In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-18-00444-CR
No. 02-18-00445-CR

EDIS LEONEL ALAS, Appellant

V.

THE STATE OF TEXAS

On Appeal from the 213th District Court
Tarrant County, Texas
Trial Court Nos. 1473359D, 1473357D

Before Kerr, Birdwell, and Bassel, JJ.
Memorandum Opinion by Justice Kerr

MEMORANDUM OPINION

Introduction

Edis Leonel Alas received four life sentences—three for sexually assaulting six-year-old Beatrice and one for kidnapping her.[1] The three sexual-assault convictions fall under cause number 02-18-00444-CR, and the kidnapping conviction falls under cause number 02-18-00445-CR. In cause number 444, we (1) reverse two of the three sexual-assault convictions for insufficient evidence and render acquittals and (2) reverse the sentence for the third sexual-assault conviction for charge error, modify the judgment to reflect a conviction corresponding to that portion of the jury's verdict that was unaffected by the charge error, and remand it to the trial court for a new punishment trial.[2] In cause number 445, we delete the assessed costs, modify the judgment to reflect $0 costs, and affirm the judgment as modified.[3]

The Indictments, Jury Findings, and Sentences

In cause number 444, Alas was indicted for and the jury convicted him of

- Count One: Aggravated sexual assault of a child under 14 years of age by causing the complainant's sexual organ to contact his sexual organ (Tex. Penal Code Ann. § 22.021(a)(1)(B)(iii), (a)(2)(B));

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[1]We use a pseudonym to refer to the complainant. *See* Tex. R. App. P. 9.10(a)(3); *McClendon v. State*, 643 S.W.2d 936, 936 n.1 (Tex. Crim. App. [Panel Op.] 1982).

[2]Trial court cause number 1473359D.

[3]Trial court cause number 1473357D.

- Count Two: Aggravated sexual assault of a child under 14 years of age by causing the complainant's anus to contact his sexual organ (*id.* § 22.021(a)(1)(B)(iv); (a)(2)(B)); and

- Count Four: Aggravated sexual assault of a child under 14 years of age by penetrating the complainant's sexual organ by inserting his finger into her sexual organ[4] (*id.* § 22.021(a)(1)(B)(i), (a)(2)(B)).

All three offenses were first-degree felonies, which normally carry a punishment range of imprisonment for life or for any term between 5 and 99 years and a fine not to exceed $10,000. *See id.* §§ 12.32, 22.021(e).

For all three counts, the indictment alleged and the jury found in a special issue that during the same criminal episode

- by acts or words in the complainant's presence, Alas threatened to kidnap any person; *id.* § 22.021(a)(2)(A)(iii); or

- by acts or words, Alas placed the complainant in fear that he would imminently kidnap any person. *Id.* § 22.021(a)(2)(A)(ii).

The jury's special-issue finding raised Alas's minimum imprisonment term from 5 years to 25 years. *See id.* § 22.021(f)(2).

After the jury convicted Alas of all three counts and found the special issue in the State's favor, the trial court (not the jury) sentenced Alas to life imprisonment on all three counts.

[4]The State waived Counts Three and Five.

In cause number 445, the jury convicted Alas of aggravated kidnapping, a first-degree felony, and the trial court sentenced him to life imprisonment. *See id.* §§ 12.32, 20.04(c).

Alas's Appellate Points

On appeal, Alas raises six points. Five of them attack the judgment in cause number 444; the sixth affects the judgment in cause number 445. The six points fall into three groups.

A. Evidentiary Insufficiency

In Alas's first two points, he attacks the evidentiary sufficiency of two convictions for aggravated sexual assault of a child under 14 years of age—one for penile contact with Beatrice's sexual organ (Count One) and the other for penile contact with Beatrice's anus (Count Two).[5] The State concedes evidentiary insufficiency on both counts and agrees that we should reverse both convictions and render acquittals.

B. The Special Issue

In Alas's third and fourth points, he attacks, respectively,

- the evidentiary sufficiency supporting the jury's affirmative finding on the special issue and
- the jury instruction accompanying the special issue, which gave the jury the wrong burden of proof.

[5]Alas does not challenge his conviction on Count Four.

The State maintains that the evidence was sufficient to support the jury's finding beyond a reasonable doubt but concedes that the charge misstated the State's burden of proof as being only a preponderance of the evidence. Because the error was structural and—according to the State—affected only Alas's punishment range, the State asserts that Alas is entitled only to a new punishment trial on the remaining conviction for aggravated sexual assault of a child under 14.

C. Costs

Alas's fifth and sixth points attack costs. In his fifth point, Alas asserts that the statute authorizing the "Child Abuse Prevention Fee" is unconstitutional because it violates the separation-of-powers clause, and in his sixth, he argues that the trial court erroneously assessed costs in both cause numbers. We have previously ruled against the substance of Alas's fifth point, and the State concedes error in Alas's sixth point.

Disposition Summary

For the reasons set out below, in cause number 444,

- we sustain Alas's first two points, reverse Counts One and Two for evidentiary insufficiency, and render acquittals;
- we do not address Alas's third point attacking the sufficiency of the evidence supporting the jury's special-issue finding because Alas's fourth point makes this contention moot;
- we sustain Alas's fourth point because the jury charge misstated the State's burden of proof on the special issue, modify the Count-Four judgment to reflect a conviction for aggravated sexual assault of a child under 14 (not the conviction for the offense that the judgment currently reflects—aggravated sexual assault of a child under 14 by threats and

placing in fear), and remand Count Four to the trial court for a new punishment trial for that offense; and

- following our binding precedent, we overrule Alas's fifth point attacking the constitutionality of the "Child Abuse Prevention Fee";

and in cause number 445,

- because the State tried the offenses in both cause numbers together, the trial court erred in assessing costs in both judgments, so we sustain Alas's sixth point, delete the costs assessed in cause number 445, order that the judgment reflect no assessed costs, and affirm the judgment in cause number 445 as modified.

Points One and Two: Insufficient Evidence

In his first two points, Alas contends that insufficient evidence supports his convictions in Counts One and Two because both required penile contact, one with Beatrice's sexual organ and the other with her anus. No evidence showed that Alas had touched Beatrice's anus, and although Beatrice made an outcry that Alas had touched her sexual organ, she said that he had touched it with his hand. DNA evidence confirmed that Alas had touched Beatrice's sexual organ, but the DNA evidence could not show which part of Alas's body had left his DNA there.

A. Standard of Review

In our evidentiary-sufficiency review, we view all the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the crime's essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787 (1979); *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017). This standard gives full play to the factfinder's responsibility to

resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Queeman*, 520 S.W.3d at 622.

The factfinder alone judges the evidence's weight and credibility. *See* Tex. Code Crim. Proc. Ann. art. 38.04; *Queeman*, 520 S.W.3d at 622. We may not re-evaluate the evidence's weight and credibility and substitute our judgment for the factfinder's. *Queeman*, 520 S.W.3d at 622. Instead, we determine whether the necessary inferences are reasonable based on the evidence's cumulative force when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015); *see Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017) ("The court conducting a sufficiency review must not engage in a 'divide and conquer' strategy but must consider the cumulative force of all the evidence."). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict, and we must defer to that resolution. *Murray*, 457 S.W.3d at 448–49. The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt. *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016).

On the other hand, a speculation-driven conclusion cannot support a finding beyond a reasonable doubt. *Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013). Evidence is insufficient if it "creates only a suspicion that a fact exists." *McKay v. State*, 474 S.W.3d 266, 270 (Tex. Crim. App. 2015). "Speculation is mere theorizing

or guessing about the possible meaning of the facts and evidence presented." *Anderson v. State*, 416 S.W.3d 884, 888 (Tex. Crim. App. 2013); *see Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007). To speculate is "to review something . . . usu[ally] with an element of doubt or without sufficient evidence." *Speculate*, Webster's Third New Int'l Dictionary (2002). A conclusion reached by speculation may not be completely unreasonable, but as proof, it lacks sufficient evidentiary support. *See Hooper*, 214 S.W.3d at 16.

B. Application

1. Error

Beatrice made no outcry during her forensic interview and did not testify. The State relied on the statements that she made to the CARE[6] Team nurse, Danni Smith. Nurse Smith testified that when she asked Beatrice if Alas's penis had contacted her vagina or her anus, Beatrice did not respond. But when Nurse Smith asked Beatrice if Alas's hand or finger had touched Beatrice's anus, Beatrice said, "[N]o." The only sexual abuse that Beatrice described to Nurse Smith was Alas's using his hand to rub her sexual organ under her clothing. Nurse Smith acknowledged that although she had determined how Beatrice identified her female body parts, she had not determined how Beatrice referred to male body parts, so when Nurse Smith asked

[6]CARE is an acronym for Child Advocacy Resources and Evaluation. *See In re J.H.*, No. 02-18-00249-CV, 2018 WL 6113172, at *2 n.5 (Tex. App.—Fort Worth Nov. 21, 2018, no pet.) (mem. op.).

Beatrice questions about penile contact, Beatrice might not have understood the questions.

DNA evidence confirmed that Alas had touched Beatrice's sexual organ but shed no light on what portion of his body he had used. Epithelial or "contact" DNA found on Beatrice's mons pubis, outer labia, and inner labia could not exclude Alas. The State's forensic DNA scientist (Trisa Crutcher) did not test a perianal swab. Crutcher could not say which part of Alas's body had left the epithelial or "contact" DNA.

In short, Beatrice did not allege penile contact, and even with the DNA evidence, whether Alas's penis had contacted Beatrice's sexual organ or anus was guesswork and speculation. We hold that the evidence does not suffice to support either conviction. *See McKay*, 474 S.W.3d at 270. The State concedes Alas's first two points: "While the jury's conclusions may not have necessarily been unreasonable, they were not sufficiently based on the facts and evidence to support a finding of guilt beyond a reasonable doubt."

2. Remedy

Because other evidence—a photograph that Alas himself had taken—showed that Alas exposed his penis while Beatrice was present, the next question is whether to acquit Alas or to reform the judgment to reflect the lesser-included offense of indecency by exposure.

When an appellate court finds the evidence insufficient to support a conviction, it may reform the judgment to reflect a guilty verdict on a lesser-included offense even if no lesser-included instruction was given at trial. *See Thornton v. State*, 425 S.W.3d 289, 294 (Tex. Crim. App. 2014). Before doing so, a court like ours must answer two questions:

- in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant for the lesser-included offense?

and

- after conducting an evidentiary-sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense?

Id. at 299–300. If the answer to either question is no, we may not reform the judgment; but if the answers to both are yes, we may—indeed must—reform the judgment to reflect a conviction for the lesser-included offense to avoid the "unjust" result of an outright acquittal. *Id.* at 300.

Indecency with a child by exposure requires that the accused exposed himself intending to arouse or gratify his or someone else's sexual desire. *See* Tex. Penal Code Ann. § 21.11(a)(2)(A). In contrast, aggravated assault of a child does not require the State to prove that the accused acted with such intent. *See id.* § 22.021(a)(1)(B), (a)(2). Thus, when the jurors found Alas guilty of aggravated sexual assault of a child in Counts One and Two, they did not have to determine whether he acted intending to arouse or gratify his (or someone's) sexual desire. Because the answer to the first

question posed in *Thornton* is thus no, we may not reform either judgment. *See Thornton*, 425 S.W.3d at 300. The State concedes that because the offense of indecency with a child includes the intent-to-arouse-or-gratify element—which the charged offense did not—the judgment cannot be reformed but must reflect an acquittal.

We thus sustain Alas's first and second points, reverse the convictions for Counts One and Two, and render judgment acquitting Alas of both offenses.

Points Three and Four: the Special Issue

In point three, Alas argues that insufficient evidence supports the jury's affirmative finding on the special issue (relating to threat or fear of imminent kidnapping), and in point four, he maintains that the jury charge on the special issue erroneously reduced the State's burden of proof from "beyond a reasonable doubt" to "by a preponderance of the evidence." Because point four renders point three moot, we address point four first.

A. Charge Error

Alas contends that the special issue in the jury charge in cause number 444 erroneously instructed the jury that the State's burden of proof was by a preponderance of the evidence when its actual burden was beyond a reasonable doubt:

> Do you, the jury, find *by a preponderance of the evidence* that the Defendant during the same criminal episode of the offense or offenses set out above, that [Beatrice] was younger than 14 years of age, and by acts or words occurring in the presence of [Beatrice], Defendant threatened kidnapping of any person, or by acts or words placed [Beatrice] in fear

> that kidnapping will be imminently inflicted on any person? [Emphasis added.]

At the charge conference, Alas did not object to the special issue on that basis.

The State concedes that the jury charge contains structural error because it misstated the State's burden of proof.

1. Standard of Review

We must review "all alleged jury-charge error . . . regardless of preservation in the trial court." *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). In reviewing a jury charge, we first determine whether error occurred; if not, our analysis ends. *Id.* Unpreserved charge error warrants reversal only when the error resulted in egregious harm. *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); *see* Tex. Code Crim. Proc. Ann. art. 36.19. The appropriate inquiry for egregious harm is fact- and case-specific. *Gelinas v. State*, 398 S.W.3d 703, 710 (Tex. Crim. App. 2013); *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011).

2. Application

Assuming the special issue addressed an element of the charged offenses, the State's burden of proof was "beyond a reasonable doubt." *See Jackson*, 443 U.S. at 316, 99 S. Ct. at 2787; *Queeman*, 520 S.W.3d at 622. Regardless, "[f]acts that increase the mandatory minimum sentence . . . must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 108, 133 S. Ct. 2151,

2158 (2013). Either way, the State's burden of proof was "beyond a reasonable doubt"—not merely "by a preponderance of the evidence." *See id.*, 133 S. Ct. at 2158; *Jackson*, 443 U.S. at 316, 99 S. Ct. at 2787. The trial court's charge was therefore erroneous. *See Alleyne*, 570 U.S. at 108, 133 S. Ct. at 2158; *Jackson*, 443 U.S. at 316, 99 S. Ct. at 2787.

A charge that excludes an instruction on reasonable doubt, or that defines the State's burden of proof as being less than beyond a reasonable doubt—as happened here—constitutes structural error that is not subject to harmless-error review. *See Olivas v. State*, 202 S.W.3d 137, 142–43 (Tex. Crim. App. 2006).

We thus sustain Alas's fourth point.

3. Relief

Both Alas and the State request, in essence,[7] that we

- sustain Alas's fourth point,
- vacate the jury's special-issue finding,

[7]Neither Alas's nor the State's suggested remedy for the jury-charge error is quite as granular as our bullet points, which seem the only logical disposition, given both sides' agreement that a new punishment trial on Count Four is warranted. On the verdict form, the jury found Alas "guilty of the offense of aggravated sexual assault of a child as charged in Count Four of the indictment," followed by answering "We do" to the special issue. The resulting judgment, after the trial court assessed punishment, collapsed the two answers into an "Offense for which Defendant Convicted" that was described as "aggravated sexual assault of a child under 14 years of age by threats and placing in fear." Because Alas does not challenge his conviction on Count Four as submitted to the jury, modifying the judgment in the way we describe will resolve the charge error and incorporate the parties' suggested "fix."

- reverse Alas's Count-Four life sentence for aggravated sexual assault of a child under 14 by threats and placing in fear,

- modify Alas's Count-Four judgment to reflect a conviction for aggravated sexual assault of a child under 14 and to delete all references to the special issue, and

- remand Alas's fourth count to the trial court for a new punishment trial on the modified conviction, which has a punishment range of imprisonment for life or for any term between 5 and 99 years and a fine not to exceed $10,000.

We grant the relief that aligns with the parties' mutual request for a new punishment trial on Count Four.

B. Sufficiency

Our resolution of Alas's fourth point renders his third point moot. Assuming, without deciding, that we sustained Alas's third point attacking the evidentiary sufficiency for the jury's special-issue finding, the relief that we would grant Alas would be identical to the relief that he has already been awarded under his fourth point. *See Thornton*, 425 S.W.3d at 294, 299–300. Disposing of Alas's third point is thus unnecessary, so we do not address it. *See* Tex. R. App. P. 47.1; *see Hill v. State*, No. 02-16-00106-CR, 2017 WL 1953329, at *9 (Tex. App.—Fort Worth May 11, 2017, pet. ref'd) (mem. op., not designated for publication).

Points Five and Six: Costs

A. Constitutionality of Article 102.0186

In his fifth point, Alas argues that Article 102.0186 of the Texas Code of Criminal Procedure—assessing a $100 cost against a defendant convicted of sexually

assaulting a child—is facially unconstitutional because it violates the separation-of-powers clause under the Texas constitution. *See* Tex. Const. art. II, § 1; Tex. Code Crim. Proc. Ann. art. 102.0186. In conjunction with that argument, he also argues that the child-abuse-prevention programs funded by these costs are not related to administering the criminal justice system. We have already addressed and rejected these arguments. *See Ingram v. State*, 503 S.W.3d 745, 748–50 (Tex. App.—Fort Worth 2016, pet. ref'd). We thus overrule Alas's fifth point.

B. Applying Article 102.073

1. Error

In Alas's sixth point, he asserts that the trial court unlawfully assessed court costs in both cause numbers. He contends that when a defendant is convicted of more than one offense in a single criminal action, the court may assess each court cost or fee against him only once. *See* Tex. Code Crim. Proc. Ann. art. 102.073(a). Citing this same statutory provision, the State concedes that the trial court should not have assessed costs in both cases. We agree and sustain Alas's sixth point. *See id.*

2. Remedy

When a defendant is convicted of more than one offense in a single criminal action, the court may assess costs and fees only for the "the highest category of offense that is possible based on the defendant's convictions." *See id.* art. 102.073(b). Both Alas and the State assert that the convictions in both cause numbers were first-degree felonies and that when the offenses are coequal, the appropriate remedy is to

delete the court costs in the judgment with the lower total amount and retain the costs in the judgment with the higher total. *See Steen v. State*, Nos. 02-18-00036-CR, 02-18-00220-CR, 2018 WL 4782164, at *2 (Tex. App.—Fort Worth Oct. 4, 2018, no pet.) (mem. op., not designated for publication); *Cain v. State*, 525 S.W.3d 728, 734 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). Because the costs in cause number 445 were less than those in cause number 444, both sides assert that the judgment in cause number 445 should be modified to delete any costs assessment.

Based on our disposition of Alas's non-cost-related issues, both cause numbers have convictions for first-degree felonies carrying the typical first-degree felony punishment range of 5–99 years or life and a fine up to $10,000. *See* Tex. Penal Code Ann. §§ 12.32, 20.04(c), 22.021(a)(1)(B)(i), (a)(2)(B), (e).

We sustain Alas's sixth point, delete the costs assessed in cause number 445, order the costs to reflect $0, and as modified, we affirm the judgment in that cause number.

Conclusion

In cause number 02-18-00444-CR,[8] we

- reverse Count One and enter a judgment of acquittal,
- reverse Count Two and enter a judgment of acquittal, and
- reverse the life sentence in Count Four,

[8]Trial court cause number 1473359D.

- modify the judgment on Count Four to reflect a conviction for aggravated sexual assault of a child under 14 and to delete all references to the special issue, and

- remand Count Four to the trial court for a new punishment trial on the modified conviction with its punishment range of imprisonment for life or for any term of years between 5 and 99 years and a fine not to exceed $10,000.

In cause number 02-18-00445-CR,[9] we

- delete the $569 awarded in costs,

- modify the judgment to award $0 in costs, and

- as modified, affirm the trial court's judgment.

/s/ Elizabeth Kerr
Elizabeth Kerr
Justice

Do Not Publish
Tex. R. App. P. 47.2(b)

Delivered: June 25, 2020

[9]Trial court cause number 1473357D.