



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-14-00190-CV

IN THE MATTER OF S.L., A JUVENILE

**On Appeal from the County Court
Dallam County, Texas
Trial Court No. 636; Honorable David Field, Presiding**

February 3, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Appellant, S.L., a juvenile, appeals the trial court's adjudication order and disposition order finding he engaged in delinquent conduct for possession of a controlled substance in amount of one gram or more but less than four in a drug-free zone, a third degree felony,¹ and ordering him placed on community supervision in the custody of his guardian until his eighteenth birthday.² By two issues, Appellant asserts (1) the trial court erred in entering orders of adjudication and disposition without a

¹ TEX. HEALTH & SAFETY CODE ANN. § 481.134(c)(1) (West 2010).

² Appellant was sixteen at the time the order was entered.

waiver of his right to a jury trial and without a record of the proceedings and (2) the evidence is insufficient to support the judgment. We reverse and remand.

BACKGROUND

In March 2014, the State alleged that Appellant engaged in delinquent conduct by intentionally and knowingly possessing 2.1 grams of methamphetamine in a drug-free zone. No reporter's record was made of the proceedings leading to Appellant's adjudication and disposition. By motion for new trial, Appellant asserted he did not waive the right to a record or the right to a jury trial as required by section 51.09 of the Texas Family Code. The *Designation of Clerk's Record* requests the inclusion of "[a]ll waivers" but none appear in the record.

APPLICABLE LAW

Section 51.09 of the Texas Family Code provides as follows:

[u]nless a contrary intent clearly appears elsewhere in this title, any right granted to a child . . . may be waived in proceedings under this title if:

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

TEX. FAM. CODE ANN. § 51.09 (West 2014). A juvenile has a statutory right to trial by jury in an adjudication hearing. *Id.* at § 54.03(b)(6). Additionally, all judicial proceedings under chapter 54 of the Family Code except detention hearings *shall* be recorded by

stenographic notes or by electronic, mechanical, or other appropriate means. *Id.* at § 54.09.

ANALYSIS

By his first issue, Appellant alleges the trial court erred by entering the challenged orders without a proper waiver of his right to a jury trial and by the lack of a recording of the proceedings. The State did not favor this court with a brief. We agree with Appellant.

The record before this court is silent on whether Appellant waived his right to a jury trial. The clerk's record does not contain a waiver. The lack of a waiver is not structural error and is subject to a harm analysis. *Johnson v. State*, 169 S.W.3d 223, 235 (Tex. Crim. App. 2005).

In *In re R.A.J.*, No. 07-14-00048-CV, 2014 Tex. App. LEXIS 8242, at *2 (Tex. App.—Amarillo July 29, 2014, pet. denied), this court held the trial court's failure to comply with section 51.09 of the Family Code was harmless. Failure to comply with the requirements of section 51.09 may be raised for the first time on appeal. *Id.* at *2 n.1. In this case, however, without a reporter's record, it is not possible to conduct a meaningful harm analysis. Given the circumstances of this case, the nature of the error, the insufficiency of the record, and the State's failure to file a brief, the record does not affirmatively establish that Appellant and his attorney waived his right to a jury trial. *In re S.G.*, 304 S.W.3d 518, 522 (Tex. App.—Waco 2009, no pet.). We resolve any doubt concerning harm in Appellant's favor. The trial court also erred in failing to record the underlying proceedings. Issue one is sustained.

Although we find issue one dispositive of this appeal, we nevertheless consider Appellant's second issue concerning the sufficiency of the evidence because, if successful, such a claim would result in greater relief through a dispositive judgment in favor of Appellant.³ See *Benavidez v. State*, 323 S.W.3d 179, 182 (Tex. Crim. App. 2010) (stating that the Court of Criminal Appeals has "long held" that an appellant who establishes reversible error is still entitled to appellate consideration of a sufficiency of the evidence claim). While trial error alone would not bar the State from retrying the case, a finding of insufficient evidence would interpose a jeopardy bar to retrial. See *id.*; *Rains v. State*, 604 S.W.2d 118, 120 (Tex. Crim. App. 1980).

Simply stated, Appellant contends that because there is no reporter's record there is "no evidence" to support the trial court's orders. In that regard, generally speaking, an appellant is entitled to a new trial when, without appellant's fault, a significant portion of the court reporter's record has been lost or destroyed and that portion is necessary to the appeal's resolution. See TEX. R. APP. P. 34.6(f). We find the situation in this case to be analogous to a lost or destroyed record. Furthermore, Appellant's argument fails to distinguish the difference between no evidence and no record. Just because there is no record, that does not mean there was no evidence. Because a reporter's record is unavailable in this case, we are unable to make a determination whether the evidence actually presented was legally sufficient or insufficient. Accordingly, because the official court reporter never filed a record on

³ If there is no evidence that the child engaged in delinquent conduct or conduct indicating a need for supervision, the case against the child shall be dismissed with prejudice. TEX. FAM. CODE ANN. § 54.03(g) (West 2014).

appeal, we reverse the trial court's adjudication and disposition orders and we remand this cause for a new trial.

CONCLUSION

The trial court's orders are reversed and the cause is remanded to the trial court for further proceedings.

Patrick A. Pirtle
Justice