NUMBER 13-17-00429-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ENRIQUE ANGEL RAMOS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 206th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

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

Appellant Enrique Angel Ramos was convicted of continuous sexual abuse of a child, a first-degree felony, and prohibited sexual conduct, a third-degree felony, and sentenced to forty years' and five years' imprisonment. *See* TEX. PENAL CODE ANN. §§ 21.02, 25.02(a)(2). By three issues, Ramos argues (1) law enforcement administered

insufficient *Miranda* and article 38.22 warnings,[1] and thus, the trial court erred in admitting his written and video recorded statement into evidence; (2) he was punished twice for an offense the Legislature intended to punish only once in violation of his freedom from double jeopardy; and (3) the evidence was legally insufficient to show that the complaining witness was his stepdaughter. We affirm in part and affirm as modified in part.

I. BACKGROUND

On November 29, 2016, Ramos was indicted on three charges: continuous sexual abuse of a child, prohibited sexual conduct, and aggregated sexual assault of a child under fourteen. *See id.* §§ 21.02, 22.021(a)(1)(B), 25.02(a)(2). Ramos pleaded not guilty to each charge.

A. Motion to Suppress

On December 8, 2016, Ramos filed a Motion to Suppress, seeking to suppress (1) "All written and oral statements or confessions made by the Defendant to any law enforcement officers or others in connection with this case[;]" and (2) "Any and all written or oral waiver of rights made by the Defendant to any law enforcement officers or others in connection with this case."

At the suppression hearing, Ramos asserted he did not receive his *Miranda* or article 38.22 warnings, and he did not voluntarily waive his rights. *See Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966); TEX. CODE CRIM. PROC. ANN. art. 38.22. The trial court admitted the following State's evidence at the hearing:

1. Ramos's notice and waiver of rights form, typed in Spanish and containing Ramos's initials next to each delineated right;

[1] *See Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966); TEX. CODE CRIM. PROC. ANN. art. 38.22.

2. An English translation of Ramos's notice and waiver of rights form;

3. Ramos's written "Statement of Accused";

4. An English translation of Ramos's "Statement of Accused";

5. A video recording of Ramos's interview with Detectives Jesse Moreno and Joaquin Mendoza; and

6. A Spanish and English transcript of the video recording.

The trial court denied the motion, and the case proceeded to trial.

B. Trial

At trial, Alicia Gonzalez,[2] Ramos's 13-year-old stepdaughter and complaining witness, testified to multiple instances of sexual abuse. According to Alicia, the abuse began when she was "four or five" years old. Alicia stated that Ramos would go into her bedroom "in the middle of the night" and "touch" her vagina with "his hands." While the abuse was initially limited to "under the clothing" touching, Alicia testified it escalated to penile-to-vaginal penetration. Alicia said the last incident occurred on August 11, 2016, inside the bathroom of a residence her stepfather was renovating. Alicia was twelve years old.

Within twenty-four hours of the August 11, 2016 assault, Alicia reported the incident to her mother, and she was transported to the local hospital where she underwent a sexual assault examination. Specimen samples retrieved from Alicia's underwear tested positive for the presence of blood and semen. Texas Department of Public Safety Capitol Laboratory DNA specialist Maria Christina Trevino testified it was "11.7 quintillion times more likely that the DNA [obtained from Alicia's underwear] came from Enrique Angel Ramos than that the DNA came from an unrelated, unknown individual." Ramos's semen

[2] "Alicia Gonzalez" is the pseudonym used at trial to protect the minor's identity.

was also identified in a sample taken from a tissue found inside the bathroom where Alicia alleged the assault occurred.

In a written statement, Ramos confessed only to the August 11, 2016 incident:

> On this day, August 11, 2016, about 7:00 a.m., I left home with my stepchildren, [S.S.] and [Alicia], to go work at two houses that I am remodeling . . . . We started working. [Alicia] cleaned up the area where I was going to install a new wooden floor. After a while, my stepdaughter [Alicia] started touching me and I also started touching her. After a while[,] she pulled down her shorts and I undid my pants, taking out my penis. I rubbed my penis against the labia of [Alicia's] vagina until I ejaculated . . .

The trial court admitted Ramos's written statement and English translation into evidence without an objection from Ramos. Ramos objected, however, to the admittance of his video recorded confession, wherein he admitted to more than a single episode of digital and penile penetration and waivered when he was asked to provide additional details or a timeline of abuse. In his video recorded statement, Ramos also depicted Alicia as the sexual instigator:

> She simply comes to me and tells me if—sometimes I even have to scold her . . . . She does come to me and gives me the chance to play with her body sometimes . . . . [S]ometimes I say, ['']no, my daughter, no, leave me, don't touch me.['] But I don't want to make her guilty . . .

When Ramos testified at trial, he accused law enforcement of "playing . . . mind games." "He got me to plead guilty," said Ramos, claiming he did not understand his rights as explained to him by the detectives. "I understood that I—if I did not have an attorney present, I needed to give the interview." Contrary to his admitted written statement, Ramos denied ever admitting that he (1) touched Alicia's vagina with his hands, (2) penetrated Alicia's vagina with his penis, or (3) ejaculated near her. Ramos stated the detectives misunderstood his statements. He asserted that the semen found in the

bathroom was from him masturbating after he had refused Alicia's advancements. Ramos was unable to explain how his semen ended up in Alicia's underwear.

The State dismissed the aggravated sexual assault of a child charge, and the jury found Ramos guilty of continuous sexual abuse and prohibited sexual conduct. This appeal followed.

II. STATEMENT ADMISSIBILITY

By his first issue, Ramos argues that (1) the warnings administered during his custodial interview were not the "fully effective equivalent" of the warnings required under article 38.22 of the Texas Code of Criminal Procedure,[3] (2) he was improperly interrogated prior to the issuance of any *Miranda* warnings, and (3) the trial court therefore erred in admitting his ensuing written and video recorded statements. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3.

A. Preservation

A complaint that evidence obtained in violation of *Miranda* was erroneously admitted by the trial court must be preserved for appellate review, and it may be forfeited. *See Vasquez v. State*, 483 S.W.3d 550, 553–54 (Tex. Crim. App. 2016). To preserve a complaint for appellate review, a party must first present to the trial court a timely request, objection, or motion stating the specific grounds for the desired ruling if not apparent from the context and obtain a ruling from the trial court. TEX. R. APP. P. 33.1(a)(1); *Adams v. State*, 180 S.W.3d 386, 398 (Tex. App.—Corpus Christi–Edinburg 2005, no pet.). "Moreover, an objection must be made each time inadmissible evidence is offered unless the complaining party obtains a running objection or obtains a ruling on his complaint in

[3] Although argued in his motion to suppress and at trial, Ramos does not contest the voluntariness of his waiver of rights on appeal.

a hearing outside the presence of the jury." *Lopez v. State*, 253 S.W.3d 680, 684 (Tex. Crim. App. 2008). "An error [if any] in the admission of evidence is cured where the same evidence comes in elsewhere without objection." *Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004).

In this case, the State offered State's Exhibit Five and Six, Ramos's "Statement of Accused" and the Spanish-to-English translation of his written statement.

> [STATE]: Your Honor, at this time I'm going to tender State's Exhibit Number 5 to defense counsel for inspection and I would offer it into evidence.
>
> [DEFENSE]: If I could just have a minute, Your Honor, to review it with my client. (Discussion off the record)[.]
>
> [DEFENSE]: Your Honor, we have no objection.
>
> [COURT]: State's Exhibit 5 will be admitted.
>
> [STATE]: Your Honor, at this time I'm also going to tender to defense counsel State's Exhibit Number 6. It is a translation of State's Exhibit Number 5. It has been on file with both the court and provided to defense counsel more than 45 days before trial.
>
> [DEFENSE]: No objection, Your Honor.

Because Ramos did not object to the trial court's admission of his written statement and translation at trial, we conclude he has failed to preserve error for these two pieces of evidence. *See* TEX. R. APP. P. 33.1(a)(1); *Lane*, 151 S.W.3d at 193. We proceed with our analysis in sole consideration of the video evidence and corresponding transcript, which Ramos did object to at trial and which differs considerably from his written statement.

B. Standard of Review

In reviewing a trial court's ruling on a *Miranda*-violation claim, an appellate court conducts a bifurcated review:

> [The court] affords almost total deference the trial judge's rulings on questions of historical fact and on application of law to fact questions that turn upon credibility and demeanor, and it reviews *de novo* the trial court's rulings on application of law to fact questions that do not turn upon credibility and demeanor.

Alford v. State, 358 S.W.3d 647, 652 (Tex. Crim. App. 2012) (citing *Ripkowski v. State*, 61 S.W.3d 378, 381–82 (Tex. Crim. App. 2001)). The decision as to whether custodial questioning constitutes "interrogation" under *Miranda* is a mixed question of law and fact, and we defer to the trial court's fact findings that turn on an evaluation of credibility and demeanor. *See id.* at 653; *Hoff v. State*, 516 S.W.3d 137, 139 (Tex. App.—Amarillo 2017, no pet.). If credibility and demeanor are not necessary to the resolution of an issue, whether a set of historical facts constitutes custodial interrogation under the Fifth Amendment is subject to de novo review because that is an issue of law; it requires application of legal principles to a specific set of facts. *Alford*, 358 S.W.3d 653.

C. Applicable Law

In *Miranda*, the United States Supreme Court determined that an accused, held in custody, must be given the required warnings prior to questioning. *Vasquez v. State*, 411 S.W.3d 918, 919 (Tex. Crim. App. 2013). The failure to comply with the *Miranda* requirements results in forfeiture of use of any statement obtained during that interrogation by the prosecution in its case-in-chief. *Id.* Similarly, the Texas Code of Criminal Procedure provides that a statement is admissible against a defendant in a criminal proceeding if, among other things, the defendant was given the warnings set out in article 38.22 before the statement was made, and the defendant "knowingly, intelligently, and voluntarily" waived the rights set out in the warnings. *Id.*; *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007); *see also* TEX. CODE CRIM. PROC. ANN. art. 38.22, §§ 2(a), 3(a).

For a statement taken from a person in custody to be admissible, the person must be informed of the following rights or of their "fully effective equivalent":

> (1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
>
> (2) any statement he makes may be used as evidence against him in court;
>
> (3) he has the right to have a lawyer present to advise him prior to and during any questioning;
>
> (4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and
>
> (5) he has the right to terminate the interview at any time.

TEX. CODE CRIM. PROC. ANN. art. 38.22, § 2(a); *see Woods v. State*, 152 S.W.3d 105, 116 (Tex. Crim. App. 2004); *Hernandez v. State*, 533 S.W.3d 472, 479 (Tex. App.—Corpus Christi–Edinburg 2017, pet. ref'd). "A warning substantially complies with article 38.22 when it 'convey[s] on the face of the statement the exact meaning of the statute, but in slightly different language[.]'" *Hernandez*, 533 S.W.3d at 479 (quoting *White v. State*, 779 S.W.2d 809, 827 (Tex. Crim. App. 1989)). Thus, an accused's oral statement will be admissible even if he receives warnings that are "slightly different" from those contained in section 2(a). *See id.*

The warnings provided in the code are virtually identical to the *Miranda* warnings, with one exception—the warning that an accused "has the right to terminate the interview at any time" as set out in section 2(a)(5) is not required by *Miranda. Herrera*, 241 S.W.3d at 526. As with the *Miranda* warnings, the warnings in article 38.22 of the code are required only when there is custodial interrogation. *Id.*; *Woods*, 152 S.W.3d at 116; TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(a).

D. "Fully Effective Equivalent" Statements

Detective Mendoza provided the following verbal warnings to Ramos at the police station:

> You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer to ask for advice before we ask you questions and to have the lawyer with you while you are being asked questions. If you do not have the means to get a lawyer and you wish to do so, a lawyer may be assigned to you to be present or to help you. If you want to answer the questions now without the presence of the lawyer, you still have the right that at any time, [sic] you know what? I don't want the process anymore, the interview is over and it's over.

In addition to the verbal warnings, officers gave Ramos a written copy of his rights in Spanish, which were translated to English in State's Exhibit Two:

> 1) You have the right to remain silent.
>
> 2) Anything you say can be used against you in court.
>
> 3) You have the right to talk to a lawyer to obtain counsel before we ask you questions and to have one with you while you are being questioned.
>
> 4) If you do not have the means to obtain a lawyer and you wish to do so, one will be appointed before you are asked any question.
>
> 5) If you decide to answer the questions now without the presence of a lawyer, you still have the right to stop answering whenever you want. You also have the right to stop answering until you talk to a lawyer.

Ramos was instructed to initial his name next to each warning prior to additional questioning.

Ramos argues that the section 2(a)(2) and (5) warnings provided—namely the statements "[a]nything you say can be used against you in court" and "[y]ou also have the right to stop answering until you talk to a lawyer"—do not sufficiently comply with the statute. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 2(a); *Hernandez*, 533 S.W.3d at 479. However, the Court of Criminal Appeals of Texas dealt with near identical language

as communicated here and concluded contrary to Ramos. *See Sosa v. State*, 769 S.W.2d 909, 915–16 (Tex. Crim. App. 1989).

> Alaniz read the warnings off of the form to appellant. The pertinent part of the form reads as follows:
>
> > "Anything you say can be used against you in court."
> >
> > . . .
> >
> > "You also have the right to stop answering at any time until you talk to a lawyer."
> >
> > . . .
> >
> > We have previously held in several cases that a warning which is only slightly different from the language of the statute but which conveys the exact meaning of the statute is sufficient to comply with the statute. We have reviewed the warnings given to appellant in the instant case and find them sufficiently similar to comply with the warnings set out in Article 38.22, supra.

Id. (citations omitted). Moreover, this Court in *Hernandez* recently revisited the analysis of a similarly articulated section 2(a)(2) warning and resolved that such language conveyed the "fully effective equivalent" of the statute:

> In this case, the warnings provided that "anything that you say may be used as evidence against you in a court of justice." We conclude that this warning could be reasonably understood to include the term "trial." We also note that the phrasing used in this case is almost identical to the language in *Sosa* which the court determined was in substantial compliance with article 38.22. Therefore, we hold that the warnings provided to appellant convey the "fully effective equivalent" of the warnings contained in article 38.22.

533 S.W.3d at 480 (citations omitted). Although this Court in *Hernandez* was tasked to analyze the use of the word "court" in place of "trial," whereas here, Ramos challenges the use of the word "say" in place of "statement," we nonetheless determined in *Hernandez*—as the Texas Court of Criminal Appeals did in *Sosa*—that the entire phrasing of the warning advising "anything you say [can] be used . . . against you" was in

compliance with article 38.22. *See Sosa*, 769 S.W.2d at 914; *Hernandez*, 533 S.W.3d at 480.

Guided by *Hernandez* and *Sosa*, we likewise conclude that the language used for the challenged warnings here are in substantial compliance with article 38.22 and *Miranda*.[4] *See Sosa*, 769 S.W.2d at 914; *Hernandez*, 533 S.W.3d at 480; *see also Hernandez v. State*, No. 05-17-00560-CR, 2018 WL 2316026, at *10 (Tex. App.—Dallas May 22, 2018, pet. ref'd) (mem. op., not designated for publication) (finding the warning advising "you could proceed to answer questions and you can stop anytime" substantially complied with article 38.22); *Reyes v. State*, No. 12–16–00235–CR, 2017 WL 5167555, at 2 (Tex. App.—Tyler Nov. 8, 2017, no pet.) (mem. op., not designated for publication) (concluding the same for a warning advising "[you can] decide at any time to exercise the right and not answer any questions or make any statement"); *see also McGowan v. State*, No. 12–12–00056–CR, 2013 WL 1143240, at *3–4 (Tex. App.—Tyler March 20, 2013, no pet.) (mem. op., not designated for publication) (concluding the same for a warning advising "[you can] decide at any time to exercise the right and not answer any questions or make any statement"); *Speed v. State*, No. 11–02–00199–CR, 2003 WL 22211264, at *4 (Tex. App.—Eastland, Sept. 25, 2003, pet. ref'd) (mem. op., not designated for

[4] Ramos urges this Court to observe the same conclusion as we did in *Hughes v. State*, No. 13-09-00267-CR, 2010 WL 1138447, at *6–7 (Tex. App.—Corpus Christi–Edinburg Mar. 25, 2010, no pet.) (mem. op., not designated for publication). However, *Hughes* was disavowed in-part by *Hernandez v. State*, 533 S.W.3d 472, 479 (Tex. App.—Corpus Christi–Edinburg 2017, pet. ref'd). *See also Campbell v. State*, 426 S.W.3d 780, 783 n.2 (Tex. Crim. App. 2014); TEX. R. APP. P. 47.7. Further, the section 2(a)(5) warning contemplated in *Hughes* is distinguishable from the warning before this Court now. *See Hughes*, 2010 WL 1138447, at *6. The defendant in *Hughes* was admonished that he could "'stop answering questions' *but he was not advised of his right to 'terminate the interview' at any time*." *See id.* (emphasis added). Whereas here, in addition to being informed that he had "the right to stop answering whenever [he] want[ed]," Ramos was told he had the right to say "[']I don't want the process anymore, the interview is over[']' and it's over." The crux of the warning, a defendant's "right to terminate the interview at any time," was effectuated by the warnings given to Ramos. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 2(a)(5); *Sosa v. State*, 769 S.W.2d 909, 915–16 (Tex. Crim. App. 1989).

publication) (concluding the same for a warning advising "I can decide to talk with anyone and I can stop talking to them at any time I want"); *Bigham v. State*, No. 08-99-00211-CR, 2000 WL 1818524, at *4 (Tex. App.—El Paso Dec. 13, 2000, pet. ref'd) (mem. op., not designated for publication) (concluding the same for a warning advising "anything you say can be used against you in . . . court"); *King v. State*, No. 05-96-01923-CR, 1998 WL 249370, at *5 (Tex. App.—Dallas May 19, 1998, no pet.) (mem. op., not designated for publication) (observing the same).

E. Pre-*Mirandization* Statements

Ramos additionally asserts that while he voluntarily accompanied Investigator Moreno to the police station,[5] officers subjected him to a custodial interrogation, and he made incriminating statements before he received any warnings.

For purposes of a *Miranda* and article 38.22 analysis, four general situations may constitute evidence of "custody": (1) the suspect is physically deprived of his freedom of action in any significant way; (2) a law enforcement officer tells the suspect he is not free to leave; (3) law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; and (4) there is probable cause to arrest the suspect, and law enforcement officers do not tell the suspect he is free to leave. *Gardner v. State*, 306 S.W.3d 274, 294 (Tex. Crim. App.

[5] Having reviewed the evidence, we agree. Moreno testified he arrived unannounced, wearing civilian clothes and driving an unmarked police vehicle, at Ramos's construction job site. Moreno explained he was there because "a report was being filed or had been filed." He described Ramos as "cooperative," and said Ramos openly identified himself and his relation to the complainant, admitting he had been with her earlier in the day. Moreno then asked Ramos to accompany him to the police station for additional questioning, and Ramos complied, expressing a brief concern regarding his vehicle, employer, and two children, who were present at the worksite. Moreno said Ramos's concerns were assuaged after he was told a female officer would remain to watch his children and speak to his employer on his behalf. Moreno told Ramos he was not in custody and testified that had Ramos refused to accompany him to the police department, Moreno would have "just tried to schedule" a more convenient time. Ramos was transported in Moreno's unmarked vehicle and was seated in the front passenger seat. Ramos was not handcuffed.

2009); *see also Hawkins v. State*, 592 S.W.3d 602, 610 (Tex. App.—Corpus Christi–Edinburg 2020, pet. ref'd). The subjective intent of law enforcement officials to arrest is irrelevant, unless that intent is somehow communicated or otherwise manifested to the suspect. *State v. Ortiz*, 382 S.W.3d 367, 372 (Tex. Crim. App. 2012); *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996). "The determination of custody must be made on an ad hoc basis, after considering all of the (objective) circumstances." *Dowthitt*, 931 S.W.2d at 255.

Investigator Mendoza accompanied Moreno during the interview. Moreno said Ramos was offered water and denied that Ramos was refused basic necessities at any point. Contrary to Ramos's assertions, Moreno began the interview by asking Ramos biographical questions—i.e., "What state of Mexico do you come from?"; "Where [were] you born?"; "[Y]our date of birth is[?]; "[H]ow long have you been living here in the United States?"; "[H]ow many children does [your wife] have?"; "What's [sic] the names [and ages]?" He proceeded to ask Ramos to expound on what he had told police at the worksite. After confirming Alicia was at the worksite with Ramos earlier in the day, Mendoza *Mirandized* him.[6] Questions pertaining to the allegations and Ramos's self-incriminating responses occurred after he had been *Mirandized*. At no point between the start of the interview and when he was *Mirandized* does Ramos point to direct or indirect evidence of restricted freedom of movement. *See Gardner*, 306 S.W.3d at 294; *Hawkins*, 592 S.W.3d at 610. Under these circumstances, we conclude as a matter of law that Ramos was not in custody prior to his *Mirandization*. *Hawkins*, 592 S.W.3d at 610–11.

[6] We observe that Ramos notes as much in his brief: "Detective Mendoza gave Appellant the following oral *Miranda* warnings *near the beginning* of his interview on August 11, 2016." (emphasis added).

His video recorded voluntary, non-custodial oral statements were thus admissible. We overrule Ramos's first issue.

III. DOUBLE JEOPARDY

By his second issue, Ramos argues he was punished twice for the same alleged act that the Legislature intended to be punished once.

A. Preservation

The Double Jeopardy Clause protects against "multiple punishments for the same offense." *Price v. State*, 434 S.W.3d 601, 609 (Tex. Crim. App. 2014) (quoting *Whalen v. United States*, 445 U.S. 684, 688 (1980)); *see* U.S. CONST. amends V, XIV. The Texas Constitution provides substantially identical protections. *See* TEX. CONST. art. I, § 14 ("No person, for the same offense, shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.").

Because of the "fundamental nature" of double jeopardy protections, a double jeopardy claim may be raised for the first time on appeal if "(1) the undisputed facts show the double-jeopardy violation is clearly apparent from the face of the record, and (2) enforcement of the usual rules of procedural default serves no legitimate state interest." *Garfias v. State*, 424 S.W.3d 54, 57–58 (Tex. Crim. App. 2014), *cert. denied*, 135 S. Ct. 359 (2014). 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. *Gonzalez v. State*, 516 S.W.3d 18, 23 (Tex. App.—Corpus Christi–Edinburg 2016, pet. ref'd) (quoting *Ex parte Denton*, 399 S.W.3d 540, 544–45 (Tex. Crim. App. 2013)).

With regard to the first prong, an appellant "has the burden of presenting the necessary record rather than meeting the burden of demonstrating from the face of the record already before the appellate court that an undisputed double jeopardy violation was involved." *Ellison v. State*, 425 S.W.3d 637, 643 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Gonzalez*, 516 S.W.3d at 23. We conclude that the first prong has been met in this case. Ramos has brought forth a complete, developed record on appeal, and if a double jeopardy violation exists, we can resolve his claims based on that record without the necessity of supplementary evidentiary proceedings. *See Ellison*, 425 S.W.3d at 643. Moreover, the two convictions at issue are based on near identical conduct occurring to the same complaining witness in the same period of time. *See id.*; *Weber v. State*, 536 S.W.3d 31, 37 (Tex. App.—Austin 2017, pet. ref'd).

We likewise conclude that the second prong has been met. *See Ex Parte Denton*, 399 S.W.3d at 545 ("While the state may have an interest in maintaining the finality of a conviction, we perceive no legitimate interest in maintaining a conviction when it is clear on the face of the record that the conviction was obtained in contravention of constitutional double-jeopardy protections."); *Gonzalez*, 516 S.W.3d at 24. We now consider the merits of Ramos's double jeopardy claim.

B. Applicable Law

"The *Blockburger* test is the starting point in the analysis of a multiple-punishments double-jeopardy claim." *Ex Parte Denton*, 399 S.W.3d at 546 (citing *Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App. 2008)); *see Blockburger v. United States*, 284 U.S. 299, 304 (1932). Under the *Blockburger* test, two offenses are not the same if "each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. In Texas, we employ a "cognate-pleadings approach" and look to the pleadings to inform

the *Blockburger* test. *Ex Parte Denton*, 399 S.W.3d at 546. In other words, if the two pleaded offenses have the same elements under the cognate-pleadings approach, then a judicial presumption arises that the offenses are the same for purposes of double jeopardy, and the defendant may not be convicted of both offenses. *Id.* Conversely, if the two offenses, as pleaded, have different elements under the *Blockburger* test, the judicial presumption is that the offenses are different for double jeopardy purposes and multiple punishments may be imposed. *Id.*

"But the *Blockburger* test is . . . not the exclusive test for determining if two offenses are the same." *Shelby v. State*, 448 S.W.3d 431, 436 (Tex. Crim. App. 2014) (citing *Bigon*, 252 S.W.3d at 370). "[T]he true inquiry in a multiple-punishments case is whether the Legislature intended to authorize the separate punishments." *Garfias*, 424 S.W.3d at 58 (citing *Ervin v. State*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999)); *Guerrero v. State*, 305 S.W.3d 546, 555 (Tex. Crim. App. 2009) ("[E]ven if two offenses are not the same under *Blockburger's* rule of statutory construction, this rule of statutory construction 'cannot authorize two punishments where the [L]egislature clearly intended only one.'"). The Texas Court of Criminal Appeals set forth a list of non-exclusive factors to assist courts:

> [1] whether offenses are in the same statutory section; [2] whether the offenses are phrased in the alternative; [3] whether the offenses are named similarly; [4] whether the offenses have common punishment ranges; [5] whether the offenses have a common focus; [6] whether the common focus tends to indicate a single instance of conduct; [7] whether the elements that differ between the two offenses can be considered the same under an imputed theory of liability that would result in the offenses being considered the same under *Blockburger*; and [8] whether there is legislative history containing an articulation of an intent to treat the offenses as the same or different for double jeopardy purposes.

Shelby, 448 S.W.3d at 436 (quoting *Garfias*, 424 S.W.3d at 59); *Ervin*, 991 S.W.2d at 814.

C. The *Blockburger* Test

Neither party disputes that an application of the *Blockburger* test reveals that the two offenses at issue in this appeal, continuous sexual abuse of a young child and prohibited sexual conduct, contain a distinct element as pleaded that the other does not. *See Blockburger*, 284 U.S. at 304. We therefore must examine relevant considerations as set forth in *Ervin* to determine whether the Legislature intended to permit multiple punishments under these circumstances. *See Garfias*, 424 S.W.3d at 58; *Ervin*, 991 S.W.2d at 814.

D. The *Ervin* Factors

1. Factors One Through Four

We first observe that the offenses do not appear in the same statutory section. This suggests that the Legislature did not intend for these offenses to be treated the same for double jeopardy purposes or to disallow multiple punishments under these circumstances and weighs against a finding of a double jeopardy violation. *See Shelby*, 448 S.W.3d at 437. "Prohibited sexual conduct" is located in Title 6, Chapter 25, "Offenses Against the Family," and "Continuous Sexual Abuse of [a] Young Child" is in Title 5, Chapter 21, "Sexual Offenses." TEX. PENAL CODE ANN. §§ 21.02, 25.02(a)(2), (b)(1)–(2). Because the statutes appear in separate sections of the code, they cannot be construed to be phrased in the alternative, and the second *Ervin* factor is inapplicable. *See Shelby*, 448 S.W.3d at 438 (citing *Bigon*, 252 S.W.3d at 371).

To the third factor, the offenses are similarly named, both sharing the word "sexual"; thus, this *Ervin* factor weighs in favor of treating the offenses as being the same

for double jeopardy purposes. *See id.* at 436 (analyzing the offenses of aggravated assault with a deadly weapon against a public servant and intoxication assault and determining that although each was not phrased in the alternative, the offenses share similar names "[b]ecause both offenses here have the word assault in their names" and the courts "have held that even in cases where the names of two statutes share no words, but still denote similar offenses that differ only in degree, that this is evidence" of sameness); *see also Holt v. State*, No. 03-08-00631-CR, 2010 WL 2218543, at *2 (Tex. App.—Austin June 2, 2010, pet. ref'd) (mem. op., not designated for publication) (observing the offenses of "sexual assault" and "prohibited sexual conduct" are similarly named in its *Ervin* analysis).

The two statutes, however, do not carry common punishment ranges, and this factor, therefore, weighs against treating the two offenses as the same for double jeopardy purposes. *Id.* at 438. An offense under § 21.02 is a first-degree felony, *see id.* § 21.02(h), and an offense under § 25.02 is a "felony of the third degree, unless the offense is committed under Subsection (a)(1), in which event the offense is a felony of the second degree." *Id.* § 25.02(c).

2. Factors Five Through Eight

The remaining factors require an analysis hinged "not on the statutory elements of the offenses, but on the elements of the offenses as alleged in the charging instrument."[7] *Garfias*, 424 S.W.3d at 62. The charge, in applicable portion, reads as follows:

[7] We have found only two sister courts which have examined the issue of whether prohibited sexual conduct and sexual assault convictions based on the same act constitute multiple punishments for the same offense in violation of the Double Jeopardy Clause. *See McKnight v. State*, No. 05-12-00445-CR, 2013 WL 4517276, at *4 (Tex. App.—Dallas Aug. 23, 2013, no pet.) (mem. op., not designated for publication); *Holt v. State*, No. 03-08-00631-CR, 2010 WL 2218543, at *2–3 (Tex. App.—Austin June 2, 2010, pet. ref'd) (mem. op., not designated for publication). Both cases concluded that the appellant's convictions for

[Count 1]

> Now if you find from the evidence beyond a reasonable doubt that on or about AUGUST 11, 2011 through on or about AUGUST 11, 2016, in Hidalgo County, Texas, the Defendant, ENRIQUE ANGEL RAMOS, during a period that was 30 days or more in duration, committed two or more acts of sexual abuse against Alicia Gonzalez, a pseudonym, said acts of sexual abuse having been violations of one or more of the following penal laws, including: aggravated sexual assault of a child by intentionally or knowingly causing the sexual organ of Alicia Gonzalez, to contact the sexual organ of the Defendant, aggravated sexual assault of a child by intentionally or knowingly causing the penetration of the sexual organ of Alicia Gonzalez, by Defendant's sexual organ, indecency with a child by contact, with intent to arouse or gratify the sexual desire of the Defendant, engage in sexual contact with Alicia Gonzalez, by touching any part of the genitals of Alicia Gonzalez, and each of the aforementioned acts of sexual abuse were committed on more than one occasion, and at the time of the commission of each of the acts of sexual abuse, the Defendant was 17 years of age or older and Alicia Gonzalez, was a child younger than 14 years of age, then you will find the Defendant guilty of the offense of Continuous Sexual Abuse of a Child as charged in the indictment. . .
>
> . . .
>
> [Count 2]
>
> Now if you find from the evidence beyond a reasonable doubt that on or about AUGUST 11, 2016, in Hidalgo County, Texas, the Defendant, ENRIQUE ANGEL RAMOS, did then and there intentionally or knowingly engage in sexual intercourse with Alicia Gonzalez, a pseudonym, a person the defendant knew to be, without regard to legitimacy, the defendant's stepchild, then you will find the defendant guilty of Prohibited Sexual Conduct as charged in the indictment. . .

Ramos asserts, and we agree, that double jeopardy is implicated where a defendant is charged with continuous sexual abuse of a child *and* with a predicate offense occurring inside the same period of time the continuous sexual abuse was committed. *See Price*, 434 S.W.3d at 611 (concluding that the legislative intent behind the continuous

(aggravated) sexual assault of a child and prohibited sexual conduct, although involving the same complaining witness and based on the same conduct, did not constitute multiple punishments for the same offense. *See McKnight*, 2013 WL 4517276, at *4; *Holt*, 2010 WL 2218543, at *2–3. Neither court conducted an analysis of the *Ervin* factors as applied to the charge before the court. *See Garfias v. State*, 424 S.W.3d 54, 62 (Tex. Crim. App. 2014).

sexual abuse statute is to "permit one punishment where continuous sexual abuse is alleged against a single victim within a specified time frame"); TEX. PENAL CODE ANN. § 21.02(c) (listing out the predicate offenses under the continuous sexual abuse statute). Ramos, however, further claims that though prohibited sexual conduct is not a predicate offense under the continuous sexual abuse statute, the language of the prohibited sexual conduct charge mirrors that of the predicate offense charged here: aggravated sexual assault; as such, the two convictions cannot contemporaneously stand.

In analyzing the remaining *Ervin* factors, we first observe that the prohibited sexual conduct and continuous sexual abuse (and aggravated sexual assault) statutes are conduct-oriented statutes and individually contain multiple subsections, each entailing "different and separate acts to commit the various, prohibited conduct." *Gonzales v. State*, 304 S.W.3d 838, 849 (Tex. Crim. App. 2010); *see* TEX. PENAL CODE ANN. §§ 21.02, 22.021(a)(1)(B), 25.02(a)(2), (b)(1)–(2). "[S]uch specificity in a conduct-oriented statute ordinarily reflects a legislative intent that each discretely defined act should constitute a discrete offense." *Gonzales*, 304 S.W.3d at 849; *see Maldonado v. State*, 461 S.W.3d 144, 150 (Tex. Crim. App. 2015) ("Because the focus of sex offenses is the prohibited conduct and the [L]egislature intended to allow separate punishments for each prohibited act, the multiple convictions do not violate the Double Jeopardy Clause."); *Pizzo v. State*, 235 S.W.3d 711, 717–18 (Tex. Crim. App. 2007) (providing that where a "statute criminalizes many types of sexually assaultive conduct with a child" and "each section usually entails different and separate acts to commit the various, prohibited conduct," "[t]his specificity reflects the legislature's intent to separately and distinctly criminalize any act which constitutes the proscribed conduct").

However, as indicated *supra*, "a double-jeopardy determination hinges not on the statutory elements of the offenses, but on the elements of the offenses as alleged in the charging instrument." *Garfias*, 424 S.W.3d at 62. As charged, the prohibited sexual conduct and continuous sexual abuse (or aggravated sexual assault) offense, tend to indicate a single instance of conduct: (1) "[O]n or about AUGUST 11, 2016[,] . . . [Ramos] intentionally or knowingly causing the penetration of the sexual organ of Alicia Gonzalez, by Defendant's sexual organ"; and (2) "[O]n or about AUGUST 11, 2016[,] . . . [Ramos] intentionally or knowingly engage in sexual intercourse[8] with Alicia Gonzalez." *See Price*, 434 S.W.3d at 611 (determining that "the statute's legislative intent was to permit one punishment where continuous sexual abuse is alleged against a single victim within a specified time frame," and "this intent extends to the statute's enumerated predicate offenses and to criminal attempts to commit those predicate offenses").

The offenses, as charged, share the same complainant (Alicia), focus and unit of prosecution (penetration), mode of commission (penile to vaginal), and period of time (August 11, 2016). *Shelby*, 448 S.W.3d at 436 (providing that "'the focus,' or 'gravamen,' of the two offenses is the best indicator of the Legislature's intent to treat the offenses as the same or different for double jeopardy purposes."); *Jourdan v. State*, 428 S.W.3d 86, 95–96 (Tex. Crim. App. 2014) (holding that the gravamen of the aggravated sexual assault statute "is penetration, not the various and unspecified "means" by which that penetration may be perpetrated"); *Aekins v. State*, 447 S.W.3d 270, 285 n.13 (Tex. Crim. App. 2014) (observing that penetration of anus and sexual organ are different units in aggravated sexual assault). Moreover, what would principally distinguish the statutes

[8] "Sexual intercourse" was defined in the charge as "any penetration of the female[']s sexual organ by the male sexual organ."

here—consent—is irrelevant as charged. *Compare* TEX. PENAL CODE ANN. § 21.02 (criminalizing repeated sexual acts against a child under the age of fourteen, which inherently precludes consent) *with id.* at § 25.02 (criminalizing intercourse between two familial persons, including two consensual adults).

We are thus compelled to borrow the language of the Texas Court of Criminal Appeals in *Bigon*:

> To be clear, [prohibited sexual conduct and continuous sexual abuse of a child (aggregated sexual assault)] are certainly not the same offense in all situations. What distinguishes this case is the way in which the State chose to indict Appellant. There is no legislative indication that [prohibited sexual conduct and continuous sexual abuse of a child (aggregated sexual assault)] w[ere] meant to be treated the same[,] . . . [but] it is hard to fathom that the [L]egislature intended for [the same conduct against the same complaining witness and time period][9] to result in multiple . . . convictions.

252 S.W.3d at 372 (evaluating whether intoxication manslaughter and felony murder constitute the "same offense" for purposes of a double jeopardy claim). When the two charges stem from the impermissible overlap of the same underlying instances of sexual conduct against the same victim during the same time period, the record shows a double jeopardy violation. *Price*, 434 S.W.3d at 611; *Holton v. State*, 487 S.W.3d 600, 613 (Tex. App.—El Paso 2015, no pet.) ("[T]he Court made clear that the prohibition against multiple convictions, as set forth in the statute itself, only applied to the same 'conduct against the same child during the same period of time.'" (quoting *Price*, 434 S.W.3d at 606)); *see also Rachal v. State*, No. 02-18-00500-CR, 2019 WL 5996985, at *6 (Tex. App.—Fort Worth

[9] We observe that had the acts evidencing the prohibited sexual conduct offense occurred prior to or after the dates charged for the continuous sexual abuse offense (i.e., after the child turned fourteen), we may have concluded differently.

Nov. 14, 2019, pet. ref'd) (mem. op., not designated for publication) (holding double jeopardy violation where same conduct, victim, and time period are charged).

We sustain Ramos's second issue,[10] and vacate the prohibited sexual conduct conviction. *See Shelby*, 448 S.W.3d at 440 (providing that when an individual is convicted of two offenses that are the "same" for double jeopardy purposes, the appropriate remedy is to affirm the conviction for the "most serious" offense and to vacate the other conviction); *Bigon*, 252 S.W.3d at 372–73 (citing *Ex parte Cavazos*, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006)).

IV. CONCLUSION

We affirm Ramos's judgment of conviction for continuous sexual abuse of a child but modify the judgment to vacate the prohibited sexual conduct conviction and affirm as modified.

GREGORY T. PERKES
Justice

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

Delivered and filed the
23rd day of July, 2020.

[10] Because we sustain Ramos's second issue, we do not address his third issue of whether there was legally sufficiently evidence to convict him of prohibited sexual conduct.