COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JORGE CARBAJAL,		§	08-20-00069-CR
	Appellant,	§	Appeal from the
v.		§	41st District Court
THE STATE OF TEXAS,		§	of El Paso County, Texas
	Appellee.	§	(TC# 20200D00106)

O P I N I O N

Appellant Jorge Carbajal was convicted by a jury of four offenses, two sexual and two assaultive, spread over thirteen counts. As to each count, the jury also found true that Carbajal had previously been convicted of the felony offense of aggravated assault with a deadly weapon. For punishment, the jury assessed a term of confinement for life and a $10,000 fine for each count. Imposing the jury's life sentences as to each count, the trial court rendered four judgments of conviction, grouped by each offense charged, as follows: (1) continuous sexual abuse of a child victim under fourteen (Count I), *see* TEX. PENAL CODE ANN. § 21.02; (2) sexual assault of a child (Counts II-V, and VII-XI), *see id.* § 22.011(A)(2); (3) indecency with a child by sexual contact (Count XII), *see id.* § 21.11(a)(1); and (4) sexual assault (Counts XIII and XIV), *see id.* § 22.011(A)(1). All sentences as listed above to run concurrently.

Carbajal advances six issues on appeal addressing a variety of topics. He challenges the sufficiency of the evidence as to two counts. He asserts a constitutional claim against an offense charged, and also with regard to the State's failure to elect acts relied on for conviction, except as to the one count of continuous sexual abuse of a child. Additionally, with regard to evidentiary rulings and closing arguments, he asserts the trial court erred in admitting overly prejudicial evidence in the guilt phase of trial, and in permitting improper jury argument during the punishment phase. Because the State concedes his double-jeopardy argument has merit as to Count XI, and we agree, we reverse and render a judgment of acquittal with respect to that count only. Otherwise, finding no error as to all remaining counts and all remaining issues, we modify each judgment rendered and affirm as modified.

I. BACKGROUND

A. The indictment

In a fourteen-count indictment, Carbajal was charged with multiple sexual offenses committed against Jane, a child born in late April 2001.[1] The indictment charged counts by type of offense, by prohibited acts, and by time frame based on Jane's age. Each count included an enhancement paragraph charging that Carbajal had been finally convicted of the felony offense of aggravated assault with a deadly weapon in 2002. During trial, the State abandoned one count (Count VI).

As submitted to the jury, Count XII charged one count of indecency with a child by sexual contact occurring on or before April 2011, the earliest timeframe alleged. Next, Count I alleged multiple predicate charges under an overarching charge of continuous abuse of a child under age

[1] Because the complaint was a minor at the time of the offenses, we refer to her by the pseudonym of "Jane" as provided by appellee's briefing. *See* TEX. R. APP. P. 9.10(a)(3)(providing for privacy protection of any person who was a minor at the time the offense was committed); *McClendon v. State*, 643 S.W.2d 936, 936 n.1 (Tex. Crim. App. [Panel Op.] 1982).

fourteen occurring between April 27, 2011 and April 1, 2015, when Jane was ten through thirteen years old. These two counts were presented in substance, but not word for word, as follows:

> **Count I: Continuous Sexual Abuse of a Child under 14**:
> During a period that was 30 or more days in duration, to-wit, from on or about April 27, 2011 through April 1, 2015, Carbajal committed two or more acts of sexual abuse against Jane, a child younger than 14 years of age, namely:
>
> > Indecency with a Child: By then and there intentionally or knowingly, with intent to arouse or gratify Carbajal's sexual desires, causing Jane to engage in sexual contact by causing Jane to touch Carbajal's genitals;
> >
> > Aggravated Sexual Assault of a Child: By then and there intentionally or knowingly causing the sexual organ of Jane to contact Carbajal's mouth;
> >
> > Aggravated Sexual Assault of a Child: By then and there intentionally or knowingly causing the penetration of the mouth of Jane by Carbajal's sexual organ;
> >
> > Aggravated Sexual Assault of a Child: By then and there intentionally or knowingly causing the penetration of the sexual organ of Jane by Carbajal's sexual organ; or
> >
> > Aggravated Sexual Assault of a Child: By then and there intentionally or knowingly causing the penetration of the sexual organ of Jane with a brush.
>
> **Count XII: Indecency with a Child by Sexual Contact**:
> On or about April 28, 2011, Carbajal did then and there intentionally and knowingly, with intent to arouse and gratify the sexual desire of defendant, engaged in sexual contact with Jane, a child younger than 17 years of age, by touching Jane's breast.

In contrast to those counts, the on-or-about dates used in Counts II through XI were dated after Jane turned fourteen years old but before she reached her seventeenth birthday, April 27, 2015 through April 28, 2017, presented in substance as follows:

> **Count II: Sexual Assault of a Child**:
> On or about April 27, 2015, Carbajal did then and there intentionally and knowingly cause the penetration of the sexual organ of Jane, a child younger than 17, by Carbajal's sexual organ.
>
> **Count III: Sexual Assault of a Child**:
> On or about April 28, 2015, Carbajal did then and there intentionally and knowingly cause the penetration of the sexual organ of Jane, a child younger than 17, with a brush.
>
> **Count IV: Sexual Assault of a Child**:
> On or about April 27, 2015, Carbajal did then and there intentionally and knowingly cause

the penetration of the mouth of Jane, a child younger than 17, by Carbajal's sexual organ.

Count V: Sexual Assault of a Child:
On or about April 27, 2016, Carbajal did then and there intentionally and knowingly cause the penetration of the sexual organ of Jane, a child younger than 17, by Carbajal's sexual organ.

Count VII: Sexual Assault of a Child:
On or about April 28, 2016, Carbajal did then and there intentionally and knowingly cause the penetration of the sexual organ of Jane, a child younger than 17, with a brush.

Count VIII: Sexual Assault of a Child:
On or about April 27, 2017, Carbajal did then and there intentionally and knowingly cause the penetration of the mouth of Jane, a child younger than 17, by Carbajal's sexual organ.

Count IX: Sexual Assault of a Child:
On or about April 27, 2017, Carbajal did then and there intentionally and knowingly cause the penetration of the sexual organ of Jane, a child younger than 17, by Carbajal's sexual organ.

Count X: Sexual Assault of a Child:
On or about April 28, 2017, Carbajal did then and there intentionally and knowingly cause the penetration of the sexual organ of Jane, a child younger than 17, with a brush.

Count XI: Sexual Assault of a Child:
On or about April 27, 2017, Carbajal did then and there intentionally and knowingly cause the penetration of the mouth of Jane, a child younger than 17, by Carbajal's sexual organ.

And finally, Counts XIII and XIV set a timeframe for incidents occurring on or about July 26, 2018, and May 1, 2018, respectively, when Jane was over the age of seventeen. Unlike the other counts, these counts in substance alleged prohibited acts against Jane without her consent, as follows:

Count XIII: Sexual Assault:
On or about July 26, 2018, Carbajal did then and there intentionally and knowingly cause the penetration of the mouth of Jane by his sexual organ without her consent.

Count XIV: Sexual Assault:
On or about May 1, 2018, Carbajal did then and there intentionally and knowingly cause the penetration of the sexual organ of Jane by his sexual organ without her consent.

B. Factual Background

Jane testified she believed from a young age that Carbajal was her biological father. She learned otherwise only after he showed her a DNA result when she was fourteen years old. Jane recalled when Carbajal became involved in her life. When she was about four years old, her mother, and her one-year-old brother were moving to Amarillo. Carbajal helped with their move. They all lived together in Amarillo for a time, but soon moved to Houston. Jane's mother then gave birth to Jane's two other brothers.[2] In about 2008, when Jane was seven or eight years old, the family—consisting of Carbajal, Jane's mother, Jane, and the three boys—moved to El Paso. Beginning around 2009, Jane's mother began a period of coming and going in and out of the house, sometimes leaving for extended periods of time. Occasionally, Jane described that her mother would take her and her brothers with her when she left their home. They stayed in shelters until they returned. Jane then saw that her mother had started using "crack," which caused her to be disoriented. After Jane reached the age of ten, in April of 2011, her mother never again lived with her permanently. From that point forward, Carbajal took care of Jane and her brothers.

Jane described that life with Carbajal soon changed. One day, she was playing a game of Tetris on Carbajal's phone while she and he lay on his bed. She described, "[h]e grabbed my hand and put it on his penis, on top of his shorts." That day stood out as the start of him causing her to touch him inappropriately. From that point forward, incidents progressed. From age ten until seventeen, Jane mostly slept in Carbajal's bed, or in the same room with him, while her brothers shared another room. Jane testified about a number of specific incidents over the years, including touching, oral sex, and eventually vaginal sex, describing that some form of prohibited act occurred

[2] The record describes that Jane had three younger brothers. The father of the oldest of the three brothers went to prison. Carbajal is the father of the two younger brothers. The record also describes that Jane had a baby brother who died when he was only one month old.

almost every night unless they had visitors staying overnight. Jane described that when she refused to perform, or to permit acts from continuing, Carbajal would hit her or discipline her until she complied.

At around the age of twelve, when she had already started middle school, Jane described: "my father started showing me how to, um, jerk him off, and eventually, when, um -- as time progressed, he taught me how to, um, suck his -- to perform oral sex." He also performed oral sex on her. About the time she reached her fifteenth birthday, he held her hands down and penetrated her sexual organ with his sexual organ. She recalled, "he was calling me a slut and he said he wanted to see if I had been sleeping with other guys." Eventually, she said, when she did not react as he wanted while he performed sexual acts, "he would show me his porn[,] which was stepdaughter and stepfather[,] and he said it was normal." "'Look. See, it happens.' He said, 'It's okay. Why aren't you like those girls?'" By her sophomore year of high school, she tried to fight or argue more often but it only led to more beatings and discipline. Jane recalled there came a point when Carbajal used drugs, or he would be very drunk. She could tell when he had used cocaine. The residue from his hands would transfer to his penis and it made her mouth go numb. Other times he would have trouble becoming erect and he would penetrate her sexual organ with a hairbrush while she performed oral sex. These acts occurred nearly every night, even during a time when they briefly lived with her grandmother after they were kicked out of a shelter.

The last of these incidents occurred during the overnight period of July 25 and 26, 2018, when Jane was seventeen years old. On the evening of July 25, Carbajal had some neighbors over for a barbeque. Carbajal caught Jane communicating on her phone with a boy and he got very angry. He asked his guests to leave, and ultimately, he expressed to Jane that he wanted her to get out of their house. When Jane began packing, however, Carbajal threw her to the floor then punched and kicked her. Although he had left her on the floor, he soon returned and took her to

his room, where—like most other nights—he touched her and forced her to perform oral sex on him. The next morning, before Carbajal awoke, Jane planned to leave for good. She made sure to retrieve her social security card and birth certificate. Carbajal awoke, however, and demanded that she come back to bed to perform oral sex, which she did. When Carbajal ejaculated into her mouth, she spit into a sock and threw it near the bedroom closet. As he fell back to sleep, Jane grabbed her bags, said goodbye to her brothers, and left.

She went to a friend's house. She told her friend and her friend's aunt, a caseworker visiting from California, that Carbajal had been physically abusing her. But she did not disclose any of the sexual conduct that occurred. Later that same day, her friend encouraged her to make a report with the police. They went to a nearby station where Jane planned on reporting that Carbajal had physically beat her. On arriving, however, she learned that Carbajal had already reported her as a runaway. Police officers planned on detaining her and taking her back home. The officer even advised her that her eighteen-year-old friend could get in trouble if she helped Jane stay hidden from Carbajal.

Jane testified to the jury, while weeping, that she knew she did not want to go back home where she would be beaten and would have to go back to doing "the things that [she] did." She explained, "so I finally told the officer what else was going on, in front of my friend, which is very embarrassing because I didn't want her to know. I didn't want anyone to know, but I did not want to go back home." Once she reported that Carbajal had been sexually abusing her, the officer listened and made a report. She was taken to a hospital to undergo a sexual assault forensic exam. Afterwards, she was allowed to leave with a different family friend. Eventually, she and her brothers were placed into foster care. Describing her current situation, Jane testified she had reached her eighteenth birthday and she lived with a foster mother. She had graduated high school and was then attending classes at a local college.

In addition to Jane, the State called five other witnesses at trial to include the sexual assault nurse examiner, three police officers who were all involved in the investigation of the case, and a forensic scientist who conducted DNA testing. The nurse testified at trial about meeting Jane on July 27, 2018, during her overnight shift. The nurse recalled that Jane came by herself, with law enforcement, but no parents or anyone else. While Jane answered questions, the nurse took handwritten notes. The nurse made a note of Jane's demeanor describing that she was "quiet, distant, crying, [and] sad." She reported she was assaulted 24 hours earlier, on July 26, 2018, at about 3:00 a.m. When asked to provide details, Jane provided the following information which the nurse transcribed, word for word, as the patient history portion of the exam:

> I was in my room packing because he had told me to get out of the house. Then he said, "no te hagas pendeja, vente para aca."[3] As soon as I entered his bedroom he was standing up. He told me, "come on, on your knees." He was already fully naked. I knew what I had to do of course, I began to suck him off. I wasn't going to fight him. My back was hurting so he laid down. He wanted to come inside my mouth, and I didn't want to. He got mad and told me "you should be swallowing it." Then he told me, "take off your underwear." He turned me around, like position 69. He told me, "let me suck your pussy." He kept sucking me and then he told me to put it in his [sic] mouth and he ejaculated. It's always the same. He always wants me to do it. All the time. He woke me up at 5 am and had me do it all over again. I never want to do it. I always try to get out of it by saying my back hurts or something. But that's all he did that day, oral.

Jane also reported she had showered, eaten, and brushed her teeth in the time period since the incident with Carbajal had occurred. The nurse described that she collected evidence based on the nature and extent of Jane's outcry. She took an oral swab of the inside of Jane's mouth and of her external genitalia. On her physical report, she identified no visible injuries on Jane's body but she did note that Jane complained of pain to her rib area and lower back.

Based on Jane's report of sexual abuse, Carbajal was arrested at his home. Officers also

[3] At trial, the nurse testified she understood and spoke Spanish. She translated Jane's quote as, "Don't act dumb, come over here."

executed a search warrant at his home which included a seizure of Carbajal's mobile phone. Detective Harmon of the El Paso Police Department testified about the results of forensic testing performed on the stored data of the device. Two years' worth of internet history was recovered from the extraction of data, dating from 2016 to 2018. Detective Harmon searched the browser history for anything indicating "father/daughter, stepdaughter/stepfather" pornography. Analysis showed that numerous searches and views of father/daughter pornography and videos, as well as general pornography, had been downloaded from the phone. A report of the analysis was prepared and entered into evidence. Detective Harmon explained how to interpret data shown in his report. For example, on May 30, 2018, at 5:04 a.m., the phone's data indicated a viewing of a video titled, "Naughty daddy takes daughter." A minute later, on the same website, the data showed a search inquiry typed into the phone containing the following terms: "Dad," "f**ks," "daughter." In total, hundreds of pages of data were extracted showing a web history pertaining to "daddy/daughter porn," all generated from the analysis of Carbajal's phone.

A forensic scientist who conducted DNA analysis testified as the State's last witness in its case in chief. The scientist testified that DNA analysis found semen on a sock that had been retrieved from Carbajal's bedroom closet on July 27, 2018, the day of his arrest. Testing revealed the DNA profile indicated it was "422 septillion times more likely" to have originated from Carbajal than it was to have come from an unrelated, unknown individual. Following the DNA testimony, the State rested its case-in-chief.

Before Carbajal presented any witnesses, he requested again, as he had requested before trial, that the trial court force the State to elect which act it relied on to convict with regard to Counts II through XIV of the indictment. Carbajal urged that without the election it would not be possible to know whether the jury had rendered a unanimous decision regarding each count. The trial court denied the request.

Carbajal then called three witnesses in his defense. First, a DNA expert testified he would have expected to see significant DNA fraction from Jane's saliva on the DNA analysis of the sock retrieved from Carbajal's bedroom. The expert highlighted for the jury that the State's DNA report did not show any definitive contribution from Jane on any of the DNA analyzed from the sock, showing only that she could not be excluded as a contributor in one of the analyses. On cross-examination, the expert acknowledged the State's DNA report showed there was a second contributor on one of the stains analyzed from the sock.

As his second and third witnesses, Carbajal called two neighbors who were mother and daughter. They were invited to several backyard cookouts with Carbajal and the children. These witnesses described that Jane had made complaints to each of them about Carbajal being too strict with giving his permission for her to go out with her friends. They said they had not seen any inappropriate contact by Carbajal when they were present. To both witnesses, the relationship between Carbajal, Jane, and her brothers, appeared to be close and loving.

The jury returned a guilty verdict on all thirteen counts submitted with the charge (Counts I through V and VII through XIV). Following a punishment hearing, the jury also found the enhancement paragraph of each count to be true and assessed a punishment of life in prison plus a $10,000 fine for each conviction. The trial court imposed the jury's sentence as to each of the thirteen counts with all punishment running concurrently.

This appeal followed.

II. ISSUES ON APPEAL

Carbajal brings forth six issues on appeal, which we re-order and address under five

headings.[4] First, he asserts the evidence was legally insufficient to support the convictions in Counts XIII and XIV. Second, he asserts that Texas Penal Code § 21.02, as charged in Count I, violates due process rights and permits convictions without unanimity. Third, he complains on differing grounds in two issues, that the trial court committed constitutional error as to all counts, by failing to force the State to elect particular acts upon which it relied in support of convictions. Fourth, he asserts the trial court erred in ruling on the admission of evidence, which he claims was overly prejudicial. Fifth and finally, he complains of jury argument made by the State during the sentencing phase of trial.

III. SUFFICIENCY OF THE EVIDENCE AS TO TWO COUNTS

In his sixth issue, Carbajal argues there was insufficient evidence to support his convictions under Counts XIII and XIV. In those counts, the indictment charged Carbajal with two separate counts of sexual assault committed against Jane after she had turned seventeen years old. As to both counts, he complains the evidence was insufficient to prove beyond a reasonable doubt that he had committed the prohibited acts, as alleged by each count, without her consent.

A. Standard of Review

In determining whether evidence is legally sufficient to support a conviction, we must apply the well-known standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979); *Brooks v. State*, 323 S.W.3d 893, 894-95 (Tex. Crim. App. 2010) (finding no meaningful distinction between the legal and factual sufficiency standards and therefore no justification for retaining both standards) (citing *Jackson*, 443 U.S. at 319). Under that standard, a reviewing court must consider all evidence in the light most favorable to the verdict and in doing so must determine whether a

[4] We re-order issues in part to address those challenges first that would afford the greatest amount of relief, if meritorious, and in part for organizational clarity. *Benavidez v. State*, 323 S.W.3d 179, 182 (Tex. Crim. App. 2010); *Lopez v. State*, 615 S.W.3d 238, 248 (Tex. App.—El Paso 2020, pet. ref'd).

rational justification exists for the jury's finding of guilt beyond a reasonable doubt. *Id.*

In considering the evidence, we keep in mind that the trier of fact is the sole judge of the weight and credibility of the evidence, and we must presume that the fact finder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *See* TEX. CODE CRIM. PROC. ANN. art. 38.04; *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014). Further, we are not permitted to reevaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder. *See Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). "[S]ufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case." *See Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Therefore, our task is to determine whether, based on the evidence and reasonable inferences drawn therefrom, a rational juror could have found the essential elements of the charged offenses beyond a reasonable doubt. *Id.*

B. Applicable law

One method of committing sexual assault is by intentionally or knowingly causing the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent. TEX. PENAL CODE ANN. § 22.011(a)(1)(B). That manner of sexual assault was set out in Count XIII of the indictment. Another method of committing sexual assault is by intentionally or knowingly causing the penetration of the sexual organ of another by any means, without the person's consent. *Id.* § 22.011(a)(1)(A). This manner of sexual assault was set out in Count XIV.

A sexual assault under either of these methods is without the consent of the person if the defendant compelled the person to submit or participate by the use of physical force, violence, or coercion. *Id.* § 22.011(b)(1). Under the terms of this statute, the emphasis is placed upon the actor's compulsion rather than the victim's resistance. *Barnett v. State*, 820 S.W.2d 240, 241 (Tex. App.—Corpus Christi 1991, pet. ref'd) (citing *Wisdom v. State*, 708 S.W.2d 840, 842-43 (Tex. Crim. App.

1986)). The State is not required to demonstrate any certain threshold of force used to compel the victim's submission, only that the defendant used some force. *Gil v. State*, No. 08-05-00108-CR, 2007 WL 926470, at *5 (Tex. App.—El Paso Mar. 29, 2007, no pet.) (not designated for publication) (citing *Gonzales v. State*, 2 S.W.3d 411, 415 (Tex. App.—San Antonio 1999, no pet.)). Physical injury to the victim is not required to prove that the actor compelled a victim to participate through force. *Cepeda v. State*, No. 14-16-00432-CR, 2017 WL 3927544, at *2 (Tex. App.—Houston [14th Dist.] Sept. 7, 2017, pet. ref'd) (mem. op., not designated for publication) (citing *Edwards v. State*, 97 S.W.3d 279, 291 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd)). A sexual-assault complainant's uncorroborated testimony alone is sufficient to support a conviction for sexual assault if the complainant informed any person, other than the defendant, of the offense within one year after the date on which the offense is alleged to have occurred. TEX. CODE CRIM. PROC. ANN. art. 38.07(a); *Calais v. State*, 624 S.W.2d 811, 813 (Tex. App.—Houston [14th Dist.] 1981, no pet.) (holding that a conviction based solely on the uncorroborated testimony of the complainant was sufficient as long as the outcry was made within the applicable statutory time period).

To prove the defendant acted "without consent" under section 22.011(b)(2), the State can demonstrate that the defendant "compels the other person to submit or participate by threatening to use force or violence against the other person or to cause harm to the other person, and the other person believes that the actor has the present ability to execute the threat . . . ." TEX. PENAL CODE ANN. § 22.011(b)(2). Explicit verbal threats are not necessary to prove a defendant compelled a complainant's participation; a course of conduct compelling participation by implied threat of force is sufficient. *Edwards*, 97 S.W.3d at 291; *see also Graves v. State*, 994 S.W.2d 238, 244 (Tex. App.—Corpus Christi 1999, pet. ref'd, untimely filed) (holding that where a victim had previously been beaten, later similar encounters carried with them the implicit threat of the same

conduct); *Smith v. State*, 719 S.W.2d 402, 403 (Tex. App.—Houston [1st Dist.] 1986, no pet.) (rejecting defendant's argument that the evidence was insufficient because there were no threats of force contemporaneous with the sexual act, but evidence showed the victim passively accepted sexual intercourse because she had been forced by physical violence to submit to sexual demands most of her life); *Martinez v. State*, No. 01-07-00983-CR, 2008 WL 4595365, at *3 (Tex. App.—Houston [1st Dist.] Oct. 16, 2008, pet. ref'd) (mem. op., not designated for publication) (holding evidence legally sufficient where victim testified that initially the defendant struck her to compel her to submit to sexual acts, but in subsequent instances she submitted knowing he would hit her if she did not).

C. Analysis

Regarding Count XIII, Carbajal argues the evidence was insufficient to establish the oral sex Jane testified to on or about July 26, 2018—during the hours immediately before she left the house—was compelled by force, violence, or coercion. We disagree. The evidence at trial showed a long pattern and history of physical abuse by Carbajal against Jane to compel her to perform or to permit acts of sexual abuse. Jane testified that Carbajal would "hit me to be quiet, or he would beat me up because I would say 'no'; or put me on the wall to stand for hours until I accepted to do things." In response to the question whether Carbajal would hit her every night, Jane testified: "I would just let go sometimes. Most of the time, I didn't want to get hit. I didn't want to get into trouble." Even the night of July 26, Jane testified that Carbajal grabbed her by the hair and threw her to the floor when she began following his instruction to pack her bags and get out of the house. She also testified that he punched her in the stomach and kicked her. Shortly after this beating, Carbajal told her to go to his room "to do stuff," which Jane understood to mean sex acts.

This testimony—both about the pattern and history of physical abuse, and the specific testimony regarding the physical abuse committed on or about the night of July 26, 2018—was

sufficient to establish that the oral sex Jane performed was compelled by force, and therefore lacked Jane's consent. *See Edwards*, 97 S.W.3d at 291; *Graves*, 994 S.W.2d at 244; *Smith*, 719 S.W.2d at 403; *Martinez*, 2008 WL 4595365, at *3. Because Jane made an outcry regarding this incident within hours after she left the home, her uncorroborated testimony is sufficient to support Carbajal's conviction under Count XIII. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07(a); *Calais*, 624 S.W.2d at 813. Reviewing the evidence in the light most favorable to the verdict, a rational trier of fact could have concluded that Carbajal compelled Jane to submit or participate by the use of physical force. *See Jackson*, 443 U.S. at 319.

Moving to Count XIV, Carbajal argues there was no evidence that he had vaginal sex with Jane after she turned seventeen. *Id*. We disagree. Jane turned seventeen near the end of April of 2018. Under Count XIV, the State charged Carbajal with sexual assault of a victim over the age of seventeen, committed on or about May 1, 2018, by causing his sexual organ to penetrate Jane's sexual organ. Jane testified that Carbajal fully penetrated her vagina for the first time when she was about fifteen years old, and from that point forward, these sexual acts continued nearly "every night" until she left the house on July 27, 2018. This evidence was sufficient for the jury to infer that from late April until late July 2018, while Jane was seventeen years old and living with Carbajal, he caused the penetration of Jane's sexual organ with his sexual organ, without her consent. *See Edwards*, 97 S.W.3d at 291; *Graves*, 994 S.W.2d at 244; *Smith*, 719 S.W.2d at 403; *Martinez*, 2008 WL 4595365, at *3. Additionally, because Jane made this outcry on July 27, 2018, approximately three months after she turned seventeen, her uncorroborated testimony is sufficient to support Carbajal's conviction under Count XIV. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07(a); *Calais*, 624 S.W.2d at 813. Reviewing the evidence in the light most favorable to the verdict, a rational trier of fact could have concluded that Carbajal intentionally and knowingly caused the penetration of the sexual organ of Jane by his sexual organ, without her consent. *See Jackson*, 443

U.S. at 319.

Carbajal's sixth issue is overruled.

IV. CONSTITUTIONALITY OF PENAL CODE SECTION 21.02

In his second issue, Carbajal argues that § 21.02 of the Texas Penal Code, the continuous-sexual-abuse statute, is unconstitutional because it allows juries to reach non-unanimous verdicts, violating a defendant's due process rights. The jury convicted Carbajal of this offense based on Count I of the indictment.

To start, Carbajal admits that several appellate courts, including this Court, have rejected identical claims as he asserts by his second issue. *See, e.g.*, *Holton v. State*, 487 S.W.3d 600, 605-08 (Tex. App.—El Paso 2015, no pet.); *Carmichael v. State*, 505 S.W.3d 95, 106 (Tex. App.—San Antonio 2016, pet. ref'd); *Render v. State*, 316 S.W.3d 846, 858 (Tex. App.—Dallas 2010, pet. ref'd). Despite this acknowledgement, he argues the outcome should be different in this instance in light of a recent decision of the United States Supreme Court in *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020). We disagree.

Ramos v. Louisiana abolished the practice—only utilized in Louisiana and Oregon—of allowing a criminal conviction by a 10-2 jury verdict. *Id.* at 1391. Because Texas does not allow such a verdict for a criminal conviction—and, of course, that is not what happened in this case—we conclude that *Ramos* has no impact on *Holton*, which concludes that § 21.02 does not allow for a non-unanimous verdict. *See Holton*, 487 S.W.3d at 606-07. As the State points out, and we agree, *Holton's* key holding remains intact, even in light of *Ramos*:

> [I]n continuous sexual abuse cases, a defendant's constitutional right to a unanimous jury verdict is fulfilled by requiring the jury to agree on the key element of the offense, i.e., that the defendant committed a 'series' of acts within a certain period of time, and that jury unanimity is not required regarding which of the particular acts of sexual abuse the defendant committed. Because the jury in [the defendant's] case was properly instructed on this point, we reject [his] argument that he was deprived of his constitutional right to a unanimous

> verdict, and we once again uphold the constitutionality of the continuous sexual abuse statute in this context.

Id. at 608.

Additionally, the jury charge in this case provided specific instructions on this point, as follows:

> In order to find the Defendant, Jorge Carbajal, guilty of the offense of continuous sexual abuse of a child, you are not required to agree unanimously on which specific acts of sexual abuse were committed by the Defendant or the exact date when those acts were committed. However, in order to find the Defendant guilty of the offense of continuous sexual abuse of a child, you must agree unanimously that the Defendant, during a period that is 30 days or more in duration, committed two or more acts of sexual abuse.

These jury instructions mirrored those required by *Holton*. *See id.* at 605. Therefore, we determine there was no due process violation arising from Count I, that Carbajal was convicted of that count by a unanimous jury verdict, and, for the same reasons detailed in *Holton*, that § 21.02 of the Texas Penal Code does not allow for non-unanimous jury verdicts.

Carbajal's second issue is overruled.

V. ELECTION OF ACTS RELIED ON FOR CONVICTION

In his first and third issues, Carbajal complains about the trial court's failure to order the State to elect which incident of the same act of sexual assault it would rely on for conviction on various counts alleged by the indictment. His first issue asserts that harmful error occurred by the State's failure to elect acts it relied on, while his third issue asserts such failure caused double jeopardy violations. Being that both issues involve the election requirement, we consider them together, but address them in reverse order.

A. Double jeopardy violation

In his third issue, Carbajal argues the State's refusal to elect acts relied on for conviction resulted in Carbajal twice being convicted of the same criminal act in violation of the double

jeopardy clauses of both the United States and Texas Constitutions; and, in violation of a state statute forbidding multiple punishments for the same offense in a single prosecution. *See* U.S. CONST. amend. V; TEX. CONST. art. I, § 14; TEX. CODE CRIM. PROC. ANN. art 1.10. He asserts that double jeopardy law generally prohibits prosecution, conviction and punishment of the same discrete act, even if the act was alleged in separate counts. Because the State failed to elect the acts it relied on for conviction, he urges it is impossible to determine whether the jury found him guilty in Count I of the same acts that it found him guilty of in Counts II through XIV. He asserts that either Count I or Counts II through XIV should be set aside and dismissed.

1. Background

Prior to trial, Carbajal requested the trial court quash the multi-count indictment asserting it failed to give him sufficient notice of the charges against him such that he could prepare for trial and "plead the judgment that may be given upon this charge in bar of any prosecution for the same offense." On this basis, Carbajal motioned the court to order the State to elect which count it intended to proceed on among the multiple counts which had been charged. A supplemental motion was also filed with this same request. The trial court denied both his original and supplemental motions.

2. Applicable law

The Double Jeopardy Clause of the Fifth Amendment, which is applicable to the states through the Fourteenth Amendment, incorporates three protections: (1) protection against a second prosecution for the "same" offense following an acquittal; (2) protection against a second prosecution for the "same" offense following a conviction; and (3) protection against multiple punishments for the "same" offense. *Ramos v. State*, 636 S.W.3d 646, 651 (Tex. Crim. App. 2021).

To determine "sameness" for double-jeopardy analysis, the traditional starting point is the

"Blockburger test" announced in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Id.* *Blockburger* established that two separately-defined statutory offenses are presumed *not* to be the same so long as each requires proof of an elemental fact that the other does not. *Littrell v. State*, 271 S.W.3d 273, 276 (Tex. Crim. App. 2008) (citing *Blockburger*, 284 U.S. at 304). When comparing elements of differing statutory provisions, courts must not only examine the statutory elements in the abstract, but also compare the offenses as pleaded. *Id.*; *see also Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App. 2008).

To obtain a conviction for continuous sexual abuse of a child, the State must show that the defendant committed at least two acts of sexual abuse against a child younger than fourteen years of age during a period of at least thirty days' duration. TEX. PENAL CODE ANN. § 21.02(b)(1), (2)(A). This provision permits the State to seek one conviction for multiple acts of sexual abuse, over an extended period of time, as an alternative to the near impossibility of requiring the State to allege specific dates. *See Price v. State*, 434 S.W.3d 601, 609 (Tex. Crim. App. 2014) ("[T]he Legislature intended to permit one conviction for continuous sexual abuse for conduct committed against a single complainant during a specified time period."). The statute lists eight predicate offenses to include aggravated sexual assault of a child under the age of fourteen. *See* TEX. PENAL CODE ANN. § 21.02(c); *id.* § 22.021(a)(1), (2)(B).

A defendant cannot be convicted of both continuous sexual abuse and any predicate offense listed in § 21.02(c) unless the predicate offense "occurred outside the period in which the [continuous sexual abuse] was committed." *Aguilar v. State*, 547 S.W.3d 254, 261 (Tex. App.—San Antonio 2017, no pet.) (quoting TEX. PENAL CODE ANN. § 21.02(e)(2)). Stated differently, a defendant may be convicted of both continuous sexual abuse of a child and one of the predicate offenses listed as an independent offense if the independent offense occurred after the victim turned fourteen years old. *Aguilar*, 547 S.W.3d at 262; *see also Holton*, 487 S.W.3d at 614. In

determining whether a defendant may be convicted in the same criminal action for a continuous abuse offense against the same victim and an offense listed in § 21.02(c), the proper consideration is whether the evidence shows that the § 21.02(c) offense occurred outside of the period that the continuous abuse offense was committed. *Allen v. State*, 620 S.W.3d 915, 921 (Tex. Crim. App. 2021). Of note, § 21.02(e)'s inclusion of the words "was committed" indicates "the time period when the continuous abuse offense was committed should be controlling, not the time period alleged in the indictment." *Id.* at 920 (internal quotation marks omitted).

3. Analysis

On appeal, Carbajal argues the flexibility of the "on or about" language used in Counts II through XIV of the indictment could have allowed the jury to convict him for any of those counts based on the evidence presented against him under Count I, the charge for continuous sexual assault of a child under the age of fourteen. Count I of the indictment alleged a charge of continuous abuse of a child under age fourteen occurring on or about April 27, 2011 through April 1, 2015, or a time when Jane was ages ten through thirteen. In contrast, the on-or-about dates used in Counts II through XI, XIII, and XIV, were dated after Jane turned fourteen years old, and, as a result, those offenses could not have been subsumed under Count I.

The record shows Jane reached age fourteen on the dates alleged for Counts II through IV, age fifteen for the dates alleged for Counts V and VII, age sixteen for the dates alleged for Counts VIII through XI, and age seventeen for the dates alleged for Counts XIII and XIV. And even more importantly, the evidence presented at trial shows that it supported acts of sexual abuse being committed against Jane, on an ongoing basis, after April 2015, when she had already reached her fourteenth birthday, and continued thereafter through July 26, 2018. *See Allen*, 620 S.W.3d at 921. Thus, the independent offenses as charged under Counts II through V, VII through XI, XIII, and XIV, were all committed during a time outside the timeframe of the charge for continuous abuse

of a child. *Id.*; *Aguilar*, 547 S.W.3d at 262; *see also Holton*, 487 S.W.3d at 614.

As for Count XII, which alleged a charge of indecency with a child by touching the breast of a child, the continuous abuse statute specifically excludes such charge from the predicate offenses allowed to support a conviction under the continuous abuse statute. *See* TEX. PENAL CODE ANN. § 21.02(c)(2). Because this type of indecency with a child offense is not a predicate offense allowed to be used to charge the offense of continuous sexual abuse of a child, the State was entitled to prosecute this non-predicate offense separately and independently, even though it occurred within the same time frame as that alleged in the continuous-sexual-abuse-of-a-child charge. *See Ramos*, 636 S.W.3d at 652; *Holton*, 487 S.W.3d at 612 n.9.

Nonetheless, for a different reason than that argued by Carbajal, the State otherwise concedes in its briefing that the conviction under Count XI should be reversed on double jeopardy grounds. As the State points out, Counts VIII and XI both allege the same on-or-about date, the same age, and the same offense—Carbajal causing the penetration of Jane's mouth with his sexual organ. Because Carbajal was convicted of Count VIII, he cannot be convicted again of the same offense alleged in Count XI. *See Whalen v. United States*, 445 U.S. 684, 688 (1980). Even if the second conviction results in no greater sentence, it results in an impermissible punishment. *Ball v. United States*, 470 U.S. 856, 865 (1985); *Ex parte Cavazos*, 203 S.W.3d 333, 338-39 (Tex. Crim. App. 2006). In such case, the remedy is to affirm the conviction for the most serious offense and vacate the other conviction. *Bigon*, 252 S.W.3d at 372. Because Count VIII was the first of these two convictions, it stands. *Id.* Count XI is reversed as an impermissible punishment. *See Ball*, 470 U.S. at 865; *Ex parte Cavazos*, 203 S.W.3d at 338-39.

Carbajal's third issue is sustained as to Count XI only; otherwise, his third issue is overruled as to all remaining counts.

B. Harmful error in failing to elect acts relied on for convictions

In his first issue, Carbajal argues on non-jeopardy grounds that the trial court committed harmful error in not requiring the State to elect—as to all counts—which acts it would rely on for conviction. He asserts the State's failure to make such an election caused several issues resulting in him not receiving a fair trial. Setting aside the time frames alleged by the charges, he argues that Counts II, V, IX, and XIV, all charged the same prohibited act of penetration of the complainant's sexual organ with defendant's sexual organ; Counts III, VII, and X, all charged the same prohibited act of penetration of complainant's sexual organ with a brush; Counts IV, VIII, XI and XIII, all charged the act of penetration of the complainant's mouth with defendant's sexual organ; and lastly, Count XII charged touching the complainant's breast. Specifically, he argues that evidence of multiple separate incidents, or units of prosecution, were admitted to evidence which could prove each of the counts alleged, many times over, if the jury believed the evidence beyond a reasonable doubt.

1. Applicable Law and Standard of Review

Under the Texas Constitution and Code of Criminal Procedure, a Texas jury must reach a unanimous verdict on the specific criminal offense alleged against the defendant. *Stuhler v. State*, 218 S.W.3d 706, 716 (Tex. Crim. App. 2007) (citing TEX. CONST. art. V, § 13); *Landrian v. State*, 268 S.W.3d 532, 535 (Tex. Crim. App. 2008); *Cosio v. State*, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011). Jury unanimity requires a jury to agree upon a single and discrete incident that would constitute the commission of the offense alleged. *Stuhler*, 218 S.W.3d at 717. Non-unanimity may occur, for example, when the State charges a defendant with one offense and presents evidence that he committed the charged offense on multiple but separate occasions. *Cosio*, 353 S.W.3d at 772. In such case, each of the multiple incidents individually establishes a different offense or unit of prosecution. *Id.* In the context of sexual assault-type offenses, "[w]hen one particular act of

sexual assault is alleged in the indictment, and more than one incident of that same act of sexual assault is shown by the evidence, the State must elect the act upon which it would rely for conviction." *Owings v. State*, 541 S.W.3d 144, 150 (Tex. Crim. App. 2017) (internal quotation marks omitted). In such case, once the State rests its case in chief, and after a timely request by the defendant, the trial court must order the State to make its election. *See Garcia v. State*, 614 S.W.3d 749, 753 (Tex. Crim. App. 2019).

Moreover, other procedural actions taken during trial do not render the election requirement unnecessary. *Phillips v. State*, 193 S.W.3d 904, 911-12 (Tex. Crim. App. 2006). For example, permitting admission of extraneous acts between a defendant and child "for its bearing on relevant matters, including . . . the state of mind of the defendant and the child; and . . . the previous and subsequent relationship between the defendant and the child," as permitted by article 38.37 of the Code of Criminal Procedure, does not restrict a defendant's right to have the State elect the incident for which it will seek a conviction. TEX. CODE CRIM. PROC. ANN. art 38.37, § 1(b); *Phillips*, 193 S.W.3d at 911. Similarly, "[a] jury charge alone . . . does not afford the defendant with the requisite notice that is provided by a valid and timely election by the State" because the charge is not given until the end of trial and would not require the State to make its election at a time "when the defense needs to know the evidence it must refute in order to challenge the specific act in the indictment." *Phillips*, 193 S.W.3d at 912.

When the trial court requires the State to make an election, a defendant is also entitled to an instruction in the jury charge informing the jury to consider only the elected act in deciding guilt and limiting the consideration of the unelected acts to the purposes for which they were admitted, such as for consideration under article 38.37. *See Rivera v. State*, 233 S.W.3d 403, 406 (Tex. App.—Waco 2007, pet. ref'd). "While each of the incidents presented [to the jury during trial testimony] may constitute the commission of a sexual abuse offense, the jury must agree on

one distinct incident in order to render a unanimous verdict." *Phillips*, 193 S.W.3d at 913. The jury's consideration of multiple instances of sexual abuse without the State's election of one instance on which to rely for a conviction "jeopardizes the defendant's right to a unanimous jury verdict as guaranteed by the Texas Constitution, even though the extraneous incidents may be admissible for other purposes under Article 38.37 of the Code of Criminal Procedure." *Id.*

The Court of Criminal Appeals has instructed that a trial court's failure to require the State to elect the specific act on which it intends to rely for a conviction—upon a timely request by the defendant—constitutes constitutional error. *Id.* at 914. And in such cases, we must reverse a judgment of conviction unless we determine beyond a reasonable doubt that the error did not contribute to the conviction. *See* TEX. R. APP. P. 44.2(a); *Phillips*, 193 S.W.3d at 914; *Dixon v. State*, 201 S.W.3d 731, 734 (Tex. Crim. App. 2006). In determining whether the trial court's failure to require an election caused constitutional harm to the defendant, we consider the error in the context of the four purposes underlying the election rule:

> (1) to protect the accused from the introduction of extraneous offenses[;]
>
> (2) to minimize the risk that the jury might choose to convict, not because one or more crimes were proven beyond a reasonable doubt, but because all of them together convinced the jury the defendant was guilty[;]
>
> (3) to ensure unanimous verdicts, that is, all of the jurors agreeing that one specific incident, which constituted the offense charged in the indictment, occurred[;] and
>
> (4) to give the defendant notice of the particular offense the State intends to rely upon for prosecution and afford the defendant an opportunity to defend.

Dixon, 201 S.W.3d at 733; *see also Garcia*, 614 S.W.3d at 757 (reaffirming the harm analysis required where an election error has occurred).

2. Analysis

The State asserts that Carbajal's arguments are without merit as to all counts except Count

XI, which it already conceded as barred on double jeopardy grounds. As to all remaining counts presented to the jury, we consider each in turn. We first analyze whether error was committed by the trial court's failure to require an election of acts relied on for conviction; if error is shown, we then consider whether such error was constitutionally harmful.

a. Count I

The Court of Criminal Appeals has held that an election is not required under a charge of continuous sexual abuse of a child under the age of fourteen. *See Price*, 434 S.W.3d at 609 ("[T]he Legislature intended to permit one conviction for continuous sexual abuse for conduct committed against a single complainant during a specified time period."). Notably, before the state legislature enacted the offense of continuous sexual abuse of a child under the age of fourteen, Judge Cochran wrote in a concurring opinion about the problem of a defendant's right to election of acts in light of criminal conduct that is not necessarily limited to "one specific act at one specific moment." *Dixon*, 201 S.W.3d at 737 (Cochran, J., concurring). As a result, the state legislature passed § 21.02 of the Penal Code, allowing the prosecution of continuous sexual abuse of children under age fourteen. *See Price*, 434 S.W.3d at 608-09. And in *Price*, when the Court of Criminal Appeals was presented with the factual scenario of continuous sexual abuse of a child, it held that an election of acts is not required because the statute allows the jury to consider multiple acts of abuse over an extended period of time. *See id.* at 609. Based on *Price*, we conclude that no election was required as to Count I.

b. Count XIII

As to Count XIII, the State argues that no election was necessary because the evidence showed only one act or instance of sexual abuse and, as a result, no election was required. On this point, we cannot agree. Count XIII alleged that on or about July 26, 2018—hours before Jane left the house—Carbajal penetrated Jane's mouth with his sexual organ without her consent. Contrary

to the State's argument, the evidence did show two separate and distinct instances of oral sex on or about July 26. First, Jane testified that she performed oral sex on Carbajal without her consent before they went to sleep for the night. Second, Jane testified that she performed oral sex on Carbajal without her consent when he awoke early that morning as she gathered her belongings. As a result of the "on or about" language used in the indictment, along with evidence of these two separate and distinct instances of oral sex, we cannot say that the evidence only showed one act constituting the charge of Count XIII. Accordingly, we first conclude the trial court erred in not requiring the State to elect the act it relied on, and thus, we must apply the harm analysis applicable to constitutional error. *See* TEX. R. APP. P. 44.2(a). Unless we find beyond a reasonable doubt that the error did not contribute to the conviction, we must reverse Count XIII based on harmful error. *Id.* In analyzing whether Carbajal was harmed by the error, we look to the four purposes underlying the election requirement. *See Dixon*, 201 S.W.3d at 733; *Garcia*, 614 S.W.3d at 757.

i. To protect the accused from the introduction of extraneous offenses

As stated in *Dixon*, evidence of other crimes, wrongs, or acts committed by Carbajal against Jane were admissible for the purposes of showing the state of mind of Carbajal and Jane, as well as the previous and subsequent relationship between them. TEX. CODE CRIM. PROC. ANN. art. 38.37. For that reason, Carbajal "was not entitled to protection from the introduction of evidence of extraneous offenses involving [Jane]." *Owings*, 541 S.W.3d at 151. Because he was not entitled to this protection in the first place, the failure to require an election did not prevent the first purpose of an election from being met. *See id.*

ii. To minimize the risk that the jury might choose to convict, not because one or more crimes were proved beyond a reasonable doubt, but because all of them together convinced the jury the defendant was guilty

In *Dixon*, the child complainant testified that the act of sexual abuse occurred "one hundred times," and almost always at night. *Dixon*, 201 S.W.3d at 732. There, the Court of Criminal

Appeals held that the second purpose of the election requirement had been met because "[t]he 'multiple offenses' were all recounted by the same source—the child." *Id.* at 735. This case, much like *Dixon* and *Owings*, did not involve the presentation of evidence from different sources that a jury might perceive to "add up" to the defendant's guilt. *See Owings*, 541 S.W.3d at 151. Although Jane testified distinctly about two prohibited acts, as charged in Count XIII—occurring only hours apart—the same reasoning found in *Dixon* and *Owings* would still apply: Jane "was either credible or she was not." *Owings*, 541 S.W.3d at 152. Stated differently, with Jane being the same source for the evidence of both acts, we have no concern that a jury might add up different activities from different sources and find Carbajal guilty even though no individual offense was proven beyond a reasonable doubt. *Dixon*, 201 S.W.3d at 735. The jury either believed Jane's testimony that both prohibited acts occurred, on or about July 26, 2018, or they did not. By the guilty verdict, we conclude the jury found Jane's testimony to be credible, and the trial court's failure to require the State to elect did not prevent the fulfillment of this second purpose supporting the election requirement. *See Owings*, 541 S.W.3d at 152.

iii. To ensure a unanimous verdict

For similar reasons to those set out under the previous discussion, we cannot conclude the election failure resulted in a non-unanimous verdict. We understand Carbajal's argument as asserting in theory that some of the jurors could have convicted him of Count XIII based on the first incident of oral sex described by Jane as occurring on or about July 26, 2018, while others could have convicted based on the second incident. However, we determine that circumstance to be highly unlikely. This case, like *Owings*, depended on the credibility of Jane's testimony. *See id.* Other than a blanket denial, Carbajal did not put forth any evidence for the jury to believe that one incident occurred and the other did not. On this record, there would be no basis on which some jurors could have believed one incident but not the other and vice versa. *See id.* We are satisfied

there is no significant risk of a non-unanimous verdict on Count XIII. *See Dixon*, 201 S.W.3d at 735-36.

iv. To give the defendant notice of the particular offense the State intends to rely upon for prosecution and afford the defendant an opportunity to defend

Finally, we also find no significant risk that Carbajal was deprived of adequate notice of which act to defend against. Like in *Owings*, Carbajal generally denied that any incident of sexual abuse happened at all. He presented no evidence that could distinguish either incident or otherwise offer an alibi against one but not the other. Like in *Owings*, his defense was not inhibited by the error. *Owings*, 541 S.W.3d at 153. The only issue at trial was whether the jury believed Jane or not. By its verdict, it is clear the jury found her credible. We cannot say the fourth purpose was not met such that Carbajal was deprived of an opportunity to defend against the charge. Because each of the four purposes of the election requirement were met as to Count XIII, we find that the trial court's error in not requiring the State to elect was harmless. *See Owings*, 541 S.W.3d at 154.

c. Counts II through V, VII through X, XII, and XIV

The indictment charged the following as to the remaining counts:

- Counts II through V, and VII through X, charged Sexual Assault of a Child Under the Age of Seventeen;
- Count XII charged Indecency with a Child by Sexual Contact; and
- Count XIV charged Sexual Assault of a Victim Over Age Seventeen.

Each of these remaining counts detail a different offense, a different method of committing the offense, or a different time frame related to Jane's age (age fourteen and older, age fifteen and older, age sixteen and older, and age seventeen and older). The State argues that because Jane's testimony was replete with evidence of acts of sexual abuse too numerous to count between the ages of fourteen to over seventeen, it would have been nearly impossible to pinpoint a specific act

on a specific date to elect for each of those charges. Jane described a progression of prohibited acts occurring on an ongoing and continuing basis after she started middle school and entered high school. As Judge Cochran stated in her concurring opinion in *Dixon*, "Texas law does not easily accommodate the prosecution of generic, undifferentiated, ongoing acts of sexual abuse of young children." *Dixon*, 201 S.W.3d at 737 (Cochran, J., concurring).

The acts Jane described which supported the charges under these remaining counts amount to generic, undifferentiated, ongoing acts of sexual abuse on a repeated basis. In these situations, the Court of Criminal Appeals has held that even if elections must be made, any harm in not requiring an election would be harmless under the constitutional-harm standard. *See Dixon*, 201 S.W.3d at 732-36 (holding that, beyond a reasonable doubt, under the constitutional standard for harm, failure to elect in cases of generic, undifferentiated, ongoing acts of sexual abuse of a young child do not contribute to the defendant's conviction or punishment, such that the failure to elect is harmless).

Carbajal's first issue is overruled.

VI. EVIDENTIARY ISSUE

In his fifth issue, Carbajal argues the trial court committed reversible error in allowing Jane to testify that Carbajal told her he would take her to have an abortion if she was pregnant.

A. Background

At trial, Jane testified that, during her sophomore year of school, she suddenly realized she had not yet had her period. After telling Carbajal about her concern, he took her to buy a pregnancy test, which came back negative. The prosecutor then asked the following question, drawing an immediate objection from the defense:

> [Prosecutor]: Tell me about what he told you if it turned out positive, if you were actually pregnant.

[Defense counsel]: Your Honor, I'm going to object to the prejudicial nature of the testimony.

THE COURT: Overruled.
[Defense counsel]: It violates Rule 403 and 404.

THE COURT: Overruled.

Jane then described, while weeping, that she was scared and worried about being pregnant by Carbajal. She worried about what people would say. Describing what Carbajal said to her, Jane testified, "But my dad just told me not to worry. If I was pregnant, we would just go get an abortion in Juarez and everything would be okay."

B. Standard of Review

A trial court's ruling on the admissibility of evidence is reviewed under an abuse-of-discretion standard. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016); *Holman v. State*, No. 08-19-00012-CR, 2020 WL 913840, at *2 (Tex. App.—El Paso Feb. 26, 2020, pet. ref'd) (not designated for publication). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Johnson*, 490 S.W.3d at 908; *Holman*, 2020 WL 913840, at *2.

C. Applicable law

Article 38.37 of the Texas Code of Criminal Procedure authorizes the admission of other-acts evidence committed by the defendant against the child who was the victim of the alleged offense for which the defendant is on trial. TEX. CODE CRIM. PROC. ANN. art. 38.37. Article 38.37 supersedes the application of Rule 404 of evidence. *Id.* at 38.37(1)(b). Because it supersedes Rule 404, article 38.37 allows the jury to consider relevant matters, including evidence of the defendant's character and acts performed in conformity with that character. *Id.* at 38.37(2)(b).

Rule 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." TEX. R. EVID. 403. Even where

evidence is found to be relevant under article 38.37, the court has an obligation to weigh the probative value of the evidence against the unfair prejudice of its admission. *See Montgomery v. State*, 810 S.W.2d 372, 289 (Tex. Crim. App. 1990). Factors to be considered in this balancing test include:

> (1) [H]ow compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable, (2) the potential the other offense evidence has to impress the jury in some irrational but nevertheless indelible way, (3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense, and (4) the force of the proponent's need for this evidence to prove a fact of consequence, *i.e.*, whether the proponent has other probative evidence available to him to help establish this fact, and whether the fact related to an issue in dispute.

Isenhower v. State, 261 S.W.3d 168, 178 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing *Santellen v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997)(internal quotation marks omitted).

The State brings a case to our attention from one of our sister courts. In *Isenhower v. State*, the Fourteenth District Court of Appeals reviewed the conviction of a defendant convicted of sexual assault of a child. 261 S.W.3d at 168. In that case, the child and her mother had moved from Ukraine when the child was fourteen years old. *Id.* at 171. The mother married an American man whom she had previously met, but they ended up leaving that man's house because he was physically abusive to the mother. *Id.* The mother and child moved in with a married couple—defendant Isenhower and his wife—who they had befriended. *Id.* Over the coming months, the defendant forced the child into having sexual intercourse over 100 times. *Id.* at 171-72. According to the child's trial testimony, she became pregnant at one point, and the defendant took her to get an abortion. *Id.*

The victim's outcry in that case was delayed for approximately six years, and the delayed outcry was a hotly contested issue in the case. *Id.* at 178. When the victim testified about the abortion, the defendant objected that the evidence was only marginally relevant and that its

prejudicial effect greatly outweighed any probative value. *Id.* at 177.

The Fourteenth District Court of Appeal held that the evidence had been properly admitted, concluding that "even though the evidence was inflammatory and took a relatively disproportionate amount of time to develop, the evidence of [the child's] abortion admitted under article 38.37 was properly admitted under the Rule 403 balancing test based on its probative value in explaining the parties' relationship and [the child's] delayed outcry." *Id.* at 179; *see also Brown v. State*, 657 S.W.2d 117, 119 (Tex. Crim. App. 1983) (holding that evidence of extraneous offenses was admissible to explain a delayed outcry); *Wilson v. State*, 90 S.W.3d 391, 394 (Tex. App.—Dallas 2002, no pet.) (holding that the victim's fear of the defendant allowed for the admission of evidence regarding extraneous offenses to explain a delayed outcry).

D. Analysis

Here, like in *Isenhower*, *Brown*, and *Wilson*, one of Carbajal's main points in closing argument included his counsel's assertion that Jane's outcry was extremely delayed and a cause for reasonable doubt as to all charges:

> [Y]ou listened to the horrific nature of the events that took place in this household, according to her, what she testified took place for a full ten years. And not once—not once did she talk to anybody about it.
>
> . . . .
>
> [I]t just shouts out that somebody would have mentioned that this was going on—that she would have mentioned that this was going on, but never—but never did.
>
> You heard about the opportunities. You know, she lived in four or five different houses; the neighbors and stuff, people coming over all the time. She went to many different schools. She had counselors and friends in three or four different schools. She went to shelters on separate occasions. She was in volleyball. She was in track.
>
> I don't know. It just seemed like—she had friends who were being sexually abused and they would talk about it, but she didn't share. She had relatives that she'd visit with and could talk to. She had friends who she ultimately moved in with who she called 'Mother.' All these people that she could have shared with, and she didn't. To me, I think that screams reasonable doubt.

During her testimony, Jane explained that she had not told anyone what was going on for all those years because she was afraid of Carbajal, and she was scared for her brothers who also lived with them. Ultimately, the testimony about Carbajal's statement about the abortion is evidence of the control Carbajal had over her life, and the fear she lived under, which is probative evidence, especially in light of Carbajal's delayed-outcry defense. Having established reasonable probative value, we also consider the prejudicial effect, time spent developing the testimony, and the State's need for the evidence. *See Santellen*, 939 S.W.2d at 169. Regarding the prejudicial effect, we determine this would be relatively low. Unlike in *Isenhower*, where the defendant actually took his pregnant child-victim to get an abortion, here, Carbajal only offered it as a solution for a potential situation that did not end up playing out. The risk of the jury convicting Carbajal of these serious crimes simply because of a single mention of a possible, but never sought abortion, is highly unlikely, and this factor weighs in favor of admission.

The time spent developing the testimony was relatively short, unlike in *Isenhower*, where the appellate court described the abortion-related testimony as occupying approximately seventeen pages of trial transcript. *Isenhower*, 261 S.W.3d at 179. Here, the testimony regarding the pregnancy scare and the abortion conversation between Jane and Carbajal cover only a page and a half of the trial transcript. This factor also weighs in favor of admission.

Lastly, we look at the State's need for this evidence. We determine that the State had a reasonably strong need for evidence showing Carbajal's control over Jane. The jury heard evidence that Jane had her own car, had friends, and played sports at school. This factor also weighs in favor of admission.

Ultimately, this evidence had probative value, and the relevant factors regarding prejudicial effect weighed in favor of the testimony's admissibility. Accordingly, we determine that the trial

court's admission was certainly not outside the zone of reasonable disagreement, and therefore we find no abuse of discretion.

Carbajal's fifth issue is overruled.

VII. JURY ARGUMENT

In his fourth issue, Carbajal claims the trial court erred in not granting a mistrial during the sentencing phase of trial after the State claimed in closing argument that any sentence imposed would run concurrently.

A. Background

Specifically, the State made the following statement during closing arguments: "I want to make sure you understand that right now as the law sits, these verdicts would run at the same time." Counsel for Carbajal objected and the trial court sustained the objection. Counsel for Carbajal requested that the jury be instructed to disregard the comment. The trial court gave the following instruction: "The jury shall disregard the last sentence of the prosecutor. I want you to recall that all of the instructions and the law that you must rely on are in the Charge." Next, counsel for Carbajal requested a mistrial, and that request was denied.

B. Applicable law

The law provides for, and presumes, a fair trial, free from improper argument by the prosecuting attorney. *Dickinson v. State*, 685 S.W.2d 320, 322 (Tex. Crim. App. 1984). The purpose of closing argument is "to facilitate the jury in properly analyzing the evidence presented at trial so that it may arrive at a just and reasonable conclusion based on the evidence alone, and not on any fact not admitted in evidence." *Milton v. State*, 572 S.W.3d 234, 239 (Tex. Crim. App. 2019) (internal quotation marks omitted). It should not "arouse the passion or prejudice of the jury by matters not properly before them." *Campbell v. State*, 610 S.W.2d 754, 756 (Tex. Crim. App. [Panel Op.] 1980). Proper jury argument generally falls within one of four areas: "(1) summation

of the evidence, (2) reasonable deduction from the evidence, (3) answer to an argument of opposing counsel, and (4) plea for law enforcement." *Freeman v. State*, 340 S.W.3d 717, 727 (Tex. Crim. App. 2011).

When a prosecutor misstates the law to the jury, an instruction to disregard will generally cure the error. *Blondett v. State*, 921 S.W.2d 469, 474 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). Except in extreme cases, the jury is presumed to follow the instructions to disregard. *Id.* Generally, those extreme cases have less to do with the prosecutor's misstatement, and more to do with direct evidence indicating that the members of the jury failed to follow the curative instruction. *See Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998) (holding there is a presumption that the jury followed the trial court's instruction unless a defendant presents evidence to rebut the presumption).

Here, Carbajal has not presented any evidence that the jury failed to follow the trial court's instruction to disregard the comment by the prosecutor. As a result, we presume that the jury followed the instructions of the trial court, and any error was cured. *See Id.* Carbajal does draw this Court's attention to *Andrews v. State*, a case in which the Court of Criminal Appeals held this sort of argument so egregious that there could be no reasonable trial strategy in failing to correct the false statement. 159 S.W.3d 98 (Tex. Crim. App. 2005). However, as the State points out, *Andrews* dealt with this issue in an entirely different context. In *Andrews*, the prosecutor argued to the jury that the defendant's sentences would run concurrently, could not be stacked, and that the longest confinement the defendant could receive was 20 years. *See Id.* at 100. In reality, the prosecutor had filed a motion to stack the sentences, which had been granted by the trial court. *Id.* Although the prosecutor's statement was completely untrue, the defendant's attorney did not object. *Id.* Ultimately, the Court of Criminal Appeals held the record of the case supported a claim of ineffective assistance of counsel. *Id.*

If anything, *Andrews* would indicate that Carbajal's defense attorney did the right thing to object. His objection was sustained, and he even obtained an immediate, clear instruction from the trial court that the jury disregard the prosecutor's statement. Without any evidence to the contrary, we will assume the jurors heeded the trial court's instruction. *See Colburn*, 966 S.W.2d at 520. As a result, any error was cured and rendered harmless. *Id*.

Carbajal's fourth issue is overruled.

VIII. MODIFICATION OF THE JUDGMENTS

On review, we have the authority to modify a trial court's judgment and affirm as modified. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993) (courts of appeals have authority to modify a judgment). Here, we observe from the multi-count indictment that each count included an enhancement paragraph alleging that "on the 29th day of July, 2002, in cause number 78973 in the 65th District Court of El Paso County, Texas, the defendant was finally convicted of the felony offense of Aggravated Assault with a Deadly Weapon . . . ." On review, the reporter's record revealed that Carbajal pleaded "true" to the State's enhancement allegations. 9 And, we also note the 2002 judgment of conviction was admitted to evidence as State's exhibit 29. And finally, the jury found the enhancement paragraph to be true regarding all counts submitted. Yet, as we observe from the record, none of the four judgments rendered reflect either Carbajal's plea of true to the enhancement, or the jury's finding of true regarding the same. Rather, each of the four judgments of conviction erroneously provide "N/A" in the space provided for "1st Enhancement Paragraph," and in the space for the corresponding "Finding on 1st Enhancement Paragraph." Accordingly, we modify each judgment to reflect on each that Carbajal pleaded "true" to the enhancement paragraph, and the jury made a finding of "true" on the same.

IX. CONCLUSION

Having sustained Carbajal's double-jeopardy complaint as to Count XI of the indictment, which he advanced in his third issue, we reverse and render a judgment of acquittal as to that count only but affirm the remaining judgments of conviction as to all other counts. TEX. R. APP. P. 43.2(c). And having overruled each of Carbajal's remaining issues, we conclude the four judgments of conviction under Counts I through V, VII through X, and XII through XIV, are affirmed as modified by this decision. TEX. R. APP. P. 43.2(b).

GINA M. PALAFOX, Justice

August 5, 2022

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

(Publish)