

**STATE BAR
SECTION REPORT
JUVENILE LAW**

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CHAIR’S MESSAGE
by **Bill Connolly**

After a very successful conference in February, the Council moved on to this year’s legislative activities. The Council has also been busy finalizing the plans for the Annual Nuts and Bolts Conference. This valuable conference is co-sponsored by the Juvenile Law Section and the Texas Juvenile Probation Commission. It always has an exceptional program that not only covers the basics of juvenile law but also covers practical issues that are not always contained in the statutes and case law. This year’s seminar will be even more interesting, containing a prosecutorial and defense perspective of juvenile jury trials. If your involved in juvenile jury trials this is a must attend. The Conference will be held on August 12-14, at the Marriott Austin Airport South in Austin.

I would like to take this opportunity to thank each member of the Council, Kristy Almager, and the Honorable Pat Garza for their continued leadership and commitment to the Section. The dedication and drive of this team makes a Chair’s job much easier and helps the Section membership better serve the children of Texas.



EDITOR'S FOREWORD
by Pat Garza

By the time you read this my oldest daughter, Michelle, will have graduated from the University of Texas Law School. May 23, to be exact. To match that, daughter number 2, Nikki, will be getting her Masters from Azusa Pacific in California at the end of the summer. So, since (theoretically) they have completed their education and have amassed a vast array of knowledge, I have formed a few questions to ask them, just to see how much they have learned after all those years.

Question 1: Why doesn't glue stick to the inside of the bottle? (I have noticed that it does a good job of sealing the opening after only one use.)

Question 2 (along the same line as question 1): If nothing ever sticks to TEFLON, how do they make TEFLON stick to the pan? (Probably an unfair question, college students won't have any idea what a pan is used for.) And, finally:

Question 3: If it's zero degrees outside today and it's supposed to be twice as cold tomorrow, how cold is it going to be? (I threw in a math question just to see if their education was well rounded.)

Now the bad news, how do I let them know that the real education begins after you leave school? Congratulations Michelle and Nikki. Dad is very proud of you.

Post-Legislative Conference. TJPC is sponsoring the 2009 Texas Juvenile Probation Commission's Post-Legislative Conference on June 28-30, 2009, at the Sheraton Austin Hotel. You can get all the details to the conference online at www.tjpc.state.tx.us. For everyone interested in how juvenile fared this legislative session, it's a must attend.

Nuts and Bolts Conference. The Juvenile Law Section and TJPC are jointly sponsoring the 2009 Nuts and Bolts of Juvenile Law Conference in Austin on August 12-14, 2009. It is an excellent conference for both the new and seasoned juvenile practitioner.

Special Legislative Issue. The special legislative issue of the Juvenile Law Reporter is in the putting-together stage. This Legislative Issue should be available in September. We will keep you posted.

What is done to children, they will do to society.

Karl A. Menninger
1893-1990, American Psychiatrist

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**Texas Juvenile Probation Commission's
POST-LEGISLATIVE CONFERENCE
June 28-30, 2009**

**SHERATON AUSTIN HOTEL
701 East 11th Street – Austin, Texas**

**Go online to www.tjpc.state.tx.us for full conference details.
TJPC has submitted for 9.75 Hours of MCLE from the State Bar of Texas.**

Registration

On-Line Registration Only

Conference space is limited so we encourage you to pre-register. We will make every effort to accept registrations at the door, but cannot guarantee that there will be space or course materials available. TJPC does not accept paper registration forms. For your convenience, you may register online at www.tjpc.state.tx.us.

Fees

\$125.00 Pre-Registration Fee (Registration received by the close of business on June 25)
\$150.00 On-Site Registration Fee (Checks or money orders only – Cash will not be accepted on-site)
\$50.00 Conference Materials Only

Hotel Information

Hotel Accommodations

The conference will be held at the Sheraton Austin Hotel. The Sheraton Austin Hotel is a landmark situated in the cultural heart of Austin, Texas. The Sheraton Austin Hotel is located next door to the famed Capitol and just steps from the University of Texas, the allure of the Sixth Street/Warehouse District, and Austin's burgeoning business district.

Rates

A limited number of hotel rooms will be available before June 10, 2009 or until the reserved block of rooms are depleted, whichever is earlier. The hotel is offering a discounted rate of \$85/single or double, \$125/triple and \$150/quad. After June 10, the block will be released for sale to the general public at prevailing rates and the conference rate will only be honored based on availability. When making accommodations, please contact the hotel at (800) 325.3535 and refer to the Texas Juvenile Probation Commission room block.

Tentative Agenda

Sunday, June 28, 2009

3:00 p.m. – 6:00 p.m. *Early Registration*

Monday, June 29, 2009

8:30 a.m. – 4:00 p.m. *Topics include appropriations to Texas Juvenile Probation Commission, Texas Youth Commission and Texas Department of Family and Protective Services, Sunset and the Juvenile Justice System, Gangs, Sex Offenders, Child Abuse and Neglect, Victims and Victims' Rights, Education, DAEPs, and JJAEPs.*

Tuesday, June 30, 2009

8:30 a.m. – 12:00 p.m. *Topics include legislative changes made to Title III of the Family Code (Juvenile Justice), Code of Criminal Procedure and Penal Code.*

Contact Information

For questions, please contact Ellie Hernandez at 512.424.6707 or Ellie.Hernandez@tjpc.state.tx.us.

**Juvenile Law Section of the State Bar of Texas and
Texas Juvenile Probation Commission's
NUTS AND BOLTS OF JUVENILE LAW CONFERENCE
August 12-14, 2009**

**MARRIOTT AUSTIN AIRPORT SOUTH
4415 South IH-35 – Austin, Texas**

Go online to www.tjpc.state.tx.us or www.juvenilelaw.org for full conference details and flyer.
MCLE from the State Bar = 13.25 Hours (includes 1.25 Hour of Ethics)

Registration

Please download the conference flyer at www.tjpc.state.tx.us or www.juvenilelaw.org, which includes the registration form. Fill out the registration form accordingly and return it with payment to the address or fax listed on the flyer.

Fees

- \$175.00 Members of the Juvenile Law Section, Judges, Associate Judges, Referees, and Masters
(Registration AND payment must be received by August 7)
- \$200.00 Non-Section Members (Registration AND payment must be received by August 7)
- \$225.00 On-Site Registration Fee (If payment is received after August 7, or on-site)
- \$50.00 Conference Materials Only

Hotel Information

The training will be held at the Airport Marriott South in Austin. A limited number of hotel rooms will be available before August 1, 2009 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 State Bar of Texas Juvenile Law Section room block. You may also visit them online at <http://marriott.com/property/propertypage/AUSAP>.

Tentative Agenda

Wednesday – August 12, 2009

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| <ul style="list-style-type: none"> 11:00 a.m. Registration 1:00 p.m. Welcoming Remarks 1:15 p.m. Juvenile Age Limits (0.50 Hour) 1:45 p.m. Arrests and Searches (0.75 Hour) 2:30 p.m. Juvenile Confessions (0.75 Hour) 3:15 p.m. Break 3:30 p.m. Detention Hearings (0.75 Hour) 4:15 p.m. Adjudication of Juveniles in Justice and Municipal Courts (0.75 Hour) 5:00 p.m. Adjourn | <ul style="list-style-type: none"> 10:30 a.m. Dispositions and Modifications (0.75 Hour) 11:15 a.m. TYC Commitments (0.75 Hour) 12:00 p.m. Lunch (on your own) 1:30 p.m. Jury Trials (1.00 Hour) 2:30 p.m. Juvenile Records (0.75 Hour) 3:15 p.m. Break 3:30 p.m. Mental Illness and Retardation (1.00 Hour) 4:30 p.m. Ethical Pre-Trial Considerations (0.50 Hour) 5:00 p.m. Adjourn |
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Thursday – August 13, 2009

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| <ul style="list-style-type: none"> 8:00 a.m. Continental Breakfast (<i>Provided</i>) 8:30 a.m. Pre-Trial Diversion Programs (0.50 Hour) 9:00 a.m. Petitions, Summons and Service (0.50 Hour) 9:30 a.m. Adjudication Hearings (0.75 Hour) 10:15 a.m. Break | <h4><u>Friday – August 14, 2009</u></h4> <ul style="list-style-type: none"> 8:30 a.m. Determinate Sentencing (0.75 Hour) 9:15 a.m. Certifications (0.75 Hour) 10:00 a.m. Break 10:15 a.m. Sex Offenders (0.50 Hour) 10:45 a.m. Ethics in Juvenile Court (0.75 Hour) 11:30 a.m. Appeals (0.50 Hour) 12:00 p.m. Adjourn |
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Contact Information

For questions, please contact Ellie Hernandez at 512.424.6707 or Ellie.Hernandez@tjpc.state.tx.us.

REVIEW OF RECENT CASES

CRIMINAL PROCEEDINGS—

BAIL SET AT \$200,000 FOR JUVENILE CERTIFIED AS ADULT FOR THE OFFENSE OF MURDER DID NOT VIOLATE CONSTITUTIONAL AND STATUTORY PROHIBITIONS AGAINST EXCESSIVE BAIL.

¶ 09-2-1. **Ex Parte Wilson**, MEMORADUM, No. 04-08-00553-CR, WL 330994 (Tex.App.—San Antonio, 2/11/09).

Facts: Darrell Wilson was arrested and charged with murder, a first degree felony. *See* Tex. Penal Code Ann. § 19.02(c) (Vernon 2003). Wilson was a juvenile at the time of the alleged offense, but was certified as an adult for purposes of trial. Wilson filed an application for writ of habeas corpus seeking a reduction in his pretrial bail from the original amount of \$250,000 to \$50,000. The trial court granted partial relief following a hearing, reducing Wilson's bail to \$200,000. Wilson appeals, asserting that the lowered amount violates the constitutional and statutory prohibitions against excessive bail. *See* U.S. Const. amends. VIII, XIV; Tex. Const. art. I, §§ 11, 13; Tex.Code Crim. Proc. Ann. arts. 1.09, 17.15 (Vernon 2005).

Held: Affirmed

MEMORANDUM Opinion: “The primary purpose or object of an appearance bond is to secure the presence of a defendant in court for the trial of the offense charged.” *Ex parte Rodriguez*, 595 S.W.2d 549, 550 (Tex.Crim.App.1980). Courts should not set bail so high as to be oppressive, but should set bail high enough to provide reasonable assurance that the defendant will appear at trial. *Ex parte Ivey*, 594 S.W.2d 98, 99 (Tex.Crim.App. 1980). The burden of proof is on the defendant to show that the bail set is excessive. *Ex parte Rubac*, 611 S.W.2d 848, 849 (Tex.Crim.App.1981). The decision regarding a proper bail amount lies within the sound discretion of the trial court. *Brown v. State*, 11 S.W.3d 501, 502 (Tex.App.—Houston [14th Dist.] 2000, no pet).

When reviewing bail settings, courts are guided by article 17.15 of the Texas Code of Criminal Procedure. *See* Tex.Code Crim. Proc. Ann. art. 17.15. Article 17.15 provides:

1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.

2. The power to require bail is not to be so used as to make it an instrument of oppression.
3. The nature of the offense and the circumstances under which it was committed are to be considered.
4. The ability to make bail is to be regarded, and proof may be taken upon this point.
5. The future safety of a victim of the alleged offense and the community shall be considered.

In addition, courts may give consideration to the defendant's work record, family and community ties, length of residency, prior criminal record, conformity with previous bond conditions, the existence of outstanding bonds, and any aggravating factors involved in the charged offense. *Ex parte Rubac*, 611 S.W.2d at 849-50. Considering these factors in light of the record before us, we cannot say the trial court abused its discretion by reducing Wilson's bail from \$250,000 to \$200,000.

The evidence related to the first factor reveals that Wilson lacks strong family and community ties to Bexar County, Texas. Wilson testified that he is a lifelong resident of Guadalupe County and attends high school in that community. Wilson's mother confirmed that Wilson resides with her in Guadalupe County.

Concerning the second factor, “[b]ail set in a particular amount becomes 'oppressive' when it is 'based on the assumption that [the accused cannot] afford bail in that amount and for the express purpose of forcing [the accused] to remain incarcerated pending [trial].” *Richardson v. State*, 181 S.W.3d 756, 759 (Tex.App.—Waco 2005, no pet.). The record contains nothing to indicate that the trial court rendered its decision on this basis, especially since the court reduced bail from \$250,000 to \$200,000. Moreover, it does not appear that \$200,000 is an excessive bail amount for a murder charge. The intermediate appellate courts of this state have often concluded that bail ranging from \$200,000 to \$250,000.00 for a murder charge is not excessive. *See, e.g., Ex parte McBride*, No. 12-07-00241-CR, 2007 WL 4216370, *2-3 (Tex.App.—Tyler Nov. 30, 2007, no pet.) (mem.op.) (not designated for publication) (analyzing various appellate court decisions and concluding bail of \$250,000 for first degree murder charge was not excessive); *Richardson*, 181 S.W.3d at 759-60 (determining that bail of \$200,000 was not excessive for murder charge because offense appeared premeditated and appellant posed a flight risk and danger to her children); *Ex parte McFarland*, No. 04-03-00154-CR, 2003 WL 21658599, *3 (Tex.App.—San Antonio July 16, 2003, no pet.) (mem.op.) (not designated for publication) (determining

that bail of \$500,000.00 for murder charge was excessive and lowering bail to \$250,000.00); *Ex parte Lebron*, No. 04-97-00087-CR, 1997 WL 311488, *1-2 (Tex.App.—San Antonio June 11, 1997, no pet.) (not designated for publication) (determining that bail of \$250,000.00 for murder charge was not excessive because of the violent nature of the crime and appellant's criminal history and lack of ties to the community).

As for the third factor, Wilson is charged with murdering Robert Perales by stabbing him with a knife. Murder carries a potential maximum sentence of life imprisonment and a fine of up to \$10,000. Tex. Pen.Code Ann. §§ 12.32, 19.02(c) (Vernon 2003). The evidence shows Perales was stabbed four times and that the homicide was gang related. The record further suggests that Wilson did not kill Perales in an act of self defense. According to witness statements, Wilson and his associates provoked the fight that resulted in Perales's death. In addition, witnesses indicate that Perales was observed "getting jumped by five black males" prior to his death.

With respect to the fourth factor, the record shows that Wilson lacked any valuable property. Although the record indicates Wilson's mother attempted to exhaust all of her available resources to help her son make bail, it is unclear from the record whether Wilson's father attempted to exhaust all of his available resources as well.

Regarding the last factor, the record evidence suggests Wilson poses a threat to the community. Although Wilson appears to have no prior convictions for serious crimes, the State's evidence shows that Wilson is allegedly affiliated with a street gang. In addition, the record shows Wilson stabbed his victim at a community carnival in the presence of the general public.

Conclusion: We conclude that bail in the amount of \$200,000.00 was supported by the evidence. Consequently, we hold the trial court did not abuse its discretion under the circumstances presented. Wilson's appellate complaints are therefore overruled, and we affirm the trial court's order.

**SEARCH & SEIZURE—
ROUTINE ADMINISTRATIVE SEARCHES AT
ALTERNATIVE SCHOOL WERE CONSIDERED
PERMISSIBLE UNDER THE FOURTH AMENDMENT.**

¶ 09-2-2. **In the Matter of P.P.**, MEMORANDUM, No. 04-08-00634-CV, 2009 WL 331887 (Tex.App.—San Antonio, 2/11/09).

Facts: Officer Jaime Perales performs routine searches of students entering an alternative high school in Edgewood Independent School District. During these searches, students must take off their shoes, socks, and belt, and submit to a pat down. During one of these routine searches, Officer Perales felt a little bulge inside P

.P.'s right front pocket. The officer swiped his finger into P.P.'s pocket and pulled out a plastic baggy containing a green leafy substance. The substance was tested and came back positive for marihuana.

Held: Affirmed

Memorandum Opinion: Administrative searches at schools have been upheld in various circumstances. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995) (upholding random drug testing of athletes without any individualized suspicion); *Earls*, 536 U.S. at 838 (approving random drug testing for all students participating in extracurricular activities). In *In re O.E.*, No. 03-02-00516-CV, 2003 WL 22669014 (Tex.App.—Austin Nov. 13, 2003, no pet.), a student, O.E., was adjudicated for possession of marihuana in a drug free zone, just as in this case. The student was subjected to a routine search upon entering an alternative learning center. *Id.* at *1. Upon entering the school each day, all students had to pass through a metal detector, be patted down, empty their pockets onto a tray, remove their shoes, and place their shoes on a table for inspection. *Id.* at *2. Before attending the center, all students and their parents were required to attend an orientation session at which they were informed of school policies, including the search policy. *Id.* An officer found marihuana in O.E.'s shoe during the routine search. *Id.* at *1. O.E. appealed the denial of his motion to suppress, and our sister court held:

The search procedure was justified at its inception as a method of furthering the State's interest in maintaining a safe and disciplined learning environment in a setting at high risk for drugs and violence.... [The search procedure was] tailored to meet the needs of a school setting at higher risk than usual for disciplinary problems involving weapons and drugs. The intrusion on the students' more limited expectation of privacy is reasonable. Accordingly, the search was an administrative search of the sort permissible under the Fourth Amendment. *Id.* at *3-4.

The analysis and reasoning utilized in *In re OE* can be applied to the case at hand.

As was the case in *In re O.E.*, the record in this case established that prior to entering the alternative school, all students and parents are required to complete an orientation session which includes an overview of the school rules and policies, and the students are required to sign a contract which includes an agreement to be searched each day before entering the school. P.P. clearly had notice of the routine search requirement, which reduced his expectation of privacy. *See Shoemaker v. State*, 971 S.W.2d 178, 182 (Tex.App.—Beaumont 1998, no pet.) (noting that a student had no reasonable expectation of privacy in a locker when the student handbook warned

lockers could be searched any time there was reasonable cause to do so).

In light of a student's diminished expectation of privacy, the search procedure imposed on the students was relatively unobtrusive. As noted, administrative searches at schools have been upheld in various circumstances. In addition, the court in *In re O.E.* upheld a school search which mirrored the search conducted in the present case. *In re O.E.*, 2003 WL 22669014 at * 4. Consequently, we hold the search conducted on P.P. and his fellow students was not overly obtrusive.

Finally, the needs of the alternative school were met by the uniform search instituted for students entering the school. Officer Perales testified that the main objective of the search was the security of the students and staff at the school. Officer Perales stated that students were not allowed to come into the school with anything on them other than their uniform; everything else was provided for them. He also noted that the school employed a uniform search procedure such that every student was searched upon entering the school, no matter the circumstances. *See In re O.E.*, 2003 WL 22669014 at *4 (stating that "[s]uch uniformity serves as a safeguard against an abuse of discretion on the part of school officials in making a determination of which persons will be searched"). Accordingly, the search was an administrative search of the sort permissible under the Fourth Amendment. *See Earls*, 536 U.S. at 838; *Vernonia*, 515 U.S. at 664-65

Conclusion: The trial court did not abuse its discretion in denying P.P.'s motion to suppress all physical evidence and statements taken from him. Accordingly, we affirm the trial court's judgment.

**ORDERS AND JUDGEMENTS—
COURT OF APPEALS MAY MODIFY THE TRIAL
COURT'S ORDER MODIFYING DISPOSITION
TO COMMIT APPELLANT TO TYC TO RE-
FLECT THE TRIAL COURT'S ORAL PRONOUN-
CEMENT.**

¶ 09-2-3. **In the Matter of L.L., Jr.**, MEMORANDUM, No. 07-08-0241-CV, 2009 WL 322897 (Tex.App.—Amarillo, 2/10/09).

Facts: In October 2006, appellant was found to be a child engaged in delinquent conduct on his plea of "true" to an allegation he committed burglary of a habitation. He was placed on probation until his eighteenth birthday. The State filed two motions to modify the disposition in 2007. The first was dismissed. After a hearing held in August 2007 as to the second, appellant was placed in a rehabilitation program outside of his home. [FN1] In March 2008, the State filed another motion to modify the disposition. A hearing was held in May 2008 wherein

appellant plead "not true" to the allegations. The court found the allegations to be true and modified the disposition to commit appellant to TYC.

FN1. The record reflects appellant successfully completed this program and was released on December 20, 2007.

The oral pronouncements made by the trial court regarding its decision included the pronouncement "that [appellant] cannot be provided the quality of care and level of support and supervision that [he] need[s] to meet the conditions of probation." But this pronouncement was not included in the written judgment, contrary to the statutory requirement in section 54.05(m)(1)(C) of the Family Code. Appellant timely appealed.

Held: Affirmed

Memorandum Opinion: Via his sole point of error, appellant complains the trial court erred in failing to include the above-noted statutorily-directed finding in the written judgment. Because appellant complains only of an omission in the written judgment and not the trial court's decision to place appellant in TYC, we will address only the evidence pertinent to the omitted finding.

Section 54.05(m)(1)(C) (Vernon 2007) provides:

- (m) If the court places the child on probation outside the child's home or commits the child to the Texas Youth Commission, the court:
 - (1) shall include in the court's order a determination that:
 - (C) 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....

This Court has authority to correct, modify and reform a judgment to make the record speak the truth when the matter has been called to its attention and it has the necessary information to do so. *In re K.B.*, 106 S.W.3d 913, 916 (Tex.App.—Dallas 2003, no pet.); *In re J.K.N.*, 115 S.W.3d 166, 174 (Tex.App.—Fort Worth 2003, no pet.) (court is authorized to modify juvenile court's judgment); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex.App.—Dallas 1991, pet. ref'd). This power extends to reforming, correcting or modifying the written judgment to include omitted findings. *See, e.g., French v. State*, 830 S.W.2d 607, 609 (Tex.Crim.App.1992) (court of appeals properly granted State's motion to reform trial court's judgment to include the jury's affirmative deadly weapon finding); *Cobb v. State*, 95 S.W.3d 664, 668 (Tex.App.—Houston [1st Dist.] 2002, no pet.) (court's power includes adding a deadly-weapon finding to a judgment that erroneously omitted a fact-finder's deadly-weapon finding); *Asberry*, 813 S.W.2d at 529-31 (adding

deadly-weapon finding). The authority of the appellate courts to reform judgments is not limited to those situations involving mistakes of a clerical nature. *Bigley v. State*, 865 S.W.2d 26, 27 (Tex.Crim.App.1993). The necessary information is provided in the record here. Accordingly, we are authorized to modify the trial court's judgment. Tex.R.App. P. 43.2(b).

At the close of the May 2008 hearing, the trial court stated the following findings on the record:

This court finds that you are a juvenile who is in need of rehabilitation. I further fined [sic] that the public needs protection from you. I find that it would be in the best interest of yourself that you be placed outside your home, that you cannot be provided the quality of care and level of support and supervision that you need to meet the conditions of probation; that there have been reasonable efforts made by this Court to eliminate the need for your removal and make it possible for you to return to your home.

I particularly take notice of the fact that this is the second time I have found that you have violated your probation. I gave you a [break] once before; so therefore, it will be the order of the Court that you shall be committed to the Texas Youth Commission where they're authorized by law to keep you until your 21st birthday.

However, as both parties agree, the court's written order committing appellant to TYC failed to include the requisite determination 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." Tex. Fam.Code Ann. § 54.05 (m)(1)(C) (Vernon 2007).

Appellant argues this omission requires the reversal of the judgment and remand of the case. Appellant relies on the decision in *In re J.T.H.*, 779 S.W.2d 954 (Tex.App.—Austin 1989, no pet.) for this proposition. There, the trial court stated in its order that it was in the child's best interest to be placed outside the home but it made no finding whether efforts were made to keep the child at home. The court concluded that by omitting its determination concerning efforts to keep appellant in his home, the trial court failed to comply with section 54.04(g). As a result, the appellate court reversed the trial court's order of disposition and remanded the cause. As noted by the State here, however, the *J.T.H.* opinion does not clearly indicate whether the trial court made oral findings with regard to the information omitted from the order. Because the trial court did so here, we find *In re J.T.H.* distinguishable.

Not only did the trial court make the finding that appellant could not be provided the quality of care and level of support and supervision in his home that he needs to meet the conditions of probation, the evidence of record supports the finding. The trial judge who made

the finding presided over the prior proceedings involving appellant and had repeatedly found appellant could not be provided the quality of care and level of support and supervision needed to meet the conditions of his probation at home. [FN2] Evidence supporting the trial court's finding was presented at each of the proceedings. The evidence presented showed appellant's mother was incarcerated for transporting illegal drugs across the border from the beginning of the case until after appellant was committed to TYC. Appellant's father failed to appear at one modification hearing despite being properly served notice. Appellant's father was out of the country for at least one week, leaving his eight children without adult supervision. While in his father's custody, appellant regularly smoked marijuana and crack cocaine. Appellant committed additional offenses immediately after being released from a rehabilitation program and from county jail.

FN2. The social case history generated by appellant's probation officer admitted at the hearing included a statement that "[t]here also continues to be concerns with [appellant's] home environment and lack of parental supervision."

We modify the trial court's order modifying disposition to commit appellant to TYC to reflect the trial court's oral pronouncement 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." Tex. Fam.Code Ann. § 54.05 (m)(1)(C) (Vernon 2007). *See* Tex.R.App. P. 43.2(b); *Bigley*, 865 S.W.2d at 27-28; *Asberry*, 813 S.W.2d at 529-30. [FN3]

FN3. *See Thompson v. State*, 108 S.W.3d 287, 290 (Tex.Crim.App.2003) (when oral pronouncement of a sentence in open court and the written judgment conflict, the oral pronouncement controls); *Smith v. State*, 176 S.W.3d 907, 920 (Tex.App.—Dallas 2005, no pet.). *See also In re C.L.W.*, Nos. 05-05-00754-CV, 05-05-00776-CV, No. 05-05-00777- CV, 05-05-00778-CV, 05-05-0079-CV, 2006 WL 321959 (Tex.App.—Dallas Feb. 13, 2006, no pet.) (mem. op., not designated for publication) (modifying trial court's adjudication order to reflect appellant committed to TYC despite conflict between oral pronouncement and disposition order).

Conclusion: As modified, we affirm the trial court's judgment.

**MODIFICATION OF DISPOSITION—
EVIDENCE WAS SUFFICIENT TO JUSTIFY THE
EXERCISE OF THE TRIAL COURT'S DISCRE-
TION IN MODIFYING DISPOSITION.**

¶ 09-2-4. **In the Matter of J.M.**, MEMORANDUM, No. 07-08-0215-CV, 2009 WL 322895 (Tex.App.—Amarillo, 2/10/09).

Facts: On November 26, 2007, when J.M. was sixteen, he entered pleas of true to two allegations: (1) on March 16, 2007, he caused bodily injury to his mother, E.M., by pushing her with his hands; and (2) on October 23, 2007, he intentionally obstructed a person whom he knew was a peace officer from effecting his arrest by using force against the peace officer. After a stipulation of evidence was admitted during the adjudication phase of the hearing, the trial court found that J.M. had engaged in delinquent conduct and was in need of supervision and rehabilitation. After the disposition phase of the hearing, J.M. was placed on probation for a period of one year, subject to certain terms and conditions, including a term that he "commit no offense against the laws of the State of Texas or any other state or of the United States or penal ordinances of a subdivision."

On April 18, 2008, the State filed a petition to modify J.M.'s disposition alleging that on March 17, 2008, he violated the terms and conditions of probation by causing bodily injury to his mother, E.M., by striking her with a closed hand. After receiving evidence at the modification hearing, the trial court found that J.M. had violated the terms and conditions as alleged by the State and it entered an order modifying J.M.'s juvenile disposition. The court announced that by committing J.M. to the Garza County Regional Juvenile Facility, a boot camp facility, it was not only protecting him, but also the public.

By issues one and two, J.M. maintains the evidence is legally and factually insufficient to show that he violated the terms and conditions of probation by causing bodily injury to E.M. by striking her with a closed hand. By issues three, four, five, six, and seven, J.M. contends the evidence is legally and factually insufficient to show that reasonable efforts were made to prevent his removal from the home, placement outside his home was not in his best interest, and the trial court's decision was arbitrary and unreasonable.

Held: Affirmed

Memorandum Opinion: The trial court's modification order recites:

[t]he Court finds that it is in the best interest of the child, [J.M.], to be placed outside his home; that all reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to his home, and the child, in the child's home, cannot be provided the quality of care and the level of support and supervision that the child needs to meet the conditions of probation.

When questioned during cross-examination what effort had been made to prevent or eliminate J.M.'s removal from his home, juvenile probation officer, Ken Brock, testified that J.M. was offered every program

available in Vernon. In fact, J.M. had previously participated in and completed two separate counseling programs. Brock also testified that placement with other relatives was considered but that J.M.'s mother claimed no other family members would take him.

Brock testified at the adjudication and disposition hearing that several years earlier, J.M. had assaulted a peace officer resulting in a referral. At the conclusion of that hearing, the trial court expressed to J.M. its concern for his lack of respect for authority and "the fact you've gotten in fights with police officers on two different occasions." At the modification hearing, the court had sufficient evidence before it that J.M.'s best interests would be served by committing him to the boot camp program at the Garza County Regional Juvenile Facility.

Although the evidence established that J.M.'s mother and sister were not afraid of him and that no other acts of violence occurred following the March 17, 2008 episode resulting in the State's petition to modify disposition, there was sufficient evidence to justify the exercise of the trial court's discretion in modifying J.M.'s disposition.

Conclusion: We conclude the trial court's decision was not arbitrary and unreasonable and thus, did not amount to an abuse of discretion. Issues three, four, five, six, and seven are overruled. Having overruled J.M.'s seven issues, the trial court's order modifying his disposition is affirmed.

**DISPOSITION PROCEEDINGS—
APPELLANT WAS NOT DENIED THE RIGHT TO
MEANINGFUL REVIEW EVEN THOUGH THE
RECORD FAILED TO SHOW EVIDENCE THE
TRIAL COURT CONSIDERED AT THE DISPOSI-
TION HEARING.**

¶ 09-2-5. **In the Matter of J.L.H.**, MEMORANDUM, No. 07-11-00973 JV, 2009 WL 201354 (Tex.App.—Waco, 1/28/09).

Facts: A juvenile, was adjudicated delinquent in Harris County, Texas based on a charge of assault on a public servant. TEX. FAM.CODE ANN. § 54.03 (Vernon Pamp.2008); TEX. PENAL CODE ANN. § 22.01(a), (b)(1) (Vernon Supp.2008). The case was transferred for a disposition hearing to the child's home county of Robertson County where the child was being detained on another offense. After a hearing, the trial court committed J.L.H. to the Texas Youth Commission. We affirm. INEFFECTIVE ASSISTANCE OF COUNSEL J.L.H. contends in her first issue that her counsel at the disposition hearing was ineffective. She points to a variety of "failures" by counsel to support her claim. A juvenile has the right to effective assistance of counsel. See *In re Gault*, 387 U.S. 1, 41, 87 S.Ct. 1428, 18 L.Ed.2d 527

(1967). This record, however, is undeveloped and cannot adequately reflect the motives behind counsel's alleged failures to take certain actions. See *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex.Crim.App.2005). Counsel should ordinarily be afforded an opportunity to explain his actions. *Id.* Absent such an opportunity, an appellate court should not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Id.* (citing *Garcia v. State*, 57 S.W.3d 436, 440 (Tex.Crim.App.2001)). No. 10-08-00126-CV Court of Appeals of Texas, Waco.

The disposition hearing was conducted in an informal manner. Neither J.L.H.'s counsel nor her ad litem objected to the informality of the proceeding. Based upon this record, we cannot conclude J.L.H. established that counsel's performance was "so outrageous" that it fell below the objective standard of reasonableness, and thus, satisfied the first prong of *Strickland*. See *id.*; see also *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Her first issue is overruled.

In her second issue, J.L.H. argues she was denied the right to a meaningful review on appeal because the record fails to show what evidence the trial court considered at the disposition hearing. Specifically, J.L.H. contends the documents named by the State that it "offered" to the court do not appear in the clerk's or reporter's records.

Held: Affirmed

Memorandum Opinion: Section 54.04(b) of the Texas Family Code allows the court to consider "written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses." Tex. Fam.Code Ann. § 54.04(b) (Vernon Pamp.2008). J.L.H. relies on *In re M.S.* as support for the proposition that "without a full record, appellant has been denied the right to a meaningful review of the trial court's order." Appellant's brief at 12; *In re M.S.*, 940 S.W.2d 789 (Tex.App.—Austin 1997, no pet.). But *M.S.* is distinguishable. In that case, the appellate court was contemplating whether to allow the late filing of a statement of facts when the rules of appellate procedure did not provide for such in the context of a civil appeal. *In re M.S.*, 940 S.W.2d at 790-791. That is not the scenario presented here. As stated earlier, this was an informal hearing, about which no one complained at trial or has complained on appeal. The State offered the social history report, which it believed was in the court's file, any documents from the detention center, any testimony that had already been presented to the court, the offense reports from the pending charge in Robertson County, and "everything about [J.L.H.]." Granted, there are no documents from the detention center and no offense reports in the record. But contrary to J.L.H.'s assertion, the record does contain some of what the State offered. In the

clerk's record is a Juvenile Probation Report which appears to have been prepared by the Harris County Juvenile Probation Department. There is also a two-page report with a cover letter by a juvenile probation officer for Falls, Milam, and Robertson Counties. Both reports contain information, such as family background, a criminal history, and a recommendation by the probation department, which the trial court might need in making a disposition determination. Thus, either of these reports could be the "social history report" [FN1] mentioned by the State. Additionally, the reporter's record contains testimony of the juvenile probation officer, recollections by the trial court as to what had happened earlier in J.L.H.'s case, and statements by the State, counsel for J.L.H., and the ad litem for J.L.H. We find J.L.H. has a full record available for review on appeal. J.L.H. further complains that the trial court's Dispositional Order of Commitment to the Texas Youth Commission lists two exhibits as support for the required findings which are not actually attached as stated in the order. See Tex. Fam.Code Ann. § 54.04(i) (Vernon Pamp.2008). The trial court need not state any reasons or provide support for why it made the required findings. See *In re M.S.*, 940 S.W.2d at 792.

Conclusion: Therefore, the fact that documentation mentioned is missing from the order does not mean there is no ability to have a meaningful review of her appeal. Because J.L.H. has a full record on appeal, she has not been deprived of a meaningful appellate review. Her second issue is overruled.

APPEALS—
TRIAL COURT FAILED TO PRESERVE HIS TCCP CHAPTER 14 COMPLAINT FOR APPEAL WHERE TCCP CHAPTER 14 WAS NEVER MENTIONED IN OBJECTION TO WARRANTLESS ENTRY OF APARTMENT.

¶ 09-2-6A. **Rangel v. State**, MEMORANDUM, No. 10-07-00247-CR, 2009 WL 540780 (Tex.App.—Waco, 3/4/09).

Facts: A jury found Jerry Rangel guilty of aggravated sexual assault and assessed punishment at life in prison. Asserting four issues, Rangel appeals.

Rangel's first issue contends that the trial court abused its discretion by admitting evidence recovered during an unlawful warrantless arrest. Initially, we address the State's contention that Rangel failed to preserve part of this complaint for appellate review. As the State began to offer evidence about the apartment in which Rangel was arrested, Rangel's trial counsel objected based on the police officer's warrantless entry into the apartment and the warrantless arrest of Rangel. The trial court overruled that objection. Trial counsel then stated the grounds for his objection: "It's based on the Fourth

and Fourteenth Amendments to the United States Constitution; Article I, Section 9 and 10 of the Texas Constitution; and Article 38.23 of the Texas Code of Criminal Procedure."

Held: Affirmed

Memorandum Opinion: The Court of Criminal Appeals recently wrote:

In order to preserve an issue for appellate review, a timely and specific objection is required. Tex.R.App. P. 33.1(a)(1)(A); Tex.R. Evid. 103(a)(1); *Gillenwaters v. State*, 205 S.W.3d 534, 537 (Tex.Crim.App.2006). A specific objection is necessary to inform the trial judge of the issue and basis of the objection, and to allow the judge a chance to rule on the issue at hand. *Neal v. State*, 150 S.W.3d 169, 178 (Tex.Crim.App.2004), citing *Zillender v. State*, 557 S.W.2d 515, 517 (Tex.Crim.App.1977). As we stated in *Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App.1992), "all the party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." Beyond this, there are no specific words or technical considerations required for an objection to ensure that the issue will be preserved for appeal. *Id.* If the correct ground of exclusion was apparent to the judge and opposing counsel, no waiver results from a "general or imprecise objection." *Id.* at 908, citing *Zillender*, 557 S.W.2d at 517.

Layton v. State, --- S.W.3d ----, ----, 2009 WL 250080, at *2-3 (Tex.Crim.App. Feb. 4, 2009).

Chapter 14 of the Code of Criminal Procedure governs warrantless arrests in Texas. See Tex.Code Crim. Proc. Ann. arts. 14.03, 14.05 (Vernon 2005 & Supp.2008). Rangel's trial counsel did not specifically mention Chapter 14 in his warrantless-arrest objection; he mentioned only state and federal constitutional provisions and article 38.23, Texas' statutory exclusionary rule. *Id.* art. 38.23 (Vernon 2005). In a nearly identical case involving a written motion to suppress, the Court of Criminal Appeals held that the defendant's suppression motion, which cited the same constitutional provisions and article 38.23, failed to alert the trial court or opposing counsel that defense counsel was invoking Chapter

14 and that the defendant thus failed to preserve his Chapter 14 complaint for appeal. *Buchanan v. State*, 207 S.W.3d 772 (Tex.Crim.App.2006). Applying *Buchanan*, we hold that it was not obvious to the trial court that Rangel was also raising a Chapter 14 argument and that Rangel did not preserve it for appellate review. See *id.* We therefore will only address his constitutional complaint on the warrantless arrest.

We review a trial court's admission or exclusion of evidence for abuse of discretion. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex.Crim.App.2005). We review a suppression ruling under an abuse-of-discretion standard. See *Montanez v. State*, 195 S.W.3d 101, 108 (Tex.Crim.App.2006). We afford almost total deference to the trial court's determination of historical facts but review de novo its ruling on mixed questions of law and fact that do not turn on the credibility and demeanor of witnesses. *Neal v. State*, 256 S.W.3d 264, 281 (Tex.Crim.App. 2008). If the trial court does not make explicit findings of historical facts, we review the evidence in the light most favorable to the trial court's ruling. *Walter v. State*, 28 S.W.3d 538, 540 (Tex.Crim.App.2000). Because in this case the trial court did not make explicit findings, we review the evidence in the light most favorable to the trial court's ruling.

"Neither the United States Constitution, nor Article I, Section 9 contains a requirement that an arrest be authorized by an arrest warrant. An arrest that is otherwise reasonable will not be found to be in violation of either provision because it was not authorized by an arrest warrant." *Buchanan v. State*, 175 S.W.3d 868, 874 (Tex.App.—Texarkana 2005), *rev'd on other grounds*, 207 S.W.3d 772 (Tex.Crim.App.2006) (citing *Hulit v. State*, 982 S.W.2d 431, 436 (Tex.Crim.App.1998)).

Reviewing the evidence in the light most favorable to the trial court's ruling, we hold that Rangel's warrantless arrest was reasonable. Inez, the grandmother of 13-month-old E.A. and the person paying the apartment's rent, found her in the early afternoon on a bed naked, unconscious, and bleeding vaginally. Rangel, who stayed overnight in the apartment a couple of nights a week with E.A.'s mother, was asleep on the bedroom floor with his belt buckle undone after being out all night with E.A.'s mother, whom Inez had taken to work early that morning. Inez relayed that information to her employer, who relayed it to the police just before they entered the apartment and found Rangel still asleep. We overrule Rangel's first issue.

Conclusion: We affirm the trial court's judgment.

EVIDENCE—

WHERE THE CUSTODIAN OF THE 'PEN PACKET' IS NOT THE CUSTODIAN OF THE ORIGINAL JUDGMENT, AND CANNOT ATTEST TO THE CORRECTNESS OF THE ORIGINAL DOCUMENTS, AND THE RECORDS ARE NOT SELF-AUTHENTICATING, THE DOCUMENTS ARE NOT ADMISSIBLE.

¶ 09-2-6B. **Rangel v. State**, MEMORANDUM, No. 10-07-00247-CR, 2009 WL 540780 (Tex.App.—Waco, 3/4/09).

Facts: A jury found Jerry Rangel guilty of aggravated sexual assault and assessed punishment at life in prison. Asserting four issues, Rangel appeals. We will affirm.

In his fourth and final issue, Rangel complains that, in the punishment phase, the trial court abused its discretion by admitting improperly authenticated evidence of Rangel's juvenile criminal history. The evidence at issue is a 56-page packet from the Texas Youth Commission (TYC) accompanied by a "business records" affidavit (from a TYC records custodian) comporting with Rule of Evidence 902(10). The documents are approximately twenty juvenile court records from Burleson County and Washington County, only two of which are certified. After Rangel's objection was overruled, the State was allowed to summarize the records for the jury. The prosecutor noted that the records revealed Rangel's juvenile adjudications for vehicle burglary, two criminal mischief offenses, two home burglaries, and penetration of the female sexual organ of a child younger than 14.

The affiant states that the "records are kept by TYC in the regular course of business, and it was the regular course of business of TYC for an employee or representative of TYC with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original." The TYC custodian, however, is not the custodian of the original court documents; she cannot attest to the authenticity of the original court documents, but only that the TYC packet contains correct copies of documents that TYC received from other sources. *See Flowers v. State*, 220 S.W.3d 919, 922 n. 14 (Tex.Crim.App.2007) ("The compiler and custodian of the 'pen packet' is not the custodian of the original judgment or data compilation relating to a defendant's prior conviction. The pen packet custodian cannot attest to the correctness of the original documents, he can attest only that the pen packet contains correct copies of documents that he received from some other source.").

Held: Affirmed.

Memorandum Opinion: The TYC's self-authenticating business record affidavit does not authenticate the court records, and we disagree with *In re C.P.*, No. 14-98-01094-CV, 2000 Tex.App. LEXIS 3042, at *5 (Tex.App.—Houston [14th Dist.] 2000, no pet.) (not designated for publication), relied on by the State, to the extent that case is support for the contrary. And we agree with the State's concession in its brief (State's Brief at 32, n. 18) that the uncertified court records are not self-authenticating under Rule of Evidence 902(4) and that the trial court erroneously admitted the uncertified court records under that rule.

We thus proceed to a harm analysis on the improperly admitted uncertified records. Rangel says that he was harmed because he received the maximum sentence available when he was a first-time felon eligible for community supervision and that the erroneously admitted juvenile records influenced the jury's sentence.

Error in admitting evidence is nonconstitutional error governed by Texas Rule of Appellate Procedure 44.2(b). Tex.R.App. P. 44.2(b); Tex.R. Evid. 103(a); *Solomon v. State*, 49 S.W.3d 356, 365 (Tex.Crim.App. 2001). Rule 44.2(b) provides that a nonconstitutional error "that does not affect substantial rights must be disregarded." Substantial rights are not affected by the erroneous admission of evidence if, after examining the record as a whole, we have fair assurance that the error did not influence the jury, or had but a slight effect. *Motilla v. State*, 78 S.W.3d 352, 356 (Tex.Crim.App. 2002). In conducting a harm analysis under Rule 44.2(b), we decide "whether the error had a substantial or injurious effect on the jury verdict." *Morales v. State*, 32 S.W.3d 866, 867 (Tex.Crim.App. 2000). We "consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the error and how it might be considered in connection with other evidence in the case[,] ... the jury instruction given by the trial judge, the State's theory and any defensive theories, closing arguments, and voir dire if material to appellant's claim." *Id.* We also consider overwhelming evidence of guilt, but that is only one factor in our harm analysis. *Motilla*, 78 S.W.3d at 356- 58.

We first consider the offense. The jury heard that Inez found E.A. on the bed, bleeding and unconscious, with Rangel asleep on the floor with his belt unbuckled, zipper down, and the front of his pants wet. Blood on Rangel's pants belonged to E.A., and DNA on a diaper suspiciously discovered the next day in the same bedroom belonged to both E.A. and Rangel. E.A. suffered severe injuries, including multiple bruises and abrasions, multiple skull fractures, a fractured femur, and a vaginal laceration. In his post-arrest statement to Detective Loup, Rangel admitted to drinking beer and ingesting cocaine the night before. At the time of the offense, Rangel was out on bond for the aggravated assault of another girlfriend, who testified that Rangel grabbed her by the

neck until she almost passed out, threatened to kill her, and then put a knife to her neck.

Another officer testified that Rangel was a sex offender, had failed to register after moving, and charges for failure to register had been filed. Rangel's father testified that Rangel had gotten in trouble at age 13 and was sent to TYC until he was 18. An acquaintance of Rangel testified that Rangel had admitted to committing a house and a vehicle burglary and to being a registered sex offender as a juvenile.

The State's theory at punishment was that the facts of the offense alone justified a life sentence, although it did mention Rangel's juvenile history in the punishment phase during its opening and closing.

Conclusion: After examining the circumstances of the offense, the evidence relating to the other pending charges against Rangel, and the similar properly admitted testimony about Rangel's juvenile criminal history, we have a fair assurance that the erroneous admission of the uncertified juvenile records did not influence the jury or had but a slight effect and was therefore harmless. *See, e.g., Petruccelli v. State*, 174 S.W.3d 761, 769 (Tex. App.—Waco 2005, pet. ref'd). Rangel's fourth issue is overruled.

We affirm the trial court's judgment.

APPEALS—

A COMPLAINT ABOUT FACTUAL SUFFICIENCY NEED NOT BE PRESENTED IN A MOTION FOR NEW TRIAL IN A JUVENILE ADJUDICATION OF DELINQUENCY TO PRESERVE IT FOR APPEAL.

¶ 09-2-7. **In the Matter of C.J.**, ___ S.W.3d ___, 2009 WL 276827 (Tex.App.—Houston [1st Dist.], 2/5/09).

Facts: The State filed a petition alleging that C.J., a juvenile, had engaged in delinquent conduct by striking another boy with his hand. C.J. pleaded not true to the allegation. The trial court found the allegation true, and it placed C.J. on probation, in the custody of his mother, until his eighteenth birthday. C.J. contends that the evidence is legally and factually insufficient to support the trial court's finding of delinquency. C.J. did not challenge the legal or factual sufficiency of the evidence in his motion for new trial.

Held: Affirmed

Opinion: The rules of civil procedure govern juvenile delinquency cases. TEX. FAM.CODE ANN. § 51.17(a) (Vernon 1991); *In re M.R.*, 858 S.W.2d 365, 365 (Tex. 1993), cert. denied, 510 U.S. 1078, 114 S.Ct. 894 (1994); *In re S.D.W.*, 811 S.W.2d 739, 749 (Tex.App.—Houston [1st Dist.] 1991, no pet.). Preservation Rule 324(b) pro-

vides that to preserve a factual insufficiency point of error, the party seeking relief must file a motion for new trial complaining of the insufficiency. S.D.W., 811 S.W.2d at 739; TEX.R. CIV. P. 324(b) (1998).

We hold that C.J. need not have raised his factual sufficiency complaint in the trial court to preserve it for our review. Whether or not a motion for new trial is necessary to preserve factual sufficiency review is somewhat contested. Based on *In re M.R.*, many courts have found that factual sufficiency must be alleged in the motion for new trial to preserve the error. *M.R.*, 858 S.W.2d at 366. However, the Supreme Court decided *M.R.* before the advent of factual sufficiency review in criminal cases. *In Clewis v. State*, decided after *M.R.*, the Court of Criminal Appeals held that a criminal defendant has a right to factual sufficiency review of a conviction. *Clewis v. State*, 922 S.W.2d 126, 136 (Tex. Crim.App.1996). Thereafter, the Court of Criminal Appeals further held that an appellate claim concerning the sufficiency of the evidence did not need to be raised in a motion for directed verdict or motion for new trial before it could be raised on appeal. *Moff v. State*, 131 S.W.3d 485, 488-89 (Tex.Crim.App.2004). Thus, our sister court has determined that, because the juvenile justice system is more closely related to the adult criminal justice system than the civil system, juveniles should have the same right to appeal factual sufficiency now that the Court of Criminal Appeals has granted that right to adults, despite the fact that juvenile appeals are determined under civil law. *In re J.L.H.*, 58 S.W.3d 242, 245-46 (Tex.App.—El Paso 2001, no pet.).

We use the criminal standard of review in juvenile cases, despite the fact that they are technically civil cases. *See In re J.B.M.*, 157 S.W.3d 823, 826 (Tex.App.—Fort Worth 2005, no pet.) (holding that the criminal standard of review is appropriate for a legal sufficiency challenge). Recognizing the underlying constitutional principals at play, the Texas Supreme Court has held that juveniles don't need to first raise in the trial court the complaint that the trial court failed to give adequate admonishments because juvenile cases are "quasi-criminal." *In re C.O.S.*, 988 S.W.2d 760, 763 (Tex. 1999). Following *Clewis* and *Moff*, we hold that because of the quasi-criminal nature of juvenile cases, a complaint about factual sufficiency need not be presented in a motion for new trial in a juvenile adjudication of delinquency to preserve it for appeal. *See Clewis*, 922 S.W.2d at 136; *Moff*, 131 S.W.3d at 488-89. Thus, we consider both the legal and factual sufficiency of the evidence.

The only evidence presented at trial was the testimony of T.J., Officer Jackson, and C.J. C.J.'s testimony that he acted in self-defense is the evidence that most undermines the guilty verdict. However, viewing all of the evidence in a neutral light, we cannot say that the verdict was against the great weight and preponderance of the evidence, clearly wrong, or manifestly unjust. Even with C.J.'s testimony that he acted in self-defense,

T.J. and Officer Jackson's testimony was factually sufficient to support the trial court's verdict.

Conclusion: We hold that C.J. need not have challenged the factual sufficiency of the evidence in the trial court to raise that challenge on appeal, and that legally and factually sufficient evidence exists to support the finding of delinquency based on assault. We therefore affirm.

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**DETERMINATE SENTENCE ACT—
JURY CAN NOT CONSIDER INDETERMINATE
SENTENCE IN A DETERMINATE SENTENCE
CASE.**

¶ 09-2-8. **In the Matter of J.B.L.**, MEMORANDUM, 2009 WL 545573 (Tex.App.—Eastland, 3/5/09).

Facts: The State filed a petition for determinate sentencing alleging that J.B.L. committed aggravated robbery by threatening Coats with a deadly weapon while in the course of committing a theft. The grand jury certified the petition. J.B.L. pleaded true to the petition and elected to go to a jury for disposition. After a two-day trial, the jury assessed disposition at thirty years confinement.

Issue on Appeal

J.B.L. argues in one issue that the determinate sentencing statute, as applied in this case, violates the Due Process Clause of the Fifth Amendment of the United States Constitution by increasing his punishment without allowing him to present the enhancement to the jury for consideration beyond a reasonable doubt.

Held: Affirmed

Memorandum Opinion: When a juvenile commits a felony, the juvenile court may impose either an indeterminate sentence or a determinate sentence. Section 54.04. If a juvenile commits an aggravated robbery, under an indeterminate sentence, he would spend at least one year confined in the Texas Youth Commission, and the Texas Youth Commission would be required to release him no later than his nineteenth birthday. Section 54.04(d)(2); Tex. Hum. Res.Code Ann. § 61.084(e) (Vernon Supp.2008). [FN4] However, when a juvenile is charged with aggravated robbery, the State also has the option to file a petition for determinate sentencing with the grand jury. Tex. Fam.Code Ann. § 53.045(a)(7) (Vernon 2008). If the grand jury certifies the petition for determinate sentencing, a jury may sentence the juvenile to commitment to the Texas Youth Commission with a possible transfer to the Texas Department of Criminal Justice for a term not to exceed forty years. Section 54.04(d)(3). The following steps must be taken in order for a court to impose a determinate sentence: (1) the State's petition must allege that the juvenile committed one of the crimes enumerated in Tex. Fam.Code Ann. §

53.045(a) (Vernon 2008); (2) the State must refer the petition to the grand jury; (3) the grand jury must approve the petition by a vote of at least nine jurors; (4) the approval by the grand jury must be certified to the court; and (5) the certification must be entered in the record. Tex. Fam.Code Ann. §§ 53.045, 54.04(d)(3) (Vernon 2008); *In re S.J.*, 977 S.W.2d 147, 149 (Tex.App.—San Antonio 1998, no pet.).

FN4. J.B.L. argues in his brief that he may be confined to the Texas Youth Commission until his twenty-first birthday; however, in 2007, the 80th legislature amended the statute for the Texas Youth Commission to terminate its control once the juvenile turns nineteen instead of twenty-one. This amended statute became effective June 8, 2007. J.B.L. was sentenced to the Texas Youth Commission on June 13, 2007. *See* Act of June 8, 2007, 80th Leg., R.S., ch. 263, §§ 53, 78, 2007 Tex. Sess. Law Serv. 421, 449 (Vernon) (codified in Tex. Hum. Res.Code Ann. § 61.084(e) (Vernon Supp.2008)).

A juvenile who receives a determinate sentence is initially committed to the Texas Youth Commission's custody. Section 54.04(d)(3). However, when the juvenile turns sixteen but before he turns nineteen, the Texas Youth Commission may refer the juvenile to the committing court for a transfer hearing. Tex. Hum. Res.Code Ann. § 61.079(a) (Vernon Supp.2008). At the transfer hearing, the committing court has the authority to (1) return the juvenile to the Texas Youth Commission with approval for the release of the juvenile under supervision, (2) return the juvenile to the Texas Youth Commission without the approval for the release of the juvenile under supervision, or (3) order the transfer of the juvenile to the custody of the Texas Department of Criminal Justice, Institutional Division. Tex. Fam.Code Ann. § 54.11(i), (j) (Vernon 2008). An appeal may be taken from an order transferring the juvenile to the Texas Department of Criminal Justice, Institutional Division. Tex. Fam.Code Ann. § 56.01(c)(2) (Vernon 2008). If the Texas Youth Commission does not refer the juvenile to the committing court for a transfer hearing before his nineteenth birthday, the Commission must either discharge the juvenile from its custody or transfer the juvenile to the Texas Department of Criminal Justice, Division of Pardons and Paroles, to serve out the juvenile's sentence on parole. Tex. Hum. Res.Code Ann. § 61.084 (e), (g) (Vernon Supp.2008).

J.B.L. argues that his due process rights were violated because, rather than having a jury determine beyond a reasonable doubt whether his punishment should be increased from an indeterminate sentence to a determinate sentence, the grand jury certified the petition for determinate sentencing based upon probable cause. J.B.L. argues that the jury should have had an opportunity to consider an indeterminate sentence. At the disposition hearing, the probation officer, Amechi Esekody, testified on direct examination that her recommendation was that J.B.L. be committed to the Texas Youth Com-

mission for an indeterminate sentence. J.B.L. cross-examined Esekody as to why he would be a candidate for indeterminate sentencing.

- Q. Is it safe for this jury to conclude, then, that [J.B.L.]'s behaviors are more associated with child-like behaviors than adult behaviors and that's why you're recommending he go to the youth commission for an indeterminate time period? Can we draw that conclusion or not?
- A. It would be difficult to draw that conclusion based on the fact of his extensive record in the juvenile justice system.

On redirect, the State clarified with the witness that it was seeking a determinate sentence. J.B.L. objected to that line of questioning, stating that the jury should have the option of sentencing him to an indeterminate sentence as a lesser included type of sentence. The trial court overruled the objection. J.B.L. did not present an instruction for an indeterminate sentence in the charge.

The jury was instructed that, in order to assess a disposition, it must find that the juvenile is in need of rehabilitation or that the protection of the public requires disposition be made. The jury was charged that the disposition for aggravated robbery was commitment to the Texas Youth Commission, with a possible transfer to the Texas Department of Criminal Justice, Institutional Division, or the Division of Pardons and Paroles for no more than forty years. The jury was instructed that, if it assessed the disposition for a term of not more than ten years, then it could place the juvenile on probation as an alternative to commitment to the Texas Youth Commission. The jury was also instructed that it could not have a disposition placing the juvenile on probation outside the juvenile's home unless it found beyond a reasonable doubt that the juvenile's home did not provide the quality of care and level of support and supervision that the juvenile needed to meet the conditions of probation.

The jury found beyond a reasonable doubt that J.B.L. was in need of rehabilitation or that the protection of the public required disposition be made. The jury assessed punishment at thirty years confinement and, therefore, did not consider probation for J.B.L.

On appeal, J.B.L. relies upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the appellant fired several .22 caliber bullets into the home of an African-American family that had moved into a previously all-white neighborhood. *Id.* at 469. Apprendi admitted to the shooting and stated that he did not want the family in the neighborhood because they were black. *Id.* He was charged with twenty-three different counts alleging shootings on four different dates and the unlawful possession of various weapons. *Id.* None of the counts referred to the hate crime statute or that Apprendi acted for a racially biased purpose. Apprendi entered into a plea bargain agreement in which he pleaded guilty to two

counts of second degree possession of a firearm for an unlawful purpose and one count of the third degree offense of unlawful possession of an antipersonnel bomb. *Id.* at 469-70. The State agreed to drop the remaining twenty counts. The State reserved the right to request that the court impose an enhanced sentence on the ground that the offense was committed with a biased purpose, and Apprendi reserved the right to appeal the constitutionality of the hate crime statute. *Id.* at 470.

After Apprendi pleaded guilty, the State moved to enhance the sentence under New Jersey's hate crime statute. *Id.* The trial court found by a preponderance of the evidence that Apprendi's purpose in committing the crime was to intimidate the victim and that the crime was motivated by racial bias. *Id.* at 471. The trial court sentenced Apprendi to twelve years confinement for one of the possession of firearm counts and to shorter concurrent sentences on the other counts. *Id.*

The United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The high court went on to say that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Id.*

Apprendi is distinguishable from the case before us in a number of ways. In *Apprendi*, the issue was that a factual determination authorizing an increase in punishment was not made by a jury on the basis of proof beyond a reasonable doubt. *Id.* at 469. Also in *Apprendi*, the appellant pleaded guilty to possession of a firearm for an unlawful purpose and unlawful possession of a prohibited weapon. However, there was no mention of the hate crime statute in the charging instrument. After Apprendi pleaded guilty, the State sought to increase the punishment by filing a motion to enhance the sentence under the hate crime statute. Here, there are no facts that change the range of punishment. Rather, once the State decided to file a petition for determinate sentencing, the range of punishment was set. There was not an enhancement in punishment. The range of punishment did not increase based on any facts that were not presented to the jury. All the facts were presented to the jury when it decided J.B.L.'s disposition.

J.B.L. also argues that the determinate sentencing statute increases the stigma associated with his activity by changing the consequences of such criminal activity from a confidential, privileged period of juvenile supervision to a first degree felony conviction on J.B.L.'s public adult record. The Due Process Clause of the Fifth Amendment of the United States Constitution requires that any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Jones v.*

United States, 526 U.S. 227, 243 (1999). This case met all of those requirements. The petition for determinate sentencing acts as an indictment. Section 53.045(d); *In re R.L.H.*, 771 S.W.2d 697, 699 (Tex.App.—Austin 1989, writ den'd). A petition, acting as an indictment, was presented to the grand jury, all the facts were submitted to the jury, and all the facts were proven beyond a reasonable doubt.

Whether J.B.L. will serve any time in the Texas Department of Criminal Justice, Institutional Division, hinges on the required transfer hearing. J.B.L. has not been transferred to the Texas Department of Criminal Justice, Institutional Division, and the required referral for a transfer hearing has not been made to the committing court. If the committing court does issue an order transferring J.B.L. to the Texas Department of Criminal Justice, Institutional Division, then he may appeal that order. However, because J.B.L. may not serve any time in the Texas Department of Criminal Justice, Institutional Division, his claims are not ripe for review. An opinion on J.B.L.'s due process claims at this time would be wholly advisory. *In re S.B.C.*, 805 S.W.2d 1, 5 (Tex. App.—Tyler 1991, writ den'd). This court has no authority to render advisory opinions. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex.1998); *City of Garland v. Louton*, 691 S.W.2d 603, 605 (Tex.1985). J.B.L.'s issue on appeal is overruled.

Conclusion: We affirm the judgment of the trial court.

**SUFFICIENCY OF THE EVIDENCE—
IN THEFT ADJUDICATION, THE FAIR MARKET
VALUE OF A WHEEL ON ONE VEHICLE DOES
NOT ESTABLISH THE FAIR MARKET VALUE
OF A WHEEL ON A DIFFERENT VEHICLE EVEN
WHERE BOTH VEHICLE ARE THE SAME YEAR,
MAKE AND MODEL.**

¶ 09-2-9. **In the Matter of O.A.G.**, MEMORANDUM, No. 03-07-00554-CV, 2009 WL 638192 (Tex. App.—Austin, 3/12/09).

Facts: On the afternoon of January 6, 2007, several Austin police officers responded to a report of a vehicle burglary in progress at an apartment complex. The officers found four young men, one of whom was O.A.G., standing or kneeling beside two automobiles parked side-by-side in the complex parking lot. Both cars were 1995 Honda Accords, one maroon, the other tan. The ignitions of both cars had been "punched," that is, the steering columns had been broken and the ignitions hot-wired to allow the cars to be started and driven without keys. The officers found meat thermometers in the cars that they testified are used for that purpose.

Two of the officers, Michael Metcalf and Joseph VanDeWege, testified that the four men appeared to be exchanging the tires of the two cars. [FN1] This is con-

firmed by a recording of the entire incident made by the video unit in one of the patrol cars. This video was introduced in evidence and viewed by the juvenile court, and it has also been viewed by this Court. When the officers arrived at the scene, both of the cars were on jacks. O.A.G. was kneeling beside the left rear wheel of the maroon Honda, by the jack. A second man was holding a tire tool and rolling a mounted tire from the maroon Honda to the tan Honda. The other two men were bent over, studying the right rear wheels of the two vehicles. At the approach of the officers, O.A.G. stood and walked behind a nearby trash dumpster. The other men also stopped their activities and tried to walk away from the two cars. The officers testified that all four men's hands were heavily soiled, as if they had been changing or handling the wheels and tires.

FN1. In ordinary usage, the phrase "changing a tire" means changing both the tire and the wheel on which it is mounted, and this appears to be how the phrase was used by the witnesses in this case. There is no evidence that O.A.G. and his companions were removing the tires from the wheels of the two cars.

The maroon Accord belonged to Sherita Brown. Brown testified that it had been stolen that very day from a shopping mall parking lot. She testified that when she recovered her car at the impound lot, the ignition was broken, cameras were missing, and the driver's window was damaged. Brown also testified that "[t]he tires--one of them was bigger than what was originally on there." Brown testified that she paid \$60 to purchase a replacement tire. [FN2]

FN2. The record does not indicate whether Brown spent \$60 to replace the tire alone, or to replace both the tire and wheel.

The tan Accord belonged to Maria Alvarez. Alvarez testified that it had been stolen the day before, also from a shopping mall parking lot. She testified that in addition to the broken ignition, her car's body had been damaged on the passenger side and the "rims" had been "taken off." [FN3] Alvarez testified that she had turned the car over to her nephew to repair and did not know how much the repairs would cost.

FN3. We infer that Alvarez used the word "rims" to refer to wheels.

O.A.G. lived at the apartment complex with his mother. She testified at the hearing that she had asked O.A.G. to take some trash to the dumpster. A few minutes later, two police officers knocked at her door and told her that O.A.G. had been arrested. A neighbor testified that he had made several trips to the dumpster that afternoon and noticed some persons standing by the two cars. O.A.G. was not among them. Later, the neighbor noticed O.A.G. leave his apartment with a load of trash,

only to return with the officers about five minutes later. In rebuttal, one of the police officers testified that when he spoke to O.A.G.'s mother that afternoon, she told him that O.A.G. had been gone from the apartment for thirty or forty minutes.

One paragraph of the delinquency petition alleged that O.A.G. committed theft by unlawfully acquiring or otherwise exercising control over a motor vehicle belonging to Sherita Brown valued at more than \$1500 but less than \$20,000 with the intent to deprive Brown of the property. Another paragraph made the same allegation with regard to Maria Alvarez's vehicle. At the conclusion of the hearing, the juvenile court found that the evidence did not support the allegations that O.A.G. had been a party to the theft of the cars. However, the court found that the evidence did support a finding that appellant had been a party to the theft of one tire from each car, with each tire having a value of at least \$50.

In points of error three and four, O.A.G. contends that the evidence is legally insufficient to sustain the finding that he appropriated tires from Brown and Alvarez with the intent to deprive them of the property. In points one and two, O.A.G. contends that the evidence is legally and factually insufficient to sustain the finding that the tire stolen from Alvarez had a value of at least \$50. [FN4]

FN4. Theft of property having a value of less than \$50 is a class C misdemeanor punishable only by fine and is not delinquent conduct. *See* Tex. Penal Code Ann. § 12.23 (West 2003), § 31.03(e)(1)(A) (West Supp.2008); Tex. Fam.Code Ann. § 51.03(a)(1) (West 2008).

Held: Evidence insufficient to establish value of theft over \$50.

Memorandum Opinion: Although the evidence supports the finding that O.A.G. was a party to the theft of Alvarez's tire, we agree with his contention that the evidence is legally insufficient to prove that the tire was worth \$50 or more. In the context of this case, the value of stolen property is its fair market value at the time and place of the offense or, if the fair market value cannot be determined, the cost of replacing the stolen property within a reasonable time after the theft. Tex. Penal Code Ann. § 31.08(a) (West 2003). "Fair market value" means the amount the property would sell for in cash, given a reasonable time for selling it. *Keeton v. State*, 803 S.W.2d 304, 305 (Tex.Crim.App.1991).

Alvarez did not testify to the fair market value of the tire stolen from her automobile. Moreover, the evidence shows that Alvarez had not purchased a replacement tire or made any other repairs because she was waiting for her nephew to do the work. Nevertheless, the State argues that the value of the tire removed from Alvarez's car was proved by Brown's testimony that she had spent \$60 to replace the tire stolen from her car. The State contends that because both cars were 1995 Honda

Accords, the juvenile court could reasonably infer that Alvarez's stolen tire had the same value as Brown's stolen tire. [FN6]

FN6. The State variously describes Brown's testimony as establishing either the fair market value or the "replacement value" of the tire stolen from Alvarez's car. We assume that the latter term refers to the replacement cost.

Brown did not testify to the fair market value of her missing tire, that is, to the amount for which she could sell such a tire. It follows that her testimony has no tendency to prove the fair market value of the tire stolen from Alvarez's car. Brown did testify to the cost of replacing her stolen tire, but this testimony does not prove the cost of replacing Alvarez's stolen tire. Even if we assume that both cars had the same original equipment wheels and tires when new in 1995, there is no evidence that twelve years later the wheels and tires on Brown's car were the same as those on Alvarez's car. In fact, the evidence shows that the wheels, at least, were not the same. On the video, the wheels on Brown's Accord appear to be standard original equipment wheels, but the wheels on Alvarez's car appear to be more highly styled custom wheels. In addition, Brown testified that the tire that had been placed on her car—that is, the tire that had been taken from Alvarez's car—was "bigger than what was originally on there," from which it may be inferred that the wheel on which the tire was mounted—also taken from Alvarez's car—was a different size.

Conclusion: Given the obvious differences in the wheels, no reasonable trier of fact could find beyond a reasonable doubt that the cost of replacing the tire stolen from Alvarez's car would necessarily be the same as or greater than the cost of replacing the tire stolen from Brown's car. Point of error one is sustained. We need not address point of error two.

**JUDICIAL DISQUALIFICATION—
IN HEARING TO RECUSE, APPELLANT DID NOT ESTABLISH BIAS ON JUDGE'S PART WHERE JUDGE HAD PREVIOUSLY WORKED IN THE D.A.'S OFFICE WITH MOTHER OF ONE OF THREE COMPLAINANTS IN AGGRAVATED ASSAULT ADJUDICATION.**

¶ 09-2-10. **In the Matter of E.A.P.**, MEMORANDUM, No. 04-08-00503-CV, 2009 WL 618463 (Tex.App.—San Antonio, 3/11/09).

Facts: In the underlying juvenile proceeding, appellant was charged with three counts of aggravated assault, against three different complainants. Based on appellant's plea of true, Judge Laura Parker entered an order of adjudication and set the case for a disposition hearing. De-

spite a juvenile probation officer's recommendation of a lesser sentence, Judge Parker committed appellant to the TYC for a fifteen year determinate sentence. Approximately one month after the sentencing, the court granted a substitution of counsel, and the new attorney for appellant filed three motions: (1) motion for new trial, (2) motion to disqualify the Bexar County Criminal District Attorney, and (3) motion to recuse Judge Parker.

Held: Affirmed

Memorandum Opinion: The Texas Code of Judicial Conduct requires judges to avoid the appearance of impropriety in all of the judge's activities and "comply with the law and ... act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." TEX.CODE JUD. CONDUCT, Canon 2A, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtitle. G app. B (Vernon 2005). The Texas Rules of Civil Procedure require a judge to recuse herself in any proceeding in which her "impartiality might reasonably be questioned" or she "has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Tex.R. Civ. P. 18b(2).

At the recusal hearing, Judge Parker testified that prior to taking the bench, she had worked in the Bexar County Criminal District Attorney's Office as an ADA. She admitted to being acquainted with Melisa Skinner, although she had never met Ms. Skinner's husband or children. She and Ms. Skinner had never been assigned to the same court during the time they both worked as ADAs and had never worked together in any capacity. Judge Parker said she attended some of the same political events as Ms. Skinner and they both took the same group trip to Las Vegas for the purpose of attending another ADA's birthday party. As to the underlying proceeding against appellant, Judge Parker said ADA Khristina Fielder came to her office to tell her she did not think a trial would be necessary because the case "was being worked out" and Ms. Fielder wanted her to know that one of the three complainants was Ms. Skinner's son. Judge Parker said she told Ms. Fielder she had no problem "with it," but she instructed Ms. Fielder to inform defense counsel "in case he had a problem with it." Finally, Judge Parker testified her sentencing decision in appellant's case had nothing to do with her acquaintance with Ms. Skinner.

Judge Pat Priest heard and later denied the motion to recuse Judge Parker. Thereafter, Judge Parker denied the motion for new trial and the motion to recuse the Bexar County Criminal District Attorney.

In addition to Judge Parker's testimony, Judge Priest also heard testimony from appellant's trial attorney. Counsel agreed that he never questioned Judge Parker's ability to be fair and impartial during the adjudication and disposition hearing, "except when she pronounced sentence. [I]t was a lot more than what I thought

that [appellant] was going to get." Counsel said he did not know Judge Parker had been an ADA during the same time period as Ms. Skinner. On appeal, appellant asserts Judge Parker should have been recused, the Bexar County Criminal District Attorney ("DA") should have been disqualified, and the determinate sentence should be set aside.

Conclusion: We conclude appellant did not establish bias on Judge Parker's part; therefore, he did not establish that his due process rights were violated. Accordingly, on this record, we conclude Judge Parker did not err by not sua sponte recusing herself, and Judge Priest did not abuse his discretion in denying the motion to recuse Judge Parker.

EVIDENCE—

INCONSISTENCIES AND CONFLICTS IN A CHILD'S TESTIMONY DOES NOT AUTOMATICALLY RULE HER INCOMPETENT; BUT ARE ONLY FACTORS AFFECTING THE WEIGHT OF THE CHILD'S CREDIBILITY.

¶ 09-2-11. **In the Interest of K.H.**, MEMORANDUM, No. 04-08-00459-CV, 2009 WL 962469 (Tex.App.—San Antonio, 4/8/09).

Facts: Before allowing the complainant to testify, the trial court conducted a competency hearing. The complainant was four years old at the time of trial, and she was three years old when she was assaulted by appellant, her eleven-year-old brother. Appellant asserts the trial court erred in allowing the complainant to testify because she was not competent to do so. As a general rule, a child is competent to testify unless, after being examined by the court, she does not appear to possess sufficient intellect to relate transactions with respect to which she is interrogated. *See* Tex.R. Evid. 601(a)(2). We review a trial court's ruling on whether a child witness is competent to testify for an abuse of discretion. *See Macias v. State*, 776 S.W.2d 255, 257 (Tex.App.—San Antonio 1989, pet. ref'd). To determine whether the trial court abused its discretion, we must review the entire testimony of the child. *See Dufrene v. State*, 853 S.W.2d 86, 88 (Tex.App.—Houston [14th Dist.] 1993, pet. ref'd).

Prior to allowing the complainant to testify, the trial court asked her several questions:

Q: ... Okay. And so, Ms. ..., if someone asks you some questions, will you tell us the truth? Will you?

A: (Shakes head)

Q: And you're shaking your head. What do you mean when you shake your head? What does that mean? What is this?

A: Yes.

Q: Yes. That's good. Okay. We got that. That's a hard part. So we said our name and we said yes.

A: Yes.

Q: Good, good job. Now, ... I'm going to show you something.

A: What?

Q: Okay. Has she ever had a Coca Cola? Have you ever seen something that looked like this? What is this?

A: Coke.

Q: Yes. What color is the can? What color is this?

A: Red.

Q: Very good. So have you ever had a Coke before?

A: My mom says no.

Q: Okay.

A: That's my mom.

Q: That's your mom? Well, ..., what color sweater is she wearing? What color is her sweater? Can you say it again?

A: Green.

* * *

Q: Okay. Okay. All right. So I got a question for you. [I]f I told you your mother's really wearing a red sweater, have I told the truth or a lie?

A: A lie.

Q: A lie, that's right. Because what color is her sweater?

A: Green.

* * *

Q: ... Okay. So since it's—you said it's bad to tell a lie, is that what you told me?

A: [Nods head]

Q: Okay. So if the attorneys or these people ask you questions, are you going to tell them the truth or tell them a lie?

A: Truth.

* * *

Q: ... If you tell a lie, what happens if you tell a lie?

A: It's not true.

* * *

Q: And if a person tells a lie and it's not true, what happens to them?

A: They get a spanking.

After the court determined the complainant was competent to testify, on direct examination she said the part of her body she used to "pee-pee" was her "coo coo" and she identified appellant as the person who touched her and she said it was a "bad" thing when he touched her. She also said her brother was "so funny." When defense counsel began his cross-examination, the complainant hid below the seat with her head down, at which point the prosecutor introduced complainant to defense counsel and the child was allowed to take a break. While on break, the complainant sat with her parents in a small side room waiting to again be introduced to defense

counsel to "break the ice." However, before counsel entered the room, the complainant asked her mother why she could not give her brother a hug, and her mother told her that other people still needed to ask her questions. The complainant then told her mother that her brother did not touch her, "[i]t was for fake." When trial recommenced, on cross-examination she said her favorite game was playing hide and seek with appellant and she wanted to give him a hug. The following questioning then occurred by defense counsel:

Q: ... [A]nd is it good or bad to tell the truth?

A: It's good to tell the truth.

Q; Okay. And what--what--what does it mean to tell the truth?

Q. My brother touched my coo coo.

* * *

Q. ... Did Daddy tell you to say that last night?

A. No

Defense counsel asked the complainant several times who told her to identify her brother as the person who touched her, and although she gave no direct answer, she answered "maybe" when asked if it was the doctor or the CPS investigator who told her to accuse her brother. When counsel asked about her recanting her testimony while in the side room, the complainant at first denied saying her brother did not touch her, then she said "maybe" she said that. The trial court again allowed a short break, at which time defense counsel raised his objection to the totality of her testimony. When the court denied the objection, defense counsel declined to cross-examine her further, arguing it was futile to do so.

Held: Affirmed

Opinion: Our review of the entire testimony reveals the complainant wanted to go home to her mother's house, she did not always want to testify, her answers were at times hesitant, and she had a short attention span. And, there is no dispute the complainant's young age and short attention span made questioning by the court, the State, and the defense a frustrating endeavor. However, the complainant demonstrated an ability to understand the difference between the truth and a lie, and the consequences of telling a lie, and she eventually answered each question asked of her. Inconsistencies and conflicts in a child's testimony do not automatically rule her incompetent; rather, they are simply factors affecting the weight of the child's credibility. *See Upton v. State*, 894 S.W.2d 426, 429 (Tex.App.—Amarillo 1995, pet. ref'd); *Kirchner v. State*, 739 S.W.2d 85, 88 (Tex.App.—San Antonio 1987, no pet.).

Conclusion: On this record, we cannot conclude the trial court erred in allowing the complainant to testify, nor can we conclude appellant's right of confrontation was violated.

**SUFFICIENCY OF THE EVIDENCE—
SINCE RESPONDENT WAS NOT AWARE HE
WAS ADDRESSING A POLICE OFFICER, WHEN
USING PROFANE LANGUAGE, THE HIGHER
STANDARD FOR OFFICERS WHEN EVALUAT-
ING SPEECH TO DETERMINE “FIGHTING
WORDS,” DID NOT APPLY.**

¶ 09-2-12. **In the Matter of J.A.P.**, MEMORANDUM, 2009 WL 700833 (Tex.App.—San Antonio, 3/18/09).

Facts: Officer Marcos Serda received a complaint from the president of a homeowner's association about middle school students remaining in the street and creating a traffic hazard by not allowing vehicles to pass. Officer Serda testified that it is a violation of the law to walk on the street when a sidewalk is present. In response to the complaint, Officer Serda personally observed a group of students standing in the middle of the street, and "as a vehicle attempted to pass them or honk their horns, or something like this, they [the students] would say something to them." At that time, Officer Serda was in a marked vehicle approximately half a block away.

Just after school dismissed one afternoon, Officer Serda approached the area in an unmarked truck. Because the windows were darkly tinted, no one could see inside the vehicle. Officer Serda once again observed the students blocking the street. Because the students refused to move from the street, Officer Serda observed another vehicle go around the students by driving on a grassy easement. Officer Serda drove up to the students in the street. J.A.P. and another male student turned around. Officer Serda observed J.A.P. mouth, "What the f--?" Officer Serda partially rolled his window down, and heard J.A.P. again say, "What the f--? What the f--?" Officer Serda was ten feet from J.A.P., and he described J.A.P. as being aggressive, defensive, and making gestures. Officer Serda demonstrated for the trial court the gestures J.A.P. was making. Officer Serda called for backup because he knew he would not be able to control all of the students in the group. Eight of the female students in the group told J.A.P., "Hey, hey, behave." Numerous other cars were parked along the street where parents were waiting for their children. Officer Serda observed several of the people waiting for the children become frustrated at the language being used.

When Officer Serda exited his truck, J.A.P. saw his uniform for the first time and said, "Oh, what the f--dawg?" The backup officers arrived almost immediately, and another officer arrested J.A.P. while Officer Serda tried to control the other male student. Officer Serda testified that he had to control the other student who "was getting more belligerent with me at the time. I had to control him. I had him against the fence." While Officer Serda was attempting to control the other male student, J.A.P. "was, again, being more aggressive and getting closer to [him]."

In denying the motion to suppress, the trial court found J.A.P. was in the street in violation of the law. The trial court also found that Officer Serda had probable cause to arrest J.A.P. for disorderly conduct. In a search conducted incident to the arrest, Officer Serda discovered J.A.P. was in possession of marijuana. After the trial court denied his motion to suppress, J.A.P. pled true to engaging in delinquent conduct by committing the offense of possession of marijuana.

Held: Affirmed

Memorandum Opinion: A police officer may arrest a juvenile offender without a warrant for any offense committed in his presence or within his view. Tex. Fam.Code Ann. 52.01(a)(2),(3)(A) (Vernon 2008); Tex. Code Crim. Proc. Ann. art. 14.01(b) (Vernon 2005); *In re E.P.*, 257 S.W.3d at 526; *Rivenburgh*, 933 S.W.2d at 701. "In order to justify a warrantless arrest, the officer need not determine whether an offense has in fact been committed, but rather the State need only prove that probable cause existed." *Rivenburgh*, 933 S.W.2d at 701. Probable cause exists when the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent man to believe that the arrested person has committed or was committing an offense. *In re E.P.*, 257 S.W.3d at 526-27; *Rivenburgh*, 933 S.W.2d at 701.

A person commits the offense of disorderly conduct if he intentionally or knowingly uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace. Tex. Pen.Code Ann. § 42.01(a)(1) (Vernon Supp.2008). In order to constitute an offense, the words must amount to "fighting words." *Ross v. State*, 802 S.W.2d 308, 314-15 (Tex.App.—Dallas 1990, no pet.); *see also Rivenburgh*, 933 S.W.2d at 701. Fighting words are those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *Ross*, 802 S.W.2d at 315. Fighting words include profane, obscene, and threatening words. *Id.* "Language which is merely harsh and insulting does not generally rise to the level of 'fighting words;' derisive or annoying words only rise to such level when they plainly tend to excite the addressee to a breach of the peace." *Rivenburgh*, 933 S.W.2d at 701. The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. *Ross*, 802 S.W.2d at 315.

Whether particular words constitute fighting words is a question of fact. *Coggin v. State*, 123 S.W.3d 82, 90 (Tex.App.—Austin 2003, pet. ref d); *Rivenburgh*, 933 S.W.2d at 701. "This require[s] careful consideration of the actual circumstances surrounding the expression, asking whether the expression is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Coggin*, 123 S.W.3d at 90 (quoting *Texas v. Johnson*, 491 U.S. 397, 409 (1989)).

J.A.P.'s sole complaint is that the trial court erred in denying his motion to suppress because the evidence failed to establish that his speech "by its very utterance tend[ed] to incite an immediate breach of the peace." Therefore, J.A.P. asserts that Officer Serda did not have probable cause to believe that J.A.P. committed the offense of disorderly conduct.

J.A.P. relies on a federal district court decision asserting that speech directed at police officers is treated "somewhat differently" because police officers "are held to an even higher standard than the average citizen when evaluating speech to determine if it includes 'fighting words;' that is, they are required to endure a greater amount of verbal criticism." *U.S. v. Hazlewood*, No. SA-06-CR-160-XR, 2007 WL 1888883, at *8 (W.D. Tex. June 20, 2007), *aff'd on other grounds*, 526 S.W.3d 862 (5th Cir.2008). Even if we were to follow this heightened federal standard, it would not apply in the instant case. J.A.P.'s speech was not directed at Officer Serda as a police officer. Instead, his speech was directed at an unknown driver of a vehicle that J.A.P. and his group were preventing from driving down the street by blocking the driver's path.

The trial court found that Officer Serda had probable cause to believe that J.A.P.'s words were "fighting words" tending to incite an immediate breach of the peace. Unlike *Jimmerson v. State*, 561 S.W.2d 5, 7 (Tex.Crim.App.1978), another case relied upon by J.A.P., the record contained the actual profane language used by J.A.P., and profanity has provided a basis for finding probable cause that a disorderly conduct offense has been committed. *See Collins v. State*, Nos. 04-00-00586-CR & 04-00-00587-CR, 2001 WL 1131413 (Tex. App.—San Antonio Sept. 26, 2001, no pet.) (not designated for publication). J.A.P.'s language even caused the female students present in the group to caution him to behave. Because the record can reasonably be viewed as supporting the trial court's conclusion when viewed in the light most favorable to that conclusion, the trial court did not err in finding that a prudent man would believe that J.A.P. had committed the offense of disorderly conduct. [FN1] *See Ste-Marie v. State*, 32 S.W.3d 446, 449 (Tex.App.—Houston [14th Dist.] 2000, no pet.) (holding officer could reasonably believe appellant engaged in disorderly conduct by asking a ten-year-old girl "Hey, b---ch, what are you looking at?" while driving by the girl's home); *Ross*, 802 S.W.2d at 315 (holding words and phrases such as "mother f---r, a--hole, and f--k you" to be words men of common intelligence would understand to be words likely to cause the average addressee to fight).

FN1. We further note that in reviewing a trial court's decision on a motion to suppress, we are permitted to consider alternative theories of law applicable to the case that support the trial court's decision, and we must affirm the trial court's decision if it is correct on any theory of law that finds support in the record. *State v.*

Mercado, 972 S.W.2d 75, 77 (Tex.Crim.App.1998); *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App.1990). "This principle holds true even when the trial judge gives the wrong reason for his decision." *Romero*, 800 S.W.2d at 543. Accordingly, even if the trial court erred in finding that Officer Serda had probable cause to arrest J.A.P. for disorderly conduct, we would affirm the trial court's denial of the motion to suppress on the basis that Officer Serda had probable cause to arrest J.A.P. for the offense of obstructing the street. *See Tex. Pen.Code Ann.* § 42.03(a) (Vernon 2003).

Conclusion: The trial court's judgment is affirmed.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT—

STATE'S EFFORTS TO SERVE RESPONDENT BEFORE HIS EIGHTEENTH BIRTHDAY WITH THE PETITION WAS NOT SUFFICIENT TO CONSTITUTED DUE DILIGENCE.

¶ 09-2-13. **Powell v. State**, MEMORANDUM, No. 05-07-01078-CR, 05-07-01079-CR, 2009 WL 866194 (Tex. App.—Dallas, 4/1/09).

Facts: The State filed its two petitions on July 20, 2004, after Powell confessed to Mesquite detective Michael Holley that he had sexually assaulted a six-year old boy several times. The offenses occurred in 2003, before Powell and his family moved from Mesquite to Vernon Parish, Louisiana. Although the State knew Powell's Louisiana address and could have served Powell and his parents with the petition by certified mail, return receipt requested, *see id.* § 53.07(a), the State served the Vernon Parish sheriff instead, expecting his staff to personally serve Powell and his parents. [FN1] The sheriff's office received the petition but, for reasons not explained, never served Powell or his parents.

FN1. In its brief, the State notes that it "sent a letter to [Powell's] family in Louisiana on July 13, 2004, notifying them that a prosecution report had been filed" and cites to a certain volume of the record where the letter can be found. Our review of that particular portion of the record leads us to a copy of the return of service of the petition to transfer filed in March 2006. We have reviewed the entire record and cannot find the letter to which the State refers.

On December 13, 2004, after the court had reset the "announcement setting" three times because Powell had not been served, the court issued an "at large" bench warrant for Powell's arrest. The warrant was faxed to the Vernon Parish sheriff in May 2005, and when Powell still had not been served and arrested by December 2005, the warrant was faxed again. Powell was finally arrested on February 22, 2006. By then, Powell, who was born in December 1987, had turned eighteen.

Because it had not been able to proceed in juvenile court before Powell's eighteenth birthday, the State petitioned the juvenile court to transfer the case to district court so that Powell could be prosecuted as an adult. The State argued as its basis for being unable to proceed before Powell's eighteenth birthday that, despite its due diligence, Powell "could not be found."

At the transfer hearing, the State elicited testimony concerning the specific efforts undertaken to ensure Powell was served and arrested. Those efforts consisted of (1) the sending of the petition and the warrant, each containing Powell's address, to the Vernon Parish sheriff's office in July 2004, May 2005, and December 2005, (2) four follow-up phone calls--between May 2005 and February 2006--by detective Holley to the sheriff and his staff providing again Powell's address and "impressing upon them" the importance of serving and arresting Powell, and (3) a phone call to Powell's house in December 2005 to confirm he still lived there. According to Holley, the sheriff's staff informed him they knew where Powell lived, had "been out [to Powell's house] several times," but had not found him. Each time Holley called though, the staff "assured" him that they were continuing their efforts "to locate ... and apprehend [Powell]." Holley testified that throughout the nineteen months between the filing of the petitions and Powell's arrest, Powell remained in Vernon Parish.

Based on the testimony, the State argued it had done "everything in [its] power" to ensure Powell was timely served and arrested and that any "fault" in not serving and arresting Powell lay with the Vernon Parish sheriff and his staff, not the State. Persuaded by the argument, the juvenile court granted the State's petition and transferred the case to district court. A jury subsequently convicted Powell of the lesser included offenses of indecency with a child and assessed punishment in each case at ten years' confinement and a \$5000 fine, both probated for five years. In a single issue, Powell now challenges the transfer order. Maintaining the State's efforts to locate him did not amount to due diligence, Powell asserts the transfer order was not proper and, because the transfer order was not proper, the district court did not acquire jurisdiction over the case, rendering the judgments of conviction void.

Held: Vacated and remanded

Memorandum Opinion: Although original jurisdiction over a child engaged in delinquent conduct lies exclusively with the juvenile court, *see* Tex. Fam.Code. Ann. § 51.04, family code section 54.02(j) allows a district court to acquire jurisdiction over a child alleged to have committed a felony if, as here,

- the offense was committed when the child was fourteen years of age or older but younger than seventeen,
- the child has turned eighteen, and

- no adjudication hearing has been conducted.

Before the district court may acquire jurisdiction, though, the juvenile court must

- waive its jurisdiction,
- determine probable cause exists to believe the child committed the offense, and
- find from a preponderance of the evidence "after due diligence of the state it was not practicable to proceed in juvenile court before the person's eighteenth birthday because the person could not be found." [FN2]

FN2. Alternatively, the court could find after due diligence of the state it was not practicable to proceed because (1) the state did not have probable cause to proceed in juvenile court but new evidence has been found since the child's eighteenth birthday or (2) a previous transfer order was reversed by an appellate court or set aside by a district court. *Id.* § 54.02(j)(4)(B)(i),(iii). The court could also find, in the alternative simply that it was not practicable to proceed "for a reason beyond the control of the state." *Id.* § 54.02(j)(4)(A).

The family code does not define "due diligence," but courts have interpreted the term in general to require that a party do more than "sit on its rights or duties." In other words, the party must attempt to move ahead, or be able to reasonably explain delays.

Viewing the record here under the appropriate standard, we conclude the State's efforts to serve and arrest Powell, whose location was known at all times, did not constitute due diligence. Although the State could have served Powell and his parents the petitions to adjudicate by mail, the State chose to rely on the Vernon Parish sheriff's office for service and mailed the petition there. The sheriff received the petition but took no action despite knowing where Powell lived. As a result, three court settings between July 20, 2004 and December 13, 2004 had to be rescheduled. Despite knowing the settings were rescheduled due to lack of service, the State did nothing and, when the court issued the arrest warrant on December 13, 2004 because of the lack of service, the State took no action for five months--until May 2005 when detective Holley faxed the warrant to the sheriff's office. Over the next nine months, until Powell was arrested February 22, 2006, the State followed-up with only four phone calls to the sheriff's office. Although the State might not have had control over the efforts the Vernon Parish sheriff and his staff exerted to serve and arrest Powell, we see no reason, and the State has not offered any, why it could not have "started the ball rolling" earlier by following-up with the service request made in July 2004 after the first, or even the second, "announcement setting" was rescheduled due to lack of service, or by sending the warrant to the sheriff upon its issuance instead of waiting five months. We also fail to see any reason, and again the State has not offered any,

why the State could not have followed-up on the warrant with more than four phone calls over a nine month period. Given the record before us, we conclude the State failed to reasonably explain the nineteen month delay in serving and arresting Powell and as such, the juvenile court abused its discretion by waiving its jurisdiction and ordering the transfers.

Conclusion: We sustain Powell's sole issue, vacate the trial court's judgments, and remand the cases to the juvenile court for further proceedings consistent with this opinion.

**CRIMINAL PROCEEDINGS—
JUVENILE IS ENTITLED TO ADULT CREDIT
FOR TIME SPENT WHILE CONFINED IN A JUVENILE
DETENTION FACILITY BEFORE HE
WAS CERTIFIED AS AN ADULT.**

¶ 09-2-14. **Ex Parte Marsh**, UNPUBLISHED, Nos. AP-76138, AP-76139, 2009 WL 1067932 (Tex.Crim.App., 4/22/09).

Facts: Applicant was convicted of aggravated robbery and attempted capital murder and sentenced to 45 years' imprisonment and 30 years' imprisonment, respectively.

In his first ground for relief, Applicant contends that he is entitled to credit for time spent confined in a juvenile detention facility before he was certified as an adult. Specifically, he seeks credit for a period of confinement from March 1, 1986 to May 23, 1986 by way of Applications for Writs of Habeas Corpus.

Held: Granted

Opinion: The trial judge has entered findings of fact and conclusions of law recommending that relief be granted. *See Ex parte Gomez*, 15 S.W.3d 103, 104 (Tex. Crim.App.2000). Relief is granted.

Conclusion: The Texas Department of Criminal Justice shall credit Applicant's sentences in cause numbers F86-97782 and F86-97784 from the 282nd Judicial District Court of Dallas County with additional time credit for a period of confinement from March 1, 1986 to May 23, 1986.

**APPEALS—
WHERE NO OBJECTION WAS MADE AT THE
TIME OF THE HEARING, TRIAL COURT DID
NOT ERR IN CONSIDERING A PRESENTENCE
INVESTIGATION REPORT THAT INCLUDED A
REFERENCE TO JUVENILE ADJUDICATION
THAT APPELLANT ASSERTS HAD NOT BEEN
UNSEALED.**

¶ 09-2-15. **Dorsey v. State**, MEMORANDUM, Nos. 12-07-00251-CR, 12-07-00252-CR, 12-07-00253-CR, 2009 WL 824600 (Tex.App.—Tyler, 3/31/09).

Facts: In his third issue, Appellant argues that the trial court erred in considering a presentence investigation report that included a reference to a juvenile adjudication that Appellant asserts has not been unsealed.

FN1. As with the first issue, it appears that Appellant's guilty plea would forfeit this complaint. However, the State does not make this argument, and Appellant argues, though not in this specific context, that he would not have pleaded guilty but for the recess.

When issues arise with a juror's continued service during trial, an objection to the trial court's resolution of that issue is necessary to preserve a complaint for appellate review. Appellant did not object either to the recess in the trial or to the court's consideration of the presentence investigation report, which included the fact of his juvenile adjudication.

Held: Affirmed

Memorandum Opinion: Appellant argues that the record of his juvenile adjudication had been sealed and that the trial court erred when it considered the presentence investigation report because it contained a reference to that juvenile adjudication. Appellant did not make this argument to the trial court. Instead, when the trial court asked Appellant's counsel if he had objections to the report, he responded that he did not have an objection. [FN2]

FN2. Because this issue was not litigated, it is not clear whether Appellant's juvenile records are, in fact, sealed.

Conclusion: A contemporaneous objection is a prerequisite to a complaint on appeal about evidence admitted at the punishment hearing. Accordingly, we hold that Appellant has not preserved this complaint for appellate review, and we overrule Appellant's third issue.

**APPEALS—
COURT OF APPEALS WAS WITHOUT JURIS-
DICTION TO HEAR AN ORDER TRANSFERRING
A DISPOSITION TO ANOTHER COUNTY BE-
CAUSE THE FAMILY CODE DOES NOT AU-
THORIZE IT.**

¶ 09-2-16. **In the Matter of S.D.S.**, MEMORANDUM, No. 07-07-0499-CV, 2009 WL 839053 (Tex. App.—Amarillo, 3/31/09).

Facts: On August 20, 2007, the Potter County Attorney's office filed a petition alleging that S.D.S. had en-

gaged in delinquent conduct and prayed that, upon a finding that the child had engaged in delinquent conduct, S.D.S.'s care, custody, and control be disposed by the trial court including the possibility of S.D.S.'s commitment to the Texas Youth Commission. On September 12th, the trial court held a hearing and adjudicated S.D.S. as having engaged in delinquent conduct. On September 28th, the Potter County Attorney's Office filed a motion to transfer disposition in the case to the juvenile's county of residence, Swisher County. *See* Tex. Family Code Ann. § 51.07. However, neither S.D.S. nor his attorney were served with the Motion to Transfer or the corresponding order granting the transfer.

On November 19th, a disposition hearing was held in Swisher County before the county court judge. Although S.D.S. and his attorney were present at the disposition hearing, a review of an audio recording of the hearing does not establish that S.D.S. objected to the commencement of the disposition hearing based on the failure of the State to give S.D.S. notice of the filing of the motion for transfer of the hearing. After hearing evidence, the trial court concluded that S.D.S. had engaged in delinquent conduct, determined that S.D.S. was in need of rehabilitation, and that it was in his best interest and in the best interest of the community to commit S.D.S. to the care, custody, and control of the Texas Youth Commission for an indeterminate period not to exceed S.D.S.'s 19th birthday.

Although S.D.S. and his attorney attended the disposition hearing, S.D.S. was not served with a copy of the motion for transfer. S.D.S. appeals contending that, because notice of the transfer was not served upon him, Swisher County did not have jurisdiction to enter the disposition order. Therefore, S.D.S. contends that the disposition order must be vacated.

Held: Dismissed for want of jurisdiction

Memorandum Opinion: As a threshold matter, we consider our jurisdiction to review the challenged order. S.D.S. does not contest that Potter County had jurisdiction over the initial adjudication proceeding. § 51.04. Although S.D.S. framed the issue as one of jurisdiction, the issue is actually one of venue. *See* § 51.06(a). Venue is not a constitutional requirement; rather, it is a statutory requirement. A juvenile's right to appeal in a juvenile proceeding is controlled by section 56.01(c). § 56.01(c); However, section 56.01 does not authorize an appeal from a transfer order issued under section 51.07. *See* § 56.01(c). When a legislative enactment says a juvenile may appeal orders delineated in the statute, there is no right to appeal orders not so included. Neither section 56.01 or 51.07 expressly allow a juvenile to appeal from a motion to transfer. Therefore, applying the plain language of section 56.01(c), we conclude that an order transferring the cause to another county under section 57.01 is not an appealable order.

Conclusion: Because the controlling statute does not authorize an appeal from a transfer order issued under section 51.07, we conclude the order transferring S.D.S.'s case to another county for disposition is not an appealable order. Because the transfer order is not an appealable order, we are without jurisdiction to consider S.D.S.'s issue and must dismiss the appeal.

RESTITUTION—

GENERALLY, RESTITUTION MAY BE ORDERED ONLY FOR PROPERTY DAMAGE OR LOSS THAT OCCURS IN THE COMMISSION OF THE OFFENSE FOR WHICH THE ACCUSED IS CONVICTED, HOWEVER, IN THIS UNAUTHORIZED USE OF A MOTOR VEHICLE ADJUDICATION, THE COURT REASONABLY INFERED THAT THE LAST PERSON TO OPERATE THE CAR (RESPONDENT) WAS RESPONSIBLE FOR THE DAMAGE TO THE VEHICLE AND LOSS OF ITS CONTENTS.

¶ 09-2-17. *In the Matter of A.J.V.*, MEMORANDUM, No. 03-08-00183-CV, 2009 WL 961526 (Tex.App.—Austin, 4/10/09).

Facts: A.J.V. pleaded true to allegations that he engaged in delinquent conduct by committing the offenses of unauthorized use of a motor vehicle and evading arrest. *See* Tex. Fam.Code Ann. § 51.03 (West 2008); Tex. Penal Code Ann. §§ 31.07, 38.04 (West 2003). The juvenile court adjudicated him delinquent on both grounds and placed him on probation until September 25, 2009, to be served at an intermediate sanctions center. The court also ordered A.J.V. and his mother to pay \$1150 in restitution. In his only point of error, A.J.V. contends that the evidence does not support the restitution order. We find no abuse of discretion, but we will modify the restitution order to accurately state the amount ordered.

The automobile in question belonged to Sergio Oviedo Ovalle. Ovalle testified at the disposition hearing that the car, a 1993 Ford Tempo, was stolen on January 29, 2008, which was a Tuesday. Ovalle said that he had purchased the car about a year earlier for \$1500, and that it was in good condition before it was stolen. On Thursday morning, which would have been January 31, the police notified Ovalle that his car had been recovered. When Ovalle arrived at the wrecker yard where the car had been taken, he discovered that the license plates and speakers had been removed, the exterior had been painted a gray-black primer color, and the upholstery had been slashed. In addition, a three-month-old weed eater worth \$150 had been stolen from the trunk of the car. Ovalle testified that when he tried to start the car, "the engine was making a weird noise like if a piston had broken, and something inside the starter was making a weird noise and it didn't want to start, and the back seat was broken and the seat belts that were automatic, be-

cause it was an automatic car, were also broken. When you put the key to start, the engines of the seat belts would stick making a noise." Ovalle added, "I didn't go and pick it up because to me it's useless because I would have to get a tow truck to bring it to my house because the car doesn't start." After being told that he would have to pay a \$298 impound fee and an additional \$95 to have the car towed to his house, Ovalle elected to abandon the vehicle because "[t]he car is useless."

When a juvenile is found to have engaged in delinquent conduct arising from the commission of an offense in which property damage or loss or personal injury occurred, the court may order the child or his parent to make full or partial restitution to the victim of the offense. Tex. Fam.Code Ann. § 54.041(b) (West 2008). Because delinquency proceedings are quasi-criminal in nature, the rules of restitution in criminal cases apply. *In re J.R.*, 907 S.W.2d 107, 109 (Tex.App.—Austin 1995, no writ). The question of restitution is committed to the court's discretion, but that discretion is not unlimited. *Campbell v. State*, 5 S.W.3d 693, 696 (Tex.Crim.App. 1999). The amount of restitution must have a factual basis within the victim's loss; the trial court may not order restitution to anyone but the victim of the offense with which the offender is charged; and the trial court may not order restitution for an offense for which the defendant is not criminally responsible. *Id.* at 696-97.

The juvenile court ordered A.J.V. to pay \$1150 in restitution, \$1000 for the car and \$150 for the weed eater. A.J.V. contends that the juvenile court abused its discretion by ordering him to pay restitution for losses that were not shown to be the result of his unauthorized use of Ovalle's vehicle. A.J.V. argues that there is no evidence that he stole, damaged, or vandalized Ovalle's car, or that he stole the weed eater. He contends that the juvenile court abused its discretion by ordering him to pay restitution for losses resulting from offenses for which he was not shown to be criminally responsible.

Held: Affirmed as modified

Memorandum Opinion: A.J.V. urges that this cause is analogous to *In re D.S.*, 921 S.W.2d 860 (Tex.App.—San Antonio 1996, no writ). In that case, a juvenile pleaded true to the allegation that he committed criminal trespass, was adjudicated delinquent, and ordered to pay restitution to the property owner. *Id.* at 861. Citing criminal precedent, the court of appeals held that restitution may be ordered only for property damage or loss that occurs in the commission of the offense for which the accused is convicted. *Id.* The court vacated the restitution order because the property loss at issue was not the result of the criminal trespass. *Id.*

The State disputes A.J.V.'s contention that Ovalle's losses did not result from his unauthorized use of the automobile, citing *In re C.T.*, 43 S.W.3d 600 (Tex.App.—Corpus Christi 2001, no pet.). C.T. was adjudicated delinquent for having failed to stop and leave

information after she was involved in a three-vehicle accident, and she was ordered to pay restitution for the damages to one of the vehicles. *Id.* at 601; *see* Tex. Transp. Code Ann. § 550.022 (West Supp.2008). Citing *D.S.*, she argued that the damages were the result of the accident and not her failure to stop and leave information. *Id.* at 602-03. The court of appeals rejected this argument, noting that both her involvement in the accident and the damages to the other vehicle were elements of the offense of failing to stop and leave information; in other words, but for the accident and resulting damages, C.T.'s failure to stop would not have been a crime. *Id.* at 603. Therefore, the damages to the other vehicle were occasioned by and arose out of the offense for which she was adjudicated delinquent. *Id.* [FN1] We agree with the reasoning and result in *C.T.*, although that opinion is legally distinguishable because damage to the vehicle is not a formal element of the offense of unauthorized use. *See* Tex. Penal Code Ann. § 31.07.

FN1. The court of appeals relied on an opinion by this Court in which we upheld a restitution order in a prosecution for failing to stop and render aid. *See Lerma v. State*, 758 S.W.2d 383, 384 (Tex.App.—Austin 1988, no pet.).

Both parties refer us to two opinions involving restitution orders based on a juvenile's unlawful use of a vehicle. The first is *In re R.M.Z.*, No. 04-00-00465-CV, 2001 Tex.App. LEXIS 2668 (Tex.App.—San Antonio Apr. 25, 2001, no pet.) (not designated for publication). In that case, there was a jury trial and a full evidentiary record. *Id.* at *1. Police officers stopped a "primer red vehicle" seen driving away from another, stripped vehicle. *Id.* at *2. The driver of the red vehicle, who was R.M.Z., told the officers that "this has been my car for a while," and that he had just got it running. *Id.* As it turns out, the car had been stolen three days before. *Id.* The evidence also showed that the steering column had been broken to allow the car to be driven without a key, and the vehicle identification number and license plates had been altered. *Id.* at *8. R.M.Z. was found to have committed the offense of unauthorized use and ordered to pay restitution to the owner of the vehicle. *Id.* at *2. Citing the San Antonio court's earlier opinion in *D.S.*, R.M.Z. argued on appeal that the restitution order was improper because there was no evidence that he had stolen the car. *Id.* at *7. The court of appeals rejected this argument, holding that the evidence supported a finding that the car had been in R.M.Z.'s possession for the three days it had been missing, and that he was responsible for the damage to the vehicle while it was in his possession. *Id.* at *8.

The other opinion is *In re R.M.*, No. 05-06-00519-CV, 2007 Tex.App. LEXIS 5785 (Tex.App.—Dallas Jul. 24, 2007, no pet.) (mem.op.). R.M. pleaded true to unauthorized use of a vehicle and was ordered to pay restitution for damages to the vehicle. *Id.* at *1. The opinion

contains only a limited recitation of the facts, but it states that the "[t]estimony at trial showed [that R.M.] and his cohorts jumped out of the car *they had taken* while it was still moving." *Id.* (emphasis added). The car, which had been in "perfect condition" before the incident, had to be towed to a repair facility because there was no key and the ignition was damaged. *Id.* at *3. The court held that this evidence was sufficient to establish that the damages to the vehicle resulted from the unauthorized use offense. *Id.* at *4.

We conclude that the juvenile court did not abuse its discretion by ordering A.J.V. to pay restitution for the damage to Ovalle's car. The car was stolen on January 29. A.J.V. admitted to the juvenile court that on January 30, he intentionally and knowingly operated Ovalle's car without consent. He also admitted that on January 30, he intentionally fled from a police officer who he knew was attempting to lawfully arrest him. On January 31, Ovalle examined his car and discovered that due to damage to the engine and starter, the car would not start. From this evidence, the juvenile court could reasonably infer that A.J.V. was the last person to operate the car and, as such, was responsible for the damage to the vehicle. The inference that appellant damaged Ovalle's car is strengthened by the short time frame. The damage had to have occurred during a roughly twenty-four hour period beginning with the theft of the car and ending with A.J.V.'s arrest. Given this timetable, the possibility that the damage to the car was inflicted by someone else is considerably reduced. We hold that the evidence supports the juvenile court's finding that the damage to Ovalle's car occurred during or as a result of A.J.V.'s unauthorized use of the vehicle.

A closer question is presented by the juvenile court's order that A.J.V. pay restitution for the stolen weed eater. As noted above, the family code authorizes the payment of restitution when a juvenile is found to have engaged in delinquent conduct arising from the commission of an offense in which property damage or loss of personal injury occurred. Tex. Fam.Code Ann. § 54.041(b). This statute has been construed to mean that the damage or loss must have resulted from the offense on which the delinquency finding is based. *D.S.*, 921 S.W.2d at 861.

It is obvious that Ovalle's weed eater would not have been stolen if his car had not been stolen, and it would be reasonable to order the thief to pay restitution for the loss. But A.J.V. was not adjudged delinquent for having stolen the car. Rather, he was adjudged delinquent for having operated Ovalle's car without his consent. However, the same conduct on which the delinquency finding was based would also have supported the inference that A.J.V. was the thief. *See Chavez v. State*, 843 S.W.2d 586, 587-88 (Tex.Crim.App.1992) (conviction for theft may be based on unexplained possession of recently stolen property); *Hardesty v. State*, 656 S.W.2d 73, 76-77 (Tex.Crim.App.1983) (same).

Conclusion: Under the particular circumstances of this case, we conclude that the connection between A.J.V.'s unauthorized use of Ovalle's vehicle and the loss of the weed eater that had been in the vehicle was sufficient to warrant the juvenile court's order that A.J.V. pay restitution for the loss of the weed eater. No abuse of discretion is shown, and the point of error is overruled.

The dispositional order of probation does not conform to the juvenile court's restitution order, and it is modified to state that restitution in the amount of \$1150 is to be paid. [FN2] As so modified, the juvenile court's judgment is affirmed.

FN2. The written order erroneously states that the restitution amount is \$1100.

**WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT—
IN A HEARING FOR DISCRETIONARY TRANSFER TO ADULT COURT THE ABSENCE OF A PSYCHIATRIC EXAMINATION DOES NOT RESULT IN AN INCOMPLETE INVESTIGATION OR DIAGNOSTIC STUDY AS REQUIRED BY SECTION 54.02.**

¶ 09-2-18. *Acevedo v. State*, UNPUBLISHED, No. 05-08-00467-CR, 2009 WL 930347 (Tex.App.—Dallas, 4/8/09).

Facts: At the hearing on the State's petition for discretionary transfer, the juvenile court heard evidence that Acevedo entered Amratlal Mistry's food store, pointed a gun and yelled at Mistry and his son to give him money, and shot Mistry, seriously injuring him.

A juvenile probation officer, Thomas King, evaluated Acevedo's case and testified to his history in the juvenile system and his findings. "A Social Evaluation and Investigative Report" prepared by King and a "Report of Psychological Evaluation and Diagnostic Study" prepared by a licensed staff psychologist at the doctorate level were admitted without objection. Acevedo's prior offenses were: unlawful carrying of a weapon (probation); runaway; failure to identify; and contempt.

In part and as pertinent to this appeal, the juvenile court's order of discretionary transfer stated that "after considering all the testimony, diagnostic study, social evaluation, and full investigation," it found it was contrary to the interests of the public to retain jurisdiction; it found that because of the seriousness of the alleged offense and Acevedo's background, the welfare of the community required criminal proceedings; and, Acevedo "has not accepted or responded to supervision."

Held: Affirmed

Opinion: We first consider Acevedo's assertion that the transfer proceeding "was devoid of a full investigation

and lacked a full diagnostic study." Acevedo describes the social and psychological evaluations as "minimal" and "conclusory" and urges that they fall short of constituting a "full investigation" as required by section 54.02.

"Full investigation" is not defined in section 54.02. *Turner v. State*, 796 S.W.2d 492, 497 (Tex.App.—Dallas 1990, no writ). "[A]ny inquiry into the circumstances of an offense must be one of degree." *In re I.B.*, 619 S.W.2d 584, 586 (Tex.Civ.App.—Amarillo 1981, no writ). "It is a matter of common knowledge that the course and scope of an investigation will vary according to the circumstances surrounding the events." *Id.* The primary function of the investigation is to discover evidence of probative force, whether for or against the child, for presentation at the hearing. *Id.* The issue of whether an investigation is complete is determined by the court that ordered the investigation. *In re C.C.*, 930 S.W.2d 929, 934 (Tex.App.—Austin 1996, no writ); *In re I.B.*, 619 S.W.2d at 586. The statutory requirement of a complete diagnostic study bears upon the maturity and sophistication of the child and relates to the questions of culpability, responsibility for conduct, and ability to waive rights intelligently and assist in the preparation of a defense. *L.M. v. State*, 618 S.W.2d 808, 811 (Tex.Civ.App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.). The paramount concern of the juvenile court is "the qualitative content of a diagnostic study, rather than a mere quantitative 'check-list' of included items." *Id.* at 811-12.

The social evaluation in the record is a five-page single-spaced document. [FN1] It details the juvenile department referrals, including the current offense and statement of circumstances, prior offenses and dispositions, and prior court orders. It also describes the child: his description, attitude, school, employment, religion, hobbies and leisure time, residence, sophistication, and maturity. Finally, it includes King's recommendation that the petition for discretionary transfer be granted.

FN1. The pages are numbered one through six; page five is missing. It appears that the document admitted into evidence without objection did not contain page five.

The psychological evaluation is a four-page single-spaced document. It states that the instruments utilized in making the evaluation were a clinical interview, mental status exam, review of records, and thematic apperception test. It refers to a recent psychological assessment and the subsequent psychological screening conducted by other professionals. It also includes the results of an intelligence and an achievement test. It details Acevedo's answers to questions about his background, the facts supporting the behavioral observations and mental status conclusions, and testing results.

Acevedo contrasts these reports to the documents considered by the juvenile court in *I.L. v. State*, 577 S.W.2d 375, 376 (Tex.Civ.App.—Austin 1979, writ ref'd n.r.e.): a psychiatrist's report, a social evaluation and

investigation by a court investigator, monthly progress reports from a one-year stay at the Texas Youth Council, and an intelligence test. Acevedo also refers to a scholarly recommendation that a full investigation should include examinations by a psychiatrist and a clinical psychologist and an evaluation by a probation department caseworker. *See id.* The gist of his argument is that there is no psychiatric, and thus no medical, examination here. However, unlike in *I.L.*, *id.*, where the child's prior offenses included burglary, aggravated assault, and stabbing, Acevedo's prior offenses were minor, resulting in probation and juvenile detention, not juvenile commitment. The psychological evaluation states that "[t]he results of personality testing indicated no significant difficulties associated with a severe psychiatric disorder," and Acevedo did "not appear to be experiencing severe psychological distress...." Under these circumstances, we cannot say that the absence of a psychiatric examination here resulted in an incomplete investigation or diagnostic study.

Acevedo also argues that the investigation relied on his self-reporting. We disagree. As noted above, the psychological evaluation utilized a review of records and an intelligence and an achievement test.

After reviewing the qualitative content of the social evaluation and psychological evaluation, we cannot agree with Acevedo that they were no more than a "mere quantitative 'check-list' of included items." *See L.M.*, 618 S.W.2d at 811-12. Under the facts of this case, we conclude the documents presented are sufficient to constitute the "full investigation" required by section 54.02. *See In re I.B.*, 619 S.W.2d at 586. We reject Acevedo's first argument.

Conclusion: Having rejected Acevedo's arguments, we conclude the juvenile court did not abuse its discretion in transferring Acevedo's case to the district court for trial as an adult. *See In re K.B.H.*, 913 S.W.2d at 687-88; *Brown*, 960 S.W.2d at 778; *Benitez*, 5 S.W.3d at 918. We resolve Acevedo's issue against him and affirm the trial court's judgment of conviction.

**DETERMINATE SENTENCE TRANSFER—
AN ADULT DISTRICT COURT, TO WHICH A
JUVENILE HAS BEEN TRANSFERRED, HAS THE
AUTHORITY TO EXTEND THE PROBATIO-
NARY PERIOD PREVIOUSLY SET BY THE JU-
VENILE COURT, WHEN THE JUVENILE FAILS
TO COMPLY WITH THOSE CONDITIONS.**

¶ 09-2-19. **Krupa v. State**, No. 10-08-00166-CR, 2009 WL 1163430 (Tex.App.—Waco, 4/29/09).

Facts: The juvenile court placed Jonathan Krupa on determinate sentence probation for a two-year probationary period. Krupa was transferred to the district court and

placed on community supervision. The district court later extended the probationary period for an additional three years. After the original period had expired, but within the extended period, the district court revoked Krupa's community supervision and sentenced him to seven years in prison. On appeal, Krupa maintains that the revocation is void because the district court lacked authority under section 54.051 of the Family Code to extend the probationary term set by the juvenile court.

Held: Affirmed

Opinion: Section 54.051 provides for the transfer of a child placed on probation, which continues past his eighteenth birthday, to an appropriate district court. *See* Tex. Fam.Code Ann. § 54.051(a), (d) (Vernon 2008). After transfer, the district court "shall place the child on community supervision under Article 42.12, Code of Criminal Procedure, for the remainder of the child's probationary period and under conditions consistent with those ordered by the juvenile court." *Id.* at § 54.051(e). If the juvenile violates a condition of community supervision, the district court shall dispose of the violation, "as appropriate, in the same manner as if the court had originally exercised jurisdiction over the case." *Id.* at § 54.051(e-2).

Relying on the Family Code's definition of a "child" and the statute's bill analysis, Krupa construes the language "remainder of the child's probationary period" to mean that the district court could not extend his probation because it was limited to the two-year term set by the juvenile court. *See* Tex. Fam.Code Ann. § 51.02(2) (A)-(B) (Vernon 2008) (A "child" is one who is: (1) ten years of age or older and under 17 years of age; or (2) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age."); *see also* House Comm. on Juvenile Justice and Family Issues, Bill Analysis, Tex. H.B. 3517 § 10, 76th Leg., R.S. (1999) ("[the court [must] discharge the child from the sentence of probation on the child's 18th birthday, unless the court transfers the child to an appropriate district court, if a sentence of probation ordered under this subsection and *any extension of probation* will continue after the child's 18th birthday."). Krupa further contends that extending probation past the period set by the juvenile court is not 'consistent with' a two-year probation." (Citing *Foster v. Bullard*, 496 S.W.2d 724, 734 (Tex.Civ.App.—Austin 1973, writ ref'd n.r.e.) ("We find the term 'consistent with' to mean a price not contradictory of, but having agreement with").

The State maintains that the "probationary period is distinct from the conditions that apply during that period;" the word "child" merely "modifies 'probationary period' to the extent that it identifies when the period begins." According to the State, the plain language of the statute authorizes changes to both the period and the

conditions set forth by the juvenile court. We agree with the State.

The statute makes clear that the district court exercises jurisdiction over the transferred juvenile. *See* Tex. Fam.Code Ann. § 54.051(e). Once transferred, the juvenile is subject to the rules enunciated in article 42.12, which applies for the remainder of the probationary period set by the juvenile court. *Id.* During that period, the district court may impose conditions provided in article 42.12 as long they are consistent with those ordered by the juvenile court. *Id.* If the juvenile complies, he will be discharged at the end of the probationary period set by the juvenile court. If the juvenile violates the conditions, the district court may handle the violation, "in the same manner as if the court had originally exercised jurisdiction over the case." *Id.* at § 54.051(e-2).

According to the record, Krupa violated various conditions of his community supervision. The district court handled these violations by modifying Krupa's community supervision. Krupa agreed to the modifications, including the extension of his probationary period, in lieu of revocation. The district court was authorized, via article 42.12, to extend Krupa's period of community supervision upon a violation of community supervision. *See* Tex.Code Crim. Proc. Ann. art. 42.12 § 22(c) (Vernon Supp.2008). Similarly, the juvenile court may extend the juvenile's probationary period upon proof of a violation. *See* Tex. Fam.Code Ann. § 54.051(l) (Vernon 2008). As section 54.051(e-2) indicates, the Legislature clearly intended that the district court have such authority after transfer, in the event the juvenile violates the conditions of community supervision. Had Krupa been under the jurisdiction of the juvenile court, his probation could have been similarly extended. *See id.* We cannot say that extension of Krupa's probationary period is inconsistent with the juvenile court's probation order.

Moreover, nothing in section 54.051 suggests that article 42.12, section 22 is inapplicable to the transferred juvenile. Rather, section 54.051 specifically identifies certain provisions in article 42.12 that either *do not* apply to the transferred child or that may have a different application. *See* Tex. Fam.Code Ann. § 54.051(e-1) (section 3g, limitations on judge ordered community supervision, and section 3(b), minimum period of community supervision, do not apply to a case transferred from the juvenile court); *see also* § 54.051(e-2) (upon revocation, the district court may "reduce the prison sentence to any length without regard to the minimum term imposed by Section 23(a), Article 42.12"); § 54.051(e-3) (The time that a child serves on probation is the same as time served on community supervision for purposes of determining eligibility for early discharge under Section 20, Article 42.12). The Legislature neither limited nor eliminated the district court's authority under section 22(c), although it certainly knew how to do so.

Conclusion: We, therefore, hold that a district court, to which a juvenile is transferred under section 54.051, has

authority under article 42.12 section 22(c) to extend the probationary period set by the juvenile court when the juvenile fails to comply with the conditions of community supervision. To hold otherwise would lead to the absurd result that the district court has virtually no authority over the transferred juvenile, a result clearly not contemplated by the Legislature. *See Mason*, 980 S.W.2d at 638; *see also Slaughter*, 110 S.W.3d at 502. Because the district court was authorized to extend Krupa's communi-

ty supervision, its subsequent revocation was not void. [FN1] We overrule Krupa's sole issue and affirm the trial court's judgment.

FN1. Because we so hold, we need not address Krupa's contention that the district court's *capias* was issued after the probationary period expired, making the revocation void.