**Affirmed and Opinion Filed December 20, 2017**

**In The**
# Court of Appeals
# Fifth District of Texas at Dallas

**No. 05-16-01138-CR**
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**DERRICK BRANNON SULLIVAN, Appellant**
**V.**
**THE STATE OF TEXAS, Appellee**

**On Appeal from the 282nd Judicial District Court**
**Dallas County, Texas**
**Trial Court Cause Nos. F-1324555-S, F-1324563, F-1325621**

## MEMORANDUM OPINION

Before Justices Francis, Myers, and Whitehill
Opinion by Justice Whitehill

Appellant was indicted in three separate cases alleging a single count of indecency with a child by touching the genitals of BH, KH, and MH. The cases were tried together, and a jury found appellant guilty and assessed punishment at three years imprisonment for each offense. On the State's motion, the sentences were cumulated.

In three issues, appellant argues that the jury charge was erroneous as to BH and KH because it did not require the jurors to reach a unanimous verdict and the trial court mistakenly believed that it had to cumulate the sentences.

We conclude that (i) the charge was erroneous but did not cause appellant egregious harm and (ii) the record reflects the trial judge's understanding of her discretion to cumulate the sentences. We thus affirm the trial court's judgments.

## I. BACKGROUND

The State adduced evidence including the following:

BH and KH lived with their father (Ryan) during the week and stayed with appellant's girlfriend, their aunt Tammy, every other weekend. Another of Tammy's nieces, MH, had lived with a different father, and MH did not have contact with Tammy, BH, and KH for many years.

Tammy worked and appellant did not, so he was in charge of BH and KH when Tammy was not home.

In October, 2012, Ryan told Tammy that the girls had accused appellant of sexual abuse, but Tammy did not believe Ryan. When she asked appellant about the allegations, he calmly denied them, and she believed him.

In 2013, about a week after MH accompanied Tammy, BH, KH, and appellant on a camping trip, Tammy learned that MH had accused appellant of touching her. Because, among other reasons, MH had no contact with BH and KH, Tammy concluded that what BH and KH told her in 2012 must be true.

Tammy asked appellant about MH's allegation, and he said that his finger had slipped when he helped her use the bathroom. But MH was five years old and did not require bathroom assistance. Tammy asked about BH and KH, and appellant admitted that he touched them on the outside of their clothes. She kicked appellant out of the house and called the police.

BH was ten years-old at trial. She said that she and her sister KH would go to Tammy's house on weekends and appellant was there. BH did not like appellant because "he touched [her] in the wrong place." This happened three or four times.

BH did not remember the first time it happened, but she remembered the last. She was in the living room on the couch, and appellant touched her "middle private part" on the outside of her clothes. She was scared to tell anyone because appellant told her he would hurt someone if she did.

On another occasion, BH was using the computer when appellant called her into the kitchen. Appellant was on his knees and touched the same middle part over her clothes with his hand.

Another time, appellant told her to come to the bathroom and locked the door when she entered. He then touched her middle part over her clothes with his hand.

KH was nine years-old at trial. She testified that appellant touched her on more than one occasion while in the kitchen at Tammy's house. On one occasion, appellant called her to the kitchen from the living room. He was on his knees, leaning, and touched her private part outside her clothes. The private part was what KH used "to go to the restroom to pee." When appellant would touch her private part he would tell her not to tell because he would get in trouble. But KH eventually told her grandmother.

MH was eight years-old at trial. She said appellant touched the front part of her body where she goes to the bathroom with his hand. This happened once, in the kitchen at Tammy's house. Appellant called her in, and had one knee bending and one knee on the floor, and touched her underneath her clothes. He told her that he would hurt her if she told anyone, and that made her feel sad.

Patti Flowers, a forensic interviewer with the Canton Children's Advocacy Center testified about interviewing BH and KH and their outcry to her. Anatomical drawings the girls made to illustrate where appellant touched them were admitted into evidence. Flowers said she saw no indication that the girls had been coached.

Patricia Guardiola with The Dallas Children's Advocacy Center interviewed MH in 2013, when MH outcried to her. MH told her that appellant touched her "area" with his hand over her panties when she was in the bathroom. An anatomical drawing MH made was admitted into evidence.

A therapist from the Dallas Children's Advocacy Center explained the dynamics of child sexual abuse, including delayed outcry. She also explained "inculcation," which is repeating something to a person over and over to get that person to learn new material. A person can be inculcated to a false fact by repetition.

The girls' mother, Regina, testified that MH and KH made sexual abuse allegations against appellant in 2012, but she did not know him very well and did not know what to believe. Then, in 2013, MH made an allegation against appellant as they were driving to Tammy's house, and she called Tammy.

Theresa Franks, the girls' paternal grandmother, testified that the girls made sexual abuse allegations against appellant in October 2012. She called their father (Ryan) immediately, and they filed a police report the next day.

On the other hand, appellant called several character witnesses and testified on his behalf. Appellant denied the girls' allegations, said they were lying, and claimed that Franks would do anything to get the children for herself. He claimed that he could not have been alone with KH and BH "at the time" because he was working, was only at Tammy's house one weekend a month, and was never alone with the girls. According to appellant, he thought Tammy was having an affair and trying to get rid of him. He described Tammy as manipulative and denied telling her that the girls' allegations were true. He also described a hernia that caused him great pain and prevented him from bending or stooping.

The jury sent out several notes for exhibits and the forensic interviews. One note concerned what Tammy said during the camping trip with MH, and another concerned MH's outcry to her mother. After two days of deliberations, the jury sent the judge a note that read: "We, the jury, have a disagreement on the two counts of three. We, the jury, are not able and

cannot come to an [sic] unanimously—unanimous agreement." The court read the jury an *Allen* charge, and the jury subsequently found appellant guilty of all three charges.

The jury assessed punishment at three years for each offense, and after a hearing on the State's motion to cumulate, the judge cumulated the sentences. This appeal followed.

## II. ANALYSIS

### A. Appellant's First Two Issues: Charge Errors

#### 1. Was the charge erroneous because it did not require a unanimous verdict?

Appellant's first two issues argue that the charge allowed the jury to reach a non-unanimous verdict as to BH and KH because it did not limit the offenses to a specific incident or date. We agree that the charge was erroneous, but conclude that it did not cause appellant egregious harm.[1]

"Texas law requires that a jury reach a unanimous verdict about the specific crime that the defendant committed." *Cosio v. State*, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011). "This means that the jury must agree upon a single and discrete incident that would constitute the commission of the offense alleged." *Id.* A non-unanimous verdict may result if the jury charge fails to instruct the jury, "based on the indicted offense(s) and specific evidence in the case, that its verdict must be unanimous." *Id.*

"[N]on-unanimity may occur when the State charges one offense and presents evidence that the defendant committed the charged offense on multiple but separate occasions." *Id.* at 772. Separate instances of indecency with a child by contact are separate offenses. *Pizzo v. State*, 235 S.W.3d 711, 719 (Tex. Crim. App. 2007). Therefore, in such a case, to ensure unanimity, the jury charge needs to "instruct the jury that its verdict must be unanimous as to a single offense or unit of prosecution among those presented." *Cosio*, 353 S.W.3d at 772.

[1] There were three charges, one for each offense. But since the complained-of language is the same in the BH and KH charges, we refer to the charge singularly.

For example, in *Cosio*, the jury charge erroneously allowed for a non-unanimous verdict when there was evidence of multiple instances of misconduct supporting each count of aggravated sexual assault and indecency with a child. *See id*. at 770, 774. The "standard, perfunctory unanimity instruction," did not rectify the error because, although the jury could have believed it had to be unanimous about the offenses, the jury could have believed it did not have to be unanimous about the criminal conduct constituting the offenses. *See id.* at 774.

Here, the charge was similarly erroneous. Although there was evidence that appellant touched BH on three or four occasions and touched KH "more than one time," the charge tracked the language in the indictments and asked whether appellant engaged in sexual contact with BH "on or about August 1, 2012," and with KH "on or about July 15, 2012." Thus, the charge was erroneous because it did not require unanimity regarding which of the sexual contact the jury believed appellant committed.

**2. Did the erroneous charge cause appellant egregious harm?**

Having concluded that the charge was erroneous, we next consider whether appellant was harmed. When, as here, there was no objection to the charge, we reverse only if the error caused actual, egregious harm as opposed to theoretical harm. *See Arrington v. State*, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015).

Actual egregious harm occurs if the jury charge (i) affected the very basis of the case, (ii) deprived the defendant of a valuable right, or (iii) vitally affected a defensive theory. *Id.* To this end, an appellate court will "inquire about the likelihood that the jury would in fact have reached a non-unanimous verdict on the facts of the particular case." *Jourdan v. State*, 428 S.W.3d 86, 98 (Tex. Crim. App. 2014).

When assessing harm based on the particular facts of the case, we consider (i) the entire jury charge; (ii) the state of the evidence, including contested issues and the weight of the

probative evidence; (iii) the parties' arguments; and (iv) all other relevant information in the record. *Arrington*, 451 S.W.3d at 840.

**a. The Entire Jury Charge**

Applying the foregoing factors to this case, we first consider the entire jury charge. The State argues that the entire charge "bears minimal weight as to egregious harm" because it "limited the jury's consideration of the unindicted acts to state of mind, relationship, motive, intent, scheme or design, or the character of the defendant." But the State does not explain how this helps the jury understand the unanimity requirement. A limiting instruction concerning extraneous acts is inadequate to instruct the jury that it must unanimously agree on a single incident of criminal conduct that supports the charged offense. *See Cosio*, 353 S.W.3d at 773–74. As previously explained, the charges as to BH and KH permitted non-unanimous verdicts based on the evidence presented at trial and did not militate against that conclusion. Therefore, this factor favors finding egregious harm.

**b. The State of the Evidence**

Next, we consider the state of the evidence. The State's evidence came primarily from the complainants' testimony, family members testifying about the outcries, forensic interviewers, and the therapist. Each complainant testified that appellant touched her vagina through their clothes. And KG and BH said that he did that on more than one occasion.

Appellant vehemently denied doing so and denied that he was ever alone with them. He also explained that his hernia prevented him from kneeling. The defensive theory, developed primarily through cross-examination, was that some family members had a motive to "inculcate" the children into unknowingly accusing appellant.

Defense counsel also cross-examined the witnesses on inconsistencies in the interviews with the District Attorney's office, the forensic interviews, and the children's testimony. For

example, MH told the forensic interviewer that appellant touched her in the bathroom over her panties, but testified that it occurred in the kitchen over her clothes. Similarly, BH told the District Attorney's office that the offense occurred more than eight times, but testified that it happened "three or four" times.

While there were differences between the children's testimonies and the interviews, none of these inconsistencies were date specific. And with the general testimony that the touching occurred more than one time, it is unlikely that some of the jurors would have believed the conduct occurred only once while others believed that it also occurred another time.

Moreover, appellant did not argue that he was guilty of only some of the allegations. Instead, his trial strategy left the jury with an all or nothing decision—either he was guilty or he was not. According to the court of criminal appeals, in finding him guilty the jury necessarily disbelieved appellant's defensive evidence. *See Arrington*, 451 S.W.3d at 842.

Finally, there was evidence that appellant previously admitted committing the offenses. Although appellant denied doing so, the jury's verdicts suggest otherwise.

Accordingly, we conclude that the state of the evidence weighs against finding harm. *See Cosio*, 353 S.W.3d at 778.

**c. The Parties' Arguments**

Appellant asserts that the State's argument encouraged a non-unanimous verdict because the prosecutor referred to the touching as occurring "over and over, and over" and then argued that the State only had to prove that the appellant touched the girls' vaginas. The State responds that it was reasonable to infer that the reference was to one indicted act against one child because the complained-of argument was made in the context of arguing that the touching occurred "child after child after child."

Regardless of how isolated portions of the arguments may be interpreted, viewed as a whole, the arguments reflect that neither the State nor the defense argued that the jurors were required to be unanimous about which touching instance constituted each offense, nor were they told that they need not be unanimous. Therefore, we do not weigh this factor for or against finding egregious harm. *See Arrington*, 451 S.W.3d at 844.

**d. Other Relevant Information**

Finally, we evaluate other relevant information. Appellant relies on the jury's seven notes, particularly the note concerning their inability to reach a unanimous verdict, to argue that the charge errors contributed to these difficulties and thus support egregious harm. He further argues that the court's standard *Allen* charge did nothing to ameliorate the charges' unanimity problems. We disagree.

While it is possible that the jurors were confused about whether they needed to agree on a single instance of conduct, there are other plausible explanations for the jury's unanimity note. For example, it is possible that the jury understood what was required but was simply unable to reach a consensus about whether the conduct underlying one or more of the charges occurred at all. Moreover, the jury reached a unanimous verdict after the *Allen* charge, and confirmed that verdict when polled. Consequently, nothing in the record indicates that the verdict was not unanimous. Accordingly, we cannot conclude that this factor supports egregious harm.

Thus, although the charges failed to identify the particular acts necessary to support the offenses, the evidence in the entire record, viewed together with the jury's verdicts, the charges themselves, the parties' arguments, and other relevant information, show that the charge errors did not cause appellant actual, egregious harm. *See Arrington*, 451 S.W.3d at 845. We thus resolve appellant's first two issues against him.

**B. Appellant's Third Issue: Did the trial court fail to exercise its discretion when it cumulated appellant's sentences?**

Appellant's third issue argues that the trial court failed to exercise its discretion and "apparently believed that it was obligated to cumulate the sentences." We disagree.

Indecency with a child by contact is a second degree felony with a punishment range of between two to twenty years and a possible fine of up to $10,000. *See* TEX. PENAL CODE § 21.11(a) (1) & (d), and TEX. PENAL CODE § 12.33. The jury returned unanimous verdicts of three years imprisonment in each case.

In certain circumstances, a trial judge has discretion to stack, or cumulate sentences. *See Bonilla v. State*, 452 S.W.3d 811, 815 (Tex. Crim. App. 2014). Specifically, penal code § 3.03 provides:

> (a) When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently.
>
> (b) If the accused is found guilty of more than one offense arising out of the same criminal episode, the sentences *may* run concurrently or consecutively if each sentence is for a conviction of . . .
>
> (2) an offense:
>
> (A) [under Section 21.11] committed against a victim younger than 17 years of age at the time of the commission of the offense regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of more than one section . . . .

TEX. PENAL CODE § 3.03.

Here, the State filed a motion to cumulate appellant's sentences and argued that appellant's case met the statutory requirements permitting the court to order the sentences to run consecutively. Appellant replied that he should sentenced to three years in accordance with the jury's wishes. The court concluded:

> The statute does contemplate under these circumstances, that being of the same criminal transaction that the ***Court has the discretion*** to cumulate the sentences.
>
> Based on the fact that these are the same criminal episode as defined under 3.03 and the fact that the defendant was convicted under Penal Code Section 21.11, the Court is cumulating these sentences and so ordered.

(Emphasis added).

Appellant does not dispute that the judge had discretion to cumulate the sentences, but instead argues that she did so simply because she believed the penal code required that she do so. Nothing in the record, however, suggests that the trial judge misunderstood the statute. Indeed, the trial judge's comments show her awareness that she had discretion. Because nothing establishes that the judge's decision was based on anything other than an exercise of her discretion, we resolve appellant's third issue against him.

## III. CONCLUSION

Having resolved all of appellant's issues against him, we affirm the trial court's judgments.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

DERRICK BRANNON SULLIVAN,
Appellant

No. 05-16-01138-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F13-24555-S.
Opinion delivered by Justice Whitehill.
Justices Francis and Myers participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered December 20, 2017.

# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

DERRICK BRANNON SULLIVAN,
Appellant

No. 05-16-01139-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F13-24563-S.
Opinion delivered by Justice Whitehill.
Justices Francis and Myers participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered December 20, 2017.

# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

DERRICK BRANNON SULLIVAN,
Appellant

No. 05-16-01140-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F13-25621-S.
Opinion delivered by Justice Whitehill.
Justices Francis and Myers participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered December 20, 2017.