



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-22-00309-CR**

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**GUILLERMO GARDUNO, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 351st District Court  
Harris County, Texas  
Trial Court Cause No. 1754314**

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**MEMORANDUM OPINION**

A jury found appellant Guillermo Garduno guilty of continuous sexual abuse of a child and assessed punishment at life imprisonment. Tex. Penal Code § 21.02. In a single issue, he argues that the trial court’s refusal to instruct the jury that it was required to agree unanimously that an act of sexual abuse occurred against each victim violated his right to a unanimous verdict. We affirm.<sup>1</sup>

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<sup>1</sup> Because appellant has not challenged the sufficiency of the evidence, we include only

### ***Background***

In January 2022, appellant was indicted for the felony offense of continuous sexual abuse of a child. Appellant's trial took place in April 2022.

Tracking the text of the statute, the trial court's charge included the following language:

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

Appellant objected to the jury charge and requested a jury instruction requiring unanimity regarding the specific acts of sexual abuse committed against each victim that formed the basis of the offense. The trial court overruled appellant's objection finding that the jury charge "accurately reflects the law and accurately and clearly informs the jury of what the indictment states."

### ***Discussion***

Appellant argues that his right to a unanimous verdict was violated when the trial court refused to instruct the jury that it was required to unanimously agree that at least one act of sexual abuse was committed against each victim. The State counters that appellant's proposition is inconsistent with section 21.02 because the statute specifically penalizes two or more acts "regardless of whether the acts of sexual abuse are committed against one or more victims."

"It has long been the case that juror unanimity is required in felony cases by

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those facts necessary for disposition of this appeal. *See* Tex. R. App. P. 47.1.

the Texas Constitution and in all criminal trials by state statutes.” *See Young v. State*, 341 S.W.3d 417, 422 (Tex. Crim. App. 2011) (citing Tex. Const. art. V, § 13 and Tex. Code Crim. Proc. arts. 37.02, 37.03, 37.04); *see also Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005) (providing that every juror must agree that “the defendant committed the same, single, specific criminal act.”). However, there is a distinction between a fact that is a specific element of the crime and one that is but the means to the commission of a specific element. *Ngo*, 175 S.W.3d at 747. Jurors must unanimously agree on all elements of a crime in order to convict, but jurors need not agree on all underlying facts that make up a particular element. *Id.*

A person commits the offense of continuous sexual abuse of a young child if, (1) during a period that is thirty or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and (2) at the time of the commission of each of the acts of sexual abuse, the actor is seventeen years of age or older and the victim is: (A) a child younger than fourteen years of age, regardless of whether the actor knows the age of the victim at the time of the offense.

Tex. Penal Code § 21.02(b). If a jury is the trier of fact, members are not required to agree unanimously on which specific acts of sexual abuse were committed or the exact date when those acts were committed. *Id.* at 21.02(d). Instead, the jury must agree unanimously that the defendant, during a period that is thirty or more days in duration, committed two or more acts of sexual abuse. *Id.*

In his brief, appellant concedes that the “continuous sexual abuse statute criminalizes multiple acts of sexual abuse, whether they occur against one, or more, complainants.” Appellant also concedes that “the jury was not required to unanimously agree on which acts of aggravated sexual assault appellant committed

within the time frame required by the statute.” Nonetheless, he argues, without citing any authority, that “the indictment required the State to prove, and the jury to unanimously find, that at least one act of aggravated sexual assault was committed against M.M. and at least one act of aggravated sexual assault was committed against V.M.” We disagree.

In *McMillian v. State*, this court held that the plain language of section 21.02(d) leaves no doubt as to the legislature’s intent: [¶] “If a jury is the trier of fact, members of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. The jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse.”

388 S.W.3d 866, 871–873 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (quoting Tex. Penal Code § 21.02(d)). The commission of two or more acts of sexual abuse over a specified time period—that is, the pattern of behavior or the series of acts—is the element as to which the jurors must be unanimous in order to convict. *Id.* To convict, jurors must unanimously agree on each element of the crime but need not agree on all the underlying facts that make up a particular element. *Jacobsen v. State*, 325 S.W.3d 733, 736 (Tex. App.—Austin 2010, no pet.).

Appellant was charged with committing 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 V.M. and an act constituting the offense of sexual assault of a child, committed against M.M. Section 21.02(d) makes it clear that the jury did not need to agree on which individual acts appellant committed as long as they agreed that he committed at least two. Tex.

Penal Code § 21.02(d). Because appellant does not challenge the sufficiency of the evidence, we conclude that the trial court was not required to instruct the jury that they were required to agree unanimously that at least one act of sexual abuse was committed against V.M. and that at least one act of sexual abuse was committed against M.M. Such an instruction would contradict the plain language of section 21.02 because “individual acts of sexual abuse are the manner and means by which the element of ‘two or more acts of sexual abuse’ is committed, and not elements in and of themselves.” *See Navarro v. State*, 535 S.W.3d 162, 166 (Tex. App.—Waco 2017, pet. ref’d).

Accordingly, we overrule appellant’s sole issue.

***Conclusion***

We affirm the trial court’s judgment.

/s/ Frances Bourliot  
Justice

Panel consists of Justices Wise, Bourliot, and Spain.

Do Not Publish — TEX. R. APP. P. 47.2(b).