COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

IN THE MATTER OF R.R.S., A JUVENILE,	§	No. 08-16-00042-CV
	§	Appeal from the
Appellant.	§	65th District Court
	§	of El Paso County, Texas
	§	(TC# 1500853)

O P I N I O N

At his adjudication hearing, Appellant R.R.S. stipulated to evidence of guilt and pled "true" to the State's petition of delinquent conduct alleging he committed aggravated sexual assault against his two younger siblings who were under fourteen years old.[1] At the time of the charged offense, Appellant was also under the age of fourteen. After retaining new counsel, Appellant requested withdrawal of his stipulation and a new trial, which the trial court denied. On appeal, Appellant asserts he was denied due process as the record indicates legal and factual insufficiency to support a knowing and voluntary plea. We reverse and remand for a new trial.

BACKGROUND

The State filed a petition of delinquent conduct alleging Appellant intentionally and knowingly committed two counts of aggravated sexual assault of his twin sibling brothers in

[1] *See* TEX. PENAL CODE ANN. § 22.021 (West Supp. 2016).

violation of section 22.021 of the Texas Penal Code. The petition described Appellant as being thirteen years old at the time of the conduct alleged, he was residing with his mother, and his father was listed as deceased. Appellant's mother requested that Appellant receive a court appointed attorney and she provided financial information to qualify. Thereafter, the trial court entered an order of appointment and scheduled a pretrial hearing.

On the day of his pretrial, Appellant appeared with his mother, maternal grandfather, and appointed attorney, and the court proceeded to an adjudication hearing. At the hearing, the State abandoned two paragraphs of the petition and the Appellant then pled true to the remaining two counts of aggravated sexual assault. The prosecutor presented and the court admitted without objection a form titled "Waiver, Stipulation and Admission" signed by Appellant and his attorney. In the stipulation, Appellant admitted the allegations of the petition, confessed that he committed the offense charged, and waived his constitutional rights. The court then ordered the El Paso County Juvenile Probation Department to prepare a pre-disposition report due prior to the later scheduled disposition hearing. Based on the plea and the written stipulation, the court entered an order of adjudication finding that Appellant, described in the order's caption as a juvenile with a date of birth as September 3, 2001, engaged in delinquent conduct on January 1, and 17, 2015, as alleged in counts 1(a) and 2(b) of the State's petition.

A month following his plea, Appellant retained new counsel and filed a motion to withdraw stipulation and motion for new trial. The motion asserted that Appellant wanted to withdraw his stipulation and plea "to challenge the factual and legal sufficiency of the evidence in a Jury Trial." At the hearing that followed, Appellant's attorney stated to the court that there were "mitigating factors that were not presented at the adjudication hearing[,]" and further explained that he was

referring to information revealed in the pre-disposition report prepared for the court by Appellant's probation officer. The trial court denied Appellant's motions.

A few weeks later, the court held a disposition hearing receiving testimony from Appellant's probation officer and his mother. Additionally, the State admitted without objection the probation officer's pre-disposition report. After finding Appellant in need of rehabilitation and protection, the court placed Appellant on intensive probation and ordered treatment measures and other delineated conditions. Among other terms and conditions, Appellant's disposition included supervised contact with his siblings as described by a child safety plan, electronic monitoring, and an order to later register as a sex offender in accordance with Article 62 of the Code of Criminal Procedure, unless otherwise deferred. In concluding the hearing, the court advised Appellant in open court and in writing of his right to appeal both the adjudication and disposition of his case. Appellant thereafter filed this timely appeal. *See* TEX. FAM. CODE ANN. § 56.01(n)(1) (West Supp. 2016).

DISCUSSION

In his only issue on appeal, Appellant asserts the trial court abused its discretion in denying his motions to withdraw stipulation and for new trial on the basis that the record as a whole fails to show by legally sufficient evidence that Appellant entered a knowing, intelligent, and voluntary plea. The State responds that Appellant entered his plea voluntarily and his request to withdraw his stipulation and for new trial was based solely on the impermissible ground of "buyer's remorse."

A. Standard of Review

We review a trial court's ruling on a motion for new trial using an abuse of discretion

standard. *Webb v. State*, 232 S.W.3d 109, 112 (Tex.Crim.App. 2007). A trial court abuses its discretion only when it acts in an unreasonable and arbitrary manner, or when it acts without reference to any guiding principles. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007); *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004); *In re C.J.H.*, 79 S.W.3d 698, 702 (Tex. App.--Fort Worth 2002, no pet.). That a trial judge may decide a matter within his or her discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate an abuse of discretion. *In re L.R.*, 67 S.W.3d 332, 339 (Tex. App.--El Paso 2001, no pet.). The trial court's ruling is presumed to be correct, and the burden rests on Appellant to establish the contrary. *Jackson v. State*, 139 S.W.3d 7, 13 (Tex. App.--Fort Worth 2004, pet. ref'd).

In Texas, the juvenile justice code provides that juvenile justice courts have exclusive original jurisdiction in "all cases involving . . . delinquent conduct . . . by a person who was a child[.]" TEX. FAM. CODE ANN. § 51.04(a) (West Supp. 2016). A "child" is a person who is ten years old or older and under seventeen years of age. *Id*. § 51.02(2)(A) (West Supp. 2016). "Delinquent conduct" includes "conduct, other than a traffic offense, that violates a penal law of this state or of the United States punishable by imprisonment or by confinement in jail[.]" *Id*. § 51.03(a)(1) (West Supp. 2016). A child may be found to have engaged in delinquent conduct or conduct indicating a need for supervision only after an adjudication hearing. *Id*. § 54.03(a) (West 2014). Texas courts must construe provisions of the juvenile justice code such that "parties are assured a fair hearing and their constitutional and other legal rights [are] recognized and enforced." TEX. FAM. CODE ANN. § 51.01(6) (West 2014); *In re J.S.S.*, 20 S.W.3d 837, 843 (Tex. App.--El Paso 2000, pet. denied).

Juvenile delinquency proceedings are "quasi-criminal" in nature and therefore criminal rules of procedure must be looked to for guidance. *In re B.L.D. and B.R.D.*, 113 S.W.3d 340, 351 (Tex. 2003). A juvenile charged by petition with delinquent conduct is guaranteed the same constitutional rights as an adult in a criminal proceeding. *See In re R.A.*, 346 S.W.3d 691, 697 (Tex. App.--El Paso 2009, no pet.). Under the Family Code, juvenile trials are governed by the Rules of Evidence and by Chapter 38 of the Code of Criminal Procedure. *See* TEX. FAM. CODE ANN. § 51.17 (West 2014). The adjudication of delinquency is based on proof beyond a reasonable doubt. *Id.* § 54.03(f). Standards of review applicable to criminal cases also may apply to a juvenile adjudication. *In re A.J.G.*, 131 S.W.3d 687, 691 (Tex. App.--Corpus Christi 2004, pet. denied).

Although juvenile proceedings are civil matters, we review the sufficiency of the evidence underlying a finding that the juvenile engaged in delinquent conduct by applying the standard applicable to challenges of the sufficiency of the evidence in criminal cases. *In re R.R.*, 420 S.W.3d 301, 303 (Tex. App.--El Paso 2013, no pet.). The relevant question is not whether there is *any* evidence to support a state court conviction, but whether there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979). "[T]he *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 895 (Tex.Crim.App. 2010); *In re J.A.G.*, No. 02-10-00235-CV, 2011 WL 2436756, at *3 (Tex. App.--Fort Worth June 16, 2011, no pet.) (mem. op.).

In reviewing the legal sufficiency of the evidence under the criminal standard, we view all evidence in the light most favorable to the judgment to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789; *Burden v. State*, 55 S.W.3d 608, 612 (Tex.Crim.App. 2001). The criminal standard of review is more stringent than the "no evidence" standard applicable in civil cases. *In re J.S.*, 35 S.W.3d 287, 292 (Tex. App.--Fort Worth 2001, no pet.). The juvenile adjudication proceeding is prescribed by section 54.03 of the juvenile justice code. TEX. FAM. CODE ANN. § 54.03 (West 2014). Before a juvenile may be found to have engaged in delinquent conduct or in need of supervision, the Texas Legislature requires that a court first provide the juvenile and his parent or guardian with admonishments. *Id*. at § 54.03(b) (listing requirements for proper admonishments given at the beginning of an adjudication hearing). Texas courts recognize that admonishments serve an important protective function. "Admonishments to juveniles under Section 54.03 of the Texas Family Code are given to ensure that juveniles understand the nature of the proceedings and the rights they possess." *In re E.J.G.P.*, 5 S.W.3d 868, 870–71 (Tex. App.--El Paso 1999, no pet.). "Without a full understanding of the proceedings against him, of his rights in those proceedings, and of the possible consequences of a finding of delinquent conduct, a juvenile cannot enter a voluntary plea." *Matter of B.J.*, 960 S.W.2d 216, 220 (Tex. App.--San Antonio 1997, no pet.). When the record reflects that a defendant was properly admonished, it presents a prima facie showing that the guilty plea was knowing and voluntary. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex.Crim.App. 1998). To prevail on a claim of an involuntary plea, Appellant must then demonstrate that he did not fully understand the consequences of his plea such that he suffered harm. *Id.* To determine the voluntariness of a

plea, the reviewing court examines the record as a whole. *Id*.

The waiver of rights in a criminal context is surrounded by procedural protections that are both constitutional and statutory. *See Mendez v. State*, 138 S.W.3d 334, 344 (Tex.Crim.App. 2004). Due process requires that "waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Id*. at 344, n.39 (quoting *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)). A plea is not voluntary in the sense that it constitutes an intelligent admission that a defendant committed an offense unless the defendant receives "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Henderson v. Morgan*, 426 U.S. 637, 645, 96 S.Ct. 2253, 2257–58, 49 L.Ed.2d 108 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334, 61 S.Ct. 572, 574, 85 L.Ed. 859 (1941)). An involuntary guilty plea may result where a defendant is not given sufficient information to make a knowing and intelligent waiver of his constitutional rights and where his plea is based on misleading advice from his counsel. *See Matter of E.Q.*, 839 S.W.2d 144, 147 (Tex. App.--Austin 1992, no writ); *Huffman v. State*, 676 S.W.2d 677, 682-83 (Tex. App.--Houston [1st Dist.] 1984, pet. ref'd).

In its petition of delinquency, the State alleged that, on or about January 1, and 17, 2015, Appellant engaged in delinquent conduct by committing two counts of prohibited sexual contact with two siblings who were younger than fourteen years old in violation of section 22.021 of the Texas Penal Code. *See* TEX. PENAL CODE ANN. § 22.021 (West Supp. 2016). Section 22.021 prohibits a "person" from intentionally or knowingly causing unlawful sexual contact with a child under fourteen. *Id.* at § 22.021(a)(1)(B) and (2)(B). In a prosecution for sexual assault, the State

must prove that the defendant engaged in the conduct intentionally or knowingly without the complainant's consent. *Hernandez v. State,* 203 S.W.3d 477, 480 (Tex. App.--Waco 2006, pet. ref'd). "A person acts intentionally, or with intent, with respect . . . to a result of his conduct when it is his conscious objective or desire to . . . cause the result." TEX. PENAL CODE ANN. § 6.03(a) (West 2011). Moreover, "[a] person acts knowingly, or with knowledge, with respect to the nature of his conduct . . . when he is aware of the nature of his conduct[.]" *Id*. § 6.03(b). When a victim is younger than fourteen years old, the offense is elevated from a sexual assault to an aggravated sexual assault and is punishable as a first-degree felony subject to a term of imprisonment. *Id*. at §§ 12.32 (West 2011), 22.021(e). Mistake of age is not a recognized defense to aggravated sexual assault, as there is no *mens rea* element regarding the age component of the offense. *Fleming v. State,* 455 S.W.3d 577, 582 (Tex.Crim.App. 2014) (citing TEX. PENAL CODE ANN. § 22.021).

B. Analysis

On appeal, Appellant contends that he was denied due process because his plea of true was entered without adequate understanding of any defenses available to him. He asserts moreover that he was a victim of sexual abuse by his father and during the time of the alleged conduct he was thinking of the time his father had abused him. Thus, he contends "a factual dispute arises when the record as a whole suggests his intentions during the commission of the offense negates the element of his culpable mental state."

As a preliminary matter, we note that Appellant brings forth no challenge on the issue of whether he was properly admonished. *See* TEX. FAM. CODE ANN. § 54.03(b). Nonetheless, because Appellant's challenge, in part, includes questions as to the voluntariness of his plea, we

must first review the record to determine whether Appellant was duly admonished such that there is a prima facie showing that his plea of true was entered knowingly and voluntarily. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex.Crim.App. 1998).

Here, the record reflects that after the parties announced ready, the trial court informed Appellant of his right to remain silent, his right to be represented by a lawyer, his right to confront and cross-examine any of the State's witnesses, and his right to a jury trial. TEX. FAM. CODE ANN. § 54.03(b)(3) – (6). When the court asked Appellant whether he understood what a jury did, he gave a short answer saying, "[w]here you have people decide for like if you're guilty or not." The court then added a short explanation that twelve people would sit and listen to his case and decide whether he was delinquent. Next, the court verbally confirmed with Appellant that he did not want a jury trial and his attorney concurred.

Proceeding then to an explanation of the nature and possible consequences of the proceedings, the court advised Appellant that "once you do plea[d] true to these allegations, you will receive some type of sanction as a result of your plea." TEX. FAM. CODE ANN. § 54.03(b)(2). The court further stated, "[i]t could be anything from probation all the way to commitment at the Texas Juvenile Justice Department." Next, the court advised him that his juvenile record may be used in the punishment phase of an adult trial if he were accused of a crime when he became an adult. TEX. FAM. CODE ANN. § 54.03(b)(2). The court then inquired of Appellant whether he understood his rights and he politely responded, "Yes, ma'am."

At this juncture, the court addressed Appellant stating, "I want you to listen as [the prosecutor] reads the allegations against you." Then, when asked whether he understood the allegation, Appellant replied, "Yes, Your honor." TEX. FAM. CODE ANN. § 54.03(b)(1). The

court then asked Appellant about each of the two counts of the petition and Appellant confirmed he was pleading true to both counts because it was true. Appellant also confirmed that he was not being forced to plead true nor was he promised anything in return. Appellant's attorney then confirmed his own agreement with Appellant's plea. We find that Appellant was duly admonished as required by section 54.03(b) of the Family Code. TEX. FAM. CODE ANN. § 54.03(b).

Having been duly admonished, the burden shifted to Appellant to show that a misunderstanding resulted in him entering a plea that was not a voluntary, knowing, and intelligent waiver of his rights. *Martinez*, 981 S.W.2d at 197. A defendant may show he entered a plea without understanding the consequences of his actions and that he was harmed by the plea. *Id*. Here, Appellant argues that he was not informed by his prior attorney about the nature of the culpable mental state required of the charges brought against him and how his intent during the charged conduct applied to his case. He further contends that the trial court's refusal to withdraw his plea caused him harm because he may be subject to a requirement to register as a sex offender upon reaching adulthood.

We construe the essence of Appellant's argument as an assertion that his plea was involuntary due to a misunderstanding and this misunderstanding caused him harm. *See Martinez*, 981 S.W.2d at 197. To meet his burden, Appellant relies on the testimony and report of his probation officer, as well as testimony given by his mother. The report provides background information from both Appellant and his mother. Appellant revealed to his probation officer sexual abuse he experienced that was on his mind at the time of his alleged misconduct. The report states:

> "[Appellant] further reported that when he thought about sexual [sic] abusing his brothers, he was thinking about his own sexual abuse that his father imposed upon him for approximately two years when he was between the ages of 5 and 7, and he was curious."

Appellant's mother described his father as having suffered from PTSD and depression after returning from Afghanistan and that he committed suicide by shooting himself in October of 2012. The report also includes, "[s]he further reported during their marriage the juvenile's father had told her that he had been sexually abused by a family friend at the age of 5." Appellant's mother described Appellant as having been very close to his father before his death. In July of 2015, she reported taking Appellant to El Paso Behavioral Health Hospital as he was depressed.

Regarding the adjudication proceeding itself, the report states Appellant's mother hired a new attorney because "their decision to appeal the juvenile's adjudication, is not because they are denying the offense, or the need for the juvenile to get help to address his sexual behaviors, but because of the long term effects this type of adjudication is going to have on her son." The report further states, "[f]amily also reported they believe the legal system should have taken into account the juvenile was also victim of sexual abuse when charging him with the offenses."

At the hearing on Appellant's post-adjudication motion, Appellant argued he was not informed of the different ways that the law provides regarding how children could testify, or how they could present evidence, when they have been alleged to be a victim of a sex offense. Appellant argued that his status as a victim of abuse presented "defensive issues" that a jury should have been able to hear to decide "whether or not . . . the offense that's being alleged . . . support[s] a finding of what [Appellant's] intent was because that is relevant, that is material." Appellant wanted to withdraw his plea as neither he nor his mother were aware of things that could have been done on his case to present a defense or to mitigate the charges brought against him when he

entered his plea and waived his jury trial rights.

At the later disposition hearing, the record includes testimony from Appellant's mother wherein she described that she spoke with Appellant's prior attorney during his representation and was never informed of trial presentation for children alleged to be a victim of a sex offense. She only learned of these issues after she met with Appellant's new attorney. She would not have advised Appellant to proceed with a stipulation had she known of this additional information. She also testified to her concerns about not being informed of future consequences stating, "[a]ccording to what he had told us we believed that that was the best option. We were not fully informed of what would, I guess, the consequences would be in the future. We were not in full understanding."

Appellant brings forth two cases illustrating how a misunderstanding regarding an essential element of an offense may undermine the sufficiency of evidence supporting a plea. Both cases involve aggravated robbery charges, wherein the use of a real gun, as opposed to a toy gun, comes to light only after a defendant enters his plea. First, in *Payne v. State*, 790 S.W.2d 649, 652 (Tex.Crim.App. 1990), the Court of Criminal Appeals held that the trial court committed reversible error in refusing a timely request to withdraw a plea. In *Payne*, the defendant revealed he had used a toy gun and not a real gun in the commission of his robbery offense and had not understood the significance of the difference when he entered his plea. *Id*. at 650. Because defendant's revelation undermined the factual validity of his signed confession to an aggravated robbery, the Court of Criminal Appeals remanded to the trial court to allow the defendant to again answer the indictment filed against him.[2] *Id*. at 652 ("testimony served to raise an issue of the voluntariness

[2] *Compare* TEX. PENAL CODE ANN. § 29.03(a)(2) (West 2011) (uses or exhibits a deadly weapon), *and* TEX. PENAL CODE ANN. § 29.02(a)(2)(West 2011) (threaten or place another in fear of imminent bodily injury or death) .

of the signed confessions made pursuant to [defendant's] guilty plea").

In Appellant's second case, a juvenile defendant charged with aggravated robbery likewise revealed after his plea of true that he used a toy gun and not a real gun in the commission of his offense. *Matter of J.B.*, No. 01-13-00844-CV, 2014 WL 6998068, at *2 (Tex. App.--Houston [1st Dist.] Dec. 11, 2014, no pet.) (mem. op.). Unlike the defendant in *Payne*, however, the juvenile failed to timely request a withdrawal of his plea from the trial court. *Id.*, at *3 On that procedural distinction, the Houston court of appeals found that error was not preserved as the trial court was not required to act on the misunderstanding *sua sponte*. *Id.*

Here, Appellant timely requested withdrawal of his stipulation of evidence, and argues that he misunderstood the nature of the charges and defenses he could raise. This misunderstanding, he explains, undermined the legal sufficiency of the evidence regarding the "intentionally or knowingly" component of his plea. Because Appellant questions the legal sufficiency of an essential element of the offense charged, we construe his argument as placing at issue his own intent in committing the offense.[3] Within Appellant's larger contention of lack of voluntariness, he also challenges the legal sufficiency of the evidence in supporting the "knowing" element of the sexual assault charge. "[W]hen the defensive theory of consent is raised in a prosecution for sexual assault, the defendant necessarily disputes his intent to engage in the alleged conduct without the complainant's consent and [thereby] places his [own] intent to commit sexual assault at issue." *Casey v. State*, 215 S.W.3d 870, 880 (Tex.Crim.App. 2007) (citing *Rubio v. State*, 607

[3] "[P]oints of error should be liberally construed to fairly and equitably adjudicate the rights of litigants." *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 863 (Tex. 2005) (citing TEX.R.APP.P. 38.9) (briefs are meant to acquaint the court with the issues in a case).

S.W.2d 498, 501 (Tex.Crim.App. 1980)); *Brown v. State,* 96 S.W.3d 508, 512 (Tex. App.--Austin 2002, no pet.); *see Martin v. State,* 173 S.W.3d 463, 466 n.1 (Tex.Crim.App. 2005)). A defendant's own intent cannot be inferred from the mere act of sexual conduct with the complainant. *Rubio,* 607 S.W.2d at 501; *Brown,* 96 S.W.3d at 512.

As we consider the intent element of the charges brought against Appellant, we are particularly guided by *In re B.W.,* 313 S.W.3d 818 (Tex. 2010), as the case directly construes Penal Code section 22.021, the same provision at issue here. In *In re B.W.*, a thirteen-year-old girl pled true to the offense of prostitution and thereafter filed a motion for new trial contesting the sufficiency of evidence to support the intent element of her plea. *Id*. at 819. Mirroring this case, in *In re B.W.*, the record merely included the young girl's plea and stipulation to evidence, and a report from her probation officer. *In re B.W.*, 274 S.W.3d 179, 180 (Tex. App.--Houston [1st Dist.] 2008), *rev'd*, 313 S.W.3d 818 (Tex. 2010).

In challenging the legal sufficiency of her plea, B.W. argued that her age under fourteen precluded as a matter of law her ability to form the necessary intent to commit the offense of prostitution. *Id*. In support of her argument, B.W. cited to section 22.021 of the Penal Code as her primary authority supporting her argument that she was not able to form intent as a matter of law as required by the offense. *In re B.W.*, 313 S.W.3d at 820 (citing TEX. PENAL CODE ANN. § 22.021) ("criminalizing sex with a child irrespective of consent"). Although charged with prostitution, B.W. argued that section 22.021 applied to her generally as she was less than fourteen at the time of her alleged offense, and thus, she was deemed unable to "knowingly" consent to sex for a fee as a matter of law.[4] *Id*.; *see* TEX. PENAL CODE ANN. § 43.02(a)(1) (West 2016).

[4] Section 43.02(a)(1) of the penal code provides that a person commits an offense if, in return for receipt of a fee, the person "knowingly . . . offers to engage, agrees to engage, or engages in sexual conduct[.]" TEX. PENAL CODE

Moreover, she argued that the Texas Legislature did not intend for children under the age of fourteen to be prosecuted for an offense such as prostitution in that an essential element of the offense required knowing agreement to engage in sex for a fee and children under fourteen were not legally capable of such consent. *Id.*

Signaling a strong shift in doctrine as applied to the youngest of offenders, the Supreme Court found that the underlying rationale of Texas' sexual assault scheme established that "younger children lack the capacity to appreciate the significance or the consequences of agreeing to sex, and thus cannot give meaningful consent." *Id*. at 820-21 (citing *see, e.g.*, *State v. Hazelton*, 915 A.2d 224, 234 (Vt. 2006); *Collins v. State*, 691 So.2d 918, 924 (Miss. 1997); *Coates v. State*, 50 Ark. 330, 7 S.W. 304, 304–06 (1888); *see also Anschicks v. State*, 6 Tex.App. 524, 535 (Tex.Ct.App. 1879); *cf. Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 1195, 161 L.Ed.2d 1 (2005) (holding that as compared to adults, juveniles have a "'lack of maturity and an underdeveloped sense of responsibility'. . . [they] are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure") (quoting *Johnson v. Tex.*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993)); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (confirming the Court's observations in *Roper* about the difference between juvenile and adult minds)).

In *In re B.W.*, the Supreme Court held "in Texas, 'a child under fourteen cannot legally consent to sex.'" 313 S.W.3d at 821 (quoting *May v. State*, 919 S.W.2d 422, 424 (Tex.Crim.App. 1996)). The Court also stated, "[t]he Legislature has determined that children thirteen and younger cannot consent to sex." *Id*. at 824; s*ee* TEX. PENAL CODE ANN. § 22.021(a)(2)(B). The

ANN. § 43.02(a)(1).

court further explained, "legal capacity to consent . . . is necessary to find that a person 'knowingly agreed' to engage in sexual conduct for a fee." *Id*. at 824. "Courts, legislatures, and psychologists around the country have recognized that children of a certain age lack the mental capacity to understand the nature and consequences of sex, or to express meaningful consent in these matters." *Id*. at 826 (citing *Hazelton,* 915 A.2d at 234; *Collins,* 691 So.2d at 924; *Jones v. Florida,* 640 So.2d 1084, 1089 (Fla. 1994); *Payne,* 623 S.W.2d 867; *Goodrow v. Perrin,* 119 N.H. 483, 403 A.2d 864 (N.H. 1979) (citation omitted)). "The State has broad power to protect children from sexual exploitation without needing to resort to charging those children with prostitution and branding them offenders." *Id*. at 825 (citing TEX. FAM. CODE ANN. § 261.101). A bright line has been established regarding the age of consent, "[b]y unequivocally removing the defense of consent to sexual assault, the Texas Legislature has drawn this line at the age of fourteen." *Id*. at 823. With the Legislature determining that children under fourteen cannot consent to sex, the rationale then follows that the state may not adjudicate such a young offender for an offense that includes consent to sex as one of its essential elements. *Id*. at 824.

Regarding crimes of this nature and children under fourteen, the Supreme Court also explained that the State has broad power to protect these children without resorting to the juvenile justice system or considering it the only portal to providing services. *Id*. at 825. "Section 261.101 of the Family Code requires a person to report to a law enforcement agency or the Department of Family and Protective Services if there is cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect." *Id*. (citing TEX. FAM. CODE ANN. § 261.101). Just because a young offender may not be adjudicated for certain offenses due to age-related incapacity, it does not then mean that the State will not become involved in

providing necessary protection and services. Once aware of a child's circumstances, "[t]he department or agency must then conduct an investigation during which the investigating agency may take appropriate steps to provide for the child's temporary care and protection." *Id.*; *see* TEX. FAM. CODE ANN. §§ 261.301, 261.302, 262.001–.309 (West Supp. 2016 & West 2014).

Although we recognize that *In re B.W.* involved an offense different from the underlying offense here, nonetheless, we find *In re B.W.* implicated as section 22.021 is central to the holding finding that the Legislature did not intend to prosecute children under fourteen for offenses that include legal capacity to consent to sex. We also note that the holding of *In re B.W.* reiterates an earlier recognition of age-related incapacity by the Court of Criminal Appeals when it stated that section 22.021 is aimed at adult offenders:

> The statutory prohibition of *an adult* having sex with a person who is under the age of consent serves to protect young people from being coerced by the power of an older, more mature person. The fact that the statute does not require the State to prove *mens rea* as to the victim's age places *the burden on the adult* to ascertain the age of a potential sexual partner and to avoid sexual encounters with *those who are determined to be too young to consent to such encounters*.
>
> *Fleming v. State*, 455 S.W.3d 577, 582 (Tex.Crim.App. 2014) [emphasis added].

As for the question of whether *In re B.W.* extends beyond the offense of prostitution, the Corpus Christi court of appeals nearly decided the issue but the procedural posture of the case did not allow the court to reach the issue. In *In re O.D.T.*, the state brought a petition of delinquency against an eleven-year-old boy based on two counts of aggravated sexual assault of a child under fourteen years of age. *In re O.D.T.*, No. 13-12-00518-CV, 2013 WL 485754, at *1 (Tex. App.--Corpus Christi Feb. 7, 2013, no pet.) (mem. op.); s*ee* TEX. PENAL CODE ANN. § 22.021(a)(1)(B), (a)(2)(B). Citing *In re B.W.* as support, the juvenile offender applied for pretrial habeas relief contending that the state's prosecution was "fundamentally invalid as a matter of law." *Id.*

O.D.T. argued a child under the age of fourteen lacked the capacity to act with the mental state required of the charge. *Id*., at *1. Specifically, he argued that a child under fourteen years of age could not be prosecuted for the offense of aggravated sexual assault because "a child under fourteen cannot legally consent to sex." *Id.* (quoting *In re B.W.*, 313 S.W.3d at 821) (citation omitted). The trial court denied the application for relief. *Id*. On appeal, the Corpus Christi court of appeals found that the trial court's denial constituted an interlocutory order and the court lacked appellate jurisdiction. *Id*., at *2.

In a second case discussing *In re B.W.* involving charges other than prostitution, the state alleged that a thirteen-year-old boy engaged in conduct consisting of both sexual assault and unlawful restraint of another against a victim described as a "high functioning" autistic fifteen-year-old boy. *In re H.L.A.*, No. 01-12-00912-CV, 2014 WL 1101584, at *1 (Tex. App.--Houston [1st Dist.] Mar. 20, 2014, no pet.) (mem. op.). In *In re H.L.A.*, the state voluntarily dismissed the sexual assault charges during the charge conference and a jury then adjudged the defendant as delinquent on the remaining charge of unlawful restraint. *Id*. Among other treatment terms and conditions, the court then ordered the juvenile offender to register as a sex offender. *Id*., at *5; *see* TEX. PENAL CODE ANN. § 20.02(a) (West 2011); TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(E)(ii) (West Supp. 2016).[5] On appeal, the juvenile argued that he lacked the experience and mental capacity to appreciate that his conduct would require him to register as a sex offender and, therefore, "he [could not] be said to have intentionally or knowingly restrained another person." *Id*. (citing *In re B.W.*, 313 S.W.3d at 820). The Houston court of appeals, however,

[5] Article 62.001(5)(E)(ii) provides that unlawful restraint (Section 20.02) qualifies as a reportable conviction or adjudication for purposes of sex offender registration programs. See TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(E)(ii) (West Supp. 2016).

distinguished *In re B.W.* finding the intent element of the unlawful restraint charge was distinct from the *mens rea* element required of prostitution.[6] *Id.*, at *6.

In this case, given the age of Appellant and the charged offense, we find that he met his burden of showing there is legally insufficient evidence to support a knowing and voluntary plea of true to delinquent conduct as alleged by the State. *See Martinez*, 981 S.W.2d at 197; *In re B.W.*, 313 S.W.3d at 824 ("The Legislature has determined that children thirteen and younger cannot consent to sex."). We disagree with the State that this is a case of buyer's remorse or a situation where a defendant chose to voluntarily waive defenses and later changed his mind as was rejected in *Ulloa v. State*, 370 S.W.3d 766, 769 (Tex. App.--Houston [14th Dist.] 2011, pet. ref'd). Being a child of only thirteen years old at the time of the offense, Appellant here misunderstood defenses he could assert that he nonetheless waived when he pled true and judicially confessed to committing the underlying sexual assault offense. Other than his plea, no other evidence was provided in support of his plea. To enable Appellant to make a voluntary, knowing, and informed waiver of his constitutional rights, Appellant should have been informed prior to the entry of his plea of true of the potential defense of lack of capacity to consent to sex as a matter of law, and other pertinent defensive theories applicable to his circumstances. *See In re B.W.*, 313 S.W.3d at 824.

Withdrawal of Appellant's plea of true and stipulation of evidence, and a new trial, will

[6] At least one legal commentator considered the holding of *In re H.L.A.* as an extension of the rationale of *In re B.W* to prohibited activities beyond prostitution: "By basing its decision on these grounds, the court inadvertently reaffirmed Justice Wainwright's assertion that the precedent of *In re B.W.* applies in all cases where an element of the offense requires a child to knowingly engage in an activity to which they cannot consent." Tara Schiraldi, *For They Know Not What They Do: Reintroducing Infancy Protections for Child Sex Offenders in Light of in Re B.W.*, 52 AM. CRIM.L.REV. 679, 692 (2015) (citing *In re H.L.A.*, 2014 WL 1101584, at *1 addressing an argument based upon *In re B.W.*, 313 S.W.3d at 836 (Wainwright, J., dissenting)).

enable the parties to address directly, in the first instance, the question of whether the holding of *In re B.W.* extends to the offense of aggravated sexual assault. Trial presentation will yield a developed record of Appellant's circumstances and evidence of his and his siblings' need for services. Thus, we find in these circumstances, it was error for the trial court to refuse to withdraw the plea of true and stipulation of evidence and to order a new trial. Issue One is sustained.

CONCLUSION

Accordingly, we reverse the trial court's judgment and remand for a new trial.

GINA M. PALAFOX, Justice

August 25, 2017

Before McClure, C.J., Rodriguez, and Palafox, JJ.
Rodriguez, J., dissenting