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

No. 02-19-00122-CR

CARLOS CAMPOS, Appellant

V.

THE STATE OF TEXAS

On Appeal from the 297th District Court
Tarrant County, Texas
Trial Court No. 1512148D

Before Gabriel, Bassel, and Womack, JJ.
Memorandum Opinion by Justice Bassel

MEMORANDUM OPINION

I. Introduction

A jury convicted Appellant Carlos Campos of continuous sexual abuse of a child and indecency with a child by contact. *See* Tex. Penal Code Ann. §§ 21.02, 21.11. The trial court assessed punishment for the offense of continuous sexual abuse of a child at sixty years' confinement in the Institutional Division of the Texas Department of Criminal Justice and for the offense of indecency with a child by contact at ten years' confinement.

Appellant raises a single issue on appeal that turns on two errors that the trial court allegedly made by permitting multiple witnesses to testify about the complainant's outcry of sexual abuse. With respect to the first claim of error, the trial court did not abuse its discretion by permitting different witnesses to testify about the complainant's outcry as to different episodes of abuse. With respect to the second claim of error, the trial court did not abuse its discretion by permitting a question that asked only if the complainant made an outcry of sexual abuse but did not elicit the substance of that outcry. Accordingly, we affirm the trial court's judgment pertaining to the continuous-sexual-abuse-of-a-child offense. After modifying the judgment pertaining to the indecency offense to reflect the sentence that was pronounced, we affirm that judgment as modified.

II. Background[1]

Appellant was charged with committing the following offenses: continuous sexual abuse of a child under fourteen, aggravated sexual assault of a child under fourteen, and indecency with a child by contact. Appellant pleaded not guilty to the charges.

At trial, the complainant testified that she had been repeatedly sexually abused by Appellant. The abuse initially came to light when the complainant's mother asked her to explain her recent behavioral problems.

An initial investigation of the sexual-abuse claim was closed when the complainant recanted. The complainant's mother claimed at trial that she had told authorities that the complainant had lied about being abused because Appellant had threatened the complainant's mother. The complainant testified that she was afraid of Appellant because of his threats.

Allegations of abuse came to light again when the complainant made an outcry to a school counselor. This disclosure prompted another investigation. As part of the reopened investigation, the complainant was interviewed by a forensic interviewer and underwent a medical examination to determine if there was physical evidence of sexual abuse.

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[1]Appellant does not challenge the sufficiency of the evidence. We present only a brief summary of the background facts and will set forth additional factual detail in the discussion of the arguments raised by Appellant.

During the trial, the jury heard testimony from the complainant as well as from the complainant's mother, the school counselor, the complainant's brother, and the investigative officer. A forensic interviewer, who is trained to conduct interviews of child sexual-abuse victims and who conducted the forensic interview of the complainant, also testified. The forensic interviewer's testimony did not reveal the details of what the complainant had said during the interview; instead, the forensic interviewer testified as an expert witness about the dynamics of the disclosure process seen in child sexual-abuse victims.

The jury also heard testimony from the pediatric nurse practitioner who conducted the medical examination of the complainant. As part of the history given during the examination, the complainant stated, as she later did when she testified, that Appellant had abused her since she was four years old. The examination also revealed physical evidence of the abuse.

At the close of the evidence, the jury found Appellant guilty of continuous sexual abuse of a child under fourteen and of indecency with a child. The jury also found that Appellant had placed the complainant in fear that death, serious bodily injury, or kidnapping would be inflicted on her.

The punishment phase was conducted by the trial court, and the trial court pronounced Appellant's sentence as follows: "I'll set your sentence at 60 years in the institutional division [for the offense of continuous sexual abuse of a child]. In the

case of the indecency with a child, I'll set your sentence at 10 years in the institutional division."

III. Analysis

A. Article 38.072's exception to the hearsay rule permits testimony about a child sexual-abuse victim's outcry.

Appellant's two arguments within his sole issue on appeal turn on the application of the provision of the Texas Code of Criminal Procedure that permits the introduction of an outcry made by a sexual-abuse victim younger than fourteen years of age. *See* Tex. Code Crim. Proc. Ann. art. 38.072. The statute creates "an exception to the hearsay rule, meaning [the outcry] is considered substantive evidence, admissible for the truth of the matter asserted in the testimony." *Duran v. State*, 163 S.W.3d 253, 257 (Tex. App.—Fort Worth 2005, no pet.).

Article 38.072 requires notice to the defendant that the State will rely on the statute to introduce outcry statements, a hearing by the trial court, and the entry of certain findings before an outcry may be admitted into evidence. We recently summarized the process as follows:

> [T]he trial court may admit hearsay statements if the State complies with the statutory notice requirements and if—in a hearing outside the jury's presence—the trial court finds that
>
> > (1) the statement is reliable based on its time, content, and circumstances;
> >
> > (2) the complainant testifies or is available to testify at the proceeding; and

(3) the statement:

> • describes the alleged offense,
>
> • was made by the complainant against whom the charged offense or other extraneous crime, wrong, or act was allegedly committed, and
>
> • was made to the first person, 18 years of age or older, other than the defendant, to whom the complainant made a statement about the offense or extraneous crime, wrong, or act.

Starkey v. State, No. 02-18-00192-CR, 2019 WL 3819505, at *6–7 (Tex. App.—Fort Worth Aug. 15, 2019, pet. ref'd) (mem. op., not designated for publication) (citing Tex. Code Crim. Proc. Ann. art. 38.072, §§ 2(a)(1)(A), (a)(2), (a)(3), (b)(2), (b)(3)).

The trial court exercises discretion when determining whether a hearsay statement should be admitted under Article 38.072. *Id.* at *7. When confronted with the primary question involved in this appeal—which witness is the proper outcry witness for a particular episode of abuse—the trial court's discretion is likewise broad. *Id.* (citing *Chapman v. State*, 150 S.W.3d 809, 813 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (op. on reh'g)). The trial court's decision must be outside the zone of reasonable disagreement for it to constitute an abuse of discretion. *Chapman*, 150 S.W.3d at 813.

The trial court's discretion is broad because the structure of Article 38.072 often requires the trial court to sort out whether there may be different outcry

witnesses to different episodes of abuse. The trial court in this case was required to exercise its discretion to apply that principle.

Multiple outcry witnesses may testify because outcries are event specific and not person specific. *Hines v. State*, 551 S.W.3d 771, 780 (Tex. App.—Fort Worth 2017, no pet.). The Waco Court of Appeals recently outlined the parameters of when an additional outcry witness may testify to a second, discrete episode of abuse:

> Testimony of a second outcry witness is admissible if it concerns a separate, discrete instance of sexual abuse from the instance testified about by the first outcry witness. *See Hernandez v. State*, 973 S.W.2d 787, 789 (Tex. App.—Austin 1998, pet. ref'd). The outcry testimony of a second witness is not admissible, however, when the witness merely provides additional details regarding the same instance of sexual abuse. *Brown v. State*, 189 S.W.3d 382, 387 (Tex. App.—Texarkana 2006, pet. ref'd) ("[B]efore more than one outcry witness may testify, it must be determined the outcry concerned different events and was not simply a repetition of the same event told to different individuals."); *Broderick v. State*, 35 S.W.3d 67, 73 (Tex. App.—Texarkana 2000, pet. ref'd) ("[T]he proper outcry witness is not to be determined by comparing statements the child gave to different individuals and then deciding which person received the most detailed statement about the offense.").

McDaniel v. State, No. 10-18-00353-CR, 2020 WL 1429675, at *1 (Tex. App.—Waco Mar. 23, 2020, no pet. h.) (mem. op., not designated for publication).

B. The trial court did not abuse its discretion by permitting two outcry witnesses when each testified about different episodes of abuse.

The record before the trial court gave it a basis to find that there were two outcry witnesses because the complainant described different episodes to each of them. The witnesses were the complainant's mother and the school counselor.

To give context to the difficulty of the trial court's determination in this case, the situation the trial court faced was more complicated than most because the complainant's mother testified through an interpreter. As will be described in more detail below, this led to a situation in which the complainant's mother's responses were hard to decipher regarding the timing of the sexual-abuse episode that the complainant had described to her. In such a circumstance, the trial court's determination of this issue is not one that falls outside the zone of reasonable disagreement.

The complainant first made a claim of abuse to her mother on Christmas Day in 2016. The complainant's mother testified during a voir dire examination that she had asked the complainant during the Christmas Day conversation why her behavior had deteriorated. At that point, the complainant said that Appellant "had raped her." The complainant's mother confirmed on cross-examination that the complainant had simply said that Appellant had raped her. When asked when the sexual abuse had occurred, the complainant's mother testified that the complainant had not described an event that had occurred on Christmas Day but one that had occurred several months earlier:

> Q. [The complainant] didn't say that anything had happened that day on Christmas Day?
>
> A. Yes, sir. She hadn't said anything.
>
> Q. But nothing had happened -- she wasn't telling you that he had raped her on Christmas Day?

A. I'm sorry?

Q. You're calling [sic] on Christmas Day, December 25th, 2016?

A. Yes, sir.

Q. Did [the complainant] say that anything had happened to her by [Appellant] that particular day?

A. Yes.

Q. So did she say that he had done something to her on Christmas Day?

A. It wasn't on Christmas Day. It was previous days, days ago.

Q. And how many days before, do you think?

A. What she said that the last time was in April, but I don't recall the day.

Q. Would that have been April of 2016?

A. I think so.[2] [Emphasis added.]

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[2]On cross-examination, the complainant's mother gave answers that were confusing about when the sexual abuse had occurred:

Q. . . . [O]n Christmas Day 2016, you're saying this is when she told you that something had happened?

A. Yes.

Q. Did she say anything had happened on Christmas Day between [Appellant] and her?

A. Yes.

Q. On that same day or sometime before?

THE INTERPRETER: I'm sorry, can -- can you repeat it?

Though the police were called as a result of the complainant's statements on Christmas Day, the complainant later claimed that the abuse had not occurred, and the police closed their investigation. As noted above, the investigation revived several months later as a result of a conversation that the complainant had with a school counselor.

This later conversation occurred in March 2017, a couple of months after the complainant's Christmas Day conversation with her mother. The complainant and another child were brought to a school counselor. The children had been discussing abuse that they had suffered, and both were upset. The counselor separated the girls and then questioned them. The counselor stated that she had been trained to ask children who mentioned abuse to describe the latest episode of abuse that they had

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> Q. [BY DEFENSE COUNSEL] On that same day, she said something had happened to her by [Appellant] that day?
>
> A. Yes.
>
> Q. Okay. Did she tell you that something had happened once before or on that day?
>
> Do you understand what I'm saying?
>
> A. That same day.

The testimony is muddled regarding whether the complainant's mother was changing her testimony that the episode that the complainant had described had occurred in April or whether she was saying that the event had also occurred on Christmas Day. It is equally likely that the complainant's mother was trying to convey that the information that the complainant had told her on Christmas Day was about a prior event. The confusing nature of the testimony does not undermine the trial court's determination of the outcry issue.

suffered and then to terminate the questioning if the child revealed information that was sufficient for the counselor to notify Child Protective Service of the allegation.

During a voir dire examination to determine her status as an outcry witness, the counselor recounted an episode that the complainant had described as being at Christmastime when Appellant had come into her bedroom, had used "a dresser to block the door, [had gone] to her bed, [had] tried to undress her, and [had] touch[ed] her in a sexual way." The counselor elaborated on her own conclusions about when the episode had occurred as follows:

> Q. And your understanding of what [the complainant] communicated to you, the latest incident, is that something that you were looking for asking her about the latest incident?
>
> A. Uh-huh, yes, sir. I asked her what was the last -- when was the last time this occurred is probably what I said.
>
> Q. And with this conversation between you and [the complainant] happening in March of 2017, did you understand that to mean last year like the year before?
>
> A. Yes. She -- when she said "Christmas," I assumed at Christmastime, yes. She said -- she said it happened at Christmas.

The trial court found both the complainant's mother and the school counselor to be reliable and admitted their testimony under Article 38.072. The trial court found both the complainant's mother and the school counselor were appropriate outcry witnesses.

Although Appellant recites the law that outcries are event specific and not person specific, Appellant's issue challenging the trial court's ruling never confronts

whether, after all the trial court had heard about multiple events, it abused its discretion by permitting both the complainant's mother and the school counselor to testify as outcry witnesses. Indeed, Appellant never even acknowledges that there was testimony from which the trial court could have found that each witness had described different episodes. Instead, Appellant complains about the process by which the trial court reached the result. Appellant's argument avoids the question that we must resolve, which is whether the trial court erred in deciding both the mother and counselor were proper outcry witnesses. After considering the entire record, we conclude that it did not.

Specifically, Appellant begins his attack by highlighting the State's notice of outcry that described the outcry testimony that would be given by the school counselor. Describing what the school counselor had been told by the complainant, the notice recounted the episode during which Appellant had pushed a dresser in front of the bedroom door and also described the complainant's conversation with her mother when the complainant was confronted about her behavior. The notice contained a sentence that suggested the dresser episode had occurred shortly before the conversation with the mother and that the complainant had told her mother about the dresser episode and not an episode that had occurred in a prior month as the complainant's mother later claimed in her testimony: "Her mother pressed her to say what was wrong[,] and she told her mother about the incident from the previous

night." The counselor's voir dire testimony seemingly supported this conclusion: "But she did tell me that she had told her mother."

Appellant's specific complaint is that the school counselor was called as the State's first witness, and when she was permitted to testify on the basis of the notice, it appeared that she was not the first adult to whom the complainant had made an outcry about the incident that had occurred around Christmastime in 2016; Appellant's supporting argument is that there is evidence that the complainant had told her mother about a Christmastime assault, rather than one that had occurred months earlier as the complainant's mother testified. Thus, Appellant argues that the trial court should have sustained his objection that the school counselor was not the first person to whom the complainant had made an outcry of a Christmastime abuse episode. But Appellant ignores the inquiry the trial court made before admitting the counselor's testimony to determine if the counselor was the first person to whom the complainant made an outcry about the Christmastime event. That inquiry occurred immediately after the voir dire examination of the counselor:

> THE COURT: Any objection, Defense?
>
> [Appellant's counsel]: Well, Judge, we think from what we know, it's coming from other alleged outcry witness.
>
> This is kind of out of order.
>
> THE COURT: Well --
>
> [Appellant's counsel]: We don't really have anything to know that this was the first person who was told.

THE COURT: Well, I'm going to find this outcry statement is reliable and admissible under 38.072 as to at least the incident where the defendant is alleged to have touched her at Christmastime.

I presume you're going to have more than one incident since this is a continuous case, right, State?

[State's Counsel]: *That's correct, Your Honor.*

THE COURT: *Is the -- is the other outcry that you're going to have specific enough in relation to this particular incident or is it just a general outcry*?

[State's Counsel]: *Our -- our position is it's a general outcry, the statement, "He raped me."*

THE COURT: This is going to come in. [Emphasis added.]

We review a trial court's exercise of its discretion in admitting evidence "in light of what was before the trial court at the time the ruling was made." *Billodeau v. State*, 277 S.W.3d 34, 39 (Tex. Crim. App. 2009). Here, the trial court made its admissibility decision based on the representation of the prosecutor that the mother and the counselor would testify about different events, a representation that was not challenged by Appellant either by claiming the representation was untrue or by seeking to adduce testimony outside the presence of the jury that would challenge the representation. The mother's later testimony bore out that the outcry the complainant had made to her involved a different event. In light of what was before the trial court when it made the decision to admit the counselor's testimony, it did not

abuse its discretion to admit that testimony, and that decision was validated when the mother testified.[3]

C. The trial court did not abuse its discretion by permitting the forensic interviewer to answer a question simply because that question contained the word "outcry."

Appellant also claims reversible error resulted from the use of a single word in one of the prosecutor's questions. The forensic interviewer offered expert testimony about the circumstances regarding when an abused child may temporarily recant a

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[3]Appellant also challenges the trial court's determination that the school counselor was a proper outcry witness because the complainant testified that she had "talk[ed] to some grown-ups about what happened" when law enforcement was called after her Christmastime conversation with her mother. On cross-examination, the complainant testified that she had "told" CPS and law enforcement after the Christmastime conversation, without specifying any detail about what was told. Without any detail about what the complainant allegedly told CPS and law enforcement, we have no ability to determine whether the complainant revealed discernible details about a particular event of abuse. *See Daniel v. State*, No. 02-18-00041-CR, 2019 WL 3334422, at *3 (Tex. App.—Fort Worth July 25, 2019, no pet.) (mem. op., not designated for publication) (stating that a general allusion to abuse that does not describe abuse in a discernible way does not amount to outcry testimony). Without any details about what the complainant told CPS and law enforcement, we have no basis to question the trial court's exercise of its discretion in admitting the outcry testimony provided by the school counselor about the incident described to her. Beyond the lack of detail in the record about what was allegedly "told" to adults by the complainant, the detective investigating the case after the initial December 2016 outcry testified that when interviewed by CPS in early January 2017, the complainant made no outcry of abuse. Indeed, shortly after the initial outcry, the detective's initial investigation was closed. Thus, not only was there an absence of detail from the complainant about what she had allegedly told adults during the initial investigation, there was affirmative proof that she made no outcry statements at all during this period. Such a record does not support Appellant's implication that the complainant made a statement to an undisclosed outcry witness and that the trial court should have (in some way that Appellant fails to explain) unearthed those statements and considered them in making its outcry determinations.

claim of abuse. During direct examination, the forensic interviewer responded to a question setting out the context for why she had continued speaking to the complainant after she answered yes to whether the complainant had made an "outcry" of sexual abuse to her during the interview. The witness was not asked about and gave no description of the abuse that the complainant claimed had occurred, abuse that the complainant and several other witnesses had detailed at other points during the trial.

Also the question asked by the prosecutor conformed to a representation that he had made regarding how he would ask the contextual question—a representation that drew Appellant's statement that he hoped the prosecutor would keep to an "understanding" to ask that limited question during the examination. But when the prosecutor asked the very question that Appellant had said that he understood would be asked, Appellant objected solely because the question mentioned the word outcry. The trial court overruled that objection. The trial court did not abuse its discretion by controlling the examination of a witness and permitting a limited contextual question that did not elicit any details of a hearsay statement, that noted a fact that the jury already knew, and that appeared to be in conformity with the form question that Appellant indicated was acceptable.

To detail the sequence of events that led up to the question at issue being asked, the forensic interviewer testified as an expert witness regarding the interview process used with child sexual-abuse victims. The forensic interviewer had

interviewed the complainant, but the forensic interviewer's testimony was limited to opinions about the stages of disclosure that a child victim might go through. Appellant raises no objection on appeal that attacks the forensic interviewer's qualifications, reliability, relevance, or other testimony. *See Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019) (stating that the preconditions for admissibility of expert testimony are "referred to as (1) qualification, (2) reliability, and (3) relevance").

Appellant did express a concern during a Rule 705(b) hearing held outside the jury's presence; Appellant said that he "just want[ed] to be sure [they were] not talking about anything that was factually disclosed in the interview."[4] This concern prompted the prosecutor to preview how he planned to question the interviewer:

> As far as the content of the forensic interview, *I do plan to ask her if there was an outcry of sexual abuse* made during that interview and nothing more about the content of that interview.
>
> And as far as the disclosure process, it's -- it's generally speaking, and the jury can apply the facts that they've heard in the case as -- as she describes the disclosure process. [Emphasis added.]

The trial court confirmed the limited nature of the prosecutor's planned approach, and Appellant expressed a hope that the prosecutor would conform to the

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[4]Texas Rule of Evidence 705(b) provides,

> **Voir Dire Examination of an Expert About the Underlying Facts or Data**. Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may—or in a criminal case must—be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.

Tex. R. Evid. 705(b).

understanding reached about the limited nature of the question that the prosecutor would ask:

> THE COURT: And that's the whole purpose of the forensic interview. You're not going to be getting into the hearsay statements that were actually made on that forensic interview video, correct?
>
> [Prosecutor]: No, Your Honor.
>
> THE COURT: Okay.
>
> [Appellant's counsel]: I hope we have that understanding.

After the quoted exchange, the forensic interviewer was questioned before the jury. Well into the questioning, the prosecutor asked the forensic interviewer a question that conformed to his prior representation about the narrow question that he said he would ask, which was "[d]id [the complainant] make a -- an outcry of sexual abuse to you?" The question drew the following objection: "Your Honor, I object to any mention of outcry." The trial court responded, "Well, I'll let her answer that question, so your objection is overruled as to that question." The prosecutor never asked the witness to detail the abuse that the complainant had described to her.

An interplay of three rules demonstrates that the trial court did not abuse its discretion by overruling Appellant's objection:

- A trial court has discretion to control the mode of examining witnesses. Tex. R. Evid. 611(a) ("**Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment."); *see also In re Commitment of Winkle*, 434 S.W.3d 300, 306 (Tex. App.—

Beaumont 2014, pet. denied) (stating that Rule 611(a) accords the trial court discretion to control the mode of examining an expert).

- A party cannot invite an error and then complain of that error on appeal. *Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999) ("[T]he law of invited error estops a party from making an appellate error of an action it induced.").

- Article 38.072 "applies only to statements that: (1) describe: (A) the alleged offense." Tex. Code Crim. Proc. Ann. art. 38.072, § 2(1)(A).

Here, the trial court permitted a question that the prosecutor had previewed when he described the specific question that he planned to ask the forensic interviewer. Appellant indicated that the prosecutor's approach would be acceptable and then apparently changed his mind and objected. Under these circumstances, the trial court acted within its discretion to find that Appellant had invited the question to which he later objected.

Nor does the mere use of the word "outcry" in the question create the error that Appellant now claims. The forensic interviewer did not testify an as outcry witness because she offered no statements that described the alleged offense. She answered a question that at most recapped the obvious—she interviewed the complainant because the complainant had said that she had been sexually abused. Indeed, the jury had already heard the complainant answer yes to the question, "[D]id you go to the [forensic interview] and -- and talk to an adult and tell what -- tell what had happened?" The complainant was then cross-examined about the fact that she

was interviewed by a forensic interviewer. A detective investigating the case testified without objection that the complainant was interviewed by a forensic interviewer.

Thus, the trial court did not act outside the bounds of its discretion to reasonably control the examination of an expert witness. The trial court permitted the witness to provide the context for why she had spoken to the complainant. It did so in a way that did not prejudice Appellant. The contextual question was not used as a subterfuge to place facts before the jury that it did not already know; the jury knew that the complainant had spoken to the forensic interviewer about her claim of abuse. Nor did the question violate the strictures of the hearsay rule or Article 38.072 by permitting the forensic interviewer to offer hearsay statements describing the alleged offense or to repeat the statements testified about by prior outcry witnesses.

Because the trial court did not abuse its discretion by allowing the forensic interviewer to answer the "outcry" question, we overrule Appellant's sole issue.

D. Modification of judgment

The State points out that the judgment dealing with Appellant's conviction for indecency with a child by contact states that Appellant received a sixty-year sentence. However, the trial court sentenced Appellant to ten years in TDCJ for this offense. The trial court's sentence in the judgment must conform to the trial court's oral pronouncement of sentence. *See Taylor v. State*, 131 S.W.3d 497, 502 (Tex. Crim. App. 2004). We may modify the trial court's judgment and affirm it as modified. *See* Tex. R. App. P. 43.2(b); *Nelson v. State*, 149 S.W.3d 206, 213 (Tex. App.—Fort Worth 2004,

no pet.) (holding that an appellate court may modify a trial court judgment to make the judgment congruent with the record). We therefore modify the punishment assessed in the section of the judgment in "Case No. 1512148D Count Seven" under the heading "Punishment and Place of Confinement:" to state "10 YEARS Institutional Division, TDCJ."

IV. Conclusion

Having overruled Appellant's sole issue but having modified the judgment for the indecency offense to reflect the sentence that was pronounced, we affirm as modified the trial court's judgment pertaining to the indecency offense (count seven), and we affirm the trial court's judgment pertaining to the continuous-sexual-abuse-of-a-child offense (count one).

/s/ Dabney Bassel

Dabney Bassel
Justice

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Delivered: June 25, 2020