COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

BRIAN MILLAN,		§	No. 08-19-00092-CR
	Appellant,	§	Appeal from the
v.		§	243rd Judicial District Court,
THE STATE OF TEXAS,		§	of El Paso County, Texas
	Appellee.	§	(TC# 20190D00102)

OPINION ON REHEARING

The Court issued its opinion and judgment on May 28, 2021, affirming Appellant Brian Millan's conviction. Appellant filed a motion for rehearing. The Court grants the motion for rehearing, withdraws its prior opinion and judgment and substitutes the following opinion in place of the previous one.

Appellant was found guilty by a jury of one count of the Class A misdemeanor offense of assault family violence, sentenced to one year in county jail, and placed on community supervision. Under the jury charge as given, Appellant could be found guilty of the Class A misdemeanor offense of assault family violence if the jury found, beyond a reasonable doubt, that he committed an assault on either one of two specified dates. For both dates, the trial court admitted videotaped statements of the complaining witness over Appellant's objection that the statements violated his

Sixth Amendment rights. We sustain those issues and further conclude that we cannot say beyond a reasonable doubt that the admission of the videotape did not contribute to Appellant's conviction or affect his sentence. We reverse the trial court's judgment and remand for a new trial.

PROCEDURAL BACKGROUND

The complaining witness, Bunni Martinez, was in an on-again, off-again dating relationship with Appellant, and the mother of his two children. Stemming from two incidents in which he allegedly assaulted Martinez on February 26, 2018, by unspecified means, and again on May 12, 2018, by striking her face or head with this hand, Appellant was charged with one count of continuous violence against a family member.[1] Appellant was also charged with two counts of child endangerment, alleging that during the May 12th incident, he pulled on the steering wheel of a car being driven by Martinez, while their two children were in the car, placing them in danger. The jury returned not guilty verdicts on each of these three charges.

But the jury was also asked if Appellant committed the lesser included offense of assault by family violence. Under that jury question, Appellant could be found guilty if he committed *either* the assault on February 26th, by biting Martinez's body, *or* the May 12th assault by striking her face or head with his hand. The jury found him guilty of the lesser included offense of assault family violence. Nothing in the verdict form tells us which of the two events (or possibly both) was the basis of the jury's answer.

A. The Videotaped Statements

After each of the two alleged assaults, Martinez gave videotaped statements while at a police station. In each of the statements, she described the events leading up to, and the details of the alleged assault. For the February 26th incident, she described how Appellant became upset

[1] TEX.PENAL CODE ANN. § 25.11.

with her, and reluctantly came to pick her up, when her car would not start at a school's parking lot. Upon his arrival, Appellant yelled at her as she was transferring their children's two car seats from her car into his vehicle. Despite her protestations, Appellant then drove to his friend's house, rather than take her home. When they arrived at the friend's house, the argument escalated when she tried to take the car seats out of his car. Appellant then pulled her inside his vehicle and drove away from the friend's house. She recounted that Appellant began hitting her as she tried to exit the vehicle, and then bit her two or three times on the buttocks while she tried to crawl into the backseat. After Martinez managed to exit the vehicle, Appellant drove away, and she was assisted by two good Samaritans who called 911 on her behalf.

For the May 12th incident, Martinez is seen in the videotape with dried blood on her face, looking visibly upset. She reported that following a fight with Appellant, she advised him that she was leaving his residence to go to her mother's house. Appellant first assisted Martinez with putting her things in the car. But he soon got into the car and refused to leave. Martinez drove away with Appellant in the passenger seat and their two children, ages two and one, in the back seat. As she was driving to her mother's house, Appellant hit her in the face. Appellant also tried to stop the car by grabbing the gear knob and her keys, and he also grabbed the steering wheel three or four times, which caused the car to swerve off the road at least twice. When asked if this was the first time that he had assaulted her, she referred to the February incident in which Appellant had bitten her, as well as a prior incident in which he had allegedly choked her in front of his family members.

B. Appellant Challenges the Admissibility of the Videotapes

Before trial, the State alerted the trial court of its intent to admit the two videotaped statements, claiming that they were both admissible under the excited utterance exception to the

hearsay rule. Appellant objected, arguing that they did not fit within that exception, and that their admission would violate his constitutional right to confront witnesses because it was unclear at the time whether Martinez intended to appear in court for trial. Because of the uncertainty of whether Martinez would appear, the trial court first deferred ruling on the request. At any rate, Martinez did appear in court, and while the State was presenting evidence of the February 26th incident, it renewed its request to admit the February videotaped statement. In response, Appellant again objected that the videotape was inadmissible hearsay and violated his right to confront witnesses. The trial court, however, concluded that the statement was admissible as an excited utterance, and that Appellant's right to confrontation would not be violated as Martinez had appeared in court and he would therefore be able to confront her about her statement when she was called as a witness.

C. Martinez Testifies, but Soon Invokes the Fifth Amendment

When Martinez took the stand, she testified to the same events that led up to the February 26th assault, including that Appellant was upset when she called him to assist her with her car and refused to take her home. But in contrast to her recorded statement, she testified that she played an active role in the struggle that ensued after Appellant refused to take her home, claiming that she pinched his arm several times, shoved him, and kicked him as she was trying to exit the car. Martinez was, however, consistent in testifying that Appellant bit her on her "butt cheek" as she was trying to exit the car though the back seat.

Upon questioning by the State, Martinez acknowledged that she had included additional facts in her testimony that she had not revealed to police in her videotaped statement. Martinez, however, denied that she was changing her story because she was scared of Appellant, and instead claimed that she was doing so based on her obligation to tell the truth in court. At defense counsel's

behest, the court spoke with Martinez outside the presence of the jury and advised her of the possible consequences if it were later determined that she was not telling the truth. The court further advised Martinez that she might need legal counsel, and after she agreed, the court appointed an attorney from the public defender's officer to represent her. Then the State continued its questioning of Martinez about both the February and the May incidents, but Martinez responded to almost every question by stating that she was invoking the Fifth Amendment upon advice of her counsel. The only exception was when the State asked her if the person who was the "subject of all of our conversation" was in the courtroom, and she responded by identifying Appellant.

D. The Trial Court Admits the Videotaped Statement on the May Incident

The State thereafter moved once again to introduce the recording of Martinez's videotaped statement of the May 12th incident, this time contending that it was admissible as a "past recollection recorded." Once again, Appellant objected to its admission, because he could no longer confront Martinez as a witness, given her repeated invocation of the Fifth Amendment, and that playing the videotape would violate his Sixth Amendment right to confront his accuser. The trial court, however, responded that Appellant did not yet know what Martinez's testimony would be on cross-examination, and allowed the videotaped statement into evidence.

Following the presentation of the videotape, Appellant's attorney tried to cross-examine Martinez about the two incidents, but Martinez once again repeatedly invoked the Fifth Amendment, and refused to answer any of his questions.

E. The Verdict and Punishment

The trial court instructed the jury that in order to find Appellant guilty of continuous family violence, it needed to find that Appellant had engaged in conduct two or more times during a 12-month period that constituted an offense of assault against Martinez; in particular, the trial court

instructed the jury that it was required to find that Appellant bit Martinez on her body during the February 26th incident and that he struck her face or head with his hand during the May 12th incident. The trial court also instructed the jury on the lesser included offense of assault by family violence, advising the jury that it could find Appellant guilty of the lesser included offense if it found that he had committed either the assault on February 26th (by biting Martinez's body), or the May 12th assault (by striking her face or head with his hand).

The jury found Appellant not guilty of the two counts of child endangerment stemming from the May 12th incident, as well as not guilty of the offense of continuous family violence. But the jury was also asked if Appellant committed the lesser included offense of assault by family violence. Under that jury question, Appellant could be found guilty if he committed either the assault on February 26, by biting Martinez's body, *or* the May 12 assault by striking her face or head with his hand.[2] The jury found him guilty of the lesser included offense, but did not specify which of the two incidents on which it was basing its verdict. Later, the jury assessed Appellant a one-year term in county jail, but recommended that the sentence be probated, and that Appellant be placed on community supervision. The trial court entered a judgment of conviction in accordance with the sentence recommended by the jury, and this appeal followed.

---

[2] The charge read as follows:

> Now if you find from the evidence beyond a reasonable doubt that the Defendant, BRIAN MILLAN, in El Paso County, Texas, against a member of the defendant's family or a member of the defendant's household, or a person with whom the defendant has or has had a dating relationship, intentionally, knowingly, or recklessly caused bodily injury to Bunni Martinez, by striking her about the face or head with the hand of the defendant on or about the 12th day of May, 2018, or by biting Bunni Martinez about the body on the 26th day of February, 2018, then you will find the Defendant, BRIAN MILLAN, Guilty of the Lesser-Include offense of Assault Family Violence (Verdict Form G).
>
> Unless you so find beyond a reasonable doubt or if you have a reasonable doubt thereof, you will find the Defendant, BRIAN MILLAN, Not Guilty of the Lesser Included offense of Assault Family Violence (Verdict Form H).

The jury signed verdict Form G.

I. ISSUES ON APPEAL

In Issues One through Four, Appellant contends that the trial court erred in admitting Martinez's two videotaped statements, arguing that the admission of the statements violated the rule against hearsay, and his Sixth Amendment right to confront witnesses. The State responds that both videotapes were admissible as excited utterances, but by failing to address the issue in its briefing, it tacitly acknowledges that their admission violated Appellant's Sixth Amendment right to confront witnesses given Martinez's invocation of her Fifth Amendment rights. Additionally, the State argues that the trial court's error in admitting the videotapes was harmless beyond a reasonable doubt. On this last point, we disagree with the State, as we cannot declare ourselves satisfied, to a level of confidence beyond a reasonable doubt, that the admission of the February 26th and May 12th videotapes did not contribute to Appellant's conviction or punishment.[3]

II. ADMISSIBILITY OF THE VIDEOTAPED STATEMENTS

Appellant challenges the admissibility of both the February 26th and May 12th videotaped statements under both the Confrontation Clause and the hearsay rule.

A. Standard of Review and Applicable Law: Confrontation Clause

The Sixth Amendment guarantees an accused, in all federal and state prosecutions, the right "to be confronted with the witnesses against him." U.S. CONST. AMENDS. VI, XIV; *Crawford v. Washington*, 541 U.S. 36, 42 (2004). Under the U.S. Supreme Court's holding in *Crawford*, confrontation rights are implicated when an out-of-court statement is made by an absent witness,

[3] Appellant also raises in his fifth and sixth issues whether the trial court also erred in allowing two of the investigating police officers to testify indirectly to statements that Martinez made to them at the police station, arguing that their testimony constituted "backdoor" hearsay. Given our resolution of the first four issues, we need not address these additional evidentiary challenges, which seek the same appellate relief as his first four issues.

and that statement is testimonial in nature. *Crawford*, 541 U.S. at 50-52. "Testimonial" statements may include statements taken by police officers in the course of interrogations and custodial examinations, as well as similar pretrial statements the declarant would "reasonably expect to be used prosecutorially." *Id.* at 52, 68; *see also Langham v. State*, 305 S.W.3d 568, 576 (Tex.Crim.App. 2010), *citing Wall v. State*, 184 S.W.3d 730, 735 (Tex.Crim.App. 2006); *see also In re M.H.V.-P.*, 341 S.W.3d 553, 557-58 (Tex.App.--El Paso 2011, no pet.) (there is little doubt that statements made during formal police interrogations are testimonial in nature). In particular the Court has recognized that an accuser who makes a formal statement to government officers "bears testimony." *Crawford*, 541 U.S. at 51. Under *Crawford*, testimonial statements are admissible only if (1) the declarant is unavailable at trial, and (2) the defendant had a prior opportunity to cross-examine the declarant. *Id.* at 53-54.

Once an objection is made based on *Crawford*, the proponent of a statement made by an unavailable witness bears the burden of demonstrating its admissibility. *See De La Paz v. State*, 273 S.W.3d 671, 680-81 (Tex.Crim.App. 2008) (once defendant objected to the admission of evidence under *Crawford*, the burden shifted to the State, as the proponent of that evidence, to establish that it was admissible under *Crawford*). And in determining whether a trial court erred in overruling a *Crawford* objection, we review the trial court's ruling de novo. *In re M.H.V.-P.*, 341 S.W.3d at 556, *citing Wall*, 184 S.W.3d at 742; *see also Mendoza v. State*, No. 08-17-00230-CR, 2019 WL 6271271, at *4 (Tex.App.--El Paso Nov. 25, 2019, pet. ref'd) (not designated for publication).

B. Did Appellant Preserve His Sixth Amendment Argument for Our Review?

The State argues that as to the February videotaped statement, Appellant failed to preserve error. It claims that although Appellant first raised a Confrontation Clause objection to the

admission of the evidence before trial when the parties believed that Martinez was not going to appear to testify, he did not renew his objection after Martinez exercised her Fifth Amendment right to remain silent. The State contends that because the videotape had been admitted before this new ground for denying its admission arose, Appellant needed to renew his objection by moving to strike the videotape at that time, and that because he failed to do so, he did not preserve his Sixth Amendment argument for appeal. We disagree.

The right of confrontation is a trial right that must be preserved by a timely and specific objection. *Mallory v. State*, 752 S.W.2d 566, 569 (Tex.Crim.App. 1988) (en banc); *see also Paredes v. State*, 129 S.W.3d 530, 535 (Tex.Crim.App. 2004) (where defendant only objected to the admission of a witness's testimony on hearsay grounds, and not on Confrontation Clause grounds, he failed to preserve Confrontation Clause argument for appeal); *Ortiz v. State*, No. 08-15-00344-CR, 2017 WL 3667829, at *4 (Tex.App.--El Paso Aug. 25, 2017, pet. ref'd) (not designated for publication) (holding that a Confrontation Clause complaint is not fundamental error and is thus waived on appeal if a defendant fails to object at trial on that basis).

Here, Appellant made repeated objections to the admission of both the February and the May videotapes on Sixth Amendment grounds both before trial, and each time the State sought to admit them. The only question then, is whether Appellant needed to renew his objection and move to strike the already-admitted February videotape from the record after Martinez invoked her Fifth Amendment right to remain silent. In support of its argument that Appellant needed to do so, the State relies only on our sister court's holding in *Gordillo v. State*, No. 01-13-00477-CR, 2015 WL 730593, at *3 (Tex.App.--Houston [1st Dist.] Feb. 19, 2015, no pet.) (mem. op., not designated for publication). In that case, a defendant argued on appeal that he was denied his Sixth Amendment right to cross-examine a witness about the witness's immigration status because the

witness invoked the Fifth Amendment right not to incriminate himself in response to the defendant's questions. *Id.* The court, however, held that he did not preserve his Sixth Amendment argument, as his only argument in the trial court was that he was denied his right to impeach the witness's credibility without mention of the constitutional confrontation right. *Id.* at 4. In reaching its conclusion, the court further noted that the defendant did not move to strike the witness's direct testimony after he invoked his Fifth Amendment rights. *Id.*

As discussed above, however, and unlike the defendant in *Gordillo*, Appellant made repeated Sixth Amendment objections to the admission of the February videotape before its admission. Although he did not move to strike the February videotape after Martinez invoked her Fifth Amendment rights, he did argue that his Sixth Amendment rights were violated due to her invocation of the Fifth Amendment, given his inability to cross-examine Martinez, when the State later sought admission of the May videotape. Under these circumstances, when viewing the record as a whole, we believe that Appellant sufficiently conveyed his Sixth Amendment objection to the trial court and did so at a time when the trial court could correct the error. *See Reyna v. State*, 168 S.W.3d 173, 179 (Tex.Crim.App. 2005) (recognizing that the "purpose of requiring [an] objection is to give to the trial court or the opposing party the opportunity to correct the error or remove the basis for the objection."); *see also Douds v. State*, 472 S.W.3d 670, 674 (Tex.Crim.App. 2015) (recognizing that trial court must resolve questions of error preservation in the "context of the entire record," and should not consider arguments in isolation). As the Texas Court of Criminal Appeals has recognized, "all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App. 1992) (en banc). We

believe that Appellant has met that standard, and we therefore decline to find a forfeiture under these circumstances.

C. Admission of the February and May Videotapes Violated Appellant's Sixth Amendment Rights

Appellant contends that the admission of both videotapes violated his Sixth Amendment Confrontation Clause rights, given Martinez's invocation of her Fifth Amendment right and her refusal to answer his questions about the February and May incidents on cross-examination. We agree. Martinez's statements were testimonial, as they were made in a formal setting, in response to a police investigation, and under circumstances that a reasonable person in Martinez's position would have understood to be intended for prosecutorial use. *See Wall*, 184 S.W.3d at 742 (even if statement qualified as an excited utterance, it could still be considered testimonial if the declarant, despite being dominated by the emotions of a startling event, had the capacity "to appreciate the legal ramifications of her statement."). And Martinez became unavailable for cross-examination when she invoked her Fifth Amendment rights. *See Keller v. State*, 662 S.W.2d 362, 364 (Tex.Crim.App. 1984) (en banc) (recognizing that when a defendant is prevented from cross-examining a prosecution witness due to the witness's invocation of his Fifth Amendment privilege against self-incrimination, the defendant's Sixth Amendment rights are implicated); *see also* TEX.R.EVID. 804(a)(1), (2) (a declarant is unavailable as a witness if the declarant: "(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies [or] (2) refuses to testify about the subject matter despite a court order to do so"). Finally, Appellant had no prior opportunity to cross-examine her. In response, the State does not dispute any of these points.

D. We Decline to Reach the Hearsay Issue

While Appellant also contends that the admission of the two statements violates the hearsay

rule (measured against the State's claim that they were excited utterances), we have no need to address that issue. The harm standard for a Confrontation Clause violation requires a reversal unless we are convinced beyond a reasonable doubt that the error did not lead to the rendition of an improper judgment. TEX.R.APP.P. 44.2(a). Yet any error based on the hearsay rule would invoke the more lenient harm standard of Rule 44.2(b). Because we have found constitutional error, and will apply the stricter Rule 44.2(a) harm standard for that error, there is no need to address the hearsay error, if any.

E. Harm Analysis

1. The paradox of the two events

To begin, we find it necessary to recognize—as both parties do—that because of how the jury was charged on the lesser included offense, we do not know which of the two incidents the jury relied on in finding Appellant guilty of the lesser included offense. As explained above, the trial court instructed the jury in the disjunctive that it could find Appellant guilty of the lesser included offense of assault family violence if it found that he had committed either the February incident or the May incident. Added to that, the jury charge did not inform the jury of the need to unanimously agree on which of the two incidents Appellant committed in reaching its verdict.

In Texas, a jury must unanimously agree about the occurrence of a single criminal offense in both felony and misdemeanor cases, but need not agree on the specific manner and means by which a single offense was committed. *See Jefferson v. State*, 189 S.W.3d 305, 311 (Tex.Crim.App. 2006) (under "our state constitution, jury unanimity is required in felony cases, and, under our state statutes, unanimity is required in all criminal cases."), *citing Ngo v. State*, 175 S.W.3d 738, 745 (Tex.Crim.App. 2005) (en banc); *see also Young v. State*, 341 S.W.3d 417, 422 n.15 (Tex.Crim.App. 2011) (recognizing jury unanimity requirement in misdemeanor cases),

citing TEX.CODE CRIM.PROC.ANN. arts. 37.02 (requiring unanimous verdicts in misdemeanors), 37.03 (verdicts in county court "must be concurred in by each juror"), and 37.04 (verdict cannot be entered unless "in proper form and no juror dissents therefrom"). To be unanimous, the "jury must 'agree upon a single and discrete incident that would constitute the commission of the offense alleged.'" *Cosio v. State*, 353 S.W.3d 766, 771 (Tex.Crim.App. 2011) *quoting Stuhler v. State*, 218 S.W.3d 706, 717 (Tex.Crim.App. 2007). Thus, a court may not instruct the jury in the disjunctive, as it did here, with regard to separate offenses without informing the jury of the need to unanimously agree on which of the offenses (or criminal acts) the defendant committed in reaching its verdict. *Ngo*, 175 S.W.3d at 745; *see also Francis v. State*, 36 S.W.3d 121, 124–25 (Tex.Crim.App. 2000) (en banc) (op. on reh'g); *Timmons v. State*, No. 05-19-00126-CR, 2020 WL 2110708, at *3 (Tex.App.--Dallas May 4, 2020, pet. ref'd) (mem. op., not designated for publication) (appellant was deprived of his right to a unanimous verdict, where he was charged with continuous sexual abuse of a child consisting of three separate incidents of forced oral sex, and the jury was instructed that it could find him guilty of the lesser-included offense of aggravated sexual assault of a child if it found that he committed only one of the acts, where charge failed to instruct the jury that it needed to agree on which of the three incidents he committed); *Clear v. State*, 76 S.W.3d 622, 623 (Tex.App.--Corpus Christi 2002, no pet.) (trial court committed egregious error by submitting a charge to the jury that allowed a conviction upon a disjunctive finding among three separate offenses). Here, the trial court not only failed to instruct the jury on the need to unanimously agree on which of the two assaults it believed occurred to support its verdict, but the State expressly informed the jury during closing argument that it did not have to agree on which one of the two assaults occurred in order to convict Appellant of the lesser included offense of assault family violence. We therefore have no way of knowing which of the two offenses

the jury relied on in finding him guilty.

Although Appellant did not object to the jury charge in the trial court, and does not raise an issue of jury unanimity on appeal, we point out this anomaly to explain the unique problem presented in the harm analysis: we are tasked in deciding whether the error, beyond a reasonable doubt, did not contribute to the conviction or punishment, yet we cannot determine which offense the jury based its verdict on.

2. Standard for harm

Confrontation Clause errors under *Crawford* are evaluated using a *Chapman* harmless-error analysis. *See Davis v. State*, 203 S.W.3d 845, 850 (Tex.Crim.App. 2006), *citing Chapman v. California*, 386 U.S. 18 (1967). The correct inquiry in conducting such a harm analysis is "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Id.* In applying such a harm analysis in determining whether a defendant was harmed by the admission of evidence in violation of his Sixth Amendment rights, we are guided by the following list of nonexclusive factors: 1) the importance of the evidence to the State's case; 2) whether the evidence was cumulative of other evidence; 3) the presence or absence of evidence corroborating or contradicting the statement on material points; and 4) the overall strength of the prosecution's case. *Langham*, 305 S.W.3d at 582, *citing Scott v. State*, 227 S.W.3d 670 (Tex.Crim.App. 2007); *see also Davis*, 203 S.W.3d at 852 (citing forth the same factors). A reviewing court may also consider other relevant factors, including "the source and nature of the error, to what extent, if any, it was emphasized by the State, and how weighty the jury may have found the erroneously admitted evidence to be compared to the balance of the evidence with respect to the element or defensive issue to which it is relevant." *Scott*, 227 S.W.3d at 690. As the Court of Criminal Appeals has

noted, the question for the reviewing court is not whether the jury verdict was supported by the evidence, but whether the "constitutional error was actually a contributing factor in the jury's deliberations in arriving at that verdict—whether, in other words, the error adversely affected 'the integrity of the process leading to the conviction.'" *Id.* In short, the "reviewing court must ask itself whether there is a reasonable possibility that the *Crawford* error moved the jury from a state of non-persuasion to one of persuasion," and at the end of our review, we must be able to declare ourselves satisfied, to a level of confidence beyond a reasonable doubt, that the error did not contribute to the conviction before we can affirm it. *Scott*, 227 S.W.3d at 690-91, *citing* TEX.R.APP.P. 44.2(a); *Chapman*, 386 U.S. at 24; *Davis*, 203 S.W.3d at 852–53.

3. The May 12th event

a. The importance to the State's case

The State acknowledges that the May 12th videotape was important to its case, and we agree. The May videotape directly linked Appellant to the assault, and as explained below, was the key, if not the only, piece of evidence that directly linked Appellant to the assault. The State repeatedly referred to the videotapes in its closing argument, emphasizing their importance to the State's case. So this factor weighs in favor of a finding of harm.

b. Whether the videotape was cumulative of other evidence

The State next acknowledges that the May videotape was not merely cumulative of the other evidence it presented at trial, and once again, we agree. In the May videotape, Martinez provided a detailed account of the events preceding the assault, as well as the assault itself, and identified Appellant as her assailant. As the State recognizes, unlike the situation with the February incident, Martinez did not provide any testimony on the May assault, and there was no other evidence describing the details of the assault itself, or identifying Appellant as the perpetrator of

the assault. We therefore find that this factor also supports a finding of harm.

c. The existence of corroborating or conflicting evidence

The State, however, contends that it presented corroborating evidence of the assault, first pointing to the officer's testimony who interviewed Martinez that she came to the police station to report an assault, and second pointing to photographs that were taken at the station showing the injuries to Martinez's face. While the officer's testimony and the photographs confirmed that an assault took place, they did not provide any evidence that Appellant was her assailant. Instead, that evidence came solely from Martinez's recorded statement.[4]

The State also relies on a recording of a 911 call that it introduced into evidence, without objection, in which a caller reported seeing male and female fighting in a car the same day that Martinez reported the May assault, and that the "lady" was being "beaten" by the male. Yet the State failed to directly link the recording to Appellant's case. In particular, although the caller provided a license plate number of the car, the State never presented any evidence for the ownership of the car. Further, while the caller did identify the male assailant as having short black hair, she did not provide any other description of the male, and she did not appear in court to identify Appellant as the assailant.

Accordingly, while the State did present evidence to corroborate the fact that Martinez was assaulted that day, it presented no evidence to corroborate that Appellant was her assailant. We therefore find that this factor favors a finding of harm.

d. The strength of the State's case and other factors

Without any other evidence linking Appellant to the offense, the State clearly did not have

[4] Martinez did identify Appellant in court when asked by the State if the person who was the "subject of all of our conversation" was in the courtroom. But at that point, Martinez had been repeatedly invoking her Fifth Amendment rights, and it was unclear exactly what the State was asking or what her response meant.

a strong case against Appellant without the statements that Martinez made in the May videotape linking Appellant to the assault. The State, however, claims that the admission of the May videotape also helped Appellant's case in terms of diminishing Martinez's credibility. We disagree. Martinez did not provide any conflicting details about the May incident that could be used to assail her credibility. To the contrary, the May videotape was the only account of the assault presented at the trial. And while Martinez's credibility may have been doubted by the fact that she invoked her Fifth Amendment rights for both incidents, this does not affect whether the admission of the videotapes themselves were helpful or harmful to Appellant's case. We thus find that this factor also supports a finding of harm.

As we have found that all four factors in our analysis favor a finding of harm, we cannot say, beyond a reasonable doubt, that the admission of the videotape did not adversely affect the integrity of the process leading to Appellant's conviction, or otherwise contribute to the jury's finding of guilt.

4. The February event

On rehearing, Appellant challenges the rationale in our original opinion that the conviction could be upheld based on the assumption that the jury could have unanimously agreed the evidence proved the February event beyond a reasonable doubt—even without the use of the videotaped interview of the complaining witness for that incident. We agree with two of Appellant's argument on rehearing. First, in a number of other contexts, appellate court are counseled against making assumptions about how a jury might have reached a verdict. *See Williams v. United States*, 238 F.2d 215, 220 (5th Cir. 1956) ("There is no power in the trial or the appellate courts to speculate about what the jury might have based their verdict on in view of the erroneous charge[.]"); *United States v. Powell*, 469 U.S. 57, 66 (1984) (in the context of inconsistent verdict finding,

"individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake."); *State v. Ramos*, 479 S.W.3d 500, 509 (Tex.App.--El Paso 2015, no pet.) (same); *Balderas v. State*, 517 S.W.3d 756, 790 (Tex.Crim.App. 2016) (declining to accept defendant's speculation on how jury changed its position based on claimed outside influence). We are particularly disinclined to speculate on which offense a jury based its verdict on from a charge erroneous on its face. *See Ngo*, 175 S.W.3d at 745.

Second, even if the other evidence might support the conviction, the videotaped statement for both events was before the jury when it determined punishment, and we cannot say beyond a reasonable doubt that the first-hand account of the complaining witness would not have impacted the jury's punishment verdict. We review the improper admission of evidence for its effect on both guilt-innocence and punishment findings. TEX.R.APP.P. 44.2(a) (". . . the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment."). Without the February video, the jury only knew that Appellant bit Martinez after he was pinched, jumped on, and kicked. The video added Martinez's claim that Appellant yelled and screamed at her, had committed a previous assault, and choked her. It added a reference to him cheating on her. Much the same can be said of the May video. Absent that video, the jury would not have heard Martinez' claim of a previous uncharged choking allegation. She also claims Appellant pushed her when she was pregnant. These other claims were all uncontested, as Appellant never had the chance to cross-examine Martinez about them.

The jury assessed the maximum time that it could for a misdemeanor assault-365 days' imprisonment and a fine of $4,000.; TEX.PENAL CODE ANN. § 12.21 (stating that punishment for

a Class A misdemeanor is not to exceed 365 days' incarceration, a $4,000 fine, or both such fine and incarceration); TEX.PENAL CODE ANN. § 22.01(b) (stating that assault causes bodily injury against a family member is a Class A misdemeanor). The State responds that the jury also recommended community supervision, and that the trial judge ordered community supervision for 365 days when the statute would have allowed a longer term. *See* TEX.CODE CRIM.PROC.ANN. art. 42A.053(f) (stating that the maximum period of community supervision in a misdemeanor case is 2 years). Yet the jury still assessed the longest term and the highest fine that it could. We cannot say beyond a reasonable doubt that the two videotaped statements, which contain so much material outside the rest of record, had no influence on the punishment finding.

Appellant's Issues One and Three are sustained.[5]

III. CONCLUSION

For the reasons set forth above, we reverse Appellant's conviction and remand for a new trial.

JEFF ALLEY, Justice

December 8, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.

(Do Not Publish)

[5] In light of our disposition of Issues Three and Four, we need not address the other issues Appellant raises.