**Opinion issued December 9, 2021**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-20-00309-CR**

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**DAVID GREEN, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 331st District Court**
**Travis County, Texas**
**Trial Court Case No. D-1-DC-19-904057**

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## MEMORANDUM OPINION

Appellant David Green was indicted on two counts of aggravated sexual assault and one count of aggravated robbery.[1] A jury convicted Green on all three

[1] *See* TEX. PENAL CODE §§ 22.021 (aggravated sexual assault), 29.03 (aggravated robbery).

counts, enhanced by prior convictions for aggravated robbery and burglary, and sentenced him to 50 years' imprisonment for each count, to run concurrently. In one issue on appeal,[2] Green contends his conviction for aggravated sexual assault in Count II was barred by the Double Jeopardy Clause of the United States Constitution.[3]

We will modify the trial court's judgments of conviction to correct non-reversible errors and affirm the judgments as modified.

## Background

On or about the early evening of December 21, 2018, Alyssa Vargas (Pseudonym) left the Austin-area home of her boyfriend Noah Sales after an argument and took an Uber to a nearby park. Vargas took the phone she had gifted her boyfriend, her own phone, and her purse. When Vargas arrived at the park, she noticed a man, later identified as Green, staring at her. Green and another man, Kyle Kenoski, approached Vargas. After some conversation, Green put a knife to Vargas's throat while pulling her hair. Green and Kenoski led Vargas to the

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[2] Pursuant to its docket-equalization authority, the Supreme Court of Texas transferred this appeal to this Court. *See* Misc. Docket No. 19-9091 (Tex. Oct. 1, 2019); *see also* TEX. GOV'T CODE § 73.001 (authorizing transfer of cases). We researched relevant case law and did not locate any conflict between the precedent of the Court of Appeals for the Third District and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

[3] Green does not raise any arguments challenging his convictions in Count I (aggravated sexual assault) or Count III (aggravated robbery).

playscapes, where Green made Vargas undress, forced her to the ground, and then penetrated her vagina with his penis. Kenoski held the knife and stayed close to Vargas so that she "couldn't do anything."

After a few minutes, Green stopped and told Kenoski to "do whatever he wanted to" Vargas. Kenoski penetrated Vargas's vagina with his penis and then attempted, but failed, to penetrate Vargas's anus. Kenoski ejaculated.

Green then ordered Vargas on the ground and began to strangle her with a cord or cable. Vargas pleaded with Green to stop, saying "it wasn't necessary, that [she] wasn't going to do anything." Green stopped and, after removing the cord from around Vargas's neck, grabbed the necklace Vargas was wearing. Vargas removed the necklace from around her neck because she was "scared that [Green] could use [it] . . . to strangle [her]." Green took the necklace from Vargas and then instructed her to "suck on his penis." He unzipped his pants and told Vargas to "make it like if [she] was enjoying it." Green forced his penis into Vargas's mouth until he ejaculated. Green and Kenoski then returned Vargas's clothing to her and made her change and clean herself in the bathroom nearby. The two men instructed Vargas to wait for five minutes before coming out of the bathroom.

When Vargas came out of the bathroom, she discovered that her purse had been gone through and that her cellphone was missing. But she still had Sales's cellphone. Vargas called Sales to tell him what had happened. Within a few minutes

of the call, Sales and his mother arrived at the park to pick up Vargas. Sales's mother called the police and reported the assault.

After speaking with and being assessed by EMS at the park, Vargas elected to go to SafePlace[4] instead of the hospital. SafePlace offers sexual assault forensic exams ("SAFE exam") and treatment for patients. At SafePlace, Vargas underwent a SAFE exam that revealed bruising and petechiae over several parts of her body. Petechiae are small, popped blood vessels that can cause a purple or blue coloring on the skin. The SAFE exam showed redness on the back of Vargas's throat near her uvula, petechiae on the top of her palate, and redness under her tongue. The SAFE exam also revealed redness around Vargas's anus and perianal. During the SAFE exam, sampling was collected from Vargas's vagina, mouth, and buttocks area.

Following Vargas's assault, Sales began searching nearby homeless campsites to help find Vargas's attackers. At one of the campsites, Sales discovered a prescription bottle in the name of "David Green." Sales then searched for "David Green" on Facebook and discovered Green's profile, which contained a picture of

[4] In her testimony, Vargas referred to the location where her SAFE exam was performed as "SafePlace." The nurse who conducted the SAFE exam did not specifically reference "SafePlace," but testified that, in December 2018, she was working for an organization known as The Safe Alliance and performed Vargas's SAFE exam at the organization's free clinic in South Austin. Documentary evidence admitted at trial showed that The Safe Alliance and SafePlace are one and the same. For ease of reference in this opinion, we refer to the location where Vargas's SAFE exam was conducted as SafePlace.

Green in what looked like the same park where Vargas was attacked. Sales testified he showed the Facebook photo to Vargas because Green resembled Vargas's description of one of her attackers. Vargas "knew it was him." Sales provided this information to the police.

The police verified the information received from Sales and arrested Green at a homeless campsite near the park where Vargas was attacked. Green's DNA was taken through a buccal swab. Brianne Floryan, a forensic scientist, explained that Green's buccal swab was tested and compared to a circumoral swab taken from Vargas's SAFE exam. The DNA from Vargas's circumoral swab matched Green's DNA profile. No other DNA contributors were found in Vargas's circumoral swab.

Green was charged with two counts of aggravated sexual assault and one count of aggravated robbery. In Count I, Green was charged with "intentionally or knowingly caus[ing] the penetration of [Vargas's] female sexual organ . . . by [his] sexual organ." In Count II, Green was charged with "intentionally or knowingly caus[ing] the penetration of [Vargas's] mouth . . . by [his] sexual organ."

The jury found Green guilty on all counts. The trial court found true two enhancement paragraphs for prior felony convictions, which subjected Green to a punishment range of 25 years to life for each conviction.[5] The trial court assessed punishment at 50 years' imprisonment for each count, with the sentences to run

[5] *See* TEX. PENAL CODE §§ 12.42(d), 22.021, 29.03.

concurrently. Green moved for a new trial but did not include a double jeopardy argument in his motion. The motion for new trial was overruled by operation of law, and Green appealed.

## Double Jeopardy

Green contends the Double Jeopardy Clause barred his charge and conviction for aggravated sexual assault in Count II. *See* U.S. CONST. amend. V. The crux of Green's argument is that the Count I and Count II convictions are for "the same offense, but for an allegation of a different body part." Count I and Count II both charged the offense of aggravated sexual assault. Count I was based on Section 22.021(a)(1)(A)(i) of the Penal Code, which defines the offense as "intentionally or knowingly . . . caus[ing] the penetration of the anus or sexual organ of another person by any means, without that person's consent." TEX. PENAL CODE § 22.021(a)(1)(A)(i). Count II was based on Section 22.021(a)(1)(A)(ii), which defines the offense as "intentionally or knowingly . . . caus[ing] the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent." *Id.* § 22.021(a)(1)(A)(ii).

### A. Standard of Review

The Double Jeopardy Clause provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. This guarantee was made applicable to the states by the Due Process Clause of

the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 796 (1969); *see also* U.S. CONST. amend. XIV.

There are three distinct types of double jeopardy claims: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Langs v. State*, 183 S.W.3d 680, 685 (Tex. Crim. App. 2006). When a defendant is convicted of two or more crimes in a single trial, as Green was here, only a multiple punishments claim is involved. *See Eubanks v. State*, 326 S.W.3d 231, 243 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). A multiple punishments claim arises in two contexts:

> (1) the lesser-included offense context, in which the same conduct is punished twice; once for the basic conduct, and a second time for that same conduct plus more; and
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> (2) punishing the same criminal act twice under two distinct statutes when the Legislature intended the conduct to be punished only once.

*Langs*, 183 S.W.3d at 685; *see also Gonzales v. State*, 304 S.W.3d 838, 845 (Tex. Crim. App. 2010) ("[The Double Jeopardy Clause] also protects [a defendant] from being punished more than once for the same offense in a single prosecution.").

What constitutes the same offense in the multiple-punishments context is "purely a matter of legislative intent." *Gonzales*, 304 S.W.3d at 845. Typically, to determine whether there have been multiple punishments for the same offense, we apply the "same elements" test from *Blockburger v. United States*, 284 U.S. 299

(1932). *Blockburger* instructs that where the same act or transaction violates two distinct statutory provisions, the test to determine whether there are one or two offenses is whether each provision requires proof of a fact which the other does not. *Id.* at 304. For purposes of a multiple punishments analysis, however, "the *Blockburger* test is only a tool of statutory construction—and not even an exclusive one." *Gonzales*, 304 S.W.3d at 845. "An accused may be punished for two offenses even though they would be regarded as the same under a *Blockburger* analysis if the Legislature has otherwise made manifest its intention that he should be." *Id.*

Green did not present his double jeopardy claim to the trial court. When the undisputed facts show the double jeopardy violation is apparent on the face of the record and when enforcement of usual procedural default serves no legitimate state interests, a defendant need not raise an objection at trial and may raise a double jeopardy claim for the first time on appeal. *Gonzales v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000). A double jeopardy claim is apparent on the face of the record if resolution of the claim does not require further proceedings to introduce additional evidence in support of the double jeopardy claim. *Ex Parte Denton*, 399 S.W.3d 540, 544 (Tex. Crim. App. 2013).

**B. Analysis**

To determine whether Green preserved his double jeopardy complaint for appellate review, we consider whether the issue he raises is apparent on the face of

the record. The jury charge included the following language for Count I, Aggravated Sexual Assault:

> If you believe from the evidence beyond a reasonable doubt that . . . Green . . . intentionally or knowingly cause[d] the *penetration of the female sexual organ* of . . . Vargas by the sexual organ of . . . Green, without the consent of . . . Vargas . . . then you will find [Green] guilty of the offense of aggravated sexual assault as alleged in the indictment, and so say by your verdict in Verdict Form #1[.]

(Emphasis added.) Likewise, the jury charge included the following language for Count II, Aggravated Sexual Assault:

> Now bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt that . . . Green . . . intentionally or knowingly cause[d] the *penetration of the mouth* of . . . Vargas by the sexual organ of . . . Green, without the consent of . . . Vargas . . . you will find [Green] guilty of the offense of aggravated sexual assault as alleged in the indictment, and so say by your verdict in Verdict #2[.]"

(Emphasis added.)

As reflected in the jury charge, Green was charged with two separate counts of aggravated sexual assault by two separate means of sexual contact—penetration of Vargas's mouth and penetration of Vargas's sexual organ.

Although Green contends his conviction for Count II violated his double jeopardy rights after he was convicted of Count I, the Court of Criminal Appeals has rejected such an argument in interpreting Section 22.021 of the Penal Code. *See Vick*

*v. State*, 991 S.W.2d 830, 831 (Tex. Crim. App. 1999).[6] In doing so, the Court explicitly held that the Legislature intended violations of two subsections of Section 22.021 to constitute separate and distinct offenses for double jeopardy purposes. *Id.*

In *Vick*, the defendant was first charged with aggravated sexual assault of a child based on the penetration of the female child's sexual organ. *Id.* Although the defendant was acquitted of that crime, he was later indicted for aggravated sexual assault by causing "the female sexual organ of the child victim to contact the mouth of [defendant]," which resulted from the same transaction as the previous indictment. *Id.* The defendant argued his double jeopardy rights were violated because he was subjected to multiple prosecutions for acts of aggravated sexual assault of a child arising out of the same incident. *Id.*

The Court analyzed the legislative intent to determine whether the alleged conduct violated two distinct statutory provisions within one statute. *Id.* at 832. The Court stated:

> [Section] 22.021 is a conduct-oriented offense in which the [L]egislature criminalized very specific conduct of several different types. Also, the statute expressly and impliedly separates the sections by "or," which is some indication that any one of the proscribed conduct provisions constitutes an offense. A more compelling demonstration of legislative intent is reflected in the specific conduct prohibited in the

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[6] While *Vick v. State*, 991 S.W.2d 830 (Tex. Crim. App. 1999), discusses the portion of Section 22.021 of the Penal Code related to sexual offenses against children, the language and structure of that portion is nearly identical to the portion relating to sexual offenses against adults. *Compare* TEX. PENAL CODE § 22.021(a)(1)(A)(i), (ii), *with id.* § 22.021(a)(1)(B)(i), (ii).

> four sections applicable to this case. Section (i) prohibits penetration of a male or female child's anus or the sexual organ of a female child. The focus is on penetration of the child's genital area. Somewhat related is section (ii), which prohibits penetration of the child's mouth by the defendant's sexual organ. Both section (i) and section (ii) concern penetration of the child, one focusing on the genital area, and the other on the mouth.

*Id.* at 832–33. Given these considerations, the Court concluded that "the Legislature intended that each separately described conduct constitutes a separate statutory offense." *Id.* at 833. The Court held that because the indictments alleged violations of separate and distinct aggravated sexual assault offenses, this ended the inquiry for double jeopardy purposes. *Id.*

The Court also noted that although the *Blockburger* test "serves as a jeopardy bar . . . in prosecutions of multiple offenses arising from the same act or transaction under certain circumstances," that test "is simply a tool with which to evaluate whether the Legislature intended multiple punishments." *Id.* (internal quotation omitted). Because it held the Legislature intended to punish separate acts, even if such acts might be in close temporal proximity, the Court concluded that it "need not determine whether those offenses would be considered the 'same' under the *Blockburger* test because the precondition for employing the test (that the two offenses involve the same conduct) is absent." *Id.*

In 2010, the Court of Criminal Appeals again considered whether a defendant's conviction for two counts of aggravated sexual assault under Section

22.021, arising out of the same transaction, violated the double jeopardy bar. *See Gonzales*, 304 S.W.3d at 840. In *Gonzales*, the defendant was convicted of aggravated sexual assault of his daughter, a child, and was indicted separately for the offenses of anal and vaginal intercourse, both arising from a single transaction. *Id.* at 840. As Green does here, the defendant claimed a double jeopardy violation because he was subjected to multiple punishments based on convictions for anal intercourse and vaginal intercourse. *Id.* at 844. Although the court of appeals concluded "because both theories of aggravated assault (anal and vaginal penetration) are contained in the same subsection of the penal provision, the Legislature must have considered them to be the same for double-jeopardy purposes," the Court of Criminal Appeals disagreed. *Id.*

The Court acknowledged the *Gonzales* case was different than *Vick* in two ways: (1) it was a multiple-punishments and not a multiple-prosecution case, and (2) the separate theories of sexual assault derived from the same subsection of the statute, while *Vick* dealt with two subsections within the same statute. *Id.* at 847. But it concluded that its determination of legislative intent in *Vick* "would apply with at least as much force in the multiple-punishment context." *Id.* "If the Legislature intended different subsections of the aggravated sexual assault statute to constitute separate offenses for purposes of whether an accused may be twice *prosecuted* for

the 'same' offense, it would have harbored no different intent for purposes of whether he may be twice *punished*." *Id.* (emphasis in original).

The Court held that there was no double jeopardy violation when the appellant was convicted under both counts because the Legislature intended that "penetration of a child's anus should be regarded as a distinct offense from penetration of her sexual organ even if they occur during the course of the same incident or transaction." *Id.* at 849. The Court elaborated, "our reasoning in *Vick* did not necessarily turn on the fact that the separate theories of aggravated sexual assault were incorporated in separate subsections of the statute." *Id.* at 847. Rather, it was the statute's use of "various phrases and subsections separated by the disjunctive 'or,'" that the Court found to be "at least some indication that any one of the prohibited types of conduct would constitute a separate offense." *Id.* Thus, the Court concluded that it could "appropriately infer that the Legislature intended to create separate offenses for double-jeopardy purposes by virtue of the fact that it chose to proscribe separate acts in separate phrases, *even within the same subsection*, so long as those phrases are disjunctive and embrace discretely prohibited acts." *Id.* at 847–48 (emphasis in original).

Green argues that *Vick* and cases like *Vick* are the Legislature's and State's attempt to avoid "the spirit and letter of the Double Jeopardy Clause by a sophisticated manipulation of [ ] language to get around common sense." He

contends that although the Supreme Court may have once tried to broaden the application of *Blockburger* to a more "conduct oriented approach," it has since "returned to the 'elements' analysis of *Blockburger*."[7] While the *Blockburger* test is the starting point in the analysis of a double jeopardy claim based on multiple punishments, its "application . . . does not serve to negate otherwise clearly expressed legislative intent." *Denton*, 399 S.W.3d at 546 (quoting *Villanueva v. State*, 227 S.W.3d 744, 747 (Tex. Crim. App. 2007)). In the multiple-punishments context, *Blockburger* is no more than a rule of statutory construction, useful in discerning the legislative intent about the scope of punishment where the intent is not otherwise manifested. *Id.*

Turning to this case, Green was charged with and convicted of two separate and distinct acts—penetration of Vargas's mouth and penetration of her sexual organ. The Court of Criminal Appeals determined the Legislature intended for such offenses to be punished separately, as written in Section 22.021. Here, as in *Vick* and *Gonzales*, application of the *Blockburger* test is unnecessary because "the

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[7] A careful reading of the cases cited by Green reveals that legislative intent has always controlled when dealing with the Double Jeopardy Clause. For example, in *Brown v. Ohio*, the Supreme Court explained that the "Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors" and the "[L]egislature remains free under the Double Jeopardy Clause to define crimes and fix punishments." 432 U.S. 161, 165 (1977). The Court further explained "the role of the constitutional guarantee is limited to assuring that the court does not exceed its *legislative authorization* by imposing multiple punishments for the same offense." *Id.* (emphasis added).

precondition for employing the test (that the two offenses involve the same conduct) is absent." *Vick*, 991 S.W.2d at 833. Green's characterization of his actions as "one continuous act, one fluid set of actions against a person, not a body part," does not negate the Legislature's intent to punish each offense separately. Moreover, by its holding that the "Legislature intended to punish separate acts, even though such acts might be in close temporal proximity," *Vick* explicitly rejects Green's argument that his offenses were "one continuous act," and thus should not be subjected to multiple punishments. *Id.*; *see also Gonzales*, 304 S.W.3d at 849 ("Penetration of the anus constitutes a discrete act from penetration of the sexual organ, even if they occur within a short period of time.").

In sum, *Vick* held that Section 22.021 contains separate and distinct offenses for double jeopardy purposes. 991 S.W.2d at 832–33. *Gonzales* reinforced this holding. *See* 304 S.W.3d at 849. As a lower court, we are bound by these holdings that the Legislature intended separate subsections of Section 22.021 to constitute separate and distinct statutory offenses. *See Ervin v. State*, 331 S.W.3d 49, 53 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) ("As an intermediate court of appeals, we are bound to follow the precedent of the [C]ourt of [C]riminal [A]ppeals."). The precedent and language are clear: Green's convictions for penetrating Vargas's mouth and sexual organ constituted two separate and distinct offenses. His

conviction on one count does not bar his conviction for the other. We therefore hold there is no double jeopardy violation apparent on the face of the record.

We overrule Green's sole issue on appeal.

**Clerical Errors in the Judgments**

In a separately filed motion, the State asks us to modify the trial court's judgment to correct two errors. First, the State asserts that although Green was convicted of two counts of aggravated sexual assault, the judgments in Counts I and II fail to specify that he was required to register as a sex offender. Second, the State asserts that the judgments in Counts II and III incorrectly state that punishment was assessed by a jury, rather than the trial court. Green did not file a response opposing the State's motion to modify the judgment.

This Court has the authority to modify incorrect judgments when it has the information necessary to do so. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993). In fact, "[a]ppellate courts have the power to reform whatever the trial court could have corrected by a judgment nunc pro tunc where the evidence necessary to correct the judgment appears in the record." *Morris v. State*, 496 S.W.3d 833, 836 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (internal quotations omitted). Further, under the rules, an appellate court may "reform a judgment to include an affirmative finding to make the record

speak the truth when the matter has been called to its attention by any source." *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992).

Regarding the State's first request, Green was convicted of two counts of aggravated sexual assault. *See* TEX. PENAL CODE § 22.021. Under the governing provisions of the Code of Criminal Procedure, a conviction for aggravated sexual assault is a "[r]eportable conviction or adjudication," meaning that an individual convicted of that offense is required to register as a sex offender. *See* TEX. CODE CRIM. PROC. arts. 62.001(5)(A), 62.051. Because this case involved "an offense for which registration as a sex offender is required under Chapter 62," the trial court was required to include in its judgment "a statement that the registration requirement . . . applies to the defendant and a statement of the age of the victim of the offense." *See id.* art. 42.01, § 1(27). "When the law requires the trial court to enter a particular finding in the written judgment of conviction," the trial court has no discretion not to enter the finding, and the failure to include it is a clerical error "that can properly be corrected nunc pro tunc." *Dewalt v. State*, 417 S.W.3d 678, 690 (Tex. App.—Austin 2013, pet. ref'd) (citing *Ex parte Poe*, 751 S.W.2d 873, 876 (Tex. Crim. App. 1988)). Accordingly, we modify the trial court's judgments in Count I and Count II to reflect that Green is required to register as a sex offender and that the age of the victim at the time of the offense was nineteen years old. *See Vega-Gonzalez v. State*, No. 03-19-00413-CR, 2020 WL 7051187, at *12 (Tex.

App.—Austin Dec. 2, 2020, no pet.) (mem. op., not designated for publication) (making similar modification to judgment); *see also Epps v. State*, No. 05-19-00066-CR, 2019 WL 6799753, at *2 (Tex. App.—Dallas Dec. 13, 2019, no pet.) (mem. op., not designated for publication) (same).

Regarding the State's second request, the State correctly points out that punishment was assessed by the trial court, not a jury. Accordingly, we modify the trial court's judgments in Count II and Count III to reflect that the trial court, not a jury, assessed punishment. *See Miranda-Aguirre v. State*, No. 03-19-00467-CR, 2020 WL 2786863, at *2 (Tex. App.—Austin May 29, 2020, no pet.) (mem. op., not designated for publication) (making similar modification to judgment); *Hall v. State*, No. 01-10-00620-CR, 2011 WL 4609600, at *1 (Tex. App.—Houston [1st Dist.] Oct. 6, 2011, no pet.) (mem. op., not designated for publication) (same).

For these reasons, we grant the State's motion.

## Conclusion

Having overruled Green's appellate issue but concluded that the written judgments contain non-reversible clerical errors, we modify the trial court's judgments for Counts I, II, and III as described above and affirm the judgments as modified.

Amparo Guerra
Justice

Panel consists of Chief Justice Radack and Justices Rivas-Molloy and Guerra.

Do not publish. TEX. R. APP. P. 47.2(b).