TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00541-CR

Florentino Richard Gonzales, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF COMAL COUNTY, 207TH JUDICIAL DISTRICT
NO. CR2012-598, HONORABLE R. BRUCE BOYER, JUDGE PRESIDING

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

A jury found appellant Florentino Richard Gonzales guilty of four counts of indecency with a child by contact (Counts I-IV), a second-degree felony, *see* Tex. Penal Code § 21.11(a)(1), and two counts of aggravated sexual assault of a child (Counts V-VI), a first-degree felony, *see id.* § 22.021(a)(1)(B)(iii). The jury also found Gonzales not guilty of two counts of aggravated sexual assault. The jury assessed punishment at five years' imprisonment for Count I, 10 years and one day's imprisonment for Count II, 15 years' imprisonment for Count III, 20 years' imprisonment for Count IV, 50 years' imprisonment for Count V, and 50 years' imprisonment for Count VI. The trial court rendered judgment on the jury's verdicts and ordered that Gonzales's sentences run consecutively, except that his two 50-year sentences would run concurrently with one another. In seven appellate issues, Gonzales contends that the evidence was insufficient to support one of the two convictions for aggravated sexual assault, that the evidence was insufficient to support his

conviction for indecency with a child, that the trial court erred in failing to instruct the jury that its verdict had to be unanimous as to the criminal conduct underlying each count, that the retroactive application of article 38.37 of the Texas Code of Criminal Procedure violated the Ex Post Facto Clause, that the trial court abused its discretion in admitting the testimony of an alleged prior sexual assault victim, that it was improper for the prosecutor to argue to the jury that probation would be "offensive" in this case, and that there was insufficient evidence to support the jury's finding that Gonzales's assertion that he had never been convicted of a felony was "Not True." Because we conclude that the jury charge improperly allowed for a non-unanimous verdict and that the charge error caused Gonzales egregious harm, we will reverse the trial court's judgments of conviction and remand for a new trial.

BACKGROUND

During the summer of 2006, the alleged victim, I.L., lived with her grandmother Petra and Gonzales, who was married to Petra at the time. The three of them sometimes slept in a house and sometimes in an RV parked near the house. The offenses for which Gonzales was convicted all allegedly occurred that summer, when I.L. was about six years old.

At Gonzales's trial, which took place in 2016, I.L. testified to the following incidents of abuse:

- The first time Gonzales touched her, I.L. was lying in between Gonzales and Petra in their bedroom in the house. She often slept in their bedroom because she was "too afraid to sleep on [her] own." She felt Gonzales's hand on her genitals on top of her clothing. Gonzales's hand was "just resting there, not doing anything." She "wasn't comfortable lying on her side," so she "moved to lie on [her] stomach." Gonzales did not say or do anything.

- On another occasion "after that," "[t]he same thing happened," "[e]xcept that [I.L.] was on a different part of the bed." She was lying next to Gonzales, and Petra was lying on the far side of Gonzales. This time, Gonzales's hand was "[o]ver the clothing, once again, but it was moving." His hand was "making a scooping motion."

- On another occasion, when it was night and Petra was downstairs, Gonzales pulled down I.L.'s pants and his own pants and tried to put his penis inside her vagina, but he was unable "to get inside." Gonzales told her, "This is our secret." She did not respond, because she was afraid that "he might kill [her]." This was "the final time" that Gonzales touched her.

- On another occasion, I.L. was in the "bedding area" of the RV at night with Gonzales. Petra was on the sofa. I.L. woke up and "felt something weird." Her pants and underwear were pulled down, and Gonzales was licking her genitals. She was too afraid to say anything. Then, Petra woke up, screamed at I.L., and hit her with a sandal. This was "the last time something happened with [I.L.] and [Gonzales]."

- Gonzales touched his penis to I.L.'s genitals three times, he licked her genitals once, he touched her genitals over her clothing "[f]our to five times," and he touched her genitals "skin to skin" "four to five times."

In her testimony at trial, Petra also testified concerning the incident in the RV. According to Petra, she had fallen asleep on the floor after telling I.L. to sleep on the sofa bed. Petra woke up during the night and realized that I.L. was not on the sofa bed. Petra "felt" or "heard" something: "the RV, was, like, shaking . . . you know, like, when somebody is having an affair or something, you know. You can feel the trailer—the RV moving and stuff like that." Petra walked back to the bed and turned on the light. She saw Gonzales "scoot" "down to the wall." She also saw that I.L. had her panties pulled down. Petra asked I.L. why her panties were down, but I.L. did not respond. Petra pulled the blankets off Gonzales and saw that his boxers were pulled "[n]ot quite down to his knees." Petra "couldn't believe it" and "just banged on him" and "started crying and

everything." She "was shocked." Then, Petra ran into the house and grabbed the phone. She intended to call 911, but Gonzales would not let her. Gonzales "just kept telling me that he was sorry and this and that." He also told Petra, "The devil made me do it." Petra did not report the incident to law enforcement.

The State also called M.H. at trial. M.H., who was 41 years old at the time of trial, testified that, when she was about 13 years old, she was living with her mother and Gonzales, who was her stepfather at the time. According to M.H., on one occasion when she was home from school sick with a fever, Gonzales was lying next to her. Gonzales put his hand on her stomach and then began to move his hand down her body. Eventually, she felt Gonzales's hand "fingering [her]," going "in and out" of her vagina with his fingers "and up and down." In addition, Gonzales was "suckling on [her] breasts and then under [her] neck." M.H. then pushed Gonzales off, and he told her that she "better not tell nobody." M.H. did not report the incident to law enforcement until 2012. She also testified that, when she alluded to the incident years later, Gonzales told her that she "should get over it and that what happened happened."

Gonzales was indicted on four counts of indecency with a child by contact, four counts of genital-to-genital aggravated sexual assault, and one count of mouth-to-genital aggravated sexual assault. At trial, the court granted Gonzales's motion for a directed verdict as to one count of genital-to-genital aggravated sexual assault and submitted the other eight counts to the jury. The jury found Gonzales not guilty of one count of genital-to-genital aggravated sexual assault and the count of mouth-to-genital aggravated sexual assault and found him guilty of the remaining six counts. This appeal followed.

DISCUSSION

Issue 1: Aggravated Sexual Assault—Evidentiary Sufficiency and Double Jeopardy[1]

In his first appellate issue, Gonzales contends that the evidence was insufficient to support one of his convictions for aggravated sexual assault and that his conviction for the second count of aggravated sexual assault violates the Double Jeopardy Clause. In evaluating the sufficiency of the evidence supporting a jury's verdict, we "view the evidence in the light most favorable to the verdict to determine whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012) (quoting *Brooks v. State*, 323 S.W.3d 893, 902 n.19 (Tex. Crim. App. 2010)). We are instructed only to "ensure that the evidence presented supports the jury's verdict and that the state has presented a legally sufficient case of the offense charged." *Id.* "The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses," and if "the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict, and we defer to that determination." *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014).

To support his contentions, Gonzales interprets I.L.'s testimony to mean that he unsuccessfully tried to penetrate I.L.'s vagina three times on one occasion. He then argues that the

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[1] Although we will reverse and remand Gonzales's convictions for the reasons given under Issue 3 below, we must first address his sufficiency challenges, because these challenges, if successful, would entitle Gonzales to the greater relief of acquittal. *See Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000) ("If the evidence is insufficient to support Curry's conviction, the remedy is acquittal. That remedy is greater than simply granting Curry a new trial. Curry's sufficiency point of error must be addressed, regardless of the fact that he has prevailed on his point of error concerning an erroneous amendment of the indictment.").

three times that his penis allegedly touched I.L.'s genitals were part of one assault, not separate units of prosecution. The relevant testimony is as follows:

> Prosecutor: Okay. You described that he's—he touched his penis to your vagina. How many times did that happen?
>
> I.L.: Three.
>
> Prosecutor: And you described earlier that time where he was licking your area. How many times did that happen?
>
> I.L.: Once.
>
> Prosecutor: We talked about where he was touching you over the clothing. How many times did he touch your area over the clothing?
>
> I.L.: Four to five times.
>
> Prosecutor: Did he ever touch your area under the clothing?
>
> I.L.: No. The clothing was always off during that.
>
> ***
>
> Prosecutor: He would touch that area [I.L.'s genitals] skin to skin?
>
> I.L.: Yes.
>
> Prosecutor: How many times did that happen?
>
> I.L.: Four to five.
>
> Prosecutor: Okay. So four to five times over your clothing?
>
> I.L.: Yes.
>
> Prosecutor: And four to five times skin to skin?
>
> I.L.: Yes.

Prosecutor: And then you said three times where his penis was touching your area?

I.L.: Yes.

Prosecutor: And then the one time where his mouth was licking your area?

I.L.: Only once.

Reading I.L.'s responses in context, we conclude that I.L. was not testifying that Gonzales touched her genitals with his penis three times on one occasion, but rather that he touched his penis to her genitals on three separate occasions. This interpretation is supported by the fact that the prosecutor's questioning moves away from the specific incident I.L. had been describing and toward an overview of all the instances of abuse. The prosecutor was asking I.L. to provide the total number of times that the several types of abuse occurred. Moreover, even if I.L.'s response that Gonzales touched her genitals with his penis three times was ambiguous, we must view the evidence in the light most favorable to the verdict and assume that the jury interpreted her statement to refer to three separate occasions. *See Dobbs*, 434 S.W.3d at 170; *Montgomery*, 369 S.W.3d at 192.

Because we conclude that I.L. testified that Gonzales touched his penis to her genitals on three separate occasions, we conclude that the evidence was sufficient to support the jury's finding that he was guilty of two counts of genital-to-genital aggravated sexual assault. *See* Tex. Code Crim. Proc. art. 38.07 (stating that a conviction for aggravated sexual assault is "supportable on the uncorroborated testimony" of a child victim); *Villarreal v. State*, 470 S.W.3d 168, 170 (Tex. App.—Austin 2015, no pet.) (same). This is true even though I.L. did not testify to specific details of each assault. *See Klein v. State*, 273 S.W.3d 297, 303 (Tex. Crim. App. 2008) ("The evidence that appellant touched the complainant's sexual organ with his fingers and with his tongue 'most nights'

or 'many times' when the complainant's mother was at dance class on Monday nights is 'specific evidence of separate' sexual assaults that occurred 'on at least four separate occasions' during this six to eight week period of time."); *Rodriguez v. State*, No. 04-11-00809-CR, 2012 WL 6013426, at *3 (Tex. App.—San Antonio Nov. 30, 2012, pet. ref'd) (mem. op., not designated for publication) ("P.R. specifically described the conduct that constituted sexual assault and testified that Rodriguez committed each type of assault at least six or seven separate times during a particular time period. This testimony is sufficiently specific to support the convictions."). Furthermore, because I.L. testified to three separate incidents of aggravated sexual assault, Gonzales's conviction for a second count of aggravated sexual assault does not violate the Double Jeopardy Clause. *See* U.S. Constitution amend. V ("No person shall . . . be subject *for the same offence* to be twice put in jeopardy of life or limb . . . .") (emphasis added); *see also Urtado v. State*, 333 S.W.3d 418, 424 (Tex. App.—Austin 2011, pet. ref'd) (noting that "if two different attacks occur, even if close in time, a defendant may be charged with two separate assaults"). Accordingly, we overrule Gonzales's first issue.

Issue 2: Indecency with a Child—Evidentiary Sufficiency

In his second issue, Gonzales contends that the evidence was insufficient to support his four convictions for indecency with a child by contact.

As relevant to this case, "[a] person commits an offense if, with a child younger than 17 years of age . . . the person . . . engages in sexual contact with the child or causes the child to engage in sexual contact." Tex. Penal Code § 21.11(a)(1). The statute's definition of "sexual contact" includes, "if committed with the intent to arouse or gratify the sexual desire of any person . . . any touching by a person, including touching through clothing, of the anus, breast, or any part of the

genitals of a child." *Id.* § 21.11(c)(1). For each of the four counts of indecency with a child, the indictments alleged that Gonzales "with the intent to arouse or gratify [his] sexual desire . . . did then and there engage in sexual contact with [I.L.], a child younger than 17 years of age . . . by touching the genitals or part of the genitals of [I.L.], with the hands or fingers of the said [Gonzales]."

Gonzales first argues that the evidence was insufficient to support his conviction for one of the indecency counts because the evidence was insufficient to establish beyond a reasonable doubt that he touched I.L. with the intent to arouse or gratify his sexual desire or to establish that his actions were voluntary. With respect to this incident, I.L. testified that she was sleeping in between her grandparents, that she woke up and felt Gonzales's hand resting on her genitals over her clothes, that she rolled over, and that Gonzales never moved or spoke.

Even if this testimony in isolation would not have been sufficient evidence of Gonzales's *mens rea*, the jury could also have considered the remainder of I.L.'s testimony when evaluating the elements of the offense with respect to the touching incident Gonzales describes. Specifically I.L. testified that, on a later occasion, Gonzales placed his hand on her genitals over her clothing while they were lying in bed and made a "scooping motion" with his hand, and that on another occasion he pulled down her underwear and attempted to penetrate her genitals with his penis. She further testified that Gonzales touched her genitals a total of four to five times over her clothing and four to five times "skin to skin" and that he touched her genitals with his penis a total of three times. In addition, M.H. testified that Gonzales had sexually assaulted her years earlier when she was a child. Based on this additional evidence, the jury could have inferred that Gonzales's abuse of I.L. began with this first touching and later escalated to more overt and aggressive assault.

Therefore, it could have concluded, beyond a reasonable doubt, that Gonzales voluntarily placed his hand on I.L.'s clothed genitals during the first incident with the intent to arouse or gratify his sexual desire. *See Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002) (noting that "[d]irect evidence of the requisite intent is not required," that a jury "may infer intent from any facts which tend to prove its existence, including the acts, words, and conduct of the accused," and that "[w]e must examine the entire record to see whether it contains evidence of the requisite intent"); *Holcomb v. State*, 445 S.W.3d 767, 782 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (explaining that "the repetition of similar unusual events over time demonstrate a decreasing probability that those unusual events occurred by chance"). Accordingly, we conclude that the evidence was sufficient to support his conviction for that count of indecency with a child.

Gonzales also argues that the evidence was insufficient with respect to the second touching incident that I.L. described. According to Gonzales, I.L. "did not state what part of her body his hand was touching." Gonzales further argues that the evidence was insufficient for the jury to find beyond a reasonable doubt that he touched I.L. voluntarily and with the intent to arouse or gratify his sexual desire.

Immediately after describing the first incident of touching discussed above, I.L. testified as follows concerning the second touching incident:

> Prosecutor: And was there a time after that that he touched you?
>
> I.L.: Yes.
>
> Prosecutor: Okay. What happened that time?
>
> I.L.: The same thing happened.

Prosecutor: And when you say "the same thing happened"—

I.L.: Except I was on a different part of the bed. I was—I wasn't—I wasn't in between. He was in between Petra and I. I was lying on this side by the—by the door and the wall.

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Prosecutor: Okay. That time that it happened, was—where was his hand?

I.L.: Over the clothing, once again, but it was moving.

Prosecutor: When you say "it was moving," what was he doing?

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Prosecutor: And so for the record, the witness is—has her hand up and is making a scooping motion with her hand.

I.L. gave this testimony immediately after describing the first incident in which Gonzales touched her genitals over her clothing. She testified that "[t]he same thing happened." She also testified that this incident differed from the first incident she had described only because she, Gonzales, and Petra were arranged differently in the bed and because this time Gonzales made a scooping motion with his hand while touching her. Viewing this evidence in the light most favorable to the verdict, we conclude that the jury could have found beyond a reasonable doubt that Gonzales touched I.L.'s genitals over her clothing.[2] Moreover, for the reasons discussed above and based on

[2] Gonzales relies on *McEntire v. State*, 265 S.W.3d 721, 724 (Tex. App.—Texarkana 2008, no pet.), in which our sister court held that the evidence was insufficient to support three of the defendant's four convictions for aggravated sexual assault of a child because, although the victim testified that the defendant "had licked her with his tongue four times that summer," her testimony did not "show where McEntire licked her." Unlike in *McEntire*, however, I.L.'s testimony, when viewed in the light most favorable to the verdict, sufficiently communicates that Gonzales touched her genitals during the second touching incident and a total of four to five times while clothed and

the fact that Gonzales was moving his hand on her genitals, we conclude that the jury could have found beyond a reasonable doubt that Gonzales touched I.L. voluntarily and with the intent to arouse or gratify his sexual desire. Accordingly, we conclude that the evidence was sufficient to support his conviction for that count of indecency with a child.

Finally, Gonzales argues that the evidence was insufficient to support his conviction for the remaining counts of indecency with a child because I.L. did not describe any additional incidents of indecency in sufficient detail to prove the elements of the offense beyond a reasonable doubt or to allow the jury to conclude that I.L. was testifying about separate events as opposed to one continuous act.[3] We disagree. As discussed above under Issue 1, after I.L. described specific instances of abuse in detail, the prosecutor asked her how many times in total Gonzales touched her genitals over her clothing, how many times he touched her genitals "skin to skin," and how many times he touched her genitals with his penis. We conclude that the jury could have determined from this testimony that I.L. was referring to separate incidents of abuse and not to one continuous assault.

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four to fives times while unclothed. *See Alanis v. State*, No. 12-11-00256-CR, 2012 WL 2501026, at *4 (Tex. App.—Tyler June 29, 2012, no pet.) (mem. op., not designated for publication) (distinguishing *McEntire*).

[3] In his second issue, Gonzales also contends that "even if I.L.'s testimony is meant to refer to repeated occurrences of either of the first two specific instances she recalled, it would be impossible for a jury to determine beyond a reasonable doubt which of the two instances she could have been referring to. The jury must be unanimous about the specific conduct underlying each count and it would require pure speculation for a jury to decide that I.L. was referring to one instance over another." (citation omitted). To the extent Gonzales is complaining about alleged error in the jury charge that allowed a non-unanimous verdict, we will address that complaint under Issue 3 below. To the extent he is making an argument about jury unanimity distinct from his jury-charge complaint, we conclude that he has not adequately briefed the issue and has thereby waived it because he does not explain his argument and the only authority that he cites relates to jury-charge error. *See* Tex. R. App. P. 38.1(i).

Moreover, as discussed above, because I.L. described particular incidents of abuse and then testified as to how many times Gonzales engaged in each type of assault, I.L.'s testimony was sufficient evidence from which the jury could have concluded beyond a reasonable doubt that Gonzales touched I.L.'s genitals on at least four separate occasions, as alleged in the four counts of indecency with a child. *See Klein*, 273 S.W.3d at 303; *Rodriguez*, 2012 WL 6013426, at *3.

Because we conclude that the evidence was sufficient to support Gonzales's four convictions for indecency with a child by contact, we overrule his second issue.

Issue 3: Jury-Charge Error

In his third issue, Gonzales contends that the trial court erred in failing to instruct the jury that it had to be unanimous as to the criminal conduct underlying each count. We review alleged jury-charge error in two steps: first, we determine whether error exists; if so, we then evaluate whether sufficient harm resulted from the error to require reversal. *See Arteaga v. State*, 521 S.W.3d 329, 333 (Tex. Crim. App. 2017); *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)); *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). In this case, the record does not indicate that Gonzales objected to the trial court's jury instructions. Therefore, any jury-charge error the trial court may have committed "will not result in reversal of the conviction without a showing of egregious harm." *See Price*, 457 S.W.3d at 440.

The jury charge included the following general instructions:

> Your verdict, if any, will be by unanimous vote as to each count.

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> Your verdict, if any, must be unanimous, and after you have arrived at your verdict, you may use the verdict forms attached hereto by having your Foreperson sign the particular form that conforms to your verdict for each count.

"Texas law requires that a jury reach a unanimous verdict about the specific crime that the defendant committed." *Cosio v. State*, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011). "This means that the jury must 'agree upon a single and discrete incident that would constitute the commission of the offense alleged.'" *Id.* (quoting *Stuhler v. State*, 218 S.W.3d 706, 717 (Tex. Crim. App. 2007)). The Texas Court of Criminal Appeals has explained that the jury must be unanimous as to the conduct underlying each count:

> [N]on-unanimity may occur when the State charges one offense and presents evidence that the defendant committed the charged offense on multiple but separate occasions. Each of the multiple incidents individually establishes a different offense or unit of prosecution. The judge's charge, to ensure unanimity, would need to instruct the jury that its verdict must be unanimous as to a single offense or unit of prosecution among those presented.

Id. at 772 (footnotes omitted).

> After reviewing the applicable case law, we conclude that the court of appeals was correct in holding that the charges in this case allowed for the possibility that the jury rendered non-unanimous verdicts. The jury could have relied on separate incidents of criminal conduct, which constituted different offenses or separate units of prosecution, committed by Cosio to find him guilty in the three remaining counts upheld by the court of appeals. Further . . . the standard, perfunctory unanimity instruction at the end of each charge did not rectify the error. *The jury may have believed that it had to be unanimous about the offenses, not the criminal conduct constituting the offenses.*

Id. at 774 (footnotes omitted, emphasis added).

Here, the State presented evidence that Gonzales touched I.L.'s genitals with his hand over her clothing "[f]our to five times" and that he touched her genitals "skin to skin" "four to five times." This evidence would support at least eight counts of indecency with a child. The State charged Gonzales with four counts of indecency, and the counts were all worded the same in the jury charge except for the dates.[4] The jury found Gonzales guilty of all four counts. The State also presented evidence that Gonzales touched I.L.'s genitals with his tongue on one occasion and that he touched her genitals with his penis three times. This evidence would support four convictions for aggravated sexual assault. The State charged Gonzales with five counts of aggravated sexual assault, but the trial court granted Gonzales's motion for directed verdict as to one count. Thus, the court submitted three counts of genital-to-genital aggravated sexual assault to the jury and one count of mouth-to-genital aggravated sexual assault. The three counts of genital-to-genital aggravated sexual assault were all worded the same in the jury charge except for the dates. The jury found Gonzales not guilty of one count of genital-to-genital aggravated sexual assault, guilty of the other two counts of genital-to-genital aggravated sexual assault, and not guilty of the count of mouth-to-genital aggravated sexual assault.

The trial court instructed the jury that its verdict "must be unanimous" and "will be by unanimous vote as to each count." We conclude that this "standard, perfunctory unanimity instruction" was not sufficient to prevent a non-unanimous verdict under *Cosio*, because the jury

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[4] The trial court instructed the jury, "The State is not bound by the specific dates in the indictment that the offense is alleged to have been committed . . . . Therefore, proof that the offense, if any, occurred prior to the filing of the indictment on, [sic] December 5, 2012 is sufficient." In addition, nothing in the record indicates that the State alleged that the offenses actually occurred on the given dates. Instead, as the prosecutor explained during closing argument, "[a]ll of the dates in this case came from the summer of 2006," when I.L. was staying with her grandmother and Gonzales.

may have agreed that Gonzales committed conduct satisfying the elements of each count but still have disagreed as to which underlying conduct satisfied each count. *See id.*; *see also Arrington v. State*, 451 S.W.3d 834, 841 (Tex. Crim. App. 2015) ("The multiple generic instructions in *Cosio*, therefore, were no more effective at informing the jury of the proper unanimity requirement than the single generic unanimity instruction given in this case."); *Ansari v. State*, 511 S.W.3d 262, 265 (Tex. App.—San Antonio 2015, no pet.) ("The unanimity requirement ensures the jury agrees on the factual element underlying the charged offense, not that it merely agrees that a statute was violated."). Specifically, the State presented evidence that Gonzales committed conduct satisfying the elements of indecency with a child on one occasion by touching I.L.'s genitals over her clothing while in bed, on a separate occasion by making a "scooping motion" with his hand on her genitals over her clothing, on four to five total occasions by touching her over her clothing, and on four to five total occasions by touching her when she was unclothed. It is possible that the jury, while unanimously agreeing that Gonzales committed conduct satisfying each of the four indecency counts, disagreed as to which incidents of the eight to ten incidents testified to by I.L. actually occurred.[5] Similarly, the State presented evidence that Gonzales committed genital-to-genital aggravated sexual assault by touching his penis to her genitals on one occasion in which he tried unsuccessfully to penetrate her and on three occasions total. Again, it is possible that the jury, while unanimously agreeing that

[5] For example, it is possible that one juror did not believe that Gonzales committed indecency with a child by resting his unmoving hand on I.L.'s genitals while in bed but did believe that Gonzales committed indecency by making a "scooping motion" on I.L.'s clothed genitals and by touching her unclothed genitals on three separate occasions. Another juror might have believed that Gonzales committed indecency by touching I.L.'s clothed genitals on four occasions but might not have believed that he ever touched her unclothed genitals.

Gonzales committed conduct satisfying each of the two counts for aggravated sexual assault for which it found him guilty, disagreed as to which incidents testified to by I.L. actually occurred.[6]

Because the trial court's instructions allowed for a non-unanimous verdict, we conclude that there was error in the jury charge. *See Gomez v. State*, 498 S.W.3d 691, 697 (Tex. App.—Houston [1st Dist.] 2016, no pet.) ("In this case, as in *Cosio* . . . the trial court failed to instruct the jury in the jury charge that it needed to unanimously base its verdict on a single offense among those presented."); *Williams v. State*, 474 S.W.3d 850, 857 (Tex. App.—Texarkana 2015, no pet.) ("In this situation we find the trial court's charge failed to instruct the jury to be unanimous upon which offense they were convicting Williams."); *Ansari*, 511 S.W.3d at 266 ("[T]he trial court permitted the jury to convict Ansari if it found he committed any one of the three assaults for which the State produced evidence. This permitted the jury to convict Ansari on less than a unanimous verdict.").

Having concluded that there was error in the trial court's instructions, we must next determine whether this error caused Gonzales egregious harm. *See Arteaga*, 521 S.W.3d at 333; *Price*, 457 S.W.3d at 440. "Jury 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." *Arteaga*, 521 S.W.3d at 338. "In examining the record for egregious harm, we consider the entire jury charge,

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[6] The jury found Gonzales guilty of two counts of genital-to-genital aggravated sexual assault but not guilty of one count. It is possible that some jurors believed the occurrence of genital-to-genital contact that I.L. specifically described and believed that the contact happened only one additional time while other jurors believed that the described occurrence did not happen but believed that the other two instances of genital-to-genital contact did happen. In any event, it is difficult to make sense of the jury's verdicts in this case, and, as discussed below, this difficulty indicates that the jury charge's lack of more specific unanimity instructions confused the jury and egregiously harmed Gonzales.

the state of the evidence, the closing arguments of the parties, and any other relevant information in the record." *Id.* We will consider each of these factors in turn.

Entirety of the Jury Charge

As explained above, the jury charge permitted non-unanimous verdicts. Although the charge stated that the jury's verdicts must be "by unanimous vote as to each count" and "must be unanimous," "the Court of Criminal Appeals has repeatedly held, generic language regarding unanimity in the overall verdict is insufficient to ensure a unanimous verdict on a single incident." *Gomez*, 498 S.W.3d at 697, 695 (concluding that the jury-charge factor "weigh[ed] in favor of egregious harm" where the charge instructed the jury to certify its verdict when it had "unanimously agreed upon a verdict"). While the State emphasizes that the jury charge in this case stated that the verdicts must be unanimous "as to each count," this instruction did not ensure that the jury would be unanimous as to which underlying conduct satisfied the elements of any particular count. Moreover, the jury charge in this case was particularly confusing and likely to lead to a non-unanimous verdict because it contained so many counts that were nearly identically worded[7] and because the State had presented evidence of so many indistinguishable alleged offenses. Therefore, we conclude that nothing in the jury charges "militates against th[e] conclusion" that the charge permitted non-unanimous verdicts. *See Cosio*, 353 S.W.3d at 777.

[7] The four counts of indecency with a child differed only in the dates, which the State did not intend to correspond to the actual dates of the alleged offenses. *See* n.4, *supra*. Therefore, the jury charge contained no information to distinguish the various counts.

State of the Evidence

The State argues that any error in the jury charge was not harmful because there was "overwhelming evidence" of Gonzales's guilt. We disagree. The State's most compelling evidence, including a detailed description of the RV incident by I.L. and vivid corroborating testimony from Petra, related to the count of mouth-to-genital aggravated sexual assault—an offense of which the jury found Gonzales not guilty. While the evidence of the remaining offenses was sufficient to support the convictions, it was not "overwhelming." Indeed, if the jury had considered the evidence overwhelming, it would not have found Gonzales not guilty on two of the counts. We conclude that this factor does not weigh for or against a finding of egregious harm.

Closing Arguments

During closing argument, the prosecutor made the following remarks concerning the count of mouth-to-genital aggravated sexual assault:

> The first paragraph says that he committed the criminal offense of Aggravated Sexual Assault of a Child by making contact with the genitals of [I.L.] with his mouth or tongue. And then in the alternative, it says that he caused the penetration of the genitals of [I.L.] with his mouth or tongue. That—for that one and only that one, those are set in the alternative such that you do not have to agree unanimously as to which of those occurred. So long as all 12 of you are unanimous that one of those two alternatives occurred, then you can be unanimous for guilty as to that count. So that's unique as to all the other counts in this offense, in that all the others require you to be unanimous as alleged.

On appeal, the State argues that these remarks contrasting this count with the others "made it clear that the jury must be unanimous as to the discrete incident underlying each count" and that, "[w]hen combined with the separate and additional jury instruction that the jury's verdict

must be 'unanimous as to each count,' the State's emphasis on the unanimity requirement reinforced that the jury must be unanimous as to the conduct underlying each count." We disagree. The prosecutor's comments about the mouth-to-genital count do not address whether the jury must be unanimous concerning which underlying conduct satisfied the elements of each additional count. Instead, the comments merely point out that the mouth-to-genital count, unlike the other counts, contains two alternative paragraphs and that the jury need not be unanimous as to which of the two alternative manner or means Gonzales used.[8] Therefore, we conclude that this jury argument does not weigh for or against a finding of egregious harm.

Other Relevant Information

Finally, we examine other relevant information in the record. The record contains a note sent out by the jury during its deliberations. The note includes the following questions:

> We have questions on how to address the charges[.]
>
> Do we consider each charge to be associated with an individual event? They give 8 charges with 8 different dates.
>
> Do we relate any specific counts with the RV incident?
>
> Could two charges occured [sic] together on the [sic] a different date?
>
> Can multipule [sic] A.S.A. charges occur from a single instance?

[8] One paragraph alleged that Gonzales "did . . . intentionally or knowingly cause the penetration of the female sexual organ of [I.L.] . . . with [his] mouth or tongue," while the other paragraph alleged that Gonzales "did . . . cause the female sexual organ of [I.L.] . . . to contact [his] mouth."

The trial court responded with the following written instruction:[9]

> You directed [sic] to the specific provisions of the charge.

The jury's questions indicate serious confusion regarding unanimity. The juror or jurors who raised these questions did not understand how to relate the evidence of separate incidents to the various counts, how to relate the charged conduct to the evidence concerning the RV incident, or how to relate the evidence to the counts of aggravated sexual assault. It is likely that this confusion is also reflected in the jury's verdicts, which are difficult to understand. For example, the jury found Gonzales not guilty of one count of genital-to-genital aggravated sexual assault but guilty of the other two, even though I.L. described only one instance of such an assault and then stated that this type of assault happened a total of three times. One would expect that the jury would either believe that the two undescribed, undifferentiated assaults both happened or that neither happened. It is also notable that the jury found Gonzales not guilty of the mouth-to-genital aggravated sexual assault that allegedly occurred during the RV incident, despite the fact that the State's most compelling evidence pertained to that charge, including the detailed corroborating testimony of I.L.'s grandmother.

This note demonstrated that the jurors required further instructions regarding unanimity, yet the trial court's response merely refers the jury back to the original instructions, which, as discussed above, did not adequately instruct the jury on unanimity. The theoretical harm that could come from the initial inadequate instruction became actual harm during the jury's deliberations,

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[9] The record before us does not include a reporter's record of the reading of the jury note or any discussion that may have occurred concerning the trial court's response.

as evidenced by the jury's questions. *See Cosio*, 353 S.W.3d at 777 ("An egregious harm determination must be based on a finding of actual rather than theoretical harm."). Therefore, we conclude that the jury note and the court's response weigh heavily in favor of a finding of egregious harm. *See Reece v. State*, No. 06-13-00082-CR, 2014 WL 1851322, at *4 (Tex. App.—Texarkana May 6, 2014, no pet.) (mem. op., not designated for publication) ("As far as other relevant matters in the record, the jury's note is quite persuasive in prompting a finding of egregious harm. Not only was the required instruction not given, but, when the jury asked the impact of parole on a twenty-year sentence, it received no curative instruction."); *see also Gelinas v. State*, 398 S.W.3d 703, 709 (Tex. Crim. App. 2013) (plurality op.) (noting that the presence of a note showing juror confusion would be relevant to an analysis under the fourth *Almanza* factor); *cf. Hammons v. State*, No. 10-17-00037-CR, 2017 WL 4079622, at *2 (Tex. App.—Waco Sept. 13, 2017, no pet. h.) (mem. op., not designated for publication) (noting that "[t]here was no jury note regarding parole or good-conduct time" and holding, "[W]e cannot say Appellant suffered egregious harm from the erroneous parole law instruction.").[10]

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[10] The jury's note also distinguishes this case from cases like *Owings v. State*, No. PD-1184-16, 2017 WL 4973823 (Tex. Crim. App. Nov. 1, 2017). In *Owings*, the court of criminal appeals concluded that "the trial court erred by not requiring the State to elect the act of genital-to-genital contact upon which it would rely for a conviction." *Id.* at *5. When analyzing whether the error was harmful, the court stated, "we are confident that the State's failure to elect did not result in a non-unanimous verdict." *Id.* at *7. In its unanimity analysis, the court remarked on the similarity of the incidents that the State could have relied upon for the conviction and explained that the risk of a non-unanimous verdict was low:

> Although, theoretically, it could be said that some jurors could convict based only on the one incident in Uncle Ty's room, some jurors could convict based only on the one incident in Appellant's father's house, and some jurors could convict based only on one of the multiple incidents in Appellant's bedroom, the likelihood of that is almost

Summary of *Almanza* Factors

We have determined that the fourth *Almanza* factor weighs heavily in favor of a finding of egregious harm and that none of the factors weigh against a finding of egregious harm. Therefore, we conclude that the trial court's error in failing to adequately instruct the jury on unanimity egregiously harmed Gonzales. Accordingly, we sustain Gonzales's third issue.

CONCLUSION

Having sustained Gonzales's third issue, we reverse the trial court's judgments of conviction and remand this cause for a new trial.[11]

> infinitesimal. The prosecution's case depended on the credibility of K.M. Appellant's defense was that the sexual abuse did not occur at all. There is no basis anywhere in the record for the jury to believe that one incident occurred and another did not. Either they all did or they all did not. Thus . . . there was no danger here that some jurors might have believed that one incident occurred and another or others did not.

Id. Unlike in *Owings*, the jury in this case could have believed "that one incident occurred and another did not." Indeed, the jury found Gonzales not guilty of two counts and guilty of six counts. Moreover, the jury's note demonstrates its confusion relating to unanimity, and the *Owings* court recognized that the presence of a jury note might have altered its harm analysis. *See id.* at *8 ("There were no notes sent out by the jurors indicating confusion of the issues or disputes over testimony, and there was no indication from the jurors that they were not unanimous about which incident was the charged offense.").

[11] Because Gonzales's remaining issues would not entitle him to greater relief, we need not address them.

Scott K. Field, Justice

Before Justices Puryear, Field, and Bourland

Reversed and Remanded

Filed: December 21, 2017

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