the YMCA TEXAS YOUTH & GOVERNMENT

ATTACHMENT 3

2016-2017 APPELLATE REFERENCE CASES AND AUTHORITIES

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SUPPRESSION CASES AND STATUTES

Texas Family Code Sec. 51.095. ADMISSIBILITY OF A STATEMENT OF A CHILD.

(a) Notwithstanding Section 51.09, the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if:
   1. the statement is made in writing under a circumstance described by Subsection (d) and:
      A. the statement shows that the child has at some time before the making of the statement received from a magistrate a warning that:
         i. the child may remain silent and not make any statement at all and that any statement that the child makes may be used in evidence against the child;
         ii. the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;
         iii. if the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and
         iv. the child has the right to terminate the interview at any time;
      B. and:
         i. the statement must be signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present, except that a magistrate may require a bailiff or a law enforcement officer if a bailiff is not available to be present if the magistrate determines that the presence of the bailiff or law enforcement officer is necessary for the personal safety of the magistrate or other court personnel, provided that the bailiff or law enforcement officer may not carry a weapon in the presence of the child; and
         ii. the magistrate must be fully convinced that the child understands the nature and contents of the statement and that the child is signing the same voluntarily, and if a statement is taken, the magistrate must sign a written statement verifying the foregoing requisites have been met;
      C. the child knowingly, intelligently, and voluntarily waives these rights before and during the making of the statement and signs the statement in the presence of a magistrate; and
      D. the magistrate certifies that the magistrate has examined the child independent of any law enforcement officer or prosecuting attorney, except as required to ensure the personal safety of the magistrate or other court personnel, and has determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights;
   2. the statement is made orally and the child makes a statement of facts or circumstances that are found to be true and tend to establish the child's guilt, such as the finding of secreted or stolen property, or the instrument with which the child states the offense was committed;
   3. the statement was res gestae of the delinquent conduct or the conduct indicating a need for supervision or of the arrest;

(b) This section and Section 51.09 do not preclude the admission of a statement made by the child if:
   1. the statement does not stem from interrogation of the child under a circumstance described by Subsection (d); or
   2. without regard to whether the statement stems from interrogation of the child under a circumstance described by Subsection (d), the statement is:
      A. voluntary and has a bearing on the credibility of the child as a witness; or
      B. recorded by an electronic recording device, including a device that records images, and is obtained:
         i. in another state in compliance with the laws of that state or this state; or
         ii. by a federal law enforcement officer in this state or another state in compliance with the laws of the United States.

(d) Subsections (a)(1) and (a)(5) apply to the statement of a child made:
   a. while the child is in a detention facility or other place of confinement;
   b. while the child is in the custody of an officer; or
   c. during or after the interrogation of the child by an officer if the child is in the possession of the Department of Family and Protective Services and is suspected to have engaged in conduct that violates a penal law of this state.

Texas Family Code Sec. 52.01. TAKING INTO CUSTODY; ISSUANCE OF WARNING NOTICE.

(a) A child may be taken into custody:
   1. pursuant to an order of the juvenile court under the provisions of this subtitle;
   2. pursuant to the laws of arrest;
   3. by a law-enforcement officer, including a school district peace officer commissioned under Section 37.081, Education Code, if there is probable cause to believe that the child has engaged in:
      A. conduct that violates a penal law of this state or a penal ordinance of any political subdivision of this state;
      B. delinquent conduct or conduct indicating a need for supervision; or

(b) The taking of a child into custody is not an arrest except for the purpose of determining the validity of taking him into custody or the validity of a search under the laws and constitution of this state or of the United States.

Texas Code of Criminal Procedure Art. 38.21. STATEMENT

A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed.

Texas Code of Criminal Procedure Art. 38.22. WHEN STATEMENTS MAY BE USED

Sec. 1. In this article, a written statement of an accused means a statement signed by the accused or a statement made by the accused in his own handwriting or, if the accused is unable to write, a statement bearing his mark, when the mark has been witnessed by a person other than a peace officer.

Sec. 2. No written statement made by an accused as a result of custodial interrogation is admissible as evidence against him in any criminal proceeding unless it is shown on the face of the statement that:

(a) the accused, prior to making the statement, either received from a magistrate the warning provided in Article 15.17 of this code or received from the person to whom the statement is made a warning that:
   1. he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
   2. any statement he makes may be used as evidence against him in court;
   3. he has the right to have a lawyer present to advise him prior to and during any questioning;
   4. if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and
   5. he has the right to terminate the interview at any time; and

(b) the accused, prior to and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights set out in the warning prescribed by Subsection (a) of this section.

Sec. 6. In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions. If the statement has been found to have been voluntarily made and held admissible as a matter of law and fact by the court in a hearing in the absence of the jury, the court must enter an order stating its conclusion as to whether or not the statement was voluntarily made, along with the specific finding of facts upon which the conclusion was based, which order shall be filed among the papers of the cause. Such order shall not be exhibited to the jury nor the finding thereof made known to the jury in any manner. Upon the finding by the judge as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof. In any case where a motion to suppress the statement has been filed and evidence has been submitted to the court on this issue, the court within its discretion may reconsider such evidence in his finding that the statement was voluntarily made and the same evidence submitted to the court at the hearing on the motion to suppress shall be made a part of the record the same as if it were being presented at the time of trial. However, the state or the defendant shall be entitled to present any new evidence on the issue of the voluntariness of the statement prior to the court's final ruling and order stating its findings.

Defendant was convicted in the 65th District Court, El Paso County, Edward S. Marquez, J., of two counts of capital murder, and was sentenced to death. Automatic appeal followed. The Court of Criminal Appeals, Mansfield, J., held that: (3) evidence established that defendant's confession was voluntary;

Affirmed.

OPINION

MANSFIELD, Judge.

An El Paso County jury found appellant, Steven Brian Alvarado, guilty of two counts of capital murder, to wit: the September 22, 1991, murders of Refugio Carmen Sustaita and her adult son, Manuel Sustaita.[FN1] At the punishment stage of appellant's trial, the jury answered affirmatively, as to each count, the special issues submitted to it under Article 37.071, § 2(b), [FN2] and it answered negatively, as to each count, the special issue submitted to it under Article 37.071, § 2(e).[FN3] The ***204** trial court then sentenced appellant to death on each count. Direct appeal to this Court was automatic. See Article 37.071, § 2(h). We will affirm the judgments of the trial court.

*****(Footnotes 1-3 removed)

Appellant argues fourteen points of error in his brief on appeal. We will address his evidentiary insufficiency points of error first and then address his remaining points in chronological order.

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*204 Martha Reyna testified that she had been a neighbor of Carmen and Manuel Sustaita on Wilshire Street in El Paso. She testified further that on September 23, 1991, she received a telephone call from Blanca Sustaita, who had tried without success to contact Carmen. At Blanca's urging, Reyna walked to the Sustaita residence and knocked on the door. There was no answer, so Reyna peered through the windows of the residence to determine whether anyone was at home. She saw Carmen's motionless body through a bedroom window and telephoned the police.

El Paso Police Officer Ernest Wade testified that police officers found Carmen and Manuel Sustaita's bodies at 10301 Wilshire Street in El Paso on September 23, 1991. According to Wade, the residence "appeared as [though] it had been ransacked," and "three different sets of ... bloody shoe prints" were seen leading away from the residence.

El Paso Police Officer Dale Fernandez testified that Manuel Sustaita's body was found ***205** just inside the entrance to the Sustaita residence. He also testified that a baggie of marihuana was found on Manuel Sustaita's person.

Blanca Sustaita testified that she was Carmen Sustaita's daughter and Manuel Sustaita's sister, and that she knew before their deaths that they were selling marihuana and cocaine out of their residence at 10301 Wilshire Street in El Paso.

Norma Nieto testified that she, too, was a daughter of Carmen Sustaita and a sister of Manuel Sustaita, and that she visited them at their residence on September 22, 1991. She testified further that she saw Manuel and appellant arguing at the Sustaita residence around 3:00 or 4:00 p.m. on that day.

Joshua Salcido testified that late on the evening of September 22, 1991, he went to David Cameron's residence in El Paso to visit Cameron. When Salcido arrived at the residence, he saw appellant, Cameron, and Augustin "Augie" Avila preparing to leave. They soon did leave, but Salcido remained behind to watch television. Appellant, Cameron, and Avila returned to the Cameron residence about 45 minutes later, covered with blood. They carried with them a small duffel bag containing three kitchen knives, a small quantity of marihuana and cocaine, and $80 in cash. The cocaine was divided among the four of them. While the cocaine was being divided, Avila, who was trembling, stated that he, Cameron, and appellant had "just took somebody out." Salcido then asked to whom Avila was referring, and Cameron, who was also trembling, responded that it had been "Manny and his mom." Appellant then said, "It felt fucking good." Salcido testified further that Cameron, Avila, and appellant placed their bloody clothes and knives into a white plastic trash bag, and that later that night, after a cousin of Salcido arrived at the Cameron residence, they all rode in a

car to Transmountain Road, where they dumped the trash bag.

Chris Carillo testified that late on the evening of September 22, 1991, he drove his car to the Cameron residence in response to a telephone call from his cousin, Joshua Salcido. After Carillo arrived at the residence, appellant, Salcido, and Cameron got into Carillo's car and all four "cruised around" El Paso, eventually finding their way to Transmountain Road, where they threw a bag off the side of the road. Later that night, while the four were still driving around, either Cameron or appellant stated that they had "fucked some people up"—which Carillo interpreted to mean they had killed some people—because an unnamed woman had cheated them in a drug deal.

El Paso Police Detective Joe Laredo testified that a police search of the area adjacent to Transmountain Road in late September 1991 turned up a plastic bag, some clothing, a box of baggies, and two kitchen knives.

Betty Ann Cranford testified that she was David Cameron's mother and that on September 25, 1991, she noticed that two kitchen knives were missing from the Cameron residence. She testified further that the knives found by police off Transmountain Road were identical to the knives that were missing from her home.

El Paso Police Detective Alfonso Marquez testified that on September 24, 1991, he and several police officers arrested appellant at a residence in El Paso for the murders of the Sustaitas. The officers apprehended appellant as he was attempting to flee out the back door of the residence. Appellant had several open wounds on both of his hands.

El Paso Police Detective Antonio Leyba testified that appellant gave a statement, which was reduced to written form, after he was arrested. The statement (State's exhibit number 126) [FN6] read, in relevant part, as follows:

> FN6. Appellant's written statement shows on its face that, prior to making the statement, he received the warning required by Article 38.22, § 2, and he knowingly, intelligently, and voluntarily waived the rights set out in the warning.

... I am 17 years of age. I am high school drop out. I last attended the 9th grade at Andress High School. At this time I am in the Crimes Against Persons office where I am under arrest for 2 counts of Capital Murder dealing with the murder of a friend of mine Manny whose last name I don't know and his mother who I also ***206** don't know her name.... I met Manny a short while ago I don't remember exactly when and I also don't remember when I found out that he dealt drugs.

On Sunday night Sept. 22, 1991 David I don't know his last name and Auggie I don't know his last name either decided to go to Manny's house to pay him some money that I owed him from a previous drug deal. All 3 of us went to Manny's house to pay him the money and I was going to make another purchase. I don't remember who knocked on the door. Manny answered the door and he let all 3 of us in. I then gave him the money for the previous deal. Manny then started to complain that the money wasn't the right amount. Manny told me This isn't the right amount of money. I then told him fuck you that is the amount that I always pay. I then gave him the money to the other purchase. Rather I gave him the money all at once. Manny then said I'm going to keep all of your money. I then told him no man fuck you just give me my money. Manny then said no I'm going to fuck you up. *Manny then pulled out a knife from the back of his waist. He then proceeded to come towards me with the weapon. I defended myself by using his own weapon against him. He cut his own throat. I then got the knife away from him and I started to stab him.* I don't remember how many times I stabbed him but I know that it was more than once. *I don't know what happened to the mother but I remember seeing her laying floor unconscious. All of us then started to look for the stuff. By stuff I mean anything worth of value that you can carry.* I didn't take anything because I didn't find anything. I looked for the stuff just here and there. All 3 of us left the house and walked to David's house. I know my way around but I don't pay attention to the streets.

When we got to David's house I then noticed that they had some stuff from Manny's house. I believe that Auggie was the one who had it. We then washed up and took our clothes off because they had blood on them. We then just kicked back. Later a friend of our who I don't know what

his name is came over and picked up our stuff which was our clothes that had the blood on them. He then took with the clothes and David and I stayed there. I believe that Auggie went home. We stayed there until the guy who took our clothes came back. Then we went with him in his car. We just went cruising, Auggie was no longer with us when we were in the car. We stayed all night in the car.

On yesterday Tuesday afternoon I called my girlfriend Joelynn and told her that we were in a bit of a jam and asked her if we could stay there with her since we didn't have a place to stay. She asked her mom then said that we could stay there. David and I then went to her house. I don't remember her address. We stayed there until the police arrived placed us under arrest. I would like to say that Angel (Joelynn) nor her mom knew what was going on. The police took me to the station ... and then I decided to give this account of what happened on Sunday night at Mannys house. *I want the record to show that I acted only in self defense.*

I want to say that even though this are not my exact words it is an accurate account of what ... happened on Sept. 22, 1991 at Manny's house.

/s/ Steve Alvarado

(Emphasis added; all errors in original.)

Finally, El Paso County Chief Medical Examiner Juan Contin testified that on September 24, 1991, he performed autopsies on the bodies of Carmen and Manuel Sustaita. He testified further that Carmen's body had sustained eighteen knife wounds, three of which had been fatal, and that Manuel's body had sustained 34 knife wounds, seventeen of which had been fatal. He also testified that Manuel was a "well-nourished, muscular male that ... weighed 174 pounds," and that Manuel's neck wounds could not have been self-inflicted.

[1][2][3][4] Consistent with the Fourteenth Amendment guarantee of due process of law, no person may be convicted of a criminal offense and denied his liberty unless his criminal responsibility for the offense is ***207** proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072–73, 25 L.Ed.2d 368 (1970). Our state statutory law has the same requirement. Tex.Penal Code § 2.01; Tex.Code Crim.Proc. art. 38.03. Because the jury is the sole judge of the weight and credibility of the evidence at a criminal trial, our task as an appellate court is to consider all the record evidence in the light most favorable to the jury's verdict, and to determine whether, based on that evidence and all reasonable inferences therefrom, any rational jury could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). If, given all the evidence, a rational jury would necessarily entertain a reasonable doubt as to the defendant's guilt, the due process guarantee requires that we reverse and order a judgment of acquittal. *Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex.Crim.App.1992), cert. denied, 507 U.S. 975, 113 S.Ct. 1422, 122 L.Ed.2d 791 (1993). Appellate judges are not factfinders, however; we may not re-evaluate the weight and credibility of the record evidence. Rather, we act only "as a final, due process safeguard ensuring ... the rationality of the factfinder." *Moreno v. State*, 755 S.W.2d 866, 867 (Tex.Crim.App.1988).

[5] Based on the evidence at trial, a rational jury could have found beyond a reasonable doubt that: (1) on September 22, 1991, appellant, Cameron, and Avila armed themselves with kitchen knives and went to the Sustaita residence with the intent of killing the Sustaitas in retaliation for the Sustaitas' cheating in a drug deal; (2) appellant, Cameron, and Avila did in fact kill the Sustaitas that night in the Sustaita residence; (3) appellant himself intentionally and unjustifiably killed Manuel; and (4) appellant, if he did not directly cause the death of Carmen Sustaita, was nonetheless criminally responsible for her death as a party because his killing of Manuel Sustaita was done in part to prevent Manuel from defending her. Thus, a rational jury could have found that appellant committed an act (the killing of Manuel) with the intent to promote or assist the intentional killing of Carmen. See *Martinez v. State*, 763 S.W.2d 413, 420, n. 5 (Tex.Crim.App.1988); *Webb v. State*, 760 S.W.2d 263, 268–269 (Tex.Crim.App.1988), cert. denied, 109 S.Ct. 3202 (1989); Tex.Penal Code § 7.02(a)(2). A rational jury, as the sole judge of the weight and credibility of the evidence, could have rejected appellant's assertion in his written statement that he acted only in self-defense. We overrule point of error number seven.

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***210** In point of error number one, appellant argues that the trial court violated his Fourteenth Amendment right to due process of law when it denied his pretrial motion to suppress his written statement. Appellant argues that his statement was not given to the El Paso police voluntarily:

> [I]t is clear that [when appellant gave his statement, he] was intoxicated and mumbling, and probably, as it was stated in the evidence [at the suppression hearing], "higher than a kite." Obtaining a confession in a serious matter in this way, by filling in blanks in a computerized [statement] form, wholly misstating the date [on the form], and forcing a man who was obviously intoxicated and overborne by the whole process to submit to this process, is fundamentally wrong and renders any statement involuntary and inadmissible.

The State responds that "[t]he evidence [adduced at the suppression hearing] supports the trial court's finding that appellant ... voluntarily ... gave a confession without being under the influence of intoxicants."

The record reflects that the trial court conducted a suppression hearing before trial and that several witnesses, including appellant, testified. El Paso Police Officer Saul Medrano testified that he participated in the arrest of appellant at an El Paso residence on September 24, 1991. He testified further that, at the time of the arrest, he gave appellant the *Miranda* [FN7] warnings, that appellant appeared to understand those warnings, and that appellant appeared intoxicated with alcohol but still "very coherent as to what was happening." Medrano also testified that he transported appellant to the police station that night, that he remained with appellant throughout the interview process, that appellant was not stripped of his clothing or beaten or threatened or promised anything in return for his statement, and that appellant never requested a lawyer.

> FN7. See *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

El Paso Police Detective Antonio Leyba testified that he interviewed appellant and took the statement in question from him at an El Paso police station late on the evening of September 24, 1991. Leyba testified further that he gave the *Miranda* warnings to appellant at the start of the interview, that appellant appeared to understand those warnings, that appellant was "coherent" and ***211** did not appear intoxicated at any time during the interview, that appellant was not threatened or otherwise coerced or promised anything in return for his statement, and that appellant never requested a lawyer. Leyba also testified that he typed appellant's statement on a "fill-in-the-blank" form using a word processor, and that appellant's statement was erroneously dated "April 26, 1989" because of a software error.

El Paso Detention Officer Lance Brown testified that when appellant was brought to the El Paso County Jail after his arrest, his eyes "looked weird" and his behavior "wasn't normal." Brown testified further, however, that appellant appeared to understand what was said to him and what was occurring around him.

Jolene Martinez [FN8] testified that she was with appellant at the time of his arrest and that appellant was intoxicated with marihuana at that time. She also testified, however, that appellant understood what was said to him and what was happening around him.

> FN8. In appellant's written statement (State's exhibit number 126), he referred to Martinez erroneously as "Joelynn."

Finally, appellant testified that he was intoxicated with marihuana at the time of his arrest and interview, and that because of the intoxication he did not fully understand what was said to him or what was happening around him. He testified further that, during the interview process, police officers attempted to intimidate him by cursing at him, stripping him to his underwear, striking him in the face with a boot, refusing his repeated requests for a lawyer, and forcing him to sit on a cold, steel desk. He also testified that the officers promised to "tell the judge to take it easy on [him]" if he would give a statement.

After the suppression hearing concluded, the trial court found, as matters of fact, that there was "nothing coercive in the way that the confession was taken," that "[t]he statement ... was freely and voluntarily made," that "[t]he defendant was not

under a disability that rendered him incapable of waiving his rights," and that "[t]he defendant did not invoke his right to an attorney from the time of arrest through the taking of the statement."

Once a defendant moves to suppress a statement on the ground of "involuntariness," the due process guarantee requires the trial court to hold a hearing on the admissibility of the statement outside the presence of the jury. *Jackson v. Denno*, 378 U.S. 368, 380, 84 S.Ct. 1774, 1782–83, 12 L.Ed.2d 908 (1964). Article 38.22, § 6 and Texas Rule of Criminal Evidence 104(c) have the same requirement. At the hearing, the trial court is the sole judge of the weight and credibility of the evidence, and the trial court's finding may not be disturbed on appeal absent a clear abuse of discretion. *Alvarado v. State*, 853 S.W.2d 17, 23 (Tex.Crim.App.1993). The burden of proof at the hearing on admissibility [FN9] is on the prosecution, which must prove by a preponderance of the evidence that the defendant's statement was given voluntarily. *Colorado v. Connelly*, 479 U.S. 157, 169, 107 S.Ct. 515, 523, 93 L.Ed.2d 473 (1986) (citing *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972)).[FN10] A statement is "involuntary," for the purposes of federal due process, only if there was official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker. *Alvarado v. State*, 853 S.W.2d at 19, n. 4; *Smith v. State*, 779 S.W.2d 417, 427 (Tex.Crim.App.1989). "Absent [coercive] police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Colorado v. Connelly*, 479 U.S. at 164, 107 S.Ct. at 520.

> FN9. No evidence regarding the voluntariness of appellant's statement was submitted at the guilt/innocence stage of trial. Had such evidence been submitted, the trial court would have been required to instruct the jury in accordance with Article 38.22, § 6.
>
> FN10. Appellant does not argue, and therefore we have no occasion to consider, whether a higher standard of proof was required as a matter of state law. See *Griffin v. State*, 765 S.W.2d 422, 429 n. 13 (Tex.Crim.App.1989).

The record evidence supports the trial court's finding that no official, coercive conduct***212** occurred with respect to the taking of appellant's statement. Therefore, we discern no abuse of discretion and overrule point of error number one.

***Bram v. U.S.*, 168 U.S. 532, 18 S.Ct. 183 (1897).**

In Error to the Circuit Court of the United States for the District of Massachusetts.

Mr. Justice WHITE delivered the opinion of the court.

This writ of error is prosecuted to a verdict and sentence thereon, by which the plaintiff was found guilty of murder, and condemned to suffer death. The homicide was committed on board the American ship Herbert Fuller, While on the high seas, bound from Boston to a port in South America. The accused was the first officer of the ship, and the deceased, of whose murder he was convicted, was the **184 master of the vessel. The bill of exceptions, after stating the sailing of the vessel from Boston on the 2d of July, 1896, with a cargo of lumber, gives a general summary of the facts leading up to and surrounding the homicide, as follows:

'She had on board a captain, Charles I. Nash; Bram, the defendant; a second mate, August W. Blomberg; a steward; and six seamen; also the captain's wife, Laura A. Nash, and one passenger, Lester H. Monks.

'The vessel proceeded on her course towards her port of destination until the night between July 13th and July 14th. On that night, at 12 o'clock, the second mate's watch was relieved by the mate's watch, of which Bram, the defendant, was *585 the

officer in charge. The captain, his wife, the passenger, Monks, and the first mate and the second mate, all lived in the after-cabin, occupying separate rooms. * * * The crew and the steward slept forward in the forward house.

'When the watch was changed at midnight, Bram, the defendant, took the deck, the seamen Loheac and Perdok went forward on the lookout, and Charles Brown (otherwise called Justus Leopold Westerberg, his true name) took the wheel, where it was his duty to remain till two o'clock, at about which time he was relieved by Loheac. The second mate went to his room and the seamen of his watch to their quarters at twelve midnight, and there was no evidence that any of them or the steward appeared again till daylight.

'The passenger, Monks, who occupied a room on the starboard side of the cabin, between the chart room where the captain slept and the room on the forward starboard side where Mrs. Nash slept, with doors opening from the passenger's room into both the chart room used by the captain as his room and that of Mrs. Nash, was aroused not far from two o'clock (the exact time is not known, as he says) by a scream, and by another sound, characterized by him as a gurgling sound. He arose, went to the captain's room, and found the captain's cot overturned, and the captain lying on the floor by it. He spoke, but got no answer; put his hand on the captain's body, and found it damp or wet. He then went to Mrs. Nash's room; did not see her, but saw dark spots on her bedding, and suspected something wrong. He went on deck, and called the mate, the defendant, telling him the captain was killed. Both went below, took down the lantern hanging in the main cabin, burning dimly, turned it up, and went through the captain's room to the passenger's room, and the passenger there put on a shirt and pantaloons. They then both returned to the deck, the mate on the way stopping a brief time in his own room. Bram and Monks remained talking on deck till about daybreak, when the steward was called, and told what had happened. Up to this time no call had been made for the second mate, nor had any one visited his room. Later it was found that Captain Nash, his wife, and *536 Blomberg, the second mate, were all dead, each with several wounds upon the head, apparently given with a sharp instrument, like an ax, penetrating the skull, and into the substance of the brain; and the second mate lying on his back, with his feet crossed, in his berth; Mrs. Nash in her bed, in her room, and at the back side of the bed; and Captain Nash in his room, as already stated.

'The whole crew was called at or about daylight, and were informed of the deaths.

'The bodies were removed from the cabin, and placed in the jolly boat, and the boat was towed astern to Halifax. The cabin was then locked, Bram taking the keys, and it remained locked till the vessel reached Halifax.

'At first, after the discovery of the murders, there was some hesitancy as to where the vessel should go. At the defendant's suggestion, she was headed to go to Cavenne, in French Guiana; but the plan was changed, and she steered for Halifax, Nova Scotia, where she arrived July 21st, and was taken possession of by the local authorities, at the instance of the consul general of the United States.

'At first, after the discovery of the murders, Bram, on whom had devolved the command of the ship, made Brown chief mate and Loheac second mate.

'No blood or spots of blood were ever discovered on the person or the clothing of any person on board, nor did anything direct suspicion to any one.

'In a day or two, suspicion having been excited in respect to the seaman Brown, the crew, under the supervision of Bram, seized him, he not resisting, and put him in irons. All the while the officers and seamen remained on deck. Bram navigated the ship until Sunday before they reached Halifax, on Tuesday, and after the land of Nova Scotia was in sight, when, Brown having stated to his shipmates, or some of them, that he saw into the cabin through a window in the after-part and on the starboard side of the house, and saw Bram, the mate, kill the captain, in consequence of this statement of Brown, the crew, led by the steward, suddenly overpowered the mate, and put him in irons, he making no resistance, but *537 declaring his innocence. Bram and Brown were both carried into Halifax in irons.'

The bill of exceptions further states that, when the ship arrived at Halifax, the accused and Brown were held in custody by the chief of police at that place, and that, while in such custody, the accused was taken from prison to the office of a detective,

and there questioned, under circumstances to be hereafter stated. Subsequently to this occurrence at Halifax, all the officers, the crew, and the passenger were examined before the American consul, and gave their statements, which were reduced to writing and sworn to. They were thereafter, at the request of the American consul, sent to Boston, where the accused was indicted for the murder of Nash, the captain, **185 of Mrs. Nash, and the second mate, Blomberg. The trial and the conviction now under review related to the first of these charges. The errors which are here assigned as grounds for reversal are more than 60 in number, and are classified by the counsel for the accused as follows: (a) Questions raised preliminary to the trial; (b) questions raised during the trial; (c) questions raised in connection with two motions for a new trial.

We first examine the error relied on which seems to us deserving of the most serious consideration. During the trial, a detective, by whom the accused was questioned while at Halifax, was placed upon the stand as a witness for the prosecution, for the purpose of testifying to the conversation had between himself and the accused at Halifax, at the time and place already stated. What took place between the accused and the detective at the time of the conversation, and what occurred when the witness was tendered in order to prove the confession, is thus stated in the bill of exceptions:

'Nicholas Power, of Halifax, called by the government, testified that he was connected with the police department of Halifax, and had been for thirty-two years, and for the last fifteen years of that time as a detective officer; that after the arrival of the Herbert Fuller at Halifax, in consequence of a conversation with Charles Brown, he made an examination of Bram, the defendant, in the witness' office, in the city hall *538 at Halifax, when no one was present besides Bram and the witness. The witness testified that no threats were made in any way to Bram, nor any inducements held out to him.

'The witness was then asked: 'What did you say to him and he to you?'

'To this the defendant's counsel objected. The defendant's counsel was permitted to cross-examine the witness before the court ruled upon the objection, and the witness stated that the conversation took place in his office, where he had caused the defendant, Bram, to be brought by a police officer; that up to that time the defendant had been in the custody of the police authorities of Halifax, in the custody of the superintendent of police, John O'Sullivan; that the witness asked that the defendant should be brought to his office for the purpose of interviewing him; that at his office he stripped the defendant, and examined his clothing, but not his pockets; that he told the defendant to submit to an examination, and that he searched him; that the defendant was then in custody, and did everything the witness directed him to do; that the witness was then a police officer, acting in his official capacity; that all this took place before the defendant had been examined before the United States consul; and that the witness did not know that the local authorities had at that time taken any action, but that the defendant was held for the United States,-for the consul general of the United States.

'The witness answered questions by the court as follows:

"You say there was no inducement to him in the way of promise or expectation of advantage?

"A. Not any, your honor.
"Q. Held out?
"A. Not any, your honor.
"Q. Nor anything said in the way of suggestion to him that he might suffer if he did not,-that it might be worse for him?
"A. No, sir; not any.
"Q. So far as you were concerned, it was entirely voluntary?
"A. Voluntary, indeed.

*539 "Q. No influence on your part exerted to persuade him one way or the other?

"A. None whatever, sir; none whatever.'

'The defendant then renewed his objection to the question what conversation had taken place between Bram and the witness, for the following reasons: That, at the time, the defendant was in the custody of the chief of police at Halifax; that the witness, in an official capacity, directed the police authorities to bring the defendant as a prisioner to his private office, and there proceeded to take extraordinary liberties with him. He stripped him. The defendant understood that he was a prisoner,

and he obeyed every order and direction that the witness gave. Under these circumstances, the counsel submitted that no statement made by the defendant while so held in custody, and his rights interfered with to the extent described, was a free and voluntary statement, and no statement as made by him bearing upon this issue was competent.

'The objection was overruled, and the defendant excepted on all the grounds above stated, and the exceptions were allowed.

'The witness answered as follows:

"When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies.

"Q. Anything further said by either of you?

"A. No; there was nothing further said on that occasion.'

*540 'The direct examination of this witness **186 was limited to the interview between the witness and the defendant, Bram.

'On cross-examination of the witness Power, he testified that, at the time of the above-stated examination, he took possession of a pair of suspenders belonging to the defendant, and kept the same in his office until the prisoners were coming to Boston (the whole crew and the passenger were imprisoned at Halifax, and sent as prisoners to Boston), when he handed them over to the Halifax superintendent of police, and they were sent to Boston, with other property of the defendant.

'Defendant's counsel, upon the ground of showing interest on the part of the witness, then asked: 'What other articles belonging to the defendant did you take possession of at that time?'

'This line of inquiry was objected to by the district attorney, on the ground that the matter was not opened on the direct examination, and the defendant could call the witness as part of his case if he saw fit. The court excluded the inquiry, ruling that it was not proper cross-examination, and did not tend to show interest, and the defendant duly excepted, and the exception was allowed.'

The contention is that the foregoing conversation, between the detective and the accused, was competent only as a confession by him made; that it was offered as such; and that it was erroneously admitted, as it was not shown to have been voluntary. The question thus presented was manifestly covered by the exception which was taken at the trial. When it was proposed to examine the detective officer as to the conversation had by him with the accused, objection was duly made. The court thereupon allowed the officer to be examined and cross-examined as to the circumstances attending the conversation which it was proposed to offer as a confession. When this examination was concluded, the accused renewed his objection, and his exception to the admissibility of the conversation was allowed, and regularly noted. The witness then proceeded to give the conversation. To say that under these circumstances the objection which was twice presented *541 and regularly allowed should have been renewed at the termination of the testimony of the witness would be pushing to an unreasonable length the salutary rule which requires that exceptions be taken at the trial to rulings which are considered erroneous, and the legality of which are thereafter to be questioned on error. There can be no doubt that the manner in which the exception was allowed and noted fully called attention to the fact that the admission of the conversation was objected to because it was not voluntary, and the overruling of this objection is the matter now assigned as error here. Indeed, in the argument at bar no contention was made as to the sufficiency and regularity of the exception. It is manifest that the sole ground upon which the proof of the conversation was tendered was that it was a confession, as this was the only conceivable hypothesis upon which it could have been legally admitted to the jury. It is also clear that, in

determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt. Having been offered as a confession, and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot, on the one hand, offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand, for the purpose of avoiding the consequence of the error caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial, because it did not tend to prove guilt. The principle on the subject is thus stated in a note to section 219 of Greenleaf on Evidence: 'The rule excludes not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another or a refusal to confess. Rex v. Tyler, 1 Car. & P. 129; Rex v. Enoch, 5 Car. & P. 539. See further, as to the object of the rule, Rex v. Court, 7 Car. & P. 486, per Littledale, J.; People v. Ward, 15 Wend. 231.' Nor from the fact that in Wilson v. U. S., 162 U. S. 621, 16 Sup. Ct. 895, *542 mention was made of the circumstance that the statement of the accused was a mere denial of guilt, accompanied with exculpatory explanations, does the decision in that case conflict with the principle we have just stated. The ruling there made that error to the prejudice of the accused did not arise from the admission of the statement there considered was based, not alone upon the nature of the statement, but upon 'the evidence of its voluntary character, the absence of any threat, compulsion, or inducement, or assertion or indication of fear, or even of such influence as the administration of an oath has been supposed to exert.' 162 U. S. 624, 16 Sup. Ct. 900.

The contradiction involved in the assertion that the statement of an accused tended to prove guilt, and therefore was admissible, and then, after procuring its admission, claiming that it did not tend to prove guilt, and could not therefore have been prejudicial, has been well stated by the supreme court of North Carolina (State v. Rorie [1876] 74 N. C. 148):

'But the State says this was a denial of guilt, and not a confession. It was a declaration which the State used to procure a conviction; and it is not for the State to say the declaration did not prejudice the prisoner's case. Why introduce it at all unless it was to lay a foundation for the **187 prosecution? The use which was made of the prisoner's statement precludes the State from saying that it was not used to his prejudice.'

In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the constitution of the United States commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' The legal principle by which the admissibility of the confession of an accused person is to be determined is expressed in the text-books.

In 3 Russ. Crimes (6th Ed.) 478, it is stated as follows:

'But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied *543 promises, however slight, nor by the exertion of any improper influence. * * * A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.'

And this summary of the law is in harmony with the doctrine as expressed by other writers, although the form in which they couch its statement may be different. 1 Greenl. Ev. (15th Ed.) § 219; Whart. Cr. Ev. (9th Ed.) § 631; 2 Tayl. Ev. (9th Ed.) § 872; 1 Bish. New Cr. Proc. § 1217, par. 4.

These writers but express the result of a multitude of American and English cases, which will be found collected by the authors and editors either in the text or in notes, especially in the ninth edition of Taylor, second volume, tenth chapter, and the American notes, following page 588, where a very full reference is made to decided cases. The statement of the rule is also in entire accord with the decisions of this court on the subject. Hopt v. Utah (1883) 110 U. S. 574, 4 Sup. Ct. 202; Sparf v. U. S. (1895) 156 U. S. 51, 55, 15 Sup. Ct. 273; Pierce v. U. S. (1896) 160 U. S. 355, 16 Sup. Ct. 321; and

Wilson v. U. S. (1896) 162 U. S. 613, 16 Sup. Ct. 895.

A brief consideration of the reasons which gave rise to the adoption of the fifth amendment, of the wrongs which it was intended to prevent, and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the amendment was but a crystalization when the amendment was adopted, and since expressed in the text writers and expounded by the adjudications, and hence that the statements on the subject by the text writers and adjudications but formulate the conceptions and commands of the amendment itself. In Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, attention was called to the intimate relation existing between the provision of the fifth amendment securing one accused against being compelled to testify against himself, and those of the *544 fourth amendment protecting against unreasonable searches and seizures; and it was in that case demonstrated that both of these amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change. In commenting on the same subject in Brown v. Walker, 161 U. S. 596, 16 Sup. Ct. 647, the court, speaking through Mr. Justice Brown, said:

'The maxim, 'Nemo tenetur seipsum accusare,' had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne, in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly imbedded in English as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law; so that *545 a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.'

There can be no doubt that long prior to **188 our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was imbedded in that system as one of its great and distinguishing attributes.

In Burrowes v. High Commission Court (1616) Bulst. 49, Lord Coke makes reference to two decisions of the courts of common law as early as the reign of Queen Elizabeth, wherein it was decided that the right of a party not to be compelled to accuse himself could not be violated by the ecclesiastical courts. Whatever, after that date, may have been the departure in practice from this principle of the common law (Tayl. Ev. § 886), certain it is that, without a statute so commanding, in Felton's Case (1628) 3 How. State Tr. 371, the judges unanimously resolved, on the question being submitted to them by the king, that 'no such punishment as torture by the rack was known or allowed by our law.'

Lord Hale died December 25, 1676. In the first volume of his Pleas of the Crown (1st Ed. p. 1736), treating of the subject of confessions in cases of treason, it is said, at page 304:

'That the confession before one of the privy council or a justice of the peace being voluntarily made, without torture, is sufficient as to the indictment on trial to satisfy the statute, and it is not necessary that it be a confession in court; but the

confession is sufficient if made before him that hath power to take an examination.'

In the second volume, at page 225, it is said:

'When the prisoner is arraigned, and demanded what he saith to the indictment, either he confesseth the indictment, or pleads to it, or stands mute, and will not answer.

'The confession is either simple, or relative in order to the attainment of some other advantage.

'That which I call a simple confession is, where the defendant,*546 upon hearing of his indictment, without any other respect, confesseth it, this is a conviction; but it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 27 Assiz. 40.

'If it be but an extrajudicial confession, tho it be in court, as where the prisoner freely tells the fact, and demands the opinion of the court whether it be felony, tho upon the fact thus shown it appear to be felony, the court will not record his confession, but admit him to plead to the felony 'Not guilty.' 22 Assiz. 71, and Stamf. P. C. lib. 2, c. 51, fol. 142b.'

In chapter 38 of volume 2, at page 284, after referring to the power of justices of the peace and coroners, under the statutes of Philip and Mary, to take examinations of accused persons, but not upon oath, and that the same might be read in evidence on the trial of the prisoner, it is said:

'But then (1) oath must be made either by the justice or coroner that took them, or the clerk that wrote them; that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination.

'(2) As to the examination of the prisoner, it must be testified that he did it freely, without any menace or undue terror imposed upon him; for I have known the prisoner disown his confession upon his examination, and hath sometimes been acquitted against such his confession. * * *'

Gilbert, in his treatise on Evidence (2d Ed., published in 1760), says, at page 139:

'* * * But, then, this confession must be voluntary, and without compulsion; for our law in this differs from the civil law; that it will not force any man to accuse himself; and in this we do certainly follow the law of nature, which commands every man to endeavor his own preservation; and therefore pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on.'

In Hawkins' Pleas of the Crown (6th Ed., by Leach, published in 1787, bk. 2, c. 31) it is said:

'Sec. 2. * * * And where a person upon his arraignment*547 actually confesses he is guilty, or unadvisedly discloses the special manner of the fact, supposing that it doth not amount to felony where it doth, yet the judges, upon probable circumstances, that such confession may proceed from fear, menace, or duress, or from weakness or ignorance, may refuse to record such confession, and suffer the party to plead not guilty.'

In section 3, c. 46, it is stated that examinations by the common law before a secretary of state or other magistrate for treason or other crimes not within the statutes of Philip and Mary, and also the confession of the defendant himself in discourse with private persons, might be given in evidence against the party confessing. A note (2) to this section, presumably inserted by the editor (see note to Gilham's Case, 1 Moody, 194, 195), reads as follows:

'The human mind, under the pressure of calamity, is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted (vide O. B. 1786, p. 387), is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.'

Although the English reports, prior to the **189 separation, are almost devoid of decisions applying the principles stated by Lord Hale, Hawkins, and Gilbert, both the opinion of Lord Mansfield in Rex

v. Rudd (1775) Cowp. 333, and that of Mr. Justice Wilson, some years after the separation, in Lambe's Case (1791) 2 Leach (4th Ed.) 552, make it certain that the rule as stated by Hawkins, Gilbert, and Hale was considered in the English courts as no longer open to question, and as one of the fundamental principles of the common law. Looking at the doctrine as thus established, it would seem plainly to be deducible that as the principle from which, under the law of nature, it was held that one accused could not be compelled*548 to testify against himself, was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes, the rule formulating the principle with logical accuracy came to be so stated as to embrace all cases of compulsion which were covered by the doctrine. As the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effect upon the mind,-that is, hope or fear,-so that, however diverse might be the facts, the test of whether the confession as voluntary would be uniform,-that is, would be ascertained by the condition of mind which the causes ordinarily operated to create. The well-settled nature of the rule in England at the time of the adoption of the constitution and of the fifth amendment, and the intimate knowledge had by the framers of the principles of civil liberty which had become a part of the common law, aptly explain the conciseness of the language of that amendment. And the accuracy with which the doctrine as to confessions as now formulated embodies the rule existing at common law, and imbedded in the fifth amendment, was noticed by this court in Wilson v. U. S., supra, where, after referring to the criteria of hope and fear, speaking through Mr. Chief Justice Fuller, it was said: 'In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort.' 162 U. S. 623, 16 Sup. Ct. 899.

In approaching the adjudicated cases for the purpose of endeavoring to deduce from them what quantum of proof, in a case presented, is adequate to create, by the operation of hope or fear, an involuntary condition of the mind, the difficulty encountered is that all the decided cases necessarily rest upon the state of facts which existed in the particular case, and therefore furnish no certain criterion, since the conclusion that a given state of fact was adequate to have produced an involuntary confession does not establish that the same result has been created by a different, although somewhat similar, condition*549 of fact. Indeed, the embarrassment which comes from the varying state of fact considered in the decided cases has given rise to the statement that there was no general rule of law by which the admissibility of a confession could be determined, but that the courts had left the rule to be evolved from the facts of each particular case. 2 Tayl. Ev. § 872[2]. And, again, it has been said that so great was the perplexity resulting from an attempt to reconcile the authorities that it was manifest that not only must each case solely depend upon its own facts, but that even the legal rule to be applied was involved in obscurity and confusion. Green v. State, 88 Ga. 516, 15 S. E. 10; State v. Patterson, 73 Mo. 695, 705; State v. Matthews, 66 N. C. 106, 109.

The first of these statements but expresses the thought that whether a confession was voluntary was primarily one of fact, and therefore every case must depend upon its own proof. The second is obviously a misconception, for, however great may be the divergence between the facts decided in previous cases and those presented in any given case, no doubt or obscurity can arise as to the rule itself, since it is found in the text of the constitution. Much of the confusion which has resulted from the effort to deduce from the adjudged cases what would be a sufficient quantum of proof to show that a confession was or was not voluntary has arisen from a misconception of the subject to which the proof must address itself. The rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that, from causes which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement when but for the improper influences he would have remained silent. With this understanding of the rule, we come to a consideration of the authorities.

By statutes enacted early in the second half of the sixteenth century (1 & 2 Phil. & M. c. 13, and 2 & 3 Phil. & M. c. 10), *550 justices of the peace were

directed, on accusations of felony, to 'take the examination of the said prisoner and information of them that bring him.' In 1655, the judges directed that the examination of prisoners should be without oath (Kel. 2), and the reason of this rule, Starkie, Ev. (2d Ed. p. 29), says, was that an examination under oath 'would be a species of duress, and a violation of the maxim that no one is bound to criminate himself.' The ruling of the judges in this regard was recognized in the statute of 7 Geo. IV. c. 64, which, although requiring **190 'information of witnesses' to be 'upon oath,' simply directed an 'examination' of the accused.

But, even where the examination was held without oath, it came to be settled by judicial decisions in England that, before such an examination could be received in evidence, it must appear that the accused was made to understand that it was optional with him to make a statement. Reg. v. Green (1833) 5 Car. & P. 322; Reg. v. Arnold (1838) 8 Car. & P. 621. The reason upon which this rule rested undoubtedly was that the mere fact of the magistrate's taking the statement, even though unaccompanied with an oath, might, unless he was cautioned, operate upon the mind of the prisoner to impel him involuntarily to speak. The judicial rule as to caution was finally embodied into positive law by the statute of 11 & 12 Vict. c. 42, where, by section 18, the magistrate was directed, after having read or caused to be read to the accused the depositions against him, to ask the accused: 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial.'

The English courts were frequently called upon to determine whether language used by a magistrate when about to take the examination of one accused tended to induce in the mind of the latter such hope or fear as to lead to involuntary mental action. In Reg. v. Drew (1837) 8 Car. & P. 140, and Reg. v. Harris (1844) 1 Cox, Cr. Cas. 106, though the accused had been cautioned not to say anything to prejudice himself, *551 the further statement, in substance, by the magistrate or his clerk, that what the prisoner said would be taken down, and 'would' be used for or against him at his trial, was held by Coleridge, J., to be equivalent to saying that what the prisoner chose to say might be used in his favor at the trial, and to be a direct inducement to make a confession, rendering the statement incompetent as evidence. Like rulings were also made in cases where similar assurances that the statement of the prisoner would be used were made to him by a police officer. Reg. v. Morton (1843) 2 Moody & R. 514, and Reg. v. Farley (1844) 1 Cox. Cr. Cas. 76.

In cases where statements of one accused had been made to others than the magistrate upon an examination, differences of opinion arose among the English judges as to whether a confession made to a person not in a position of authority over the accused was admissible in evidence after an inducement had been held out to the prisoner by such person. Rex v. Spencer (1837) 7 Car. & P. 776. It was finally settled, however, that the effect of inducements must be confined to those made by persons in authority (Reg. v. Taylor [1839] 8 Car. & P. 734; Reg. v. Moore [1852] 2 Denison, Cr. Cas. 522), although, in the last cited case, while former precedents were followed, the court expressed strong doubts as to the wisdom of the restriction (2 Denison, Cr. Cas. 527). There can be no question, however, that a police officer, actually or constructively in charge of one in custody on a suspicion of having committed crime, is a person in authority within the rule; and, as this is so well established, we will not consider the adjudicated cases in order to demonstrate it, but content ourselves with a reference to the statement on the subject made in 3 Russ. Crimes, at page 501.

Many other cases in the English reports illustrate the application of the rule excluding statements made under inducement improperly operating to influence the mind of an accused person.

In Rex v. Thompson (1783) 1 Leach (4th Ed.) 291, a declaration to a suspected person that, unless he gave a more satisfactory account of his connection with a stolen bank note, his *552 interrogator would take him before a magistrate, was held equivalent to stating that it would be better to confess, and to have operated to lead the prisoner to believe that he would not be taken before a magistrate if he confessed. Baron Hotham, after commenting upon the evidence, in substance said that the prisoner was hardly a free agent at the time, as, though the language addressed to him scarcely amounted to a threat, it was certainly a strong invitation to the prisoner to confess, the manner in

which it had been expressed rendering it more efficacious.

In Cass' Case (1784) 1 Leach, 293, a confession induced by the statement of the prosecutor to the accused, 'I am in great distress about my irons. If you will tell me where they are, I will be favorable to you,' was held inadmissible. Mr. Justice Gould said that the slightest hopes of mercy held out to a prisoner to induce him to disclose the fact was sufficient to invalidate a confession.

In the cases following, statements made by a prisoner were held inadmissible, because induced by the language set out in each case: In Rex v. Griffin (1809) Russ. & R. 151, telling the prisoner that it would be better for him to confess. In Rex v. Jones, Id. 152, the prosecutor saying to the accused that he only wanted his money, and, if the prisoner gave him that, he might go to the devil, if he pleased. In Rex v. Kingston (1830) 4 Car. & P. 387, saying to the accused: 'You are under suspicion of this, and you had better tell all you know.' In Rex. v. Enoch (1833) 5 Car. & P. 539, saying: 'You had better tell the truth, or it will lie upon you, and the man go free.' In Rex v. Mills (1833) 6 Car. & P. 146, saying: 'It is no use for you to deny it, for there is the man and boy who will swear they saw you do it.' In Sherrington's Case (1838) 2 Lewin, Cr. Cas. 123, saying: **191 'There is no doubt, thou wilt be found guilty: It will be better for you if you will confess.' In Rex v. Thomas (1833) 6 Car. & P. 353, saying: 'You had better split, and not suffer for all of them.' In Rex v. Simpson (1834) 1 Moody, 410, and Ryan & M. 410, repeated importunities by neighbors and relatives of the prosecutor, coupled with assurances to the *553 suspected person that it would be a good deal worse for her if she did not, and that it would be better for her if she did confess. In Rex v. Upchurch (1836) 1 Moody, 465, saying: 'If you are guilty, do confess. It will perhaps save your neck. You will have to go to prison. If William H. [another person suspected, and whom the prisoner had charged] is found clear, the guilt will fall on you. Pray, tell me if you did it.' In Reg. v. Croydon (1846) 2 Cox, Cr. Cas. 67, saying: 'I dare say you had a hand in it. You may as well tell me all about it.' In Reg. v. Garner (1848) 1 Denison, Cr. Cas. 329, saying: 'It will be better for you to speak out.'

In Reg. v. Fleming (1842) Arms., M. & O. 330, statements of a police officer suspected of having committed a crime, in answer to questions propounded by his superior in office, after the latter had warned the accused to be cautious in his answers, were held inadmissible. The court said: 'The prisoner and witness being both in the police force, the prisoner, as the witness admitted, might have conceived himself bound to tell the truth; and the caution was not of that nature which should make the confession of the prisoner admissible.'

In the leading case of Reg. v. Baldry (1852) 2 Denison, Cr. Cas. 430, after full consideration, it was held that the declaration made to a prisoner, who had first been cautioned that what he said 'would' be used as evidence, merely imported that such statement 'might' be used, and could not have induced in the mind of the prisoner a hope of benefit sufficient to lead him to make a statement. The cases of Reg. v. Drew, Reg. v. Harris, Reg. v. Morton, and Reg. v. Farley, heretofore referred to, were held to have been erroneously decided.

In the course of the argument, counsel for the prisoner cited and commented upon Cass' Case, Rex v. Thomas, Sherrington's Case and Rex v. Enoch, also heretofore referred to, as illustrating the doctrine that assuring the accused that it would be better for him to speak, or other intimation given of possible benefit, would invalidate a confession thus induced. After counsel had concluded his reference to these cases, Pollock, C. B., said (page 432): 'There is no doubt as to the application*554 of the rule in those cases, which are all familiar to the judges and to the bar.'

In the course of the opinion, subsequently delivered by him, Chief Baron Pollock said (page 442):

'A simple caution to the accused to tell the truth, if he says anything, it has been decided not to be sufficient to prevent the statement made being given in evidence; and although it may be put that, when a person is told to tell the truth, he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say anything, but, if he says anything, let it be true. It has been decided that that would not prevent the statement being received in evidence, by Littledale, J., in the case of Rex v. Court, 7 Car. & P. 486, and by Rolfe, B., in a case at Gloucester, Reg. v. Holmes, 1 Car. & K. 258; but, where the admonition to speak the truth

has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession was not receivable, the objectionable words being that it would be better to speak the truth, because they import that it would be better for him to say something. This was decided in the case of Reg. v. Garner, 1 Denison, Cr. Cas. 329. The true distinction between the present case and a case of that kind is that it is left to the prisoner a matter of perfect indifference whether he should open his mouth or not.'

In Reg. v. Moore (1852) 2 Denison, Cr. Cas. 523, also decided by the court of criminal appeal, an admonition to a person suspected of crime that she 'had better speak the truth,' was held not to vitiate a subsequent confession, because not made by a person in authority. Parke, B., delivering the opinion of the judges, said, in substance (page 526), that one element in the consideration of the question whether a confession ought to be excluded was 'whether the threat or inducement was such as to be likely to influence the prisoner,' and 'that if the threat or inducement was held out, actually or constructively, by a person in authority, it cannot be received, however slight the threat or inducement.'

*555 In Reg. v. Cheverton (1862) 2 Falc. & F. 833, a statement made by a policeman to a person in his custody, that 'you had better tell all about it; it will save you trouble,' was held to operate as a threat or inducement sufficient to render what was said by the prisoner inadmissible.

In Reg. v. Fennell (1881) 7 Q. B. Div. 147, the court for crown cases reserved referred approvingly to the statement of the rule contained in Russell on Crimes, and, 'upon all the decided cases,' held inadmissible a statement made, induced by the prosecutor saying to the prisoner in the presence of an inspector of police: 'The inspector tells me you are making housebreaking implements. If this is so, you had better tell the truth; it may be better for you.'

The latest decision in England on the subject of inducement, made by the court for crown cases reserved, is Reg. v. Thompson [1893] 2 Q. B. 12. At the trial a confession was offered in evidence, which had been made by the defendant before his arrest upon the charge of having embezzled funds of a certain corporation. Objection was interposed to its reception in evidence, on the ground that it had been made under the operation of an inducement **192 held out by the chairman of the company in a statement to a relative of the accused, intended to be and actually communicated to the latter, that 'it will be the right thing for Marcellus [the accused] to make a clean breast of it.' The evidence having been admitted, and the prisoner convicted, the question was submitted to the upper court whether the evidence of the confession was properly admitted. The opinion of the appellate court was delivered by Cave, J., and concurred in by Lord Coleridge, C. J., Hawkins, Day, and Wills, JJ. After stating and adopting the ruling of Baron Parke in Reg. v. Warringham, 2 Denison, Cr. Cas. 447, note, to the effect that it was the duty of the prosecutor to satisfy the trial judge that the confession had not been obtained by improper means, and that, where it was impossible to collect from the proof whether such was the case or not, the confession ought not to be received, the opinion referred approvingly to the declaration of Pollock, C. B., in Reg. v. Baldry, that the true ground of the *556 exclusion of statements not voluntary was that 'it would not be safe to receive a statement made under any influence or fear.' The court then quoted the rule laid down in Russell on Crimes as being a statement of the principles which had been restated and affirmed by the Lord Chief Justice in the Fennell Case, and added:

'If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask, is it proved affirmatively that the confession was free and voluntary? that is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible.'

After reviewing the evidence, and holding that, under the ruling of Pollock, C. B., in the Baldry Case, it was immaterial whether the statements made by the chairman were calculated to elicit the truth, and intimating that they tended to lead the prisoner to believe that it would be better for him to say something, the opinion concluded with deciding that, 'on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary,' the confession ought not to have been received.

While, as we have said, there is no question that a police officer having a prisoner in custody is a person in authority, within the rule in England, and, therefore, that any inducement by him offered, calculated to operate upon the mind of the prisoner, would render a confession as a consequence thereof inadmissible, there seems to be doubt in England whether the doctrine does not extend further, and hold that the mere fact of the interrogation of a prisoner by a police officer would per se render the confession inadmissible, because of the inducement resulting from the very nature of the authority exercised by the police officer, assimilating him in this regard to a committing or examining magistrate. 3 Russ. Crimes, p. 510, note t. In Reg. v. Johnson (1864) 15 Ir. C. L. 60, this subject was elaborately considered by the *557 Irish court of criminal appeal, seven of the judges writing opinions, and the majority concluding, on a full consideration of the English and Irish authorities, that a policeman was not such an official as would render per se any confession elicited by his questioning the prisoner inadmissible, although the fact of his questioning became an important element in determining whether inducement resulted from the language by him used. The English authorities, however, referred to in the above note to Russell on Crimes, are later in date than Reg. v. Johnson, although they emanate from nisi prius courts, and not from appellate tribunals. Whatever be the rule in this regard in England, however, it is certain that, where a confession is elicited by the questions of a policeman, the fact of its having been so obtained, it is conceded, may be an important element in determining whether the answers of the prisoner were voluntary. The attempt on the part of a police officer to obtain a confession by interrogating has been often reproved by the English courts as unfair to the prisoner, and as approaching dangerously near to a violation of the rule protecting an accused from being compelled to testify against himself. Berriman's Case (1854) 6 Cox, Cr. Cas. 388; Cheverton's Case (1862) 2 Falc. & F. 833; Mick's Case (1863) 3 Falc. & F. 822; Reagan's Case (1867) 17 Law T. (N. S.) 325; and Reason's Case (1872) 12 Cox, Cr. Cas. 228.

From this review it clearly appears that the rule as to confessions by an accused (leaving out of consideration the rule now followed in England restricting the effect of inducements, according as such inducements were or were not held out by persons in authority) is in England to-day what it was prior to and at the adoption of the fifth amendment, and that, while all the decided cases necessarily rest upon the state of facts which the cases considered, nevertheless the decisions as a whole afford a safe guide by which to ascertain whether in this case the confession was voluntary, since the facts here presented are strikingly like those considered in many of the English cases.

We come, then, to the American authorities. In this court the general rule that the confession must be free and voluntary-*558 that is, not produced by inducements engendering either hope or fear-is settled by the authorities referred to at the outset. The facts in the particular cases decided in this court, and which have been referred to, manifested so clearly that the confessions were voluntary that no useful purpose can be subserved by analyzing them. In this court also it has been settled that the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, **193 or was drawn out by his questions, does not necessarily render the confession involuntary; but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements of the prisoner were voluntary. Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202; Sparf v. U. S., 156 U. S. 51, 55, 15 Sup. Ct. 273. And this last rule thus by this court established is also the doctrine upheld by the state decisions.

In the various state courts of last resort the general rule we have just referred to, that a confession must be voluntary, is generally recognized, although in Indiana there is a statute authorizing confessions obtained by inducements to be given in evidence to the jury, with all the attending circumstances, except when made under the influence of fear produced by threats, while it is also provided that a conviction cannot be had by proof of a confession made under inducement, 'without corroborating testimony.' Rev. St. Ind. 1881, § 1802 (Rev. St. 1894, § 1871). And, in the Texas Code of Procedure (article 750) it is provided that confessions shall not be used against a prisoner at his trial 'if, at the time it was made, the defendant was in jail or other place of confinement, nor where he was in custody of an officer, unless such confession be made in the voluntary statement of the accused, taken before an examining court in accordance with law; or be made voluntarily, after

having been first cautioned that it may be used against him; or unless, in connection with such confession, he make statement of facts or of circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or instrument with which he states the offense was committed.'

*559 The English doctrine which restricts the operation of inducements solely to those made by one in authority has been adopted by some state courts, but disapproved of in others, as in Ohio. Spears v. State, 2 Ohio St. 583. Whether it is one which should be followed by this court in view of the express terms of the constitution need not be now considered, as it does not arise under the state of facts here presented. In some it is also held that the fact that the accused is examined on oath by a magistrate or coroner, or by a grand jury, with or without an oath, will per se exclude confessions, because of the influence presumed to arise from the authority of the examining officer or body. People v. McMahon (1857) 15 N. Y. 384, followed in People v. Mondon (1886) 103 N. Y. 211, 218, 8 N. E. 496; State v. Matthews (1872) 66 N. C. 106; Jackson v. State (1879) 56 Miss. 311, 312; State v. Clifford (1892) 86 Iowa, 550, 53 N. W. 299. This doctrine as to examining magistrates is in some states enforced by statutes somewhat similar in character to the English statutes. 2 Tayl. Ev. § 888, note 2.

In some of the states it has been held that where questions are propounded to a prisoner by one having a right to ask them, and he remains silent, where from the nature of the inquiries, if innocent, reply would naturally be made, the fact of such silence may be weigned by the jury. See authorities collected in Chamberlayne's note to 2 Tayl. Ev. p. 588[4], et seq.

Having stated the general lines upon which the American cases proceed, we will not attempt to review in detail the numerous decisions in the various courts of last resort in the several states treating of confessions in the divergent aspects in which that doctrine may have presented itself, but will content ourselves with a brief reference to a few leading and well-considered cases treating of the subject of inducements, and which are therefore apposite to the issue now considered.

In the following cases the language in each mentioned was held to be an inducement sufficient to exclude a confession or statement made in consequence thereof: In Kelly v. State (1882) 72 Ala. 244, saying to the prisoner: 'You have got your foot in it, and somebody else was with you. *560 Now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth.' In People v. Barrie, 49 Cal. 342, saying to the accused: 'It will be better for you to make a full disclosure.' In People v. Thompson (1890) 84 Cal. 598, 605, 24 Pac. 384, 386, saying to the accused: 'I don't think the truth will hurt anybody. It will be better for you to come out and tell all you know about it, if you feel that way.' In Berry v. U. S. (1893) 2 Colo. 186, 188, 203, advising the prisoner to make full restitution, and saying: 'If you do so, it will go easy with you. It will be better for you to confess. The door of mercy is open, and that of justice closed;' and threatening to arrest the accused and expose his family if he did not confess. In State v. Bostick (1845) 4 Har. (Del.) 563, saying to one suspected of crime: 'The suspicion is general against you, and you had as well tell all about it. The prosecution will be no greater. I don't expect to do anything with you. I am going to send you home to your mother.' In Green v. State (1891) 88 Ga. 516, 15 S. E. 10, saying to the accused: 'Edmund, if you know anything, it may be best for you to tell it;' or, 'Edmund, if you know anything, go and tell it, and it may be best for you.' In Rector v. Com. (1882) 80 Ky. 468, saying to the prisoner in a case of larceny: 'It will go better with you to tell where the money is. All I want is my money, and, if you will tell me where it is, I will not prosecute you hard.' In Biscoe v. State (1887) 67 Md. 6, 8 Atl. 571, saying to the accused: 'It will be better for you to tell the truth, and have no more trouble about it.' In Com. v. Nott (1883) 135 Mass. 269, saying to the accused: 'You had better own up. I was in the place when you took it. We have got you down fine. This is not the first you have taken. We have got other things against **194 you nearly as good as this.' In Com. v. Myers (1894) 160 Mass. 530, 36 N. E. 481, saying to the accused: 'You had better tell the truth.' In People v. Wolcott (1883) 51 Mich. 612, 17 N. W. 78, saying to the accused: 'It will be better for you to confess.' In Territory v. Underwood (1888) 8 Mont. 131, 19 Pac. 398, saying to the prisoner that it would be better *561 to tell the prosecuting witness all about it, and that the officer thought the prosecuting

witness would withdraw the prosecution, or make it as light as possible. In State v. York (1858) 37 N. H. 175, saying to one under arrest immediately before a confession: 'If you are guilty, you had better own it.' In People v. Phillips (1870) 42 N. Y. 200, saying to the prisoner: 'The best you can do is to own up. It will be better for you.' In State v. Whitfield (1874) 70 N. C. 356, saying to the accused: 'I believe you are guilty. If you are, you had better say so. If you are not, you had better say that.' In State v. Drake (1893) 113 N. C. 624, 18 S. E. 166, saying to the prisoner: 'If you are guilty, I would advise you to make an honest confession. It might be easier for you. It is plain against you.' In Vaughan v. Com. (1867) 17 Grat. 576, saying to the accused: 'You had as well fell all about it.'

We come, then, to a consideration of the circumstances surrounding, and the facts established to exist, in reference to the confession, in order to determine whether it was shown to have been voluntarily made. Before analyzing the statement of the police detective as to what took place between himself and the accused, it is necessary to recall the exact situation. The crime had been committed on the high seas. Brown, immediately after the homicide, had been arrested by the crew in consequence of suspicion aroused against him, and had been by them placed in irons. As the vessel came in sight of land, and was approaching Halifax, the suspicions of the crew having been also directed to Bram, he was arrested by them, and placed in irons. On reaching port, these two suspected persons were delivered to the custody of the police authorities of Halifax, and were there held in confinement, awaiting the action of the United States consul, which was to determine whether the suspicions which had caused the arrest justified the sending of one or both of the prisoners into the United States for formal charge and trial. Before this examination had taken place, the police detective caused Bram to be brought from jail to his private office; and, when there alone with the detective, he was stripped of his clothing, and either while the detective was in the act of so stripping him, or after he was *562 denuded, the conversation offered as a confession took place. The detective repeats what he said to the prisoner, whom he had thus stripped, as follows:

'When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.'"

The fact, then, is that the language of the accused, which was offered in evidence as a confession, was made use of by him as a reply to the statement of the detective that Bram's co-suspect had charged him with the crime; and, although the answer was in the form of a denial, it was doubtless offered as a confession, because of an implication of guilt which it was conceived the words of the denial might be considered to mean. But the situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrow any possible implication that his reply to the detective could have been the result of a purely voluntary mental action; that is to say, when all the surrounding circumstances are considered in their true relations, not only is the claim that the statement was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind.

It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that, if he remained silent, it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person; and it cannot be conceived that the converse impression would not also have naturally arisen that, by denying, there was hope of removing the suspicion from himself. If this must have been the state of mind of one situated as was the prisoner when the confession was made, how, in reason, *563 can it be said that the answer which he gave, and which was required by the situation, was wholly voluntary, and in no manner influenced by the force of hope or fear? To so conclude would be to deny the necessary relation of cause and effect. Indeed, the implication of guilt resulting from silence has been considered by some state courts of last resort, in decided cases, to which we have already made reference, as so cogent that they have held that where a person is accused of guilt, under circumstances which call upon him to make denial, the fact of his silence is competent evidence as

tending to establish guilt. While it must not be considered that, by referring to these authorities, we approve them, it is yet manifest that, if learned judges have deduced the conclusion that silence is so weighty as to create an inference of guilt, it cannot, with justice, be said that the mind of one who is held in custody under suspicion of having committed a crime would not be impelled to say something when informed by one in authority **195 that a co-suspect had declared that he had seen the person to whom the officer was addressing himself commit the offense, when otherwise he might have remained silent but for fear of the consequences which might ensue; that is to say, he would be impelled to speak either for fear that his failure to make answer would be considered against him, or in hope that, if he did reply, he would be benefited thereby. And these self-evident deductions are greatly strengthened by considering the place where the statements were made, and the conduct of the detective towards the accused. Bram had been brought from confinement to the office of the detective, and there, when alone with him, in a foreign land, while he was in the act of being stripped, or had been stripped, of his clothing, was interrogated by the officer, who was thus, while putting the questions and receiving answers thereto, exercising complete authority and control over the person he was interrogating. Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influnece compelling a statement had been exerted; yet, when taken as a whole, in conjunction with the nature of the communication made, they give room to the strongest inference *564 that the statements of Bram were not made by one who, in law, could be considered a free agent. To communicate to a person suspected of the commission of crime the fact that his co-suspect has stated that he has seen him commit the offense, to make this statement to him under circumstances which call imperatively for an admission or denial, and to accompany the communication with conduct which necessarily perturbs the mind and engenders confusion of thought, and then to use the denial made by the person so situated as a confession, because of the form in which the denial is made, is not only to compel the reply, but to produce the confusion of words supposed to be found in it, and then use statements thus brought into being for the conviction of the accused. A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of.

Moreover, aside from the natural result arising from the situation of the accused and the communication made to him by the detective, the conversation conveyed an express intimation rendering the confession involuntary, within the rule laid down by the authorities. What further was said by the detective? “Now, look here, Bram, I am satisfied that you killed the captain, from all I have heard from Mr. Brown. But,' I said, ‘some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.” But how could the weight of the whole crime be removed from the shoulders of the prisoner as a consequence of his speaking, unless benefit as to the crime and its punishment was to arise from his speaking? Conceding that, closely analyzed, the hope of benefit which the conversation suggested was that of the removal from the conscience of the prisoner of the merely moral weight resulting from concealment, and therefore would not be an inducement, we are to consider the import of the conversation, not from a mere abstract point of view, but by the light of the impression that it was calculated to produce on the mind of the accused, situated as he was at the time the conversation took place. Thus viewed, the weight to be removed by speaking naturally *565 imported a suggestion of some benefit as to the crime and its punishment as arising from making a statement.

This is greatly fortified by a consideration of the words which preceded this language; that is, that Brown had declared he had witnessed the homicide, and that the detective had said he believed the prisoner was guilty, and had an accomplice. It, in substance, therefore, called upon the prisoner to disclose his accomplice, and might well have been understood as holding out an encouragement that, by so doing, he might at least obtain a mitigation of the punishment for the crime which otherwise would assuredly follow. As said in the passage from Russell on Crimes already quoted: ‘The law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of

influence has been exerted.' In the case before us we find that an influence was exerted, and, as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that error was committed by the trial court in admitting the confession under the circumstances disclosed by the record.

Our conclusion that the confession was wrongfully admitted renders to unnecessary to pass on the serious question arising from the ruling of the trial court by which, in cross-examination, the accused was denied the right to ask the detective as to an article of personal property taken from the prisoner at the time the alleged confession was had. In other words, that the accused could not bring out, by way of cross-examination, everything which took place at the time of the alleged confession, but was compelled, in order to do so, to make the detective his own witness, and therefore be placed in the position where he could not impeach him. We are also, as the result of our conclusion on the subject of the confession, relieved from examining the many other assignments of error, except in so far as they present questions which are likely to arise on the new trial.

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Diaz v. State, 61 S.W.3d 525 (Tex.App.—San Antonio 2001, no pet.).

Defendant juvenile tried as an adult was convicted in the 25th Judicial District Court, Guadalupe County, Dwight E. Peschel, J.P., of aggravated assault and aggravated robbery with a deadly weapon. Defendant appealed. The Court of Appeals, Stone, J., held that: (1) defendant's confession was involuntary, and (2) trial court committed harmful error in admitting confession.

Reversed and remanded.

OPINION

Opinion by: CATHERINE STONE, Justice

Daniel Diaz alleges reversible error in his conviction for aggravated assault and aggravated robbery with a deadly weapon. Daniel's appeal centers on whether his confession should have been excluded from evidence because of the deficient magistrate's warnings that he received within the juvenile justice system before he was certified and tried as an adult. Because we believe the trial court committed harmful error in admitting Daniel's confession, we reverse the conviction and remand the cause to the trial court for a new trial.[FN1]

> FN1. We do not address the other issues raised by Diaz because they are not necessary to the final disposition of this appeal. TEX.R.APP. P. 47.1.

***527 FACTUAL AND PROCEDURAL BACKGROUND**

In July of 1998, fifteen-year-old Daniel Diaz, his older brother David, and their friend Jorge Medina, traveled from Sealy to Seguin, Texas to visit an uncle. At some point, there was a discussion about stealing a car so they could return to Sealy. The Diaz brothers ultimately met Arturo Guevara at a carwash. Guevara agreed to give them a ride after David Diaz had chatted with him. David Diaz was seated behind Guevara. As Guevara was driving, David Diaz pulled out a gun and ordered Guevara to pull the vehicle over. Guevara stopped the car, grabbed the keys, and ran. David Diaz fired several shots at Guevara and wounded him in the foot. Daniel, David, and Jorge then "hot-wired" the vehicle and drove until they had a flat tire in Gonzales, Texas, where they abandoned the car.

By March of 1999, the police had identified Daniel, David, and Jorge as the perpetrators of the crime. Daniel, now sixteen, was taken into custody and brought before the magistrate prior to questioning. As a juvenile suspect, he was warned by the magistrate before questioning and again after signing a confession. In the process of giving Daniel the statutorily-required warnings, the magistrate provided Daniel with incorrect information about the maximum possible sentence. The magistrate told Daniel that he "might get up to a year in confinement or up to a $10,000 fine if he were tried as an adult." The actual maximum prison term in the adult system is up to 99 years for aggravated assault with a deadly weapon. Daniel was certified to stand trial as an adult, and the trial court overruled his objection to the introduction of

his confession into evidence. Under the law of parties, Daniel was convicted by the jury on two counts of aggravated robbery and assessed concurrent fifteen year sentences.

ADMISSIBILITY OF JUVENILE'S STATEMENT

In his first appellate issue, Daniel complains that his confession was involuntary and should have been excluded from evidence at trial, contending: (1) due process rights were violated when the magistrate misstated the maximum range of punishment; (2) the magistrate's misstatement rendered his statement involuntary; and (3) the magistrate's failure to put a check mark by the last requirement on the warning form is conclusive evidence that the magistrate failed to give all the statutory warnings.

[1][2][3][4] Although juvenile proceedings are identified as civil or quasi-criminal rather than criminal, the protections and due process requirements of adult criminal prosecutions are applicable to juvenile cases. *See* *Breed v. Jones*, 421 U.S. 519, 529–31, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975); *Matter of M.R.*, 846 S.W.2d 97, 101 (Tex.App.—Fort Worth 1992, writ denied). The confession of a juvenile is not admissible at trial unless it is obtained in compliance with the warnings required in section 51.095 of the Texas Family Code. *See* *In re L.M.*, 993 S.W.2d 276, 291 (Tex.App.—Austin 1999, pet. denied). A magistrate is required to read the warnings listed in section 51.095(a)(1)(A) to the juvenile suspect before any interrogation by law enforcement. *Id.* at 290–91. No law enforcement personnel are allowed to be present during the warnings, and the juvenile must have the warnings read to him again by the magistrate during the making of the juvenile's written statement. TEX. FAM.CODE ANN. § 51.095 (Vernon Supp.2001). Even if the juvenile is later tried as an adult, the admissibility of the confession ***528** in the criminal case is predicated upon whether the warnings were given as required in a juvenile proceeding. *Griffin v. State*, 765 S.W.2d 422, 427 (Tex.Crim.App.1989).

[5][6][7] If the circumstances indicate that the juvenile defendant was threatened, coerced, promised something in exchange for his confession, or if he was incapable of understanding his rights and warnings, the trial court must exclude the confession as involuntary. *Darden v. State*, 629 S.W.2d 46, 51 (Tex.Crim.App.1982). Once the accused claims that the confession was not voluntary, the burden is upon the State to prove its voluntariness. *Farr v. State*, 519 S.W.2d 876, 880 (Tex.Crim.App.1975). In determining the voluntariness of the confession, the trial court must look at the totality of the circumstances. *Griffin*, 765 S.W.2d at 429.

[8] In the present case, the magistrate told Daniel that he "might get up to a year in confinement or up to a $10,000 fine if he were tried as an adult," while the actual maximum prison term in the adult system is up to 99 years for aggravated assault with a deadly weapon. Under these facts, Daniel claims his confession was involuntarily obtained. Providing information about the sentence one might receive is not required by section 51.095 of the Texas Family Code. Though well intentioned, the magistrate gave additional incorrect information. Daniel's decision to give a statement following the misstatement regarding the possible punishment, rendered that decision involuntary. *See* *In re R.J.H.*, 28 S.W.3d 250, 254 (Tex.App.—Austin 2000) (stating that actual coercive conduct is not required to make a statement inadmissible, but rather it is the totality of the circumstances surrounding the statement which includes factors such as the appellant being a minor).

Daniel's age at the time of his statement further emphasizes its involuntary nature in viewing the totality of the circumstances. The Supreme Court has emphasized that admissions and confessions of juveniles require special caution. In *Haley v. State of Ohio*, 332 U.S. 596, 599, 68 S.Ct. 302, 92 L.Ed. 224 (1948), the Court reversed the conviction of a 15–year–old boy for murder. In reference to the confession of the teenager, the Court remarked: "[w]hat transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child-an easy victim of the law-is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."

In the instant case, Daniel was sixteen at the time he gave his statement to police. Daniel testified that he was "scared" and that this was "the first time [he had] ever been in a situation like this."

Daniel further testified that he admitted he had a knife when he did not have one because the police repeatedly asked him if he had pulled out a knife. Daniel finally agreed that he had a knife because he was scared. Wrongly believing he would receive at most a year of prison time, Daniel made a choice to give what he later testified was an untruthful statement.

The case at hand is analogous to cases in which a defendant is unable to appreciate the actual value of his plea bargain because the maximum punishment he risked without the bargain was overstated in the court's admonition, rendering the plea involuntarily entered. *See* *Ex Parte Smith*, 678 S.W.2d 78, 79–80 (Tex.Crim.App.1984). Here, Daniel was unable to make a voluntary***529** waiver of his rights in making his statement because the maximum amount of punishment he thought he risked was one year. In viewing Daniel's age, the magistrate's misstatement of the maximum sentence that Daniel could receive violated his constitutional rights of due process and rendered his statement involuntary.

HARM ANALYSIS

[9] Daniel's statement was undoubtedly inculpatory. In his statement, Daniel admits to planning to steal a car with his brother David. The only other evidence that Daniel had plotted with his brother came from the State's witness, Steven Vasquez. Vasquez, on probation for robbery at the time of his testimony, admitted that he could not specifically recall Daniel saying anything about stealing a car, just that he was present when his brother discussed it. Guevara testified that though he thought at first that Daniel had a razor when Daniel placed his hand in his pocket, Daniel never actually pulled anything out of his pocket. Guevara further testified that it was Daniel's brother who pulled the gun on him and threatened everyone in the car, including Daniel. Daniel testified he was frightened of his brother and was scared he would shoot Guevara.

CONCLUSION

Under these facts, we cannot conclude beyond a reasonable doubt that the admission of Daniel's statement did not contribute to his conviction. *See* TEX.R.APP. P. 44.2(a). The judgment of the trial court is reversed and the cause is remanded to the trial court for further proceedings.

***Freeman v. State*, 723 S.W.2d 727 (Tex.Crim.App. 1986).**

Defendant was convicted in the 283rd Judicial District Court, Dallas County, of murder, and he appealed. The Eastland Court of Appeals, Eleventh Supreme Judicial District affirmed, and defendant petitioned for discretionary review. The Court of Criminal Appeals, W.C. Davis, J., held that: (1) investigator's indicating that defendant would not be charged with capital murder did not render confession involuntary.

Affirmed.

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

A jury convicted appellant of murder and assessed his punishment at fifty years' confinement. The Eastland Court of Appeals affirmed the conviction, holding that appellant's confession was not involuntary because the "promise" he received from police was not conditioned on his giving a confession. The Court of Appeals also ***728** found that appellant knowingly and intelligently waived his right to have counsel present during the questioning which resulted in his confession. *Freeman v. State*, 691 S.W.2d 739 (Tex.App.—Eastland 1985). We granted appellant's petition for discretionary review to consider both issues.

The trial court conducted a pretrial hearing to determine the issue of the voluntariness of appellant's confession. The trial court found that appellant was properly informed of his rights, that no promise or threat was made to appellant, and that appellant freely and voluntarily confessed.

Steven Waddell was murdered by appellant, acting with Waddell's wife, on April 17, 1983, at a Sonic Drive-In in Grand Prairie. Appellant fled to Pulaski, Tennessee, where he was arrested on April 20, 1983. He was arraigned and an attorney was appointed for him. Harroll Lynn Rhoads, an

investigator with the Grand Prairie Police Department went to Pulaski on April 21, to speak with appellant.

Rhoads testified that he met with Investigator Richard Jernigan, a member of the Sheriff's Department in Pulaski, and then spoke to appellant at about 6:15 p.m. on April 21. Rhoads informed appellant of his rights. Appellant told him he understood his rights and that he had an attorney. Rhoads explained to appellant that he was investigating Waddell's murder and he knew what had taken place during the offense, including the fact that Waddell had not died right after he was shot. He also told appellant that Waddell's wife had given statements and he asked appellant if he would like to talk about the offense. Rhoads testified that appellant reiterated several times that, although he wanted to talk about the offense, he was too young to die and did not want to get the death penalty. Rhoads showed appellant the murder statute and the capital murder statute in the Texas Penal Code. He read both statutes and explained the differences to appellant. Rhoads testified that when he talked to appellant, based on what he knew about the case, he considered it a murder case not a capital murder case. Appellant then told Rhoads he would like to talk to him but that he wanted to see his attorney.

At that point appellant's attorney, Tom Stack, was contacted. He arrived at the Sheriff's office at about 7:30 p.m. to talk with appellant. Appellant and his attorney conferred for a while, after which Stack asked to speak with Rhoads. Rhoads told him what he knew about the offense and Stack indicated he knew what Rhoads was talking about. Rhoads testified Stack indicated that appellant wanted to talk about the offense but was afraid he would get the death penalty. Rhoads also testified Stack stated that if he could be sure that the police would not file a capital murder case on appellant they could talk about whether or not appellant would make a statement.[FN1] Rhoads told Stack he had to talk to his department in Grand Prairie about the matter. Stack said he would like to talk to the District Attorney in Dallas County the next morning and that they could then talk about the statement. Stack also told Rhoads that he had told appellant not to talk to the officers.

Rhoads immediately called Sergeant Dale Phifer of the Grand Prairie Police Department and explained the situation. Phifer told him he would confer with the legal advisors and call Rhoads back. Phifer spoke to Norman Kinne, an assistant district attorney for Dallas County, who told him that based upon the evidence the police related to him, including a statement from Waddell's wife, legally the cases were not capital murders and would not be accepted as such by the district attorney's office.[FN2] ***729** Phifer called Rhoads back that same evening and told him it was okay to tell appellant that the police would not file capital murder charges if appellant was the one who had initiated the subject.

> FN2. The case was not a capital murder case because appellant, who was apparently having an affair with Waddell's wife, murdered Waddell and then committed robbery only to disguise his motive and hopefully his identity in committing the murder. See V.T.C.A. Penal Code, Sec. 19.03(a)(2).

Just after Rhoads finished with the phone calls, Jernigan came to Rhoads and said appellant wanted to talk to him. Jernigan brought appellant into the room and Rhoads asked him if he wanted to talk about the offense. Appellant said he did, but that he still had some reservations about the death penalty. Rhoads asked him if he would feel better about it if Rhoads stated in writing that a murder charge would be filed and that a capital offense would not be filed against appellant. Appellant said he would feel better if that were done. Rhoads then executed an affidavit stating that appellant would not be charged with capital murder.

Rhoads testified he hoped that his written affidavit would lead appellant to confess, but that he had no assurance of that. He simply told appellant that he would not be charged with capital murder in response to appellant's concern about the matter. Rhoads also said he repeatedly told appellant that he could have his attorney with him or that he could waive counsel. Appellant indicated he would waive having his attorney present. Appellant then gave a confession admitting his part in killing Waddell.

Rhoads testified that no promises were given to appellant in exchange for his confession and that no bargain was made. Rhoads hoped that assuring appellant that he would not be charged with capital murder would ease appellant's mind so that he would confess. No “bargain” was made. The

"promise" not to charge appellant with capital murder was simply an assurance to appellant that under the law and the evidence he would not be charged with capital murder.

Appellant's version of the events leading up to his confession is, not surprisingly, contrary to Rhoads' rendition. Appellant testified that after he conferred with his attorney, Stack told Rhoads that appellant was not going to make a statement and that if he still wanted to make a deal Stack would be back in the morning and would call the district attorney. Appellant also said that after his attorney left Rhoads told appellant that he was leaving the next morning and was going to file capital murder charges and that appellant would not have a choice about it. Appellant said Rhoads called the District Attorney's office while appellant was present and then told appellant he would make an agreement with him. Appellant said the agreement was that he would not be charged with capital murder and in return he would make a statement. Appellant also said he requested that his lawyer be present.

The trial court is the sole judge of the credibility of the witnesses in a pretrial hearing and absent a showing of an abuse of discretion, the trial court's findings will not be disturbed. *Hawkins v. State*, 613 S.W.2d 720 (Tex.Cr.App.1981); *McMahon v. State*, 582 S.W.2d 786 (Tex.Cr.App.1979). Obviously, the trial court chose to disbelieve appellant's version of the circumstances surrounding the confession. We find nothing in the record to show an abuse of discretion and we likewise reject appellant's version.

Appellant contends that his statement was inadmissible under the long established rule that:

> A confession obtained as a result of a benefit positively being promised to the defendant made or sanctioned by one in authority and of such character as would be likely to influence a defendant to speak untruthfully is not admissible.

Walker v. State, 626 S.W.2d 777, 778 (Tex.Cr.App.1982). See also *Hardesty v. State*, 667 S.W.2d 130 (Tex.Cr.App.1984); *Hawkins v. State*, 613 S.W.2d 720 (Tex.Cr.App.1981); *Washington v. State*, 582 S.W.2d 122 (Tex.Cr.App.1979); *Fisher v. State*, 379 S.W.2d 900 (Tex.Cr.App.1964); *Searcy v. State*, 28 Tex.App. 513, 13 S.W. 782 (1890).

The Court of Appeals held that in order to render a confession involuntary the promised benefit to the accused must be a benefit offered *in exchange* for a statement***730** from the accused. The Court of Appeals noted that the aforementioned cases have all involved conditional promises from the State to the accused whereby the State promises a benefit only "if" the accused gives a statement. In the instant case the "promise" was unconditional. Appellant was told that he would not be charged with capital murder. While Rhoads hoped this would ease appellant's mind so that he would confess, it was not contingent on appellant making a statement. Thus, the Court of Appeals found that no "deal" or "agreement" was made because the assurance not to file a capital murder charge was unconditional.

Appellant argues that his statement was induced by the promise of a benefit—no capital murder charge—and was therefore involuntary under Texas law and constitutional law. We disagree with appellant.

Appellant is correct that a statement induced by a promise of some benefit to a defendant, which promise is positive, made or sanctioned by one in authority, and likely to influence the defendant to speak untruthfully is involuntary. *Fisher*, supra. The rationale for this rule is the inherent unreliability of a confession if the influence applied was such as to make the defendant believe his condition would be bettered by making a confession, true or false. *Searcy*, supra.

However, the State is correct that this four part test does not apply in the instant case because no "promise of some benefit" to appellant was ever made. In the instant case appellant himself stated repeatedly to the police that he wanted to talk to them, but, he was fearful of the death penalty. In response to this anxiety, Rhoads checked with legal advisors, including the district attorney's office and then told appellant he would not be charged with capital murder. This was not a promise of a benefit in the sense that appellant was promised something he would not otherwise have had. Rather, it was an answer to relieve appellant's anxiety and a statement of the status of the case in terms of the facts and law. The police did not coerce appellant by suggesting or expressly stating that if he would confess they would reduce the charge. Nor did they

threaten explicitly or implicitly that he would be charged with capital murder if he did not make a statement. Appellant himself initiated the discussion, essentially telling Rhoads that he wanted to confess but he wanted to know the ramifications of such, in terms of punishment. Although appellant may have decided not to confess if he was to be charged with capital murder, the decision not to charge him with capital murder was not made in response to appellant's wishes or to accomodate appellant, but was a choice made by the district attorney after considering the evidence the police had. Thus, legally, appellant was not and could not be charged with capital murder. Just because this served to relieve appellant's concern and "ease his mind" does not render the subsequent confession involuntary nor render the information a "promise of some benefit" to appellant.

The instant case is analogous to *Roberts v. State*, 545 S.W.2d 157 (Tex.Cr.App.1977) and *Hawkins*, supra. In *Roberts* the defendant contended that his confession was involuntarily given in return for his wife's release from custody. The defendant and his wife were arrested while in their car when police saw someone hand a package of heroin to the defendant, the driver of the car. The defendant insisted to police that his wife did not know anything about the drugs and had nothing to do with it. The officer asked the defendant if he would make a statement to that effect. The defendant agreed. This Court held the confession to be voluntary, stating that the police officer had a duty to determine whether or not there was evidence to hold or release the defendant's wife. And, "it was the appellant, who first said the appellant's wife was innocent and initially introduced the subject of leniency for his wife. The trial court could well conclude that the statement was self-motivated and voluntarily made by the appellant because he wanted his innocent wife who was under suspicion***731** freed ..." *Roberts*, 545 S.W.2d at 161.

In the instant case appellant's statement was self-motivated and voluntarily made after appellant's anxiety about the death penalty was shown to be groundless. Likewise, *Hawkins*, supra, is analogous to the instant case. The defendant Hawkins first introduced to the police a long history of his abnormal behavior. The officers "professed understanding and empathy ... not to promise anything but to get to the point of the interrogation." This sympathy and willingness to help the defendant was not found to be a promise which induced the defendant's confession. In the same way, Rhoads' inquiry into the status of the offense as a capital offense or "only" a murder offense was not a promise to induce a confession. The easing of appellant's mind by checking out the legal status of his case is somewhat analogous to the empathy and willingness to help related in *Hawkins*, supra.

This case is not like those where the police promise not to seek the death penalty if the defendant gives a statement. That situation is clearly improper and renders a confession involuntary. Cf. *McMahon*, supra; and *Sherman v. State*, 532 S.W.2d 634 (Tex.Cr.App.1976). Nor is the instant case similar to a case in which the State offers to reduce the charge if the defendant gives a statement. See W. Ringel, Searches & Seizures, Arrests and Confessions, § 25.2(c) (1984). No "promise" is made when a defendant expresses a fear of prosecution for some offense for which he actually cannot be prosecuted and the State explains that he cannot be prosecuted for the feared offense, and the defendant then confesses. Just because a defendant thinks he has benefitted because his anxiety is quelled does not reflect a promise of some benefit from the State. The benefit lay in the facts of the case not in the actions of the police. The fact that he need not have worried about the death penalty and that the police allayed that worry, without any deal, bargain, agreement, or exchange does not render the confession involuntary. Further, from the record before us it does not appear that the police pretended that they could charge appellant with capital murder and agreed that if he would confess, would not so charge him. This would be a different case. Rhoads' affidavit assuring appellant that he would not be charged with capital murder was not contingent on a confession. Thus, not only was a promise of some benefit not bestowed upon appellant by the State, but there was no "deal" or "bargain" or "contingency" involved.

Under the constitutional standard—the totality of the circumstances—appellant's confession was freely and voluntarily given. The totality of the circumstances show that appellant was informed of his rights numerous times and that he conferred with his attorney immediately prior to making a statement. Appellant told the police and indicated to his attorney that he wanted to confess. Once his

fears about the death penalty were erased, appellant did confess. The circumstances show that appellant voluntarily and freely confessed. The ground of error is overruled.

The judgment of the Court of Appeals affirming the trial court is likewise affirmed.

Henderson v. State, 962 S.W.2d 544 (Tex.Crim.App. 1998).

Defendant was convicted in the District Court, Travis County, Jon N. Wisser, J., of capital murder of three-and-a-half-month-old child whom defendant had been babysitting and was sentenced to death. On automatic appeal, the Court of Criminal Appeals, en banc, Keller, J., held that: (4) defendant was not induced to give confession, so as to render confession involuntary, by any alleged promise implied from federal agent's responses;

Affirmed.

OPINION

KELLER, Judge delivered the opinion of the Court with respect to Parts 1, 2b, 3, and 4, in which McCORMICK, Presiding Judge, and MEYERS, MANSFIELD, PRICE, HOLLAND, and WOMACK, Judges joined, and an opinion with respect to Part 2a, in which MEYERS, PRICE and HOLLAND, Judges, joined, and in which MANSFIELD and WOMACK, Judges, joined only as to point of error nine.

In a trial beginning in May of 1995, appellant was convicted of the capital murder of three-and-a-half-month-old Brandon Baugh committed on January 21, 1994 in Travis County.[FN1] The jury answered the punishment issues in the State's favor, and appellant was sentenced to death. Direct appeal to this Court is automatic under Article 37.071(h).[FN2] Appellant raises seventeen points of error on appeal. We will affirm.

FN1. Texas Penal Code § 19.03(a)(8) provides that a person commits capital murder when "the person murders an individual under six years of age."

FN2. All references to articles refer to the Texas Code of Criminal Procedure unless otherwise indicated.

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3. Confession

In points of error thirteen through fifteen, appellant contends that her confession to Agent Napier was obtained involuntarily in violation of Articles 38.21 and 38.22 of the Texas Code of Criminal Procedure, the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 19 of the Texas Constitution.[FN18] She argues that her confession was involuntary because (1) Napier induced her to incriminate herself through sympathy with a "Christian burial" speech, and (2) that he led her to believe that she would be able to stay in Missouri if she confessed.

FN18. Because Napier's interrogation occurred outside Texas, there is a question as to whether Article 38.21 & 38.22 and the provisions of the Texas Constitution even apply. We do not decide that issue but assume for the sake of argument that those provisions are applicable to the present case.

a. *Facts*

Early in the interview, Agent Napier told appellant that she was at a crossroads, that she could determine which path to take, and that she could tell her story or let the justice system take its course. Later in the interview, appellant offered to tell everything she knew in exchange for staying in Missouri. In response, Napier asked questions such as: "What do you mean?" "What's everything?" Napier never promised appellant that she could stay in Missouri, and in fact, told her that he was not in a position to make any bargains, deals, or promises. He also told her that the people in a position to make a ***564** deal would want to have a basis for making their decision. Later, through leading questions, Napier elicited from appellant a confession that she killed the baby. He asked appellant, "When you say the whole thing, are you talking about that Brandon is dead, that you know where the body's located, that it was an accident, that you're sorry?" Appellant responded by nodding her head. Later Napier stated, "Brandon's dead. It was an accident." To this statement, appellant replied, "Yes." Napier asked, "Did you bury him."

Appellant responded, "Of course, I did. He's just a baby." Subsequent interrogation led to appellant's statement that she had buried Brandon in a wooded area near Waco. At that point, Napier asked appellant to draw a map so that the authorities could find Brandon. Napier talked about Brandon's parents and talked about their need to "put closure" on this episode. Appellant, however, refused to draw a map.

b. Standard of review

Appellant urges that we adopt the federal system's standard of review for mixed questions of law and fact and cites *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). In the federal system, the standard of review concerning the voluntariness of confessions is a deferential review of the trial court's determination of the historical facts and a *de novo* review of the law's application to those facts. *Miller v. Fenton*, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). This is the same standard articulated in *Ornelas*. *See Ornelas*, generally; *Villarreal*, 935 S.W.2d at 139–141 (McCormick, J. concurring) and 145–150 (Keller, J.concurring). We need not decide whether to adopt the *Ornelas*/ *Miller* standard here because appellant loses under any standard of review arguably applicable to this case. As the *Ornelas*/ *Miller* standard is the most favorable to appellant in the present case, we will assume without deciding that it is the applicable standard and review the case accordingly.

a. The merits

We may easily dispense with appellant's attack on Napier's statements regarding "closure" for Brandon's parents. Those statements were made after appellant had revealed that Brandon was buried near Waco. Those statements were attempts by Napier to persuade appellant to draw a map. But she refused to draw a map; so, appellant gave no statements that are a product of Napier's attempt to play upon her sympathies. Without any product statements, appellant has no involuntary confession claim under any authority.

That leaves appellant's claim that Napier influenced her to give a confession with the hope of remaining in Missouri. Appellant first contends that Napier's conduct constituted an improper inducement under Article 38.21.[FN19] In essence, appellant contends that the Missouri conversation acted as an improper promise that caused her to confess. For a promise to render a confession invalid under Article 38.21, it must be (1) positive, (2) made or sanctioned by someone in authority, and (3) of such an influential nature that it would cause a defendant to speak untruthfully. *Janecka v. State*, 937 S.W.2d 456, 466 (Tex.Crim.App.1996); *Muniz v. State*, 851 S.W.2d 238, 254 (Tex.Crim.App.), *cert. denied*, 510 U.S. 837, 114 S.Ct. 116, 126 L.Ed.2d 82 (1993).

> FN19. Article 38.21 provides that: "A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed."

However, appellant's claim cannot even get off the ground because no promise ever existed. Napier never promised appellant that she could stay in Missouri if she confessed. Moreover, appellant initiated the idea of a "deal" for staying in Missouri. Having cast herself in the role of entrepreneur, she cannot expect an appellate court to find implied "promises" in official responses (to her overtures) that are ambiguous at best. *See Jacobs v. State*, 787 S.W.2d 397, 400 (Tex.Crim.App.1990). And, even if we were to imply some sort of promise from the conversation, it was not made or sanctioned by someone in authority. Appellant contends that such a rule opens the door to ***565** wide-ranging police misconduct by permitting the police to obtain confessions by making promises they cannot deliver. Whatever the merits of appellant's argument as a general proposition, it would apply only where a police officer appears to, but does not in fact possess, the requisite authority. In the present case, however, Napier clearly informed appellant that he did not have the authority to make any deals. Because appellant knew Napier had no authority, she could not have been improperly induced by any alleged promises.

As for her claim that Napier violated Article 38.22, appellant points to no section of 38.22 that she believes was violated. She merely cites *Dunn v. State*, 721 S.W.2d 325 (Tex.Crim.App.1986) for the proposition that Article 38.22 is violated if a law enforcement agent tells the accused that his statement may be used "for or against him." Appellant does not contend, however, that Napier used the offending language. She merely argues that

what Napier said is "more specific" than the language condemned in *Dunn.* But, appellant does not explain why being "more specific" brings Napier's questioning within the prohibitions of Article 38.22. *Dunn* 's holding was based upon the peculiarities of the particular phrase "for or against" and has no application to the case at bar. *See* 721 S.W.2d at 341.

With regard to her federal constitutional arguments, appellant cites the federal due process standard for voluntary confessions: "Is the confession the product of an essentially free and unconstrained choice by its maker?" *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). She contends that the state bears the burden of proving the voluntariness of a confession but does not explain why she believes the state has failed to meet this burden. Our review of the record indicates to us that appellant's confession was indeed the product of an essentially free and unconstrained choice upon appellant's part. Nothing in the record suggests that Napier used any coercive tactics to obtain information. As discussed above, Napier made no promises to appellant, and he told her that he had no authority to make deals. Moreover, as discussed above, the record shows that appellant initiated the "Missouri deal" idea and Napier made, at most, noncommittal replies.

Appellant next advances two claims under the Texas Constitution. First, she argues that the Texas Constitution places upon the State the burden of proving the voluntariness of a confession beyond a reasonable doubt as opposed to a mere preponderance of the evidence under the federal constitution. We need not decide whether the Texas Constitution provides broader protection in this respect. Appellant has not explained why she should prevail under her proposed standard. Even if we reviewed the admissibility of the confession under the *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) standard [FN20] for legal sufficiency of the evidence, which incorporates the reasonable doubt standard, the evidence is sufficient to show that appellant's confession was voluntary.

> FN20. The *Jackson* standard is: "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found [the issue in question] beyond a reasonable doubt." *Id.* at 319, 99 S.Ct. at 2789 (emphasis in original, bracketed material substituted for original).

In her second state constitutional claim, appellant contends that *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897) is the law in Texas. *Bram* contains some language that indicates that any promise, no matter how small its influence, renders a confession involuntary. *Id.* at 542–543, 18 S.Ct. at 186–187. Appellant contends that we should interpret the Texas Constitution to embody the *Bram* standard instead of the *Schneckloth* standard because *Bram* was the Supreme Court precedent in effect at the time the Fifth Amendment's right against compelled self-incrimination was applied to the states and because this Court has never articulated a standard of admissibility that exceeds the minimum federal requirements.

But appellant's argument contains a number of faulty premises. First, the Supreme Court maintained in *Schneckloth* that the standard it articulated has always been the applicable standard: "The ultimate test ***566** remains that which has been the only clearly established test in Anglo–American courts for two hundred years." 412 U.S. at 225, 93 S.Ct. at 2047. Second, even if *Bram* represented a different standard, the fact that it may have been in existence at the time federal constitutional requirements were applied to the states does not mean that we automatically adopted that standard as a matter of *state* constitutional law. Appellant concedes elsewhere, as she must to even advance a separate state constitutional claim, that Texas is not bound to interpret its constitution in lockstep with the federal constitution. *See Heitman v. State*, 815 S.W.2d 681 (Tex.Crim.App.1991). *Bram* 's interpretation of federal constitutional law does not govern or bind our interpretation of the Texas Constitution. The only way outdated federal precedent could have any logical impact on state constitutional interpretation would be for this Court to accept two unstated premises: (1) that the state constitution cannot provide less protection than the federal constitutional minimum, and (2) that a federal constitutional minimum standard, once articulated, becomes the standard for the state constitution, even if the United States Supreme Court later retracts its position. Appellant has given us no reason to believe that either of those unstated assumptions is correct. Finally, even if *Bram* were the standard, that case still requires the existence of

a "promise" as a condition that vitiates voluntariness, and no promise was made in the present case. Points of error thirteen, fourteen, and fifteen are overruled.

***Joseph v. State*, 309 S.W.3d 20 (Tex.Crim.App. 2010).**

Background: Defendant was convicted in the 187th District Court, Bexar County of murder, and he was sentenced to 25 years' confinement. Appeal followed. The Corpus Christi Court of Appeals affirmed. Defendant petitioned for discretionary review, which was granted with respect to a suppression issue.

Holdings: The Court of Criminal Appeals, Meyers, J., held that:
(1) defendant's waiver of his *Miranda* rights was voluntary, and
(2) defendant's waiver of his *Miranda* rights was made with full awareness of both the nature of the rights being abandoned and the consequences of the decision to abandon them.

Affirmed.

OPINION

MEYERS, J., delivered the opinion of the Court in which PRICE, JOHNSON, KEASLER, HERVEY, HOLCOMB, and COCHRAN, JJ., joined, and in which KELLER, P.J., joined except as to note 7, and in Parts I, II, and III of which WOMACK, J., joined except as to note 7 and Sections A and B.

Appellant, Wesley Charles Joseph, was convicted of murder and sentenced to twenty-five years' confinement. A key piece of evidence was a recorded statement produced as a result of Appellant's interview with police. The trial court denied Appellant's motion to suppress evidence, finding that Appellant had waived his rights prior to and during the statement. Appellant appealed and the court of appeals affirmed. We granted review to consider whether Appellant knowingly, intelligently, and voluntarily waived his rights under Article 38.22 of the Code of Criminal Procedure and *Miranda v. Arizona.* We will affirm.

I. Facts

On December 6, 2004, Appellant and his friend, Juan Martinez, went to the San ***22** Antonio Metropolitan Ministries (SAMM) homeless shelter to confront Javier Gonzalez–Diaz (A.K.A. "Bolillo"). Martinez's wife, Vivian, who was also Appellant's girlfriend, said she had been sexually assaulted by Bolillo. A witness to the incident testified that he saw Appellant punching Bolillo in the stomach and that Appellant put something under his clothing as he walked away. Afterwards, Bolillo lifted up his shirt and looked toward the witness for help.

Appellant and Martinez were arrested and taken to the police station where they were interviewed separately. Detective Sean Walsh interviewed Appellant for approximately six hours. At the start of the interview, Walsh read a warning card to Appellant and upon Walsh's request, Appellant signed his name in the margin. The warning card stated:

WARNING TO ARRESTEE OR SUSPECT

Before you are asked any questions, it is my duty as a police officer to advise you of your rights and to warn you of the consequences of waiving these rights.

1. You have the right to remain silent.

2. You do not have to make any statement[,] oral or written, to anyone.

3. Any statement that you make will be used in evidence against you in a court of law, or at your trial.

4. You have a right to have a lawyer present to advise you before and during any

questioning by police officers or attorneys representing the state.

5. You may have your own lawyer present, or if you are unable to employ a lawyer, the court will appoint a lawyer for you free of charge, now, or at any other time.

6. If you decide to talk with anyone, you can, and you can stop talking to them at any time you want.

7. The above rights are continuing rights which can be urged by you at any stage of the proceedings.

DO YOU UNDERSTAND THESE RIGHTS?

SAPD Form 66–E (Jul 99)

[Signed] SW [Detective Sean Walsh] [Badge number] 12–06–04

[Signed] WCJ Wesley C. Joseph, Jr. 2:05 pm 12–06–04

At trial, Appellant sought to suppress the DVD recording of his interview. The court held a *Jackson v. Denno* hearing to determine whether Appellant's statement to Detective Walsh was voluntary and thus admissible. *See Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Pursuant to Article 38.22, the trial judge entered findings of fact and conclusions of law regarding the voluntariness of the statement. CODE CRIM. PROC. ANN. art. 38.22, § 6. The trial court found that Appellant received notification of his rights "prior to the statement but during the recording" and that Appellant knowingly, intelligently, and voluntarily waived those rights. Because the statement was made under voluntary conditions, the trial court concluded that Appellant's statement was admissible as a matter of law.[FN1]

FN1. As noted by the trial court's findings of fact, the recorded statement was shortened because there were redactions made for defense counsel and "dead time" was removed. "The DVD was altered by agreement of all the parties and in accordance with the Texas Rules of Evidence."

During the trial, the State played clips of the interview, accompanied by live testimony from Detective Walsh. The State asked Walsh to repeat or confirm some of Appellant's comments from the DVD, including that he "wished he hadn't put the ***23** knives in his backpack," that "he didn't want to die in the penitentiary," and that "he wasn't going to hit the wrong dude." Walsh also relayed that Appellant had vaguely referred to a "stab-by" at one point during the interview. The jury found Appellant guilty of murder and assessed punishment at twenty-five years' confinement.

Appellant appealed to the Thirteenth Court of Appeals with four points of error, one of which stated: The trial court erred in denying the motion to suppress Appellant's statement because he did not make a knowing, intelligent, and voluntary waiver of his rights under Article 38.22 of the Code of Criminal Procedure and *Miranda v. Arizona*.[FN2] CODE CRIM. PROC. ANN. art. 38.22; *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The court of appeals overruled all of Appellant's four issues and affirmed the judgment of the trial court. *Joseph v. State*, No. 13–06–00561–CR, 2008 WL 5575063, 2008 Tex.App. LEXIS 5133 (Tex.App.-Corpus Christi July 10, 2008, pet. granted) (mem. op., not designated for publication). We granted Appellant's petition to this Court on the following ground for review: The court of appeals erred in affirming the trial court's denial of the motion to suppress Appellant's statement because Appellant did not knowingly, intelligently, and voluntarily waive his rights under Article 38.22 and *Miranda*.[FN3]

FN2. Appellant's four points of error to

the court of appeals were as follows: (1) The trial court erred in denying the motion to suppress because Appellant was arrested without a warrant, probable cause, or other lawful authority, in violation of the Fourth Amendment; (2) The trial court erred in denying the motion to suppress because Appellant did not make a knowing, intelligent, and voluntary waiver of his rights under Article 38.22 of the Code of Criminal Procedure and *Miranda v. Arizona;* (3) The trial court erred in admitting the entirety of Appellant's lengthy and prejudicial interview when that was unnecessary to complete the jury's understanding of what had happened during the interview; (4) The trial court caused Appellant egregious harm when it directed the jury to assess a general verdict without requiring a unanimous verdict on a specific offense, contrary to Article V, Section 13 of the Texas Constitution.

FN3. Appellant filed a supplemental brief asking that we hold this case in abeyance until the U.S. Supreme Court rules in *Thompkins v. Berghuis*, 547 F.3d 572 (6th Cir.2008), *cert. granted*, ––– U.S. ––––, 130 S.Ct. 48, 174 L.Ed.2d 632 (2009).

> Of the two questions presented in that case, one relates to Appellant's issue: "Whether the Sixth Circuit expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them." *See* http:// origin. www. supremecourtus. gov/ qp/ 08– 01470 qp. pdf (italics added). For two reasons, we conclude that we need not await the *Berghuis* decision. First, the issue to be resolved by the U.S. Supreme Court addresses the absence of waiver, and there *is* evidence of a waiver in Appellant's case. Second, the facts in *Berghuis* paint a picture of a very different interrogation than that experienced by Appellant. Unlike Appellant, Thompkins refused to sign the warning card acknowledging that the officers had read him his *Miranda* rights. *Berghuis*, 547 F.3d at 576. Furthermore, for at least two hours and forty-five minutes during the interrogation, Thompkins " 'consistently exercised his right to remain substantively silent.' " *Id.* Such conduct is so different from Appellant's that a significantly different waiver analysis would be expected.

II. Article 38.22: warning and waiver

[1] Article 38.22 of the Code of Criminal Procedure establishes procedural safeguards for securing the privilege against self-incrimination. CODE CRIM. PROC. ANN. art. 38.22. Among its requirements, it provides that no oral statement of an accused made as a result of custodial interrogation***24** shall be admissible against the accused in a criminal proceeding unless (1) the statement was recorded and (2) prior to the statement but during the recording, the accused was warned of his rights and knowingly, intelligently, and voluntarily waived those rights. CODE CRIM. PROC. ANN. art. 38.22, § 3. The warning must inform a defendant of the following rights:

> (1) [H]e has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
>
> (2) any statement he makes may be used as evidence against him in court;
>
> (3) he has the right to have a lawyer present

to advise him prior to and during any questioning;

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

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

CODE CRIM. PROC. ANN. art. 38.22, § 2. The statute contains two distinct elements pertaining to a statement's admissibility: the defendant's receipt of the prescribed warning and his waiver of the rights set out in the warning. Appellant does not assert that he was not warned of his rights. The warning card implemented by the San Antonio Police Department included all of the rights found in *Miranda* and Article 38.22. *Miranda*, 384 U.S. at 444, 86 S.Ct. 1602; CODE CRIM. PROC. ANN. art. 38.22, § 2. And, by signing the card, he acknowledged having received the requisite warning from Detective Walsh. Rather, Appellant argues that though he "clearly understood his rights," he "did not explicitly waive them."

III. Appellant's waiver

The State has the burden of showing that a defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights. *See Miranda*, 384 U.S. at 444, 475, 86 S.Ct. 1602; *Hill v. State*, 429 S.W.2d 481, 486 (Tex.Crim.App.1968). The State must prove waiver by a preponderance of the evidence.[FN4] *Colorado v. Connelly*, 479 U.S. 157, 168, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Appellant argues that he did not "provid[e] a written waiver" or "articulate any kind of waiver of his rights." But Appellant's objection to the absence of a written or articulated waiver runs contrary to "the general rule ... that neither a written nor an oral express waiver is required." *Watson v. State*, 762 S.W.2d 591, 601 (Tex.Crim.App.1988). True, "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda*, 384 U.S. at 475, 86 S.Ct. 1602. But a waiver need not assume a particular form and, in some cases, a "waiver can be clearly inferred from the actions and words of the person interrogated."[FN5] ***25***North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

FN4. "Whenever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the State need prove waiver only by a preponderance of the evidence." *Connelly*, 479 U.S. at 168, 107 S.Ct. 515.

FN5. Appellant cites to *Garcia v. State*, 919 S.W.2d 370 (Tex.Crim.App.1996), to support his argument, and asks us to clarify *Garcia* and announce "that there must be an affirmative acknowledgment of the waiver of the rights set out in Article 38.22." First, to accept Appellant's proposal that we require an "affirmative acknowledgment" of waiver would run counter to the established rule that waiver can be inferred and need not be express. Second, the facts of *Garcia* concern a written statement and a written waiver, and therefore that case is not particularly instructive here.

In contrast, in a case factually similar to Appellant's, *Barefield v. State*, 784 S.W.2d 38, 40 (Tex.Crim.App.1989), the defendant presented essentially the same request to this Court as Appellant does now: that we construe Article 38.22 Section 3 to require that electronically recorded confessions contain an express waiver of rights. We analyzed videotaped statements in which a defendant "was not specifically asked, nor did he specifically volunteer, that he waived

> [his] rights." *Id.* We declined the defendant's suggested statutory interpretation and concluded that the trial court properly found that the defendant had knowingly, intelligently, and voluntarily waived his *Miranda* rights. *Id.* at 40–41.

The question is not whether Appellant "explicitly" waived his *Miranda* rights, but whether he did so knowingly, intelligently, and voluntarily.[FN6] *Id.* To evaluate whether Appellant knowingly, intelligently, and voluntarily waived his *Miranda* rights we turn to the standard outlined in *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

> FN6. Presiding Judge Keller's concurring opinion refashions Appellant's ground for review, stating, the "primary claim is that he did not waive his rights at all, rather than that his waiver was involuntary." However, Appellant's petition for discretionary review and brief to this Court state his sole ground for review as, "[Appellant] did not make a knowing, intelligent[,] and voluntary waiver of his rights."

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. *Id.* (quoting *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)). The "totality-of-the-circumstances approach" requires the consideration of "all the circumstances surrounding the interrogation," including the defendant's experience, background, and conduct. *Fare*, 442 U.S. at 725, 99 S.Ct. 2560; *see also Butler*, 441 U.S. at 375–76, 99 S.Ct. 1755. We agree with the court of appeals that the totality of the circumstances indicates that Appellant knowingly, intelligently, and voluntarily waived his *Miranda* rights.[FN7]

> FN7. One point not raised by Appellant concerns the requisite timing of a defendant's waiver. The trial court found compliance with Article 38.22, stating in its conclusions of law: "This Court finds that the defendant, prior to and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights as set out above." But what exactly constituted Appellant's waiver? The court of appeals identified the waiver in this way: "the fact that [Appellant] acknowledged his rights in writing, combined with the fact that [he] voluntarily continued the interview after being advised of those rights, is strong evidence that he knowingly, voluntarily, and intelligently waived the protections afforded to him." *Joseph*, 2008 WL 5575063, at *7, 2008 Tex.App. LEXIS 5133 at *23. Does the timing of those actions comply with statutory and Supreme Court guidelines for waiver?
>
> The Code of Criminal Procedure requires waiver prior to the start of the statement. CODE CRIM. PROC. ANN. art. 38.22. Article 38.22 Section 2 requires that for a written statement to be admissible, the accused must waive his rights "prior to and during the making of the statement." CODE CRIM. PROC. ANN. art. 38.22, § 2. Section 3 addresses oral and sign language statements and requires that "prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently,

and voluntarily waives any rights set out in the warning." CODE CRIM. PROC. ANN. art. 38.22, § 3.

Butler allows waiver to be "inferred from the actions and words of the person interrogated." *Butler*, 441 U.S. at 373, 99 S.Ct. 1755. In that case, the warning card given to the defendant included a statement of waiver at the bottom. *Id.* at 371. The defendant refused to sign the waiver but agreed to speak to the FBI agents who had arrested him. *Id.* The North Carolina Supreme Court held that under *Miranda* "no statement of a person under custodial interrogation may be admitted in evidence against him unless, at the time the statement was made, he explicitly waived the right to the presence of a lawyer." *Id.* at 370. The U.S. Supreme Court disagreed, concluding that a defendant's actions and words can indicate waiver and that an express written or oral waiver is not required. *Id.* at 373. Thus, under *Butler*, a defendant's conduct—namely, willingly talking with investigators—can demonstrate a knowing, intelligent, and voluntary waiver of his *Miranda* rights.

Therefore the question becomes, how do you reconcile the Code's requirement that a defendant show waiver *before* giving a statement when *Butler* and this Court's adoption of *Butler* (*see Rocha v. State*, 16 S.W.3d 1, 12 (Tex.Crim.App.2000); *Watson*, 762 S.W.2d at 601) allow a defendant to show waiver *by* giving a statement? Admittedly, the facts of *Butler* require less interpretation than Appellant's case; the implicit waiver in *Butler* ("I will talk to you ....") was neatly separate from the defendant's inculpatory statements. *Butler*, 441 U.S. at 371, 99 S.Ct. 1755. Nevertheless, Appellant's actions, though less distinct, do show a "course of conduct indicating waiver." *Id.* at 373, 99 S.Ct. 1755. The quandary concerns the timing: the waiver identified by the court of appeals occurred contemporaneous with and not prior to Appellant's statement.

Perhaps the answer lies in the method by which waiver is to be analyzed. A court must evaluate the totality of the circumstances and this "approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation." *Fare*, 442 U.S. at 725, 99 S.Ct. 2560. Thus, in a case where there is no express waiver, we search not for a specific moment, but for a collective body of facts representing the interrogation as a whole.

***26 A. Voluntariness**

The totality of the circumstances surrounding the interrogation shows Appellant's waiver was voluntary. That is, the waiver resulted from a free and deliberate choice without intimidation, coercion, or deception. Immediately after being warned by Detective Walsh that he had the right to remain silent and that he did not have to make any statement to anyone, Appellant willingly participated in a six-hour interview. At no time during the statement did Appellant request an attorney and at no time did he ask that the interview be stopped. In fact, during portions of the interview, Appellant seemed eager to share information with the detectives. For example, when discussing Vivian's description of Bolillo, one of the detectives stood up to leave the interrogation room and Appellant urged that the detective stay to listen to his explanation. Furthermore, the record shows no evidence of intimidation or coercion. Detective Walsh testified that he did not coerce Appellant in any way into giving information. The lack of

intimidation and coercion can be seen during the interview when Appellant felt comfortable responding to specific questions with "no comment." Upon hearing this response, the detectives did not resort to "physical or psychological pressure to elicit [further] statements." *Moran*, 475 U.S. at 421, 106 S.Ct. 1135. Moreover, the fact that Appellant felt free to decline answering particular questions suggests that the information he did choose to provide was given voluntarily. Finally, there appears to be no possibility that a promise from police could have jeopardized the voluntariness of Appellant's statement. Detective Walsh testified that at no time did members of the police department promise Appellant anything in exchange for giving a statement.[FN8]

> FN8. "A promise made by a law enforcement officer may render a confession involuntary if it was positive, made or sanctioned by someone with apparent authority, was of some benefit to the defendant and was of such a character as would likely cause a person to speak untruthfully." *Garcia*, 919 S.W.2d at 388.

***27 B. Awareness**

[12] The totality of the circumstances surrounding the interrogation shows Appellant's waiver was made with full awareness of both the nature of the rights being abandoned and the consequences of the decision to abandon them. At the start of the interview, Detective Walsh asked if Appellant spoke and read English; to both inquiries Appellant replied, "Yes, sir." Then Walsh read the warning card aloud, which repeatedly informed Appellant that he did not have to say anything. The warnings read to Appellant made him fully aware of the rights set forth in *Miranda* and Article 38.22, as well as the consequences of abandoning those rights. *Miranda*, 384 U.S. at 444, 86 S.Ct. 1602; CODE CRIM. PROC. ANN. art. 38.22, § 2. When asked if he understood his rights, Appellant replied, "Yes, sir," and signed his name in the margin of the warning card. That Appellant replied "no comment" to certain questions not only relates to our inquiry into the voluntariness of the statement but also shows his awareness of his rights. His conduct during those portions of the interview demonstrated that he had the requisite level of comprehension to waive his *Miranda* rights.

IV. Conclusion

The totality of the circumstances shows that Appellant did knowingly, intelligently, and voluntarily waive his rights under Article 38.22 and *Miranda*. The court of appeals did not err in affirming the trial court's denial of Appellant's motion to suppress. Appellant was adequately advised of his rights and, as he stated to this Court, he "clearly understood his rights." Immediately after being told that he had the right to remain silent, that he did not have to make any statement to anyone, and that any statement he made would be used against him, he willingly participated in a six-hour interview with police. Not once did he ask that the interview be stopped, nor did he request an attorney. We affirm the judgment of the court of appeals.

***Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).**

State prisoner brought petition for habeas corpus. The United States District Court for the Northern District of California denied the petition, and the prisoner appealed. The United States Court of Appeals for the Ninth Circuit, 448 F.2d 699, vacated the order of the District Court, and remanded, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that when the subject of a search is not in custody and the state attempts to justify a search on basis of his consent, state must demonstrate that the consent was in fact voluntarily given; that voluntariness is a question of fact to be determined from all the circumstances; and that, while the subject's knowledge of his right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Judgment of the Court of Appeals reversed.

***219** Mr. Justice STEWART delivered the opinion of the Court.

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***223** The precise question in this case, then, is what must the prosecution prove to demonstrate that a consent was 'voluntarily' given. And upon that question there is a square conflict of views between the state and federal courts that have reviewed the search involved in the case before us. The Court of Appeals for the Ninth Circuit concluded that it is an essential part of the State's initial burden to prove that a person knows he has a right to refuse consent. The California courts have followed the rule that voluntariness is a question of fact to be determined from the totality of all the circumstances, and that the state of a defendant's knowledge is only one factor to be taken into account in assessing the voluntariness of a consent. See, e.g., People v. Tremayne, 20 Cal.App.3d 1006, 98 Cal.Rptr. 193; People v. Roberts, 246 Cal.App.2d 715, 55 Cal.Rptr. 62.

A

The most extensive judicial exposition of the meaning of 'voluntariness' has been developed in those cases in which the Court has had to determine the 'voluntariness' of a defendant's confession for purposes of the Fourteenth Amendment. Almost 40 years ago, in Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682, the Court held that a criminal conviction based upon a confession obtained by brutality and violence was constitutionally invalid under the Due Process Clause of the Fourteenth Amendment. In some 30 different cases decided during the era that intervened between Brown and Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, the Court was faced with the necessity of determining whether in fact the confessions in issue had been 'voluntarily' given.[FN5] It is to that body ***224** of case law to which we turn for initial guidance on the meaning of 'voluntariness' in the present context.[FN6]

FN5. See Miranda v. Arizona, 384 U.S. 436, 507, and n. 3, 86 S.Ct. 1602, 1645, 16 L.Ed.2d 694 (Harlan, J., dissenting); Spano v. New York, 360 U.S. 315, 321 n. 2, 79 S.Ct. 1202, 1206, 3 L.Ed.2d 1265 (citing 28 cases).

FN6. Similarly, when we recently considered the meaning of a 'voluntary' guilty plea, we returned to the standards of 'voluntariness' developed in the coerced—confession cases. See Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747. See also n. 25, infra.

Those cases yield no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen. 'The notion of 'voluntariness,'' Mr. Justice Frankfurter once wrote, 'is itself an amphibian.' Culombe v. Connecticut, 367 U.S. 568, 604—605, 81 S.Ct. 1860, 1880—1881, 6 L.Ed.2d 1037. It cannot be taken literally to mean a 'knowing' choice. 'Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are 'voluntary' in the sense of representing a choice of alternatives. On the other hand, if 'voluntariness' incorporates notions of 'butfor' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.'[FN7] It is thus evident that neither linguistics nor epistemology will provide a ready definition of the meaning of 'voluntariness.'

FN7. Bator & Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions, 66 Col.L.Rev. 62, 72—73. See also 3 J. Wigmore, Evidence s 826 (J. Chadbourn rev. 1970): 'When, for example, threats are used, the situation is one of choice between alternatives, either one disagreeable, to be sure, but still subject to a choice. As between the rack and a confession, the latter would usually be considered the less disagreeable; but it is nonetheless a voluntary choice.'

Rather, 'voluntariness' has reflected an accommodation of the complex of values implicated in police questioning***225** of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. See Culombe v. Connecticut, supra, at 578—580, 81 S.Ct., at 1865—1866. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. Haynes v. Washington, 373 U.S. 503, 515, 83 S.Ct. 1336, 1344, 10 L.Ed.2d 513. At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice. '(I)n cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.' Blackburn v. Alabama, 361 U.S. 199, 206—207, 80 S.Ct. 274, 280, 4 L.Ed.2d 242. See also Culombe v. Connecticut, supra, 367 U.S., at 581—584, 81 S.Ct., at 1867—1869; Chambers v. Florida, 309 U.S. 227, 235—238, 60 S.Ct. 472, 476—478, 84 L.Ed. 716.

This Court's decisions reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty. The Due Process Clause does not mandate that the police forgo all questioning, or that they be given carte blanche to extract what they can from a suspect. 'The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his ***226** confession offends due process.' Culombe v. Connecticut, supra, 367 U.S., at 602, 81 S.Ct., at 1879.

In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. **Some of the factors taken into account have included the youth of the accused**, e.g., Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224; his lack of education, e.g., Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975; or his low intelligence, e.g., Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246; the lack of any advice to the accused of his constitutional rights, e.g., Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895; **the length of detention**, e.g., Chambers v. Florida, supra; the repeated and prolonged nature of the questioning, e.g., Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192; and the use of physical punishment such as the deprivation of food or sleep, e.g., Reck v. Pate, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948.[FN8] **In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted.** Culombe v. Connecticut, supra, 367 U.S., at 603, 81 S.Ct., at 1879.

> FN8. See generally Miranda v. Arizona, 384 U.S., at 508, 86 S.Ct., at 1645 (Harlan, J., dissenting); 3 J. Wigmore, Evidence s 826 (J. Chadbourn rev. 1970); Note, Developments in the Law: Confessions, 79 Harv.L.Rev. 938, 954—984.

The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances. See Miranda v. Arizona, 384 U.S. 436, 508, 86 S.Ct. 1602, 1645, 16 L.Ed.2d 694 (Harlan, J., dissenting); id., at 534—535, 86 S.Ct., at 1659—1660 (White, J., dissenting). In none of them did the Court rule that the Due Process Clause required the prosecution to prove as part of its ***227** initial burden that the defendant knew he had a right to refuse to answer the questions that were put. While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the 'voluntariness' of an accused's responses, they were not in and of themselves determinative. See, e.g., Davis v. North Carolina, supra; Haynes v. Washington, supra, 373 U.S., at 510—511, 83 S.Ct., at 1341—1342; Culombe v. Connecticut, supra, 367 U.S., at 610, 81 S.Ct., at 1883; Turner v. Pennsylvania, 338 U.S. 62, 64, 69 S.Ct. 1352, 93 L.Ed. 1810.

CERTIFICATION CASES AND STATUTES

Sec. 54.02. WAIVER OF JURISDICTION AND DISCRETIONARY TRANSFER TO CRIMINAL COURT

(a) The juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate district court or criminal district court for criminal proceedings if:
  (1) the child is alleged to have violated a penal law of the grade of felony;
  (2) the child was:
    (A) 14 years of age or older at the time he is alleged to have committed the offense, if the offense is a capital felony, an aggravated controlled substance felony, or a felony of the first degree, and no adjudication hearing has been conducted concerning that offense; and
  (3) after a full investigation and a hearing, the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings.

(b) The petition and notice requirements of Sections 53.04, 53.05, 53.06, and 53.07 of this code must be satisfied, and the summons must state that the hearing is for the purpose of considering discretionary transfer to criminal court.

(c) The juvenile court shall conduct a hearing without a jury to consider transfer of the child for criminal proceedings.

(d) Prior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.

(e) At the transfer hearing the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses. At least five days prior to the transfer hearing, the court shall provide the attorney for the child and the prosecuting attorney with access to all written matter to be considered by the court in making the transfer decision. The court may order counsel not to reveal items to the child or the child's parent, guardian, or guardian ad litem if such disclosure would materially harm the treatment and rehabilitation of the child or would substantially decrease the likelihood of receiving information from the same or similar sources in the future.

(f) In making the determination required by Subsection (a) of this section, the court shall consider, among other matters:
  (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the 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 the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

(g) If the petition alleges multiple offenses that constitute more than one criminal transaction, the juvenile court shall either retain or transfer all offenses relating to a single transaction. Except as provided by Subsection (g-1), a child is not subject to criminal prosecution at any time for any offense arising out of a criminal transaction for which the juvenile court retains jurisdiction.

(g-1) A child may be subject to criminal prosecution for an offense committed under Chapter 19 or Section 49.08, Penal Code, if:
  (1) the offense arises out of a criminal transaction for which the juvenile court retained jurisdiction over other offenses relating to the criminal transaction; and

(2) on or before the date the juvenile court retained jurisdiction, one or more of the elements of the offense under Chapter 19 or Section 49.08, Penal Code, had not occurred.

(h) If the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court, and shall transfer the person to the appropriate court for criminal proceedings and cause the results of the diagnostic study of the person ordered under Subsection (d), including psychological information, to be transferred to the appropriate criminal prosecutor. On transfer of the person for criminal proceedings, the person shall be dealt with as an adult and in accordance with the Code of Criminal Procedure, except that if detention in a certified juvenile detention facility is authorized under Section 152.0015, Human Resources Code, the juvenile court may order the person to be detained in the facility pending trial or until the criminal court enters an order under Article 4.19, Code of Criminal Procedure. A transfer of custody made under this subsection is an arrest.

(i) A waiver under this section is a waiver of jurisdiction over the child and the criminal court may not remand the child to the jurisdiction of the juvenile court.

(j) The juvenile court may waive its exclusive original jurisdiction and transfer a person to the appropriate district court or criminal district court for criminal proceedings if:

(2) the person was:

(A) 10 years of age or older and under 17 years of age at the time the person is alleged to have committed a capital felony or an offense under Section 19.02, Penal Code;

(k) The petition and notice requirements of Sections 53.04, 53.05, 53.06, and 53.07 of this code must be satisfied, and the summons must state that the hearing is for the purpose of considering waiver of jurisdiction under Subsection (j) of this section.

(l) The juvenile court shall conduct a hearing without a jury to consider waiver of jurisdiction under Subsection (j) of this section.

(m) Notwithstanding any other provision of this section, the juvenile court shall waive its exclusive original jurisdiction and transfer a child to the appropriate district court or criminal court for criminal proceedings if:

(1) the child has previously been transferred to a district court or criminal district court for criminal proceedings under this section, unless:

(A) the child was not indicted in the matter transferred by the grand jury;

(B) the child was found not guilty in the matter transferred;

(C) the matter transferred was dismissed with prejudice; or

(D) the child was convicted in the matter transferred, the conviction was reversed on appeal, and the appeal is final; and

(2) the child is alleged to have violated a penal law of the grade of felony.

(n) A mandatory transfer under Subsection (m) may be made without conducting the study required in discretionary transfer proceedings by Subsection (d). The requirements of Subsection (b) that the summons state that the purpose of the hearing is to consider discretionary transfer to criminal court does not apply to a transfer proceeding under Subsection (m). In a proceeding under Subsection (m), it is sufficient that the summons provide fair notice that the purpose of the hearing is to consider mandatory transfer to criminal court.

(o) If a respondent is taken into custody for possible discretionary transfer proceedings under Subsection (j), the juvenile court shall hold a detention hearing in the same manner as provided by Section 54.01, except that the court shall order the respondent released unless it finds that the respondent:

(1) is likely to abscond or be removed from the jurisdiction of the court;

(2) may be dangerous to himself or herself or may threaten the safety of the public if released; or

(3) has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term of jail or prison and is likely to commit an offense if released.

(p) If the juvenile court does not order a respondent released under Subsection (o), the court shall, pending the conclusion of the discretionary transfer hearing, order that the respondent be detained in:

(1) a certified juvenile detention facility as provided by Subsection (q); or

(2) an appropriate county facility for the detention of adults accused of criminal offenses.

(q) The detention of a respondent in a certified juvenile detention facility must comply with the detention requirements under this title, except that, to the extent practicable, the person shall be kept separate from children detained in the same facility.

(r) If the juvenile court orders a respondent detained in a county facility under Subsection (p), the county sheriff shall take custody of the respondent under the juvenile court's order. The juvenile court shall set or deny bond for the respondent as required by the Code of Criminal Procedure and other law applicable to the pretrial detention of adults accused of criminal offenses.

Texas Constitution Article 1, Section X

Sec. 10. RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

***Faisst v. State*, 105 S.W.3d 8 (Tex.App.—Tyler 2003, no pet.).**

Juvenile defendant was certified as an adult and pleaded guilty in the 7th Judicial District Court, Smith County, Kerry L. Russell, J., to intoxicated manslaughter. Defendant appealed. The Court of Appeals affirmed. Defendant petitioned for discretionary review. The Court of Criminal Appeals, 98 S.W.3d 226, reversed and remanded. On remand, the Court of Appeals, James T. Worthen, C.J., held that evidence was legally and factually sufficient to support juvenile defendant's certification as adult for prosecution of intoxication manslaughter offense based on finding that welfare, safety, and protection of community required adult prosecution.

Affirmed.

OPINION ON REMAND

JAMES T. WORTHEN, Chief Justice.

Appellant Lindsay Faisst was certified as an adult and was charged with the offense of Intoxication Manslaughter. After certification and transfer to district court, Appellant entered a plea of guilty and was sentenced to confinement for ten years, probated. Appellant appeals the discretionary transfer from juvenile court.

In *Faisst v. State*, 2001 WL 1535453, at *1, 107 S.W.3d 7, 8 (Tex.App.-Tyler, November 30, 2001), we held that, based upon *Young v. State*, 8 S.W.3d 656, 666–67 (Tex.Crim.App.2000), this court did not have jurisdiction over Appellant's appeal because she pleaded guilty at the district court level. Disagreeing with our interpretation of *Young*, the court of criminal appeals has remanded this case for further proceedings consistent with its opinion. *See Faisst v. State*, 98 S.W.3d 226 (Tex.Crim.App.2003). We affirm.

BACKGROUND

Appellant was driving a vehicle, with Ashleigh McCaa as her passenger, when the Whitehouse police clocked her traveling above the speed limit. She attempted to flee when the police began pursuit of her vehicle. As Appellant was negotiating a curve at a high rate of speed, estimated at 100 m.p.h., she lost control of her car and hit a large tree. She was thrown from the vehicle and sustained minor injuries, but her passenger was decapitated and an arm was ripped off when her side of the vehicle made contact with the tree. Because of the amount of force which had been applied to McCaa's seatbelt, it finally gave way, and she was thrown from the ***11** car into a barbed wire fence. At the scene, Appellant asked repeatedly, “Where am I?” and “Is my car o.k.?” Her speech was slurred and hard to understand, although there was no evidence of head trauma. It was later determined that Appellant was intoxicated at the time of the incident.

Appellant was sixteen years old when the

accident occurred. An original petition was filed in juvenile court alleging that Appellant had engaged in delinquent conduct. The State then filed its motion for discretionary transfer to district court. By the time of the hearing, Appellant had turned seventeen. After hearing testimony, considering evidence and argument of counsel, the juvenile court certified Appellant as an adult, and transferred this case to the district court.

Appellant waived presentment of the indictment for Intoxication Manslaughter, waived her right to trial by jury, and pleaded guilty without benefit of a plea recommendation. A pre-sentence report was prepared, and after presentment of evidence and argument, Appellant was sentenced to ten years of confinement in the Texas Department of Criminal Justice—Institutional Division. Appellant then filed a Motion for Probation after Execution of Sentence, which the trial court granted. This appeal followed.

DISCRETIONARY TRANSFER

Standard of Review

In order to transfer a juvenile to adult court, the court must find that (1) there is probable cause to believe that the juvenile committed the offense alleged in the petition,[FN1] and (2) because of the seriousness of the offense alleged or the background of the child, the welfare of the community requires criminal prosecution. TEX. FAM.CODE ANN. art. 54.02(a)(3) (Vernon Supp.1998). To facilitate this decision, the Family Code sets out criteria for the court to consider:

> FN1. Appellant stipulated to her age and that there was probable cause to believe that she had committed intoxicated manslaughter.

(1) whether the alleged offense was against a person or property, with greater weight in favor of transfer given to offenses against the 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 the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

TEX. FAM.CODE ANN. art. 54.02(f) (Vernon Supp.1998). While the juvenile court must consider all of these factors before transferring the case to district court, it is not required to find that each factor is established by the evidence. *In re D.D.*, 938 S.W.2d 172, 176 (Tex.App.-Fort Worth 1996, no pet.). And the juvenile court is not required to give each factor equal weight so long as each is considered. *In re J.J.*, 916 S.W.2d 532, 535 (Tex.App.-Dallas 1995, no writ); *In re C.C.G.*, 805 S.W.2d 10, 15 (Tex.App.-Tyler 1991, writ denied). Further, a court does not abuse its discretion by finding the community's welfare requires transfer due to the seriousness of the crime alone, despite the child's background. *D.D.*, 938 S.W.2d at 177; *C.C.G.*, 805 S.W.2d at 15.

At the conclusion of the transfer hearing, the juvenile court issued the following findings:

***12** (1) The Court finds that the said act would be a felony under the laws of the State of Texas if committed by an adult.

(2) The Court finds that the alleged offense was against a person.

(3) The Court finds that the Child is of sufficient sophistication and maturity to be tried as an adult. The Court specifically finds that the Child is of sufficient sophistication and maturity to aid an attorney in her defense.

(4) The Court finds that because of the extreme and severe nature of the alleged offense, the prospects of adequate protection for the public and likelihood of reasonable rehabilitation of the Child by the use of procedures, services and facilities which are currently available to the Juvenile Court are in doubt.

The standard of review for an appellate court in reviewing a juvenile court's decision to certify a juvenile defendant as an adult is abuse of discretion. *In the Matter of K.B.H.*, 913 S.W.2d 684, 687–88 (Tex.App.-Texarkana 1995, no writ). A court abuses its discretion when it acts in an arbitrary or unreasonable manner. *In the Matter of J.P.O.*, 904 S.W.2d 695, 702 (Tex.App.-Corpus Christi 1995, writ denied). Relevant factors to be considered when determining if the court abused its discretion include legal and factual sufficiency of the

evidence. *KBH*, 913 S.W.2d at 688. The juvenile court's findings of fact are reviewable by the same standards as are applied in reviewing the legal or factual sufficiency of the evidence supporting a jury's answers to a charge. *J.P.O.*, 904 S.W.2d at 700.

When the legal sufficiency of the evidence supporting a certification and transfer order is challenged, we view the evidence in the light most favorable to the court's findings and determine whether there is any evidence to support such findings. *J.J.*, 916 S.W.2d at 535. It is not within our power to second guess the factfinder unless only one inference can be drawn from the evidence. *Id.* If there is more than a scintilla of evidence to support the finding, the no evidence challenge fails. *Id.*

By contrast, when the factual sufficiency of the evidence to support a certification and transfer order is challenged, we 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. *C.M. v. State*, 884 S.W.2d 562, 563 (Tex.App.-San Antonio 1994, no writ). Absent an abuse of discretion, we will not disturb a juvenile court's findings. *Id.*

In her sole issue, Appellant agrees that the facts of this offense are tremendously serious. However, taken in conjunction with the testimony at trial, Appellant asserts that they do not show that the welfare, safety and protection of the community require her adult criminal prosecution, which is a challenge to the juvenile court's fourth finding. Therefore, Appellant contends, because there is neither legally nor factually sufficient evidence to support the finding, the trial court abused its discretion when it transferred the case to the district court.

Legal Sufficiency

During the discretionary transfer hearing, Joe Berg, a juvenile probation officer for Smith County, testified for the State. He explained that in the juvenile justice system, the minimum punishment for an offense is three months of intensive supervision, plus six months of probation. The maximum punishment is twelve months of intensive supervision, followed by twelve months of probation. The juvenile court loses its jurisdiction, however, ***13** when the child turns eighteen, whether he has completed his supervision and probation or not. Berg opined that the crime for which Appellant was charged was of a most serious nature, and that if she were not certified an adult, she should be assessed the maximum punishment. He explained, however, that Appellant was already seventeen, and that the court would lose jurisdiction over her long before she had served her sentence. Berg also testified that when a person who is under the influence of alcohol commits an offense where death occurs, that person needs a minimum of fifteen to twenty months of supervision to ensure that rehabilitation takes place.

Berg plainly stated that because of the serious nature of intoxication manslaughter, Appellant requires longer supervision than the juvenile justice system can provide. We hold, therefore, that this evidence is legally sufficient to support the juvenile court's finding that

> because of the extreme and severe nature of the alleged offense, the prospects of adequate protection for the public and likelihood of reasonable rehabilitation of the Child by the use of procedures, services and facilities which are currently available to the Juvenile Court are in doubt.

Factual Sufficiency

In addition to the above-described testimony, Berg stated that Appellant had been issued a ticket for the offense of Minor in Possession in June of 1998, one and a half years before the accident. At that time, she was required to complete, and did complete, six hours of alcohol education. He pointed out that the education obviously had no effect on Appellant's actions. Berg further related Appellant's admission that she had been drinking for six months before the accident, and had been intoxicated on at least six or seven of those occasions. Berg opined that this level of drinking showed that Appellant had a significant problem with alcohol abuse.

In addition to Berg's testimony that Appellant should be transferred to district court because the juvenile system did not have the resources to adequately supervise or rehabilitate Appellant, a Social Evaluation and Investigative Report which was prepared by Smith County Juvenile Services was also admitted into evidence. The Deputy Director and the investigating Juvenile Probation

Officer both recommended that Appellant be transferred to the district court of Smith County, Texas for criminal prosecution, due to the fact that she had committed a felony offense. Attached to the report was a Texas Department of Public Safety Traffic Law Enforcement Division Offense Report. The investigating officer completed this report after speaking to witnesses and analyzing all physical evidence. He concluded that

> Lindsay Marie Faisst chose to drink alcoholic beverages, even though she was under the age of 21. She chose to drive after reaching a state of intoxication. She chose to accelerate her vehicle to an unsafe speed to avoid being stopped by Whitehouse Police Department. Then she chose to continue driving at the unsafe speed as she entered a curve, causing her vehicle to leave the roadway on the North side of the road and strike the trees. Based upon the actions of Ms. Faisst prior to and during this incident, it is certain that Ms. McCaa died as a direct result of Ms. Faisst's decision to drive while intoxicated, to flee from the police and to exceed the critical curve speed on a narrow, winding, two lane farm to market roadway.

The investigating officer further explained that Appellant had made very poor decisions***14** which a sober person would not normally have made.

James Brown, the owner of Trinity Counseling Associates of East Texas, testified on Appellant's behalf. He stated that he had seen Appellant on two occasions. The first time he simply evaluated her maturity level. During the second interview, he spoke with Appellant about the accident. He opined that because of her remorse, he did not believe that there was a high probability that an incident like the one in question would reoccur. Brown also stated that he was not aware that Appellant had any prior juvenile referrals, any truancy problems or any other criminal violations. But he admitted that Appellant had not told him that she received an MIP prior to the incident. During the hearing, the following exchange occurred between Appellant's attorney and Brown:

> Q: Do you see anything other than the results of what happened that night, Ms. Faisst, as any indication that it was any different than any teenager experimenting with alcohol?
>
> A: If I see anything, it is vague. There may have been something growing in this pattern that would be difficult to identify clinically and to spell out. And probably the thing that you know is most consistent in this pattern is the deception of her parents about where she was and what she was doing.
>
> Q: Would you agree with me that it's not abnormal for teenagers to deceive their parents with who they're with and where they have been?
>
> A: I agree that that's not an unusual pattern, but however when it begins to fall into something that's a regular pattern, that might be an indication of a problem. That's what I mean by something that's ill defined, perhaps.

Brown admitted that he had made no recommendation in his report about whether or not Appellant's case should remain in the juvenile system. He also stated that he was aware that there had been a change in the law from "best interest of the child" to determining an appropriate punishment for a juvenile.

Tom Allen, a psychologist who also interviewed Appellant on two occasions, testified that in regard to the question of whether or not Appellant would be a danger to the community, he saw little to no risk assessment issues. He opined that there was a minimal risk of recidivism because of her profound grief and remorse. He also stated that any concerns which society might have about Appellant could be adequately addressed in an eleven-month period. Further, Allen testified that he had found no indication of psychopathy, conduct disorder, attention deficit disorder, or any other type of mental disease or defect. He also opined that an adolescent's judgment is not as defined or mature as an adult's. Allen would not comment on whether or not eleven months of probation would be adequate to punish Appellant for causing the death of another individual. He stated that "as far as I'm concerned, that's up to the court not a mental health expert."

Shirley Estes, a dance teacher in the Whitehouse Independent School District, testified that when Appellant was in her class, she had been a good student, was respectful, had a sweet disposition, and interacted well with other students. Additionally, she stated that Appellant was a "normal teenager." Lee Yeager, also a teacher with

WISD, agreed with Estes' evaluation of Appellant. He further testified that after the accident, Appellant had a very difficult transition, that she no longer interacted with other students, and that she was sometimes zombie-like.

15 *CONCLUSION

After a thorough review of the record, we find not only legally sufficient, but also factually sufficient evidence to support the juvenile court's fourth finding. The court's finding that because of the severity of the offense, which requires a long period of supervision and probation, the juvenile justice system cannot adequately protect the public or provide for the rehabilitation of Appellant, is not so against the great weight and preponderance of the evidence as to be manifestly unjust. Accordingly, we hold that the juvenile court did not abuse its discretion when it certified Appellant as an adult and transferred her case to the district court. We overrule Appellant's sole issue and affirm the judgment of the trial court.

***In re B.T.*, 323 S.W.3d 158 (Tex. 2010).**

Background: State filed petition for discretionary transfer of juvenile charged with murder to criminal court. The County Court at Law No. 3, Smith County, Floyd T. Getz, J., set juvenile's transfer hearing without awaiting completion of diagnostic study. Juvenile sought mandamus relief. The Tyler Court of Appeals, 323 S.W.3d 220, denied relief. Juvenile petitioned for writ of mandamus.

Holdings: The Supreme Court held that:
(1) juvenile court abused its discretion in not delaying the setting of transfer hearing until author of commissioned diagnostic study completed her facially incomplete report, and

Writ conditionally granted.

PER CURIAM.

In this mandamus proceeding, we consider whether the juvenile court abused its discretion when it did not obtain a complete diagnostic evaluation of a juvenile prior to a hearing to transfer the juvenile to adult criminal court. The Family Code mandates a "complete diagnostic study," and the psychologist who performed this report emphasized it was incomplete. We hold the trial court abused its discretion, a determination the State does not dispute, and we conditionally grant the petition for writ of mandamus.

B.T. is a 17–year–old charged with murdering his teacher. In 2009, the State filed a petition for discretionary transfer urging the juvenile court to order B.T. tried as an adult. Under Family Code Section 54.02(a), the "juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate district court or criminal district court for criminal proceedings if" certain conditions are met. Section 54.02(a)(3) authorizes transfer to criminal court if, among other requirements, the juvenile court determines "after a full investigation and a hearing" that there is probable cause to believe the child committed the alleged offense and "because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings." Section 54.02(d) provides that "[p]rior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense." Section 54.02(f) provides that the juvenile court, in making the transfer decision, shall consider several factors, including "the sophistication and maturity of the child," "the record and previous history of the child," and "the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court."

***160** In accordance with the Family Code, the juvenile court commissioned Dr. Emily Fallis to perform a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense, and to assess his background, his sophistication and maturity, his record and previous history, the prospects of adequate protection of the public, and the likelihood of his rehabilitation by use of procedures, services, and facilities currently available to the juvenile court. Dr. Fallis's preliminary evaluation concluded B.T. suffered

from a mental disease or defect that substantially impaired his capacity to understand the charges against him and the proceedings in juvenile court, and to assist in his own defense. Dr. Fallis stated she would "not proffer an opinion regarding [B.T.'s] capacity to be adjudicated as an adult until he is fit to proceed." The report recommended that B.T. receive inpatient psychiatric treatment "in order to help him attain a minimal level of fitness to proceed" and be reevaluated with regard to the State's transfer motion. Dr. Fallis therefore submitted a report she specifically stated was incomplete.

Based on Dr. Fallis's recommendations, the juvenile court committed B.T. to Vernon State Hospital for 90 days, where he underwent treatment and counseling until he was deemed fit to proceed by Dr. Stacey Shipley. The juvenile court then set B.T.'s transfer hearing for May 13, 2010, even though Dr. Fallis's report remained incomplete.

B.T. and the State *jointly* urged the court to delay the hearing to await completion of the diagnostic study. The court refused, believing it had sufficient information to proceed under Section 54.02(d). At the time, the juvenile court possessed Dr. Fallis's partial report, medical records from Vernon State Hospital by Dr. Shipley, and an evaluation of B.T. by Dr. Paul Andrews from an unrelated juvenile proceeding in 2007. B.T.'s counsel objected that the materials merely addressed B.T.'s fitness to proceed and did not comprise the "complete diagnostic study" required by statute. The court ignored this objection, explaining: "I think I've got before me so much information of an evaluative nature, psychological evaluations and that sort of thing, that I think I've got before me what I would consider a complete diagnostic study." B.T. filed a motion requesting the court reconsider its ruling and await the complete diagnostic study. The court denied this motion on May 10, 2010.

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***161**The primary issue presented is whether the juvenile court erred in concluding the information it already possessed was sufficient, despite Dr. Fallis's caution that further evaluation was required to finish the report. We conclude the juvenile court abused its discretion in proceeding without the complete diagnostic study.

Based on a plain reading of Section 54.02(d), the juvenile court is required to "order and obtain" a "complete diagnostic study" before the hearing. Neither the Legislature, this Court, nor the Court of Criminal Appeals has defined "complete diagnostic study" for purposes of Section 54.02. One court of appeals has described a complete diagnostic study as one that "bears upon the maturity and sophistication of the child and relates to the questions of culpability, responsibility for conduct, and ability to waive rights intelligently and assist in the preparation of a defense." *L.M. v. State*, 618 S.W.2d 808, 811 (Tex.App.-Houston [1st Dist.] 1981, writ ref'd n.r.e.) (citations omitted). It is the "qualitative content of a diagnostic study, rather than a mere quantitative 'checklist' of included items, [that] is the paramount concern." *Id.* at 811–12.

Some courts of appeals have held a trial court did not abuse its discretion where it relied upon materials that did not clearly constitute a complete diagnostic report, but instead contained a variety of psychological evaluations and records. *See I.L. v. State*, 577 S.W.2d 375, 376 (Tex.Civ.App.-Austin 1979, writ ref'd n.r.e.) (study included an intelligence test completed one year prior to hearing, a social evaluation and investigation, monthly progress reports during a one-year stay at the juvenile detention center, a psychiatric examination conducted less than one month prior to the hearing, and testimony from an examining psychiatrist at the hearing that "no further testing was needed and that a complete diagnostic study had been made"); *R.K.A. v. State*, 553 S.W.2d 781, 783 (Tex.Civ.App.-Fort Worth 1977, no writ) (study that was "very comprehensive" included reports from three doctors, the supervisor of intake at the juvenile detention center, and a probation officer, and an evaluation prepared from daily observations by a juvenile department program director and a staff member); *Vasquez v. State*, No. 03–99–00664–CR, 2000 WL 795328, at *1 (Tex.App.-Austin June 22, 2000, no pet.) (study included "a juvenile probation officer's summary, a psychological evaluation, a psychiatric evaluation, a physical examination, and ... an elementary school record"); *L.M.*, 618 S.W.2d at 811–12 (psychological testing for a study was ordered and obtained by the trial judge but not entered into evidence due to the juvenile's objections).

B.T.'s case is distinguishable from these cases. While a trial court has discretion to determine whether a diagnostic study is in fact complete, no appellate court has upheld a case where the commissioned report itself declares it is insufficient. The State candidly concedes the awkwardness: "it is troubling to the State ***162** that the record as it currently stands contains evidence that the only § 54.02(d) diagnostic study ordered by Judge Getz states on its face that it was not completed due to Relator's unfitness to proceed."

The three fitness reports the juvenile court deemed sufficient under Section 54.02(d) contain detailed information regarding B.T.'s background, his treatment, his history of behavioral issues, the various evaluation and testing he has undergone, his diagnoses, and his understanding of the alleged murder and the surrounding circumstances. Each report, however, deals solely with the matter of B.T.'s fitness to proceed. A juvenile is unfit to proceed if "as a result of mental illness or mental retardation[, he] lacks capacity to understand the proceedings in juvenile court or to assist in [his] own defense." TEX. FAM.CODE § 55.31(a). After a motion to determine fitness to proceed is filed, the court may, in making its determination, consider the motion, supporting documents, professional statements of counsel, and witness testimony, and also make its own observation of the child. *Id.* at (b). In contrast, the "complete diagnostic study" for a transfer hearing calls for a far more comprehensive analysis, as described above. The juvenile court here violated Section 54.02(d) by substituting the Vernon State Hospital report and Dr. Andrews's two-year-old report for a reevaluation and complete report by Dr. Fallis.

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***In the Matter of C.C.*, 930 S.W.2d 929 (Tex.App.—Austin 1996, no writ).**

Juvenile delinquency petition was filed alleging that juvenile committed offense of attempted murder by beating and burning homeless person. The 98th Judicial District Court, Travis County, W. Jeanne Meurer, J., waived jurisdiction in juvenile proceeding and transferred matter for criminal prosecution. Juvenile appealed. The Court of Appeals, Carroll, C.J., held that: (1) eyewitness evidence established probable cause to believe that juvenile committed attempted murder; (2) welfare of community required transfer for criminal prosecution; (3) investigation prior to transfer hearing was adequate; and (4) attempted murder offense as well as all criminal offenses occurring during criminal episode were properly transferred, even though transfer order did not allege all possible charges.

Affirmed.

CARROLL, Chief Justice.

Appellant, a juvenile, was charged with attempted murder by a petition alleging he committed delinquent conduct. *See* Tex. Fam.Code Ann. § 53.04 (West 1996). The district court of Travis County, Texas, sitting as a juvenile court, waived jurisdiction and transferred the matter to district court. In two points of error, appellant appeals the order waiving jurisdiction and transferring the cause to district court ("the order"). We will affirm the juvenile-court order.

BACKGROUND

On January 10, 1995, Ricardo Davila, a homeless person, was severely beaten and set on fire. Appellant, a juvenile suspected of participating in the assault, was detained under the authority of the juvenile court of Travis County. Before an adjudicative hearing was held, the State petitioned the juvenile court to waive its jurisdiction and transfer the matter to the district court of Travis County. At the hearing on the petition, the State presented witnesses who testified to the following facts.

Scott Ferris was climbing the stairs to his apartment the night of January 10, 1995, when he saw two persons kicking, stomping on, and throwing bottles at an object in an alley behind a convenience store. Ferris went into his apartment, retrieved a baseball bat, and walked to the alley to find out what had happened. Through the fence separating***932** the apartment complex from the alley, Ferris saw a person (Davila) on the ground. Ferris walked to the end of the fence and saw two young men leaving the scene. Immediately afterward, Ferris saw Davila engulfed in flames. When neither Ferris nor Davila could extinguish the flames, Davila ran across the street to a gas station. Customers at the gas station eventually put out the

flames using blankets and a fire extinguisher.

Officer Robert Hester of the Austin Police Department was dispatched to investigate the alleged assault. Tammy Socha, also an officer with the Austin Police Department, was riding with Hester that night. When the two arrived at the scene, Socha videotaped the crime scene and the condition of the victim.

Several hours after the crime occurred, one of the accomplices to the crime told an acquaintance, Bradley Livingston, about the incident. The accomplice identified appellant as one of the persons responsible for the assault and burning. Appellant was present during the conversation. Shortly after that conversation, appellant admitted to Livingston that he and another person had poured lighter fluid on the victim and set him on fire. Not only did appellant implicate himself in the matter, but eyewitness Scott Ferris also identified him in a police photo line-up as one of the two men Ferris saw leaving the scene.

Appellant was detained and later evaluated by psychologist Kevin McFarley. Dr. McFarley concluded that appellant was of at least average intelligence, had a history of depression, understood the difference between right and wrong, and was not suffering from a severe psychiatric illness. Dr. McFarley believed that appellant could respond positively to anti-depressant medication and psychiatric hospitalization, but concluded that appellant probably would not benefit from counseling or psychotherapy. Dr. McFarley testified that appellant was more sophisticated in some ways than many adolescents his age. The record also reflects that appellant lived alone in an apartment but that his father paid the rent for the apartment.

Appellant presented no evidence in his defense at the hearing on the petition. The juvenile court found, among other things, that there was probable cause to believe appellant had committed attempted murder. Additionally, the court found that the welfare of the community required criminal proceedings. The court waived its jurisdiction over the matter and transferred it to district court.

DISCUSSION

Legal and Factual Sufficiency of the Evidence

In order to properly transfer a matter to district court, a juvenile court must find two things.[FN1] First, the court must find probable cause to believe the juvenile committed the offense or offenses alleged in the transfer petition. *See* Act of May 11, 1973, 63d Leg., R.S., ch. 544, § 1, 1973 Tex. Gen. Laws 1460, 1476 (Tex. Fam.Code Ann. § 54.02(a)(3), since amended) (hereinafter "Former Code"). Second, the juvenile court must find that the welfare of the community requires criminal proceedings because of the seriousness of the offense alleged or because of the background of the juvenile. *Id.* The juvenile court made the required findings before it transferred appellant's case to district court.

> FN1. The parties do not dispute that the other requirements for transfer were met (i.e., appellant was charged with a second degree felony, no adjudication hearing had been held, and appellant was over fifteen years of age at the time of the alleged offense). *See* Tex. Fam.Code Ann. § 54.02(a)(2)(B) (West 1996).

In his first point of error, appellant complains the juvenile court erred in waiving jurisdiction and transferring the cause because the evidence was not legally or factually sufficient to support three of the juvenile court's findings. The rules governing transfer determinations are the same as those ***933** governing civil appeals in general. Tex. Fam.Code Ann. § 56.01(b) (West 1996). Absent a showing of an abuse of discretion, we will not disturb the juvenile court's findings. *In re J.P.O.*, 904 S.W.2d 695, 698 (Tex.App.—Corpus Christi 1995, writ denied). In deciding whether evidence is legally sufficient, we consider only the evidence and inferences tending to support the finding of the trier of fact. *E.g.*, *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex.1995); *J.P.O.*, 904 S.W.2d at 700. We will uphold the finding if more than a scintilla of evidence supports it. *E.g.*, *Crye*, 907 S.W.2d at 499. When reviewing the factual sufficiency of the evidence supporting a finding, we must consider and weigh all the evidence in support of and contrary to the finding. *E.g.*, *Plas–Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex.1989); *J.P.O.*, 904 S.W.2d at 700. We will uphold the contested findings unless we find the evidence is too weak to support them, or they are so against the overwhelming weight of the evidence that they are manifestly unjust. *E.g.*, *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex.1965); *J.P.O.*, 904 S.W.2d at 700.

Appellant challenges the juvenile court's finding that there was probable cause to believe appellant committed the offense of attempted murder. Probable cause exists where there are sufficient facts and circumstances to warrant a prudent person to believe the suspect committed the offense. *J.P.O.*, 904 S.W.2d at 700. The evidence showed that appellant was present at the scene of the crime; an eyewitness to the crime identified appellant. The evidence also showed that appellant participated in the burning; appellant admitted to Livingston that he had taken part in the burning. Those facts alone constitute legally sufficient evidence upon which to base a finding of probable cause. Those facts constitute factually sufficient evidence as well because there was little if any evidence supporting the idea that appellant did not intentionally participate in the burning. We, therefore, overrule appellant's challenge to the juvenile court's probable cause determination.

Appellant also challenges the juvenile court's findings that he was sophisticated enough to be tried as an adult and that he was unlikely to benefit from rehabilitative programs. In determining that the welfare of the community required transfer to district court, the juvenile court was required to *consider* the six factors listed in Former Code Section 54.02(f), two of which concern a juvenile's sophistication and likelihood to be rehabilitated.[FN2] The court was not required to make affirmative findings on any of the factors, *In re C.C.G.*, 805 S.W.2d 10, 15 (Tex.App.—Tyler 1991, writ denied), but it did so on five of the factors. First, the juvenile court found that the alleged offense was a crime against a person. [FN3] Second, the court found the offense alleged was committed in an aggressive and premeditated manner. Third, the court found there was evidence upon which a grand jury might be expected to return an indictment against appellant for attempted murder. Fourth, the court found appellant was not likely to benefit from the rehabilitation programs available to him. Finally, the court found appellant was of sufficient***934** sophistication and maturity to be tried as an adult. Appellant only contests the validity of the findings on sophistication and rehabilitation. Because the other three findings support the court's ultimate decision to transfer, any factual insufficiency with regard to the court's findings on the two challenged factors is irrelevant.

FN2. The statute as it appeared at the time the juvenile court conducted the hearing read,

> "In making the determination required by Subsection (a) of this section, the court shall consider, among other matters: (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person; (2) whether the alleged offense was committed in an aggressive and premeditated manner; (3) whether there is evidence on which a grand jury may be expected to return an indictment; (4) the sophistication and maturity of the child; (5) the record and previous history of the child; and (6) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court."

See Former Code § 54.02(f). The legislature amended the statute in 1995 to delete factors (2) and (3). *See* Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 34, 1995 Tex. Gen. Laws 2517, 2533.

FN3. A court may give greater weight in favor of transfer to offenses against the person. Former Code § 54.02(f)(1).

Furthermore, we find the evidence factually sufficient to support the two contested findings. With respect to the finding that appellant was of sufficient sophistication and maturity to be tried as an adult, the record reflects that appellant lived in an apartment alone. Dr. McFarley testified that appellant was more sophisticated than his peers in many areas and was familiar with "street issues." With respect to the juvenile court's finding that appellant was not likely to benefit from the rehabilitative programs available to him, Dr. McFarley testified that appellant would probably not benefit from therapy. Moreover, the record contains evidence that, despite his long-time involvement with the mental health system, appellant had failed to improve significantly. In short, there was ample evidence supporting the juvenile court's findings and little evidence controverting those findings. Therefore, we

overrule appellant's challenge to the findings.

Adequacy of Investigation

In his first point of error, appellant additionally challenges the adequacy of the investigation prior to the transfer hearing. Former Code Section 54.02(a)(3) required a "full investigation" be conducted before a transfer hearing. The phrase "full investigation" was not defined in Section 54.02. However, "it is a matter of common knowledge that the course and scope of an investigation will vary according to the circumstances surrounding the events." *Turner v. State*, 796 S.W.2d 492, 497 (Tex.App.—Dallas 1990, no writ) (quoting *In re I.B.*, 619 S.W.2d 584, 586 (Tex.Civ.App.—Amarillo 1981, no writ)). The issue of whether an investigation is complete is determined by the court that ordered the investigation. *In re I.B.*, 619 S.W.2d at 586.

The juvenile court's order reflected that the order was rendered "after full investigation and hearing." The court took judicial notice of an investigator's report and attached psychological evaluation at the hearing. Appellant complains the investigator should have obtained more information than that included in the psychological assessment. However, the investigator was unable to obtain at least part of the missing information because appellant's attorney had instructed the investigator not to talk with certain people, including appellant's parents. Appellant will not be heard to complain about the inadequacy of the investigation when the investigator was precluded from obtaining information on appellant's counsel's instruction. *See In re R.E.M. v. State*, 541 S.W.2d 841, 844–45 (Tex.Civ.App.—San Antonio 1976, writ ref'd n.r.e.). We hold that the juvenile court did not abuse its discretion in finding the investigation complete. We overrule the remainder of appellant's first point of error.

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_In the Matter of I___ L___ v. State_, 577 S.W.2d 375 (Tex.App.—Austin 1979, no writ).

Appeal was taken from a judgment of the 98th District Court, Travis County, Hume Cofer, J., transferring juvenile to criminal court. The Court of Civil Appeals, Phillips, C. J., held that: (1) finding that criminal proceedings were required was supported by evidence; (2) court did not abuse its discretion in admitting diagnostic study of juvenile into evidence, and (3) order of discretionary transfer was not invalid because it failed to state diagnostic study was ordered and obtained and considered.

Affirmed.

PHILLIPS, Chief Justice.

This is an appeal from the judgment of the juvenile court of Travis County waiving its exclusive jurisdiction and transferring appellant, I___ L___, to district court for trial for murder. We affirm the judgment of the juvenile court.

The hearing to consider discretionary transfer of appellant to criminal court was held on June 30 and July 5, 1978, pursuant to Texas Family Code Ann. s 54.02 (1975). As required by section 54.02(a)(3), the court found that "because of the seriousness of the offense or [FN1] the background of the child the welfare of the community requires criminal proceedings." This finding is supported by evidence in the record. Appellant is accused of stabbing a man in the heart outside an Austin nightclub. Appellant's past record includes a burglary charge which was subsequently dropped, an adjudication of delinquency for aggravated assault, and revocation of probation and commitment to Texas Youth Council for stabbing a student.

> FN1. Section 54.02(a)(3) provides for a determination by the judge based upon "the seriousness of the offense Or the background of the child . . . ." (Emphasis added)

Appellant's first two points of error deny compliance with Texas Family Code Ann. s 54.02(d) (1975) which provides:

"Prior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense."

Appellant objected to the admission of the

diagnostic study into evidence. Appellant contends that the diagnostic study obtained pursuant to section 54.02(d) was insufficient in its contents. The study was comprised of a psychiatrist's report, a social evaluation and investigation by a court investigator, monthly progress reports on appellant compiled during a one-year stay at the Texas Youth Council, and an intelligence test which was made at least one year prior to the hearing during appellant's stay at Texas Youth Council. There was no physical examination or interview with a clinical psychologist.

The legislature did not clarify what must be included in a "complete diagnostic study." The authors of one article have suggested the elements necessary are examinations by a psychiatrist And clinical psychologist and an evaluation by a probation department caseworker. See Hays & Solway, The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults, 9 Hous.L.Rev. 709 (1972). Although no examination was made by a psychologist in the present case, we do not believe that omission merits reversal of the juvenile court's judgment.

Appellant points out that the intelligence test was made at least one year prior to the hearing. There was, however, a psychiatric examination conducted less than a month before the hearing. The examining psychiatrist testified at the hearing that in his opinion no further testing was needed and that a complete diagnostic study had been made. Under the circumstances, the court did not abuse its discretion in the admission of the diagnostic study.

Appellant contends that the trial court erred by not including in its order a finding of fact that a complete diagnostic study had been ordered and obtained. In fact, the study was not mentioned in the order. Appellant also argues the order was void because it did not state that the judge read and considered the study. The requirements of section 54.02(d) are mandatory and must be strictly followed. See R. E. M. v. State, 532 S.W.2d 645 (Tex.Civ.App.1975, no writ); In re J. R. C., 522 S.W.2d 579 (Tex.Civ.App.1975, writ ref'd n. r. e.); Moreno v. State, 510 S.W.2d 116 (Tex.Civ.App.1974, writ ref'd n. r. e.). Undoubtedly, ***377** the court must not only "order and obtain" a diagnostic study, but must also consider it. R. K. A. v. State, 553 S.W.2d 781 (Tex.Civ.App.1977, no writ). It is undisputed that the diagnostic study was ordered and obtained.

The United States Supreme Court has stated that a juvenile transfer proceeding is critically important, and a reviewing court may not assume a "full investigation" has been made. Kent v. U. S., 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). We believe, however, that it must be presumed the trial judge carried out his lawful duty of considering all the evidence in the record, including the diagnostic study. The Supreme Court in Kent v. U. S., Supra, stated:

"Presumably, prior to entry of his order, the Juvenile Court judge received And considered recommendations of the Juvenile Court staff, the Social Service file relating to petitioner, and a report . . . submitted to him by the Juvenile Probation Section." (Emphasis added)

We hold the order of discretionary transfer was not invalid because it failed to state the diagnostic study was ordered and obtained and considered.

Appellant challenges in separate points of error findings in the order concerning the existence of evidence supporting an indictment (s 54.02(f)(3)), the sophistication and maturity of the child (s 54.02(f)(4)), and the prospects of adequate protection of the public and the likelihood of rehabilitation of the child by use of procedures available to the juvenile court (s 54.02(f) (6)). It has been held the factors enumerated in section 54.02(f) need only be considered and each one need not be present in a specific case. See Matter of B. L. H. v. State, Docket No. 12,861, (Tex.Civ.App. Austin, Dec. 13, 1978) (not yet reported); Matter of J. R. C., 551 S.W.2d 748 (Tex.Civ.App.1977, writ ref'd n. r. e.); Meza v. State, 543 S.W.2d 189 (Tex.Civ.App.1976, no writ). In the present case there was testimony by witnesses supporting each item. This Court cannot substitute its judgment for that of the juvenile court. See B. L. C. v. State, 543 S.W.2d 151 (Tex.Civ.App.1976, writ ref'd n. r. e.).

***In the Matter of J.S.C.*, 875 S.W.2d 325 (Tex.App.—Corpus Christi 1994, no writ).**

Juvenile sought review of order of 23rd District Court, Matagorda County, Neil Caldwell, J., that waived exclusive, original jurisdiction of juvenile court and transferred case to criminal district court for prosecution on charge of capital murder of two juvenile victims. The Court of Appeals, Kennedy, J., held that: (1) risk to welfare of community from seriousness of alleged offenses supported transfer, despite juvenile's refusal to answer questions and resulting lack of interview of juvenile in diagnostic study required by statute before transfer.

Order affirmed.

OPINION

KENNEDY, Justice.

J.S.C. is charged with capital murder of two juveniles, committed when J.S.C. was sixteen years old. He appeals from an order by which a juvenile court waived its exclusive, original jurisdiction and transferred his case to criminal district court. Appellant seeks a reversal and remand of the matter to juvenile court and to have further proceedings against him addressed in juvenile court. By four points of error, appellant complains that the juvenile court improperly transferred its jurisdiction because it reached its decision without first obtaining and considering a diagnostic study of appellant as required by Texas Family Code section 54.02(d). We affirm the trial court's order.

The State alleged in its petition for waiver of jurisdiction that J.S.C., during the same criminal transaction, intentionally and knowingly caused the death of one woman by stabbing her with a knife, and intentionally and knowingly caused the death of a second woman by stabbing her with a knife while in the course of committing and attempting to commit aggravated sexual assault.

Texas Family Code section 54.02(a) provides that the juvenile court may waive its exclusive, original jurisdiction and transfer a child to the appropriate district court for criminal proceedings if the child is alleged to have committed a felony and was aged fifteen or older at the time of the alleged offense. Tex.Fam.Code Ann. § 54.02(a) (Vernon Supp.1994). When considering whether to transfer its jurisdiction, the court must conduct a full investigation and hearing. *Id.* The juvenile court then determines whether there is probable cause to believe that the child committed the offense alleged, and, that because of the seriousness of the offense, *or,* the background of the child, the welfare of the community requires criminal proceedings. *Id.* (emphasis added). Texas Family Code section 54.02(d) provides that before the transfer hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense. Tex.Fam.Code Ann. § 54.02(d) (Vernon 1986). In making its decision, the juvenile court shall consider, among other matters:

> 1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person; 2) whether the alleged offense was committed in an aggressive and premeditated manner; 3) whether there is evidence on which a grand jury may be expected to return an indictment; 4) the sophistication and maturity of the child; 5) the record and previous history of the child; and 6) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.
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> Tex.Fam.Code Ann. § 54.02(f) (Vernon 1986).

Absent a showing of an abuse of discretion, the trial court's findings will not be disturbed. *In re D.W.L.*, 828 S.W.2d 520, 525 (Tex.App.—Houston [14th Dist.] 1992, no writ); *In re D.J.R.*, 565 S.W.2d 392, 395 (Tex.App.—Fort Worth 1978, no writ).

Pursuant to section 54.02, the court ordered, obtained and considered a certification investigation report. Typically, the certification report includes a psychiatric report, a psychological report, and a report by a probation***327** department caseworker. *See In re W.R.M.*, 534 S.W.2d 178, 180 (Tex.Civ.App.—Eastland 1976, no writ). Included in the certification report were reports by a psychiatrist, a psychologist, and appellant's juvenile probation officer. The court obtained these studies and reports before the hearing.

In its order, the court stated that, among other things, it had considered the factors set forth in Family Code section 54.02(f). After conducting a full investigation and hearing arguments of counsel, the court determined that there was probable cause to believe that appellant committed the offenses of capital murder as alleged. The court waived its exclusive, original jurisdiction for the following reasons: 1) the alleged offenses were against persons; 2) the alleged offenses were committed in an aggressive and premeditated manner; 3) there appears to be evidence upon which a grand jury may be expected to return an indictment; 4) the sophistication and maturity of the juvenile are such that he understands the allegations against him, and he is able to assist his attorney in his defense; 5) the child will not likely be rehabilitated through the juvenile system; 6) without effective rehabilitation through the juvenile system, the public will not be adequately protected; and 7) without adequate protection of the public, the welfare of the community requires criminal proceedings against the juvenile. The court's waiver order then states, "After conducting such full investigation, including evidence and argument of counsel, this Court finds that the welfare of the community requires criminal proceedings that there is probable cause to believe that the child committed the offenses of capital murder."

By point one, appellant asserts that the court did not obtain and consider a complete diagnostic study of appellant as required by the Family Code. By point four, appellant contends that the trial court abused its discretion when transferring its jurisdiction. Appellant asserts that the diagnostic study was incomplete because it did not include an interview with appellant. Appellant specifically asserts that the court should have determined that the psychological evaluation received was unsatisfactory. Appellant suggests that the proper action was for the court to order a new psychological evaluation, and reset the hearing to be conducted only when a satisfactory evaluation had been made, obtained, and considered by the court.

The testimony at the hearing reflects that Dr. Williams, a psychiatrist, attempted to interview appellant on three occasions. Dr. Williams explained that upon each attempt, appellant politely declined to answer his questions. Dr. Williams recalled that appellant told him that his attorney advised him not to answer any of the doctor's questions. Dr. Williams reviewed medical and school records that were sent to him regarding appellant. Dr. Williams also spoke with people at the Brazoria County Juvenile Detention Center. Dr. Williams also observed appellant for between an hour and ninety minutes at the detention center. Based on the information collected, Dr. Williams opined that appellant was "quite sophisticated and mature for his age." Based upon the records received, the persons interviewed and what Dr. Williams observed, he testified that he had gathered all of the information necessary for his conclusions. He also stated that he spent much more time on this case because he was unable to interview appellant. Additionally, he determined that appellant knew the difference between right and wrong.

Appellant's attorney, during cross-examination, asked Dr. Williams about a telephone conversation the two had in which the attorney discussed the possibility of being present when the doctor interviewed appellant. Dr. Williams recalled the conversation and testified that he had told the attorney that he "had no objection to [him] being [at the interview] when [he] asked me." The doctor continued, "[t]o the best of my recollection, I said I did not object if you were there." Additionally, Dr. Williams said that he did not notify appellant's attorney when he attempted the interviews because the attorney never asked that he be informed when the interviews would take place and never stated that he wanted to be present. The attorney suggested to Dr. Williams that each time he attempted an interview perhaps appellant had answered that he did not want to speak with the doctor without his attorney present. ***328** The doctor responded that appellant never told him that. The doctor also stated that appellant never told him that he would talk to the doctor if his attorney were present. Appellant did not testify at the hearing and there is no evidence that appellant ever stated that he wanted his attorney present at the interviews.

Dr. Joe, the psychologist, attempted to interview appellant on three occasions. Dr. Joe testified that on those occasions, upon introducing himself, appellant responded that "he had been advised by his attorney not to take any tests or answer any questions at that time." Dr. Joe also reviewed school and medical records which helped him to gain some sense of the overall perspective of

the appellant's ability to function intellectually. Dr. Joe noted by reviewing appellant's achievement test summaries, he determined that appellant was functioning at the average range or above average range of intelligence. Dr. Joe stated that because of the limited perspective he had of appellant he was not comfortable making an overall recommendation. Upon further questioning, Dr. Joe stated that he did not see any reason that appellant should not be certified as an adult.

Both doctors testified that generally an attorney is not present when they conduct interviews with juveniles whom the State is requesting be tried as adults.

James Hicks, the juvenile probation officer for Matagorda County, testified at the hearing that he was ordered by the court to make a social evaluation, and full investigation of the child and his circumstances, and the circumstances of the alleged offense. He filed his report before the hearing.

At the hearing, Hicks testified about the information he reviewed regarding the investigation of the offenses. He reviewed the sheriff's offense reports; viewed a video; heard a 911 tape; and interviewed sheriff's officers, and several school officials who were acquainted with appellant.

In this case, the evidence shows that appellant made a 911 call to the police identifying himself and stating that he had killed two people and was still at the scene. Officers arriving at the scene found a thirteen-year-old female lying on a bed with a gown or shirt pulled above her breasts with the lower part of her body exposed. There was a large wound opened in her chest, there appeared to be knife wounds in her hand, and her vagina appeared to have been lacerated. Blood covered most of her body. Officers also found the body of a seventeen-year-old female who was dressed in a T-shirt, with the lower part of her body exposed. Her throat had been cut. Blood covered most of her body. Officers discovered a large butcher knife, believed to be the murder weapon, and a window opened onto the rear stairway which was believed to be the point of entry and exit. The officers also found a pair of shoes at the foot of the rear stairway which were believed to belong to J.S.C. The court heard evidence at the hearing that three days before these murders, appellant had attacked the seventeen-year-old's car breaking out the rear and side windows. Later that same day, appellant assaulted the seventeen-year-old by striking her in the mouth, splitting her lip, and breaking her eyeglasses. Appellant also had previous offenses of criminal mischief and assault, unauthorized use of a motor vehicle and assault, and telephone harassment. Hicks opined that there was sufficient evidence to find probable cause and that a grand jury would probably indict appellant for both offenses.

Hicks testified that appellant was enrolled in the eleventh grade at Tidehaven High School. He made average grades and his school records indicated that he has average or above average intelligence. He has maintained a romantic relationship for two years and drives an automobile. Hicks testified that appellant had spent several nights away from home. All of these factors led Hicks to believe that appellant was sophisticated and mature. Hicks noted that appellant had several friends of whom he was the leader.

Hicks also testified that the facilities, services, and procedures available to the juvenile court would not likely help in rehabilitating appellant. Hicks stated that he talked with several professional people who said, generally speaking, a five-year rehabilitation of intense psychotherapy and psychological therapy would be necessary to rehabilitate a ***329** person charged with this type of offense. He explained that the juvenile system would not be adequate to deal with appellant because he has already turned seventeen and the juvenile system would be required to release him at age twenty-one, only four years. Hicks recommended that it would be in the best interest of the child and the community for the court to transfer the proceedings against appellant to criminal district court.

Section 54.02(d) requires the juvenile court to order and obtain a complete diagnostic study, a social evaluation, full investigation of the child and his circumstances, and the circumstances of the alleged offense. The juvenile court is not required to find each factor is established by the evidence. *In re C.C.G.*, 805 S.W.2d 10, 15 (Tex.App.—Tyler 1991, writ denied). The statute does not apportion the weight that the trial court shall give to any of these areas of investigation. *Id.* Additionally, appellant concedes that the statute does not give a list of everything to be included in a diagnostic

study.

If the child refuses to cooperate with the authorities compiling the diagnostic study, a report is sufficient to satisfy the statutory requirements provided a bona fide effort is made to obtain the full study. *In re R.E.M.*, 541 S.W.2d 841, 844–45 (Tex.Civ.App.—San Antonio 1976, writ ref'd n.r.e.). An interview with appellant by the psychiatrist and the psychologist may have been helpful to the court in determining the sophistication and maturity factors of appellant. However, there was other evidence presented relating to appellant's sophistication and maturity. The record and previous history of the child, the prospects of adequate protection of the public, and likelihood of rehabilitation by use of the juvenile court procedures and services also were considered by the court.

The phrase "full investigation" is not defined in section 54.02. However, "[i]t is a matter of common knowledge that the course and scope of an investigation will vary according to the circumstances surrounding the events." *Turner v. State*, 796 S.W.2d 492, 497 (Tex.App.—Dallas 1990, no writ) (quoting *In re I.B.*, 619 S.W.2d 584, 586 (Tex.Civ.App.—Amarillo 1981, no writ)). The determination of what constitutes a "full investigation" is for the trial court. *In re R.L.H.*, 646 S.W.2d 499, 502 (Tex.App.—Houston [1st Dist.] 1982, no writ).

The court determined, based upon the certification report, that because of the seriousness of the offense, the welfare of the community required criminal proceedings. The Family Code does not require that the court find both the seriousness of the offense and the background of the child demand criminal proceedings.

In reviewing the record from the hearing, we find no evidence that appellant would have answered the doctors' questions had his attorney been present. Nor is there any evidence in the record that appellant stated to the doctors that his attorney had instructed him not to answer any questions *unless* his attorney was present. We overrule point one.

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In the Matter of K.B.H., 913 S.W.2d 684 (Tex.App.—Texarkana 1995, no writ).

State filed petition to transfer juvenile charged with murder to criminal court. The 307th Judicial District Court, Gregg County, Robin Sage, J., granted petition. Juvenile appealed. The Court of Appeals, Cornelius, C.J., held that: (1) district court properly allowed state to present testimony by juvenile's probation officer and probation official; (2) evidence supported transfer; and (3) evidence supported finding of probable cause.

Affirmed.

OPINION

CORNELIUS, Chief Justice.

K.B.H., sixteen, appeals from an order certifying him to stand trial as an adult on a murder charge. He contends that the trial court erred in allowing the State to present witnesses it did not list in discovery. He also contends that the trial court abused its discretion in waiving jurisdiction and transferring the case to criminal court because no evidence supported the order under ***686**Section 54.02(d) or (f)(6) of the Family Code; [FN1] because the court did not find, as required by Section 54.02(a)(3) of the Family Code, that his background required criminal proceedings; and because no evidence supported the finding under Section 54.02(a)(1) of the Family Code that the offense was a felony. We affirm the trial court's judgment.

FN1. TEX.FAM.CODE ANN. § 54.02 (Vernon 1986 & Supp.1995).

K.B.H. was taken into custody September 12, 1994, at his Longview high school in connection with the July 10 shooting death of Taylor Lee Brent. While in custody, K.B.H. gave sheriff's investigators a statement in which he said that on the night of the shooting he was riding in a van driven by his brother and that he took a 9mm semiautomatic pistol from beneath the seat and began shooting at a pickup truck on FM 1845. He gave no reason for the shooting. After the incident, he went home, but returned to the scene later that

evening and saw the police cars there. He said that after hearing news reports later, "I realized that I had killed the boy in the truck." He said he told some friends about the shooting and that others also knew, including his brother and his cousin, Damon Andra "Tootie" Wright, who had been a passenger in the van.

K.B.H. was detained until December 19, when the district court, after a hearing, waived its juvenile jurisdiction and transferred K.B.H. to criminal court for trial as an adult. The court filed its findings of fact and conclusions of law on February 1, 1995.

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***687** K.B.H. also contends that the trial court abused its discretion in waiving jurisdiction and transferring the case to criminal court because no evidence supported the order under Section 54.02(d) or 54.02(f)(6).

K.B.H. argues that the State improperly introduced the social evaluation and investigation through Williams, and that without this report no evidence would have supported the court's required determination pursuant to Section 54.02(d). He further argues that without Johnson's improper testimony, the court would have no evidence about the procedures, services, and facilities available to the juvenile court, which Section 54.02(f)(6) requires the court to consider.

A juvenile court may waive its exclusive original jurisdiction and transfer a child to a district court for criminal proceedings if: (1) the State alleges the child has committed a felony, (2) the child was at least fifteen years old at the time of the incident and no court has held an adjudication hearing, *and* (3) after a full investigation and hearing, the court finds probable cause to believe that the juvenile committed the offense and that because of the crime's seriousness *or* the child's background, the community's welfare requires criminal proceedings. TEX.FAM.CODE ANN. § 54.02(a).

Before the hearing, the court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense. TEX.FAM.CODE ANN. § 54.02(d).

In making its determination, the court shall consider, among other matters, the prospect of the public's adequate protection and the likelihood of the child's rehabilitation by use of procedures, services, and facilities available to the juvenile court. TEX.FAM.CODE ANN. § 54.02(f)(6).[FN2]

FN2. Section 54.02(f) reads:

> (f) In making the determination required by Subsection (a) of this section, the court shall consider, among other matters:
>
> (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
>
> (2) whether the alleged offense was committed in an aggressive and premeditated manner;
>
> (3) whether there is evidence on which a grand jury may be expected to return an indictment;
>
> (4) the sophistication and maturity of the child;
>
> (5) the record and previous history of the child; and
>
> (6) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

The court must determine whether it is in the best interest of the child and of society to retain jurisdiction or to transfer the child to district court for adult criminal proceedings. *In re M.D.B.*, 757 S.W.2d 415, 417 (Tex.App.—Houston [14th Dist.] 1988, no writ). A juvenile transfer proceeding is not a trial on the merits. *In re P.A.C.*, 562 S.W.2d at 915.

The question for an appellate court reviewing a trial court's decision in a Section 54.02 proceeding is whether the trial ***688** court abused its discretion in certifying the child to be tried as an adult for the alleged crime. *D.J.R. v. State*, 565 S.W.2d 392, 395

(Tex.Civ.App.—Fort Worth 1978, no writ). Under an abuse of discretion standard, the legal sufficiency of the evidence is not an independent ground of error, but is a relevant factor in assessing whether the trial court abused its discretion. *In re Pecht*, 874 S.W.2d 797, 800 (Tex.App.—Texarkana 1994, no writ). In reviewing a "no evidence" point, a reviewing court considers only the evidence and inferences that, when viewed in their most favorable light, tend to support the finding and disregards all contrary evidence and inferences. *Davis v. City of San Antonio*, 752 S.W.2d 518, 522 (Tex.1988).

The court had Williams's report, made pursuant to Section 54.02(d), which the court could consider even if the State had not formally offered it into evidence. Section 54.02(f)(6) required the court to consider Johnson's testimony about the procedures, services, and facilities available to the juvenile court. K.B.H. does not argue that Williams's and Johnson's testimony was factually insufficient, only that the court improperly heard their testimony.

Williams testified that, based on a psychological evaluation performed by Hetrick which indicated that K.B.H. knew right from wrong and had the intellectual maturity and functioning behavioral development for a child his age, K.B.H. could help his attorney in his defense. She also testified she felt K.B.H. could understand the proceedings. Johnson described some of the juvenile justice facilities available for K.B.H. He offered an opinion that the Texas Youth Commission facilities available to the court were inadequate to rehabilitate a sixteen-year-old who committed murder.

We find sufficient competent evidence supporting the court's waiver and transfer of the case.

K.B.H. also contends that the trial court abused its discretion in transferring the case to criminal court because it did not find or conclude, pursuant to Section 54.02(a)(3), that the child's background required criminal proceedings.

The State in its original petition alleged that "because of the seriousness of the offense(s) *and* the background of the child, the welfare of the community requires that the Juvenile Court waive jurisdiction and have [K.B.H.] transferred to Criminal Court" (emphasis added). The Family Code speaks in the disjunctive and requires the court to determine whether the community's welfare requires criminal proceedings because of the seriousness of the offense *or* because of the child's background. TEX.FAM.CODE ANN. § 54.02(a)(3). The court in its findings of fact and conclusions of law concluded: "Based on the seriousness of the offense, the welfare of the community requires that these proceedings proceed in criminal court." K.B.H. argues that although the statute is phrased in the disjunctive, because the State submitted its petition in the conjunctive, that is, alleged both the seriousness of the crime *and* the child's background required criminal proceedings, it must prove both.

In the case of *In re L.G.*, 728 S.W.2d 939, 944 (Tex.App.—Austin 1987, writ ref'd n.r.e.), a juvenile discretionary transfer proceeding, the court found that the trial court did not err where the State in its original petition alleged the juvenile "intentionally *and* knowingly" possessed cocaine and the court submitted the jury question in the disjunctive. The court relied on *Zanghetti v. State*, 618 S.W.2d 383, 388 (Tex.Crim.App. [Panel Op.] 1981), an adult criminal proceeding in which the reviewing court found no error where the trial court overruled an objection that the indictment alleged that the offense was committed "intentionally *and* knowingly" and court instructed the jury to find the defendant guilty if he acted "intentionally *or* knowingly" (emphasis added).

When the State in its original petition asked the juvenile court to waive jurisdiction because of the child's background *and* the crime's seriousness, the trial court did not abuse its discretion by waiving jurisdiction by finding the community's welfare required transfer because of the crime's seriousness alone.

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***In the Matter of M.D.B.*, 757 S.W.2d 415 (Tex.App.—Houston [14th Dist.] 1988, no writ).**

Juvenile appealed from order of the County Court At Law No. Three, Brazoria County, James Blackstock, J., acting as juvenile court, waiving its jurisdiction in transferring juvenile to district court for criminal proceedings. The Court of Appeals, Murphy, J., held that: (1) evidence that juvenile and his companion drove with victim in her vehicle before sexually assaulting victim and ultimately killing her was sufficient to support juvenile court's finding that offense was carried out in aggressive and premeditated manner within meaning of statute governing waiver of juvenile court jurisdiction over child, and (2) juvenile's assertion that trial court violated his right to mental health treatment was waived.

Affirmed.

OPINION

MURPHY, Justice.

M.D.B., Jr., a juvenile, appeals from an order of the Brazoria County Court, acting as juvenile court, waiving its jurisdiction and transferring him to the district court for criminal proceedings. Appellant raises ***416** three points of error. We affirm the lower court's order.

On January 12, 1987, the criminal district attorney for Brazoria County filed a petition for waiver of jurisdiction and discretionary transfer in county court, sitting as juvenile court, to pursue criminal proceedings for capital murder against M.D.B., Jr., in district court. Because M.D.B., Jr. was fifteen years old when he allegedly committed the offense, the state sought the court's permission for transfer pursuant to Tex.Fam.Code Ann. § 54.02 (Vernon Supp.1988). In its petition the state alleged, among other things, that on or about November 17, 1986, M.D.B., Jr., age 15, murdered Cathy Lynn O'Daniel in the course of committing the aggravated offenses of sexual assault, kidnapping and robbery. The state's petition also addressed the remaining requirements dictated by the Family Code for discretionary transfer of a juvenile. Appellant responded by filing a Suggestion of Mental Retardation and Motion for Comprehensive Diagnosis. The court ordered a diagnostic social study and investigation by a Dr. Malone. Following the results of this court ordered testing, the appellant filed a Suggestion of Mental Illness and a Motion for Temporary Hospitalization. Pursuant to Tex.Fam.Code Ann. § 55.02 (Vernon 1986), the court stayed the hearing for waiver of jurisdiction and initiated proceedings to determine the need for temporary hospitalization of M.D.B. Section 55.02 reads:

> If it appears to the juvenile court, on suggestion of a party or on the court's own notice, that a child alleged by petition or found to have engaged in delinquent conduct or conduct indicating a need for supervision may be mentally ill, the court shall initiate proceedings to order temporary hospitalization of the child for observation and treatment.

The hearing on the matter of appellant's need for hospitalization was held before a jury which heard testimony from appellant's chosen doctor, the court ordered doctor and the state's doctor. After hearing testimony from all of the doctors and a Brazoria County Juvenile Detention Center officer, the jury determined, by answering special issues, that M.D.B. was mentally ill. Subsequent to the jury's finding, the court directed the juvenile department to commence a search for an appropriate facility for treatment of M.D.B.

The record shows that the facility initially chosen for treatment was Austin State Hospital. From there, however, appellant was transferred to the maximum security unit of Rusk State Hospital, where, purportedly, the appellant was thoroughly examined, both physically and psychologically. As a direct result of the State Hospital's findings, appellant was returned to the custody of the court. Despite appellant's objection, the trial court then proceeded with the hearing on certification and waiver of jurisdiction.

Appellant's first point of error attacks the Brazoria County Court acting as Juvenile Court, for abuse of discretion in waiving its jurisdiction and transferring appellant to the Brazoria County District Court for criminal proceedings.

The statute governing waiver of juvenile court jurisdiction over a child, § 54.02 of the Family Code, sets out three mandatory requirements in subsection (a) inquiring whether:

(1) the child is alleged to have violated a penal

law of the grade of felony;

(2) the child was 15 years of age or older at the time he is alleged to have committed the offense and no adjudication hearing has been conducted concerning that offense; and

(3) after full investigation and hearing the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense or the background of the child the welfare of the community requires criminal proceedings.

In addition, the court must obtain a complete diagnostic study, social evaluation and full investigation of the child, his circumstances, and the circumstances of the alleged offense. Finally, subsection (f) of § 54.02 requires the juvenile court, when ***417** making the determination, to consider, among other matters:

(1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;

(2) whether the alleged offense was committed in an aggressive and premeditated manner;

(3) whether there is evidence on which a grand jury may be expected to return an indictment;

(4) the sophistication and maturity of the child;

(5) the record and previous history of the child; and

(6) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court. § 54.02(f).

The discretionary transfer hearing is not held for determining guilt or innocence. Instead it is held for the purpose of establishing whether the child's and society's best interests are met by maintaining juvenile custody of the child or by transferring him to a district court for adult proceedings. *B.L.C. v. State*, 543 S.W.2d 151 (Tex.Civ.App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.). Importantly, § 54.02 mandates that the trial court make only the three findings cited above from subsection (a). Once it is established by the trial court that the child was 15 years of age when he allegedly committed the felony offense, and after a full investigation indicates probable cause exists to believe the child actually did commit the offense, the state is charged with presenting some evidence of probative value on the factors to be considered by the court under § 54.02(f). It is thereafter the function of the court to exercise its discretion in determining whether or not to certify the juvenile to stand trial as an adult. *Moore v. State*, 713 S.W.2d 766, 768 (Tex.App.—Houston [14th Dist.] 1986, no writ.). Importantly, while the juvenile court is required to consider all six factors of § 54.02(f) as cited above, it is not required to find that each factor is established by the evidence. 713 S.W. 2d at 768.

Appellant has no dispute with the trial court's finding regarding his age and the gravity of his alleged offense. However, he argues that the remaining findings and waiver of jurisdiction by the juvenile court constitute "textbook examples of a court exercising unlimited discretion to the point of patently abusing the discretionary powers granted by § 54.02." In reviewing the trial court's action for an abuse of discretion, this court must determine if the trial court acted without reference to any guiding rules and principles. *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297, 298 (Tex.1986).

The first finding complained of by appellant is the finding that the offense was committed in an "aggravated" and premeditated manner. We assume the appellant is referring to the court's finding in the language of the statute of "aggressive" manner. Here, the appellant focuses on testimony by Edwin Kroschel, a detective from the Harris County Sheriff's Department. Essentially, Kroschel admitted that while it was his opinion that the crime was committed in an aggressive and premeditated manner, this conclusion was not based on any personal understanding or knowledge of M.D.B., Jr., psychologically or otherwise. Additionally, appellant claims that there was no evidence in the record to support a finding that the alleged offense was premeditated. The appellant relies on testimony from his psychologist, Dr. Seth Silverman, on the subject of intent and malicious behavior. Silverman testified that he did not consider M.D.B., Jr., to be malicious because he lacked the requisite intent in his behavior. At best, we find appellant's argument unconvincing.

This court has held that aggressiveness can be inferred from the act which constitutes the charged offense. *See* *Moore v. State*, 713 S.W.2d at 769. In *Moore* we held that striking a person with a police baton was an aggressive act. We also found that during the relatively short period in which Moore was chased by the police officer, he had time to contemplate ***418** his attack upon the officer and form the requisite intent. This allowed a finding of premeditation. Furthermore, in *In re I.B.*, 619 S.W.2d 584, 587 (Tex.Civ.App.—Amarillo 1981, no writ.) the court concluded that "a premeditated design can be legally formulated in an instant ..." In this case, the facts indicate that the appellant and his companion drove with the victim in her vehicle before sexually assaulting her and ultimately killing her. We conclude that it is reasonable to infer from the evidence of the offense that it was carried out in an aggressive and premeditated manner.

The appellant further asserts that the trial court's finding of "[t]he unlikelihood of the rehabilitation of the Juvenile-respondent by use of procedures, services and facilities currently available to the Juvenile Court" was unsupported by the evidence. His entire argument for this assertion is, essentially, that the evidence in the trial court did not show that all the available facilities in the state had been considered for his treatment. As we said in *Moore:*

> In a discretionary transfer proceeding, there is no requirement of proof concerning procedures, services, and facilities available to the court for the juvenile's rehabilitation because whatever resources are available would be within the courts knowledge without need of proof. 713 S.W.2d at 770.

The letter sent to the court following appellant's physical and psychological testing at Rusk State Hospital set forth in pertinent part that the child had no treatable illness. M.D.B., Jr., was only transferred to Rusk State Hospital after Austin State Hospital's Institutional Review Board released him, finding that he was manifestly dangerous. The alleged offenses, taken with the trial court's knowledge of which facilities and procedures are available support the court's finding of the unlikelihood of rehabilitation.

Finally, appellant attacks the court's finding that "because of the seriousness of the offense and the background of the Juvenile–Respondent, the welfare of the community requires criminal proceedings." Appellant incorrectly argues that no investigation into appellant's background or living conditions was conducted. The court ordered an investigation into the social history of M.D.B., Jr. Jack Singleton, a probation officer for Brazoria County, produced a report of such an investigation after interviewing M.D.B.'s custodial grandparents (both of his parents are deceased) and a Texas Youth Commission caseworker, familiar with M.D.B., Jr.'s history. The report reflected M.D.B., Jr.'s living conditions at the home of his grandparents, his past disruptive behavior in school, his prior criminal activity which included theft, burglary, and indecency with a child, and the present alleged criminal offense. Although it is not necessary for a juvenile court to find all of the factors listed in § 54.02 of the Family Code to be established, we find that the evidence was sufficient to establish all the findings the court did make.

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***Matter of T.D.*, 817 S.W.2d 771 (Tex.App.—Houston [1 Dist.] 1991, writ denied).**
*****REVIEW THE DISSENT IN THIS CASE*****

Juvenile appealed from order entered in the 314th District Court of Harris County, Robert Baum, J., transferring jurisdiction over him from district court sitting as juvenile court to criminal district court. The Court of Appeals, Duggan, J., held that: (3) juvenile court's findings were sufficiently specific; and (4) evidence supported finding that there was little likelihood that facilities and services available to juvenile court could reasonably be expected to rehabilitate juvenile.

Affirmed.

O'Connor, J., dissented and filed opinion.

OPINION

DUGGAN, Justice.

This is an appeal from an order entered under TEX.FAM.CODE ANN. § 54.02(a) (Vernon*773 Supp.1991), transferring jurisdiction over appellant, T.D., from the district court, sitting as a juvenile court, to the criminal district court. TEX.FAM.CODE ANN. § 56.01(c)(1)(A) (Vernon Supp.1991). We affirm.

Statement of Facts

Appellant was born on February 15, 1973. He has been referred six times to the Harris County Juvenile Probation Department: (1) on June 10, 1987 for indecent exposure; (2) on December 22, 1988 for possession of crack cocaine; (3) on January 1, 1989 for possession of crack cocaine; (4) on May 3, 1989 for robbery; (5) on May 25, 1989 for possession and delivery of crack cocaine; and (6) on January 30, 1990 for possession and delivery of crack cocaine, the current referral. For the first referral, appellant was counseled and the case was closed. The second and third referrals were consolidated, and appellant was found to have engaged in delinquent conduct and committed to the Texas Youth Commission. Appellant was re-referred to the Texas Youth Commission for the fourth and fifth referrals. He was released to his mother's custody after the fourth referral and his father's custody after the fifth referral because the Texas Youth Commission declined the referrals.

With respect to the present referral, it is alleged that appellant sold two $10 pieces of crack cocaine to undercover Houston Police Officer Chaney on January 30, 1990. The police arrested appellant the same day and placed him in the Harris County Juvenile Center on hold for the Texas Youth Commission. He had regularly scheduled detention hearings, but no adjudicatory hearing while at the Center.

On February 5, 1990, the State filed a motion requesting to waive jurisdiction of the juvenile court. On the same day, the juvenile court ordered a diagnostic study, social evaluation, and full investigation of appellant, his circumstances, and the circumstances of the alleged offense ("the report"). TEX.FAM.CODE ANN. § 54.02(d) (Vernon 1986). The report was filed on March 29, 1990. The juvenile court held the hearing on the motion on April 3, 4, and 5, 1990. On April 6, 1990, the juvenile court waived jurisdiction and transferred appellant to the criminal district court.

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775 *Specificity of Reasons

In his third point of error, appellant urges that the juvenile court erred in waiving its jurisdiction over him because the court failed to specify its reasons, certify its findings, or specifically state which constitutional and statutory rights were waived by appellant, all in violation of express statutory requirements.

Section 54.02 of the Texas Family Code provides in relevant part:

If the juvenile court waives jurisdiction, it shall *state specifically in the order its reasons* for waiver and *certify its action*, including the written order and findings of the court, and shall transfer the child to the appropriate court for criminal proceedings.

TEX.FAM.CODE ANN. § 54.02(h) (Vernon Supp.1991) (emphasis added). The statute directs the juvenile court in arriving at its decision to waive jurisdiction to consider, "among other matters," whether the alleged offense was against people or property and committed in an aggressive and premeditated manner, whether there is evidence on which a grand jury might return an indictment, the sophistication, maturity, record, and previous history of the child, adequate protection of the public, and the likelihood of the child's rehabilitation through juvenile services. TEX.FAM.CODE ANN. § 54.02(f) (Vernon 1986).

The order of the juvenile court waiving jurisdiction dated April 6, 1990, provides as follows:

[T]he Court finds that the said [appellant] is charged in the violation of a penal law of the grade of felony, if committed by an adult, to wit: THREE PARAGRAPHS OF DELIVERY OF CONTROLLED SUBSTANCE NAMELY COCAINE on or about the 30th day of January, 1990; that there has been no adjudication of these offenses; that he was 16 years of age at the time of the commission of the alleged offense, having been born on the 15th day of FEBRUARY, 1973, that there is probable cause to believe that the child committed the offense alleged and that because of the seriousness of the offense the welfare of the community requires criminal proceedings. In making that determination, the Court has considered, among other matters:

1. Whether the alleged offense was against the person or property, with the greater weight in favor of waiver given to offenses against the person;

2. Whether the offense was committed in an aggressive and premeditated manner;
3. Whether there is enough evidence upon which the grand jury may be expected to return an indictment;
***776** 4. The sophistication and maturity of the child;
5. The record and previous history of the child; and
6. The prospects of adequate protection of the public and likelihood of reasonable rehabilitation of the child by use of procedures, services and facilities currently available to the Juvenile Court.
The Court finds that the penal law alleged to have been violated by the Respondent, was of the grade of felony. The Court further finds that the Respondent is now 17 years of age and was at the time of the alleged offense 15 years of age or over having been born on the 15th day of February, 1973. The Court further finds that there was no adjudication hearing concerning the offense. The Court has considered the offense and finds that it was committed in an aggressive and premeditated manner, and that there is sufficient evidence upon which a grand jury might be expected to return an indictment, and that the Court has considered the sophistication and maturity of the Respondent and his previous history.
....
The Court finds that it has considered the rehabilitative processes available to this Court and the facilities currently available to this Court, and having considered these among other matters, the Court finds that there is little if any, likelihood that the facilities and services available to this Court could reasonably be expected to rehabilitate the Respondent and that there is from the nature of the offense the likelihood that the public is not adequately protected from future such conduct, and for those reasons and other reasons, the jurisdiction of this Court is waived.
The juvenile court arrived at its findings after three days of testimony, filling five volumes of the statement of facts, from appellant's juvenile probation officer, the six Houston police officers who were involved in arresting and processing appellant for the alleged offenses in January 1989, May 1989, and January 1990, appellant's case manager from the Texas Youth Commission, the psychologist who evaluated appellant, the drug rehabilitation counselor who evaluated appellant, the psychiatrist who evaluated appellant, and appellant's mother. The documentary evidence introduced included the certification investigation report, the psychiatric and psychological evaluations, records from the Texas Youth Commission, and appellant's probation file.

Appellant cites *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966); *In re J.R.C.*, 522 S.W.2d 579 (Tex.Civ.App.—Texarkana 1975, writ ref'd n.r.e.); *R.E.M. v. State*, 541 S.W.2d 841 (Tex.Civ.App.—San Antonio 1976, writ ref'd n.r.e.); and *In the Matter of N.S.D.*, 555 S.W.2d 807 (Tex.Civ.App.—El Paso 1977, no writ) to support his contention that the juvenile court's findings are not specific enough.

In *Kent*, the court made no findings and recited no reasons. 383 U.S. at 546, 86 S.Ct. at 1049. The waiver of jurisdiction merely stated, "after full investigation, I do hereby waive jurisdiction of petitioner." *Id.* In *J.R.C.*, with a statute substantially similar to the one before us today, the court's order stated, "after diagnostic study, social evaluation and full investigation, [the Court] is of the opinion that it is contrary to the best interest of said child and to the public to retain jurisdiction." 522 S.W.2d at 580. In *R.E.M.*, the order waiving jurisdiction appears to have stated reasons substantially similar to those in the order before us. 541 S.W.2d at 846. The court did not object to the specificity of the reasons, but to the fact that there was no evidence to support the reasons. *Id.* In *N.S.D.*, the order recited three reasons for waiving jurisdiction, which were not nearly as extensive as those before us today: "(a) The juvenile is in need of rehabilitation.... (b) There are no services ... to effectuate the juvenile's rehabilitation. (c) The general public ... needs to be protected." 555 S.W.2d at 809. The court condemned reasons (a) and (c) as too general and found no evidence to support (b). *Id.*

We find that these cases provide no support for appellant's contention that the juvenile*777 court's reasons were not specific enough. Moreover, other courts have approved specific findings similar to those before us. *See In re I.B.*, 619 S.W.2d 584, 587–88 (Tex.Civ.App.—Amarillo 1981, no writ); *P.G.*, 616 S.W.2d at 638–39; *see also In re C.L.Y.*, 570 S.W.2d 238, 241 (Tex.Civ.App.—Houston [1st Dist.] 1978, no writ). Therefore, we find the juvenile court's reasons to be specific as required by the statute.

Appellant also complains that the court's order waiving jurisdiction was not certified to the district court. The copy of the juvenile court order that appears in the transcript does not contain a

certificate, but it is signed. The order of the criminal district court receiving the case, which also appears in the transcript, reads: "[I]t appearing to this court that the 314TH JUDICIAL DISTRICT COURT, sitting as a Juvenile Court of Harris County, Texas, has *certified* to this court that it has waived jurisdiction ... and it appearing to the court from said court's *certification* including the written order and finding of the court...." (Emphasis added.) Therefore, we find the juvenile court did certify its findings to the criminal district court. *See* *In the Matter of B.V.*, 645 S.W.2d 334, 336 (Tex.App.—Corpus Christi 1982, no writ) (the signing of the order by the judge in his capacity of presiding judge of the juvenile court is sufficient to comply with the certification requirement of § 54.02(h)).

The juvenile court order also provides that appellant "is of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional and statutory rights heretofore waived by the said Respondent...." Appellant asserts that such a finding lacks specificity, and complains that he did not waive any constitutional or statutory rights. The order does not state that appellant waived any constitutional or statutory rights, merely that *if* he did so, such waiver was intelligent, knowing, and voluntary. Therefore, any error is harmless. TEX.R.APP.P. 81(b)(1).

We overrule appellant's third point of error.

Sufficiency of Evidence

Appellant, in his fourth point of error, argues that there was no evidence or, alternatively, insufficient evidence to support the juvenile court's findings. More specifically, appellant asserts that there is no probative evidence that the welfare of the community required a waiver of jurisdiction of the juvenile court and criminal proceedings against appellant. Appellant identifies the procedures, resources, and services available to the juvenile court as being of primary importance in establishing the welfare of the community.

Findings of fact entered in a case tried to the court are of the same force and dignity as a jury's verdict upon special issues. *A.T.S. v. State*, 694 S.W.2d 252, 253 (Tex.App.—Fort Worth 1985, writ dism'd w.o.j.). The court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards applied in reviewing the legal or factual sufficiency of the evidence supporting the jury's answers to special issues. *Id.* In deciding a challenge to the legal sufficiency of the evidence, we must consider only the evidence and inferences tending to support the finding and disregard all evidence and inferences to the contrary. *Id.*; *I.B.*, 619 S.W.2d at 587; *N.S.D.*, 555 S.W.2d at 809.

Dr. Cavazos, who did the psychiatric evaluation of appellant, testified that she still thought appellant could benefit by consistent education, a structured environment, and vocational training, *provided* he was motivated and dedicated. Ms. Olson, who was appellant's case manager at the Texas Youth Commission, testified that, after appellant was released from the Brownwood state school, he chose not to participate in the services provided him through the Texas Key Program, which included educational, psychological, and drug treatment plans. She stated that appellant was angry at being placed in the Texas Key Program because he felt he was being "baby sat," and because he felt he had completed his time at the state school. She stated appellant wished to return to Brownwood because he believed he would be *778 freed faster from control by the Texas Youth Commission. Dr. Scherzer, who performed the psychologic examination of appellant, testified that rehabilitation services would be helpful for someone who was motivated and willing to participate. He also characterized appellant as someone who denied any current psychological or emotional problems and who did not remember having past depression anxieties. He stated that appellant knew the difference between right and wrong and between acceptable and unacceptable behavior, and that appellant should be considered culpable and responsible for his behavior. Mr. Chevalier, an alcohol and drug abuse counselor who administered a "SASSI" test to appellant, testified if a person was willing to go into treatment and was also willing to follow instructions, he or she would benefit from treatment. In response to a hypothetical by appellant's attorney, which reflected appellant's circumstances, Mr. Chevalier stated such a person would have no chance at recovery and rehabilitation.

Ms. Willis, appellant's Harris County juvenile probation officer, testified that appellant was streetwise, mature, and sophisticated, and did what he determined he wanted to do. She stated that appellant's mother lacked the ability to control his behavior, that Harris County did not offer programs for someone as sophisticated as appellant, and that the only place capable of doing anything for him

was the Texas Youth Commission. She admitted, however, that the Texas Youth Commission had been handling him for a year and that he had picked up subsequent offenses. She agreed that the concept behind the juvenile system is to rehabilitate those children who can be rehabilitated. She conceded appellant did not come across as a child, but as a streetwise person who was not dependent on his parent or the system to survive. She gave as her opinion that appellant needed a "full time lockup" because he was not capable of conforming his behavior to the rules of society without being held against his will in a lockup facility.

Officer Chaney, who participated in the events leading up to appellant's arrests for cocaine possession and delivery in May 1989 and January 1990, testified that the attitude of appellant was that the police should hurry up and complete their paperwork so he could return to his business on the street. Police Officer Drozd, who arrested appellant in January 1990, testified that appellant acted more like an adult than a juvenile. He characterized appellant as cool, calm, and sure of himself; he stated appellant did not appear to be under the influence of drugs or alcohol. He stated that appellant said he would be out dealing his stuff before the police finished the paperwork on him.

Having reviewed the testimony and records pertaining to the unavailability of rehabilitative services suitable for appellant and the unwillingness of appellant to be rehabilitated, we conclude there is probative evidence supporting the juvenile court's finding that there is little likelihood the facilities and services available to the juvenile court could reasonably be expected to rehabilitate appellant.

In reviewing appellant's factual sufficiency contention, we consider all the evidence. *P.G.*, 616 S.W.2d at 639. The finding will be upheld if it is not so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. *A.T.S.*, 694 S.W.2d at 253; *I.B.*, 619 S.W.2d at 587. However, we do not substitute our judgment for that of the juvenile court. *C.L.Y.*, 570 S.W.2d at 240.

In January 1989, Dr. Cavazos diagnosed appellant as having a probable chemical dependence. Appellant's mother testified that he had expressed willingness to go into an alcohol and drug rehabilitation treatment program. She stated that in her experience her son was very cooperative. She also stated that he needed treatment for his addiction and because of his low I.Q. Dr. Scherzer found appellant cooperative and polite and that he gave his best effort on the test administered. He stated that people under the influence of drugs and alcohol, even though they know the difference between right and wrong, act in an unacceptable manner. Officer Chaney testified that if someone has an identified substance abuse problem, he or she ought *779 to be treated for it and that such treatment was in the best interest of society. Ms. Willis testified that appellant had become very cooperative with her. She stated nothing in appellant's records reflected any violent acts against third parties. She testified, in her opinion, that appellant could still benefit from long-term care in a structured facility that provided the special education and vocational training he needed. She stated that the Texas Youth Commission had a state hospital that could meet appellant's needs. She also agreed that, although appellant had been in the custody of the Texas Youth Commission for a year, he had really not received any structure or care for the last six months. She also stated that Harris County Juvenile Probation could provide a structured environment for one year, individual drug counseling, and daily school attendance. Ms. Olson testified that appellant's needs assessment done by the Texas Youth Commission in 1989 dictated that he be placed in a structured medium risk facility; however, he was placed in a low risk facility. She acknowledged that the Texas Youth Commission was required to establish an educational plan for a child; however, it had not done so with respect to appellant.

Having reviewed all the evidence regarding appellant's willingness to rehabilitate and the availability of juvenile services to rehabilitate him, as well as the previously described evidence to the contrary, we conclude there was conflicting testimony. The juvenile court, as the trier of fact, was entitled to weigh the evidence and the credibility of the witnesses. We find the evidence factually sufficient to uphold the juvenile court's conclusion there is little likelihood the facilities and services available to the juvenile court could reasonably be expected to rehabilitate appellant.

Furthermore, we note that appellant has challenged the sufficiency of only one of the juvenile court's findings. The availability of services to rehabilitate a juvenile is only one of the issues to be considered by the court in determining if juvenile court jurisdiction should be waived. *See* *P.G.*, 616 S.W.2d at 639; *C.L.Y.*, 570 S.W.2d at 240–41.

We overrule appellant's fourth point of error.

The judgment is affirmed.

O'CONNOR, Justice, dissenting.

I dissent.

T.D. is a black male who is functionally illiterate, with poor social and language skills, and has an intelligence quotient of 73, which is considered the lower end of the borderline range of intelligence. T.D. was described by a psychologist as emotionally isolated and likely to react to situations and events in a childish, immature, impulsive, and restless manner. T.D. is from a family of 11 children, and lives with his mother in a drug-infested part of Houston; his father is an alcoholic. When T.D. was 15 years of age, he was diagnosed as a substance abuser, both of alcohol and crack cocaine.

In December of 1988 and January of 1989, when T.D. was 15 years old, he was referred to the Harris County Juvenile Probation Department for possession of crack cocaine. As a result of the two referrals, the juvenile court found T.D. had engaged in delinquent conduct and committed him to the Texas Youth Commission (TYC).[FN1] In the order referring T.D. to TYC, the court said T.D. needed a highly structured environment with constant supervision and control. The recommendation of Ms. Willis, his probation officer, was that T.D. be given some sort of substance abuse counseling and, because of his borderline intelligence, some specialized academic and vocational training. The court order committed T.D. to the Brownwood State School for an indeterminate period of time not to exceed T.D.'s twenty-first birthday. Two months after his commitment, Brownwood released T.D., returned him to the custody of his mother, and assigned him to the Texas Key *780 Day Treatment program, a contract facility for nonresidential treatment.

FN1. There were three other referrals, but they were declined and T.D. was released to the custody of his parents.

When T.D. was told he was going to be discharged from Brownwood, he objected to being sent home and asked to go back to the state school. Ms. Olson, his case manager at TYC, testified that she told T.D. that he would have to do something wrong, that is, get into more trouble, before he could go back to the state school. He did.

While at TYC, T.D. was medicated with Thorazine, a major neuroleptics, anti-psychotic drug, given to people with schizophrenia or schizophrenic-formed disorder, a heavy sedative used to calm psychotic patients. At the certification hearing, an expert testified there was no indication T.D. was psychotic. Although institutions sometimes use Thorazine to control their patients, TYC is prohibited by regulation from using psychotropic drugs as a means of management control.[FN2] Thus, TYC, in prescribing the drug for T.D., violated its own regulations regarding the medication of children. When TYC discharged T.D., it gave him a month's supply of Thorazine, 25 milligrams, and told him to medicate himself daily. Recall: T.D. is a diagnosed substance abuser. By regulation, TYC is required to have the prescribing physician periodically review drug prescriptions.[FN3] TYC did not review T.D.'s use of the drug Thorazine. Thus, TYC again violated its own regulations regarding the medication of children.

FN2. Tex. Youth Comm'n, 37 TEX.ADMIN.CODE § 87.103(a)(5) (West Supp. Dec. 20, 1990).

FN3. Tex. Youth Comm'n, 37 TEX.ADMIN.CODE § 87.103(a)(6) (West Supp. Dec. 20, 1990).

After being discharged from Brownwood, TYC enrolled T.D. in the Texas Key day-care program, which required parental supervision. All the records indicate that TYC knew that T.D. had no parental supervision. T.D.'s mother works as a medical clerk full time as the sole support of her children. One of the complaints lodged by TYC against T.D. was that, after he returned home, he dropped out of the Texas Key program. One doctor's report stated, "Since quitting school, T.D. has generally slept late (into the afternoon) at home, gotten up and gone over to the park where he hangs out with friends." T.D.'s mother testified TYC did not tell her it sent T.D. home with Thorazine (another violation of TYC's regulations).[FN4] When she found the Thorazine, she threw it out. Until then, she said, T.D. slept most of the day.

FN4. Under Tex. Youth Comm'n, 37 TEX.ADMIN.CODE § 87.91(a), (f) (West Supp. Dec. 20, 1990), parents must be contacted for medical consent for TYC to administer drugs. Unless contrary notice is given by the parents, TYC has authority to administer drugs. Contact with the parents is documented by the postal receipt for certified mail, kept in the youth's medical file.

When T.D. was released from Brownwood, TYC gave him a curfew. A few months later, T.D. was shot in the leg as a bystander at the scene of a robbery. Inexplicably, as a direct result of that

incident, TYC responded by extending T.D.'s curfew to a later hour.

In October 1987, T.D. was re-enrolled in the ninth grade at Kashmere High School, even though he could barely read and write. Another of the complaints lodged against T.D. was that he stopped going to school. It was predictable that he would stop attending school. His records showed that, with his low IQ, he needed special education and vocational training, neither of which was offered to him at Kashmere.

In January of 1990, T.D. was arrested for possession and delivery of two $10 pieces of crack cocaine to undercover Houston Police Officer Chaney, the referral made the basis of the certification hearing. T.D. was placed in the Harris County Juvenile Center on hold for TYC. At the Juvenile Center, he had regularly scheduled detention hearings, but no adjudicatory hearing.

On February 5, 1990, the State filed a motion for the juvenile court to waive jurisdiction. In response, the juvenile court ordered a diagnostic study, social evaluation, and full investigation of T.D., his circumstances, and the circumstances of the offense (the report). On April 6, 1990, after a three-day hearing, the court waived jurisdiction and transferred T.D. to the criminal district court.

*781 At the certification hearing, Ms. Willis testified that T.D. could benefit from long-term care in a structured facility that provides the special services he needs, that is special education and vocational training. She recommended that T.D. be sent to a long term substance abuse program for at least a year. She testified that based on her experience with T.D., it was not in his best interest to give him Thorazine to medicate himself. She testified that the TYC facilities could serve T.D.'s needs; that T.D. needs to be in a long range, lock-up facility that will meet his need for drug and alcohol addiction treatment, and provide vocational training and education.

Joseph Chevalier, the clinical director for the Chrysalis Center, a speciality hospital that deals with substance abuse whose staff is made up of minority doctors, testified for T.D. He said T.D., as all addicts, denied his addiction, and was not able to self-medicate with the Thorazine. He said that if T.D. were willing to go into treatment and would follow instructions, he would benefit if enrolled in a treatment program.

1. Error in the referral

In point of error three, T.D. urges that the juvenile court erred in waiving its jurisdiction over him because the court did not specify its reasons, certify its findings, or specifically state which constitutional and statutory rights he waived both in violation of express statutory requirements. I begin this analysis by reminding the reader that the determination to transfer a child from the statutory structure of the juvenile court to the criminal processes of the district court is a "critically important" proceeding. *Kent v. United States*, 383 U.S. 541, 556, 86 S.Ct. 1045, 1057, 16 L.Ed.2d 84 (1966).

a. *Specific findings*

Section 54.02 of the Texas Family Code directs the juvenile court judge to state *specifically in the order its reasons* for waiver. TEX.FAM.CODE ANN. § 54.02(h) (Vernon Supp.1991) (emphasis added). The statute directs the juvenile court to consider "among other matters," whether the alleged offense was against people or property, whether it was committed in an aggressive and premeditated manner, whether there is evidence on which a grand jury might return an indictment, the sophistication, maturity, record, and previous history of the child, adequate protection of the public, and the likelihood of the child's rehabilitation through juvenile services. TEX.FAM.CODE ANN. § 54.02(f) (Vernon 1986).

T.D. complains that the order is merely a restatement of the statute, and does not include any specific reasons for the referral. T.D. cites *Kent* to support his argument that the juvenile court's findings are not specific enough. In *Kent*, the juvenile court made no findings and recited no reasons for the referral. 383 U.S. at 546, 86 S.Ct. at 1049. The court's waiver of jurisdiction merely stated, "after full investigation, I do hereby waive jurisdiction of petition." 383 U.S. at 546, 86 S.Ct. at 1049. The Supreme Court held the order waiving jurisdiction was invalid. 383 U.S. at 552, 86 S.Ct. at 1053. The Court said that the procedure used in *Kent* was faulty because, among other things, the court did not state its reasons for the referral. 383 U.S. at 554, 86 S.Ct. at 1053–54.

The *Kent* opinion teaches that the trial court's order must set forth the reasons for the order with sufficient specificity to permit meaningful review. *Kent*, 383 U.S. at 561, 86 S.Ct. at 1057. The appellate court must have before it a statement from

the trial court of the reasons that motivated the waiver. *Kent*, 383 U.S. at 561, 86 S.Ct. at 1057. We should not "assume" the trial court had adequate reasons for the waiver. *Kent*, 383 U.S. at 561, 86 S.Ct. at 1057.

A comparison of the provisions in § 54.02(a) and (f) that require the court to consider certain, specified matters, with the language from the trial court's order follows:

Required findings	Findings of the court
Juvenile alleged to commit a felony. § 54.02(a)(1).	The Court finds that the [juvenile] is charged in the violation of a penal law of the grade of felony, if committed by an adult, to wit: THREE PARAGRAPHS OF DELIVERY OF CONTROLLED SUBSTANCE NAMELY COCAINE on or about the 30th day of January, 1990 . . . . The Court finds that the penal law alleged to have been violated by the [juvenile], was of the grade of felony.
Juvenile was 15 or over at time of offense. § 54.02(a)(2).	[The juvenile] was 16 years of age at the time of the commission of the alleged offense, having been born on the 15th day of FEBRUARY, 1973 . . . . The Court further finds that the [juvenile] is now 17 years of age and was at the time of the alleged offense 15 years of age or over having been born on the 15th day of February, 1973.
No adjudication hearing was conducted. § 54.02(a)(2).	[T]here has been no adjudication of these offenses . . . . The Court further finds that there was no adjudication hearing concerning the offense.
Probable cause to believe juvenile committed offense. § 54.02(a)(3).	[T]here is probable cause to believe that the child committed the offense alleged.
Because of the seriousness of the offense or the background of the child, the welfare of the community requires criminal proceedings. § 54.02(a)(3).	[B]ecause of the seriousness of the offense, the welfare of the community requires criminal proceedings.
Whether the alleged offense was against the person or property, with the greater weight in favor of waiver given to offenses against the person. § 54.02(f)(1).	**No finding.**
Whether the offense was committed in an aggressive and premeditated manner. § 54.02(f)(2).	The Court has considered the offense and finds that it was committed in an aggressive and premeditated manner . . . .
Whether a grand jury may be expected to return an indictment. § 54.02(f)(3).	[T]here is sufficient evidence upon which a grand jury might be expected to return an indictment . . . .
The sophistication and maturity of the child. § 54.02(f)(4).	The Court specifically finds that [the juvenile] is of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional and statutory rights heretofore waived ... and is of sufficient sophistication and maturity to intelligently and knowingly understand . . . the proceedings . . . .
The record and previous history of the child. § 54.02(f)(5).	[T]he Court has considered . . . the previous history of the [juvenile] . . . .—**not a finding.**
Likelihood of rehabilitation by use of services currently available. §	[T]he Court finds that there is little if any, likelihood that the facilities and services

54.02(f)(6).	available to this Court could reasonably be expected to rehabilitate the [juvenile] . . . .
Prospects of adequate protection of the public. § 54.02(f)(6).	[F]rom the nature of the offense the likelihood that the public is not adequately protected from future such conduct . . . .
	[F]or those reasons **and other reasons,** the jurisdiction of this Court is waived . . . .

*783 If we reject the assumption that the trial court is only required to adopt the language in the statute for its findings and it must make actual findings that relate to this juvenile, the court's order makes few findings that relate to this juvenile—only the findings of T.D.'s age and the time of the offense are specific as to him. Worse, the order implies that there are other reasons, not stated in the order, on which the court relies. In *Kent,* the United States Supreme Court said the juvenile court may not "receive and rely on secret information." *Kent,* 383 U.S. at 563, 86 S.Ct. at 1058. I would hold that reproducing the language of the statute in the order does not comply with the requirements in the statute itself, TEX.FAM.CODE ANN. § 54.02, or with *Kent.* Appellate courts need factual findings, not legal reasons. It is not necessary for the order to reproduce the language of the statute; it is necessary for the order to state the factual reasons for waiving jurisdiction. *See In the Matter of J.R.C.,* 522 S.W.2d 579, 583–84 (Tex.Civ.App.—Texarkana 1975, writ ref'd n.r.e.) ("The fact that the Legislature changed 'briefly state' to 'state specifically' indicates that it contemplated more than merely an adherence to printed forms").

For example, the trial court found that T.D. committed the offense in an aggressive and premeditated manner. It would be helpful for us to know what behavior of T.D. the court considered aggressive. T.D. was charged with the offense of selling crack, not assault or murder. When the undercover police officer approached T.D. to buy crack, T.D. responded with three questions: "You okay? You cool? You the law?" Did the trial court consider that as aggressive behavior? If the trial court had stated that T.D.'s sales approach was aggressive, this Court might have something to review. What the court more likely considered as aggressive was the police officers' characterization of T.D. during the booking procedure as impatient, cocky, and "mouthy." Again, if the trial court had stated its findings, we might be in the position to evaluate its reasons for finding the crime was committed in an aggressive manner.

Another example of the problem the lack of findings creates, is that we do not know how the trial court evaluated the evidence that T.D. was referred on six different matters, three of which were declined. Did the court consider the three that were declined?

I recognize that the court in *In re I.B.,* 619 S.W.2d 584, 587 (Tex.App.—Amarillo 1981, no writ), held that an order that "parrots" the considerations in the statute complies with the requirement to state specific reasons, so long as the reasons have some support in the evidence. I disagree. The United States Supreme Court said the court may not "assume" the juvenile court had adequate reasons for the waiver of jurisdiction. *Kent,* 383 U.S. at 561, 86 S.Ct. at 1057. To reproduce the statutory requirements as the findings, makes a mockery of the entire proceeding.

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In the Matter of T.L.C., 948 S.W.2d 41 (Tex.App.—Houston [14th Dist.] 1997, no writ).

Juvenile was certified, by the 315th District Court, Harris County, Trial Court Cause No. 89044, Kent Ellis, J., for trial as an adult on charges of aggravated robbery. He appealed. The Court of Appeals, Murphy, C.J., held that: (1) juvenile perfected appeal; (2) voluntariness of confession would not be reviewed; and (3) juvenile's confession could be considered regardless of whether it would have been admissible in adversarial proceeding.

Affirmed.

OPINION

MURPHY, Chief Justice.

Appellant, T.L.C., appeals from his juvenile

certification. In four points of error, appellant claims (1) the reasons for waiving jurisdiction contained in the trial court's order failed to meet the minimum requirements of the United States and Texas Constitutions and the Texas Family Code, and (2) the trial court erred when it admitted appellant's confession into evidence, in violation of the Fifth and Sixth Amendments to the United States Constitution and the Texas Family Code. We affirm the waiver of jurisdiction and transfer by the juvenile court.

I. Background

The State petitioned the juvenile court to waive its jurisdiction over appellant, T.L.C., claiming he committed two aggravated robberies. After a certification hearing, the juvenile court waived its jurisdiction and transferred appellant's case to the criminal courts. T.L.C. now appeals, claiming irregularities in his certification hearing.

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***43 III. The Court's Order Waiving Jurisdiction**

In his first and second points of error, appellant argues the juvenile court's order waiving jurisdiction and transferring him to the district court violated the U.S. and Texas Constitutions and the Texas Family Code. More specifically, he claims the order, by tracking exactly the language of the Family Code, failed to "state specifically" the reasons for the waiver. Section 54.02(h) requires a juvenile court waiving jurisdiction to "state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court, and transfer the child to the appropriate court for criminal proceedings." TEX. FAM.CODE ANN. § 54.02(h) (Vernon 1986).[FN1] Section 54.02(f) requires a juvenile court determining waiver to consider:

> FN1. Appellant's certification hearing took place on April 5, 1995, prior to the effective date of the 1995 amendment to Article 54.02. Any reference to the Family Code is to the code in effect at the time of appellant's hearing. The current version of Article 54.02 can be found at TEX. FAM.CODE ANN. § 54.02 (Vernon 1996).

> (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
>
> (2) whether the alleged offense was committed in an aggressive and premeditated manner;
>
> (3) whether there is evidence on which a grand jury may be expected to return an indictment;
>
> (4) the sophistication and maturity of the child;
>
> (5) the record and previous history of the child; and
>
> (6) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

TEX. FAM.CODE ANN. § 54.02(f) (Vernon 1986). These statutory factors codify the due process considerations set forth in *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). In *Kent*, the U.S. Supreme Court, noting the "critical importance" of the juvenile certification process, held that "it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor.... [T]he statement should be sufficient to demonstrate that the statutory requirement of 'full investigation' has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review." *Id.* at 560–62, 86 S.Ct. at 1057.

In this case, the juvenile court's order waiving jurisdiction noted that it had considered the statutory factors listed above in making its determination. The order further stated:

> The Court specifically finds that ... the offenses alleged to have been committed were against the person of another and were committed in an aggressive and premeditated manner; there has been no adjudication of said offenses; that evidence was presented concerning the alleged offenses upon which a grand jury may be expected to return an indictment; the evidence and reports heretofore presented to the Court demonstrate to the Court that there is little, if any prospect of adequate protection of the public and likelihood of reasonable rehabilitation of the said T___ L___ C___ by use of procedures, services

and facilities currently available to the Juvenile Court, and for those reasons the jurisdiction of this Court is waived in this cause on aggravated robbery (eight counts) as enumerated in this order.

***44** Appellant complains that this order, which appears to be a form order and "parrots" the statutory considerations mandated by 54.02(h), does not state the reasons for waiver specifically enough to satisfy 54.02(f) and *Kent*. However, if a juvenile court's order waiving jurisdiction states reasons for waiver which are supported by the record, the fact that the order "parrots" the required statutory considerations does not render it infirm. *Matter of T.D.*, 817 S.W.2d 771, 776–77 (Tex.App.—Hous. [1st. Dist.] 1991, writ denied); *In re I.B.*, 619 S.W.2d 584, 587–88 (Tex.Civ.App.—Amarillo 1981, no writ); *Appeal of B.Y.*, 585 S.W.2d 349, 351 (Tex.Civ.App.—El Paso 1979, no writ). The record in this case shows the juvenile court had before it evidence of appellant's alleged crimes, his conduct while in confinement, his school record, and several psychiatric evaluations. The court heard testimony from appellant's mother, his alleged robbery victims, and a robbery investigator. We hold the juvenile court carefully considered all the required factors, and that the order before us sufficiently states proper reasons for waiver of jurisdiction, all of which are supported by ample evidence in the record. We overrule appellant's first and second points of error.

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Kent v. U.S., 383 U.S. 541 (1966).

Prosecution for housebreaking, robbery and rape. The United States District Court for the District of Columbia entered judgments of conviction on counts of housebreaking and robbery and the defendant appealed. The United States Court of Appeals for the District of Columbia Circuit, 119 U.S.App.D.C. 378, 343 F.2d 247, affirmed and certiorari was granted. The Supreme Court, Mr. Justice Fortas, held that under District of Columbia Juvenile Court Act allowing Juvenile Court to waive jurisdiction over juvenile after full investigation, as a condition to a valid waiver order, juvenile was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably were considered by court, and to a statement of reasons for the Juvenile Court's decision.

Reversed and remanded.

Mr. Justice FORTAS delivered the opinion of the Court.

This case is here on certiorari to the United States Court of Appeals for the District of Columbia Circuit. The facts and the contentions of counsel raise a number ***543** of disturbing questions concerning the administration by the police and the Juvenile Court authorities of the District of Columbia laws relating to juveniles. Apart from raising questions as to the adequacy of custodial and treatment facilities and policies, some of which are not within judicial competence, the case presents important challenges to the procedure of the police and Juvenile Court officials upon apprehension of a juvenile suspected of serious offenses. Because we conclude that the Juvenile Court's order waiving jurisdiction of petitioner was entered without compliance with required procedures, we remand the case to the trial court.

Morris A. Kent, Jr., first came under the authority of the Juvenile Court of the District of Columbia in 1959. He was then aged 14. He was apprehended as a result of several housebreakings and an attempted purse snatching. He was placed on probation, in the custody of his mother who had been separated from her husband since Kent was two years old. Juvenile Court officials interviewed Kent from time to time during the probation period and accumulated a 'Social Service' file.

On September 2, 1961, an intruder entered the apartment of a woman in the District of Columbia. He took her wallet. He raped her. The police found in the apartment latent fingerprints. They were developed and processed. They matched the fingerprints of Morris Kent, taken when he was 14 years old and under the jurisdiction of the Juvenile Court. At about 3 p.m. on September 5, 1961, Kent was taken into custody by the police. Kent was then 16 and therefore subject to the 'exclusive

jurisdiction' of the Juvenile Court. D.C.Code s 11—907 (1961), now s 11—1551 (Supp. IV, 1965). He was still on probation to that court as a result of the 1959 proceedings.

Upon being apprehended, Kent was taken to police headquarters where he was interrogated by police officers. ***544** It appears that he admitted his involvement in the offense which led to his apprehension and volunteered information as to similar offenses involving housebreaking, robbery, and rape. His interrogation proceeded from about 3 p.m. to 10 p.m. the same evening. [FN1]

***Footnote 1 deleted

Some time after 10 p.m. petitioner was taken to the Receiving Home for Children. The next morning he was released to the police for further interrogation at police headquarters, which lasted until 5 p.m.[FN2]

***Footnote 2 deleted

The record does not show when his mother became aware that the boy was in custody but shortly after 2 p.m. on September 6, 1961, the day following petitioner's apprehension, she retained counsel.

Counsel, together with petitioner's mother, promptly conferred with the Social Service Director of the Juvenile Court. In a brief interview, they discussed the possibility that the Juvenile Court might waive jurisdiction under D.C.Code s 11-914 (1961), now s 11—1553 (Supp. IV, 1965) and remit Kent to trial by the District Court. Counsel made known his intention to oppose waiver.

Petitioner was detained at the Receiving Home for almost a week. There was no arraignment during this ***545** time, no determination by a judicial officer of probable cause for petitioner's apprehension.[FN3]

***Footnote 3 deleted

During this period of detention and interrogation, petitioner's counsel arranged for examination of petitioner by two psychiatrists and a psychologist. He thereafter filed with the Juvenile Court a motion for a hearing on the question of waiver of Juvenile Court jurisdiction, together with an affidavit of a psychiatrist certifying that petitioner 'is a victim of servere psychopathology' and recommending hospitalization for psychiatric observation. Petitioner's counsel, in support of his motion to the effect that the Juvenile Court should retain jurisdiction of petitioner, offered to prove that if petitioner were given adequate treatment in a hospital under the aegis of the Juvenile Court, he would be a suitable subject for rehabilitation.

***546** At the same time, petitioner's counsel moved that the Juvenile Court should give him access to the Social Service file relating to petitioner which had been accumulated by the staff of the Juvenile Court during petitioner's probation period, and which would be available to the Juvenile Court judge in considering the question whether it should retain or waive jurisdiction. Petitioner's counsel represented that access to this file was essential to his providing petitioner with effective assistance of counsel.

The Juvenile Court judge did not rule on these motions. He held no hearing. He did not confer with petitioner or petitioner's parents or petitioner's counsel. He entered an order reciting that after 'full investigation, I do hereby waive' jurisdiction of petitioner and directing that he be 'held for trial for (the alleged) offenses under the regular procedure of the U.S. District Court for the District of Columbia.' He made no findings. He did not recite any reason for the waiver.[FN4] He made no reference to the motions filed by petitioner's counsel. We must assume that he denied, sub silentio, the motions for a hearing, the recommendation for hospitization for psychiatric observation, the request for access to the Social Service file, and the offer to prove that petitioner was a fit subject for rehabilitation under the Juvenile Court's jurisdiction.[FN5]

***Footnotes 4 and 5 deleted

***547** Presumably, prior to entry of his order, the Juvenile Court judge received and considered recommendations of the Juvenile Court staff, the Social Service file relating to petitioner, and a report dated September 8, 1961 (three days following petitioner's apprehension), submitted to him by the Juvenile Probation Section. The Social Service file and the September 8 report were later

sent to the District Court and it appears that both of them referred to petitioner's mental condition. The September 8 report spoke of 'a rapid deterioration of (petitioner's) personality structure and the possibility of mental illness.' As stated, neither this report nor the Social Service file was made available to petitioner's counsel.

The provision of the Juvenile Court Act governing waiver expressly provides only for 'full investigation.' It states the circumstances in which jurisdiction may be waived and the child held for trial under adult procedures, but it does not state standards to govern the Juvenile Court's decision as to waiver. The provision reads as follows:

'If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order ***548** such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases.'[FN6]

***Footnote 6 deleted

Petitioner appealed from the Juvenile Court's waiver order to the Municipal Court of Appeals, which affirmed, and also applied to the United States District Court for a writ of habeas corpus, which was denied. On appeal from these judgments, the United States Court of Appeals held on January 22, 1963, that neither appeal to the Municipal Court of Appeals nor habeas corpus was available. In the Court of Appeals' view, the exclusive method of reviewing the Juvenile Court's waiver order was a motion to dismiss the indictment in the District Court. Kent v. Reid, 114 U.S.App.D.C. 330, 316 F.2d 331 (1963).

Meanwhile, on September 25, 1961, shortly after the Juvenile Court order waiving its jurisdiction, petitioner was indicted by a grand jury of the United States District Court for the District of Columbia. The indictment contained eight counts alleging two instances of housebreaking, robbery, and rape, and one of housebreaking and robbery. On November 16, 1961, petitioner moved the District Court to dismiss the indictment on the grounds that the waiver was invalid. He also moved the District Court to constitute itself a Juvenile Court as authorized by D.C.Code s 11—914 (1961), now s 11—1553 (Supp. IV, 1965). After substantial delay occasioned by petitioner's appeal and habeas corpus proceedings, the District Court addressed itself to the motion to dismiss on February 8, 1963.[FN7]

***Footnote 7 deleted

***549** The District Court denied the motion to dismiss the indictment. The District Court ruled that it would not 'go behind' the Juvenile Court judge's recital that his order was entered 'after full investigation.' It held that 'The only matter before me is as to whether or not the statutory provisions were complied with and the Courts have held * * * with reference to full investigation, that that does not mean a quasi judicial or judicial hearing. No hearing is required.'

On March 7, 1963, the District Court held a hearing on petitioner's motion to determine his competency to stand trial. The court determined that petitioner was competent.[FN8]

***Footnote 8 deleted

***550** At trial, petitioner's defense was wholly directed toward proving that he was not criminally responsible because 'his unlawful act was the product of mental disease or mental defect.' Durham v. United States, 94 U.S.App.D.C. 228, 241, 214 F.2d 862, 875, 45 A.L.R.2d 1430 (1954). Extensive evidence, including expert testimony, was presented to support this defense. The jury found as to the counts alleging rape that petitioner was 'not guilty by reason of insanity.' Under District of Columbia law, this made it mandatory that petitioner be transferred to St. Elizabeths Hospital, a mental institution, until his sanity is restored.[FN9] On the six counts of housebreaking and robbery, the jury found that petitioner was guilty.[FN10]

***Footnotes 9 and 10 deleted

Kent was sentenced to serve five to 15 years on each count as to which he was found guilty, or a total of 30 to 90 years in prison. The District Court ordered that the time to be spent at St. Elizabeths on

the mandatory commitment after the insanity acquittal be counted as part of the 30-to 90-year sentence. Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. That court affirmed. 119 U.S.App.D.C. 378, 343 F.2d 247 (1964).[FN11]

***Footnote 11 deleted

***551** Before the Court of Appeals and in this Court, petitioner's counsel has urged a number of grounds for reversal. He argues that petitioner's detention and interrogation, described above, were unlawful. He contends that the police failed to follow the procedure prescribed by the Juvenile Court Act in that they failed to notify the parents of the child and the Juvenile Court itself, note 1, supra; that petitioner was deprived of his liberty for about a week without a determination of probable cause which would have been required in the case of an adult, see note 3, supra; that he was interrogated by the police in the absence of counsel or a parent, cf. Harling v. United States, 111 U.S.App.D.C. 174, 176, 295 F.2d 161, 163, n. 12 (1961), without warning of his right to remain silent or advice as to his right to counsel, in asserted violation of the Juvenile Court Act and in violation of rights that he would have if he were an adult; and that petitioner was fingerprinted in violation of the asserted intent of the Juvenile Court Act and while unlawfully detained and that the fingerprints were unlawfully used in the District Court proceeding. [FN12]

***Footnote 12 deleted

These contentions raise problems of substantial concern as to the construction of and compliance with the Juvenile Court Act. They also suggest basic issues as to the justifiability of affording a juvenile less protection than is accorded to adults suspected of criminal offenses, particularly where, as here, there is an absence of any indication that the denial of rights available to adults was offset, mitigated or explained by action of the Government, as parens patriae, evidencing the special ***552** solicitude for juveniles commanded by the Juvenile Court Act. However, because we remand the case on account of the procedural error with respect to waiver of jurisdiction, we do not pass upon these questions.[FN13]

***Footnote 13 deleted

It is to petitioner's arguments as to the infirmity of the proceedings by which the Juvenile Court waived its otherwise exclusive jurisdiction that we address our attention. Petitioner attacks the waiver of jurisdiction on a number of statutory and constitutional grounds. He contends that the waiver is defective because no hearing was held; because no findings were made by the Juvenile Court; because the Juvenile Court stated no reasons for waiver; and because counsel was denied access to the Social Service file which presumably was considered by the Juvenile Court in determining to waive jurisdiction.

We agree that the order of the Juvenile Court waiving its jurisdiction and transferring petitioner for trial in the United States District Court for the District of Columbia was invalid. There is no question that the order is reviewable on motion to dismiss the indictment in the District Court, as specified by the Court of Appeals in this case. Kent v. Reid, supra. The issue is the standards to be applied upon such review.

We agree with the Court of Appeals that the statute contemplates that the Juvenile Court should have considerable***553** latitude within which to determine whether it should retain jurisdiction over a child or—subject to the statutory delimitation [FN14]—should waive jurisdiction. But this latitude is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.' Green v. United States, 113 U.S.App.D.C. 348, 308 F.2d 303 (1962). [FN15] The statute gives the Juvenile Court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached. It does not confer upon the Juvenile Court a license for arbitrary procedure. The statute does not permit the Juvenile Court to determine in isolation and without the participation or any representation of the child the 'critically important' question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act.[FN16] It does not authorize the Juvenile Court, in total disregard of a motion for hearing filed by counsel, and without any hearing or statement or reasons, to decide—as in this case—that the child will be taken from the Receiving Home for Children ***554** and transferred to jail along with adults, and that he will

be exposed to the possibility of a death sentence[FN17] instead of treatment for a maximum, in Kent's case, of five years, until he is 21.[FN18]

***Footnote 14 deleted

FN15. 'What is required before a waiver is, as we have said, 'full investigation.' * * * It prevents the waiver of jurisdiction as a matter of routine for the purpose of easing the docket. It prevents routine waiver in certain classes of alleged crimes. It requires a judgment in each case based on 'an inquiry not only into the facts of the alleged offense but also into the question whether the parens patriae plan of procedure is desirable and proper in the particular case.' Pee v. United States, 107 U.S.App.D.C. 47, 50, 274 F.2d 556, 559 (1959).' Green v. United States, supra, at 350, 308 F.2d, at 305.

FN16. See Watkins v. United States, 119 U.S.App.D.C. 409, 413, 343 F.2d 278, 282 (1964); Black v. United States, 122 U.S.App.D.C. 393, 355 F.2d 104 (1965).

***Footnotes 17 and 18 deleted

We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not.

1. The theory of the District's Juvenile Court Act, like that of other jurisdictions,[FN19] is rooted in social welfare philosophy rather than in the corpus juris. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is parens ***555** patriae rather than prosecuting attorney and judge.[FN20] But the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness.

***Footnotes 19 and 20 deleted

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556** 3. It is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile. The Court of Appeals for the District of Columbia Circuit has so held. See Black v. United States, supra; Watkins v. United States, 119 U.S.App.D.C. 409, 343 F.2d 278 (1964). The statutory scheme makes this plain. The Juvenile Court is vested with 'original and exclusive jurisdiction' of the child. This jurisdiction confers special rights and immunities. He is, as specified by the statute, shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. The court is admonished by the statute to give preference to retaining the child in the custody of his parents 'unless his welfare and the safety and protection557** of the public can not be adequately safeguarded without * * * removal.' The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment. D.C.Code ss 11—907, 11—915, 11—927, 11—929 (1961). [FN26]

FN26. These are now, without substantial changes, ss 11—1551, 16—2307, 16—2308, 16—2313, 11—1586 (Supp. IV, 1965).

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***561** We are of the opinion that the Court of Appeals misconceived the basic issue and the underlying values in this case. It did note, as another panel of the same court did a few months later in Black and Watkins, that the determination of whether to transfer a child from the statutory structure of the Juvenile Court to the criminal processes of the District Court is 'critically important.' We hold that it is, indeed, a 'critically

important' proceeding. The Juvenile Court Act confers upon the child a right to avail himself of that court's 'exclusive' jurisdiction. As the Court of Appeals has said, '(I)t is implicit in (the Juvenile Court) scheme that non-criminal treatment is to be the rule—and the adult criminal treatment, the exception which must be governed***561** by the particular factors of individual cases.' Harling v. United States, 111 U.S.App.D.C. 174, 177—178, 295 F.2d 161, 164—165 (1961).

Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not 'assume' that there are adequate reasons, nor may it merely assume that 'full investigation' has been made. Accordingly, we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the statute as requiring that this statement must be formal or that it should necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of 'full investigation' has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review.

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***563** For the reasons stated, we conclude that the Court of Appeals and the District Court erred in sustaining the validity of the waiver by the Juvenile Court. The Government urges that any error committed by the Juvenile ***564** Court was cured by the proceedings before the District Court. It is true that the District Court considered and denied a motion to dismiss on the grounds of the invalidity of the waiver order of the Juvenile Court, and that it considered and denied a motion that it should itself, as authorized by statute, proceed in this case to 'exercise the powers conferred upon the juvenile court.' D.C.Code s 11—914 (1961), now s 11—1553 (Supp. IV, 1965). But we agree with the Court of Appeals in Black, that 'the waiver question was primarily and initially one for the Juvenile Court to decide and its failure to do so in a valid manner cannot be said to be harmless error. It is the Juvenile Court, not the District Court, which has the facilities, personnel and expertise for a proper determination of the waiver issue.' 122 U.S.App.D.C., at 396, 355 F.2d, at 107.[FN32]

***Footnote 32 deleted

Ordinarily we would reverse the Court of Appeals and direct the District Court to remand the case to the Juvenile Court for a new determination of waiver. If on remand the decision were against waiver, the indictment in the District Court would be dismissed. See Black v. United States, supra. However, petitioner has now passed the age of 21 and the Juvenile Court can no longer exercise jurisdiction over him. In view of the unavailability of a redetermination of the waiver question by the Juvenile Court, it is urged by petitioner that the conviction should be vacated and the indictment dismissed. In the circumstances of this case, and in light of the remedy which the Court of Appeals fashioned in ***565** Black, supra, we do not consider it appropriate to grant this drastic relief.[FN33] Accordingly, we vacate the order of the Court of Appeals and the judgment of the District Court and remand the case to the District Court for a hearing de novo on waiver, consistent with this opinion.[FN34] If that court finds that waiver was inappropriate, petitioner's conviction must be vacated. If, however, it finds that the waiver order was proper when originally made, the District Court may proceed, after consideration of such motions as counsel may make and such further proceedings, if any, as may be warranted, to enter an appropriate judgment. Cf. Black v. United States, supra.

***Footnotes 33 and 34 deleted

Reversed and remanded.

After remand, 532 S.W.2d 645, the 186th District (Juvenile) Court, Bexar County, James E. Barlow, J., transferred murder charge against infant to district court so that he might be tried as an adult for such offense and infant appealed. The Court of Civil Appeals, Cadena, J., held that statute providing that person who has been alleged in petition for adjudication hearing to have engaged in juvenile conduct may not be prosecuted for, or convicted of, any offense alleged in juvenile court petition or any offense within knowledge of juvenile court judge as evidenced by anything in record of juvenile court proceedings did not deprive juvenile court of jurisdiction to certify child for prosecution as an adult; that, in view of refusal of child to cooperate in diagnostic study, county psychiatrist's report indicating that child evidenced no overt neurotic or psychotic symptomatology and appeared competent constituted as complete and adequate a diagnostic study as was possible under the circumstances; but that admission into evidence of transcript of testimony offered at previous hearing, which resulted in entry of first transfer order which had been set aside, without establishing required predicate for admission of such testimony, required reversal.

Reversed and remanded.

CADENA, Justice.

Appellant seeks reversal of an order of the juvenile court of Bexar County transferring the murder charge against him to the district court so that he may be tried as as adult for such offense.

A previous order of the juvenile court transferring appellant for trial as an adult for this same offense was reversed by this Court on the ground that, prior to the hearing on the State's motion to transfer, the juvenile court had not obtained a diagnostic study as required by Sec. 54.02(d) of the Tex.Family Code.[FN1] R.E.M. v. State, 532 S.W.2d 645 (Tex.Civ.App., San Antonio 1975, no writ).

> FN1. Unless otherwise indicated, all statutory references are to Tex.Family Code Ann.

We consider first appellant's point 1, asserting that the juvenile court lacked jurisdiction to entertain the transfer motion, since, prior to the time that the motion for transfer was filed, the State had filed its petition seeking to have appellant adjudged delinquent for the same offense.

Under Sec. 54.02(a)(1) and Sec. 54.02(a)(2) of the Tex.Family Code, the juvenile court may 'waive' its exclusive jurisdiction over juvenile offenders and transfer a child to district court for prosecution as an adult if the child is alleged to have committed an offense of the grade of felony when he was fifteen years of age or older 'and no adjudication hearing has been conducted concerning that offense.' Since no adjudication hearing has been held in juvenile court concerning the offense in question, this provision of the Family Code presents no problem.

The offense in question was allegedly committed on April 8, 1974. The petition seeking to have appellant adjudged delinquent was filed on April 19, 1974. The motion for transfer was filed on May 6, 1974. As far as possible application to this case is concerned, the State concedes that ***844** we must look to Article 30(c), Tex.Penal Code Ann. (1973), which provided:

A person who has been alleged in a petition for an adjudication hearing to have engaged in delinquent conduct . . . may not be prosecuted for or convicted of any offense alleged in the juvenile court petition or any offense within the knowledge of the juvenile court judge as evidenced by anything in the record of the juvenile court proceedings.[FN2]

> FN2. Article 30 of the old Penal Code has been replaced by what is now Article 8.07 of the Penal Code. Article 8.07(d) now provides that no person who has been 'adjudged a delinquent child' may be convicted of any offense alleged in the petition to have him adjudged delinquent or any offense within the knowledge of the juvenile judge as evidenced by the record of the juvenile proceedings.

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Section 54.02(d) requires that the juvenile court, 'Prior to the hearing' on the State's motion to

transfer, shall order and obtain 'a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.'

After the first transfer order had been set aside by this Court, the juvenile judge, on March 18, 1976, ordered 'a complete diagnostic study and social evaluation' of appellant. Appellant contends that, since this order did not call for 'full investigation of the child, his circumstances, and the circumstances of the alleged offense,' there has been no compliance with the requirements of Sec. 54.02(d). We overrule this contention.

When the motion for transfer was originally filed in 1974, the juvenile judge promptly ordered the preparation of all items mentioned in Sec. 54.02(d). Except for the diagnostic study, these reports were made and delivered to the juvenile judge. Nothing in the statute requires a duplication of the reports and investigations which had been made originally. The juvenile judge, had, in fact, 'ordered and obtained' the investigation which was not mentioned in the second order.

As a result of the court's order for a complete diagnostic study, Dr. Sherman, county child psychologist, and Dr. Cameron, county psychiatrist, interviewed appellant. After Dr. Sherman had introduced himself to appellant, appellant said, 'If this is for the psychological, man, I don't want to do it. My attorney told me not to.' Appellant refused to take psychometric tests and refused to answer any questions. As a result, it was impossible for Dr. Sherman to draw any conclusions as to appellant's 'present mental status or psychological makeup.'

Dr. Cameron reported that appellant told him he would like to cooperate, but that his attorney had instructed him to answer no questions. According to Dr. Cameron, appellant was embarrassed 'because he did not and would not answer even the most simple and innocuous questions,' other than to give such personal data as his name, age, height, weight, and place of birth. Dr. Sherman testified that he could not 'perform a psychological evaluation' if the person to be evaluated refused to cooperate 'in ***845** regard to having an interview or as to taking any tests.'

Based upon his observation of appellant, Dr. Cameron reported that appellant 'appeared to be a rather alert, personable individual who was in good contact with his surroundings,' who evidence no 'overt neurotic or psychotic symptomatology' and who 'is apparently able to cooperate with his attorney because he was following his instructions to the letter.' He added that appellant 'appears competent and must be presumed so until otherwise established.'

In setting aside the first transfer order, we relied on the fact that the juvenile court had not obtained the 'complete diagnostic study' required by the statute. But our conclusion to reverse was based on the absence of evidence showing that appellant's refusal to cooperate and submit to interviews precluded the making of such a study. 532 S.W.2d at 648. The record now before us shows that attempts were in fact made to effect a diagnostic study, and that the limited nature of the study was due solely to appellant's refusal to cooperate. Under these circumstances, we conclude that the reports of Dr. Sherman and Dr. Cameron, and particularly the report of Dr. Cameron, constitute as complete and adequate a 'diagnostic study' as was possible under the circumstances, and that a bona fide effort was made to comply with the statute. We are not inclined to hold that the statute requires the accomplishment of that which is impossible due to appellant's attitude.

Over appellant's objection, the court admitted into evidence the transcript of the testimony offered at the previous hearing which resulted in the entry of the first transfer order which we set aside. Appellant contends, and we agree, that the admission of such transcript requires reversal.

It is the settled rule in this State that testimony of a witness given at a prior trial of the same case or substantially the same issues, at which prior hearing there was opportunity for cross-examination, may be introduced in evidence at a subsequent trial 'where it is shown that the witness is dead, or that he had become insane, or is physically unable to testify, or is beyond the jurisdiction of the court, or that his whereabouts is unknown and that diligent search has been made to ascertain where he is, or that he has been kept away from the trial by the adverse party.' Houston Fire & Casualty Insurance Co. v. Brittian, 402 S.W.2d 509, 510 (Tex.1966). The State admits that there is no showing that any of the conditions precedent to the admission of the testimony given at the first hearing existed.

We see no reason why the rule should not be applied in a hearing for the purpose of determining whether a youthful offender is going to be deprived of the protection afforded by the juvenile court system. The transfer proceedings must be characterized as the most critical stage of the juvenile court process. Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). The stakes in a transfer proceeding are exceedingly high. Stamm, Transfer of Jurisdiction in Juvenile Court: An Analysis of the Proceeding, Its Role in the Administration of Justice, and A proposal for the Reform of Kentucky Law, 62 Ky.L.J. 122, 144 (1973). In view of the gravity of the determination to be made and its dire consequences on the youthful offender, it would be anomalous to relax the rules which govern the admissibility of evidence in other proceedings.

Section 54.02(e) permits the juvenile court at the transfer hearing to consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses. This provision falls short of sanctioning the admission of testimony given at a previous hearing without establishing the required predicate for the admission of such testimony.

We cannot classify the error in admitting the testimony at the prior hearing, embodied in the State's exhibit 2, as other than prejudicial.

Section 54.02(f) requires that, in determining whether to transfer the case to ***846** criminal court, the juvenile judge consider (1) whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person; (2) whether the offense was committed in an aggressive and premeditated manner; (3) whether there is evidence on which a grand jury may be expected to return an indictment; (4) the sophistication and maturity of the child; the record and previous history of the child; and (5) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

Section 54.02(h) requires that the juvenile court, if it certifies the child to criminal court for trial as an adult, state specifically in the transfer order 'its reasons for waiver.'

The order in this case recites that the juvenile court considered all of the factors enumerated in Sec. 54.02(f). It contains findings to the effect that (1) the offense was murder, committed against the person of another; (2) the offense was committed in an aggressive and premeditated manner; (3) evidence was presented concerning the alleged offense upon which a grand jury may be expected to return an indictment; (4) the evidence and reports filed demonstrate that there is little likelihood 'if (sic) any' prospect of adequate protection of the public and likelihood 'or (sic) reasonable' rehabilitation of appellant by use of procedures, services, and facilities currently available to the juvenile court.

The case history submitted by the county probation office contains a statement to the effect that appellant murdered an airman. We assume that this is sufficient to support the finding that the alleged offense was of the grade of felony and was committed against the person of another. Except for State's exhibit 2, there is no evidence whatever to support the finding that the offense was committed in an aggressive and premeditated manner. Aside from the statement contained in the report of the probation officer, there is no evidence that appellant committed the murder. Aside from State's Exhibit 2, there is no evidence to support the finding that there is little likelihood that appellant could be rehabilitated by resort to the facilities, services, and procedures presently available to the juvenile court. In fact, the report filed by the probation officer states that appellant has fully cooperated with the representatives of the juvenile office, and the recommendation contained in this report is to the effect that appellant be committed to the Texas Youth Council. That is, the report is diametrically opposed to the finding that appellant could not have been successfully rehabilitated by being treated as a juvenile.

The trial court also found that appellant is of 'sufficient sophistication and maturity to have intelligently, knowingly, and voluntarily waived all constitutional and statutory rights heretofore waived' by him 'and to have aided in the preparation of this (sic) defense.' This finding is somewhat difficult to understand. We believe that the requirement that the juvenile court consider the maturity and sophistication of the child refers to the question of culpability and responsibility for his

conduct, and is not restricted to a consideration of whether he can intelligently waive rights and assist in the preparation of his defense. In this connection, the report of the juvenile officer states that it is 'doubtful if he understands the seriousness' of his conduct.

It is clear from the record that there is no evidence, aside from State's exhibit 2, concerning a majority of the factors which the statute requires that the juvenile court consider.

Unless we are prepared to hold that the mere fact that appellant is accused of having committed murder justifies transfer, we must conclude that the record affirmatively reflects that the admission and consideration by the juvenile court, of State's Exhibit 2 amounted to such a denial of appellant's rights 'as was reasonably calculated to cause and probably did cause the rendition of an improper judgment.' Tex.R.Civ.P., Rule 434. We are aware of the ***847** fact that in In Re Buchanan, 433 S.W.2d 787, 789 (Tex.Civ.App., Fort Worth 1968, writ ref'd, n.r.e.), it was said that the 'seriousness of the offense of murder is sufficient to justify the Juvenile Court in determining that the welfare of the community requires criminal proceedings' as provided in the statutory provision concerning transfer. But it should be pointed out that in Buchanan the 'evidence introduced at the hearing shows without dispute that appellant shot and killed a man without provocation or cause.' 433 S.W.2d at 789. Here there is no admissible evidence to that effect. In any event, the Buchanan opinion obviously focuses on only one of the factors which Sec. 54.02(f) requires to be considered. We find nothing in the statute which suggests that a child may be deprived of the benefits of our juvenile court system merely because the crime with which he is charged is a 'serious' crime. Implicit in this conclusion is a rejection of the underlying philosophy of the juvenile court system, since it is based on the assumption that children who commit 'serious' crimes cannot be successfully rehabilitated. Only by indulging this presumption can it be concluded that 'the welfare of the community requires criminal' prosecution of any child who commits a serious crime. If, despite the gravity of the charged offense, the child can be successfully rehabilitated by resort to the facilities available to juvenile court, it is clear that such rehabilitation will promote the 'welfare of the community' at least as effectively as criminal prosecution with no prospects of rehabilitation, while, at the same time, it accords to the child the beneficial results which our Legislature has concluded can be achieved by protecting youthful offenders from the stigma and demoralizing effects of criminal prosecution.

The judgment of the trial court is reversed and the cause is remanded for further proceedings.