COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00091-CR

JOSE LUIS PEREZ BASILIO AKA JOSE L. PEREZ — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 372ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1361709D

MEMORANDUM OPINION ON REHEARING[1]

I. INTRODUCTION

The State of Texas filed a motion for rehearing and a motion for en banc reconsideration of our opinion that issued on December 8, 2016. We deny both motions, withdraw our opinion and judgment dated December 8, 2016, and substitute the following.

[1]*See* Tex. R. App. P. 47.4.

A jury did not convict appellant Jose Luis Perez Basilio, also known as Jose L. Perez, of continuous sexual abuse of a child, the sole live count in the indictment, but did convict him of three lesser included offenses of indecency with a child ("Offense One," "Offense Two," and "Offense Three"). In three separate judgments, the trial court sentenced him to ten years' confinement on each offense, ordering that the sentence for Offense Two run consecutively to the sentence for Offense One and that the sentence for Offense Three run concurrently. In three points, Basilio contends that two of the child witnesses were incompetent to testify, that the evidence is insufficient to support his three convictions, and that the trial court reversibly erred by amending the jury charge after closing arguments. Because we hold that the trial court erred by signing two judgments of conviction for indecency by contact against the complainant K.R. when the evidence supports only one conviction, we will vacate the trial court's judgment convicting and sentencing Basilio for Offense Three and dismiss the prosecution of that charge. We will affirm the trial court's judgments for Offense One and Offense Two.

II. BRIEF BACKGROUND

Sisters S.R. and K.R., their brother A.R., their parents, and their younger brothers lived with Basilio and his wife for a time. Some evenings, the children's mother (Mother) would leave the children at home alone with Basilio while she picked up their father at work. After S.R.'s parents caught her with lime or lemon beer salt that they did not use but that they knew Basilio used, allegations

surfaced of sexual abuse of the two little girls by Basilio. The girls were both interviewed at the child advocacy center, and the younger one, K.R., also underwent a sexual assault exam.

At trial, S.R., K.R., and A.R. testified, as well as Mother, the people who interviewed the children at the child advocacy center, the nurse (SANE) who examined K.R., and the detective in charge of the case. The jury also watched and listened to a video of Basilio's interview with the police.

Count One of the indictment charged Basilio with committing continuous sexual abuse of a child on or about October 1, 2013, through January 14, 2014. The State waived Counts Two through Five, which alleged four separate acts of indecency with a child by contact regarding S.R.—two counts with "on or about" dates of October 1, 2013, and two counts with "on or about" dates of January 14, 2014.

In addition to charging the jury on Count One, the jury charge also charged the jury on three lesser included offenses of indecency with a child by contact—specifically, Basilio's touching of the named complainant's genitals with his hand. After the charge conference but still outside the presence of the jury, the trial court explained,

> I have submitted by the agreement of both parties what as a matter of law are lesser-included offenses of the continuous sexual abuse of young child count, but they're labeled as "Offense One," "Offense Two," and "Offense Three" simply to assist [] the jury in keeping track of which case is which alleged victim of circumstance, but as a matter of law, they're submitted as lessers.
>
> K.R. was the named complainant in Offense One and Offense Three; S.R.

was the named complainant in Offense Two. Originally, Offense One and Offense Two had "on or about" dates of October 1, 2013, and Offense Three had an "on or about" date of January 14, 2014. After jury deliberations began, the trial court amended the "on or about" date of Offense Three to October 1, 2013.

III. DISCUSSION

A. Competence of Children to Testify

In part of his third point, Basilio contends that the trial court abused its discretion by determining that K.R. and A.R. were competent to testify. Basilio does not challenge S.R.'s competence to testify. Further, and as the State points out, Basilio did not object to the trial court's ruling on A.R.'s competence to testify in the trial court. He has therefore forfeited his complaint pertaining to A.R. for our review. *See* Tex. R. App. P. 33.1(a)(1); *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 1461 (2016); *Sanchez v. State*, 418 S.W.3d 302, 306 (Tex. App.—Fort Worth 2013, pet. ref'd); *see also De Los Santos v. State*, 219 S.W.3d 71, 80 (Tex. App.—San Antonio 2006, no pet.). Thus, the only issue remaining in this part of Basilio's third point is whether the trial court abused its discretion by determining that K.R. was competent to testify. *See Broussard v. State*, 910 S.W.2d 952, 960 (Tex. Crim. App. 1995), *cert. denied*, 519 U.S. 826 (1996).

A trial court does not abuse its discretion by allowing a child to testify if its decision to allow the testimony falls within the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on

reh'g); *Torres v. State*, 424 S.W.3d 245, 254 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd).

As this court recently explained,

> We review the child's responses to qualification questions as well as the child's entire testimony to determine whether the trial court's ruling constituted an abuse of discretion.
>
> All witnesses are presumed competent to testify, including children. When competency is challenged, however, the trial court must make a determination of whether the child (1) had the ability to intelligently observe the events in question at the time of the occurrence and (2) has the capacity to recollect and narrate the events. A witness has the capacity to narrate if the witness is able to understand the questions asked, frame intelligent answers to those questions, and understand the moral responsibility to tell the truth.

Gonzalez v. State, No. 02-14-00229-CR, 2015 WL 9244986, at *3 (Tex. App.—Fort Worth Dec. 17, 2015, pet. ref'd) (mem. op., not designated for publication) (citations omitted), *cert. denied*, 137 S. Ct. 169 (2016).

Establishing the child witness's incompetence to testify is the responsibility of the party moving to exclude her testimony. *Id.* (citing *Gilley v. State*, 418 S.W.3d 114, 121 (Tex. Crim. App.), *cert. denied*, 135 S. Ct. 57 (2014)). Further, "[c]onfusing and inconsistent responses from a child are not reasons to determine she is incompetent to testify; rather, they speak to the credibility of her testimony." *In re A.W.*, 147 S.W.3d 632, 635 (Tex. App.—San Antonio 2004, no pet.); *Gonzalez*, 2015 WL 9244986, at *6. The trial court's role is to determine competence, not to assess the weight or credibility of the child's testimony. *A.W.*, 147 S.W.3d at 635.

While Basilio concedes that six-year-old K.R. was able to name her siblings and her teacher, could count to twenty in English and Spanish, and could identify the basic color groups, he argues,

> In every other matter, her testimony was a hodgepodge of non-sequiturs, forgetfulness, or lack of understanding. She was unable to remember her birthday, the month in which Christmas falls, the name of her school, the number of children in her class, the city in which she lived, the name of the street she lived on, the place where she had lived before that, and the very purpose for her presence in the courtroom. This last point is very disturbing, because it might be expected that the prosecutor or the victim's assistance personnel would have prepared the child for the courtroom. Yet, after all that preparation K.R. could not recall why she was in the courtroom:
>
> THE COURT: Do you know why people asked you to come to court today?
>
> THE WITNESS: I forgot.
>
> THE COURT: Do you know when you come into court, people ask you questions, kind of like I do? That's our job. We ask questions. We get paid to ask questions. That's our job. Okay? Did you know that?
>
> THE WITNESS: *I didn't say it*. [record citations omitted]

Basilio also points out K.R.'s inability to recognize people in the courtroom and to properly identify them and her multiple "I forgot" answers when testifying about the alleged offense.

But K.R. demonstrated at the hearing and at trial that she knew the difference between the truth and a lie by stating that the trial judge would be telling a lie if he said her purple dress was green. K.R. also testified at the hearing that she was there to answer questions about "the young man d[oing]

nasty things to [her]." Before the jury, K.R. identified Basilio as the man she knew as Parquitas. She testified that he did "nasty things" to her genital area with his hand, and she demonstrated by rubbing the thumb and fingers of her left hand together. She further testified that it had happened in his kitchen when she lived there, and that it happened one time.

As the trial judge pointed out, this case was hampered by "an ongoing with-interpreter-double-translation process," and he was present "to personally evaluate the child and her responses." *Id.* Further, any confusion in K.R.'s answers goes to the weight and credibility of her testimony, not her competence to testify. *See id.* Accordingly, based on our review of her testimony at the hearing as well as her testimony before the jury, we hold that Basilio failed to overcome the presumption that K.R. was competent to testify and that the trial court did not abuse its discretion by deciding that she was competent to testify. We overrule this portion of Basilio's third point.

B. Sufficiency of the Evidence

In parts of his first, second, and third points, Basilio contends that the evidence is insufficient to support his convictions. We agree, as does the State, that the evidence is insufficient to support Offense Three, but we agree with the State that the evidence is sufficient to support Offense One and Offense Two.

1. Standard of Review

In our due-process review of the sufficiency of the evidence to support a

conviction, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014).

This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599; *Dobbs*, 434 S.W.3d at 170.

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979);); *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016); *Dobbs*, 434 S.W.3d at 170. Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010); *see Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015); *Sorrells v. State*, 343 S.W.3d 152, 155 (Tex. Crim. App. 2011); *see Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). We

must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793; *Murray* at 448–49; *Dobbs*, 434 S.W.3d at 170; *see Blea*, 483 S.W.3d at 33.

We measure the sufficiency of the evidence by the elements of the offense as defined by the hypothetically correct jury charge for the case, not the charge actually given. *Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)); *see Crabtree v. State*, 389 S.W.3d 820, 824 (Tex. Crim. App. 2012) ("The essential elements of the crime are determined by state law."). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Byrd*, 336 S.W.3d at 246. The law as authorized by the indictment means the statutory elements of the charged offense as modified by the factual details and legal theories contained in the charging instrument. *See Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013); *see also Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014) ("When the State pleads a specific element of a penal offense that has statutory alternatives for that element, the sufficiency of the evidence will be measured by the element that was actually pleaded, and not any alternative statutory elements.").

The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing

the guilt of an actor. *Dobbs*, 434 S.W.3d at 170; *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We must consider all the evidence admitted at trial, even improperly admitted evidence, when performing a sufficiency review. *Jenkins*, 493 S.W.3d at 599; *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014); *Moff v. State*, 131 S.W.3d 485, 489–90 (Tex. Crim. App. 2004).

2. Law of Indecency with a Child

Section 21.11 of the penal code provides in relevant part that "[a] person commits an offense if, with a child younger than 17 years of age, . . . the person . . . engages in sexual contact with the child." Tex. Penal Code Ann. § 21.11(a)(1) (West 2011). The statute defines "sexual contact" to include "any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child" as long as the touching is "committed with the intent to arouse or gratify the sexual desire of any person." *Id.* § 21.11(c)(1).

While Basilio focuses on the specific dates of October 1, 2013, and January 14, 2014, time is not generally a material element of an offense and definitely is not in the case of indecency with a child by contact. *See Garcia v. State*, 981 S.W.2d 683, 686 (Tex. Crim. App. 1998); *see also* Tex. Penal Code Ann. § 21.11(a)(1); *Gutierrez v. State*, No. 02-16-00005-CR, 2016 WL 5957023, at *2 (Tex. App.—Oct. 13, 2016, no pet.) (mem. op. on reh'g, not designated for publication). The "on or about" language allowed the State to prove any date before the presentment of the indictment and within the statutory limitation period of the offense. *Sledge v. State*, 953 S.W.2d 253, 255–56 (Tex. Crim. App. 1997).

Moreover, there is no statute of limitations for indecency with a child. Tex. Code Crim. Proc. Ann. art. 12.01(1)(E) (West Supp. 2016); *Gutierrez*, 2016 WL 5957023, at *2.

3. The Evidence of Indecency with a Child by Contact

S.R., who was ten years old at trial, testified that her family had lived in Basilio's home a year earlier when she was in the fourth grade. She stated that he liked the children to call him Parquitas. S.R. told the jury that when her parents were not home, Basilio started touching her "parts" and her "middle part" in October of her fourth-grade year. She explained that "the middle part" was also called the "wee-wee" and that she used it to urinate. S.R. stated that the sexual abuse began when K.R. would go to Basilio's bedroom and S.R. would follow her. S.R. testified that Basilio gave her Takis (spicy chips) in his room. She said that he touched her "wee-wee" with his hand over her clothes; then he would smell his hand and say, "It smells good." S.R. testified that it happened more than ten times after Halloween but before Thanksgiving.

S.R. testified that she told her brother about the sexual abuse after the first or second occurrence and that he then went to Basilio's bedroom with her each time and witnessed the events. S.R. also testified that K.R. told their parents, maybe in December of that year, but that the parents thought she was joking. S.R. stated that she also told two friends at school because they knew how to keep a secret. She further explained that Mother figured out something was going on when she saw S.R. with the "beer salt" that Basilio had given her. The

last occurrence happened before that discovery.

S.R. also testified that she saw something happen with K.R. while Basilio and the girls were in Basilio's bedroom. S.R. testified that Basilio would touch K.R. with his hands "[o]n the same part he touched [S.R.]," her "wee-wee," but he did not smell his hand after touching K.R.

K.R., who was six years old and in kindergarten at trial, identified Basilio as the man she knew as Parquitas. She testified that he did "[n]asty things" to the part of her body from which she urinates, under her clothes and with his hand, and she demonstrated by rubbing her thumb to the fingers of her left hand. She further testified that it had happened in the kitchen of Basilio's home, that her parents were at the home, that her family had lived there then but had moved "so nothing else" would "happen to [her]," that it had happened once, and that it had not happened to S.R.

A.R., who was seven years old at trial, testified that Basilio came into the children's room one night near Christmas and touched both S.R. and K.R. as they lay in bed. According to A.R., first Basilio grabbed S.R. and told her to come to his room but A.R. said that she declined. A.R. testified that Basilio then touched the girls on their "parts." A.R. explained that Basilio touched S.R. on her front part and back part and clarified that the front part was "[w]here she . . . pees from." A.R. testified that Basilio touched S.R. on top of the bed covers as she lay under them. A.R. also testified that Basilio touched K.R., who was asleep, on her front part and that Basilio touched above the covers as she lay under them.

A.R. said that the incident made him feel bad and that he told his parents the next day that it had happened but that "[t]hey didn't tell [him] to tell them about it."

Mother testified that she left the children at home with Basilio only about eight times each month in December 2013 and January 2014. She stated that she saw S.R. with the salt in January 2014 and asked her directly if someone had been touching her. Mother testified that S.R. denied it at first but then reported that Basilio had touched her "wee-wee" and then would smell his hand. Mother testified that she understood her daughter to be speaking of her vulva when using the term "wee-wee."

After the outcry, Mother called her pastor, and she and the girls met him at McDonald's. Mother then called the police and took the three children to Alliance for Children, and K.R. was later taken to Cook Children's for a sexual assault exam. Mother admitted that Basilio sometimes complained that the children were in his room when she was not at home.

Detective Pat Henz testified that he received the case on January 16, 2014, that the children were interviewed at Alliance for Children on January 28, 2014, and that a sexual assault exam was performed on K.R. on February 10, 2014.

The SANE testified that K.R. told her that "Carpita," identified as Basilio, had touched her underneath her clothes with his hand on her "thing," which is the term that K.R. used to describe her genitalia, but that she denied penetration.

The forensic interviewer who interviewed K.R. testified that K.R. had told her that "Carpita" had fondled her under her underwear and that he "touched the part where she pees from" and "the part where she poops from" with his hand and that he then "smelled it." The forensic interviewer also testified that K.R. described digital penetration of both the vagina and anus. The forensic interviewer testified that K.R. told her that it happened when Mother had gone to pick the father up from work and that it happened when Basilio was sitting on "his table for eating" and she was standing up.

The forensic interviewer who interviewed S.R. testified that S.R. disclosed sexual abuse, but the forensic interviewer did not provide details.

Basilio told officers that he was occasionally home alone with the children. He stated that sometimes they would wake up and leave their bedroom, and S.R. would come in his bedroom. He also stated that all three of the children were in his bedroom once because they picked the lock to get in. He stated that on another occasion, he pushed them out of the bathroom he was using. Basilio believed that the girls made outcries because he threatened to tell their mother about some misbehavior and threatened to spank them. He said they got the idea from an incident at their school involving a teacher sexually abusing a student. He denied ever being in the children's bedroom but admitted that he had bought S.R. Takis.

4. The Two Convictions of Indecency by Contact with K.R.

The jury charge questions on Offense One and Offense Three (after the

trial court amended the date in Offense Three) both instructed the jury to find Basilio guilty of indecency with a child if they found

> from the evidence beyond a reasonable doubt that [Appellant] in Tarrant County, Texas, on or about the 1st day of October, 2013, did then or there intentionally, with the intent to arouse or gratify [his] sexual desire . . . , engage in sexual contact by touching the genitals of [K.R.], a child younger than 17 years of age[.]

a. Offense Three

Basilio contends that the record clearly shows that K.R.'s genitalia was allegedly touched, if at all, only once, according to her testimony and that of various professionals. The State concedes that the evidence only supports one conviction for indecency by contact regarding Basilio having contacted K.R.'s genitalia and that neither the indictment nor the jury charge alleged an improper touching of K.R.'s anus by Basilio (even though evidence was presented of such an act), and thus insufficient evidence exists to support the trial court's judgment for Offense Three. We agree that the State's concession is supported by the law and facts of this case. *Saldano v. State*, 70 S.W.3d 873, 884 (Tex. Crim. App. 2002) ("A confession of error by the prosecutor in a criminal case is important, but not conclusive, in deciding an appeal."); *see also Estrada v. State*, 313 S.W.3d 274, 286–88 (Tex. Crim. App. 2010) (following *Saldano* and independently examining record to determine whether appellant's asserted issue had merit), *cert. denied*, 462 U.S. 1142 (2011).

Indecency with a child is a conduct-oriented offense, and each of the types of circumstances—whether it be touching of the breasts, genitals, or anus—

constitute three separate and different offenses. *See Pizzo v. State*, 235 S.W.3d 711, 719–20 n.10 (Tex. Crim. App. 2007) (holding that different types of conduct under the indecency-with-a-child statute are different "nature of conduct" offenses). Moreover, due process prevents us from affirming a conviction based on legal or factual grounds that were not submitted to the jury. *Malik v. State*, 953 S.W.2d 234, 238 (Tex. Crim. App. 1997). Because Offense Three alleged a separate offense for indecency by contact with K.R. by touching her genitalia and because neither the indictment nor the jury charge authorized a conviction predicated on a second act of this type of touching (because there was no evidence of a second act of this type presented at trial), we reverse Offense Three and enter a judgment of acquittal on that charge. *See McGlothlin v. State*, 260 S.W.3d 124, 133 (Tex. App.—Fort Worth 2008, pet. ref'd) (reversing third of three counts of sexual assault of a child when evidence did not support third count and entering judgment of acquittal to third count while affirming counts one and two).

b. Offense One

Viewing the evidence in a light most favorable to the jury's verdict, the evidence demonstrates that S.R. had seen Basilio touch K.R. with his hands on K.R.'s "wee-wee"; that K.R. testified that Basilio touched her part of the body where she urinates from, under her clothes with his hand; that K.R. demonstrated to the jury how Basilio would touch this area of her body; that A.R. testified that Basilio had touched K.R.'s "front part" as she slept; that the SANE nurse testified

K.R. said that Basilio had touched her underneath her clothes with his hand on her "thing," which is the term that K.R. used to describe her genitalia; and that the forensic interviewer testified that K.R. reported that "Carpita," who was identified as Basilio, had fondled her under her underwear and that he "touched the part where she pees from" with his hand.

We conclude that a rational trier of fact could have found beyond a reasonable doubt that Basilio, with the intent to gratify his sexual desires, touched K.R.'s genitals. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Dobbs*, 434 S.W.3d at 170; *see also Gutierrez*, 2016 WL 5957023, at *2. Thus the evidence is sufficient to support the jury's verdict regarding Offense One, and we overrule this portion of Basilio's first, second, and third points.

5. The Conviction of Indecency by Contact with S.R.

Regarding Offense Two, the offense alleged to have happened to S.R., the jury was charged,

> Now, if you find from the evidence beyond a reasonable doubt that [Basilio], . . . on or about the 1st day of October, 2013, did then or there intentionally, with the intent to arouse or gratify [his] sexual desire . . . , engage in sexual contact by touching the genitals of [S.R.], a child younger than 17 years of age, then you will find [him] guilty of the offense of indecency with a child.

As recited above, among other evidence, the jury heard evidence that Basilio had touched S.R.'s genitals over her clothes, smelled his hand, and stated that they smelled good. That is sufficient evidence to support that a rational trier of fact could have found beyond a reasonable doubt that Basilio, with the intent to gratify his sexual desires, touched S.R.'s genitals. *See*

Jackson, 443 U.S. at 319, 99 S. Ct. at 2789; *Dobbs*, 434 S.W.3d at 170; *see also Gutierrez*, 2016 WL 5957023, at *2. We overrule this portion of Basilio's first, second, and third points and affirm his conviction of Offense Two for committing indecency of a child by contact of S.R.

Accordingly, we hold that the evidence is sufficient to support Basilio's convictions for Offense One and Offense Two, but we enter a judgment of acquittal for Offense Three.

C. The Jury Charge

In parts of his first two points, Basilio complains of the trial court's amending the jury charge after closing argument. Basilio's argument is that by amending the jury charge, the trial court commented on the weight of the evidence. Specifically, Basilio argues that "the jury actually received an explanation that acted as a clear comment to the jury that the Court had an opinion that there were two separate offenses involving the child K.R., when the evidence did not show more than one single offense against K.R."

The State argues that the trial court was authorized to correct what it believed was an erroneous charge. We agree with the State, while noting that we have already sustained Basilio's evidentiary-sufficiency objection to Offense Three, and it is hard for this court to conclude that this argument is not now moot. But in the interest of justice, we will discuss Basilio's contentions as if the court's amending the jury charge as to Offense Three had impacted Offense One and Offense Two.

The State explained the three lesser included offenses charged (Offense One, Offense Two, and Offense Three) in its closing argument,

> Ladies and gentlemen of the jury, the verdict form on continuous, we've done it. We've proved it beyond a reasonable doubt. You stop right here. What I want to talk to you about is the verdict forms after this, why they do mean something.
>
> . . . .
>
> And those acts that were discussed in the charge under continuous sexual abuse of a child make up the lesser offenses that start with Offense One. And that lesser offense for Offense One has to do with [K.R.]. When [she] outcried to Charity Henry that [Basilio] put his hands in her pants, put his hands next to her skin, while he's sitting on a table he put his finger in the hole. That's aggravated sexual assault of a child. Okay? Now, an offense less than that would be if he had just touched her genitals and that one time that [K.R.] talked about. It's that simple for Offense One.
>
> Now, Offense Two deals with [S.R]. And there's a lot with [her], from the end of October all the way until the day before her mother finds her with those lime salts, all that time. You heard about how many times it happened. You heard about what [Basilio] did, the touching of her genitals over the clothes, over and over and over again. You heard the testimony about the grooming, the Takis, the salt, all of those go into Offense Two, all of those times she suffered at his hand.
>
> Now, Offense Three—and including Offense Two is when [A.R.] was in bed and saw [Basilio] touch [S.R.] over the covers. That's indecency with a child by contact, and that's what gets us to Offense Three[,] which is indecency with a child, with [K.R.] when she's underneath the covers, not when she's talking about when she was in the kitchen and [Basilio] was sitting on the table, great sensory details, peripheral details. Now we're talking about when [A.R.] sat there and saw the door open. And he told the defense attorney when the defense attorney asked him, How did you know it happened?
>
> I saw it with my own eyes. I saw what he did to my sisters. And the defense attorney went after him, You mean you saw him as he leaned over your sister and leaned over you to touch [K.R.]?

[A.R.], brave kid as he was, looked at him and said, Yes, because it happened because I saw it.

. . . .

We have proven to you beyond a reasonable doubt that [Basilio] victimized these girls, that he touched them, that he committed two or more acts of sexual abuse outside of the 30-day period. It started in October and it ended when [K.R.] (sic) was found with the salts. And you know it because it happened to [S.R.] ten times. You know it because it happened to [K.R]. And you know it because [A.R.] told you he saw it with his two eyes. So you're going to take this verdict form, and it's on page ten, and you're going to do what's right and just sign the bottom one and you're going to hold him accountable for what he did[.]

The original jury charge charged the jury on continuous sexual abuse of a young child and then provided,

Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof or if you are unable to agree, then you will next consider whether he is guilty of any of the following offenses.

Offense 1

Now, if you find from the evidence beyond a reasonable doubt that [Basilio], . . . on or about the 1st day of October, 2013, did then or there intentionally or knowingly cause the penetration of the female sexual organ of [K.R.], a child younger than 14 years of age, by inserting his finger into the sexual organ of [K.R.], then you will find [him] guilty of the offense aggravated assault of a child.

Unless you so find from the evidence beyond reasonable doubt, or if you have a reasonable doubt thereof, or if you are unable to agree, you will next consider whether [Basilio] is guilty or not guilty of the offense of indecency with a child.

Now, if you find from the evidence beyond a reasonable doubt that [Basilio], . . . on or about the 1st day of October, 2013, did then or there intentionally, with the intent to arouse or gratify [his] sexual desire . . . , engage in sexual contact by touching the genitals of

[K.R.], a child younger than 17 years of age, then you will find [him] guilty of the offense of indecency with a child.

Unless you so find from the evidence beyond reasonable doubt, or if you have a reasonable doubt thereof, you will acquit [Basilio] and say by your verdict "Not Guilty" of this offense.

Offense 2

Now, if you find from the evidence beyond a reasonable doubt that [Basilio], . . . on or about the 1st day of October, 2013, did then or there intentionally, with the intent to arouse or gratify [his] sexual desire . . . , engage in sexual contact by touching the genitals of [S.R.], a child younger than 17 years of age, then you will find [him] guilty of the offense of indecency with a child.

Unless you so find from the evidence beyond reasonable doubt, or if you have a reasonable doubt thereof, you will acquit [Basilio] and say by your verdict "Not Guilty" of this offense.

Offense 3

Now, if you find from the evidence beyond a reasonable doubt that [Basilio], . . . on or about the 14th day of January, 2014, did then or there intentionally, with the intent to arouse or gratify [his] sexual desire . . . , engage in sexual contact by touching the genitals of [K.R.], a child younger than 17 years of age, then you will find [him] guilty of the offense of indecency with a child.

The verdict forms for the lesser included offense charges were labeled "(Offense 1)," "(Offense 2)," and "(Offense 3)."

The prosecutor, defense counsel, and Basilio all signed an agreement providing that if the jury wrote "a note requesting any information from the" trial court, the trial court could "send its answer to the jury room for the jury," after giving the parties a chance to object to the responses, without bringing the jury into open court. Excluding the jury's note indicating that it had reached a verdict, the jury sent out four notes during its deliberations. In open court but outside the

presence of the jury, the trial court summarized all the notes and the trial court's responses to them. The first note requested copies of the jury charge. The second note asked, "Why does Page 11 state 'offense of indecency with a child' for Offense 1 which conflicts with Page 5 which states 'offense of aggravated sexual assault'"? The trial court responded by directing the jury to "read the entire charge concerning 'Offense 1' on pages five and six of the charge."

The jury's third note stated, "Page 7 refers to [K.R.] under Offense 3 Jan[.] 14. Page 5 refers to [K.R.] under Offense 1 Oct[.] 1. Didn't [S.R.] testify to the 10X over this period, not [K.R.]"? The trial court explained its actions in response to the jury's third note,

> We reviewed the charge and realized not having corrected part of the original, there was a misdate of January 14th. It should have said October 1st. With the permission in the presence of counsel, the original charge was retrieved and I handwrote and corrected the October 1st date of January 14th. It was a typo. The correct date was placed on the charge which was returned to the jury and they were advised to correct all of their 11 copies to reflect the accurate date that apparently was a computer glitch. . . .

The jury's fourth note asked, "What is the difference please between Offense 1, Part 2, indecency with a child and Offense 3, indecency with a child because the specific child named in both is [K.R.]"? The trial court responded, "Offense 1, 'Part 2', is a lesser accusation to Offense 1, 'Part 1.' Offense 3 is a separate charge."

At the end of the trial court's explanation of all the notes and the responses, the trial court asked defense counsel if he "agree[d] with the short

historical summary concerning the notes and the answers," and defense counsel stated that he did.

Article 36.16 of the code of criminal procedure provides,

> After the judge shall have received the objections to his main charge, together with any special charges offered, he may make such changes in his main charge as he may deem proper, and the defendant or his counsel shall have the opportunity to present their objections thereto and in the same manner as is provided in Article 36.15, and thereupon the judge shall read his charge to the jury as finally written, together with any special charges given, and no further exception or objection shall be required of the defendant in order to preserve any objections or exceptions theretofore made. *After the argument begins no further charge shall be given to the jury unless required by the improper argument of counsel or the request of the jury, or unless the judge shall, in his discretion, permit the introduction of other testimony*, and in the event of such further charge, the defendant or his counsel shall have the right to present objections in the same manner as is prescribed in Article 36.15. The failure of the court to give the defendant or his counsel a reasonable time to examine the charge and specify the ground of objection shall be subject to review either in the trial court or in the appellate court.

Tex. Code Crim. Proc. Ann. art. 36.16 (West 2006) (emphasis added).

In addition to the exceptions listed in the statute, courts have interpreted the statute to allow a trial court to withdraw and correct its charge if convinced that an erroneous charge has been given. *Smith v. State*, 898 S.W.2d 838, 855 (Tex. Crim. App.), *cert. denied*, 516 U.S. 843 (1995); *Black v. State*, Nos. 03-95-00740-CR, 03-95-00741-CR, 1997 WL 217145, at *1 (Tex. App.—Austin May 1, 1997, no pet.) (not designated for publication).

"[A]ll alleged jury-charge error must be considered on appellate review regardless of preservation in the trial court." *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). In our review of a jury charge, we first determine

whether error occurred; if error did not occur, our analysis ends. *Id.* If error occurred, whether it was preserved determines the degree of harm required for reversal. *Id.* Unpreserved charge error warrants reversal only when the error resulted in egregious harm. *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); *see* Tex. Code Crim. Proc. Ann. art. 36.19 (West 2006). The appropriate inquiry for egregious harm is fact specific and must be performed on a case-by-case basis. *Gelinas v. State*, 398 S.W.3d 703, 710 (Tex. Crim. App. 2013); *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011).

In making an egregious harm determination, "the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." *Almanza*, 686 S.W.2d at 171; *see generally Gelinas*, 398 S.W.3d at 708–10 (applying *Almanza*). Errors that result in egregious harm are those "that affect the very basis of the case, deprive the defendant of a valuable right, vitally affect the defensive theory, or make a case for conviction clearly and significantly more persuasive." *Taylor*, 332 S.W.3d at 490 (citing *Almanza*, 686 S.W.2d at 172). The purpose of this review is to illuminate the actual, not just theoretical, harm to the accused. *Almanza*, 686 S.W.2d at 174.

Part of Basilio's argument rests on his theory that the evidence showed that only one instance of conduct amounting to indecency by contact with her

sexual organ, if any, occurred to K.R. and his contention that the "on or about" date, whether October 1 or January 14, is an element of the offense. It is not. *See* Tex. Penal Code Ann. § 21.11(a)(1). As we stated earlier, the State is not required to allege a specific date in an indictment—the "on or about" language allows the State to prove any date before the presentment of the indictment. *Sledge*, 953 S.W.2d at 255–56. So even if the trial court erred by changing the "on or about" date in the charge for Offense Three, which we do not hold, that change had no legal effect because any alleged date prior to indictment being presented was fair game. *See id.*; *see also Cabral v. State*, 170 S.W.3d 761, 764–65 (Tex. App.—Fort Worth 2005, pet. ref'd). We therefore conclude that error, if any, was harmless as to Basilio's convictions and sentences for Offense One and Offense Two. *See Marshall v. State*, 479 S.W.3d 840, 843–44 (Tex. Crim. App. 2016). We overrule this portion of Basilio's first and second points.

In what remains of this point, Basilio contends that by amending the charge, the trial court commented on the weight of the evidence. Because the evidence supported the Offense One conviction involving K.R. as the complainant; because the specific date named in the charge had no legal effect, as the "on or about" language allowed the State to prove any date before the presentment of the indictment; and because we have held that Offense Three, which the court's changed language impacts, should be reversed and a judgment of acquittal entered; we hold that any error the trial court committed by replacing the date of January 14, 2014, with the date of October 1, 2013, in the Offense

Three charge is harmless as to Basilio's convictions and sentences for Offense One and Offense Two. *See Sledge*, 953 S.W.2d at 255–56; *see also Marshall*, 479 S.W.3d at 843–44. We overrule the portions of Basilio's first and second points pertaining to his argument that the trial court erred by amending the charge.

D. Ineffective Assistance

Basilio also raises the specter of ineffective assistance at least twice in his brief, stating, "It might be noted that trial counsel's failure to object and his acquiescence to the change in the charge was arguably ineffective assistance of counsel" and "putting aside any ineffective assistance issues" before arguing different points. But Basilio does not develop an argument for ineffective assistance at all. To the extent that ineffective assistance was raised as an issue, we overrule it as inadequately briefed. *See* Tex. R. App. P. 38.1(i); *Lucio v. State*, 351 S.W.3d 878, 896 (Tex. Crim. App. 2011) (citing cases), *cert. denied*, 132 S. Ct. 2712 (2012).

IV. Conclusion

Having held that the trial court erred by allowing two convictions regarding K.R. when the evidence supported only one, we reverse the trial court's judgment for Offense Three and render a judgment of acquittal on that charge. Having overruled the remainder of Basilio's three points, we affirm the trial court's judgments for Offense One and Offense Two.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

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

DELIVERED: July 6, 2017