

# Juvenile Law Section

STATE BAR OF TEXAS



Volume 24, Number 2 June 2010

Visit us online at  
[www.juvenilelaw.org](http://www.juvenilelaw.org)



NEWSLETTER EDITOR

**Associate Judge Pat Garza**  
 386<sup>th</sup> District Court  
 San Antonio, Texas

#### OFFICERS AND COUNCIL MEMBERS

##### **Chris Hubner, Chair**

Texas Juvenile Probation Commission  
 P.O. Box 13547, Austin, TX 78711

##### **Nydia Thomas, Chair Elect**

Texas Juvenile Probation Commission  
 P.O. Box 13547, Austin, TX 78711

##### **Jill Mata, Treasurer**

Bexar County District Attorney's Office  
 235 East Mitchell, San Antonio, TX 78210

##### **Richard Ainsa, Secretary**

Juvenile Court Referee, 65<sup>th</sup> District Court  
 6400 Delta Drive, El Paso, TX 79905

##### **Bill Connolly, Immediate Past Chair**

2930 Revere Suite 300, Houston, TX 77098

##### **Terms Expiring 2011**

Kameron Johnson, Austin  
 Marisela Ledezma, Edinburg  
 Laura Peterson, Garland

##### **Terms Expiring 2012**

Ann Campbell, Houston  
 Kevin Collins, San Antonio  
 Kaci Sohrt, Austin

##### **Terms Expiring 2013**

Kim Brown, Fort Worth  
 David Hazlewood, Lubbock  
 Riley Shaw, Fort Worth

#### QUICK LINKS

[Juvenile Law Section Website](#)

[Nuts and Bolts of Juvenile Law](#)

[State Bar of Texas Website](#)

[State Bar of Texas Annual Meeting](#)

[Texas Bar CLE](#)

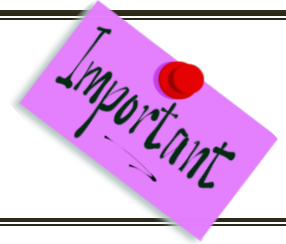
[Texas Bar Circle](#)

[State Bar of Texas Facebook](#)

Dear Juvenile Law Section Members:

Welcome to the first e-newsletter published by the Juvenile Law Section of the State Bar of Texas. Your input is valued so please take a moment to [email us](#) and tell us what you think of the new format.

The "Review of Recent Cases" includes cases that are hyperlinked to Casemaker, a free service provided by [TexasBarCLE](#). To access these opinions, you must be a registered user of the [TexasBarCLE](#) website, which requires creating a password and log-in. If you do not wish to receive emails from TexasBarCLE, you can opt-out of their email list.



#### TABLE OF CONTENTS

<a href="#">Editor's Forward</a> .....	3
<a href="#">Chair's Message</a> .....	3
<a href="#">Review of Recent Cases</a> .....	4

#### By Subject Matter

<a href="#">Appeals</a> .....	4
<a href="#">Collateral Attack</a> .....	8
<a href="#">Court Appointed Attorney</a> .....	9
<a href="#">Criminal Proceedings</a> .....	10
<a href="#">Defenses</a> .....	11
<a href="#">Determinate Sentence Act</a> .....	13
<a href="#">Disposition Proceedings</a> .....	16
<a href="#">Evidence</a> .....	17
<a href="#">Search and Seizure</a> .....	18
<a href="#">Sufficiency of the Evidence</a> .....	20
<a href="#">Waiver and Discretionary Transfer to Adult Court</a> .....	31

#### By Case

<a href="#">A.C., In the Matter of</a> , MEMORANDUM, No. 2-09-278-CV, 2010 WL 1730790, Juvenile Law Newsletter ¶ 10-2-12 (Tex.App.-Fort Worth, 4/29/10).....	20
<a href="#">Bleys v. State</a> , No. 04-09-00360-CR, --- S.W.3d ---, 2010 WL 1904130, Juvenile Law Newsletter ¶ 10-2-17 (Tex.App.-San Antonio, 5/12/10).....	13
<a href="#">D.H., In the Matter of</a> , No. 03-07-00426-CV, --- S.W.3d ---, 2010 WL 744117, Juvenile Law Newsletter ¶ 10-2-2 (Tex.App.-Austin, 3/5/10).....	18
<a href="#">D.R.R., In the Matter of Expunction of</a> , No. 08-08-00064-CV, --- S.W.3d ---, 2010 WL 456851, Juvenile Law Newsletter ¶ 10-2-13 (Tex.App.-El Paso, 2/10/10).....	8

[Graham v. Florida](#), No. 08-7412, 560 U.S. \_\_\_, Juvenile Law Newsletter ¶ 10-2-18  
(Sup. Ct., 5/17/10) .....10

[H.G.G.D., In the Matter of](#), No. 08-08-00280-CV, --- S.W.3d ----, 2010 WL 636935,  
Juvenile Law Newsletter ¶ 10-2-5 (Tex.App.-El Paso, 2/24/10).....25

[J.A., In the Matter of](#), MEMORANDUM, No. No. 04-09-00556-CV, 2010 WL 816198,  
Juvenile Law Newsletter ¶ 10-2-7 (Tex.App.-San Antonio, 3/10/10).....16

[J.A.B., In the Matter of](#), MEMORANDUM, No. 03-09-00184-CV, 2010 WL 1930163,  
Juvenile Law Newsletter ¶ 10-2-16 (Tex.App.-Austin, 5/13/10).....27

[J.R.N., III, In the Matter of](#), MEMORANDUM, No. 09-08-00029-CV, 2009 WL 6312273,  
Juvenile Law Newsletter ¶ 10-2-10 (Tex.App.-Beaumont, 4/1/10) .....5

[J.S.H., In the Matter of](#), MEMORANDUM, No. 01-08-00563-CV, 2010 WL 987247,  
Juvenile Law Newsletter ¶ 10-2-8 (Tex.App.-Hous. (1 Dist.), 3/18/10).....7

[Longoria v. State](#), MEMORANDUM, No. 07-09-0196-CR, 2010 WL 668535,  
Juvenile Law Newsletter ¶ 10-2-4 (Tex.App.-Amarillo, 2/25/10).....7

[M.A.J., In the Matter of](#), MEMORANDUM, No. 03-09-00492-CV, 2010 WL 668890,  
Juvenile Law Newsletter ¶ 10-2-3 (Tex.App.-Austin, 2/26/10).....11

[Maldonado v. State](#), MEMORANDUM, No. 07-09-00168-CR, 2010 WL 840814,  
Juvenile Law Newsletter ¶ 10-2-6 (Tex.App.-Amarillo, 3/12/10).....31

[Menson v. State](#), UNPUBLISHED, No. 07-09-0221-CR, 2010 WL 571716,  
Juvenile Law Newsletter ¶ 10-2-1 (Tex.App.-Amarillo, 2/18/10).....9

[R.D., In the Matter of](#), 304 S.W. 3d 368, 53 Tex.Sup.Ct.J. 303,  
Juvenile Law Newsletter ¶ 10-2-9 (2/12/10) .....4

[R.L.S., In the Matter of](#), MEMORANDUM, No. 11-08-00170-CV, 2010 WL 1500864,  
Juvenile Law Newsletter ¶ 10-2-11 (Tex.App.-Eastland 4/15/10) .....17

[V.R., In the Matter of](#), MEMORANDUM, No. 10-09-00293-CV, 2010 WL 966168,  
Juvenile Law Newsletter ¶ 10-2-14 (Tex.App.-Waco, 3/10/20).....28

[Z.J.R., In the Matter of](#), MEMORANDUM, No. 04-09-00008-CR, 2010 WL 724398,  
Juvenile Law Newsletter ¶ 10-2-15 (Tex.App.-San Antonio, 3/3/10).....29

## EDITOR'S FOREWORD By Associate Judge Pat Garza

Oh my goodness. We are in the summer of 2010! Think about it, the SUMMER OF TWENTY-TEN!! I can't believe where I am today. I mean today in time. Where has the time gone? I'm much too young to be this old. You know what, if you are younger than forty-five, quit reading. Just stop! Go straight to the cases. Don't even bother reading any further because you simply will not understand. For the rest of you, bear with me while I digress.

I think my kids know that I'm a history major, but for the sake of this discussion, I don't think that matters. However, it does seem that I'm always the one they come to when they have a history question. So, is it cheating that I am able to answer history questions not because I paid attention in school but because I actually lived through the answers? You know how scary it is to be asked about presidential impeachments knowing your talking from personal knowledge? Ok, I didn't know Andrew Johnson personally, but I did live through the Clinton hearings. Is it really weird that when my daughter is trying to remember the name of that Clinton guy as being the second president to be impeached I'm ready to go into a thirty minute dissertation on Monica Lewinsky and Kenneth Starr? Maybe it's a dad thing. Maybe that's why dads are here. I don't know. Do you think we're supposed to be the authority on history? But come on, the authority on the 60s, 70s, 80s, 90s and 2000s? That's 50 years! Half a century! I can (and have) talked to my kids about Kennedy, and the Cuban missile crisis, Johnson and the Vietnam War, Nixon and the Watergate Hearings, as well as, Carter and the Iranian hostages. I guess the saddest part is that I even get enthused when they ask about history. I know, they think I'm weird. Unfortunately, I think I know what you're thinking too. I am weird! You know what, just go read the cases.

---

*It is nonsense for you to talk of old age  
so long as you outrun young men in the race for service  
and in the midst of anxious times fill rooms with your laughter  
and inspire youth with hope when they are on the brink of despair.*

---

Mohandas K. Gandhi, 22 May 1932

## CHAIR'S MESSAGE By Chris Hübner

Happy Spring, everyone! It's been a gorgeous time to live in Texas with all the rain we've enjoyed and the flowers in bloom. Appropriately enough, it's time to celebrate the first electronic edition of our Juvenile Law Section Report. Special thanks go out to Tracy Nuckols of the State Bar of Texas, as well as Kristy Almager and Sunni Zuniga for their technological expertise. We hope you enjoy the new format. If you have any suggestions about how we can improve our report, please contact us so we can make the necessary changes as we move forward in our new electronic medium.

The sad news is that all this lovely weather will soon give way to another hot Texas summer. The good news is that the month of July will bring our next juvenile law conference. So, please mark your calendars and plan to attend our 10th Annual Nuts and Bolts of Juvenile Law Conference co-sponsored by the Juvenile Law Section and the Texas Juvenile Probation Commission. This year's Nuts and Bolts conference is scheduled for Wednesday – Friday, July 28 – 30, 2010, in Austin.

**Conference Brochure and Registration:** The conference brochure and registration form can be downloaded online at [www.juvenilelaw.org](http://www.juvenilelaw.org) or [www.tjpc.state.tx.us](http://www.tjpc.state.tx.us). Please complete the registration form and mail or fax it to Kristy Almager at the contact information listed below. Online registration is not available. Be sure to register by July 23, 2010, to get the Early Bird rate of \$175 (Section members) or \$200 (non-members). After July 23, the on-site registration rate of \$225 will apply.

**Conference Location:** The Nuts and Bolts conference will be held at the Marriott Airport South located at 4415 South IH-35 in Austin. The Marriott will be offering a discounted rate of \$115/Single or Double until July 6, 2010. When making accommodations, please contact the hotel at (800) 228-9290 or (512) 441-7900 and refer to the State Bar of Texas Juvenile Law Section room block. You may also make your reservations online by clicking [here](#).

**Additional Information:** The Juvenile Law Section will submit for 12.50 hours of CEU's (including 3.25 hours of ethics) from the State Bar of Texas, Texas Juvenile Probation Commission, Texas Association of Counties, TCLEOSE and Texas Center for the Judiciary. If you have any questions about the conference or need additional information, please contact Kristy Almager at [Kristy.Almager@tjpc.state.tx.us](mailto:Kristy.Almager@tjpc.state.tx.us) or 512.424.6710.

**Final Note:** There are many exciting changes impacting our Section these days: newly designed website, electronic newsletter, which includes links to juvenile-related case law and, of course, quality CLE at our annual conferences. With these innovations in mind, I'd like to encourage folks to "talk up" our Juvenile Law Section. According to the State Bar of Texas, we currently have 847 Section members. Wouldn't it be something if we could boost our membership over the 1,000 member level? By promoting the benefits our Section offers juvenile justice practitioners, it should be an easy sell to bring new members into the fold. Please seek out a colleague and encourage him or her to consider becoming a member of the Juvenile Law Section.

## REVIEW OF RECENT CASES

### APPEALS

#### JUVENILE'S MOTION FOR NEW TRIAL WAS SUFFICIENT TO ENCOMPASS AND PRESERVE HIS COMPLAINT ON APPEAL THAT JURY'S REJECTION OF HIS AFFIRMATIVE DEFENSE OF DURESS HAD NO EVIDENTIARY SUPPORT, WARRANTING REVERSAL.

[¶ 10-2-9. In the Matter of R.D., 304 S.W.3d 368, 53 Tex.Sup.Ct.J. 303 \(2/12/10\).](#)

**Facts:** Accused of committing aggravated robbery, R.D. claimed that he acted under duress and raised the issue as an affirmative defense at trial. The jury was asked to decide whether R.D. had engaged in delinquent conduct by committing aggravated robbery, and if not, if R.D. had engaged in delinquent conduct by committing the lesser offense of robbery, the distinction being whether a deadly weapon was used. The jury was instructed that the burden of proof for the affirmative defense rested upon R.D., and that if it believed R.D. committed the crime under duress the jury should find that he did not engage in delinquent conduct. The jury found that R.D. had engaged in delinquent conduct by committing aggravated robbery.

R.D. filed a motion for new trial contending the evidence presented by the State was legally and factually insufficient to support the jury's delinquency verdict. R.D. followed this general challenge with a specific challenge to the legal and factual sufficiency of the State's proof of the use of a deadly weapon. The trial court denied R.D.'s motion for new trial.

On appeal, R.D. challenged the legal and factual sufficiency of the evidence supporting\*370 the jury's deadly-weapon finding, but also the factual sufficiency of the evidence to support the jury's rejection of his affirmative defense. The appeal was transferred from the Fourth Judicial District Court of Appeals to the Eighth, which upheld the deadly-weapon finding. Applying the transferor court's precedent, the court of appeals held that R.D.'s evidentiary challenge to the jury's failure to find duress was not preserved because he did not specify this ground in his motion for new trial. Accordingly, the court of appeals affirmed.FN1

FN1. The court noted that had it applied its own precedent, which acknowledged "the drift of juvenile law

from its civil roots," *In re J.L.H.*, 58 S.W.3d 242, 246 (Tex.App.-El Paso 2001, no pet.), there would be no requirement of a new trial motion to preserve a factual sufficiency challenge on appeal. 304 S.W.3d at 429.

**Held:** Reversed and remanded

**Opinion:** PER CURIAM. In a civil case, in order to challenge on appeal the factual sufficiency of the evidence to support a jury finding, the point must be raised in a motion for new trial. TEX.R. CIV. P. 324(b)(2). In *In re M.R.*, 858 S.W.2d 365, 366 (Tex.1993) (per curiam opinion denying application for writ of error), we stated that, unlike the rule in criminal cases, in juvenile proceedings a motion for new trial is necessary to preserve a factual sufficiency challenge.<sup>FN2</sup> Unlike in *In re M.R.*, however, R.D. did file a motion for new trial. The question is whether that motion was sufficient to encompass R.D.'s complaint on appeal that the jury's rejection of his affirmative defense had no evidentiary support. We conclude that it was.

FN2. Since our decision and R.D.'s trial in this case, the Legislature has eliminated the requirement of a new trial motion to preserve a factual sufficiency challenge on appeal in juvenile delinquency cases. TEX. FAM.CODE § 56.01(b1). We make no comment about the continuing viability of *In re M.R.* in light of subsequent developments in the law.

The jury's single finding that "the respondent ... did engage in delinquent conduct by committing aggravated robbery" subsumed its rejection of R.D.'s affirmative defense, which was not submitted as a separate question but as an instruction to the delinquency question. In his motion for new trial, R.D. made a general challenge to the legal and factual sufficiency of the evidence to support the jury's delinquency finding. That R.D. followed this general complaint with a more specific one aimed at the deadly-weapon instruction does not constitute a waiver in these circumstances.

Where practical, the rules of civil procedure are to be given a liberal construction in order to obtain a just, fair, equitable, and impartial adjudication of the rights of litigants under established principles of substantive law. TEX.R. CIV. P. 1. *See also Verburgt v. Dorner*, 959 S.W.2d

615, 616-17 (Tex.1997) (“[W]e have instructed the courts of appeals to construe the Rules of Appellate Procedure reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule.”). We conclude that R.D.’s general challenge to the sufficiency of the evidence to support the jury’s delinquency finding met Rule 324’s requirement for preserving his challenge to the jury’s rejection of his affirmative defense.

**Conclusion:** Accordingly, pursuant to Rule 59.1 of the Texas Rules of Appellate Procedure, without hearing oral argument, we grant R.D.’s petition for review, reverse the court of appeals’ judgment, and remand the case to that court for further proceedings.

---

**WHERE ASSERTIONS OF VIOLATIONS OF CONSTITUTIONAL RIGHTS IN JUVENILE’S MOTION FOR NEW TRIAL WERE VAGUE AND UNTIMELY, NO ERROR WAS PRESERVED FOR APPEAL.**

[¶ 10-2-10. In the Matter of J.R.N., III., MEMORANDUM, No. 09-08-00029-CV, 2009 WL 6312273 \(Tex.App.-Beaumont, 4/1/10\).](#)

**Facts:** In August of 2006, S.W., who was eight years of age, was living with her mother, M.N., sister, B.W., brother, A.W., stepfather, B.N., and her stepbrothers, J.R.N. and J.N. S.W. and B.W. were at their grandparents’ home when S.W. asked to speak with her biological father, T.W., on the telephone. T.W. lived in Georgia at that time. S.W.’s grandparents called T.W. so that S.W. could speak with him. While speaking with T.W. on the telephone, S.W. told him that her stepbrother, J.R.N., had been touching her “privates.” T.W. immediately called the Texas Child Protective Services (“CPS”) and reported S.W.’s allegations of molestation. T.W. also told his parents about S.W.’s allegations, and that CPS would contact them.

S.W.’s grandfather, E.W., called the Montgomery County Sheriff’s Department and reported S.W.’s allegations of molestation, and an officer was sent out to investigate. CPS gave S.W.’s grandparents temporary custody of S.W., B.W. and A.W., and arranged for the children to go to Children’s Safe Harbor to be interviewed.

Kari Prihoda, a forensic interviewer with Children’s Safe Harbor, testified at trial that she interviewed S.W. on August 8, 2006, and that S.W. told her about the alleged sexual abuse. Prihoda provided details of the allegations as relayed to her by S.W. S.W. claimed J.R.N. performed both oral and anal sex on her. S.W. also claimed that the sexual abuse started when she was in kindergarten and continued through August 1, 2006, at which time she was eight years of age. S.W.

reported to Prihoda that she told her dad and mom about the abuse, but that her mom did not believe her. S.W.’s interview was videotaped, admitted into evidence at trial, and played for the jury.

Following the interview at Children’s Safe Harbor, Karen Trevino, a Sexual Assault Nurse Examiner (“SANE”) with Children’s Safe Harbor performed a SANE exam on S.W. Nurse Trevino testified at trial that S.W. reported that her stepbrothers, J.R.N. and J.N., touched her butt and privates with both their “fingers and dingaling.” S.W. told nurse Trevino this happened from kindergarten through the second grade. Nurse Trevino’s physical exam of S.W. indicated “clear evidence of blunt force, of penetrating trauma,” to S.W.’s vagina. Nurse Trevino also found scarring on S.W.’s anus which could only be indicative of “a very traumatic assault” or “chronic abuse over and over, which is mostly the case with kids.” Nurse Trevino testified that she reviewed her findings with S.W.’s mother, M.N., immediately following the exam, and that M.N. was extremely angry and told S.W. “that she had messed the whole family and everything up.” Nurse Trevino’s written findings were admitted into evidence at trial.

At trial, S.W. recanted. S.W. testified that she remembered meeting with Prihoda at Children’s Safe Harbor and telling her that J.R.N. abused her. However, she testified that J.R.N. had not abused her, and that she made it up because her grandmother, father, and stepmother promised her “a horse and two dogs” to “lie on the boys.” When questioned further regarding the details of the abuse she had provided to Prihoda, S.W. claimed she did not remember making those statements to Prihoda. Specifically, she did not remember telling Prihoda the following: that she woke up to J.R.N. touching her, that he had pulled off her pants, that he moved his finger around, that he put his dingaling in her butt, that he touched the inside of her butt, that he was lying on top of her and she was on her belly, that he licked her thing, that he told her he was doing it because it was a “medical thing,” that he made her touch his “dingaling” and that it felt nasty, and that she told her mother first because she didn’t want it to happen over and over again. Further, at trial, S.W. did not remember sitting in the prosecutor’s office prior to trial and telling him that she did remember saying these things to Prihoda.

S.W. testified that she remembered writing letters about her grandfather, E.W., her grandmother, J.W., and her father, T.W. The two letters, which were dated December 20 and December 30 of 2006, stated that it was her grandfather, E.W., who had abused her and not her stepbrothers. The letters stated specifically that “[E.W.] put his finger up my pee pee.” S.W. testified that her grandfather touched her in her privates with his “fingers” and “with his thing.” The letters further stated that her grandfather, E.W., grandmother, J.W.,

stepmother, C.W., and her father, T.W., told her to lie "because they wanted [B.N.], [J.R.N.] and [J.N.] out of the [h]ouse." The two letters were admitted into evidence at trial. When questioned by the State about the spelling of the names in the letters, S.W. admitted that at the time of her Safe Harbor interview with Prihoda she did not know how to spell J.R.N.'s last name. However, she testified that she learned how to spell it while the boys were still living with them, which was before the interview.

Detective Lisa Pickering testified that she investigated the allegations made by S.W. against J.R.N. and later, against the grandfather. Pickering testified that on December 8, 2006, she called S.W.'s mother, M.N., to get J.R.N.'s father's phone number so that she could call him and give him an opportunity to bring J.R.N. to the police station, prior to his arrest. Pickering further testified that on December 12, M.N. called Pickering and said she filed a report on December 10 because of a note her daughter wrote to her. Specifically, Pickering testified that according to M.N., S.W. brought a note to M.N. saying her grandfather was the one who touched her, not her stepbrothers. J.R.N. was arrested on December 14, 2006. Pickering testified that she spoke with the grandfather about the subsequent allegations S.W. had asserted against him, but found the new allegations not to be credible. Pickering took the information to the district attorney's office for review, but they refused to file criminal charges against the grandfather based on S.W.'s allegations.

After the State rested, J.R.N. put on testimony from several witnesses, including S.W.'s mother, M.N. After deliberation, the jury returned a verdict against appellant committing him to the Texas Youth Commission ("TYC") for a ten-year determinate sentence.

In four issues, J.R.N. argues that the trial court erred because (1) J.R.N. was denied the opportunity to pursue a vigorous defense in violation of his right to confront the witnesses against him through complete cross-examination of the witnesses and by denying him the right to introduce certain testimony in support of his defensive theory; (2) the court allowed testimony concerning allegations against J.R.N.'s brother, J.N., to be introduced into evidence in violation of J.R.N.'s Sixth Amendment right to confrontation and Fourteenth Amendment right to due process and fundamental right to fair trial; (3) the court allowed the SANE report to be admitted into evidence, without redactions, and the Children's Safe Harbor videotaped interview, without redacting inadmissible statements, and (4) the evidence is factually insufficient to sustain the verdict in this case.

**Held:** Affirmed

**Memorandum Opinion:** 4 J.R.N.'s constitutional complaints in issues one and two center around the trial court's exclusion of certain testimony he attempted to introduce at trial through both direct and cross-examination of various witnesses. A party seeking to introduce evidence must meet an objection to the evidence with an argument stating the basis for its admission. *Reyna*, 168 S.W.3d at 177. In some instances, J.R.N. stated his basis for the admission of the excluded testimony and in some instances he did not, merely continuing instead with his direct or cross-examination after the trial court sustained the State's objections. In those instances where J.R.N. did make an argument asserting the basis for the admission of the challenged evidence, he failed to assert any constitutional grounds as the basis for admission of such evidence. Likewise, J.R.N. failed to assert constitutional grounds when he objected to the admission of evidence concerning similar allegations made against J.R.N.'s brother. Further, J.R.N. did not raise constitutional grounds when he objected to the admission of the SANE report, testimony regarding the report, and the unredacted Safe Harbor videotaped interview.

We note that J.R.N. did raise constitutional challenges to the trial court's evidentiary rulings in his motion for new trial, and the trial court heard arguments on that motion. However, we find that the assertion of the violation of J.R.N.'s constitutional rights in J.R.N.'s motion for new trial were vague and untimely. See *Tex.R.App. P. 33.1(a)* (To preserve a complaint for review the record must show the complaint was made to the trial court by a timely request, objection, or motion that stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint). The only constitutional challenge set forth with any specificity in J.R.N.'s motion for new trial is his complaint that he was denied the right to pursue a vigorous defense due to the exclusion of the testimony set forth in his bill of exceptions. To be timely, an objection must be made at the earliest possible opportunity. *Turner v. State*, 805 S.W.2d 423, 431 (Tex.Crim.App.1991); see also *Lagrone v. State*, 942 S.W.2d 602, 618 (Tex.Crim.App.1997) ("An objection should be made as soon as the ground for objection becomes apparent."). Here, J.R.N.'s constitutional challenges to the trial court's evidentiary rulings should have been raised at trial, at the time the trial court sustained the State's objections to the admission of the proffered evidence. Failure to timely object at trial to error under the Confrontation Clause waives this argument on appeal. See *Wright v. State*, 28 S.W.3d 526, 536 (Tex.Crim.App.2000); see also *Reyna*, 168 S.W.3d at 179 (concluding to preserve error proponent of evidence must clearly articulate to trial court that confrontation clause requires admission of evidence).

**Conclusion:** Because J.R.N. does not complain on appeal that the trial court abused its discretion in denying his motion for new trial, we find that J.R.N. failed to preserve his constitutional challenges for review.

---

**FAILURE TO OBJECT AT TRIAL TO THE AMOUNT OF CHILD SUPPORT ORDERED BY THE TRIAL COURT FAILS TO PRESERVE ISSUE FOR APPEAL.**

[¶ 10-2-8. In the Matter of J.S.H., MEMORANDUM, No. 01-08-00563-CV, 2010 WL 987247 \(Tex.App.-Hous. \(1 Dist.\), 3/18/10\).](#)

**Facts:** Appellant, L.H., appeals the child-support portion of the trial court's May 28, 2008 judgment and order of commitment to the Texas Youth Commission of her son J.S.H..

**Held:** Affirmed.

**Memorandum Opinion:** L.H.'s sole issue on appeal is that she cannot afford the \$419 monthly child-support payments ordered by the trial court. She did not object at trial to the amount of child support ordered by the trial court. This issue, therefore, is not preserved for appeal. See Tex.R.App. P. 33.1(a) (as prerequisite to presenting complaint for appellate review, appellate record must show that complaint was made to trial court by timely request, objection, or motion stating specific grounds of complaint and that trial court ruled on request or objection). We have not been presented with any issue as to whether L.H. may file a motion to modify the amount of her child-support payments, nor have we been presented with arguments on her behalf to justify a modification.

**Conclusion:** We overrule L.H.'s sole issue and affirm the trial court's judgment.

---

**OBJECTION TO JUVENILE ENHANCEMENT WAS NOT PRESERVED FOR APPEAL WHERE OBJECTIONS AT TRIAL DID NOT COMPORT WITH WHAT WAS ASSERTED ON APPEAL.**

[¶ 10-2-4. Longoria v. State, MEMORANDUM, No. 07-09-0196-CR, 2010 WL 668535 \(Tex.App.-Amarillo, 2/25/10\).](#)

**Facts:** Appellant Rene Longoria appeals his conviction for aggravated robbery, a felony of the first degree. He contends that the trial court erred in permitting the enhancement of his sentence via the use of a purported state jail felony. In 2004, appellant, a juvenile at the time, was adjudicated as having engaged in delinquent conduct and was committed to the Texas Youth Commission. The conduct consisted of participating in

organized criminal activity involving the burglary of a vehicle. Furthermore, a conviction for engaging in it allegedly constituted a state jail felony. Such a felony may not be used to enhance the punishment applicable to a subsequent felony. Tex. Penal Code Ann. § 12.42(e) (Vernon Supp.2009); *Fortier v. State*, 105 S.W.3d 697, 701 (Tex.App.-Amarillo 2003, pet. refd). Yet, appellant believes such happened here. Whether that is true is not something we address for the complaint was not preserved.

**Held:** Affirmed

**Memorandum Opinion:** Appellant's objection at trial was two-fold. First, he stated that he was not afforded proper notice of the State's intent to use the prior adjudication for enhancement purposes. Then he averred that it's not at all certain that the conviction which the State desires to introduce to use for the purpose of enhancement met the proper requisites of Chapter 51 of the Family Code, and that it--I don't believe that it had the proper findings as required by the Family Code since it was a juvenile conviction to be used in a subsequent 1st degree felony prosecution. He then ended his objection by saying, "[s]o on those grounds, Judge, we would object to the inclusion of any enhancement in the punishment stage...." [FN2] As can be seen, none of those utterances mention the purported inability to use a state jail felony for purposes of enhancing a subsequent felony. Instead, they focused on the supposed lack of prior notice or the status of the prior conviction, if any, as being one involving a juvenile. Consequently, the substance of his objection at trial fails to comport with that asserted on appeal; this, in turn, means that the matter was not preserved. *Pena v. State*, 285 S.W.3d 459, 464 (Tex.Crim.App.2009) (requiring the substance of the objection at trial to comport with that on appeal; otherwise the matter is waived); see *Harris v. State*, 204 S.W.3d 19, 27 (Tex.App.-Houston [14th Dist.] 2006, pet. refd) (stating that one may fail to preserve a complaint involving the enhancement of his punishment by failing to object); *Brown v. State*, No. 02-08-037-CR, 2009 TEX.APP. LEXIS 2664 at \*2-3 (Tex.App.-Fort Worth April 9, 2009, no pet.) (not designated for publication) (stating the same); *Cody v. State*, No. 05-06-01222-CR, 2007 TEX.APP. LEXIS 2764 at 8-9 (Tex.App.-Dallas April 11, 2007, pet. refd) (not designated for publication) (stating the same). [FN3]

FN2. In later referring to the objections during trial, he characterized them as "objections to the improper or untimely notice thereof."

FN3. Aggravated robbery is a felony of the first degree and carries a punishment of life or any term of not more than 99 years or less than five years. Tex. Penal Code Ann. 12.32(a) (Vernon Supp.2009). Here, appellant was sentenced to fifty years imprisonment. Because the sentence fell within the lawful range, it cannot be said to

be an illegal one. See *Mizell v. State*, 119 S.W.3d 804, 806 (Tex.Crim.App.2003) (stating that a sentence that is outside the maximum or minimum range of punishment is illegal, which relieves one from uttering a contemporaneous objection to the sentence). Thus, appellant was obligated to preserve his complaint by contemporaneously objecting and informing the trial court of all grounds upon which he intends to rely.

**Conclusion:** Accordingly, we overrule appellants issue and affirm the judgment.

### COLLATERAL ATTACK

#### EXPUNGEMENT OF 17 YEAR-OLD'S RECORD WAS IMPROPER WHERE PLEA BARGAIN STATED THAT HE HAD WAIVED HIS RIGHT TO EXPUNGE HIS RECORD.

[¶ 10-2-13. In the Matter of Expunction of D.R.R., No. 08-08-00064-CV, --- S.W.3d ---, 2010 WL 456851 \(Tex.App.-El Paso, 2/10/10\).](#)

**Facts:** This appeal centers upon the filing by Appellee of a petition to expunge the records of his arrest on November 29, 2002 for possession of marijuana under two ounces. On November 28, 2007, a hearing was held regarding the expungement petition. The evidence adduced at the hearing revealed that Appellee, represented by counsel, and the State of Texas entered into a plea bargain agreement whereby Appellee would enroll in the Pre-Trial Diversion Program, and upon completion of that program, the charge for possession of marijuana under two ounces would be dismissed. The District Attorney, however, has a policy requiring defendants, including Appellee, to waive their right to an expunction if they want to enroll in the Pre-Trial Diversion Program as part of a plea bargain agreement. Appellant was seventeen years old at the time, and he was charged as an adult.

In order to enroll in the program, Appellee went to the offices of the Adult Probation Department to sign the requisite forms. He was not accompanied by counsel. Appellee stated there was a provision in the document indicating he was waiving his right to an expunction.<sup>FN1</sup> That waiver language indicated that Appellee was voluntarily waiving his right to an expunction. The last line of the document indicated that he read and understood the document fully. Appellee signed both the waiver portion and the last part of the document indicating he fully understood the document.

Upon his successful completion of his participation in the Pre-Trial Diversion Program, the charge of possession of marijuana under two ounces was dismissed by the court. Appellee testified that the purpose of seeking the expunction was to enlist in the

United States Navy. He stated that he was unfamiliar with the word "expunction" when he signed the forms, and the rights that he waived were not explained to him.

The court granted the petition for expunction. The court stated that as Appellee was seventeen years old at the time he waived his right to expunction, he did not have the capacity to contract for himself regarding that right.

**Held:** Reversed and rendered

**Opinion:** In its sole issue on appeal, the County asserts the court abused its discretion in granting Appellee's petition for expunction by ruling that Appellee lacked the capacity to contract; thereby invalidating his waiver of his right to expunge his criminal records. We review a trial court's ruling on a petition for expunction under an abuse of discretion standard. *Ex parte Jackson*, 132 S.W.3d 713, 715 (Tex.App.-Dallas 2004, no pet.); *see also Tex. Dep't of Pub. Safety v. J.H.J.*, 274 S.W.3d 803, 806 (Tex.App.-Houston [14th Dist.] 2008, no pet.). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex.2004); *Bowie Memorial Hospital v. Wright*, 79 S.W.3d 48, 52 (Tex.2002).

Appellee was charged as an adult for committing the offense of possession of marijuana under two ounces. He was seventeen years old at the time of the offense. TEX. PENAL CODE ANN. § 8.07(b) (Vernon Supp. 2009) provides in relevant part:

Unless the juvenile court waives jurisdiction under Section 54.02, Family Code, and certifies the individual for criminal prosecution or the juvenile court has previously waived jurisdiction under that section and certified the individual for criminal prosecution, a person may not be prosecuted for or convicted of any offense committed before reaching 17 years of age....

A negotiated plea agreement has been equated to a contract. *Ex parte Williams*, 637 S.W.2d 943, 948 (Tex.Crim.App.1982). As part of this contract, Appellee agreed to waive his right to expunge his misdemeanor conviction. Plea bargaining consists of the prosecutor's concessions regarding punishment, lesser charges or reduction in counts in exchange for a defendant's plea of guilty or nolo contendere. *Id.* at 947. When a defendant agrees to a plea bargain agreement, he becomes a party to a contract that becomes operative when the court announces it will be bound by the plea agreement. *Id.* Once the court makes this announcement, the State becomes bound by its side of the bargain. *Id.* When a plea bargain is not kept, the proper relief is either specific enforcement of the plea agreement or withdrawal of the plea. *Id.*

Appellee contends that as a minor, one younger than eighteen, he could not make a contract or waive a legal right; accordingly, as his minority disability has not been removed, the waiver is voidable, and he has the option to disallow it. Appellee maintains that in invoking his right to set aside the contract, he has not cancelled out the entire plea agreement. He cites *Ex parte White*, 50 Tex.Crim. 473, 474, 98 S.W. 850, 851 (1906) for the proposition that his minority status allows him to plead guilty, but that same disability prevents him from entering into a contract, waiving his rights or forming a contract that may be in contravention of the law or public policy. However, the cited case stands for no more than the proposition that a minor may plead guilty to an offense. *Id.* Logically, if Appellee can disallow one portion of the contractual plea agreement, he can disavow any portion of the agreement. This cannot be the intent of the legislature in providing that one has adult status with regard to criminal liability at the age of seventeen. When one who becomes involved with the criminal justice system is considered in his or her majority at age seventeen, that majority status carries over into the attendant contractual agreements. We find that when Appellee entered into a plea bargain contract legally at the age of seventeen, he was bound by that contract and its attendant provisions. He cannot absolve himself from those portions of the contract that he, at some later time, finds unsuitable. We predicate this finding on the concept of estoppel by contract. A party who accepts benefits under a contract is estopped from questioning the contract's existence, validity, or effect. *Rhodes v. State*, 240 S.W.3d 882, 891 (Tex.Crim.App.2007). As is true with most contracts, it is typical that both parties to a plea bargain will benefit from the judgment. *Id.* A defendant cannot enter a plea agreement that imposes an allegedly illegal sentence, or in this case, waiver, benefit from that sentence, and then attack the judgment later when it is suddenly in his interests to do so.<sup>FN2</sup> *Id.* Issue One is sustained.

**Conclusion:** We reverse and render judgment denying Appellee's petition for expunction.

**COURT APPOINTED ATTORNEY**

**APPELLATE COURT MUST REMAND FOR APPOINTMENT OF NEW COUNSEL WHERE APPELLATE ISSUES EXIST IRRESPECTIVE OF FILING OF ANDERS BRIEF.**

[¶ 10-2-1. \*Menson v. State\*, UNPUBLISHED, No. 07-09-0221-CR, 2010 WL 571716 \(Tex.App.-Amarillo, 2/18/10\).](#)

**Facts:** On June 18, 2007, Appellant was charged by information with the second degree felony offense of aggravated assault. The information also contained an enhancement paragraph alleging that Appellant had previously been convicted of the felony offense of aggravated robbery. Pursuant to a plea bargain,

Appellant was placed on deferred adjudication community supervision.

In 2009, the State filed a motion to proceed, alleging ten violations of the terms and conditions of community supervision. Appellant entered a plea of "not true" to those allegations. After a hearing on the State's motion, the trial court found seven of the ten allegations to be true, and adjudicated Appellant guilty of the charged offense.

At the commencement of the punishment phase of the proceeding, no plea was taken as to the enhancement allegation. Brief testimony was presented that Appellant had previously been adjudicated as a juvenile for the offense of aggravated robbery, but no order of adjudication was offered and no evidence was presented as to when that offense was committed. For purposes of enhancement, adjudication by a juvenile court that a child engaged in delinquent conduct on or after January 1, 1996, constituting a felony offense for which the child is committed to the Texas Youth Commission under section 54.04(d)(2), (d)(3), or (m), or section 54.05(f), Family Code, is a final felony conviction. At the conclusion of the hearing, no § 12.42 finding was made as to whether Appellant had previously either been convicted of a felony or adjudicated guilty of delinquent conduct occurring after January 1, 1996. The trial court then sentenced Appellant to twenty-five years confinement and a \$2,000 fine.

**Held:** Appeal abated and remand for appointment of new counsel.

**Opinion:** In presenting this appeal, counsel has filed an Anders brief in support of a motion to withdraw.

Because the trial court assessed Appellant's sentence outside the range of punishment for a second degree felony, a finding of true as to the enhancement paragraph was essential to support the trial court's sentence of twenty-five years confinement. Given the facts of this case, at least four potential issues arise:

- (1) Did the trial court err by not taking a plea to the enhancement allegation?
- (2) Did the trial court err by not making a finding of true to the enhancement allegation?
- (3) Was any implied finding of true to the enhancement allegation supported by legally and factually sufficient evidence?
- (4) Was the error, if any, harmless?

**Conclusion:** Having concluded that an arguable ground for appeal exists affecting the punishment phase of Appellant's trial, we grant Appellants counsels motion to withdraw, abate this proceeding, and remand this cause to the trial court for the appointment of new counsel.

**CRIMINAL PROCEEDINGS****THE SUPREME COURT OF THE UNITED STATES HELD THAT THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENTS CLAUSE DOES NOT PERMIT A JUVENILE OFFENDER TO BE SENTENCED TO LIFE IN PRISON WITHOUT PAROLE FOR A NONHOMICIDE CRIME.**

[¶ 10-2-18. \*Graham v. Florida\*, No. 08-7412, 560 U.S. \(Sup. Ct., 5/17/10\).](#)

**Facts:** Petitioner Graham was 16 when he committed armed burglary and another crime. Under a plea agreement, the Florida trial court sentenced Graham to probation and withheld adjudication of guilt. Subsequently, the trial court found that Graham had violated the terms of his probation by committing additional crimes. The trial court adjudicated Graham guilty of the earlier charges, revoked his probation, and sentenced him to life in prison for the burglary. Because Florida has abolished its parole system, the life sentence left Graham no possibility of release except executive clemency. He challenged his sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause, but the State First District Court of Appeal affirmed.

**Held:** Reversed and remanded

**Opinion:** The Clause does not permit a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime.

(a) Embodied in the cruel and unusual punishments ban is the "precept . . . that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U. S. 349, 367. The Court's cases implementing the proportionality standard fall within two general classifications. In cases of the first type, the Court has considered all the circumstances to determine whether the length of a term-of-years sentence is unconstitutionally excessive for a particular defendant's crime. The second classification comprises cases in which the Court has applied certain categorical rules against the death penalty. In a subset of such cases considering the nature of the offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. E.g., *Kennedy v. Louisiana*, 554 U. S. \_\_\_, \_\_\_. In a second subset, cases turning on the offender's characteristics, the Court has prohibited death for defendants who committed their crimes before age 18, *Roper v. Simmons*, 543 U. S. 551, or whose intellectual functioning is in a low range, *Atkins v. Virginia*, 536 U. S. 304. In cases involving categorical rules, the Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether

there is a national consensus against the sentencing practice at issue. *Roper*, supra, at 563. Next, looking to "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," *Kennedy*, supra, at \_\_\_, the Court determines in the exercise of its own independent judgment whether the punishment in question violates the Constitution, *Roper*, supra, at 564. Because this case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes, the appropriate analysis is the categorical approach used in *Atkins*, *Roper*, and *Kennedy*.

(b) Application of the foregoing approach convinces the Court that the sentencing practice at issue is unconstitutional.

(1) Six jurisdictions do not allow life without parole sentences for any juvenile offenders. Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. Thirty-seven States, the District of Columbia, and the Federal Government permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. The State relies on these data to argue that no national consensus against the sentencing practice in question exists. An examination of actual sentencing practices in those jurisdictions that permit life without parole for juvenile nonhomicide offenders, however, discloses a consensus against the sentence. Nationwide, there are only 129 juvenile offenders serving life without parole sentences for nonhomicide crimes. Because 77 of those offenders are serving sentences imposed in Florida and the other 52 are imprisoned in just 10 States and in the federal system, it appears that only 12 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders, while 26 States and the District of Columbia do not impose them despite apparent statutory authorization. Given that the statistics reflect nearly all juvenile nonhomicide offenders who have received a life without parole sentence stretching back many years, moreover, it is clear how rare these sentences are, even within the States that do sometimes impose them. While more common in terms of absolute numbers than the sentencing practices in, e.g., *Atkins* and *Enmund v. Florida*, 458 U. S. 782, the type of sentence at issue is actually as rare as those other sentencing practices when viewed in proportion to the opportunities for its imposition. The fact that many jurisdictions do not expressly prohibit the sentencing practice at issue is not dispositive because it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that such sentences would be appropriate. See *Thompson v. Oklahoma*, 487 U. S. 815, 826, n. 24, 850.

(2) The inadequacy of penological theory to justify life without parole sentences for juvenile nonhomicide

offenders, the limited culpability of such offenders, and the severity of these sentences all lead the Court to conclude that the sentencing practice at issue is cruel and unusual. No recent data provide reason to reconsider Roper’s holding that because juveniles have lessened culpability they are less deserving of the most serious forms of punishment. 543 U. S., at 551. Moreover, defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of such punishments than are murderers. E.g., Kennedy, *supra*. Serious nonhomicide crimes “may be devastating in their harm . . . but ‘in terms of moral depravity and of the injury to the person and to the public,’ . . . they cannot be compared to murder in their ‘severity and irrevocability.’ ” *Id.*, at \_\_\_\_\_. Thus, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. Age and the nature of the crime each bear on the analysis. As for the punishment, life without parole is “the second most severe penalty permitted by law,” *Harmelin v. Michigan*, 501 U. S. 957, 1001, and is especially harsh for a juvenile offender, who will on average serve more years and a greater percentage of his life in prison than an adult offender, see, e.g., *Roper, supra*, at 572. And none of the legitimate goals of penal sanctions—retribution, deterrence, incapacitation, and rehabilitation, see *Ewing v. California*, 538 U. S. 11, 25—is adequate to justify life without parole for juvenile nonhomicide offenders, see, e.g., *Roper*, 543 U. S., at 571, 573. Because age “18 is the point where society draws the line for many purposes between childhood and adulthood,” it is the age below which a defendant may not be sentenced to life without parole for a nonhomicide crime. *Id.*, at 574. A State is not required to guarantee eventual freedom to such an offender, but must impose a sentence that provides some meaningful opportunity for release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance.

(3) A categorical rule is necessary, given the inadequacy of two alternative approaches to address the relevant constitutional concerns. First, although Florida and other States have made substantial efforts to enact comprehensive rules governing the treatment of youthful offenders, such laws allow the imposition of the type of sentence at issue based only on a discretionary, subjective judgment by a judge or jury that the juvenile offender is irredeemably depraved, and are therefore insufficient to prevent the possibility that the offender will receive such a sentence despite a lack of moral culpability. Second, a case-by-case approach requiring that the particular offender’s age be weighed against the seriousness of the crime as part of a gross disproportionality inquiry would not allow courts to distinguish with sufficient accuracy the few juvenile offenders having sufficient psychological maturity and depravity to merit a life without parole sentence from the many that have the capacity for change. Cf. *Roper*,

*supra*, at 572–573. Nor does such an approach take account of special difficulties encountered by counsel in juvenile representation, given juveniles’ impulsiveness, difficulty thinking in terms of long term benefits, and reluctance to trust adults. A categorical rule avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide. It also gives the juvenile offender a chance to demonstrate maturity and reform.

(4) Additional support for the Court’s conclusion lies in the fact that the sentencing practice at issue has been rejected the world over:

**Conclusion:** The United States is the only Nation that imposes this type of sentence. While the judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment, the Court has looked abroad to support its independent conclusion that a particular punishment is cruel and unusual. See, e.g., *Roper, supra*, at 575–578. 982 So. 2d 43, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG and SOTOMAYOR, JJ., joined. ROBERTS, C. J., filed an opinion concurring in the judgment. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which ALITO, J., joined as to Parts I and III. ALITO, J., filed a dissenting opinion.

**DEFENSES**

**JUVENILE COURT COULD HAVE REASONABLY INFERRED FROM THE EVIDENCE THAT RESPONDENT WAS THE AGGRESSOR IN ASSAULT, NEGATING RESPONDENT’S POSITION THAT HE WAS JUSTIFIED IN USING FORCE AGAINST VICTIM.**

[¶ 10-2-3. In the Matter of M.A.J., MEMORANDUM, No. 03-09-00492-CV, 2010 WL 668890 \(Tex.App.-Austin, 2/26/10\).](#)

**Facts:** The juvenile court heard evidence that, on February 8, 2009, M.A.J., a 15- year-old boy, punched S.K., a 16-year-old boy, in the mouth. The issue at trial was whether S.K. provoked M.A.J. and, if so, whether such provocation justified M.A.J.’s use of force.

S.K. testified that, on the day of the incident, he was visiting some of his friends, including his girlfriend, L.L., at an apartment complex when they walked past M.A.J., who was sitting in the courtyard of the complex with his friend, A.V.C. As they were walking past M.A.J., A.V.C. apparently told M.A.J. that S.K. said "F\* \*k Blue." [FN3] S.K. testified that he did not say that. In fact, S.K. claimed

that he did not remember saying anything to M.A.J. According to S.K., after A.V.C. told M.A.J. what S.K. had allegedly said, M.A.J. stood up, walked toward S.K., asked him if he had made the statement, and, before S.K. could respond, hit him in the mouth, causing S.K. to fall to the ground.

FN3. "Blue" is a reference to the gang known as "Crips." According to the officer who arrested M.A.J., M.A.J. is a "self-proclaimed" member of that gang.

L.L. testified similarly about the incident, although she recalled that, before M.A.J. hit S.K., S.K. asked M.A.J., "Are you really going to believe what [A.V.C.] says?" After that, L.L. recalled, "[M.A.J.] just started hitting him." When asked "who threw the first punch," L.L. testified, "[M.A.J.]" L.L. denied that S.K. did anything to provoke M.A.J. L.L. also testified that, after M.A.J. hit S.K., A.V.C. admitted to M.A.J. that "she was just kidding" about what S.K. had said. M.A.J. then helped S.K. to his feet. L.L. took S.K. to her house, where L.L.'s mother called the police. According to one of the officers who responded to the call, S.K. "had a large laceration to his lip. It was actually filleted open. He was bleeding profusely." S.K. was transported to the hospital, where he was treated for his injuries.

A.V.C. also testified. She admitted that she had not heard S.K. say "F\* \*k Blue" prior to telling M.A.J. that she had heard him say that, although she claimed that S.K. did say those words "like a second later." According to A.V.C., she "always plays around with [M.A.J.] like that and he knows I don't mean it." When asked "who threw the first punch" during the altercation, A.V.C. testified, "[M.A.J.]" However, A.V.C. added that, before M.A.J. hit S.K., S.K. appeared to be in a fighting stance with his arms raised and his chest puffed up, "[as] if he was going to hit [M.A.J.] first."

Officer Christi Kathleen Bergh of the Austin Police Department investigated the incident. Bergh testified that when she found M.A.J. at the apartment complex, he "was very uncooperative. He was very abrasive and it took us a while to try to talk him down and to get him to calm down. When we tried to get information, he finally just said that [S.K.] made him upset due to some comments he had made and that he broke his hand on his face." M.A.J. also told Bergh "that he had anger management problems and that [S.K.] made him upset and he couldn't control himself."

The only witness to testify on behalf of M.A.J. was Sharon Simmons, an adult resident at the apartment complex who claimed to have witnessed the altercation. According to Simmons, S.K. said "F\* \*k Blue" as he was walking past M.A.J. and began "bucking up" to him, which Simmons described as having his hands in a fist and his chest puffed out, as if he was "coming towards a

person." Then, Simmons recalled, M.A.J. asked S.K., "What did you say?" S.K. responded, "You heard me." After that, Simmons testified, M.A.J. "got up and hit him." On cross-examination, when asked "who threw the first punch," Simmons admitted, "[M.A.J.]"

After hearing the evidence and listening to argument from both sides, the juvenile court recited its findings orally. Finding the testimony of the defense witness, Simmons, "completely unbelievable" and having "no reason to doubt the State's witnesses," the juvenile court found that the State had proven beyond a reasonable doubt that M.A.J. had assaulted S.K. The juvenile court then adjudicated M.A.J. delinquent. This appeal followed.

**Held:** Affirmed

**Memorandum Opinion:** In his sole point of error, M.A.J. asserts that the evidence is factually insufficient to prove that he did not act in self-defense. We disagree.

A person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force. Tex. Penal Code Ann. § 9.31(a) (West Supp.2009). "Reasonable belief" means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor. Id. § 1.07(a)(42) (West Supp.2009). The defendant has the burden of producing some evidence to support a claim of self-defense. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex.Crim.App.2003); *Lee v. State*, 259 S.W.3d 785, 791 (Tex.App.--Houston [1st Dist.] 2007, pet. ref'd). Once the defendant produces such evidence, the State has the burden of persuasion in disproving self-defense. *Saxton v. State*, 804 S.W.2d 910, 913-14 (Tex.Crim.App.1991). The State's burden of persuasion does not require it to produce evidence refuting the self-defense claim. Id. at 913. Rather, the burden requires the State to prove its case beyond a reasonable doubt. Id.

To support his self-defense claim, M.A.J. points to the testimony of A.V.C. and Simmons, both of whom claimed that they heard S.K. actually say the words, "F\* \*k Blue" and that S.K. was in a fighting stance and "bucked up" to M.A.J. prior to M.A.J. hitting him. Viewing this evidence in a neutral light, we cannot say that the juvenile court's finding that the State proved its case beyond a reasonable doubt was "clearly wrong and manifestly unjust" or "against the great weight and preponderance of the conflicting evidence." See *Watson*, 204 S.W.3d at 414-15. The use of force against another is not justified in response to verbal provocation alone. Tex. Penal Code Ann. § 9.31(b)(1). Therefore, even if S.K. had said those words to M.A.J. (which the juvenile court was free to disbelieve), this alone would not justify M.A.J.'s use of force against S.K. See *Trammell v. State*,

287 S.W.3d 336, 342 (Tex.App.--Fort Worth 2009, no pet.). As for the testimony about S.K.'s aggressive behavior, the juvenile court could have simply found this testimony not credible, and such a finding would not have been against the great weight and preponderance of the evidence. S.K. denied saying or doing anything to provoke M.A.J., and L.L. testified similarly. We must defer to the fact finder's decision regarding what weight to give contradictory testimonial evidence. See *Lancon v. State*, 253 S.W.3d 699, 706 (Tex.Crim.App.2008). Moreover, Officer Bergh testified that M.A.J. told her that "he had anger management problems and that [S.K.] made him upset and he couldn't control himself." Also, when asked "who threw the first punch," L.L., A.V.C., and Simmons each testified that it was M.A.J. Thus, the juvenile court could have reasonably inferred from this and other evidence that it was M.A.J. and not S.K. who was the aggressor.

**Conclusion:** We conclude that the evidence is factually sufficient to disprove M.A.J.'s theory that he acted in self-defense. We overrule M.A.J.'s sole point of error.

## DETERMINATE SENTENCE ACT

### JUVENILE COURT HAS NO AUTHORITY TO FORCE THE STATE TO PROSECUTE JUVENILE UNDER THE DETERMINATE SENTENCE STATUTE.

[¶ 10-2-17. \*Bleys v. State\*, No. 04-09-00360-CR, --- S.W.3d ---, 2010 WL 1904130 \(Tex.App.-San Antonio, 5/12/10\).](#)

**Facts:** Bexar County Deputy Sheriff Santos Chavarria Jr. was dispatched to the scene of a stabbing. When he arrived, he found a chaotic scene that included neighbors, family members, the victim, and Bleys. The victim, twelve-year-old Mohammad Martinez, was lying face down near a wooded area. Martinez suffered multiple stab wounds and was covered in blood. Deputy Chavarria believed Martinez would likely die. Deputy Chavarria asked Martinez, who was conscious, who had done this to him. Martinez said it was a long story. Martinez was airlifted to the hospital where he underwent emergency surgery. Martinez's lungs had collapsed, his liver, small intestine, and duodenum were punctured, and his gall bladder had to be removed. He also suffered stab wounds to his right arm that caused nerve damage, two stab wounds to his chest, and one stab wound on his left arm. In all, it appeared Martinez suffered as many as seventeen stab wounds. He remained in the hospital for a month. An expert stated Martinez would have likely died but for the emergency surgery.

When Deputy Chavarria arrived, Bleys was sitting next to Martinez. Bleys was covered in blood and hyperventilating. The deputy asked Bleys what had

happened, and Bleys told him he heard screaming in the woods and then saw Martinez come out of the woods limping and bleeding. Deputy Chavarria noticed Bleys had a cut to his finger that was "serrated." When the deputy went into the woods, he found the foliage disturbed, blood, and a serrated steak knife. Deputy Chavarria believed Bleys might have been involved in the stabbing. Bleys was acting desperate and crazy.

Initially, Martinez continued to proclaim it was a "long story" whenever he was asked what happened. However, after a time, Martinez told his mother Bleys stabbed him. When he testified at trial, Martinez said he and Bleys were good friends even though Bleys was older and taller. According to Martinez, he and Bleys had a third friend, Brian Tolliver. Tolliver was a couple of years older than Martinez, and Bleys was about a year and a half older than Tolliver.

Martinez testified that on the day of the stabbing, he went to Tolliver's house to say good-bye to Tolliver because Tolliver and his family were going on vacation. Bleys was at Tolliver's house as well. Martinez said he and Bleys left Tolliver's house to play basketball at Martinez's house. Bleys left Martinez's house, but in a short while he returned and suggested they go into the woods behind Martinez's house. Martinez said they went further into the woods than they usually did, and when they got to a place where the brush was thick, Martinez decided to go home. Martinez testified he was leading the way back to his house when Bleys knocked him down. Bleys then stabbed him several times. Martinez tried to resist, to scream, but it became increasingly difficult. Martinez said that after the stabbing, Bleys picked him up and tried to strangle him and cut his throat. Bleys panicked, and Martinez, in an attempt to calm Bleys, told Bleys he would tell whatever story Bleys wanted him to tell. At Martinez's request, Bleys helped him make his way closer to the house.

Bleys apparently gave several stories about the stabbing. He told two neighbors Martinez had fallen on a stick. He told one of those same neighbors a hunter had injured Martinez, but then said he did not really know what happened. Bleys gave three different explanations to an investigator from the Bexar County Sheriff's Department. In each version, Bleys and Martinez entered the woods together, but the story changed each time as to subsequent events.

On the evening of the stabbing, Bleys was brought to the Sheriff's Department by his father. Bleys turned over his bloody clothing. That same evening, in a videotaped interview with the investigator handling the case, William Spaulding, Bleys insisted someone else had injured Martinez. Two days later, Bleys and his father returned to the Sheriff's Department and spoke to a different investigator, Aaron Von Maldau. Bleys's father told Investigator Von Maldau that Bleys stabbed Martinez

and wanted to do the right thing. Investigator Von Maldau called Investigator Spaulding, who was at the hospital interviewing Martinez, and told him Bleys confessed. Investigator Spaulding returned to the Sheriff's Department and took Bleys's videotaped statement. Bleys confessed during the statement. The investigators subsequently obtained a warrant and arrested Bleys.

Bleys testified at trial. According to Bleys, he had known Tolliver for about ten years. Tolliver introduced Bleys to Martinez approximately two years before the trial. Bleys admitted he got along better with Tolliver than he did with Martinez, but felt his friendship with Tolliver was weakening. Bleys said he believed Martinez was the cause of the growing distance between himself and Tolliver. [FN1] Bleys admitted that by the day of the stabbing, he had become angry with Martinez, and contradicted himself by stating he thought of Martinez as a friend, but then denying being friends with him or spending much time with him. Bleys testified he decided to kill Martinez because Martinez made some negative remarks about Tolliver, which Bleys did not like. Bleys admitted that after he and Martinez entered the woods, he stabbed Martinez approximately thirteen times. He claimed he stopped because he realized what he was doing was "absolutely crazy." Bleys told the jury he could not believe he had stabbed Martinez. Bleys stated Martinez told him to calm down and take him back to his house, which he attempted to do, eventually dropping Martinez near the house. Bleys said he apologized to Martinez after the stabbing. Bleys claimed he initially lied about what happened because he was afraid of going to jail.

FN1. Yet, Bleys also testified he believed their relationship was weakening because of Tolliver's increasing depression over a girl.

In addition to testifying on his own behalf, Bleys called Dr. Brian Skop, a forensic psychiatrist, as a witness. Dr. Skop stated he believed Bleys is intelligent, but very shy and socially immature, with an almost pathological attachment to Tolliver. According to Dr. Skop, Bleys saw Martinez as a threat to his relationship with Tolliver, causing him to lose control and attack Martinez.

Bleys, who was sixteen-years-old at the time of the stabbing, was originally under the jurisdiction of the juvenile court system. However, the State subsequently filed an "Original Petition for Waiver of Jurisdiction and Discretionary Transfer to Criminal Court," asking the juvenile court to waive jurisdiction and transfer the case to the district court. A certification hearing was held, after which the trial court granted the State's petition, waiving jurisdiction and transferring the case to criminal district court. Bleys was thereafter indicted for aggravated assault with a deadly weapon.

Bleys pled guilty to the jury, which assessed punishment at confinement for sixteen years, implicitly denying his application for community supervision. The trial court entered judgment in accord with Bleys's plea and the jury's verdict. Bleys then perfected this appeal.

**Held:** Affirmed

**Opinion:** In his sole point of error, Bleys contends the trial court abused its discretion in waiving jurisdiction and transferring his case to adult criminal court. He argues the evidence was factually insufficient to support the trial court's findings that (1) the procedures, services, and facilities available to the juvenile court were inadequate for Bleys's rehabilitation, and (2) the welfare of the community required proceedings in criminal district court. Bleys's entire argument is based on his belief that determinate sentencing was an available option that would have afforded adequate services, procedures, and facilities for his rehabilitation, and protected the community welfare.

"A defendant may appeal an order of a juvenile court certifying the defendant to stand trial as an adult and transferring the defendant to a criminal court under Section 54.02, Family Code." Tex.Code Crim. Proc. Ann. art. 44.47(a) (Vernon 2006). Such an appeal is permitted only in conjunction with an appeal of a conviction for the offense for which the defendant was transferred to criminal court. Id. art. 44.47(b). An appeal from a certification and transfer order is a criminal matter governed by the Texas Code of Criminal Procedure and the rules of appellate procedure applicable to criminal cases. Id. art. 44.47(c); see also *In re M.A.V.*, 88 S.W.3d327, 331 n. 2 (Tex.App.-San Antonio 2002, no pet.).

An appellate court reviews a juvenile court's decision to certify a juvenile defendant as an adult and transfer the proceedings to criminal court under an abuse of discretion standard. *State v. Lopez*, 196 S.W.3d 872, 874 (Tex.App.- Dallas 2006, pet. ref'd), cert. denied, 549 U.S. 1257 (2007); *Faisst v. State*, 105 S.W. 3d 8, 12 (Tex.App.-Tyler 2003, no pet.). Absent an abuse of discretion, the appellate court will not disturb a trial court's transfer and certification order. *Faisst*, 105 S.W.3d at 12 (citing *C.M. v. State*, 884 S.W.2d 562, 563 (Tex.App.- San Antonio 1994, no writ)). In determining whether the trial court abused its discretion, the reviewing court considers the sufficiency of the evidence. *Faisst*, 105 S.W.3d at 12. A trial court's findings of fact are reviewed by the same standards applicable generally to legal and factual sufficiency review in criminal cases. Id. Here, Bleys challenged only the factual sufficiency of the evidence to support the trial court's findings relating to rehabilitation and community welfare. We will, therefore, consider all of the evidence to determine if the court's finding is so against the great weight and preponderance of the

evidence as to be manifestly unjust. *Id.* (citing *CM.*, 884 S.W.2d at 563).

A juvenile court may waive its exclusive jurisdiction and transfer a child to a criminal court if: (1) the child is alleged to have committed a felony; (2) the child was fifteen years of age or older at the time the offense occurred, and the offense allegedly committed is a second or third degree felony, or a state jail felony; [FN2] (3) no adjudication hearing has been conducted concerning the alleged offense; and (4) after a full investigation and a hearing the juvenile court determines there is probable cause to believe the child committed the offense alleged, and that because of the seriousness of the offense or the child's background, the welfare of the community requires criminal prosecution. TEX. FAM.CODE ANN. § 54.02(a)(1), (2)(B), (3) (Vernon Supp.2009). To facilitate this decision, the Texas Family Code provides criteria for the court to consider:

FN2. The statute also provides the child may be transferred to criminal court if he is fourteen years of age or older and the alleged offense is a capital felony, an aggravated controlled substance felony, or a felony of the first degree. TEX. FAM.CODE ANN. § 54.02(a)(2)(A). In this case, however, it is undisputed that Bleys was sixteen at the time of the offense, and the offense alleged, aggravated assault, was a second degree felony. See TEX. PENAL CODE ANN. § 22.02(b) (Vernon Supp.2009). Accordingly, the applicable portion of the statute is section 54.02(a)(2)(B).

- (1) whether the alleged offense was against person or property, with greater weight in favor of transfer if the offense was against a person;
  - (2) the sophistication and maturity of the child;
  - (3) the record and previous history of the child;
- and
- (4) the prospects of adequate protection of the public and the likelihood of re-habilitation of the child by use of procedures, services, and facilities currently available to the juvenile court. *Id.* § 54.02(f).

Although the juvenile court must consider each factor, it is not required to find that each factor has been established, nor is it required to give each factor equal weight. *Faisst*, 105 S.W.3d at 11.

In this case, Bleys challenges only the trial court's findings that (1) the seriousness of the offense and the child's background were such that transfer to a criminal district court was necessary for the welfare of the community, and (2) the procedures, services, and facilities currently available to the juvenile court were inadequate for Bleys's rehabilitation. See TEX. FAM.CODE ANN. § 54.02(a)(3), (f)4. In arguing these findings are supported by factually insufficient evidence, Bleys relies solely on the idea that an option was available that would

have allowed for his rehabilitation and adequately protected the community--determinate sentencing.

A determinate sentence is one in which a juvenile is initially committed to a term in the custody of the Texas Youth Commission with a possible transfer to the Texas Department of Criminal Justice-Institutional Division. See *id.* § 54.04(d)(3) (Vernon Supp.2009). Section 53.045(a) of the Family Code provides that when a child is alleged to have committed certain offenses, including aggravated assault, the prosecutor may refer the petition requesting adjudication as a delinquent to the grand jury. *Id.* § 53.045(a)(6) (emphasis added). If the grand jury approves the submitted petition by a vote of nine, just as with an indictment, the approval is certified to the juvenile court and entered into the record. *Id.* § 53.045(b), (d). If the prosecutor refers the petition to the grand jury, the grand jury approves the petition, and the grand jury's approval is certified to the juvenile court and filed in the juvenile court's record, the juvenile court may impose a determinate sentence. See *Matter of S. J.*, 977 S.W.2d 147, 149 (Tex.App.-San Antonio 1998, no pet.) (citing sections 53.045(a), (d) and 54.04(d)(3) of the Texas Family Code). However, if the prosecutor does not obtain and file the grand jury's certification, the juvenile court is without jurisdiction to impose a determinate sentence. *Id.* (citing section 54.04(d)(2), (3) of the Texas Family Code). Only if all the requirements are met may the court impose a determinate sentence; it is only then that the State's petition is deemed an indictment for purposes of later transferring the juvenile to Texas Department of Criminal Justice-Institutional Division or the parole board. *Matter of S.J.*, 977 S.W.2d at 149 (citing section 53.045(d)); see also TEX. HUM. RES.CODE ANN. § 61.084(a), (c) (Vernon Supp.2009) (stating that if person is committed to Texas Youth Commission pursuant to determinate sentence under section 54.04(d)(3) of Family Code, Commission may not discharge person from custody, rather it must transfer person to Texas Department of Criminal Justice-Institutional Division for completion of sentence).

Clearly, the decision to refer the petition to the grand jury is at the State's option, and if the State never refers the petition, the trial court has no jurisdiction to order determinate sentencing. *Matter of S.J.*, 977 S.W.2d at 149 (citing section 54.04(d)(2), (3) of the Texas Family Code). In this case, the State chose not to refer the petition; rather, the State chose to seek a waiver of jurisdiction and transfer to criminal district court, as was its right. Therefore, contrary to Bleys's assertion, the trial court did not have the option of imposing determinate sentencing so as to provide Bleys with the rehabilitation needed and to protect the community welfare. See *id.* Moreover, Bleys has not cited any authority to support his suggestion that the juvenile court could somehow force the State to refer its petition for adjudication to the grand jury. The statute clearly gives the State the option

of referral without interference from the trial court. See TEX. FAM.CODE ANN. § 53.045(a).

**Conclusion:** Because Bleys's only argument is that the trial court ignored the option of determinate sentencing, rendering its findings on rehabilitation and community welfare factually insufficient, we must overrule his contention because as demonstrated above, determinate sentencing was not an option available to the trial court. The trial court was, in fact, without jurisdiction to impose a determinate sentence. Accordingly, we overrule Bleys's point of error and affirm the trial court's judgment.

## DISPOSITION PROCEEDINGS

### JUVENILE COURT DID NOT ABUSE ITS DISCRETION IN COMMITTING JUVENILE WHO WAS ADJUDICATED FOR ROBBERY TO TYC ON FIRST REFERRAL TO JUVENILE COURT.

[¶ 10-2-7. In the Matter of J.A., MEMORANDUM, No. No. 04-09-00556-CV, 2010 WL 816198 \(Tex.App.-San Antonio, 3/10/10\).](#)

**Facts:** The complainant, C.G., reported that he was walking with a friend on April 4, 2009, when he observed J.A. with three other individuals. C.G. and his friend walked down a drainage ditch to avoid J.A. because they knew J.A. caused trouble. J.A. and the others followed them and pushed C.G. to the ground. J.A. and the others started punching and kicking C.G.. The officer responding to the complaint observed physical injuries to C.G.'s eye and arm, and photographs of the injuries are included in the record. J.A. and the others removed C.G.'s shoes and took the shoes and C.G.'s backpack. J.A. and the others were yelling "We are BDTs, don't fuck with us." C.G. reported the BDT stands for Brown Down Thugs, a gang, and J.A. and the others were wearing brown bandanas around their neck. C.G. knew J.A. because he used to go to C.G.'s school before J.A. was sent to alternative school.

J.A. pled true to the offense of robbery without a plea bargain agreement. At the disposition hearing, the Bexar County Juvenile Probation Department's Pre-Disposition Report was admitted into evidence without objection. J.A. was previously referred to the juvenile probation department for a charge of arson on December 11, 2008. The charge stemmed from an allegation that J.A. had started a fire in a dumpster. Although J.A. was positively identified at the scene as the suspect, the charge was rejected on April 28, 2009. J.A. also was previously referred for expulsion on January 8, 2009.

J.A. reported that he smoked marijuana once a month. J.A. had a history of disruptive behavior at school. From September 2006 until December 2008, J.A. had thirty-nine disciplinary referrals. The referrals consisted of violations of classroom and school rules, offensive

physical contact, disruptive behavior in the classroom, and persistent misbehavior. As a result of his persistent misbehavior, J.A. was sent to alternative school. J.A. was subsequently expelled by the school district and sent to the Bexar County Juvenile Justice Academy. Although J.A. denied being associated with gangs when questioned by the probation officer, J.A. previously admitted to being affiliated with "brown" to an officer of the school district's police department.

Although the report noted that J.A. has a stable home environment, J.A.'s mother reported she had issues with J.A.'s behavior in the past and stated J.A. can be disrespectful and defiant. J.A.'s step-father reported he had told J.A. for years that his attitude and behavior were eventually going to get him in trouble.

The State recommended commitment to TYC. The probation officer also recommended TYC; however, seven of the ten individuals on the juvenile probation department's staffing committee recommended probation with participation in GANG ISP and the KAPS program. The probation officer reported that his recommendation was based on J.A.'s persistent misbehavior at home and at school and the best interest of the community. The probation officer also testified that his recommendation was based in large part on the nature of the offense because a person should not be afraid to walk down the street.

J.A.'s attorney asserted that J.A. was diagnosed with depression disorder and qualified for special education. J.A.'s attorney also asserted that J.A. had not received any prior resources and requested that J.A. be placed on probation.

The juvenile court noted that she trusted the probation officer's judgment. The juvenile court found reasonable efforts were made to prevent or eliminate the need for J.A.'s removal from the home, but the child, in the child's home, could not be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation. The juvenile court also found that commitment to TYC was the appropriate disposition due to J.A.'s behavior problems and inadequate supervision at home.

**Held:** Affirmed

**Memorandum Opinion:** In order for a juvenile to be committed to TYC, the juvenile court must find that: (1) placement outside the home is in the juvenile's best interests; (2) reasonable efforts were made to prevent or eliminate the need for removal from the home; and (3) the juvenile, in the juvenile's home, cannot be provided the quality of care and level of support and supervision the juvenile needs to meet the conditions of probation. TEX. FAM.CODE ANN. § 54.04(f)(1) (Vernon Supp.2009). A

trial court's order committing a juvenile to TYC "must be reviewed under an abuse of discretion standard divorced from legal and factual sufficiency standards." In re K.T., 107 S.W.3d 65, 67 (Tex.App.-San Antonio 2003, no pet.). "[T]he abuse of discretion standard requires that we 'view the evidence in the light most favorable to the trial court's ruling,' affording almost total deference to findings of historical fact that are supported by the record." In re K.T., 107 S.W.3d at 75 (quoting Guzman v. State, 955 S.W.2d 85, 89 (Tex.Crim.App.1997)). "However, when the resolution of the factual issue does not turn upon an evaluation of credibility and demeanor, we review the trial court's determination of the applicable law, as well as its application to the appropriate law to the facts it has found, de novo." Id.

In his brief, J.A. contends that the juvenile court abused its discretion in not placing him on probation, noting he had no prior juvenile adjudications and describing "many of [the thirty-nine school disciplinary] infractions to be rather minor." A trial court, however, is not required to exhaust all possible alternatives before sending a juvenile to TYC. In re J.R.C., 236 S.W.3d 870, 875 (Tex.App.-Texarkana 2007, no pet.). Although J.A. may not have had any prior juvenile adjudications, he was first given the chance to attend alternative school as a result of his disciplinary problems, but was subsequently expelled by the school district and required to attend the Bexar County Juvenile Justice Academy. Although J.A. seeks to describe his disciplinary referrals as minor infractions, J.A. was referred numerous times for "disrespectful/profanity" and a few times for "insubordination," which is consistent with J.A.'s mother describing him as disrespectful and defiant in the home. In addition, J.A. had multiple referrals for participating in gang activity, two referrals for offensive verbal/physical conduct, and one referral for scuffling/aggressive physical conduct, which the juvenile court could have believed were not "minor" infractions. Moreover, even if some of the infractions in isolation may appear to be minor, they must be considered in the context of J.A. having received thirty-nine referrals in just over a two-year period. Finally, the juvenile court also had to consider the offense in which J.A. engaged, i.e., attacking an individual who was simply walking down the street, the relation of the offense to J.A.'s gang involvement, and J.A.'s admitted on-going use of marijuana. Based on this evidence, we hold the juvenile court did not abuse its discretion in committing J.A. to TYC.

**Conclusion:** The juvenile court's order is affirmed.

**EVIDENCE**

**TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FINDING THAT TESTIMONY FROM EMPLOYEE WAS SUFFICIENT TO ESTABLISH THAT MANAGER WAS OWNER OF PROPERTY UNDER THEFT PETITION, EVEN**

**THOUGH MANAGER DID NOT APPEAR IN COURT TO TESTIFY.**

[¶ 10-2-11. In the Matter of R.L.S., MEMORANDUM, No. 11-08-00170-CV, 2010 WL 1500864, Tex.App.-Eastland \(4/15/10\).](#)

**Facts:** The State alleged, and the trial court found, that R.L.S. unlawfully appropriated clothing worth between \$50 and \$500 without the effective consent of Adam White, the Sears Loss Prevention Manager. Theft occurs when a person unlawfully appropriates property with the intent to deprive the owner of the property. TEX. PENAL CODE ANN. § 31.03(a) (Vernon Supp.2009). Appropriation is unlawful if it is without the owner's effective consent. Section 31.03(b)(1). An owner is a person who has title to the property, possession of the property whether lawful or not, or a greater right to possession of the property than the actor. TEX. PENAL CODE ANN. § 1.07(a)(35) (Vernon Supp.2009). Possession means actual care, custody, control, or management. Section 1.07(a)(39). Exclusive control of the property need not be vested in the owner. Turner v. State, 636 S.W.2d 189, 193 (Tex.Crim.App.1982). Anyone who had a greater right to possess, control, or manage the stolen property than appellant could be alleged as the owner of the property. Long v. State, 7 S.W.3d 316, 320 (Tex.App.-Beaumont 1999, no pet.). Proof of ownership may be made by direct or circumstantial evidence. Robertson v. State, 871 S.W.2d 701, 707 (Tex.Crim.App.1993).

When the property stolen is the property of a corporation, it is permissible to allege ownership in some natural person acting for the corporation such as an employee who has care, custody, and control of the property. Harrell v. State, 852 S.W.2d 521, 523 (Tex.Crim.App.1993). It is the employment relationship that determines whether a given individual can be a "special owner" of the property. Cross v. State, 590 S.W.2d 510, 511 (Tex.Crim.App.1979). A person acting on behalf of a corporation, with managerial authority and responsibility over its goods, is the effective owner. Johnson v. State, 606 S.W.2d 894, 896 (Tex.Crim.App.1980).

**Held:** Affirmed

**Memorandum Opinion:** R.L.S. argues that there is legally insufficient evidence that White was an owner. Victoria Olgin, a Loss Prevention Detective for Sears, testified for the State. Olgin was operating the security cameras when two females walked into the junior department. Olgin was also employed as a juvenile detention officer at Culver Detention Center, and she recognized R.L.S. as one of the two females. Olgin observed them select merchandise, walk to the children's department, and go into the dressing rooms. Olgin suspected theft when they came out without all of the merchandise, and she detained them. R.L.S. asked Olgin to let them go, but

Olgin refused and held them until a police officer arrived. The officer searched their bags and found merchandise with Sears’s tags in R.L.S.’s bag. R.L.S. did not have a receipt for this merchandise.

Olgin testified that White was her previous manager; that he was no longer employed by Sears; but that, on the day of the incident, he was the Loss Prevention Manager. Olgin testified that R.L.S. did not have permission from Sears to take the merchandise and that R.L.S. did not pay for it.

**Conclusion:** The trial court did not abuse its discretion by finding that R.L.S. had committed further delinquent conduct. Olgin’s testimony is sufficient to establish that White was a Sears’s manager on the date of the shoplifting incident and, therefore, sufficient to establish that he was a special owner.

We note also that the trial court specifically found that R.L.S. had failed to report to her probation officer four times, had four unexcused absences from school, was truant from school twice, had improperly gone to the mall without supervision, and had failed to attend the female offender program three times. R.L.S. does not challenge any of these findings. Each of them is sufficient to justify the trial court’s disposition. The order of the trial court is affirmed.

## SEARCH AND SEIZURE

### DOG SNIFF OF STUDENT’S PROPERTY IN CLASS ROOM WHILE STUDENTS WERE ASKED TO WAIT OUTSIDE WAS CONSIDERED CONSTITUTIONAL.

[¶ 10-2-2. In the Matter of D.H., No. 03-07-00426-CV, --- S.W.3d ---, 2010 WL 744117 \(Tex.App.-Austin, 3/5/10\).](#)

**Facts:** In October 2006, officers from the Austin Police Department arrived at Reagan High School to conduct a canine search of the school.FN1 D.H., who was sixteen at the time, was a student at the school. Assistant Principal Mike Perez led the officers through the school, allowing the dog to sniff several classrooms on each floor of each building. For every inspection, Perez entered the classroom and informed the teacher of the sweep. The students were then instructed to leave their property in the classroom and wait in the hall, and the police entered and allowed the dog to sniff the items left in the room. The students were not allowed to refuse the instructions or to take their items with them. When the officers searched D.H.’s classroom, the dog reacted to her backpack. The officers called D.H. into the classroom, read D.H. her rights, and searched her bag, where they found a small bag of marihuana.

On appeal, D.H. contends that (1) her backpack

was seized for Fourth Amendment purposes when she was required to leave it behind in her classroom while she went into the hallway as instructed, and (2) because neither the school nor the officers had reason to believe she was engaged in criminal activity or in violation of school rules, they lacked reasonable suspicion to seize her bag. For those reasons, she argues that the seizure of her backpack was a violation of her constitutional rights and that the marihuana, as the fruit of an improper seizure, should have been suppressed. See *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (holding that evidence obtained by improper search or seizure is inadmissible).

**Held:** Affirmed

**Opinion:** D.H. does not contend that the dog’s inspection of her bag was a search for Fourth Amendment purposes. Instead, she argues that requiring her to leave her backpack in the classroom while she left the room was an unconstitutional seizure of her property and that she otherwise would have carried it on her person, where the dog would not have been permitted to sniff it under *Horton v. Goose Creek Independent School District*, 690 F.2d 470, 479 (5th Cir.1982). FN2 We need not decide whether a seizure of D.H.’s property occurred, however, because assuming a seizure occurred, see *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) (seizure occurs if there is “meaningful interference” with individual’s possessory interests in property), the school’s actions were reasonable and thus constitutionally permissible under the standards applied in a public-school setting.

Keeping in mind that the Supreme Court has expressly refused to impose a requirement of “individualized reasonable suspicion of wrongdoing” on schools’ attempts to prevent student drug use, *Earls*, 536 U.S. at 837, 122 S.Ct. 2559, we will consider the privacy interest that was impaired by the seizure of D.H.’s backpack, the nature of the intrusion on that interest, and the nature of the government’s concerns and the efficacy of the seizure in addressing them. *Id.* at 830, 832, 834, 122 S.Ct. 2559.

We turn first to the privacy interest that was impaired by the alleged seizure. See *id.* at 830, 122 S.Ct. 2559. Students have a lessened expectation of privacy under the Fourth Amendment. *Id.*; see *Morse*, 551 U.S. at 396-97, 127 S.Ct. 2618 (stating that students’ constitutional rights must be considered in light of public-school setting and are not automatically coextensive with those of adults in other settings). “Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.” *Earls*, 536 U.S. at 831, 122 S.Ct. 2559. We “cannot disregard the schools’ custodial and tutelary responsibility for children,” and must view the school

environment as a “backdrop for the analysis of the privacy interest at stake and the reasonableness of” the school’s decisions. *Id.* at 830, 122 S.Ct. 2559 (quoting *Acton*, 515 U.S. at 656, 115 S.Ct. 2386). D.H. certainly had a legitimate privacy interest in the contents of her backpack. See *T.L.O.*, 469 U.S. at 337-38, 105 S.Ct. 733. However, considering that D.H.’s backpack was not opened, nor were its contents examined, until after the dog alerted on it, and bearing in mind the control and supervision that school authorities must properly exercise in their roles as guardians and tutors of their students, see *Earls*, 536 U.S. at 830, 122 S.Ct. 2559, we hold that restricting D.H.’s ability to take her backpack with her implicated a relatively minor privacy interest.

We next consider the nature of the alleged infringement on her privacy interests. On the day in question, before the police officers and drug dog entered the classroom, Perez went in, spoke to the teacher, and asked the students to step into the hallway. The students waited outside the classroom while the canine inspection took place, and there was no risk that another student might steal anything from or rummage through D.H.’s bag. The students themselves were not sniffed and they were not in the room while the dog sniffed their belongings. Only Perez, the dog, and the two officers were present when the dog alerted on D.H.’s backpack. Thus, D.H. was not exposed to embarrassment or scrutiny by her classmates while the inspection was taking place. She was not required to open her bag in front of anyone until after the dog alerted, and then the contents of the bag were only seen by Perez and the police officers. Given the method employed in conducting the canine inspection and the minimally intrusive nature of the inspection, we hold that the invasion of D.H.’s privacy was not significant. See *id.* at 834, 122 S.Ct. 2559.

Finally, we must weigh the invasion of D.H.’s rights against “the nature and immediacy of the government’s concerns and the efficacy” of the seizure in meeting those concerns, keeping in mind the context in which the seizure took place. See *id.* There is an important “governmental concern in preventing drug use by schoolchildren,” and the drug problem seems to be worsening. *Id.* The Supreme Court has held that “detering drug use by schoolchildren is an ‘important-indeed, perhaps compelling’ interest,” *Morse*, 551 U.S. at 407, 127 S.Ct. 2618 (quoting *Acton*, 515 U.S. at 661, 115 S.Ct. 2386), and characterized it as a “nationwide drug epidemic [that] makes the war against drugs a pressing concern in every school,” *Earls*, 536 U.S. at 834, 122 S.Ct. 2559.

Assistant Principal Perez testified that he and the other administrators knew there was a drug problem at the school and that “students have reported and we have found that there is enough Marijuana being sold, used or kids coming back from lunch under the influence that it is something we are always on the lookout for.” He

said that student drug use can lead to belligerent behavior or dangerous physical reactions, saying, “It becomes a serious safety issue for us at that point and the drug question becomes secondary, because we have to deal with the student’s safety first.” Perez testified that the school has written policies prohibiting drug possession on school grounds: the school district’s code of conduct, which states that drugs are not permitted on school property; and the campus handbook, which reiterates the district’s policy and specifies that marijuana is not permitted. Students are given the handbook at the beginning of the year and are instructed to bring it to their parents, who are asked to review the handbook, sign the back page, and return the signed page to the school. Considering the low level of intrusion on D.H.’s limited privacy rights and the evidence about the drug problem at Reagan High, we hold that the seizure effectively addressed the problem of student drug use and served the important governmental interest in protecting the students’ safety and health. See *id.* at 834-88, 122 S.Ct. 2559.

**Conclusion:** D.H. brought her backpack into a public school, where she was required to temporarily surrender its possession and leave it in the classroom to be sniffed by a dog. Given D.H.’s reduced expectation of privacy, the low level of intrusion involved in the dog’s inspection of the airspace surrounding her backpack, the limited information gathered, Reagan High’s interest in combating drug abuse, and its tutelary and custodial responsibilities for its students, we hold that the detention of her backpack was reasonable and thus constitutionally permissible. See *Jacobsen*, 466 U.S. at 125-26, 104 S.Ct. 1652.FN3 We overrule D.H.’s issues and affirm the trial court’s judgment.

FN1. There was conflicting testimony related to whether the school requested the search or the police asked to field test or train a drug dog. Although Assistant Principal Mike Perez testified that the arrival of the canine unit was unexpected, he also testified that the school principal had told the police that he would not object to the school being used for training purposes. Whether the canine inspection was initiated by the school or the police officers does not impact our analysis.

FN2. *Horton* held that allowing a dog to sniff student lockers located in a school’s public hallways and automobiles parked in the school’s parking lot did not constitute a search under the Fourth Amendment. *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 477 (5th Cir.1982).

FN3. See also *Louisiana v. Barrett*, 683 So.2d 331, 338 (La.Ct.App.1996) (school required students to empty pockets onto desk and leave classroom to allow drug dog to sniff belongings; “Taking into account the decreased expectation of privacy defendant had as a student, the relative unobtrusiveness of the search, and the severity

of the need met by the search, we conclude the type of search conducted in this case (wherein defendant was asked to empty his pockets and leave the room) is reasonable and hence constitutional.”); *Smith v. Norfolk City Sch. Bd.*, 46 Va. Cir. 238, 244-45, 261 (Va.Cir.Ct.1998) (students were required to leave belongings in classroom to be sniffed by drug dog; “Balancing Condon's lessened privacy interests and the minimal intrusion upon them against the strong governmental concerns with drugs and guns, this Court concludes that Condon's rights were not violated by the brief seizure of his belongings.”).

### SUFFICIENCY OF THE EVIDENCE

#### IN AGGRAVATED ASSAULT DISPOSITION, EVIDENCE WAS CONSIDERED FACTUALLY SUFFICIENT TO SUPPORT TYC COMMITMENT.

¶ 10-2-12. [In the Matter of A.C., MEMORANDUM, No. 2-09-278-CV, 2010 WL 1730790 \(Tex.App.-Fort Worth, 4/29/10\).](#)

**Facts:** The State charged that, on or about March 23, 2009, A.C. engaged in delinquent conduct by intentionally or knowingly threatening D.H. with imminent bodily injury and using or exhibiting a deadly weapon (scissors). See Tex. Family Code Ann. § 51.03(a)(1) (Vernon Supp.2009) (defining delinquent conduct); Tex. Penal Code Ann. § 22.02(a)(2) (Vernon Supp.2009) (defining aggravated assault). Because A.C. was not yet sixteen years old at the time, she was tried as a juvenile. See Tex. Fam.Code Ann. § 51.02(2)(A) (Vernon Supp.2009) (defining "child" as a person who is ten years of age or older and under seventeen years of age); see also *id.* § 51.01 (Vernon 2008) (explaining purpose of juvenile justice code).

A.C. waived a jury trial and agreed to stipulate to the evidence, which included the following:

- A.C. was fifteen years old and D.H. was fourteen years old--they were two middle school students in the same class;
- Their dispute began weeks before, but the March 23, 2009 argument involved a MySpace [FN2] post by A.C. in which she asserted that D.H. was afraid to meet her so they could fight;

FN2. MySpace is an interactive social-networking website. See *In re K.E.L.*, No. 09-08-00014-CV, 2008 WL 5671873, at \*3 n. 3 (Tex.App.- Beaumont Feb. 26, 2009, no pet.); see also *Draker v. Schreiber*, 271 S.W.3d 318, 326 (Tex.App.-San Antonio 2008, no pet. ) (Stone, J., concurring) (observing, in a vice-principal's suit involving a false MySpace account set up by students, that "[t]he internet capabilities of modern society present numerous opportunities for individuals to engage in extreme and

outrageous conduct that can produce severe emotional distress”).

- Other students in the classroom where the incident occurred heard A.C. threaten to stab D.H., tell D.H. that D.H. hit her, A.C. would stab her, and tell D.H. that she was going to die;
- Their argument escalated to the point that the teacher had asked another student to get a campus monitor;
- A.C. grabbed a pair of scissors from a classroom work station and stabbed D.H. multiple times in the chest;
- A campus monitor and an assistant principal had to pull A.C. away from D.H.;
- D.H. suffered multiple stab wounds to her chest area, shoulder, and arms and had to be transported to Cook Children's Hospital for surgery; and
- The investigating police detective would testify that based on the case's facts and her experience as a police officer, the scissors were a deadly weapon and that, in the manner of their use or intended use on that day, they were capable of causing death or serious bodily injury.

The trial court found that A.C. had engaged in delinquent conduct as alleged. After hearing evidence at the disposition hearing, which we will discuss below in our factual sufficiency analysis, the trial court ordered A.C. committed to TYC for six years.

All of A.C.'s challenges focus on the factual sufficiency of the evidence to support the findings upon which the trial court based its commitment decision after the disposition hearing.

**Held:** Affirmed

**Memorandum Opinion:** A juvenile court has broad discretion to determine a suitable disposition for a child who has been adjudicated as having engaged in delinquent conduct. *In re C.C.B.*, No. 02-08-00379-CV, 2009 WL 2972912, at \*3 (Tex.App.-Fort Worth Sept. 17, 2009, no pet.) (mem.op.). An abuse of discretion occurs when the juvenile court acts unreasonably or arbitrarily without reference to any guiding rules or principles. *Id.* In appropriate cases, factual sufficiency is a relevant factor in assessing whether the trial court abused its discretion. See *In re C.J.H.*, 79 S.W.3d 698, 702 (Tex.App.-Fort Worth 2002, no pet.). Merely because a trial court may decide a matter within its discretion in a different manner than an appellate court would in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Id.*

An abuse of discretion does not occur when the trial court bases its decision on conflicting evidence. *C.C.B.*, 2009 WL 2972912, at \*3. Further, an abuse of discretion does not occur as long as some evidence of substantive and probative character exists to support the trial court's decision. *C.J.H.*, 79 S.W.3d at 702. In conducting the review, we engage in a two-pronged

analysis, (1) did the trial court have sufficient information upon which to exercise its discretion, and (2) did the trial court err in its application of discretion? *C.C.B.*, 2009 WL 2972912, at \*3.

We apply the civil standard of review when reviewing the factual sufficiency of the findings at the disposition phase. *C.J.H.*, 79 S.W.3d at 703. That is, when reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, we determine that the evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and a new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex.1986) (op. on reh'g); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex.1965); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660, 661 (1951).

Section 54.04(i) of the family code sets out the mandatory findings that the trial court must make to commit a child to TYC. *C.J.H.*, 79 S.W.3d at 704. It thus informs the trial court's discretion. *Id.* Section 54.04(i) states that if the trial court commits the child to TYC, it shall include in its order its determination that:

- (A) it is in the child's best interests to be placed outside the child's home;
- (B) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and
- (C) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation[.]

Tex. Fam.Code Ann. § 54.04(i)(1)(A)-(C) (Vernon Supp.2009). A.C. challenges all three findings in addition to the trial court's finding that it was in A.C.'s and societies best interests to commit her to TYC because she needed a highly structured environment with constant supervision and control.

The State rested after the trial court admitted Petitioner's Exhibit 1, a social history containing A.C.'s psychological evaluation by Dr. Raymond F. Finn, Ph.D., [FN3] and Petitioner's Exhibit 2, an updated victim court report. Mike Jennings, a Tarrant County Juvenile Probation officer who had been supervising A.C. for the three months before the disposition hearing, A.C.'s mother B.J., and A.C. testified at the hearing.

FN3. "At the disposition hearing, the juvenile court ... may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses." Tex. Fam.Code Ann. § 54.04(b).

A.C. had a prior referral involving an assault-family violence charge in 2008 [FN4] from shoving or

hitting her mother when B.J. tried to prevent her from leaving the house. Jennings testified that the police were called, but A.C. was not taken into custody because she had already left. He stated, "We offered the family to come in and do the medi[ation]. The mother declined mediation and stated that she did not wish to prosecute. She did not feel that it was something that she could not handle, and so she signed a declaration of non-prosecution." Jennings admitted that at the time of that incident, A.C. was able to leave the home against her mother's wishes. B.J. testified that her fight with A.C. occurred because A.C. wanted to leave and B.J. tried to stop her. She and A.C. fought in the hallway "for a little bit" and then she called the police because A.C. left. During that incident, A.C. scratched B.J. on her face. B.J. testified that this happened before they realized that A.C. was bipolar.

FN4. It is unclear from the record whether this assault occurred in March, June, or August.

A.C. also has a history of fighting at school, and she has some learning disabilities, which Dr. Finn predicted would find A.C. continuing to experience school as frustrating, making her "prone to acting out." According to information contained in Dr. Finn's report, A.C. repeated the second grade because she was academically behind other students when she moved from California to Texas. A.C. repeated the seventh grade "due to frequent suspensions for such behavior as dress code violations and fighting with other students." A.C. testified about potentially having to repeat the eighth grade as well.

A.C.'s first hospitalization for mental issues occurred in October 2008 after a physical argument with her step-father; she was hospitalized for eight days and diagnosed with major depressive disorder. She received a prescription for a sedative and for Zoloft, an antidepressant. In January 2009, while on these medications, A.C. tried to run away over a dispute with her mother about money sent to A.C. from her father. When B.J. brought her back home, A.C. kicked in the front door and threatened to kill both herself and her mother.

B.J. testified that before the March 23, 2009 incident, A.C.'s medication had been switched from Abilify to Lithium. [FN6] Dr. Finn's report reflects that A.C.'s medication was changed after she "got into an argument with a parent on school grounds." The March 23 incident occurred on the Monday after Spring Break in a classroom containing around twenty students. Around a week before, on the Friday before Spring Break and not long after A.C.'s medication had been changed, A.C. called B.J. from school. B.J. said A.C. was crying and told B.J. that she did not know why she was crying and that she had been in an altercation with D.H. in the lunchroom. B.J. specified that A.C. told her that D.H. had

been trying to get her to fight with her in the lunchroom at school.

FN6. Jennings testified that Lithium is a drug that "if you're not taking it exactly as prescribed does have some severe side effects," and that as A.C. had just had the dosage increased the week before the March 23 stabbing, it would be possible that "the level of her blood screen had not equaled out." According to Dr. Finn's report, Lithium is a mood stabilizer.

A.C. testified that she deserved a chance at probation because she knew what she had done to D.H. was wrong. She elaborated, stating "But then again, I just do not know what happened at the time as I was stabbing her. I do admit that I did pick up the scissors and I then [sic] that I was going to stab her if she touched me. But that was only because, you know, I was always, you know, getting in trouble. And I only had one more chance and they were going to put me back in the eighth grade. [FN7] So I was trying to stay out of as much trouble as I could."

FN7. On cross-examination, A.C. elaborated about her concern about being put back in the eighth grade, stating that she had been in trouble for just not wanting to do my work. You know, that was before I was on my medicine. I really didn't listen to no one. You know, I thought I could do whatever and, you know, get away with it. And I've been doing that for so long that I was getting away with it at school.

A.C. testified that she remembered feeling really scared that D.H. was going to beat her up, that she had grabbed the scissors to scare D.H., that she had not intended to hurt D.H., and that she wanted to kill herself when she learned how badly she had hurt D.H.--one of her stabs nicked D.H.'s heart. A.C. testified that before her current medication, she "would just go bizarre and just chuck things, hit people."

On March 26, 2009, three days after she stabbed D.H., A.C. was released from detention for her mother to take her to UBH because she tried to cut herself. [FN8] At some point that day, she acquired a bottle of pills, took an excessive amount--according to A.C.'s testimony, because she wanted to kill herself after she found out how badly D.H. had been injured--and had to be taken to the emergency room to see if her stomach needed to be pumped. The doctor increased her Lithium dose, and the trial court allowed her to return home on an electronic monitor.

FN8. The social history included in A.C.'s psychological evaluation reflects that she was to be transported to UBH to be assessed for psychotropic medication and suicide ideation concerns.

At the time of the disposition hearing, A.C. was taking Zoloft twice a day, and she testified that now, when she gets angry, she does not "go off like how [she] used to" and that the medicine has helped her gain control of her impulses. She stated that she always takes her medicine in the way that she is supposed to and that even if she did not want to take it, B.J. would make sure that she takes it. She apologized to D.H. at the disposition hearing, stating

I know what I did was wrong and you can take it however because I'm pretty sure you won't forgive me because of the fact that, you know, you almost died. And if somebody would have stabbed me, you know, I probably would be real mad too. But, you know, I am sorry not only to you but your family and your friends because the fact that I almost took you away from your loved ones. And if that would have happened to like one of my families, I wouldn't know what I would do. And this is not--I'm not putting a show on in front of the Judge or anybody. I mean, I really do want you guys to forgive me because I know what I did was wrong and I'm so sorry.

Jennings testified that he had not seen A.C. exhibit any aggressive behavior towards anyone while he supervised her. B.J. testified that A.C. would be a good candidate for probation "[b]ased [on] her newly being bipolar and us trying to find out what medications work with her, I think that would be the best thing for her so that I can get the proper care that she needs."

In A.C.'s psychological evaluation, Dr. Finn observed that some of A.C.'s test responses "suggest a relatively low probability of aggressive behavior and more acting out generally. [His] impression is that this behavior is driven more by biological based problems of emotional and behavioral control and extreme temper outbursts with little or no provocation." However, he also noted in part of the report that A.C. "did not express any concern over her victim but stated that she is worried about 'going to jail,' " and that "[A.C.] reported some guilt about stabbing her victim but her test responses also suggest concern about avoiding punishment."

Jennings testified that the only services A.C. had received were supervision by him and an electronic monitor as an alternative to being kept at the detention center. A.C. had one violation of the electronic monitor, but he stated that it "possibly could have been [his] fault" because A.C. had been at the detention center and he might not have given the family proper time to get back home. Jennings indicated that there were a lot of programs that could potentially benefit A.C. but that A.C. had had very limited interaction with his department and had not yet had the opportunity to participate in many of the programs. He specifically mentioned the Family Partnership Program (FPP), a specialized caseload for juveniles in which most of the clients take mental health

medications, as a possibility for A.C. He stated that he thought if A.C. were allowed to remain in the community, a specialized caseload would definitely be in her best interest.

Jennings testified, "I think for the most part [A.C.] obeys her mother's rules." He described as follows one incident while he was supervising her in which he had to talk with A.C. about going to school:

The only other concern is the mother called me one time; I guess [A.C.] didn't want to go to school. And it was reported to me, basically, that she had did some work on her hair and I guess she ended up cutting some spots out of her hair and she didn't feel that she wanted to go to school that day. So her mother called me because she was concerned that [A.C.] would be in violation of her electronic monitor. I was able to calm--I was able to talk to [A.C.] over the phone and in person. I didn't have anything scheduled at that time, so I went out to the house. And she did end up going to school. But it was something where, basically, she would have been in violation of the Court's order of going to school every day and she was refusing initially. But she was able to turn around and did participate and go to school as she was instructed to. [FN9]

FN9. A.C. described the incident as, "I had did some things to my hair and I was embarrassed and I didn't want to go to school."

B.J. testified that A.C. follows the rules at home most of the time, but she qualified this, stating, "A lot of times that she don't, I'll just let her go and just do it anyhow. But most of the time, she does listen to me." She testified that there was no need to set a curfew because she did not let A.C. go anywhere except with relatives. A.C. testified that she would follow the rules of probation and the directions given by her parents, the probation department, and the court.

On March 26, 2009, before releasing A.C. from detention to go to UBH, the trial judge indicated that she did not want A.C. to have access either to the internet or to get on MySpace to communicate with anyone about the stabbing incident. Jennings testified, "She had explicit directions that she have no internet and no--actually, no My[S]pace." But a little over two weeks later, around 12:45 am., A.C. logged onto MySpace, contrary to the trial judge's specific orders. A.C. testified that she snuck her mother's internet-accessible phone out of her mother's purse while B.J. was asleep. She gave the following explanation on cross-examination:

Q... And you knew at that time, I'm assuming, that Judge Brown had specifically told you don't get back on My[S]pace?

A. Yeah, I know that.

Q. Well, can you tell us why you did it?

A. I just felt like I just had to apologize. Like, I don't know why. I just had to. Even if that meant that I was violating my probation or whatever it's called, I just thought I had to apologize to her because, you know, people who don't even know me already think I'm a bad person.

Q. Well, if you think something's important, if there's something you have to do, do you feel like you need to do it even if it's against the Judge's orders?

A. No, not really. It depends. Like this right here, with the apologizing, I just thought that I really had to apologize to her.

On redirect, A.C. testified that she knew she had to follow court orders, that she would follow an order not to use the internet again except for educational purposes, and that she would delete her MySpace account, which she was already planning to do.

Jennings testified that he believed A.C.'s family was able to provide support and adequate supervision in the home. With regard to a support network and her family, B.J. testified that A.C. had "tons and tons of relatives" nearby, as well as A.C.'s stepfather, B.J., and her fourteen-year-old sister. A.C. described her family as "the only friends I've got," stated that they were always there for her, and stated that she felt like she had a strong support network to help her follow the rules, terms, and conditions of probation. Dr. Finn stated in his report that "[h]er parents appear supportive and are likely to comply with treatment and probation conditions."

In its disposition order, the trial court made the following findings:

The Court finds [that] it is in the child's best interest to be placed outside the child's home. The Court also finds that reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home and the child, in the child's home, cannot be provided the quality of care and the level of support and supervision that the child needs to meet the conditions of probation. It further appears to the Court that the best interest of the child and the best interest of society will be served by committing [A.C.] TO THE CARE, CUSTODY AND CONTROL OF THE TEXAS YOUTH COMMISSION for the following reason: the child needs a highly structured environment with constant supervision and control.

In her first issue, A.C. argues that the trial court's finding that it is in her best interest to be placed outside her home is directly contradicted by Jennings's testimony that the probation department could help A.C. and protect the community. She acknowledges [i]f [her] bipolar condition were left untreated, if there was evidence effective medications had not yet been found, or if there was evidence A.C. did not take her medications, then removal from the home might be

warranted to protect A.C. from herself and to protect her family and the community from A.C.

But, A.C. argues, the disposition hearing evidence showed the contrary--that effective medications had been found and that she was taking them. She also refers to Jennings's testimony that Lithium could have some severe side effects as tending to show that her medication might have initially contributed to her unstable conduct because she was diagnosed as bipolar in January and her medications were not properly adjusted until after the offense in March. And A.C. refers to her mother's testimony that she had not had any problems with A.C. since A.C. had been on her medication and that she would continue to do whatever was required to keep A.C. out of trouble.

Notwithstanding the evidence above, however, in light of the disposition hearing evidence, the trial court could have questioned whether B.J. could effectively manage A.C., even with the support of the probation department and her extended family. *See, e.g., In re C.G.*, 162 S.W.3d 448, 452 (Tex.App.- Dallas 2005, no pet.) ("The trial judge heard the parents testify. She could well have concluded that the parents--despite their good intentions-- underestimated appellant's problems. She could also have concluded that appellant's parents could not provide the highly structured and supervised setting C.G. required, according to both psychological assessment and probation officer.").

Given A.C.'s turbulent history and her own testimony about waiting until B.J. fell asleep to access her MySpace account in violation of the trial court's specific order, the determination of whether to grant probation rested primarily on whether the trial court believed that B.J. and A.C.'s support network would be able to effectively and consistently monitor A.C.'s behavior and reliably ensure that A.C. stayed on her medication. *See id.* A.C.'s own testimony about how, before she was on her medicine, she had been able to "get away with" whatever she wanted to do could have led the trial court to conclude that B.J. might eventually be less vigilant than necessary to protect the public. *See id.* And the violence of the crime A.C. committed against D.H. and her history of assaulting family members cannot be minimized--the best interests of children who engage in serious and repeated delinquent conduct are superseded to the extent they conflict with public safety. [FN10] *See In re J.P.*, 136 S.W.3d 629, 632-33 (Tex.2004) (referencing section 51.01 of the family code, which sets out the purpose of the **juvenile** justice code). Under the circumstances presented here, we cannot say that the trial court abused its discretion by concluding that it was in A.C.'s best interest to be placed outside her home or that the evidence supporting the finding is so weak or so contrary to the overwhelming weight of all the evidence that it should be set aside. *See Pool*, 715 S.W.2d at 635;

*C.C.B.*, 2009 WL 2972912, at \*3. We overrule A.C.'s first issue.

FN10. The trial judge observed immediately before making the challenged findings, "I think we're very fortunate that the victim in this case did not die, from what I've heard. And you are also very fortunate because you could be here for murder instead of aggravated assault with a deadly weapon." She indicated that she was also concerned about the other family violence issues and A.C.'s mental health.

In her second issue, A.C. relies on Jennings's testimony that he thought that if she got into the Family Partnership Program, she could benefit from it to show that the evidence is factually insufficient to support the trial court's finding that reasonable efforts were made to prevent or eliminate the need for her removal from her home. She contends that she had not yet had the opportunity to participate in any type of counseling, that the trial court did not give her the opportunity to participate in the FPP, and that only if she had not been accepted into the FPP or if she had unsuccessfully participated in the FPP could the trial court have found that reasonable efforts had been made to prevent the need for removal.

A.C. primarily bases her argument on Jennings's mere speculation that she could get into the FPP. That is, his specific testimony was

Q. You mentioned the specialized caseload FPP. And that is specifically for **juvenile** respondents with mental health issues?

A. Yes.

Q. Do you feel [A.C.] would be an appropriate candidate for FPP?

A. *I feel that that's something that they would have to determine if she met the qualification.* But based on my previous experience, I feel that *she could qualify potentially to be on their caseload.* [Emphasis added.]

Moreover, although A.C. complains that she had not yet had the opportunity to participate "in any type of counseling," at the time of the disposition hearing, A.C. was seeing a psychiatrist once a month. She admitted that she had not discussed her March 26, 2009 suicide attempt with her doctors. And while released on an electronic monitor into her mother's custody, A.C. violated the trial court's order not to access the internet. *Compare In re J.D.*, Nos. 04- 01-00748-CV, 04-01-00749-CV, 2002 WL 31174477, at \*2 (Tex.App.-San Antonio Oct. 2, 2002, no pet.) ("Reasonable efforts had been made to prevent the need for removal because J.D. had been allowed to remain in his home on electronic monitoring; however, those efforts were unsuccessful [because he committed an assault while on the electronic monitoring]."), *with In re A.D.*, 287 S.W.3d 356, 367-68

(Tex.App.-Texarkana 2009, pet. denied) (concluding that there was no evidence of reasonable efforts when A.D. had never previously been referred to authorities for any offense and he was placed in confinement shortly after committing intoxication manslaughter, where he remained until confined to TYC). The trial court could have concluded that, given the violent circumstances of this case, A.C. had received reasonable efforts to prevent her removal but that they were unsuccessful, and we cannot say on the facts of this case that this constituted an abuse of discretion. *See Pool*, 715 S.W.2d at 635; *C.C.B.*, 2009 WL 2972912, at \*3. We overrule A.C.'s second issue.

A.C. refers us to her mother's statement that A.C. followed her rules "most of the time." However, given that A.C. stabbed and almost killed another child, the trial court could have determined that "most of the time" was insufficient to ensure that A.C. met the conditions of probation for the public's protection. Additionally, A.C. herself testified that whether she followed the trial court's orders would depend on if she felt something was important enough not to, [FN11] although she also testified that she would follow the trial court's orders and conditions of probation.

**FN11.** With regard to violating the trial court's order not to access MySpace, A.C. testified that her motivation was that she felt like she had to apologize to D.H. on MySpace "because, you know, people who don't even know me already think I'm a bad person." Dr. Finn reported that A.C.'s test results suggested "an unusually strong tendency to look to other people as sources of emotional gratification."

Under the circumstances presented here, we cannot say that the trial court abused its discretion by concluding that A.C. lacked the quality of care and level of support and supervision needed to meet the conditions of probation in her home or that the evidence supporting the finding is so weak or so contrary to the overwhelming weight of all the evidence that it should be set aside. *See Pool*, 715 S.W.2d at 635; *C.C.B.*, 2009 WL 2972912, at \*3. We overrule A.C.'s third issue.

In her fourth issue, A.C. admits that the trial court's finding that she needed a highly structured environment with constant supervision and control supported the reason for a disposition. However, she argues that the finding does not support why commitment to TYC was necessary if she could otherwise get the structure and supervision she needed without being removed. She contends that if any of the previous findings fail, this finding must fail as well, incorporating her earlier arguments by reference. For the same reasons that we have already set forth above in addressing her first three issues, we conclude that the trial court did not abuse its discretion by finding that commitment to TYC was necessary because the disposition hearing testimony

could have led the trial court to reasonably conclude that A.C. lacked the structure and supervision she needed. Therefore, we overrule A.C.'s final issue.

**Conclusion:** Having overruled each of A.C.'s four issues, we affirm the trial court's judgment.

---

**AFFIRMATIVE LINKS ESTABLISHED THAT APPELLANT'S CONNECTION WITH PACKAGES OF MARIJUANA FOUND HIDDEN IN VEHICLE HE WAS DRIVING ACROSS BORDER WAS MORE THAN JUST FORTUITOUS.**

[¶ 10-2-5. In the Matter of H.G.G.D., No. 08-08-00280-CV, --- S.W.3d ----, 2010 WL 636935 \(Tex.App.-El Paso, 2/24/10\).](#)

**Facts:** At 12:41 p.m. on June 22, 2008, Appellant arrived at the Bridge of the Americas, an international port of entry connecting El Paso, Texas with adjacent Ciudad Juarez, Mexico. Appellant was 18 and told Border Patrol Officer Jorge Lopez, who was working as a customs inspector, that he was going to downtown El Paso to buy some tennis shoes. Lopez noticed that Appellant was driving a recently purchased 1982 two-toned brown Ford F-150, and that the registration was expired and referenced different plates than those on the vehicle. There was only one key in the ignition. There were no house keys or any other keys, which Lopez found unnormal. Lopez also observed fresh tool marks on the gas tank and noted it was cleaner than the rest of the undercarriage, which indicated that it had been removed and replaced. Lopez knew, based on past experience, that marijuana was sometimes concealed in gas tanks. Appellant was very nervous, his hands were moving, and he played with a handkerchief. He avoided eye contact and hesitated before answering any questions. His suspicions aroused, Lopez asked Officer Jose Dominguez to conduct a second declaration.

Dominguez also noted that Appellant's hands were visibly shaky, that he could not maintain eye contact, that he looked uncomfortable, and that he kept looking around. In Dominguez's experience, Appellant's behavior was unusual. Thus, Dominguez advised Lopez that the vehicle should be sent for a more thorough inspection. The vehicle was then placed in a secondary inspection area, and with the aid of a trained canine, 119 yellow bundles of marijuana were found in the gas tank. During the search, Appellant just looked down at the ground. He never said anything.

The bundles field-tested positive for marijuana. Dominguez transported the bundles to the seizure room, weighed them, obtaining a weight of 131 pounds, and waited with them until they were picked up by El Paso Police Officer John Sanchez. Sanchez subsequently transported all of the bundles to the El Paso Police

Department's vault. There, he weighed the bundles, obtaining a total weight of 131.80 pounds. Five days before Appellant's trial, Sanchez randomly selected 26 bundles from the lot, obtained samples from those 26 bundles, and sent them for testing. The chemist then weighed those samples submitted and obtained a weight of 102.99 grams. All 26 samples tested positive for 90 percent marijuana. Relying on the number of bundles seized, the chemist determined the weight of the lot of marijuana to be 119.90 pounds.

At trial, Detective Marcela Gil with the El Paso Sheriff's Office testified that the average price per pound of marijuana in El Paso is \$220. Thus, 119 pounds of marijuana would presumably be valued at \$26,180. However, the price increases farther from the border. For instance, in New Mexico, the valuable cargo would be valued at \$35,700, in Oklahoma, the value would be \$50,575, and in Atlanta, the value would be \$130,900.

H.G.G.D., Appellant, was adjudicated for delinquent conduct and committed to the Texas Youth Commission. On appeal, Appellant challenges the legal sufficiency of the evidence to support his adjudication.

**Held:** Affirmed.

**Opinion:** To prove delinquent conduct, the State had to show that Appellant "knowingly or intentionally" possessed "a usable quantity of marihuana." Tex. Health & Safety Code Ann. § 481.121(a), (b)(5) (Vernon 2003); Tex. Fam.Code Ann. § 51.03(a)(1) (Vernon 2008). Possession is defined as "actual care, custody, control, or management." Tex. Health & Safety Code Ann. § 481.002(38) (Vernon 2003). Thus, the State had the burden to prove beyond a reasonable doubt that the juvenile (1) exercised care, control, and management over the contraband and (2) that the accused knew he possessed contraband. *King v. State*, 895 S.W.2d 701, 703 (Tex.Crim.App.1995); *In re J.M.C.D.*, 190 S.W.3d 779, 781 (Tex.App.-El Paso 2006, no pet.).

Mere presence at the scene is not sufficient to establish unlawful possession of a controlled substance, but evidence which links the defendant to the controlled substance will suffice to prove that he possessed it knowingly. *McGoldrick v. State*, 682 S.W.2d 573, 578-79 (Tex.Crim.App.1985). The links must raise a reasonable inference that the accused knew of and controlled the contraband, and may be shown by either direct or circumstantial evidence establishing "to the requisite level of confidence, that the accused's connection with the drug was more than just fortuitous." *Brown v. State*, 911 S.W.2d 744, 747 (Tex.Crim.App.1995); *Levario v. State*, 964 S.W.2d 290, 294 (Tex.App.-El Paso 1997, no pet.). The number of links present is less important than the logical force the links have alone or in combination in establishing the elements of the offense. *In re J.M.C.D.*,

190 S.W.3d at 781; *Whitworth v. State*, 808 S.W.2d 566, 569 (Tex.App.-Austin 1991, pet. ref'd).

In *Menchaca v. State*, 901 S.W.2d 640, 644, 652 (Tex.App.-El Paso 1995, pet. ref'd), we found sufficient links to establish possession of marijuana when the evidence showed: (1) the defendant was the sole occupant of the vehicle; (2) the car he drove bore temporary license plates and was borrowed from a friend; (3) the key that operated the car was the only one on the key chain; (4) the defendant was nervous, his hands were shaking, and he avoided eye contact; (5) the amount of marijuana found in the car-49.5 pounds-was a large and valuable amount; (6) the packages of marijuana were hidden throughout the vehicle; (7) the defendant was attempting to cross an international border; and (8) a letter found in the vehicle indicated that the defendant, once having crossed the border, would wait for others to discuss the "matter."

We find similar links in this case: (1) Appellant was the sole occupant of the vehicle; (2) the vehicle had been recently purchased from an unknown man and contained expired registration tags and different license plates; (3) the only key present was that in the ignition; (4) Appellant was nervous and uncomfortable, his hands were shaking, and he avoided eye contact; (5) Appellant hesitated before answering questions, played with a handkerchief, and never questioned why he was being detained; (6) the amount of marijuana found was a large amount worth between \$26,180 and \$130,900; (7) the marijuana was hidden in the gas tank, and the gas tank appeared to be new and recently installed, unlike the rest of the undercarriage of the vehicle; and (8) Appellant was attempting to cross an international border. These links establish, to a requisite level of confidence, that Appellant's connection with the packages of marijuana was more than just fortuitous. *Brown*, 911 S.W.2d at 747. As we noted in *Menchaca*, "Appellant would not have been entrusted in taking the valuable cargo across an international border if he were a mere innocent, ignorant of all the details surrounding his responsibility and the importance of the cargo in his care." *Menchaca*, 901 S.W.2d at 652.

**Conclusion:** In viewing the evidence in the light most favorable to the jury's verdict, we conclude that the jury could have rationally found beyond a reasonable doubt all of the essential elements of the offense charged, including care, control, and management of the marihuana, and that Appellant intentionally or knowingly possessed the contraband.

---

**EVIDENCE WAS SUFFICIENT TO SUPPORT TRIAL COURT'S FINDING THAT JUVENILE ENGAGED IN DELINQUENT CONDUCT BY COMMITTING AGGRAVATED ASSAULT**

**WITH A DEADLY WEAPON AND PLACING HIM ON PROBATION FOR A DETERMINATE SENTENCE.**

[¶ 10-2-16. In the Matter of J.A.B., MEMORANDUM, No. 03-09-00184-CV, 2010 WL 1930163 \(Tex.App.-Austin, 5/13/10\).](#)

**Facts:** On September 25, 2008, J.A.B. and his father were living with the complainant, Daniel Harrison, in Harrison's apartment. Harrison testified that he became upset with J.A.B., who was sixteen years old, because he would neither work nor go to school. That day, for example, "[J.A.B.] had come and gone several times and then came home around lunchtime and had gotten stoned and taken a long nap for about [an] hour, hour and a half." After J.A.B. woke from his nap, he and Harrison began to argue, and J.A.B. left the apartment.

A few minutes later, Harrison also left the apartment to go to the laundry room. He encountered J.A.B. outside another apartment and words were exchanged. Harrison testified that J.A.B. then "jumped up in my face, [and] I ... pushed him against the wall." He continued, "That's when he put his fists up. He was really angry after that." Harrison testified, "Well, we were by the stairs going down ... around the back of the building going to check the laundry. We were throwing punches at each other. Nobody really got hit. It was kind of backing each other up, pushing each other." When the two men reached the laundry room, J.A.B. walked over to a nearby picnic table, and Harrison "thought it was over." Suddenly, however, J.A.B. "came running back up ... with his fists up." Harrison saw something he could not identify in J.A.B.'s hand. "I got hit here. And I notice[d] it wasn't a punch.... And I noticed I was bleeding. So I put my arms up again. He threw one more and it cut me here." Harrison picked up a rock and threw it at J.A.B., who then ran away.

It is undisputed that J.A.B. stabbed Harrison in the neck and forearm with a pocket knife. There was considerable bleeding from the neck wound, and Harrison was briefly hospitalized. J.A.B. was arrested soon after the incident. He cooperated with the police and told them where he had hidden the knife. It was J.A.B.'s contention that he acted in self-defense. Although J.A.B. did not testify, Harrison acknowledged that it was he who initiated the physical contact. When asked if he knew why J.A.B. had attacked him with the knife, Harrison answered, "To defend himself, I guess. I don't know. You'd have to ask him. I haven't a clue."

**Held:** Affirmed

**Memorandum Opinion:** Adjudications of delinquency are based on the criminal standard of proof. Tex. Fam.Code Ann. § 54.03(f) (West Supp.2009). Therefore, we review the sufficiency of the evidence by applying the standard applicable to challenges to the sufficiency of the

evidence in criminal cases. In re E.P., 963 S.W.2d 191, 193 (Tex.App.-Austin 1998, no pet.). In a legal sufficiency review, we view all the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. Clayton v. State, 235 S.W.3d 772, 778 (Tex.Crim.App.2007). In a factual sufficiency review, we view all the evidence in a neutral light and determine whether the verdict is clearly wrong and manifestly unjust, or if it is against the great weight and preponderance of the available evidence. Watson v. State, 204 S.W.3d 404, 414-15 (Tex.Crim.App.2006).

Two definitions govern the outcome of this appeal. "Deadly weapon" means anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. Tex. Penal Code Ann. § 1.07(a)(17)(B) (West Supp.2009). "Deadly force" means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury. Id. § 9.01(3).

The knife J.A.B. used to stab Harrison had a blade that appears from a photograph to be at about two-and-a-half inches long. Although the neck wound did not prove to be serious, it could easily have been so given the location. Viewing all the evidence in the light most favorable to the judgment, the juvenile court could rationally find beyond a reasonable doubt that J.A.B. used and intended to use the knife in a manner that was capable of causing serious bodily injury or death, regardless of whether he actually intended to cause such an injury. See McCain v. State, 22 S.W.3d 497, 503 (Tex.Crim.App.2000). By the same token, the court could find beyond a reasonable doubt that J.A.B. used and intended to use force that was capable of causing serious bodily injury or death.

A person is justified in using deadly force against another when and to the degree the actor reasonably believes the deadly force is immediately necessary to protect the actor against the other's use or attempted use of unlawful deadly force. Tex. Penal Code Ann. § 9.32(a)(2)(A) (West Supp.2009). Even if Harrison's shove justified J.A.B. in using force in self-defense, it did not justify J.A.B.'s use of deadly force. We hold that the evidence is legally sufficient to support the juvenile court's finding that J.A.B. used a deadly weapon to cause bodily injury to Harrison, and to support the juvenile court's determination that J.A.B.'s conduct was not justified by self-defense. Points of error one and three are overruled.

There is no evidence that the stabbing was an accident or other than a deliberate act. In fact, J.A.B.'s self-defense claim belies any suggestion that he did not intend to stab Harrison. See Ex parte Nailor, 149 S.W.3d 125, 132 (Tex.Crim.App.2004).

**Conclusion:** Viewing the evidence in a neutral light, the juvenile court's findings that J.A.B. assaulted Harrison with a deadly weapon and that the assault was not justified by self-defense are neither manifestly unjust nor against the great weight and preponderance of the evidence. Points of error two and four are overruled. The judgment is affirmed.

**EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT JUVENILE'S ACT OF PLACING KNIFE IN TRUNK OF CAR AND GRABBING IT OUT OF TRUNK WAS AN ACT AMOUNTING TO MORE THAN MERE PREPARATION THAT TENDED BUT FAILED TO EFFECT THE COMMISSION OF THE OFFENSE OF ATTEMPTED AGGRAVATED ASSAULT WITH A DEADLY WEAPON.**

[¶ 10-2-14. In the Matter of V.R., MEMORANDUM, No. 10-09-00293-CV, 2010 WL 966168 \(Tex.App.-Waco, 3/10/20\).](#)

**Facts:** V.R., his mother, and his infant brother were in the process of moving to another residence. V.R.'s mother, who was ill at the time, had enlisted her boyfriend, Marks, to help with the move. Marks attempted to get V.R. to help move items out of the apartment. V.R. refused and got angry with Marks. He left the apartment for a short time but returned. V.R. still refused to help Marks. It is disputed as to whether Marks got angry with V.R. during this time and whether he was the instigator of the verbal altercation.

During the altercation, V.R. made threats to Marks that he was going to "f\* \* \* you up" and "kill you." At some point during this time, Marks observed V.R. taking a long knife from the apartment. V.R. carried the knife downstairs and put it in the trunk of his mother's vehicle. He did not make threats or brandish the weapon during this time. V.R.'s mother got V.R. into her car and attempted to hold him in there with her body because he was very upset and yelling that he was going to "f\* \* \* him up." V.R.'s mother asked Marks to call the police. However, V.R. pushed his way out of the car, and he and his mother fell to the ground.

V.R. got up, went to the driver's side of the car and popped open the trunk, went over to the trunk and opened it, and picked up the knife. V.R.'s mother came over and hit V.R.'s arm, causing him to drop the knife. V.R. heard sirens and ran away. V.R.'s mother testified that the knife was not visible to Marks and was never more than several inches off of the floor of the trunk. Marks testified that he never saw the knife and was not in fear of injury from V.R. At the time that V.R. picked up the knife, Marks was a short distance away next to his vehicle.

An officer responded to a call that a younger Hispanic male was threatening to kill someone with a knife. She met with V.R.'s mother and Marks, who relayed to her that V.R. had been yelling threats at Marks. Neither party informed the officer that V.R. was acting in self-defense or that Marks was verbally aggressive toward V.R. that day. Marks and V.R.'s mother did not want charges pressed against V.R. for the incidents that day. Marks was subpoenaed to attend the trial, but still did not want V.R. prosecuted for the offense.

**Held:** Affirmed

**Memorandum Opinion:** V.R. contends that the evidence was both legally and factually insufficient for the trial court to have found that the act of picking up a knife went beyond mere preparation as required by the attempt statute. See TEX. PEN.CODE ANN. § 15.01 (Vernon 2005). The relevant portion of section 15.01 states that: "(a) A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." TEX. PEN.CODE ANN. § 15.01(a) (Vernon 2005).

Section 22.02(a)(2) of the Penal Code states in relevant part that: "(a) A person commits an offense if the person commits assault as defined in § 22.01 and the person: (2) uses or exhibits a deadly weapon during the commission of the assault." TEX. PEN.CODE ANN. § 22.02(a)(2) (Vernon 2005).

The charging paragraph of the State's petition alleged that:

On or about March 11, 2009, in Brazos County, Texas, the said child violated a penal law of this State punishable by imprisonment or confinement in jail to wit: Section 15.01 of the Penal Code, in that the said child did, then and there, with specific intent to commit the offense of Aggravated Assault, do an act, to wit: pick up a knife, which amounted to more than mere preparation that tended but failed to effect the commission of the offense intended.

The question then becomes what constitutes an act that is "more than mere preparation" in accordance with the criminal attempt statute. The law of criminal attempt does not require that every act short of actual commission of the offense be accomplished. Santellan v. State, 939 S.W.2d 155, 163 (Tex.Crim.App.1997). There is necessarily a gray area between conduct that is clearly no more than mere preparation and conduct that constitutes the last proximate act prior to actual commission of the offense. Come v. State, 82 S.W.3d 486, 489 (Tex.App.-Austin 2002, no pet.) (citing McCravy v. State, 642 S.W.2d 450, 460 (Tex.Crim.App.1982) (op. on

reh'g)). Whether conduct falling in that gray area amounts to more than mere preparation must be determined on a case-by-case basis. *Id.* (citing *Gibbons v. State*, 634 S.W.2d 700, 707 (Tex.Crim.App. [Panel Op.] 1982)).

The Court of Criminal Appeals has stated that “[w]hile simple acquisition and possession of a weapon would, in most situations, be preparation, putting that weapon to use to inflict injuries clearly goes beyond preparation.” *Hart v. State*, 581 S.W.2d 675, 678 (Tex.Crim.App.1979). “Use” of a deadly weapon means that a deadly weapon must be “utilized, employed, or applied in order to achieve its intended result,” the result being “the commission of a felony offense or during immediate flight therefrom.” *Coleman v. State*, 145 S.W.3d 649, 652 (Tex.Crim.App.2004) (quoting *Patterson v. State*, 769 S.W.2d 938, 941 (Tex.Crim.App.1989)). “Use” could mean “any employment of a deadly weapon, even simple possession, if such possession facilitates the associated felony.” *Id.* To “exhibit” a weapon, however, requires a weapon to be “consciously shown, displayed, or presented to be viewed.” *Id.*

Viewing the evidence in a light most favorable to the judgment and in a neutral light, we find that the evidence was legally and factually sufficient for the trial court to determine that picking up the knife constituted more than mere preparation for V.R. to commit the offense of aggravated assault by threat. Relevant to this determination are the facts that (1) earlier Marks had observed V.R. put the knife in the trunk; (2) immediately prior to picking up the knife, V.R. was out of control, yelling and physically shoving his mother out of the way in order to force his way out of her vehicle; (3) a report was made to the police that a threat to kill a person with a knife had been made by a young Hispanic male; and (4) V.R.'s acts in first going to open the trunk from the inside of the car and proceeding to the trunk and reaching in to pick up the knife that Marks already knew was in the trunk. Neither Marks nor V.R.'s mother wanted to pursue charges against V.R.

**Conclusion:** The trial court, as the fact-finder, was free to believe or disbelieve any or all of the testimony of the witnesses. See *Lancon v. State*, 253 S.W.3d 699, 707 (Tex.Crim.App.2008). Due deference must be given to the fact-finder's determinations concerning the weight and credibility of the evidence, and reversal of those determinations is appropriate only to prevent the occurrence of a manifest injustice, which is not present here. *Martinez v. State*, 129 S.W.3d 101, 106 (Tex.Crim.App.2004). We overrule issue one.

---

**EVIDENCE WAS FACTUALLY SUFFICIENT TO SUPPORT JUVENILE'S ADJUDICATION AS DELINQUENT BASED UPON COMMISSION OF OFFENSE OF DEADLY CONDUCT.**

[¶ 10-2-15. In the Matter of Z.J.R., MEMORANDUM, No. 04-09-00008-CR, 2010 WL 724398 \(Tex.App.-San Antonio, 3/3/10\).](#)

**Facts:** At trial, twenty-five-year-old Jimmy Arroyo testified that on July 12, 2008, at approximately 9:30 p.m., he was outside his mother's home, sitting on a concrete ditch with his brother, Mark Arroyo, and his friend, Alberto Hoffman. According to Jimmy, a teenage boy whom Jimmy later identified as Z.J.R. was walking up and down the street with a friend, I.O., in front of Jimmy's mother's home. Jimmy testified that he knew Z.J.R. and I.O. only by their nicknames. Jimmy heard Z.J.R. call Mark a “pussy.” According to Jimmy, the next time Z.J.R. walked by, Z.J.R. stated that he had his “nine” on him with a “fully loaded clip.”

Jimmy testified that around midnight, he decided to leave his mother's home and was backing his GMC Yukon out of the driveway when a Chevy Cobalt, driven by Z.J.R.'s brother, stopped in the middle of the street. Jimmy could see Z.J.R. sitting in the passenger seat of the Cobalt. Jimmy's brother, Mark, was standing on the sidewalk, and his friend, Alberto, was standing in the driveway. According to Jimmy, he said to Z.J.R.'s older brother, “There's three of y'all; there's three of us, and if y'all want to fight, we can fight.” Jimmy then saw Z.J.R. pull out a small handgun and point it at Mark. Jimmy turned on his bright headlights, and Z.J.R. pointed the gun in the air and fired. Jimmy testified that Z.J.R.'s brother then reversed the Cobalt a distance, stopped, revved the engine, and then raced the Cobalt toward the Yukon. At the last minute, the Cobalt swerved and clipped the front of the Yukon's bumper.

According to Jimmy, Alberto then ran to the home of Jimmy's in-laws, who lived behind his mother's home on the next street, to tell them to keep the children inside. Mark then got into the Yukon, and Jimmy circled to the next block where his in-laws lived. Alberto then got inside the Yukon, and Mark called 911. Jimmy testified that he drove around the neighborhood looking for the Cobalt in an attempt to retrieve the license plate number. As Jimmy was driving around the neighborhood, he heard three shots, one of which struck and shattered the back window of the Yukon. Jimmy turned quickly on another street in an attempt to head back toward his mother's home. As he approached an intersection, he saw the Cobalt headed toward him and heard more shots fire. He tried to turn left, but the Cobalt cut him off, causing the two vehicles to collide. Jimmy heard someone yell, “Shoot them!” He then saw Z.J.R. “kind of sitting on the door on his side, hanging over the car, point the gun and start [ ] shooting.” Jimmy testified that he and his brother ducked, and he backed up the Yukon in an attempt to escape. He then heard five to seven shots, one of which hit the front windshield on the driver's side and one of which hit the driver's side door while he was

backing up the Yukon. He then drove to a fast food restaurant where he, Mark, and Alberto waited for police to arrive.

Mark testified to the same sequence of events as his brother, Jimmy. He saw Z.J.R. shoot the gun into the air during their first encounter with the Cobalt. Mark then got into the Yukon and called 911. He was told by the dispatcher that the police needed the license plate number. Mark testified that as they were traveling down a street in the neighborhood, he heard about three shots, and then heard the fourth shot hit and shatter the back window of the Yukon. According to Mark, Jimmy then turned left on a street that forms a circle. At the next intersection, Mark saw the Cobalt again, heard two shots, and ducked. The Yukon then collided with the Cobalt. Mark testified that he then looked up and saw Z.J.R. "hanging out the window and start shooting." Thus, both Mark and Jimmy testified that Z.J.R. was the one who shot at them.

Similarly, Alberto testified that he saw Z.J.R. shoot at them. According to Alberto, during their first encounter with the Cobalt, he saw Z.J.R. in the passenger seat, heard him say, "I am going to shoot you," and then saw him point the gun at Mark. Alberto testified that when Jimmy flashed his headlights, Z.J.R. "snapped out of it and pointed the gun [in] the air and took one shot." When Alberto heard a shot go off, he ducked down behind some branches. Later, after warning Jimmy's family to get all the children inside, Alberto got into the Yukon with Jimmy and Mark so that they could get the license plate number of the Cobalt. Alberto testified that the Cobalt then "pulled up" behind the Yukon and three shots were fired. The third shot "blew out the rear window." According to Alberto, Jimmy then accelerated, trying to get away and back to his mother's home. However, before they could get back to Jimmy's mother's home, they collided with the Cobalt. Alberto testified that he could clearly see Z.J.R.:

[Z.J.R.] just had his whole body out and was pointing forward like that. He was getting a clear view of us to see [whom] he could shoot, and I could see him through the front window where he was at [sic], and he was pointing down and shooting at the vehicle.

Thus, Alberto, Jimmy, and Mark all testified that they clearly saw Z.J.R. fire the shots.

Z.J.R. testified in his own defense. According to Z.J.R., on the night of July 12, 2008, he went to his cousin's birthday party in Seguin where he met a man named "Eddie," who showed him a gun outside in a rural area. Z.J.R. testified that he had never fired a gun before, and that Eddie let him handle the gun and fire it into a bale of hay in the backyard of his cousin's home. He left the party with his brother, his brother's girlfriend

Heather, his friend I.O., and Eddie. Z.J.R. testified that they dropped Heather home first, and as they were returning to their subdivision, their car, a Chevy Cobalt, collided with a Yukon. Z.J.R. was sitting in the passenger seat and his brother was driving. Z.J.R. testified that after the cars collided, he heard gunshots, but did not know who fired them. According to Z.J.R., after hearing gunshots, he quickly got out of the car and ran away.

When asked who "Eddie" was, Z.J.R. testified that he had never met Eddie before that night, and that his brother, Heather, and I.O. did not know Eddie either. According to Z.J.R., Eddie was in the car because he had offered Z.J.R.'s brother \$30 for a ride to San Antonio.

**Held:** Affirmed

**Memorandum Opinion:** Z.J.R. argues that the evidence is factually insufficient because of testimony from the "one neutral witness," Cristina Vachon, a forensic scientist. Vachon testified that she found three microscopic particles containing lead, barium, and antimony on Z.J.R.'s right hand, and four particles on his left hand. According to Vachon, "[b]ased on morphology and elemental composition of the particles," Z.J.R. "may have discharged a firearm, handled a discharged firearm, or was in close proximity to a discharged firearm." In support of his sufficiency argument, Z.J.R. emphasizes Vachon's testimony that "a firearm will create more residue the more times it's fired." According to Z.J.R., this testimony is consistent with him firing a few gunshots at the party in Seguin and is not consistent with him firing a gun multiple times, as claimed by the State's witnesses.

In making this argument, however, Z.J.R. ignores much of Vachon's testimony. While Vachon did testify that a firearm will create more residue when fired multiple times, she explained she cannot determine how many times a gun was fired based on the number of particles found on a person's hands. According to Vachon, while she would anticipate more particles to be created, "[t]hat does not translate into more being found on the hands."

In addition to Vachon's testimony, Z.J.R. argues that Jimmy, Mark, and Alberto were not consistent in their testimony regarding the number of shots fired. Z.J.R. also points to the recordings of the calls made to 911, arguing that if Mark and Jimmy were being truthful, Mark would have identified Z.J.R. on the calls, as both he and Jimmy knew Z.J.R. by his nickname and knew where his friend I.O. lived. Z.J.R. also argues that unlike what Mark testified to, the 911 dispatchers never asked for a license plate number. Z.J.R. claims that the reason for these inconsistencies is "obvious." According to Z.J.R., "[t]he shots were not fired by Z.J.R., but by Eddie." Z.J.R. argues that such a "theory is consistent with the great

weight and preponderance of the evidence, while the theory that Z.J.R. fired the shots is not.”

Such credibility questions, however, are the province of the jury. Jimmy, Mark, and Alberto all testified that they saw Z.J.R. fire the gun. Z.J.R. testified that he was not the person who fired those shots.

**Conclusion:** When contradictory testimonial evidence turns on an evaluation of credibility and demeanor of the witnesses, we must defer to the jury. *See Johnson v. State*, 23 S.W.3d 1, 8 (Tex.Crim.App.2000). We, therefore, hold that the evidence is factually sufficient and affirm the trial court's judgment.

### WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

**IN A CERTIFICATION AND TRANSFER HEARING, THE FAILURE TO SERVE SUMMONS ON JUVENILE IN A TIMELY MANNER DEPRIVED THE JUVENILE COURT OF ITS JURISDICTION TO TRANSFER JUVENILE CASE TO THE DISTRICT COURT AND, THEREFORE, THE DISTRICT COURT NEVER ACQUIRED JURISDICTION OVER APPELLANT.**

[¶ 10-2-6. Maldonado v. State, MEMORANDUM, No. 07-09-00168-CR, 2010 WL 840814 \(Tex.App.-Amarillo, 3/12/10\).](#)

**Facts:** On November 7, 2007, the State filed a petition alleging that appellant had engaged in delinquent conduct. Prior to any adjudication of the allegations against appellant, the State filed a motion requesting that the juvenile court waive jurisdiction of appellant's case and transfer the matter to the 69th District Court of Dallam County, Texas. The State then issued a summons for appellant's parents, Dina Maldonado and Simon Maldonado, to appear on January 24, 2008 at 2:30 p.m. when the court would consider the matter of the discretionary transfer of appellant's juvenile case to the district court. The clerk's record reflects that Dina Maldonado was not served with the summons until January 29, 2008 at 4:26 p.m., some five days after the hearing. Appellant and his father, Simon Maldonado, were served at 2:21 p.m. on January 24, 2008, some nine minutes before the hearing. On January 24, 2008, the juvenile court entered an order transferring the matter to the district court for trial as an adult. Subsequently, appellant entered a plea of guilty and was granted deferred adjudication community supervision for a period of 10 years. Appellant timely filed this appeal.

**Held:** Reversed and remanded.

**Memorandum Opinion:** A juvenile proceeding is governed by Title 3 of the Texas Family Code. See Tex. Fam.Code Ann. tit. 3 (Vernon 2007). A voluntary transfer of a case from a juvenile court to a district court is

governed by section 54.02. Section 54.02(b) requires that the notice provisions found in other sections of the Code must be satisfied. Specifically, the requirements of section 53.07 must be met. See § 54.02(b). This provision requires that a summons be served on a person at least two days prior to the hearing in question. See § 53.07(a). The record reflects that none of the parties required to be served in the underlying juvenile action, prior to the transfer to district court, were served in a timely manner. The State has confessed this error in its letter brief filed with this Court. As a result of the failure to serve the summons in question in a timely manner, the juvenile court was deprived of its jurisdiction to transfer this matter to the district court and, therefore, the district court never acquired jurisdiction over appellant. See *Carlson v. State*, 151 S.W.3d 643, 646 (Tex.App.-Eastland 2004, no pet.); *Alaniz v. State*, 2 S.W.3d 451, 452 (Tex.App.-San Antonio 1999, no pet.). We sustain appellant's second issue.

**Conclusion:** Because the juvenile court did not have jurisdiction to transfer the case to the district court, we reverse the conviction of appellant and remand this matter to the juvenile court for further proceedings. Because of our resolution of appellant's second issue, we need not address appellant's first issue concerning the failure to record the transfer hearing.



# J STATE BAR OF TEXAS JUVENILE LAW SECTION

JUSTICE AND ADVOCACY FOR THE CHILDREN OF TEXAS

## MISSION STATEMENT

---

The Juvenile Law Section of the State Bar of Texas was created in 1987 to promote advocacy for the children of Texas by coordinating efforts to ensure competent and knowledgeable legal counsel within the juvenile justice system. The Juvenile Law Section strives to promote and improve the administration of justice in the field of juvenile law, by study, conferences, publication of reports and articles with respect to both legislation and administration and to that end to take such action as may be appropriate.

## NEWSLETTER SUBMISSIONS

---

If you would like to submit an article for inclusion in the Juvenile Law Section's Newsletter, please email it to our Newsletter Editor, [Associate Judge Pat Garza](#). The editor reserves the right to edit contributions for clarity and content.

## KEEPING YOUR EMAIL ADDRESS UPDATED

---

With the electronic distribution of the newsletter, it will be important for every Section member to keep an updated email address with the State Bar of Texas since that agency will distribute the newsletter quarterly via email on behalf of the Section. You may update your email address at [MyBarPage](#) of the State Bar's website. Please note that the Section will not sell or distribute your email address to anyone, including the State Bar's CLE Division

## COPYRIGHT AND DISCLAIMER

---

Copyright 2010 by Associate Judge Pat Garza on behalf of the Juvenile Law Section. All rights reserved. Members of the Juvenile Law Section may download, in electronic or print form, all or reasonable portions of the Juvenile Law Section Report including, but not limited to, any law articles or other documents made an integral part of this publication. Electronic storage and reproduction of materials shall be limited to personal use as allowed under the intellectual property doctrines of "fair use" and "fair dealing". All materials taken from a copyrighted source must be given proper credit and acknowledgement.

## EXTERNAL LINK DISCLAIMER

---

No endorsement is intended or made of any hypertext link, product, service or information either by its inclusion or exclusion from this page or site. While all attempts are made to ensure the correctness and suitability of information under our control and to correct any errors brought to our attention, no representation or guarantee can be made as to the correctness or suitability of that information or any linked information presented, referenced or implied. The Juvenile Law Section encourages each user to independently verify any and all information contained on this or other links and/or websites.

The inclusion of links from this site does not imply endorsement by the Juvenile Law Section and/or the State Bar of Texas. The Juvenile Law Section makes no endorsement, express or implied, of any links to or from its site nor is it responsible for the content or activities of any linked sites. Any questions should be directed to the administrator(s) of this or any other specific sites.