

STATE BAR SECTION REPORT JUVENILE LAW

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CHAIR’S MESSAGE by Bill Connolly

If you are not moving forward, you’re backing up. Like any other endeavor, more benefits tend to come to an organization that engages in critical analysis of past efforts and constructive dialogue on what would best serve the organization in the future. The Council of Juvenile Law Section has done that and here are some things to watch for in the coming months:

1. The Section has agreed to utilize the Accounting Management System (“AMS”) offered at no cost to the Section by the State Bar of Texas (“SBOT”). The use of AMS will provide us with continuity (between different Treasurers and elections), while allowing the Section to maintain deposit and expenditure controls. The Record keeping will be stabilized and will make accountability easier for the State Bar and their reporting and auditing requirements. There will be no change to Section autonomy;
2. The Nuts and Bolts conference will be held biennially in years when the Legislature has not met for it’s main session;
3. The Council is exploring having the SBOT videotape our Annual Conference for State Bar Online CLE purposes. There would be no additional cost to the Section or conference attendees for this service;
4. To deal with the ever increasing cost for printing and mailing, it has been proposed that the newsletter be sent out electronically. These plans will be finalized at the annual conference in February 2010; and
5. The Section will be pursuing a website redesign through the Section Division of the SBOT. The redesign will be at no cost to the Section and will include publication of the new TYC minimum length of stay calculations.

The planning for the 23rd Annual Robert O. Dawson Juvenile Law Institute is well underway. It will be held from February 18-20, 2010, at the Westin Park Central Hotel in Dallas, Texas. We will have a keynote address by the Hon. Jim McReynolds, Chair of the House of Corrections Committee. In addition to some of our favored topics, the conference agenda will include additional mental health concerns, a Restorative Justice track and a DFPS track, that will examine some progressive programs currently in operation, such as the Tar-

rant County Family Drug Court and the Travis County Model Court. As usual, the final note is an invitation for each of you to write, call or email your props, concerns or criticisms. Our Section's vitality comes from your participation.

EDITOR'S FOREWORD
by Pat Garza

Ok, for the record, she passed the bar. My eldest daughter, Michelle, is now a full fledged attorney. Notwithstanding what society may say, that's a good thing. Hey, don't laugh. Have you noticed that being a lawyer isn't what it used to be? For those of you old enough to remember the real Beatles... no not the dressed-up pretend Beatles, I mean old enough to remember watching the real Beatles, you could relate to this. When I was a kid, I remember parents wanted their kids to grow up to be lawyers and doctors. Why has the image of lawyers taken such a fall? I know times are different, but when did we as lawyers loose so much respect? I remember about 10 years ago, I read an article by Wendy Marsh, who at that time was a member of the Texas Higher Education Coordinating Board. In the article she talked about how lawyers would lead the world into the next century. She pointed out how lawyers helped to write the Emancipation Proclamation, Securities and Exchange Laws, and the National Labor Relations Act. How lawyers wrote the charter for the United Nations along with the 23 covenants on human rights that emerged from that organization. She even went back to the Magna Carta in 1215, pointing out that it was lawyers who helped force King John to sign the list of rights and privileges that later became the blue print for the first 10 Amendments to our Constitution.

We (as lawyers) are aware of how lawyers try to right that which is wrong. We are aware of how lawyers have exposed dangerous or defective products to the public. We are aware that lawyers help the weak and fight for truth and justice. We are aware because we are there, everyday. Ours truly is a great and noble profession. Fighting for truth and justice is not a cliché, it is what we do. Michelle had many options. She could have gone in many different directions. She received her undergraduate degree from Harvard, and her law degree from the University of Texas. She has traveled around the world and has had experiences I could only dream of. I don't know what kind of law my daughter will practice. But, what I do know is that she has decided to join my profession. And my profession is better for it. I am so very proud of being a lawyer. And now, I am equally proud of being the parent of a lawyer. A father can have no better tribute than to have their child follow in their footsteps. Congratulations to Michelle, to all who passed the bar, and to all of you who continue to hold our profession with the dignity and the reverence it deserves.

Juvenile Law Section Newsletter is Going Electronic. Beginning next summer, the Juvenile Law Section newsletter will be going electronic, with the exception of the Special Legislative Issues. The new interactive, electronic version will include hyperlinks to pertinent case law reference within the issue. Be sure that your email address is updated on your MyBarPage of TexasBar.com. Please note that the Section will not sale or distribute your email address to anyone, including the State Bar's CLE Division, so you will not be inundated with emails not related to the Juvenile Law Section.

Thank you Debbie Steed. I want to take this opportunity to thank Debbie Steed for her hard work and devotion to the Section. If you ever wonder who takes my caselaw updates, my forewords, legal articles, chair's messages, council announcements and anything else that needs to get into the Newsletter and puts them all together in a well organized magazine. That would be Debbie. Professor Dawson sang her praises and so do I. On behalf of myself and the entire section, thank you.

23rd Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's 23rd Annual Juvenile Law Conference will be held February 18-20, at the Westin Park Central Hotel in Dallas, Texas. Chair-Elect Chris Hubner and his planning committee are already working on putting together an excellent and practical conference.

Officer and Council Nominees. The Annual Juvenile Law Section meeting will be held on February 18 and in conjunction with Juvenile Law Conference. The Juvenile Law Section's nominating committee submitted the following slate of nominations:

Chris Hubner, Chair
Nydia Thomas, Chair-Elect
Jill Mata, Treasurer
Richard Ainsa, Secretary
Bill Connolly, Immediate Past Chair

There will be only one open slot available for Council members whose terms will expire 2013, and two reappointments. The nominations presented by the Nominations Committee of the Juvenile Law Section will be:

Kim Brown, Fort Worth;
David Hazlewood, Lubbock (Reappointment to Council); and
Riley Shaw, Fort Worth (Reappointment to Council)

Nominations from the floor during the meeting will be accepted. If you have someone that you would like to nominate from the floor, contact the Chair of the Nominations Committee, Tim Menikos, at tmenikos@tarrantcounty.com.

Texas Juvenile Law, 7th Edition 2010 Supplement. Texas Juvenile Law, 7th Edition 2010 Supplement by Robert O. Dawson and updated by Christian A. Hubner will be released in February. This is the Supplement to *Texas Juvenile Law* (Seventh Edition), which was published in August, 2008. This Supplement will include all of the relevant amendments to juvenile statutes made by the 81st Texas legislature in 2009 and will be inclusive of case law current through August, 2009. You can order the 7th Edition online at www.tjpc.state.tx.us. **IF YOU HAVE ALREADY ORDERED YOUR 7TH EDITION, YOU WILL RECEIVE THE SUPPLEMENT AUTOMATICALLY.** If you have questions, contact Diane Laffoon at 512.424.6682 or Diane.Laffoon@tjpc.state.tx.us.

Amended Bylaws. The Council recently voted to append the Section's bylaws by amending Article III and IX.

Article III, Officers, Section 3, shall be amended by adding the following language after the last sentence: "The treasurer's duties and responsibilities shall begin at the first council meeting immediately following the annual juvenile law conference."

Article IX, Miscellaneous Provisions, shall be amended by adding the following: "Section 7. Any notice required by these bylaws or by the State Bar of Texas may be published in writing or electronically."

Article on the History of the Section. I have included an excellent article written by Karen Judd and Melissa Sircar on the origination of the Juvenile Law Section. They were interns for Judge Jean Boyd this past summer. It is a must read.

The role of the law is to protect the powerless from the powerful.
Code of Hammurabi
2,000 years before Christ

Mark Your Calendars...

**23rd Annual Juvenile Law Conference
Robert O. Dawson Juvenile Law Institute**

February 18 – 20, 2010

Westin Park Central Hotel ~ Dallas, Texas

Approximately 12.75 hours of MCLE

The conference flyer and registration information
will be mailed out in December.

Visit us online at www.juvenilelaw.org for conference brochure.

Questions? Contact Kristy Almager
512.424.6710 or Kristy.Almager@tjpc.state.tx.us

Interested in donating items to this year's Silent Auction?
Contact Susan Clevenger at
281.580.4501 or gtclevenger@yahoo.com.

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A Look Back: The Establishment of the Juvenile Law Section of the Texas State Bar

By Karen Judd and Melissa Sircar

In 1986, a group of attorneys passionate about juvenile law and its unique interests came together in Houston, Texas to create the Juvenile Law Section of the State Bar of Texas. Led by the late Professor Robert Dawson and Jo Nelson, the group was motivated by their desire to improve the administration of justice in the field of juvenile law in the state of Texas. Increasing complexity within the system, along with the need for statewide consistency in interpretation of state statutes, was the major impetus for creating this new section within the Bar.

The goal for the founding group of attorneys, judges and other professionals was improving the juvenile system to best respond to the needs of the children who found themselves in the system. According to Bill King, "The primary benefit was to move the mindset of the practitioners from custody battles to crime. Not everyone liked it, but juveniles were moving from being viewed as misguided children who committed crimes to criminals who happened to be young."

Many of the founders met at the Texas State Legislature during their lobbying efforts on behalf of juvenile justice issues. Traditionally, attorneys working in juvenile law were either part of the Family or Criminal Defense Law Sections of the State Bar, neither of which focused specifically on the improvement of juvenile law. "Juvenile Court issues were not a priority to the Family Law Section or the Criminal Defense bar—we had our own issues and needed our own experts," said Kris Moore, a founding member of the section.

Chief among experts on juvenile law was Professor Robert Dawson of the University of Texas. Professor Dawson was the principle draftsman of Title 3 of the Family Code and a well respected advisor to the Texas Legislature for all manner of topics dealing with juveniles. The impetus for pursuing a separate section for juvenile law at the state level came to Professor Dawson from a practical joke.

In the late 1970's, Professor Dawson began writing a column on juvenile law in the Family Law Section newsletter. Professor John Sampson, the editor of the newsletter, received a note from a reader expressing gratitude for the newsletter and how helpful it was. Professor Sampson decided to play a practical joke on Professor Dawson by adding a "P.S." to the letter stating that the reader thought the juvenile law column was badly written and did not fit with the rest of the newsletter. Although, Professor Sampson came clean before Professor Dawson called the reader to discuss this personally, the practical joke struck a chord with Professor Dawson

that juvenile law really was its own animal and should probably be a separate section of the State Bar.

Other respected attorneys were beginning to see the same need. Simultaneously with Professor Dawson's effort to lobby the State Bar for a new section, a group of attorneys in Houston had established a local juvenile law section. These attorneys included Jo Nelson and Connie Howell. Combining efforts with Bob Dawson, the group drew up the documentation required to create the Juvenile Law Section of the Texas State Bar. The actual drafting credit goes to Michael LeBurkien, who had previously created the paperwork to establish the Juvenile Law Section of the Houston Bar.

The first counsel of the Juvenile Law Section was voted in at the State Bar Convention on June 20, 1986. Honorable Jo Nelson took on the responsibility of being the first chairman of the section. When asked about being the first chair she replied, "I told them I don't mind being first because you don't have to fill anybody else's shoes! You just do what you've got to do and move on." She was accompanied by Vice Chairman Robert Dawson (who doubled as the newsletter editor), Secretary Michael LeBurkien, and Treasurer Connie Howell. The first council consisted of Elizabeth Godwin, David Fraga, Glenn Williams, Susan Spruce, Debby Gardner, and Honorable Gladys Oakley. Debby Gardner and Elizabeth Godwin became the Chairman of the section the next two years respectively.

From the beginning the section's activities focused on the education of practitioners, outreach to other related sections of the Bar, and efforts to upgrade the professionalism of the juvenile practitioners. Getting the State Bar to recognize the practice of juvenile law as its own specialty was seen as recognition of the section's hard work which was due significantly to the work of Professor Robert Dawson. Elizabeth Godwin commented, "Bob Dawson was the most significant voice on this issue. He understood the need for better and more lawyers in the area, the vision to foresee the increase in cases in juvenile courts, and the grasp of what a specialized section could accomplish." With over twenty years of experience to date, the Juvenile Law Section of the Texas State Bar has been able to accomplish these goals.

Special thanks go to the following for providing information used in this article: Kristy Almager, Debby Gardner, Elizabeth Godwin, Bill King, Jill Mata, Jo Nelson, Professor John Sampson, and Debbie Steed.

REVIEW OF RECENT CASES

TRIAL PROCEDURE—

A MISTRIAL IS REQUIRED ONLY IN EXTREME CIRCUMSTANCES, WHERE IMPERMISSIBLE QUESTIONS AND ANSWERS CAUSES THE KIND OF INCURABLE PREJUDICE THAT CANNOT BE ADEQUATELY ADDRESSED BY A TRIAL COURT'S INSTRUCTIONS TO THE JURY.

¶ 09-4-1. **In the Matter of D.J.T.**, MEMORANDUM, No. 12-08-00378-CV, 2009 WL 2517111 (Tex.App.—Tyler, 8/19/09).

Facts: The State alleged that D.J.T. was a child who engaged in delinquent conduct, specifically, the offenses of aggravated sexual assault and indecency with a child, which would have been felony offenses had D.J.T. been an adult. D.J.T. denied the allegations, and a jury trial was held. During the trial, the State called five witnesses, including the complainant, D.S. (a pseudonym). David Wells, an investigator with the Angelina County Sheriff's Department, testified regarding the facts that led to formal allegations being brought by the State. During his testimony, the following exchange occurred:

Q: What specific information did you hear or were you told that formed the basis of your belief that D.J.T. committed the offense of indecency?

A: The description provided during the interview at the Alliance by D.S., and it was very graphic and believable.

D.J.T. objected to Well's answer, specifically to the assertion that Wells found the witness to be believable. The trial court sustained the objection and instructed the jury to disregard the statement about the believability of the witness.

Later in Wells's testimony, the following questions and answers occurred:

Q: At some point in your investigation, did you determine probable cause existed?

A: Yes, I believe probable cause existed when I turned the case over to juvenile.

Q: And that was for both of the offenses you had mentioned earlier?

A: Yes, it was.

Q: And what is the standard for probable cause?

A: Believability of the complainant in the case.

Again, D.J.T. objected. The trial court sustained the objection and instructed the jury that the offered standard was "not a proper definition for probable cause."

Finally, as the State's questioning of Wells came to an end, the following exchange occurred:

Q: What is a complainant?

A: A complainant is the victim of a crime.

Q: If you didn't believe the complainant, would you have ever gone forward with this case?

D.J.T.'s counsel objected. The trial court sustained the objection and instructed the jury to disregard the question. D.J.T. then moved for a mistrial. The trial court overruled that motion.

D.J.T. and his father also testified. The jury found that D.J.T. had committed the acts as alleged in the State's petition. Based on that finding, the juvenile court placed D.J.T. on intensive supervision probation. This appeal followed.

In a single issue, D.J.T. contends that the trial court abused its discretion in denying his motion for mistrial following the State's repeated attempts to have Investigator Wells testify about the believability of the complainant. D.J.T. contends that this was cumulative error which required the trial court to declare a mistrial and grant him a new trial.

Held: Affirmed

Memorandum Opinion: The determination of whether a given error necessitates a mistrial must be made by examining the particular facts of the case. *Wood v. State*, 18 S.W.3d 642, 648 (Tex.Crim.App.2003). In determining whether a mistrial should be granted, we must balance the following three factors: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the certainty of conviction absent the misconduct. *See Ramon v. State*, 159 S.W.3d 927, 929 (Tex.Crim.App.2004).

Severity of the Misconduct

There were three exchanges involving the believability of the complaining witness. In the first exchange, Wells's answer was not responsive to the question asked. Specifically, the State asked Wells for the basis of his belief that D.J.T. committed indecency. Wells replied that the basis of his belief was the complainant's description of the assault, but he went further

in his answer and stated that her description was "believable." This appears to be an unnecessary line of questioning, but the State did not specifically seek the answer given, and Wells's answer was not particularly invasive of the jury's role to determine credibility.

The second response, and the line of questions that provoked it, are more problematic. The State asked the investigator if he determined that probable cause existed. He stated that he did and then prompted an objection when he testified that the standard for probable cause was the "believability of the complainant in the case." The purpose of this line of questioning may have been to set up a question that followed. Specifically, the State asked the witness if probable cause was a lower threshold than the beyond a reasonable doubt standard. He testified that it was, and then agreed with the prosecutor that he was "never asked to determine if someone did or did not do something beyond a reasonable doubt."

The State appeared to be motivated, for reasons that are unclear, to explain to the jury that the investigator acted on a lower standard of proof than was required for the jury to convict. This was unnecessary, but we are not convinced that this question and answer constitute serious misconduct.

Finally, the prosecutor asked the officer if he would have gone forward with this case if he had not believed the complainant. No answer was given because Appellant immediately objected and moved for a mistrial based on the repeated revisiting of whether the investigator believed the witness. The jury likely understood that the officer believed the child witness even if this question had not been asked. Nevertheless, it is inappropriate for a witness to vouch for the credibility of another witness, and the State should not have asked the question. *See Schutz*, 957 S.W.2d at 69; *Fuller v. State*, 224 S.W.3d 823, 835 (Tex.App.—Texarkana 2007, no pet.) (improper for witness to testify that she saw nothing to indicate that child witness was being untruthful); *see also Weathersby v. State*, 627 S.W.2d 729, 730 (Tex.Crim.App. 1982) (improper for two detectives to testify that they believed defendant was guilty); *Greene v. State*, 928 S.W.2d 119, 124 (Tex.App.—San Antonio 1986, no pet.) (improper for detective to vouch for State's main witness's credibility).

In considering Wells's testimony and the questions asked by the prosecution, we find it instructive to compare the facts of this case to the facts in *Fuller*. That case involved the sexual assault of a child. The State's case in chief consisted of the testimony of the victim and four witnesses, each of whom testified in some manner that the victim was a truthful and credible witness. *Fuller*, 224 S.W.3d at 837. Further, these witnesses' belief in the victim's truthfulness and credibility was emphasized during closing argument. *Id.* The court of appeals reversed the conviction in that case because trial counsel's failure to object to the testimony about the victim's credibility caused the defendant harm. *Id.*

This case is different. Here, only Wells gave testimony that could be considered as improperly bolstering the believability of the complainant and his two statements were relatively indirect. The prosecutor's third question went directly to the heart of the matter, whether Wells believed the complainant, but it was not answered. The State does not argue that the questions or the answers given were proper. Instead, the State argues that any error was harmless. [FN1] Accordingly, we conclude that this is misconduct, though not especially egregious misconduct.

FN1. The State did reference this issue again in closing arguments. Specifically, the State argued that the testimony showed "what offenses [the officer] thought [D.J.T.] committed." D.J.T. did not object to this statement and does not address this on appeal. While this argument appears to be unnecessary, the State actually minimized the significance of the investigator's belief that probable cause existed, rather than exhorting the jury to believe the witness because the officer did.

Measures Adapted to Cure the Misconduct

Following both of Wells's statements regarding the believability of the victim and the prosecution's question regarding the victim's believability, the trial court immediately instructed the jury to disregard the testimony or question. Not only did the trial court promptly instruct the jury while Wells was testifying, but it reemphasized those instructions during its charge to the jury by telling the jury to "continue to observe all the instructions that I have previously given you." Moreover, the trial court further instructed the jury as follows: "You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, but in matters of law you must be governed by the instructions in the charge. In discharging your responsibility on this jury, you will observe all of the instructions which I have previously given."

We presume that a jury follows instructions given by a trial court. *See Ovalle v. State*, 13 S.W.3d 774, 783 (Tex.Crim.App.2003); *Colburn v. State*, 966 S.W.2d 511, 520 (Tex.Crim.App.1998); *Reynolds v. State*, 227 S.W.3d 355, 367 (Tex.App.—Texarkana 2007, no pet.). Furthermore, with respect to the unanswered question, "the asking of an improper question will seldom call for a mistrial, because, in most cases, any harm can be cured by an instruction to disregard." *See Wood*, 18 S.W.3d at 648. The trial court's assiduous attention to this issue supports the presumption that the jury followed their instructions to disregard the inappropriate questions and answers.

Certainty of Conviction Absent the Misconduct

In sexual abuse cases, the testimony of the child victim alone is sufficient to support the conviction. *See Tran v. State*, 221 S.W.3d 79, 88 (Tex.App.—Houston [14th Dist.] 2005, no pet.). In this case, the jury was able to hear from both the complaining witness and from

D.J.T. and to make its own independent judgment as to the veracity and credibility of the witnesses.

The fact that the jury convicted D.J.T. is not enough, as the State argues, to show that there would have been a conviction absent the errant questions and answers. On the other hand, the questions and answers here are not the kind of evidence that is of such a "damning character" that it would leave an impression on the minds of the jury that was likely to override their ability and cause the jury to convict when it otherwise would not. *See Kemp v. State*, 846 S.W.2d 289, 308 (Tex.Crim.App.1992). Instead, the idea that was conveyed to the jury, if any, was that the investigating officer believed the child. He did not offer any specialized expertise behind his belief in the child's account, did not suggest that his conclusion was based on inadmissible evidence or other misconduct on D.J.T.'s part.

The complaining witness's testimony encompassed all of the elements of the offense, and D.J.T.'s counsel cross examined her at length. The jury also heard of her reports to others about D.J.T.'s actions, and heard testimony from D.J.T. and his father. After considering all of the evidence, we cannot conclude that a jury was certain to find for the State. On the other hand, there was substantial evidence to support the verdict, and the transgressions by the State and its witness were not particularly egregious.

Conclusion: After balancing all of the factors, we hold that the trial court did not err in overruling D.J.T.'s motion for mistrial. The questions and answers about whether the investigator believed the complaining witness should not have been before the jury. A mistrial, however, is required only in extreme circumstances where the prejudice is incurable. *See Archie*, 221 S.W.3d at 699. In the context of this case, we cannot conclude that the impermissible questions and answers in this case caused the kind of incurable prejudice that could not be adequately addressed by the trial court's repeated instructions to the jury. We overrule D.J.T.'s sole issue.

Having overruled D.J.T.'s sole issue, we *affirm* the judgment of the trial court.

**DETERMINATE SENTENCE TRANSFER—
IN A DETERMINATE SENTENCE TRANSFER
HEARING, THE JUVENILE COURT RETAINS
JURISDICTION OVER A PERSON, TO DETER-
MINE WHETHER THEY SHOULD BE TRANS-
FERRED TO TDCJ, WITHOUT REGARD TO THE
AGE OF THE PERSON.**

¶ 09-4-2. *In the Matter of T.L.S.*, ___ S.W.3d ___, No. 12-08-00356-CV, 2009 WL 2517168 (Tex.App.—Tyler, 8/19/09).

Facts: On December 6, 2005, the district court in Cherokee County, acting as the county's juvenile court, adjudicated T.L.S. to be a juvenile delinquent, assessed a determinate sentence of twelve years, and placed him in the custody of the Texas Youth Commission (TYC). In August 2007, the State filed a petition to transfer T.L.S. to the Institutional Division of the Texas Department of Criminal Justice (TDCJ) to complete his sentence. T.L.S. filed a plea to the jurisdiction, arguing that the trial court was without jurisdiction to grant the State's petition because he was past his nineteenth birthday. The trial court held a hearing on August 8, 2008. Following that hearing, the trial court denied T.L.S.'s plea to the jurisdiction and ordered that he be transferred to TDCJ to complete his sentence. This appeal followed.

Held: Affirmed

Opinion: A juvenile court has "exclusive original jurisdiction over proceedings under this title [the Juvenile Justice Code]." Tex. Fam.Code Ann. § 51.04(a) (Vernon 2008). Significantly, the juvenile court "retains jurisdiction over a person, without regard to the age of the person, who is referred to the court under Section 54.11 for transfer to the Texas Department of Criminal Justice or release under supervision." Tex. Fam.Code Ann. § 51.0411 (Vernon 2008). The legislature did not amend or alter any of the express terms of these provisions, and a prospective application of the changes to the underlying statutes means that the juvenile court retained jurisdiction to determine whether T.L.S. should be transferred to TDCJ. *See Matter of J.J.*, 276 S.W.3d at 175. Other courts that have considered this specific issue have concluded that the amended statutes applied prospectively and did not affect the jurisdiction of the juvenile court to consider whether to order individuals in this cohort to be transferred to TDCJ. *See In re J.J.*, 276 S.W.3d at 176; *In re T.G.*, 2008 Tex.App. LEXIS 4551, at *20. We agree with those decisions. Accordingly, we hold that the trial court properly denied T.L.S.'s plea to the jurisdiction. We overrule T.L.S.'s sole issue.

Conclusion: Having overruled, T.L.S.'s sole issue, we *affirm* the judgment of the trial court.

**SUFFICIENCY OF THE EVIDENCE—
EVIDENCE WILL BE CONSIDERED FACTUAL-
LY SUFFICIENT IF WHEN VIEWING THE EVI-
DENCE IN A NEUTRAL LIGHT, IT IS NOT SO
WEAK THAT THE CONVICTION SEEMS
CLEARLY WRONG AND MANIFESTLY UNJUST,
AND THE TRIAL COURT'S DETERMINATION IS
NOT AGAINST THE GREAT WEIGHT AND PRE-
PONDERANCE OF THE EVIDENCE.**

¶ 09-4-3. **In the Matter of E.S.**, MEMORANDUM, No. 13-08-00530-CV, 2009 WL 2623352 (Tex.App.—Corpus Christi, 8/26/09).

Facts: A little after 8:00 p.m., on the evening of July 9, 2008, Ramona Nunez sat on a chair in her front yard visiting with two grandchildren under the age of ten, her sixteen-year-old grandchild, J.A., and his teenage friend, J.G. Although the sun had set, it was not yet dark, and she noticed a blue station wagon driving down the street in front of her home. She informed J.A., who was seated at a nearby picnic table, that the station wagon was "coming real slow." The car stopped, with its passenger side immediately in front of the house. The driver, identified as E.S., reached across the passenger and began firing a gun. After firing two to four shots, E.S. drove away.

Nunez phoned 911, and officers were dispatched to her residence. Scared that the blue station wagon might return, J.A. and J.G. departed from Nunez's home before the police arrived. Officer John Turner was the first to arrive.

Officer Turner testified that upon his arrival, Nunez informed him that a blue station wagon had driven in front of her house and that E.S. had fired shots from the vehicle. Officer Turner searched the front yard and found a "crack" or "chip" in the windshield of a truck parked in Nunez's front yard. Officer Turner testified that the damage to the windshield indicated that a "projectile" such as a "bullet, BB, rock or something of that nature" had hit and "bounced off" the windshield. No bullets, fragments, or casings were found at the scene.

Officer Zachary De La Rosa testified that on the way to Nunez's residence, he received a radio alert that E.S. had been involved in the shooting. After using his computer to locate E.S.'s address, Officer De La Rosa proceeded to E.S.'s residence. Later testimony revealed that although E.S.'s residence was a "number of blocks away" from Nunez's residence, it was "not very far." While en route, Officer De La Rosa spotted a blue station wagon parked in a field across from E.S.'s home. Officer De La Rosa saw no one around the vehicle and was unable to tell whether anyone was inside. Before Officer De La Rosa could reach the station wagon, a train crossed the tracks in front of him, blocking his route. Officer De La Rosa turned and proceeded further down the road, parallel to the tracks until he was able to find a place to cross. He drove back towards E.S.'s residence. Upon his arrival, Officer De La Rosa observed that the station wagon was no longer parked in the field across from E.S.'s residence, but rather, was parked either in the driveway of, or on the street near, E.S.'s residence. As he approached the station wagon, he saw three males at a distance of forty to fifty yards away from the vehicle, running away from it. Officer De La Rosa exited his vehicle and ran to apprehend the suspects. Officer De La Rosa eventually apprehended A.R., a friend of E.S., and the

two other suspects, D.W. and T.T., were apprehended by other officers.

Officer Mark Pullin, while en route to Nunez's residence, heard over his radio that suspects believed to have been involved in the shooting had fled from a blue station wagon. Officer Pullin proceeded to assist other officers in apprehending the three suspects seen fleeing the station wagon. After the suspects were apprehended, Officer Pullin secured the station wagon. Officer Pullin found the vehicle parked near E.S.'s residence; the driver's side door was "slightly ajar," and the vehicle was making a "dinging sound" because the keys had been left in the ignition. While conducting a search of the vehicle, Officer Pullin found a spent .22 casing on the floorboard of the back seat, directly behind the driver's seat. A gun was never found, and neither the car nor the casing were dusted for fingerprints.

After securing the vehicle, Officer Pullin located E.S. at his residence. Upon questioning by Officer Pullin, E.S. denied owning a gun or having any firearms in his home; upon Officer Pullin's request to search his home, E.S. refused. E.S. told Officer Pullin that he had been at his house all day playing video games with "a white boy," but was unable to describe the "white boy" or give his name. Fearing lack of probable cause, Officer Pullin did not arrest E.S.

After presenting the testimony of A.R., the first suspect apprehended, Nunez, J.A., J.G., and the foregoing officers, the State rested its case. E.S.'s father, Eddie, then testified for the defense. Eddie stated that on July 9, 2008, he was at home "all day and all night." Eddie stated that at the time of the alleged shooting, E.S. was asleep on the couch in the living room, and that E.S. was home the entire night. Eddie testified that he did not speak to police when they came to the home and spoke with E.S. that night, because he had not seen them. Additionally, Eddie testified that if the police had come to his residence that night, it was for "[n]othing serious," because, had it been a serious matter, "they would have called [him] outside." He also stated that J.G. had made threats to him in the past, and that after the alleged shooting, J.A. and J.G. exhibited a gun in his presence.

After considering the foregoing testimony, the trial court found that E.S. committed the offense of deadly conduct as to Nunez and J.A. The court then ordered E.S. committed to TYC for a determinate sentence of ten years. This appeal ensued.

Held: Affirmed

Memorandum Opinion: In conducting a legal sufficiency review, we must ask whether " 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt'—not whether 'it believes that the evidence at the trial established guilt beyond a reasonable doubt.' " *Laster v. State*, 275 S.W.3d 512, 517 (Tex.Crim.App.2009) (quoting *Jackson v. Vir-*

ginia, 443 U.S. 307, 318-19 (1979) (emphasis in original)). We do not reevaluate the weight and credibility of the evidence, and we do not substitute our own judgment for the trier of fact. *King v. State*, 29 S.W.3d 556, 562 (Tex.Crim.App.2000) (en banc); *Beckham v. State*, 29 S.W.3d 148, 151 (Tex.App.—Houston [14th Dist.] 2000, pet. ref'd). Instead, we consider whether the jury reached a rational decision. *Beckham*, 29 S.W.3d at 151. We must resolve any inconsistencies in the evidence in favor of the judgment. *Curry v. State*, 30 S.W.3d 394, 406 (Tex.Crim.App.2000).

In conducting a factual sufficiency review, we review the evidence in a neutral light to determine whether the evidence is so weak that the jury's verdict seems clearly wrong and manifestly unjust or the jury's verdict is against the great weight and preponderance of the evidence. *Watson v. State*, 204 S.W.3d 404, 414-15 (Tex. Crim.App. 2006). We will not reverse the jury's verdict unless we can say with some objective basis in the record that the great weight and preponderance of the evidence contradicts the verdict. *Id.* at 417.

We measure the sufficiency of the evidence by the elements of the offense as defined by the hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App.1997); *Adi v. State*, 94 S.W.3d 124, 131 (Tex.App.—Corpus Christi 2002, pet. ref'd). The hypothetically correct jury charge for deadly conduct requires proof that a person knowingly discharges a firearm at or in the direction of: (1) one or more individuals, or (2) a habitation, building, or vehicle and is reckless as to whether the habitation, building, or vehicle is occupied. Tex. Penal Code Ann. § 22.05(b). A person acts knowingly, or with knowledge, "when he is aware of the nature of his conduct or that the circumstances exist" or "he is aware that his conduct is reasonably certain to cause the result." *Id.* § 6.03(b) (Vernon 2003). A person acts recklessly, or is reckless, when "he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." *Id.* § 6.03(c).

E.S. argues that the evidence is insufficient because: (1) "there was no tangible evidence to support the allegation"; (2) "the State's eyewitnesses were not credible"; and (3) E.S. "had an alibi for the time of the shooting." We disagree.

Nunez, J.A., and J.G. each testified that on the evening of July 9, 2008, a blue station wagon, driven by E.S., stopped in front of Nunez's home, and E.S. pointed a gun out of the passenger side window and fired two to four shots. Nunez testified that at the time of the shooting, she was able to identify E.S. because he "used to go to [her] house" and she knew his grandparents. J.A. testified that, despite the bottom of E.S.'s face being covered by a bandana, he was able to identify E.S. as the gunman because he and E.S. had been friends "a year or two" prior to the shooting. J.G. testified that he recognized E.S. because he and E.S. had been friends a few years before the shooting. Additionally, officers testified that

after the alleged shooting, they found a cracked windshield on a truck parked at Nunez's home. The officers also testified that shortly after the shooting, they located a blue station wagon, which matched the description of the one allegedly driven by E.S. during the shooting. The blue station wagon was found near the driveway of E.S.'s residence, and a spent .22 caliber casing was found behind the driver's seat.

Viewed in the light most favorable to the verdict, from the testimony and facts surrounding the shooting, a rational trier of fact could have found that E.S. knowingly discharged a firearm in the direction of Nunez and J.A. Accordingly, we conclude that the evidence was legally sufficient to support E.S.'s conviction. *See Laster*, 275 S.W.3d at 517-18.

E.S.'s father, Eddie, testified that E.S. was at home on the night of July 9, 2008. E.S. argues that the only evidence linking him to the shooting was the testimony of Nunez, J.A., and J.G., and that these alleged eyewitnesses are not credible. E.S. specifically argues that Nunez's testimony of the events on July 9, 2008 is contradictory to the events she described to officers when they arrived on the scene. Officer Turner testified that when he spoke to Nunez upon responding to her 911 call, Nunez did not tell him that J.G. had been at her home at the time of the shooting. However, at trial, Nunez insisted that J.G. was at her home at the time of the shooting, and that she had told police about him. Additionally, Nunez told officers at the scene that E.S. was seated in the passenger seat of the blue station wagon and that there were only three individuals in the car at the time of the shooting (two in the front seat and one in the backseat). At trial, Nunez testified that E.S. was the driver of the blue station wagon and that there were four individuals in the vehicle (two in the front seat and two in the back seat).

Reconciliation of conflicts in the evidence is within the exclusive province of the fact finder. *See Mosley v. State*, 983 S.W.2d 249, 254 (Tex.Crim.App. 1998). Viewing the evidence in a neutral light, we conclude that the evidence is not so weak that the conviction seems clearly wrong and manifestly unjust, and the trial court's determination is not against the great weight and preponderance of the evidence. *See Watson*, 204 S.W.3d at 414-15.

Conclusion: We conclude that the evidence is factually sufficient to support E.S.'s conviction. Having determined that the evidence is legally and factually sufficient to support E.S.'s conviction, we overrule his first issue.

**COURT APPOINTED ATTORNEY—
EVEN WHERE APPELLANT'S PARENT SUPPORTS COMMITMENT TO TYC, THE RECORD MUST CONTAIN EVIDENCE SUGGESTING THAT THE PARENT IS NOT CAPABLE OR WILLING TO MAKE DECISIONS IN APPEL-**

LANT'S BEST INTEREST TO WARRANT THE APPOINTMENT OF AN AD LITEM FOR THE CHILD.

¶ 09-4-4. **In the Matter of J-M.W.D.**, MEMORANDUM, No. 04-08-00908-CV, 2009 WL 2878111 (Tex.App.—San Antonio, 9/9/09).

Facts: On November 3, 2006, J-M.W.D. was adjudicated as having engaged in delinquent conduct by possessing child pornography, specifically J-M.W.D. had taken pornographic pictures of his sister with his cell phone while she was asleep. J-M.W.D. was placed on probation in the care, custody, and control of the chief juvenile probation officer for a period of eighteen months.

On September 28, 2007, the State filed a motion to modify. The trial court found that J-M.W.D. violated the conditions of his probation. Although the probation department recommended commitment to TYC, the trial court modified the disposition by extending the term of J-M.W.D.'s probation to his eighteenth birthday.

On November 24, 2008, the State filed a second motion to modify. J-M.W.D. pled true to violating the conditions of his probation by viewing pornography on his home computer.

At the beginning of the hearing on the State's second motion to modify, J-M.W.D. stated, "I don't want my mom in here. Is it okay if Mr. Held be [sic] my guardian ad litem?"

In discussing the request with J-M.W.D., the trial judge was informed that J-M.W.D. was upset with his mother because she did not visit him in detention or attend any of his detention hearings. The trial judge stated that even if she appointed Mr. Held as the guardian ad litem, J-M.W.D.'s mother had the right to be present in the courtroom. The trial judge noted that she was not familiar with J-M.W.D.'s case as she had not presided over his initial adjudication or the first motion to modify. Given the limited information that she had been provided, the trial judge denied J-M.W.D.'s request.

J-M.W.D. had previously been placed at Brookhaven Residential Treatment Center from November of 2006 to June of 2007, and at Rockdale, a facility to treat sex offenders, from December of 2007 to June of 2008. The trial court modified J-M.W.D.'s disposition and committed him to the Texas Youth Commission ("TYC").

Held: Affirmed

Memorandum Opinion: Because J-M.W.D.'s mother was present, the trial court was not required to appoint a guardian ad litem. *See* Tex. Fam.Code Ann. § 51.11(a) (Vernon 2008). The trial court did, however, have the discretion to appoint a guardian ad litem if it appeared that J-M.W.D.'s mother was incapable or unwilling to

make decisions in J-M.W.D.'s best interest. *See* Tex. Fam.Code Ann. § 51.11(b) (Vernon 2008); *see also In re P.S.G.*, 942 S. W.2d 227, 229 (Tex.App.—Beaumont 1997, no writ). Mr. Held, J-M.W.D.'s attorney, is statutorily authorized to also serve as his guardian ad litem. *See* Tex. Fam.Code Ann. § 51.11(c) (Vernon 2008).

J-M.W.D. contends his mother's testimony at his disposition hearing demonstrated that she was incapable or unwilling to represent his best interests. J-M.W.D.'s mother, however, was initially responding to the trial court's questions regarding the factual history of the case. Mr. Held did not dispute the factual information that was provided, and most of the information was already contained in the pre-disposition report that the trial court was reviewing. Although J-M.W.D.'s mother may have supported the trial court's decision to commit J-M.W.D. to the TYC, there is nothing in the record suggesting that she was not capable or willing to make decisions in J-M.W.D.'s best interest. Moreover, in committing J-M.W.D. to TYC, the trial court agreed that such placement was in J-M.W.D.'s best interest. *See In re L.A.P.*, No. 04-07-00143-CV, 2008 WL 312704, at *4 (Tex. App.—San Antonio Feb. 6, 2008, no pet.) (mem.op.).

In *In re P.S.G.*, a similar issue was raised regarding whether P.S.G.'s mother was capable and willing to make decisions in P.S.G.'s best interest. 942 S.W.2d at 229. P.S.G. asserted that his mother's duty to make decisions in his best interest conflicted with her duty to represent the victim of his alleged sexual assault, who was his sister. *Id.* The court concluded, "The circumstances in which this family was embroiled, difficult as they may have been for [P.S.G.'s mother], do not cause us to assume without inquiry that she could not render friendly support and guidance in these proceedings." *Id.*; *see also In re P.A.C.*, 562 S.W.2d 913, 917 (Tex.Civ.App.—Amarillo 1978, no writ) (introduction of father's affidavit that tended to implicate appellant as a participant in a crime did not require court to conclude that father was unwilling to make decisions in appellant's best interest).

Even if we were to conclude that the trial court abused its discretion in failing to appoint Mr. Held as guardian ad litem, we would not find reversible error unless the failure to appoint Mr. Held "probably caused the rendition of an improper judgment." Tex.R.App. P. 44.1(a)(1); *In re D.V.*, 955 S.W.2d 379, 380 (Tex.App.—San Antonio 1997, no pet.). The record reflects that Mr. Held was present and rendered friendly support and guidance, essentially serving in the capacity of guardian ad litem even without the appointment. *See Flynn v. State*, 707 S.W.2d 87, 89 (Tex.Crim.App.1986). Accordingly, "the spirit, if not the letter of the statute was met," and any error would have been harmless. *Id.*

Conclusion: The trial court's judgment is affirmed.

**CONFESSIONS—
BY EXCLUDING APPELLANT'S GRANDMOTHER FROM THE INTERVIEW ROOM, HAVING THE MAGISTRATE JUDGE READ APPELLANT HIS RIGHTS THEN RETURNING THE CHILD TO THE INTERVIEW ROOM AND LOCKING IT, WAS A SUFFICIENT RESTRAINT OF FREEDOM OF MOVEMENT TO BE ASSOCIATED WITH FORMAL ARREST, ESTABLISHING THAT APPELLANT WAS IN CUSTODY AT THE TIME HE MADE HIS STATEMENT TO POLICE.**

¶ 09-4-5A. **In the Matter of D.J.C.**, No. 01-07-01092-CV, ___ S.W.3d ___, 2009 WL 3050870 [Tex.App.—Houston [1st Dist.] 9/24/09].

Facts: On February 14, 2006, appellant D.J.C., a sixteen-year-old male, and the complainant, M.I.F., a thirteen-year-old female, had a sexual encounter in the complainant's home in Galveston, Texas. On March 31, 2006, the complainant told a case worker with Child Protective Services that she had had a sexual encounter with appellant. Galveston Police Department ("GPD") Officer C. Garcia was assigned to investigate M.I.F.'s complaint. On June 21, 2006, Officer Garcia went to appellant's home and talked to appellant and his grandmother. Officer Garcia told them that appellant was a suspect in a crime and the focus of an investigation. Officer Garcia requested that appellant's grandmother bring him to the GPD station and that "it would be best for him to cooperate." Officer Garcia left appellant's home.

In response to Officer Garcia's request, appellant and his grandmother later went to the police station. Officer Garcia led appellant to an interview room on the second floor of the police station. Officer Garcia testified that he knew very little about juvenile detention and did not know whether the interview room met the requirements of a designated juvenile detention center. He also testified that the police department had a designated juvenile section "but it wasn't equipped with the video equipment at the time," and so he did not use it. Therefore, Officer Garcia took appellant's statement in the interview room used for questioning both adult and juvenile subjects. Appellant's grandmother, who was his legal guardian, asked to be present with appellant in the interview room, but police denied her request. Officer Garcia turned on a video camera and left the interview room. A Galveston municipal court judge then entered the interview room and read appellant his rights, including his right to counsel, right to remain silent during the interview, and right to terminate the interview at any time. The magistrate also warned appellant that "you don't have to make this statement to anyone. And anything you say can be used against you." However, he did not warn appellant his statement could be used "in evidence" against him. Appellant's grandmother was not present when the magistrate read him these rights.

After the judge read appellant his rights, Officer Garcia returned to the interview room. Officer Garcia told appellant he was a suspect in an offense of having sex with a thirteen-year-old child. After Officer Garcia questioned appellant for fifteen to twenty minutes, appellant confessed to having sex with the complainant. Garcia arrested him immediately after the interview.

At trial, appellant moved to suppress his confession. The trial court excused the jury and convened a hearing on appellant's motion to suppress. At the hearing, Officer Garcia testified that he led appellant to the interview room "used routinely to interview all criminal suspects." He testified that he was armed and that the door was locked. He testified that he did not know what constituted a juvenile processing office and that he did not "routinely investigate juvenile crimes." He testified that his supervisor "advised me [the interview room] was mandated as a juvenile interview room." However, he also testified that the room was used for the interrogation of both adult and juvenile suspects and that he used that room because there was no videotape in the designated juvenile interview room at that time. The State played the video recording of Officer Garcia's interview with appellant. At the end of the hearing, the trial court ruled that appellant was not in custody at the time of his confession and denied appellant's motion to suppress.

Appellant testified that the judge told him at least twice that he could leave the interview room at any time. In addition, appellant testified that he told Officer Garcia that he was not afraid to leave the interview room at any time. Appellant also testified that he did not fully understand the warnings the judge gave him prior to his interview. He stated that he and his grandmother drove to the police station "[b]ecause the officer came to our house and told us that I need to give a statement." He further testified, in relevant part:

[Counsel]: Okay. And when you were in the room when the Judge was telling you those warnings, did you feel like you could just get up and walk out the door?

[Appellant]: Not really.

[Counsel]: Did you understand that when he told you that the statement could be used against you, did you understand that that meant in court?

[Appellant]: No.

[Counsel]: Did you understand that that meant they were charging you with a crime as a result of the statement?

[Appellant]: No, ma'am.

[Counsel]: Did you even know that this was a crime at this point?

[Appellant]: If I knew I was going to get in trouble for what I said, I wouldn't have went.

[Counsel]: You didn't understand that you were waiving your right, did you?

[Appellant]: No, ma'am.

The State also introduced testimony from the complainant. The complainant testified that she did not remember whether she had sex on February 14, 2006 with appellant. She testified that she "[didn't] know if it was 2005 or 2006." She also testified that she was thirteen years old and appellant was sixteen years old on February 14, 2006. She testified that she and appellant had sex at her house. She also testified that she told investigators that she and appellant had sex at his house but she did not know the address. She could not remember whether she or appellant brought a condom when they had sex. She also testified that she told investigators that she brought a condom for appellant when they had sex.

The jury found true that appellant had engaged in delinquent conduct by committing aggravated sexual assault against the complainant. On November 1, 2007, the trial court signed a disposition order placing appellant on one month's probation and seven hours of community service work.

Held: Reversed and remanded

Opinion: Appellant contends that his interrogation by Officer Garcia constituted custodial interrogation in violation of the United States Constitution and Texas Family Code provisions governing the admissibility of statements made by juveniles and that his confession should have been suppressed under the Family Code. *See* Tex. Fam.Code Ann. § 51.095 (Vernon 2008) (governing "Admissibility of a Statement of a Child"); § 54.03(e). The State argues that appellant was not in custody when his confession was made, and therefore, the Texas Family Code sections governing juvenile confessions do not apply and the statement was admissible under article 38.23 of the Texas Code of Criminal Procedure. [FN1] We first determine, therefore, whether appellant was in custody when he made his statement to Officer Garcia.

FN1. A statement of a juvenile that is not the product of custodial interrogation is not required to be suppressed by section 51.095 of the Family Code. *See* Tex. Fam.Code Ann. § 51.095(d)(2) (Vernon 2008); *Martinez v. State*, 131 S.W.3d 22, 32 (Tex.App.—San Antonio, no pet.). However, even in the absence of custody, due process may be violated by the admission of a confession that was not voluntarily given. *Martinez*, 131 S.W.3d at 35; *see Alvarado v. State*, 912 S.W.2d 199, 211 (Tex.Crim.App.1995).

Article 38.23 of the Texas Code of Criminal Procedure, governing "Evidence not to be used" in criminal actions provides:

(a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case. In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a

reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

(b) It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.

Tex.Code Crim. Proc Ann. art. 38.23 (Vernon 2005).

Custodial interrogation is questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom in any significant way. *See Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528-30 (1994); *Cannon v. State*, 691 S.W.2d 664, 671 (Tex.Crim.App.1985); *Martinez v. State*, 131 S.W.3d 22, 32 (Tex.App.—San Antonio 2003, no pet.). "A custodial interrogation occurs when a defendant is in custody and is exposed 'to any words or actions on the part of the police ... that [the police] should know are reasonably likely to elicit an incriminating response.'" *Roquemore v. State*, 60 S.W.3d at 868 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689-90 (1980)). A child is in custody if, under the objective circumstances, a reasonable child of the same age would believe his freedom of movement was significantly restricted. *In re U.G.*, 128 S.W.3d at 799; *Jeffley v. State*, 38 S.W.3d 847, 855 (Tex.App.—Houston [1st Dist.] 2001, pet. ref'd).

A two-step analysis is employed in a juvenile delinquency proceeding to determine whether an individual is in custody. *In re M.R.R.*, 2 S.W.3d 319, 323 (Tex.App.—San Antonio 1999, no pet.). First, the court examines all the circumstances surrounding the interrogation to determine whether there was a formal arrest or restraint of freedom of movement to the degree associated with a formal arrest. *Stansbury*, 511 U.S. at 322, 114 S.Ct. at 1528-29; *In re M.R.R.*, 2 S.W.3d at 323. This initial determination focuses on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. *Stansbury*, 511 U.S. at 322, 114 S.Ct. at 1529; *In re M.R.R.*, 2 S.W.3d at 323. Second, the court considers whether, in light of the given circumstances, a reasonable person would have felt he or she was at liberty to terminate the interrogation and leave. *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 465 (1995); *In re M.R.R.*, 2 S.W.3d at 323. Factors relevant to a determination of custody include (1) probable cause to arrest; (2) focus of the investigation; (3) subjective intent of the police; and (4) subjective belief of the defendant. *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex.Crim. App.1996); *In re J.A.B.*, 281 S.W.3d at 65; *In re M.R.R.*, 2 S.W.3d at 323. Because the determination of custody is based on entirely objective circumstances, whether the law enforcement officials had the subjective intent to arrest is irrelevant unless that intent is somehow communicated to the suspect. *Stansbury*, 511 U.S. at

323,114 S.Ct. at 1529; *Dowthitt*, 931 S.W.2d at 254; *Jeffley*, 38 S.W.3d at 855; *In re M.R.R.*, 2 S.W.3d at 323.

The following situations generally constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way; (2) when a law enforcement officer tells the suspect that he cannot leave; (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; or (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave. *Dowthitt*, 931 S.W.2d at 255; *Jeffley*, 38 S.W.3d at 855.

Being the focus of an investigation does not amount to being in custody. *Meek v. State*, 790 S.W.2d 618, 621 (Tex.Crim.App.1990); *Martinez*, 131 S.W.3d at 32. Station house questioning does not, in and of itself, constitute custody. *Dowthitt*, 931 S.W.2d at 255; *Jeffley*, 38 S.W.3d at 855. "Words or actions by the police that normally attend an arrest and custody, such as informing a defendant of his *Miranda* rights, do not constitute a custodial interrogation." *Roquemore*, 60 S.W.3d at 868. When the circumstances show that the individual acts upon the invitation or request of the police and there are no threats, express or implied, that he will be forcibly taken, then that person is not in custody at that time. *Dancy v. State*, 728 S.W.2d 772, 778-79 (Tex.Crim.App.1987); *Martinez*, 131 S.W.3d at 32.

"The mere fact that an interrogation begins as non-custodial, however, does not prevent it from later becoming custodial; police conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation." *Dowthitt*, 931 S.W.2d at 255; *Jeffley*, 38 S.W.3d at 856. A juvenile may be in custody when the juvenile is interrogated alone by an armed police officer in an enclosed office. *See In re D.A.R.*, 73 S.W.3d 505, 511- 12 (Tex.App.—El Paso 2002, no pet.).

Here, appellant came to the police station with his grandmother after Officer Garcia came to his home to request that he come to the police station. Officer Garcia testified that he told appellant's grandmother that appellant was a suspect in a crime and the focus of a police investigation. Officer Garcia also testified that he asked appellant "for his cooperation, if he would give a voluntary statement as to the allegations that were made against him." He also testified that he told appellant that "it would be best for him to cooperate" but that he made no representations as to why it would be best for appellant to cooperate.

Officer Garcia, while wearing his firearm, took appellant to an interview room used in interrogations of both adult and juvenile subjects. He denied appellant's grandmother's request to remain in the room during his interrogation of appellant. Officer Garcia then left the room and had a magistrate come in to issue appellant warnings about appellant's right to remain silent, right to counsel, and right to terminate the interview at any time in the absence of appellant's grandmother, who was ap-

pellant's legal guardian and an adult. After appellant received the magistrate's warnings, Officer Garcia returned to the room, which he testified was locked, and asked appellant about the aggravated sexual assault. Appellant was thus alone in a locked room used for the interrogation of adult, as well as juvenile, criminal defendants with an armed police officer at the time he made the statement to Officer Garcia. Appellant was arrested immediately after he gave his statement.

We conclude that by excluding appellant's grandmother from the interview room, despite her express request to be present, having the magistrate judge read appellant his rights, then returning to the interview room and locking it, Officer Garcia signaled a change in the nature of the interview. *See Jeffley*, 38 S.W.3d at 856; *Dowthitt*, 931 S.W.2d at 255 (stating that "mere fact that an interrogation begins as non-custodial does not prevent custody from arising later; police conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation"). Under the first step of the custody analysis, we hold that there was restraint of freedom of movement to the degree associated with a formal arrest. *See Stansbury*, 511 U.S. at 322, 114 S.Ct. at 1528-29; *see also In re M.R.R.*, 2 S.W.3d at 323; *see also In re D.A.R.*, 73 S.W.3d at 511.

We also conclude that, in light of the given circumstances, a juvenile of appellant's age could reasonably have felt he was not at liberty to terminate the interview and leave. *See Thompson*, 516 U.S. at 112, 116 S.Ct. 457; *In re M.R.R.*, 2 S.W.3d at 323. Appellant testified that the magistrate told him he could leave the interview room at any time. He also testified that he told Officer Garcia that he was unafraid to leave the interview room at any time. But he also testified that he did "not really" feel that he could leave. Furthermore, because the door was locked, appellant was not objectively "free" to leave. Appellant further testified that he did not understand that he could be charged with a crime as a result of his statement and that his statement could be used "in evidence" against him. *See Tex. Fam.Code Ann. § 51.095(a)(1)(A)* (Vernon 2008) (setting out warnings that must be given for admissibility of custodial statement of child, including statement that "the child may remain silent and not make any statement at all and that any statement that the child may be used in evidence against the child"). In light of all the circumstances, we hold that a reasonable child would not have felt he or she was at liberty to terminate the interrogation and leave. *See Keohane*, 516 U.S. at 112, 116 S.Ct. at 465; *Dowthitt*, 931 S.W.2d at 255; *Jeffley*, 38 S.W.3d at 855; *In re M.R.R.*, 2 S.W.3d at 323; *cf. Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 2150 (2004) (juvenile defendant's being allowed to leave at end of "non-Mirandized interview" was fact that "weigh[ed] against a finding that [defendant] was in custody").

Conclusion: We hold that appellant was in custody at the time he made his statement and, therefore, the provi-

sions in the Family Code governing the admissibility of the custodial.

**CONFESSIONS—
VIOLATIONS OF FAMILY CODE REQUIREMENTS REGARDING POLICE INTERACTIONS WITH JUVENILE, INCLUDING NON COMPLIANCE WITH JUVENILE PROCESSING OFFICE AND PARENTAL PRESENCE REQUIREMENTS DEEMED JUVENILE STATEMENT INADMISSIBLE.**

¶ 09-4-5B. **In the Matter of D.J.C.**, No. 01-07-01092-CV, ___ S.W.3d ___, 2009 WL 3050870 (Tex.App.—Houston [1st Dist.] 9/24/09).

Facts: On February 14, 2006, appellant D.J.C., a sixteen-year-old male, and the complainant, M.I.F., a thirteen-year-old female, had a sexual encounter in the complainant's home in Galveston, Texas. On March 31, 2006, the complainant told a case worker with Child Protective Services that she had had a sexual encounter with appellant. Galveston Police Department ("GPD") Officer C. Garcia was assigned to investigate M.I.F.'s complaint. On June 21, 2006, Officer Garcia went to appellant's home and talked to appellant and his grandmother. Officer Garcia told them that appellant was a suspect in a crime and the focus of an investigation. Officer Garcia requested that appellant's grandmother bring him to the GPD station and that "it would be best for him to cooperate." Officer Garcia left appellant's home.

In response to Officer Garcia's request, appellant and his grandmother later went to the police station. Officer Garcia led appellant to an interview room on the second floor of the police station. Officer Garcia testified that he knew very little about juvenile detention and did not know whether the interview room met the requirements of a designated juvenile detention center. He also testified that the police department had a designated juvenile section "but it wasn't equipped with the video equipment at the time," and so he did not use it. Therefore, Officer Garcia took appellant's statement in the interview room used for questioning both adult and juvenile subjects. Appellant's grandmother, who was his legal guardian, asked to be present with appellant in the interview room, but police denied her request. Officer Garcia turned on a video camera and left the interview room. A Galveston municipal court judge then entered the interview room and read appellant his rights, including his right to counsel, right to remain silent during the interview, and right to terminate the interview at any time. The magistrate also warned appellant that "you don't have to make this statement to anyone. And anything you say can be used against you." However, he did not warn appellant his statement could be used "in evidence"

against him. Appellant's grandmother was not present when the magistrate read him these rights.

After the judge read appellant his rights, Officer Garcia returned to the interview room. Officer Garcia told appellant he was a suspect in an offense of having sex with a thirteen-year-old child. After Officer Garcia questioned appellant for fifteen to twenty minutes, appellant confessed to having sex with the complainant. Garcia arrested him immediately after the interview.

At trial, appellant moved to suppress his confession. The trial court excused the jury and convened a hearing on appellant's motion to suppress. At the hearing, Officer Garcia testified that he led appellant to the interview room "used routinely to interview all criminal suspects." He testified that he was armed and that the door was locked. He testified that he did not know what constituted a juvenile processing office and that he did not "routinely investigate juvenile crimes." He testified that his supervisor "advised me [the interview room] was mandated as a juvenile interview room." However, he also testified that the room was used for the interrogation of both adult and juvenile suspects and that he used that room because there was no videotape in the designated juvenile interview room at that time. The State played the video recording of Officer Garcia's interview with appellant. At the end of the hearing, the trial court ruled that appellant was not in custody at the time of his confession and denied appellant's motion to suppress.

Appellant testified that the judge told him at least twice that he could leave the interview room at any time. In addition, appellant testified that he told Officer Garcia that he was not afraid to leave the interview room at any time. Appellant also testified that he did not fully understand the warnings the judge gave him prior to his interview. He stated that he and his grandmother drove to the police station "[b]ecause the officer came to our house and told us that I need to give a statement." He further testified, in relevant part:

[Counsel]: Okay. And when you were in the room when the Judge was telling you those warnings, did you feel like you could just get up and walk out the door?

[Appellant]: Not really.

[Counsel]: Did you understand that when he told you that the statement could be used against you, did you understand that that meant in court?

[Appellant]: No.

[Counsel]: Did you understand that that meant they were charging you with a crime as a result of the statement?

[Appellant]: No, ma'am.

[Counsel]: Did you even know that this was a crime at this point?

[Appellant]: If I knew I was going to get in trouble for what I said, I wouldn't have went.

[Counsel]: You didn't understand that you were waiving your right, did you?

[Appellant]: No, ma'am.

The State also introduced testimony from the complainant. The complainant testified that she did not remember whether she had sex on February 14, 2006 with appellant. She testified that she "[didn't] know if it was 2005 or 2006." She also testified that she was thirteen years old and appellant was sixteen years old on February 14, 2006. She testified that she and appellant had sex at her house. She also testified that she told investigators that she and appellant had sex at his house but she did not know the address. She could not remember whether she or appellant brought a condom when they had sex. She also testified that she told investigators that she brought a condom for appellant when they had sex.

The jury found true that appellant had engaged in delinquent conduct by committing aggravated sexual assault against the complainant. On November 1, 2007, the trial court signed a disposition order placing appellant on one month's probation and seven hours of community service work.

Held: Reversed and remanded

Opinion: Appellant contends that his custodial statement was inadmissible because it failed to fulfill several requirements of the Family Code. *See* Tex. Fam.Code Ann. § 54.03(e). Specifically, appellant contends that (1) his statement was not taken in a designated juvenile processing center, as required by sections 52.02(a) and 52.025(a) of the Family Code; (2) his grandmother was excluded from the interview room despite her request to be present, in violation of section 52.025(c) of the Code; and (3) his video-recorded statement did not comply with section 52.025(b)(5) of the Code, which requires that an electronically recorded statement of a juvenile received in a designated juvenile processing center comply with Family Code sections 51.095(a)(1), (2), (3) or (5), because it did not comply with sections 51.095(a)(1)(A) and (a)(5), governing the warnings to be given a juvenile prior to the taking of his statement.

1. Violation of Family Code Sections 52.02(a) and 52.025(a) by Failure to Take Statement in a Designated Juvenile Processing Center

Appellant first contends that his statement was not taken in a designated juvenile processing center, as required by sections 52.02(a) and 52.025(a) of the Family Code.

a. Procedures for taking a child into custody under Family Code section 52.02(a)

Section 52.02(a) of the Texas Family Code governs procedures that must be followed when a juvenile is taken into custody. *In re D.Z.*, 869 S.W.2d 561, 564

(Tex.App.—Corpus Christi 1994, writ denied). The Court of Criminal Appeals has "established a policy of strict compliance with the Family Code, especially section 52.02(a)." *Roquemore*, 60 S.W.3d at 868; *Baptist Vie Le v. State*, 993 S.W.2d 650, 655-56 (Tex.Crim.App. 1999); *Comer v. State*, 776 S.W.2d 191, 196-97 (Tex. Crim.App.1991).

Section 52.02(a) provides in relevant part:

(a) [A] person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under Section 52.025, shall do one of the following:

(1) release the child to a parent, guardian, custodian of the child, or other responsible adult upon that person's promise to bring the child before the juvenile court as requested by the court.

(2) bring the child before the office or official designated by the juvenile board if there is probable cause to believe that the child engaged in delinquent conduct, conduct indicating a need for supervision, or conduct that violates a condition of probation imposed by the juvenile court;

(3) bring the child to a detention facility designated by the juvenile board;

(4) bring the child to a secure detention facility as provided by Section 51.12(j); [FN2]

(5) bring the child to a medical facility if the child is believed to suffer from a serious physical condition or illness that requires prompt treatment;

(6) dispose of the case under Section 52.03 [FN3];

See Tex. Fam.Code. Ann. § 52.02(a) (emphasis added); *Baptist Vie Le*, 993 S.W.2d at 652-53.

FN2. Section 51.12(j) provides that, except under circumstances not relevant here, a child may be detained only in a juvenile processing office in compliance with Section 52.025. *See* Tex. Fam.Code Ann. § 51.12(j) (Vernon 2008).

FN3. Section 52.03 provides that "[a] law-enforcement officer authorized by [the Family Code] to take a child into custody may dispose of the case without referral to juvenile court" under certain circumstances, but that "[n]o disposition authorized by this section may involve "keeping the child in law-enforcement custody." *See* Tex. Fam.Code Ann. § 52.03 (Vernon 2008).

Under section 52.02(a), an officer who has taken a child into custody may only bring the child to a "designated juvenile processing office under section 52.025," or, alternatively: (1) release the child to a parent; (2)

bring the child before the office or official designated by the juvenile court; (3) bring him to a detention facility designated by the juvenile board; (4) bring him to a juvenile detention facility; (5) bring him to a medical facility; or (6) dispose of the case. *Baptist Vie Le*, 993 S.W.2d at 652-53. When a law enforcement officer deems it necessary to take a juvenile into custody, the Family Code requires that without unnecessary delay and without first taking him anywhere else except a juvenile processing office, the officer must bring the juvenile before the office designated by the juvenile court or bring him to a detention facility designated by the juvenile court. *In re D.Z.*, 869 S.W.2d at 564; *Comer*, 776 S.W.2d at 194. Once the officer has found cause initially to take the juvenile into custody and makes a decision to refer him to the intake officer or other designated authority, he relinquishes ultimate control over the investigative function of the case. *See Baptist Vie Le*, 993 S.W.2d at 654; *In re D.Z.*, 869 S.W.2d at 564. Thus, with each of the options in section 52.02(a), except the option of taking the child to a designated juvenile processing office, the officer's involvement in the case ceases. *Baptist Vie Le*, 993 S.W.2d at 654; *see In re D.Z.*, 869 S.W.2d at 564.

When police officers fail to comply with the requirements of Family Code section 52.02(a), 52.12, and 52.025, governing the taking of a child into custody and the taking of the statement of a child in a juvenile processing office, a statement obtained from a juvenile by the investigating officer may violate his rights as a juvenile under the Family Code and thus be inadmissible at trial. *See Tex. Fam.Code Ann. § 54.03(e); In re U.G.*, 128 S.W.3d at 799 (holding juvenile's statement inadmissible when, after being placed in custody, police took juvenile to police station and held juvenile in area where adult suspects were held instead of taking juvenile "to a juvenile processing office or any of the places listed as an alternative" in section 52.02 and placing juvenile in specifically designated office for juveniles). This is so even if the statement would otherwise be admissible as a custodial statement of a child under section 51.095 of the Family Code, governing the admissibility of a statement of a child. *See Tex. Fam.Code Ann. § 51.095; Roquemore*, 60 S.W.3d at 868; *Comer*, 776 S.W.2d at 195-96; *Marsh v. State*, 140 S.W.3d 901, 907 (Tex.App. — Houston [14th Dist.] 2005, pet. ref'd).

Here, Officer Garcia did not exercise any of the options provided by Family Code subsections 52.02(a)(1)-(6) that would have terminated his involvement in appellant's case. Therefore, he was authorized by section 52.02(a) only to take appellant to a "designated juvenile processing office" in compliance with Family Code section 52.025. *See Tex. Fam.Code Ann. § 52.02(a); Baptist Vie Le*, 993 S.W.2d at 654.

b. Procedures for taking the statement of a juvenile in a designated juvenile processing office under Family Code section 52.025(a)

Section 52.025, governing juvenile processing of-fices, provides, in relevant part:

(a) *The juvenile court may designate an office or a room, which may be located in a police facility or sheriff's offices, as the juvenile processing office for the temporary detention of a child taken into custody under Section 52.01 [FN4]. The office may not be a cell or holding facility used for detentions other than detentions under this section.* The juvenile board by written order may prescribe the conditions of the designation and limit the activities that may occur in the office during the temporary detention.

(b) *A child may be detained in a juvenile processing office only for:*

(1) the return of the child to the custody of a [parent or guardian] ...;

(2) the completion of essential forms and records required by the juvenile court or this title;

(3) the photographing and fingerprinting of the child ...;

(4) *the issuance of warnings to the child as required or permitted by this title; or*

(5) *the receipt of a statement by the child under Section 51.095(a)(1), (2), (3), or (5).*

(c) *A child may not be left unattended in a juvenile processing office and is entitled to be accompanied by the child's parent, guardian or by the child's attorney.*

(d) *A child may not be detained in a juvenile processing office for longer than six hours.*

Tex. Fam.Code Ann. § 52.025 (emphasis added); *see Baptist Vie Le*, 993 S.W.2d at 653.

FN4. *See Tex. Fam.Code Ann. § 52.01(a)(3)(A)* (Vernon 2008) (providing circumstances under which "a child may be taken into custody," including "by a law enforcement officer ... if there is probable cause to believe that the child has engaged in ... (A) conduct that violates a penal law of this state or (B) delinquent conduct necessitating supervision").

A "juvenile processing office" is "little more than a temporary stop for completing necessary paperwork pursuant to the arrest." *Baptist Vie Le*, 993 S.W.2d at 654. Under the plain language of section 52.025(b), it may be used only for (1) the return of the child to a parent or guardian; (2) the completion of forms or records; (3) photographing and fingerprinting if the child; (4) the issuance of warnings; and (5) the receipt of a statement in compliance with section 51.095(a)(1), (2), (3), or (5) of the Family Code. Tex. Fam.Code Ann. § 52.025(b).

Moreover, under the plain language of section 52.025(a), while a "designated juvenile processing office" may be a room located in a police station, it may

not be a room that is "used for detentions other than detentions under this section." Tex. Fam.Code. Ann. § 52.025(a); *Baptist Vie Le*, 993 S.W.2d at 653-54 (taking juvenile arrested for murder to homicide division of police department violated Family Code requirements for handling child taken into custody). If, after taking a juvenile into custody, authorities do not take him to either a juvenile processing office or a statutorily designated alternative for questioning, but rather obtain a statement from the juvenile in an area used to interview adult suspects, that statement is inadmissible. *Baptist Vie Le*, 993 S.W.2d at 654-56; *In re U.G.*, 128 S.W.3d at 799; *see* Tex.Fam.Code Ann. § 52.02(a); *Salas v. State*, 756 S.W.2d 832, 834-35 (Tex.App.—Corpus Christi 1988, no pet.) (holding statement inadmissible when, instead of following section 52.02, officers took juvenile first to police station where they obtained signed, written statement from him before taking him to appropriate juvenile detention center); *see also Roquemore*, 60 S.W.3d at 868; *Marsh*, 140 S.W.3d at 907 (holding that statement of child that meets admissibility requirements of section 51.095 "may be nonetheless inadmissible" when provisions in sections of Family Code "dictating the necessary procedures for taking the child's statement, are violated," specifically section 52.025(b)); *In re D.Z.*, 869 S.W.2d at 564 (holding that statement illegally seized or obtained in violation of Family Code provisions governing custodial interrogation is inadmissible in adjudication hearing under section 54.03(e) of Family Code).

Here, Officer Garcia took appellant into custody and interrogated him in an interview room used to interrogate both adult and juvenile subjects. Officer Garcia testified that the room was "used routinely to interview all criminal suspects," and that "adults get interviewed in this room as well." He also testified that the police department had a designated juvenile section "but it wasn't equipped with the video equipment at the time," and so he did not use it. Officer Garcia testified that he did not know what constituted a juvenile processing office and that he did not "routinely investigate juvenile crimes," but that his supervisor "advised me [that the interview room] was mandated as a juvenile interview room." We conclude that the evidence shows that the State violated sections 52.02(a) and 52.025(a) by not taking appellant's custodial statement in a designated juvenile processing office.

Once a defendant produces evidence of a section 52.02(a) or (b) violation, the burden shifts to the State to prove compliance with that section. *Roquemore*, 60 S.W.3d at 869; *see also* Tex. Fam.Code Ann. §§ 51.17(a), 54.03(f) (Vernon 2008) (providing that State bears burden of proving requirements for finding of delinquency in adjudication proceedings by competent evidence). Here, the State failed to carry its burden. The evidence shows that the interview room used by Officer Garcia was "used routinely to interview all criminal subjects," and there is no more than a scintilla of evidence in

the record that the interview room was a designated juvenile processing office, as provided in section 52.02(a).

We conclude that, in taking appellant's custodial statement, the State violated the statutory requirements in Texas Family Code sections 52.02(a) and 52.025(a) requiring that a juvenile's custodial statement be taken only in a proper place. *See* Tex. Fam.Code. Ann. §§ 52.02(a), 52.025(a); *Baptist Vie Le*, 993 S.W.2d at 654-55.

2. Exclusion of Appellant's Legal Guardian in Violation of Section 52.025(c) of the Family Code

Appellant next contends that his legal guardian, his grandmother, was excluded from the locked interview room in which Officer Garcia interrogated appellant, despite her express request to be present, in violation of section 52.025 () of the Family Code, which states, "A child may not be left unattended in a juvenile processing office and is entitled to be accompanied by the child's parent, guardian, or the child's attorney." Tex. Fam.Code Ann. § 52.025(c).

The record shows that appellant's grandmother, who was his legal guardian, accompanied appellant to the GPD station. When Officer Garcia took appellant into the interview room for questioning, she asked to be present with appellant, but Officer Garcia denied her request and excluded her from the interview room.

We hold that the State violated section 52.025(c)'s requirement that a child in custody in a juvenile processing center "is entitled to be accompanied by the child's parent, guardian, or the child's attorney." *See* Tex. Fam.Code Ann. § 52.025(c).

3. Failure to Warn that Statement of Juvenile May Be Used "In Evidence" Against Him in Violation of Sections 52.025(b)(5) and 51.095(a)(1)(A) and (a)(5) of the Family Code

Finally, appellant contends that the State violated section 52.025(b)(5) of the Family Code by failing to comply with sections 51.095(a)(1)(A) and (a)(5) in taking his statement after taking him into custody. *See* Tex. Fam.Code Ann. § 52.025(b)(5). Appellant contends that the magistrate who gave him his warnings prior to his electronically recorded statement failed to warn him that his statement could be used "in evidence" against him, in violation of sections 51.095(a)(1)(A) and (a)(5) of the Family Code, thereby violating section 52.025(b)(5) of the Code and rendering his statement inadmissible under section 53.04.

Section 51.095 of the Family Code provides means for assuring the voluntariness, hence the admissibility, of a juvenile's custodial statement. *See* Tex. Fam.Code Ann. § 51.095. It states, in relevant part:

(a) Notwithstanding Section 51.09, [FN5] *the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if:*

(1) the statement is made in writing under a circumstance described by Subsection (d) and:

(A) *the statement shows that the child has at some time before the making of the statement received from a magistrate a warning that:*

(i) *the child may remain silent and not make any statement at all and that any statement that the child may be used in evidence against the child;*

(ii) *the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;*

(iii) *the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and*

(iv) *the child has the right to terminate the interview at any time;*

....

(5) *subject to Subsection(f), the statement is made orally under a circumstance described by Subsection (d) and the statement is recorded by an electronic recording device, including a device that records images, and;*

(A) *before making the statement, the child is given the warnings described by Subsection (1)(A) by a magistrate, the warning is a part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning;*

....

(d) *Subsections (a)(1) and (a)(5) apply to the statement of a child made:*

(1) *while the child is in a detention facility or other place of confinement; [or]*

(2) *while the child is in the custody of an officer ... [.]*

Tex. Fam.Code. Ann. § 51.095 (emphasis added).

FN5. Section 51.09 of the Family Code provides that, "[u]nless a contrary intent clearly appears elsewhere in this title," a child may waive any right granted by the Family Code "or by the constitution or laws of this state or the United States" in proceedings under the Family Code if:

(1) the waiver is made by the child and the attorney for the child;

(2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it;

(3) the waiver is voluntary; and

(4) the waiver is made in writing or in court proceedings that are recorded.
Tex. Fam.Code Ann. § 51.09.

As stated above, any statement of a juvenile taken in violation of the provisions of the Family Code governing the substantial rights of a juvenile in custody is inadmissible under section 53.04(e) of the Family Code. *See* Tex. Fam.Code. Ann. § 53.04(e).

Appellant's statement was electronically recorded. The video recording shows that the municipal court judge whom Officer Garcia asked to read appellant his rights entered the interview room and warned appellant about his right to counsel, his right to remain silent during the interview, and his right to terminate the interview at any time. The magistrate also warned appellant that "you don't have to make this statement to anyone. And anything you say can be used against you." However, he did not warn appellant that his statement could be used "in evidence" against him. Appellant contends that this omission is a direct violation of section 51.095(a)(1)(A), which must be followed if a statement is electronically recorded under section 51.095(a)(5). Specifically, section 51.095(a)(1)(A) provides that a statement made by a child is admissible only if, *inter alia*, "the child has at some time before the making of the statement received from the magistrate a warning that the child may remain silent and not make any statement at all and that any statement the child makes may be used in evidence against [him]." Tex. Fam.Code Ann. § 51.095(a)(1)(A) (emphasis added); *see also* § 51.095(a)(5).

In *Sosa v. State*, the Court of Criminal Appeals held that a warning of rights made to any adult defendant that differs only slightly from the language of the statute governing the admissibility of evidence--in that case, article 38.22 of the Code of Criminal Procedure [FN6]—complies with the statute as long as it conveys its exact meaning. 769 S.W.2d 909, 915-16 (Tex. Crim.App.1989) (holding that defendant's written statement was voluntarily made when he was read his rights three times during course of evening in accordance with *Miranda* and article 38.22 and on each occasion defendant acknowledged that he understood his rights, that he wished to waive them, and that he wished to talk with FBI agents). Subsequent criminal cases, many unpublished and therefore of no precedential value, have defined the "substantial compliance" standard set in *Sosa* differently in different contexts, but none of them in the juvenile context. *See, e.g., Rutherford v. State*, 129 S.W.3d 221, 226 (Tex. App.—Dallas 2004, no pet.) (finding substantial compliance with article 38.22 where orally administered warnings added to beginning "if I am unable to hire a lawyer" instead of "if [I] am unable to employ a lawyer"); *Gonzalez v. State*, 967 S.W.2d 457, 459 (Tex.App.—Fort Worth 1998, no pet.) (finding substantial compliance where Spanish translation of statutory DUI warning substituted for "that refusal [to give a specimen] may be admissible in a subsequent prosecution,"

in Tex.Rev.Civ. Stat. Ann. art. 67011-5 § 2(b) (Vernon 1977), the words "tal acción puede usarse en su contra en el futuro," which the parties translated as "[i]f you refuse the analysis that action can be used against you in the future"); *Williams v. State*, 883 S.W.2d 317, 320 (Tex.App.—Dallas, 1994, pet.ref'd) (holding that phrase "I know I have the right to remain silent" together with phrase "and knowing that anything I say may be used against me" substantially complied with article 38.22 warnings even though warnings failed to advise accused that his statement could be used against him "at his trial" or "in court" because it advised him his statement could be used against him "in any type of context not just those mentioned in article 38.22, subsection 2(a)(1) and (2)").

FN6. Article 38.22 requires warnings to the accused in a criminal trial that:

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at this trial;

(2) any statement he makes may be used as evidence against him in court;

(3) he has the right to have a lawyer present to advise him prior to and during any questioning;

(4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview at any time[.]

Tex.Code Crim. Proc. Ann. art. 38.22 (Vernon 2005).

We find that the case closest to the instant case, however, is *State v. Subke*, 918 S.W.2d 11 (Tex.App.—Dallas 1995, pet. ref'd), decided the year after *Williams*. In *Subke*, the defendant was given the warning at the beginning of his video-recorded statement that "[y]ou have the right to remain silent and not make any statement at all and that any statement you make will be used against you at trial." *Id.* at 13. The court held that because article 38.22 specifically provided that the accused must be warned that "he has the right to remain silent and not to make a statement at all and that any statement he makes maybe used against him *at his trial* " and also provided that the accused must be warned that "any statement he makes maybe used as evidence against him *in court*," the failure to give the accused both warnings rendered his statement inadmissible. *Id.* at 14-15 (emphasis added). The court held that "the Legislature deliberately placed both warnings ... in the statute to inform the accused of his rights." *Id.* at 15.

Here, the magistrate failed to warn appellant that his video-recorded statement could be used in evidence against him, and nothing else in the warnings alerted appellant that his statement could be used in a hearing to adjudicate juvenile delinquency. Moreover, the record shows that appellant did not understand that he could be charged with a crime as a result of his statement or that his statement could be used in evidence against him at a hearing to adjudicate juvenile delinquency. The State

produced no evidence that appellant understood the warnings given him and their implications.

We hold that the warnings given appellant did not substantially comply with the warnings required to advise him of his rights. Thus appellant's statement was taken in violation of sections 51.095(a)(1)(A) and (a)(5) of the Family Code and, therefore, in violation of section 52.025(b)(5) of the Code. *See* Tex. Fam.Code Ann. § 52.025(b)(5).

Conclusion: Because appellant's electronically recorded custodial statement was taken in violation of sections 52.02(a), 52.025(a), (b)(5), and (c), and 51.095(a)(1)(A) and (a)(5) of the Family Code, and thus violated appellant's substantial rights, we hold that the statement was inadmissible in his juvenile adjudication hearing under section 54.03 of the Code. *See* Tex. Fam.Code Ann. § 54.03(e); *see also Roquemore*, 60 S.W.3d at 869; *Comer*, 776 S.W.2d at 195-96; *Marsh*, 140 S.W.3d at 907. We sustain appellant's first point of error.

CONFESSIONS—

TRIAL COURT'S ERROR IN ADMITTING APPELLANT'S ILLEGALLY OBTAINED STATEMENT WAS HARMFUL ERROR REQUIRING REVERSAL OF HIS CONVICTION.

¶ 09-4-5C. **In the Matter of D.J.C.**, No. 01-07-01092-CV, ___ S.W.3d ___, 2009 WL 3050870 (Tex.App.—Houston [1st Dist.] 9/24/09).

Facts: On February 14, 2006, appellant D.J.C., a sixteen-year-old male, and the complainant, M.I.F., a thirteen-year-old female, had a sexual encounter in the complainant's home in Galveston, Texas. On March 31, 2006, the complainant told a case worker with Child Protective Services that she had had a sexual encounter with appellant. Galveston Police Department ("GPD") Officer C. Garcia was assigned to investigate M.I.F.'s complaint. On June 21, 2006, Officer Garcia went to appellant's home and talked to appellant and his grandmother. Officer Garcia told them that appellant was a suspect in a crime and the focus of an investigation. Officer Garcia requested that appellant's grandmother bring him to the GPD station and that "it would be best for him to cooperate." Officer Garcia left appellant's home.

In response to Officer Garcia's request, appellant and his grandmother later went to the police station. Officer Garcia led appellant to an interview room on the second floor of the police station. Officer Garcia testified that he knew very little about juvenile detention and did not know whether the interview room met the requirements of a designated juvenile detention center. He also testified that the police department had a designated juvenile section "but it wasn't equipped with the video equipment at the time," and so he did not use it. There-

fore, Officer Garcia took appellant's statement in the interview room used for questioning both adult and juvenile subjects. Appellant's grandmother, who was his legal guardian, asked to be present with appellant in the interview room, but police denied her request. Officer Garcia turned on a video camera and left the interview room. A Galveston municipal court judge then entered the interview room and read appellant his rights, including his right to counsel, right to remain silent during the interview, and right to terminate the interview at any time. The magistrate also warned appellant that "you don't have to make this statement to anyone. And anything you say can be used against you." However, he did not warn appellant his statement could be used "in evidence" against him. Appellant's grandmother was not present when the magistrate read him these rights.

After the judge read appellant his rights, Officer Garcia returned to the interview room. Officer Garcia told appellant he was a suspect in an offense of having sex with a thirteen-year-old child. After Officer Garcia questioned appellant for fifteen to twenty minutes, appellant confessed to having sex with the complainant. Garcia arrested him immediately after the interview.

At trial, appellant moved to suppress his confession. The trial court excused the jury and convened a hearing on appellant's motion to suppress. At the hearing, Officer Garcia testified that he led appellant to the interview room "used routinely to interview all criminal suspects." He testified that he was armed and that the door was locked. He testified that he did not know what constituted a juvenile processing office and that he did not "routinely investigate juvenile crimes." He testified that his supervisor "advised me [the interview room] was mandated as a juvenile interview room." However, he also testified that the room was used for the interrogation of both adult and juvenile suspects and that he used that room because there was no videotape in the designated juvenile interview room at that time. The State played the video recording of Officer Garcia's interview with appellant. At the end of the hearing, the trial court ruled that appellant was not in custody at the time of his confession and denied appellant's motion to suppress.

Appellant testified that the judge told him at least twice that he could leave the interview room at any time. In addition, appellant testified that he told Officer Garcia that he was not afraid to leave the interview room at any time. Appellant also testified that he did not fully understand the warnings the judge gave him prior to his interview. He stated that he and his grandmother drove to the police station "[b]ecause the officer came to our house and told us that I need to give a statement." He further testified, in relevant part:

[Counsel]: Okay. And when you were in the room when the Judge was telling you those warnings, did you feel like you could just get up and walk out the door?

[Appellant]: Not really.

[Counsel]: Did you understand that when he told you that the statement could be used against you, did you understand that that meant in court?

[Appellant]: No.

[Counsel]: Did you understand that that meant they were charging you with a crime as a result of the statement?

[Appellant]: No, ma'am.

[Counsel]: Did you even know that this was a crime at this point?

[Appellant]: If I knew I was going to get in trouble for what I said, I wouldn't have went.

[Counsel]: You didn't understand that you were waiving your right, did you?

[Appellant]: No, ma'am.

The State also introduced testimony from the complainant. The complainant testified that she did not remember whether she had sex on February 14, 2006 with appellant. She testified that she "[didn't] know if it was 2005 or 2006." She also testified that she was thirteen years old and appellant was sixteen years old on February 14, 2006. She testified that she and appellant had sex at her house. She also testified that she told investigators that she and appellant had sex at his house but she did not know the address. She could not remember whether she or appellant brought a condom when they had sex. She also testified that she told investigators that she brought a condom for appellant when they had sex.

The jury found true that appellant had engaged in delinquent conduct by committing aggravated sexual assault against the complainant. On November 1, 2007, the trial court signed a disposition order placing appellant on one month's probation and seven hours of community service work.

Held: Reversed and remanded

Opinion: When the statement of a juvenile is obtained in violation of Family Code section 52.02(a)—much less in violation of multiple rights conferred by sections 52.02(a), 52.025, and 51.095—it must be suppressed and a harm analysis done. *See Roquemore*, 60 S.W.3d at 867-68; *Baptist Vie Le*, 993 S.W.2d at 656.

We use the criminal standard of reversible error in a juvenile delinquency proceeding, requiring the State to bear the burden of proving delinquent conduct under the more stringent beyond a reasonable doubt standard rather than under the civil standard. *See Tex. Fam.Code Ann. § 51.17(a), (c)*; *In re B.L.D.*, 113 S.W.3d at 351; *In re U.G.*, 128 S.W.3d at 799-800; *In re D.Z.*, 869 S.W.2d at 566. Because the improper admission of the statement of a juvenile in response to custodial interrogation implicates the constitutional right against self-incrimination, it is constitutional error to admit the statement into evi-

dence. *Marsh*, 140 S.W.3d at 908; *see also In re U.G.*, 128 S.W.3d at 800. Under the standard for reviewing constitutional error in criminal cases, we reverse the trial court's ruling unless the record establishes beyond a reasonable doubt that the erroneous admission of the statement did not contribute to the defendant's conviction or punishment. Tex.R.App. P. 44.2(a); *Franklin v. State*, 138 S.W.3d 351, 354-55 (Tex.Crim.App.2004); *Marsh*, 140 S.W.3d at 908; *In re U.G.*, 128 S.W.3d at 800.

Here, the only evidence against appellant other than his improperly admitted electronically recorded statement was the complainant's testimony. The complainant testified that she lied to appellant about her age. She testified that she did not remember whether she had sex on February 14, 2006 with appellant. She testified that she "[didn't] know if it was 2005 or 2006." She testified that she and appellant had sex at her house. She also testified that she told investigators that she and appellant had sex at his house, but she did not know the address of appellant's house. The State did not present any other evidence or testimony.

Conclusion: The complainant's testimony was inconsistent and contradictory. The State had no other proof. We cannot, therefore, determine beyond a reasonable doubt that the erroneous admission of appellant's statement, in which he confessed to having sex with the complainant, did not contribute to his conviction. *See* Tex.R.App. P. 44.2(a). We hold that the trial court's error in admitting appellant's illegally obtained statement was harmful error requiring reversal of his conviction.

APPEALS—

IN A JUVENILE CASE, ABSENT A TIMELY MOTION FOR NEW TRIAL, A NOTICE OF APPEAL MUST HAVE BEEN FILED WITHIN THIRTY DAYS OF THE DATE THE TRIAL COURT'S JUDGMENT WAS SIGNED.

¶ 09-4-6. **In the Matter of M.R.H.**, MEMORANDUM, No. 05-09-00725-CV, ___S.W.3d___, 2009 WL 3153167 (Tex.App.—Dallas, 10/2/09).

Facts: On June 19, 2009, appellant M.R.H., who is now an adult, filed a notice of appeal "under 56.01 Texas Family Code from order under Section 54.11(1)(2)." The cited provisions relate to proceedings under the Texas Family Code by which a juvenile who is adjudicated delinquent and committed to the Texas Youth Commission is transferred to the Texas Department of Criminal Justice. *See generally* Tex. Fam.Code Ann. § 54.11 ("Release or Transfer Hearing"); § 56.01 ("Right to Appeal") (Vernon 2008). Because the record reflects that any proceedings related to appellant's transfer or release from the Texas Youth Commission occurred in 2001, we directed the parties to file letter briefs addressing our juris-

diction over the appeal. We specifically questioned whether there were any appealable orders issued from which the June 19, 2009 appeal was brought.

Held: Dismissed

Memorandum Opinion: Appellant filed a letter brief in which he asserts this Court has jurisdiction because he cannot obtain relief by post-conviction writ of habeas corpus under article 11.07 of the code of criminal procedure. Appellant also contends the relevant sections of the family code do not place a time limit on appealing the order at issue in this appeal. The State responded that a search of the record shows no new orders were issued from which the June 19, 2009 appeal could be brought. The State asserts, therefore, that this Court does not have jurisdiction over the appeal. We agree with the State.

Section 56.01(b) of the family code states "[t]he requirements governing an appeal are as in civil cases generally." Tex. Fam.Code Ann. § 56.01(b). To properly invoke this Court's jurisdiction, an appellant must timely file a notice of appeal. *See* Tex.R.App. P. 25.1. Absent a timely motion for new trial, a notice of appeal must have been filed within thirty days of the date the trial court's judgment was signed. *See* Tex.R.App. P. 26.1.

Conclusion: In this case, the judgment about which appellant appears to complain was rendered in 2001 and the record does not reflect any other appealable orders since that date. Appellant's June 19, 2009 notice of appeal is untimely as to any 2001 judgment.

Accordingly, we conclude we lack jurisdiction over the appeal. *See generally Verburgt v. Dorner*, 959 S.W.2d 615 (Tex.1997). We dismiss the appeal.

SUFFICIENCY OF THE EVIDENCE—

EVIDENCE WAS LEGALLY SUFFICIENT TO ESTABLISH THAT RESPONDENT ENGAGED IN ORGANIZED CRIMINAL ACTIVITY AS A MEMBER OF THE NORTE 14 STREET GANG, WHERE EVIDENCE SHOWED THAT MEMBERS OF THE NORTE 14 STREET GANG WERE INVOLVED IN CRIMINAL ACTIVITY ON A REGULAR BASIS.

¶ 09-4-7A. **In the Matter of I.A.G.**, No. 09-08-00430-CV, ___ S.W.3d ___, 2009 WL 3126241 (Tex.App.—Beaumont, 10/01/09).

Facts: On the afternoon of May 7, 2008, I.A.G., and others, were involved in an altercation that occurred in the front yard of the complaining witness's home (hereinafter referred to as "the homeowner"). While attempting to stop the altercation, the homeowner, who had not initially been involved in the fight, and I.A.G., who had been a party in the fight, exchanged blows. During the

altercation, the homeowner heard I.A.G. say "North Side" several times, which the homeowner explained he understood to be gang-related. According to the homeowner, "North Side" is a gang in Port Arthur, and the homeowner had seen that name written on walls throughout the city. Ultimately, the homeowner told the group to leave, and they left. The homeowner called the police, who then sent an officer.

Later that day, the homeowner, while away from his home, was notified that some individuals had thrown rocks and tire irons in his yard. The homeowner returned to his house and called the police. Before the police arrived, an Explorer stopped in front of the home. I.A.G., along with three others got out. I.A.G. and one of the others held tire irons while standing near the Explorer. The homeowner explained that under the circumstances, including the earlier altercation, he felt threatened and he feared serious bodily injury. The homeowner also stated that despite the fact that I.A.G. and the other person only displayed the tire irons, he felt threatened.

Shortly after exiting the Explorer, the driver asked the homeowner, "Why you hitting little kids?" While standing behind the Explorer, the driver then pointed a pistol at the homeowner. At that point, the homeowner instructed his father to go inside, after which the gunman said, "I'm going to kill you. I'm going to kill you." The homeowner testified that this also caused him to fear imminent danger of serious bodily injury and to believe that the gunman was going to kill him. After he was threatened with being killed, the homeowner turned around, entered his house, and heard I.A.G. say, "Go, go, go, go, he's going to get his gun." I.A.G. and the others then left. The homeowner, once again, called the police.

The homeowner testified that he felt the two youths holding the tire irons acted in concert with the gunman. With respect to whether any gang was specifically mentioned during the confrontation involving the gun, the homeowner acknowledged that the gunman never mentioned any gang.

A Port Arthur police officer with the "street crimes unit with a specialty in gangs, street gangs" also testified at trial. The officer indicated that I.A.G. and the other minor that participated in the gunman's confrontation with the homeowner had previously been wounded in a drive-by shooting while at a known Norte 14 gang hangout. Additionally, the officer testified that I.A.G. told him that he was a member of the North Side 14 gang. The officer stated that the gunman, who owned the Explorer, was also a member of the Norte 14 gang. The officer added that the other minor who participated in the confrontation that involved the gunman also held membership in the Norte 14 gang, which he based on the minor's admission as well as tattoos on that minor's wrists that together read "North Side 14." The officer expressed his opinion that on May 7, 2008, the gunman and two

minors had acted in concert as members of their gang in threatening the homeowner.

A second Port Arthur police officer that also investigated the confrontation testified at trial. According to the second officer, the homeowner told him that he felt threatened and feared being shot. The second officer confirmed that he was familiar with the participants in the confrontation, and he knew them all to be members of the Norte 14 gang.

The petition alleges that I.A.G. committed the offense of engaging in organized criminal activity, "as a member of a criminal street gang," by committing the offense of "deadly conduct" when he, by his reckless conduct, placed the homeowner in imminent danger of serious bodily injury by pointing a firearm in the homeowner's direction. Engaging in organized criminal activity occurs if, "with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, [the defendant] commits or conspires to commit one or more of the following: ... deadly conduct[.]" Tex. Pen.Code Ann. § 71.02(a)(1) (Vernon Supp.2008).

Held: Affirmed

Opinion: I.A.G. argues that the evidence is legally insufficient to show that, as a member of a street gang, he engaged in organized criminal activity by way of deadly conduct. Because "organized criminal activity" as alleged by the State in this case was based on I.A.G.'s participation in a "criminal street gang," we also consider the definition of "criminal street gang." The Legislature defines a "criminal street gang" as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." Tex. Pen.Code Ann. § 71.01(d) (Vernon 2003).

Focusing on the frequency of criminal activity that suffices to constitute a "criminal street gang," I.A.G. asserts that one criminal act is not sufficient to prove that a person has engaged in organized criminal activity. I.A.G. relies on *Nguyen v. State*, 1 S.W.3d 694 (Tex. Crim.App.1999), to support this argument. In *Nguyen*, the Court of Criminal Appeals affirmed the acquittal of a defendant who had been jointly involved in only a single crime, a murder, where no evidence indicated that the group intended to commit more than the one crime. *Id.* at 697-98.

In this case, however, the criminal activity identified by the homeowner and by the Port Arthur officers included multiple criminal incidents. The officers described criminal activity connected to members of the Norte 14 gang that included vandalism, assault, and specific instances of terroristic threats. The second officer's testimony further indicated that the gang's activities resulted in numerous police calls to locations where the gang frequently gathered.

While I.A.G. argues that there was no evidence that he committed or conspired to commit further criminal activities, the definition of organized criminal activity involving members of street gangs requires criminal street gang membership and the commission or the conspiracy to commit one of the laundry-list crimes involving the gang. *See* Tex. Pen.Code Ann. § 71.02(a)(1)-(13) (Vernon Supp.2008). I.A.G. cites *Nguyen* for the proposition that section 71.02 cannot "be understood to include an agreement to jointly commit a single crime." However, the participants to the crime in *Nguyen* were not members of a street gang; therefore, to prove that those participants had engaged in an organized criminal activity, the State was required to prove that the participants in that case had established, maintained or participated "in a combination" under the first portion of the statute. *Nguyen*, 1 S.W.3d at 697. In this case, the State does not rely on the statute's "in a combination" language addressed in *Nguyen*, as the State alleged and proved that I.A.G. was a member of the same gang as the other two participants to the confrontation with the homeowner. *See* Tex. Pen.Code Ann. § 71.02(a)(1); *Nguyen*, 1 S.W.3d at 696-97. Thus, *Nguyen* is not controlling authority because the State, by showing that I.A.G. was a member of a "criminal street gang" sufficiently met the statute's implied requirement of regular criminal activity.

Conclusion: In summary, when viewed in the light most favorable to the judgment, we find the evidence legally sufficient to establish that gang members of Norte 14 were involved in criminal activity on a regular basis. There is also legally sufficient evidence that at the time of the offenses in May 2008, I.A.G. was a member of the gang. Consequently, we do not agree with I.A.G.'s contention that the frequency of I.A.G.'s criminal activity is insufficient on this record.

**SUFFICIENCY OF THE EVIDENCE—
UNDER THE LAW OF PARTIES, RESPONDENT'S
PRESENCE ALONG WITH OTHER ACTIONS
TEND TO SHOW HIS AGREEMENT TO COMMIT
THE OFFENSE OF DEADLY CONDUCT.**

¶ 09-4-7B. **In the Matter of I.A.G.**, No. 09-08-00430-CV, ___ S.W.3d ___, 2009 WL 3126241 (Tex.App.—Beaumont, 10/01/09).

Facts: On the afternoon of May 7, 2008, I.A.G., and others, were involved in an altercation that occurred in the front yard of the complaining witness's home (hereinafter referred to as "the homeowner"). While attempting to stop the altercation, the homeowner, who had not initially been involved in the fight, and I.A.G., who had been a party in the fight, exchanged blows. During the altercation, the homeowner heard I.A.G. say "North Side" several times, which the homeowner explained he

understood to be gang-related. According to the homeowner, "North Side" is a gang in Port Arthur, and the homeowner had seen that name written on walls throughout the city. Ultimately, the homeowner told the group to leave, and they left. The homeowner called the police, who then sent an officer.

Later that day, the homeowner, while away from his home, was notified that some individuals had thrown rocks and tire irons in his yard. The homeowner returned to his house and called the police. Before the police arrived, an Explorer stopped in front of the home. I.A.G., along with three others got out. I.A.G. and one of the others held tire irons while standing near the Explorer. The homeowner explained that under the circumstances, including the earlier altercation, he felt threatened and he feared serious bodily injury. The homeowner also stated that despite the fact that I.A.G. and the other person only displayed the tire irons, he felt threatened.

Shortly after exiting the Explorer, the driver asked the homeowner, "Why you hitting little kids?" While standing behind the Explorer, the driver then pointed a pistol at the homeowner. At that point, the homeowner instructed his father to go inside, after which the gunman said, "I'm going to kill you. I'm going to kill you." The homeowner testified that this also caused him to fear imminent danger of serious bodily injury and to believe that the gunman was going to kill him. After he was threatened with being killed, the homeowner turned around, entered his house, and heard I.A.G. say, "Go, go, go, go, he's going to get his gun." I.A.G. and the others then left. The homeowner, once again, called the police.

The homeowner testified that he felt the two youths holding the tire irons acted in concert with the gunman. With respect to whether any gang was specifically mentioned during the confrontation involving the gun, the homeowner acknowledged that the gunman never mentioned any gang.

A Port Arthur police officer with the "street crimes unit with a specialty in gangs, street gangs" also testified at trial. The officer indicated that I.A.G. and the other minor that participated in the gunman's confrontation with the homeowner had previously been wounded in a drive-by shooting while at a known Norte 14 gang hangout. Additionally, the officer testified that I.A.G. told him that he was a member of the North Side 14 gang. The officer stated that the gunman, who owned the Explorer, was also a member of the Norte 14 gang. The officer added that the other minor who participated in the confrontation that involved the gunman also held membership in the Norte 14 gang, which he based on the minor's admission as well as tattoos on that minor's wrists that together read "North Side 14." The officer expressed his opinion that on May 7, 2008, the gunman and two minors had acted in concert as members of their gang in threatening the homeowner.

A second Port Arthur police officer that also investigated the confrontation testified at trial. According

to the second officer, the homeowner told him that he felt threatened and feared being shot. The second officer confirmed that he was familiar with the participants in the confrontation, and he knew them all to be members of the Norte 14 gang.

I.A.G. also argues that the evidence is legally insufficient to show that he committed or conspired to commit deadly conduct. As defined by statute, "[d]eadly conduct" occurs when one "recklessly engages in conduct that places another in imminent danger of serious bodily injury." Tex. Pen.Code Ann. § 22.05(a)(Vernon 2003). Under section 22.05, "[r]ecklessness and danger are presumed if the actor knowingly pointed a firearm at or in the direction of another whether or not the actor believed the firearm to be loaded." Tex. Pen.Code Ann. § 22.05(c) (Vernon 2003).

Held: Affirmed

Opinion: In his brief, I.A.G. concedes that "[b]y pointing the gun in the direction of [the homeowner], [the gunman] satisfied the 'recklessness' and 'danger' elements of section 22.05." Nevertheless, I.A.G. contends that the gunman acted alone and that I.A.G.'s presence with the tire iron and his participation in the earlier altercation with the homeowner provides "no additional evidence to make the connection that [I.A.G.] intended to threaten [the homeowner] with a firearm."

Under Texas law, the law of parties enlarges upon a person's potential criminal responsibility for acts that involve others. See Tex. Pen.Code Ann. §§ 7.01, 7.02 (Vernon 2003). Under the law of parties, a person is criminally responsible for the offense of another, and can be convicted as a party, if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person committing the offense. Tex. Pen.Code Ann. §§ 7.01, 7.02.

In applying the law of parties, the defendant's physical presence at the scene is a factor used in evaluating whether the defendant acted with the intent to promote or assist the commission of the offense. "Evidence is sufficient to convict under the law of parties where the defendant is physically present at the commission of the offense and encourages its commission by words or other agreement." *Ransom v. State*, 920 S.W.2d 288, 302 (Tex.Crim.App.1994) (op. on reh'g); *Davis v. State*, 195 S.W.3d 311, 320 (Tex.App.—Houston [14th Dist.] 2006, no pet.). Though mere presence does not automatically make one a party to a crime, it is a circumstance tending to prove party status and, when considered with other facts, may be sufficient to prove that the defendant was a participant. *Davis*, 195 S.W.3d at 320.

In determining whether I.A.G. is responsible for the gunman's act of threatening the homeowner with a gun under the law of parties, we review events occurring before, during, and after the offense and may rely on

actions of the defendant that show an understanding and common design to commit the offense. *Ransom*, 920 S.W.2d at 302; *Davis*, 195 S.W.3d at 320. While there is no question that the gunman, and not I.A.G., held the gun while it was pointed at the homeowner, the court's charge allowed the jury to consider I.A.G.'s responsibility for the gunman's act under the law of the parties instruction.

Relying on *Wooden v. State*, 101 S.W.3d 542 (Tex.App.—Fort Worth 2003, pet. ref'd), I.A.G. argues that his mere presence at the home is insufficient to support a finding that he committed deadly conduct. But here, the evidence shows more than I.A.G.'s mere presence at the scene. Hours before the confrontation, I.A.G. had been involved in a fight with the homeowner and then returned with others under circumstances tending to show the group anticipated and planned to again confront the homeowner in retaliation for the fight that had occurred earlier that day. While circumstantial, there is sufficient evidence that the three agreed to act in concert to threaten the homeowner. We conclude that I.A.G.'s presence and actions tend to show his agreement to commit the offense as well as encouragement of the gunman's acts. See *Ransom*, 920 S.W.2d at 302. Therefore, we find the evidence sufficient to support a conviction under the law of parties. *Id.*

Conclusion: In summary, we find the evidence legally sufficient to prove that I.A.G., under the law of parties, committed deadly conduct while engaged in organized criminal activity as a member of a criminal street gang. See *Jackson*, 443 U.S. at 319; *Evans*, 202 S.W.3d at 161. Having addressed I.A.G.'s arguments, we overrule issue one.

**SUFFICIENCY OF THE EVIDENCE—
EVIDENCE WAS LEGALLY AND FACTUALLY
SUFFICIENT TO SUPPORT THE FINDING THAT
RESPONDENT COMMITTED THE OFFENSE OF
TERRORISTIC THREATS, WHERE HE STOOD
BESIDE A VEHICLE WITH A TIRE IRON WHILE
OTHERS SIMULTANEOUSLY THREATENED
THE HOMEOWNER, PLACING THE HOME
OWNER IN FEAR OF SERIOUS BODILY INJURY.**

¶ 09-4-7C. **In the Matter of I.A.G.**, No. 09-08-00430-CV, ___ S.W.3d ___, 2009 WL 3126241 (Tex.App.—Beaumont, 10/01/09).

Facts: On the afternoon of May 7, 2008, I.A.G., and others, were involved in an altercation that occurred in the front yard of the complaining witness's home (hereinafter referred to as "the homeowner"). While attempting to stop the altercation, the homeowner, who had not initially been involved in the fight, and I.A.G., who had been a party in the fight, exchanged blows. During the

altercation, the homeowner heard I.A.G. say "North Side" several times, which the homeowner explained he understood to be gang-related. According to the homeowner, "North Side" is a gang in Port Arthur, and the homeowner had seen that name written on walls throughout the city. Ultimately, the homeowner told the group to leave, and they left. The homeowner called the police, who then sent an officer.

Later that day, the homeowner, while away from his home, was notified that some individuals had thrown rocks and tire irons in his yard. The homeowner returned to his house and called the police. Before the police arrived, an Explorer stopped in front of the home. I.A.G., along with three others got out. I.A.G. and one of the others held tire irons while standing near the Explorer. The homeowner explained that under the circumstances, including the earlier altercation, he felt threatened and he feared serious bodily injury. The homeowner also stated that despite the fact that I.A.G. and the other person only displayed the tire irons, he felt threatened.

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A Port Arthur police officer with the "street crimes unit with a specialty in gangs, street gangs" also testified at trial. The officer indicated that I.A.G. and the other minor that participated in the gunman's confrontation with the homeowner had previously been wounded in a drive-by shooting while at a known Norte 14 gang hangout. Additionally, the officer testified that I.A.G. told him that he was a member of the North Side 14 gang. The officer stated that the gunman, who owned the Explorer, was also a member of the Norte 14 gang. The officer added that the other minor who participated in the confrontation that involved the gunman also held membership in the Norte 14 gang, which he based on the minor's admission as well as tattoos on that minor's wrists that together read "North Side 14." The officer expressed his opinion that on May 7, 2008, the gunman and two minors had acted in concert as members of their gang in threatening the homeowner.

A second Port Arthur police officer that also investigated the confrontation testified at trial. According to the second officer, the homeowner told him that he felt threatened and feared being shot. The second officer confirmed that he was familiar with the participants in the confrontation, and he knew them all to be members of the Norte 14 gang.

A person commits the offense of "terroristic threat" if "he threatens to commit any offense involving violence to any person or property with intent to ... place any person in fear of imminent serious bodily injury[.]" Tex. Pen.Code Ann. § 22.07(a)(2) (Vernon Supp.2008). The petition alleges that I.A.G. intentionally and knowingly placed the homeowner "in fear of imminent serious bodily injury" by threatening "to commit an offense involving violence" when I.A.G. threatened the homeowner with a "tire iron."

Held: Affirmed

Opinion: I.A.G. asserts that the evidence is legally and factually insufficient to show that he threatened the homeowner "with an offense involving violence." We disagree and believe the evidence is legally and factually sufficient to support the judgment.

Although the homeowner testified to his fear, we first note that section 22.07 contains no requirement that the victim or anyone else be actually placed in fear of imminent serious bodily injury. *See id.* § 22.07(a)(2); *Cook v. State*, 940 S.W.2d 344, 347 (Tex.App.—Amarillo 1997, pet. ref'd). Rather, if the defendant sought or desired that his threat placed the victim in fear of imminent serious bodily injury, the offense is complete. *Dues v. State*, 634 S.W.2d 304, 306 (Tex.Crim. App.1982); *Poteet v. State*, 957 S.W.2d 165, 167 (Tex.App.—Fort Worth 1997, no pet.). It is immaterial to the offense of terroristic threat that the defendant "had the capability or the intention to carry out his threat." *Dues*, 634 S.W.2d at 305. Nevertheless, and regardless of whether the threat was carried out, the reaction of the homeowner to the threat is some evidence of the defendant's intent. *See Hadnot v. State*, 884 S.W.2d 922, 925-26 (Tex.App.—Beaumont 1994, no pet.).

In this case, the homeowner testified that he was placed in fear of serious injury even though I.A.G. stood silently holding the tire iron. Moreover, the circumstances described in the record are sufficient to support the jury's conclusion that I.A.G., who stood beside the Explorer with a tire iron while others simultaneously threatened the homeowner, intended to place the homeowner in fear of serious bodily injury.

We find the evidence legally and factually sufficient to support the finding that I.A.G. committed the offense of terroristic threat. The evidence is not so weak that the verdict seems clearly wrong and manifestly unjust, nor is the evidence supporting the jury's finding outweighed by the great weight and preponderance of the contrary evidence. *See Roberts*, 220 S.W.3d at 524;

Johnson, 23 S.W.3d at 11. We overrule I.A.G.'s second issue.

TRIAL PROCEDURE—

A TRIAL COURT IS UNDER A DUTY TO COMMENCE A TRIAL WITH A JURY, UNLESS THE RIGHT TO A JURY IS PROPERLY AND AFFIRMATIVELY WAIVED BY THE JUVENILE AND HIS COUNSEL.

¶ 09-4-8. **In the Matter of S.G.**, No. 10-09-00035-CV, ___ S.W.3d ___, 2009 WL 3319926 (Tex.App.—Waco, 10/14/09).

Facts: S.G., a juvenile, was found to have engaged in delinquent conduct by committing the offense of Indecency with a Child by Contact by the trial court in a non-jury trial. Tex. Fam.Code Ann. § 54.03 (Vernon 2006); Tex. Pen.Code Ann. § 21.11 (Vernon 2003). S.G. complains that the evidence is factually insufficient to find that he engaged in delinquent conduct, that the trial court's questioning of his expert witness was erroneous, and that the record contains no waiver of a jury trial.

Texas Family Code Section 54.03(c) states: "Trial shall be by jury unless jury is waived in accordance with Section 51.09." Tex. Fam.Code Ann. § 54.03(c) (emphasis added). Section 51.09 of the Texas Family Code establishes the methodology for a juvenile to waive his rights, including that to a jury trial. Tex. Fam.Code Ann. § 51.09 (Vernon 2007). Section 51.09 states:

Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if:

- (1) the waiver is made by the child and the attorney for the child;
- (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it;
- (3) the waiver is voluntary; and
- (4) the waiver is made in writing or in court proceedings that are recorded.

Tex. Fam.Code Ann. § 51.09 (Vernon 2007) (emphasis added).

The record in this case is silent as to the waiver of a jury trial. There is neither a written waiver in the record nor any oral waiver on the record as required by Section 51.09. *Id.* Additionally, the judgment adjudicating S.G. makes no mention of a jury trial being waived or otherwise.

The State argues that any error stemming from this failure has not been preserved in the trial court. See

TEX. R. APP. P. 33.1. *See also* Tex. Fam.Code Ann. §§ 54.03(b) & (i) (Vernon 2008). S.G. does not dispute that no objection was lodged in the trial court, but argues that an affirmative waiver is required regardless of the failure of the trial court to explain his rights to him. Thus, we must first determine whether the failure to object to the lack of a written or oral jury trial waiver must be preserved at the trial court or may be raised for the first time on appeal.

Held: Reversed and remanded

Opinion: The Texas Supreme Court addressed the issue of the necessity of preservation of error for purposes of appeal in juvenile cases in *In re C.O.S.*, 988 S.W.2d 760 (Tex.2001). *In re C.O.S.* involved improper admonishments in a juvenile proceeding prior to the 1997 amendment to Section 54.03, which added (i), which now requires that an objection must be made to the trial court's failure to give admonishments pursuant to Section 54.03(b) prior to the start of testimony. *See* Act of May 27, 1987, 70th Leg., R.S., ch. 385, § 8, 1987 Tex. Gen. Laws 1891, 1894; Act of May 26, 1987, 70th Leg., R.S., ch. 386, § 3, 1987 Tex. Gen. Laws 1899, 1900, amended by Act of June 2, 1997, 75th Leg., R.S., ch. 1086, § 10, 1997 Tex. Gen. Laws 4179, 4184- 85 (current version at Tex. Fam.Code Ann. §§ 54.03(b) & (i)). However, we do not construe S.G.'s complaint to be based on the failure to properly give admonishments pursuant to Section 54.03(b), but the trial court's failure to comply with the mandates in Section 54.03(c).

In re C.O.S. holds that there are three categories of rights and requirements used in determining whether error may be raised for the first time on appeal. *See In re C.O.S.*, 988 S.W.2d at 765-767. The first set of rights are those that are considered so fundamental that implementation of these requirements is not optional and cannot, therefore, be waived or forfeited by the parties. *See id.* at 765; *Marin v. State*, 851 S.W.2d 275, 279 (Tex.Crim.App.1993). The second category of rights is those that must be implemented by the system unless expressly waived. *See In re C.O.S.*, 988 S.W.2d at 766; *Marin v. State*, 851 S.W.2d at 278-279. The third set of rights is those that the trial court has no duty to enforce unless requested. *See In re C.O.S.*, 988 S.W.2d at 765; *Marin v. State*, 851 S.W.2d at 279. The law of procedural default applies to this last category, wherein the failure to speak waives these forfeitable rights. *See In re C.O.S.*, 988 S.W.2d at 767 (quoting *Marin v. State*, 851 S.W.2d at 279).

The right to a jury trial in a juvenile case fits into the second category. *See In re C.D.H.*, 273 S.W.3d 421, 424-425 (Tex.App.—Texarkana 2008, no pet.) (citing *Aldrich v. State*, 104 S.W.3d 890, 895 (Tex.Crim.App.2003)). *See also Bessey v. State*, 239 S.W.3d 809, 812 (Tex.Crim.App.2007) (waivable-only right cannot be forfeited by inaction alone). This second category in-

cludes rights or requirements embodied in a statute that directs a trial court in a specific manner. *See In re C.O.S.*, 988 S.W.2d at 766. *See also In re J.L.S.*, 47 S.W.3d 128, 130 (Tex.App.—Waco 2001, no pet.). The Supreme Court held in *C.O.S.* that "when a statute directs a juvenile court to take certain action, the failure of the juvenile court to do so may be raised for the first time on appeal unless the juvenile defendant expressly waived the statutory requirement. *In re C.O.S.*, 988 S.W.2d at 766; *In re J.L.S.*, 47 S.W.3d at 130.

Thus, we find that this error may be raised for the first time on appeal.

Harm Analysis

We apply the civil harm standard when reviewing the adjudication phase of an indeterminate juvenile sentencing proceeding. *See In re C.P.*, 998 S.W.2d 703 (Tex.App.—Waco 1999, no pet.). Under the civil harm standard, an error requires reversal only if it probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case to this Court. *See Tex.R.App. P. 44.1(a).*

A harm analysis is required except in very limited circumstances. *In re D.I.B.*, 988 S.W.2d 753, 758 (Tex.2001). This is true even in cases where the error involved "defies analysis by harmless error standards" or "the data is insufficient to conduct a meaningful harmless error analysis." *In re D.I.B.*, 988 S.W.2d at 759.

This case presents particular difficulties in determining harm. The interplay between the criminal and civil standards in juvenile cases is particularly problematic here when determining which rule of appellate procedure governs the determination of harm. [FN1] Juvenile cases are most similar to criminal cases in their procedure; however, juvenile appeals are to be governed by civil rules of appellate procedure as far as practicable. *In re D.I.B.*, 988 S.W.2d at 756. Also, there is little authority to guide our decision in a case where the record is completely devoid of any reference of any kind to a jury trial by anyone, including the trial court.

FN1. The criminal standard for nonconstitutional error is: "Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Tex.R.App. P. 44.2(b). If the error affects substantial rights, then, it is not harmless. *VanNorrick v. State*, 227 S.W.3d 706, 708 (Tex.Crim.App.2007).

It is true that the failure to object to the trial court's failure to give the required explanations waives the ability to complain about the error for appeal; however, this failure is a factor in our harm analysis. *See Smith v. State*, 223 S.W.3d 690, 696 (Tex.App.—Texarkana 2007, no pet.) (defendant was aware of right to jury based on written waiver in punishment phase of trial where waiver was marked out and judgment recited jury was waived so error was harmless). *See Johnson v. State*, 72 S.W.3d 346, 349 (Tex.Crim.App.2002) (where

judgment recites jury trial waived, defendant is presumed to be aware of right to jury trial absent showing otherwise based on presumption of regularity of judgments). *See also In re M.E.W.*, No. 01-93- 01152-CV, 1995 Tex.App. LEXIS 458 at *5 & 6 (Tex.App.—Houston [1st Dist.] 1995, no pet.) (not designated for publication) (no harm from improper Section 51.09 waiver when adjudication order did not include the offenses that served as the basis for the complaint of improper waiver). *See also VanNorrick v. State*, 227 S.W.3d 706, 709, 714 (Tex.Crim.App.2007) (burden of proof to establish harm does not rest on either party; harmful error requires reversal when record is silent as to defendant's immigration status and no admonishments given regarding the effect of conviction and deportation). In the trial before the court, the trial court's only "explanation" required by Section 54.03(b) given to S.G. was "the charge is indecency with a child by contact." The trial court did offer to read the petition; however, the reading of the petition was waived by counsel for S.G. The trial court never asked S.G. if he agreed to this waiver.

We also include in our inquiry the conduct of the bench trial itself. During the bench trial, the trial court spent a significant amount of time questioning Dr. Aaron Pierce, who was an expert testifying on behalf of S.G. The trial court's questions sought clarification of Dr. Pierce's evaluations and opinions, and arguably could have resulted in the alteration of Dr. Pierce's opinions. While the interrogation of Dr. Pierce might not constitute reversible error standing alone, it certainly would have been impermissible for the trial court in a jury trial. *See Morrison v. State*, 845 S.W.2d 882, 886 n. 10 (Tex. Crim.App.1992).

The trial court was under a duty to commence a trial by jury unless that right was properly, affirmatively waived by the juvenile and his counsel. The trial court erred in conducting a bench trial with no affirmative waiver as required by Section 51.09. Further, the judgment makes no reference to a waiver of a jury trial. We hold that the trial court's error probably did result in the rendition of an improper judgment. We sustain this issue.

Conclusion: We find that the record does not affirmatively establish that S.G. and his attorney waived S.G.'s right to trial by jury as required by Texas Family Code Sections 51.09 and 54.03. We reverse and remand this cause to the trial court for a new trial. Because we are remanding this cause for a new trial, we do not address S.G.'s other issues.

**WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT—
LACK OF DUE DILIGENCE COMPLAINT IN ORDER WAIVING JURISDICTION TO ADULT COURT AFTER CHILD TURNS 18 IS NOT REVIEWABLE BY THE ADULT TRIAL COURT.**

¶ 09-4-9. **State v. Rhinehart**, UNPUBLISHED, No. 05-09-00155-CR, 2009 WL 3248270 (Tex.App.—Dallas, 10/12/09).

Facts: Forty-three days before his seventeenth birthday, appellee was charged with aggravated robbery. The State filed a petition for discretionary transfer from the juvenile court to the criminal district court, but was unable to locate appellee to effect service. After appellee turned eighteen, the juvenile court conducted a hearing on the State's petition for transfer. During the hearing, appellee challenged whether the State had exercised due diligence in moving the case through the juvenile system prior to his eighteenth birthday. The juvenile court made a specific finding that the State had exercised due diligence in its attempt to locate appellee and signed an order waiving its jurisdiction and transferring the case to the criminal district court.

Appellee was indicted after the case was transferred to the criminal district court. Appellee then moved to quash the indictment, arguing that the evidence was insufficient to support the transfer of the case under Section 54.02(j) of the family code. Specifically, appellee argued the State failed to establish that after exercising due diligence, it was not practicable to proceed in juvenile court before appellee's eighteenth birthday. The trial court granted the motion and quashed the indictment. This appeal followed.

Held: Reversed and remanded

Opinion: Here, the motion to quash does not assert any of the statutory grounds for setting aside an indictment, nor does it challenge the indictment based on form or substance. Instead, the motion asserted that the indictment should be quashed because the elements requisite to transfer a case from juvenile court to district court had not been met. Despite appellee's attempt to characterize the motion otherwise on appeal, the motion constitutes a challenge to the evidence adduced in the juvenile court transfer proceedings.

Although original jurisdiction over a child engaged in delinquent conduct lies exclusively with the juvenile court, *see* Tex. Fam.Code Ann. § 51.04 (Vernon 2002), when certain conditions are met family code section 54.02(j) allows a district court to acquire jurisdiction over a child alleged to have committed a felony. However, before the district court may acquire jurisdiction, the juvenile court must waive jurisdiction. Tex. Fam.Code Ann. § 54.02 (Vernon 2002). To do so, the juvenile court must find from a preponderance of the evidence that:

- A. for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person; or
- B. after due diligence of the state it was not practicable to proceed in juvenile court before the 18th

birthday of the person because:

- (i) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person;
- (ii) the person could not be found; or
- (iii) a previous transfer order was reversed by an appellate court or set aside by a district court....

Id. The family code no longer permits juvenile defendants to appeal from the certification proceedings prior to being finally convicted as an adult. *Small v. State*, 23 S.W.3d 549, 550 (Tex.App.—Houston [1st Dist.] 2000, pet. ref'd). Thus, issues relating to the transfer proceeding are properly raised in an appeal from a conviction after transfer. *Carlson v. State*, 151 S.W.3d 643, 645 n.1 (Tex. App.—Eastland 2004, no pet.); *State v. Lopez*, 196 S.W.3d 872, 875 (Tex.App.—Dallas 2006, pet. ref'd).

Appellee acknowledges that a party may only appeal a transfer order in conjunction with a conviction or an order of deferred adjudication. *See* Tex.Code Crim. Proc. Ann. art. 44.47(b) (Vernon 2006). Nonetheless, appellee contends that an "appeal" differs from a "challenge," and insists the statute does not restrict a defendant's right to challenge a transfer order. Although we note that the construction appellee seeks to advance would effectively allow a defendant two bites at the proverbial appellate apple, we need not decide the issue here. Appellee's motion did not seek to set aside the transfer order; it sought to quash the indictment. Moreover, even if the statute afforded different treatment for a "challenge" than an "appeal," the distinction is without a difference in the present case. Appellee's motion concerned the sufficiency of the evidence in the transfer proceeding. And in the absence of a conviction or order of deferred adjudication, we have no jurisdiction to determine the propriety of a transfer. *See* Tex.Code Crim. Proc. Ann. art. 44.47(b) (Vernon 2006).

Conclusion: Because there is nothing before us to demonstrate that the indictment was not valid, we conclude the trial court erred in quashing the indictment. The State's second issue is sustained. Our resolution of this issue obviates the need to address the State's first issue. *See* Tex.R.App. P. 47.1. We reverse the trial court's order and remand the case for further proceedings consistent with this opinion.

**WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT—
TRIAL COURT CAN, BASED ON THE EVIDENCE, BELIEVED DIFFERENT SCENARIOS IN FINDING THAT THE STATE ACTED WITH DUE DILIGENCE IN DISCRETIONARY WAIVER AND TRANSFER HEARING TO ADULT COURT FOR JUVENILE'S OVER 18.**

¶ 09-4-10. **Rosales v. State**, MEMORANDUM, No. 04-08-00874-CR, 2009 WL 3645659 (Tex.App.—San Antonio, 11/4/09).

Facts: In order for a juvenile court to waive its jurisdiction and transfer a case to a criminal district court, various requirements must be met. [FN1] Tex. Fam.Code Ann. § 54.02(j) (Vernon 2008). The only requirement the appellant, Victor Rosales, challenges in this appeal is the trial court's finding that the State exercised due diligence in trying to find Rosales so it could proceed against him before his 18th birthday. *Id.* at § 54.02(j)(4)(B)(ii). We review this complaint under an abuse of discretion standard, deferring to the trial court's factual determinations while reviewing its legal determinations *de novo*. *In re J.C.C.*, 952 S.W.2d 47, 49 (Tex.App.—San Antonio 1997, no writ).

FN1. Section 54.02(j) provides, in pertinent part, that a juvenile court may waive its exclusive original jurisdiction and transfer a person to the appropriate district court or criminal district court for criminal proceedings if:

- (1) the person is 18 years of age or older;
- (2) the person was:
 - ...
 - (C) 15 years of age or older and under 17 years of age at the time the person is alleged to have committed a felony of the second or third degree or a state jail felony;
- (3) no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted;
- (4) the juvenile court finds from a preponderance of the evidence that:
 - ...
 - (B) after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because:
 - ...
 - (ii) the person could not be found;
 - ...
- (5) the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged. Tex. Fam.Code Ann. § 54.02(j) (Vernon 2008).

The Texas Family Code does not define "due diligence," but courts have interpreted the term to require that parties do more than "simply sit on their rights or duties." *In re N.M.P.*, 969 S.W.2d 95, 100 (Tex.App.—Amarillo 1998, no pet.); *see also Powell v. State*, Nos. 05-07-01078-CR & 05-07-00179-CR, 2009 WL 866194, at *2 (Tex.App.—Dallas Apr. 1, 2009, pet. ref'd) (not designated for publication); *Webb v. State*, No. 08-00-00161-CR, 2001 WL 1326894, at *7 (Tex.App.—El Paso Oct. 25, 2001, pet. ref'd) (not designated for publication). Due diligence requires the State to "move ahead" or "be able to reasonably explain delays." *In re N.M.P.*, 969 S.W.2d at 100; *see also Powell*, 2009 WL 866194, at

*2; *In re C.B.*, No. 2-05-341-CV, 2006 WL 1791731, at *2 (Tex.App.—Fort Worth June 29, 2006, no pet.) (mem.op.). Due diligence does not, however, require the State to "do everything perceivable and conceivable to avoid delay." *In re N.M.P.*, 969 S.W.2d at 100; *In re C.B.*, 2006 WL 1791731, at *2.

Rosales was accused of sexually assaulting his nine-year-old niece on July 13, 1997. Rosales was sixteen years old at the time of the offense.

Sergeant Charles Campbell was dispatched to the hospital on July 13, 1997, to take the report on the sexual assault case. Sergeant Campbell obtained an address for Rosales from the complainant's mother, who was Rosales's sister. Sergeant Campbell testified that he never went to the address that was given. Sergeant Campbell explained that he was a crisis intervention officer, and he would have given the information he obtained to dispatch who would have given the information to an investigator.

Detective Arturo Cervantes was the investigator assigned to investigate the sexual assault. Detective Cervantes interviewed the complainant on July 28, 1997. At that time, the complainant's mother told Detective Cervantes that Rosales was no longer in the United States but had returned to Mexico. Detective Cervantes testified that the department's standard procedure would be to follow up immediately and try to locate Rosales. Detective Cervantes could not recall the efforts made in Rosales's case, but under standard procedure, officers would conduct surveillance of the areas Rosales was known to frequent or places where family members might live even before the issuance of a warrant. Detective Cervantes had the address for Rosales that was provided by the complainant's mother and testified it was "one of the addresses that I believe that we were looking at in hopes of finding" Rosales.

The original petition seeking a determinate sentence for aggravated sexual assault and indecency with a child was filed on October 30, 1997. By the time the petition was filed, Rosales was seventeen years old. At that time, Adriana Limon was the probation officer assigned to Rosales's case. On December 8, 1997, Limon spoke with Rosales's aunt who informed her that Rosales had fled to Mexico. The aunt was not identified by name, and the record does not indicate that any follow-up phone calls were made or that anyone went to the aunt's house. Because Limon could not locate Rosales to serve him with the petition, Limon submitted an affidavit requesting an arrest warrant. The affidavit stated that Limon "requested information from [Rosales's] relatives (aunt) as to [Rosales's] address and or a phone number but she did not have any such information."

A warrant was issued for Rosales's arrest on March 31, 1998. Detective Cervantes could not provide the name of a particular officer who went to the address to look for Rosales; however, Detective Cervantes stated that after the warrant was issued for Rosales's arrest, the warrants division would have gone to the address to try

to locate Rosales in compliance with mandatory policy. The warrant remained active until Rosales was arrested on March 25, 2006 in Hays County, Texas. Rosales was later released by Hays County after he posted bond.

Traci Geppert, another juvenile probation officer, was assigned the case in July of 2006, after the certification and transfer petition had been filed. Geppert unsuccessfully attempted to contact Rosales using all of the phone numbers on the booking information from Hays County. Two constables from Hays County went to Rosales's physical addresses on three separate occasions but also were unable to locate Rosales. Geppert contacted a few of Rosales's relatives who told her that Rosales had fled to either Mexico, Buda or Kyle, Texas, or North or South Carolina. As a result, a second warrant was issued for Rosales's arrest. Rosales was arrested on the second warrant on January 31, 2008.

When Geppert interviewed Rosales, he told her he had moved around in the eleven years since the offense occurred, primarily living in Mexico but also living in Austin and South Carolina. Rosales had a wife and three children living in Mexico, and his wife was pregnant with a fourth child. The certification and transfer evaluation report, which was introduced into evidence and reviewed by the trial court, states that Rosales resided in Mexico for the past ten years, but he sporadically visited the United States.

The trial court found that "after due diligence by the State it was not practicable to proceed in juvenile court before the 18th birthday of [Rosales] because [Rosales] could not be found." Rosales's 18th birthday was October 9, 1998.

Held: Affirmed

Memorandum Opinion: Based on the evidence presented, the trial court could have believed that Rosales fled to Mexico in July of 1997 immediately after the offense occurred and that his family would not provide the probation department with any contact information. The trial court could also have found that Rosales remained in Mexico from the time of the offense until the time he was arrested with only sporadic visits to the United States. Moreover, the trial court could also have believed that an officer went to the address that had been provided for Rosales when the arrest warrant was issued in March of 1998, but he could not be located. Therefore, deferring to the trial court's factual findings, the trial court did not abuse its discretion in concluding that the State acted with due diligence.

Conclusion: The trial court's judgment is affirmed.