

**STATE BAR
SECTION REPORT
JUVENILE LAW**

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CHAIR’S MESSAGE by Tim Menikos

Yearning For Zion Ranch..., Eldorado, Texas..., if you don't know what these phrases mean then you've been on an extended vacation. Quite possibly the situation in Eldorado Texas could be the “Perfect Juvenile Law Storm” of legal issues! The issues confronting the army of volunteer (and hopefully retained) attorneys, Court staff, Judges, and State's Attorneys are staggering. The toll this situation will bring on the resources of counties across the State will be immense. The issues that arise in the DFPS-related cases, as well as the likely Delinquency and Criminal cases arising out of the situation will be very interesting, and will show the cohesiveness, or flaws, in our laws under the Family Code, State and Federal Constitutions. Hopefully there will be members of this Section that will lead the way through the maze of laws that will apply. And just when things were looking a little dull around here.....!

EDITOR’S FOREWORD by Pat Garza

Ah, summer at last. You know, summers would be great if we didn’t have to deal with summer camps. They’re great for the kids, but come on. First we pay a registration, then we pay tuition, and then they want extra for field trips. And what’s with this noon dismissal? Oh, but they sound so sweet when they mention, “for a ‘small’ fee my daughter can go to after-camp-care (don’t forget the sac lunch).” Well, that solves part of the problem. After-camp-care ends at 3:00pm. Now, did I not get the memo? Does everyone else’s job end at 3:00pm during the summer?

Ok, enough is enough. It’s time to go back to year-round schooling. Hey, I just thought of something. Is it just me, or does anyone else think that the summer camp lobbyist may be the ones who put an end to year-round schooling? It makes perfect sense. Nobody even talks about year-round-schooling anymore. Did you notice that every summer rather than talking about the injustices of the summer camps, we’re talking about higher gas prices. I’m beginning to think that the high price of gas may be just a distraction created by the summer camp lobbyist. Come on everyone, join me, it’s time to call our congresspersons (sorry, had to be PC). Don’t let them be influenced by the summer camp lobbyist who are probably showering them with caps and free t-shirts as we speak. It’s time working parents of the world unite... It’s time... What? What do you mean she’s decided not to go to summer camp? Which relatives? Oh... Well, in that case, never mind.

Nuts and Bolts Conference. The Juvenile Law Section and TJPC are jointly sponsoring the 2008 Nuts and Bolts of Juvenile Law Conference in Austin on July 21-22, 2008. It is an excellent conference for both the new and seasoned juvenile practitioner. It is an intensive 1½ day program covering basic fundamentals and principles of juvenile law. Registration information is located on page 6.

Texas Juvenile Law, 7th Edition. The Texas Juvenile Law, 7th Edition by Robert O. Dawson and updated by Christian A. Hubner will be released this fall. There will be three volumes. Volume I will be a regular reference text, case citations, and commentary regarding juvenile law updated from the 80th Texas Legislative Session in 2007. Volume II will be the statutory supplement to Volume I. It contains statutory references with excerpts from various sources including, but not limited to, the Family Code, Education Code, Code of Criminal Procedure, Human Resources Code, and Health and Safety Code. Volume III will contain all administrative rules promulgated by the Texas Juvenile Probation Commission and Texas Youth Commission that affect the juvenile justice system (not scheduled for release until 2009).

The Texas Juvenile Law for Justice and Municipal Courts, 2nd Edition will also be available this fall. This book includes reference text, case citation, relevant statutes and commentary regarding juvenile law impacting justice and municipal court judges.

Volume I is listed at \$85. Volume II is listed at \$35. The Texas Juvenile Law for Justice and Municipal Court, 2nd Edition is listed at \$50.

While Professor Dawson laid the ground work for these books, a concerted effort by many was used to complete it. Many thanks should go to Vicki Spriggs and her hard working staff at the Texas Juvenile Probation Commission. To Lisa Capers and her vision of extending the legacy of Professor Dawson through his projects and her steadfast determination of doing it “the way he would have done it.” To Chris Hubner, Nydia Thomas, Chris Cowan, Leigh de la Reza, and of course Kristy Almager who all worked hard and tirelessly to make the final product the state-of-the-art reference book. And as Chris tells me, a very special thanks also must go out to the many juvenile justice practitioners across the state who served as guest editor’s and sounding boards.

Make no mistake, these books will be the most comprehensive and up-to-date reference books on Texas Juvenile Law in existence. These are the type of resource books that you don’t buy just one. You get one for the office and you get one for your home. You can download an order form online at www.tjpc.state.tx.us or contact Diane Laffoon at 512.424.6682 or Diane.Laffoon@tjpc.state.tx.us for additional information.

Case of the Quarter. The case of the quarter will be a new feature where I briefly discuss what I believe the major case of a particular issue is. I’m not sure I will do it every time, but I will try.

This quarter’s case of the quarter is *In the Matter of H.V.* This was a case heard by the Texas Supreme Court dealing with a violation of the Fifth Amendment right against self incrimination. The case centers around a juvenile who made a request to speak to an attorney while being admonished by a magistrate just before giving a confession. The request was not honored and the juvenile subsequently gave a confession and also instructed police as to where they could find the gun that had been used in the offense. The Supreme Court suppressed the confession, holding that there was a violation of the child’s Fifth Amendment rights, but allowed the gun to be admitted, finding that physical evidence that does not compel a defendant to testify against himself is not a violation of the child’s Fifth Amendment rights, and since the child did not allege any Fourth Amendment violations the evidence (gun) was admissible.

Get Something Published. If you find a certain topic interesting or maybe you have read a case that you would like to comment on, write about it. All original juvenile related articles are considered for publication. If you feel you want to have something considered for publication, please send it to me. If you’re not sure, send it to me anyway. If you think it’s interesting, probably somebody else does too.

**Standing in the middle of the road is very dangerous;
you get knocked down by the traffic from both sides.**

Margaret Thatcher

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NUTS AND BOLTS OF JUVENILE LAW

Sponsored by the Texas Juvenile Probation Commission
and Juvenile Law Section of the State Bar of Texas

July 21 - 22, 2008

Airport Marriott South, Austin, Texas

General Information

Overview

This course is an intensive 1 ½ day program is intended to assist juvenile justice practitioners with the basic fundamentals and principles of juvenile law.

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 approximately 9.00 hours (including 1 hour of ethics); and juvenile probation officers will receive approximately 9.00 hours from the Texas Juvenile Probation Commission (all of which may be used for management hours). For those individuals attempting to complete the required 60 hours of training for the Specialization exam, you may use hours received from this course.

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, course materials are available for purchase by filling out the appropriate information online when you register. The cost of materials is \$50 per notebook and will be mailed within two weeks after the conclusion of the conference. *Additional copies of the course materials must be pre-ordered.*

Persons With Disabilities

Persons with disabilities who plan to attend this conference and who need auxiliary aids or services are required to contact Kristy Almager at (512) 424-6710 at least seven (7) working days prior to the conference so that appropriate arrangements may be made.

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 Kristy Almager at (512) 424-6718. *No refunds will be given without written notification 48 hours prior to the beginning of the symposium.* All refunds will be subject to a \$25 processing fee.

Audio/Video Recording

This course will not be audio or video recorded. We apologize for any inconvenience.

Additional Information

Please visit our website at www.tjpc.state.tx.us or www.juvenilelaw.org. For additional information, you may contact Kristy Almager at (512) 424-6710 or Kristy.Almager@tjpc.state.tx.us.

Hotel Information

Hotel Accommodations

The training will be held at the Airport Marriott South in Austin. A limited number of hotel rooms will be available before July 6, 2008 or until the reserved block of rooms are depleted, whichever is earlier. The hotel is offering a discounted rate of \$85/single or double. When making accommodations, please call contact the hotel at (800) 228-9290 or (512) 441-7900 and refer to the Juvenile Law Section room block. You may also visit them online at <http://marriott.com/property/propertypage/AUSAP>.

Parking

Complimentary surface and garage parking is available on-site.

Transportation

For those individuals flying in to Austin-Bergstrom International Airport, the Marriott South offers a complimentary airport shuttle service on request. Please contact the hotel directly at (512) 441-7900 for additional information.

Super Shuttle is also available to and from the airport at a rate of \$15 per person per trip. Reservations may be made by contacting them at (512) 258-3826 or online at www.supershuttle.com. Estimated taxi fare is \$12 per person per trip.

Driving Directions

The Marriott Airport South is conveniently located on the service road of IH-35 just south of the intersection of IH-35 and Ben White / Hwy 290 / Hwy 71. The hotel is located on the east side of the highway. For detailed driving instructions, please visit mapquest.com or your favorite travel navigation website.

Tentative Agenda

Visit us online for a detailed tentative agenda at www.juvenilelaw.org.

Registration

① Tell us about yourself (please print or type)

PRINTED NAME _____

JOB TITLE _____

COUNTY _____

BAR CARD NO _____

DEPARTMENT _____

ADDRESS _____

CITY, STATE, ZIP _____

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② Fees and Course Materials

- | | |
|-----------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <input type="checkbox"/> \$125.00 | Members of the Juvenile Law Section, Judges, Associate Judges, Referees, and Masters <i>(Includes materials)</i>
<i>Payment must be received by July 15, 2008, otherwise on-site fee will apply.</i> |
| <input type="checkbox"/> \$150.00 | Non-Section Members <i>(Includes materials)</i>
<i>Payment must be received by July 15, 2008, otherwise on-site fee will apply.</i> |
| <input type="checkbox"/> \$200.00 | On-Site <i>(Includes onsite or if payment is received after July 15, 2008.)</i> |
| <input type="checkbox"/> \$50.00 | Conference Materials Only <i>(I am unable to attend the conference, but would like to purchase the course materials)</i> |

③ Payment

Method of payment can be made by credit card, check or money order made payable to the Juvenile Law Section. No purchase orders or vouchers will be accepted. Mail your registration form, along with payment to: Juvenile Law Section, c/o Kristy Almager, P.O. Box 13547, Austin, Texas 78711. An e-confirmation will be sent once you are registered. This confirmation will be for registration only and will not necessarily mean that you are paid. Please pick up your name tag and course materials at the conference.

Method of Payment: Check Money Order Visa MC American Express Discover

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Name as it Appears on the Card _____

Expiration _____

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Texas Juvenile Law, 7th Edition

BY DR. ROBERT O. DAWSON

UPDATED BY CHRISTIAN A. HUBNER

*Pre-order Now for the Fall 2008 Release...
Place your order now in order to ensure your copy is shipped by September 1.
We now accept credit cards!*

The 7th Edition of **Texas Juvenile Law** is the most comprehensive reference book on Texas juvenile law and the juvenile justice system. It reflects juvenile justice reforms made by the 80th Texas Legislature in 2007, and **Volume I** contains chapters regarding the Juvenile Justice Information System, Juvenile Files and Records, Determinate Sentencing, Juvenile Procedures in Justice and Municipal Courts, Recent Appellate Court Decisions in Juvenile Cases, School Related Issues, Progressive Sanctions, Chapter 55, Parental Rights and Responsibilities and much, much more. **Volume II** contains all pertinent statutes affecting the juvenile justice system. **Volume III**, to be published in 2009, will contain all administrative rules promulgated by the Texas Juvenile Probation Commission and the Texas Youth Commission that affect the juvenile justice system. Ordering information for Volume III is not yet available.

FOR MUNICIPAL AND JUSTICE COURT JUDGES

The second edition of **Texas Juvenile Law for Justice and Municipal Court Judges** will be a separate book specifically published for municipal and justice of the peace court judges and practitioners. This book will contain only those chapters of Texas Juvenile Law, 7th Edition, that relate to prosecution of juveniles in municipal and justice of the peace courts. Additionally, all the relevant statutes related to this area of law are compiled in this handy reference book. This book serves as a quick, easy and efficient guide for those municipal and justice court judges and practitioners who do not necessarily need the complete version of *Texas Juvenile Law*, 7th Edition.

Text	Price
Volume I – Texas Juvenile Law, 7th Edition. Perfect bound regular reference text, case citations, and commentary regarding juvenile law updated from the 80 th Texas Legislative Session in 2007.	\$85
Volume II – Texas Juvenile Law, 7th Edition Statutory Supplement. Included in this book will be statutory references with excerpts from the Family Code, Education Code, Code of Criminal Procedure, Human Resources Code, and the Health and Safety Code, to mention only a few.	\$35
Texas Juvenile Law for Justice and Municipal Courts, 2nd Edition. Included in this book will be reference text, case citations, relevant statutes and commentary regarding juvenile law impacting justice and municipal court judges.	\$50

Download an Order Form online at www.tjpc.state.tx.us or contact Diane Laffoon at 512.424.6682 or Diane.Laffoon@tjpc.state.tx.us.

REVIEW OF RECENT CASES

DETERMINATE SENTENCE TRANSFER HEARING—

IN DETERMINATE SENTENCE TRANSFER HEARING, COMPLAINED-OF PSYCHOLOGICAL EVALUATION OBJECTED TO BY RESPONDENT HAD BEEN ADMITTED AT THE BEGINNING OF THE TRIAL, AS A RESULT, ERROR WAS NOT PRESERVED FOR APPEAL.

¶ 08-2-1A. **In the Matter of M. M.**, No. 03-06-00396-CV, 2008 Tex.App.Lexis 981 (Tex.App.—Austin, 2/6/08).

Facts: On March 23, 2003, the State filed a petition alleging delinquent conduct by M.M. M.M. pleaded true to the allegation and was found to have engaged in delinquent conduct, to wit, murder. Following a disposition hearing, M.M. received a forty-year determinate sentence, with a three-year minimum, in TYC. On November 18, 2005, by letter to the juvenile court pursuant to *Texas Family Code section 54.11*, TYC recommended that M.M. be transferred from TYC to TDCJ for the remainder of his sentence. *See Tex. Fam. Code Ann. § 54.11* (West Supp. 2007).

At the transfer hearing, the trial court heard testimony from Dr. Ann Kelley, a psychologist with TYC who served as the Director of Clinical Treatment for the Giddings State School until she left just prior to the hearing to engage in private practice; Dr. Michael Hilgers, Jacqueline Daiss, and John Etheridge, associate psychologists with TYC at the Giddings State School; and Leonard Cucolo, a TYC representative serving as a liaison to the court.

At the transfer hearing, Dr. Hilgers testified to an evaluation of M.M. that he conducted in July 2005 over several days for the purposes of the transfer hearing. Hilgers testified that he advised M.M. of the purpose of the evaluation and that it might be used at a transfer hearing. Because "the Court relied in part on the psychological evaluation to make its determination on whether to transfer Appellant" to TDCJ, M.M. contends that Dr. Hilgers's psychological evaluation evidence was admitted into evidence in violation of his *Fifth Amendment* rights.

At the conclusion of the hearing, the trial court ordered that M.M. be transferred to TDCJ for the remainder of his sentence. The trial court identified the factors she considered in her determination. She stated:

In making this determination, the Court may consider the experiences, and the character of the person before and after commitment to the Texas

Youth Commission. I can also consider the nature of the offense that you have committed, and the manner in which it was committed. Even if you had done everything, done all of those reports, your behavior, your actions show a continued pattern of engaging in being dangerous, in not changing. . . . For the protection of society and for the offense you have committed, today I transfer you for the remainder of your sentence to complete it in the Texas Department of Criminal Justice.

Held: Affirmed

Opinion: M.M. challenges the admission of the State's July 2005 psychological evaluation conducted for the purposes of the transfer hearing on the ground that it violated his *Fifth Amendment* rights against self-incrimination and *Article I, Sections 10 and 19 of the Texas Constitution*.

Transfer Proceedings

Section 54.11 of the Family Code provides that when a juvenile is given a determinate sentence, upon TYC's request to transfer the juvenile to TDCJ, the trial court is required to hold a hearing. *Tex. Fam. Code Ann. § 54.11*. At that hearing, *section 54.11(d)* allows the court to consider TYC reports as evidence:

[T]he 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.

Id. § 54.11(d).

At the conclusion of the hearing, the trial court may either order the return of the juvenile to TYC or the transfer of the juvenile to the custody of TDCJ for the completion of his sentence. *Id.* § 54.11(i).

In making a determination regarding transfer of a juvenile offender to TDCJ, a trial court may consider: (1) the experiences and character of the person before and after commitment to TYC; (2) the nature of the penal offense and the manner in which it was committed; (3) the abilities of the person to contribute to society; (4) the protection of the victim or the victim's family; (5) the recommendations of TYC and the prosecuting attorney; (6) the best interests of the person; and (7) any other factor relevant to the issue to be decided. *Id.* § 54.11(k). Evidence of each factor is not required, and the trial court need not consider every factor in making its deci-

sion. *In re J.L.C.*, 160 S.W.3d 312, 313-14 (Tex. App.—Dallas 2005, no pet.); *In re R.G.*, 994 S.W.2d 309, 312 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

Admissibility of Psychological Evaluation

M.M. challenges the admission of the psychological evaluation conducted by Dr. Hilgers because, he contends, it violates his state and federal constitutional rights by compelling him to supply incriminating evidence without being advised of his rights. M.M. complains only of the admission of a single psychological evaluation—the one conducted by Dr. Hilgers in July 2005. Although other evaluations are included with the exhibits, they do not appear to be the subject of M.M.'s challenge. The State responds that M.M. has failed to preserve this point of error and that, in any event, it is without merit.

We first address M.M.'s objections as raised at trial. Prior to Dr. Kelley's testimony, the State sought to introduce into evidence State's Exhibits No. 1 and No. 2A through 2E which had been provided to the defense prior to the hearing. State's Exhibit No. 1 was a letter dated January 9, 2006, from Leonard Cucolo to the trial court enclosing a large volume of documents—designated State's Exhibits 2A through 2E—containing summary reports of M.M.'s progress, case plans, and psychological evaluations completed during M.M.'s commitment to TYC. The letter stated that the "casework masterfile and security file" had previously been delivered. M.M. generally objected to the introduction of the documents. His counsel lodged the following objection:

With regard to these documents, there are matters within these documents which constitute hearsay. And also I believe constitute violations of Defendant's right to cross examination of the witnesses. We're going to ask the Court to redact or to ignore those particular sections which are in violation of such, particular pursuant to cross.

In response, the State argued that the law is clear that TYC records and reports are admissible in transfer proceedings. The trial court overruled the objection and the exhibits were admitted. After Dr. Kelley testified to M.M.'s lack of progress and inability to engage in treatment and effect changes in his behavior, Dr. Hilgers testified. Although Dr. Hilgers had various contacts with M.M., he was specifically called to testify about the psychological evaluation he conducted on M.M. over several days in July 2005 in connection with the possibility of transferring M.M. to TDCJ. When Dr. Hilgers testified to his discussion with M.M. about the underlying offense for which M.M. was in TYC, M.M.'s counsel stated:

Your Honor, with regard to case law involving psychologists and psychiatrists talking to Defendants who aren't in custody, I believe this would fit the parameters of being custodial interrogation. And for that reason we ask the Court to strike any

further mention of this interview by this psychologist.

The trial court overruled the objection, and Hilgers continued his testimony. M.M. made no further objection during Hilgers's testimony. On appeal, M.M. does not challenge the exhibits on hearsay grounds, nor does he challenge the admission of Hilgers's testimony as he sought to do in the court below. Rather, he challenges as error, the admission of the evaluation itself.

In order to preserve error for appellate review, there must be a timely and specific trial objection. *See Tex. R. App. P. 33.1; DeBlanc v. State*, 799 S.W.2d 701, 718 (Tex. Crim. App. 1990). Moreover, the complaint on appeal must comport with the trial objection, or nothing is presented for review. *See Rezac v. State*, 782 S.W.2d 869, 870 (Tex. Crim. App. 1990).

M.M. has failed to preserve error for appellate review. Because the initial hearsay objection to the several hundred pages of documents is too general and insufficient to inform the trial court of the basis of the objection, it fails to preserve any error for review. And because the objection based on custodial interrogation seeks only to strike any further mention of the interview, it does not suffice to preserve the challenge to the admissibility of the evaluation itself. Because M.M.'s objection on appeal does not comport with his objections below, M.M. has failed to preserve anything for our review. *See Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002).

As the court of criminal appeals explained in *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003),

To preserve error in admitting evidence, a party must make a proper objection and get a ruling on that objection. In addition, a party must object each time the inadmissible evidence is offered or obtain a running objection. An error in the admission of evidence is cured where the same evidence comes in elsewhere without objection.

See also Leday v. State, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998) ("Our rule . . . is that overruling an objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling.").

The complained-of psychological evaluation was admitted at the beginning of the trial prior to the testimony of Dr. Kelley. Except for an objection to the "mention of this interview by this psychologist," M.M. did not otherwise object to it. At no time did M.M. object on the grounds he now raises on appeal. Even if M.M. preserved an objection to the admission of the evaluation report and to Hilgers's testimony, M.M.'s claim is without merit. A transfer hearing under *section 54.11 of the family code* is not considered a "stage of a criminal prosecution." Under Texas law, a transfer hearing is not a

trial; a juvenile is neither being adjudicated nor sentenced. *In re D.L.*, 198 S.W.3d at 230; *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.*). 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 legislature has provided that the trial court should be able to consider the juvenile's behavior since commitment, and the transfer statute expressly allows consideration of such reports. *Id.*; see *Tex. Fam. Code Ann.* § 54.11(d) (court may consider written reports from professional consultants and employees of TYC in addition to testimony). *Section 54.11(e)* specifies the procedures to be employed in the hearing and further provides:

At the hearing, the person to be transferred or released under supervision is entitled to an attorney, to examine all witnesses against him, to present evidence and oral argument, and to previous examination of all reports on and evaluations and examinations of or relating to him that may be used in the hearing.

Tex. Fam. Code Ann. § 54.11(e).

Thus, because a transfer hearing is not a stage of a criminal prosecution, the hearing does not require the same stringent requirements as a trial in which a person's guilt is determined, and the statute expressly provides for the consideration of the evaluation M.M. now challenges, we hold that the trial court did not err in admitting the evaluation. *In re J.M.O.*, 980 S.W.2d at 813; *In re D.S.*, 921 S.W.2d at 387.^[n1] We overrule M.M.'s single point of error.

n1 M.M. does not challenge the constitutionality of the relevant statutes.

Conclusion: Having overruled M.M.'s point of error, we affirm the trial court's order.

—————

**DETERMINATE SENTENCE TRANSFER HEARING—
WRITTEN REPORTS FROM TYC PSYCHOLOGISTS (PROFESSIONALS) ARE ADMISSIBLE IN A DETERMINATE SENTENCE TRANSFER HEARINGS BECAUSE TFC §54.11(D) SPECIFICALLY PROVIDES FOR IT.**

¶ 08-2-1B. **In the Matter of M. M.**, No. 03-06-00396-CV, 2008 Tex.App.Lexis 981 (Tex.App.—Austin, 2/6/08).

Facts: On March 23, 2003, the State filed a petition alleging delinquent conduct by M.M. M.M. pleaded true to the allegation and was found to have engaged in delinquent conduct, to wit, murder. Following a disposition hearing, M.M. received a forty-year determinate sentence, with a three-year minimum, in TYC. On November 18, 2005, by letter to the juvenile court pursuant to *Texas Family Code section 54.11*, TYC recommended that M.M. be transferred from TYC to TDCJ for the remainder of his sentence. See *Tex. Fam. Code Ann.* § 54.11 (West Supp. 2007).

At the transfer hearing, the trial court heard testimony from Dr. Ann Kelley, a psychologist with TYC who served as the Director of Clinical Treatment for the Giddings State School until she left just prior to the hearing to engage in private practice; Dr. Michael Hilgers, Jacqueline Daiss, and John Etheridge, associate psychologists with TYC at the Giddings State School; and Leonard Cucolo, a TYC representative serving as a liaison to the court.

At the transfer hearing, Dr. Hilgers testified to an evaluation of M.M. that he conducted in July 2005 over several days for the purposes of the transfer hearing. Hilgers testified that he advised M.M. of the purpose of the evaluation and that it might be used at a transfer hearing. Because "the Court relied in part on the psychological evaluation to make its determination on whether to transfer Appellant" to TDCJ, M.M. contends that Dr. Hilgers's psychological evaluation evidence was admitted into evidence in violation of his *Fifth Amendment* rights.

At the conclusion of the hearing, the trial court ordered that M.M. be transferred to TDCJ for the remainder of his sentence. The trial court identified the factors she considered in her determination. She stated:

In making this determination, the Court may consider the experiences, and the character of the person before and after commitment to the Texas Youth Commission. I can also consider the nature of the offense that you have committed, and the manner in which it was committed. Even if you had done everything, done all of those reports, your behavior, your actions show a continued pattern of engaging in being dangerous, in not changing. . . . For the protection of society and for the offense you have committed, today I transfer you for the remainder of your sentence to complete it in the Texas Department of Criminal Justice.

Held: Affirmed

Opinion: M.M. challenges the admission of the State's July 2005 psychological evaluation conducted for the purposes of the transfer hearing on the ground that it violated his *Fifth Amendment* rights against self-incrimination and *Article I, Sections 10 and 19 of the Texas Constitution*.

Transfer Proceedings

Section 54.11 of The Family Code provides that when a juvenile is given a determinate sentence, upon TYC's request to transfer the juvenile to TDCJ, the trial court is required to hold a hearing. *Tex. Fam. Code Ann. § 54.11*. At that hearing, *section 54.11(d)* allows the court to consider TYC reports as evidence:

[T]he 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.

Id. § 54.11(d).

At the conclusion of the hearing, the trial court may either order the return of the juvenile to TYC or the transfer of the juvenile to the custody of TDCJ for the completion of his sentence. *Id.* § 54.11(i).

In making a determination regarding transfer of a juvenile offender to TDCJ, a trial court may consider: (1) the experiences and character of the person before and after commitment to TYC; (2) the nature of the penal offense and the manner in which it was committed; (3) the abilities of the person to contribute to society; (4) the protection of the victim or the victim's family; (5) the recommendations of TYC and the prosecuting attorney; (6) the best interests of the person; and (7) any other factor relevant to the issue to be decided. *Id.* § 54.11(k). Evidence of each factor is not required, and the trial court need not consider every factor in making its decision. *In re J.L.C.*, 160 S.W.3d 312, 313-14 (Tex. App.—Dallas 2005, no pet.); *In re R.G.*, 994 S.W.2d 309, 312 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

Admissibility of Psychological Evaluation

M.M. challenges the admission of the psychological evaluation conducted by Dr. Hilgers because, he contends, it violates his state and federal constitutional rights by compelling him to supply incriminating evidence without being advised of his rights. M.M. complains only of the admission of a single psychological evaluation—the one conducted by Dr. Hilgers in July 2005. Although other evaluations are included with the exhibits, they do not appear to be the subject of M.M.'s challenge. The State responds that M.M. has failed to preserve this point of error and that, in any event, it is without merit.

We first address M.M.'s objections as raised at trial. Prior to Dr. Kelley's testimony, the State sought to introduce into evidence State's Exhibits No. 1 and No. 2A through 2E which had been provided to the defense prior to the hearing. State's Exhibit No. 1 was a letter dated January 9, 2006, from Leonard Cucolo to the trial court enclosing a large volume of documents—designated State's Exhibits 2A through 2E—containing summary reports of M.M.'s progress, case plans, and psychological evaluations completed during M.M.'s commitment to TYC. The letter stated that the "casework

masterfile and security file" had previously been delivered. M.M. generally objected to the introduction of the documents. His counsel lodged the following objection:

With regard to these documents, there are matters within these documents which constitute hearsay. And also I believe constitute violations of Defendant's right to cross examination of the witnesses. We're going to ask the Court to redact or to ignore those particular sections which are in violation of such, particular pursuant to cross.

In response, the State argued that the law is clear that TYC records and reports are admissible in transfer proceedings. The trial court overruled the objection and the exhibits were admitted. After Dr. Kelley testified to M.M.'s lack of progress and inability to engage in treatment and effect changes in his behavior, Dr. Hilgers testified. Although Dr. Hilgers had various contacts with M.M., he was specifically called to testify about the psychological evaluation he conducted on M.M. over several days in July 2005 in connection with the possibility of transferring M.M. to TDCJ. When Dr. Hilgers testified to his discussion with M.M. about the underlying offense for which M.M. was in TYC, M.M.'s counsel stated:

Your Honor, with regard to case law involving psychologists and psychiatrists talking to Defendants who aren't in custody, I believe this would fit the parameters of being custodial interrogation. And for that reason we ask the Court to strike any further mention of this interview by this psychologist.

The trial court overruled the objection, and Hilgers continued his testimony. M.M. made no further objection during Hilgers's testimony. On appeal, M.M. does not challenge the exhibits on hearsay grounds, nor does he challenge the admission of Hilgers's testimony as he sought to do in the court below. Rather, he challenges as error, the admission of the evaluation itself.

In order to preserve error for appellate review, there must be a timely and specific trial objection. *See Tex. R. App. P. 33.1; DeBlanc v. State*, 799 S.W.2d 701, 718 (Tex. Crim. App. 1990). Moreover, the complaint on appeal must comport with the trial objection, or nothing is presented for review. *See Rezac v. State*, 782 S.W.2d 869, 870 (Tex. Crim. App. 1990).

M.M. has failed to preserve error for appellate review. Because the initial hearsay objection to the several hundred pages of documents is too general and insufficient to inform the trial court of the basis of the objection, it fails to preserve any error for review. And because the objection based on custodial interrogation seeks only to strike any further mention of the interview, it does not suffice to preserve the challenge to the admissibility of the evaluation itself. Because M.M.'s objection on appeal does not comport with his objections below,

M.M. has failed to preserve anything for our review. *See Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002).

As the court of criminal appeals explained in *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003),

To preserve error in admitting evidence, a party must make a proper objection and get a ruling on that objection. In addition, a party must object each time the inadmissible evidence is offered or obtain a running objection. An error in the admission of evidence is cured where the same evidence comes in elsewhere without objection.

See also Leday v. State, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998) ("Our rule . . . is that overruling an objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling.").

The complained-of psychological evaluation was admitted at the beginning of the trial prior to the testimony of Dr. Kelley. Except for an objection to the "mention of this interview by this psychologist," M.M. did not otherwise object to it. At no time did M.M. object on the grounds he now raises on appeal. Even if M.M. preserved an objection to the admission of the evaluation report and to Hilgers's testimony, M.M.'s claim is without merit. A transfer hearing under *section 54.11 of the family code* is not considered a "stage of a criminal prosecution." Under Texas law, a transfer hearing is not a trial; a juvenile is neither being adjudicated nor sentenced. *In re D.L.*, 198 S.W.3d at 230; *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.*). 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 legislature has provided that the trial court should be able to consider the juvenile's behavior since commitment, and the transfer statute expressly allows consideration of such reports. *Id.*; *see Tex. Fam. Code Ann. § 54.11(d)* (court may consider written reports from professional consultants and employees of TYC in addition to testimony). *Section 54.11(e)* specifies the procedures to be employed in the hearing and further provides:

At the hearing, the person to be transferred or released under supervision is entitled to an attorney, to examine all witnesses against him, to present evidence and oral argument, and to previous examination of all reports on and evaluations and examinations of or relating to him that may be used in the hearing.

Tex. Fam. Code Ann. § 54.11(e).

Thus, because a transfer hearing is not a stage of a criminal prosecution, the hearing does not require the same stringent requirements as a trial in which a person's guilt is determined, and the statute expressly provides for the consideration of the evaluation M.M. now challenges, we hold that the trial court did not err in admitting the evaluation. *In re J.M.O.*, 980 S.W.2d at 813; *In re D.S.*, 921 S.W.2d at 387.^[n1] We overrule M.M.'s single point of error.

n1 M.M. does not challenge the constitutionality of the relevant statutes.

Conclusion: Having overruled M.M.'s point of error, we affirm the trial court's order.

**SUFFICIENCY OF THE EVIDENCE—
EVIDENCE WAS FACTUALLY SUFFICIENT TO
SUPPORT ADJUDICATION WHERE THE STATE
OFFERED EVIDENCE THAT APPELLANT
EITHER ROBBED VICTIM AT KNIFE-POINT
WHILE AN ACCOMPLIS HELD A BAT, OR HE
HELD THE BAT WHILE ACCOMPLIS HELD
THE KNIFE.**

¶ 08-2-2. **In the Matter of F.J.S.**, No. 08-06-00047-CV, 241 S.W.3d 565, 2007 Tex.App.Lexis 6547 (Tex.App.—El Paso, 8/16/07).

Facts: On October 31, 2004, Angel Marquez went trick-or-treating in an area of El Paso known as Devil's Triangle with his friends Joseph Reyes, Adan Marmolejo, and Jorge Gomez. As the group walked near some apartments, a group of six or seven people began walking behind them and one yelled "Northside." The group then demanded that Marquez and his friends give them their candy. When Marquez refused, two people in the group threatened to "beat [their] ass." Appellant, holding a black baseball bat, approached Marquez. Marquez recalled that Appellant's face may have been covered with a devil mask, but he recognized him by his voice, by his bald head, and by his height. He also described Appellant and another juvenile, D.H., as "enemies" because they are from the Northside gang, but Marquez denied being in a gang. Appellant stood in front of Marquez, and another individual known to Marquez only as Johnny stood behind him and held a knife to Marquez's throat. The two of them demanded Marquez's candy and Halloween mask. Marquez gave them the candy and his mask. Appellant struck Marquez in the face with the bat either before or after he gave them the candy and mask. The large group then chased Marquez and his friends away.

Jorge Gomez testified that he was trick-or-treating with Marquez on Halloween in 2004. Like Marquez, Gomez knew Appellant and Johnny. Gomez recalled that Appellant was not wearing a devil mask, but he was

wearing a red bandana over the lower part of his face. According to Gomez, it was Appellant who pulled the knife and held Marquez from behind while Johnny stood in front of him. Johnny was "talking trash" and asking Marquez if he remembered him while he pushed Marquez around. After they let Marquez go, either Appellant or Johnny hit him in the head with a bat and they took his candy and mask. Gomez and Marquez then ran away with the other friends in their group.

Marsela Contreras testified on behalf of Appellant. She was with her nephew in the Devil's Triangle area on October 31, 2004 when she saw an incident involving two groups of people. Contreras knows Appellant from school but she does not know Marquez or Gomez. She recalled that Appellant was in a group of four guys and the other group had seven guys. While the two groups came together in a huddle, it did not appear that anyone was in trouble and she did not see any weapons. Appellant did not have a bandana or a mask over his face.

The State called Adan Marmolejo as a rebuttal witness. Marmolejo was out trick-or-treating with his friend, Freddie Gonzalez, when they ran into Marquez. They ran into another group of people who simply said, "What's up?" He did not know Appellant. He saw a little guy in the other group holding a bat.

Held: Affirmed

Opinion: In his sole point of error, Appellant challenges the legal and factual sufficiency of the evidence supporting the trial court's determination that he engaged in delinquent conduct by committing aggravated robbery. He contends that the State failed to prove his identity beyond a reasonable doubt and also failed to establish that he had either a knife or bat.

Standards of Review

When reviewing challenges to the legal sufficiency of the evidence to establish the elements of the penal offense which forms the basis of the finding that the juvenile engaged in delinquent conduct or conduct indicating a need for supervision, we apply the *Jackson v. Virginia* [n1] standard. *In the Matter of A.S.*, 954 S.W.2d 855, 858 (Tex.App.—El Paso 1997, no pet.). Under this standard, we review all of the evidence, both State and defense, in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *A.S.*, 954 S.W.2d at 858, citing *Jackson v. Virginia*, 443 U.S. at 318-19, 99 S. Ct. at 2789, 61 l. eD. 2D 560.

n1 *Jackson v. Virginia*, 443 U.S. 307, 320, 99 S. Ct. 2781, 2789-90, 61 L. Ed. 2d 560 (1979).

In reviewing the factual sufficiency of the evidence supporting the adjudication order, we apply the

standard utilized in criminal cases. See *In re A.S.*, 954 S.W.2d at 859. Under this standard, we view all the evidence in a neutral light, favoring neither party. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex.Crim.App. 2000); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex.Crim.App. 1996); *In re A.S.*, 954 S.W.2d at 859. In performing our review, we give due deference to the fact finder's determinations. See *id.* at 8-9; *Clewis*, 922 S.W.2d at 136. The fact finder is the judge of the credibility of the witnesses and may "believe all, some, or none of the testimony." *Chambers v. State*, 805 S.W.2d 459, 461 (Tex.Crim.App. 1991). Evidence is factually insufficient if it is so weak that it would be clearly wrong and manifestly unjust to allow the verdict to stand, or the finding of guilt is against the great weight and preponderance of the available evidence. *Johnson*, 23 S.W.3d at 11. Therefore, the question we must consider in conducting a factual sufficiency review is whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the fact finder's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. See *id.* Under the first prong of *Johnson*, we cannot conclude that a conviction is "clearly wrong" or "manifestly unjust" simply because, on the quantum of evidence admitted, we would have voted to acquit had we been on the jury. *Watson v. State*, 204 S.W.3d 404, 417 (Tex.Crim.App. 2006). Under the second prong of *Johnson*, we cannot declare that a conflict in the evidence justifies a new trial simply because we disagree with the jury's resolution of that conflict. *Id.* Before finding that evidence is factually insufficient to support a verdict under the second prong of *Johnson*, we must be able to say, with some objective basis in the record, that the great weight and preponderance of the evidence contradicts the jury's verdict. *Id.*

Elements of Aggravated Robbery

A person commits robbery if, in the course of committing theft and with the intent to obtain or maintain control of property, he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. *Tex.Penal Code Ann.* § 29.02(a)(2)(Vernon 2003). A person commits aggravated robbery if he commits robbery and he uses or exhibits a deadly weapon. *Tex.Penal Code Ann.* § 29.03(a)(2). Under the Penal Code, a deadly weapon is anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. *Tex.Penal Code Ann.* § 1.07(a)(17) (Vernon Supp. 2006). The amended petition alleges that Appellant intentionally or knowingly threatened and placed Angel Marquez in fear of imminent bodily injury or death and used or exhibited a deadly weapon, namely, a knife, that in the manner of its use or intended use was capable of causing death or serious bodily injury.

Legal Sufficiency

In arguing that the evidence is legally insufficient, Appellant contends that the State did not prove beyond a reasonable doubt that he is the person who committed the aggravated robbery of Marquez or that he wielded either a knife or a bat. We disagree. First, both Marquez and Gomez testified that they knew Appellant and recognized him. While they differed in recollecting whether Appellant's face was covered with a mask or a bandana and whether he wielded a knife or a baseball bat, both witnesses affirmatively testified that they recognized Appellant as one of the assailants. Taking this evidence in the light most favorable to the verdict, we find that it is legally sufficient to prove Appellant's identity beyond a reasonable doubt.

Second, there is legally sufficient evidence supporting a finding that Appellant, as either the primary actor or acting as a party, committed the aggravated robbery of Marquez. Jorge Gomez testified that Appellant held a knife against Marquez's throat while Johnny, holding a baseball bat, stood in front of him. This evidence is legally sufficient to permit a rational trier of fact to find that Appellant, as the primary actor, committed robbery and used or exhibited a deadly weapon, namely, a knife.

Alternatively, the evidence is legally sufficient to support a finding that Appellant committed aggravated robbery as a party. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible or by both. *Tex. Penal Code Ann.* § 7.01(a) (Vernon 2003). Under the law of parties, a person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person's commission of the offense. *Tex. Penal Code Ann.* § 7.02(a)(2). In determining whether the accused participated as a party, the court may look to events occurring before, during, and after the commission of the offense, and may rely on the actions of the defendant which show an understanding and common design to do the prohibited act. *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim.App. 1985). While the presence of an accused at the scene of an offense is not alone sufficient to support a conviction, it is a circumstance tending to prove guilt, which, when combined with other facts, may suffice to show that the accused was a participant. *Beardsley v. State*, 738 S.W.2d 681, 685 (Tex. Crim.App. 1987). To impose culpability as a party to aggravated robbery, the State must prove that Johnny committed aggravated robbery, and that Appellant, acting with intent to promote or assist that offense, solicited, encouraged, directed, aided or attempted to aid Johnny to commit aggravated robbery. The evidence must show that at the time of the offense, the parties were acting together, each doing some part of the execution of the common purpose. *Cordova*, 698 S.W.2d at 111.

Marquez testified that after he refused the group's demands to give them his candy and two people in the group threatened to beat him, Appellant held the baseball bat and stood in front of him while Johnny held the knife to his throat. Appellant struck Marquez with the bat either before or after they took his candy. Taken in the light most favorable to the juvenile court's finding, this evidence is sufficient to prove beyond a reasonable doubt that Appellant acted with the intent to promote or assist Johnny's commission of aggravated robbery and he aided Johnny by standing in front of Marquez while holding the baseball bat. Accordingly, we find the evidence legally sufficient to support the juvenile court's adjudication order.

Factual Sufficiency

Appellant makes arguments under both prongs of *Johnson*. First, he asserts the State's evidence was too weak to establish his identity as one of the assailants or to prove that he had either a knife or a bat. Second, he argues that the evidence pertaining to these elements, although adequate if taken alone, is greatly outweighed by contrary proof. In this vein, he maintains that his witness was more credible than the State's witnesses. Regarding Appellant's identity as one of the two assailants, both Marquez and Gomez testified Appellant was present and participated in the aggravated robbery. Appellant's witness, Contreras, also put him at the scene of a confrontation with another group of people, but she did not witness a robbery or see any weapons. It is not clear whether the confrontation she witnessed was between Marquez and his friends, or whether she saw the entire confrontation. The evidence pertaining to Appellant's identity is not so weak that it is insufficient to establish his identity nor is it greatly outweighed by contrary proof.

The evidence is also factually sufficient to prove Appellant's guilt as the primary actor or as a party. The State offered evidence that Appellant either robbed Marquez at knife-point while Johnny held a baseball bat, or he held the baseball bat and stood in front of Marquez while Johnny held the knife to Marquez's throat. Although there is an obvious conflict between the testimony of Marquez and Gomez, it was the juvenile court's task to weigh the credibility of the witnesses and resolve the conflicts in the evidence. The juvenile court could have reasonably believed either of the State's witnesses and found Appellant guilty as a primary actor or as a party. Although Contreras did not see any weapons, her testimony does not greatly outweigh the evidence offered by the State.

Conclusion: We conclude that the evidence is factually sufficient to support the adjudication order. Accordingly, we overrule Appellant's sole point of error and affirm the adjudication order.

EVIDENCE—**THE TEXAS CODE OF CRIMINAL PROCEDURE ART. 38.37, APPLIES TO JUVENILE SEXUAL ASSAULT ADJUDICATION WHERE EVIDENCE BEARS ON STATE OF MIND OF RESPONDENT OR CHILD COMPLAINANT.**

¶ 08-2-3. **In the Matter of M.M.L.**, No. 07-05-0240-CV, 241 S.W.3d, 2006 Tex.App. Lexis 6783 (Tex.App.—Amarillo, 7/31/06).

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.

Appellant appeals his conviction and sentence. Appellant raises eleven issues, however only one issue will be covered in this brief.

Held: Affirmed

Opinion: *Extraneous offense*

Appellant next contends that the trial court erred in allowing the admission of evidence of extraneous offenses before the jury. The record shows that the State filed a notice of intent to use evidence of other crimes and that the trial court held a hearing outside the presence of the jury on the issue before any such testimony was admitted. During this hearing, Hilda, M.V.'s mother, testified that M.V. had told her that appellant had touched her on more than one occasion. The trial court ruled that the testimony could come in with a limiting instruction as to the purposes for which it could be used. However, the record reflects that Hilda was never questioned about the statement from M.V. in front of the jury. Subsequently, witness Delawater testified that, during her examination of M.V., M.V. stated that appellant touched her "like he did before."

The admission of evidence is reviewed under an abuse of discretion standard. *See Weatherred*, 15 S.W.3d at 542; *Green*, 934 S.W.2d at 101-02; *Montgomery*, 810 S.W.2d at 390. A reviewing court should not reverse a trial judge's decision whose ruling was within the zone of reasonable disagreement. *Green*, 934 S.W.2d at 102.

Article 38.37 of the Texas Code of Criminal Procedure sets the parameters for the admission of evidence of other wrongs, crimes or acts committed by a defendant against a child victim. *TEX. CODE CRIM. PROC. ANN. art. 38.37* (Vernon Supp. 2005). The Texas Family Code specifically allows the use of evidence in accor-

dance with Chapter 38 of the Texas Code of Criminal Procedure in the adjudication phase of a juvenile case. § 54.03(d). Pursuant to *article 38.37*, evidence that bears on relevant matters, including (1) the state of mind of the defendant and the child, and (2) the previous and subsequent relationship between the defendant and the child, is admissible. *TEX. CODE CRIM. PROC. ANN. art. 38.37 (2)(1)-(2)* (Vernon Supp. 2005).

At the hearing, held outside of the jury's presence, to determine the admissibility of this evidence, the State offered the evidence as highly probative of both appellant's intent to engage in the offense of indecency and the state of mind of both appellant and M.V. We note that the issue of appellant's intent to commit the offense of indecency was hotly contested throughout the trial. Additionally, on appeal, this same issue is the basis of appellant's contention that the evidence was factually and legally insufficient. Finally, appellant offered testimony that M.V. had hurt herself when she tripped over a scooter as a contradictory explanation for why M.V. was upset when her mother picked her up.

The evidence of appellant's touching M.V. "like he did before" clearly goes to the intent of appellant and to the state of mind of both appellant and M.V. and is admissible. *Ernst v. State*, 971 S.W.2d 698, 700 (Tex.App.—Austin 1998, *no pet.*). Under the facts before the trial court, we cannot say that the admission of this evidence was an abuse of discretion. *Weatherred*, 15 S.W.3d at 542. Appellant's issue is overruled.

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

APPEALS—**FAILURE TO PAY REQUIRED FILING FEE OR ESTABLISH INDIGENCE WARRANTS DISMISSAL ON APPEAL.**

¶08-2-4. **In the Matter of M.A.F.**, No. 07-08-0048-CV, 2008 Tex.App.Lexis 1154 (Tex.App.—Amarillo 2/15/08).

Facts and Opinion: On July 20, 2005, Appellant, M.A.F.,[n1] a child found to have engaged in delinquent conduct, was placed on probation. On December 17, 2007, the juvenile court's original disposition was modified and M.A.F. was committed to the Texas Youth Commission for an indeterminate period of time not to exceed the time when he shall be nineteen years old. On January 16, 2008, Appellant timely filed a notice of appeal challenging the juvenile court's order. Upon filing the notice of appeal, M.A.F. did not submit the required filing fee or establish his indigence. *See Tex. R. App. P. 5, 20.1, & 12.1(b)*. Thus, M.A.F.'s counsel was notified by letter dated January 23, 2008, to pay the required filing fee noting that failure to do so might result in dismissal of the appeal per *Rule 42.3(c) of the Texas Rules*

of *Appellate Procedure*. To date, counsel has not responded nor paid the required filing fee.

n1 To protect the privacy of the child, we refer to the him by his initials. See *Tex. Fam. Code Ann.* §§ 56.01(j), 109.002(d) (Vernon 2002).

Held: Consequently, the appeal is dismissed.
Per Curiam

**SUFFICIENCY OF THE EVIDENCE—
TRIAL COURT DID NOT ABUSE IT'S DISCRETION BY COMMITTING CHILD TO TYC FOR MISDEMEANOR OFFENSE PRIOR TO STATUTE CHANGING DISALLOWING TYC COMMITMENTS FOR MISDEMEANOR OFFENSES.**

¶ 08-2-5. **In the Matter of S.J.F.**, ___S.W.3d.___, No. 04-06-619, 2007 Tex.App.Lexis 8034 (Tex.App.—San Antonio, 10/10/07).

Facts: On or about May 28, 2006, S.J.F. attempted to burglarize a thrift shop in San Antonio. He was fourteen years old at the time. After being arrested and charged, S.J.F. pled true to the offense and was adjudicated. As S.J.F. had previously been adjudicated for the felony offense of burglary of a habitation in Jefferson County, he was eligible for TYC commitment.¹ *TEX. FAM. CODE ANN.* §§ 54.04(d)(2) & (t) (Vernon Supp. 2006). At the disposition hearing, S.J.F.'s probation officer recommended TYC commitment based on the previous adjudication for Burglary of a Habitation by Force in Jefferson County, as well as the fact that S.J.F. was then on probation for theft, an offense committed two years earlier in May of 2004. The probation officer also noted that S.J.F. had several violations of placement and further, was having numerous problems at school because of non-compliance with rules, including cursing at teachers and walking out of the classroom. The State also recommended TYC commitment and asked the court to take into consideration three referrals for Conduct Indicating a Need for Supervision ("CINS").

n1 It is unclear from the record when this offense was committed.

Defense counsel recommended that S.J.F. be placed on probation for twelve months, with a restitution order, and an order that S.J.F. wear an electronic monitor. S.J.F.'s mother told the court that S.J.F. was going to counseling and seeing a psychiatrist; however, she downplayed the attempted burglary of the thrift shop by accusing the witness of having had an argument with S.J.F.'s aunt on the day of the incident.²

n2 The record also reflects that S.J.F.'s mother was charged with Theft by Check and Possession of Marijuana in Jefferson County, and that her common law

husband was incarcerated in the Texas Department of Corrections for over seven years for Robbery and Possession of Cocaine under 28 grams. Further, S.J.F.'s mother had a history of failing to follow through concerning S.J.F.'s appointments.

The trial court ultimately ordered S.J.F. to be committed to the TYC and entered the following findings: 1) S.J.F. has previously been adjudicated for burglary of a habitation; 2) S.J.F. has been afforded several probations, including deferred prosecution and court ordered probation; 3) S.J.F. has been referred to day treatment and the intensive clinical services unit; 4) S.J.F. has been unable to comply with conditions of probation, regardless of the numerous opportunities given; 5) reasonable efforts have been made to prevent or eliminate the need for the child's removal from the child's home and to make it possible for the child to return home; 6) the child in the child's home cannot be provided the quality of care and level of support and supervision he needs to meet the conditions of probation; 7) at this time, there is no suitable placement facility available for the child; and 8) it is in the best interest of the child and the community that the child be committed to TYC. It is from this order committing S.J.F. to TYC that S.J.F. now appeals.

Held: Affirmed

Opinion: In his sole issue, S.J.F. contends the trial court abused its discretion in committing him to TYC because the record indicates that probation would have been more appropriate.

At the time of the disposition in this case, the court could commit a youth to TYC without a determinate sentence if the court found that: 1) there was a need for disposition; 2) the child engaged in delinquent conduct that violated a penal law of the State of Texas of the grade of misdemeanor; and 3) the child had a previous felony adjudication. See *TEX. FAM. CODE ANN.* §§ 54.04(d)(2) & (t).³ Further, commitment to TYC is permitted if the trial judge finds the following: (1) it is in the child's best interest to be placed outside the home; (2) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home; and (3) while in the home, the child cannot receive the quality of care and level of support and supervision needed to meet the conditions of probation. *TEX. FAM. CODE ANN.* § 54.04(i) (Vernon Supp. 2006).

n3 Effective September 1, 2007, a court cannot commit a child to TYC for a misdemeanor, regardless of the child's previous adjudications. Compare *TEX. FAM. CODE ANN.* § 54.04 (d)(2) with *TEX. FAM. CODE ANN.* § 54.04 (d)(2) (West 2007).

Although appellate counsel admits that S.J.F. "has had many opportunities in his life to straighten out, and that he ignored or disregarded most of those opportuni-

ties," counsel maintains that S.J.F. was turning his life around when this case was tried.⁴ However, the record reflects that S.J.F. pled true to the offense of burglary of a building, and the trial court found the charge to be true on August 22, 2006. Additionally, S.J.F. had previously been adjudicated for the felony offense of burglary of a habitation in Jefferson County and was, therefore, eligible for TYC commitment. See *TEX. PENAL CODE ANN. §§ 30.02 (c)(1) & 15.01(d)* (Vernon 2003). Further, there was evidence that S.J.F. repeatedly failed to comply with his probationary conditions and despite numerous opportunities, continued to engage in repeated behavioral problems in school. And although S.J.F.'s trial counsel sought to have S.J.F. wear an electronic monitor, there was evidence that S.J.F. was not being provided the quality of care and level of support and supervision in his home that he needed to otherwise meet the conditions of probation. As the trial court's findings are supported by the record, it did not abuse its discretion. *In re T.K.E.*, 5 S.W.3d at 784.

n4 Appellate counsel appears to argue that probation would have been more appropriate in this case given that S.J.F. would have been ineligible for commitment to TYC for a misdemeanor had the misdemeanor been committed on or after September 1, 2007. Nevertheless, we review an order committing a juvenile to TYC under an abuse of discretion standard and cannot say that the trial judge abused its discretion here by applying the law in effect at that time. *In re T.K.E.*, 5 S.W.3d at 784.

Conclusion: Accordingly, we affirm the trial court's order.

DEFENSES—

EVIDENCE THAT JUVENILE WAS TAKING ORDERS OR WAS INSTRUCTED BY HIS BROTHER TO REMOVE VICTIM'S SHOES AND PANTS WAS NOT SUFFICIENT TO RAISE THE DEFENSE OF DURESS.

¶ 08-2-6. **In the Matter of V.M.H.**, ___S.W.3d___, No. 04-06-00618-CV, 2007 Tex.App.Lexis 8054 (Tex. App.—San Antonio, 10/10/07).

Facts: On Christmas Day in 2004, Jonathan Simmons was brutally attacked, stabbed and beaten by boys he thought were his friends. The pants and shoes that he received as Christmas presents that morning were stolen during the altercation. V.M.H.'s brother, R.H.T., pled guilty to aggravated assault with a deadly weapon. Another brother, Jamel, was certified to stand trial as an adult for the offense. A jury found that V.M.H. also participated in the altercation and engaged in delinquent conduct by committing the offense of aggravated robbery.

V.M.H. asserts the evidence is legally insufficient to support the jury's finding that V.M.H. committed the offense of aggravated robbery. Specifically, V.M.H. contends that the State failed to prove that he was in the course of committing a theft of Jonathan's shoes and pants because he did not intend to obtain and maintain control of the shoes and pants.

Held: Affirmed

Memorandum Opinion: Intent may be inferred from circumstantial evidence such as acts, words, and the conduct of the appellant. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004). In reviewing the legal sufficiency of evidence in a juvenile case, we consider all the evidence in its most favorable light to determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *In re K.T.*, 107 S.W.3d 65, 71 (Tex. App.—San Antonio 2003, no pet.). We do not resolve any conflict of fact or assign credibility to the witnesses as this was the function of the jury. *In re M.A.L.*, 224 S.W.3d 233, 235 (Tex. App.—El Paso 2005, no pet.).

In this case, Jonathan testified that V.M.H. took his shoes and pants while he was being stabbed and beaten. In his brief, V.M.H. refers to R.H.T.'s testimony that V.M.H. did not take the shoes and pants and to discrepancies between Jonathan's testimony at trial and the initial statement given to the police while he was in the hospital recovering from surgery. The jury, however, is the sole judge of the credibility of the witnesses and the weight to be given to the evidence. *In re M.A.L.*, 224 S.W.3d at 235. Jonathan's testimony is legally sufficient to support the jury's finding that V.M.H. intended to obtain and maintain control of Jonathan's shoes and pants.

V.M.H. contends that the trial court erred in denying his motion for mistrial after Jonathan's grandmother testified that Jonathan's grandfather died seventeen days after the attack "with a broken heart." The trial court sustained V.M.H.'s objection to the testimony during trial and stated that giving an instruction to the jury would call attention to the information to which V.M.H. was objecting. V.M.H.'s sole complaint is that the trial court erred in denying the motion for mistrial.

A trial court's denial of a motion for mistrial is reviewed under an abuse of discretion standard. *In re A.W.*, 147 S.W.3d 632, 635 (Tex. App.—San Antonio 2004, no pet.). A mistrial is appropriate only for highly prejudicial and incurable errors. *Id.* A trial court is required to grant a motion for a mistrial only when the improper question is clearly prejudicial to the defendant and is of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors. *Id.*

In this case, the statement regarding the grandfather's broken heart was an isolated reference to which the trial court immediately sustained an objection. In light of the entire record and all of the evidence properly placed

before the jury, the trial court did not abuse its discretion in determining that the isolated reference was not so inflammatory or prejudicial as to warrant a mistrial.

V.M.H. complains that the trial court erred in denying his requested charge on the affirmative defense of duress. A defendant is entitled to a charge on any defensive theory raised by the evidence whether it is strong or weak, unimpeached or contradicted. *Swails v. State*, 986 S.W.2d 41, 45 (Tex. App.—San Antonio 1999, pet. ref'd). Duress is an affirmative defense if "the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another." *TEX. PEN. CODE ANN. § 8.05* (Vernon 2003). Threatened death or serious bodily injury is imminent only if it will occur in the present. *Swails*, 986 S.W.2d at 45. The claim of duress must have an objective, reasonable basis, and the fact that a defendant is taking orders from another is not sufficient to raise the defense of duress. *Cameron v. State*, 925 S.W.2d 246, 250 (Tex. App.—El Paso 1995, no pet.).

V.M.H. relies on statements made by Jonathan to the detective during his interview at the hospital. Jonathan testified that he remembered telling the detective that V.M.H. came along because he was scared and that V.M.H.'s brothers forced him to do what he did. This testimony however, does not provide an objective, reasonable basis to establish that V.M.H. was compelled to participate in the altercation "by threat of imminent death or serious bodily injury to himself or another." *TEX. PEN. CODE ANN. § 8.05* (Vernon 2003). Evidence that V.M.H. was taking orders or was instructed by his brother to remove Jonathan's shoes and pants is not sufficient to raise the defense of duress. See *Cameron*, 925 S.W.2d at 250. Accordingly, the trial court did not err in denying the requested charge.

V.M.H. asserts that the charge permitted the jury to render a verdict that was not unanimous because it instructed the jury that V.M.H. could be found delinquent if the jury found that he had engaged in aggravated robbery either by using or exhibiting a deadly weapon or by causing serious bodily injury. V.M.H. contends that the jury verdict was not required to be unanimous because some jurors might have believed that V.M.H. committed aggravated robbery with a deadly weapon while others might have believed that V.M.H. committed aggravated robbery causing serious bodily injury. V.M.H.'s argument is based on the flawed premise that these are separate offenses. Instead, the use or exhibition of a deadly weapon and the causing of serious bodily injury are alternative methods or means of aggravation. See *Sidney v. State*, 560 S.W.2d 679, 681 (Tex. Crim. App. 1978). "It is appropriate where the alternate theories of committing the same offense are submitted to the jury in the disjunctive for the jury to return a general verdict if the evidence is sufficient to support a finding under any of the theories submitted." *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991).

Finally, V.M.H. asserts that the trial court abused its discretion in committing him to the Texas Youth Commission "because the record indicates that probation would have been a more appropriate disposition." We review a juvenile court's disposition order under an abuse of discretion standard which requires us to view the evidence in the light most favorable to the trial court's ruling affording almost total deference to findings of historical fact that are supported by the record. *In re K.T.*, 107 S.W.3d at 75.

V.M.H. contends he should have received probation because his probation officer recommended probation, his participation in the offense was minor, his brothers have been removed from the home, and he was only ten at the time of the offense. In addition to the evidence cited by V.M.H., however, the trial court also was required to consider evidence that V.M.H. was routinely permitted to be outside playing unsupervised at 1:00 a.m. Furthermore, the trial court was required to consider the testimony of V.M.H.'s mother that she did not believe V.M.H. had engaged in delinquent conduct and intended to supervise V.M.H. in the same manner if he remained in the home. Evidence was also introduced that V.M.H. and his brothers were suspected of killing several tortoises by pouring salt on them and of poking sticks at a dog belonging to Jonathan's grandmother. In the two prior academic years, V.M.H. had received several disciplinary referrals at school, including referrals for threatening another student, shoving another student, hitting another student, throwing a rock at a student, fighting at recess, and being disrespectful to his teachers. Finally, the trial court heard testimony that after Jonathan had been stabbed, beaten and left for dead, V.M.H. lied to Jonathan's mother when she was looking for Jonathan and asked if V.M.H. had seen him. Given the nature of the offense and all of the evidence presented to the trial court, the trial court did not abuse its discretion in ordering V.M.H. to be committed to the Texas Youth Commission.

Conclusion: The trial court's judgment is affirmed.

**DISPOSITION PROCEEDINGS—
TRIAL COURT NEED NOT MAKE A FINDING
THAT THE PUBLIC SAFETY REQUIRES A
COMMITMENT TO TYC.**

¶ 08-2-7. **In the Matter of E.F.Z.R.**, ___S.W.3d___, No. 08-07-00078-CV, 2008 WL 668018 (Tex.App.—El Paso, 3/13/08).

Facts: On February 15, 2007, the State filed its Petition Based on Delinquent Conduct which alleged that the juvenile, E.F.Z.R., engaged in delinquent conduct by committing the offense of possession of cocaine in the amount of 400 grams or more. E.F.Z.R. waived his right to a hearing before the Judge of the designated Juvenile

Court and agreed to a hearing before the Juvenile Court Referee. He also waived a jury. E.F.Z.R. and his attorney both signed a form stipulating to the evidence and admitting to the allegations contained in the petition. An Order of Adjudication was signed by the Juvenile Court Referee on February 20, 2007.

Juvenile Probation Officer Linda Acevedo filed a Pre-Disposition Report recommending E.F.Z.R. be committed to the TYC. A disposition hearing was held on March 14, 2007. At the close of the hearing, the Juvenile Court Referee committed E.F.Z.R. to the TYC. A Judgment of Commitment and an Order of Commitment were signed by the Juvenile Court Referee on the same day and by Judge Alfredo Chavez of the 65th District Court of El Paso County, a Juvenile Court, on March 20, 2007.

At the disposition hearing, Acevedo testified that she was a juvenile probation officer for the El Paso County Juvenile Probation Department. She testified that the existent one was the juvenile's sole adjudication. She prepared the Pre-Disposition Report regarding E.F.Z.R., which was admitted into evidence. Acevedo testified that the juvenile was a citizen of Mexico, and he was in the country illegally. He had no problems with alcohol or drugs. She recommended that E.F.Z.R. be committed to the TYC, because, due to his non-citizen status, there was no other placement available for him. E.F.Z.R.'s parents did not agree with the recommendation. The juvenile had been absent from school for two years, and his parents tried to get him back into school, but he refused to go. Acevedo testified that the parents had not contributed to his delinquency. She stated that her recommendation was in the best interests of the juvenile, as well as the community.

This report indicated that on February 11, 2007, E.F.Z.R. drove a vehicle across the Ysleta Port of Entry into the United States. The vehicle contained approximately 23.35 pounds of cocaine. The evaluation portion of the report stated that the juvenile was residing with his mother and was not following her rules. She was losing control of the juvenile as he was becoming more rebellious and verbally aggressive towards her. He was associating with "negative peers" of which his mother disapproved, and he continued to do so. He was smoking cigarettes and had not attended school for two years. The report stated that, because the juvenile is a foreign national, he was ineligible for services through the Juvenile Probation Department. The recommendation in the report was that the juvenile be committed to the care, custody, and control of the TYC.

During cross-examination, Acevedo stated that it was possible that some juveniles who were in the country illegally were on probation. She stated that E.F.Z.R.'s mother worked at a business called Fun For Kidz in Cd. Juárez, Chih., and that her son had worked for the same employer for four years. Acevedo testified that the parents do not live together. The father had been to all hearings of which he had notice. The witness stated that the

juvenile had expressed remorse for his actions. She did not obtain a psychological evaluation of him.

On redirect examination, Acevedo clarified that the juveniles who are in the country illegally and are on probation are living with their parents, who live in the United States. She was not aware of any juveniles who are on probation that live in Cd. Juárez. Acevedo stated that the Juvenile Probation Department cannot supervise juveniles living in Cd. Juárez. She agreed that juveniles are sometimes placed with relatives, but that E.F.Z.R. had no relatives living in the United States. She testified that she had asked both the mother and the father whether E.F.Z.R. had any relatives living in the United States.

The defense called E.F.Z.R.'s mother to the stand. She testified that she and her son live together. Her other children are married and do not live with her. E.F.Z.R.'s mother testified that she had tried to keep her son in school, but there was difficulty with the testing procedures. She was aware that her son did not want to go to school. The mother stated that there was a period when her son was slightly rebellious, but she denied that he was ever aggressive towards her. She testified that her son did not like to do chores around the house and that she disapproved of one of his friends. He was older than her son, and she thought he was using drugs. She stated that her son had been a very good child, although her relationship with him had been strained recently. They had always been close and were best friends.

E.F.Z.R.'s father testified on his son's behalf. He stated that he had an uncle who lived in Socorro, a suburb of El Paso located in El Paso County. He had spoken to his uncle, who was willing to keep E.F.Z.R. The father did not know his uncle's address, but he knew where he lived. He stated that the Juvenile Probation Department had never asked him whether he had any relatives living in El Paso. The father testified that he had left the family when E.F.Z.R. was three years old. He saw his son about every three months. His uncle had met the juvenile three or four months ago at an aunt's house in Cd. Juárez, for about thirty minutes. The uncle had also met the juvenile ten years before. The uncle was not present in the courtroom.

At the close of the evidence, the Juvenile Court Referee stated that she was going to find the juvenile was eligible for the TYC, because he had committed a first-degree felony. She stated that E.F.Z.R. was in need of rehabilitation and that the protection of the juvenile and the public required that he be committed to the care, custody, and control of the TYC.

Held: Affirmed

Opinion: In E.F.Z.R.'s sole issue, he maintains that the court abused its discretion by committing him to the TYC, when an alternative was available. Specifically, E.F.Z.R. contends that the court should have continued the disposition hearing until further evidence could be

obtained concerning the suitability of a placement with the uncle in lieu of committing him to the TYC. The juvenile also argues that there was no evidence presented that he was a danger to society and that the community needed to be protected from him, as the Juvenile Court found in its Judgment of Commitment.

After a juvenile has been adjudged to have engaged in delinquent conduct, the juvenile court has broad discretion to determine a suitable disposition. *In re C.J.H.*, 79 S.W.3d 698, 702 (Tex. App.—Fort Worth 2002, no pet.). We will not reverse the juvenile court's findings regarding disposition, absent a clear abuse of discretion. *Id.* In conducting this review, we engage in a two-pronged analysis: (1) Did the trial court have sufficient information upon which to exercise its discretion; and (2) did the trial court err in its application of discretion? *In re M.A.C.*, 999 S.W.2d 442, 446 (Tex.App.-El Paso 1999, no pet.).

The traditional sufficiency of the evidence standards of review come into play when considering the first question. *Id.* We then proceed to determine whether, based on the elicited evidence, the trial court made a reasonable decision or whether it was arbitrary and unreasonable. *Id.* To determine whether a trial court abused its discretion, we must decide whether the court acted without reference to any guiding rules or principles; in other words, whether the act was arbitrary or unreasonable. *In re B.N.F.*, 120 S.W.3d 873, 877 (Tex.App.-Fort Worth 2003, no pet.). Merely because a trial court has decided a matter within its discretionary authority in a manner different from how an appellate court would have ruled in a similar circumstance does not demonstrate an abuse of discretion. *Sotelo v. Gonzales*, 170 S.W.3d 783, 788 (Tex.App.-El Paso 2005, no pet.). An abuse of discretion does not occur where the trial court bases its decision on conflicting evidence. *In re B.N.F.*, 120 S.W.3d at 877. Furthermore, an abuse of discretion does not occur as long as some evidence of substantive and probative character exists to support the trial court's decision. *Sotelo*, 170 S.W.3d at 788.

A juvenile court's findings of fact are reviewable for legal and factual sufficiency of the evidence by the same standards that are applied in reviewing the legal or factual sufficiency of the evidence supporting a jury's answers to a charge. *In re A.S.*, 954 S.W.2d 855, 861 (Tex.App.-El Paso 1997, no pet.).

In considering a "no evidence" legal sufficiency issue, we consider only the evidence and inferences that tend to support the challenged finding and disregard all evidence and inferences to the contrary. *See Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex.1992). If any probative evidence supports the finding, it must be upheld. *Sotelo*, 170 S.W.3d at 787.

Factual insufficiency involves a finding that is so against the great weight and preponderance of the evidence as to be manifestly wrong. *Id.* In reviewing an issue asserting that a finding is factually insufficient--i.e., that it is against the great weight and preponderance of

the evidence--we must consider all of the evidence, both the evidence which tends to prove the existence of a vital fact, as well as evidence which tends to disprove its existence. *Id.* It is for the fact finder to determine the weight to be given to the testimony and to resolve any conflicts in the evidence. *Id.* For us to reverse, we must conclude that the trial court's finding is so contrary to the great weight and preponderance of the evidence as to be manifestly wrong. *Id.*

The juvenile court's exercise of discretion in making an appropriate disposition is guided by the requirements of section 54.04 of the Family Code. *In re A.S.*, 954 S.W.2d at 861. Section 54.04(c) provides that no disposition may be made under the section, unless the child is in need of rehabilitation or the protection of the public or of the child requires that disposition be made. Tex. Fam. Code Ann. § 54.04(c). Further, the trial court may not make a disposition placing a juvenile on probation outside of his home, unless the court finds that the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation. *Id.*

Further, to commit a juvenile to the TYC, the trial court must find and include in its disposition order its determination that (A) it is in the child's best interests to be placed outside his home, (B) reasonable efforts were made to prevent or eliminate the need for his removal from the home and to make it possible for the child to return to his home, and (C) the child cannot be provided the quality of care and level of support and supervision in his home that he needs to meet the conditions of probation. Tex. Fam.Code Ann. § 54.04(i)(1)(A)-(C). Here, the trial court made the mandatory findings in its disposition order.

Tex. Fam.Code Ann. § 54.04(f) provides that the court shall specifically state in its disposition order its reasons for the disposition. In that light, the court also found that:

1. This disposition is necessary as the juvenile is an [sic] Foreign National and the Court has no other alternatives other than institutionalization, as the juvenile cannot be placed on probation, as probation officers cannot supervise juveniles in Mexico.

2. The juvenile is in need of rehabilitation and the only services available to the Court that can be provided to the juvenile are located within State institutions and therefore, the juvenile needs to be committed to the care, custody, and control of the Texas Youth Commission.

3. The juvenile has no parent(s), guardian(s) or custodian(s), [who] is/are providing suitable supervision and by using this particular disposition, the juvenile can constantly be monitored and receive services in order to modify his/her behavior.

4. The public [sic] safety requires that this disposition be made and that the juvenile be removed

from the El Paso Community and institutionalized as he/she poses a high risk to the community.

5. This disposition will hold the juvenile responsible and accountable for his/her behavior and consequences can be imposed for his/her delinquent behavior in the community.

E.F.Z.R. argues that the evidence indicated that the Juvenile Probation Officer had not investigated any alternatives to committing him to TYC. He maintains that, once his father indicated that the uncle would take him in, the court should have continued the disposition hearing until the matter could be developed. Regarding that last contention, we note that E.F.Z.R. did not move for a continuance. Notwithstanding that, E.F.Z.R. maintains that the court should have continued the disposition hearing, because the matter of the uncle's availability to care for him was unresolved. The juvenile cites no authority for the proposition that the court had a duty to continue the hearing, and we know of none. *See In re J.M.L.*, No. 08-06-00015-CV, --- S.W.3d ----, 2007 WL 3120814, at *5 (Tex.App.-El Paso Oct. 25, 2007, no pet.) (not yet published). Further, the uncle was not present in court. The evidence was conflicting on whether either parent had mentioned the uncle before, and the father's testimony, even if taken as true, indicated that the uncle had almost no prior involvement with E.F.Z.R. Under the above-mentioned standards, the court could reasonably have determined that there was no alternative to removing the juvenile from the home, given the inability of the probation authorities to supervise him.

E.F.Z.R. also argues that there was no evidence to support the court's finding that "[t]he public [sic] safety requires that this disposition be made and that the juvenile be removed from the El Paso Community...." The juvenile maintains that the crime he committed was not a violent offense, and he points to his mother's testimony that he was "a very good child." She also stated that, even though matters had been strained between them for several weeks, they had always been close and were best friends. Again, the evidence was conflicting, in that the Pre-Disposition Report indicated that the juvenile was residing with his mother and was not following her rules. Furthermore, she was losing control of him as he was becoming more rebellious and verbally aggressive towards her. He was associating with "negative peers" of whom his mother disapproved, and he continued to do so. He had not attended school for two years. However, even if the evidence supporting the finding is weak, section 54.04(c) states in the disjunctive that a disposition can be made, if the court finds that the juvenile is in need of rehabilitation or the protection of the public or of the child requires that a disposition be made. Tex. Fam.Code

Ann. § 54 .04(c). Therefore, as the court found that the child was in need of rehabilitation, it is irrelevant whether the protection of the child or the public required a disposition. *See In re S.A.M.*, 933 S.W .2d 744, 745 (Tex.App.—San Antonio 1996, no pet.). Accordingly, E.F.Z.R.'s sole issue is overruled.

Conclusion: We affirm the judgment of the trial court.

**COLLATERAL ATTACK—
HABEAS RELIEF GRANTED WHERE TRIAL
COUNSEL'S PERFORMANCE CONSIDERED DE-
FICIENT BECAUSE COUNSEL FAILED TO
KNOW THE LAW CONCERNING USE OF A
PRIOR JUVENILE CONVICTION FOR EN-
HANCEMENT.**

¶ 08-2-8. **Ex Parte Hall**, UNPUBLISHED, Nos. AP-75,868 & AP-75,869, 2008 Tex.Crim.App.Lexis 216 (Tex.Crim.App., 3/19/08)

Facts & Opinion: *Per curiam.*

Pursuant to the provisions of *Article 11.07 of the Texas Code of Criminal Procedure*, the clerk of the trial court transmitted to this Court these applications for writs of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of murder and conspiracy to possess with intent to deliver 400 grams or more of cocaine and sentenced to sixty-five and thirty years' imprisonment, respectively. The First Court of Appeals affirmed his convictions. *Hall v. State*, 137 S.W.3d 847 (Tex. App. - Houston 2004, *pet ref'd*).

Applicant contends, *inter alia*, that his trial counsel rendered ineffective assistance because counsel failed to know the law concerning use of a prior juvenile conviction for enhancement and caused a plea of "true" to be entered to a juvenile conviction that was unavailable for enhancement.

The trial court has determined that trial counsel's performance was deficient and that this deficient performance prejudiced Applicant. The trial court recommends that relief be granted in the form of new punishment proceedings. This recommendation is supported by the record.

Conclusion: Habeas corpus relief is granted. The sentences in cause numbers 915388 and 920802 from the 228th District Court of Harris County are set aside, and Applicant is remanded to the custody of the Sheriff of Harris County for new punishment proceedings.

**RESTITUTION—
RESTITUTION CAN BE ORDERED FOR REHABILITATIVE PURPOSES.**

¶ 08-2-9. **In the Matter of D.K.**, No. 05-07-00224-CV, 2008 Tex.App.Lexis 1979 (Tex.App.—Dallas [5th Dist.], 3/19/08).

Facts: The 304th Judicial District Court, Dallas County, Texas, found that defendant juvenile was a child engaged in delinquent conduct when he committed criminal mischief and ordered defendant to pay restitution in the amount of \$ 9,336.10. Defendant appealed.

Held: Affirmed

Opinion: Defendant claimed the evidence was factually insufficient to support the award of restitution. Defendant, who had been diagnosed with ADHD and bipolar disorder, claimed the monthly restitution payments would require him to obtain full-time employment, which would be difficult given his mental and emotional issues, and full-time employment would disrupt his schooling. The instant court concluded that the trial court did not abuse its discretion in awarding restitution in the amount of \$ 9,336.10. The order was imposed not only on defendant, but also on his brothers and his father, jointly and severally. Defendant would not necessarily be required to seek full-time employment for the restitution to be made. The amount of restitution set by the trial court was supported by evidence in the record on the cost of repairs made to the building defendant and his brothers vandalized. The State presented both testimonial and documentary evidence of the repair work. The \$ 9,336.10 in restitution ordered by the trial court corresponded to the combined total of the invoices submitted by the State. Defendant did not challenge the validity of this evidence or the necessity of the repairs.

Finally, the record supports the imposition of restitution in this case for the rehabilitative purpose of impressing upon D.K. the seriousness of his actions. At the conclusion of the proceedings, the trial judge noted that D.K. and his brothers did not appear to take the charges made against them seriously. The judge observed that the boys misbehaved in court by joking and "kidding around" with one another. Restitution can be an effective means to impress upon a juvenile the serious consequences of delinquent behavior, including financial consequences. *See D.M., 191 S.W.3d at 394.*

Conclusion: Based on the foregoing, we conclude the trial court did not abuse its discretion in awarding restitution in the amount of \$ 9,336.10. We overrule appellant's sole issue.

Accordingly, we affirm the trial court's judgment.

**CONFESSIONS—
BECAUSE THERE WAS NO CAUSAL CONNECTION BETWEEN THE FAILURE TO NOTIFY JUVENILE'S FATHER OF ARREST IN ACCORDANCE WITH SECTION 52.02(B) OF THE FAMILY CODE AND JUVENILE'S DECISION TO GIVE HIS STATEMENT TO POLICE, NO ERROR WAS SHOWN.**

¶ 08-2-10. **Hartmangruber v. State**, Memorandum, No. 04-07-00213-CR, 2008 Tex.App.Lexis 1956 (Tex. App.—San Antonio, 3/19/08).

Facts: On September 22, 2004, Hartmangruber and David Childress, then juveniles, strangled and killed Childress's mother, Meda Childress. Both boys, at the urging of Hartmangruber's grandparents, turned themselves into police investigators following the murder. Hartmangruber and Childress were taken to a juvenile processing office around 9:30 p.m. that evening, where they were placed under arrest for murder. Officers located a magistrate judge, who gave the boys the warnings required by the Texas Family Code. Officers then proceeded to take written statements from the boys.

At around 11:45 p.m., before the boys had completed their statements, officers received a call from Hartmangruber's father, who was advised that his son was in custody and under arrest for murder. Officers further advised Hartmangruber's father that his son was providing a statement and that he would be processed and placed in a juvenile detention facility in San Antonio, Texas following his statement.

After the boys had completed their statements, in which they confessed to killing Childress's mother and revealed their plan to kill Childress's father, the magistrate judge began his determination as to whether Hartmangruber had knowingly and voluntarily given his written statement to police. The judge concluded Hartmangruber had knowingly and voluntarily given his statement and witnessed the execution of Hartmangruber's statement.

Hartmangruber was subsequently indicted for murder. Hartmangruber's attorney filed a motion to suppress Hartmangruber's confession, which raised issues relating to the voluntariness of the confession and compliance with the parental notification requirement of *section 52.02(b) of the Texas Family Code*. The trial court, after a hearing on the motion to suppress, denied Hartmangruber's motion. Sometime after the trial court denied Hartmangruber's motion, the State dismissed Hartmangruber's indictment.

Hartmangruber was subsequently reindicted by the State on capital murder charges. Hartmangruber's new attorney filed several pretrial motions, including three motions to suppress relating to Hartmangruber's confession: (1) a motion to suppress Hartmangruber's confession; (2) a *Jackson v. Denno* motion for hearing on the voluntariness of Hartmangruber's confession; and (3)

a motion to determine the admissibility of Hartmangruber's written statement outside the presence of the jury. The trial court denied Hartmangruber's motions without a hearing on the ground that Hartmangruber had already litigated these matters at the prior suppression hearing.

Hartmangruber's counsel also filed a motion to suppress the physical evidence police seized from Hartmangruber's bedroom because Hartmangruber's father did not voluntarily consent to the search of the room. The trial court conducted an evidentiary hearing on this motion, and denied Hartmangruber's motion following the hearing. Hartmangruber proceeded to plead nolo contendere to the reduced charge of murder, and the trial court sentenced him to 40 years in prison pursuant to the terms of Hartmangruber's plea bargain agreement. The trial court granted Hartmangruber permission to appeal the court's rulings on his pretrial motions, and Hartmangruber brought this appeal.

Held: Affirmed

Memorandum Opinion: In his first issue, Hartmangruber argues the trial court erred in refusing to reopen the evidence on his motion to suppress his confession. The decision to reopen the evidence on a motion to suppress is left to the sound discretion of the trial court. *Gilbert v. State*, 874 S.W.2d 290, 293 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd); *Montalvo v. State*, 846 S.W.2d 133, 137 (Tex. App.—Austin 1992, no pet.). We thus review a trial court's decision to reopen the evidence on a motion to suppress under an abuse of discretion standard. *Montalvo*, 846 S.W.2d at 137.

When Hartmangruber was indicated on murder charges, Hartmangruber's initial trial counsel, Charles Rubiola, filed a motion to suppress Hartmangruber's confession. The trial court conducted an evidentiary hearing on the motion and denied Hartmangruber's motion. After the State dismissed the first indictment, it reindicted Hartmangruber on capital murder charges. Hartmangruber's subsequent counsel, Michael Sawyer, filed three interrelated motions to suppress upon his reindictment. The trial court denied Hartmangruber a hearing on his motions and overruled the motions on the ground that Hartmangruber had already litigated the matters raised by the motions at the previous suppression hearing. Hartmangruber's counsel complained that the trial court should reopen the evidence because prior counsel did not proffer all of the evidence available to him at the time of the first suppression hearing. Counsel claimed Hartmangruber's first attorney failed to adequately question Hartmangruber's father during the previous hearing and should have called Hartmangruber to testify in his own defense. According to defense counsel, had attorney Rubiola properly questioned Hartmangruber's father and called Hartmangruber to testify, these witnesses would have informed the court that Hartmangruber was only 14 years old at the time he gave his confession and had no family members present to support him when he was

questioned by the police. Hartmangruber's father would have also relayed to the court that he wanted to speak with his son before his questioning, but was "turned away and rebuffed" by the authorities.

Even if the trial court abused its discretion in denying Hartmangruber's motion to reopen the evidence, the error constituted harmless error. A trial court's erroneous refusal to reopen evidence is subject to non-constitutional harm analysis. *Kennerson v. State*, 984 S.W.2d 705, 707 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). "For claims of non-constitutional error, . . . 'a conviction should not be overturned unless, after examining the record as a whole, a court concludes that an error may have had 'substantial influence' on the outcome of the proceeding.'" *Burnett v. State*, 88 S.W.3d 633, 637 (Tex. Crim. App. 2002).

As previously noted, the main theme of the proffered testimony from Hartmangruber and his father was that Hartmangruber was young and did not have any family members by his side to "back him up" while he was with the authorities. The record of the first suppression hearing, however, contains considerable evidence from various other witnesses who testified as to Hartmangruber's youth and absence of family support during his questioning. The record of the first suppression hearing also shows Hartmangruber's father had an opportunity to testify regarding his desire to see his son prior to his questioning. Any error in excluding the additional testimony from Hartmangruber and his father, on the same issues about which considerable evidence had already been presented, was harmless. Hartmangruber's first issue is overruled.

SECTION 52.02(B) OF THE TEXAS FAMILY CODE

In his second issue, Hartmangruber contends the trial court should have suppressed his confession because authorities did not comply with the requirements of *section 52.02(b) of the Texas Family Code*. *Section 52.02(b) of the Family Code* requires that a person taking a child into custody promptly give notice of the person's action, and a statement of the reason for taking the child into custody, to the child's parent, guardian, or custodian and to the office or official designated by the juvenile board. *TEX. FAM. CODE ANN. § 52.02(b)* (Vernon Supp. 2007). Hartmangruber's complaint focuses on the failure to notify his father promptly.

The failure to comply with the *section 52.02(b)* notice requirement will render inadmissible any subsequent statement by the child that is obtained as a result of the statutory violation. *Cortez v. State*, 240 S.W.3d 372, 378-79 (Tex. App.—Austin 2007, no pet.). When a juvenile seeks to suppress a confession given after a failure to notify his parents promptly in accordance with the dictates of the statute, the burden is initially upon the juvenile defendant to show a violation of the statute and a causal connection between that violation and the ensuing confession. *Pham v. State*, 175 S.W.3d 767, 772-73 (Tex. Crim. App. 2005); *Adams v. State*, 180 S.W.3d 386, 412

(*Tex. App.—Corpus Christi 2005, no pet.*). Once the juvenile defendant meets his burden, the State must then shoulder the burden of demonstrating attenuation of the taint. *Pham, 175 S.W.3d at 774; Adams, 180 S.W.3d at 412.*

Even if we assume Hartmangruber's father was not promptly notified of his son's arrest as required by *section 52.02(b) of the Family Code*, Hartmangruber points to no evidence in the record demonstrating a causal connection between the failure to notify his father and his decision to give a statement to the police. Hartmangruber claims that if his father had been promptly notified, his father "very likely . . . would have advised [him] not to talk" with the police. Nothing in the record, however, demonstrates that this advice would have deterred Hartmangruber from making his statement. Hartmangruber never asked to speak with his father at any time while he was in custody. In addition, the record indicates that Hartmangruber was very eager to speak to the police about his crime, having had to be told by officers on multiple occasions to refrain from discussing his offense until the judge could magistrate him. Because there is no causal connection between the failure to notify Hartmangruber's father in accordance with *section 52.02(b) of the Family Code* and Hartmangruber's decision to give his statement to police, we must overrule Hartmangruber's second issue. *See Gonzales v. State, 67 S.W.3d 910, 913 (Tex. Crim. App. 2002)* (holding that suppression is required only when there is causal connection between the violation of the parental notice requirement and receipt of the child's statement); *Cortez, 240 S.W.3d at 380-81* (same).

CONSENT TO SEARCH

Lastly, Hartmangruber claims the trial court erroneously denied his motion to suppress the evidence seized from his bedroom because the State failed to prove, by clear and convincing evidence, that voluntary consent was given by his father to search the room. The State has the burden of proof by clear and convincing evidence that consent was freely and voluntarily given. *State v. Ibarra, 953 S.W.2d 242, 245 (Tex. Crim. App. 1997)*. Consent must be positive and unequivocal and must not be the product of duress or coercion, either express or implied. *Carmouche, 10 S.W.3d at 331; Allridge v. State, 850 S.W.2d 471, 493 (Tex. Crim. App. 1991)*. Whether consent was voluntary is determined from the totality of the circumstances. *Reasor v. State, 12 S.W.3d 813, 818 (Tex. Crim. App. 2000)*.

In this case, Hartmangruber's father signed a consent-to-search form. Hartmangruber alleges his father was "highly distraught" and "stressed out" when he signed the consent form, making his consent involuntary. The trial court, however, heard testimony to the contrary from several police officers during the suppression hearing. Officers testified that Hartmangruber's father was calm at the time they arrived at his residence. They stated they did not coerce Hartmangruber's father or make any

threats or promises to him to secure his consent to search Hartmangruber's bedroom. The trial court was free to believe the testimony provided by law enforcement officials and disregard any contrary testimony provided at the hearing on the voluntariness issue. *See Ross, 32 S.W.3d at 855; Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)*.

Conclusion: Based on the totality of the circumstances, the trial court did not abuse its discretion in finding that Hartmangruber's father's consent was given freely and voluntarily. *See Martinez v. State, 17 S.W.3d 677, 683 (Tex. Crim. App. 2000)* (holding an officer's testimony that consent was voluntarily given is sufficient evidence to prove the voluntariness of the consent). We therefore overrule Hartmangruber's third issue.

CONFESSIONS— SEARCH & SEIZURE— PHYSICAL EVIDENCE THAT IS OBTAINED IN VIOLATION OF A CHILD'S FIFTH AMENDMENT RIGHTS, BUT NOT IN VIOLATION THE CHILD'S FOURTH AMENDMENT RIGHTS IS ADMISSIBLE.

¶ 08-2-11. **In the Matter of H.V.,** __S.W.3d__, No. 06-0005, 2008 WL 1147567, (Tex.Sup.Ct., 4/11/08).

Facts: Evidence presented at the suppression hearing here showed that sixteen-year-old H.V. bought a gun on September 7, 2003. Two days later he was seen leaving North Crowley High School with Daniel Oltmanns. The next day, Oltmanns's body was found at a construction site with wounds indicating he had been shot in the head.

The following morning, a police detective met with H.V. at the high school and asked him to accompany her downtown for questioning. He agreed and was taken to a juvenile processing center. After receiving the required warnings from a magistrate,² H.V. waived his rights and gave a statement admitting he had bought a gun but claiming he had returned it before Oltmanns was shot. The statement was typed up and H.V. signed it, after which he was returned to school.

n2. *See id.* § 51.095(a)(1) (providing that children be warned of their rights by a magistrate); *see also In re R.J.H., 79 S.W.3d 1, 4 (Tex.2002)* ("The Texas Family Code provides that a juvenile can waive his rights once he is in custody only if joined by his attorney or if done in the presence of a magistrate.").

That afternoon, police officers visited H.V. and his father at their home and asked them to leave the premises pending arrival of a search warrant. They did so, but shortly thereafter H.V. returned, and an off-duty policeman saw him carrying a bloodstained carpet over the back fence of the home. H.V. was arrested on a charge of evidence tampering, and again taken to the

juvenile processing facility where he was again given warnings by a magistrate.³

n3. The State concedes that if H.V.'s statements to the magistrate constitute an invocation of his right to counsel, it is immaterial that it was not also made to police.

When asked whether he wanted to waive his rights and speak to police, H.V. said he wanted to speak to his mother, but was told he could not. H.V. then responded that he "wanted his mother to ask for an attorney." When the magistrate responded that only he (not his mother) could ask for an attorney, H.V. replied, "But, I'm only sixteen." The magistrate then reiterated that only he could ask for an attorney, after which H.V. eventually said he would talk to the police. In a second written statement, H.V. claimed Oltmanns accidentally shot himself with H.V.'s gun, after which H.V. placed him in a bathtub where he bled to death. Based on a drawing by H.V., police recovered the gun from a storm sewer close to H.V.'s home.

Finding that H.V. had invoked his right to counsel during custodial interrogation, the trial court suppressed both H.V.'s second written statement and the gun, and the court of appeals affirmed. The State brings this appeal from a juvenile court order suppressing evidence in a case involving a violent offender. As this question does not turn on an evaluation of demeanor or credibility (as discussed below), we review the question de novo.

Held: Affirmed in part, reversed in part

Opinion: *Miranda v. Arizona* requires that suspects in custody be informed before questioning begins of their right to consult with an attorney.³² If a suspect invokes that right, there can be no further interrogation unless the accused initiates it.³³ If *Miranda* warnings are not given or a request for counsel is ignored, any subsequent statements by the suspect cannot be introduced at trial during the prosecution's case-in-chief.³⁴

n32. 384 U.S. 436, 469-70 (1966) ("[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.... Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires."); see U.S. CONST. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself....").

n33. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

n34. *Davis v. United States*, 512 U.S. 452, 458 (1994); *Edwards*, 451 U.S. at 487; *Miranda*, 384 U.S. at 479.

These rights apply to juveniles just as they do to adults.³⁵ Thus, the State concedes in this case that if H.V. properly invoked his right to counsel, the second

statement he made thereafter should be suppressed. The only dispute is whether he invoked that right.

n35. *In re R.J.H.*, 79 S.W.3d 1, 4 (Tex.2002) (citing *In re Gault*, 387 U.S. 1, 41 (1967)).

In *Davis v. United States*, the United States Supreme Court established a "bright line" between suspects who *might* be asking for a lawyer and those who actually *do* ask for one, holding that only the latter have invoked their right to counsel:

To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. Rather, the suspect must unambiguously request counsel. As we have observed, a statement either is such an assertion of the right to counsel or it is not. Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.³⁶

n36. *Davis*, 512 U.S. at 458-59 (internal quotations and citations omitted) (italics in original).

Applying this standard, courts have held that it is not enough for a suspect to say:

"Maybe I should talk to a lawyer";³⁷

n37. *Id.*; accord, *Dinkins v. State*, 894 S.W.2d 330, 352 (Tex.Crim.App.1995) ("Maybe I should talk to someone").

"I might want to talk to an attorney";³⁸

n38. *United States v. Zamora*, 222 F.3d 756, 765-66 (10th Cir.2000).

"I think I need a lawyer";³⁹

n39. *Burket v. Angelone*, 208 F.3d 172, 198 (4th Cir.2000).

"Do you think I need an attorney here?";⁴⁰ or

n40. *Mueller v. Angelone*, 181 F.3d 557, 573-74 (4th Cir.1999); accord, *Soffar v. Cockrell*, 300 F.3d 588, 595 (5th Cir.2002); *Diaz v. Senkowski*, 76 F.3d 61, 63-65 (2d Cir.1996).

"I can't afford a lawyer but is there any way I can get one?"⁴¹

n41. *Lord v. Duckworth*, 29 F.3d 1216, 1219-21 (7th Cir.1994); *accord*, *Soffar*, 300 F.3d at 595.

Nor is it enough for a suspect to ask to see someone other than a lawyer, such as a probation officer,⁴² or a parent.⁴³

n42. *Fare v. Michael C.*, 442 U.S. 707, 724 (1979).

n43. *Dewberry v. State*, 4 S.W.3d 735, 747 (Tex. Crim.App.1999); *Randall v. State*, 712 S.W.2d 631, 632 (Tex.App.—Beaumont 1986, pet. ref'd).

At the same time, a suspect does not have to use the precise words "I want a lawyer."⁴⁴ Courts have held the right to counsel was invoked when a suspect said:

n44. *Montoya v. Collins*, 955 F.2d 279, 283 (5th Cir.1992) ("This holding does not require a defendant to utter the magic words, 'I want a lawyer,' in order to assert his right to counsel."); *Dewberry*, 4 S.W.3d at 747 n. 9 ("There are no magic words required to invoke an accused's right to counsel.").

he did not "want to make a statement at this time without a lawyer";⁴⁵

n45. *United States v. Johnson*, 400 F.3d 187, 195 (4th Cir.2005).

"Uh, yeah. I'd like to do that" in response to a question whether he understood his right to counsel;⁴⁶

n46. *Smith v. Illinois*, 469 U.S. 91, 93, 99-100 (1984).

"Maybe I should talk to an attorney by the name of William Evans" and proffering that attorney's business card;⁴⁷

n47. *Abela v. Martin*, 380 F.3d 915, 919, 926-27 (6th Cir.2004).

"Can I get an attorney right now, man?";⁴⁸ or

n48. *Alvarez v. Gomez*, 185 F.3d 995, 998 (9th Cir.1999).

"I'd just as soon have an attorney 'cause, you know—ya'll say there's been a shooting."⁴⁹

n49. *Kyger v. Carlton*, 146 F.3d 374, 376, 379 (6th Cir.1998).

While police often carry printed cards to ensure precise *Miranda* warnings,⁵⁰ the public is not required to carry similar cards so they can give similarly precise responses.

n50. *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 314-15 & n. 4 (1985); *Arabzadegan v. State*, 240 S.W.3d 44, 46 (Tex.App.—Austin 2007, pet. ref'd); *Fineron v. State*, 201 S.W.3d 361, 364 (Tex.App.—El Paso 2006, no pet.).

The parties here disagree whether *Davis* requires us to consider H.V.'s circumstances—his youth, Bosnian extraction, and lack of previous experience with police. On this issue, the Court's opinion in *Davis* gives somewhat mixed signals. On the one hand, the Court said a statement must be "sufficiently clear that a reasonable police officer *in the circumstances* would understand the statement to be a request for an attorney."⁵¹ But the Court also said invocation should not turn on the suspect's personal characteristics:

n51. *Davis v. United States*, 512 U.S. 452, 459 (1994) (emphasis added).

We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present.⁵²

n52. *Id.* at 460.

There appear to be no cases answering whether a juvenile's age is among the "variety of other reasons" courts cannot consider when deciding whether an accused has requested counsel. Long before *Davis*, the Supreme Court held that "a juvenile's age, experience, education, background, and intelligence, and ... capacity to understand the warnings" must be considered when deciding whether a juvenile waived *Miranda* rights.⁵³ As the question here is not whether H.V. waived his right to counsel but whether he *invoked* it, it is not entirely clear which rule applies.

n53. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *see Delao v. State*, 235 S.W.3d 235 (Tex.Crim. App.2007).

But we need not decide in this case whether the court of appeals erred in considering H. V.'s age, as we agree with its ultimate conclusion. It is hard to construe H.V.'s statement that he "wanted his mother to ask for an attorney" as anything other than "an expression of a desire for the assistance of an attorney."⁵⁴ This is not a case in which H.V. simply wanted to see his mother; the only reason he said he wanted her was for the purpose of getting him an attorney. If he wanted private counsel, his request would have been technically correct, as his age at least hindered if it did not prevent him from doing so himself.⁵⁵

n54. *Davis*, 512 U.S. at 459.

n55. *See In re D.A.S.*, 951 S.W.2d 528, 529 (Tex.App.—Dallas 1997) ("[A] minor does not have the legal capacity to employ an attorney"), *rev'd on other grounds*, 973 S.W.2d 296 (Tex. 1998); *accord, Lee v. Colorado City, Texas*, No. 04-CV-00028, 2004 WL 524923 *2 n. 2 (N.D.Tex. Mar. 4, 2004); *Francine v. Dallas Indep. Sch. Dist.*, No. 02-CV1853, 2003 WL

21501838, at *2 (N.D. Tex. June 25, 2003); *Byrd v. Woodruff*, 891 S.W.2d 689, 704 (Tex.App.—Dallas 1994, writ denied); *In re Martel*, No. 12-06-00397-CV, 2007 WL 43616, at *3 (Tex.App.—Tyler Jan. 8, 2007, orig. proceeding); *Coleson v. Bethan*, 931 S.W.2d 706, 712 (Tex.App.—Fort Worth 1996, no writ); see also *Dairyland County Mut. Ins. Co. of Tex. v. Roman*, 498 S.W.2d 154, 158 (Tex.1973) (holding contract of a minor, while not void, is voidable at minor's election). The dissent cites a nineteenth-century case for the rule that a minor can employ an attorney as a "necessary" because "it would be unreasonable to deny him the power to secure the means of defending himself." *Askey v. Williams*, 11 S.W. 1101, 1101 (Tex. 1889). We need not decide today whether that case survives the rule announced 78 years later that juveniles have a constitutional right to counsel, see *In re Gault*, 387 U.S. 1 (1967); we merely note that it remains the duty of a parent in the first instance to pay for such necessities. See Tex. Fam.Code § 151.001(c) ("A parent who fails to discharge the duty of support is liable to a person who provides necessities to those to whom support is owed.").

This case is a close one because, when the magistrate followed up by instructing H.V. that only he could ask for an appointed attorney, H.V. never did. But while ambiguous requests for counsel may be clarified by further questioning,⁵⁶ unambiguous ones cannot:

n56. *Davis*, 512 U.S. at 453.

No authority, and no logic, permits the interrogator to proceed ... on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all.⁵⁷

n57. *Smith v. Illinois*, 469 U.S. 91, 98-99 (1984).

As the objective circumstances surrounding H.V.'s statement rendered it an unambiguous request for an attorney, further "clarification" could not change it.

Accordingly, we agree with the courts below that H.V.'s second statement to the police was properly suppressed.

The court of appeals held that suppression of H.V.'s statement also required suppression of the gun as "fruits of the poisonous tree," a legal doctrine first recognized in the context of the Fourth Amendment.⁵⁸ But both the United States Supreme Court and the Court of Criminal Appeals have rejected this doctrine in the Fifth Amendment context of physical evidence obtained after failing to give *Miranda* warnings.⁵⁹

n58. *Wong Sun v. United States*, 371 U.S. 471, 487 (1963); *Kothe v. State*, 152 S.W.3d 54, 60 (Tex.Crim.App.2004); see U.S. CONST. amend. IV ("The right of the people to be secure in their persons,

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....").

n59. *United States v. Patane*, 542 U.S. 630, 634 (2004) (plurality opinion); *id.* at 645 (Kennedy, J., concurring); *Baker v. State*, 956 S.W.2d 19, 23-24 (Tex.Crim.App.1997).

The court of appeals held otherwise, distinguishing cases in which *Miranda* rights were not read from cases like this one in which an invocation of those rights was ignored.⁶⁰ That distinction was expressly rejected by the Court of Criminal Appeals in *Baker v. State*:

n60. 179 S.W.3d 746, 758.

Both *Tucker*⁶¹ and *Elstad*⁶² involved the failure to give the required warnings rather than the failure to scrupulously honor warnings given. Neither the Supreme Court nor this Court has addressed whether the *Tucker/Elstad* rule applies to the fruits of statements made in the latter context. But the principle is the same: mere noncompliance with *Miranda* does not result in a carryover taint beyond the statement itself.... We hold that the *Tucker/Elstad* rule applies to the failure to scrupulously honor the invocation of *Miranda* rights. In the absence of actual coercion, the fruits of a statement taken in violation of *Miranda* need not be suppressed under the "fruits" doctrine....⁶³

n61. *Michigan v. Tucker*, 417 U.S. 433 (1974).

n62. *Oregon v. Elstad*, 470 U.S. 298 (1985).

n63. *Baker*, 956 S.W.2d at 23-24.

The court of appeals pointed out that *Elstad* made a distinction between unread rights and ignored rights in a footnote.⁶⁴ But *Elstad* was not based on that distinction, but on reasoning that *Miranda* does not involve a constitutional violation.⁶⁵ The court of appeals also pointed out that in 2000 the Supreme Court abandoned its characterization of *Miranda* as a prophylactic rather than a constitutional rule.⁶⁶ But the Court held four years later that this did not change the rule that physical evidence was admissible even if gained from questioning that violated *Miranda*.⁶⁷

n64. See *Elstad*, 470 U.S. at 312-13 n. 3 (stating that as current case involved mere failure to give *Miranda* warnings, "[l]ikewise inapposite are the cases the dissent cites concerning suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation"). But see *Oregon v. Hass*, 420 U.S. 714, 723 (1975) (refusing to distinguish between unread rights and ignored rights when allowing statements that violate *Miranda* to be used for impeachment).

n65. See *Elstad*, 470 U.S. at 306-07 ("[A] procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment.... The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amend-

ment itself ... *Miranda's* preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.").

n66. See *Dickerson v. United States*, 530 U.S. 428, 444 (2000) ("In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively.").

n67. See *United States v. Patane*, 542 U.S. 630, 643 (2004) (plurality opinion); *id.* at 645 (Kennedy, J., concurring).

More relevant to the question here is a different principle stated by the Supreme Court in *Elstad* and since: the Self-Incrimination Clause concerns compelled testimony, not physical evidence.⁶⁸ The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself;"⁶⁹ thus, there can be no Fifth Amendment violation when a person's testimony is excluded.⁷⁰ Physical evidence that does not compel a defendant to testify against himself cannot be a violation of the Fifth Amendment rights that *Miranda* protects, which is precisely what the Supreme Court held in 2004.⁷¹

n68. *Elstad*, 470 U.S. at 304 ("The Fifth Amendment, of course, is not concerned with nontestimonial evidence.").

n69. U.S. CONST., amend. V (emphasis added).

n70. *Patane*, 542 U.S. at 643 (plurality opinion) ("Introduction of the nontestimonial fruit of a voluntary statement, such as respondent's Glock, does not implicate the Self-Incrimination Clause. The admission of such fruit presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial."); *id.* at 645 (Kennedy, J., concurring) ("Admission of nontestimonial physical fruits ... does not run the risk of admitting into trial an accused's coerced incriminating statements against himself.").

n71. *Id.* at 634.

The court of appeals expressed concern that suppressing testimonial statements but not physical evidence might encourage police to reject a request for counsel deliberately in the hope of getting something they could use.⁷² But evidence obtained through deliberate violations of constitutional rights is usually inadmissible on that basis alone.⁷³

n72. 179 S.W.3d 746, 763; see also *Patane*, 542 U.S. at 645 (Souter, J., dissenting) ("The issue actually presented today is whether courts should apply the fruit of the poisonous tree doctrine lest we create an incentive for the police to omit *Miranda* warnings.").

n73. *Missouri v. Seibert*, 542 U.S. 600, 620-21 (2004) (Kennedy, J., concurring); *Patane*, 542 U.S. at 639 (plurality opinion) (stating that fruits "of actually compelled testimony" must be excluded); *Oregon v. Hass*, 420 U.S. 714, 723 (1975) ("One might concede that when proper *Miranda* warnings have been given, and the officer then continues his interrogation after the suspect

asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material.... If, in a given case, the officer's conduct amounts to an abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness."); cf. *Fellers v. United States*, 540 U.S. 519, 524 (2004) (requiring suppression of information gained by deliberate violation of suspect's Sixth Amendment right to counsel). But see *Moran v. Burbine*, 475 U.S. 412, 423-24 (1986) ("Granting that the 'deliberate or reckless' withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.").

In this case, H.V.'s counsel does not argue that his disclosure of the gun's location was involuntary or coerced for any reason other than violation of his *Miranda* request for counsel. The warnings and invocation of counsel here all occurred in court before a magistrate without police involvement, so there could have been no police coercion.⁷⁴ Because violations of *Miranda* do not justify exclusion of physical evidence resulting therefrom, we hold the courts below erred in excluding the gun that brought about Daniel Oltmanns's death.

n74. See Tex. Fam.Code § 51.095(a)(1) (providing for admissibility of statements by a child when a magistrate "has examined the child independent of any law enforcement officer or prosecuting attorney").

Conclusion: Accordingly, we affirm the judgments below to the extent they exclude H.V.'s second statement to police, reverse the judgments to the extent they exclude the gun found as a result, and remand this case to the trial court for further proceedings consistent with this opinion.

**TRIAL PROCEDURE—
DEFENDANT WAS NOT REQUIRED TO FILE
MOTIONS OBJECTING TO JURY CHARGE
WHICH DID NOT INSTRUCT JURY TO LIMIT
CONVICTIONS TO ONLY THOSE ACTIONS OC-
CURRING AFTER DEFENDANT'S 17TH BIRTH-
DAY TO PRESERVE ERROR.**

¶ 08-2-12. **Alberty v. State**, ___S.W.3d___, Nos. PD-0822-07, PD-0823-07, 2008 WL 942050 (Tex.Crim. App., 4/9/08).

Facts: The state indicted appellant for aggravated sexual assault of a child in two indictments that alleged that those offenses were committed on or about July 7, 2001, appellant's 17th birthday, and June 1, 2003. The indictments therefore alleged two offenses that were commit-

ted when appellant was an adult and were properly filed in the district court. Much of the testimony, however, dealt with allegations of an ongoing series of assaults on the complaining witness that began when appellant was 13 years of age and continued until the dates alleged in the indictments.

The jury charge contained the usual language in regard to the time frame to be considered:

You are instructed that the State is not required to prove the exact date alleged in the indictment. The term "on or about the 1st of June, 2003" means any date prior to the date of the filing of the indictment, August 27, 2003, and within the Statute of Limitations. The Statute of Limitation for this type of alleged offense is 10 years past the child's 18th birthday.

Appellant made no objection to this instruction.

The jury convicted appellant of the charged offenses, and the judge sentenced him to fifteen years' confinement in each case.

Held: Reversed and remand.

Opinion: On appeal, appellant brought three points of error, the second of which is relevant to the issues presented for our review.

The jury charges in these cases were erroneous in that they instructed the jury that they could convict appellant of any offense anterior to presentment of the indictment and within the statute of limitations, when in fact he could only be convicted of offenses occurring on or after his seventeenth birthday, July 7, 2001, since jurisdiction over offenses before that date had never been waived by the juvenile court.

In ruling on appellant's second point of error, the court of appeals construed the complaint, not as jury-charge error, but as a jurisdictional claim and then ruled that appellant had waived the issue because he had failed to file a written motion challenging the jurisdiction of the district court as required by *Tex.Code Crim. Proc. art. 4.18(a)*. *Alberty v. State*, Nos. 05-05-01687-CR and 05-05-01688-CR (Tex.App.—Dallas, delivered February 9, 2007)(not designated for publication).

Thus, appellant claims he could only be convicted of offenses occurring on or after his seventeenth birthday because the trial court lacked jurisdiction over any offenses which occurred prior to his seventeenth birthday. For the reasons that follow, we conclude appellant waived this issue.

The Texas Code of Criminal Procedure provides A claim that a district court or criminal district court does not have jurisdiction over a person because jurisdiction is exclusively in the juvenile court and that the juvenile court could not waive jurisdiction under Section 8.07(a) Penal Code, or did not waive jurisdiction under Section 8.07(b), Penal Code, must be made by written motion in bar of prosecution filed with the

court in which criminal charges against the person are filed.

Tex.Code Crim. Proc. Ann. Art. 4.18(a) (Vernon 2005). If the defendant's guilt or punishment is being tried or determined by a jury, the written motion must be filed and presented to the presiding judge of the court before selection of the jury. *Tex.Code Crim. Proc. Ann. Art. 4.18(b)(2)*(Vernon 2005). If a defendant does not file a motion within the applicable time requirements of article 4.18(b), he may not contest the jurisdiction of the trial court on the ground that the juvenile court has exclusive jurisdiction. *Tex.Code Crim. Proc. Ann. Art. 4.18(d)(1)* (Vernon 2005).

In this case, appellant did not file a motion claiming the criminal district court lacked jurisdiction. Because he did not file an article 4.18 motion, he may not complain on appeal that the trial court lacked jurisdiction. Nevertheless, appellant contends the trial court erred in submitting a jury charge allowing his conviction for acts that occurred before his seventeenth birthday because the trial court lacked jurisdiction to do so.

Alberty, slip op. at 1-2. The court of appeals affirmed appellant's convictions.

Appellant's actual complaint was not lack of jurisdiction, but that the jury charge permitted the jury to convict appellant of offenses committed before his seventeenth birthday. It is clear from the record that a significant portion of the testimony at trial was about incidents of abuse that occurred before appellant's seventeenth birthday and that some of the testimony appears to be about at least two incidents that occurred after his seventeenth birthday. Because the indictment alleged assaultive conduct that occurred after appellant became an adult, jurisdiction was properly in the district court, and appellant did not challenge jurisdiction.

Because of age restrictions on criminal prosecution, appellant could not be held criminally responsible for the sexual assaults allegedly committed while he was 15 or 16 years of age unless the juvenile court waived jurisdiction and certified appellant for criminal prosecution as an adult, and he could not be held criminally responsible at all for the sexual assaults allegedly committed while he was under the age of 15 years. *Tex. Penal Code § 8.07(a), (b)*. Appellant asserts error in that the jury charge did not set out that distinction and did not instruct the jury that it could not convict appellant of any offense unless it found beyond a reasonable doubt that the offense of conviction occurred on or after July 7, 2001. He further alleges harm because much of the testimony was about an incident when he was thirteen and that the testimony described that assault in graphic detail.

Art. 4.18, by its plain language, applies only if jurisdiction is "exclusively in the juvenile court." The record indisputably shows that the evidence supported jurisdiction in both the juvenile and district courts, thus jurisdiction in the juvenile court was not exclusive. Be-

cause the district court also had jurisdiction, art. 4 .18 does not apply, and appellant was not bound to file any motion in regard to the earlier assaults. The court of appeals erred in holding that appellant waived his complaint.

Conclusion: We reverse and remand these cases to the court of appeals for consideration of whether the jury charge was erroneous because it did not limit the "on or about" language in regard to the statute of limitations to any date prior to the date of the filing of the indictment, August 27, 2003, and on or after the appellant's seventeenth birthday on July 7, 2003, thus permitting the jury to convict him on the basis of testimony about numerous offenses alleged to have been committed while appellant was a juvenile. If the instruction is found to be erroneous, the court of appeals shall then consider whether appellant was harmed by that error. *Almanza v. State*, 724 S.W.2d 805 (Tex.Crim.App.1986).

**CONFESSIONS—
WHEN A WRITTEN STATEMENT IS GIVEN AFTER AN INADMISSIBLE ORAL STATEMENT, THE MAGISTRATE SHOULD EXPLAIN TO THE JUVENILE THAT HIS PRIOR ORAL STATEMENTS MAY NOT BE USED AGAINST HIM AS PART OF THE ADMONISHMENTS FOR THE WRITTEN STATEMENT.**

Editor's Note: Recognize the distinction between an "unwarned or improperly warned" statement versus an "involuntary" statement.

¶ 08-2-13. **In the Matter of J.A.B.**, No. 08-06-00097-CV, ___S.W.3d ___, 2008 WL 1757880 (Tex.App.—El Paso, 4/17/08).

Facts: A hearing was held on J.A.B.'s motion to suppress his written and oral statements given to the police. The court granted the motion with regard to the two oral statements, but denied the motion with regard to the written statement.

Alberto Hernandez, an investigator with the El Paso Police Department, testified at the hearing on the motion to suppress the evidence. He testified that he had information that J.A.B. was a potential witness to a shooting, as he was riding in the vehicle involved in the shooting. On January 18, 2006, at about one o'clock in the afternoon, Detectives Hernandez and Ramon Lucero went to Cesar Chavez Academy and spoke with the principal. Hernandez spoke with J.A.B.'s mother, and she consented to have the child leave the school. J.A.B. also agreed to accompany the detectives to the Mission Valley Regional Command Center, which was staffed with a juvenile processing center. Detective Hernandez testified that J.A.B. was not in custody. During the interview, J.A.B. denied any involvement in the shooting. He stated

that he was in the vehicle and that the occupants were looking for certain persons, in order to fight them, but they could not find them, and he went home.

During the interview, Detective Hernandez received a telephone call from another investigator, who told him that one of the other occupants of the vehicle had stated that J.A.B. had been the shooter during the incident. Hernandez stopped the interview and informed J.A.B. that he had been implicated as the shooter, and he was not free to leave. He was escorted to the certified juvenile processing center located within the Mission Valley Regional Command Center for processing. As he was being fingerprinted, J.A.B. stated that he was in the car at the time of the shooting, but he was afraid to say anything, due to fear of retaliation upon his mother. This statement was not made in response to any questioning. He was told to stop speaking and was given his *Miranda* warnings. Another officer, Detective Aguirre, notified J.A.B.'s mother, and he was transported to the Juvenile Probation Department.

When the interview at the Juvenile Probation Department was completed, the officers were informed that J.A.B. wanted to provide a statement. He was taken to a magistrate, and he was then taken back to the Juvenile Probation Department, where he provided a statement indicating that he was the shooter in the incident. He was then transported back to the magistrate, where he signed the statement. J.A.B. was then returned to the Juvenile Probation Department.

Judge Rick Olivo testified that he was the magistrate who interviewed J.A.B. on January 18. J.A.B. was brought to the court by two detectives. Upon learning that J.A.B. wanted to make a statement, Olivo interviewed him and provided him with the requisite statutory warnings. J.A.B. was calm and did not appear to be nervous or intimidated. He indicated that he still wanted to give a statement to the police. J.A.B. was handcuffed and taken away by the detectives. At 8:45 p.m., J.A.B. was brought back before Judge Olivo, after he had given his statement, to determine whether the statement was given voluntarily. Again, J.A.B. was not nervous, and he did not appear to be intimidated. He told Judge Olivo that his statement was voluntary and that he had not been coerced. Detective Lucero testified that he was with Detective Hernandez at the school and during the interview at the police station. Lucero testified that J.A.B. agreed to accompany them to the police station. He was not in custody at the time, as he was merely a potential witness. The detective stated that J.A.B. was told he was not under arrest, and he could leave at any time. Neither he nor Hernandez was in a police uniform. J.A.B. was not handcuffed, and he was told he could stop the interview at any time.

Detective Jimmy Aguirre testified that he aided in the interviewing of J.A.B. During the entire interview, J.A.B. was coherent and was willing to talk to the officers. He was not threatened nor intimidated. After the information that implicated J.A.B. was received, he was

placed in custody. Forty minutes later, Aguirre called J.A.B.'s mother, Ursula Bernard, notified her that J.A.B. was in custody, and explained to her the reason for his having been placed in custody.

Bernard testified that, when the principal at her son's school called her, he did not relate that the investigation centered around an attempted murder case. Furthermore, when she received the call from Detective Aguirre, he did not tell her for what her son was being detained. Bernard testified that, had she known the nature of the investigation, she would not have allowed him to be taken from the school, and she would not have allowed him to give a statement at the police station. J.A.B. testified that, when he gave his statement, he did not understand his rights and he would not have given the statement, but for his detention for the entire day at the police station. He stated that he was forced to give the statement by the officers in that he was "egged on" to give the written statement. J.A.B. related that Judge Olivo did not tell him that any prior oral statement that he had given could not be used against him. Had he been so warned, he would not have given the statement.

Held: Affirmed

Opinion: The State maintains that the first oral statement, where J.A.B. stated that the individuals they wanted to attack were never found, was made before he was in custody. The State also asserts that the second statement, made after he was in custody, was not made in response to questioning. However, since the court found that these oral statements were inadmissible, we will conduct our analysis of the admissibility of J.A.B.'s written statement in light of that ruling; we will not speculate on the grounds the court utilized in determining that the two oral statements were inadmissible, because those determinations are not before us. *See In re R.J.H.*, 79 S.W.3d 1, 7 (Tex.2002). There was certainly evidence before the court that Appellant was not in custody, until the phone call was received that implicated J.A.B.

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." *Id.* at 6 (citing *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex.Crim.App.1995)). There was adequate testimony for the court to determine that J.A.B. was not coerced by the officers who interviewed him. Judge Olivo stated that J.A.B. did not appear intimidated, and his demeanor was calm.

In response, J.A.B. cites *Griffin v. State*, 765 S.W.2d 422 (Tex.Crim.App.1989), for the proposition that, if a juvenile gives a written statement after having given an inadmissible oral statement, a magistrate must explain to the juvenile that his prior oral statements may not be used against him. However, the juvenile must additionally show that the written statement was involuntarily given, and the admissibility of the written confes-

sion is determined based upon the totality of the circumstances under which the statement was made. *Id.* at 429 ("unless an initial statement, albeit unwarned, is actually 'involuntary,' the Miranda warning preceding a subsequent statement 'ordinarily should suffice to remove the conditions that precluded admission of the earlier statement' ") (citing *Oregon v. Elstad*, 470 U.S. 298, 314, 105 S.Ct. 1285, 1296 (1985)). In the instant case, notwithstanding J.A.B.'s testimony that he would not have given the statement had he known that the oral statements could not be used against him, viewing the totality of the circumstances, we find that the court did not err in finding the written statement admissible. The court could well have disbelieved J.A.B.'s testimony and there is evidence that he knew he could stop the interview at any time. Further, there is evidence that he was not coerced to give the statement and that his demeanor was calm and coherent throughout the entire process.

Issues Nos. One and Two are overruled.

In Issue No. Three, J.A.B. maintains that the notice given to his mother, pursuant to section 52.02 of the Family Code, was inadequate. This section provides, in relevant part:

(b) A person taking a child into custody shall promptly give notice of the person's action and a statement of the reason for taking the child into custody, to:

(1) the child's parent, guardian, or custodian....

Tex. Fam.Code Ann. § 52.02(b)(1).

Initially, we note, notwithstanding the testimony of Ursula Bernard to the contrary, that the court was entitled to believe the testimony of Detective Aguirre, who stated that he informed Bernard of the reason why J.A.B. was detained. The court could therefore have reasonably determined that the notice was timely, given the fact that the processing of J.A.B. through the juvenile probation system had just begun, and that J.A.B.'s mother had an adequate opportunity to intervene. Furthermore, even if we were to assume that the forty-minute delay constituted a violation of the Family Code, there must be a causal connection between the violation and the obtaining of the statement. *Gonzales v. State*, 67 S.W.3d 910, 913 (Tex.Crim.App.2002). Given the extensive processing that ensued after J.A.B. was placed in custody, we find there was no causal connection. Issue No. Three is overruled.

Conclusion: We affirm the judgment of the trial court.

**ADJUDICATION PROCEEDINGS—
WHEN AN INCORRECT ADMONISHMENT IS
MADE, BUT SUBSTANTIALY COMPLIES**

(FALLS WITHIN THE ACTUAL RANGE OF PUNISHMENT), THE BURDEN SHIFTS TO APPELLANT TO SHOW HIS PLEA WAS INVOLUNTARY.

¶ 08-2-14. **In the Matter of T.W.C.**, No. 01-06-01150-CV, ___ S.W.3d ___, 2008 WL 1827729 (Tex.App.—Houston [1st Dist.], 4/24/08).

Facts: Appellant contends that his plea was involuntary because the trial court erroneously informed him that the maximum punishment he could receive in the case was 40 years' punishment. At the initial setting for appellant's adjudication, the trial court admonished appellant as follows:

You are here today because the State has filed a petition alleging delinquent conduct against you with an additional proviso of requesting a determinate sentence. A consequence of that petition if I find it to be true could be to place you on probation inside or outside of your home, or I could place you with the Texas Youth Commission or send you to the Youth Commission, then at age 18 cause a review to be had in order to determine whether to send you home or to the Texas Department of Criminal Justice Institutional Division for up to 40 years. You understand that?

Both appellant and the State indicated that they were not ready to proceed with adjudication, so the trial court continued the hearing. When the hearing resumed a week later, the trial court again admonished appellant as follows:

[Appellant], you are here today because the State has filed a petition against you alleging delinquent conduct and for determinate sentencing, is my understanding. A consequence of that petition if I find it to be true could be to put you on probation inside or outside of your home or commitment to run out of the Texas Youth Commission into the Texas Department of Criminal Justice Institutional Division. In other words, prison. That could go up to 40 years. Do you understand that?

"The Family Code requires a trial court to give certain explanations to a juvenile who is accused of criminal conduct that could result in an adjudication of delinquency." *In re D.I.B.*, 988 S.W.2d 753, 755 (Tex. 1999). Relevant to this case, the Family Code provides:

(b) At the beginning of the adjudication hearing, the juvenile court judge shall explain to the child and his parent, guardian, or guardian ad litem:

(2) the nature and possible consequences of the proceeding, including the law relating to the

admissibility of the record of a juvenile court adjudication in a criminal proceeding.

Tex. Fam.Code Ann. § 54.03(b)(2) (Vernon Supp.2007).

Appellant alleges, and the State concedes, that the trial court's statements regarding a possible 40-year punishment were incorrect. Appellant was charged with aggravated assault, a second degree felony. *See* Tex. Pen.Code Ann. § 22.02 (Vernon Supp.2007). Under the Family Code, in a determinate sentence situation, the maximum punishment that a juvenile can receive for a second degree felony is 20 years. *See Tex. Fam.Code Ann. § 54.04(3)(B)* (Vernon Supp.2007). Nevertheless, the State argues that appellant failed to preserve error. Thus, the issues we decide are whether (1) appellant was required to object to the erroneous admonishment; and (2) the effect of the erroneous admonishment, *i.e.*, whether appellant's plea was involuntary because of it.

Held: Reversed and Remand

Opinion: Though the State has conceded error, it nonetheless argues that appellant has failed to preserve the error for appeal because he did not object to the erroneous admonition at trial. Specifically, the State relies on *section 54.03(i) of the Family Code*, which provides:

In order to preserve for appellate or collateral review the failure of the court to provide the child the explanation required by Subsection (b), the attorney for the child must comply with *Rule 33.1, Texas Rules of Appellate Procedure*, before testimony begins or, if the adjudication is uncontested, before the child pleads to the petition or agrees to a stipulation of evidence.

Tex. Fam.Code Ann. § 54.03(i) (Vernon Supp.2007).

Rule 33.1 of the Texas Rules of Appellate Procedure requires that, as a prerequisite for presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion and was ruled on by the trial court, or that the trial court refused to rule. *See Tex.R.App. P. 33.1*.

Prior to the enactment of *section 54.03(i) of the Family Code*, no objection was required to preserve error regarding the omission of the required juvenile admonishments. *See In re C.O.S.*, 988 S.W.2d 760, 767 (Tex.1999). Since the enactment of *section 54.03(i)*, it has been applied to require an objection to an omitted or incomplete admonishment. *See In re C.C.*, 13 S.W.3d 854, 859-60 (Tex.App.—Austin 2000, not pet.). However, we can find no cases holding that an objection is required to preserve error regarding an *erroneous* admonishment.²

n2. We note that in adult criminal cases, no objection is required to preserve error based on a trial court's failure

to properly admonish a defendant. *See Bessey v. State*, 239 S.W.3d 809, 812-13 (Tex.Crim.App.2007). The reasoning for this is that only a person who knows about an admonishment requirement, and thus does not need the admonition, would be in a position to object to the absence of the admonition. *See id.* at 815 (Johnson, concurring).

Indeed, the express language of section 54.03(i) shows that it applies to "the *failure* of the court to provide the child the explanation required [by the statute]." (Emphasis added). In this case, the trial court did not fail to provide the child with the required information. The trial court admonished the child, but the information conveyed in the admonishment was not a correct statement of the law.

"The purpose of these admonishments is to 'assist children, who are too inexperienced and unskilled to fully understand the nature of juvenile proceedings and the possible consequences thereof.'" *In re A.D.D.*, 974 S.W.2d 299, 304 (Tex.App.—San Antonio 1998, no pet.) (quoting *In re A.L.S.*, 915 S.W.2d 114, 116 (Tex. App.—San Antonio 1996, no pet.)). A further purpose of the admonishments in a juvenile adjudication hearing is to ensure the voluntariness of the juvenile's plea. *In re D.R.H.*, 966 S.W.2d 618, 621 (Tex.App.—Houston [14th Dist.] 1998, no pet.). The purpose of the juvenile admonishments would not be furthered by requiring the child to object when the trial court gives an admonishment that is not a correct statement of the law. Under these circumstances, and in light of the specific language of section 54.03(i), we conclude that the section does not apply, and no objection was required to raise the issue of the erroneous admonishment on appeal.

How does an erroneous admonishment affect the voluntariness of a guilty plea?

Thus, we turn to the issue of what effect, if any, the erroneous admonishment had on appellant's plea. Because juvenile proceedings are quasi-criminal in nature, *see In re M.A.F.*, 966 S.W.2d 448, 450 (Tex.1998), we find it appropriate to consider analogous cases in similar adult criminal proceedings. *See In re D.I.B.*, 988 S.W.2d 753, 757 (Tex.Crim.App.1999) (considering Court of Criminal Appeals decisions in adult cases to determine whether failure to provide admonishments in juvenile proceeding is subject to harmless error review).

The Code of Criminal Procedure requires that, prior to accepting a plea of guilty or nolo contendere, the trial court shall admonish the defendant, among other things, of the range of punishment attached to the charged offense. Tex.Code Crim. Proc. art. 26.13(a)(1) (Vernon Supp.2007).¹³

n3. We note that Code of Criminal Procedure article 26.13(a)(1) specifically requires an admonishment as to the range of punishment, whereas Family Code section 54.03(b)(2) requires more generally that the court admonish the child on "the nature and possible conse-

quences of the proceeding." We do not decide whether 54.03(b)(2) always requires a specific admonishment as to the range of punishment. Instead, we consider only the effect, if any, of an erroneous admonishment as to the range of punishment.

In *Robinson v. State*, 739 S.W.2d 795, 801 (Tex.Crim.App.1987), the court held that when the trial court delivers an incorrect admonishment as to the range of punishment, but the actual sentence falls within both the actual and misstated range, the trial court's admonishment substantially complies with article 26.13. *Id.*

A trial court's substantial compliance with article 26.13 in admonishing a defendant constitutes a prima facie showing that the defendant's guilty plea was entered freely and voluntarily. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex.Crim.App.1998); *Grays v. State*, 888 S.W.2d 876, 878 (Tex.App.—Dallas 1994, no pet.). The burden then shifts to the defendant to show that he was unaware of the consequences of his plea such that he suffered harm. *Martinez*, 981 S.W.2d at 197; *Grays*, 888 S.W.2d at 878. Such a showing requires more than "a bare, subjective assertion" in his appellate brief that the defendant did not know the correct range of punishment. *Grays*, 888 S.W.2d at 879. Instead, the record must demonstrate the defendant's lack of comprehension of the proper punishment range and the manner in which he was misled or harmed. *Id.* In many cases, the record on direct appeal will be insufficient to meet this burden. *See Martinez*, 981 S.W.2d at 197 ("The only support in the record for appellant's contention that his plea was involuntary is the incorrect admonishment form. The record contains no evidence which tends to indicate that appellant was actually harmed or misled in making his determination to enter a guilty plea."); *Grays*, 888 S.W.2d at 879 ("[T]here is nothing in the record before us indicating appellant did not know the true range of punishment for the offense charged.") ("Nothing in the record before us indicates appellant was misled by the trial court's admonishment into making a guilty plea and foregoing another choice that potentially could have resulted in a more favorable sentence.")

In this case, the trial court's admonishment to appellant that he faced 40 years' punishment, though incorrect, substantially complied with section 54.03(b)(2) because the punishment assessed—6 years—fell within the actual range of punishment and the misstated range of punishment. *See Robinson*, 739 S.W.2d at 781. Thus, the burden shifts to appellant to show that his plea was involuntary. *See Martinez*, 981 S.W.2d at 197.

In this case, there is more than "a bare, subjective assertion" in appellant's brief regarding the involuntariness of his plea. Appellant filed a pro se motion for new trial alleging that he was innocent and that his attorney told him that if he did not plead guilty he would get "15 years and at the most 40 years." The trial court held a hearing on appellant's motion for new trial. At the hearing, appellant testified that his attorney⁴ told him that he

faced 40 years' punishment and that he would not have pleaded guilty if he had known that he actually faced a lesser penalty. Appellant testified that he pleaded guilty because he was afraid that, if he did not, his attorney would quit and appellant would then get up to 40 years from the judge.

n4. The motion for new trial alleged ineffective assistance based upon appellant's assertion that trial counsel also misinformed him as to the appropriate range of punishment.

Thus, unlike the defendant in *Grays*, there is affirmative evidence in this record that appellant did not know the true range of punishment for the charged offense. See 888 S.W.2d at 879. This evidence is not contradicted. In fact, at the motion for new trial hearing, appellant's trial counsel testified, "I don't remember telling him a maximum. The only number I ever told him was the 15 years [that the State had indicated it would seek if appellant went to trial]. As a matter of fact, the first time I ever heard of the maximum is when I was conferring with his newly-appointed attorney." Thus, the only evidence in the record shows that appellant believed that he faced 40 years' punishment, and that he was never told, either by the court or his own attorney, that he actually faced only 20 years' punishment.

Further, unlike the defendant in *Grays*, there is affirmative evidence in this record that appellant's misunderstanding of the range of punishment caused him to forego "another choice that potentially could have resulted in a more favorable sentence." See *Grays*, 888 S.W.2d at 879. Specifically, appellant testified that he would not have pleaded guilty had he known that he faced a lesser penalty.

This case is like *Ex parte Smith*, 678 S.W.2d 78 (Tex.Crim.App.1984). In *Smith*, the defendant was admonished that he faced between two and 20 years' punishment and a fine not to exceed \$10,000, when he actually faced between two and 10 years' punishment and a fine not to exceed \$5000. 678 S.W.2d at 79. At a habeas corpus hearing, appellant presented uncontroverted evidence that he would not have entered the plea bargain if he had known that the maximum penalty he faced was one half of what he was told. *Id.* Based on this evidence, the court found that *Smith* had met his burden of proving that his guilty plea was not knowingly and voluntarily entered. *Id.* at 79-80.

Based on the record before us, we hold that, like the defendant in *Smith*, appellant has met his burden of showing that he was misled by the trial court's admonishment that he faced 40 years' punishment and that, but for his misunderstanding as to the true range of punishment, he would not have entered a guilty plea. Accordingly, we sustain appellant's second issue on appeal. In light of our disposition, we need not decide whether appellant also received ineffective assistance of counsel, and we decline to do so.

Conclusion: We reverse the judgment of the trial court and remand the cause for further proceedings.

APPEALS—

BECAUSE THE STATE JUDICIALLY ADMITTED ON APPEAL THAT THE SCHOOL (IN ARSON PROSECUTION) WAS NOT "WITHIN THE LIMITS OF AN INCORPORATED CITY," APPELLATE COURT REVERSED AND RENDERED A FINDING THAT CHILD DID NOT ENGAGE IN THE ALLEGED DELINQUENT CONDUCT.

¶ 08-2-15. **In the Matter of V.V.C.**, MEMORANDUM OPINION, No. 04-07-00166-CV, 2008 WL 1805479 (Tex.App.—San Antonio, 4/23/08).

Facts: On April 11, 2006, the State filed an original petition alleging that V.V.C., a then 12 year old juvenile, had engaged in delinquent conduct by committing the felony offense of arson¹ at Metzger Middle School. An adjudication hearing was conducted before a jury in September 2006. The evidence showed that a fire was intentionally started in the boys' restroom at Metzger Middle School, causing smoke damage to the building. Ernest Christilles, a fire investigator with the Bexar County Fire Marshal, testified that, based on his investigation, the fire was intentionally set by bringing a flame into contact with a paper towel; he also testified that his area of response is "unincorporated areas of Bexar County," and the incident occurred in an unincorporated area. A teacher testified that she saw V.V.C. and another child, M.A., running away from the restroom at the time smoke started coming out. M.A. testified that he saw V.V.C. in the boys' restroom, spraying Axe Body Spray and using a lighter to cause a fire. Finally, Officer Hernandez, assigned to the Judson Independent School District, testified that Metzger Middle School is within Bexar County but outside the City of San Antonio, while Maria Ruiz, an assistant vice-principal at Metzger, testified that the school is located "in San Antonio." At the conclusion of the hearing, the jury found that V.V.C. had engaged in delinquent conduct by committing arson. After a disposition and restitution hearing, the court found a need for disposition, placed V.V.C. on probation until the age of 18, with various conditions, and ordered him to make restitution in the amount of \$18,865 to the school district.

n1. The elements of arson, as alleged in this case, are: (1) a person starts a fire, regardless of whether the fire continues after ignition, (2) with the intent to destroy or damage, (3) any building, (4) knowing it is within the limits of an incorporated city or town. Tex. Penal Code Ann. § 28.02(a)(2)(A) (Vernon Supp. 2007).

Held: Reversed and Found that Child Did Not Engage in Delinquent Conduct.

Memorandum Opinion: On appeal, V.V.C. challenges the legal sufficiency of the evidence to support the jury's findings that (1) he had the specific intent to destroy or damage the school building, and (2) the school building is within the city limits of San Antonio, and that he had knowledge of such location; he also challenges the trial court's denial of his motion for mistrial based on the admission of extraneous offense evidence. With respect to V.V.C.'s second issue concerning the location of the school building within the city limits, the State makes the affirmative statement in its appellee's brief that Metzger Middle School is *not*, in fact, within the incorporated city limits of San Antonio, and concedes that, "[a]ppellant is actually innocent of the statutory crime of arson as it was alleged in the petition." The State asserts, however, that because V.V.C. is only challenging legal sufficiency on appeal, and there was some testimony that the school is "in San Antonio," the appropriate procedure for relief is through a writ of habeas corpus. We disagree. We accept the State's affirmative statement in its brief that Metzger Middle School is not within the incorporated city limits of San Antonio as a judicial admission of that fact. *See City of San Antonio v. Hardee*, 70 S.W.3d 207, 212 (Tex.App.—San Antonio 2001, no pet.) (appellate court may accept statements made in party's brief as true, as a judicial admission); *see also Jansen v. Fitzpatrick*, 14 S.W.3d 426, 431 (Tex.App.—Houston [14th Dist.] 2000, no pet.) (same). Therefore, in light of the State's judicial admission as to the location of Metzger Middle School, we conclude that no rational fact finder could find beyond a reasonable doubt that the school is "within the limits of an incorporated city," as required by the petition, jury charge, and arson statute. Tex. Penal Code Ann. § 28.02(a)(2)(A) (Vernon Supp.2007). Accordingly, we sustain V.V.C.'s second issue and hold the evidence is legally insufficient to support the jury's finding on this essential element of the offense. *See In re L.A.S.*, 135 S.W.3d 909, 913 (Tex.App.—Fort Worth 2004, no pet.); *In re K.T.*, 107 S.W.3d 65, 71 (Tex.App.—San Antonio 2003, no pet.) (applying criminal standard of review for legal sufficiency to adjudication of juvenile delinquency). Given our resolution of this issue, we need not reach V.V.C.'s other issues.

Conclusion: Based on the foregoing reasons, the trial court's judgment is reversed and judgment is rendered that V.V.C. did not engage in the alleged delinquent conduct. *See In re B.L.D.*, 113 S.W.3d 340, 351 (Tex. 2003) (juvenile delinquency proceedings are "quasi-criminal"); *Swearingen v. State*, 101 S.W.3d 89, 95 (Tex. Crim.App.2003) (when evidence is legally insufficient due process requires that appellate court reverse and render judgment of acquittal).

**SUFFICIENCY OF THE EVIDENCE—
WHEN THE TRIAL COURT ADJUDICATES ON A
MANNER OF COMMITTING AN OFFENSE NOT**

ALLEGED IN THE PETITION, THE RESPONDENT HAS NO NOTICE TO DEFEND HIMSELF ON THE MANNER NOT ALLEGED, AND AS A RESULT, THE VARIANCE REQUIRES AN ACQUITTAL OF THE ORIGINAL CHARGE.

¶ 08-2-16. **In the Matter of C.E.S.C.**, MEMORANDUM OPINION, No. 04-07-00490-CV, 2008 WL 1805512 (Tex.App.—San Antonio, 4/23/08).

Facts: On December 12, 2006, teacher Melanie Hutzler was having disciplinary problems with the students in her freshman algebra class. While Ms. Hutzler was outside the classroom disciplining one student, C.E.S.C. grabbed S.G. by the arm and caused her to fall and hit her head on a desk. S.G. was on the floor and holding the back of her head when C.E.S.C. put his hands between her thighs, pushed his groin against S.G.'s groin and moved his pelvis back and forth, imitating sexual intercourse. After class, Ms. Hutzler suggested to S.G. that she should consider filing charges against C.E.S.C.. Later in the week, after getting in trouble for punching C.E.S.C., S.G. told Ms. Hutzler and school disciplinary officials that C.E.S.C. had grabbed her, caused her to fall to the ground, and then "humped" her on the ground. C.E.S.C. was charged with one count of public lewdness and one count of assault bodily injury.

Held: Affirmed in part, Reversed in part.

MEMORANDUM OPINION: C.E.S.C. appeals the adjudication of Count I for public lewdness, and the State concedes this count should be reversed because of a variance between charging instrument and the findings of the juvenile court. "A 'variance' occurs when there is a discrepancy between the allegations in the charging instrument and the proof at trial." *Gollihar v. State*, 46 S.W.3d 243, 253 (Tex.Crim.App.2001). Only a material variance between the indictment and the proof will render the evidence insufficient. *Fuller v. State*, 73 S.W.3d 250, 253 (Tex.Crim.App.2002). The materiality of a variance is measured by the following two questions: (1) whether the indictment or information, as written, informed the defendant of the charge against him sufficiently to allow him to prepare an adequate defense at trial; and (2) whether prosecution under the deficiently drafted indictment or information would subject the defendant to the risk of being prosecuted later for the same crime. *See Gollihar*, 46 S.W.3d at 253.

In the State's first amended petition alleging delinquent conduct, Count I alleged that C.E.S.C. "knowingly engaged in an act of sexual contact, to wit: TOUCHING THE GENITALS OF [S.G.] WITH THE INTENT TO AROUSE AND GRATIFY THE SEXUAL DESIRE OF THE RESPONDENT OR COMPLAINANT, in a public place, NAMELY: WAGNER HIGH SCHOOL." After closing arguments, in which both sides discussed whether the alleged conduct occurred in a pub-

lic place, the juvenile court stated "I'm going to find for Count One that the location of the offense was not a public place, however it was a place where the Respondent was reckless about whether another would be present and would be offended or alarmed by the sexual contact."

The Penal Code provides that "[a] person commits [the] offense [of public lewdness] if he knowingly engages in [an act of sexual contact] in a public place or, if not in a public place, he is reckless about whether another is present who will be offended or alarmed." *See* Tex. Penal Code Ann. § 21.07 (Vernon 2003). In the charging instrument the State alleged only that the sexual contact occurred in a public place. At trial C.E.S.C. did not attempt to refute evidence that others present in the classroom were offended or alarmed, but he did contest whether the contact occurred in a public place as alleged in the charging instrument. C.E.S.C. established by testimony on cross-examination that the classroom did not meet the statutory definition of a public place because according to school policy a person not enrolled in the class must have permission and receive a formal pass to access the classroom. *See* Tex. Penal Code Ann. § 1.07(a)(40) (Vernon 2003). Neither side sought testimony from witnesses who actually viewed the sexual contact and C.E.S.C. was not on notice that he would

have to defend based on the allegation that he was reckless about whether another was present who was offended or alarmed by his act. Therefore, a material variance occurred between the allegations in Count I and the findings of the juvenile court, rendering the evidence insufficient on the public lewdness count and requiring acquittal of the adjudication of delinquency as to that count.

Conclusion: Because C.E.S.C. does not challenge the order of adjudication as to the assault claim, we affirm that portion of the order of adjudication.² Because there was a variance between the allegation presented in the charging instrument and the finding of the juvenile court with regard to the public lewdness count, we reverse the juvenile court's order of adjudication and disposition order on this count and remand for further proceedings.

n2. We note that the Order of Adjudication and the Order of Disposition list both Count I and Count II as "PUBLIC LEWDNESS." This is apparently a typographical error, as all parties agree that Count I alleges public lewdness, while Count II alleges assault bodily injury.