Affirmed and Memorandum Opinion filed March 9, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00935-CR
NO. 14-15-00936-CR

JOSE HERIBERTO LOPEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause Nos. 1348777, 1348778

M E M O R A N D U M O P I N I O N

Appellant Jose Heriberto Lopez was a pastor at a Baptist church. A jury convicted him on two counts of aggravated sexual assault of a child under the age of fourteen against two young girls, Jane and Kane.[1] The jury assessed punishment at two life sentences, and the trial court stacked them.

[1] We use pseudonyms for the child complainants.

Appellant challenges his convictions in three issues. He contends that (1) the evidence is legally insufficient because there is no evidence of penetration of the girls' sexual organs, (2) he suffered egregious harm from a jury charge that permitted non-unanimous verdicts on each count, and (3) the "jury charge was fundamentally flawed under the Double Jeopardy Clause as it allows for successive prosecution on the same set of facts."

We affirm.

I. SUFFICIENCY OF THE EVIDENCE

In his first issue, appellant contends that the State failed to prove its allegations that appellant penetrated the girls' sexual organs. He contends the girls' testimony supported charges of indecency by contact because "they repeatedly said he 'touched them,'" but they "never said anything resembling the allegation of penetration." Appellant contends that neither of the girls' testimony "approaches anything that would be similar [to penetration], such as 'inside,' 'in me,' 'in my middle part,' etc."

When a defendant challenges the sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Geick v. State*, 349 S.W.3d 542, 545 (Tex. Crim. App. 2011). To determine the essential elements of the crime, we look to the hypothetically correct jury charge. *Id.* Generally, the hypothetically correct jury charge includes the statutory elements of the offense as modified by the indictment. *See Johnson v. State*, 364 S.W.3d 292, 294 (Tex. Crim. App. 2012); *Gollihar v. State*, 46 S.W.3d 243, 254–55 (Tex. Crim. App. 2001).

For the offense against Jane, the State alleged that appellant caused the penetration of her female sexual organ by placing his finger in her female sexual organ. For the offense against Kane, the State alleged that appellant caused the penetration of her female sexual organ by placing a massager, vibrator, or unknown object in her female sexual organ. These allegations are consistent with the statute proscribing "penetration of the . . . sexual organ of a child by any means." Tex. Penal Code 22.021(a)(1)(B)(i).

Because the statute requires only "penetration of the 'female sexual organ,'" vaginal penetration is not required. *Vernon v. State*, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992). Penetration of the female sexual organ includes "tactile contact beneath the fold of complainant's external genitalia." *Steadman v. State*, 280 S.W.3d 242, 247–48 (Tex. Crim. App. 2009) (quoting *Vernon*, 841 S.W.2d at 409). In *Vernon*, for example, the complainant testified that she felt pain "[i]n my vaginal area," but she did not feel the defendant's finger "inside." 841 S.W.2d at 408–09. There was evidence of touching under the fold of the vaginal lips. *Id.* at 409. The evidence was legally sufficient to prove penetration. *Id.* at 409–10.

Penetration may be proven by circumstantial evidence. *Villalon v. State*, 791 S.W.2d 130, 133 (Tex. Crim. App. 1990). And, in a sufficiency review, "we cannot expect the child victims of violent crimes to testify with the same clarity and ability as is expected of mature and capable adults." *Id.* at 134. The evidence of penetration was sufficient in *Villalon*, for example, when the child testified that the defendant got on top of the child and was "doing bad things 'with the one he pees' and that he was trying to 'put it where I pee,'" and the child testified there was "bleeding from where I do number one." *Id.*

Here, Jane testified that when she was about six years old, she was at a baby shower at the church. Appellant took her into another room, locked the door, and

touched her "private part" and "vagina." He touched her "in the hole . . . where you pee":

> Q. And do you remember where it is that, on your vagina, that he touched you?
>
> A. In the hole.
>
> Q. In the hole? Okay. And when you say "the hole," I mean, what's that hole supposed to be used for?
>
> A. I think that's where you pee. I don't know.

Although Jane later testified that she could not remember if appellant went "inside" the hole, vaginal penetration is unnecessary to prove penetration of the sexual organ. *See Vernon*, 841 S.W.2d at 409–10. Further, the jury was free to believe any part of her testimony, and we resolve any inconsistencies in favor of the jury's verdict. *See Thomas v. State*, 444 S.W.3d 4, 10 (Tex. Crim. App. 2014) ("[W]ith respect to the testimony of witnesses, the jury is the sole judge of the credibility and weight to be attached thereto, including whether to believe all of a witnesses' testimony, portions of it, or none of it."); *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000) ("We resolve inconsistencies in the testimony in favor of the verdict.").

Based on Jane's testimony, a rational fact finder could have found that appellant caused the penetration of Jane's sexual organ. The evidence is legally sufficient in Cause No. 14-15-00935-CR. *See Villalon*, 791 S.W.2d at 134; *see also Hinkle v. State*, No. 14-98-01073-CR, 2000 WL 490744, at *2–3 (Tex. App.—Houston [14th Dist.] Apr. 27, 2000, pet. ref'd) (not designated for publication) (sufficient evidence of penetration when the child testified that the defendant put his private part "in her 'hole'").

Kane testified similarly that when she was eight years old or younger, appellant touched her at the church with a zebra-striped vibrator that was shaped

like a cylinder and curved at the top. He put the vibrator "in" and "inside" her "private part":

> Q. And where did he touch you on your body with the vibrator?
>
> A. In my private part.
>
> . . . .
>
> Q. Do you remember—well, let me ask you this: Did he put it inside of your private part?
>
> A. Yes.

Based on Kane's testimony, a rational fact finder could have found that appellant caused the penetration of Kane's sexual organ. The evidence is legally sufficient in Cause No. 14-15-00936-CR. *See Villalon*, 791 S.W.2d at 134; *see also Catland v. State*, No. 14-00-01371-CR, 2001 WL 1590168, at *1 (Tex. App.—Houston [14th Dist.] Dec. 13, 2001, pet. ref'd) (not designated for publication) (sufficient evidence of penetration when the child testified that the defendant's "private part touched the 'inside' of her private part," and the child told the outcry witness that the defendant "touched her with his private part 'in mine'").

Appellant's first issue is overruled.

II. JURY UNANIMITY

In his second issue, appellant contends that he suffered egregious harm from two jury unanimity problems in the jury charge. First, he contends that the charge for the offense against Kane erroneously authorized his conviction based on a non-unanimous verdict regarding "whether a device or human hand were used." Second, he contends that in both charges, the jury was not required to agree that "any incident happened on any date and time."

We begin by reviewing principles for jury unanimity. Then we address the argument specific to Kane's assault, and we hold that unanimity was not required

for the non-statutory manner and means of penetration. Finally, we hold that appellant has not suffered egregious harm from any unanimity problem related to the dates of the assaults against both children.

A. Principles for Jury Unanimity

"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.* (quotation omitted). 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.*

B. No Error Regarding Non-Statutory Manner and Means

The aggravated sexual assault statute criminalizes "the penetration of the anus or sexual organ of a child by any means." Tex. Penal Code § 22.021(a)(1)(B)(i). The jury charge in Kane's case authorized appellant's conviction based on three disjunctive paragraphs for the means of penetrating Kane's sexual organ: (1) "by placing a massager in the female sexual organ," (2) "by placing an unknown object in the female sexual organ," or (3) "by placing a vibrator in the female sexual organ."[2]

The Court of Criminal Appeals in *Jourdan v. State*, 428 S.W.3d 86 (Tex. Crim. App. 2014), reviewed the similarly worded aggravated sexual assault statute applicable to adult victims. The court held that "the gravamen of the subsection is penetration, not the various and unspecified 'means' by which that penetration may

[2] Appellant suggests that some jurors could have found penetration from a "human hand." We disagree. The jury charge in Kane's case did not refer to any manner and means other than the ones identified above.

be perpetrated." *Id.* at 96. Accordingly, "the penetration of a single orifice (the sexual organ) of the one victim (Kemp) during the same transaction constituted but one offense under Section 22.021(a)(1)(A)(i), regardless of the various manner and means by which the evidence may show that the penetration occurred." *Id.* Therefore, the jury was not required to reach unanimity with respect to whether the defendant penetrated the victim with his penis or finger. *Id.*

The same reasoning applies here: the penetration of Kane's sexual organ during the same transaction is one offense regardless of the various manner and means listed in the jury charge. And Kane did not testify about different assaults involving different means listed in the jury charge—massager, unknown object, or vibrator. Therefore, the jury was not required to reach unanimity with respect to whether appellant penetrated Kane with a massager, unknown object, or vibrator. *See id.* The jury charge, which submitted these non-statutory manner and means in the disjunctive, was not erroneous.

C. No Egregious Harm Related to Dates of the Assaults

Appellant complains that the jury charge in each case did not limit the offense to a specific incident or date. "[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." *Cosio*, 353 S.W.3d at 772. "Each of the multiple incidents individually establishes a different offense or unit of prosecution." *Id.* (footnote omitted). To ensure unanimity, the jury charge would need to "instruct the jury that its verdict must be unanimous as to a single offense or unit of prosecution among those presented." *Id.*

In *Cosio*, for example, the jury charge erroneously allowed for a non-unanimous verdict when there was evidence of multiple instances of misconduct that supported each count of aggravated sexual assault and indecency with a child.

See id. at 770, 774. The "standard, perfunctory unanimity instruction," like the ones given here,[3] 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; *see also Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005).

Jane testified that appellant touched her "[m]ore than one time" on "a different day," and it happened in the same room of the church where he did "the same thing." Kane testified that appellant put the vibrator in her private part "[m]ore than one time." For purposes of this appeal, we assume without deciding that the girls' testimony would have enabled the jury to rely on separate instances of criminal conduct to form a non-unanimous verdict.[4] However, we hold that appellant has not suffered egregious harm from this unobjected-to jury charge error.

To reverse for unobjected-to jury charge error, the error must have caused actual egregious harm—not merely theoretical harm. *Arrington v. State*, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015). Actual egregious harm occurs if the jury charge affected the very basis of the case, deprived the defendant of a valuable right, or vitally affected a defensive theory. *Id.* This analysis is fact-specific and is

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[3] The jury charges provide:

> After you retire to the jury room, you should select one of your members as your Foreperson. It is his or her duty 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 attached hereto and signing the same as Foreperson.

[4] But we note that the nature of the "multiple instances" evidence here differs significantly from *Cosio*. In *Cosio*, the complainant testified in detail about distinct instances of misconduct occurring on different days and at different locations. *See* 353 S.W.3d at 769. Although Jane and Kane testified about appellant's other bad acts and extraneous offenses, which involved other types of touching and showing them pornography, each girl's testimony about the specific conduct giving rise to the indicted offense was presented in the context of one occurrence. Then the girls testified generally that the conduct happened "more than one time."

done on a case-by-case basis. *Id.* 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*, 428 S.W.3d at 98.

When assessing harm based on the particular facts of the case, we consider (1) the entire jury charge, (2) the state of the evidence, including contested issues and the weight of the probative evidence, (3) the parties' arguments, and (4) all other relevant information in the record. *Arrington*, 451 S.W.3d at 840.

1. The Entire Jury Charge

The charge included only a generic unanimity instruction related to selecting a jury foreperson, and the entire charge did not apprise the jury of the proper unanimity requirement. *See id.* at 841. Therefore, this factor weighs in favor of finding egregious harm. *See id.*

2. The State of the Evidence

This factor weighs heavily against a finding of egregious harm. As the parties acknowledged during closing argument, this was a "he said, she said" case. Appellant testified and generally denied the girls' allegations. He adduced evidence that other people were usually at the church while he was there, but he acknowledged that he had access to the girls and was alone with them. Thus, his defense was that the girls were not telling the truth and that the "practical circumstances surrounding the incidents of criminal conduct did not corroborate" the girls' testimony. *See Cosio*, 353 S.W.3d at 777. "His defense was essentially of the same character and strength across the board." *Id.* The jury was not persuaded by his denials; had the jury believed him, it would have acquitted him. *See id.* at 777–78. Therefore, it is "highly likely" the jury's verdicts were, in fact, unanimous. *See id.* at 778; *see also Arrington*, 451 S.W.3d at 841–44 (factor

weighed against finding egregious harm in this "he said, she said" case because the jury did not believe the defendant's "categorical denial of all accusations").

And, as noted above, the girls did not testify that multiple instances of similar conduct—penetration by finger for Jane, penetration by vibrator, massager, or unknown object for Kane—occurred in materially different respects at different times. That is, although the jury heard evidence that the conduct was repeated, there were no meaningful distinctions among when or how the instances occurred. With general testimony that the instances occurred "more than one time," it is unlikely some of the jurors would have believed that the proscribed conduct occurred "one time" while others believed the conduct occurred "another time."

3. Arguments of the Parties

The only discussion about unanimity during arguments was the State's assertion that the jury need not be unanimous in its determination about whether appellant used a vibrator, massager, or unknown object to penetrate Kane. As discussed above, this argument was legally correct. Neither party addressed unanimity regarding multiple instances of misconduct. Therefore, this factor weighs neither for nor against finding egregious harm. *See Arrington*, 451 S.W.3d at 844.

4. Other Relevant Information

Neither party suggests there is any other relevant information in the record, and we find none.

5. No Harm

"The only factor that weighs in favor of finding egregious harm is the consideration of the jury instructions." *Id.* at 845. Based on the facts of this particular case, "the likelihood of non-unanimity is exceedingly remote." *Jourdan*,

428 S.W.3d at 98 (no egregious harm, even though the State insisted that unanimity was not required during arguments, because the defendant's primary defensive posture was that no sexual assault took place, and his defense did not depend on whether he penetrated the complainant's sexual organ with his finger versus his penis). Thus, we conclude that the evidence in the entire record, viewed together with the jury's verdicts and arguments of the parties, show that any error in the instructions did not cause actual egregious harm to appellant. *See Arrington*, 451 S.W.3d at 845.

Appellant's second issue is overruled.

III. DOUBLE JEOPARDY

In his third issue, appellant contends, "The jury charge was fundamentally flawed under the Double Jeopardy Clause as it allows for successive prosecution on the same set of facts." Appellant contends further:

> It defies description to figure out how this same set of circumstances could not be the subject of an additional prosecution. Given that there is virtually no real date restriction on either the jury charge or the indictments, nor is there a paragraph that explains that the jury must agree on a fundamental act, regardless of the date, then one could easily see this exact same indictment brought again, no matter how many double jeopardy writs might be filed. Just as the lack of unanimity argued above provides for multiple scenarios wherein the jury might not agree on the date or circumstances that occurred yet arrive at a conviction, the inverse of that problem lies here. Whatever the jury might have decided happened, the simple wording of this charge would not prevent any prosecutor from bringing the same facts again because the no [sic] defense pleading could stand against the combined notice problems of open dates and lack of specificity.

It appears that appellant's complaint is that he might, at some future time, be prosecuted again for conduct that falls within the State's allegations in this case.

The Double Jeopardy Clause prohibits a second prosecution for the same offense after a conviction. *Langs v. State*, 183 S.W.3d 680, 685 (Tex. Crim. App. 2006). This type of double-jeopardy challenge, however, is "not ripe for review because there has not yet been an initiation of any subsequent prosecution." *Keith v. State*, 782 S.W.2d 861, 864 (Tex. Crim. App. 1989). Appellant's double-jeopardy claim is not ripe unless and until the State seeks to punish appellant for the same offense arising from the same transaction and victim. *See Henson v. State*, 173 S.W.3d 92, 105 (Tex. App.—Tyler 2005, pet. ref'd).[5]

We have reviewed the authorities cited by appellant, which concern procedural default[6] and sufficiency of the evidence based on variances,[7] and do not find them supportive of appellant's argument. To the extent appellant's citation of *Ex parte Ervin*, 991 S.W.2d 804 (Tex. Crim. App. 1999), indicates a complaint about multiple punishments, we hold that appellant has not been punished twice for the same offense. The jury assessed separate life sentences in each case; each case identified a separate victim; and the evidence showed separate incidents of misconduct against each victim. For an assaultive offense, the allowable unit of prosecution is one unit per victim. *See Bigon v. State*, 252 S.W.3d 360, 372 (Tex.

[5] The State notes that there is no evidence appellant has been prosecuted twice for the same offense. And, the State acknowledges that because it did not elect among the possible offenses against each child, "the State is now barred from prosecuting him again for any penetration" of Jane's or Kane's sexual organs that occurred before "September 19, 2012, which was the date of the indictments in this case."

[6] *See Ex parte Knipp*, 236 S.W.3d 214 (Tex. Crim. App. 2007); *Langs*, 183 S.W.2d 680.

[7] *See United States v. Puig-Infante*, 19 F.3d 929 (5th Cir. 1994); *United States v. Hernandez*, 962 F.2d 1152 (5th Cir. 1992); *Gollihar*, 46 S.W.3d 243.

Crim. App. 2008). "In this case, there were two victims, so each victim would constitute a separate offense." *Id.*[8]

Appellant's third issue is overruled.

IV. CONCLUSION

Having overruled each of appellant's issues, we affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Boyce, Busby, and Wise.
Do Not Publish — Tex. R. App. P. 47.2(b).

[8] Of course, because the aggravated sexual assault statute proscribes certain conduct, "each separately described conduct constitutes a separate statutory offense." *Vick v. State*, 991 S.W.2d 830, 833 (Tex. Crim. App. 1999).