

**The right to a jury trial in a juvenile case is not a constitutional right.[In the Matter of R.R.](12-3-5)**

**On May 24, 2012, the Houston Court of Appeals (14<sup>th</sup> Dist.) held that the right to jury trial provided in the Texas Constitution applies only to adults, and it is section 54.03 of the Family Code that creates a statutory right to a jury trial in juvenile proceedings, and as a result, violations are subject to harmless-error analysis.**

¶ 12-3-5. **In the Matter of R.R.**, No. 14-10-01233-CV, --- S.W.3d ----, 2012 WL 1881342 (Tex.App.-Hous. (14 Dist.), 5/24/12).

**Facts:** Appellant, R.R., was charged with the aggravated sexual assault of a child under the age of 14. After a bench trial, the trial court found R.R. engaged in delinquent conduct and assessed punishment at five years' confinement in the Texas Youth Commission with a possible transfer to the Texas Department of Criminal Justice. On appeal, R.R. asserts that the trial court erred by (1) proceeding to a bench trial without obtaining a waiver of jury trial by R.R.'s trial counsel, (2) excluding witness testimony attacking the complainant's credibility, and (3) finding the evidence presented to be legally and factually sufficient to support adjudicating R.R. as a delinquent.

On October 11, 2010, an agreed-setting form resetting the case for "Court Trial" was signed by R.R.'s parent/guardian, his attorney, and the prosecutor. A bench trial was held three days later after the following exchange in open court among the trial judge, the prosecutor (Sarah Bruchmiller), and R.R.'s attorney (Fred Dahr):

THE COURT: Okay. [R.R.], you are charged with first degree felony offense of aggravated sexual assault of a child under the age of 14. That is said to have occurred on January 11th, 2009. You had a right to have a trial in front of a jury, but it appears that you have given up that right; is that true?

RESPONDENT: Yes, sir.

THE COURT: Okay. All right then. And I'm going to enter a plea of not true to the allegation that you're charged with. All right then. You may proceed.

MS. BRUCHMILLER: Your Honor, at this time State offers Petitioner's Exhibit 1 which is a signed stipulation of the date of birth of the respondent.

(Whereupon Petitioner's Exhibit 1 is offered into evidence.)

MR. DAHR: No objection, Judge.

THE COURT: All right. It's admitted.

During the bench trial, R.R. called S.K. to the stand, and the following exchange occurred:

MR. DAHR: About how long did you know [the complainant] for?

A: Since beginning of eighth grade.

MR. DAHR: What's your opinion of her, her truthfulness?

A: She don't have—

MS. BRUCHMILLER: Objection. Improper question.

THE COURT: That's sustained.

MR. DAHR: Have you talked to people in your community about whether [the complainant] tells the truth?

MS. BRUCHMILLER: Objection. Improper question regarding to character. [sic]

THE COURT: That's sustained.

MR. DAHR: Pass the witness, Judge.

At the conclusion of the bench trial, the trial court found that R.R. engaged in delinquent conduct and assessed punishment at five years' confinement in the Texas Youth Commission with a possible transfer to the Texas Department of Criminal Justice. The same afternoon, the trial court issued a judgment providing, in relevant part:

BE IT REMEMBERED that this cause being called for trial, came on to be heard before the above Court with the above numbered and entitled cause and came the State of Texas by her Assistant District Attorney, SARA BRUCHMILLER, and came in person the Respondent, [R.R.], with his/her defense attorney, DAHR, FRED, and the Respondent's parent(s), guardian(s), or custodian(s), [sic] and pursuant to the Texas Family Code all parties waived a jury, waived/had prior access to all reports to be considered by the courts and announced ready for a hearing; and there upon the Court, after hearing the pleading of all the parties and hearing the evidence and argument of counsel, finds beyond a reasonable doubt that said child committed the offense(s) alleged in the petition and/or established by the evidence.

R.R. timely moved for a new trial, alleging the same issues alleged in this appeal. The trial court denied that motion, and this appeal followed.

**Held:** Affirmed

**Opinion:** We turn to R.R.'s jury-trial waiver issue, and we note in passing that it is properly before us even without an objection in the trial court. Under the Family Code, jury trials are the default course of action, and a trial court has a duty to commence a trial by jury unless and until both the juvenile and his attorney release the trial court from that duty. Tex. Fam.Code §§ 51.09, 54.03(c). When a statute directs a juvenile court to take certain action, the failure of the juvenile court to do so may be raised for the first time on appeal unless the juvenile defendant expressly waived the statutory requirement. In re C.O.S., 988 S.W.2d 760, 767 (Tex.1999). Because R.R. argues that he did not waive his right to a jury trial, the issue is properly before us without an objection below.

A more difficult question is whether the trial court reversibly erred when it found that R.R. validly waived his right to a jury trial despite the absence of a written or recorded waiver by

R.R.'s attorney. The State concedes that the record does not contain a written or oral waiver by R.R.'s attorney but argues the error is harmless. Initially, then, we must determine whether the error below is subject to harmless-error analysis.

Except for certain federal constitutional errors the U.S. Supreme Court has labeled as structural, no error—even if it relates to jurisdiction, voluntariness of a plea, or some other mandatory requirement—is categorically immune to a harmless-error analysis. *Cain v. State*, 947 S.W.2d 262, 264 (Tex.Crim.App.1997) (superseded by statute on other grounds). Denial of an adult defendant's right to a jury trial is a structural error not subject to harmless-error analysis. *Green v. State*, 36 S.W.3d 211, 216 (Tex.App.Houston [14th Dist.] 2001, no pet.). However, a court's failure to follow statutory procedures for waiving a defendant's right to trial is not structural error. See *Johnson v. State*, 72 S.W.3d 346, 348 (Tex.Crim.App.2002); *Ex parte Sadberry*, 864 S.W.2d 541, 543 (Tex.Crim.App.1993) (“Neither the federal nor the state constitution require that a trial by jury be waived in writing. Rather, the legislature has chosen to observe careful regulation of that constitutional right by specifying how that right may be waived.”). Such a failure must somehow harm a defendant to be reversible error. *Johnson*, 72 S.W.3d at 348.

For adults, trial by jury is a fundamental right guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and article I, section 15, of the Texas Constitution. *Hall v. State*, 843 S.W.2d 190, 193 (Tex.App.-Houston [14th Dist.] 1992, no writ). Few jurisdictions afford the right to juvenile defendants, but Texas does.FN4Section 54.03 of the Family Code sets out the procedure for juvenile adjudication hearings and plainly provides: “Trial shall be by jury unless jury is waived in accordance with Section 51.09.”Tex. Fam.Code § 54.03(c). The State relies on the supreme court's decision in *In re D.I.B.* to argue that the requirements of section 54.03—and by extension, section 51.09—are statutory in nature and that failure to comply with those procedures is subject to harmless-error analysis. See 988 S.W.2d 753, 754 (Tex.1999). But the holding there was explicitly limited:

FN4. The majority of states and the federal government do not guarantee juveniles the right to a jury trial. Tina Chen, Comment, *The Sixth Amendment Right to a Jury Trial: Why Is It A Fundamental Right For Adults and Not Juveniles?*, 28 J. Juv. L. 1, 6 (2007). Texas has historically granted juvenile defendants broad legal protections unavailable to them in many states. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 549 n. 9 (1971) (naming Texas as one of ten states to provide a juvenile's right to a jury trial in some situations); see also Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 Buff. L.Rev. 1447, 1489 n. 166 (2009) (naming Texas as one of only two states to completely prohibit the waiver of counsel by juveniles); Mark Ells, *A Brief Analysis of Some Elements of a Proposed Model Juvenile Code*, 28 Hamline J. Pub.L. & Pol'y 199, 206 (2006) (naming Texas as one of five states to provide heightened statutory guidelines for interrogations of juveniles); Tory J. Caeti et al., *Juvenile Right to Counsel: A National Comparison of State Legal Codes*, 23 Am. J. Crim. L. 611, 625 (1996) (listing Texas among seven states offering the most comprehensive protections for juvenile defendants).

We note that our holding today regarding the explanations required by section 54.03(b) of the Family Code is limited. The only issue before us is whether an appellate court should conduct a harm analysis when a trial court fails to explain the potential use of the record from a juvenile proceeding in a future criminal case. We are not called upon to decide, and do not decide, whether the failure to give one or more of the other explanations required by section

54.03(b) of the Family Code might be a “structural defect[ ] in the constitution of the trial mechanism, which def[ies] analysis by ‘harmless-error’ standards.” D.I.B., 988 S.W.2d at 759 (citing *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)).

We must decide the source of a juvenile's right to a jury trial. See *Miles v. State*, 154 S.W.3d 679, 680 (Tex.App.-Houston [ 14th Dist.] 2004), *aff'd*, 204 S.W.3d 822 (Tex.Crim.App.2006). Only those errors that directly offend the U.S. Constitution or the Texas Constitution are structural errors immune from harmless-error analysis. *Id.*; *Fox v. State*, 115 S.W.3d 550, 563 (Tex.App.-Houston [ 14th Dist.] 2002, *pet. ref'd*). It is clear that the federal constitution does not guarantee a juvenile the right to a jury trial. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971). This, of course, does not prevent the Texas Constitution from guaranteeing that right. *Hous. Chronicle Publ'g Co. v. Crapitto*, 907 S.W.2d 99, 106 (Tex.App.-Houston [ 14th Dist.] 1995, *no writ*) (“The federal constitution sets the floor for individual rights; state constitutions establish the ceiling.”).

If the Texas Constitution guarantees the right to a jury trial to juveniles, section 54.03 of the Family Code merely recognizes that right. In that case, any error denying a jury trial to a juvenile is structural and not subject to harmless-error analysis. See *Green*, 36 S.W.3d at 216. On the other hand, if the right to jury trial provided in the Texas Constitution applies only to adults, section 54.03 creates a statutory right to jury trial in juvenile proceedings, and violations are subject to harmless-error analysis. See *Johnson*, 72 S.W.3d at 348.

Although this appears to be a matter of first impression in Texas, this court has previously chosen not to distinguish the federal and state constitutions on this issue. *Strange v. State*, 616 S.W.2d 951, 953 (Tex.Civ.App.-Houston [14th Dist.] 1981, *no writ*) (“[A] jury trial is not a constitutional requirement in the adjudicative stage of a juvenile proceeding.”) (citing *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971)). The supreme court cited *Strange* approvingly to support the proposition that “[a]lthough minors have constitutional rights, they do not have the same constitutional rights as adults.” See *Barber v. Colo. Indep. Sch. Dist.*, 901 S.W.2d 447, 451 (Tex.1995). We see no reason to alter our previous assessment. Though Texas does more than most jurisdictions to preserve the right to a jury trial for juveniles, it does not go so far as to constitutionally require jury trials in juvenile proceedings. See *Strange*, 616 S.W.2d at 953. The Family Code—not the Texas constitution—creates a juvenile's right to a jury trial.

Because a jury trial is not constitutionally required, a juvenile must demonstrate that his substantial rights were affected in order to obtain reversal based on the erroneous denial of a jury trial under section 54.03. See *Tex.R.App. P. 44.2(b)*; See *Johnson*, 72 S.W.3d at 348. In a non-jury case, an error does not affect substantial rights if the error does not deprive the complaining party of some right to which he was legally entitled. *Johnson*, 72 S.W.3d at 348; *Smith v. State*, 290 S.W.3d 368, 375 (Tex.App.-Houston [14th Dist.] 2009, *pet. ref'd*). In determining harm, we consider the entire record. *Smith*, 290 S.W.3d at 375.

Here, R.R. does not assert any harm, and the judgment indicates that “all parties waived a jury.” That recitation is binding in the absence of direct proof of its falsity. *Johnson*, 72 S.W.3d at 349; *Breazeale v. State*, 683 S.W.2d 446, 450 (Tex.Crim.App.1985) (*op. on reh'g*). There is no such proof in the record, and in fact, R.R. makes no challenge at all to the judgment itself.

Instead, R.R. portrays the record as completely silent on any waiver from his attorney and relies on the well-settled rule that waiver cannot be inferred from a silent record. See, e.g., *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

We do not agree that the record is silent. R.R. orally waived his right to a jury in open court on the record with his attorney present. Additionally, R.R.'s attorney signed a form agreeing to a "Court Trial." Although neither the oral waiver nor the trial-setting form are sufficient to satisfy the requirements of section 54.03, they both weigh against any suggestion that a trial to the bench harmed R.R.

**Conclusion:** Because the record reflects that R.R. opted for a bench trial, we conclude that any failure by the trial court to adhere to the requirements of section 54.03 was harmless. See *Johnson*, 72 S.W.3d at 349. We overrule R.R.'s second issue. For the foregoing reasons, we affirm the trial court's judgment.