



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-22-00036-CR

LUCIO DELOSSANTOS-NARVAEZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

**On Appeal from the 137th District Court
Lubbock County, Texas
Trial Court No. DC-2021-CR-0752, Honorable John J. McClendon III, Presiding**

June 28, 2023

MEMORANDUM OPINION

Before QUINN, C.J. and PARKER and DOSS, JJ.

Before us pends the contention that “Section 21.02(d) of the Texas Penal Code is unconstitutional as a matter of law as it violates the Texas Constitution and the United States Constitution. Unanimity is required.”¹ Lucio Delossantos-Narvaez raised it to reverse his conviction for continuous sexual assault of a child. We affirm.

¹ The statute provides that: “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.” TEX. PENAL CODE ANN. § 21.02(d).

Our decision to affirm lies with appellant's failure to preserve his constitutional challenge directed at that statute. It, like many other constitutional challenges, required preservation. *Shafer v. State*, No. 02-10-00496-CR, 2012 Tex. App. LEXIS 1902, at *3-4 (Tex. App.—Fort Worth Mar. 8, 2012, pet. ref'd) (mem. op., not designated for publication). Appellant acknowledged that he failed to raise the contention below but attempts to avoid the requirement by comparing it to mere charge error. Of course, the latter normally needs no preservation at trial, and the failure to voice complaint about it simply affects the harm analysis. *Bethel v. State*, ___ S.W.3d ___, No. 07-21-00297-CR, 2023 Tex. App. LEXIS 1490, at *6-7 (Tex. App.—Amarillo Mar. 8, 2023, no pet.) (so describing). Yet, appellant also acknowledged that the charge at bar tracked section 21.02(d). So, it comports with current, applicable legal authority. And, attempting to change that authority on constitutional grounds, which we rejected in *Pfeifer v. State*, No. 07-14-00277-CR, 2016 Tex. App. LEXIS 7825, at *11-12 (Tex. App.—Amarillo Jul. 21, 2016, pet. ref'd) (mem. op., not designated for publication) (wherein we held that section 21.02 did not violate due process), requires preservation of those constitutional grounds. Indeed, appellant's comparison of his constitutional challenge to mere charge error to avoid preservation was rejected in *Shafer*.

We overrule appellant's sole issue and affirm the trial court's judgment.

Brian Quinn
Chief Justice

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