NUMBER 13-17-00595-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI–EDINBURG

RAMIRO NAVA, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 347th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Hinojosa, and Perkes
Memorandum Opinion by Justice Perkes

A jury convicted appellant Ramiro Nava of aggravated sexual assault of a child and indecency with a child by exposure. *See* TEX. PENAL CODE ANN. §§ 22.021(a)(2)(B), 21.11(a)(1). The trial court assessed punishment at forty years' confinement in the Institutional Division of the Texas Department of Criminal Justice for count one to run

concurrent with ten years' confinement for count two. TEX. PEN. CODE ANN. § 12.32. By five issues, which we have renumbered, Nava argues: (1) the evidence was legally insufficient to support a conviction of aggravated sexual assault; (2) the trial court abused its discretion by admitting the child's forensic interview video; (3) the trial court erred by permitting the State to change its indictment mid-trial; (4) the charge allowed the jury to improperly convict on a non-unanimous verdict; (5) the trial court abused its discretion by denying Nava's motion for a mistrial during punishment. We affirm.

I. BACKGROUND

In 2013, the San Antonio Police Department contacted the Corpus Christi Police Department (CCPD) regarding a report of child sexual abuse occurring in Nueces County between 2006 and 2009. Following a prolonged period of no contact with the minor complainant's mother, Dana Coreen Gloria, the case remained inactive until Gloria contacted a supervisor at CCPD in 2015. Nava was indicted in June 2016, and trial began September 2017.

At trial, Gloria testified that she met Nava in 2007 while they were both working as aviation mechanics. The couple began dating soon after and moved to Washington state together with her daughter from a previous relationship, S.S.[1], in 2009. By 2010, the couple returned to Texas so Nava could be closer to his biological daughters. Nava and Gloria separated three years later. Although the defense made allegations that Gloria fabricated the sexual abuse allegations following their separation, Gloria maintained a different timeline of events at trial. Gloria testified S.S.'s revelation of abuse was the

[1] We use initials to refer to minor victims to protect their privacy. *See* TEX. R. APP. P. 9.8 cmt. ("The rule [protecting the privacy for filed documents in civil cases] does not limit an appellate court's authority to disguise parties' identities in appropriate circumstances in other cases.").

reason for their abrupt breakup in 2013: "What happened with S.S. is the only reason why [Nava and I] broke up."

In 2013, S.S. was in junior high school in San Antonio. Gloria stated she remembered taking her daughter's phone away as a form of punishment. As she was going through S.S.'s phone, Gloria testified that she read a text message exchange between S.S. and an unknown person. In the messages, S.S. detailed sexual abuse that she experienced as a young child. Gloria confronted S.S., who confirmed the messages were true; Nava sexually abused S.S. in Corpus Christi when she was seven years old. At the time of S.S.'s reported outcry, Nava was working overseas. Gloria stated she immediately messaged him online. According to Gloria, Nava denied the allegations and told her to never contact him again. Prior to this exchange, the couple had been together for six years.

S.S., a young adult in college at the time of trial, testified to the allegations against Nava. She testified, in relevant part, as follows:

> I was very young. It was a summer day. I was very small and he asked me to come to the room so I did. The room was dark. It had a blanket over the window so the room wouldn't be hot. I walk in and he asked me to sit on the bed. So I did. And–He wanted me to touch him . . . . On his penis area.

S.S. said Nava asked her to "finish him off," and when S.S. wanted to stop, she said Nava insisted, "No, it's okay, just keep going." S.S. testified she remembered Nava ejaculating inside a sock. S.S. said that in addition to exposing himself to her, Nava "touched [her] vagina" underneath her clothing.

> [State:] Okay. I'm going to ask you a question you might understand now that you didn't understand then. Did he go inside of you?

[S.S.:] No. He—I felt pressure but not insertion.

[State:] You felt pressure on your vagina; is that right?

[S.S.:] Yes.

[State:] Can you describe more clearly where or did it just feel like pressure?

[S.S.:] Where the vagina is, the—layman's terms, hole. Yeah?

S.S. also testified to separate incidents involving Nava that made her uncomfortable, including one time when Nava tried to enter her bedroom naked, with a towel thrown over his shoulder, offering her Mike's Hard Lemonade, an alcoholic beverage. S.S. said she took a sip of the drink, handed it back, and closed the door on him. Another time, S.S. said she remembered Nava asking if she needed "help" showering.

During cross-examination of S.S., the defense attorney referenced the recorded interview and questioned whether S.S.'s alleged outcry actually preceded her mother's breakup with Nava:

[Defense:] You remember talking to Mary Floyd at the Child Safe Center back in 2013?

[S.S.:] Mary Floyd. Was she the one interviewing me?

[Defense:] Yes. You remember it was videotaped?

[S.S.:] Yes.

. . . .

[Defense:] Now at the time back in 2013, your mom and Mr. Nava were broken up; is that correct?

[S.S.:] Yes.

[Defense:] So prior to any of these allegations coming out, they were broken up, they had gone their separate ways; is that correct?

[S.S.:] Well, the reason why they broke up was because of this.

[Defense:] Okay. Now, you talked to Mary Floyd at the Center. You said you told her the truth; is that correct?

[S.S.:] Yes.

[Defense:] You were interviewed March of 2013; is that correct?

[S.S.:] Yes.

[Defense:] Do you remember telling Mary Floyd that your mom took the break up with Ramiro Nava hard? You remember telling her that?

. . . .

[Defense:] You remember telling her you wanted to help your mom; do you remember telling her that?

[S.S.:] Yes.

[Defense:] You said all of that to Ms. Floyd; is that correct?

[S.S.:] Yes.

[Defense:] Now, you were asked—you remember—first of all, have you ever seen that interview? Have you had a chance to review that interview?

At that point, the State asked to approach the bench and notified the court that it would be moving to admit the video interview through a sponsoring witness after S.S. and a sexual assault nurse examiner (SANE) testified.

Annette Santos, a SANE nurse, examined S.S. on March 1, 2013. Santos testified she noted no genital trauma in her report, but stated this was not uncommon in

sexual assault examinations. The State admitted Santos's report, which also detailed statements S.S. made during the examination:

> Patient states this happened seven years ago. I was seven in Corpus. My mama's ex-boyfriend, Ramiro Nava, . . . He poked me down there. Again motion [sic] over her front private. With his thing. He kind of poked it. He put my hand on his thing to touch it. He had a sock on it and junk. The sock was like wet. . . .

When asked by the State whether S.S. gave a reason for her delayed outcry, Santos stated: "[S.S.] said I see my mom sad. I should not have been texting that night. I did not want to tell my mom. I wanted to keep that secret until I died." Following testimony from the child forensic interviewer, the State admitted S.S.'s forensic interview video and rested its case-in-chief.

Nava requested a directed verdict, arguing the State had provided no evidence in support for count one of the indictment, continuous sexual abuse of a child, or count two, indecency with a child by contact. The State countered that: (1) it met its burden because the video evidence indicated two separate penetration assaults, although S.S. only testified to one; and (2) alternatively, the State could proceed on a lesser-included offense of count one, aggravated assault. The State was unopposed to dismissing the indecency by contact allegation. The trial court subsequently denied defense's oral motion for a directed verdict.

Nava testified and maintained his innocence during his case-in-chief. Nava's statements regarding the timeline of the accusation and the end of his relationship with Gloria, however, wavered. Initially, Nava testified that the relationship ended after he received a phone call from Gloria while he was in Japan, and she told him that "she did

not want to be with [him] anymore." Nava testified that "about a month" later, Gloria called him to accuse him of "molest[ing] her daughter."

When cross-examined by the State, Nava then stated the breakup coincided with the accusation phone call.

> [State:] What type of relationship were you in with Ms. Gloria at that time?
>
> [Nava:] We were girlfriend and boyfriend.
>
> [State:] Okay. How did that call end?
>
> [Nava:] She told me that I molested her daughter and I said I did not know what she was talking about. She said okay and hung up.
>
> [State:] Was she upset?
>
> [Nava:] She sounded like she was crying.
>
> [State:] And what did you do after that call?
>
> [Nava:] I did not do nothing. Like I said, I never had any more contact after that.

The jury convicted Nava of aggravated sexual assault of a child and indecency with a child by exposure.

During sentencing, Nava moved for a mistrial after testimony surfaced concerning his biological daughters. Nava argued that testimony that the "youngest [daughter] wanted to kill herself" was unduly prejudicial, implying that Nava's daughter was suicidal because she was sexually assaulted by Nava. The trial court immediately instructed the jury to disregard the elicited testimony, but denied the motion for mistrial. In closing arguments, the State requested that the jury assess punishment at a minimum of fifty years' confinement for aggravated sexual assault and ten years' confinement for

indecency by exposure. Punishment was ultimately assessed at forty years' confinement for count one to run concurrently with ten years' confinement for count two. This appeal followed.

II. LEGAL INSUFFICIENCY

By his first issue, Nava argues that the evidence was legally insufficient to establish that he committed the offense of aggravated sexual assault of a child.

A. Standard of Review and Applicable Law

When reviewing claims of legal insufficiency, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007); *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[A] reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014) (quoting *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011)). The fact finder is the exclusive judge of the facts, credibility of the witnesses, and weight to be given to the testimony and is presumed to have resolved any conflicts in the evidence in favor of the verdict. *See Bartlett v. State*, 270 S.W.3d 147, 150 (Tex. Crim. App. 2008).

Sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Braughton v. State*, 569 S.W.3d 592, 608 (Tex. Crim. App. 2018) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997) (en

banc)). In this case, a hypothetically correct charge would instruct the jury to find a defendant accused of aggravated sexual assault of a child guilty, if the person: (1) intentionally or knowingly, (2) regardless of whether the person knows the age of the child at the time of the offense, (3) causes the penetration of the anus or sexual organ of a child by any means, and (4) the child was younger than fourteen years of age. *See* TEX. PENAL CODE ANN. § 22.021.

B. Discussion

Nava specifically argues there was no evidence of penetration because the complainant stated she felt "pressure" but not insertion when Nava touched her "hole." However, complete "insertion" into a woman's sexual organ is not required to prove the element of "penetration." *See Green v. State*, 476 S.W.3d 440, 447 (Tex. Crim. App. 2015) (acknowledging that a woman's sexual organ is layered and approving an instruction that read: "'female sexual organ' means the entire female genitalia, including both vagina and the vulva. Vulva is defined as the external parts of the female sexual organs, including the labia majora, the labia minora, mons veneris, clitoris, perineum, and the vestibule or entrance to the vagina"). So long as contact "could reasonably be regarded by ordinary English speakers as more intrusive than contact with her outer vaginal lips," it amounts to penetration. *Vernon v. State*, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992); *see, e.g.*, *Murphy v. State*, 4 S.W.3d 926, 929 (Tex. App.—Waco 1999, pet. ref'd) (finding evidence sufficient to prove penetration when complainant testified defendant "rubbed her 'first and second holes'" because "a reasonable fact-finder could have concluded that [defendant's] fingers penetrated [complainant's] sexual organ if they reached beyond the outer layer of skin comprising the external genitalia or labia.").

S.S.'s testimony that Nava put "pressure" on her "hole" with his finger was sufficiently descriptive to support a finding of penetration to her sexual organ. *See Vernon*, 841 S.W.2d at 409; *see also Gonzalez Soto v. State*, 267 S.W.3d 327, 332 (Tex. App.—Corpus Christi–Edinburg 2008, no pet.) ("The testimony of a child sexual abuse victim alone is sufficient to support a conviction for indecency with a child or aggravated sexual assault.").

The jury was also privy to the statements S.S. made to her mother and the SANE nurse in 2013, whereby showing the allegations of digital penetration remained consistent over time. *See generally Owings v. State*, 541 S.W.3d 144, 152 (Tex. Crim. App. 2017) (discussing complaining witness credibility via consistent testimony); *Rodriguez v. State*, 819 S.W.2d 871 (Tex. Crim. App. 1991) (holding that an outcry witness's testimony was, by itself, sufficient to support verdict of aggravated sexual assault). In a recorded forensic interview, S.S. also alleged penile penetration. The jury could infer from S.S.'s depiction of Nava's acts that Nava acted intentionally and that he did so with the intent to arouse or gratify his sexual desire. *See Tienda v. State*, 479 S.W.3d 863, 873 (Tex. App.—Eastland 2015, no pet.) (providing that a defendant's intent to commit sexual assault against a child can be inferred from his acts and conduct (citing *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. [Panel Op.] 1981))). And although Nava presented an alternative timeline at trial, one which dictated that he and Gloria first separated, prompting S.S. to make allegations against him in retaliation, the jury was free to reject his version of events and denial of abuse. *See Whatley*, 445 S.W.3d at 166.

Considering the cumulative force of all of the evidence, in the light most favorable to the verdict, drawing reasonable inferences based on that evidence, presuming the fact

finder resolved any conflicting inferences in favor of the prosecution, and deferring to that resolution, we conclude that a rational fact finder could have found each element of aggravated sexual assault of a child—including penetration of the victim's sexual organ—was proven beyond a reasonable doubt. *See* TEX. PENAL CODE § 22.021; *see also Whatley*, 445 S.W.3d at 166; *Clayton*, 235 S.W.3d at 778; *Vernon*, 841 S.W.2d at 409. We hold the evidence was legally sufficient to support Nava's conviction of aggravated sexual assault of a child. We overrule Nava's first issue.

III. FORENSIC INTERVIEW VIDEO

Nava contends by his second issue that the trial court abused its discretion when it admitted the forensic interview video[2] of the child into evidence under the rule of optional completeness. *See* TEX. R. EVID. 107.

A. Standard of Review and Applicable Law

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2011). The trial court does not abuse its discretion unless its determination lies outside the zone of reasonable disagreement. *Id.* If the trial court's decision is correct on any theory of law applicable to the case, we will uphold the decision. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

Hearsay, a statement made outside of court that is offered for its truth, is generally inadmissible. *See* TEX. R. EVID. 801, *id.* R. 102. Under the rule of optional completeness, an exception to the hearsay rule, if a party introduces into evidence part

[2] The State conferred with Nava regarding which portions of the video required redactions prior to the video's admission into evidence. The admitted video reflected Nava's requested redactions.

of a conversation or recorded statement, the party's opponent may introduce any other conversation or recorded statement that is necessary to explain or allow the jury to fully understand the part previously introduced. *See* TEX. R. EVID. 107; *see also Pena v. State*, 353 S.W.3d 797, 814 (Tex. Crim. App. 2011). Thus, if a party questions a witness about specific statements made during a recorded interview, the opponent may introduce any remaining part of the interview that concerns the same subject and is necessary to permit the jury to place those specific statements in their proper context. *See Sauceda v. State*, 129 S.W.3d 116, 122–23 (Tex. Crim. App. 2004). The proponent of evidence has the burden of establishing its admissibility. *White v. State*, 549 S.W.3d 146, 151–52 (Tex. Crim. App. 2018).

B. Discussion

Throughout the trial, Nava called S.S.'s truthfulness and consistency into question, arguing in opening statements that the allegations surfaced only after he "was no longer in the picture" and when Gloria and S.S. were "motivated by some other means." Nava carried his theory into his cross-examination of S.S.:

> [Defense:] So prior to any of these allegations coming out, they were broken up, they had gone their separate ways; is that correct?
> . . . .
>
> [Defense:] Do you remember telling Mary Floyd that your mom took the break up with Ramiro Nava hard? You remember telling her that?
> . . . .
>
> [Defense:] You remember telling her you wanted to help your mom; do you remember telling her that?

During questioning, Nava questioned all aspects of S.S.'s allegations, couching questions with repeated references to her recorded interview.

Given Nava's challenge of S.S.'s consistency during her interview—arguing that she stated in the interview that the allegations surfaced after the breakup but told the jury the allegations surfaced before—the State was entitled to introduce the video into evidence so that the jury could decide for itself the extent, if any, to which her story had changed. *See* TEX. R. EVID. 107; *Sauceda*, 129 S.W.3d at 122–23; *see also Tovar v. State*, 221 S.W.3d 185, 190–91 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (holding that the State is entitled to admission of a complainant's videotaped statement when the defense questioning concerning the videotape may cause a false impression without further context).

Nava's challenge to S.S.'s consistency embraced virtually every aspect of her story, and the trial court reasonably could have found that her entire recorded interview was necessary to place any inconsistencies in context for the jury. *See Tovar*, 221 S.W.3d at 190–91; *see also Bezerra v. State*, 485 S.W.3d 133, 142–43 (Tex. App.—Amarillo 2016, pet. ref'd) (affirming admission of a complainant's recorded interview under the rule of optional completeness when the entire interview is necessary to place testimony elicited during cross-examination into context); *Cline v. State*, No. 13-11-00734-CR, 2013 WL 398916, at *4 (Tex. App.—Corpus Christi–Edinburg Jan. 31, 2013, no pet.) (mem. op.) (same); *Mick v. State*, 256 S.W.3d 828, 830–32 (Tex. App.—Texarkana 2008, no pet.) (same). Accordingly, we hold that the trial court did not abuse its discretion in admitting the complainant's recorded interview.

Should we assume, without deciding, that the trial court did abuse its discretion in admitting the recording, we conclude that Nava cannot show that its admission was harmful. *See Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex. Crim. App. 2018) ("The erroneous admission of evidence is non-constitutional error. . . . If we have a fair assurance from an examination of the record as a whole that the error did not influence the jury, or had but a slight effect, we will not overturn the conviction."). Considering (1) the character of the alleged error and how it might have been considered in connection with other evidence; (2) the nature and degree of additional evidence supporting the verdict; and (3) the State's lack of emphasis of the complained of error, we conclude "that the error did not influence the jury, or had but a slight effect". *Id*. We overrule Nava's second issue.

IV. NON-UNANIMOUS VERDICT

By his third issue, Nava argues that the trial court erred by submitting an improper jury charge that permitted a conviction on allegations of two distinct penetrations punishable by separate offenses within a single verdict form, allowing for a non-unanimous jury verdict.

A. Standard of Review and Applicable Law

Jury unanimity is required in all criminal cases in Texas. *French v. State*, 563 S.W.3d 228, 233 (Tex. Crim. App. 2018); *Ngo v. State,* 175 S.W.3d 738, 745 (Tex. Crim. App. 2005); *see also* TEX. CONST. art. V, § 13. Every juror must agree that "the defendant committed the same, single, specific criminal act." *Ngo,* 175 S.W.3d at 745. However, "[t]he unanimity requirement is not violated by instructing the jury on alternative theories of committing the same offense, in contrast to instructing the jury on two separate

offenses involving separate incidents." *Martinez v. State,* 129 S.W.3d 101, 103 (Tex. Crim. App. 2004).

As previously discussed, a hypothetically correct jury charge is one which is authorized by the indictment, accurately sets out the law, does not unnecessarily increase the State's burden of proof or restrict the State's theories of liability, and adequately describes the offense in question. *Braughton*, 569 S.W.3d at 608. A hypothetically correct charge here would instruct the jury to find Nava guilty of aggravated sexual assault of a child guilty, if it was proven beyond a reasonable doubt that he: (1) intentionally or knowingly, (2) caused the penetration of the anus or sexual organ of S.S. by any means, and (3) S.S. was younger than fourteen years of age at the time of the offense. *Id.*; *see* TEX. PENAL CODE ANN. § 22.021.

Here, the jury charge tracked the language in the indictment:

> Now if you find from the evidence beyond a reasonable doubt that RAMIRO NAVA, did then and there in Nueces County, Texas, on or about January 9, 2006, when the defendant was 17 years of age or older, intentionally or knowingly caused: the penetration of the sexual organ of S.S., a child younger than 14 years of age, by the defendant's sexual organ *or* finger, then you will find the Defendant guilty of Count 1: Aggravated Sexual Assault of a Child, as charged in the indictment.

(Emphasis added). Nava argues that the "or" included in the charge allowed the jury to convict him of aggravated assault on a non-unanimous verdict because it afforded for two distinct penetrations punishable by separate offenses. Nava cites to *Williams v. State*, 474 S.W.3d 850, 854 (Tex. App.—Texarkana 2015, no pet.) and *French v. State*, 534 S.W.3d 693, 696 (Tex. App.—Eastland 2017), *rev'd*, 563 S.W.3d 228 (Tex. Crim. App. 2018) in support of his position. Nava opines that this case, like *Williams* and *French*, is distinguishable from *Jourdan v. State*, 428 S.W.3d 86, 95 (Tex. Crim. App. 2014). We

disagree.

The Court of Criminal Appeals in *Jourdan* held that including two separate forms of penetration, penile and digital, alleged against the same complainant and complainant's sexual organ "constitutes but two alternative ways of alleging the same offense under Section 22.021(a)(1)(A)(i), thus creating no jury unanimity requirement." *Jourdan*, 428 S.W.3d at 95. Meanwhile in *Williams*, the penetration alleged in the charge involved the penetration of the victim's anus and sexual organ by the defendant's sexual organ, implicating the penetration of separate parts of the victim's person. Our sister court in *Williams* acknowledged that "the result in *Jourdan* was highly dependent on the particular facts of that case," and that *Jourdan* was based on evidence involving "penetration of a singular orifice of a singular victim." *Williams*, 474 S.W.3d at 854. Although *French* was recently reversed, the charge there also involved the penetration of different orifices. *See French v. State*, 563 S.W.3d 228, 235 (Tex. Crim. App. 2018). The Texas Court of Criminal Appeals once more reiterated its *Jourdan* holding, stating that although "the contact and/or penetration of *multiple orifices* always constitutes more than one offense," "[w]hen both contact and penetration occur in a single sexual act, involving a single orifice, contact is subsumed by penetration." *Id.* at 235.

Paralleling the facts of *Jourdan*, and distinguishable from *Williams* and *French*, the jury charge here instructed on the penetration of one complainant and of one orifice by alternative means. *See id*.; *Jourdan*, 428 S.W.3d at 95; *Williams*, 474 S.W.3d at 854. Such an instruction is permissible and does not implicate double jeopardy. *See French*, 563 S.W.3d at 235; *Jourdan*, 428 S.W.3d at 95. Finding no error, we overrule Nava's third issue.

V. MODIFIED INDICTMENT

By his fourth issue, Nava argues that the trial court abused its discretion when it allowed the State to alter the indictment mid-trial to allege aggravated sexual assault of a child in place of continuous sexual abuse of a child.

A. Standard of Review and Applicable Law

Texas Code of Criminal Procedure article 28.10 provides that an indictment may not be amended after the trial on the merits commences "over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced." TEX. CODE CRIM. PROC. ANN. art. § 28.10(c).

Amendment of an indictment, however, is not synonymous with abandonment. *Eastep v. State,* 941 S.W.2d 130, 132 (Tex. Crim. App. 1997), *overruled on other grounds by Gollihar v. State,* 46 S.W.3d 243 (Tex. Crim. App. 2001); *see also Moore v. State,* 54 S.W.3d 529, 546 (Tex. App.—Fort Worth 2001, pet. ref'd). "An amendment is an alteration to the face of the charging instrument which affects the substance of the charging instrument." *Eastep,* 941 S.W.2d at 132; *Moore,* 54 S.W.3d at 546. Conversely, "the State can abandon an element of the charged offense without prior notice and proceed to prosecute a lesser-included offense," because an abandonment would not invoke article 28.10. TEX. CODE CRIM. PROC. ANN. art. 28.10; *see Grey v. State*, 298 S.W.3d 644, 650 (Tex. Crim. App. 2009) (citing *Eastep,* 941 S.W.2d 134).

B. Discussion

Although Nava argues to the contrary, aggravated sexual assault of a child is a lesser included offense of continuous sexual abuse of a child. *See Soliz v. State,* 353

S.W.3d 850, 854 (Tex. Crim. App. 2011) ("To the extent that a continuous-sexual-abuse indictment alleges certain specific offenses, an 'offense listed under Subsection (c)' [of penal code section 21.02] will *always* meet the first step of" a lesser-included offense analysis (quoting *Hall v. State,* 225 S.W.3d 524, 535–536 (Tex. Crim. App. 2007))); TEX. PEN. CODE ANN. § 21.02(c)(4) (listing the offense of aggravated sexual assault). "Unlike cases in which the lesser offense is not actually listed in the indictment . . . continuous sexual abuse is, by its very definition, the commission under certain circumstances of two or more of the offenses listed in Subsection (c)." *Id.*

Nava, however, argues that we implicate double jeopardy in applying the court's reasoning in *Soliz v. State*. 353 S.W.3d at 854; *Price v. State*, 434 S.W.3d 601, 606 (Tex. Crim. App. 2014) ("[I]t would violate a defendant's rights against double jeopardy to permit convictions for both continuous sexual abuse and an attempt to commit a predicate act with respect to conduct committed against the same complainant during the same period of time."). We distinguish an amendment, which adds an element and raises double jeopardy concerns, from an abandonment, which removes an element and the potential for an improper conviction. *Soliz*, 353 S.W.3d at 852–53. The latter occurred here when the State abandoned certain language in the indictment, reducing the charged offense of continuous sexual abuse of a child to the lesser-included offense of aggravated sexual assault of a child. TEX. PEN. CODE ANN. §§ 21.02(c)(4), 22.021(a)(2)(B).

Therefore, the changes sought by the State and approved by the trial court did not constitute an amendment of the indictment nor an abuse of the court's discretion. *See Grey*, 298 S.W.3d at 650; *Eastep,* 941 S.W.2d at 134–35. We overrule Nava's fourth issue.

VI. MOTION FOR MISTRIAL

By his fifth issue, Nava argues the trial court erred in denying his motion for a mistrial due to testimony produced during punishment proceedings.

A. Standard of Review and Applicable Law

We review a trial court's denial of a motion for mistrial under an abuse of discretion standard. *Archie v. State*, 340 S.W.3d 734, 738 (Tex. Crim. App. 2011). "Only in extreme circumstances where the prejudice is incurable, will a mistrial be required." *Hawkins v. State,* 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); *see Wood v. State,* 18 S.W.3d 642, 648 (Tex. Crim. App. 2000) ("A mistrial is appropriate for 'a narrow class of highly prejudicial and incurable errors' and is used to terminate a trial proceeding when the error is so prejudicial that 'expenditure of further time and expense would be wasteful and futile.'" (quoting *Ladd v. State,* 3 S.W.3d 547, 567 (Tex. Crim. App. 1999))).

Whether a mistrial should have been granted involves the analysis of three factors: (1) the severity of the misconduct (the magnitude of the prejudicial effect of the remarks), (2) the measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge), and (3) the certainty of punishment absent the misconduct (the strength of the evidence supporting the punishment). *Hawkins,* 135 S.W.3d at 76–77 (citing *Mosley,* 983 S.W.2d at 259).

In most cases, any harm resulting from an improper question can be cured by an instruction to the jury to disregard, and we presume that the jury followed the trial court's instruction to disregard in the absence of evidence that it did not. *See Ladd,* 3 S.W.3d at 567; *see, e.g.*, *Taylor v. State*, 509 S.W.3d 468, 484 (Tex. App.—Austin 2015, pet. ref'd) (holding trial court did not abuse its discretion by failing to grant defendant's request

for a mistrial after testimony regarding the fact that he took the polygraph was presented to the jury); *Orr v. State*, 306 S.W.3d 380, 405 (Tex. App.—Fort Worth 2010, no pet.) (holding no abuse of discretion for denial of mistrial after prosecution asked defendant's mother if defendant had an abortion).

Here, the State asked Gloria how Nava's biological daughters behaved when they were staying with Nava, prompting the objectionable statement. Gloria testified, "[T]hey wanted to go back home. The youngest one wanted to kill herself." The defense counsel immediately objected and moved for a mistrial, arguing that Gloria's statement implies that Nava's biological daughters were sexually abused by him too. Following a brief bench conference, the trial court instructed the jury:

> [D]isregard the testimony that was just elicited from the stand. You may not consider it in your deliberations in regards to any type of suicidal thoughts by the children on this case. So I am instructing you to disregard it. If you or anyone brings it up in the jury room, please let me know. It is jury misconduct.

In punishment, S.S. testified again. She spoke to the effects that she faced having been sexually abused by a man she once trusted, stating most nights she cried herself to sleep. S.S. testified that as result of Nava's abuse, she self-harmed for several years and still struggles to trust others despite ongoing therapy. S.S. also stated that she feared Nava was capable of re-offending.

There was abundant evidence by which a jury could have found Nava deserving of the sentence that he received; S.S.'s statements alone were sufficient. *See Archie,* 181 S.W.3d at 432. Given that the jury had considerable latitude in assessing punishment and assessed punishment within the lower end of the statutory range for Nava's first-degree felony, *see* TEX. PEN. CODE ANN. § 12.32, we cannot conclude the jury

did not follow the trial court's instruction to disregard the improper question. *See Ladd,* 3 S.W.3d at 567. Under the facts of this case, we conclude that the trial court sufficiently ameliorated any potential harm in instructing the jury as it did. *See Hawkins,* 135 S.W.3d at 76–77. As a consequence, the trial court did not abuse its discretion in denying Nava's motion for mistrial. We overrule Nava's fifth point.

VII. CONCLUSION

The trial court's judgment is affirmed.

GREGORY T. PERKES
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
25th day of July, 2019.