IN THE
TENTH COURT OF APPEALS

No. 10-15-00348-CR

JUSTIN SHANE WINSETT,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 413th District Court
Johnson County, Texas
Trial Court No. F49686

MEMORANDUM OPINION

In five issues, appellant, Justin Shane Winsett, challenges his convictions for one count of aggravated sexual assault of a child and two counts of injury to a child. *See* TEX. PENAL CODE ANN. §§ 22.021(a)(1)(B)(i), 22.04 (West Supp. 2016). We affirm.

I. SUFFICIENCY OF THE EVIDENCE

In his first two issues, appellant contends that the record contains insufficient evidence to support his convictions for one count of aggravated sexual assault of a child

and two counts of injury to a child. In issue one, appellant argues that the jury's guilty verdicts for the two counts of injury to a child demonstrate that the jury actually acquitted him of aggravated sexual assault of a child and that there is no evidence to support this conviction. In his second issue, appellant asserts that the State's proof and argument, "in connection with count one of the indictment, disproved . . . that Appellant acted recklessly or with criminal negligence in attempting to fall asleep while responsible for the care of his daughter. . . ." And "the resulting omission in the level of care provided by Appellant clearly did not involve disregard of a recognizable danger or risk then threatening the welfare of K.W."

A. Applicable Law

In *Lucio v. State*, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011), the Texas Court of Criminal Appeals expressed our standard of review of a sufficiency issue as follows:

> In determining whether the evidence is legally sufficient to support a conviction, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). This "familiar standard gives full play to the responsibility of the trier of fact fairly 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. "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper*, 214 S.W.3d at 13.

Id.

Our review of "all of the evidence" includes evidence that was properly and improperly admitted. *Conner v. State*, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001). And if the record supports conflicting inferences, we must presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793. Furthermore, direct and circumstantial evidence are treated equally: "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper*, 214 S.W.3d at 13. Finally, it is well established that the factfinder is entitled to judge the credibility of the witnesses and can choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

The sufficiency of the evidence is measured by reference to the elements of the offense as defined by a hypothetically correct jury charge for the case. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically-correct jury charge does four things: (1) accurately sets out the law; (2) is authorized by the indictment; (3) does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability; and (4) adequately describes the particular offense for which the defendant was tried. *Id.*

B. Discussion

1. Aggravated Sexual Assault of a Child

Here, appellant was charged with and convicted of one count of aggravated sexual assault of a child ("Count 1") and two counts of injury to a child ("Counts 2 and 3").[1] As to Count 1, the indictment alleged that appellant penetrated K.W.'s sexual organ with his sexual organ, his finger, a sexual-stimulation device resembling a male sex organ, or by an unknown object. Under section 22.021(a)(1)(B)(i) of the Penal Code, the State must prove beyond a reasonable doubt that appellant intentionally or knowingly caused the penetration of the anus or sexual organ of a child by any means. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i).

At trial, Sergeant Justin Smith of the Johnson County Sheriff's Office testified that when he arrived at the residence, he observed that six-year-old K.W. was bleeding from her vagina and had scratch marks on the outside thigh of one of her legs. When Sergeant Smith inquired about what had happened, appellant stated that "the dog [Boomer] had

[1] We recognize that, from a global perspective, the jury's verdicts as to the three charged counts could be construed as inconsistent. Case law provides that where a multi-count verdict appears inconsistent, the appellate inquiry is limited to a determination of whether the evidence is legally sufficient to support the counts on which a conviction was returned. *United States v. Powell*, 469 U.S. 57, 64-67, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984); *Sauceda v. State*, 739 S.W.2d 375, 376-77 (Tex. App.—Corpus Christi 1987, pet. ref'd). Inconsistent verdicts do not require reversal for legal sufficiency. *Jackson v. State*, 3 S.W.3d 58, 60 (Tex. App.—Dallas 1999, no pet.) (citing *Dunn v. United States*, 284 U.S. 390, 393-94, 52 S. Ct. 189, 76 L. Ed. 356 (1931)); *see Thomas v. State*, 352 S.W.3d 95, 101 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). As long as the evidence is sufficient to support a conviction, what the factfinder did with the remainder of the charge is immaterial. *Jackson*, 3 S.W.3d at 62 (citing *Powell*, 469 U.S. at 64-67); *Ruiz v. State*, 641 S.W.2d 364, 366 (Tex. App.—Corpus Christi 1982, no pet.). Moreover, even where an inconsistent verdict might have been the result of compromise or mistake, the verdict should not be upset by appellate speculation or inquiry into such matters. *See Powell*, 469 U.S. at 64-67; *Ruiz*, 641 S.W.2d at 366; *see also Moranza v. State*, 913 S.W.2d 718, 724 (Tex. App.—Waco 1995, pet. ref'd) (noting that inconsistent verdicts do not necessarily imply the jury convicted the defendant on insufficient evidence, but may simply stem from the jury's desire to be lenient or to execute its own brand of executive clemency).

undressed his daughter, had intercourse with her, and then he found her in bed—or the mother found her in bed later and found out she was bleeding from her vagina." At the time of the incident, only appellant, K.W., and Boomer were home. In any event, after hearing this story, officers determined that they needed to take Boomer to an Alvarado veterinarian for examination. Prior to doing so, the officers took pictures of Boomer, including his underside. The pictures showed that Boomer had some blood on his underside. At some point, officers brought Boomer in the room with K.W., and Sergeant Smith recounted that K.W. never cried out or screamed in fear of the dog. Sergeant Smith also testified that he did not observe Boomer exhibit any "aggressive or dominance-type behavior"—an observation that was echoed by Corporal Loren Carter of the Johnson County Sheriff's Office. Based on his investigation of the scene, "[a]t no point" did Sergeant Smith "believe the dog did it. It was done by a human." And when asked about Boomer's DNA in K.W.'s panties, Sergeant Smith noted that it did not surprise him because "they're on the floor. I mean, he was through the house. You've got his hair, saliva from him slobbering everywhere."

Later, Jay Kniffen, an investigator with the Johnson County Sheriff's Office, noted that K.W. was interviewed at the Child Advocacy Center. During the interview, K.W. heard Jake, a yellow Lab that serves as a therapy dog, scratching at the door. K.W. asked if Jake could come into the room with her. Kniffen recalled that K.W. was happy to see the dog and that "she interacted with the dog very well, feeding the dog Cheetos,

throwing them up in the air, petting the dog." According to both Kniffen and Kacie Hand, a caseworker at the Child Advocacy Center, K.W. did not exhibit any fearful responses towards the dog. Kniffen also testified that he learned during his investigation that K.W.'s mother had a sex toy that resembled a male's penis at the house and that he was concerned that the sex toy could have "been something that was used on the victim."

Stacey Henley, a registered nurse certified as a Sexual Abuse Nurse Examiner at Cook Children's Medical Center, testified that she was the nurse who treated K.W. after the incident. Initially, Nurse Henley interviewed K.W. and learned that appellant was the only other person in the house with K.W. at the time the injuries occurred. K.W.'s mother indicated that K.W. had told her that Boomer had injured her while appellant was asleep. Nurse Henley then recounted K.W.'s description of the incident as follows:

> Okay. She said, and I quote, "It was Boomer's fault. He got up on me and he knocked me down. He stuck it in my no-no part—my no-no spot." I'm sorry. "He's a doggie. He's two years old. He got up on me. I cried when I got in bed with my daddy. Actually, he heard me. I was crying when I got in bed. Then it was 8:30. Then I was crying. Then I woke up when it was 8:30 and then he picked me up. Then he told me I was bleeding—Then he told me I was bleeding."
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> And then I asked her, I said, "Well, how did Boomer get your pants down?" And she said, "I'm not sure. I was on my stomach, my hands and knees. My mom came but she forgot to check on me."

Nurse Henley noted that K.W.'s ability to quote times and inability to explain how her pants were pulled down were both odd.

Nurse Henley testified that because of the amount of bleeding, hospital staff irrigated K.W.'s vaginal area, which could have destroyed trace evidence or DNA evidence on the body. With regard to the external injuries sustained by K.W., Nurse Henley observed a scabbed abrasion on K.W.'s back less than a centimeter long, two small linear scratches on the top of her left pointer finger that K.W. said were caused by her cat, two parallel linear red marks on her upper right thigh, a small linear scratch near the parallel marks and towards her abdomen, and yellow bruising on her outer left thigh. Nurse Henley also observed bloody discharge and the redness of K.W.'s labia minora, which is "the little wings inside the labia majora." Furthermore, K.W.'s hymen and anus had tears at seven o'clock and six o'clock, respectively. Nurse Henley opined that the hymen injury was caused by penetration and the anal injury was caused by blunt trauma. In particular, according to Nurse Henley, the hymen tear was not caused by an accident because there was no outer labia damage. Rather, Nurse Henley noted that the tear in K.W.'s hymen was caused by a finger, a male sexual organ, or any object inserted in K.W.'s sexual organ that resembled a male sexual organ. As a result of her examination, Nurse Henley concluded that K.W.'s injuries were not accidental and that she had suffered sexual assault, "specific for abuse."

Nurse Henley also stated that she did not believe that Boomer caused K.W.'s injuries because,

> The history was inconsistent. She said that the dog had pushed her down and that she had—she described to me that she bent on her stomach and

> her hands and knees at the time of the incident, and there were no scratches on her back or the back of her legs or on her buttocks. She also, you know, had reported that the father was asleep in the bedroom at the time, and that she told me that she would be crying and yelling at the time of the incident.
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> . . .
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> Another thought—another—something else that we learn is that if the injury is from behind, that there could be injury on the—it would be the top of the hymen because a child is flipped over. And the injuries were on the bottom.

K.W.'s injury to her hymen was medically consistent with her being on her back with the object "going down into the hymenal area and not up."

Cynthia Jones, a veterinarian with the Humane Society of North Texas, stated that she personally cared for Boomer for twenty-eight days.[2] During that time, Boomer was never aggressive, antisocial, anxious, or upset. Dr. Jones also testified that Boomer did not exhibit abnormal humping, nor did he attempt to sexually assault anyone. In her professional opinion, Dr. Jones did not believe that Boomer committed this act on K.W., as the trauma produced would be so painful for K.W. and would last longer than that which was observed.[3] Dr. Jones explained that male dogs are only sexually attracted to

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[2] Dr. Jones described Boomer as "a black lab, weighed 68 pounds, well-behaved."

[3] Notably, Dr. Jones described that when a male dog mounts a female dog and inserts his penis,

> his penis will enlarge inside her so that they—he can't pull it back out. If you've ever seen two dogs joined and be stuck together, that's because the back end of the penis has a gland that enlarges where they can't pull back out.
>
> . . .

female dogs due to the fact that only female dogs produce pheromones in their urine and their vaginal secretions. Humans are unable to produce such pheromones. Furthermore, in her research, Dr. Jones was unable to find any known cases of dogs spontaneously sexually assaulting a child. She did admit to learning about one instance in Brazil where a dog was trained and assisted in having sex with a child. Dr. Jones further testified that:

> If the scenario were the case that that could have happened, the injuries sustained physically on her body would have been much more severe. Her back and her shoulders, the size of her shoulders, the size of her torso, would have been scratched and bruised. And where her—the lower part of her—the back of her legs where the dog would have been standing, like with his back feet, her legs would have been in the way, so they would have had scratches on them also.

She also stated that K.W. would not have injuries on the front part of her thigh as a result of a sexual assault perpetrated by a dog. Moreover, according to Dr. Jones, "[b]ecause the pheromones like I described before weren't present to stimulate the dog to want to mount the person because that person wasn't a dog. . . . Mounting behavior in a dog that's physiologically been stimulated from pheromones is different than mounting behavior for social display, like humping." And finally, Dr. Jones denied that the

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> So you've got this male and female dog that are stuck together, and they can stay that way on an average 15 to 20 minutes, but it can last up to an hour. It can be very traumatic if the release is—or if those animals are forced to release earlier than that.
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> . . .
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> [B]ut physically for the dog to mount and insert his penis into a child, the trauma that would be produced would be so painful and would last the length of time that the scenario that has been talked about and discussed, I can't see that as having happened.

presence of Boomer's saliva in K.W.'s panties necessarily indicates sexual assault or penetration by Boomer.

Dr. Jayme Coffman, the medical director of the CARE Team at Cook Children's Medical Center, stated that she supervised Nurse Henley's examination of K.W. Dr. Coffman has personally reviewed thousands of sexual-assault cases and has never encountered a case where a dog spontaneously sexually assaulted a child. She further testified that, in her professional medical opinion, K.W.'s injuries could not have been caused by a dog because a dog would have caused more trauma to the perineum and the vagina. Dr. Coffman later clarified that:

> And I believe my response then as now was: There's no physical evidence of who, because we don't have DNA, but the only people and living creatures present at the time of the injury was [K.W.], her father, and the dog. And I don't believe it was the dog.
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> . . .
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> We know there's injuries to the hymen. There was penetration of her vagina because we have a tear of the hymen. It wasn't the dog because the injuries aren't consistent with that. There is [sic] no allegations of a fall. There's [sic] no allegations of impalement onto anything. There's no—The only person there was the father. This is an injury that we commonly see—well, not commonly because most the time we don't see any injuries. But when we do see injuries, this is what we see in sexual abuse.

Despite the foregoing, appellant called multiple witnesses, including K.W., to testify about the incident. However, none of the witnesses could explain how Boomer could have sexually assaulted K.W. K.W. herself stated that Boomer hurt her with his no-no spot and that he was on her back. She tried to get him off her back, but he was too

heavy. She also stated that this happened in the bedroom on the floor in front of the bed where appellant was sleeping. K.W. recalled yelling and screaming when it happened. K.W. could not explain how Boomer took off her clothes, but she did testify that she put her own clothes back on after the incident.

Additionally, appellant called a veterinarian, Dr. Chris Plumley, from New Hampshire to testify. Dr. Plumley noted that it may be a sign of sexual interest if a dog humps a human. However, on cross-examination, Dr. Plumley admitted that dogs do not naturally show sexual attraction to humans, even female humans who are menstruating. He further acknowledged that there is nothing about a female human that is going to activate a dog's sexual drive and that he could not find anything in the veterinary literature documenting a dog sexually assaulting a child.

Viewing the evidence in the light most favorable to the verdict, we hold that the evidence is sufficient to support appellant's conviction in Count 1 for aggravated sexual assault of a child. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i); *see also Lucio*, 351 S.W.3d at 894; *Hooper*, 214 S.W.3d at 13. And given that the evidence is legally sufficient to support his conviction in Count 1, we are not persuaded by appellant's contention that his convictions in Counts 2 and 3 necessarily demonstrate that the jury impliedly acquitted him in Count 1.

Additionally, we reject appellant's reliance on K.W.'s testimony as definitively showing that he did not engage in the charged offense of aggravated sexual assault of a

child. This is because the jury was entitled to judge the credibility of the witnesses and can choose to believe all, some, or none of the testimony presented by the parties. *See Chambers*, 805 S.W.2d at 461. And furthermore, because the resolution of conflicts in the evidence is within the province of the jury, we are to defer to the jury's resolution of such conflicts. *See id.*; *see also Jackson*, 443 U.S. at 326, 99 S. Ct. at 2792-93; *Lancon v. State*, 253 S.W.3d 699, 706 (Tex. Crim. App. 2008); *Render v. State*, 316 S.W.3d 846, 859 (Tex. App.—Dallas 2010, pet. ref'd) ("An appellate court must give deference to a jury's decision regarding what weight to give contradictory testimonial evidence because the decision is most likely based on an evaluation of credibility and demeanor, which the jury is in a better position to judge."). In convicting appellant of the charged offense, the jury did not appear to believe K.W.'s version of the events, especially in light of the medical and veterinary evidence contained in the record; as such, we must defer to the jury's resolution of any conflicts in the evidence. *See Chambers*, 805 S.W.2d at 461; *see also Jackson*, 443 U.S. at 326, 99 S. Ct. at 2792-93; *Lancon*, 253 S.W.3d at 706; *Render*, 316 S.W.3d at 859. Accordingly, we overrule appellant's first issue.

2. Injury to a Child

With regard to Counts 2 and 3, the indictment alleged the following, in pertinent part:

> **COUNT TWO, PARAGRAPH ONE:** . . . JUSTIN SHANE WINSETT, ON OR ABOUT MARCH 24, 2014, . . . DID THEN AND THERE RECKLESSLY, BY OMISSION, CAUSE BODILY INJURY TO [K.W.], A CHILD 14 YEARS OF AGE OR YOUNGER, BY FAILING TO PROPERLY SUPERVISE THE

> SAID CHILD WHEN THE SAID JUSTIN SHANE WINSETT WAS THE SOLE ADULT IN THE HOME BY TAKING SLEEP MEDICATION AND LEAVING THE CHILD UNSUPERVISED, AND THE DEFENDANT HAD ASSUMED CARE, CUSTODY OR CONTROL OF SAID CHILD,
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> **COUNT TWO, PARAGRAPH TWO:** . . . JUSTIN SHANE WINSETT, ON OR ABOUT MARCH 24, 2014, . . . DID THEN AND THERE RECKLESSLY, BY OMISSION, CAUSE BODILY INJURY TO [K.W] A CHILD 14 YEARS OF AGE OR YOUNGER, BY FAILING TO PROVIDE ASSISTANCE TO THE SAID CHILD AFTER BEING MADE AWARE THAT THE CHILD WAS IN DANGER, AND THE DEFENDANT HAS ASSUMED CARE, CUSTODY, OR CONTROL OF SAID CHILD.
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> **COUNT THREE:** . . . JUSTIN SHANE WINSETT, ON OR ABOUT MARCH 24, 2014, . . . DID THEN AND THERE BY CRIMINAL NEGLIGENCE, CAUSE BODILY INJURY TO [K.W.], A CHILD 14 YEARS OF AGE OR YOUNGER, BY TAKING SLEEP MEDICATION AND GOING TO SLEEP AND LEAVING SAID CHILD UNATTENDED, WITH A LARGE DOG IN THE ROOM, AND BY NOT COMING TO THE CHILD'S AID AFTER SAID DEFENDANT KNEW OR SHOULD HAVE KNOWN THE CHILD WAS IN DANGER.

Pursuant to section 22.04 of the Penal Code, a "person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child . . . serious bodily injury . . . or bodily injury." TEX. PENAL CODE ANN. § 22.04(a)(1), (3) (West Supp. 2016).

Much of the evidence listed above in our analysis of appellant's first issue is also relevant for Counts 2 and 3, especially the evidence documenting the injuries sustained by K.W. In addition to the foregoing, Sergeant Miguel Torres of the Johnson County Sheriff's Office stated that he took appellant's written statement while K.W. was at the hospital being examined by Nurse Henley. In his statement, appellant acknowledged

that just he, K.W., and Boomer were home and in the same bedroom when the injuries occurred. Appellant admitted to falling asleep when K.W. came home and that he woke up when Boomer barked announcing the arrival of appellant's wife. At that time, appellant let Boomer outside. He then put the covers over K.W. and heard that she groaned a little. When he woke K.W. up, appellant noticed that K.W. was bleeding from her private area. Appellant subsequently called 911 and stated that he "never would make that mistake of leaving an animal around [his] family."

Kniffen was later called to testify and read agreed-upon portions of appellant's grand-jury testimony, wherein appellant stated that he took Tylenol PM at noon and again at 4:00 p.m. on the day in question to help him fall asleep. Appellant also testified at trial. When asked whether the Tylenol PM knocked him "out so hard that you couldn't hear your daughter screaming as Boomer is assaulting her," appellant responded: "For one, she said she didn't—wasn't screaming. And for two, yes ma'am, I did not hear her. I would have woke up and that dog would have been dead by the time my wife got home."

As shown above, the undisputed evidence is that K.W. sustained injuries on the day in question. Furthermore, appellant was the only adult in the home when the injuries occurred; appellant took multiple doses of medication to help him sleep when he was the sole caretaker for K.W.; and appellant allowed K.W. to be in the same room as Boomer, a large dog that appellant blamed for K.W.'s injuries. Viewing the evidence in a light most

favorable to the jury's verdicts, we conclude that the evidence is sufficient to support appellant's convictions for injury to a child in Counts 2 and 3. *See* TEX. PENAL CODE ANN. § 22.04(a)(1), (3); *see also Lucio*, 351 S.W.3d at 894; *Hooper*, 214 S.W.3d at 13. We overrule appellant's second issue.

II. EXCLUSION OF DEFENDANT'S EXHIBITS 3 AND 4

In his third issue, appellant contends that the trial court abused its discretion by granting the State's objections to the admission of the report of scientific test results proffered by the State's forensic examiner. We disagree.

We review a trial court's decision to exclude evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). A trial court abuses its discretion only if its decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008). A trial court does not abuse its discretion if any evidence supports its decision. *See Osbourn v. State*, 92 S.W.3d 531, 538 (Tex. Crim. App. 2002). We will uphold the trial court's evidentiary ruling if it was correct on any theory of law applicable to the case. *See De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

At trial, appellant sought to admit Defendant's Exhibits 3 and 4, which were an affidavit and records from a University of California-Davis laboratory that purportedly showed the presence of Boomer's saliva in K.W.'s panties. Among the State's numerous objections to these exhibits were that the person who conducted the testing was not

present to testify at trial and that the exhibits violated articles 38.41 and 38.42 of the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. arts. 38.41, 38.42 (West Supp. 2016). The trial court sustained the State's objections.

Article 38.41 of the Code of Criminal Procedure speaks to certificates of analysis, allowing compliant certificates to be made part of the trial-court record and to satisfy evidentiary and constitutional thresholds, if the statute's requirements are met. *See id.* art. 38.41. Specifically, article 38.41 allows a proponent of scientific evidence to file with the clerk of the trial court a laboratory analysis or report. *Id.* If no objection is lodged, such a report is admissible at trial without the proponent's having to summon for live testimony the analyst who made the report. *See id.*; *see also Ray v. State*, No. 06-14-00106-CR, 2015 Tex. App. LEXIS 2828, at *11 (Tex. App.—Texarkana Mar. 26, 2015, pet. ref'd) (mem. op., not designated for publication). To satisfy article 38.41, the proponent must file the report with the clerk at least twenty days before trial. *See* TEX. CODE CRIM. PROC. ANN. art. 38.41, § 4; *see also Ray*, 2015 Tex. App. LEXIS 2828, at *11.

The record reveals that appellant filed the complained-of affidavit and UC-Davis records on September 4, 2015. Furthermore, the trial in this matter commenced on September 21, 2015. Because appellant did not file the complained-of documents at least twenty days before trial began, we cannot say that the trial court abused its discretion in excluding Defendant's Exhibits 3 and 4 under article 38.41 of the Code of Criminal

Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.41; *see also Martinez*, 327 S.W.3d at 736; *De La Paz*, 279 S.W.3d at 344.

Additionally, we note that the content of the exhibits—that Boomer's DNA was found in K.W.'s panties—was elicited without objection during Kniffen's testimony. Texas courts have held that "[a]ny error in excluding evidence is harmless if the same evidence is subsequently admitted without objection." *Khoshayand v. State*, 179 S.W.3d 779, 784 (Tex. App.—Dallas 2005, no pet.) (citing *Chamberlain v. State*, 998 S.W.2d 230, 235 (Tex. Crim. App. 1999); *McFarland v. State*, 845 S.W.2d 824, 840 (Tex. Crim. App. 1992)). Accordingly, even if the trial court erred in excluding the complained-of evidence, the error was harmless because the same evidence was subsequently admitted without objection. *See id.*; *see also Chamberlain*, 998 S.W.2d at 235; *McFarland*, 845 S.W.2d at 840. Therefore, based on the foregoing, we overrule appellant's third issue.

III. APPELLANT'S EXPERT WITNESS

In his fourth issue, appellant asserts that the trial court abused its discretion by excluding the testimony of his expert witness, psychologist Dr. William Flynn, concerning the lack of any evidence that the child victim had been coached or coerced to falsely report what happened to conceal appellant's purported involvement.

A. Applicable Law

We review a trial court's decision to admit or exclude expert testimony using an abuse-of-discretion standard. *See Ellison v. State*, 201 S.W.3d 714, 723 (Tex. Crim. App.

2006). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *See Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007).

The Texas Rules of Evidence set out three separate conditions regarding the admissibility of expert testimony. First, Rule 104(a) requires a trial judge to determine "[p]reliminary questions concerning the qualification of a person to be a witness." TEX. R. EVID. 104(a). Next, Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness is qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." *Id.* at R. 702. And finally, Rule 402 renders relevant evidence admissible. *Id.* at R 402. Rule 401 defines "relevant evidence" as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* at R. 401.

These rules require a trial judge to make three separate inquiries, all of which must be met before admitting expert testimony: "(1) the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and (3) admitting the expert testimony will actually assist the fact-finder in deciding the case." *Rodgers v. State*, 205 S.W.3d 525, 527 (Tex. Crim. App. 2006). These inquiries are commonly referred to as

qualification, reliability, and relevance, respectively. *See Vela v. State*, 209 S.W.3d 128, 131 (Tex. Crim. App. 2006).

B. Discussion

At trial, the primary focus of the State's challenge to Dr. Flynn's testimony was the reliability element. Reliability focuses on the subject matter of the witness's testimony; the proponent of the expert testimony must demonstrate by clear and convincing evidence that the expert testimony is reliable. *Russeau v. State*, 171 S.W.3d 871. 881 (Tex. Crim. App. 2005). To be considered sufficiently reliable, scientific evidence must meet the following criteria: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. *Vela*, 209 S.W.3d at 134; *see also Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992). Factors that could affect the trial court's determination of reliability include, but are not limited to: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the expert testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) a potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the

person(s) who applied the technique on the occasion in question. *Kelly*, 824 S.W.2d at 573; *see Jessop v. State*, 368 S.W.3d 653, 671 (Tex. App.—Austin 2012, no pet.).

At a hearing conducted outside the presence of the jury, Dr. Flynn noted that he was called to "offer an opinion on whether the child witness has a memory, a good enough memory of any event that actually occurred as opposed to a memory of something she has been coached in, for." Dr. Flynn later testified that the "Criterion Based Content Analysis, the C.B.C.A., those 14 items were critical and important in me determining that she had a good memory, but it's also true that the Validity Checklist with its 11 items is also critical in showing that the C.B.C.A. actually counts and is relevant and reliable." The C.B.C.A. and the Validity Checklist were "both critical in how [Dr. Flynn] came to [his] conclusions about her memory."

Dr. Flynn agreed that the C.B.C.A. "comes out of Statement Validity Analysis that originated in Germany." He also acknowledged that the techniques he used in this case have been challenged in court on the basis of "junk science." Furthermore, Dr. Flynn admitted that he is aware that multiple studies in the United States have found that this German theory of Statement Validity Analysis and the C.B.C.A. instrument he used are: (1) not appropriate for American forensic interviews; and (2) not reliable enough to be used in American courtrooms. In addition, Dr. Flynn agreed that: (1) the studies done in this area reveal a high rate of error, 30 percent, for the techniques he used; and (2) the relevant scientific community as a whole does not accept the Statement Validity Analysis

and the C.B.C.A. as reliable scientific procedures. And finally, Dr. Flynn testified that it is "probably" true that one of the leading experts in this area cautions against the use of Statement Validity Analysis and the C.B.C.A. to evaluate the validity of sexual-abuse allegations.

In light of the foregoing, the State objected to Dr. Flynn's testimony, primarily on the basis that his methodologies are unreliable. The trial court ultimately excluded Dr. Flynn's testimony. Based on our review of the record, we cannot say that the trial court abused its discretion in excluding Dr. Flynn's testimony. *See Casey*, 215 S.W.3d at 879; *see also Ellison*, 201 S.W.3d at 723. This is especially true because the methodologies used by Dr. Flynn in this case have been determined to be inappropriate for use in American forensic interviews and, in particular, in evaluating the validity of sexual-abuse allegations. Furthermore, these methodologies have a high rate of error and have been determined to be unreliable by at least one other Texas court. *See Salazar v. State*, 127 S.W.3d 355, 359-60 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) ("Therefore, based on Brown's own testimony, the trial court could have reasonably concluded that content-based criteria analysis was not generally accepted by the relevant scientific community, that study of the technique was still ongoing and far from complete, and that the potential for error in using the analysis was still great. . . . For these reasons, the trial court could have reasonably determined that Brown's testimony was not sufficiently reliable and thus was inadmissible."). Accordingly, we overrule appellant's fourth issue.

IV. THE JURY CHARGE

In his fifth issue, appellant argues that the charge was fundamentally erroneous because it submitted multiple, entirely speculative, theories of liability in Count 1 that implied: (1) that the jurors need not agree upon an actus reus in accordance with the evidence; and (2) that the State was not required to prove any specific conduct on the part of the appellant.

A. Standard of Review

In reviewing a jury-charge issue, an appellate court's first duty is to determine whether error exists in the jury charge. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). If error is found, the appellate court must analyze that error for harm. *Middleton v. State*, 125 S.W.3d 450, 453-54 (Tex. Crim. App. 2003). If error was properly preserved by objection, reversal will be necessary if the error is not harmless. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). Conversely, if error was not preserved at trial by a proper objection, as was the case here, a reversal will be granted only if the error presents egregious harm, meaning appellant did not receive a fair and impartial trial. *Id.* To obtain a reversal for jury-charge error, appellant must have suffered actual harm and not just merely theoretical harm. *Sanchez v. State*, 376 S.W.3d 767, 775 (Tex. Crim. App. 2012); *Arline v. State*, 721 S.W.2d 348, 352 (Tex. Crim. App. 1986).

B. Applicable Law

The Texas Constitution requires a unanimous verdict in felony criminal cases. TEX. CONST. art. V, § 13; *see* TEX. CODE CRIM. PROC. ANN. art. 36.29(a) (West Supp. 2016). A unanimous verdict is more than a mere agreement on a violation of a statute; it ensures that the jury agrees on the factual elements underlying an offense. *Francis v. State*, 36 S.W.3d 121, 125 (Tex. Crim. App. 2000) (op. on reh'g) (en banc). In other words, the jury must agree that the defendant committed "the same, single, specific criminal act," but need not unanimously find that the defendant committed that crime by one specific manner or means. *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005); *see Schad v. Arizona*, 501 U.S. 624, 631-32, 111 S. Ct. 2491, 115 L. Ed. 555 (1991).

> The phrase "manner or means" describes how the defendant committed the specific criminal act, which is the actus reus. *Ngo*, 175 S.W.3d at 745-46; *Schad*, 501 U.S. at 630 (noting that the act of "murder" was the actus reus of the offense, and whether it was premeditated or committed during the course of robbery described "how" the murder was committed). The State is permitted to plead alternate "manner and means" of committing the same offense. *Landrian* [*v. State*], 268 S.W.3d [532,] 535 [(Tex. Crim. App. 2008)]; *Martinez v. State*, 225 S.W.3d 550, 554 (Tex. Crim. App. 2007) (State is required to set out each separate offense in a separate count, but may allege different methods of committing the same offense in separate paragraphs within a single count).
>
> The Legislature has considerable discretion in defining crimes and the manner and means in which those crimes can be committed. *Landrian*, 268 S.W.3d at 536 (in deciding what elements and facts a jury must unanimously agree on, courts implement the legislative intent behind the penal provision). That legislative discretion is limited only by the Due Process Clause of the United States Constitution and by the Due Course of Law provision of the Texas Constitution. *Id.* at 535; *Schad*, 501 U.S. at 632 (stating that the Due Process Clause places limits on "a State's capacity to define different courses of conduct, or states of mind, as merely alternative means of committing a single offense, thereby permitting a defendant's

conviction without jury agreement as to which course or state actually occurred"). The question of what the jury must be unanimous about is determined by the legislative intent of the applicable statute. *Valdez v. State*, 218 S.W.3d 82, 84 (Tex. Crim. App. 2007) (it is the legislature, not the courts, that defines the forbidden act, the required culpability, and the particular result, if any); *Pizzo* [*v. State*], 235 S.W.3d [711,] 714 [(Tex. Crim. App. 2007)] (appellate court examines the statute defining the offense to determine whether legislature created multiple, separate offenses, or a single offense with different methods or means of commission).

The rule of thumb for determining what is the actus reus of an offense, i.e., the forbidden conduct about which the jury must be unanimous, and what is "the mere means of satisfying the actus reus element of an offense," is a simple "eighth grade grammar" test that looks to the statutory verb defining the criminal act. *Stuhler*, 218 S.W.3d at 717-19 (applying the test discussed in Justice Cochran's concurring opinion in *Jefferson v. State*, 189 S.W.3d 305, 314-16 (Tex. Crim. App. 2006) (Cochran, J., concurring)). Justice Cochran described the analysis as follows:

> In sum, we must return to eighth-grade grammar to determine what elements the jury must unanimously find beyond a reasonable doubt. At a minimum, these are: the subject (the defendant); the main verb; and the direct object if the main verb requires a direct object (i.e., the offense is a result-oriented crime); and the specific occasion (the date phrase within the indictment, but narrowed down to one specific incident regardless of the date alleged). Generally, adverbial phrases, introduced by the preposition "by," describe the manner and means of committing the offense. They are not the gravamen of the offense, nor elements on which the jury must be unanimous.

Jefferson, 189 S.W.3d at 315-16 (Cochran, J., concurring) (footnote omitted). Therefore, in order to identify the essential elements, or gravamen of the offense, on which the jury must be unanimous, the court diagrams the statutory text to discern (1) the subject, (2) the main verb, (3) the direct object of the verb if one is required, as it is for a result-oriented crime, (4) the requisite mental state, and (5) the specific occasion. *Pizzo*, 235 S.W.3d at 714-15. The means of commission, which are "nonessential unanimity elements," are generally set forth in adverbial phrases commonly introduced by the preposition "by" which describe how the offense was

committed. *Id.* at 715. Different means of commission may be presented in a disjunctive jury instruction when the charging instrument alleges the different means within a single count. *Id.*

Moreno v. State, 413 S.W.3d 119, 125-26 (Tex. App.—San Antonio 2013, no pet.).

C. Discussion

With regard to Count 1, the charge provided the following, in pertinent part:

> Now if you find from the evidence beyond a reasonable doubt that on or about the 24th day of March, 2014, in Johnson County, Texas, the defendant, JUSTIN SHANE WINSETT, did then and there intentionally or knowingly cause the penetration of the sexual organ of [K.W.], a child who was then and there younger than 14 years of age, by defendant's sexual organ, or by the defendant's finger, or by a sexual stimulation device that resembles the male sex organ, or by an object unknown to the Grand Jury, then you will find the defendant, JUSTIN SHANE WINSETT, guilty of the offense of Aggravated Sexual Assault of a Child as charged in Count One of the indictment.
>
> Unless you do find from the evidence beyond a reasonable doubt or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict not guilty.

Later, the charge stated:

> The prosecution has the burden of proving the defendant guilty, and it must do so by proving each and every element of the offense charged beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant.
>
> . . .
>
> After you retire to the jury room, you should select one of your members as your Presiding Jurors. It is his/her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate forms attached hereto.

The language of the charge pertaining to Count 1 tracks section 22.021 of the Penal Code—the operative statute for this count. *See Riddle v. State*, 888 S.W.2d 1, 8 (Tex. Crim. App. 1994) ("A jury charge which tracks the language of a particular statute is a proper charge on a statutory issue."); *see also Martinez v. State*, 924 S.W.2d 693, 699 (Tex. Crim. App. 1996). Furthermore, the language referencing appellant's sexual organ, his finger, a sexual-stimulation device, or an object unknown to the Grand Jury follows the word "by" in Count 1 of the charge and simply describes the "manner or means" by which the crime of aggravated sexual assault of a child was committed in this case. *See Moreno*, 413 S.W.3d at 125-26; *see also Jefferson*, 189 S.W.3d at 315-16. And as mentioned above, the jury did not need to unanimously conclude that appellant committed the charged offense by one specific manner or means. *See Schad*, 501 U.S. at 631-32; *see also Ngo*, 175 S.W.3d at 745. Rather, the jury only needed to conclude that appellant committed "the same, single, specific criminal act"—penetration of K.W.'s sexual organ. *See Schad*, 501 U.S. at 631-32; *Ngo*, 175 S.W.3d at 745; *see also Williams v. State*, 474 S.W.3d 850, 855 (Tex. App.—Texarkana 2015, no pet.) ("The gravamen of the offense of aggravated sexual assault of a child is penetration." (citing *Jourdan v. State*, 428 S.W.3d 86, 96 (Tex. Crim. App. 2014) ("Thus defined, the gravamen of the subsection is penetration, not the various and unspecified 'means' by which that penetration may be perpetrated, which are not elemental."))).

Therefore, based on the foregoing, we cannot say that the language in the charge pertaining to Count 1 is "fundamentally erroneous." *See Hutch*, 922 S.W.2d at 170. And because we reject appellant's contention that error exists in the charge as to Count 1, we need not proceed to a harm analysis. *See Middleton*, 125 S.W.3d at 453-54; *see also Hutch*, 922 S.W.2d at 170. We overrule appellant's fifth issue.

V. CONCLUSION

Having overruled all of appellant's issues on appeal, we affirm the judgments of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
(Chief Justice Gray concurring with a note)*
Affirmed
Opinion delivered and filed September 13, 2017
Do not publish
[CR25]

*(Chief Justice Gray concurs in the Court's judgment affirming the trial court's judgments. A separate opinion will not issue.)