PD-0038-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 1/31/2018 4:59 PM
Accepted 2/2/2018 10:45 AM
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PD-0038-18

IN THE COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
2/2/2018
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OF THE STATE OF TEXAS

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CODY DARUS FRENCH,

Appellant,

V.

STATE OF TEXAS,

Appellee.

****

On Appeal from the Court of Appeals
Eleventh Judicial District, Eastland, Texas
Cause Number 11-14-00284-CR
350th District Court of Taylor County, Texas
Honorable Quay Parker Presiding
Trial Court Cause Number 10940-D

****

STATE'S PETITION FOR DISCRETIONARY REVIEW

****

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THE STATE REQUESTS ORAL ARGUMENT

PD-0038-18

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CODY DARUS FRENCH, APPELLANT

V.

STATE OF TEXAS, APPELLEE

****

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Appellee: State of Texas

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Presiding Judge:

Honorable Quay Parker (sitting for Hon. Thomas Wheeler)
350th District Court
300 Oak St.
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IN THE TEXAS COURT OF CRIMINAL APPEALS

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CODY DARUS FRENCH,

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V.

STATE OF TEXAS,

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STATE'S PETITION FOR DISCRTIONARY REVIEW

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through her Assistant Criminal District Attorney, Britt Lindsey, and submits this Petition for Discretionary Review pursuant to Tex. R. App. Proc. 68.

STATEMENT REGARDING ORAL ARGUMENT

This case involves unique questions of error preservation and juror unanimity which the State believes will be best addressed in both written briefs and oral discussion. The State accordingly requests oral argument.

STATEMENT OF PROCEDURAL HISTORY

Appellant was convicted of aggravated sexual assault of a child younger than six years of age following a jury trial. (CR1: 8, 32-33, 35-36, 51) On October 27, 2014, punishment was assessed by the trial court at sixty years TDCJ-ID. (CR1: 87-89) Appellant appealed to the Eastland Court of Appeals, alleging in two issues that the trial court improperly denied a requested instruction in the jury charge and that the trial court improperly excluded the public during his hearing on a motion for new trial. (CR1: 59) The Eleventh Court of Appeals in Eastland, Texas issued an opinion reversing the trial court on Appellant's first issue and declining to reach the second on August 10, 2017. *French v. State,* --- S.W.3d ---, 11-14-00284-CR, 2017 Tex. App. LEXIS 7589, 2017 WL 3554003 (Tex. App. – Eastland, delivered August 10, 2017). *See Opinion of the Court, appendix*. The State filed a motion for rehearing on September 9, 2017; the Eastland Court requested that Appellant file a response, and the State filed a reply to that response. The Eastland Court denied the State's motion for rehearing on December 7, 2017.

STATEMENT OF THE CASE

This petition stems from an appeal from a judgment and conviction for aggravated sexual assault of a child. Cody Darus French, Appellant, was found guilty following a jury trial and was sentenced by the trial court to 60 years confinement in TDCJ-ID. Appellant appealed to the Eastland Court of Appeals alleging two points of error: that the trial court erred in not granting Appellant's requested instruction in the jury charge, and that the trial court erred in excluding members of the public during a hearing. The Eastland Court found that the trial court erred in not granting Appellant's requested instruction, and that he was harmed by a jury charge that allowed for a non-unanimous verdict. The State now appeals, arguing that Appellant's requested instruction was an incorrect statement of the law and would not have cured the error, and that Appellant was not harmed by any error.

GROUNDS FOR REVIEW

1. **Does a defendant preserve error regarding juror unanimity when the instruction requested is both an incorrect statement of the law and would not have corrected the error complained of on appeal?**

2. **Does a defendant suffer harm when a jury charge allows for non-unanimous verdicts as to contact or penetration of a either a child's sexual organ or anus, but the evidence is overwhelming as to the defendant's guilt as to one charge?**

ARGUMENT AND AUTHORITIES

Factual Background

Appellant was charged with aggravated sexual assault of his five year old daughter J.F. (CR1: 8, 32-33, 35-36) *See* Tex. Penal Code Ann. § 22.021(a)(1)(B) (West Supp. 2014). Appellant and his wife also had an older daughter and two boys. (RR3: 27, 82-83) The child's maternal grandmother observed five year old J.F. and her six year old brother simulating a sex act and told the children's mother. (RR3: 71-73, 92-94) The mother asked the children where they had learned that; the boy said he learned it from J.F., and J.F. said that she learned it from her dad. (RR3: 97-98, 122) J.F. said that her father had "humped her" and was "sexing her." (RR3: 98) She said that he gets behind her and humps her while holding her hips. (RR3: 98) The mother reported the child's outcry of sexual abuse to CPS. (RR3: 101)

Forensic interviewer Melissa Beard testified at trial that J.F. was a typical five year old and understood the difference between the truth and a lie. (RR4: 15-18) The child told Beard that her father "humped" and "sexed" her. (RR4: 21) Beard asked the child to tell her about humping and said that the child "really didn't have the words for that,"

which is typical for a child of her age. (RR4: 21) The child said that incidents occurred in the bathroom, the living room, and in Appellant's room. (RR4: 21-22) She described an incident in the bathroom where her father took her clothes off, got on top of her, and put his private on her butt, which hurt her. (RR4: 22) She described another instance in the living room where her father put his hands on her hips, sat her on top of him and "humped her." (RR4: 22) She said his private went into her butt and it hurt her. (RR4: 22) She stated that afterwards Appellant got "wipeys" and wiped her "pee-pee" and her butt and wiped his private, and she had to go and change panties. (RR4: 22) She described another instance that occurred in the bedroom where her father took off his clothes, got on top of her and "humped" her. (RR4: 23) Beard said that the child said Appellant put his private into her "pee-pee" but self-corrected that it was her butt and not her "pee-pee." (RR4: 23) She clarified that it was his private on her butt and that it hurt her butt. (RR4: 23) The child indicated that it happened in the bathroom more than one time and that it happened in the bedroom one time. (RR4: 23) The forensic interview was entered into evidence as State's exhibit 8 and played for the jury at trial. (RR4: 27) (SX: 8)

After the interview, the child was taken for examination by Sexual Assault Nurse Examiner Judith LaFrance. (RR3: 25-36, 102-103, 152) LaFrance took a history from J.F., which she read for the jury:

> [w]hen mommy's at work, daddy is sexing me. He puts his hands on my hips like this – and puts her hands on her hips – and humps me. He pulls his pants down so his private sticks out. It stands up kinda big. He puts his private all on my butt and in it too. When I tell him, Ow, ow he says, Okay, okay, I won't do it again. But he always does. That happens in the living room, bathroom, and in mommy and daddy's room. Sometimes he sits on the couch with his private standing up and tells me to sit on it. Me and him pull my pants down. Even sometimes I tell him no. He says, Aw, dang it. Then I pull them down. He always spits in his hands and put his spit in his private, then he humps me with it.

(RR3: 169) The report with this history was entered into evidence as State's exhibit 4. (SX: 4) LaFrance said that she did not find evidence of genital trauma, which she said is not unusual in cases of child sexual abuse. (RR3: 169) She said that full penetration of the child's vaginal area or female sexual organ would have caused "[h]orrible damage," possibly requiring surgical intervention and definitely causing scarring. (RR3: 172) She was asked about penetration of the anus and said "[t]he anus is a little – to be blunt, a little bit more forgiving." (RR3: 173) She said that the anus is meant to accomodate stools, and that "children can have very large stools, and so that tissue is a lot more elastic, a lot more

forgiving, and can accommodate things much more easily than a five-year-old's vagina." (RR3: 173) She was asked if it was possible to penetrate a five year old's anus and not have any kind of trauma noted and said that it was possible. (RR3: 173)

J.F. took the stand to testify at trial; she was six years of age at that time. (RR3: 137, 139) She testified that she called her vagina her "middle part" and her anus her "bottom," and that her term for penis was "ding ding ding." (RR3: 144-145) She was asked if anybody ever put anything in her middle part and replied "[h]uh-uh" and nodded her head side to side. (RR3: 146) Counsel for the State asked "[n]o?" to clarify and the child responded "[n]o." (RR3: 146) The child was asked if anybody ever put anything in her bottom and nodded her head up and down. (RR3: 147) She was asked who and indicated Appellant. (RR3: 146-147) Counsel for the State asked "[y]our daddy?" and the child nodded her head up and down. (RR3: 147) The child was asked what he put in her bottom and replied "[h]is ding ding ding." (RR3: 147) Counsel for the State asked the child "[w]hen your daddy put his ding-ding in your middle part – I mean, I'm sorry – in your bottom, how were your clothes?" and the child responded "[m]y pants were off." (RR3: 148) She

said Appellant's pants and belt were off. (RR3: 148) She was asked "[w]hat happened after he put it in your bottom?" and replied "[w]e both got dressed and he took a shower." (RR3: 148) She described another instance in the living room when Appellant sat down and pulled down his pants and she sat on him with a blanket over them. (RR3: 148) She testified that her six year old brother was in the room. (RR3: 148)

Counsel for the State asked the child "[d]id it hurt when his ding-ding went into your middle – into your bottom?" and she responded by nodding her head up and down. (RR3: 150) She was asked if she told him that it hurt and responded "[y]es." (RR3: 150) asked "did his ding-ding ever go inside of your bottom?" and the child nodded her head up and down. (RR3: 151) Counsel asked "[h]is ding-ding never went inside your middle part. Is that right?" and the child shook her head from side to side. (RR3: 151) Counsel clarified "no, it never did?" and the child replied "[n]o." (RR3: 151)

After both sides had rested and closed, a jury charge was prepared and presented to both sides. (RR5: 67) Appellant objected to a sentence in the application portion of the charge which read "[y]ou must all agree on elements one and two listed above, but with regard to element one

you need not all agree on the manner in which the sexual assault was committed," and requested that the sentence be changed to read "[w]ith regard to element one, you must all agree on the manner in which the sexual assault was committed." (RR5: 67-68) The State responded that the law did not require that the jury agree on the manner and means of the commission of the assault. (RR5: 68) The trial court denied Appellant's request. (RR5: 68) Appellant was subsequently found guilty and sentenced to 60 years confinement. (RR6: 23-24)

Analysis: Ground for Review One (error preservation)

The Eastland Court of Appeals quoted this Court as saying that no "magic words" are required to preserve error for appellate review, citing *Bennet v. State,* 235 S.W.3d 241, 243 (Tex. Crim. App. 2007). However, this Court has also repeatedly admonished that "[a]s regards specificity, all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Lankston v. State*, 827 S.W.2d 907, 909 (Tex.

Crim. App. 1992); *see also Mays v. State,* 318 S.W.3d 638, 382-83 (Tex. Crim. App. 2010).

The Eastland Court of Appeals found that Appellant's objection was similar to the one made in *Francis v. State,* 36 S.W.3d 121 (Tex. Crim. App. 2005). The objection made in *Francis* was:

> Judge, we would still urge that [the State] be required to elect between the two manners of committing the offense between touching breasts or touching the genitals because the way the indictment is set out in a single court [sic] single paragraph, it would authorize the jury to essentially have a non-unanimous verdict if some voted - believed beyond a reasonable doubt he touched breasts and another group believed beyond a reasonable doubt he touched genitals.

Id. at 123 (alterations in original). The objection made in the instant case was:

> Yes, Your Honor. On page 5 of the charge, under application of law to facts, the third – or actually, I guess it's the second paragraph which says, "You must all agree on elements one and two listed above, but with regard to element one you need not all agree on the manner in which the sexual assault was committed," we would object to that charge – that part of the charge and request that the charge be changed to read, "With regard to element one, you must all agree on the manner in which the sexual assault was committed."

(RR5: 67-68) The Eastland Court held that while Appellant "could have been more artful and specific in pointing out the exact error and could have been more precise with his requested remedy, he preserved his

complaint on the jury charge issue." *Court's opinion at 6.* Respectfully, the objection made in the instant case is in no way similar to that made in *Francis.*

In *Francis* the defendant specifically noted that the charge as written would authorize a non-unanimous verdict, and requested that the State elect between the two manners of committing the offense alleged in the indictment. *Francis* at 123. In the instant case Appellant did not note that the problem was one of unanimity of the verdict and did not request that the State be required to elect. Rather, Appellant requested that the charge read "with regard to element one, you must all agree on the manner in which the sexual assault was committed." This not only fails to inform the trial court of the specific problem of unanimity that was complained of on appeal, it is flatly a misstatement of the law; the jury is not required to agree on the manner and means of the offense. When the trial court asked the counsel for the State her response to Appellant's requested change, she responded "I believe that the law is that they do not have to agree on the manner and means of the commission of the assault." (RR5: 68) The State's response was correct; Appellant's requested instruction was a contradiction of the

rule articulated in *Jourdan v. State,* 428 S.W.3d 86 (Tex. Crim. App. 2014), which observed that the "requirement of jury unanimity is not violated by a jury charge that presents the jury with the option of choosing among various alternative manner and means of committing the same statutorily defined offense." Had Appellant received the instruction that he requested, it would have been simply wrong. Appellant did not identify the error in the jury charge, tell the court what he wanted, or why he was entitled to it. If Appellant was not requesting an instruction regarding manner and means, he did nothing to clarify that to the trial court after the State's response.

Moreover, had Appellant received the instruction that he requested it would not have corrected the error which he complains of on appeal. Appellant did not request that the State be required to elect between which incident it chose to proceed on and did not request an instruction. There can be strategic reasons not to do so, as this court noted in *Cosio v. State,* 353 S.W.3d 766, 776 (Tex. Crim. App. 2017): "[b]ecause it will be impossible to determine which particular incident of criminal conduct that the jury was unanimous about, the State will be jeopardy-barred from later prosecuting a defendant for any of the

offenses presented at trial." Appellant did not request language that would have made clear that the jury must be unanimous as to whether Appellant offended against the child by contact or penetration of her sex organ, her anus, or of both. Appellant did not properly preserve the error in the trial court, and under *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984) the Court should have performed a harm analysis using a standard of egregious harm rather than some harm.

Analysis: Ground for Review Two (harm analysis)

As the Court of Appeals found that Appellant preserved error, the court conducted an analysis for "some harm" rather than "egregious harm" under *Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). As stated above, the State argues that Appellant's request for a change in the charge language was not sufficient to preserve error. The State further argues that the Court of Appeals did not take facts into account which should have rendered any error harmless, regardless of which standard was used.

The child can be heard on the forensic video stating at multiple points that Appellant touched or penetrated her "butt" with his "private." The child says Appellant "gets on my butt" at approximately

30:50. (SX: 8 at 30:50 to 31:05) At 35:30 she says "[h]e makes me stand up and gets his wiener out a little and then I sit on him." (SX 8 at 35:30 to 36:00)

Beard stated at trial that the child said in the forensic interview that Appellant put his private into her "pee-pee" but self-corrected that it was her butt and not her "pee-pee." (RR4: 23) The child then clarified that it was his private on her butt and that it hurt her butt. (RR4: 23) This exchange can be heard beginning at 42:00:

Q: In the bedroom, what part of daddy's body did he use to hump you?

A: (coloring) His private.

Q: His private? And what part of your body did his private touch?

Q: (coloring) Huh?

Q: When he was humping you with his private, what part of your body did the private touch?

A: (coloring) I don't know…my, my pee-pee.

Q: Your pee-pee? How did that feel to your pee-pee?

A: He touched my pee-pee? No, my butt.

Q: Your butt?

A: He touched my butt.

Q: What did he touch your butt with?

A: His wiener.

Q: And when his weiner touched your butt, what did his weiner do?

A: Um, puts it inside my butt.

Q: He puts it inside your butt. And how does that feel to your butt when he puts it in there?

A: Hurts.

(SX: 8, 42:00 to 43:00)

The child was consistent throughout the interview in saying Appellant contacted her "butt" with his penis, and the only time that the child stated that Appellant contacted her sex organ with his penis, she corrected herself and said that it was her "butt." At trial, the child stated clearly and repeatedly that Appellant put his male sex organ on or in her "butt" and that it hurt her. (RR4: 22) The child was very clear that she was not offended against by contact or penetration of her sexual organ.

Q: I'm going to put these back up here so we can use these right words. Okay, [J.F]? Did anybody ever put anything in your middle part?

A: Huh-uh. (Nodded head side to side.)

Q: No?

A: No.

Q: Did anybody ever put anything in your bottom?

A: (Nodded head up and down.)

Q: Okay. Who was that?

A: (Indicating.)

Q: Your daddy?

A: (Nodded head up and down.)

Q: Okay. What did he put in your bottom?

A: His ding-ding-ding.

….

Q: Okay. When your daddy put his ding-ding in your middle part – I mean, I'm sorry – in your bottom, how were your clothes?

A: My pants were off.

(RR3: 146-147, 148)

Counsel for the State asked the child "[d]id it hurt when his ding-ding went into your middle – into your bottom?" and she responded by nodding her head up and down. (RR3: 150) She was asked if she told him that it hurt and responded "[y]es." (RR3: 150) She asked "did his

ding-ding ever go inside of your bottom?" and the child nodded her head up and down. (RR3: 151) Counsel asked "[h]is ding-ding never went inside your middle part. Is that right?" and the child nodded her head from side to side. (RR3: 151) Counsel clarified "no, it never did?" and the child replied "[n]o." (RR3: 151)

No evidence was adduced in trial from the child's statement to police, from the medical evidence, from the forensic interview, or from the child's testimony that Appellant offended against the child by contact or penetration of her sexual organ. The Court based its finding solely on the child's statement that after offending against her Appellant used "wipeys" on both her "pee-pee" and her "butt," inferring contrary to the child's own testimony that this meant that Appellant offended against her by contact of the sexual organ as well. This does not follow. When a female child's bottom is wiped, it is normal and habitual to wipe the child's vulva as well, from front to back in order to prevent stool from entering the urethra and causing a urinary tract infection.

Case law has consistently held that error is harmless on an egregious harm standard when the evidence overwhelmingly supports

all of the charged offenses and the defendant consistently denies all offenses, as it is clear that "[t]he jury was not persuaded that [the defendant] did not commit the offenses or that there was any reasonable doubt." *Cosio* at 777. In *Cosio* the defendant was charged with multiple instances of sexual criminal conduct that could have satisfied the charged offenses; the defendant did not object on the basis that the jury charges allowed for non-unanimous verdicts, and the trial court did not instruct the jury that it must be unanimous about which instance of criminal conduct satisfied each charged offense. *Id.* at 769. This Court noted that the child testimony detailed each incident, and that Cosio's defense was that he did not commit any of the offenses and that the child was not credible; in the Court's words, "[h]is defense was essentially of the same character and strength across the board." *Id.* at 777. The Court noted that had the jury believed Cosio's testimony, it would have acquitted him on all counts, and that it was "logical to suppose that the jury unanimously agreed that Cosio committed all of the separate instances of criminal conduct during each of the four incidents." *Id.* at 777-78. Accordingly actual and egregious harm was not shown. *Id.* at 778.

This principle was again articulated in *Arrington v. State*, 451 S.W.3d 834, 844 (Tex. Crim. App. 2015), which noted that the jury's rejection of a defendant's categorical denial of all accusations weighed against a finding of egregious harm in connection with the lack of a unanimity instruction, and in *Saenz v. State*, 479 S.W.3d 939, 953 (Tex. App.—San Antonio 2015, pet. ref'd), which noted that although the charge did not require the jury to agree on any one specific murder as the predicate murder, the record supported that any of five murders could have so served and that "the evidence overwhelmingly creat[ed] unanimity" (citing *Ovalle v. State*, 13 S.W.3d 774, 787 (Tex. Crim. App. 2000)). Similarly, in *Martinez v. State,* 190 S.W.3d 254, 261-62 (Tex. App. – Houston [1st Dist.] 2006, pet. ref'd), the court found no egregious harm because the "overwhelming evidence supported both charges" of aggravated sexual assault alleging anal and vaginal contact, noting that unlike *Ngo v. State*, 175 S.W.3d 738 (Tex. Crim. App. 2005), "this is not a case where the commission of one offense is mutually exclusive to the commission of a disjunctively joined offense."

In the instant case, the evidence was overwhelming as to anal contact, and Appellant did not request an election as to separate

instances of either anal or vaginal contact. Appellant did not admit some offenses and deny others, but rather made a blanket denial and questioned the credibility of the child and other witnesses. There is no possible harm that six jurors believed that Appellant contacted the child vaginally, because no evidence of that offense was adduced. The evidence showed that Appellant committed aggravated sexual assault of a child by contacting or penetrating the child's anus, and that all twelve members of the jury clearly believed that evidence. In *Cosio, Arrington, Saenz,* and *Martinez,* there was no actual harm of a non-unanimous verdict despite the fact that the evidence pointed equally to a number of offenses. Here, there is no danger at all of a non-unanimous verdict because the evidence pointed squarely to one offense.

The Court further found that the prosecutor's argument in close compounded the harm, stating that it was ambiguous. The argument in question was:

> "[T]he word there is 'or,' so you don't have to find that he contacted and penetrated the anus of the child and he contacted and penetrated the female sexual organ. You only have to find one of those. That's what the 'or' means"….So you can find that one of them – you know, one of you may think that he contacted the anus and another one may think that he penetrated the anus. You don't have to agree on that thing, as long as you all agree he did one of those things. All

> of those things are sexual assault in that, so you don't have to reach an agreement, a unanimous agreement, on that. So that's what that language at the bottom of that says with regard to element one, you need to not all agree on the manner in which the sexual assault was committed."

(RR5: 80-81) The Eastland Court found this statement to be ambiguous, saying "the jury could have interpreted, in light of the trial court's instruction, that "manner" referred to J.F.'s two orifices." *Court's opinion at 9.* The Court also noted that "[i]n this context, the State may have intended "manner" as "manner and means" of contact or penetration of the anus, for which a jury need not be unanimous because penetration includes contact." *Id.* There is no ambiguity here. This latter statement is not merely a possible interpretation of the State's argument, it is precisely what the prosecutor said: "[o]ne of you may think that he contacted the anus and another one may think that he penetrated the anus." (RR5: 81) The former statement was never made by the State. The meaning was clear both from context and from the State's earlier argument against changing that sentence in the charge on the grounds that the law did not require that the jury agree on the manner and means of the commission of the assault. (RR5: 68) Any error in the charge was harmless.

Conclusion

Nobody in the trial court believed that Appellant was requesting the relief that the Eastland Court's opinion decided that he was requesting. Appellant was asking for an instruction contrary to the law on manner and means, the State correctly argued against it on those grounds, and the trial court ruled correctly. Even had Appellant received the relief that he requested, he would not have had a correct instruction in the charge regarding juror unanimity as to individual offenses, he merely would have had an incorrect instruction on the law of manner and means. The state of the evidence was such that it was clear to the jury that Appellant was guilty of contact or penetration of the child's anus, and the State never argued otherwise.

PRAYER FOR RELIEF

The State respectfully requests that this Court grant review, and further grant oral argument. The State further prays that this Court reverse the judgment of the Eleventh Court of Appeals regarding Appellant's issue one and remand to that court to address Appellant's remaining issue. Alternatively, the State requests a summary remand

to the court of appeals to re-examine Appellant's issue one under an egregious harm standard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Britt Lindsey, affirm that the above brief is in compliance with the Rules of Appellate Procedure. The font size in the brief is 14 point, except for footnotes which are 12 point. The word count is 4333, excluding the exceptions listed in Rule 9.4.

/s/ Britt Lindsey
Britt Lindsey

CERTIFICATE OF SERVICE

I certify that on this 31st day of January, 2018, a true copy of the foregoing State's Brief was served on the Attorney for Appellant according to the requirements of law by email or efiling to:

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APPENDIX: OPINION OF THE 11TH COURT OF APPEALS

Opinion filed August 10, 2017

In The

Eleventh Court of Appeals

No. 11-14-00284-CR

CODY DARUS FRENCH, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 350th District Court
Taylor County, Texas
Trial Court Cause No. 10940-D

O P I N I O N

The jury convicted Cody Darus French of the offense of aggravated sexual assault of his five-year-old daughter.[1] The trial court assessed punishment at confinement for sixty years and sentenced him. On appeal, Appellant asserts two issues. We reverse and remand.

I. *Evidence at Trial*

Appellant has not challenged the sufficiency of the evidence, so we only outline the necessary and contextual facts relevant to his appeal. Appellant and D.F.

[1]*See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i), (iii), (iv), (a)(2)(B) (West Supp. 2016).

were married when D.F. was fourteen.[2] During their marriage, they had four children together, including the victim, J.F.[3] While babysitting, D.F.'s mother, C.B., witnessed J.F. and her six-year-old brother, C.F., engage in a simulated sexual act. C.B. informed D.F. of this incident when D.F. returned home. When confronted by her mother, J.F. stated that she learned the act from Appellant.

A. *The State's Case*

J.F. testified that Appellant had penetrated her anus with his sexual organ. Although no physical evidence of sexual abuse existed, a SANE nurse, Judith LaFrance, testified that the details that J.F. gave her appeared reliable. Marshall Davidson, a Child Protective Services investigator, conducted a joint investigation with law enforcement. He spoke to several individuals, including J.F., her sister, one of J.F.'s brothers, her mother, LaFrance, and Appellant. Davidson reported how C.F. had described inappropriate "acting out" by J.F. According to Davidson, J.F.'s acting out occurred because of acts allegedly done by Appellant.

Davidson testified that Appellant had told him that Appellant had been aroused when J.F. sat on his lap, but Appellant denied that he had abused J.F. and claimed that maybe a neighbor had abused her. Davidson found J.F.'s story to be credible. Likewise, Melinda Beard, the director of the Taylor County Child Advocacy Center, testified that J.F. did not appear to have been "coached"; Beard also said that J.F. reported that, after Appellant had finished assaulting her, he would clean her "pee-pee"[4] with "wipeys."

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[2]D.F. testified that Appellant, during the marriage, liked to have sex a lot, rubbed his penis on her "butt," and asked her to engage in anal sex. After he was finished, he would sometimes clean himself with baby wipes.

[3]Appellant, who was twenty-one years old when he married D.F. in 2003, had children from four other women.

[4]J.F. also referred to her sexual organ as her "pee-pee."

B. *Appellant's Defense*

Appellant called witnesses who testified about false allegations that C.B. had made against Appellant; Appellant also argued that C.B. had made up the allegations against Appellant because she did not like him and because she had to move out of the family's house. Appellant testified on his own behalf and denied that he assaulted J.F.

C. *The Jury Charge Conference*

During the jury charge conference, Appellant objected to a portion of the charge and requested that the jury charge clearly instruct the jury that, in order to find Appellant guilty, all jurors must agree on the "manner" in which the sexual assault occurred; the trial court denied his request. The charge included two distinct offenses, aggravated sexual assault of a child by contact or penetration of (1) the victim's sexual organ or (2) the victim's anus with Appellant's sexual organ. The trial court did not instruct the jury that it must be unanimous in finding either that Appellant used his sexual organ to contact or penetrate J.F.'s sexual organ or that he used his sexual organ to contact or penetrate her anus.

II. *Analysis*

Appellant asserts in his first issue that the jury charge violated his constitutional right to a unanimous verdict and asserts in his second issue that the trial court violated his right to a public trial.

A. *Issue One: The trial court should have included a jury unanimity instruction.*

Appellant asserts that the jury charge violated his constitutional right to a unanimous verdict with respect to whether he used his sexual organ to contact or penetrate J.F.'s sexual organ *or* her anus. TEX. CONST. art. V, § 13; *see* TEX. CODE CRIM. PROC. ANN. art. 36.29(a) (West Supp. 2016); *Cosio v. State*, 353 S.W.3d 766, 771–74 (Tex. Crim. App. 2011).

1. *Units of Prosecution*

The Texas Court of Criminal Appeals has held that a defendant may face prosecution for aggravated sexual assault of a child for the penetration of separate orifices regardless of whether the penetration occurred during the same transaction. *Jourdan v. State*, 428 S.W.3d 86, 96 (Tex. Crim. App. 2014); *see* PENAL § 22.021(a)(1)(B)(i), (iii), (iv), (a)(2)(B). The Texas Court of Criminal Appeals in *Vick v. State* noted that "each section [under section 22.021] usually entails different and separate acts to commit the various, prohibited conduct." 991 S.W.2d 830, 833 (Tex. Crim. App. 1999). In *Vick*, the court held that this specificity reflected the legislature's intent to separately and distinctly criminalize any act that constituted the proscribed conduct. *Id.* Therefore, because Section 22.021(a)(1)(B)(iii) and (iv) prohibit contact with a child's sexual organ and anus, respectively, the statute's subsections define two separate and distinct acts. *See id.* (a conduct-oriented statute, Section 22.021 uses "or" to distinguish different conduct).

2. *The jury charge*

The application paragraph of the trial court's jury charge included the following "two elements":

> 1. [T]he defendant, in Taylor County, Texas, on or about March 7, 2013, intentionally or knowingly caused the contact with or penetration of the anus of [J.F.] with his male sexual organ ***or*** the defendant caused contact with or penetration of the female sexual organ of [J.F.] with his male sexual organ; and
>
> 2. [J.F.] was at the time a child younger than fourteen (14) years of age.
>
> . . . With regard to element 1, you need not all agree on the manner in which the sexual assault was committed.

(Emphasis added). The Texas Court of Criminal Appeals has held that, when disjunctive language contains different criminal acts, a jury must be instructed that it cannot return a guilty verdict unless it agrees unanimously that the defendant

committed one of the acts. *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005); *see Francis v. State*, 36 S.W.3d 121, 125 (Tex. Crim. App. 2000) (holding that jury charge that allows for nonunanimous verdict concerning what specific criminal act defendant committed is error); *Martinez v. State*, 190 S.W.3d 254, 259 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (holding that allegation that defendant caused his sexual organ to contact minor's sexual organ is different offense than allegation that he caused his sexual organ to contact minor's anus). Unanimity in this context means that each and every juror agrees that the defendant committed the same, single, specific criminal act. *Ngo*, 175 .W.3d at 745.

In this case, the trial court did not provide a unanimity instruction that the jury must unanimously agree on which orifice was contacted or penetrated by Appellant, and this was error. *See Ngo*, 175 S.W.3d at 744; *Francis*, 36 S.W.3d at 125; *Martinez*, 190 S.W.3d at 259. Because the jury charge submitted two distinct criminal offenses, we hold that the charge was erroneous because it failed to instruct the jury on the unanimous verdict requirement as to which orifice Appellant contacted or penetrated with his sexual organ. *See Martinez*, 190 S.W.3d at 258–59.

B. *Issue One: Appellant preserved his jury charge complaint.*

The State argues that, even if there was error, Appellant failed to preserve error for appellate review when he failed to object to the charge. While we agree that Appellant's objection was not as specific as it could have been, he did preserve his jury charge complaint.

No "magic words" are required to preserve error for appellate review. *Bennett v. State*, 235 S.W.3d 241, 243 (Tex. Crim. App. 2007). In *Francis*, the court held that the defendant had preserved error when he brought to the court's attention a potential error in the charge. 36 S.W.3d at 123. In *Francis*, before the defense counsel objected to the charge, defense counsel stated:

> Judge, we would still urge that [the State] be required to elect between the two manners of committing the offense between touching breasts or touching the genitals because the way the indictment is set out in a single court [sic] single paragraph, it would authorize the jury to essentially have a non-unanimous verdict if some voted-believed beyond a reasonable doubt he touched breasts and another group believed beyond a reasonable doubt he touched genitals.

Id. (alteration in original).

Similar to *Francis*, the State alleged that Appellant had contacted or penetrated two separate body parts of J.F. *See Francis*, 36 S.W.3d at 123. In response to the proposed charge, Appellant's trial counsel objected as follows:

> [DEFENSE COUNSEL]: Yes, Your Honor. On page 5 of the charge, under application of law to facts, the third -- or actually, I guess it's the second paragraph which says, "You must all agree on elements one and two listed above, but with regard to element one you need not all agree on the manner in which the sexual assault was committed," we would object to that charge -- that part of the charge and request that the charge be changed to read, "With regard to element one, you must all agree on the manner in which the sexual assault was committed."

While Appellant's trial counsel could have been more artful and specific in pointing out the exact error and could have been more precise with his requested remedy, he preserved his complaint on the jury charge issue.

C. *Issue One: Harm Analysis*

The State also argues that, even if Appellant preserved error, he suffered no actual harm. Appellant asserts that he suffered "some harm" from the jury charge error.[5] *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). When an appellate court undertakes an *Almanza* harm analysis for jury charge error, the

[5]Appellant does not assert that this court should apply a constitutional harm analysis pursuant to TEX. R. APP. P. 44.2(a). We note that we have previously recognized that, when a party alleges a unanimity violation and the party has properly preserved that error at trial, the error is subject to a constitutional harm analysis under Rule 44.2(a). *Newsome v. State*, No. 11-09-00222-CR, 2012 WL 4458176, at *5 (Tex. App.—Eastland Sept. 27, 2012, no pet.) (mem. op., not designated for publication) (citing *Cosio*, 353 S.W.3d at 776). Under that standard, we must reverse the judgment of conviction unless we can determine beyond a reasonable doubt that the error did not contribute to the conviction. *See* TEX. R. APP. P. 44.2(a).

first question is whether the defendant preserved error. If he did, then the court will reverse if the defendant suffered "some harm." *Ngo*, 175 S.W.3d at 743 (citing *Almanza*, 686 S.W.2d at 171). Neither the State nor the defendant bears the burden of proving harm; the court of appeals must review the entire record to determine if the defendant suffered harm. *See Elizondo v. State*, 487 S.W.3d 185, 205 (Tex. Crim. App. 2016); *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

As this court analyzes whether a defendant suffered "some harm," we consider: (1) the jury charge as a whole; (2) the arguments of counsel; (3) the entirety of the evidence; and (4) other relevant factors present in the record. *Reeves*, 420 S.W.3d at 816. The less stringent standard of finding "some harm" still requires us to find that the defendant "suffered some actual, rather than merely theoretical, harm from the error." *Elizondo*, 487 S.W.3d at 205 (quoting *Reeves*, 420 S.W.3d at 816). "Reversal is required if the error is 'calculated to injure the rights of the defendant.'" *Cornet v. State*, 417 S.W.3d 446, 449 (Tex. Crim. App. 2013); *Almanza*, 686 S.W.2d at 171. We will address factors one and three first followed by two and four.

1. *Factor One: The entirety of the jury charge*

The charge provided the instruction that, "[t]o prove that the defendant is guilty of aggravated sexual assault of a child, the state must prove, beyond a reasonable doubt, two elements." The trial court instructed the jury that, "[w]ith regard to element 1, you need not all agree on the manner in which the sexual assault was committed." The Texas Court of Criminal Appeals has held that, when multiple offenses are alleged—for example, when the defendant is accused of touching the victim's breasts or genitals, two separate offenses—the jury must be instructed that its verdict must be unanimous as to one of those acts. *See Pizzo v. State*, 235 S.W.3d 711, 719 (Tex. Crim. App. 2007); *see also Williams v. State*, 474 S.W.3d 850, 859–60 (Tex. App.—Texarkana 2015, no pet.). The trial court should have instructed the jury that it had to be unanimous on the offense of contact or penetration of the

child's sexual organ or unanimous on the offense of contact or penetration of the child's anus, and because it did not do so, it erred.

2. *Factor Three: The entirety of the evidence*

A review of the entirety of the evidence reveals that the State focused on Appellant's acts in the living room, bedroom, and bathroom, where he sexually assaulted J.F. by contact or penetration of her anus by his penis. LaFrance testified about the lack of injury to J.F.'s sexual organ, and LaFrance also described how J.F. would have suffered horrible damage if her sexual organ had been penetrated. However, Beard testified that J.F. did not appear to have been "coached" and also said that J.F. reported that, after Appellant had finished assaulting her, he would clean her "pee-pee" with "wipeys." Davidson testified that Appellant told him that Appellant had been aroused when J.F. sat on his lap. Davidson also found J.F.'s story to be credible. Beard further testified that there were one or two instances where "[J.F.] said that it was his private in her pee-pee, but she self-corrected" to "butt."

3. *Factor Two: The State's Arguments*

The prosecutor specifically argued, "[T]he word there is 'or,' so you don't have to find that he contacted and penetrated the anus of the child *and* he contacted and penetrated the female sexual organ. You only have to find one of those. That's what the 'or' means" (emphasis added). The prosecutor also stated:

> So you can find that one of them -- you know, one of you may think that he contacted the anus and another one may think that he penetrated the anus. You don't have to agree on that thing, as long as you all agree he did one of those things. All of those things are sexual assault in that, so you don't have to reach an agreement, a unanimous agreement, on that. So that's what that language at the bottom of that says with regard to element one, you need to not all agree on the manner in which the sexual assault was committed.

In this context, the State may have intended "manner" as "manner and means" of contact or penetration of the anus, for which a jury need not be unanimous because penetration includes contact. *See Jourdan v. State*, 428 S.W.3d 86, 97 (Tex. Crim. App. 2014); *see also Valdez v. State*, 211 S.W.3d 395, 399–400 (Tex. App.—Eastland 2006, no pet.). However, the statement was ambiguous because the jury could have interpreted, in light of the trial court's instruction, that "manner" referred to J.F.'s two orifices. In addition, the jury could have inferred from J.F.'s testimony about Appellant wiping her "pee-pee" after the abuse that Appellant had sexually assaulted her by contact or penetration of her sexual organ. The jury may convict on the testimony of the victim alone. *See* CRIM. PROC. art. 38.07; *Evans v. State*, No. 11-13-00296-CR, 2015 WL 1501663, at *4 (Tex. App.—Eastland Mar. 31, 2015, pet. ref'd).

Appellant's case is similar to *Clear v. State*, where harm was shown because the jury heard evidence on separate and distinct offenses, and then in closing argument, the State argued that the jury did not need to decide unanimously if the defendant had penetrated the victim's sexual organ with his own sexual organ or with his finger. 76 S.W.3d 622, 623–24 (Tex. App.—Corpus Christi 2002, no pet.); *see also Williams*, 474 S.W.3d at 859–60 (trial court erroneously instructed or reminded the jury that it need not be unanimous in deciding whether a victim's sexual organ or anus was sexually assaulted). In Appellant's case, the prosecutor did not state that some of the jury could convict on the offense related to the sexual organ and some of the jury could convict on the offense related to the anus. The prosecutor specifically argued, "[S]o you don't have to find that he contacted and penetrated the anus of the child *and* he contacted and penetrated the female sexual organ" (emphasis added). The prosecutor also did not argue that the jury could mix evidence of two separate acts. She primarily adduced evidence that Appellant

sexually assaulted J.F. by contacting or penetrating J.F.'s anus and, in closing, focused on that set of facts to the jury.

4. *Factor Four: Other Relevant Information*

In the fourth factor, we review other relevant information in the record, including voir dire and opening statements. The State explained that the case was a very serious aggravated sexual assault case that may involve talking about the words "vagina," "anus," "penis," and "ejaculation." The State explained that penetration does not have to mean full penetration but could mean just contact with the child's vaginal area, the lips. The State explained the elements of the crime and gave an example that the perpetrator's penis contacted what the child described as her "pee-pee or whatever."

The prosecutor questioned the venire panel about the percentage of "false allegations" of child sexual abuse. The prosecutor explained the process of an investigation and a trial and how a child-victim would be interviewed by her parents, police, a forensic interviewer, a licensed counselor, and the prosecutor before being questioned by defense counsel at trial. The State asserted that ninety-seven percent of the abusers of children are family members and explained that availability was the reason for that statistic. The State outlined that abnormal findings found in a physical exam after an allegation of abuse occurs in only 5.5% of the cases; in one study, it was two out of thirty-six victims that definitive findings of penetration were found. The State discussed how those statistics could occur because of how quickly the body heals and because of delayed outcries.

The State discussed how to evaluate the credibility of the child-victim by the consistency of her story, her age and mental abilities, the words that she used and whether she had been "coached," and how children can be scared, but generally lie to "get out of trouble" not "in trouble." The State also explained that a child who has to tell the story five times before they get to court probably has not gained

anything and is not lying. The State further explained that, at trial, the child had to take an oath to tell the truth and that the trial court would determine if the child knew the difference between the truth and a lie.

The State asked about how a child-victim under the age of fourteen might act if she had been abused, and panel members responded that a child may act out "sexually," "violently," or with just "crazy behavior." The State explained how the "Law & Order" show on television was not real life and asked if a prospective juror would require her to have scientific evidence, physical evidence, or DNA evidence to prove the case. She queried the members of the venire panel as to whether they could convict if they believed the child beyond a reasonable doubt and that was the only evidence in the case. The State also asked if they could follow the law. During opening statements, the State mentioned that there was no trauma to J.F.'s sexual organ and anus.

5. *Summary of Four Factors*

The State built its case against Appellant based on J.F.'s testimony and that of other witnesses, including D.F., J.F.'s mother; the Child Protective Services investigator, Davidson; C.B., J.F.'s grandmother; LaFrance, the SANE nurse; and Beard, the forensic interviewer. Although the State primarily presented evidence of a sexual assault of J.F.'s anus by Appellant with his penis, Beard said that J.F. reported that, after Appellant had finished assaulting her, he would clean her "pee-pee" with "wipeys." Beard also testified that there were one or two instances where "[J.F.] said that it was his private in her pee-pee, but she self-corrected" to "butt." The jury could have inferred from J.F. that Appellant wiped her "pee-pee" and "butt" after he had assaulted her sexual organ and anus. After a review of the record, we

cannot say that Appellant suffered no harm.[6] We sustain Appellant's first issue, and in light of that resolution, we do not address his second issue.

III. *This Court's Ruling*

We reverse the judgment of the trial court and remand the cause to the trial court for further proceedings consistent with this opinion.

MIKE WILLSON
JUSTICE

August 10, 2017

Publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., Bailey, J.

[6]Furthermore, we cannot determine beyond a reasonable doubt that the error did not contribute to Appellant's conviction. *See* TEX. R. APP. P. 44.2(a); *Newsome*, 2012 WL 4458176, at *5.