TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00193-CR

Martin Lopez Montejo, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 390TH JUDICIAL DISTRICT
NO. D-1-DC-11-302208, HONORABLE WILFORD FLOWERS, JUDGE PRESIDING

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

A jury convicted appellant Martin Lopez Montejo of one count of the offense of aggravated sexual assault of a child and two counts of the offense of indecency with a child by exposure, assessing punishment at forty years' imprisonment for the aggravated-sexual-assault count, seven years' imprisonment for the first indecency count, and five years' imprisonment for the second indecency count.[1] The district court rendered judgment on each verdict. In seven points of error on appeal, Montejo asserts that his multiple convictions violated double jeopardy, that the district court abused its discretion in admitting certain hearsay testimony, and that Montejo was egregiously harmed by a jury charge that allowed for a non-unanimous verdict. Concluding that the double-jeopardy complaint has merit—indeed, it is largely uncontested by the State—we will vacate the

[1] *See* Tex. Penal Code §§ 21.11(a)(2), 22.021(a)(1)(B)(i), (2)(B).

judgments of conviction for the indecency offenses and affirm the judgment of conviction for the "more serious offense" of aggravated sexual assault of a child.

BACKGROUND

In a seven-count indictment, Montejo was charged with the offenses of aggravated sexual assault of a child (counts I and II), indecency with a child by contact (counts III and IV), and indecency with a child by exposure (counts V, VI, and VII), all arising out of a single incident involving V.C., an 11-year-old girl at the time of the incident.[2] During trial, V.C. testified that on May 15, 2011, Montejo, a man who had been renting a room at the house where V.C. lived with her family, had sexually assaulted her at a time when she was alone with Montejo at her house. Other evidence considered by the jury included the testimony of V.C.'s mother, the first adult to whom V.C. had reported the assault; Dr. Beth Nauert, a pediatrician who had examined V.C. following the assault; Martha Rodriguez, a counselor at the Center for Child Protection who had interviewed V.C. after the assault had been reported to authorities; and Dr. William Carter, a psychologist who provided testimony concerning "the dynamics and nuances associated with child sex abuse." Based on this and other evidence, which we discuss in more detail below, the jury found Montejo guilty of committing the offenses alleged in counts I, V, and VII of the indictment and assessed punishment

[2] V.C. was 14 years old at the time of trial.

on each count as noted above.[3] The district court rendered judgment on each verdict. This appeal followed.

ANALYSIS

Double Jeopardy

The Double Jeopardy Clauses of both the United States and Texas Constitutions prohibit the state from punishing a person twice for the same offense.[4] In his first and second points of error, Montejo argues that the offense of aggravated sexual assault of a child as alleged in count I of the indictment and the offense of indecency with a child by exposure as alleged in count V of the indictment were the same for double-jeopardy purposes. In his third and fourth points of error, Montejo makes a similar argument as to the offense of indecency with a child by exposure as alleged in count VII of the indictment.[5] Montejo contends that the exposure of the victim's genitals as alleged in count V and the exposure of Montejo's genitals as alleged in count VII occurred at the same time as the assault of the victim as alleged in count I. Therefore, according to Montejo, the

---

[3] The jury also found Montejo guilty of the offense alleged in count III of the indictment, but the district court granted Montejo's motion for new trial on that count and the State subsequently dismissed it.

[4] *See* U.S. Const. amend. V; Tex. Const. art. 1, § 14; *see also Ex parte Lange*, 85 U.S. 163, 168 (1873); *Stephens v. State*, 806 S.W.2d 812, 814-15 (Tex. Crim. App. 1990).

[5] The only difference between count V and count VII is that count V alleged exposure of the victim's genitals, whereas count VII alleged exposure of Montejo's genitals.

exposure offenses were "subsumed" by the aggravated-sexual-assault offense and should be vacated for that reason.[6]

Although Montejo did not raise any double-jeopardy complaints in the court below, "because of the fundamental nature of double-jeopardy protections, a double-jeopardy claim may be raised for the first time on appeal . . . when the undisputed facts show the double jeopardy violation is clearly apparent on the face of the record and when enforcement of the usual rules of procedural default serves no legitimate state interests."[7] "A double-jeopardy claim is apparent on the face of the trial record if resolution of the claim does not require further proceedings for the purpose of introducing additional evidence in support of the double-jeopardy claim."[8]

Here, the double jeopardy violation is clearly apparent on the face of the record. The Court of Criminal Appeals has held that multiple convictions, "based on a hypertechnical division of what was essentially a single continuous act, are barred under the Double Jeopardy Clause."[9] That is what the record reflects occurred here. V.C. testified that during the course of the assault, Montejo partially removed his pants and underwear and her pants and underwear, thus exposing both his and

---

[6] In its brief, the State concedes that under the applicable law, Montejo's convictions for counts I and VII violated double jeopardy. Regarding the convictions for counts I and V, the State argues only that "there is no authority, and defense counsel has cited none, that holds that the offense of Indecency with a Child by Exposure of the victim's genitals is necessarily subsumed by the offense of Aggravated Sexual Assault of a Child." Other than that assertion, the State provides no argument contesting these points.

[7] *Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000); *Zuliani v. State*, 383 S.W.3d 289, 294 n.4 (Tex. App.—Austin 2012, pet. ref'd).

[8] *Ex parte Denton*, 399 S.W.3d 540, 544 (Tex. Crim. App. 2013).

[9] *Aekins v. State*, 447 S.W.3d 270, 283 (Tex. Crim. App. 2014).

her genitals. V.C. testified to no other acts of exposure that occurred before or after the assault. Thus, on this record, only one conviction was authorized. As the Court of Criminal Appeals has explained:

> Penetration without exposure is next to impossible. . . . A single sexual act of penile penetration almost always consists of exposing the penis en route to contacting the vagina (or anus or mouth) with the penis, en route to penetration of the same with the penis. That one continuing act, the result of a single impulse, may violate three separate Penal Code provisions, but . . . the Legislature intended only one conviction for that one completed sexual assault. This means that multiple convictions for one complete, ultimate sexual assault violate the Double Jeopardy Clause. . . . In short, in Texas, as in many other jurisdictions, a defendant may not be convicted for a completed sexual assault by penetration and also for conduct (such as exposure or contact) that is demonstrably and inextricably part of that single sexual assault.[10]

Additionally, we find no legitimate state interests that would be served in this case by enforcing the usual rules of procedural default, and the State does not provide any argument to the contrary.[11] Accordingly, we sustain Montejo's first, second, third, and fourth points of error.

---

[10] *Id*. at 280-81.

[11] *See Duckett v. State*, 454 S.W.2d 755, 758 n.2 (Tex. Crim. App. 1970) (addressing double-jeopardy violation for first time on appeal when multiple convictions were obtained "in the same court, on the same day based on the same evidence reflecting the same act"); *Johnson v. State*, 208 S.W.3d 478, 510 (Tex. App.—Austin 2006, pet. ref'd) (concluding that "because both convictions arise out of the same trial, enforcement of the usual rules of procedural default would serve no legitimate state interest"). *Cf. Shaffer v. State*, 477 S.W.2d 873, 876 (Tex. Crim. App. 1971) (holding that double-jeopardy claim could not be raised for first time on appeal when convictions "did not occur in the same court," "no evidence concerning the verdict [in the first case] was ever offered" in the second case, and "[t]he trial court had no way of knowing of the prior proceeding other than by way of evidence offered by appellant").

When a defendant is subjected to multiple punishments for the same offense, the remedy is to affirm the conviction for the "most serious offense" and vacate the other convictions.[12] The "most serious offense" is the offense for which the greatest sentence was assessed.[13] Here, Montejo was sentenced to 40 years' imprisonment for the aggravated-sexual-assault offense, and seven and five years' imprisonment, respectively, for each of the indecency offenses. Accordingly, we will retain Montejo's conviction for aggravated sexual assault of a child and vacate his convictions for indecency with a child by exposure.

Hearsay

The State's designated outcry witness was V.C.'s mother, who was allowed to testify to hearsay statements that V.C. had made to her concerning the assault.[14] However, following the testimony of V.C.'s mother, the State called Martha Rodriguez, the counselor who had interviewed V.C. after the assault had been reported to the authorities, to testify to statements that V.C. had made to Rodriguez during the interview. In his fifth point of error, Montejo asserts that the district court abused its discretion in admitting Rodriguez's testimony over Montejo's hearsay objection.

---

[12] *Ex parte Denton*, 399 S.W.3d at 547; *Ex parte Cavazos*, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006).

[13] *Ex parte Denton*, 399 S.W.3d at 547; *Ex parte Cavazos*, 203 S.W.3d at 338.

[14] *See* Tex. Code Crim. Proc. art. 38.072 (authorizing admission of child's outcry of sexual abuse "made to the first person, 18 years of age or older, other than the defendant, to whom the child . . . made a statement about the offense").

We review the trial court's evidentiary rulings for abuse of discretion.[15] We are to view the record "in the light most favorable to the trial court's determination, and the judgment will be reversed only if it is arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.'"[16] We consider the ruling in light of what was before the trial court at the time the ruling was made.[17] "If a trial court's ruling is supported by the record, we will affirm that ruling if there is any valid theory of law that supports the ruling, even if that theory was not presented to the trial court."[18]

"Hearsay is 'a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.'"[19] "Generally, hearsay statements are not admissible unless the statement falls within a recognized exception to the hearsay rule."[20] One such exception is article 38.072 of the Texas Code Criminal Procedure, which "creates a hearsay exception for a child's first outcry of sexual abuse to an adult."[21] If all of the statutory requirements are satisfied, "then the child's outcry statement 'is not inadmissible because of the

---

[15] *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014) (citing *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)); *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011).

[16] *Story*, 445 S.W.3d at 732 (quoting *Dixon*, 206 S.W.3d at 590); *see Montgomery v. State*, 810 S.W.2d 372, 391-92 (Tex. Crim. App. 1991) (op. on reh'g).

[17] *Billodeau v. State*, 277 S.W.3d 34, 39 (Tex. Crim. App. 2009).

[18] *Miller v. State*, 393 S.W.3d 255, 263 (Tex. Crim. App. 2012).

[19] *Pena v. State*, 353 S.W.3d 797, 814 (Tex. Crim. App. 2011) (quoting Tex. R. Evid. 801(d)).

[20] *Id*.

[21] *Bays v. State*, 396 S.W.3d 580, 581 n.1 (Tex. Crim. App. 2013) (citing Tex. Code Crim. Proc. art. 38.072, § 2(a)).

hearsay rule'"[22] and is "considered substantive evidence of the crime."[23] However, "[t]here may be only one outcry witness per event."[24] "Hearsay testimony from more than one outcry witness may be admissible under article 38.072 only if the witnesses testify about different events."[25]

On appeal, Montejo asserts that there was only one event in this case, the assault that had occurred on May 15, 2011, and the designated outcry witness for that event was V.C.'s mother. Therefore, according to Montejo, Rodriguez could not testify to the additional hearsay statements that V.C. had made to Rodriguez concerning the assault.

Assuming without deciding that Rodriguez's testimony was not admissible pursuant to article 38.072, there is another hearsay exception that the district court could have found to be applicable here. Texas Rule of Evidence 107, known as the rule of optional completeness, provides that "[i]f a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject."[26] "An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary

---

[22] *Id*. (quoting Tex. Code Crim. Proc. art. 38.072, § 2(b)).

[23] *Id*. (citing *Martinez v. State*, 178 S.W.3d 806, 811 (Tex. Crim. App. 2005)).

[24] *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011).

[25] *Id*.; *see also Dorsey v. State*, No. 03-10-00039-CR, 2010 Tex. App. LEXIS 7994, at *9 (Tex. App.—Austin Sept. 30, 2010, pet. ref'd) (mem. op., not designated for publication) ("Because outcry witnesses are event-specific, the hearsay exception permits testimony of multiple outcries if they regard 'discrete occurrences' or 'discrete events' of abuse and are not merely a repetition of the same event told to different individuals.").

[26] Tex. R. Evid. 107.

to explain or allow the trier of fact to fully understand the part offered by the opponent."[27] "The plain language of Rule 107 indicates that in order to be admitted under the rule, the omitted portion of the statement must be 'on the same subject' and must be 'necessary to make it fully understood.'"[28] "This rule is one of admissibility and permits the introduction of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter 'opened up' by the adverse party."[29] "It is designed to reduce the possibility of the jury receiving a false impression from hearing only a part of some act, conversation, or writing."[30] "A party who opens a door to an issue 'cannot complain when the opposing party desires to go into the details of that subject.'"[31]

In this case, prior to Rodriguez's testimony, and before the State had made any reference to V.C.'s interview with Rodriguez, Montejo had cross-examined V.C. concerning statements that she had made to Rodriguez, in an attempt to impeach V.C.'s credibility. V.C. had testified during direct examination that Montejo had penetrated her sexual organ. However, on cross, V.C. testified that she had told Rodriguez that Montejo had not penetrated her sexual organ but had instead penetrated her anus. As part of his impeachment efforts, Montejo offered into

---

[27] *Id*.

[28] *Sauceda v. State*, 129 S.W.3d 116, 123 (Tex. Crim. App. 2004) (quoting Tex. R. Evid. 107).

[29] *Walters v. State*, 247 S.W.3d 204, 217-18 (Tex. Crim. App. 2007) (citing *Parr v. State*, 557 S.W.2d 99, 102 (Tex. Crim. App. 1977)).

[30] *Id*. at 218 (citing *Cerda v. State*, 557 S.W.2d 954, 957 (Tex. Crim. App. 1977)).

[31] *Tovar v. State*, 221 S.W.3d 185, 190 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (quoting *Sherman v. State*, 20 S.W.3d 96, 101 (Tex. App.—Texarkana 2000, no pet.)).

evidence Defense Exhibit 1, a video recording showing approximately eight seconds of V.C.'s interview with Rodriguez, during which V.C. had told Rodriguez that Montejo had penetrated the part of her body "where poop comes out."[32] The district court admitted the eight-second portion of the recording into evidence and it was played for the jury. Montejo then proceeded to question V.C. concerning what she had said to Rodriguez, implying through his questioning that V.C.'s statements to Rodriguez during the interview were inconsistent with her trial testimony.[33]

It would not have been outside the zone of reasonable disagreement for the district court to conclude that playing only eight seconds of V.C.'s interview with Rodriguez might have given the jury a false impression of the substance of that interview. The district court could have reasonably found that the partial recording, combined with V.C.'s subsequent testimony attempting to explain what she had said on the recording, could have left the jury with the impression that V.C. was not telling the truth and that, in order for the jury to properly evaluate V.C.'s credibility, additional information concerning V.C.'s interview with Rodriguez should be admitted. And it would not have been outside the zone of reasonable disagreement for the district court to have further found that an effective method to fairly and fully convey that additional information to the

[32] Although the entire recording was not admitted into evidence and thus we cannot confirm the length of the full interview, in a hearing outside the presence of the jury, the State represented that the total length of the recording was approximately 96 minutes.

[33] At one point during the questioning, Montejo asked V.C. if she was "lying back on the day that you gave the interview to Ms. Rodriguez or today?" In response, V.C. answered that she "wasn't sure where [Montejo's sexual organ] went" but that it "felt like in the middle." On redirect, V.C. clarified that "[i]t felt in the middle, where my period comes out, and my poop. It felt like mostly where my poop comes out." The State also asked V.C. if she "recall[ed] pointing to [her] vagina" when Rodriguez had asked her where Montejo had penetrated her. V.C. answered in the affirmative, although she also answered in the affirmative when defense counsel later asked her if she "recall[ed] saying that [the penetration] was closer to the back of [her] body."

jury would be through Rodriguez's live testimony, as that would allow both sides to question Rodriguez on what V.C. had said. On this record, we cannot conclude that the district court abused its discretion in admitting Rodriguez's testimony over Montejo's hearsay objection.[34]

We overrule Montejo's fifth point of error.

Jury unanimity

In count I of the indictment, Montejo was charged with "intentionally and knowingly caus[ing] the penetration of the sexual organ or anus of [V.C.], a child younger than 14 years of age, by the sexual organ of the said Martin Montejo." The application paragraph of the jury charge tracked the language in the indictment but included no language instructing the jury that it needed to unanimously agree on whether Montejo had penetrated V.C.'s sexual organ or her anus. In his sixth and seventh points of error, Montejo asserts that this omission in the charge violated his federal and state constitutional rights to a unanimous verdict.[35]

---

[34] *See Bezerra v. State*, 485 S.W.3d 133, 142-43 (Tex. App.—Amarillo 2016, pet. ref'd), *cert. denied*, 137 S. Ct. 495 (2016); *Mick v. State*, 256 S.W.3d 828, 831-32 (Tex. App.—Texarkana 2008, no pet.); *Tovar*, 221 S.W.3d at 191; *Credille v. State*, 925 S.W.2d 112, 116 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd); *see also Rackley v. State*, No. 12-14-00331-CR, 2015 Tex. App. LEXIS 12692, at *7-8 (Tex. App.—Tyler Dec. 16, 2015, no pet.) (mem. op., not designated for publication); *Smith v. State*, Nos. 01-10-00903-CR & 01-10-00904-CR, 2012 Tex. App. LEXIS 2510, at *2-7 (Tex. App.—Houston [1st Dist.] Mar. 29, 2012, pet. ref'd) (mem. op. on reh'g, not designated for publication); *Bailey v. State*, No. 11-09-00223-CR, 2011 Tex. App. LEXIS 5085, *9-13 (Tex. App.—Eastland June 30, 2011, no pet.) (mem. op., not designated for publication).

[35] We note that, "although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials." *McDonald v. City of Chicago, III.*, 561 U.S. 742, 766 n.14 (2010); *see also Schad v. Arizona*, 501 U.S. 624, 634 n.5 (1991) ("[A] state criminal defendant, at least in noncapital cases, has no federal right to a unanimous jury verdict."). Accordingly, we limit our analysis to the jury unanimity requirements under Texas law. *See Romero v. State*, 396 S.W.3d 136, 147 (Tex. App.—Houston

We review claims of jury-charge error under the two-pronged test set out in *Almanza v. State*.[36] "Our first inquiry is whether the jury charge contained error."[37] "If error exists, we then analyze the harm resulting from the error."[38] "If the error was preserved by objection, any error that is not harmless will constitute reversible error."[39] "If the error was not preserved by objection, the error will not result in reversal of the conviction without a showing of egregious harm."[40]

We first review the charge for error. "Texas law requires that a jury reach a unanimous verdict about the specific crime that the defendant committed."[41] "In other words, 'the jury must be unanimous in finding every constituent element of the charged offense in all criminal cases.'"[42] "This means that the jury must 'agree upon a single and discrete incident that would constitute the

---

[14th Dist.] 2013, pet. ref'd) ("proceed[ing] to examine appellant's claimed right to unanimity of the jury verdict under Texas law only" after observing that there was no federal right to unanimous verdict in state criminal cases).

[36] 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); *see Swearingen v. State*, 270 S.W.3d 804, 808 (Tex. App.—Austin 2008, pet. ref'd).

[37] *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015).

[38] *Id*.

[39] *Id*.

[40] *Id*.

[41] *Cosio v. State*, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011) (citing *Landrian v. State*, 268 S.W.3d 532, 535 (Tex. Crim. App. 2008)); *see Hodge v. State*, 500 S.W.3d 612, 624 (Tex. App.—Austin 2016, no pet.); *see also* Tex. Const. art. V, § 13; Tex. Code Crim. Proc. arts. 36.29(a), 37.02, 37.03, 45.034-45.036.

[42] *Hodge*, 500 S.W.3d at 624 (quoting *Jourdan v. State*, 428 S.W.3d 86, 94 (Tex. Crim. App. 2014)).

commission of the offense alleged.'"[43] To satisfy this requirement, "'the jury must be instructed that it must unanimously agree on one incident of criminal conduct (or unit of prosecution), based on the evidence, that meets all of the essential elements of the single charged offense beyond a reasonable doubt.'"[44]

The statute proscribing the offense of sexual assault "criminalizes two separate acts—penetrating by any means (1) the anus, or (2) the sexual organ" of the victim.[45] The statute proscribing the offense of aggravated sexual assault of a child, as charged here, operates similarly.[46] "Jury unanimity is required for these distinct acts. . . ."[47] Because the jury was required to unanimously agree on whether Montejo had penetrated V.C.'s sexual organ or her anus, the court's charge should have included an instruction in the application paragraph to that effect.[48] It did not. In its brief, the State concedes that the charge was erroneous for that reason, and we agree that it was.

---

[43] *Id*. (quoting *Stuhler v. State*, 218 S.W.3d 706, 717 (Tex. Crim. App. 2007)).

[44] *Saenz v. State*, 451 S.W.3d 388, 390 (Tex. Crim. App. 2014) (quoting *Cosio*, 353 S.W.3d at 776).

[45] *Aekins*, 447 S.W.3d at 279 (citing Tex. Penal Code § 22.011(a)(1)(A)).

[46] *See* Tex. Penal Code § 22.021(a)(1)(B)(i) ("A person commits an offense if the person intentionally or knowingly causes the penetration of the anus or sexual organ of a child by any means."); *see also Jourdan*, 428 S.W.3d at 95-96.

[47] *Aekins*, 447 S.W.3d at 279; *see also Gonzales v. State*, 304 S.W.3d 838, 849 (Tex. Crim. App. 2010) ("The Legislature intended that penetration of a child's anus should be regarded as a distinct offense from penetration of her sexual organ even if they occur during the course of the same incident or transaction.").

[48] *See Ngo v. State*, 175 S.W.3d 738, 749 & n.44 (Tex. Crim. App. 2005).

We next consider whether Montejo was harmed by the error. The record reflects that Montejo did not object to the failure of the application paragraph to include a unanimity instruction. Accordingly, Montejo is entitled to reversal only if he was "egregiously harmed" by the charge error. "Egregious harm is harm that deprives a defendant of a 'fair and impartial trial.'"[49] Stated another way, "[j]ury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory."[50] In this case, "[i]f the charge error caused the jury, in fact, to render a less-than-unanimous verdict on an issue on which unanimity is required, the charge error is egregiously harmful."[51] "The purpose of the egregious-harm inquiry is to ascertain whether the defendant has incurred actual, not just theoretical, harm."[52] It is a "difficult standard and must be proved on a case-by-case basis."[53] "In examining the record to determine whether jury-charge error is egregious, the reviewing court should consider the entirety of the jury charge itself, the evidence, including the contested issues and weight of the probative

---

[49] *Price*, 457 S.W.3d at 440 (quoting *Almanza*, 686 S.W.2d at 171).

[50] *Stuhler*, 218 S.W.3d at 719.

[51] *Hodge*, 500 S.W.3d at 629 (quoting *Swearingen*, 270 S.W.3d at 812); *see Ngo*, 175 S.W.3d at 750-52); *see also Jourdan*, 428 S.W.3d at 98 (observing that it is "relevant to the egregious harm analysis to inquire about the likelihood that the jury would in fact have reached a non-unanimous verdict on the facts of the particular case" and concluding that "on the facts of [that] particular case, the likelihood of non-unanimity [was] exceedingly remote").

[52] *Id*. (citing *Almanza*, 686 S.W.2d at 174).

[53] *Ellison v. State*, 86 S.W.3d 226, 227 (Tex. Crim. App. 2002).

evidence, the arguments of counsel, and any other relevant information revealed by the record of the trial as a whole."[54]

The entirety of the charge

Again, there was nothing in the application paragraph of the charge instructing the jury that it needed to be unanimous on whether Montejo had penetrated V.C.'s anus or her sexual organ. However, contrary to Montejo's assertion, there was also nothing in the charge "expressly instruct[ing] [the jury] to convict despite being non-unanimous." Instead, the charge merely omitted any reference to the unanimity requirement, with the exception of a single, isolated reference contained within the final paragraph of the charge:

> After the reading of this charge, you shall not talk with anyone not of your jury. After argument of counsel, you will retire and select one of your members as your presiding juror. **It is his or her duty to preside at your deliberations and to vote with you in arriving at a unanimous verdict**. After you have arrived at your verdict, you may use the forms attached hereto by having your presiding juror sign his or her name to the particular form that conforms to your verdict.

This reference, however, failed to inform the jury that it needed to be unanimous on whether Montejo had penetrated V.C.'s anus or her sexual organ. We conclude that the first factor weighs in favor of a finding of egregious harm.[55]

---

[54] *Stuhler*, 218 S.W.3d at 719 (citing *Ngo*, 175 S.W.3d at 750 n.48; *Bailey v. State*, 867 S.W.2d 42, 43 (Tex. Crim. App. 1993); *Almanza*, 686 S.W.2d at 171).

[55] *See Arrington v. State*, 451 S.W.3d 834, 841 (Tex. Crim. App. 2015); *Cosio*, 353 S.W.3d at 774.

State of the evidence, including contested issues and weight of the probative evidence

It is true, as Montejo contends, that there was some evidence tending to show that Montejo had penetrated V.C.'s anus. As discussed above, V.C. acknowledged on cross-examination that she had told Rodriguez that Montejo had penetrated her anus, and on the video recording of her interview with Rodriguez, V.C. can be heard telling Rodriguez that Montejo had penetrated the part of her body "where poop comes out." Additionally, Rodriguez confirmed during her testimony that V.C. had told her that Montejo's "middle part went inside where poop comes out."

However, the weight of the probative evidence supported the State's theory of the case that Montejo had penetrated V.C.'s sexual organ.[56] The State's designated outcry witness, V.C.'s mother, testified that V.C. had told her that Montejo had penetrated her vagina and that, as a result, Montejo "had made her bleed." V.C.'s testimony on direct was consistent with her outcry. When asked to describe where Montejo had penetrated her, V.C. testified, "On my vagina." Later, when asked to describe where Montejo had "spit" on her prior to penetrating her, V.C. again testified, "On my vagina." V.C. also recounted that, when the assault was over, she had gone to the bathroom and noticed that she was bleeding. When asked to describe from where she had been bleeding, V.C. testified, "My vagina."

On the other hand, when V.C. was confronted during cross-examination with the statement that she had made to Rodriguez, V.C. began to express some uncertainty as to where she had been penetrated. At one point, she testified, "I don't know how to explain it because like—you

---

[56] As we discuss in more detail below, the State acknowledged during its closing argument that Montejo might have penetrated V.C.'s anus. However, throughout trial, the State emphasized the evidence of vaginal penetration.

know where like my period comes out. Right? I felt it like—not like right-right there, but I felt it like where—close [to] where my poops come out." Later, V.C. further testified, "Like I—I wasn't sure where it went because like it felt—it felt like in the middle. Like it was like—I didn't really know if it was in like where my period comes out or poop . . . ." However, on redirect, the State elicited testimony from V.C. tending to show that although it might have "felt like" V.C.'s anus had been penetrated, due to V.C.'s age and sexual inexperience, this did not foreclose the possibility that it was actually V.C.'s vagina that had been penetrated, as V.C. had earlier indicated:

> Q. [V.C.] when—at the time this video [of the interview with Rodriguez] was taken, you were 11 years old. Is that correct?
>
> A. Yes, ma'am.
>
> Q. And had anyone ever touched you before?
>
> A. No, ma'am.
>
> Q. Had anyone ever done anything like Martin had done to you that time?
>
> A. No, ma'am.
>
> Q. So when he put his dick in your vagina, did it feel like that's where the poop was coming out?
>
> A. Yes, ma'am.
>
> Q. And is that the way that—when you were explaining to the defense attorney, is that what you were trying to explain?
>
> A. Yes, ma'am.
>
> Q. And were you lying on that video?
>
> A. No, ma'am. Like . . .

Q. Have you told a lie here today in this courtroom about what happened that day after church?

A. Like I said, it—it felt like it. But, I mean . . .

Q. It felt like what?

A. It was—because like I—well, yeah. It felt in the middle, where my period comes out, and my poop. It felt like mostly where my poop comes out.

Q. And do you recall a part on the video where Ms. Rodriguez asked you, "where did Martin put his dick?" Do you recall pointing to your vagina?

A. Yes, ma'am.

Additionally, Dr. Beth Nauert, the pediatrician who had examined V.C., testified that V.C. had told her that Montejo had penetrated her "private parts" and that V.C. had "put[] her hand over her vaginal area when referring to her private parts." Nauert also provided testimony that tended to support the State's theory that V.C. might have been confused when she had told Rodriguez that Montejo had penetrated her anus. Nauert testified that "[m]ost kids don't have any experience with anything being put in their vagina or their rectum" and that it can therefore be difficult for children to know which orifice has been penetrated. Nauert explained, "But the vagina and the rectum are very close together. There's just a little bridge of skin and nerves between them. And if something is pushing right at that area between the vagina and the rectum, that pressure goes both ways, so it's going to feel like everything is being pushed in."

Moreover, another witness for the State was Dr. William Lee Carter, a psychologist who provided testimony on the characteristics concerning "the dynamics and nuances associated with child sex abuse." During Carter's testimony, the State asked him a series of questions involving a

hypothetical abuse situation that mirrored the facts of this case. Notably, the questions concerned only vaginal penetration.[57] The State asked no questions involving anal penetration.

We also observe that the defensive theory of the case was not that V.C. was uncertain as to whether Montejo had penetrated her anus or sexual organ, and thus that the State could not prove that element of the offense beyond a reasonable doubt. Instead, the defensive theory was that Montejo had not done anything to V.C. and that she had fabricated the allegations altogether.[58] When Montejo confronted V.C. during cross-examination on the inconsistencies between her testimony and her statement to Rodriguez, his questions implied that she was lying, not that she was

---

[57] The questions asked by the State included the following:

> "If a child describes a penis being placed inside her vagina and the perpetrator's body moving up and down, is that something that we know is consistent with what happens in a child sex abuse case?"
>
> "If a child then describes hearing what sounds swishy, like water, coming from her vagina while the perpetrator is penetrating her vagina with his penis, is that something that we know is consistent in child abuse cases?"
>
> "If a child describes, after she went to clean herself up, she was bleeding from her vagina and thought it was her period, is that something that occurs in child sexual abuse cases?"

[58] This theory was evident in defense counsel's closing argument, when she argued the following:

> [V.C.'s] stories were inconsistent. So that should lead you to question her credibility. . . . I believe that once you have considered all the evidence, I believe that once you have really thought about the story that you heard from [V.C.], about the inconsistencies—I think that's a huge inconsistency, pussy or where poop comes out. I mean, that goes to tell you that is not a credible story. It is not reliable. So I think that once you have done that, you will come back with the right verdict.

confused as to what had occurred.[59] Thus, this was a case in which the contested issue was not where V.C. had been penetrated, but whether V.C. had been penetrated at all, and the weight of the probative evidence, summarized above, supported the State's theory that Montejo had penetrated V.C.'s sexual organ.[60] The jury, by its guilty verdict, chose to believe the State's theory of the case. If it had not, Montejo would have been acquitted. We conclude that this factor weighs against a finding of egregious harm.[61]

The arguments of counsel

"Under this factor, we look to whether any statements made by the State, appellant, or the court during the trial exacerbated or ameliorated error in the charge."[62] For example, in *Ngo*

---

[59] At one point during cross, Montejo asked V.C., "When you said to this jury earlier that you had never said that he put his dick inside where poop or number two comes out, that was a lie, wasn't it?" Later, after the video recording of V.C.'s statement to Rodriguez was played for the jury, Montejo asked V.C., "So were you lying back on the day that you gave the interview to Ms. Rodriguez or today?"

[60] We also note that the State emphasized the evidence of vaginal penetration during its closing argument, at one point summarizing the evidence as follows:

> And she told you those very graphic details that no 11-year-old can make up. What did she tell you? That he spit—used saliva to lubricate. He used that to put on his penis and on her vagina. Heavy breathing. She heard squishy sounds coming from her vagina. He ejaculated on her stomach. And then she bled.

[61] *See Arrington*, 451 S.W.3d at 843-44 (concluding that, although the victim was "somewhat inconsistent as to the types of abuse that appellant inflicted upon her . . . the jury clearly resolved any inconsistencies in favor of" victim and "did not believe appellant's categorical denial of all accusations. Had it believed appellant rather than [the victim], it would have acquitted him of all charges.").

[62] *Id*. at 844 (citing *Ngo*, 175 S.W.3d at 750).

v. State, there were three different ways in which the charged offense could have been committed, and the State argued that it could "prove one to the satisfaction of part of the jury, another one to the satisfaction of others, [and] the third one to the satisfaction of another part of the jury."[63] This argument exacerbated the error because "the jury was affirmatively told . . . that it need not return a unanimous verdict."[64] No such argument was made here. The State did acknowledge in its argument that there was evidence of anal penetration and also acknowledged that "both" V.C.'s sexual organ and her anus could have been penetrated.[65] However, at no point did the State argue to the jury that it need not be unanimous on where V.C. had been penetrated. Because the State made no affirmative statement that the jury need not be unanimous, but also made no statement that it must be unanimous, this factor "weighs neither for nor against finding egregious harm."[66]

Any other relevant information revealed by the record of the trial as a whole

During voir dire, the State recited the elements of the offense and explained to the venire that the State "must prove each and every element . . . before you can find him guilty of this offense." The State added that it "must prove each and every element beyond a reasonable doubt." The State never informed the venire that the jury must be unanimous in its guilty verdict, much less

---

[63] *Ngo*, 175 S.W.3d at 750-51.

[64] *Id*. at 751.

[65] Specifically, the State argued, "And we know from the evidence that she was bleeding from her vagina following this. So where do you think his penis went? And it could have gone in her anus. It could have gone in both. That's your decision to make."

[66] *See Arrington*, 451 S.W.3d at 844.

that its verdict must be unanimous regarding every element of the offense. However, neither did the State inform the venire that unanimity was not required.

Montejo also asserts that two of the jury's notes to the court during its deliberations were evidence of egregious harm. These notes "request[ed] any video of the victim's interview with the caseworker" and asked "to review the portion of the transcript from Ms. Rodriguez's testimony regarding [V.C.'s] account of the alleged incident from the questioning by the State." However, without more, these notes indicate merely that the jury was interested in reviewing V.C.'s statements to Rodriguez. We can only speculate as to why the jury wanted to review that evidence,[67] but there is nothing in the notes that would support a finding that the jury lacked unanimity on whether Montejo had penetrated V.C.'s sexual organ or her anus. We conclude that the fourth factor, like the third, weighs neither for nor against a finding of egregious harm.

In summary, of the four factors, only the first weighs in favor of a finding of egregious harm, and it is counterbalanced by the second factor, which weighs against such a finding. On this record, we conclude that the second factor outweighs the first. Because the weight of the probative evidence strongly supported the State's theory that Montejo had penetrated V.C.'s sexual organ, and because Montejo's theory of the case was that V.C. had fabricated the allegations in their entirety—a theory that the jury necessarily rejected by its verdict—we cannot conclude on this record that Montejo suffered anything more than theoretical harm from the failure of the charge to instruct

[67] One possible reason, as suggested by the State in its brief, is that the jury wanted to review the video and transcript in order to better assess V.C.'s overall credibility.

the jury that it must unanimously agree on whether Montejo had penetrated V.C.'s sexual organ or her anus.[68]

We overrule Montejo's sixth and seventh points of error.

CONCLUSION

We vacate the district court's judgments of conviction for the offense of indecency with a child by exposure. We affirm the district court's judgment of conviction for the offense of aggravated sexual assault of a child.

_____

Bob Pemberton, Justice

Before Chief Justice Rose, Justices Pemberton and Field

Affirmed in part; Vacated in part

Filed:

Do Not Publish

[68] *See Arrington*, 451 S.W.3d at 845; *Cosio*, 353 S.W.3d at 777-78.