

Opinion issued January 4, 2022



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NOS. 01-20-00117-CR, 01-20-00118-CR, 01-20-00119-CR & 01-20-00120-CR

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ANGEL CRUZ, Appellant

V.

THE STATE OF TEXAS, Appellee

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On Appeal from the 351st District Court  
Harris County, Texas  
Trial Court Case Nos. 1545544, 1546096, 1545543 & 1545545

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**MEMORANDUM OPINION**

Following a joint trial on four separate indictments, a jury found Angel Cruz guilty of three offenses of possession of child pornography and one offense of

continuous sexual abuse of a child.<sup>1</sup> For each child-pornography offense, the trial court assessed Cruz's punishment at 10 years in prison. For the offense of continuous sexual abuse of a child, the trial court assessed Cruz's punishment at 50 years in prison with the four sentences to run concurrently.

Cruz appealed each of the four judgments of conviction, raising one issue on appeal.<sup>2</sup> He contends that in the three child-pornography cases the trial court erred in instructing the jury because the jury charges in those cases permitted the jury to render a non-unanimous verdict. Because we conclude that any error in instructing the jury regarding the child-pornography offenses was not harmful error, and because Cruz offers no separate issue or argument challenging his conviction for continuous sexual abuse of a child, we affirm the four judgments of conviction.

### **Background**

Jane is the complainant in these four cases.<sup>3</sup> Jane's mother and Cruz worked together and began dating in 2014. At the time, Jane was seven years old, and she

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<sup>1</sup> See TEX. PENAL CODE § 21.02(b)–(c) (continuous sexual abuse of a child); *id.* § 43.26(a) (child pornography).

<sup>2</sup> Appellate cause number 01-20-00117-CR corresponds to trial court cause number 1545544 (child pornography). Appellate cause number 01-20-00118-CR corresponds to trial court cause number 1546096 (continuous sexual abuse of a child). Appellate cause number 01-20-00119-CR corresponds to trial court cause number 1545543, and appellant cause number 01-20-00120-CR corresponds to trial court cause number 1545545 (both child pornography).

<sup>3</sup> We use pseudonyms to refer to the complainant and to her family.

lived with her mother and four siblings in an apartment that was in disrepair. After their roof started leaking, Jane and her family moved in with Cruz at his apartment in Rosenberg, Texas. They all lived there from 2014 until 2016. They then moved to a new apartment in Houston leased by Cruz. The family lived there with Cruz until March 2017. While they lived with Cruz, Jane's mother stopped working, and the family became financially dependent on Cruz.

In addition to providing Jane and her family a place to live, Cruz also bought them clothes and electronics. Cruz gave Jane and her older sister, Amy, each a tablet computer and a cell phone. Cruz had his personal Google email (Gmail) account on Jane's and Amy's tablets. This allowed Cruz to upload photographs from the tablets to the Google cloud service associated with his Gmail account.

Cruz set up an Instagram account for Jane on her tablet. Cruz also accessed the Instagram account on his cell phone.

After she and her family moved into the Rosenberg apartment, Cruz began sexually abusing seven-year-old Jane. The first instance of sexual abuse occurred when Jane was sick and had a fever. Jane was sleeping with her mother, and Cruz was also in the bed. Cruz began hugging her. When her mother went to the kitchen to get a cold cloth for Jane's head, Cruz touched Jane's breasts and her vagina with his fingers.

Cruz continued to sexually abuse Jane after they moved to the Houston apartment. At trial, Jane testified that, on one occasion, Cruz removed her clothes and touched her genitals with his penis. When asked if he put his penis anywhere else, Jane testified that Cruz “would put it on my breasts.” She further testified that Cruz forced her to perform oral sex on him.

Cruz also put pornography on Jane’s tablet and showed her pornography that he was watching, asking her if she wanted to try it. She testified that Cruz would “walk around naked in the house” and “bother” her. Jane locked her bedroom door, but Cruz disabled the lock “for him to come in every day.”

Jane testified that, after they moved to the Houston apartment, Cruz bothered her “a lot” for photographs of herself and “wouldn’t leave [her] alone.” He sent messages to Jane through Instagram with pictures of “naked women,” asking her to take photographs of herself for him, posing like the women. Jane complied with the requests in exchange for candy and being allowed to have her tablet. She used both Cruz’s cell phone and her tablet to take sexually explicit photographs of herself. She confirmed in her testimony that, in the photos, she displayed her breasts, genitals, and buttocks.

Cruz also asked Jane’s older sister, Amy, to take nude photos of herself. Amy was 13 or 14 years old at the time. Amy rebuffed Cruz at first but then agreed, using Cruz’s cell phone to take the pictures. In exchange, Cruz gave Amy marijuana.

On March 26, 2017, Cruz sent Jane suggestive photographs while Jane was sitting next to her mother at their apartment. Jane's 21-one-year-old cousin, Mary, happened to come to the apartment at that time. At trial, Mary testified that Jane's mother was "in a panic" and was on the phone with Cruz's sister. Mary saw messages on Jane's tablet that she described as "images of scantily clad women and asking [Jane] to pose like that, like the pictures that [Cruz] was sending her, telling her to pose like that for daddy, be a good girl for daddy." Mary also saw photographs in which Jane was unclothed. The tablet's contents led Mary to believe that Cruz was "raping" Jane, and she called the police.

Houston Police Department officers arrived on the scene, including Officer J. Hasley. The officers obtained consent from Jane's mother to search the apartment, locating numerous digital devices in Cruz's bedroom. Jane's mother had the password for Jane's tablet and gave police permission to look through it. Officer Hasley viewed the tablet at the scene and testified that he saw "inappropriate messages for a 10-year-old child." He also saw images that were "obvious photographs of child pornography." These included three images depicting the "lewd exhibition" of Jane's genitals. Officer Hasley photographed the tablet's screen to ensure the preservation of the images and messages. The police seized Jane's tablet as well as other digital devices, including two iPhones—an iPhone 6 and an iPhone 7—belonging to Cruz.

Cruz was arrested at the scene for possession of child pornography. After Cruz's arrest, Jane and her siblings stayed with Mary at her home. In the initial days after Cruz's arrest, Jane disclosed to Mary the details of Cruz's sexual abuse of her.

Detective S. Wyatt of the Houston Police Department was assigned to investigate the case. She obtained search warrants (1) for the electronic devices seized from Cruz's apartment, (2) for the Google account associated with Cruz's Gmail address, and for (3) the Instagram account on the tablet. On Cruz's iPhone 6, the police found sexually explicit images of Amy. At trial, Detective Wyatt testified that she considered 24 of the images of Amy on the iPhone 6 to be child pornography.

A search of the tablet revealed sexually explicit images of Jane, including 12 images that Detective Wyatt testified were child pornography. These included the three images that Officer Hasley testified were a "lewd exhibition" of Jane's genitals and which were among the images he had photographed on the tablet at the scene.

A search of the Google account associated with Cruz's email revealed that digital photo albums had been created to store photographs on Google's cloud-based storage service. Among the photographs in the albums were the three images from the tablet showing Jane's genitals. The metadata for the photographs showed that they were taken on March 24, 2017, and that the on-line albums containing them were created on March 25, 2017.

The investigation resulted in Cruz being charged with the offense of continuous sexual abuse of child. The indictment alleged that Cruz,

on or about JANUARY 1, 2016 CONTINUING THROUGH JANUARY 1, 2017 unlawfully during a period of time of thirty or more days in duration, commit[ted] at least two acts of sexual abuse against a child younger than fourteen years of age, including an act constituting the offense of AGGRAVATED SEXUAL ASSAULT OF A CHILD, committed against [Jane] on or about January 1, 2016, and an act constituting the offense of AGGRAVATED SEXUAL ASSAULT OF A CHILD, committed against [Jane] on or about January 1, 2017, and [Cruz] was at least seventeen years of age at the time of the commission of each of those acts.

Cruz was also charged with three offenses of child pornography. Each of the three indictments alleged that Cruz,

on or about MARCH 26, 2017, did then and there unlawfully intentionally and knowingly POSSESS visual material, namely, a DIGITAL IMAGE, that visually depicts a child younger than eighteen years of age, at the time that the image was made, who was engaging in sexual conduct, namely, LEWD EXHIBITION OF THE GENITALS, and [Cruz] knew that the visual material depicted a child engaging in said sexual conduct.

Jane testified at trial about Cruz's sexual abuse of her over a three-year period when she was seven to ten years old. She also testified about the nude photographs she had taken of herself at Cruz's request using the tablet and his cell phone.

Amy testified that she had taken nude photographs of herself at Cruz's request in exchange for marijuana. Amy stated that Cruz placed his email account on the tablets that he had given to her and to Jane. Evidence at trial showed that the Google

profile on Jane's tablet was for "Angel C"—Cruz's first name and last initial—with the email address of angelpctech1.bec@gmail.com.

Jane's cousin, Mary, testified that when she went to the Cruz's apartment, she had discovered the messages from Cruz to Jane and the nude photographs of Jane on the tablet. She stated that she called the police to report the child pornography on the tablet. Mary also testified that she took Jane and her siblings from the apartment to her home where Jane disclosed to Mary that Cruz had been sexually abusing her.

Officer Hasley and Detective Wyatt also testified. Officer Hasley testified that he had photographed the screen of the tablet containing nude photographs of Jane. He stated that, because data can be wiped remotely, he had been trained to photograph the screen of a digital device to ensure preservation of the information.

Three photographs of the tablet's screen taken by Officer Hasley at the scene were admitted into evidence as State's Exhibit (SX) 61, 62, and 63. Each photograph showed a collage of images on the tablet's screen. The collage of images shown in SX 61 contained two images of Jane's genitals. The collage of images seen in SX 62 contained the same two images of Jane's genitals as seen in SX 61. SX 62 also contained a third image of Jane's genitals. Officer Hasley testified that the three images seen in SX 61 and 62 depicted the "lewd exhibition" of Jane's genitals. SX 63 contained photos of Jane posing provocatively, but her genitals are not seen.



During her testimony, Detective Wyatt also testified about the photographs taken by Officer Hasley and about the virtual storage of the images:

Q. And [SX] 61 through 63, are these also photos of the tablet from the scene of that morning?

A. Correct.

Q. And are those images that consist of child pornography?

A. They are.

Q. How so?

A. Well, you can see [Jane] in the center of Exhibit 61. She is in one photo, she is opening up her lips to her vagina and the other two she's bending over spreading her buttocks to expose her anus.

Q. And does it also expose her vaginal area?

A. Yes, it does.

Q. And would that be considered lewd exhibition of genitals?

A. It is.

Q. And is that a digital image?

A. It is.

Q. From these photos were you able to gather whether any applications had actually been used by the tablet?

A. Yes, I can tell by—I can tell by the bottom part of the screen that it's from Google.

Q. And how do you know that?

A. I am well aware of Google. There is also a little Google Cloud in the upper right-hand corner.

Google houses Google photos, Google Plus, Chat applications. All kinds of nifty little things that people use to exchange pictures and chats and things online.

Q. How does Google Cloud operate for anyone who doesn't know?

A. The easiest way to explain Google Cloud is it's like a storage service. It saves the information.

Q. Is it like a virtual album—

A. Yes—

Q.—of sorts?

A.—it is.

Q. And can it be password protected?

A. Yes.

Q. Can the person who sets up the account have a password so only the person who sets up the account has access to the images?

A. It can.

Q. So right off the bat when you see these images what are you thinking you need to do to conduct this investigation?

A. I need to take the tablet and tag it for evidence and then submit it to our lab to have the information extracted.

Q. And what about the Gmail account or possible Google account?

A. I need to do a search warrant to get the information from the Gmail account for the Google [account].

In addition to Amy's testimony about Cruz's email, Detective Wyatt provided testimony showing that the Gmail account on the tablet belonged to Cruz. Detective Wyatt testified that search warrants were obtained for the digital devices found at Cruz's apartment, including the tablet and the iPhone 6, and for the Google account associated with Cruz's Gmail account and for the Instagram account accessed on the tablet. She confirmed that the profile for the Gmail account, `angelpctech1.bec@gmail.com`, found on Jane's tablet, was "Angel C," which is Cruz's first name and last initial. She also confirmed that Cruz's cell phone number was listed in the subscriber information for the Google account associated with `angelpctech1.bec@gmail.com`. A forensic examination of the account revealed the internet searches associated with it. The searches included: "Father and daughter triple X stepdad" and "Curly hair sexy body white girls no face."

Detective Wyatt testified that the subscriber information for Jane's Instagram account linked the account to Cruz. The account was registered under the email account `angelpctech2.bec@gmail.com`, which is one digit different than the Gmail account associated with the Google account containing the photo album. This account uses a "2" and the other account uses a "1" at the end of "angelpctech." The phone number associated with the Instagram account was Cruz's phone number and was the same phone number associated with `angelpctech1.bec@gmail.com`.

Messages obtained from the Instagram account show correspondence between Jane and someone appearing to be Cruz. The sender referred to himself as her “daddy” and referred to members of Jane’s family in a manner indicating it was Cruz. In the messages, Cruz asked Jane for pictures of herself and seemed concerned that Jane’s mother will see the tablet. He also sent Jane pictures of adult women in which their breasts and nipples can be seen. With the first photo of a woman, he asked Jane, “Is this nice?” and “Or a different?” He then sends her another photo of a woman in which her breasts are seen.

The State also offered into evidence exhibits containing the data returned on the warrants for the devices and for the accounts. While reviewing the exhibits with the State’s attorney, Detective Wyatt provided testimony to assist the jury in understanding the information returned on the warrants.

SX 4 contained the information extracted from the iPhone 6. This included thumbnail images of the photographs on the phone. Detective Wyatt testified that the images on the iPhone 6 included “24 single file images” of Amy that were child pornography.

SX 11 contained the data and information forensically extracted from Jane’s tablet. The exhibit contained thumbnails images of the images that were on the tablet. Detective Wyatt testified that these included 12 images of child pornography. Among those were the three images that Officer Hasley had photographed on the

tablet's screen. These were the three images of Jane's genitals for which Detective Wyatt provided detailed testimony, set out above. The metadata from the tablet showed that the photographs of Jane's genitals had been taken or "captured" on the tablet on March 24, 2017.

SX 101 contained information obtained through the search warrant for the Google account associated with Cruz's Gmail address. The information provided by Google in response to the warrant showed that virtual photo albums were created in the account on March 25, 2017. The photo albums contained the three images of Jane's genitals taken on March 24, 2017, using the tablet. These were the same three images of Jane's genitals that were in the information extracted from the tablet, as seen in SX 4, and were the same three images contained in the photos taken by Officer Hasley of the tablet's screen, as seen in SX 61 and SX 62, and for which Detective Wyatt provided detailed testimony.

Cruz's defense was that he did not possess any of the child pornography or engage in any of the charged conduct. Cruz's defense was based primarily on attacking the credibility of the State's witnesses. The defense argued that Detective Wyatt was too emotionally invested in the case and that her bias had colored her investigation and her testimony. But the defense focused primarily on attacking Jane's and Amy's credibility, indicating that Jane's credibility was key to the jury finding Cruz guilty of the offenses.

The defense pointed out that Jane and Amy admitted that they had taken the nude photos of themselves. And the defense emphasized that Cruz was not the only person with access to the tablet and cell phones. The defense argued that this indicated that Cruz was not the only person in the house who had access to the Google account to upload the pictures to the online photo album.

The defense also pointed to evidence that Cruz was stricter than the girls' mother and that he had enforced household rules and schedules that the children had never previously been required to follow. The defense's theory was that Jane and Amy were lying about Cruz's role in the creation and possession of the child pornography in order to get him out of the home so that they would not be required to follow his rules.

After closing arguments, the jury was provided with four separate jury charges—one charge for the continuous-sexual-abuse-of-a-child offense and three separate charges for the child-pornography offenses. As mentioned, the three indictments charging Cruz with three offenses of child pornography had identical allegations, alleging that, on or about March 26, 2017, Cruz knowingly possessed a digital image of a child under the age of 18 who was engaging in sexual conduct, specifically, the lewd exhibition of the child's genitals. In turn, the three jury charges for the child-pornography offenses contained identical language.

The trial court's jury charge for the continuous-sexual-assault-of-a-child offense gave specific and general instructions regarding jury unanimity. But the trial court's charges for the child-pornography offenses provided only two generic instructions regarding unanimity. The first instructed the jury that it must select a foreman whose duty was "to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form." The second, at the end of the charges, instructed the jury that its verdict must be "by a unanimous vote of all members of the jury." Cruz did not object to the child-pornography charges on the basis that they allowed for non-unanimous verdicts, a complaint he now raises on appeal.

The jury found Cruz guilty of all four charged offenses. The trial court assessed Cruz's punishment at 10 years in prison for each child-pornography offense and assessed his punishment at 50 years in prison for the offense of continuous sexual assault of a child. Cruz appeals, raising one issue, challenging only his conviction for the three child-pornography offenses.

### **Jury Unanimity Regarding Child-Pornography Offenses**

In his sole issue raised in each of the three child-pornography cases, Cruz asserts that the trial court erred because it did not instruct the jury in those cases that it was required to unanimously agree on which digital image depicting child

pornography “satisfied each charge.” Cruz further contends that he was egregiously harmed by the error.

**A. Standard of Review**

We review alleged jury charge error in two steps: first, we determine whether error exists; if so, we then evaluate whether sufficient harm resulted from the error to require reversal. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). The degree of harm required for reversal depends on whether the jury-charge error was preserved in the trial court. *Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016); *see Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (setting forth procedure for appellate review of claim of jury-charge error). If the jury-charge error has not been properly preserved by an objection or request for instruction, as here, the error must be “fundamental” and requires reversal only if it was “so egregious and created such harm that the defendant was deprived of a fair and impartial trial.” *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015) (citing *Almanza*, 686 S.W.2d at 171).

**B. No Egregious Harm**

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); *see* TEX. CODE CRIM. PROC. art. 36.29(a). This means that every juror



must agree that “the defendant committed the same, single, specific criminal act.” *Ngo*, 175 S.W.3d at 745.

A non-unanimous verdict “may occur when the State charges one offense and presents evidence that the defendant committed the charged offense on multiple but separate occasions.” *Cosio*, 353 S.W.3d at 772. Each of the multiple incidents establishes a different offense or “unit of prosecution.” *Id.* In such a situation, it is the trial court’s responsibility to ensure unanimity by instructing the jury that “its verdict must be unanimous as to a single offense or unit of prosecution among those presented.” *Id.*

In child-pornography cases, the possession of each item of child pornography constitutes a separate unit of prosecution. *See Vineyard v. State*, 958 S.W.2d 834, 838 (Tex. Crim. App. 1998). Stated differently, each item of child pornography found in a defendant’s possession constitutes a separate offense for which he may be prosecuted.<sup>4</sup> *See Witt v. State*, 237 S.W.3d 394, 397 (Tex. App.—Waco 2007, pet.

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<sup>4</sup> A person commits the offense of possession of child pornography under Penal Code section 43.26(a) if the person knowingly or intentionally possesses visual material that visually depicts a child younger than 18 years of age at the time the image of the child was made who is engaging in sexual conduct, and the person knows that the material depicts the child as described in subsection 43.26(a)(1). TEX. PENAL CODE § 43.26(a)(1)–(2). Visual material includes any disk, diskette, or other physical medium that allows an image to be displayed on a computer. *Id.* § 43.26(b)(3). As used in section 43.26, the meaning of “sexual conduct” includes actual or simulated sexual intercourse, deviate sexual intercourse, and lewd exhibition of the genitals. *Id.* § 43.25(a)(2); *see* 43.26(b)(2) (referencing definition of “sexual conduct” found in Penal Code section 43.25(a)(2)).

ref'd) (citing *Vineyard*, 958 S.W.2d at 838; *Roise v. State*, 7 S.W.3d 225, 232 (Tex. App.—Austin 1999, pet. ref'd)).

The State charged Cruz with three separate offenses of child pornography. The allegations—that Cruz knowingly possessed a digital image of a child under 18 engaging in the lewd display of the child’s genitals—were the same in each of the three indictments. The indictments did not identify a particular digital image to correspond to each charged offense. And Cruz did not request the State to elect the images for which it was seeking to convict him for each offense. *See Cosio*, 353 S.W.3d at 776 (explaining that, when defendant’s decision is not to elect, “jury must be instructed that it must unanimously agree on one incident of criminal conduct (or unit of prosecution), based on the evidence, that meets all of the essential elements of the single charged offense beyond a reasonable doubt”).

Here, the State’s evidence included the three digital images of Jane’s genitals that were on the tablet, as seen in SX 61 and SX 62, and which were uploaded to the Google photo album associated with Cruz’s email account. The State’s evidence also showed other images of Jane that were on the tablet, which were sexually provocative. Detective Wyatt testified that the tablet had 12 images of Jane that she considered to be child pornography, although Jane’s genitals were not seen in all the images. The State’s evidence further showed that Cruz’s iPhone 6 contained digital

images of Amy, including 24 images that Detective Wyatt testified were child pornography. In some of these images, Amy's genitals were displayed.

The trial court did not instruct the jury that it must be unanimous regarding which image satisfied each charged offense of child pornography. The jury charges included two general, standard instructions that the verdict must be unanimous. But, in *Cosio*, the Court of Criminal Appeals concluded that a general unanimity instruction was not sufficient to prevent a non-unanimous verdict. *See* 353 S.W.3d at 773.

In *Cosio*, the defendant was convicted of two counts of aggravated sexual assault of a child and two counts of indecency with a child by contact. *Id.* at 769–70. The Court of Criminal Appeals agreed that, because there was evidence of several instances of sexual misconduct that could have satisfied the charged offenses, the trial court erred by failing to instruct the jury that it must be unanimous about which instance of criminal conduct satisfied each offense charged. *See id.* at 774. The court concluded that “the standard, perfunctory unanimity instruction at the end of each charge did not rectify the error.” *Id.*; *see Ngo*, 175 S.W.3d at 745 (providing that when “the word ‘unanimously’ appeared only in the ‘boilerplate’ section of the jury charge dealing with selection of the jury foreman,” “the jury could well have believed that they need only be unanimous about their ‘verdict’ of guilty or not guilty”). The *Cosio* court explained that the jury “may have believed that it

had to be unanimous about the offenses, not the criminal conduct constituting the offenses.” *Cosio*, 353 S.W.3d at 774.

Similarly, the question here is whether, without a specific unanimity instruction, the State’s evidence permitted the jury to agree that Cruz possessed images of child pornography but to disagree as to which of the images satisfied the charges. In other words, could the jury have believed that it had to be unanimous about the offenses, but not about which images constituted child pornography? *See id.*

Even if we assume that the trial court erred by not instructing the jury that it was required to unanimously agree on which digital image satisfied each charge, we must still determine whether Cruz was harmed by that error. Because he did not object at trial to the lack of an unanimity instruction in the jury charges, the jury-charge error was not preserved, and reversal is required only if the error was “so egregious and created such harm that the defendant was deprived of a fair and impartial trial.” *Villarreal*, 453 S.W.3d at 433.

“Egregious harm is a ‘high and difficult standard’ to meet, and such a determination must be ‘borne out by the trial record.’” *Id.* (quoting *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013)). We will not reverse a conviction for egregious harm unless the defendant has suffered “actual rather than theoretical harm.” *Cosio*, 353 S.W.3d at 777. Actual harm is established when the erroneous

jury instruction affected the very basis of the case, deprived the defendant of a valuable right, or vitally affected a defensive theory. *Arrington v. State*, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015).

Neither party has the burden to show harm or lack of harm; rather, we must examine the record and independently determine whether an appellant suffered actual harm as opposed to theoretical harm. *See Marshall*, 479 S.W.3d at 843. In examining the record to determine whether jury-charge error resulted in egregious harm, we consider four factors: (1) the entire jury charge, (2) the state of the evidence, including the contested issues and the weight of probative evidence, (3) the parties' arguments, and (4) all other relevant information in the record. *See Arrington*, 451 S.W.3d at 840; *Cosio*, 353 S.W.3d at 777.

### ***1. Entire Jury Charge***

Here, the jury charges for the child-pornography offenses included only two generic unanimity instructions. The first related to selecting a jury foreman, and the second was a general instruction that the verdict must be unanimous. As mentioned, the Court of Criminal Appeals has determined that such boilerplate instructions do not rectify the error of failing to give the jury a more specific unanimity instruction. *See Cosio*, 353 S.W.3d at 774; *Ngo*, 175 S.W.3d at 745.

Aside from the general unanimity instructions, the State points out that the jury was instructed that a defendant cannot be convicted of an offense “unless each

element of the offense is proved beyond a reasonable doubt.” The State also points out that the application paragraph in “each child-pornography jury charge had an offense application paragraph that asked jurors whether they found ‘on or about’ March 26, 2017, [Cruz] possessed *a* digital image depicting a child engaging in lewd exhibition of the genitals.” (Emphasis in State’s brief, not in jury charge.) The State asserts that “the application paragraphs of each child-pornography offense instruction restricted the relevant acceptable image for sufficiency purposes to one involving ‘lewd exhibition of the genitals.’” It contends that “[t]he unanimity and beyond-reasonable-doubt instructions together arguably required every juror to be unanimous as to every element of the offense.”

The State also calls attention to two charge instructions concerning extraneous-offense instructions—one for offenses against the child complainant (section 1 of Code of Criminal Procedure article 38.37) and one for offenses against any child (section 2 of article 38.37). *See* TEX. CODE CRIM. PROC. art. 38.37, §§ 1(b), 2(b). The section 1 instruction allowed the jury to consider evidence of Cruz’s “other crimes, wrongs, or acts against the child who is the victim of the alleged offense.” The section 2 instruction allowed the jury to consider evidence of “alleged offenses against a child under seventeen years of age, other than the complainant.” The charge instructed the jury that both types of extraneous-offense evidence could not be considered unless the jury found, beyond a reasonable doubt, that Cruz had

committed the alleged offenses. Even then, the extraneous offenses could only be considered “in determining [the evidence’s] bearing on relevant matters,” such as the relationship between Cruz and “the child,” and Cruz’s and the child’s state of mind.

The State asserts that, “[t]aken together, the offense, application, unanimity, and extraneous-offense instructions divided the evidence into that which did and did not fit within the elements of the offense.” But, even taking the State’s assertion as correct, the charges still permitted non-unanimous verdicts based on the evidence presented because there were multiple images, such as the three images of Jane’s genitals depicted in SX 61 and 62, that fit within the elements of the offense. Even if the charges limited the scope of the evidence that the jury could find satisfied the elements of the offense, the instructions cited by the State did not prevent the jury from unanimously agreeing that Cruz committed each charged offense of child pornography without unanimously agreeing on a single digital image (i.e., unit of prosecution) for each offense. Thus, while the instructions pointed out by the State may have had a slight ameliorative effect with respect to the error, this factor nonetheless weighs in favor of finding egregious harm. *See Arrington*, 451 S.W.3d at 841.

## 2. *State of the Evidence*

Under this prong, we consider the state of the evidence to determine whether the evidence made it more or less likely that the jury charge caused Cruz actual harm. *Id.* at 841. As part of this analysis, we determine “the likelihood that the jury would in fact have reached a non-unanimous verdict on the facts of [this] particular case.” *Jourdan v. State*, 428 S.W.3d 86, 94 (Tex. Crim. App. 2014).

Jane testified that Cruz provided her with the tablet to use. She also testified that, after they moved to the Houston apartment, Cruz bothered her “a lot” for photographs of herself and “wouldn’t leave [her] alone.” She stated that Cruz sent her pictures of “naked women.” He asked her to take pictures of herself posing like the women in the photos and send the pictures to him. This testimony was corroborated by messages in Jane’s Instagram account from “daddy” and contained messages like those Jane described. Jane testified, over time, that she had complied with Cruz’s requests for nude photos of herself in exchange for candy and being allowed to use her tablet. Jane used both Cruz’s cell phone and her tablet to take sexually explicit photographs of herself. In her testimony, she confirmed that, in the photos, she displayed her breasts, genitals, and buttocks. Amy also testified that she took nude photographs of herself at Cruz’s request using his cell phone in exchange for marijuana.



The evidence also showed that the Gmail account on the tablet belonged to Cruz. The Google account associated with the email contained photo albums on Google's cloud service, which had images of Jane and Amy. These photographs included the three photographs where Jane's genitals are displayed. These were the same three images of Jane's genitals that were in the information extracted from the tablet, as seen in SX 4, and were the same three images contained in the photos taken by Officer Hasley of the tablet's screen, as seen in SX 61 and SX 62, and for which Detective Wyatt provided detailed testimony describing the images. The evidence also showed that there were other nude photos of both Jane and Amy that Detective Wyatt testified were child pornography.

However, the State emphasizes that, in its presentation and development of the evidence and in its closing argument, it focused on the three images of Jane displaying her genitals in SX 61 and 62 as being the images on which it was prosecuting Cruz for child pornography. If we focus on these three images, it is unlikely that the jury would have found that only one or two of the images, rather than all three, satisfied the elements of the child-pornography charges. *See Flores v. State*, 513 S.W.3d 146, 160 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (“From the evidence the jury heard, it is very unlikely that any member of the jury believed that the second incident took place but that the first did not.”). Thus, we

agree that the harmful effect of no unanimity instruction was decreased by the State's emphasis on the three images.

We are mindful, though, that there was still a risk that the jury considered other images in which Jane and Amy displayed their genitals aside from the three images emphasized by the State. Even considering that risk, this prong weighs solidly against a finding of egregious harm. Courts, including the Court of Criminal Appeals, have concluded that a defendant is not egregiously harmed by a lack of a specific unanimity instruction when, like here, the defendant's trial strategy is to completely deny the commission of any offense. *See Cosio*, 353 S.W.3d at 777–78 (“The jury was not persuaded that [Cosio] did not commit the offenses or that there was any reasonable doubt. Had the jury believed otherwise, they would have acquitted Cosio on all counts. On this record, therefore, it is logical to suppose that the jury unanimously agreed that Cosio committed all of the separate instances of criminal conduct during each of the four incidents.”); *Smith v. State*, 515 S.W.3d 423, 431 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (concluding that, “by finding appellant guilty of both offenses, the jury necessarily found [complainant] credible and rejected appellant's testimony and his defense that he committed no crime” and holding that appellant was not egregiously harmed by charge error when only factor weighing in favor of harm was first factor); *Rodriguez v. State*, 446 S.W.3d 520, 532–33 (Tex. App.—San Antonio 2014, no pet.) (holding evidence

showed no egregious harm when “Rodriguez’s defense, like that in *Cosio*, was not that he did not commit *these specific* alleged incidents, but that he did not commit *any* of the alleged acts”).

Here, Cruz engaged in an all-or-nothing trial strategy, asserting that he did not intentionally or knowingly possess any of the nude photographs of Jane or Amy admitted into evidence. The basis of Cruz’s defense was to attack the credibility of the State’s witnesses. Cruz painted Detective Wyatt as being too emotionally invested in the case, which undermined her investigation and her testimony. But the primary targets of Cruz’s credibility attacks were Jane and Amy. The defense argued that it was reasonable to infer that Jane and Amy had lied about Cruz asking them for nude photos in exchange for items that the girls desired. The defense pointed out that Cruz had made the children follow rules and schedules and suggested that by falsely accusing him of child pornography and sexual abuse of Jane, they could get rid of Cruz. The defense pointed out that Jane and Amy admittedly had taken the nude pictures of themselves. And the defense argued that other members of the household had access to the Google account.

In sum, Cruz generally argued that he did not commit any of the alleged child-pornography offenses; thus, his defense was “of the same character and strength across the board.” *Cosio*, 353 S.W.3d at 777. But the jury rejected this argument and found Cruz guilty of each offense, suggesting that it found Jane and Amy credible

and that it unanimously believed that Cruz committed all of the separate instances of possession of child pornography because, otherwise, the jury would have acquitted him of all the child-pornography charges. *See Arrington*, 451 S.W.3d at 842 (holding guilty verdicts showed jury “necessarily disbelieved [defendant’s] defensive evidence” that he never saw complainant naked or had inappropriate sexual contact with her, noting that if jury had believed defendant rather than complainant, it would have acquitted him of all charges); *Ruiz v. State*, 272 S.W.3d 819, 826–27 (Tex. App.—Austin 2008, no pet.) (holding that state of the evidence weighed against finding egregious harm when defendant did not argue that he was guilty of only some of complainant’s allegations of abuse, but instead argued that he had not committed any of the alleged conduct, leaving jury with an “all-or-nothing” decision). Because the entire record fails to show actual harm to Cruz, this factor weighs against a finding of egregious harm. *See Arrington*, 451 S.W.3d at 842.

### ***3. Arguments of the Parties***

Under this factor, we look to whether any statements made by the State, appellant, or the court during the trial exacerbated or ameliorated error in the charge. *Id.* at 844. In its closing statement, the State addressed the unanimity requirements with respect to the offense of continuous sexual abuse of a child. But neither the parties nor the trial court told the jury that it must be unanimous about the specific unit of prosecution or image in rendering its verdict in the child-pornography cases;

nor was the jury told that it need not be unanimous in the child-pornography cases. *See Cosio*, 353 S.W.3d at 777 (noting that neither parties nor trial court added to charge error by telling jury that it did not need to be unanimous and, therefore, this factor did not weigh in favor of finding egregious harm); *cf. Ngo*, 175 S.W.3d at 750–52 (recognizing that omission of unanimity instruction caused egregious harm when State and trial court each misstated law concerning unanimity on multiple occasions). Therefore, this factor weighs neither for nor against finding egregious harm.

#### **4. *Other Relevant Information***

Finally, we review the record for other relevant information that may require consideration, such as whether the jury sent requests for clarification during deliberations. *See Smith*, 515 S.W.3d at 431. The only note the jury sent to the trial court was one requesting “all the evidence.” The record reveals no notes or any other indication that the jury sought any clarification regarding unanimity. *See id.* Also, the jury was provided with separate jury charges and verdict forms for each offense and found Cruz guilty of the three child-pornography offenses. *See id.* Thus, this factor does not weigh for or against a finding of egregious harm. *See id.*

#### **5. *Conclusion Regarding Harm***

In sum, of the four factors, the only factor that weighs in favor of a finding of egregious harm is the jury charge itself. The state of the evidence weighs against a

finding of egregious harm; the other two factors weigh neither in favor of nor against a finding of egregious harm. In both *Arrington* and *Cosio*, the Court of Criminal Appeals found no egregious harm when the erroneous jury charge that permitted a non-unanimous verdict was the only factor weighing in favor of a finding of harm. *See Arrington*, 451 S.W.3d at 845; *Cosio*, 353 S.W.3d at 777–78. Likewise, after reviewing the record and considering the required factors, we conclude that any harm Cruz suffered from the trial court’s failure to instruct the jury that it must be unanimous regarding which image satisfied each charged offense of child pornography was theoretical, not actual. We hold that the charge error, if any, did not egregiously harm Cruz.

We overrule Cruz’s sole issue raised in each child-pornography case.

### **Continuous Sexual Abuse of a Child**

Cruz filed a notice of appeal in the continuous-sexual-abuse-of-a-child case along with the three child-pornography cases. However, Cruz has not raised an issue challenging his conviction for the offense of continuous sexual abuse of a child, and none of his arguments in his sole issue asserting charge error apply to his conviction for that offense. Although the State’s brief pointed out the lack of any arguments challenging Cruz’s conviction for continuous sexual abuse of a child, Cruz did not file a reply brief or otherwise supplement his briefing. Accordingly, we affirm the trial court’s judgment of conviction for continuous sexual abuse of a child. *See*

*Ingram v. State*, 503 S.W.3d 745, 747 (Tex. App.—Fort Worth 2016, pet. ref'd) (affirming appellant's conviction for indecency with a child because none of appellant's points on appeal raised any argument directed to that conviction and his points addressed only his conviction for continuous sexual abuse of a child—the other offense for which he was convicted and had appealed).

### **Conclusion**

We affirm the trial court's four judgments of conviction.

Richard Hightower  
Justice

Panel consists of Justices Kelly, Landau, and Hightower.

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