COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00364-CR

RAYMOND STEVEN MORALES — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 432ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1426445R

MEMORANDUM OPINION[1]

In two issues, Appellant Raymond Steven Morales appeals his convictions for two counts of indecency with a child by contact and eight counts of sexual assault of a child under seventeen years of age. *See* Tex. Penal Code Ann. §§ 21.11, 22.011(a)(2) (West 2011). We affirm.

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

Background

Appellant was Angelica's[2] stepfather. Angelica first met Appellant when her mother, Marie, started dating him when Angelica was 11 or 12 years old. Marie and Appellant married in January 1997, at which time Marie and Angelica moved into an apartment with Appellant and his biological daughter, Janie. Marie's older sister, Linda, also lived with the family at that time; she moved out at some point but lived with them off and on during the years that followed.

I. Appellant's ongoing abuse of his stepdaughter

According to Angelica, who was 32 at the time of trial, Appellant's inappropriate behavior with her began before he married Marie. While he was dating Marie, he shared a bed with Angelica at least once when Angelica stayed at his apartment without Marie. Angelica testified that on that occasion, Appellant "opened [her] legs and [rubbed her] inner thigh" beneath her shorts. Once Appellant and Marie were married, however, his behavior escalated.

Within months of the wedding, Appellant approached Angelica while she was lying on the living room floor and pretending to be asleep, and he rubbed his penis on her lips for 10 or 15 minutes. Appellant said to Angelica, "Come on, [Angelica]. I know you're not sleeping." Shortly after he said that, he heard Marie coming so he got up and walked out of the living room.

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[2]In accordance with rule 9.10(a)(3), we refer to children and their family members by aliases. *See* Tex. R. App. P. 9.10(a)(3); 2nd Tex. App. (Fort Worth) Loc. R. 7.

According to Angelica, after the living room incident, Appellant would come into her room "once or twice weekly" while she was asleep, stand next to her bed, and put her hand under his shorts and place it on his penis. He would stand there with her hand on his penis for a few minutes and then leave the room. Appellant would also ask Angelica to wear "certain shirts" or other clothing, including thong underwear, "so he could just look at [her]." Angelica also recalled a time when, at Appellant's request, she wore a "real short-fitted shirt" underneath an unbuttoned long-sleeve flannel shirt, and Appellant rubbed her stomach and told her that her skin was soft.

Shortly after she turned 15 in early 1998, the family moved to a house in Fort Worth on Beckwood Drive (the Beckwood House). According to Angelica, the abuse further escalated at this point, and "it wasn't just touching anymore. It wasn't just touching me or it wasn't just having me put my hand on him. It was more. I mean, he would have me do other things to him." In addition to his placing of Angelica's hand on his crotch, which Angelica testified continued on a weekly basis, Appellant began forcing her to allow him to rub the outside of her sexual organ a "couple of times a week."

During this time, Appellant also started having vaginal intercourse with Angelica. His first attempt occurred when Angelica was 15 and in the ninth grade, but he stopped when she told him that it hurt. However, the next time, he did not stop when Angelica said that it hurt, and he continued forcing her to have sex with him "[m]aybe weekly, once a week" or more often. Angelica testified, "It

always hurt a little bit, but he would have me on top of him for hours. I would be in that room for hours upstairs."[3]

Angelica testified that the family moved into a house on Haverford in Arlington (the Haverford House) when she was 16 years old, although she could not remember what year they moved. It was at this point, according to Angelica, that Appellant began to force her to engage in oral sex while continuing to also engage in vaginal intercourse. According to Angelica, Appellant forced her to perform oral sex at the Haverford House "[a]t least a handful of times" while she was still 16, and that "[a]t least twice" he performed oral sex on her.

Angelica also testified to two specific instances, both of which occurred away from home. The first happened in 1999 when Appellant took her to a public park and performed oral sex on her in a wooded area. The second incident occurred when she traveled to El Paso with Appellant for a celebration of Appellant's parents' 50th wedding anniversary.[4] When Appellant and Angelica were on their way back and nearing their home in Arlington, Appellant forced her to perform oral sex on him while he drove.

According to Angelica, she did not tell Marie about the abuse because her mother seemed "happy" and Angelica "didn't want to mess that up." She also

[3]Angelica testified that nobody else would be home at the time—her mother worked most of the day—and if anyone was, they never said anything about her and Appellant being locked away in a bedroom together for hours.

[4]Marie was unable to go with them because she had surgery.

testified that she was scared to tell her mother. Angelica testified that her reluctance to tell Marie was reinforced by Appellant, who made a point of telling Angelica that Marie was happy. Finally, when Angelica was 17 she told Linda about the abuse, and Linda told Marie. Fearing that things with Appellant would get worse, Angelica did not share the full extent of the abuse with either Linda or Marie. Later, she "clammed up" altogether and "didn't say anything" to Marie about the abuse. Linda reported Angelica's outcry to Child Protective Services (CPS), but Angelica testified that she told CPS that nothing had happened, "Because my mom was going to stay, so why make it hard for me? I mean, it - - it would just - - it just wouldn't be good." CPS closed its investigation. After her outcry, the abuse stopped.

Over the ensuing years, when Marie would periodically ask Angelica about what had happened with Appellant, Angelica would "tell her little by little more and more," but from Angelica's viewpoint, no one ever confronted Appellant about the abuse. However, Marie testified that she did confront Appellant and that he "just looked down and he kept saying, 'I'm sorry.'" And, according to Marie, Appellant never denied having sex with Angelica.

Appellant mentioned the abuse to Angelica more than once during the ensuing years, including one instance in front of Angelica's son[5] when he referred to her performing oral sex on him. On another occasion, Appellant

[5]Angelica did not say how old her son was at the time but testified that he was "young" and "couldn't understand."

asked Angelica if she ever thought about what had happened between them and then told her that when he thought about it, it "ma[de] him hard." Once, Angelica asked Appellant why he did it, and according to her, he responded, "[B]ecause [she] wasn't his real daughter."

Angelica testified that as a result of the abuse, she began to engage in promiscuous behavior and to abuse alcohol. In April 2013, when she was 30, she voluntarily checked into a rehabilitation facility for alcohol dependency and self-harm. She also testified that she would cut herself because she "didn't want to feel the pain" that she felt from "the nightmares" she had of Appellant "showing up at [her] house" and from remembering "the things that he did to [her]." She was eventually diagnosed with post-traumatic stress disorder (PTSD) as a result of the sexual abuse.

II. The ensuing investigation

In 2013, Angelica reported the abuse to the police. Detective Marge Almy investigated Angelica's allegations of sexual abuse by Appellant. As part of her investigation, she interviewed Angelica and noted that the statements made by Angelica in her interview were consistent with what Angelica had reported to the police shortly before the case was assigned to her. When Detective Almy met with Angelica on July 23, 2013, they telephoned Appellant so that Angelica could confront him with the sexual abuse allegations. The phone call was recorded, and the recording was admitted into evidence and played for the jury. During the phone conversation, Appellant did not deny that the abuse took place, stating,

"I'm not gonna lie, I'm not gonna uh uh [unintelligible] make excuses, I'm one hundred percent accountable." Throughout the course of the conversation, he emphasized that he did not deny anything. He apologized to her when she said that he had made it sound like it was all her fault, and he told her that it was not her fault. The following exchange also took place:

> Angelica: I was thirteen, [Appellant]. I mean—you make it seem—I was a kid, [Appellant]. I want to know why, I want to know why, I was a child. I mean—
>
> Appellant: Well, I don't know [Angelica], I just totally took advantage of the . . . love that you had for me, and the love that I had for you.
>
> Angelica: You knew all I wanted was a dad, you knew and you took advantage of that.
>
> Appellant: I know, [Angelica], I know. [Angelica], there's nothing—I don't know [unintelligible] I hurt, [Angelica], every day, every day, [unintelligible].

Appellant also acknowledged that he had considered that her son might be his, told her that he had been "selfish" and "stupid," and claimed that they had a "special bond." He admitted, "I . . . took advantage of our relationship, I hurt you, I abused you. Yeah, I don't know why. . . . I'm upset that I did this to you."

Appellant took an entirely different tack when Detective Almy interviewed him a month later. He acknowledged that Angelica had confronted him on an earlier phone call asking him why he had abused her but said that he was "taken aback" by her questions and did not know where Angelica "was getting this from." But he admitted that he had talked to his family about "what happened between

he and [Angelica]," and, as a result, he had been "shunned" by his parents.[6] He repeatedly mentioned that during the CPS investigation, CPS found "everything came up negative," he was cleared of any allegations by CPS, and the case was closed. He described their relationship as more "emotional."

Although at one point in the phone conversation Appellant categorically denied that his penis had penetrated Angelica's sexual organ, when Detective Almy asked, "Did your penis ever touch her vaginal area?" he responded, "I don't think so, ma'am, I don't think so—probably close, but I don't think so." He also replied, "I don't think so," when Detective Almy asked him if his penis ever touched her mouth.

Detective Almy testified that she felt that "there was a lot that he was hiding," and she characterized his answers as evasive. For instance, he claimed he could not remember when he married Marie. He also said it was "crazy" that Angelica claimed he had questioned whether her son was his even though he had admitted doing so in the previous recorded phone call with Angelica.[7]

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[6]When Detective Almy asked, "Did you tell your parents you were having sex with [Angelica]?" Appellant responded, "Yeah—uh, basically, just inappropriate uh contact and stuff I said, but that's uh . . . no penetration, nothing like that."

[7]Marie also testified at trial that at some point Appellant had asked her whether he was the father of Angelica's son.

Based on her investigation, Detective Almy obtained arrest warrants for Appellant for two counts of sexual assault of a child under 17. Appellant was subsequently charged with eight counts of sexual assault and two counts of indecency with a child by contact. *See* Tex. Penal Code Ann. §§ 21.11, 22.011(a)(2). Counts one and two alleged indecency by causing Angelica to touch Appellant's penis on or about April 1, 1997; counts three, four, five, six, eight, and ten alleged sexual assault of Angelica by causing her sexual organ to contact Appellant's sexual organ on or about June 1, 1998, September 1, 1998, November 1, 1998, January 1, 1999, May 1, 1999, and August 1, 1999, respectively; count seven alleged sexual assault by causing her sexual organ to contact Appellant's mouth on or about March 1, 1999; and count nine alleged sexual assault by causing her mouth to contact his penis on or about July 1, 1999.

III. The trial

A. Appellant's strategy of denying abuse before Angelica turned 17

There is no dispute that Angelica was 17 by March 2000. At trial, Appellant, who testified in his own defense, did not deny that there had been inappropriate sexual behavior between him and Angelica, but he denied that any of it had occurred before she was 17 years old. As part of this strategy, Appellant sought to show that any instances of abuse did not take place until after the family moved to the Haverford House, when Angelica was 17. Marie, who was called as part of his defense, testified that she was "pretty sure" that the

family moved to the Haverford House in March 2000, at which time Angelica would have been 17.[8] On cross-examination by Appellant's counsel, Detective Almy testified that the family moved into the Haverford House in March 2000 and that she had verified the same on the Tarrant Appraisal District records.[9]

According to Appellant, in the summer of 2000—after they moved to the Haverford House, "[Angelica] grabbed me from my midsection and told me to F her and started kissing on me. . . . [Y]eah, she just said, F*** me." He subsequently clarified that Angelica had grabbed his crotch, and he testified, "She pulled me to her and started kissing on me, and I pushed her away. And I did push up against her breasts." He claimed that he responded to Angelica, "What the hell's wrong with you[?]"

Appellant also admitted to the incident of oral sex that took place on the way back from El Paso for his parents' wedding anniversary. He testified that on October 5, 2000, he and Angelica were driving to his parents' 50th wedding anniversary celebration near El Paso when he "asked [Angelica] if she would perform oral sex, and she did." He testified, "We were joking around, but she

[8]Marie also testified that she understood that the sexual contact that had occurred happened when Angelica was a minor, and she characterized Appellant as "manipulative" and dishonest during their marriage. They were no longer married at the time of trial.

[9]Detective Almy testified, "I had checked the Tarrant Appraisal District, and it had March 2000 on there." The appraisal district records were not admitted into evidence and are not part of the record before us; therefore, the March 2000 reference is unclear.

was more clingy and hanging onto me before that happened." Although Appellant insisted that the incident occurred in 2000 because that was his parents' 50th anniversary, he could not remember what year his parents were married.

Appellant also described Angelica as "pretty dishonest" and a "liar" and painted her as a child who would frequently get into trouble. According to Appellant, it took "a couple of years" for Angelica to warm up to Appellant and become more talkative with him. His biological daughter, Janie, also testified that Angelica was a disobedient "liar."

In contrast, Linda testified that Angelica was an "honest," "sweet" child who was never in trouble and was a "people pleaser." Linda described Angelica's relationship with Appellant as "[c]lose" and "[c]lingy," testifying that Angelica "always wanted to just be with him, just always hanging on his arm." Linda testified, "There was always - - well, there was always something disturbing. They - - they were just too close. They were too close. It wasn't like a . . . father/daughter relationship. It wasn't - - it - - it was just too close." According to Linda, Appellant and Angelica were always together—"If he went to the store, she went with him. If he had an errand to run, she went with him. If he had somewhere to go, she went with him."

B. The jury verdict

The jury found Appellant guilty of all ten counts and sentenced him to 20 years' confinement on each count. The trial court ordered that the first five

sentences were to be served concurrently and the second five sentences were to be served concurrently after Appellant served the first five sentences.

Discussion

I. Sufficiency of the evidence

In his first issue, Appellant complains of the sufficiency of the evidence to support the convictions on counts seven and nine. Appellant specifically argues that the evidence shows that these two counts took place after Angelica turned 17.

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).

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.

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). 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. *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). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49; *see Blea*, 483 S.W.3d at 33.

To determine whether the State has met its burden under *Jackson* to prove a defendant's guilt beyond a reasonable doubt, we compare the elements of the crime as defined by the hypothetically correct jury charge to the evidence adduced at trial. *See Jenkins*, 493 S.W.3d at 599; *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 increase the State's burden of proof or restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Jenkins*, 493 S.W.3d at 599. 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 id.*; *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.").

Counts seven and nine related to allegations of oral sex occurring before Angelica turned 17—count seven alleged that Appellant contacted Angelica's sexual organ with his mouth on or about March 1, 1999, and count nine alleged that Appellant contacted Angelica's mouth with his penis on or about July 1, 1999. Appellant argues that the evidence conclusively shows that such conduct only took place at the time the family was living in the Haverford House and that Angelica was 17 at the time the family moved to the Haverford House.

Angelica did not testify to any oral sex acts that occurred before the family lived in the Haverford House. Once they moved to the Haverford House, Appellant forced her to perform oral sex "[a]t least a handful of times," including the incident in the car on the pair's return trip from El Paso, an instance Appellant readily admitted to. She also testified that he performed oral sex on her "[a]t least twice" at the Haverford House and once in a public park.

According to Angelica, she was 16 at the time they moved to the Haverford House and at the time she traveled to El Paso with Appellant. However, Appellant and Marie testified that the family did not move to the Haverford House until after Angelica turned 17. In his brief, Appellant particularly relies upon testimony by Detective Almy that she checked the records of the Tarrant Appraisal District (TAD) and verified that the family did not move to the Haverford House until March 2000, after Angelica turned 17:

> [Appellant's counsel]: You said she moved in the Haverford house in March of 2000; is that right?
>
> A: I don't know if [Marie] remembered the date. That was Texas - - or Tarrant County Appraisal District date, though.
>
> . . . .
>
> I had checked the Tarrant Appraisal District, and it had March 2000 on there.
>
> Q: Is when they moved into the Haverford house?
>
> A: Yes.

Acknowledging that we typically must defer to the jury's resolution of conflicting inferences, Appellant contends that the jury's verdict on these two counts is irrational in light of Detective Almy's testimony to the TAD records. We disagree.

Although we afford high deference to the jury's verdict, in applying the legal sufficiency standard, the evidence must support a *rational* verdict. *Brooks v. State*, 323 S.W.3d 893, 915 (Tex. Crim. App. 2010) (Cochran, J., concurring). As the court of criminal appeals noted in *Brooks*, the hypothetical "robbery-at-a-convenience-store" case illustrates proper application of such standard:

> The store clerk at trial identifies A as the robber. A properly authenticated surveillance videotape of the event clearly shows that B committed the robbery. But, the jury convicts A. It was within the jury's prerogative to believe the convenience store clerk and disregard the video. But based on *all* the evidence the jury's finding of guilty is not a rational finding.

Id. at 907 (quoting *Johnson v. State*, 23 S.W.3d 1, 15 (Tex. Crim. App. 2000) (McCormick, P.J., dissenting)).

Detective Almy's reference to the TAD records is distinguishable from the example of the video of the convenience store robbery. First, because the TAD records themselves were not produced at trial or admitted into evidence, the jury did not have the benefit of seeing the records themselves. Consequently, the jury had to make a credibility determination regarding Detective Almy's testimony about what the TAD records reflected. Second, even assuming the TAD records revealed a deed reciting that the Haverford house was purchased in March 2000, this would not constitute conclusive proof of when the family actually moved into the home, as the record is silent as to the family's financial arrangements regarding this house. For example, the family could have rented the premises prior to purchasing the home. The State offered yet another explanation—that Angelica was correct as to her age at the time the sexual conduct occurred but was mistaken as to which house the family lived in when it happened.

As the exclusive judge of the facts, the jury was free to believe none, some, or all of Angelica's testimony regarding where and when the sexual abuse occurred. Likewise, the jury was free to disregard Detective Almy's testimony regarding what she believed the TAD records reflected. Any conflict between Angelica's testimony and Detective Almy's regarding what she gleaned from the TAD records was for the jury to resolve and is not enough to render the evidence insufficient to support the jury's verdict. *See Upton v. State*, 853 S.W.2d 548, 552 (Tex. Crim. App. 1993). We therefore overrule Appellant's first issue.

II. Jury charge

In his second issue, Appellant argues that the jury charge erroneously allowed for a non-unanimous verdict because it did not instruct the jury that it must be unanimous as to a single offense among those presented by the State for each count. Appellant admits that this charge error was not preserved, but "all 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).

Appellant is correct that a jury must reach a unanimous verdict. *Landrian v. State*, 268 S.W.3d 532, 535 (Tex. Crim. App. 2008); *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005). And the jury must "agree upon a single and discrete incident that would constitute the commission of the offense alleged." *Stuhler v. State*, 218 S.W.3d 706, 717 (Tex. Crim. App. 2007).

The court of criminal appeals has addressed three situations that may result in non-unanimous verdicts if the jury charge fails to properly instruct the jury that its verdict must be unanimous. *Ngo*, 175 S.W.3d at 747. The State

agrees that one of these situations is present here. As explained by the court of criminal appeals:

> [N]on-unanimity may occur when the State charges one offense and presents evidence that the defendant committed the charged offense on multiple but separate occasions. Each of the multiple incidents individually establishes a different offense or unit of prosecution. The judge's charge, to ensure unanimity, would need to instruct the jury that its verdict must be unanimous as to a single offense or unit of prosecution among those presented.

Cosio v. State, 353 S.W.3d 766, 772 (Tex. Crim. App. 2011) (citations omitted).

The jury charge in this case included a general instruction that stated, "All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt." Generally, such "boilerplate" language is not sufficient to rectify error in failing to instruct the jury that its verdict must be unanimous as to a single offense or unit of prosecution. *Id.* at 774 (holding that "the standard, perfunctory unanimity instruction at the end of each charge did not rectify the error"); *see also Ngo*, 175 S.W.3d at 745.

Although it concedes that "a unanimity instruction would have been preferable," the State argues that it is "significant" that the jury charge included a separate instruction and verdict form for each count in the jury charge. But the court of criminal appeals considered and rejected a similar argument in *Cosio*. 353 S.W.3d at 774. In that case, the defendant was charged with two counts of indecency with a child and two counts of aggravated sexual assault. *Id.* at 769. The court held that the jury charge erroneously allowed for the possibility that the

jury rendered non-unanimous verdicts because "[t]he jury could have relied on separate incidents of criminal conduct, which constituted different offenses or separate units of prosecution," to find the defendant guilty of three of the counts. *Id.* at 774. The four counts were submitted to the jury "in four parts, each separately styled and entitled 'CHARGE OF THE COURT' and each referencing exactly one count." *See Cosio v. State*, 318 S.W.3d 917, 930 n.2 (Tex. App.—Corpus Christi 2010) (Garza, J., dissenting), *rev'd*, 353 S.W.3d at 778. But they did not meet the requirements of unanimity because the evidence "failed to differentiate between the similar, but yet separate, incidents of criminal conduct in relation to the offenses as charged and the alleged on or about dates." *Cosio*, 353 S.W.3d at 774, 778 (observing that the dissenting opinion in the court of appeals was incorrect and concluding that although the charges were erroneous, Cosio was not egregiously harmed by them).

Likewise, the evidence in this case failed to differentiate between the similar-but-separate incidents of criminal conduct. Perhaps most obviously, count nine alleged that Appellant forced Angelica to perform oral sex on him on or about July 1, 1999. According to the testimony, Angelica was forced to do this on their trip to El Paso and multiple times while they lived in the Haverford House. The evidence does not differentiate between these similar instances of criminal conduct in relation to the offenses as charged and the alleged on or about dates. We therefore hold that the trial court erred by failing to instruct the jury as to unanimity. *See id.*

Having found error, we must determine whether such error resulted in egregious harm. *Nava*, 415 S.W.3d at 298 (noting that unpreserved charge error only merits reversal if the record shows the appellant suffered egregious harm"). 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.

As we have stated above, the jury charge permitted non-unanimous verdicts based on the evidence presented in this case. *See Cosio*, 353 S.W.3d at 777. Thus, as the State concedes, this factor weighs in favor of finding egregious harm.

We may also look at whether the parties or the trial court added to the charge error by telling the jury that it did not have to be unanimous about the specific instances of criminal conduct in rendering its verdict. *Id*. at 777. During trial, neither the trial court nor defense counsel made any comments to this effect. In its closing argument, the State emphasized that it could have brought additional charges based on Angelica's testimony but also warned that the jury could not "vote guilty across the board":

> There are ten counts in this case, ten accusations against the Defendant for indecency [with] a child and for sexual assault of a child under 17. Could have been a hundred, I guess. [Angelica] told you about it wasn't just these ten times. It went on for three years while she was in that household to the point where she lost count of the number of times it happened to her.
>
> The State, however, is asking you to find him guilty of the ten that we've selected to bring forward to you today. Ten counts equals ten verdicts. That means what? Y'all need to look at each count independently. You don't vote guilty across the board. You don't vote not guilty across the board.

We do not view this argument as suggesting to the jury that it did not have to be unanimous about the specific instance of criminal conduct committed in rendering its verdicts. *Cf. Ngo*, 175 S.W.3d at 750–52 (holding egregious harm existed when prosecutor and trial court misstated the law and informed the jury it did not need to be unanimous as to which portion of the statute the defendant violated). Though the argument stops short of explicitly stating so, it could be argued the State's remarks indicated just the opposite—that unanimity was required as to all ten counts.

The parties disagree as to whether the error had an effect on the defensive theory of the case, which was to deny that any abuse took place before Angelica turned 17. Appellant admits that courts have often declined to find egregious harm in similar situations but argues that some of those cases are distinguishable on the basis that the defendants denied any sexual contact had occurred. Appellant points us to *Taylor*, 332 S.W.3d at 492–93. In *Taylor*, the jury charge erroneously authorized the jury to convict a defendant based on acts that were committed before his 17th birthday. *Id.* at 492. In holding that the error did not result in egregious harm, the court of criminal appeals noted, "The defensive theory was that no sexual abuse occurred at any time. It is unlikely that the jury believed that [the defendant] sexually assaulted the victim before he turned 17 years old but not after. In this case, the jury either believed Appellant or believed the victim." *Id.* at 493. Furthermore, the court went on to point out that the jury in that case "could have convicted Appellant based upon evidence presented, even if the proper instruction had been given and Appellant's pre-[age] seventeen acts were disregarded by the jury." *Id*.

Similarly, here, while Appellant admitted that inappropriate sexual contact occurred, at trial he insisted that it did not occur until Angelica had turned 17, when the family moved to the Haverford House. Angelica, on the other hand, testified that the sexual abuse also occurred repetitively from the time she was 12 years old until she made her original outcry when she was 17. The jury could have believed Appellant, that all sexual contact occurred after Angelica had

turned 17, or Angelica, that the multiple incidents of sexual contact she described in the Haverford house and the incident during the El Paso trip occurred before she was 17. If the jury believed Appellant, they would have acquitted on all counts. But the jury here believed Angelica and convicted on all ten counts.[10] *See id.* at 493; *see also Cosio*, 353 S.W.3d at 777–78 (noting, "The jury was not persuaded that he did not commit the offenses or that there was any reasonable doubt. Had the jury believed otherwise, they would have acquitted Cosio on all counts."). As in *Taylor*, here the jury could have convicted Appellant based upon the evidence presented, even if the proper instruction had been given and all sexual contact that occurred after Angelica turned 17 was disregarded by the jury. Thus, *Taylor* does not support Appellant's position but instead disposes of Appellant's complaint here.

We are not persuaded, based upon the record in this case, that actual harm has been shown and that Appellant was denied a fair and impartial trial.

We overrule Appellant's second issue.

Conclusion

Having overruled Appellant's two issues, we affirm the trial court's judgment.

[10]In reaching this decision, the jury could have taken into account Appellant's own statements during his phone call with Angelica, wherein he admitted that he "took advantage" of her when she said that she was only 13 years old.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: SUDDERTH, KERR, and PITTMAN, JJ.

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DELIVERED: July 13, 2017