

**STATE BAR  
SECTION REPORT  
JUVENILE LAW**

**VOL. 20, NO. 4  
DECEMBER 2006**

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**COUNCIL**

<u>Terms Expire 2007</u>		<u>Terms Expire 2008</u>	
Bill Connolly	Houston	Laura Peterson	Garland
Richard Ainsa	El Paso	Nydia Thomas	Austin
Maxine Longoria	Edinburg	Lauro Trejo	Edinburg
<u>Terms Expire 2009</u>			
	Mary Wolf		Austin
	Jill Long Mata		San Antonio
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**CHAIR’S MESSAGE**  
**by Sharon Pruitt**

Dear Section Members:

Since September, we have finalized the agenda for the 20<sup>th</sup> Annual Robert O. Dawson Juvenile Institute in Houston, Texas, February 22 - 24, 2007, at the Westin Galleria. This schedule is a flashback to the early days of the Conference when we held class on Saturday morning. If you are joining us from out of town, the Westin will allow you to continue your stay Saturday night at the limited time Conference price. Over the years many attendees have expressed an interest in enjoying golf after the conference. If you are really interested in pursuing this as an organized event, please contact Council Member, Bill Connolly.

We will also be working hard in the next few months to prepare for the Scholarship Fund Silent Auction held during the Conference. As you read about the progress that our latest student has made, let it inspire you to sponsor a gift basket to donate to the silent auction or start your own savings to spend, spend, spend at the silent auction. You can personally contribute to the success of this student and more. Contact our Immediate-Past Chair, Anne Hazlewood, to join our Scholarship Committee.

The 80<sup>th</sup> Legislative Session is just around the corner. We have had an opportunity to reorganize the Legislative Committee and welcome Elizabeth Godwin as the Chair of the Legislative Committee. This should be a well-balanced effort, we have several prosecutors involved, but we need more input from the juvenile defense bar. So, if you are interested in participating on this committee, please contact Elizabeth Godwin at [egodwin1@houston.rr.com](mailto:egodwin1@houston.rr.com).

It is hard to believe that a year has almost passed. Before the next edition of the newsletter, a new council will be formed with new faces representing the diversity of our juvenile section. The Council’s goal has always been to keep a balance of defense, prosecution, judicial, and regional diversity in mind when making nominations for the Council. I believe the proposed slate of Officers and Council Members found in this newsletter continues this goal. Please join us in Houston in February to vote. If you are interested in volunteering your time or sharing your knowledge, remember you can contact me or any of our committee chairs to become more involved in your section.

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## EDITOR'S FOREWORD

by Pat Garza

Are you ready for the holidays? Ready or not here they come. Here they come? I've been seeing holiday decorations since Halloween. When you get to my age, it's more like, is it over yet? I'm only kidding, of course. I love to shop. I've got so many people to shop for when I show up at Target I get valet parking and free drinks. And my kids have gotten smarter too. They don't ask if I can afford it anymore. They ask if I've maxed out my credit cards yet. I hope everyone has a very joyful and safe holiday season.

**20<sup>th</sup> Annual Robert Dawson Juvenile Law Institute.** The Juvenile Law Section's Juvenile Law Institute will be held on February 22-24, at the Westin Galleria in Houston, Texas. Chair-elect Brian Fischer and his planning committee are putting together an excellent and practical conference that I'm sure all juvenile law practitioners will enjoy. Registration information is enclosed later in this newsletter.

**Scholarship Update.** Scott, the current recipient of educational assistance from the Juvenile Law Section, recently received his letter of acceptance from The University of Texas San Antonio (UTSA) for the spring semester. The following is a portion of an email received by Mary Wolf of the Juvenile Law Section in that regard:

*Mary,*

*I have wonderful news to share about Scott! I received a phone call from him this morning. He received his acceptance letter to University of Texas San Antonio for the spring semester. After his credits transfer, he will be considered a sophomore!*

*Needless to say, he is ecstatic. He is going to begin searching for classes and register as soon as possible. He said, "I can be like a **real** university student now!" Of course, none of this would be possible without the continued support from all of the folks in the Juvenile Law Section.*

*Thank you!*

*Christina Escareno, Assistant Trust Fund Administrator*

Scott will pursue a Bachelor of Science degree in Computer Science and wants to become a software engineer. He has been funded by the Juvenile Law Section since January 2006 and will enter UTSA as a sophomore. Because of the continued support of the Juvenile Law Section, Scott is a step closer to realizing his goals. Thanks to everyone for continuing to support this important program!

Money to fund our scholarships comes from contributions made at the silent auction held during the Professor Robert O. Dawson Juvenile Law Institutes in February. Please contact Brian Fischer, at (713) 520-7500, if you have items to donate or ideas for the silent auction.

**Officer and Council Nominees.** The annual Juvenile Law Section Meeting will be held in conjunction with the February Juvenile Law Conference. The Juvenile Law Section's nominating committee submitted the following slate of nominations:

Chair-Elect — Tim Minekos, Fort Worth  
 Secretary — Chris Hubner, Austin  
 Treasurer — William Connolly, Houston  
 Council Members — Terms to Expire 2010  
     Richard Anisa  
     David Hazlewood  
     Kimberly McCary

Additional nominations for the council may be made by any juvenile law section member during the annual meeting which will be held on February 22, during the Robert Dawson Juvenile Law Institute in Houston.

**My father used to play with my brother and me in the yard. Mother would come out and say, "You're tearing up the grass." "We're not raising grass," Dad would reply. "We're raising boys."**

— Harmon Killebrew



Sponsored by the  
Juvenile Law Section of the State Bar of Texas

**20<sup>th</sup> Annual Juvenile Law Conference**  
**PROFESSOR ROBERT O. DAWSON**  
**JUVENILE LAW INSTITUTE**



February 22 - 24, 2007  
Westin Galleria Hotel • Houston, Texas

## Tentative Agenda

**Thursday, February 22, 2007 – approx. 500**  
*General Session (Grand Ballroom) – 3.5 hours (including 1.0 hour ethics)*

- 10:30 a.m. Registration  
*You may register at any time between 10:30 a.m. and the time you arrive. You are not obligated to register early.*
- 1:00 p.m. Welcome and Introductions  
*Brian Fischer, Chair Elect  
 Juvenile Law Section*
- 1:15 p.m. Keynote Speaker  
*Honorable Michael Schneider (Tentative)  
 Federal Judge, Eastern District of Texas*
- 1:45 p.m. Police Interactions with Juveniles  
*The Honorable Pat Garza  
 Associate Judge, 386th District Court  
 Bexar County, San Antonio, Texas*
- 2:45 p.m. Break
- 3:00 p.m. Ethics in Juvenile Cases-A View From the Bench (*includes 1 hour Ethics*)  
*The Honorable Robert Molder  
 Associate Judge, 313th District Court  
 Harris County, Houston, Texas*
- 4:00 p.m. Legislative Outlook  
*Lisa Capers, Deputy Executive Director  
 Texas Juvenile Probation Commission  
 Austin, Texas*  
  
*Neil Nichols, General Counsel  
 Texas Youth Commission  
 Austin, Texas*  
  
*Sharon Pruitt, Assistant Attorney General  
 Juvenile Crime Intervention Section, Office of the Attorney General  
 Austin, Texas*
- 5:00 p.m. Adjourn
- 5:15 p.m. Election of Officers – All Invited

**Friday, February 23, 2007 – approx. 500**  
*General Session (Grand Ballroom) – 3.0 hours (including .45 hours ethics)*

- 8:00 a.m. Continental Breakfast (provided)
- 8:30 a.m. Anchor Speaker  
 To be Announced
- 10:15 a.m. Break
- 10:30 a.m. Parental Rights and Responsibility  
*Nydia Thomas, Senior Staff Attorney  
 Texas Juvenile Probation Commission  
 Austin, Texas*
- 11:15 a.m. Confidentiality, Medical and Mental Health  
 Issues in Juvenile Cases (*.45 Ethics*)  
*William B. Connolly,  
 Attorney at Law  
 Houston, Texas*
- 12:00 p.m. Lunch (provided)



### JUVENILE LAW SECTION OF THE STATE BAR OF TEXAS

Sharon Pruitt, Chair  
 Brian Fischer, Chair Elect  
 Tim Menikos, Treasurer  
 Chris Hubmer, Secretary  
 Anne Hazlewood, Immediate Past Chair

### JUVENILE LAW SECTION COUNCIL MEMBERS

#### *Terms Expiring 2007*

Bill Connolly, Houston  
 Richard Ainsa, El Paso  
 Maxine Longoria-Nash, Edinburg  
*Terms Expiring 2008*

Laura Petersen, Garland  
 Nydia Thomas, Austin  
 Lauro Trejo, Edinberg  
*Terms Expiring 2009*

Mary Wolf, Austin  
 Jill Long Mata, San Antonio  
 Laura Parker, San Antonio

### CONFERENCE PLANNING COMMITTEE

Richard Ainsa  
 Kim Brown  
 Bill Connolly  
 Brian Fischer  
 Anne Hazlewood  
 David Hazlewood  
 Chris Hubner  
 Maxine Longoria  
 Tim Menikos  
 Kris Moore  
 Laura Parker  
 Laura Peterson  
 Sharon Pruitt  
 Nydia Thomas  
 Lauro Trejo

### SPECIAL THANKS

The State Bar of Texas Committee on Child  
 Abuse & Neglect for Coordinating and  
 Presenting Track C on CPS Issues

The Office of the Attorney General's  
 Juvenile Crime Intervention Section

**Friday, February 23, 2007 (Continued) approx. 135 each breakout session**  
*Breakout Sessions – 3.5 hours (including 1.25 hours ethics)*

	Breakout Track A – Ballroom D <b>Nuts and Bolts</b>	Breakout Track B – Ballroom E <b>Advanced</b>	Breakout Track C – Ballroom F <b>CPS Issues</b>
1:15 p.m.	Detention Hearings <i>Honorable Beverly Malazzo</i> Associate Judge Harris County, Houston, Texas	Crawford Implications in Juvenile Cases <i>Jill Mata</i> Assistant District Attorney Bexar County District Attorney's Office	10 Useful Platitudes-Trial of a CPS Case (includes .25 Ethics) <i>Honorable Andy Hathcock</i> Associate Judge Travis County, Austin, Texas
1:45 p.m.	Charging Decisions <i>Helen Jackson</i> Assistant District Attorney Harris County D.A.'s Office Houston, Texas	Post 18 Proceedings-Certifications <i>Wallace Warriner</i> Attorney at Law Houston, Texas	Confidentiality, Medical and Mental Health Issues in CPS Cases (includes 1 hour Ethics) <i>William B. Connolly</i> Attorney at Law Houston, Texas
2:45 p.m.	Break		
3:00 p.m.	Inter-County Transfer of Probation and Update (includes .25 Ethics) <i>Nydia Thomas</i> Senior Staff Attorney Texas Juvenile Probation Com- mission Austin, Texas	Charging of Offenses (includes .25 Ethics) <i>Kevin L. Collins, Attorney at Law</i> San Antonio, Texas <i>Tyra Jones MCCollough, Attorney at Law</i> Fort Bend County, Texas <i>Brent Norris, Attorney at law</i> Galveston, Texas	Case Law Update <i>Lana Shadwick</i> Staff Attorney Department of Family and Protective Ser- vices Houston, Texas
3:30 p.m.	Ethics: Ethical Pitfalls of Juvenile Practice (includes 1 hour Ethics) <i>Andy Olivo</i> Attorney at Law Carrollton, Texas	The Trial of a High Profile Juvenile Case (includes .5 Ethics) <i>Brian Fischer, Attorney at Law</i> Houston, Texas <i>Bill Hawkins, Assistant District Attorney</i> Harris County, Texas <i>Christopher Tritico, Attorney at Law</i> Houston, Texas	Appeals in a CPS/DFPS Case (includes .25 Ethics) <i>Sandra Hachem</i> Assistant County Attorney Harris County Attorney's Office Houston, Texas
4:30 p.m.	Sealing of Records <i>Kris Moore</i> Assistant District Attorney Harris County Houston, Texas	To Be Announced	Defending the CPS Case <i>Kelly Swanda</i> Attorney at Law Arlington, Texas
5:00 p.m.	Adjourn		

5:30 p.m. Reception & Silent Auction – All Invited (To Be Announced)

**Saturday, February 24, 2007 approx. 500**  
*General Session – 3.25 hours (including .75 hour ethics)*

8:00 a.m.	Continental Breakfast (provided)
8:30 a.m.	Case Law Update <i>The Honorable Judge Pat Garza</i> Associate Judge, 386 <sup>th</sup> District Court Bexar County, San Antonio, Texas
9:00 a.m.	TYC Determination of Sex Offender Treatment and Classification <i>Patricia Logterman</i> Texas Youth Commission Austin, Texas
10:00 a.m.	Break
10:15 a.m.	School Law and Juveniles <i>Stacey Brownlee</i> Williamson County Attorney's Office Georgetown, Texas
11:00 a.m.	The History of Juvenile Law, From Gault to Tomorrow <i>Gail Lutz, Attorney at Law</i> Houston, Texas
12:00 p.m.	Adjourn

## Make your voice heard...

The Juvenile Law Section will hold its annual election of officers on **Thursday, February 22, 2007 at 5:15 p.m.** in the Grand Ballroom of the Westin Galleria Hotel in Houston, Texas. **All members of the Juvenile Law Section are encouraged to attend the election.**

Nominations for positions including Chair, Chair-Elect, Treasurer and Secretary will be announced in the December issue of the Juvenile Law Newsletter.

There will be three slots available for Council members whose terms expire 2010. At that time, there will be three names presented by the Nominations Committee of the Juvenile Law Section; however, nominations from the floor will also be accepted. Check your December issue of the Juvenile Law Newsletter for additional information.

On behalf of the Juvenile Law Section, we would like to thank our outgoing Council members for their countless hours of commitment to improving services for juveniles and enhancing practices for juvenile justice practitioners.

## General Information

### Mark Your Calendars....February 22 – 24, 2007!

#### Registration

Conference space is limited so we encourage you to pre-register for this conference. Registration fees are \$250 for members of the juvenile law section, judges, associate judges, referees, and maters. Non-members registration fees are \$275. Registration fees include all take-home materials and lunch on Thursday. We will make every effort to accept registrations at the door, but cannot guarantee that there will be space or course materials available.

#### Registration Fee for Non-Members Includes Membership to Juvenile Law Section

If you register for the conference as a non-member, your conference fees will include membership to the Juvenile Law Section for the remaining Bar year, ending May 31, 2006.

#### Payment

Method of payment shall be check or money order made payable to the *State Bar of Texas Juvenile Law Section*. No purchase orders, vouchers or credit cards will be accepted. Please mail your registration form along with payment in full to: Juvenile Law Section, c/o Brian Fischer, 6200 Gulf Freeway, Suite 202, Houston, Texas 77023. No confirmation will be sent. Please pick up your name tag and course materials at the program.

#### If You Register But Cannot Attend

If you register but cannot attend and would like a refund, fax your refund request so that we receive it at least two days prior to the start of the conference to Brian Fischer: (713) 644-8080. Registrants who do not attend will be mailed the written materials within two weeks from the conclusion of the conference.

#### Accreditation

This activity has been submitted to the MCLE Committee of the State Bar of Texas and should be accredited for CLE and Judiciary credit for a total of 13.25 hours, including 3.0 hours of ethics. Other accrediting agencies include: Texas Juvenile Probation Commission, Texas Justice Court Training Center, Texas Association of Counties, and the Texas Commission on Law Enforcement Officers and Standards and Education

#### Additional Course Materials

Each registered, paid participant will receive a conference notebook. If you are interested in purchasing additional copies of the course materials or cannot attend the conference, conference materials are available for purchase by filling out the appropriate information on the registration form. Materials will be mailed within two weeks after the conclusion of the conference. Additional copies of the course materials must be pre-ordered and WILL NOT be sold at or after the conference.

#### Audio/Video Recording

The Juvenile Law Conference will NOT be video recorded this year.

#### Hotel Accommodations

The training will be held at the Westin Galleria Hotel in Houston. A limited number of hotel rooms will be available before January 15, 2006 or until the reserved block of rooms are depleted, whichever is earlier. Please contact the hotel directly when making your reservation and specify that you are with the Juvenile Law Section. The hotel is offering a discounted rate of \$85/single and \$145/double. The Westin Galleria Hotel is located at 5060 West Alabama, Houston, Texas 77056 and can be contacted at 713.960.8100 or on-line at

#### Hotel Parking Options

To be updated

#### Shuttle Service

For those individuals flying in to George Bush Airport or Hobby Airport, the Westin Galleria Hotel does not offer shuttle service.

Taxi service is available at both airports.

#### Persons With Disabilities

Persons with disabilities who plan to attend this conference and who need auxiliary aids or Brian Fischer, Chair Elect at 713.520.7500 at least seven (7) working days prior to the conference so that appropriate arrangements may be made.

#### Nanny Service

To be announced if available.

#### Additional Information

Please contact Brian Fischer, Chair Elect at 713.520.7500 for additional information. We do not offer on-line registration or accept credit cards.

# REGISTRATION

## 20<sup>th</sup> Annual Juvenile Law Conference

### Robert O. Dawson Juvenile Law Institute

*February 22 - 24, 2007 • Westin Galleria Hotel • Houston, Texas*

**Tell Us About Yourself** (please print or type)

PRINTED NAME \_\_\_\_\_

JOB TITLE \_\_\_\_\_

DEPARTMENT \_\_\_\_\_

ADDRESS \_\_\_\_\_

CITY, STATE, ZIP \_\_\_\_\_

WORK PHONE \_\_\_\_\_

FAX \_\_\_\_\_

E-MAIL ADDRESS \_\_\_\_\_

BAR CARD NUMBER \_\_\_\_\_

### Conference Fees and Course Materials

<i>Registration fee includes course materials and lunch on Thursday</i>	<i>Qty</i>	<i>Price</i>
Members of the Juvenile Law Section and Judges, Associate Judges, Referees, and Masters		\$250.00
Non-Members of the Juvenile Law Section (Conference fee will include membership dues for the Section)		\$275.00
I cannot attend the conference, but would like to purchase the course materials (price includes shipping & handling).		\$85.00

*Participants who register or pay onsite will be charged an additional \$25.*

## Directions to the Westin Galleria Hotel

### From West

Take I-10 East, and exit to I-610 West Loop South, take Exit 8B, toward Hidalgo / Richmond Street, turn right into Hidalgo Street, turn right onto McCue Rd, turn Right onto W. Alabama to hotel.

### From George Bush International Airport

Take I-45 South to I-610 North Loop West, go west and stay on I-610 until it becomes the West Loop South. Take Exit 8B, toward Hidalgo / Richmond Street, turn right into Hidalgo Street, turn right onto McCue Rd, turn Right onto W. Alabama to hotel.

### From North

Take I-45 South to I-610 North Loop West, go west and stay on I-610 until it becomes the West Loop South. Take Exit 8B, toward Hidalgo / Richmond Street, turn right into Hidalgo Street, turn right onto McCue Rd, turn Right onto W. Alabama to hotel.

### From South and Hobby Airport

Take I-45 North to I-610 South Loop West, go west and stay on I-610 until it becomes West Loop North. Exit Westheimer go left on Westheimer, go left on Sage, then left on West Alabama to hotel

### Hotel Parking Options

To be announced

### Payment Information

Payment may be made by check or money order only. All payments shall be made payable to the State Bar of Texas Juvenile Law Section. **No purchase orders, vouchers or credit cards will be accepted.** No confirmation will be sent. Please pick up your name tag and course materials at the program.

Please make checks payable to:  
**STATE BAR OF TEXAS  
JUVENILE LAW SECTION**

### Special Accommodations

- Please check here if you require specific aids or services in order to participate in the conference. A representative will contact you prior to the conference.
- Please check here if you require a vegetarian lunch.

### Contact Information

#### By mail

Juvenile Law Council  
c/o Brian Fischer  
6200 Gulf Freeway, #202  
Houston, TX 77023

#### By phone

Brian Fischer, Chair Elect  
(713) 520-7500 -work (Monday – Friday)

#### By facsimile

You may fax your registration form and then mail a hard copy along with payment to  
(713) 644-8080

#### By email

**There is NO Registration on-line.**  
If you have questions or need additional information, please contact  
[biflaw@hotmail.com](mailto:biflaw@hotmail.com)



## TABLE OF CASES

<b>C.S., <i>In the Matter of</i></b> , ___ S.W.3d ___, No. 05-05-01597-CV, 2006 Tex.App.Lexis 6926 (Tex.App.—Dallas [5 <sup>th</sup> Dist.], 8/4/06).....	¶ 06-4-2
<b>D.R., <i>In the Matter of</i></b> , 193 S.W.3d 924, 2006 Tex.App. Lexis 5238 (Tex.App.—Dallas [5 <sup>th</sup> Dist.], 6/20/06) .....	¶ 06-4-4
<b>F.C.W., <i>In the Matter of</i></b> , MEMORANDUM, No. 14-05-00556-CV, 2006 Tex.App.Lexis 8364 (Tex.App.—Houston, 9/26/06) .....	¶ 06-4-7A
<b>F.C.W., <i>In the Matter of</i></b> , MEMORANDUM, No. 14-05-00556-CV, 2006 Tex.App.Lexis 8364 (Tex.App.—Houston, 9/26/06) .....	¶ 06-4-7B
<b>F.F.G., <i>In the Matter of</i></b> , MEMORANDUM, No. 03-05-00854-CV, 2006 Tex.App.Lexis 8844 (Tex.App.—Austin, 10/12/06) .....	¶ 06-4-6
<b>M.M.L., <i>In the Matter of</i></b> , ___ S.W.3d ___, No. 07-05-0240-CV, 2006 Tex.App.Lexis 6783 (Tex.App.—Amarillo, 7/31/06).....	¶ 06-4-3
<b>O.M., <i>In the Matter of</i></b> , MEMORANDUM, No. 03-05-00165-CV, 2006 Tex.App.Lexis 9327 (Tex.App.—Austin, 10/25/06) .....	¶ 06-4-9
<b>P.N., <i>In the Matter of</i></b> , MEMORANDUM, No. 03-04-00751-CV, 2006 Tex.App.Lexis 6878 (Tex.App.—Austin, 8/4/06) .....	¶ 06-4-1A
<b>P.N., <i>In the Matter of</i></b> , MEMORANDUM, No. 03-04-00751-CV, 2006 Tex.App.Lexis 6878 (Tex.App.—Austin, 8/4/06) .....	¶ 06-4-1B
<b>R.S., <i>In the Matter of</i></b> , MEMORANDUM, No. 04-05-00819-CV, 2006 Tex.App.Lexis 7945 (Tex.App.—San Antonio, 9/6/06).....	¶ 06-4-5
<b>S.M., <i>In the Matter of</i></b> , ___ S.W.3d ___, No. 2-05-262-CV, 2006 Tex.App.Lexis 9056 (Tex.App.—Fort Worth, 10/19/06).....	¶ 06-4-8

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## REVIEW OF RECENT CASES

### Official Citations to Cases Previously Reported

- ¶ 05-3-23. ***In the Matter of U.G.V.***, 199 S.W.3d 1, 2005 Tex.App.Lexis 5490 (Tex.App.—El Paso 7/14/05).
- ¶ 06-1-18. ***In the Matter of J.G.***, 195 S.W.3d 161, 2006 Tex.App. Lexis 812 (Tex.App.—San Antonio, 2/1/06) re-hearing denied 4/6/06.
- ¶ 06-2-8. ***In the Matter of J.M.C.D.***, 190 S.W.3d 779, 2006 Tex.App.Lexis 2187 (Tex.App.—El Paso, 3/23/06) rel. for pub. 5/24/06.
- ¶ 06-2-9. ***In the Matter of D.M.***, 191 S.W.3d. 381, 2006 Tex.App.Lexis 2601 (Tex.App.—Austin, 3/30/06).

**SUFFICIENCY OF THE EVIDENCE—  
EVIDENCE WAS SUFFICIENT TO DETERMINE  
THAT STUDENT HAD ASSAULTED PUBLIC SER-  
VANT, WHERE STUDENT CAUSED BODILY IN-  
JURY WHEN ATTEMPTING TO BREAK FREE  
FROM DISCIPLINARY RESTRAINT.**

¶ 06-4-1A. *In the Matter of P.N.*, MEMORANDUM, No. 03-04-00751-CV, 2006 Tex.App.Lexis 6878 (Tex. App.—Austin, 8/4/06).

**Facts:** Jeffrey Dunlap testified that he was a “substitute teaching assistant . . . assigned to work with [P.N.] as a one-on-one shadow.” The initial purpose of this role was to reward P.N. for completing his work; *i.e.*, to “play a game” with him and “to be his companion.” But Dunlap was also assigned to “observe” P.N. and, if “any restraint [was] needed for P.N., you know, as a last resort, I would be the one to do it.” Prior to taking on this role, Dunlap received two days’ training in aggression management, wherein he was taught to use the Satori Alternative to Managing Aggression (SAMA) technique for restraint. Also present at this training class were Dobie security staff, the administrators, and “teachers that would be directly involved on a day-to-day basis with [P.N.]”

On the morning at issue, both divisions of the special education department were together in the “breakfast room” [n1] at Dobie. This included P.N.’s “behavioral unit,” comprised of students with behavioral problems, and the “life skills unit,” comprised of mentally disabled students. Around 8:30 a.m., all members of the behavioral unit exited to go to class, except P.N., who refused. Dunlap testified that P.N. began running around, causing Dunlap to worry that P.N. would knock over one of the life-skills students, who were “not physically adept” to protect themselves. Dunlap attempted “to corral P.N. . . . trying to separate him and get him out of the [breakfast room].” P.N. continued running around the room with his arms and fists “flailing” and making “verbal outbursts.” At one point, Dunlap observed that two of the life-skills students were “within [P.N.’s] immediate vicinity,” and Dunlap “thought [they] would be struck by [P.N.’s] fists. And so that’s when [Dunlap] placed [P.N.] in a restraint.” At this point in Dunlap’s testimony, the prosecutor asked Dunlap to demonstrate how P.N. was behaving, and the district court described for the record that the demonstrated “movements were violent, rapid. He ran some ten feet, swerving, gesticulating wildly. The Court was frightened during the demonstration as he approached and went back into the area where the audience was and as he almost knocked down the easel.” [n2]

n1 Apparently, this is a classroom style facility where the students in the special education department gather for meals before classes begin.

n2 The court also stated that it “found Mr. Dunlap to be very credible as a witness, both in his physical demonstrations as well as in his testimony.”

Dunlap described the restraint he used on P.N. as a “bear hug . . . which consisted of both his arms crossed, with my hands grabbing on to his hands. “ Dunlap’s intention was to get P.N. out of the breakfast room and into a “cool-down room.” He was able to get P.N. to the hallway and, as Dunlap was about to open the classroom door, P.N.’s “legs reared up, and he kicked off—off the wall,” causing both Dunlap and P.N. to go “hurling backwards.” Dunlap testified that P.N.’s action caused him to be “knocked off balance” and fall to the ground. As a result, Dunlap sustained a “sprained ankle with a possible hairline fracture, along with several bruised vertebrae.”

On cross-examination, Dunlap testified that he was trained to use restraint only “if there was anybody in direct physical jeopardy . . . or if there is a possibility of any property damage occurring.” When asked whether this meant that he was “not to use force unless there was a threat of imminent, serious, physical harm,” Dunlap responded, “I would have to look at the exact wording of the law, but I would assume that’s accurate.”

Officer Craig Rigtrup with the Austin Independent School District Police testified that he interviewed Dunlap twenty minutes after this incident. According to Rigtrup’s report, Dunlap had described P.N. as being “disruptive” and “up and about the room, wouldn’t be quiet, . . . making inappropriate comments to female students,” and exhibiting “unruly behavior,” which was “escalating.” Rigtrup’s report further reflected that P.N. resisted Dunlap’s initial efforts to get him out of the room. In so doing, “P.N. began to slightly push against Dunlap. Dunlap then applied a lawful, policy-approved restraint, to wit: a bear hug.” But, as highlighted on cross-examination, Rigtrup’s report contained no indication of Dunlap stating that P.N. had physically threatened or harmed other students or that Dunlap, the teachers, or the students “were in fear or danger of any physical harm.” When asked whether or not Rigtrup believed P.N.’s behavior constituted “an assault on a public servant,” Rigtrup responded, “I felt like it was.”

Following this incident between P.N. and Dunlap, a detention hearing was held at which the court ordered that P.N. be removed from his grandmother’s custody and placed in the care of the Juvenile Justice Center at the Gardner-Betts Juvenile Detention Facility. While there, P.N.’s probation officer, Creschenda Shuler, came to his dorm room to “check on his well being.” Shuler testified that part of her job as P. N.’s probation officer was to “make a recommendation about disposition on his case” and “come into court and testify as to what the Department’s recommendation is for him.” Shuler testified that P.N. knew these functions were part of her job. Shuler further testified that, when she met with P.N. in his dorm room, they began discussing some of his behav-

ioral problems and what “the consequences [could be] of his continued negative behavior.” At that point, P.N. told Shuler “that if [she] sent him to the Texas Youth Commission, that when he went and came back, that he would be waiting in the parking lot to shoot [her].” Shuler testified that she “didn’t take him seriously” and she “was not in fear.”

The State filed a petition against P.N. alleging that he had engaged in delinquent conduct by committing the offenses of assault on a public servant and retaliation, as well as four other allegations not at-issue in this appeal. Adjudication and disposition hearings were held before an associate judge, at which the State called four witnesses (including Dunlap, Rigtrup, and Shuler), and appellant offered no evidence. The associate judge determined the assault on a public servant and retaliation charges to be true beyond a reasonable doubt and, accordingly, recommended that P.N. be committed to the Texas Youth Commission. The district judge signed a final judgment of delinquency and order of commitment adopting this recommendation October 18, 2004, from which P.N. now appeals.

In four issues, P.N. attacks the factual and legal sufficiency of the evidence to support the judgment regarding assault on a public servant and the legal sufficiency of the evidence to support the judgment regarding retaliation. We will address each in turn.

**Held:** Affirmed

**Memorandum Opinion:** *Factual and Legal Sufficiency*

We review adjudications of delinquent conduct in juvenile proceedings under the same standard of review we employ to review the sufficiency of the evidence supporting a jury’s verdict in a criminal case. *See In re L.M.*, 993 S.W.2d 276, 284 (Tex.App.—Austin 1999, *pet. denied*); *see also In re B.M.*, 1 S.W.3d 204, 206 (Tex.App.—Tyler 1999, *no pet.*). The State must prove beyond a reasonable doubt that the juvenile committed an offense, thus engaging in delinquent conduct. *Tex. Fam. Code Ann.* §§ 51.03, 54.03(f).

To evaluate the legal sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict and determine whether from that evidence any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Sanders v. State*, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003); *In re L.M.*, 993 S.W.2d at 284; *see also Tex. Fam. Code Ann.* § 54.03(f). The trier of fact is entitled to resolve any conflicts in the evidence, to evaluate the credibility of witnesses, and to determine the weight to be given any particular evidence. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). The standard of review is the same for both direct and circumstantial evidence. *Green v. State*, 840 S.W.2d 394, 401 (Tex. Crim. App. 1992).

In reviewing the factual sufficiency of the evidence, we consider and weigh all of the evidence in a neutral light and determine whether the fact-finder was rationally justified in finding guilt beyond a reasonable doubt. *Zuniga v. State*, 144 S.W.3d 477, 484 (Tex. Crim. App. 2004). Evidence may be found factually insufficient when the evidence supporting the verdict, considered alone, is too weak to support the finding of guilt beyond a reasonable doubt, or when the evidence contrary to the verdict is so strong that the standard of proof beyond a reasonable doubt could not have been met. *Johnson v. State*, 172 S.W.3d 6, 10 (Tex. App.—Austin 2005, *pet. ref’d*). In a juvenile case, if the finding is so against the great weight and preponderance of the evidence as to be manifestly unjust, we set aside the disposition order and remand the case for a new disposition hearing. *In re C. C.*, 13 S.W.3d 854, 859 (Tex. App.—Austin 2000, *no pet.*).

*Assault on a Public Servant*

In relevant part, *penal code section 22.01* provides that “a person commits an offense if the person . . . intentionally, knowingly, or recklessly causes bodily injury to another,” which constitutes “a felony of the third degree if the offense is committed against . . . a person the actor knows is a public servant while the public servant is lawfully discharging an official duty.” *Tex. Pen. Code Ann.* § 22.01(a)(1), (b)(1). P.N. contends that the district court erroneously determined that he committed this offense because the evidence was legally insufficient to establish the requisite *mens rea* or to establish that Dunlap was a “public servant,” and was factually insufficient to establish that Dunlap was “lawfully discharging an official duty.” *See id.*

*Mens rea*

*Section 22.01* requires the State to prove beyond a reasonable doubt that the assault was committed either intentionally, knowingly, or recklessly. *Id.* The State is only required to prove one of these mental states, not all three. Here, through its petition, the State limited its case to the first two—intentionally or knowingly. Thus, as long as the evidence was legally sufficient to establish, at a minimum, that P.N.’s actions were knowing, then we need not reverse the judgment on this point.

For a result-oriented offense such as assault, “a person acts knowingly . . . when he is aware that his conduct is reasonably certain to cause the result.” *Id.* § 6.03(b) (West 2003); *Kelly v. State*, 748 S.W.2d 236, 239 (Tex. Crim. App. 1988). Hence, the inquiry here is whether P.N. was aware that, while being held from behind by Dunlap, rearing his legs up and pushing off the wall would likely result in Dunlap falling. “Proof of a culpable mental state almost invariably depends upon circumstantial evidence. Ordinarily, the culpable mental state must be inferred from the acts of the accused or the surrounding circumstances, which include not only acts, but words and conduct.” *Lee v. State*, 21 S.W.3d 532,

539-40 (Tex.App.—Tyler 2000, *pet. ref'd*) (citations omitted); *see also Skillern v. State*, 890 S.W.2d 849, 880 (Tex.App.—Austin 1994, *pet. ref'd*).

The undisputed evidence in this case reflects that P.N. was attempting to break free from Dunlap, and it is reasonable to infer that, as a means of achieving this result, P.N. knowingly engaged in the disputed conduct with reasonable awareness that it would knock Dunlap down. *See Lee*, 21 S.W.3d at 539-40. Also, Officer Rigrup testified that, given “all [his] years of experience,” based on these circumstances, he would classify P.N.’s behavior as “an assault on a public servant.” Viewing the evidence in the light most favorable to the judgment, we determine that the district court, as the trier of fact in this case, could rationally determine beyond a reasonable doubt that P.N. was aware that the probable result of his actions—rearing up his legs and pushing off the wall—would be for Dunlap to lose his balance and fall, thereby sustaining a bodily injury. *See Brooks v. State*, 967 S.W.2d 946, 948-49 (Tex.App.—Austin 1998, *no pet.*) (in assault on public servant case, despite appellant’s testimony that she accidentally hit officer in attempt to flee his restraint, rational trier of fact could infer that appellant swung with knowledge that injury was likely to occur); *In re J. L. O.*, No. 03-01-00632-CV, 2002 Tex. App. LEXIS 5730, at \*3, \*8 (Tex.App.—Austin Aug. 8, 2002, *no pet.*) (evidence sufficient to determine that student assaulted public servant, education assistant, where student caused assistant bodily injury by attempting to break free from her disciplinary restraint, causing assistant to fall backwards to floor).

P.N.’s first issue is overruled.

#### Other Issues Omitted.

**Conclusion:** We affirm the district court’s judgment.

**SUFFICIENCY OF THE EVIDENCE—**  
IN OFFENSE FOR ASSAULT ON A PUBLIC SERV-  
VANT, TEACHER WAS CONSIDERED TO BE  
LAWFULLY DISCHARGING “AN OFFICIAL DUTY”  
WHEN PHYSICALLY RESTRAINING STUDENT  
WHOSE BEHAVIOR WAS UNRULY AND POTEN-  
TIALY THREATENING.

¶ 06-4-1B. *In the Matter of P.N.*, MEMORANDUM, No. 03-04-00751-CV, 2006 Tex.App.Lexis 6878 (Tex. App.—Austin, 8/4/06).

**Facts:** Jeffrey Dunlap testified that he was a “substitute teaching assistant . . . assigned to work with [P.N.] as a one-on-one shadow.” The initial purpose of this role was to reward P.N. for completing his work; *i.e.*, to “play a game” with him and “to be his companion.” But Dunlap was also assigned to “observe” P.N. and, if “any restraint [was] needed for P.N., you know, as a last resort, I would

be the one to do it.” Prior to taking on this role, Dunlap received two days’ training in aggression management, wherein he was taught to use the Satori Alternative to Managing Aggression (SAMA) technique for restraint. Also present at this training class were Dobie security staff, the administrators, and “teachers that would be directly involved on a day-to-day basis with [P.N.]”

On the morning at issue, both divisions of the special education department were together in the “breakfast room” [n1] at Dobie. This included P.N.’s “behavioral unit,” comprised of students with behavioral problems, and the “life skills unit,” comprised of mentally disabled students. Around 8:30 a.m., all members of the behavioral unit exited to go to class, except P.N., who refused. Dunlap testified that P.N. began running around, causing Dunlap to worry that P.N. would knock over one of the life-skills students, who were “not physically adept” to protect themselves. Dunlap attempted “to corral P.N. . . . trying to separate him and get him out of the [breakfast room].” P.N. continued running around the room with his arms and fists “flailing” and making “verbal outbursts.” At one point, Dunlap observed that two of the life-skills students were “within [P.N.’s] immediate vicinity,” and Dunlap “thought [they] would be struck by [P.N.’s] fists. And so that’s when [Dunlap] placed [P.N.] in a restraint.” At this point in Dunlap’s testimony, the prosecutor asked Dunlap to demonstrate how P.N. was behaving, and the district court described for the record that the demonstrated “movements were violent, rapid. He ran some ten feet, swerving, gesticulating wildly. The Court was frightened during the demonstration as he approached and went back into the area where the audience was and as he almost knocked down the easel.” [n2]

n1 Apparently, this is a classroom style facility where the students in the special education department gather for meals before classes begin.

n2 The court also stated that it “found Mr. Dunlap to be very credible as a witness, both in his physical demonstrations as well as in his testimony.”

Dunlap described the restraint he used on P.N. as a “bear hug . . . which consisted of both his arms crossed, with my hands grabbing on to his hands. “Dunlap’s intention was to get P.N. out of the breakfast room and into a “cool-down room.” He was able to get P.N. to the hallway and, as Dunlap was about to open the classroom door, P.N.’s “legs reared up, and he kicked off—off the wall,” causing both Dunlap and P.N. to go “hurling backwards.” Dunlap testified that P.N.’s action caused him to be “knocked off balance” and fall to the ground. As a result, Dunlap sustained a “sprained ankle with a possible hairline fracture, along with several bruised vertebrae.”

On cross-examination, Dunlap testified that he was trained to use restraint only “if there was anybody in direct physical jeopardy . . . or if there is a possibility of any property damage occurring.” When asked whether

this meant that he was “not to use force unless there was a threat of imminent, serious, physical harm,” Dunlap responded, “I would have to look at the exact wording of the law, but I would assume that’s accurate.”

Officer Craig Rigtrup with the Austin Independent School District Police testified that he interviewed Dunlap twenty minutes after this incident. According to Rigtrup’s report, Dunlap had described P.N. as being “disruptive” and “up and about the room, wouldn’t be quiet, . . . making inappropriate comments to female students,” and exhibiting “unruly behavior,” which was “escalating.” Rigtrup’s report further reflected that P.N. resisted Dunlap’s initial efforts to get him out of the room. In so doing, “P.N. began to slightly push against Dunlap. Dunlap then applied a lawful, policy-approved restraint, to wit: a bear hug.” But, as highlighted on cross-examination, Rigtrup’s report contained no indication of Dunlap stating that P.N. had physically threatened or harmed other students or that Dunlap, the teachers, or the students “were in fear or danger of any physical harm.” When asked whether or not Rigtrup believed P.N.’s behavior constituted “an assault on a public servant,” Rigtrup responded, “I felt like it was.”

Following this incident between P.N. and Dunlap, a detention hearing was held at which the court ordered that P.N. be removed from his grandmother’s custody and placed in the care of the Juvenile Justice Center at the Gardner-Betts Juvenile Detention Facility. While there, P.N.’s probation officer, Creschenda Shuler, came to his dorm room to “check on his well being.” Shuler testified that part of her job as P. N.’s probation officer was to “make a recommendation about disposition on his case” and “come into court and testify as to what the Department’s recommendation is for him.” Shuler testified that P.N. knew these functions were part of her job. Shuler further testified that, when she met with P.N. in his dorm room, they began discussing some of his behavioral problems and what “the consequences [could be] of his continued negative behavior.” At that point, P.N. told Shuler “that if [she] sent him to the Texas Youth Commission, that when he went and came back, that he would be waiting in the parking lot to shoot [her].” Shuler testified that she “didn’t take him seriously” and she “was not in fear.”

The State filed a petition against P.N. alleging that he had engaged in delinquent conduct by committing the offenses of assault on a public servant and retaliation, as well as four other allegations not at-issue in this appeal. Adjudication and disposition hearings were held before an associate judge, at which the State called four witnesses (including Dunlap, Rigtrup, and Shuler), and appellant offered no evidence. The associate judge determined the assault on a public servant and retaliation charges to be true beyond a reasonable doubt and, accordingly, recommended that P.N. be committed to the Texas Youth Commission. The district judge signed a final judgment of delinquency and order of commitment

adopting this recommendation October 18, 2004, from which P.N. now appeals.

In four issues, P.N. attacks the factual and legal sufficiency of the evidence to support the judgment regarding assault on a public servant and the legal sufficiency of the evidence to support the judgment regarding retaliation. We will address each in turn.

**Held:** Affirmed

**Memorandum Opinion:** *Factual and Legal Sufficiency*

We review adjudications of delinquent conduct in juvenile proceedings under the same standard of review we employ to review the sufficiency of the evidence supporting a jury’s verdict in a criminal case. *See In re L. M.*, 993 S.W.2d 276, 284 (Tex.App.—Austin 1999, *pet. denied*); *see also In re B.M.*, 1 S.W.3d 204, 206 (Tex.App.—Tyler 1999, *no pet.*). The State must prove beyond a reasonable doubt that the juvenile committed an offense, thus engaging in delinquent conduct. *Tex. Fam. Code Ann.* §§ 51.03, 54.03(f).

To evaluate the legal sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict and determine whether from that evidence any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Sanders v. State*, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003); *In re L.M.*, 993 S.W.2d at 284; *see also Tex. Fam. Code Ann.* § 54.03(f). The trier of fact is entitled to resolve any conflicts in the evidence, to evaluate the credibility of witnesses, and to determine the weight to be given any particular evidence. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). The standard of review is the same for both direct and circumstantial evidence. *Green v. State*, 840 S.W.2d 394, 401 (Tex. Crim. App. 1992).

In reviewing the factual sufficiency of the evidence, we consider and weigh all of the evidence in a neutral light and determine whether the fact-finder was rationally justified in finding guilt beyond a reasonable doubt. *Zuniga v. State*, 144 S.W.3d 477, 484 (Tex. Crim. App. 2004). Evidence may be found factually insufficient when the evidence supporting the verdict, considered alone, is too weak to support the finding of guilt beyond a reasonable doubt, or when the evidence contrary to the verdict is so strong that the standard of beyond a reasonable doubt could not have been met. *Johnson v. State*, 172 S.W.3d 6, 10 (Tex. App.—Austin 2005, *pet. ref’d*). In a juvenile case, if the finding is so against the great weight and preponderance of the evidence as to be manifestly unjust, we set aside the disposition order and remand the case for a new disposition hearing. *In re C. C.*, 13 S.W.3d 854, 859 (Tex. App.—Austin 2000, *no pet.*).

### *Assault on a Public Servant*

In relevant part, *penal code section 22.01* provides that “a person commits an offense if the person . . . intentionally, knowingly, or recklessly causes bodily injury to another,” which constitutes “a felony of the third degree if the offense is committed against . . . a person the actor knows is a public servant while the public servant is lawfully discharging an official duty.” *Tex. Pen. Code Ann. § 22.01(a)(1), (b)(1)*. P.N. contends that the district court erroneously determined that he committed this offense because the evidence was legally insufficient to establish the requisite *mens rea* or to establish that Dunlap was a “public servant,” and was factually insufficient to establish that Dunlap was “lawfully discharging an official duty.” *See id.*

### *Lawful discharge of official duty*

For an offense under *section 22.01(b)(1)* to constitute a felony, the assault must be committed against a public servant “while the public servant is lawfully discharging an official duty.” *Tex. Pen. Code Ann. § 22.01(b)(1)*. P.N. claims that the evidence is factually insufficient to establish this element because Dunlap was acting in excess of his lawful authority by holding P.N. in a “bear hug” restraint. We disagree.

Dunlap testified that part of his job function was to physically restrain P.N. if necessary and that the school district provided him, as well as other employees who would be working with P.N., specialized training about how to exercise such force; namely, using the SAMA “bear hug” technique for restraint. Dunlap further testified that, pursuant to his training, he was authorized to use restraint “if there was anybody in direct physical jeopardy . . . or if there is a possibility of any property damage occurring.” Regarding the incident at issue, Dunlap stated that, after non-physical attempts to remove P.N. were unsuccessful, the use of restraint became necessary when two of the life-skills students were “within [P.N.’s] immediate vicinity,” and Dunlap “thought [they] would be struck by [P.N.’s] fists.” Dunlap’s demonstration of P.N.’s behavior satisfied the district court that P.N.’s “movements were violent, rapid” and “frighten[ing],” and included running and “swerving, gesticulating wildly.”

Even taking as true that Dunlap was authorized to use restraint only when “there was a threat of imminent, serious, physical harm,” the above evidence satisfies this criteria. Just because Officer Rigtrup’s report did not expressly include a statement by Dunlap that teachers or students were physically threatened or in fear of harm by P.N. does not disprove the existence of imminent harm that Dunlap testified about. Furthermore, Rigtrup’s report noted that P.N. was engaging in “unruly behavior” that was “escalating.” And based on the account Dunlap provided him, Rigtrup’s report described Dunlap’s action as “a lawful, policy-approved restraint, to wit: a bear hug.” *See In re J. L. O., 2002 Tex. App. LEXIS 5730, at \*10* (teacher lawfully discharging official duty when

physically restraining student whose behavior was “unruly and potentially threatening,” where non-physical attempts to defuse situation had been unsuccessful, because “teachers must have the authority to establish rules and maintain discipline within their classrooms”). [n4]

n4 *See also Johnson v. State, 172 S.W.3d 6, 11 (Tex. App.—Austin 2005, pet. ref’d)* (in context of police officer, “lawful discharge” of official duties means “officer is acting within his capacity as a peace officer” and “is not criminally or tortuously abusing his office as a public servant”).

Considering all the evidence presented on this issue, which consisted of only Dunlap’s and Rigtrup’s testimony, we conclude that the district court, as the factfinder in this case, was rationally justified in determining that Dunlap was “lawfully discharging an official duty” at the time P.N. assaulted him. *See Zuniga, 144 S.W.3d at 484; see also Tex. Pen. Code Ann. § 22.01 (b)(1)*. This finding is not so against the great weight and preponderance of the evidence as to be manifestly unjust. *See In re C.C., 13 S.W.3d at 859 (Tex.App.—Austin 2000, no pet.)*. Rather, the finding was supported by factually sufficient evidence.

P.N.’s third issue is overruled.

### **Other Issues Omitted.**

**Conclusion:** We affirm the district court’s judgment.

### **APPEALS—**

**FAILURE TO PRESENT CERTAIN DUE PROCESS COMPLAINTS AT TRIAL WAIVES THEM.**

¶ 06-4-2. *In the Matter of C.S.*, 198 S.W.3d 855, 2006 Tex.App.Lexis 6926 (Tex.App.—Dallas [5<sup>th</sup> Dist.] 8/4/06).

**Facts:** In 2004, appellant was adjudicated a child engaged in delinquent conduct in Dallas County and placed on probation for one year in his parents’ custody. Just over three months after appellant’s probation began, he was detained for two new offenses in Collin County. At that time, Dallas County stopped supervising appellant, and he was placed on “warrant status.” Despite several attempts, the warrant was never executed. In 2005, the State filed a motion to modify disposition of the Dallas offenses alleging appellant had violated the terms of his probation by failing to attend school. Appellant pleaded true to the allegation and after a hearing, the trial court committed appellant to the TYC.

**Held:** Affirmed, with modifications

**Opinion:** In his first two issues, appellant asserts his due process rights under the state and federal constitutions were violated because the trial court stated that if appellant were a Dallas County resident, it might consider a placement other than the TYC. Generally, to preserve a complaint for appeal, appellant must first present his specific contentions to the trial court. *See TEX. R. APP. P. 33.1*. Our review of the record reveals that appellant never presented his due process complaints to the trial court during or after the hearing. Almost all trial error, even constitutional error, is waived if appellant fails to object to the error at trial. *See Aldrich v. State, 104 S.W.3d 890, 894 (Tex. Crim. App. 2003)*. There are two exceptions to the general rule involving violations of rights that are either “waivable only” or “absolute systemic requirements.” *Id.* Appellant has not argued his due process complaints fall into one of these narrow categories, and we do not believe that they do. He has therefore waived these complaints.

In his fourth issue, appellant asserts, and the State agrees, that the trial court’s order contains several errors. We have authority to modify incorrect judgments when the necessary information is available to do so. *See TEX. R. APP. P. 43.2(b); Bigley v. State, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993); Asberry v. State, 813 S.W.2d 526, 529 (Tex.App.—Dallas 1991, pet. ref’d).*

**Conclusion:** Affirmed as modified.

#### EVIDENCE—

FOUR YEAR OLD COMPLAINANT CONSIDERED COMPETENT TO TESTIFY, POTENTIAL THAT SHE WOULD TESTIFY FALSELY WAS AN ISSUE OF THE WEIGHT TO BE AFFORDED THE TESTIMONY AT TRIAL RATHER THAN EVIDENCE OF HER INCOMPETENCE AS A WITNESS.

¶ 06-4-3. *In the Matter of M.M.L.*, No. 07-05-0240-CV, 2006 Tex.App.Lexis 6783 (Tex.App.—Amarillo, 7/31/06).

**Background:** Appellant is a twelve-year-old male accused of engaging in delinquent conduct by committing the offense of indecency with a child. The adjudication trial was to a jury, who found the allegation to be true. After the disposition hearing, appellant was placed on probation. Appellant has appealed, alleging error by eleven issues.

**Facts:** Hilda Sanchez, the mother of M.V., the complaining witness, employed appellant’s mother, Juana Mejia, as a baby sitter. On July 22, 2004, Sanchez picked her daughter up at the Mejia apartment and found her daughter crying and Mejia not in the apartment. Sanchez was met at the door by appellant, whom she described as acting hurriedly. After leaving the apartment, Sanchez

questioned M.V. about why she was crying. M.V. told her that appellant touched her in her private area with his private area. As a result of M.V.’s outcry to Sanchez, Sanchez notified the police in McKinney about appellant’s actions.

By eleven issues, appellant appeals his conviction and sentence. By ten of these issues, appellant contends that the trial court committed reversible error by:

1. limiting appellant’s cross-examination of M.V. during the competency hearing;
2. finding M.V. competent to testify;
3. limiting appellant’s cross-examination of M.V. during the trial before the jury;
4. admitting the testimony of the SANE nurse;
5. admitting the testimony of the “outcry” witness;
6. denying the appellant’s motion for mistrial;
7. commenting on the evidence;
8. allowing evidence of an extraneous offense;
9. limiting the testimony at the motion for new trial hearing; and,
10. denying the motion for new trial.

Further, by his ninth issue, appellant contends that the evidence was factually and legally insufficient to sustain the finding of true to the allegations in the State’s petition.

**Held:** Affirmed

**Opinion:** Appellant’s first two contentions were briefed together and both concern the competency of M.V. to testify and will, therefore, be addressed together. M.V. was three-years old at the time of the incident and was four-years old at the time of trial. Appellant contested M.V.’s competency as a witness and requested a hearing on the matter. *See TEX. R. EVID. 601(a)(2)*. The trial court held a hearing on the issue of competency out of the presence of the jury and ruled that she was competent to testify. We review that ruling under an abuse of discretion standard. *Broussard v. State, 910 S.W.2d 952, 960 (Tex.Crim.App. 1995), In re A.W., 147 S.W.3d 632, 635 (Tex.App.—San Antonio 2004, no pet.)* (applying the same standard of review to juvenile cases).

At the hearing on the competency of M.V., the State conducted an examination of M.V. during which she testified as to her complete name, age and that she was able to distinguish between the truth and a lie by identifying the color of a pen (blue) the attorney was holding. When asked if she was told the pen was black would it be the truth or a lie, she testified it would be a lie. M.V. further acknowledged that she understood that she would be required to tell the truth in court. Upon cross-examination by appellant, M.V. answered “yes” to a series of questions about having met appellant’s attorney before, playing with puppies belonging to appellant’s counsel and hunting for Easter eggs with the attorney. Each of these questions were designed to show that

the witness would agree whenever leading questions were asked. Based upon this exchange, appellant contends that M.V. was not competent to testify. While appellant's point is that M.V. did not know the difference between the truth and a lie, during appellant's own cross-examination of M.V., she was asked what the word "lie" means. M.V. answered, "That it's not the truth and it's a lie." This statement demonstrates that M.V. knew the difference between the truth and a lie. In determining whether the trial court abused its discretion, we are not to focus only on the questions asked during the hearing on competency but rather to review the entire record of her testimony. *Clark v. State*, 558 S.W.2d 887, 890 (Tex. Crim.App. 1977). The record reveals that, during both the competency hearing and the trial on the merits, M.V. was able to communicate the actions of appellant and the events surrounding the incident in question. From this review, we conclude that M.V. had the ability to intelligently observe the events, the capacity to recollect and narrate them, and, from the competency hearing, the moral responsibility to tell the truth. *Upton v. State*, 894 S.W.2d 426, 429 (Tex.App.—Amarillo 1995, writ ref'd). Accordingly, we find no abuse of discretion in the ruling that M.V. was competent to testify.

Appellant also contends that the court impermissibly limited his right to cross-examine M.V. during the competency hearing. Specifically, appellant contends that the following colloquy demonstrates an attempt by the court to limit cross-examination. After asking a series of leading questions designed to show that M.V. would say "yes" whenever asked a leading question, the following exchange occurred:

The Court: I'm not going to allow you to do any more of that.

Trial Counsel: I have no other way, Judge, to show that she'll say stories.

The Court: You have—you've made your point. You said you wanted to call yourself. Go ahead.

At that time, appellant's counsel took the witness stand and testified that M.V.'s cross-examination testimony was untruthful.

Appellant complains that the court impermissibly limited his cross-examination of M.V., yet the exchange clearly demonstrates that the court was aware of the potential for false testimony from the witness but, based upon all of the factors, found the witness competent. It appears that the trial court felt that the potential that M.V. would testify falsely was an issue of the weight to be afforded the testimony at trial rather than evidence of M.V.'s incompetence as a witness. We do not find the court abused its discretion in ruling M.V. competent or in limiting appellant's cross-examination at the competency hearing. *Broussard*, 910 S.W.2d at 960; *In re A.W.*, 147 S.W.3d at 635. Appellant's first two issues are overruled.

### Other Issues Omitted.

**Conclusion:** Having overruled appellant's issues, the judgment of the trial court is affirmed.

### MODIFICATION OF DISPOSITION— TRIAL COURT DID NOT ABUSE ITS DISCRETION IN COMMITTING APPELLANT TO TYC ON VIOLATIONS OF PROBATION.

¶ 06-4-4. *In the Matter of D.R.*, 193 S.W.3d 924, 2006 Tex.App. Lexis 5238 (Tex.App.—Dallas [5<sup>th</sup> Dist.], 6/20/06).

**Background:** D.R. appeals the trial court's order modifying disposition and committing him to the Texas Youth Commission. In two issues, appellant contends the trial court abused its discretion in committing him to TYC and he requests modification of the order to correct several clerical errors.

**Facts:** The record shows that on June 6, 2005, appellant entered a plea of no contest to being a child engaged in delinquent conduct by committing the offense of robbery. The trial court adjudicated appellant to be a child engaged in delinquent conduct and placed him on probation for one year in his mother's custody. Appellant was placed into detention on September 9, 2005 after testing positive for marijuana. Before his detention, appellant had been living at home and participating in a non-residential drug treatment program as a condition of probation. On September 19, 2005, the State filed a motion to modify disposition alleging that appellant had violated his probation conditions by failing to report to his probation officer and testing positive for illegal drug use.

Appellant's treatment provider discharged him from his drug treatment program and recommended that he receive residential drug treatment. Because appellant violated probation and was discharged before completion from drug treatment, the Dallas County Juvenile Department's Case Planning and Review Committee (CPRC) recommended that appellant be committed to TYC.

Appellant's counsel requested that he be evaluated for substance abuse by an independent organization. The independent evaluator recommended that appellant receive day treatment for substance abuse. Appellant's probation officer, Sandra Banks, then took the new recommendation back to CPRC for a reevaluation of appellant's case. CPRC again recommended that appellant be committed to TYC. At the time of the disposition hearing, appellant had been matched with two residential treatment programs (Medlock and Incentives) and a day program (START).

On November 3, 2005, the trial court conducted a hearing on the State's motion to modify disposition. After appellant entered a plea of true to the State's allega-

tions, the trial court heard testimony from appellant, his mother, and his probation officer. The State admitted into evidence updated predisposition reports from appellant's probation officer, a psychological assessment, and appellant's independent substance abuse evaluation. During the disposition hearing, appellant and his mother asked the trial court to put him into the START program. Appellant's mother explained appellant failed to report because he did not have transportation after her husband suffered a stroke. She testified that appellant tested positive for drugs only once, and she did not believe appellant had used drugs on other occasions. She admitted, however, that appellant had not answered her inquiries about his drug use.

Appellant admitted smoking marijuana once while on community supervision and being absent and tardy to school on many occasions. Appellant testified he behaved well in detention and was rewarded by being placed in the shelter. He understood he would have to work hard in the START program and he was willing to participate in the anger management component of the program. Appellant agreed that he might benefit from counseling about the effect of his stepfather's illness on the family. Appellant admitted that any placement would benefit him. He wanted to enter the START program because, at sixty days duration, it was the shortest program.

Banks related the juvenile department's opinion that reasonable efforts had been made to keep appellant at home, that he could not be provided the quality of care and support and supervision necessary to complete probation at home, and that placement outside the home was in his best interest. Banks told the court TYC would best be able to address appellant's needs for individual, drug and family counseling. Banks further indicated appellant could benefit from "decision making/coping skills" counseling, anger management counseling, the development of independent living skills, and vocational training. Banks testified that appellant could receive independent living skills and vocational training at TYC, but such services were not available at START. Banks admitted that appellant had performed half of his community service.

After the presentation of evidence, the trial court announced its findings as follows:

I do find that there is a need for disposition and, for your protection and the protection of the public, disposition should be made.

I find that all reasonable efforts were made to keep you in your home. Reasonable efforts will be made to return you to your home, when possible and, at this time, placement is in your best interest.

I find that the juvenile cannot be provided the quality of care and level of support and supervision that is needed to meet conditions of probation in the home, and a large part of this is the fact that, when your mom asked you a question, you wouldn't an-

swer it. I want you in the longest program possible, not the shortest.

The trial court then committed appellant to TYC.

**Held:** Affirmed

**Opinion:** Appellant contends the evidence does not support the trial court's findings because his violations of community supervision were relatively minor, he had been accepted into three other drug programs, and there was some evidence presented that the START program was a less-restrictive program that could meet his needs. Appellant points out that he tested positive for marijuana use on only one occasion and only failed to report twice. Appellant points to evidence showing he attained the highest behavior level while in detention, was placed into the shelter due to his good behavior, and had completed half of his community service hours. Thus, appellant contends, the trial court's findings are unsupported by the record.

The record shows that appellant used marijuana and failed to report to his probation officer. The parties presented conflicting evidence regarding whether appellant should be committed to TYC or should remain in the home and receive non-residential drug treatment. The State's evidence showed that the START program appellant preferred met some, but not all, of appellant's needs. We conclude that the trial court's findings are supported by some evidence, and the trial court did not abuse its discretion in committing appellant to TYC. We overrule appellant's first issue.

In his second issue, appellant contends the order modifying disposition should be modified to correct numerous clerical errors. The State agrees to each of appellant's proposed modifications.

We have the authority to modify incorrect judgments when the necessary information is available to do so. *See TEX. R. APP. P. 43.2(b); Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex.App.—Dallas 1991, *pet. ref'd*).

We modify the order in the following respects. First, we modify the order to reflect that the Court, rather than counsel, informed appellant and his parent of the right to appeal as required by Section 56.01(e) of the Juvenile Justice Code. Second, we modify the order to reflect that the Court instructed appellant and his parent of the right to appeal as required by Section 56.01(e) rather than Section 54.04(h). Third, we modify the order to reflect that the court considered the reports referred to in Section 54.05(e) rather than Section 54.05(f). Fourth, we modify the order to reflect appellant's commitment to the Texas Youth Commission pursuant to Section 54.05(f) rather than Section 54.04(s). Finally, we modify the order to delete the second occurrence of the following two sentences: (a) "The Court further finds that a material and substantial change in the circumstances

necessitates a modification of the disposition and such is in the best interest of the Respondent Child;” and (b) “The Court further finds that all reasonable efforts have been made to prevent or eliminate the need for the child’s removal from the home and make it possible for the child to return to the home.”

**Conclusion:** As modified, we affirm the trial court’s order modifying disposition.

#### SUFFICIENCY OF THE EVIDENCE—

TO ESTABLISH A KNIFE AS DEADLY WEAPON, THE STATE IS REQUIRED TO SHOW SOME EVIDENCE OF THE KNIFE’S SIZE, SHARPNESS, BRANDISHING MOTION BY THE ACCUSED, OR TESTIMONY REGARDING THE VICTIM’S FEAR OF SERIOUS BODILY INJURY OR DEATH.

¶ 06-4-5. *In the Matter of R.S.*, MEMORANDUM, No. 04-05-00819-CV, 2006 Tex.App.Lexis 7945 (Tex.App.—San Antonio, 9/6/06).

**Facts:** On July 8, 2005, around 2:00 a.m., Danny Sevilla was leaving work at the Rialto theaters. Sevilla was walking through the parking lot to his vehicle when he noticed someone sitting in the parking lot. Sevilla was on his cellphone when this person, R.S., walked up behind him. As Sevilla turned around, R.S. demanded Sevilla’s keys to his vehicle.

During this encounter, R.S. brandished a small green pocketknife. Sevilla complied with R.S.’s demands, and he even assisted R.S. in learning about the keyless entry. R.S. stated that he would not harm him for cooperating and then left in the vehicle. Sevilla subsequently called the police. At the scene, Officer William Kasberg conducted an investigation and took a statement from Sevilla regarding R.S.’s appearance and the details of the encounter.

Approximately a week later, R.S. took his girlfriend to Rivercenter Mall in the stolen vehicle; however, R.S. was unable to pay the parking fee when he attempted to leave. Due to R.S.’s inability to provide identification or payment, the parking attendant contacted security, who ultimately called the San Antonio Police Department (SAPD). Officer George Morales ran a license plate check which revealed that the vehicle had been stolen; thus, R.S. was arrested for the unauthorized operation of a motor vehicle. An investigating officer of the initial robbery created a photo lineup with six individuals, and Sevilla positively identified R.S. as the person who robbed him.

At trial Sevilla testified about the event that took place that night as well as the fear R.S. inflicted in him that evening. Several officers and the parking attendants testified about R.S.’s arrest and the numerous lies R.S. stated regarding the ownership of the vehicle and his age.

Ultimately, the jury found that R.S. engaged in delinquent conduct, specifically, aggravated robbery.

The disposition proceeding was conducted immediately after the trial on the merits. At the disposition hearing the State called Landon Cross, R.S.’s juvenile probation officer. Due to R.S.’s criminal history, unstable family structure, and the seriousness of the offense, Cross and the probation staff recommended R.S. be committed to TYC. The jury agreed with the recommendation and returned a determinate sentence of fifteen years.

**Held:** Affirmed

#### Memorandum Opinion: *Legal Sufficiency*

To review a legal sufficiency challenge, this court shall “view the relevant evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). When conducting a legal sufficiency review, an appellate court does not review the fact finder’s weighing of the evidence. *Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996).

In his third issue, R.S. complains that the evidence cannot support the conviction of aggravated robbery because there is no evidence showing R.S. used or exhibited a “deadly” weapon. [n2] R.S. contends that *Blain v. State*, 647 S.W.2d 293 (Tex. Crim. App. 1983), is consistent with his argument. In *Blain*, the court held that the evidence was insufficient to show that a table knife was a deadly weapon. *Id.* at 294. Because a knife is not a deadly weapon per se, the court determined that the State was required to show some evidence of the knife’s size, sharpness, brandishing motion by the accused, or testimony regarding the victim’s fear of serious bodily injury or death. *Id.*

n2 Aggravated robbery is committed “if, in the course of committing theft... and with intent to obtain or maintain control of the property, [a person]... intentionally or knowingly threatens or places another in fear of imminent bodily injury or death... and [said person]... uses or exhibits a deadly weapon ....” TEX. PEN. CODE ANN. §§ 29.02(a), 29.03(a)(2) (Vernon 2003).

Unlike *Blain*, the State provided evidence regarding the knife’s physical characteristics, the brandishing motions made by R.S., and the testimony concerning Sevilla’s fear of serious injury or death. An officer’s report documented Sevilla’s description of the “small, green hunting knife with many relatively small teeth.” Not only did the officer testify that such a knife is capable of causing death, Sevilla testified numerous times concerning his fear of being stabbed, feeling “terrified,” and worrying about his parents “los[ing] their son.” Furthermore, evidence was provided which documented the manner in which R.S. brandished the knife while cursing

at Sevilla and demanding his car keys. *See McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000) (concluding that merely carrying a butcher knife during an attack was legally sufficient to support a finding that the knife was a deadly weapon). A rational trier of fact could have found beyond a reasonable doubt that R.S. committed aggravated robbery.

**[Other Issues Omitted by Editor.]**

**Conclusion:** Each of R.S.'s arguments are overruled; thus, the trial court's judgment is affirmed.

**APPEALS—**

FAILURE TO FILE A MOTION FOR NEW TRIAL WAIVES FACTUAL SUFFICIENCY CHALLENGE ON APPEAL.

¶ 06-4-6. *In the Matter of F.F.G.*, MEMORANDUM, No. 03-05-00854-CV, 2006 Tex.App.Lexis 8844 (Tex. App.—Austin, 10/12/06).

**Facts:** On March 7, 2005, at approximately 3:50 p.m., Goldia Earls was working when she received a call from her sister stating that someone had shattered Earls's dining room window with a rock. Earls told her sister to call the police, then headed home.

Once both Earls and the police had arrived at Earls's home, Lydia Martinez—Earls's next-door neighbor—came over and explained that she had seen the person who threw the rock through Earls's window. Martinez testified that she saw F.F.G., who is a white male, standing with three African-American teenagers in a circle outside her kitchen window. Martinez further testified that she saw F.F.G. carrying a rock which he threw through Earls's window, and then the four teenagers immediately ran across the street.

Martinez telephoned the police to report the crime. After the police arrived and listened to Martinez's account, they suspected F.F.G. because he was part of a group of boys matching Martinez's description that they had noticed playing down the street. According to her testimony, because F.F.G. lived across the street from both Martinez and Earls, Martinez recognized him and was able to identify him as the person who threw the rock through Earls's window. Martinez also testified that Earls was only a passing acquaintance whom Martinez did not know by name; that she had never had a problem with F.F.G. or his mother before; and that she did not know F.F.G. by name before the trial, but did recognize him from the neighborhood.

Both F.F.G.'s mother, Donna Sanders, and his supervisor, Shara Kohrs, testified that F.F.G. spent the day working for Guy Bundy and Kohrs fixing up a duplex around the corner from Earls's house. Sanders testified that she dropped F.F.G. off at work that morning and that

F.F.G. had received a check for \$ 20 for his day's work. However, Sanders was not with her son at the time the rock was thrown through Earls's window.

Additionally, Kohrs testified that F.F.G. was working for her preparing a duplex to be rented, and that she did not see F.F.G. leave the work site. Further, Kohrs testified that even though she had not kept F.F.G. in her sight the entire time, she did not think it possible that F.F.G. could have left without her knowledge.

Kohrs also testified that she had been involved in verbal altercations with both Earls and Earls's daughter and that she had previously called the police on several occasions because Earls's daughter had thrown rocks through Kohrs's windows. The juvenile court was also presented with evidence of Kohrs's criminal record.

F.F.G. testified that he did not throw the rock through Earls's window and did not see the actual perpetrator.

Finally, the court was presented with evidence that the cost of repairs to Earls's broken window totaled \$ 408.

**Held:** Affirmed

**Memorandum Opinion:** As a preliminary matter, we must address the state's argument that F.F.G. failed to properly preserve the issue of factual sufficiency by filing a motion for new trial.

Among the rights of adult criminal defendants is the right to factual sufficiency review of a conviction. *Clewis v. State*, 922 S.W.2d 126, 136 (Tex. Crim. App. 1996). However, the Texas Family Code mandates that juvenile delinquency proceedings are governed by the Texas Rules of Civil Procedure. *Tex. Fam. Code Ann. § 51.17(a)* (West Supp. 2006). Under *Texas Rule of Civil Procedure 324(b)(2)*, a motion for a new trial is required to preserve the issue of factual sufficiency for appellate review in the civil context. As a result, a juvenile who complains on appeal of the factual sufficiency of the evidence must have preserved the complaint through a motion for new trial. *In re M.R.*, 858 S.W.2d 365, 366, 36 *Tex. Sup. Ct. J. 1015* (Tex. 1993) (per curiam); *Davila v. State*, 930 S.W.2d 641, 647 (Tex.App.—El Paso 1996, *pet. ref'd*).

Because F.F.G. failed to file a motion for new trial and therefore failed to preserve the issue of factual sufficiency for review, we must affirm the juvenile court's adjudication of F.F.G. as delinquent. *Tex. R. App. P. 33.1*.

**Conclusion:** F.F.G. did not properly preserve the issue of factual sufficiency for appeal by filing a motion for new trial. And even if the issue had been properly preserved, the proof of guilt was not too weak, nor was the contrary evidence presented too strong to rationally support the court's adjudication. As a result, we affirm the judgment of the trial court.

**CONFESSIONS—**

SECTION 51.095 OF THE FAMILY CODE DID NOT APPLY REGARDING CHILD'S STATEMENT, WHERE RESPONDENT WAS THE FOCUS OF THE INVESTIGATION AND HIS FREEDOM OF MOVEMENT WAS RESTRICTED, BECAUSE IT WASN'T RESTRICTED TO THE DEGREE ASSOCIATED WITH FORMAL ARREST.

¶ 06-4-7A. *In the Matter of F.C.W.*, MEMORANDUM, No. 14-05-00556-CV, 2006 Tex.App.Lexis 8364 (Tex.App.—Houston, 9/26/06).

**Facts:** On the evening of August 20, 2004, fifteen-year-old F.C.W. and his friend J.N. visited the home of a mutual friend, K. Allard. At around 8:00 or 9:00 p.m., F.C.W. and J.N. left Allard's house and walked to the home of another friend, Priscilla, who lived nearby. After Priscilla's mother told the pair that Priscilla could not see them that night, F.C.W. and J.N. walked back to Allard's house, [n1] passing the house where Stacey Hawileh lived with her father and younger siblings. A short time later, a passerby knocked on Mr. Hawileh's door and told him the truck in his driveway was on fire. [n2] Mr. Hawileh extinguished the fire and called the police. A member of the Harris County Sheriff's Department arrived, assessed the situation, and called the fire marshal.

n1 According to F.C.W.'s testimony at trial, he and J.N. were casually lighting pine needles with lighters and letting them burn. J.N. denied this.

n2 F.C.W. testified that he had picked up a newspaper in plastic wrapping, and that J.N. took the newspaper, shoved pine needles into it, lit the pine needles, and threw the package into the bed of Mr. Hawileh's truck. Although J.N.'s testimony agreed with F.C.W.'s testimony regarding the means used to start the fire, J.N. testified that F.C.W. ignited the pine needles and threw the newspaper into the truck.

About thirty minutes later, arson investigator Nathan Green arrived. He photographed the damage to the truck, examined the scene, and concluded that arson was the likely cause of the fire. Meanwhile, F.C.W. and J.N. returned to Allard's house and spent the night. According to Allard, the boys told him they had set a girl's red truck on fire. [n3] The next day, Stacey Hawileh commented to Allard that her truck had been set on fire, and Allard told her about F.C.W.'s and J.N.'s involvement. Stacey gave this information to her father, who repeated it to Investigator Green.

n3 Allard also testified that F.C.W. insulted J.N. for not helping him do it or fully participating.

On September 14, 2004, Green and a partner went to the disciplinary school F.C.W. attended to speak with him about the incident. F.C.W. was summoned to the

principal's office where the two investigators were waiting with the school principal. The two investigators were wearing polo-style golf shirts with the word "Arson" on them, and their firearms were visible on their waistbands. Green sat behind the principal's desk and conducted most of the interview. F.C.W. sat in a chair opposite Green, and the principal stood behind Green, in front of a door to the office. There was conflicting testimony as to where Green's partner, Investigator Bolton, was located. F.C.W. testified that Bolton stood behind him, blocking the remaining door to the office, but Green testified that Bolton sat beside F.C.W. Finally, F.C.W. testified that the office doors locked automatically from the outside, but that he knew he could open the doors from the inside.

The interview lasted twenty or twenty-five minutes. It is undisputed that the arson investigators did not inform F.C.W. of his right to remain silent, consult an attorney, or have a parent or other adult present. According to Green, he told F.C.W. he was not under arrest and was free to leave; however, F.C.W. testified that Green never told him he was free to leave. At trial, F.C.W. stated he felt scared during the interview, and Green testified that F.C.W. cried briefly. F.C.W. made no attempt to leave the office or end the interview, and did not ask to speak to anyone or to have anyone else present. He admitted he was involved in the arson, but only in a joint capacity with J.N., saying he was not quite sure who exactly started the fire. [n4] Green incorporated some of F.C.W.'s statements into his report. After the interview ended, F.C.W. returned to class.

n4 This is based on the following exchange between appellant's attorney and Green:

Q: And your report just mentioned that you interviewed [F.C.W.] and that he said that he and [J.N.], from your statements today, he and [J.N.] placed pine needles and newspapers into the back of the truck; is that correct?

A: Correct, yes, sir.

Q: Did he mention who started the fire?

A: No, he did not.

Q: No?

A: They just made reference to both of them being there.

Q: Okay. Did he tell you that [J.N.] might have started the fire?

A: Actually, I believe the comment was made that he wasn't quite sure or remembered who set that particular fire.

On January 26, 2005, F.C.W. was charged with arson. Following a bench trial on April 18, 2005, F.C.W. was adjudicated delinquent for arson, sentenced to probation until his eighteenth birthday, and ordered to pay restitution of \$ 935.00 to Mr. Hawileh.

## II. ISSUES PRESENTED

In two issues, F.C.W. contends the trial court erred by admitting statements he made to the arson investigators on September 14, 2004. F.C.W. argues in his first issue that his statements were the product of a custodial interrogation without the protections of *TEX. FAM. CODE ANN. § 51.095(b)* (Vernon Supp. 2005), and are therefore inadmissible. In his second issue, F.C.W. argues that even if the interrogation is deemed non-custodial, the statements were involuntary, and thus, their admission violated his right to due process.

**Held:** Affirmed

**Memorandum Opinion:** *Section 51.095* dictates that certain requirements must be met for a juvenile's statements to be admissible. *See TEX. FAM. CODE ANN. § 51.095*. However, when a juvenile makes voluntary oral statements that do not arise from custodial interrogation, the statute does not require the statements to be excluded. *See TEX. FAM. CODE ANN. § 51.095(b)(1), (d)*. Here, it is undisputed that the requirements of *section 51.095* were not met at the time F.C.W. made his statements to the arson investigators. Thus, the outcome of F.C.W.'s first issue depends on whether the questioning in the principal's office was custodial.

In general, a person is in custody if a reasonable person under the same circumstances would believe that his freedom of movement was restrained to the degree associated with a formal arrest. *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996) (citing *Stansbury v. California*, 511 U.S. 318, 320, 114 S. Ct. 1526, 1528-30, 128 L. Ed. 2d 293, 298-99 (1994)). When the person involved is a minor, courts consider the age of the defendant and all the circumstances surrounding the interrogation to decide whether there was a formal arrest or a restraint of movement to the degree associated with formal arrest. *In re V.P.*, 55 S.W.3d 25, 31 (Tex.App.—Austin 2001, *pet. denied*). Stated another way, the court's inquiry is whether, based on the objective circumstances, a reasonable child of the same age would believe his or her freedom of movement was significantly restricted. *Id.* The factors relevant to the determination of whether a child is in custody include whether there was probable cause to arrest; the focus of the investigation; and to the extent communicated or manifested, the officer's subjective intent and the child's subjective beliefs. *Dowthitt*, 931 S.W.2d at 254.

We first examine whether arson investigators had probable cause to arrest F.C.W. at the time of the interview. A law enforcement officer has probable cause to arrest when the facts and circumstances within the offi-

cer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent person in believing that the arrested person had committed an offense. *Beverly v. State*, 792 S.W.2d 103, 105 (Tex. Crim. App. 1990). Here, Green had been told by two other students at the disciplinary school that F.C.W. was involved in the crime, but Green had no corroborating evidence, and the teenagers could have been motivated by other factors. On this record, we cannot say that the information was sufficient to provide Green with probable cause to arrest F.C.W.

We next examine the manifested intent of the investigators. According to Green, he told F.C.W. he was not under arrest and was free to leave. F.C.W. was not placed in handcuffs at any point during the interview, and although F.C.W. testified that he believed the doors of the office locked automatically, he also testified he knew he could open the doors from the inside. It is also undisputed that F.C.W. never attempted or asked to leave the office or to speak to his parents, a lawyer, or a trusted adult. Although F.C.W. testified that the investigators told him they had a videotape of the incident, the trial court was free to disbelieve this statement, and hence, to find that the officers did not manifest an intent to arrest F.C.W. *See Marsh v. State*, 140 S.W.3d 901, 905 (Tex. App.—Houston [14th Dist.] 2004, *pet. ref'd*) (“The trial court is the exclusive fact finder in a motion to suppress hearing, and, therefore, it may choose to believe or disbelieve any or all of a witness's testimony.”).

We conclude that, although a reasonable fifteen-year-old in this situation could have felt his freedom of movement was restricted, he would not have felt that his freedom of movement was restrained to the degree associated with a formal arrest. [n5] F.C.W. was never handcuffed, and the trial court could have found that F.C.W. was told he was free to leave. Although F.C.W. was the focus of the investigation, he was not in custody when he spoke to the arson investigators. Because only a custodial interrogation invokes the protections of *section 51.095 of the Family Code*, the absence of those safeguards does not render F.C.W.'s statements inadmissible. We overrule F.C.W.'s first issue.

n5 Although not essential to our disposition, we note that F.C.W. had been arrested before, and thus would not equate an interview in the school principal's office with the significant restraint on freedom of movement associated with a formal arrest.

**Conclusion:** For the foregoing reasons, we hold the trial court did not abuse its discretion in denying the appellant's motion to suppress the statements he made to arson investigators. Accordingly, we affirm the judgment of the trial court.

**CONFESSIONS—**  
**STATEMENT BY RESPONDENT GIVEN TO ARSON**  
**INVESTIGATORS WAS CONSIDERED VOLUN-**  
**TARY.**

¶ 06-4-7B. *In the Matter of F.C.W.*, MEMORANDUM, No. 14-05-00556-CV, 2006 Tex.App.Lexis 8364 (Tex. App.—Houston, 9/26/06).

**Facts:** On the evening of August 20, 2004, fifteen-year-old F.C.W. and his friend J.N. visited the home of a mutual friend, K. Allard. At around 8:00 or 9:00 p.m., F.C.W. and J.N. left Allard's house and walked to the home of another friend, Priscilla, who lived nearby. After Priscilla's mother told the pair that Priscilla could not see them that night, F.C.W. and J.N. walked back to Allard's house, [n1] passing the house where Stacey Hawileh lived with her father and younger siblings. A short time later, a passerby knocked on Mr. Hawileh's door and told him the truck in his driveway was on fire. [n2] Mr. Hawileh extinguished the fire and called the police. A member of the Harris County Sheriff's Department arrived, assessed the situation, and called the fire marshal.

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About thirty minutes later, arson investigator Nathan Green arrived. He photographed the damage to the truck, examined the scene, and concluded that arson was the likely cause of the fire. Meanwhile, F.C.W. and J.N. returned to Allard's house and spent the night. According to Allard, the boys told him they had set a girl's red truck on fire. [n3] The next day, Stacey Hawileh commented to Allard that her truck had been set on fire, and Allard told her about F.C.W.'s and J.N.'s involvement. Stacey gave this information to her father, who repeated it to Investigator Green.

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The interview lasted twenty or twenty-five minutes. It is undisputed that the arson investigators did not inform F.C.W. of his right to remain silent, consult an attorney, or have a parent or other adult present. According to Green, he told F.C.W. he was not under arrest and was free to leave; however, F.C.W. testified that Green never told him he was free to leave. At trial, F.C.W. stated he felt scared during the interview, and Green testified that F.C.W. cried briefly. F.C.W. made no attempt to leave the office or end the interview, and did not ask to speak to anyone or to have anyone else present. He admitted he was involved in the arson, but only in a joint capacity with J.N., saying he was not quite sure who exactly started the fire. n4 Green incorporated some of F.C.W.'s statements into his report. After the interview ended, F.C.W. returned to class.

n4 This is based on the following exchange between appellant's attorney and Green:

Q: And your report just mentioned that you interviewed [F.C.W.] and that he said that he and [J.N.], from your statements today, he and [J.N.] placed pine needles and newspapers into the back of the truck; is that correct?

A: Correct, yes, sir.

Q: Did he mention who started the fire?

A: No, he did not.

Q: No?

A: They just made reference to both of them being there.

Q: Okay. Did he tell you that [J.N.] might have started the fire?

A: Actually, I believe the comment was made that he wasn't quite sure or remembered who set that particular fire.

On January 26, 2005, F.C.W. was charged with arson. Following a bench trial on April 18, 2005, F.C.W. was adjudicated delinquent for arson, sentenced to pro-

bation until his eighteenth birthday, and ordered to pay restitution of \$ 935.00 to Mr. Hawileh.

## II. ISSUES PRESENTED

In two issues, F.C.W. contends the trial court erred by admitting statements he made to the arson investigators on September 14, 2004. F.C.W. argues in his first issue that his statements were the product of a custodial interrogation without the protections of *TEX. FAM. CODE ANN. § 51.095(b)* (Vernon Supp. 2005), and are therefore inadmissible. In his second issue, F.C.W. argues that even if the interrogation is deemed non-custodial, the statements were involuntary, and thus, their admission violated his right to due process.

**Held:** Affirmed

**Memorandum Opinion:** For a statement to be involuntary, there must have been “official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker.” *In re R.J.H.*, 79 S.W.3d at 6 (quoting *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995)). In this case, the conduct of the arson investigators was not so coercive to have caused F.C.W. to make statements that were not the product of free and unconstrained choice. F.C.W. identified no conduct or statements by the investigators that he considered threatening or intimidating, nor does F.C.W. contend he was promised anything in exchange for his cooperation. See *In re Z.L.B.*, 115 S.W.3d 188, 191 (Tex. App.—Dallas 2003, no pet.) (citing the absence of a detective’s promise in exchange for the appellant’s written statement as a factor in determining the statement was voluntary). The interview took no longer than twenty-five minutes, and at no time did appellant indicate a desire to speak with his parents or an attorney. Although F.C.W. was not asked if he wished to speak to a parent or trusted adult or have such a person present, these protections were not required in a non-custodial interview such as this.

On the record before us, and presuming as we must that the trial court made all findings of fact consistent with its ruling, we cannot conclude that the trial court abused its discretion in admitting F.C.W.’s statements. Thus, we overrule appellant’s second issue.

**Conclusion:** For the foregoing reasons, we hold the trial court did not abuse its discretion in denying the appellant’s motion to suppress the statements he made to arson investigators. Accordingly, we affirm the judgment of the trial court.

## DETERMINATE SENTENCE TRANSFER—

THE HOLDING IN *CRAWFORD V. WASHINGTON* DOES NOT APPLY TO DETERMINATE SENTENCE TRANSFER HEARINGS BECAUSE THEY ARE NOT CONSIDERED A STAGE OF CRIMINAL PROSECUTION.

¶06-4-8. *In the Matter of S.M.*, \_\_\_S.W.3d \_\_\_, No. 2-05-262-CV, 2006 Tex.App.Lexis 9056 (Tex.App.—Fort Worth, 10/19/06).

**Facts:** On December 21, 2001, Appellant [n1] entered a negotiated plea of true to engaging in delinquent conduct by committing the felony offense of manslaughter with a deadly weapon. The trial court sentenced Appellant to twenty years’ confinement in TYC, subject to a possible transfer to IDTDCJ. On July 18, 2005, pursuant to TYC’s request, the trial court conducted a transfer hearing and transferred Appellant from TYC to IDTDCJ. See *TEX. FAM. CODE ANN. § 54.11* (Vernon Supp. 2006). Appellant appeals from the transfer order.

Appellant argues that the admission into evidence of Exhibit Number Two, the TYC report, violates his right of confrontation under *Crawford v. Washington* because the persons who gave information described in the report were not present to testify at the transfer hearing. See 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Appellant complains of Exhibit Number Three, which contains an eight-page report signed by Cuculo, because his testimony and recommendation was solely based upon the testimonial reports in TYC records. The records contained numerous incidents of misconduct. [n2]

n2 Section 54.11(d) of the Texas Family Code provides that at a transfer hearing “the court may consider written reports from probation officers, professional court employees, professional consultants, or employees of the Texas Youth Commission, in addition to the testimony of witnesses. At least one day before the hearing, the court shall provide the attorney for the person to be transferred or released under supervision with access to all written matter to be considered by the court.” *TEX. FAM. CODE ANN. § 54.11(d)* (Vernon Supp. 2006). There is no complaint in the instant case that Appellant’s attorney was not given timely access to the complained-of exhibits.

**Held:** Affirmed

**Opinion:** Under *Crawford*, the admission of testimonial hearsay violates the *Confrontation Clause* unless the declarant is shown to be unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374. Appellant relies upon a recent holding of the Texas Court of Criminal Appeals applying *Crawford* to the introduction of prison incident reports and disciplinary reports, and concluding that the reports violated the *Sixth*

*Amendment's Confrontation Clause. See Rousseau v. State, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005), cert. denied, 126 S. Ct. 2982 (2006).*

The *Confrontation Clause of the Sixth Amendment* explicitly applies to "criminal prosecutions." U.S. CONST. amend. VI. The reports in question in *Rousseau* were admitted at the punishment stage of the defendant's criminal trial. *Id.* at 880. Clearly, this was a "criminal prosecution." In comparison, a transfer hearing under *family code section 54.11* is not a stage of a criminal prosecution for purposes of the *Sixth Amendment*. *In re D.L., 198 S.W.3d 228, 230 (Tex. App.—San Antonio 2006, pet. denied)*. Under Texas law, a transfer hearing is not a trial; a juvenile is neither being adjudicated nor sentenced. *Id.*; *In re J.M.O., 980 S.W.2d 811, 813 (Tex. App.—San Antonio 1998, pet. denied)*; *In re D.S., 921 S.W.2d 383, 387 (Tex. App.—Corpus Christi 1996, writ dismissed w.o.j.)*. Rather, the transfer hearing is a "second chance hearing" after the juvenile has already been sentenced to a determinate number of years. *In re D.S., 921 S.W.2d at 387*. Because the juvenile is already being punished for his original conduct in which he was adjudged delinquent, in making this "second chance" determination the trial court should be able to consider the juvenile's behavior since commitment. *Id.* As such, the hearing does not need to meet the same stringent due process requirements as a trial in which a person's guilt is decided. *In re J.M.O., 980 S.W.2d at 813*; *In re D.S., 921 S.W.2d at 387*; see also *In re T.D.B., 2006 Tex. App. LEXIS 1491, No. 10-05-00015-CV, 2006 WL 408417, at \*1 (Tex.App.—Waco Feb. 22, 2006, no pet.)* (mem. op.) (holding that a juvenile challenging TYC records at transfer hearing has no right of confrontation). Because a transfer hearing is not a stage of a criminal prosecution, we hold that *Crawford* does not apply. Accordingly, we overrule Appellant's two points.

**Conclusion:** Having overruled each of Appellant's two points, we affirm the trial court's judgment.

**Concurring Opinion (by Justice Livingston):** I join in the majority's opinion and result but respectfully write this concurring opinion only to address the conflict I see between the family code provision that allows the State to introduce written reports from probation officers, professional court employees, and professional consultants at a juvenile's transfer hearing, and the *Sixth Amendment confrontation clause* rights. See U.S. CONST. amend. VI; *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*; TEX. FAM. CODE ANN. § 54.11(d) (Vernon Supp. 2006). I do not believe *section 54.11(d)* comports with the Supreme Court's directives set forth in *Crawford* regarding a defendant's *Sixth Amendment* right of confrontation against prosecution witnesses or our Court of Criminal Appeal's opinion in *Rousseau*, which held such incident reports to be testimonial in nature, thereby requiring a right to cross-examine those witnesses. *Crawford, 541 U.S. at 36, 124 S. Ct. at*

*1354; Rousseau v. State, 171 S.W.3d 871, 880 (Tex. Crim. App. 2005), cert. denied, 126 S. Ct. 2982 (2006)*

A transfer hearing determines whether a juvenile who has received a determinate sentence is released from the Texas Youth Commission's custody and released or transferred into the adult system for the remainder of his sentence. TEX. FAM. CODE ANN. § 54.11(i),(j). Despite this, another intermediate court has already held that juvenile transfer hearings, like revocation hearings, are not "criminal prosecution[s]" entitling juveniles to *Crawford* protections. *In re D.L., 198 S.W.3d 228, 230 (Tex. App.—San Antonio, 2006, pet. denied)*. However, I am unable to reconcile the potential magnitude of the result of a transfer hearing with the lack of protection for a juvenile's right to cross-examine the witnesses who testify against him via untested written reports. For this reason, I respectfully concur.

#### MODIFICATION OF DISPOSITION—

INCLUSION OF THE OFFENSE AND ITS SURROUNDING CIRCUMSTANCES IN AN ORDER CONSISTING OF MAINLY STATUTORY LANGUAGE IS SUFFICIENT TO SATISFY THE REQUIREMENTS OF SECTION 54.05(I) OF THE FAMILY CODE FOR A COMMITMENT TO TYC.

¶ 06-4-9. *In the Matter of O.M.*, MEMORANDUM, No. 03-05-00165-CV, 2006 Tex.App.Lexis 9327 (Tex. App.—Austin, 10/25/06).

**Facts:** On May 22, 2002, O.M. was placed on probation for unauthorized use of a motor vehicle. One month later, O.M. was detained for theft and was subsequently ordered to undergo ten months of Intensive Supervision Probation [n1] with Project Spotlight. After continuing to violate his probation, O.M. was moved to the Travis County Leadership Academy (TCLA) in January 2003. O.M. then absconded from the TCLA Halfway House for approximately seven months until he was detained for failure to identify himself and other probation violations committed when he was involved in an automobile collision. After this incident, the probation department recommended that O.M. be placed in TYC, but the juvenile court returned him to Intensive Supervision Probation and ordered him to attend classes at American Youthworks.

n1 Intensive Supervision Probation is a program that provides increased supervision services and monitoring as an alternative for juveniles who require a higher level of supervision than juveniles receiving standard probation services. These programs require frequent reporting to a probation officer who carries a reduced caseload.

One condition of O.M.'s probation was that he could not leave Travis County without his probation officer's approval. On February 20, 2005, O.M. left Travis

County and drove to San Antonio without notifying his probation officer. On the way, O.M. was arrested on the misdemeanor charges of driving without a license and failure to identify. *See Tex. Pen. Code Ann. § 38.02(b)* (West Supp. 2006); *Tex. Transp. Code Ann. § 521.025* (West Supp. 2006).

On February 28, 2005, the State filed a motion to modify disposition. The motion alleged that O.M. violated the terms of his probation when he left Travis County without notifying his probation officer. The motion also alleged that O.M. violated his probation by not being inside his residence every day after curfew and by failing to attend classes at American Youthworks. The State waived these latter two grounds at the hearing, and O.M. admitted leaving Travis County without notifying his probation officer. The juvenile court then heard evidence regarding sentencing.

O.M.'s probation officer testified that O.M. was currently employed and that his supervisor recently sent a letter stating that O.M. had a positive attitude and good customer service skills. She additionally testified that O.M. told her that his girlfriend was pregnant and that he was planning to support the baby. He was also considering enrolling in a GED program. She stated that the probation department had used all the resources it had available to help O.M., including Project Spotlight, the TCLA, and American Youthworks. Each time O.M. was given another chance, he had violated the terms of his probation. Therefore, a probation department committee unanimously agreed that the only avenue left for O.M. was commitment to TYC.

The district court noted O.M.'s history of non-compliance and determined that commitment to TYC would be best for O.M. and the community. The district court committed O.M. to TYC for an indeterminate amount of time, not to extend past O.M.'s 21st birthday. [n2] The district court's order stated in part:

That among said terms and conditions of probation were the following: Rule # 6—"Notify your assigned Probation Officer by telephoning [number omitted], or the Officer's direct telephone number before making any change of address, telephone, school, or employment, or before leaving the limits of Travis County." The child violated this rule of probation, to-wit: The said child on February 20, 2005, left Travis County without Probation Officer's permission. The Court further finds that the Respondent remains in need of rehabilitation and that for the protection of the public and of the

child, a modification of the prior disposition must be made.

This appeal followed.

n2 At the time of the hearing, O.M. was seventeen years old.

**Held:** Affirmed

**Memorandum Opinion:** In his first issue, O.M. insists that the juvenile court erred by merely quoting statutory language and not specifically stating the reasons for its modifications of the prior order. *Section 54.05(i) of the Texas Family Code* states that the "court shall specifically state in the order its reasons for modifying the disposition." *Id.* The purpose of this requirement is to ensure that the child has notice of the court's reasoning so he can determine if he should challenge the order on appeal. *In re J.R.*, 907 S.W.2d 107, 110 (Tex.App.—Austin 1995, no writ). The requirement also creates a record for the appellate court to determine whether the evidence supports the court's order and if the findings are sufficient to justify the disposition. *In re L.R.*, 67 S.W.3d 332, 336-37 (Tex.App.—El Paso 2001, no pet.). Therefore, merely reciting statutory language will not be sufficient to justify a court's ruling. *In re J.T.H.*, 779 S.W.2d 954, 959 (Tex.App.—Austin 1989, no writ). However, statutory language supplemented by additional findings is sufficient to meet the requirements of the family code. *See In re P.L.*, 106 S.W.3d 334, 338 (Tex.App.—Dallas 2003, no pet.) (order tracking language of *section 54.05* and explaining court's reasons was appropriate). This Court has held that the inclusion of the offense and its surrounding circumstances in an order consisting of mainly statutory language is sufficient. *In re J.T.H.*, 779 S.W.2d at 959.

Here, in addition to repeating statutory language, the district court specifically described the conditions of O.M.'s probation and how O.M. violated those conditions. These findings are sufficient to satisfy the requirements of *section 54.05(i)*. *See Tex. Fam. Code Ann. § 54.05(i)*. Additionally, the district court's findings were supported by O.M.'s admission, evidence of multiple probation violations, and the recommendation of the probation department. We overrule O.M.'s first issue.

**Second Issue Omitted.**

**Conclusion:** Because we have overruled both of O.M.'s issues, we affirm the district court's order.