NUMBER 13-19-00125-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

SAMUEL TREVINO LISCANO, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 398th District Court
of Hidalgo County, Texas.

MEMORANDUM OPINION

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

Appellant Samuel Trevino Liscano appeals his conviction of aggravated sexual assault of a child under six. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i), (f)(1) (enhancing minimum punishment to twenty-five years' confinement if the child is under the age of six when the offense is committed). Liscano was sentenced to life imprisonment. *See id*. § 12.42(c)(2) (enhancing punishment range to life imprisonment if

the defendant is convicted of an offense pursuant, to among others, § 22.021 and has previously been convicted under § 20A.02(a)(7) or (8), § 21.02, 21.11, § 22.011, § 22.021, or § 25.02). By three issues, Liscano contends that the evidence is insufficient and the "presence of third parties in the jury room during the deliberations violated" his right to a fair and impartial jury.[1] We affirm as modified.

I. Sufficiency of the Evidence

A. Standard or Review and Applicable Law

In determining the sufficiency of the evidence, we consider all the evidence in the light most favorable to the verdict and determine whether a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt based on the evidence and reasonable inferences from that evidence. *Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014); *Brooks v. State*, 323 S.W.3d 893, 898–99 (Tex. Crim. App. 2010) (plurality op.). The fact finder is the exclusive judge of the facts, the credibility of witnesses, and the weight to be given their testimony. *Brooks*, 323 S.W.3d at 899. We resolve any evidentiary inconsistencies in favor of the judgment. *Id.*

Sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Villarreal v. State*, 286 S.W.3d 321, 327 (Tex. Crim. App. 2009); *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). "Such a

[1] By his second issue, Liscano states that the evidence is against the great weight and preponderance of the evidence. We construe this claim as a challenge to the factual sufficiency of the evidence. *See Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009) ("Evidence that is legally sufficient . . . can be deemed factually insufficient in two ways: (1) the evidence supporting the conviction is 'too weak' to support the factfinder's verdict, or (2) considering conflicting evidence, the factfinder's verdict is 'against the great weight and preponderance of the evidence.'"). However, under *Brooks* we no longer apply a separate factual sufficiency review. *Brooks v. State*, 323 S.W.3d 893, 898–99 (Tex. Crim. App. 2010) (plurality op.). We must apply the standard of review as set out in *Brooks*, and if the evidence is insufficient, we render an acquittal. *See id*. Thus, Liscano's factual sufficiency claim is no longer viable under *Brooks*. *See id*. Accordingly, we overrule his second issue.

charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Villarreal*, 286 S.W.3d at 327; *see Malik*, 953 S.W.2d at 240. As charged in this case, a person commits the offense of aggravated sexual assault of a child under six if that person either intentionally or knowingly penetrates the anus of a child under six by any means. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i), (f)(1).

B. The Evidence

Aida Tovar testified that she took care of E.J.E., her friend E.C.'s eight-month-old child, on Good Friday, April 14, 2017. Tovar stated that Liscano, her boyfriend, was present when she took care of E.J.E. Tovar explained the events of that day as follows:

> I know that [E.C.] dropped off the kids because they didn't have daycare, and so I was watching them, and I had to be at work at 2:00, so I know I jumped in the shower before 1:00, and I—I put [E.J.E.] down on a blanket in the floor in the living room.
>
> I was there with the kids watching them, and—I don't know. I don't know the rest of the day. But I know we were taking care of them, and my [thirteen-year-old] son, [S.H.], was playing with [E.C.'s] little boy.
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> Later on, I saw the time, and I had to get ready for work, so I put a blanket in the living room so [E.J.E.] could sit there and just play there by herself, and [S.H.] was running around with [E.J.E.'s brother], and I told [S.H.] to keep an eye on her, and [Liscano] was in the—in the bedroom . . . with the door open.
>
> I was getting out of the shower and I hear [E.J.E.] scream, like a loud scream, and she starts crying. And I hurried and rushed and changed clothes, and I got out of there, and I saw [Liscano] with the baby. He was carrying her [in the living room].

Tovar stated that she questioned Liscano about what had happened to E.J.E. because she did not usually cry, and Liscano told Tovar that E.J.E. had fallen and hit her forehead.

Tovar testified that because “the floor was a wooden floor and because she’s light-complected . . . .[Tovar] was assuming maybe she would have, like, a little red mark or something on her forehead, but she didn’t have anything.” Tovar said that she asked S.H. if he saw E.J.E. fall, and he told her no. The State asked if Tovar thought Liscano’s statement that E.J.E. fell and hit her head was “a little odd.” Tovar replied that she did without further explanation. Shortly thereafter, E.J.E.’s father picked her up.

According to Tovar, on Easter Sunday, E.C. called her asking for Liscano’s last name and then later she called again informing her that Liscano was a sex offender. Tovar said she was “in shock,” and Liscano had never told her about his sex offender status.

S.H., who was fifteen-years old at the time of trial, testified that his mother, Tovar, took care of E.J.E. when E.C. was working. S.H. recalled that on one occasion, his mother was taking a shower, and he saw Liscano in the bedroom alone with E.J.E. in the bed. S.H. stated that he was searching for his mother, so he opened the door to the bedroom, and Liscano told him that Tovar was in the shower. S.H. stated that he could not see much in the bedroom because the lights were off, but he “saw [E.J.E.] in the bed.” S.H. did not see Liscano doing anything to E.J.E.; he only saw that Liscano was alone with her. S.H. clarified that the bedroom where he saw Liscano with E.J.E. was not located next to the bathroom where his mother was showering.

E.C. testified that on Good Friday, April 14, 2017, she left E.J.E. with Tovar so that E.C. could go to work. E.C. stated that her husband picked up E.J.E. from Tovar’s home, and he called E.C. informing her that E.J.E. had diarrhea, and “it didn’t look normal.” According to E.C., she took E.J.E. to the emergency room because of bloody diarrhea. The emergency room doctor said that E.J.E. was constipated and prescribed

suppositories. E.C. said that she did not fill the prescription for the suppositories because E.J.E. had diarrhea, and she "couldn't put that on her." E.C. testified that she was very concerned that there was blood in E.J.E.'s stool, and she was "fussy" and "not herself."

E.C. testified that on April 16, 2017, Easter Sunday, she took E.J.E. to a party in Los Fresnos, Texas. E.C. explained "[E.J.E.] was fussy, and she started with diarrhea more, and with more blood, so my husband was more concerned about it, and he questioned me, like, let's just take her to the doctor—to the hospital but to the one in Harlingen[, Texas]." According to E.C., she and her husband suddenly became suspicious about Liscano; E.C. looked Liscano up on the Internet and discovered that he had previously been convicted of indecency with a child. E.C. said that she informed the hospital staff of Liscano's past and that he had taken care of E.J.E. A nurse then performed a sexual assault examination on E.J.E. E.C. testified that E.C. observed "little tears" on E.J.E.'s anus. E.C. filed a police report.

On cross-examination by Liscano, which Liscano points out in his brief, E.C. took E.J.E. to the doctor for a variety of ailments prior to this incident. E.C. agreed that she took E.J.E. to the doctor: (1) five days after her birth, and the doctor prescribed suppositories because E.J.E. was constipated; (2) one month later, on September 20, 2016, E.J.E. was diagnosed with vomiting and congestion, and E.C. gave E.J.E. the prescribed medications Zyrtec, Zofran, and Tylenol; (3) on September 21, 2016 for congestion; (4) on November 1, 2016, due to a cold and head lice; (5) in December 2016, due to cough and bronchitis, and E.C. gave E.J.E. Albuterol; (6) on December 29th, 2016, for cough, vomiting, congestion, and bronchitis, and she gave E.J.E. Amoxicillin; (7) on January 13, 2017, for cough, conjunctivitis and vaccines, and she gave E.J.E. Vigamox

and Amoxicillin; (8) twelve days later, for the same reasons; (9) on February 5, 2017, for a cold, cough and fever; (10) on March 10, 2017 for ear pain and vomiting, and E.C. gave her Amoxicillin and Zyrtec; (11) on March 23, 2017, for cough, fever, congestion, sore throat, constipation, bronchial pneumonia, tachycardia, and ear pain, and E.C. gave E.J.E. Albuterol; (12) on April 8, 2017, for congestion, diarrhea and ear pain; and (13) on April 12 with cough, congestion, runny nose, conjunctivitis to the eyes, diarrhea, and tugging on the ears.

E.C. testified that on April 13, 2017, the day before the alleged incident, she took E.J.E. to the emergency room at McAllen Medical Center in Weslaco, Texas for fever, diarrhea and a lot of ear pain; E.J.E. was diagnosed with an ear infection, and E.C. gave her the prescribed antibiotic Cefdinir.

E.C. agreed that E.J.E. was being fed Similac formula fortified with iron. Liscano's trial counsel informed E.C. that Cefdinir combined with formula fortified with iron can cause a red maroon discoloration of the feces. E.C. was not aware of this side effect. E.C. testified that she did not inform anyone at the hospital in Harlingen that E.J.E. was taking Cefdinir. E.C. acknowledged that the nurse that performed the sexual assault examination of E.J.E. was not aware of the medications E.J.E. was taking. E.C. disagreed with Liscano's trial counsel's claim that perhaps she had not properly cleaned E.J.E.'s butt causing irritation. E.C. stated that she had seven children and that it was impossible that she improperly cleaned E.J.E.'s butt or caused any rash or irritation by not properly cleaning her.

Elizabeth Marie Blancher, a sexual assault nurse examiner, testified that on April 16, 2017, she performed a sexual assault examination of E.J.E., who was eight months

old. Blancher stated that the hospital records show that E.C. took E.J.E. to the emergency room due to blood in her stool and that Blancher examined E.J.E. after E.C. told a nurse practitioner that E.J.E. had been with Liscano, a registered sex offender. Blancher testified that she noted reddish-brown stains on E.J.E.'s diaper. Blancher stated she performed the examination of E.J.E. while E.J.E. lay on her back. Blancher did not see anything abnormal on E.J.E.'s vagina. However, Blancher noted abnormalities on E.J.E.'s anus, which she described as follows:

> So around here—so around this part of the anus there was a one and a half to four-centimeter area of purple bruising. And that was noted from 10:00 on the clock to 4:00.
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> . . . .
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> And then down here—we have a little abrasion down here, we have one over here and two abrasions up this way. So here there was a one-half by one-centimeter right abrasion noted to the anus from 5:00 to 6:00. And then over here we had a half-centimeter bleeding tear noted to the anus at 7:00. And up here, I had two one-quarter-centimeter linear abrasions to the east at 11:00.
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> . . . .

Blancher explained that due to a problem with her equipment, after returning E.J.E. to E.C., Blancher had to take E.J.E. back to the examination room to take pictures of the injuries on her anus. However, according to Blancher, this time, she examined E.J.E. while the child lay on her stomach because E.J.E. was asleep, and Blancher did not want to disturb her; therefore, according to Blancher, her descriptions of E.J.E.'s anus using the hours as seen on a clock were inverted as she forgot to account for E.J.E.'s new position. Blancher said

> She was sound asleep, and when I imposed these, I forgot to turn the clock, because this is always going to be 12. So if we turn her upside down, 12:00 is now here, 6:00 is now here, and then this would be 9:00, and this would

> be 3:00. So instead of being on her back when I went back in to see her, she was laying on her tummy, and she was sleeping, so we just undid the diaper and took pictures with the camera, the digital camera, but I did not invert the clock when I drew the injuries onto the diagram.

Regarding E.J.E.'s anus, Blancher said, "The findings are abnormal. Normal would be no injury, no redness, to discoloration of any kind." Blancher stated,

> So right along here you see the discoloration, dark purplish color there.
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> . . . .
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> The [abrasion] to the anus at 6:00 is right about here, right there. And at 7:00 is right past there. These pictures are on here. And the redness was noted circumferentially that the—the baby does have redness around the anal area.
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> . . . .
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> And then over at 11:00, it's very hard to see it on this diagram, but there is an abrasion that was noted with a colposcope at 11:00.

Blancher opined that the location of the bruising on E.J.E.'s anus "could be something that is consistent with penetration"; however, Blancher could not "say 100 percent that that's what that's from." As to the abrasions, Blancher said, "[I]t would be an injury that could be consistent with penetration." Blancher stated that she observed blood "coming from the one little tear that was" on E.J.E.'s anus.

Blancher explained that a bruise is "usually broken blood vessels underneath the skin that causes a discoloration," and it is not normal for an eight-month old child to have bruises on her anus. Blancher did not believe that E.J.E. could have received the bruises to her anus by falling on her butt stating, "No, because for one, babies wear diapers, which is a protective area, and, also, too, the anal area is tucked up, so, if anything, you would tend to see bruising more on the buttocks . . . than you would actually see it, like, in the anal area. That's a very unusual place to have a bruise." Blancher testified that

there was no medication that could have caused bruising to E.J.E.'s anus and that neither diarrhea nor constipation could cause bruising to the anus. Blancher said, "The redness can sometimes be caused like a generalized redness because the diarrhea can kind of be acidic to the skin, but bruising, no."

Blancher disagreed that the bruises to E.J.E.'s anus could be a birthmark referred to as Mongolian spots. Blancher explained

> Mongolian spots are a type of birth mark that probably approximately 40 to 60 percent of Hispanic children are born with. They are usually, like, a slate gray color, and they are on the buttocks, the lower part of the back, up the back, sometimes the arms. I've seen kids have spots all over their backs. And they usually fade by about five to six years of life.

Blancher had "never" seen Mongolian spots on the anus.

The State asked Blancher to review the medications that E.J.E. had been taking and asked if each medication could cause bruising. Blancher replied, "Well, if you were putting a suppository in very, very forcefully, you may cause some bruising." However, Blancher acknowledged that E.C. had not given suppositories to E.J.E.

Blancher agreed that some patients have reddish-brown bowel movements when the patient combines iron with Cefdinir, which E.J.E. had been taking prior to this incident. Blancher explained that a non-medical professional could mistakenly conclude that the reddish-brown stool contained blood when this occurs. Blancher gave E.J.E. "prophylactic antibiotics . . . just in case to cover any chance of any sexually transmitted infections."

On cross-examination by Liscano, Blancher acknowledged that a diagnostic test performed at the hospital came back negative for blood in E.J.E.'s stool. Blancher denied that the four tears she observed were anal fissures, which she described as "usually deeper . . . more pronounced" than the tears she observed on E.J.E.'s anus. Blancher

explained that "[t]he abrasions that [she] saw were very—they could be, but they weren't even deep enough to be a crack. They are more like a little scratch, like an abrasion that way, not like a separation, a deep crevice or anything in the skin." According to Blancher, the tears she observed could not have been the source of the amount of bleeding that E.C. described.

Blancher disagreed with Liscano that the bruise on E.J.E.'s anus could be venous pooling of blood. Blancher explained "[v]enous pooling or venous congestion is when a part of the body that's dependent—that's laying down or whatever, the blood pools into that area."

Blancher testified that the tests for sexually transmitted diseases were all negative. Blancher agreed that there was a possibility that there would be "issues" for a child ill with continuous constipation, diarrhea and antibiotic use. However, Blancher did not elaborate regarding the possible issues. Liscano asked, "So is there a possibility that your findings, yes, in one instance, could be sexual assault, but in another instance could be the product or byproduct of the illnesses that this child suffered from?" Blancher replied, "That is a possibility, yes." However, on redirect examination by the State, Blancher clarified that the bruises she observed could not have been caused by any of the medications E.J.E. took.

Felix Salinas, a criminal investigator with the Weslaco Police Department, testified that he had been assigned to this case when E.C. filed a report with the department taken by Officer Miguel Martinez at a hospital in Harlingen. Investigator Salinas stated that she spoke with E.J.E.'s mother, father, and Tovar. He said that E.J.E.'s mother and father were very upset. Investigator Salinas acknowledged that he did not go to Tovar's home

to investigate the allegations against Liscano, and he did not collect any evidence from the home. Investigator Salinas explained his failure to collect evidence at the scene of the alleged offense as follows: "In this particular case, I just didn't go back and recover it. I know the incident allegedly occurred two days before, so I just didn't get to recover any—any evidence at the scene." On cross-examination, Liscano asked, "Why didn't you collect any of the clothes or sheets, blankets or anything like that than what you wrote in your report?" Investigator Salinas replied, "Made a mistake."

Maria Dolores Salinas, a lieutenant with the Weslaco Police Department, testified that she took Liscano's statement regarding this case. According to Lieutenant Salinas, Liscano stated that he helped care for E.J.E. and that on Good Friday, "he had put some pillows around the baby to—she would not fall." Liscano told Lieutenant Salinas that "at one point . . . he heard the baby cry and that he went to check on the baby and that the baby had—had fallen." According to Lieutenant Salinas, Liscano "didn't remember seeing any—any redness on the child where he had—he had heard or she had gotten hurt, and then . . . that's when he picked her up." Lieutenant Salinas testified that "Liscano was very defensive, at one point even upset. He stated that he would never hurt a child. He kept stating that he was willing to give a DNA sample." Lieutenant Salinas told Liscano that she would get an "ID tech to take care of that." Lieutenant Salinas said,

> Well, I believe he was being forward with the willingness to come forward and say something, as far as the DNA. In my experience, people who are accused of sexual assault are not very willing to provide DNA. So at the time, due to what the officer had told me, with the baby's injuries, I felt that he may have used something else other than his private organ to sexually assault the child.

The trial court admitted Liscano's statement into evidence. It states, in pertinent part, the following:

> On Friday morning [Tovar's] friend [E.C.] dropped off the kids at our house so we could babysit them. We were all in the living room. [Tovar] then got up to get in the shower at around 12:00. I stayed in the living room with [S.H.] ([Tovar's] 13 year old son) [E.C.'s] son, (2 Years old) and the 8 month old little girl. The little girl was surrounded by pillows. I was sitting in the couch watching TV when I heard her cry. I then picked her up and I patted her on her back. [Tovar] came out of the shower and asked me what had happened. I told [Tovar] that the little girl had hit herself on the forehead on the floor when she was moving around. Later on that day, I would say about 1:00pm [E.C.'s] husband picked up the kids. I want to say that I have not done anything to that little girl. Yes. I have baby sat for her but that is all. I have never sexually touched her. I have touched her by carrying her and burping her.

Alejandro Vasquez, a forensic scientist with the Texas Department of Public Safety Crime Lab, testified that he performed tests of the swabs taken of E.J.E. Vasquez found that the swabs taken of E.J.E.'s anus contained blood. Vasquez said,

> The swabs were light red in color, light red brown in color, so in addition to the AP testing, I did another test that would detect for the presence of blood. And those results were positive. The . . . tetramethylbenzidine, or TMB for short, is a test for blood, which would also be indicated by a color change, so a blue-green color change would be an indication of a positive reaction.

Vasquez explained that "[i]n this case there was positive reaction for blood." Vasquez did not find any semen or DNA on the samples he tested.

C. Discussion

The bulk of Liscano's complaints on appeal refer to the evidence that he alleges contradicted the jury's finding of guilt. Liscano states that the jury was not allowed to disregard the evidence that E.J.E. had been constipated, had diarrhea, and was taking medication for several ailments. Liscano also argues that the jury merely speculated that he sexually abused E.J.E. based solely on his prior convictions of indecency with a child. Liscano states, that "the jury speculated that the baby was penetrated, by an unknown object, as opposed to having bloody stools and abrasions, due to the chronic constipation

and diarrhea.” Liscano further complains that Blancher never confirmed that the bruising to E.J.E.’s anus was not venous pooling, and neither of the parents testified that they saw any bruising on her anus.

Liscano states:

> It is undisputed that after the alleged assault: (1) the mother failed to disclose to treating physicians and the SANE nurse the prescriptions the child was taking; (2) the mother failed to disclose to treating physicians and the SANE nurse that the mom was injecting the child with an antibiotic from Mexico, Linconcin[2]; (3) the mother failed to disclose to the SANE nurse the child had been on Cefdinir Omnicef for 4 days; (5) the child had been seen by Emergency Room physicians on three prior occasions for constipation.
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> . . . .
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> It was reasonable to infer that the baby had a reaction to the Cefdinir, as well as the other antibiotics she was being administered, along with the ibuprophen [sic]. Due to bouts of diarrhea, the excessive wiping could have caused the small abrasions, and draw appearance of the child’s anus. The appearance of the bruising could have been from venous pooling or from the digital camera angle. It was not reasonable to infer that the injuries to the baby, were caused by Appellant sexually assaulting her with an unknown object, without speculating.

However, as explained in *Brooks*, under the *Jackson* standard, we must defer to the jury’s weight and credibility determinations, and for that reason, we view the evidence in the light most favorable to the verdict rather than in a neutral light. 323 S.W.3d at 899–900 (explaining that “the difference between a factual-sufficiency standard and a legal-sufficiency standard is that the reviewing court is required to defer to the jury’s credibility and weight determinations (i.e., it must view the evidence in the light most favorable to the verdict) under a legal-sufficiency standard while it is not required to defer to a jury’s credibility and weight determinations (i.e., it must view the evidence in a ‘neutral light’)

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[2] During her testimony, E.C. acknowledged that she injected E.J.E. with this medication from Mexico.

under a factual-sufficiency standard"). Moreover, we must resolve any inconsistencies in the evidence in favor of the verdict. *Martines v. State*, 371 S.W.3d 232, 239–40 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (citing *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000)). The jury was not obligated to believe Liscano's theory that E.J.E.'s injuries to her anus were caused by the medication she was taking or that the reddish-brown color of her stool was caused by a reaction to her medication and diet, especially, given that lab results showed that there was blood in E.J.E.'s stool. Instead, the jury was free to assign weight and credibility to other pieces of evidence including Blancher's testimony that the bruises and tears to E.J.E.'s anus could not have been caused by simply taking medication. In addition, the jury could have believed Liscano was alone in the bedroom with E.J.E. on the bed in the dark when she screamed in pain, that E.J.E. began bleeding from her anus immediately after this incident, and that an unknown object caused E.J.E. to have abrasions and bruises to her anus. As to whether Blancher verified that the bruises to E.J.E.'s anus were not venous pooling, she testified that she examined E.J.E. in two positions, and the bruises were visible in both positions, and Blancher did not believe that the bruises were caused by venous pooling. Finally, the jury could have reasonably found that Liscano lied to Lieutenant Salinas about what had occurred on the day that E.J.E. screamed in pain because he failed to mention that he was alone with E.J.E. and E.J.E. was in bed when Tovar was taking a shower. Instead, he stated that he was with E.J.E. in the living room when she fell and hit her head.

Having reviewed all of the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt based on the evidence and reasonable inferences from that

evidence. *Whatley*, 445 S.W.3d at 166; *Brooks*, 323 S.W.3d at 898–99. We overrule Liscano's first issue.

II. JURY DELIBERATIONS

By his third issue, Liscano contends that the presence of third parties in the jury room during deliberations violated his right to a fair and impartial jury because the harm it caused was incurable. Specifically, Liscano complains that the trial court allowed the alternate jurors to be present in the jury room during jury during deliberations.

A. Pertinent Facts

The trial court provided the charge to the jury and stated that it would provide the jury with the exhibits. The trial court asked if there were any questions, and one of the prosecutors said, "The alternates as well, Judge." The trial court replied as follows:

> This is the question. As to the alternates, Article 5, Section 13 of the Constitution says they are allowed to be in deliberations, but not to vote, to be in there, but it is also a—some case law that says that no one shall be permitted to be in the jury while they are deliberating. So in the past they have agreed when they're in there they just don't say a word just in case a juror has to leave for whatever excuse. Do you have any recommendations or agreements as to the two alternates?

Liscano stated, "Judge, I don't want the alternates in there," and "They're deliberating already, so they can be removed." Liscano did not specifically object pursuant to any rule or statute and did not state any basis for requesting that the alternate jurors not be allowed in the jury room during deliberations. The trial court responded,

> I'm not going to do that. If something happens while they are deliberating—they can remain outside. It is what it is, but there is two conflicting laws. One says there is no problems and one outside, also, and that's why there is no agreement, so the jurors will remain outside the presence of the jurors deliberating. We're off the record, then.

B. Discussion

On appeal, Liscano complains that he was entitled to a jury of twelve persons pursuant to "Article V, Section 13, of the Texas Constitution and article 33.01 of the Texas Code of Criminal Procedure," and because the trial court allowed the alternate jurors to be in the jury room during deliberations, harm is presumed.

Article V, Section 13 of the Texas Constitution "has plainly required that 'petit juries in the District Court shall be composed of twelve members" and a "[t]rial by jury in a felony case in Texas has long been thought to mean a verdict returned by exactly twelve jurors—no more and (unless up to three jurors should die or become disabled, subject to statutory regulation) no fewer." *Trinidad v. State*, 312 S.W.3d 23, 26–27 (Tex. Crim. App. 2010). Article 33.01 of the Texas Code of Criminal Procedure sets out how many alternate jurors are allowed and the procedure that the trial court should follow when it must replace a regular juror with an alternate juror. TEX. CODE CRIM. PROC. ANN. art. 33.01.

It is not clear from the trial court's comments that the alternate jurors were actually allowed in the jury room during deliberations because the trial court said, "so the jurors will remain outside the presence of the jurors deliberating." Nonetheless, the Texas Court of Criminal Appeals stated in *Trinidad*, that "[a]s long as only the twelve regular jurors voted on the verdicts that the appellant[] received, it cannot be said that [he was] judged by a jury of more than the constitutionally requisite number" 312 S.W.3d at 28. Even if "the alternate jurors were present in the jury rooms during, and may even have participated in all but the voting, does not mean that the jury was 'composed' of more than twelve members for purposes of Article V, Section 13." *Id*. Here, there is nothing in the record showing that the alternate jurors voted on the verdict or even participated in deliberations; therefore, even assuming without deciding that the record shows that the

alternate jurors were in the jury room during deliberations, Liscano's argument that the jury was composed of more than twelve jurors in contravention of Article V, Section 13 of the Texas Constitution is without merit. *See id*. To the extent that Liscano argues that he is entitled to relief pursuant to article 33.01, he has not provided any substantive argument with legal analysis stating how 33.01 applies to the facts of this case or supporting such a conclusion. *See* TEX. R. APP. P. 38.1(i). We overrule Liscano's third issue.

III. JUDGMENT

The State brings to our attention that the judgment mistakenly recites "that no finding was made as to the enhancement paragraph associated with the count of conviction, in which it was alleged that Appellant had a prior final conviction for a sexual offense."

"A trial court's pronouncement of sentence is oral, while the judgment, including the sentence assessed, is merely the written declaration and embodiment of that oral pronouncement." *Ex parte Madding*, 70 S.W.3d 131, 135 (Tex. Crim. App. 2002). Moreover, "[w]hen the oral pronouncement of sentence and the written judgment vary, the oral pronouncement controls." *Id*. Once the defendant "leaves the courtroom, the defendant begins serving the sentence imposed. Thus, 'it is the pronouncement of sentence that is the appealable event, and the written sentence or order simply memorializes it and should comport therewith.'" *Id*. (quoting *Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998)). When the oral pronouncement and the written judgment conflict, the solution "is to reform the written judgment to conform to the sentence that was orally pronounced." *Thompson v. State*, 108 S.W.3d 287, 290 (Tex. Crim. App. 2003).

Here, the record shows that at the sentencing hearing, the trial court orally pronounced that it was enhancing Liscano's sentence from a minimum of twenty-five years to life to a minimum of life imprisonment. Specifically, the trial court stated on the record the following:

> All right, sir. Mr. Liscano, in this case, CR-4636-17-I, a jury of your peers have found you guilty beyond a reasonable doubt, sir. And based on that, you were found guilty on Count 1 of super aggravated sexual assault of a child. That is a first-degree felony and a minimum of 25 years to life and/or $10,000, but it's been enhanced where it's automatic life in prison.
>
> . . . .
>
> So at this time a jury of your peers have found you guilty beyond a reasonable doubt. I have no choice but to sentence you. It is the order of the judgment of the Court that you be taken by the sheriff of this county and you be transferred to an authorized receiving agent of the Texas Department of Criminal Justice where you shall be confined for a period of no less than life in prison.
>
> . . . .
>
> All right. Sentence will commence this day, and you will be given credit, but this time you're given life, for any time spent in jail.

Nonetheless, despite the trial court's oral pronouncement that it had enhanced Liscano's sentence from a minimum of twenty-five years to life imprisonment to a minimum of life imprisonment, the trial court's written judgment states, "the Court made a finding of NONE on the enhancement paragraph(s), if any, and assessed punishment at LIFE in the INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE and a Fine of NONE."

The Texas Rules of Appellate Procedure allow this Court to modify judgments sua sponte to correct typographical errors and make the record speak the truth. *See* TEX. R. APP. P. 43.2(b); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *Gray v.*

State, 628 S.W.2d 228, 233 (Tex. App.—Corpus Christi–Edinburg 1982, pet. ref'd). Here, the record clearly shows that the trial court enhanced Liscano's sentence, and it stated on the record that it found the prior convictions to be true. Under these circumstances, we conclude that the trial court impliedly found the enhancement paragraphs to be true. *See Torres v. State*, 391 S.W.3d 179, 184 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (explaining that when the record establishes the truth of an allegation, the trial court has made an implied finding of "true" to the enhancement allegation); *Garner v. State*, 858 S.W.2d 656, 660 (Tex. App.—Fort Worth 1993, pet. ref'd) ("While it is the better practice for trial courts to orally read the enhancement paragraphs and find them to be true or false on the record, we find that the trial court did not err by failing to do so since the trial court assessed punishment instead of a jury."); *see also Dawkins v. State*, No. 05-16-00101-CR, 2017 WL 3301784, at *2 (Tex. App.—Dallas Aug. 3, 2017, no pet.) (mem. op., not designated for publication) ("A trial court is not required to make an oral pronouncement of its findings on enhancements when it assesses punishment." (citing *Meineke v. State*, 171 S.W.3d 551, 557 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd))); *Harris v. State*, No. 05-02-01728-CR, 2005 WL 639388, at *1 (Tex. App.—Dallas Mar. 21, 2005, pet. ref'd) (mem. op., not designated for publication) (stating that "the trial court did not err by failing to orally read the enhancement paragraphs and find them to be true or false on the record"). Accordingly, we modify the judgment to reflect that the trial court found the enhancement paragraphs "true" and enhanced his sentence to the minimum of life imprisonment. *See* TEX. PENAL CODE ANN. § 12.42(c)(2).

IV. CONCLUSION

We affirm the trial court's judgment as modified.

JAIME TIJERINA,
Justice

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

Delivered and filed the
18th day of June, 2020.