion: Appellant cites Moore v. State in support of her argument. See Moore v. State, 532 S.W.3d 400, 403–05 (Tex. Crim. App. 2017). The Court of Criminal Appeals stated in Moore that Section 54.02(j)(4) "is meant to limit the prosecution of an adult for an act he committed as a juvenile if his case could reasonably have been dealt with when he was still a juvenile." Id. at 405. The State has the burden under Section 54.02(j)(4), and the State's "failure to get around to this case in time [does] not meet that burden." Id. We believe that the facts in the present case are distinguishable from those in Moore, where the outcry was made when the defendant was sixteen years old and the nearly two-year delay was attributable to the State. See id. at 402, 405.

The record from the hearing in this case indicates that the outcry was delayed; the child complainant made her first outcry approximately seven weeks before Appellant's eighteenth birthday. Based on the testimony presented at the transfer hearing, the juvenile court could have found that, for a reason beyond the control of the State—such as the complainant's delayed outcry, it was not practicable to proceed in the juvenile court prior to Appellant's eighteenth birthday. See FAM. § 54.02(j)(4); In re L.M.B., No. 11-16-00241-CV, 2017 WL 253654, at *2 (Tex. App.—Eastland Jan. 6, 2017, no pet.) (mem. op.); In re B.C.B., No. 05-16-00207-CV, 2016 WL 3165595, at *4–6 (Tex. App.—Dallas June 7, 2016, pet. denied) (mem. op.).

In her second issue, Appellant challenges the finding made by the trial court pursuant to Section 54.02(j)(5). Appellant argues that the State failed to present evidence on which the trial court could have found that "penetration occurred," an element that is required for the offense to be a first-degree felony and subject to transfer under Section 54.02(j). See PENAL § 22.021(a)(1)(B)(i), (e) (providing that a person commits a first-degree felony if she intentionally or knowingly causes the penetration of the anus or sexual organ of a child by any means); FAM. § 54.02(j)(2)(B), (j)(5).

The State must only have proved that there was probable cause to believe that Appellant committed the offense of aggravated sexual assault as alleged. The evidence from the transfer hearing includes the complainant's statement that Appellant's finger "went inside" the complainant's vagina. From this evidence, the juvenile court could have determined that there was probable cause to believe that Appellant had penetrated the sexual organ of the complainant. See Villa v. State, 417 S.W.3d 455, 462 (Tex. Crim. App. 2013); Vernon v. State, 841 S.W.2d 407, 408–10 (Tex. Crim. App. 1992); Gonzalez v. State, No. 11-12-00027-CR, 2014 WL 97295, at *3 (Tex. App.—Eastland Jan. 9, 2014, no pet.) (mem. op., not designated for publication). We conclude that the State presented legally and factually sufficient evidence from which the juvenile court could reasonably have concluded that there was probable cause to believe that Appellant committed the alleged offense. See FAM. § 54.02(j)(5).

Conclusion: Based upon our review of the record in this appeal, we hold that the juvenile court's findings under Section 54.02(j) are supported by the evidence presented at the transfer hearing and that the juvenile court did not abuse its discretion when it entered the transfer order. We affirm the order of the juvenile court.

THE CASE SPECIFIC FINDINGS REQUIRED IN MOON, APPLY TO FAMILY CODE SECTION 54.02(A) (THE UNDER 18 PROVISION), NOT TO 54.02(J) (THE OVER 18 TRANSFER PROVISION).

In the Matter of G.O., MEMORANDUM, No. 05-19-01429-CV, 2020 WL 1472218, Juv. Rep. Vol 34 No. 2 ¶ 20-2-10 (Tex.App.—Dallas, 3/26/2020).

Facts: At the time of the hearing from which this appeal arises, G.O. was 26 years old. The juvenile court waived its jurisdiction and ordered G.O. to be transferred to the district court to be prosecuted as an adult for offenses he allegedly committed when a juvenile.

The offense alleged was sexual assault of B.O., a relative living in G.O.'s home, who was eight years and nine months younger than G.O. The issue at the hearing was G.O.'s age at the time of the offenses.

Fernando Robledo, a certified peace officer with the Collin County Sheriff's Department, was the first witness at the hearing. He is assigned to the Collin County Child Abuse Task Force. He observed the forensic interview of B.O. at the Collin County Child Advocacy Center in late 2018. He explained that G.O.'s parents are B.O.'s great-aunt and great-uncle, and B.O. was living in their home. In the forensic interview, B.O. explained that G.O. sexually abused her multiple times when she was approximately six or seven years old. Robledo testified that B.O.'s 2018 forensic interview was the first report law enforcement received about G.O.'s alleged sexual abuse of B.O.

Robledo also testified that after B.O.'s interview, G.O. came to the Child Advocacy Center and spoke with

Juvenile Law Section www.juvenilelaw.org Volume 34, Number 2

Robledo. Robledo testified that G.O.'s story "evolved" as the interview proceeded. He first admitted tickling B.O. and touching her vaginal area. When confronted with B.O.'s outcry of additional sexual abuse, G.O. admitted to putting on a condom and rubbing B.O.'s sexual organ over his erect penis and ejaculating when neither B.O. nor G.O. was wearing any clothes. G.O. told Robledo that B.O. was probably in the first or second grade when the abuse occurred, and G.O. was 13 or 14. Robledo testified that in his opinion, there was probable cause to believe that G.O. committed the offense of aggravated sexual assault of B.O.

B.O., age 17 at the time of the hearing, testified that CPS placed her with G.O.'s parents just before her third birthday. B.O. considered them to be her parents although they did not formally adopt her. She explained that when their parents would go grocery shopping, G.O. would remove B.O.'s clothes, put on what B.O. now knows was a condom, and penetrate her sexual organ with his. G.O. referred to his conduct as "tickling" her, so when she complained of the "tickling" to her parents, they considered it to be normal conduct between siblings.

B.O. testified that the assaults occurred over a period of about a year, before and after her seventh birthday. She recalled that her mother had been out shopping for her birthday dinner and cake when one of the assaults occurred. B.O. also testified that the assaults occurred before G.O. was able to drive. She said that G.O. "wasn't even able to drive yet because they happened up until he got his first girlfriend, and I still remember our family having to take her home some nights because [G.O.] wasn't able to drive her home."

B.O. did not make any outcry at the time of the offenses. She told G.O.'s parents only after G.O. was no longer living in the home but was returning to the home for overnight visits. She then told a nurse at school, and the school notified law enforcement.

On cross-examination, B.O. confirmed that she had told the forensic interviewer that G.O. played "All Star Baseball" around the time the assaults occurred, and that the assaults stopped after G.O. had started dating his first girlfriend Courtney and he got a flat-screen TV in his room.

G.O.'s mother ("Mother") testified that B.O. came to live with them in 2005, when B.O. was three years old and G.O. was twelve. She confirmed that B.O. did not make any outcry of abuse by G.O. until many years later. She testified that B.O. told her "everything stopped when [G.O.] got his first girlfriend Courtney." She is "a hundred percent sure" that G.O. began dating Courtney when G.O. was in the seventh grade, because there is school yearbook picture of them attending a dance together in 2006. G.O. was thirteen years old at the time of the dance. Mother brought the yearbook and photograph to trial, and the photograph was admitted into evidence.

Mother also testified that the summer after G.O. completed seventh grade, Courtney accompanied the family on a swimming trip to Oklahoma. Mother testified that Courtney and G.O. stopped dating the following school year. Like B.O., Mother recalled that G.O. did not have his driver's license when he dated Courtney, because she and her husband would drive G.O. and Courtney back and forth between their homes.

Mother also testified that G.O. was in All Star Baseball in 2005, and the age limitation for that league was 14. She identified a newspaper article dated July 15, 2005, with a picture of the team including G.O., and testified that G.O. did not participate in All Star Baseball in high school. Mother also contradicted B.O.'s testimony about the flat-screen TV in G.O.'s room, saying that G.O. paid for the TV with his own money when he was a senior in high school.

After the hearing, the juvenile court made findings of fact, including a finding that "there is probable cause to believe that [G.O.] was 14 years of age or older and under 17 years of age at the time he is alleged to have committed the 1st degree felony offense of Aggravated Sexual Assault of a Child." The court waived jurisdiction and ordered transfer of G.O. to the district court "for proper criminal proceedings." This appeal followed.

Held: Affirmed

Memorandum Opinion: In his first issue, G.O. complains that the juvenile court abused its discretion by transferring the case to district court without making the necessary case-specific findings of fact. Because G.O. was over the age of 18 at the time of the transfer hearing, subsection (j) of family code section 54.02 applied to the proceeding. See TEX. FAM. CODE § 54.02(j)(1) (waiver of jurisdiction for person 18 years of age or older at time of transfer hearing). G.O. argues that the juvenile court's findings numbered two, four, and five lack the specificity required under subsection (h) of section 54.02. See TEX. FAM. CODE § 54.02(h) (juvenile court "shall state specifically in the order its reasons for waiver"); Moon, 451 S.W.3d at 49–50 (appellate court must limit its sufficiency review to facts that juvenile court expressly relied upon as required to be explicitly set out in transfer order under § 54.02(h)). In Moon, the court explained that the purpose of section 54.02(h) "is not well served by a transfer order so lacking in specifics that the appellate court is forced to speculate as to the juvenile court's reasons for finding transfer to be appropriate or the facts the juvenile court found to substantiate those reasons." Moon, 451 S.W.3d at 49.

The State argues that Moon addressed orders under subsection (h) of section 54.02, not subsection (j), and in any event, the juvenile court's order in this case included case-specific findings from which a reviewing court may determine that the ruling was appropriately guided by statutory criteria.

The juvenile court found that G.O. is "a person 18 years of age or older," a fact that G.O. does not dispute, although the juvenile court's first finding of fact also misstates G.O.'s birth date as November 15, 1995, instead of the correct date of September 21, 1992. Even under the incorrect date, G.O. was older than 18 at the time of the hearing on June 27, 2019. The juvenile court also found:
2. That there is probable cause to believe that [G.O.] was 14 years of age or older and under 17 years of age at the time he is alleged to have committed the 1st degree felony offense of Aggravated Sexual Assault of a Child.
4. The [C]ourt finds from a preponderance of the evidence that after due diligence of the [S]tate it was not practicable to proceed in juvenile court before the 18th birthday of [G.O.] because the State did not have probable cause to proceed in juvenile court and new evidence has been found since the 18[th] birthday of the person.
5. The Court finds there is probable cause to believe that the Respondent committed the alleged offense.

The evidence supporting the juvenile court's fourth and fifth findings is undisputed. As to the fourth finding, the only evidence in the record is that B.O. made no outcry until November 2018, after G.O.'s 26th birthday. As to the fifth finding, B.O. testified to G.O.'s sexual assaults, and Robledo testified that G.O. admitted his own conduct constituting the offenses. There was no evidence to the contrary. See Matter of D.L.C., No. 06-16-00058-CV, 2017 WL 1055680, at *6 (Tex. App.—Texarkana Mar. 21, 2017, no pet.) (mem. op.) ("In fact, there may be no reversible error even when the juvenile court's order seemingly restates the factors contained in Section 54.02, as long as the enumerated reasons were supported by the evidence.").

The only disputed fact was G.O.'s age at the time of the offenses. In Matter of D.L.C., a finding that "D.L.C. was sixteen years of age at the time the alleged offense(s) occurred" was sufficiently specific to provide a definite basis for the appellate court to determine that the juvenile court's decision was " 'appropriately guided by the statutory criteria, principled, and reason[able].' " Id. at *7 (quoting Moon, 451 S.W.3d at 49). Here, the juvenile court found that G.O. was "was 14 years of age or older and under 17 years of age" at the time of the offense, a finding that tracks the applicable statutory language. See TEX. FAM. CODE § 54.02(j)(2)(B).

G.O. also argues that the juvenile court's findings do not include the findings required under subsections (a) and (f) of section 54.02. But because G.O. was "18 years of age or older" at the time of the hearing, subsection (j) applied to establish the required findings. Compare TEX. FAM. CODE §§ 54.02(a) (applying to transfer of "child") and 54.02(f) (factors to consider "in making the determination required by Subsection (a)") with TEX. FAM. CODE § 54.02(j) (required findings for transfer of person 18 years of age or older). Findings under subsection (a) and (f) were not required. See Matter of D.L.C., 2017 WL 1055680, at *5 (because D.L.C. was 18 years of age at time of hearing on State's petition for discretionary transfer, factors in subsection (j) of § 54.02 applied, not factors in subsections (a) and (f)).

We conclude that the juvenile court's order contained sufficiently specific findings on subsection 54.02(j)'s factors. See id. at 6–7. We decide G.O.'s first issue against him.

THERE WAS NO ABUSE OF DISCRETION IN THE JUVENILE COURT'S DECISION TO WAIVE JURISDICTION AND TO TRANSFER APPELLANT TO THE ADULT DISTRICT COURT WHERE THE JUVENILE COURT SET OUT THE ALLEGATIONS, PROBABLE CAUSE, AND THE COURT'S FINDINGS IN GREAT DETAIL IN ITS TRANSFER ORDER.

In the Matter of L.W., MEMORANDUM, No. 05-19-00966-CV, 2020 WL 728431, Tex. Juv. Rep. Vol 34 No. 2 ¶ 20-2-2 (Tex.App.—Dallas, 2/13/2020)

Facts: L.W. is charged with one count of capital murder, four counts of aggravated sexual assault, two counts of aggravated assault, and one count of burglary of a habitation. The charges relate to offenses against seven different complainants in four separate incidents occurring between September 12, 2018 and November 27, 2018. L.W. is alleged to have used or exhibited a deadly weapon (a firearm) in each offense. L.W. was born on January 27, 2003 and was fifteen years old at the time the offenses are alleged to have occurred. The State petitioned for discretionary transfer to adult district court for criminal proceedings against L.W. concerning those felony offenses. The juvenile court ordered the psychological evaluation, diagnostic study, social evaluation, and full investigation into the child, his circumstances, and the circumstances of the alleged offenses required by family code section 54.02(d).

After the social study and evaluations were completed, the juvenile court conducted a hearing on the State's petition for discretionary transfer. The juvenile court took judicial notice of the contents of the court's file, including the May 2, 2019 Report of Psychological Evaluation: Fitness to Proceed and corrected copy dated June 3, 2019, June 13, 2019 Report of Psychological Evaluation and Diagnostic Study Addendum, and July 16, 2019 Social Evaluation and Investigative Report. At the hearing, the State presented testimony from three Dallas police detectives, the probation officer assigned to the court assessment unit of the Dallas County juvenile probation department, and the Assistant Chief Psychologist for the Dallas County Juvenile Department. L.W. presented testimony from his mother, a foster mother he lived with in 2013, the Clinical Supervisor of the sexual behavior treatment program (SBTP) for the Texas Juvenile Justice Department (TJJD), and another employee of the TJJD.

Following the two-day certification hearing on the State's petition, the juvenile court certified L.W. to be tried as an adult and transferred the criminal proceedings to a criminal district court. The juvenile court judge issued an eleven-page order on July 26, 2019, granting the State's motion for discretionary transfer and specifically stating the reasons for waiver. See TEX. FAM. CODE ANN. § 54.02(b). L.W. now appeals that order. See id. § 56.01(c)(1)(A).

Held: Affirmed

Memorandum Opinion: In three issues, L.W. argues the juvenile court's certification and transfer order should be reversed because the order was deficient and lacking in specificity and the evidence presented was legally and factually insufficient to support the trial court's decision to transfer the case to criminal district court. We address each issue in turn.

A. Issue One – Specificity of the Order

L.W. does not complain of the findings regarding probable cause or that the offenses are felonies and offenses against persons and property. He argues that the court did not "show its work" as to its other 54.02(a) findings and the following findings regarding the section 54.02(f) factors.

We disagree with L.W.'s analysis. In addition to the findings L.W. complains of, the juvenile court stated that the following were reasons for the court's disposition:

- L.W.'s conduct was willful and violent.
- L.W. used a deadly weapon during the course of the offenses.
- The offenses were premeditated.
- L.W. "has not accepted or responded to supervision at home, in foster care or in detention"
- L.W. "has been violent and exhibited extreme anger while awaiting his hearing," had to be "physically and mechanically restrained due to his violence and anger while in detention" awaiting the transfer hearing, made a replica 3-D assault rifle while in the detention facility, made a comb knife he intended to use to hurt a staff member in detention, and planned to commit an aggravated assault against a staff member while in detention.
- Personal injury resulted to three victims,
- Death resulted to one victim.
- "[T]he offenses were so serious that transfer to a District Court with criminal jurisdiction must be granted."
- L.W. "has been following an adult pattern of living."

The court then set out "specific factual findings made to support the transfer decision." For example, the trial court set out the findings of Dr. Hinton and of Jefferson concerning L.W.'s sophistication, the tactics used by L.W. in each of the offenses, the violent and extreme anger shown by L.W. while in detention, his manipulative nature, and their conclusions concerning L.W. following their social evaluation and fitness to proceed reports. The juvenile court also cited the testimony of L.W.'s foster mother regarding L.W.'s past violent behavior and the escalation of that behavior as further support for the court's findings. The order also cited Jefferson's findings that L.W. hunted his victims and used his youthful appearance to his advantage to commit all of the offenses in the State's petition. The court also mentioned Dr. Hinton's testimony that L.W. is more sophisticated than his peers and is a danger to himself and others.

In Moon, the only reason stated in the transfer order to explain the juvenile court's waiver of jurisdiction was that the alleged offense was a serious offense. Moon, 451 S.W.3d at 50. And the only fact specified in the order in support of that reason was that the alleged offense was an offense against the person. Id. The order made no findings about the specifics of the alleged offense. Id. at 48. The court of criminal appeals held that waiver of juvenile jurisdiction based on the seriousness of the offense, supported by a fact that did not relate to the alleged offense, constituted an abuse of discretion. Id. at 50. That is not the case here. The juvenile court included specific factual recitations to support its findings here and, as such, did not abuse its discretion by ordering certification. See, e.g. In the Matter of K.M.D., 2018 WL 3238142, at *5; Moon, 451 S.W.3d at 49 (by showing its work, the juvenile court provides a "sure-footed and definite basis from which an appellate court can determine that its decision was in fact appropriately guided by the statutory criteria, principled, and reasonable").

B. Issues Two and Three – Legal and Factual Sufficiency of the Evidence

In his second and third issues, L.W. argues that the evidence is legally and factually insufficient to support the certification and transfer order. L.W. argues the evidence is legally and factually insufficient to support three of the juvenile court's section 54.02(f) findings: (1) his sophistication and maturity; (2) his record and previous history; (3) the lack of prospects of adequate protection of the public from him and the doubtful likelihood of the juvenile system to rehabilitate him. L.W. does not challenge the sufficiency of the evidence to support the finding that the alleged offenses were against persons and property or the finding of probable cause. The juvenile court is obligated to consider the factors set forth in section 54.02(f) to make the determination required under section 54.02(a)(3). Not every factor in section 54.02(f) need weigh in favor of transfer. Moon, 451 S.W.3d at 47. Any combination of the criteria may suffice to support the juvenile court's waiver of jurisdiction. Id. at 47 & n.78 (citing Hidalgo, 983 S.W.2d at 754, n.16).

1) Sufficiency of the evidence

As discussed above, our review of L.W. sufficiency points is a two-step process. First, we must review the specific findings of fact concerning the section 54.02(f) factors under a "traditional sufficiency of the evidence review." Moon, 451 S.W.3d at 47.

a. Sophistication and maturity of L.W.
The juvenile court found that L.W.'s levels of sophistication and maturity weighed in favor of certification.

Based on the record before us, we conclude that the juvenile court had more than a scintilla of evidence to support its finding that L.W.'s sophistication and maturity weighed in favor of certification as an adult and, thus, it is supported by legally sufficient evidence.

When conducting a factual sufficiency review, we must consider any evidence contrary to the juvenile court's determination and determine if, after weighing all the evidence, the "juvenile court's finding that appellant was of sufficient sophistication and maturity to be tried as an adult was not so against the great weight and preponderance of the evidence as to be manifestly unjust." In re K.J., 493 S.W.3d 140, 151 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (quoting In re K.D.S., 808 S.W.2d 299, 303 (Tex. App.—Houston [1st Dist.] 1991, no pet.)). Here, the only reference to immaturity came from Jefferson when he described some of L.W.'s behavior while in detention as "silliness" and "horseplay" caused by immaturity. Jefferson, however, testified that he had no issue with L.W. being tried as an adult in a criminal district court. He concluded that L.W. was of "highly excessive" sophistication, manipulative, and able to use his youthful appearance and immature actions when it benefits him. Having reviewed all of the evidence under the appropriate standard, we hold the juvenile court's determination is not so against the great weight and preponderance of the evidence as to be manifestly unjust.

b. Record and previous history of L.W.
L.W. next argues that the evidence is legally and factually insufficient to support the juvenile court's findings that L.W.'s background "indicates that the welfare of the community requires criminal prosecution." L.W. complains the trial court failed to provide case-specific reasons for this conclusion and argues that his lack of a prior record contradicts the finding. We disagree. Although L.W. did not have a prior record with the juvenile department, the record established that he had a significant history of behavioral problems, angry outbursts, and violent behavior at home and during his time in detention. L.W. also spent sixteen to seventeen months in a residential treatment program in San Antonio. The transfer order references these facts and the extremely violent behavior that required L.W.'s foster family to restrain L.W. while he was in their care. L.W. has been diagnosed with bipolar disorder but financial constraints have caused L.W. to be inconsistent in taking the medication necessary to treat that condition. Further, the court's findings noted that the evidence suggested L.W. was the perpetrator of two prior sexual assaults in Louisiana at a time when he had medication. Dr. Hinton testified to L.W.'s history of aggressive behavior and noted that the community should be concerned about L.W.'s inability to control his anger and violent outbursts. L.W.'s foster mother testified that he exhibited the same behavior when he lived with her at the age of ten. L.W.'s history also included treatment in two psychiatric treatment facilities and a residential treatment facility. Moreover, the evidence showed that the offenses were premeditated, followed the same plan, used the same tactics, and escalated to the point of murder.

Based on the record before us, we conclude that the juvenile court had more than a scintilla of evidence to support its finding that L.W.'s background indicates that the welfare of the community requires criminal prosecution and, thus, it is supported by legally sufficient evidence. We further hold the juvenile court's determination is not so against the great weight and preponderance of the evidence as to be manifestly unjust.

c. Prospects of adequate protection of the public and likelihood of rehabilitation by use of services, procedures, and facilities currently available to the juvenile court
As to the fourth factor in Section 54.02(f) regarding the prospects for the adequate protection of the public and the likelihood of rehabilitation by the juvenile system, the juvenile court found that the services currently available from the juvenile court would be unlikely to rehabilitate L.W. Additionally, the juvenile court found that due to L.W.'s age, the juvenile system would be unlikely to rehabilitate him before his nineteenth birthday. The court based its determination on the testimony of Jefferson and Dr. Hinton. Jefferson testified that the Department's recommendation that the court transfer L.W. was based in part on the lack of sufficient time to complete rehabilitative programs within the juvenile system. Dr. Hinton testified that any treatment of L.W. would be fairly challenging because he suffers from significant mental health and behavioral health issues that are chronic and long standing. She testified that these challenges would come with a probability of relapse. Dr. Hinton agreed that L.W. is a troubled young man and recommended L.W. be placed in a highly supervised environment.

Based on the record before us, we conclude that the juvenile court had more than a scintilla of evidence to support its finding that consideration of adequate protection of the public as well as the likelihood of reasonable rehabilitation weighed in favor of certification as an adult; and, thus, the finding is supported by legally sufficient evidence.

2) Abuse of discretion of decision to transfer
The record reflects the juvenile court carefully considered this matter. The juvenile court considered the investigating officers' testimony as well as the expert testimony of Dr. Hinton, the opinions of L.W.'s mother and former foster mother, and the testimony of L.W.'s other witnesses. The trial court also considered, addressed, and applied the opinions of Jefferson, a probation officer with over thirteen years of experience working with juvenile offenders, who had met with L.W. over thirty times and prepared the social

Juvenile Law Section www.juvenilelaw.org Volume 34, Number 2

evaluation and investigative report. The court further considered Dr. Hinton's report, Jefferson's report, the various incident reports, the DNA analysis, and M.E.'s autopsy report.

On this record, we cannot say that the juvenile court's decision was arbitrary or made without reference to guiding rules or principles. See Moon, 451 S.W.3d at 47. Accordingly, we find no abuse of discretion in the juvenile court's decision to waive jurisdiction and to transfer appellant to district court. We overrule appellant's second and third issues on appeal.

Conclusion: It is undisputed that L.W. is alleged to have committed multiple felonies and was fifteen years old or older at the time he committed the alleged offenses. Each offense was willful, violent, and premeditated. The record is also replete with evidence, including DNA evidence linking L.W. to each complainant, to establish probable cause to believe L.W. committed the alleged offenses. Moreover, the record contains much evidence to support the determination that the welfare of the community requires criminal proceedings because of the seriousness of these alleged offenses and L.W.'s background, including his history of anger and violent behavior. The juvenile court's eleven-page order sets out the allegations, probable cause, and the court's findings in great detail and sets out specific facts from that evidence as to the section 54.02(f) factors. After reviewing the record, we conclude the evidence is legally and factually sufficient to support the juvenile court's findings and find no abuse of discretion in the juvenile court's decision to waive jurisdiction and to transfer appellant to district court. Accordingly, we affirm the juvenile court's certification and transfer order.

IN WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT, A SUFFICIENCY CHALLENGE TO TFC §54.02(J) CANNOT BE MADE IN A PRETRIAL WRIT OF HABEAS CORPUS BECAUSE AN ADEQUATE REMEDY BY DIRECT APPEAL IS AVAILABLE.

Ex Parte Moon, No. 01-18-01014-CR, --- S.W.3d ----, 2020 WL 827424, Tex. Juv. Rep. Vol 34 No. 2 ¶ 20-2-4A [Tex.App.—Houston (1st Dist.), 2/20/2020]

Facts: On December 18, 2008, a juvenile court waived jurisdiction over sixteen-year old Cameron Michael Moon and certified him to stand trial as an adult in criminal district court for the charged offense of murder. After a jury convicted him and assessed his punishment at thirty years' imprisonment, Moon appealed. This Court held that the juvenile court abused its discretion in waiving jurisdiction over Moon, vacated the district court's judgment, and dismissed the case. See Moon v. State, 410 S.W.3d 366, 378 (Tex. App.—Houston [1st Dist.] 2013), aff'd, 451 S.W.3d 28 (Tex. Crim. App. 2014). On the State's petition for discretionary review, the Court of Criminal Appeals affirmed this Court's judgment. See Moon v. State, 451 S.W.3d 28 (Tex. Crim. App. 2014).

On remand, the juvenile court again waived jurisdiction over Moon, who was then over the age of eighteen, and recertified him to stand trial as an adult. Moon filed a motion to dismiss and an application for writ of habeas corpus in district court, both of which the trial court denied.

Moon now appeals the trial court's denial of pretrial habeas corpus relief. In eight points of error, he contends that (1) the State presented legally and factually insufficient evidence to prove the elements required under section 54.02(j) of the Family Code; (2) the juvenile court's findings under section 54.02(j) were insufficient to allow it to waive jurisdiction; (3) the criminal district court had jurisdiction at the time it originally adjudicated the charged offense; (4) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that reversal of the previous transfer order made it impracticable for the State to proceed in juvenile court before Moon turned eighteen; (5) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that it exercised due diligence; (6) the application of section 54.02(j) to recertify Moon deprived him of the process to which he was originally due under section 54.02(a), (d), and (f) in violation of the United States and Texas Constitutions; (7) the application of the standards for certification under section 54.02(j) violated the ex post facto doctrine; and (8) the recertification of Moon under section 54.02(j) violated the equal protection and double jeopardy doctrines.

Held: Affirmed

Opinion: In his first through fifth points of error, Moon challenges the sufficiency of the evidence presented by the State, and its failure to obtain necessary findings, to prove each of the elements under Family Code section 54.02(j) as well as the sufficiency of the juvenile court's findings on each element. Specifically, Moon contends that:
(1) the State presented legally and factually insufficient evidence to prove the elements required under section 54.02(j) of the Family Code;
(2) the juvenile court's findings under section 54.02(j) were insufficient to allow it to waive jurisdiction;
(3) the criminal district court had jurisdiction at the time it originally adjudicated the charged offense;
(4) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that reversal of the previous transfer order made it impracticable for the State to proceed in juvenile court before Moon turned eighteen; and
(5) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that it exercised due diligence.

In response, the State argues that none of Moon's first five points is cognizable on pretrial writ of habeas

corpus and that Moon is instead attempting to mount a premature appeal and circumvent the statutory requirements of Code of Criminal Procedure 44.47. The State further argues that, even if Moon could prematurely attack the factual findings contained in the juvenile court's transfer order, his contentions fail on the merits.

We review a trial court's ruling on a pretrial writ of habeas corpus for an abuse of discretion. Kniatt v. State, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006); Ex parte Arango, 518 S.W.3d at 923. In conducting this review, we view the facts in the light most favorable to the trial court's ruling. See Kniatt, 206 S.W.3d at 664; Ex parte Arango, 518 S.W.3d at 924. We must therefore determine which, if any, of Moon's claims are cognizable via pretrial habeas before we may address the merits. See Ex parte Ellis, 309 S.W.3d at 79.

In support of his argument that pretrial habeas relief is appropriate, Moon relies on this Court's decision in Ex parte Arango. There, when Arango was sixteen years old, a juvenile court concluded that, because of the seriousness of the offense with which he had been charged, the welfare of the community required criminal proceedings and it transferred the case to criminal district court. See Ex parte Arango, 518 S.W.3d at 918. Nine years later, Arango, still having not been tried, filed a pretrial habeas application in the criminal district court contending that the juvenile court's transfer order was facially deficient under Moon and, therefore, failed to vest the criminal court with jurisdiction. See id. The trial court denied habeas relief. See id.

"Generally, pretrial habeas is not available to test the sufficiency of the charging instrument or to construe the meaning and application of the statute defining the offense charged." Ex parte Ellis, 309 S.W.3d at 79; see also Ex parte Doster, 303 S.W.3d at 727 (dismissing appeal because pretrial habeas application not appropriate vehicle to raise alleged violation of Interstate Agreement on Detainers Act); Ex parte Smith, 185 S.W.3d 887, 892–93 (Tex. Crim. App. 2006) (affirming denial of pretrial habeas relief because in pari materia claim was not cognizable in pretrial writ of habeas). We agree with the State's contention that Moon's challenge to the sufficiency of the transfer order is analogous to challenging a charging instrument because it is the order by which the criminal court has authority to criminally charge the defendant.

Further, Moon's challenge to the transfer order would require us to analyze and define terms and construe the meaning of the statute permitting the waiver of jurisdiction, something we are not permitted to do at this stage. See Ex parte Ellis, 309 S.W.3d at 79. For example, Moon argues that the statutory "no adjudication" requirement under section 54.02(j)(3) is not limited to "juvenile adjudication" and, therefore, his previous adjudication in criminal district court means that the State failed to prove this requirement. Moon's challenge also asks us to construe section 54.02(j)(4)(B)(iii) ("[A]fter due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because ... a previous transfer order was reversed by an appellate court[.]"). He argues that "[a]s written, subsection (B)(iii) can only be satisfied when the reversal of the previous transfer order takes place before the juvenile's 18th birthday but too late for it to be practicable to proceed in juvenile court."3 Thus, he concludes, "given the undisputed fact that the reversal of the original transfer order had not happened before Moon's 18th birthday, that reversal could not have impeded the State's ability to proceed in juvenile court before Moon's 18th birthday." Moon argues that the State's choice to seek certification rather than proceed in juvenile court when it could have done so precludes recertification under section 54.02(j).4

Moreover, pretrial habeas relief does not lie when there is an adequate remedy by appeal. See Ex parte Weise, 55 S.W.3d at 619. Moon's second transfer order was entered after January 1, 1996, but before September 1, 2015, and, therefore, Code of Criminal Procedure article 44.47 applies, which requires the discretionary transfer decision to be reviewed on direct appeal. See Ex parte Powell, 558 S.W.2d 480, 482 (Tex. Crim. App. 1977) (holding that statutory procedure for challenging juvenile court's transfer order on direct appeal was proper procedure for seeking review rather than writ of habeas corpus).

Conclusion: Because Moon has an adequate remedy by direct appeal of the discretionary transfer decision under article 44.47, he may not use a pretrial writ of habeas corpus to appeal prematurely his subsection (j) sufficiency challenges in his first, fourth, and fifth points of error. Ex parte Smith, 178 S.W.3d at 801 n.13.

IN WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT, §54.02(J) FAILS ON A DUE PROCESS CONSITUTIONAL FACIAL CHALLENGE SINCE IT ALSO APPLIES TO JUVENILES WHO COULD NOT BE FOUND OR THOSE WHO COULD NOT BE CHARGED UNTIL AFTER THEIR EIGHTEENTH BIRTHDAY BECAUSE ONLY THEN WAS NEW EVIDENCE FOUND TO ESTABLISH PROBABLE CAUSE, AND TO PREVAIL ON FACIAL CHALLENGE A PARTY MUST PROVE THAT NO FACTUAL CIRCUMSTANCES EXIST UNDER WHICH THE STATUTE WOULD BE CONSTITUTIONAL.

Ex Parte Moon, No. 01-18-01014-CR, --- S.W.3d ----, 2020 WL 827424, Tex. Juv. Rep. Vol 34 No. 2 ¶ 20-2-4B [Tex.App.—Houston (1st Dist.), 2/20/2020]

Facts: On December 18, 2008, a juvenile court waived jurisdiction over sixteen-year old Cameron Michael Moon and certified him to stand trial as an adult in criminal district court for the charged offense of murder. After a jury convicted him and assessed his punishment at thirty years' imprisonment, Moon appealed. This Court held that the juvenile court

abused its discretion in waiving jurisdiction over Moon, vacated the district court's judgment, and dismissed the case. See Moon v. State, 410 S.W.3d 366, 378 (Tex. App.—Houston [1st Dist.] 2013), aff'd, 451 S.W.3d 28 (Tex. Crim. App. 2014). On the State's petition for discretionary review, the Court of Criminal Appeals affirmed this Court's judgment. See Moon v. State, 451 S.W.3d 28 (Tex. Crim. App. 2014).

On remand, the juvenile court again waived jurisdiction over Moon, who was then over the age of eighteen, and recertified him to stand trial as an adult. Moon filed a motion to dismiss and an application for writ of habeas corpus in district court, both of which the trial court denied.

Moon now appeals the trial court's denial of pretrial habeas corpus relief. In eight points of error, he contends that (1) the State presented legally and factually insufficient evidence to prove the elements required under section 54.02(j) of the Family Code; (2) the juvenile court's findings under section 54.02(j) were insufficient to allow it to waive jurisdiction; (3) the criminal district court had jurisdiction at the time it originally adjudicated the charged offense; (4) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that reversal of the previous transfer order made it impracticable for the State to proceed in juvenile court before Moon turned eighteen; (5) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that it exercised due diligence; (6) the application of section 54.02(j) to recertify Moon deprived him of the process to which he was originally due under section 54.02(a), (d), and (f) in violation of the United States and Texas Constitutions; (7) the application of the standards for certification under section 54.02(j) violated the ex post facto doctrine; and (8) the recertification of Moon under section 54.02(j) violated the equal protection and double jeopardy doctrines.

Held: Affirmed

Opinion: In his first through fifth points of error, Moon challenges the sufficiency of the evidence presented by the State, and its failure to obtain necessary findings, to prove each of the elements under Family Code section 54.02(j) as well as the sufficiency of the juvenile court's findings on each element. Specifically, Moon contends that:

(1) the State presented legally and factually insufficient evidence to prove the elements required under section 54.02(j) of the Family Code;

(2) the juvenile court's findings under section 54.02(j) were insufficient to allow it to waive jurisdiction;

(3) the criminal district court had jurisdiction at the time it originally adjudicated the charged offense;

(4) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that reversal of the previous transfer order made it impracticable for the State to proceed in juvenile court before Moon turned eighteen; and

(5) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that it exercised due diligence.

In response, the State argues that none of Moon's first five points is cognizable on pretrial writ of habeas corpus and that Moon is instead attempting to mount a premature appeal and circumvent the statutory requirements of Code of Criminal Procedure 44.47. The State further argues that, even if Moon could prematurely attack the factual findings contained in the juvenile court's transfer order, his contentions fail on the merits.

Due Process Challenge

In his sixth point of error, Moon contends that the application of section 54.02(j) to recertify him deprived him of the process to which he was originally due under section 54.02(a), (d), and (f) in violation of the United States and Texas Constitutions. The State argues that Moon's claim is an improper "as applied" challenge that is not cognizable in pretrial writ of habeas corpus and, even if it were cognizable, it fails on the merits.

Due process requires, as a condition to a valid waiver order, "a hearing, including access by [the juvenile's] counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's [transfer] decision." Kent, 383 U.S. at 557. The Supreme Court in Kent held that a juvenile court must "accompany its waiver order with a statement of the reasons or considerations therefor" and that transfer hearings must "measure up to the essentials of due process and fair treatment." Id. at 561–62.

We must first determine whether Moon's due process complaint is cognizable on pretrial habeas review.

There are two types of challenges to the constitutionality of a statute: the statute is unconstitutional as applied to the defendant, or the statute is unconstitutional on its face. In re J.G., 495 S.W.3d 354, 364 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). "A facial challenge is an attack on a statute itself as opposed to a particular application." City of Los Angeles v. Patel, — U.S. —, 135 S. Ct. 2443, 2449 (2015). In order to successfully mount a facial challenge, a party must establish that no set of circumstances exists under which that statute would be valid. See United States v. Salerno, 481 U.S. 739, 745 (1987); State v. Rosseau, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013) ("[T]o prevail on a facial challenge, a party must establish that the statute always operates unconstitutionally in all possible circumstances."). When a party makes an "as applied" challenge to a statute, the essence of the challenge asserts that the statute, although generally constitutional, is unconstitutional when applied to the challenging party's particular circumstances. See State ex. rel. Lykos v. Fine, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011); In re Commitment of Fisher, 164 S.W.3d 637, 656 n.17 (Tex. 2005).

The State contends that Moon's due process complaint is an as-applied challenge that is not cognizable on pretrial writ of habeas corpus but that, even if it was, it fails on the merits because Moon cites to no right that would be lost if not vindicated before trial.

Moon contends that section 54.02(j) "is facially unconstitutional by virtue of the fact that the deprivation of due process required by Kent and Hidalgo cannot be corrected on remand as to any juveniles who have aged out after a post-conviction appeal." He argues that "[t]he result of this flawed process is that a child who was erroneously certified, but 18 years or older when the case is remanded, will never receive the benefit of the § 54.02(a) and (f) standards to which he or she was originally entitled. Stated differently, the individual will have been permanently deprived of the process that was originally due to protect the child's liberty interest in access to the juvenile justice system." We construe Moon's due process claim as a facial challenge to section 54.02.

To prevail on a facial challenge, a party must establish that the statute always operates unconstitutionally in all possible circumstances. Rosseau, 396 S.W.3d at 557 (citing Lykos, 330 S.W.3d at 908–09); see also Santikos v. State, 836 S.W.2d 631, 633 (Tex. Crim. App. 1992) ("A facial challenge to a statute is the most difficult challenge to mount successfully because the challenger must establish that no set of circumstances exists under which the statute will be valid."). "In a facial challenge to a statute's constitutionality, we examine the statute as it is written, rather than how it is applied in a particular case." Rosseau, 396 S.W.3d at 558 n.9; Lykos, 330 S.W.3d at 908. Analysis of a statute's constitutionality begins with the presumption that the statute is valid and that the Legislature did not act arbitrarily or unreasonably in enacting it. Rosseau, 396 S.W.3d at 557; Rodriguez v. State, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). The individual challenging the statute has the burden of rebutting the presumption of constitutionality. See Lykos, 330 S.W.3d at 911; Rodriguez, 93 S.W.3d at 69. "In the absence of contrary evidence, we presume that the legislature acted in a constitutionally sound fashion, and we uphold the statute if we can ascertain a reasonable construction that will render the statute constitutional and will carry out the legislative intent." In re J.G., 495 S.W.3d at 365.

Moon contends that section 54.02 is structurally flawed because it systematically denies the procedural due process protections of section 54.02(a), (d), and (f) to all persons who, like him, are improperly certified and are over eighteen when the transfer order is reversed and he is transferred back to juvenile court. According to Moon, section 54.02 is unconstitutional because "it contains no exception to the applicability of § 54.02(j) for those who were originally entitled to the protections of § 54.02(a), (d), and (f) but were wrongly certified under those sections." He asserts that "[b]ecause Moon error can never be corrected as to any person who has reached the age of 18 before being remanded to the juvenile court, a re-transfer under § 54.02(j) is facially unconstitutional as to all of those persons."

Moon's broad facial challenge, to be successful, must demonstrate that the statute is unconstitutional when applied not only to those individuals, such as Moon, who were erroneously certified under (a) and (f) and who are eighteen or older when their transfers are reversed but also to those individuals entering the juvenile system for the first time who are over the age of eighteen; in other words, it must also be unconstitutional when applied to those individuals who never had the protection of section 54.02(a) and (f) in the first place. However, subsection (j) does not apply only to those whose transfer orders were set aside by an appellate court. It also applies to juveniles who could not be found, see § 54.02(j)(4)(B)(ii), and those who could not be charged until after their eighteenth birthday because only then was new evidence found to establish probable cause, see id. (j)(4)(B)(i) (contemplating lengthier investigation process). None of these juveniles would be entitled to the protections of subsections (a), (d) and (f). Thus, the statute is not facially unconstitutional under all possible circumstances because it validly applies to individuals who initially enter the juvenile system when they are over eighteen years of age. See Lykos, 330 S.W.3d at 909 (noting that to prevail on facial challenge, party must prove that no factual circumstances exist under which statute would be constitutional).

In support of his argument, Moon relies on In re J.G. in which this Court, reviewing a very similar fact situation, declined a due process challenge to a second certification order under section 54.02(j) after the defendant's prior certification under section 54.02(a) and (f) had been reversed. 495 S.W.3d at 367–69. Moon contends that we only overruled the challenge because when the defendant was recertified the juvenile court also made findings under the subsection (a) and (f) factors. See id. at 368 ("In this case, therefore, the juvenile court essentially considered all of the relevant statutory factors for waiver of jurisdiction that the Legislature has specifically enumerated in section 54.02, despite the age-based distinction between subsections (a) and (f) and subsection (j).") (emphasis in original). Moon argues that here, unlike in In re J.G., the juvenile court made no findings under subsections (a) and (f) and, thus, In re J.G. compels a ruling that Moon's due process rights were violated. However, unlike here, In re J.G. was an as-applied challenge on direct appeal and not a facial challenge raised in a pretrial writ of habeas corpus. See id. at 368–69 ("We therefore conclude that section 54.02(j), as applied to appellant in this case, did not deprive appellant of due process and equal protection.").

Conclusion: Because Moon has failed to show that section 54.02(j) is unconstitutional in every possible respect, the statute is not facially unconstitutional. See

Juvenile Law Section www.juvenilelaw.org Volume 34, Number 2

Rosseau, 396 S.W.3d at 557. We therefore overrule his sixth point of error.

INDIVIDUALS SUBJECTED TO TRANSFER UNDER §54.02(j) CANNOT BE CONSIDERED A SUSPECT CLASS FOR AN EQUAL PROTECTION ARGUMENT BECAUSE THAT STATUTE ITSELF DEALS WITH THE TREATMENT OF THOSE WHO HAVE ALREADED REACHED THE AGE OF EIGHTEEN AND ARE NO LONGER MINORS.

Ex Parte Moon, No. 01-18-01014-CR, --- S.W.3d ----, 2020 WL 827424, Tex. Juv. Rep. Vol 34 No. 2 ¶ 20-2-4C [Tex.App.—Houston (1st Dist.), 2/20/2020]

Facts: On December 18, 2008, a juvenile court waived jurisdiction over sixteen-year old Cameron Michael Moon and certified him to stand trial as an adult in criminal district court for the charged offense of murder. After a jury convicted him and assessed his punishment at thirty years' imprisonment, Moon appealed. This Court held that the juvenile court abused its discretion in waiving jurisdiction over Moon, vacated the district court's judgment, and dismissed the case. See Moon v. State, 410 S.W.3d 366, 378 (Tex. App.—Houston [1st Dist.] 2013), aff'd, 451 S.W.3d 28 (Tex. Crim. App. 2014). On the State's petition for discretionary review, the Court of Criminal Appeals affirmed this Court's judgment. See Moon v. State, 451 S.W.3d 28 (Tex. Crim. App. 2014).

On remand, the juvenile court again waived jurisdiction over Moon, who was then over the age of eighteen, and recertified him to stand trial as an adult. Moon filed a motion to dismiss and an application for writ of habeas corpus in district court, both of which the trial court denied.

Moon now appeals the trial court's denial of pretrial habeas corpus relief. In eight points of error, he contends that (1) the State presented legally and factually insufficient evidence to prove the elements required under section 54.02(j) of the Family Code; (2) the juvenile court's findings under section 54.02(j) were insufficient to allow it to waive jurisdiction; (3) the criminal district court had jurisdiction at the time it originally adjudicated the charged offense; (4) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that reversal of the previous transfer order made it impracticable for the State to proceed in juvenile court before Moon turned eighteen; (5) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that it exercised due diligence; (6) the application of section 54.02(j) to recertify Moon deprived him of the process to which he was originally due under section 54.02(a), (d), and (f) in violation of the United States and Texas Constitutions; (7) the application of the standards for certification under section 54.02(j) violated the ex post facto doctrine; and (8) the recertification of Moon under section 54.02(j) violated the equal protection and double jeopardy doctrines.

Held: Affirmed

Opinion: In his first through fifth points of error, Moon challenges the sufficiency of the evidence presented by the State, and its failure to obtain necessary findings, to prove each of the elements under Family Code section 54.02(j) as well as the sufficiency of the juvenile court's findings on each element. Specifically, Moon contends that:
(1) the State presented legally and factually insufficient evidence to prove the elements required under section 54.02(j) of the Family Code;
(2) the juvenile court's findings under section 54.02(j) were insufficient to allow it to waive jurisdiction;
(3) the criminal district court had jurisdiction at the time it originally adjudicated the charged offense;
(4) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that reversal of the previous transfer order made it impracticable for the State to proceed in juvenile court before Moon turned eighteen; and
(5) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that it exercised due diligence.

In response, the State argues that none of Moon's first five points is cognizable on pretrial writ of habeas corpus and that Moon is instead attempting to mount a premature appeal and circumvent the statutory requirements of Code of Criminal Procedure 44.47. The State further argues that, even if Moon could prematurely attack the factual findings contained in the juvenile court's transfer order, his contentions fail on the merits.

Equal Protection

In his eighth point of error, Moon asserts that his recertification under section 54.02(j) violated the equal protection and double jeopardy clauses.

A. Equal Protection

1. Applicable Law

An equal protection challenge to a statute involves a two-step analysis. We first determine the level of scrutiny required, and then apply that level of scrutiny to the statute. Cannady v. State, 11 S.W.3d 205, 215 (Tex. Crim. App. 2000). "A statute is evaluated under 'strict scrutiny' if it interferes with a 'fundamental right' or discriminates against a 'suspect class.' " Id.; Walker v. State, 222 S.W.3d 707, 711 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). Otherwise, the challenged statute need only be "rationally related to a legitimate governmental purpose" to survive the equal protection challenge. Cannady, 11 S.W.3d at 215; Walker, 222 S.W.3d at 711; see also Romer v. Evans, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."). When the rational

basis test applies, the challenging party has the burden to negate "any reasonably conceivable state of facts that could provide a rational basis for the classification." Alobaidi v. Univ. of Tex. Health Sci. Ctr. at Hous., 243 S.W.3d 741, 747 (Tex. App.–Houston [14th Dist.] 2007, pet. denied) (quoting Bd. of Trustees v. Garrett, 531 U.S. 356, 367 (2001) (internal citations omitted)).

2. Analysis

We previously considered an equal protection challenge to section 54.02 in In re H.Y., 512 S.W.3d 467 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). There, after we reversed the juvenile court's original transfer order pursuant to Moon, the juvenile court again waived its jurisdiction and recertified the defendant, who was then over the age of eighteen, to stand trial as an adult. See id. at 470. On appeal from the second certification, the defendant argued, among other things, that section 54.02(j) violated the equal protection clause of the Texas and United States Constitutions because it enabled the State to transfer a person who has reached the age of eighteen more easily than a person under the age of eighteen. See id. at 477. He asserted that juveniles are a suspect class and that section 54.02 unlawfully penalized him for prevailing in his first appeal by making it easier for the State to transfer him on remand since he had reached the age of eighteen. See id.

After noting that "[a]ge has never been held to be a suspect classification requiring strict scrutiny under an equal protection analysis," we rejected the defendant's argument that 54.02(j) could not survive a rational basis review because "[t]he government has no legitimate interest in punishing children who successfully enforce their statutorily created rights under section 54.02(a) by prevailing on appeal." Id. at 476, 478. We noted that the text of the statute negated the defendant's argument, and that "there are many reasons to have non-juveniles transferred out of the juvenile court, including the fact that the resources of the juvenile court are designed to assist and rehabilitate juveniles, not adults." Id. at 478. We held that the defendant had failed to negate "any reasonably conceivable state of facts that could provide a rational basis for the statute's dissimilar treatment of those 17 and under versus those 18 and over." Id.

Moon acknowledges that age is not considered a suspect class. Instead, he argues that the right of a child to be treated as a juvenile and not subjected to the adult prison system should be considered a fundamental right warranting strict scrutiny review. He asserts that the application of section 54.02(j) to juveniles who are wrongly certified under subsections (a) and (f) and remanded to juvenile court after they turn eighteen are subjected to a different standard as a result of being deprived of that fundamental right than those who are properly afforded the protections of subsections (a) and (f) as well as those whose certifications under section 54.02 (a) and (f) are reversed and returned to juvenile court before they turn eighteen. Moon states that, under a strict scrutiny standard, the different treatment of these individuals constitutes a denial of equal protection.

However, Moon is not actually complaining about the statute's treatment of children; rather, he is complaining about the statute's treatment of those who have reached the age of eighteen and are no longer minors. As we noted in In re H.Y., "[t]he statute itself recognizes that one of the reasons for transferring a person18 years or older to the criminal district court [is] if the person is returned to the juvenile court after a transfer order is reversed and the juvenile has reached the age of 18." Id. And, as the State points out, there are other reasons for the different standard, including the direction of juvenile resources toward juveniles, not adults.

Conclusion: Because Moon has not shown that no rational basis exists under any reasonably conceivable state of facts to support the classification, his equal protection claim fails. See id.

IN A WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT USING §54.02(J), DOUBLE JEAPARDY DOES NOT PRECLUDE THE JUVENILE COURT FROM WAIVING ITS JURISDICTION WHEN THE PRIOR CONVICTION WAS REVERSED DUE TO TRIAL ERROR, AND NOT DUE TO INSUFFICIENT EVIDENCE.

Ex Parte Moon, No. 01-18-01014-CR, --- S.W.3d ----, 2020 WL 827424, Tex. Juv. Rep. Vol 34 No. 2 ¶ 20-2-4D [Tex.App.—Houston (1st Dist.), 2/20/2020]

Facts: On December 18, 2008, a juvenile court waived jurisdiction over sixteen-year old Cameron Michael Moon and certified him to stand trial as an adult in criminal district court for the charged offense of murder. After a jury convicted him and assessed his punishment at thirty years' imprisonment, Moon appealed. This Court held that the juvenile court abused its discretion in waiving jurisdiction over Moon, vacated the district court's judgment, and dismissed the case. See Moon v. State, 410 S.W.3d 366, 378 (Tex. App.—Houston [1st Dist.] 2013), aff'd, 451 S.W.3d 28 (Tex. Crim. App. 2014). On the State's petition for discretionary review, the Court of Criminal Appeals affirmed this Court's judgment. See Moon v. State, 451 S.W.3d 28 (Tex. Crim. App. 2014).

On remand, the juvenile court again waived jurisdiction over Moon, who was then over the age of eighteen, and recertified him to stand trial as an adult. Moon filed a motion to dismiss and an application for writ of habeas corpus in district court, both of which the trial court denied.

Moon now appeals the trial court's denial of pretrial habeas corpus relief. In eight points of error, he contends that (1) the State presented legally and factually insufficient evidence to prove the elements required under section 54.02(j) of the Family Code; (2)

Juvenile Law Section www.juvenilelaw.org Volume 34, Number 2

the juvenile court's findings under section 54.02(j) were insufficient to allow it to waive jurisdiction; (3) the criminal district court had jurisdiction at the time it originally adjudicated the charged offense; (4) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that reversal of the previous transfer order made it impracticable for the State to proceed in juvenile court before Moon turned eighteen; (5) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that it exercised due diligence; (6) the application of section 54.02(j) to recertify Moon deprived him of the process to which he was originally due under section 54.02(a), (d), and (f) in violation of the United States and Texas Constitutions; (7) the application of the standards for certification under section 54.02(j) violated the ex post facto doctrine; and (8) the recertification of Moon under section 54.02(j) violated the equal protection and double jeopardy doctrines.

Held: Affirmed

Opinion: In his first through fifth points of error, Moon challenges the sufficiency of the evidence presented by the State, and its failure to obtain necessary findings, to prove each of the elements under Family Code section 54.02(j) as well as the sufficiency of the juvenile court's findings on each element. Specifically, Moon contends that:
(1) the State presented legally and factually insufficient evidence to prove the elements required under section 54.02(j) of the Family Code;
(2) the juvenile court's findings under section 54.02(j) were insufficient to allow it to waive jurisdiction;
(3) the criminal district court had jurisdiction at the time it originally adjudicated the charged offense;
(4) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that reversal of the previous transfer order made it impracticable for the State to proceed in juvenile court before Moon turned eighteen; and
(5) the State introduced legally and factually insufficient evidence, and did not obtain the necessary findings, to establish that it exercised due diligence.

In response, the State argues that none of Moon's first five points is cognizable on pretrial writ of habeas corpus and that Moon is instead attempting to mount a premature appeal and circumvent the statutory requirements of Code of Criminal Procedure 44.47. The State further argues that, even if Moon could prematurely attack the factual findings contained in the juvenile court's transfer order, his contentions fail on the merits.

Double Jeopardy
In his eighth point of error, Moon asserts that his recertification under section 54.02(j) violated the equal protection and double jeopardy clauses.

Double Jeopardy

1. Applicable Law
The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, protects an accused from being placed twice in jeopardy for the same offense. U.S. CONST. amend. V, cl. 2; see Ex parte Milner, 394 S.W.3d 502, 506 (Tex. Crim. App. 2013). The Texas Constitution provides substantially identical protections. See TEX. CONST. art. 1, § 14 ("No person, for the same offense, shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction."). "The Double Jeopardy Clause protects criminal defendants from three things: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." Milner, 394 S.W.3d at 506 (citing Brown v. Ohio, 432 U.S. 161, 165 (1977)). Although the Double Jeopardy Clause precludes retrial of a defendant whose conviction is reversed on appeal on the basis of insufficient evidence, it does not preclude retrial when the defendant's conviction is reversed on appeal for trial error. See Lockhart v. Nelson, 488 U.S. 33, 40–41 (1988).

2. Analysis
Moon argues that double jeopardy bars recertification in this case because the original certification order was reversed due to a lack of evidence.

We considered this same argument in In re J.G. There, the defendant argued that double jeopardy barred recertification because, on appeal from his original certification, the Fourteenth Court of Appeals had determined that insufficient evidence supported the juvenile court's decision to waive jurisdiction and transfer his case to the district court. See In re J.G., 495 S.W.3d at 365. We noted that although it was true that the Fourteenth Court of Appeals determined that the juvenile court had erroneously certified him as an adult, it did not reach the question of whether insufficient evidence supported the juvenile court's decision. See id. Rather, the Fourteenth Court of Appeals based its opinion on the fact that, under Moon, the transfer order itself was facially defective because it did not make any specific findings about the seriousness of the defendant's alleged offense and did not support its ultimate conclusion that transfer was warranted by the facts found in the record. See id. We emphasized that the Fourteenth Court of Appeals held that the transfer order itself was defective and not that the trial court's decision to waive jurisdiction and transfer the defendant's case was not supported by sufficient evidence. See id. We concluded that "because [the defendant's] prior conviction for the charged offense in this case was reversed due to trial error, and not due to insufficient evidence, double jeopardy does not preclude the juvenile court from waiving its jurisdiction, certifying [the defendant] as an adult, and transferring the case to district court a second time." Id. (citing Lockhart, 488 U.S. at 39).

Double jeopardy precludes retrial when an appellate court reverses a defendant's case for insufficient evidence of guilt, but it does not preclude retrial when it reverses the judgment based on trial court error. See Lockhart, 488 U.S. at 38 ("[T]he Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction."). Here, contrary to Moon's assertion, the first order certifying him was reversed because the transfer order itself was defective and not because the evidence against him was insufficient.

Conclusion: Because Moon's prior conviction for the charged offense in this case was reversed due to trial error, and not due to insufficient evidence, double jeopardy does not preclude the juvenile court from waiving its jurisdiction and recertifying him as an adult. Accordingly, we overrule Moon's eighth point of error.

Juvenile Law Section www.juvenilelaw.org Volume 34, Number 2