

SECOND NOTICE, MEMORANDUM OPINION, AND JUDGMENTS  
OF SECOND APPELLATE DISTRICT OF TEXAS, OCTOBER 11, 2018

A-1 NOTICE TO PARTIES (2 pp)

A-2 SECOND MEMORANDUM OPINION (24 pp)

A-3 JUDGMENTS: CR16-0114, CR16-0115 (2 pp)

APPENDIX A



**COURT OF APPEALS**  
**SECOND DISTRICT OF TEXAS**

CHIEF JUSTICE  
 BONNIE SUDDERTH

JUSTICES  
 SUE WALKER  
 BILL MEIER  
 LEE GABRIEL  
 ELIZABETH KERR  
 MARK T. PITTMAN  
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October 11, 2018

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RE: Court of Appeals Number: 02-17-00046-CR.  
 Trial Court Case Number: CR16-0114

Style: Joshua Eric Townley  
 v.  
 The State of Texas

Today the Second Court of Appeals issued an opinion and judgment in the above-referenced cause. Copies of the opinion and judgment are attached and can also be viewed on our Court's webpage at: <http://www.txcourts.gov/2ndcoa>.

Respectfully yours,

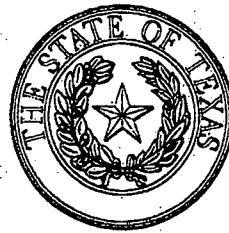
DEBRA SPISAK, CLERK

02-17-00046-CR

October 11, 2018

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*Debra Spisak*



In the  
Court of Appeals  
Second Appellate District of Texas  
at Fort Worth

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No. 02-17-00046-CR  
No. 02-17-00047-CR

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JOSHUA ERIC TOWNLEY, Appellant

v.

THE STATE OF TEXAS

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On Appeal from the 43rd District Court  
Parker County, Texas  
Trial Court Nos. CR16-0114, CR16-0115

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Before Walker and Pittman, JJ.; and Charles Bleil (Senior Justice, Retired, Sitting by Assignment).  
Memorandum Opinion by Justice Pittman

## MEMORANDUM OPINION

In two separate causes, a jury convicted Appellant Joshua Eric Townley of one count of sexual assault of a child under seventeen—by penetration of her mouth with his penis—and found the enhancement allegation true, and the trial court imposed a life sentence. The trial court stacked the two sentences. In five points, Appellant complains that in both causes,<sup>1</sup> the trial court abused its discretion by:

- rescinding its order granting a new trial (Point One);
- denying his motion to suppress and admitting during the guilt-innocence phase State's Exhibit 1, his videotaped interview with law enforcement (Point Four);
- admitting State's Exhibit 3, records concerning his prior military conviction, as proof of the offense under Texas Code of Criminal Procedure article 38.37 and as proof of the sentencing enhancement allegation culminating in his mandatory life sentences (Points Two and Three); and
- admitting State's Exhibit 4, a copy of text messages sent by the complainant's cell phone to his cell phone (Point Five).

For the reasons stated herein, we affirm the trial court's judgments.

### BRIEF SUMMARY OF FACTS

The jury heard evidence that Appellant sexually abused the complainant over a period of years while Appellant and her mother were in a relationship. At the age of fourteen, the complainant made an outcry to her mother, who notified law

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<sup>1</sup>Our discussion and disposition of Appellant's points therefore applies equally to both causes despite any use of the singular form.

enforcement. Child Protective Services (CPS) interviewed the complainant's brother and Appellant's son, both of whom were also teenagers. During the investigation, Appellant also spoke with Investigator Pitman at the Parker County Sheriff's office, and Investigator Pitman videotaped the interview. In the interview, Appellant confessed to sexually abusing the complainant on several occasions; the abuse included several instances of Appellant penetrating her mouth with his penis. Appellant does not challenge the sufficiency of the evidence to support his convictions.

## **DISCUSSION**

### **I. Rescission of Order Granting New Trial**

After the trial, Appellant filed a timely notice of appeal. On the same day, he also filed a "Motion for New Trial and Motion in Arrest of Judgment" alleging that the verdicts were contrary to the law and the evidence. He further alleged the trial court had discretion to grant a new trial "in the interests of justice" and requested the trial court to set aside the judgments and order a new trial on the merits. The trial court granted the motion but three days later signed an order (1) rescinding the prior order; (2) stating that it had granted the motion "erroneously and unintentionally"; and (3) denying the motion. The appellate record had not yet been filed when the trial court rescinded its order. *See Tex. R. App. P. 25.2(g)* ("Once the record has been filed in the appellate court, all further proceedings in the trial court—except as provided otherwise by law or by these rules—will be suspended until the trial court

receives the appellate-court mandate.”).

In his first point, Appellant contends that the trial court reversibly abused its discretion by rescinding its order granting his motion.

**A. Generally, a Trial Court May Freely Rescind an Order Granting a New Trial.**

A trial court has the power to rescind its order granting a new trial; time alone does not limit this power. *Kirk v. State*, 454 S.W.3d 511, 515 (Tex. Crim. App. 2015) (eliminating the 75-day time limit imposed by *Awadelkariem v. State*, 974 S.W.2d 721 (Tex. Crim. App. 1998)). Appellant ignores *Kirk* and argues that *Awadelkariem*—in which the Texas Court of Criminal Appeals overruled precedent to hold that a trial court has power, albeit limited, to rescind its order on a motion for new trial, 974 S.W.2d at 722, 728—was wrongly decided.

**B. Double Jeopardy Considerations Could Still Limit a Trial Court’s Freedom to Rescind an Order Granting a New Trial.**

Focusing on his rights to be free from double jeopardy, Appellant relies on *Hudson v. Louisiana*, 450 U.S. 40, 101 S. Ct. 970 (1981), and *Moore v. State*, 749 S.W.2d 54 (Tex. Crim. App. 1988), to argue that the trial court abused its discretion by rescinding its order granting a new trial because that order was the “functional equivalent of an acquittal.” See *Awadelkariem*, 974 S.W.2d at 724 (stating that the Court held in *Moore* that the granting of a new trial based on legally insufficient evidence was “the functional equivalent of an acquittal, causing the trial court’s jurisdiction to lapse under double jeopardy principles”). *Hudson* and *Moore* both

involved orders granting new trials solely because of legally insufficient evidence. *Hudson*, 450 U.S. at 44, 101 S. Ct. at 973; *Moore*, 749 S.W.2d at 56. The *Hudson* court held that the Double Jeopardy Clause barred a retrial in those circumstances, implicitly holding that acquittal was the appropriate remedy. *Hudson*, 450 U.S. at 44-45, 101 S. Ct. at 973. The *Moore* court held that the Double Jeopardy Clause barred the trial court from rescinding its order granting the new trial and that acquittal was the proper remedy. 749 S.W.2d at 58.

In overruling a line of prior cases that had held a trial court could not rescind an order granting a new trial, the *Awadelkariem* court both noted that *Moore* was distinguishable from the line of cases because it “involv[ed] double jeopardy considerations” and ostensibly overruled it along with other cases in that line. 974 S.W.2d at 724, 728.

Unlike *Hudson* and *Moore*, however, neither *Awadelkariem* nor *Kirk* concerned an order granting a motion for new trial solely because legally insufficient evidence supported the guilty verdict. See *Kirk*, 454 S.W.3d at 512 (noting the trial court revoked the defendant’s deferred adjudication community supervision, adjudicated his guilt, and sentenced him, and his “Motion for Commutation of Sentence” complained only of the sentence); *Awadelkariem*, 974 S.W.2d at 722 (noting the trial court granted the motion for new trial because the defendant agreed to change his plea to guilty in exchange for deferred adjudication). The *Kirk* court also did not mention *Moore* or expressly recognize a *Moore* exception to the general rule allowing trial courts to freely

rescind their orders granting new trials but did recognize that exceptions could exist by expressly noting what it was not addressing. Specifically, the *Kirk* court did not:

address whether the trial court's ability to rescind an order granting a new trial could be affected by events occurring after the grant of a new trial, such as . . . the start of the new trial [or] whether a defendant's double-jeopardy rights would affect a trial court's ability to rescind an order granting a new trial after the new trial has begun.

*Kirk*, 454 S.W.3d at 511 n.1. Thus, *Moore*'s continued validity for the proposition that a trial court cannot rescind an order granting a new trial solely on the basis that legally insufficient evidence supports the verdict is unclear.

### **C. Appellant Is Not at Risk of Double Jeopardy.**

We do not need to resolve *Moore*'s present viability, however, because Appellant's motion for new trial did not raise only legal sufficiency as a ground for granting a new trial. When a motion for new trial is granted on a ground other than legal sufficiency, the Double Jeopardy Clause is not implicated. *See, e.g., Dennington v. State*, No. 05-92-01892-CR, 1997 WL 112750, at \*1 (Tex. App.—Dallas Mar. 14, 1997, pet. ref'd) (not designated for publication); *Carter v. State*, 848 S.W.2d 792, 796 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd).

Appellant's motion sought a new trial (1) because the verdicts were allegedly contrary to the law and the evidence but also (2) in the interest of justice. The motion did not mention sufficiency; however, the wording of the first ground typically indicates a challenge to the sufficiency of the evidence to support the conviction. *See State v. Zalman*, 400 S.W.3d 590, 594 (Tex. Crim. App. 2013) (“In *Bogan v. State* we held

that allegations that a verdict was against the law and the evidence raised a sufficiency challenge and *only* a sufficiency challenge.”) (footnote omitted). *But see Clarke v. State*, 270 S.W.3d 573, 580 n.18 (Tex. Crim. App. 2008) (stating that a trial court would be within its discretion to refuse to set a motion for new trial “alleging such a general ground” as “the verdict is contrary to the law and the evidence” for hearing but noting that the trial court could rule on a *Brady* issue raised at such a hearing by granting or denying the motion).

Appellant raised his second ground, “[i]n the interest of justice,” separately in the motion, and it is a ground that can be distinctive from sufficiency of the evidence. *See State v. Herndon*, 215 S.W.3d 901, 907 (Tex. Crim. App. 2007) (noting that grounds for new trial listed in appellate rule 21.3 are “illustrative, not exclusive” and holding that “[a] trial judge has discretion to grant or deny a motion for new trial ‘in the interest of justice,’ but ‘justice’ means in accordance with the law”) (citations omitted); *Dennington*, 1997 WL 112750, at \*1–2.

The trial court’s order granting Appellant’s motion for new trial did not indicate the basis for the decision. The trial court could have granted the motion in the interest of justice (or unintentionally, as the trial court stated). Consequently, the order was not functionally equivalent to an acquittal, and the Double Jeopardy Clause was not implicated. *See Dennington*, 1997 WL 112750, at \*1–2. Thus, to the extent that a double-jeopardy limitation on a trial court’s power to rescind an order granting a new trial remains after *Kirk*, that limitation does not apply here.

**D. The Trial Court Did Not Abuse Its Discretion by Rescinding Its Order Granting Appellant a New Trial.**

Applying *Kirk*, we hold that the trial court had the power to freely rescind its order granting a new trial and therefore did not abuse its discretion by doing so. *See Kirk*, 454 S.W.3d at 515.

To the extent Appellant also argues that the trial court abused its discretion by rescinding its order granting the motion to arrest judgment, our resolution is the same. As our sister court in Houston has explained,

[A] trial court has all the necessary inherent power to correct, modify, vacate or amend its own rulings in order to effectuate its judgment. So long as the court does not by its ruling divest itself of jurisdiction or exceed a statutory time table, it can simply change its mind on a ruling.

*The ability to do so is a necessary function of an efficient judiciary.*

*Meineke v. State*, 171 S.W.3d 551, 555 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (citations and internal quotation marks omitted). We therefore hold that the trial court also did not abuse its discretion by rescinding its order granting the motion to arrest judgment.

Having held that the trial court did not abuse its discretion by rescinding its order granting Appellant's "Motion for New Trial and Motion in Arrest of Judgment," we overrule Appellant's first point.

**II. Appellant's Recorded Oral Statement to Law Enforcement**

Appellant filed a pretrial motion to suppress, among other things, oral statements he made to law enforcement. In the motion, Appellant asserted that while

detained, he had given an oral statement without an attorney present and without being read his *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). The trial court denied the suppression motion after a hearing. During trial, the trial court admitted State's Exhibit 1, the recording of Appellant's interview with Investigator Pitman, over Appellant's objections. In the interview, Appellant admitted to committing multiple instances of child sexual abuse against the complainant, including multiple acts of penetrating her mouth with his penis, the charged offenses.

In his fourth point, Appellant contends that the trial court erred by denying his pretrial motion to suppress his oral statement to law enforcement and abused its discretion by overruling his objections to the admission of the statement during trial. Appellant argues that the only issue is whether he was in custody during the interview.

**A. We review the Trial Court's Denial of Appellant's Motion to Suppress Under a Bifurcated Standard of Review.**

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). In reviewing the trial court's decision, we do not engage in our own factual review. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *Best v. State*, 118 S.W.3d 857, 861 (Tex. App.—Fort Worth 2003, no pet.). The trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Wiede v.*

*State*, 214 S.W.3d 17, 24–25 (Tex. Crim. App. 2007). Therefore, we give almost total deference to the trial court’s rulings on: (1) questions of historical fact, even if the trial court’s determination of those facts was not based on an evaluation of credibility and demeanor and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. *Amador*, 221 S.W.3d at 673; *Montanez v. State*, 195 S.W.3d 101, 108–09 (Tex. Crim. App. 2006); *Johnson v. State*, 68 S.W.3d 644, 652–53 (Tex. Crim. App. 2002). But when application-of-law-to-fact questions do not turn on the credibility and demeanor of the witnesses, we review the trial court’s rulings on those questions de novo. *Amador*, 221 S.W.3d at 673; *Estrada v. State*, 154 S.W.3d 604, 607 (Tex. Crim. App. 2005); *Johnson*, 68 S.W.3d at 652–53.

**B. If Appellant Was in Custody During the Interview, He Should Have Received the Article 38.22 Warnings.**

As this court has previously explained,

The United States Constitution commands that no person “shall be compelled in any criminal case to be a witness against himself.” Constitutional and statutory protections are triggered when a person undergoes custodial interrogation. “Custodial interrogation” is the “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Article 38.22 of the code of criminal procedure also prohibits the use of statements that result from a custodial interrogation without compliance with its procedural safeguards.

Custodial interrogation occurs when law enforcement officers question a person after taking him into custody or depriving him of his freedom of action in any significant way. A court must examine all of the circumstances surrounding the interrogation when determining whether someone is in custody; however, the ultimate inquiry is simply

whether there was a formal arrest or restraint on the freedom of movement of the degree associated with a formal arrest.

*Williams v. State*, 513 S.W.3d 619, 630 (Tex. App.—Fort Worth 2016, pet. ref'd) (citations omitted).

The Texas Court of Criminal Appeals has outlined four general situations which may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way; (2) when a law enforcement officer tells the suspect that he cannot leave; (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; or (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave. *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996); *Shiflet v. State*, 732 S.W.2d 622, 629 (Tex. Crim. App. 1985); *Parker v. State*, No. 02-14-00044-CR, 2015 WL 1793718, at \*2 (Tex. App.—Fort Worth Apr. 16, 2015, pet. ref'd) (mem. op., not designated for publication). Appellant argues that option (3) is implicated here.

If Appellant was in custody when being questioned, then he was entitled to the warnings under article 38.22 of the Texas Code of Criminal Procedure. Tex. Code Crim. Proc. Ann. art. 38.22, §§ 2(a), 3(a) (West 2018); *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007) (stating that the article 38.22 warnings “are virtually identical to the *Miranda* warnings” except the statutory warning that an accused “has the right to terminate the interview at any time.”) Tex. Code Crim. Proc. Ann.

art. 38.22, § 2(a)(5), has no *Miranda* counterpart). But Appellant had the initial burden of proving that his statement was the product of custodial interrogation. *Herrera*, 241 S.W.3d at 526; *Williams*, 513 S.W.3d at 631.

**C. The Evidence Supports the Trial Court's Conclusion that Appellant Was Not in Custody When He Spoke with Investigator Pitman.**

Investigator Pitman testified that:

- He called Appellant and asked him to come to the sheriff's office for an interview;
- Appellant arrived in street clothes;
- Appellant checked in with reception, and Investigator Pitman escorted him through a secured entrance to reach the small interview room;
- The door to the interview room was closed for privacy purposes;
- Appellant was neither handcuffed nor shackled;
- Appellant was neither under arrest nor in custody;
- Investigator Pitman did not read Appellant his *Miranda* rights;
- Investigator Pitman told Appellant that he was not under arrest, not being detained, and was free to go “[j]ust to let him know that he wasn’t in custody”;
- A person could leave the building without going through the secured door;
- The interview lasted about an hour;
- Appellant left after the interview, and Investigator Pitman escorted him out the secured door;
- Appellant was not arrested that day; and

- Investigator Pitman told Appellant during the interview that he would be seeking an arrest warrant.

Appellant claims with no support that “from the beginning[, he] inquired as to whether he needed an attorney during the interview” and that he was “assured that he [did] not need counsel.” Our review of the interview shows otherwise. When the topic of the outcry arose, Appellant told Investigator Pitman that (1) when Appellant received the related CPS paperwork regarding custody of his son, his friends and family advised him to get a lawyer; and (2) he contacted a lawyer who told him to continue to do what he had been doing, to be cooperative, and to not answer questions if he did not feel comfortable. After Appellant confessed, he reiterated to Investigator Pitman that he had been advised to get a lawyer but said that he was not going to “lawyer up” and was going to take responsibility for his actions. Only after Investigator Pitman told Appellant that he was seeking an arrest warrant and explained the walk-through and bonding process did Appellant ask, “So at this point should I even get a lawyer?” Investigator Pitman replied that he could not give legal advice but that it “probably wouldn’t hurt to talk to one again” because “it’s not finished here.”

Appellant also contends that the “coercive” nature of the environment—the locked doors, the “tiny interview room whose door [was] closed,” the “passageways deep into the bowels of an obviously secured area,” “an openly armed agent of the State” who “repeatedly lied to” Appellant to cause him to incriminate himself—and

Appellant's general knowledge that the police lie are proof that he was in custody, and he argues that his statement was therefore involuntary. An inducement does not make a confession involuntary unless it makes a suspect more likely to admit to committing a crime of which he is innocent. *Washington v. State*, 582 S.W.2d 122, 124 (Tex. Crim. App. [Panel Op.] 1979); *Fisher v. State*, 379 S.W.2d 900, 902 (Tex. Crim. App. 1964). Further, trickery or deception does not make a confession involuntary unless it was designed to convince an innocent person to confess to a crime or offended due process. *Creager v. State*, 952 S.W.2d 852, 855 (Tex. Crim. App. 1997). Our review of Investigator Pitman's testimony and the recorded interview does not raise those concerns.

**D. The Trial Court Did Not Err by Concluding that Appellant Was Not in Custody and that His Statement to Investigator Pitman Was Voluntary, and the Trial Court Did Not Abuse Its Discretion by Admitting the Statement.**

Regarding Appellant's allegation of coercion, the United States Supreme Court has held in a similar situation,

[Mathiason] came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a ½-hour interview [he] did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way."

Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law

enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

*Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714 (1977). Applying *Mathiason* and the other cases cited above, we hold that the record supports the trial court's determination that Appellant's statement was voluntary and its implied ruling that he was not in custody when he made the statement. We therefore hold that the trial court did not err by denying Appellant's motion to suppress and concluding that his statement was voluntary and did not abuse its discretion by admitting the statement at trial despite the motion to suppress. See *id.*; *Stone v. State*, 583 S.W.2d 410, 413 (Tex. Crim. App. [Panel Op.] 1979); *Parker*, 2015 WL 1793718, at \*2-3. We sustain this part of Appellant's fourth point.

**E. Appellant Does Not Adequately Brief His Rule 403 Complaint About His Statement's Admission into Evidence.**

Appellant's only additional objection when his statement was offered at trial was under rule 403 of the Texas Rules of Evidence, but he does not present any argument to support that part of his issue grounded in rule 403. If a party provides no argument or legal authority to support its position, the appellate court may properly overrule the issue or point as inadequately briefed. Tex. R. App. P. 38.1(i);

*Lucio v. State*, 351 S.W.3d 878, 896 (Tex. Crim. App. 2011) (citing cases), *cert. denied*, 566 U.S. 1036 (2012). We therefore overrule the remainder of Appellant's fourth point as inadequately briefed.

### **III. Admission of Appellant's Prior Military Conviction**

#### **A. The Trial Court Admitted Records of Appellant's Prior Military Conviction as Evidence of His Guilt and as Evidence Triggering a Mandatory Life Sentence.**

The State filed a pretrial notice under Texas Code of Criminal Procedure article 38.37 of its intent to offer State's Exhibit 3,<sup>2</sup> records of Appellant's prior military conviction, during guilt-innocence, and a notice under Texas Penal Code section 12.42(c)(2) of its intent to offer the same records of the prior military conviction to enhance his punishment. The notices stated that in 1997, Appellant had been convicted by a military court of an offense similar to sexual assault of a child under Texas Penal Code section 22.011 or section 21.11(a)(1). The records included a stipulation signed by Appellant admitting that he had had sexual intercourse with a fourteen- or fifteen-year-old girl.

Appellant filed written objections opposing the admission of State's Exhibit 3 under rules 401, 402, 403, and 404(b) of the Texas Rules of Evidence. At the pretrial article 38.37 hearing, he further objected: (1) the evidence violated the

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<sup>2</sup>State's Exhibit 3A was admitted for record purposes only and not as evidence against Appellant; we summarily overrule Appellant's complaints regarding it.

Confrontation Clause; (2) "Section 2(a) and (b) do not contemplate anything other than violations of Texas law"; and (3) the conviction, which occurred in Georgia, did not otherwise fall under the purview of article 38.37. The trial court overruled the objections.

At trial, the State moved to admit State's Exhibit 3, and Appellant "reurge[d] [his] prior objections, namely 403, along with all of the other prior objections" filed in written motions and raised orally. The trial court overruled the objections.

During the jury's deliberations of Appellant's guilt, he objected to the State using his prior military conviction as an enhancement: "There's no evidence . . . showing that . . . the elements [of that prior military conviction] are substantially similar" to the Texas Penal Code elements of sexual assault of a child under the age of seventeen. After the jury found Appellant guilty of the sexual assault charged in each case, the State moved to admit during the punishment phase all the evidence from the guilt-innocence phase of trial, and Appellant "reurge[d] all [his] objections" regarding that evidence and "specifically regarding [State's] Exhibit 3, . . . reurge[d] all [his] objections regarding that evidence regarding any kind of prior conviction, namely 403." The trial court overruled those objections and admitted the evidence. The jury found the enhancement allegation true.

**B. The Trial Court Did Not Abuse Its Discretion by Admitting State's Exhibit 3 Under Article 38.37, Section 2.**

In his third point, Appellant complains primarily of the trial court's admission

of State's Exhibit 3 during the guilt-innocence phase under article 38.37 of the Texas Code of Criminal Procedure. We review the trial court's admission of evidence under article 38.37 for an abuse of discretion. *Ryder v. State*, 514 S.W.3d 391, 399 (Tex. App.—Amarillo 2017, pet. ref'd); *see also Davis v. State*, 329 S.W.3d 798, 803 (Tex. Crim. App. 2010) (“We review a trial court's decision to admit evidence [for] an abuse of discretion.”), *cert. denied*, 565 U.S. 830 (2011).

Article 38.37, section 2(b), which applies to this case because Appellant was on trial for sexual assault of a child and indecency with a child, *see Tex. Code Crim. Proc. Ann. art. 38.37, § 2(a)(1)(C), (D)* (West 2018), provides,

Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) . . . may be admitted in the trial of an alleged offense described by Subsection (a)(1) . . . for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.

*Id.* art. 38.37, § 2(b). Section 2-a of article 38.37 provides,

Before evidence described by Section 2 may be introduced, the trial judge must:

- (1) determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; and
- (2) conduct a hearing out of the presence of the jury for that purpose.

*Id.* art. 38.37, § 2-a.

Appellant initially argues that evidence is admissible under article 38.37 only to show a defendant's state of mind and his relationship with the complainant. Appellant does not direct us to the place in the record where he made this objection below, and we did not see it in our review. The complaint made on appeal must comport with the complaint made in the trial court or the error is forfeited. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012); *Lovill v. State*, 319 S.W.3d 687, 691–92 (Tex. Crim. App. 2009) (“A complaint will not be preserved if the legal basis of the complaint raised on appeal varies from the complaint made at trial.”); *Pená v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009) (“Whether a party’s particular complaint is preserved depends on whether the complaint on appeal comports with the complaint made at trial.”). Appellant has therefore forfeited this complaint. In the interest of justice, we note that although article 38.37, section 1 has the limitations Appellant suggests, *see* Tex. Code Crim. Proc. Ann. art. 38.37, § 1, article 38.37, section 2 does not, *see id.* art. 38.37, § 2.

Appellant’s arguments in his brief regarding rules 402, 403, and 404b, mistakenly premised—like the rest of his argument—on section 1 and not on section 2 of article 38.37, are likewise unavailing:

CCP Art. 38.37 permits the introduction of past crimes to explain the accused’s state of mind and to show the relationship between the accused and a child victim. In this case there was no material, contested fact on either such issue. The relationship was shown and intent could be inferred from the direct evidence of the victim and the circumstances in the record. The Appellant did not open up the trial for the introduction of such evidence in cross-examination and did not testify.

Furthermore, the State from the get go went into such matters. Clearly the State offered such evidence to show that because the Appellant had had a conviction in the past it was likely that he had committed the instant offense as well. Other than the age of the child in the prior conviction there is nothing similar between the facts therein and the facts and circumstances presented in this trial. Such evidence of an act with a different victim in his 20's sheds no light on either of the issues Art. 38.37 refers to specifically with respect to the admissibility of such evidence. Even under TRE, Rules 402-404b such evidence would not have been admissible as it is only for purposes of showing the Appellant's bad character. In this case no evidence was inquired into that would have triggered the admissibility of such evidence under either Rules 403 or 404 and none of the evidence of SX-3/3A was directed to proof of the 2 matters permitted under Art. 38.37 CCP so that such evidence should not have been permitted during the guilt-innocence phase of the trial.

Because we reject the premise of these arguments, we reject the arguments in toto.

Appellant also argues that “[i]f the Legislature sought to mandate admissibility then Art. 38.37 is void because it contravenes the separation of powers provisions of our State Constitution (and by extension the due process provisions of the Federal Constitution) between the Legislative and judicial branches of government.” Again, Appellant does not direct us to this complaint or the trial court’s ruling thereon, and we did not see either in our review of the record. The complaint is therefore forfeited. *See Clark*, 365 S.W.3d at 339; *Lovill*, 319 S.W.3d at 691–92; *Pena*, 285 S.W.3d at 464; *see also McNamara v. State*, No. 02-16-00422-CR, 2018 WL 2248665, at \*7 (Tex. App.—Fort Worth May 17, 2018, pet. ref’d) (mem. op., not designated for publication) (noting that we would uphold the constitutionality of article 38.37, section (2)(b)).

Having disposed of the arguments Appellant raised in his third point, we overrule it.

**C. The Trial Court Did Not Abuse Its Discretion by Admitting State's Exhibit 3 as Proof of the Enhancement Allegation Under Section 12.42(c)(2)(B)(v) of the Texas Penal Code.**

In his second point, Appellant complains of the trial court's admission of State's Exhibit 3, the records of his prior military conviction, during the punishment phase and of their use to enhance his punishment under section 12.42(c)(2)(B)(v) of the Texas Penal Code. Section 12.42(c)(2) provides in relevant part,

- (2) [A] defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life if:
  - (A) the defendant is convicted of an offense:
    - (i) under Section . . . 21.11(a)(1), 22.021, or 22.011, Penal Code;
    - ... and
  - (B) the defendant has been previously convicted of an offense:
    - (ii) under Section . . . 21.11, 22.011, [or] 22.021, or . . .
    - (v) under the laws of *another state* containing elements that are substantially similar to the elements of an offense listed in Subparagraph . . . (ii),

Tex. Penal Code Ann. § 12.42(c)(2) (West Supp. 2018) (emphasis added).

Appellant's trial objection to the use of his prior military conviction to enhance his sentence was that "[t]here's no evidence . . . showing that . . . the elements [of the prior conviction] are substantially similar to [his current] charges." However,

Appellant does not complain in this point on appeal that his prior military conviction is not substantially similar to his convictions before us. Instead, he contends that the military conviction does not qualify as a prior conviction under Texas Penal Code section 12.42(c)(2) because the statute requires a conviction from another state. Even if Appellant's trial objection preserved his complaint on appeal, he loses on the merits.

The Texas Court of Criminal Appeals has already held that "convictions 'under the laws of another state' in Penal Code Section 12.42(c)(2)(B)(v) includes prior convictions under the [Uniform Code of Military Justice]." *Rushing v. State*, 353 S.W.3d 863, 866 (Tex. Crim. App. 2011), *cert. denied*, 570 U.S. 920 (2013). We overrule this portion of Appellant's second point.

#### **D. The State Sufficiently Linked Appellant to His Prior Military Conviction.**

Within this point Appellant also challenges the sufficiency of the evidence tying the military conviction to him. We resolve this complaint in the same way that we resolve typical complaints that enhancement offenses alleged against a defendant have not been sufficiently tied to him. *See Fisk v. State*, 538 S.W.3d 763, 769–70 (Tex. App.—San Antonio 2017, pet. granted). To establish that a defendant was convicted of an enhancement offense, the State must (1) prove the existence of the conviction described in the enhancement allegation and (2) link that conviction to the defendant. *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007); *Beck v. State*, 719 S.W.2d 205, 209–10 (Tex. Crim. App. 1986); *Davis v. State*, 268 S.W.3d 683, 715 (Tex. App.—Fort Worth 2008, pet. ref'd).

As the *Flowers* court explained,

No specific document or mode of proof is required to prove these two elements. There is no "best evidence" rule in Texas that requires that the fact of a prior conviction be proven with any document, much less any specific document. While evidence of a certified copy of a final judgment and sentence may be a preferred and convenient means, the State may prove both of these elements in a number of different ways, including (1) the defendant's admission or stipulation, (2) testimony by a person who was present when the person was convicted of the specified crime and can identify the defendant as that person, or (3) documentary proof (such as a judgment) that contains sufficient information to establish both the existence of a prior conviction and the defendant's identity as the person convicted. Just as there is more than one way to skin a cat, there is more than one way to prove a prior conviction.

*Flowers*, 220 S.W.3d at 921–22 (footnotes omitted). A trial court abuses its discretion by admitting records of an enhancement offense (pen packet) absent evidence that the person convicted of the offense charged in the pen packet is the defendant before the court. *Beck*, 719 S.W.2d at 210; *Davis*, 268 S.W.3d at 715.

Appellant complains that State's Exhibit 3 does not contain fingerprints or a photograph of the person convicted and that the State relied on "hearsay testimony of a person who was not present at the time [of the alleged prior offense] nor even in a relationship with" him then and that as a nonexpert in handwriting analysis, "all . . . she could lawfully be permitted to say was that the signatures on [State's Exhibit 3] appeared to be" Appellant's based on her familiarity with his signature.

In addition to Appellant's former wife's testimony identifying the signatures on the documents in State's Exhibit 3 as Appellant's, other evidence links him to the person convicted in the military conviction:

- Appellant and the person with the military conviction have the same first name, last name, and middle initial; the same birthdate; and the same social security number;
- Appellant's wife testified that he had told her that he "was with . . . a younger girl in the Navy" when he was in his early twenties; and
- In his interview with Investigator Pitman, Appellant admitted that he "got in trouble in the military," that he and a minor teenager had an "established sexual relationship" and "three different occasions" of consensual sexual intercourse in Georgia, and that he had served eighteen months of a twenty-four-month sentence in the brig because of his conduct.

Although the identical first and last names, middle initials, birthdates, and social security numbers would likely be sufficient alone to link Appellant to the prior conviction, *see, e.g., Haas v. State*, 494 S.W.3d 819, 824 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (relying on same birthdate, same driver's license number, and same first and last name to link defendant to a prior conviction), Appellant's admission in his interview with Investigator Pitman that while serving in the military, he had sexually abused a teenager and been confined as a result coupled with his wife's testimony that he had told her about being with "a younger girl" when he was in the Navy—both aligned with the records included in State's Exhibit 3—only increased the weight of evidence. We therefore hold that the evidence sufficiently links Appellant to his prior military conviction and that the trial court did not abuse its discretion by admitting State's Exhibit 3 during the punishment phase. We overrule Appellant's second point.

#### **IV. Outgoing Texts from the Complainant's Cell Phone**

In his fifth point, Appellant contends that the trial court abused its discretion by admitting during the trial on guilt-innocence State's Exhibit 4, written records of text messages sent from the complainant's cell phone to his cell phone number. Appellant initially objected on hearsay and relevancy grounds; under rule 403; as to improper foundation because the State had not established that the phone number to which the texts were sent belonged to him; and that it was "a one-sided conversation." Later, Appellant also objected that the State had failed to properly authenticate the exhibit. He did not make a running objection. Investigator Pitman testified about the content and significance of the texts without objection.

The preservation rule requires a party to object each time objectionable evidence is offered unless he has obtained a running objection or has requested a hearing outside the presence of the jury. *Geuder v. State*, 115 S.W.3d 11, 13 (Tex. Crim. App. 2003); *see also Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998) (explaining that Texas applies the "futility rule," meaning that even after a trial court overrules an objection to evidence, a party must keep making "futile" objections on pain of waiver). Unobjected-to testimony about objected-to evidence results in forfeiture of the objection. *See Clay v. State*, 361 S.W.3d 762, 767 (Tex. App.—Fort Worth 2012, no pet.) ("[B]ecause Wallace provided testimony about the Louisiana records without objection before and after appellant's objection to the admission of the records and because appellant failed to obtain a running objection, we conclude

that he forfeited his objection to the records' admission.") (footnote omitted); *see also* *Walker v. State*, No. 02-16-00418-CR, 2018 WL 1096060, at \*4 (Tex. App.—Fort Worth Mar. 1, 2018, no pet.) (mem. op., not designated for publication).

Because Appellant did not make a running objection and did not object when Investigator Pitman discussed the texts' content and significance, we overrule Appellant's fifth point as forfeited.

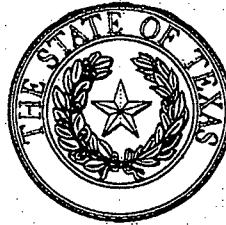
## CONCLUSION

Having overruled Appellant's five points, we affirm the trial court's judgments.

/s/ Mark T. Pittman  
Mark T. Pittman  
Justice

Do Not Publish  
Tex. R. App. P. 47.2(b)

Delivered: October 11, 2018



In the  
Court of Appeals  
Second Appellate District of Texas  
at Fort Worth

No. 02-17-00046-CR

JOSHUA ERIC TOWNLEY,  
Appellant

v.

THE STATE OF TEXAS

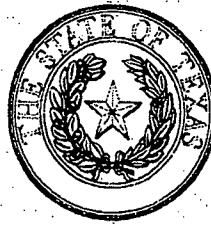
§ On Appeal from the 43rd District Court  
§ of Parker County (CR16-0114)  
§ October 11, 2018  
§ Opinion by Justice Pittman  
§ (nfp)

**JUDGMENT**

This court has considered the record on appeal in this case and holds that there was no error in the trial court's judgment. It is ordered that the judgment of the trial court is affirmed.

**SECOND DISTRICT COURT OF APPEALS**

By /s/ Mark T. Pittman  
Justice Mark T. Pittman



In the  
Court of Appeals  
Second Appellate District of Texas  
at Fort Worth

No. 02-17-00047-CR

JOSHUA ERIC TOWNLEY,  
Appellant

v.

THE STATE OF TEXAS

- § On Appeal from the 43rd District Court
- § of Parker County (CR16-0115)
- § October 11, 2018
- § Opinion by Justice Pittman
- § (nfp)

**JUDGMENT**

This court has considered the record on appeal in this case and holds that there was no error in the trial court's judgment. It is ordered that the judgment of the trial court is affirmed.

**SECOND DISTRICT COURT OF APPEALS**

By /s/ Mark T. Pittman  
Justice Mark T. Pittman

JUDGMENTS OF 43rd JUDICIAL DISTRICT COURT, PARKER COUNTY

- B-1 CR16-0114, Count I, Guilty (3 pp)
- B-2 CR16-0114, Count II, Not Guilty (1 p)
- B-3 CR16-0115, Count I, Guilty (3 pp)

APPENDIX B

NO. CR16-0114, COUNTY I  
TRN: 9139443949

RECEIVED AND FILED  
FOR RECORD

2017 FEB 16 PM 2:04

THE 43rd JUDICIAL

DISTRICT COURT OF

PARKER COUNTY, TEXAS

THE STATE OF TEXAS

VS.

JOSHUA ERIC TOWNLEY  
State ID No.: TX07598381

**JUDGMENT ON PLEA OF NOT GUILTY**

**JURY FINDING OF GUILT WITH PUNISHMENT ASSESSED BY THE COURT  
PENITENTIARY SENTENCE**

Judge Presiding: Craig Towson

Date of Judgment: February 16, 2017

Attorney Jeffrey Swain/

Attorney Andrew Herreth/

for State: Nikki Rhodes

for Defendant: Alicia Cooper

Offense

Convicted of: Sexual Assault of a Child

Statute for offense: Penal Code 22.011

Date Offense

Degree: Second Degree

Committed: January 3, 2016

Charging Instrument: Indictment/Information

Plea: Not Guilty

Found by Jury: Guilty

Findings on Use

of Deadly Weapon: None

Punishment Assessed by: The Jury

Plea to Enhancements: Not True

Finding on Enhancements: Found True

Jury Foreman: Ralph Vallejo

Date Sentence Imposed: February 16, 2017 Costs: \$749.00

Imprisonment in the Texas

Department of Criminal Justice -

Institutional Division for a term

Punishment and of LIFE and a Date to

Place of Confinement: Fine of \$0- Commence: February 16, 2017

Jail Credit: January 27, 2016 to January 27, 2016

March 4, 2016 to date of judgment

Restitution: N/A

JUDGMENT ON PLEA OF NOT GUILTY  
JURY FINDING OF GUILT WITH PUNISHMENT ASSESSED BY THE COURT  
PENITENTIARY SENTENCE

CAUSE NUMBER CR16-0114, COUNT I

SEX OFFENDER REGISTRATION REQUIREMENTS DO APPLY TO THE DEFENDANT. Tex. Code Crim. Proc. Chapter 62. The age of the victim at the time of the offense was: 14.

On the day set forth above, this cause was called for trial, and the State appeared by the above-named attorney, and the Defendant appeared in person in open court, the above-named counsel for Defendant also appeared on behalf of said Defendant. The Defendant having been duly arraigned and it appearing to the Court that the Defendant was mentally competent, and having pleaded "not guilty" to the indictment herein, both parties announced ready for trial and thereupon a jury, to wit: the above-named foreman and eleven others, was duly selected, impaneled, and sworn. Said jury, having heard the indictment read and the Defendant's plea thereto, and having heard the evidence submitted, the arguments of counsel, and having been duly charged by the Court, retired in charge of the proper officer to consider the verdict, and afterward were brought into court by the proper officer, the Defendant and counsel being present, and returned into open court the verdict set forth above, which was received by the Court and is now entered upon the minutes of the Court as shown above.

Thereafter, the Defendant, having elected to have punishment assessed by the Court, the enhancement paragraph(s), if any, were read and the Defendant entered the plea to said enhancement paragraph(s) noted above. Thereafter, the Court, having heard the evidence submitted relative to the question of punishment and the arguments of counsel returned into open Court the verdict set forth above under punishment above, and with regard to the enhancement paragraphs, if any, as shown above, which was received by the Court and is

here now entered upon the minutes of the Court as shown above.

IT IS, THEREFORE, CONSIDERED AND ORDERED by the Court, in the presence of the Defendant, that the said judgment be, and the said is hereby in all things approved and confirmed, and that the Defendant is adjudged guilty of the offense set forth above and said Defendant be punished as shown above and that the Defendant is sentenced to a term of imprisonment and a fine, if any, as set forth above, and that said Defendant be delivered by the Sheriff to the Director of the Department of Criminal Justice - Institutional Division, or other person legally authorized to receive such convicts for the punishment assessed herein, and the said Defendant shall be confined for the above named term in accordance with the provisions of law governing such punishments and execution may issue as necessary.

And the said Defendant is remanded to jail until said Sheriff can obey the direction of this judgment.

JUDGMENT ON PLEA OF NOT GUILTY  
JURY FINDING OF GUILT WITH PUNISHMENT ASSESSED BY THE COURT  
PENITENTIARY SENTENCE

CAUSE NUMBER CR16-0114, COUNT I



PRESIDING JUDGE

February 16, 2017  
DATE SIGNED

I certify that the fingerprints here set out were taken this day from the thumbs and index fingers of the Defendant in this cause.

MRS. SHARENA GILLILAND  
District Clerk of  
Parker County, Texas

OR

Bailiff of the 43rd Judicial District  
Court

By: \_\_\_\_\_  
Deputy District Clerk

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Jean Tyson  
Date: 2/16/17



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Left Index Finger



Right Index Finger



Right Thumb

NO. CR16-0114  
COUNT II

THE STATE OF TEXAS

VS.

JOSHUA ERIC TOWNLEY

\*

\*

\*

IN THE 43rd JUDICIAL DISTRICT COURT OF PARKER COUNTY, TEXAS

RECEIVED AND FILED  
FOR RECORD  
2017 FEB 24 AM 10:41  
SHARENA GILLILAND, CLERK  
PARKER COUNTY, TEXAS  
DEPUTY

JUDGMENT ON JURY VERDICT OF NOT GUILTY

Date of Verdict: February 15, 2017

Defendant: Joshua Eric Townley

Judge Presiding: Honorable Craig Towson

Attorney for State: Don Schnebly/Jeffrey Swain/Nikki Rhodes

Attorney for Defendant: Andrew Herreth/Alicia Cooper

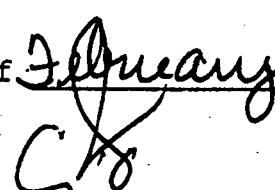
Offense: Indecency with a Child

Jury Verdict: Not Guilty

On the day set forth above, this cause was called for trial, and the State appeared by the above-named attorney, and the Defendant appeared in person in open court, the above-named counsel for Defendant also appeared on behalf of said Defendant. The Defendant having been duly arraigned and it appearing to the Court that the Defendant was mentally competent, and having pleaded "not guilty" to the indictment herein, both parties announced ready for trial and thereupon a jury was duly selected, impaneled, and sworn. Said jury, having heard the indictment read and the Defendant's plea thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer to consider the verdict, and afterward were brought into court by the proper officer, the Defendant and counsel being present, and returned into open court the verdict set forth above for Count II of the indictment in this cause only, which was received by the Court and is now entered upon the minutes of the Court as shown above. [Verdict in Count I was guilty - See Judgment on Plea of Not Guilty Jury Finding of Guilt with Punishment Assessed by the Court Penitentiary Sentence, entered in this cause on February 16, 2017]

It is therefore, CONSIDERED AND ADJUDGED by the Court that the said Defendant is hereby acquitted of the charge for which he was tried herein in Count II, as reflected above and in the indictment in this cause.

SIGNED on this the 23<sup>rd</sup> day of January, 2017.

  
JUDGE PRESIDING  
43rd Judicial District  
Parker County, Texas

NO. CR16-0115  
TRN: 9139443949

THE STATE OF TEXAS

VS.  
JOSHUA ERIC TOWNLEY  
State ID No.: TX07598381

RECEIVED AND FILED  
FOR RECORD  
2017 FEB 16 PM 04  
43rd JUDICIAL DISTRICT COURT  
PARKER COUNTY, TEXAS

**JUDGMENT ON PLEA OF NOT GUILTY  
JURY FINDING OF GUILT WITH PUNISHMENT ASSESSED BY THE COURT  
PENITENTIARY SENTENCE**

Judge Presiding: Craig Towson  
Attorney Jeffrey Swain/  
for State: Nikki Rhodes  
Offense

Date of Judgment: February 16, 2017  
Attorney Andrew Herreth/  
for Defendant: Alicia Cooper

Convicted of: Sexual Assault of a Child

Statute for offense: Penal Code 22.011

Degree: Second Degree Date Offense  
Committed: September 1, 2015

Charging Instrument: Indictment/Information

Plea: Not Guilty

Found by Jury: Guilty

Findings on Use

of Deadly Weapon: None

Punishment Assessed by: The Jury

Plea to Enhancements: Not True

Finding on Enhancements: Found True

Jury Foreman: Ralph Vallejo

Date Sentence Imposed: February 16, 2017 Costs: \$ 704.00

Imprisonment in the Texas  
Department of Criminal Justice -  
Institutional Division for a term

Punishment and of LIFE and a Date to  
Place of Confinement: Fine of \$-0- Commence: February 16, 2017  
Sentence shall be served: Consecutively:

Pursuant to Penal Code §3.03, this sentence shall consecutively with  
the sentence imposed by the 43rd Judicial District Court of Parker  
County, Texas, in cause no. CR16-0114, Count I, which was imposed on  
February 16, 2017 in which the Defendant was convicted of Sexual  
Assault of a Child and sentenced to life in TDCJ-ID and the sentence  
in this cause shall not commence until the sentence in that cause has  
ceased to operate.

JUDGMENT ON PLEA OF NOT GUILTY  
JURY FINDING OF GUILT WITH PUNISHMENT ASSESSED BY THE COURT  
PENITENTIARY SENTENCE

CAUSE NUMBER CR16-0115

Jail Credit: January 27, 2016 to January 27, 2016  
March 4, 2016 to date of judgment

Restitution: N/A

SEX OFFENDER REGISTRATION REQUIREMENTS DO APPLY TO THE DEFENDANT. Tex. Code Crim. Proc. Chapter 62. The age of the victim at the time of the offense was: 14.

On the day set forth above, this cause was called for trial, and the State appeared by the above-named attorney, and the Defendant appeared in person in open court, the above-named counsel for Defendant also appeared on behalf of said Defendant. The Defendant having been duly arraigned and it appearing to the Court that the Defendant was mentally competent, and having pleaded "not guilty" to the indictment herein, both parties announced ready for trial and thereupon a jury, to wit: the above-named foreman and eleven others, was duly selected, impaneled, and sworn. Said jury, having heard the indictment read and the Defendant's plea thereto, and having heard the evidence submitted, the arguments of counsel, and having been duly charged by the Court, retired in charge of the proper officer to consider the verdict, and afterward were brought into court by the proper officer, the Defendant and counsel being present, and returned into open court the verdict set forth above, which was received by the Court and is now entered upon the minutes of the Court as shown above.

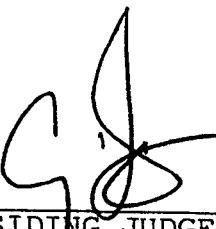
Thereafter, the Defendant, having elected to have punishment assessed by the Court, the enhancement paragraph(s), if any, were read and the Defendant entered the plea to said enhancement paragraph(s) noted above. Thereafter, the Court, having heard the evidence submitted relative to the question of punishment and the arguments of counsel returned into open Court the verdict set forth above under punishment above, and with regard to the enhancement paragraphs, if any, as shown above, which was received by the Court and is here now entered upon the minutes of the Court as shown above.

IT IS, THEREFORE, CONSIDERED AND ORDERED by the Court, in the presence of the Defendant, that the said judgment be, and the said is hereby in all things approved and confirmed, and that the Defendant is adjudged guilty of the offense set forth above and said Defendant be punished as shown above and that the Defendant is sentenced to a term of imprisonment and a fine, if any, as set forth above, and that said Defendant be delivered by the Sheriff to the Director of the Department of Criminal Justice - Institutional Division, or other person legally authorized to receive such convicts for the punishment assessed herein, and the said Defendant shall be confined for the above named term in accordance with the provisions of law governing such punishments and execution may issue as necessary.

And the said Defendant is remanded to jail until said Sheriff can obey the direction of this judgment.

JUDGMENT ON PLEA OF NOT GUILTY  
JURY FINDING OF GUILT WITH PUNISHMENT ASSESSED BY THE COURT  
PENITENTIARY SENTENCE

CAUSE NUMBER CR16-0115

  
PRESIDING JUDGE

February 16, 2017  
DATE SIGNED

I certify that the fingerprints here set out were taken this day from the thumbs and index fingers of the Defendant in this cause.

MRS. SHARENA GILLILAND  
District Clerk of  
Parker County, Texas

OR

Bailiff of the 43rd Judicial District  
Court

By: Deputy District Clerk

Date: \_\_\_\_\_

By: 

Date: 2/16/17



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Right Index Finger



Right Thumb

OFFICIAL NOTICES FROM COURT OF CRIMINAL APPEALS OF TEXAS  
RECEIVING, FILING, AND REFUSING PETITION FOR  
DISCRETIONARY REVIEW

C-1 RECEIVING AND FILING PDR, APRIL 11, 2019  
C-2 REFUSING PDR, MAY 15, 2019

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS  
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

FILE COPY

4/11/2019

**TOWNLEY, JOSHUA ERIC Tr. Ct. No. CR16-0114**

**COA No. 02-17-00046-CR**

**PD-0117-19**

I have this day received and filed the Appellant's Pro Se Petition for Discretionary Review.

Deana Williamson, Clerk

JOSHUA ERIC TOWNLEY  
ALLRED UNIT - TDC # 2118495  
2101 FM 369 NORTH  
IOWA PARK, TX 76367

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS  
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

FILE COPY

5/15/2019

**TOWNLEY, JOSHUA ERIC** Tr. Ct. No. CR16-0114

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

**COA No. 02-17-00046-CR**

**PD-0117-19**

Deana Williamson, Clerk

JOSHUA ERIC TOWNLEY  
ALLRED UNIT - TDC # 2118495  
2101 FM 369 NORTH  
IOWA PARK, TX 76367

OFFICIAL NOTICES FROM COURT OF CRIMINAL APPEALS OF TEXAS  
RECEIVING, FILING, AND DENYING REHEARING OF PDR

D-1 RECEIVING, AND FILING OF REHEARING, MAY 29, 2019

D-2 DENYING OF REHEARING, JUNE 19, 2019

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS  
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

FILE COPY

5/29/2019

TOWNLEY, JOSHUA ERIC Tr. Ct. No. CR16-0114

COA No. 02-17-00046-CR

PD-0117-19

I have this day received and filed the Appellant's Pro Se Motion for Rehearing in  
the above-styled and numbered cause.

Deana Williamson, Clerk

JOSHUA ERIC TOWNLEY  
MICHAEL UNIT - TDC # 02118495  
2664 FM 2054  
TENNESSEE COLONY, TX 75886

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS  
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

FILE COPY

6/19/2019

**TOWNLEY, JOSHUA ERIC Tr. Ct. No. CR16-0114**

On this day, the Appellant's Pro Se motion for rehearing has been denied.

**02-17-00046-CR**

**PD-0117-19**

Deana Williamson, Clerk

JOSHUA ERIC TOWNLEY  
MICHAEL UNIT - TDC # 02118495  
2664 FM 2054  
TENNESSEE COLONY, TX 75886

PETITIONER'S COMBINED MOTION FOR NEW TRIAL AND  
MOTION IN ARREST OF JUDGMENT, FEBRUARY 22, 2017  
(3 pp)

APPENDIX E

**NO. CR16-0114 & CR16-0115**

**STATE OF TEXAS**

**vs.**

**JOSHUA ERIC TOWNLEY**

**§ IN THE DISTRICT COURT**

**§ 43rd JUDICIAL DISTRICT**

**§ PARKER COUNTY, TEXAS**

**MOTION FOR NEW TRIAL AND MOTION IN ARREST OF JUDGMENT**

**TO THE HONORABLE JUDGE OF SAID COURT:**

COMES NOW, Joshua Eric Townley, the Defendant in the above styled and numbered cause, and files this Motion for New Trial and Motion in Arrest of Judgment pursuant to Rules 21 and 22 of the Texas Rules of Appellate Procedure, and in support thereof would show this court the following:

1. The Defendant was sentenced on February 16, 2017. This Motion, filed within the thirty-day timetable, is therefore timely. A hearing must be commenced before the 75th day after the sentence, which is May 2, 2017, or this motion is overruled by operation of law.

2. The verdict in this cause is contrary to the law and the evidence. See Tex. R. App. P. 21.3.

3. The trial court has the discretion to grant a new trial in the interests of justice, as the Court of Criminal Appeals has emphasized:

For more than one hundred and twenty years, our trial judges have had the discretion to grant new trials in the interest of justice. In Mullins v. State, 37 Tex. 337, 339-340 (1872-73), the Supreme Court, which at that time had criminal jurisdiction, held:

... The discretion of the District Court, in granting new trials, is almost the only protection to the citizen against the illegal or oppressive verdicts of prejudiced,

careless, or ignorant juries, and we think the District Court should never hesitate to use that discretion whenever the ends of justice have not been attained by those verdicts.

State v. Gonzalez, 855 S.W.2d 692 (Tex. Crim. App. 1993).

4. For the foregoing reasons, and for such other reasons that may arise on the hearing of this Motion, Defendant requests a new trial.

**WHEREFORE, PREMISES CONSIDERED**, Defendant prays that the Court set aside the judgment of conviction entered in this cause and order a new trial on the merits.

Respectfully submitted,

James R. Wilson  
933 W. Weatherford  
Suite 212  
Fort Worth, Texas 76102  
Tel: (817) 335-3346  
Fax: (817) 332-1293

By:

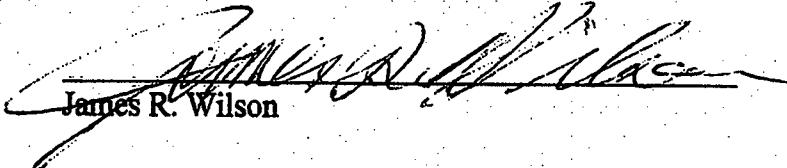
  
James R. Wilson  
State Bar No. 21695400  
jwilsonlawyer@gmail.com  
Attorney for Joshua Eric Townley

**CERTIFICATE OF PRESENTMENT**

By signature above, I hereby certify that a true and correct copy of the above and foregoing has been hand-delivered to the Office for the 43rd Judicial District Court of Parker County, on this day, February 16, 2017.

**CERTIFICATE OF SERVICE**

This is to certify that on February 22, 2017, a true and correct copy of the above and foregoing document was served on the District Attorney's Office, Parker County, by electronic service through the Electronic Filing Manager.

  
James R. Wilson

ORDER OF 43rd JUDICIAL DISTRICT COURT, GRANTING  
PETITIONER'S COMBINED MOTION, FEBRUARY 24, 2017

APPENDIX F

Filed: 02/27/2017 10:55 a  
Sharena Gilliland  
District Clerk  
Parker County, Texas  
Victoria Taylor

NO. CR16-0114 & CR16-0115

STATE OF TEXAS

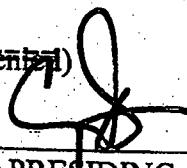
vs.

JOSHUA ERIC TOWNLEY

§ IN THE DISTRICT COURT OF APPEALS  
§ FORT WORTH, TEXAS  
§ 43rd JUDICIAL DISTRICT 11:24:25 AM  
§ DEBRA SPISAK  
§ PARKER COUNTY, TEXAS Clerk

ORDER

On February 24, 2017, came on to be considered Joshua Eric Townley's Motion for New Trial and Motion in Arrest of Judgment, and said motion is hereby

(Granted) (Denied) 

JUDGE PRESIDING

FIRST NOTICE, MEMORANDUM OPINION, AND JUDGMENTS  
OF SECOND APPELLATE DISTRICT OF TEXAS, MARCH 9, 2017

G-1 NOTICE TO PARTIES, MARCH 10, 2017 (1p)

G-2 FIRST MEMORANDUM OPINION (2 pp)

G-3 JUDGMENTS • CR16-0114 • 02-17-00046-CR  
• CR16-0115 • 02-17-00047-CR

APPENDIX G



**COURT OF APPEALS**  
**SECOND DISTRICT OF TEXAS**

CHIEF JUSTICE  
 TERRIE LIVINGSTON

JUSTICES  
 SUE WALKER  
 BILL MEIER  
 LEE GABRIEL  
 BONNIE SUDDERTH  
 ELIZABETH KERR  
 MARK T. PITTMAN

TIM CURRY CRIMINAL JUSTICE CENTER  
 401 W. BELKNAP, SUITE 9000  
 FORT WORTH, TEXAS 76196-0211

TEL: (817) 884-1900

FAX: (817) 884-1932

[www.txcourts.gov/2ndcoa](http://www.txcourts.gov/2ndcoa)

CLERK  
 DEBRA SPISAK

CHIEF STAFF ATTORNEY  
 LISA M. WEST

GENERAL COUNSEL  
 CLARISSA HODGES

March 10, 2017

Don Schnebly  
 Parker County District Attorney  
 117 Fort Worth St.  
 Weatherford, TX 76086  
 \* DELIVERED VIA E-MAIL \*

James R. Wilson  
 100 Austin Ave., Suite 105  
 Weatherford, TX 76086  
 \* DELIVERED VIA E-MAIL \*

Hon. David L. Evans  
 Regional Presiding Judge  
 Tom Vandergriff Civil Courts Bldg.  
 100 N. Calhoun St., 2nd Floor  
 Fort Worth, TX 76196  
 \* DELIVERED VIA E-MAIL \*

District Clerk, Parker County  
 117 Fort Worth Highway  
 Weatherford, TX 76086  
 \* DELIVERED VIA E-MAIL \*

Hon. Craig Towson  
 Judge, 43rd District Court, Parker County  
 117 Fort Worth Highway  
 Weatherford, TX 76086  
 \* DELIVERED VIA E-MAIL \*

RE: Court of Appeals Number: 02-17-00046-CR  
 Trial Court Case Number: CR16-0114

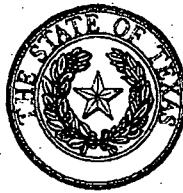
Style: Joshua Eric Townley  
 v.  
 The State of Texas

The Second Court of Appeals issued an opinion and judgment in the above-referenced cause. Copies of the opinion and judgment are attached and can also be viewed on our Court's webpage at: <http://www.txcourts.gov/2ndcoa>.

Respectfully yours,

DEBRA SPISAK, CLERK

*Debra Spisak*



**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 02-17-00046-CR  
NO. 02-17-00047-CR**

**JOSHUA ERIC TOWNLEY**

**APPELLANT**

**v.**

**THE STATE OF TEXAS**

**STATE**

**FROM THE 43RD DISTRICT COURT OF PARKER COUNTY  
TRIAL COURT NOS. CR16-0114, CR16-0115**

**MEMORANDUM OPINION<sup>1</sup>**

Appellant Joshua Eric Townley timely filed a motion for new trial and a notice of appeal from two judgments convicting him of sexual assault of a child. See Tex. R. App. P. 21.4(a), 26.2(a)(2). The trial court subsequently timely granted Townley's motion for new trial. See Tex. R. App. P. 21.8(a). The granting of a motion for new trial restores the case to its position before the

---

<sup>1</sup>See Tex. R. App. P. 47.4.

former trial. See Tex. R. App. P. 21.9(b). Accordingly, on our own motion, we dismiss these appeals as moot.

**PER CURIAM**

**PANEL: MEIER, GABRIEL, and SUDDERTH, JJ.**

**DO NOT PUBLISH**  
Tex. R. App. P. 47.2(b)

**DELIVERED: March 9, 2017**

RECEIVED AND FILED  
FOR RECORD

2017 MAR 13 AM 7:38

SHAREN GILLILAND, DISTRICT CLERK  
PARKER COUNTY, TEXAS

BY JN RECD/IV



**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 02-17-00046-CR**

**Joshua Eric Townley**

**§ From the 43rd District Court**

**v.**

**§ of Parker County (CR16-0114)**

**The State of Texas**

**§ March 9, 2017**

**§ Per Curiam**

**§ (nfp)**

**JUDGMENT**

**This court has considered the record on appeal in this case and holds that  
the appeal should be dismissed. It is ordered that the appeal is dismissed.**

**SECOND DISTRICT COURT OF APPEALS**

**PER CURIAM**



**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 02-17-00047-CR**

**Joshua Eric Townley**

§ From the 43rd District Court  
§ of Parker County (CR16-0115)  
§ March 9, 2017  
§ Per Curiam  
§ (nfp)

**v.**  
**The State of Texas**

**JUDGMENT**

**This court has considered the record on appeal in this case and holds that  
the appeal should be dismissed. It is ordered that the appeal is dismissed.**

**SECOND DISTRICT COURT OF APPEALS**

**PER CURIAM**

RESCINDING ORDER IN RESPONSE TO SECOND APPELLATE  
DISTRICT OF TEXAS' DISMISSAL OF APPEALS AS MOOT  
FILED MARCH 10, 2017 (dated FEBRUARY 27, 2017)

APPENDIX H

NO. CR16-0114

THE STATE OF TEXAS

VS.

JOSHUA ERIC TOWNLEY

S  
S  
S  
S  
S

IN THE 43<sup>rd</sup> JUDICIAL DISTRICT COURT OF APPEALS  
FORT WORTH, TEXAS  
DISTRICT COURT OF  
PARKER COUNTY, TEXAS

RECEIVED AND FILED  
FOR RECORD

2017 FEB 27 PM

BY  
SHARENA GILLILAND

DEBRA SPISAK

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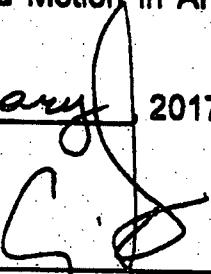
**ORDER AMENDING ORDER ON MOTION FOR NEW TRIAL AND MOTION IN  
ARREST OF JUDGMENT AND WITHDRAWING PRIOR ORDER**

---

On February 24, 2017, the Court considered the Defendant's Motion for New Trial and Motion in Arrest of Judgment. The court erroneously and unintentionally granted said motion. Accordingly, it is therefore

ORDERED that the Motion for New Trial and Motion in Arrest of Judgment is DENIED and the prior order is rescinded.

SIGNED on this the 27<sup>th</sup> day of February, 2017.

  
JUDGE, 43rd Judicial District  
Parker County, Texas

ORDER OF SECOND APPELLATE DISTRICT OF TEXAS REINSTATING  
APPEALS IN RESPONSE TO 43rd JUDICIAL DISTRICT COURTS  
RESCINDING ORDER, MARCH 16, 2017 (2PP)

APPENDIX I



FILE COPY

RECEIVED AND FILED  
FOR RECORD

2017 MAR 17 AM 8:38  
SHAREN GILLILAND, DISTRICT CLERK  
PARKER COUNTY, TEXAS

BY *[Signature]*  
DEPUTY

**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NOS. 02-17-00046-CR  
02-17-00047-CR**

**JOSHUA ERIC TOWNLEY**

**APPELLANT**

**V.**

**THE STATE OF TEXAS**

**STATE**

**FROM THE 43RD DISTRICT COURT OF PARKER COUNTY  
TRIAL COURT NO. CR16-0114, CR16-0115**

**ORDER**

On March 9, 2017, we dismissed these appeals as moot because the trial court timely granted appellant's motion for new trial. See Tex. R. App. P. 21.9(b). Unbeknownst to this court, before we dismissed these appeals, the trial court signed amended orders denying appellant's motion for new trial and rescinding the original orders granting appellant's motion for new trial. Therefore, these appeals are not moot.

**Accordingly, on the court's own motion, we withdraw our memorandum opinion and judgment dated March 9, 2017, and reinstate these causes on the court's docket. See Tex. R. App. P. 19.1(a).**

**The clerk of this court is directed to transmit a copy of this order to the attorneys of record, the trial court judge, the trial court clerk, and the court reporter.**

**DATED March 16, 2017.**

**PER CURIAM**