No. 14-24-00355-CR

In The Court of Appeals
For the 14th District of Texas

Juan Espinoza,
Appellant

v.

The State of Texas,
Appellee

On Appeal from Cause Number 1720412
From the 174th District Court of Harris County, Texas

Brief for Appellant

ORAL ARGUMENT NOT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument but would welcome the opportunity should the Court determine argument would be helpful to its deliberations and decision.

STATEMENT OF THE CASE

On May 13, 2024, a jury found Appellant guilty of continuous sexual abuse of a child. On the same day, the court assessed punishment at 35 years TDCJ. Notice of Appeal was filed on May 13, 2024.

ISSUES PRESENTED

1. Where the State failed to disclose essential facts of Gustavo Garcia's outcry testimony and insisted that their disclosure was complete, did the court err in later admitting his testimony when it became clear that his testimony was much more detailed than the State's required notice?

2. Where Gustavo Garcia testified about his sister's writings in a journal as an "excited utterance," but the State had not presented any evidence of a startling or exciting event, did the court err in admitting the statement as an excited utterance?

3. Where the Court had not heard evidence to prove that Veronica Garcia was the first adult outcry witness rather than Gustavo Garcia, did the court err in admitting her hearsay testimony by designating her as an outcry witness?

4. Where the jury informed the court that they were having a dispute about Exhibit 23, did the court err in refusing to provide a readback of relevant testimony?

5. Where the court was aware that Spanish-speaking jurors could self-translate a Spanish-language exhibit in evidence and believed that they had already done so, did the court err in failing to instruct the jurors against the misconduct of juror self-translation?

STATEMENT OF FACTS

As is often the case with continuous sexual abuse cases, this was a case involving a delayed outcry. Without conclusive physical or forensic corroboration, the testimony presented to the jury revolved around the credibility of Complainant's[1] allegations.

The State introduced the testimony of five adults other than the Complainant to contextualize and discuss her out-of-court statements about abuse before ultimately introducing Complainant's own testimony (4 R.R. 91). These witnesses were Complainant's mother (3 R.R. 94)[2], a forensic interviewer (3 R.R. 189), Complainant's therapist (3 R.R. 210), a pediatrician (4 R.R. 8), and Complainant's brother (4 R.R. 52). A law enforcement officer, Jason Garcia, also testified about the way he conducted the investigation of these allegations (3 R.R. 60-93).

In all, the core of each witness's testimony was about what Complainant herself said about the allegations, and what Mr. Espinoza said when confronted with general statements like "[Complainant] told me what's going on" (3 R.R. 136),

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[1] Though she was an adult at the time of trial, to maintain the privacy of the child complainant in this case, this brief will always refer to her in an anonymized manner as Complainant.

[2] Because there are so many witnesses named Garcia and to avoid confusion, this brief will refer to Complainant's mother with that label, as Veronica Garcia, or as Ms. Garcia.

"[Complainant] told me everything. I know everything" (4 R.R. 71), and "I thought that you cared for us, that we can be safe with you, that you will protect us, but I was so wrong. . .Why do you pay me like this?" (3 R.R. 155).

Complainant's allegations

Complainant admitted that she and her brother had conflicts with their stepfather over the years. Around the time her allegations were reported to her family and law enforcement, she was in conflict with Mr. Espinoza about a job he didn't approve of. (4 R.R. 140-141). She stated that her brother Gustavo[3] Garcia had "a grudge" (4 R.R. 96).

Multiple witnesses testified that Complainant was a fan of crime shows and learned about the concepts of rape and molestation at a young age around 5th grade from that media. (3 R.R. 174; 3 R.R. 207-208; 4 R.R. 131-132). Around the same time, 5th grade or 10 years old, Complainant claimed to other children that her stepfather was molesting her: her friend (3 R.R. 174; 4 R.R.101-102) and her brother (4 R.R. 57). Once Child Protective Services got involved,

[3] There are two Misters Garcia who testified in this trial, so to avoid confusion, this brief refers to Gustavo Garcia with his full name, as Gustavo, or as Complainant's brother.

Complainant said nothing happened and that it wasn't true (3 R.R. 174, 4 R.R. 102).

Years later, Complainant's brother Gustavo testified that she came to him again around her 15th birthday when he was "18 or 19" to tell him something that was upsetting her. (4 R.R. 61). Gustavo testified that Complainant could not get words out but gave him a journal full of "extensive, very graphic, just disgusting amount of literature" about how she was being molested (4 R.R. 68-69).

Complainant's mother testified that she sat down to talk to her daughter about a video she saw of her smoking and that Mr. Espinoza was originally tasked with addressing the smoking with her but had procrastinated (3 R.R. 134-37). Once Ms. Garcia asked Complainant about the video, rather than respond to the smoking allegations, Complainant began to cry and told her that her stepfather had been "bothering me" per the court interpreter (3 R.R. 140), which Ms. Garcia suggested could also mean "It could be that someone is like overwhelming you, putting pressure on you, or the sexual abuse" (Id.). Then she testified that Complainant indicated to her breasts, vaginal area, and buttocks (3 R.R. 141, 145). This conversation occurred in July 2019 (3 R.R. 147).

After making no reports for several months, Complainant's mother went on her own to speak to police on December 19, 2019 (3 R.R. 86). Shortly

thereafter, Complainant was forensically interviewed by the Children's assessment center (3 R.R. 189). The interviewer recounted that Complainant alleged that her stepfather made her touch his penis and masturbate him when she was 12 and 14 (3 R.R. 202, 206), that when she was 12 to 13 he touched inside her vagina with his fingers, and once attempted to put his penis in her vagina (3 R.R. 204). She testified that Complainant told her the abuse happened "either in her room or in his room," and that overall, the abuse ranged from when she was 7 years old until she was about 15 (3 R.R. 206).

Before trial, complainant also spoke to a therapist Merdith Roach (3 R.R. 209) and to a pediatrician Dr Dhvani Shanghvi (4 R.R. 8), and reported anxiety, emotional problems and sleep disturbances. Complainant recounted details of her allegations to each; Dr. Shanghvi and Merdith Roach each testified about those out-of-court statements at trial (Merdith Roach: 3 R.R. 216, 223-24; Dr. Shanghvi: 4 R.R. 27, 30-35).

Doctors Shanghvi and Crowson also offered expert testimony at trial, but their conclusions largely consisted of inconclusive information. Dr. Sanghvi testified about an abnormal hymenal transection (4 R.R. 35-36) that was "a finding of indeterminate significance in terms of sexual contact" (4 R.R. 38). Dr. Sanghvi also acknowledged that complainant had had consensual sexual contact with a boyfriend before the examination occurred (4 R.R. 25, 47). Dr.

Crowson testified generally about the dynamics of sexual abuse without having met Complainant or reviewed her records (4 R.R. 129, 169), but acknowledged that signs and signals of abuse are different in every person, and that some things that are signals of abuse can also come from other causes (4 R.R. 170-172).

Once Complainant testified at trial, she recounted the same allegations to the jury that she had disclosed to her brother, mother, forensic interviewer, therapist, and pediatrician (4 R.R. 103-107). She also testified that these incidents allegedly recurred almost every night (4 R.R. 108) in the same queen bed where her little sister and often the family's pet bird were sleeping (4 R.R. 128, 130, 139-140), and near her brother's room while he "a night owl…would be up all night" (3 R.R. 133).

Appellant's words

Juan Espinoza speaks Spanish and spoke primarily Spanish with his family in conversation and in text messages. (3 R.R. 140-145) His words became the subject of witnesses' testimony multiple times throughout trial.

Gustavo testified that he confronted Mr. Espinoza right after he reviewed Complainant's journal, told him he knew "everything," and threatened him (4 R.R. 70-71). When confronted about "everything" Mr. Espinoza made a general

apology which Gustavo translated as "he said sorry like once or twice in Spanish." (4 R.R. 72).

Complainant's mother testified that she too confronted Mr. Espinoza by saying "I spoke to Maureen and she told me what's going on. How do you dare?" When confronted with "what's going on," Ms. Garcia translated Juan's response from Spanish to English as: "I tried to stop it many times, but it just went out of my hands." (3 R.R. 146-47). She acknowledged that they did not discuss the details of what she was referring to by saying "what's going on" (Id.).

Ms. Garcia translated text messages of Juan's as well. Looking at State's Exhibit 23, the prosecutor initially suggested reading the texts in Spanish for the court interpreter to translate, then established that Ms. Garcia speaks Spanish and English and asked Ms. Garcia to translate it herself instead, asking her, "read it to me in English" (3 R.R. 155). After Ms. Garcia asked Mr. Espinoza why he hurt their family, she translated his response as "I can just ask you for forgiveness. I can't say anything else. And I want to die. But I also -- I have to do so many things for you and I'm already dead in life. I -- I don't have anything of what I want and this is just for me being an ass." (3 R.R. 156). When cross examined, Ms. Garcia could not say that Juan apologized specifically for molesting Complainant, or for a specific incident; she only testified that, that's

what it meant to her and that she believed "he knew" what they were talking about (3 R.R. 159).

The Complainant also translated her stepfather's words from Spanish to English when discussing a series of text messages about sending a photo of herself while away on a trip (4 R.R. 120-126).

Every word attributed to Juan Espinoza at trial was translated to the jury by someone who was testifying against him. The State also shared their own interpretation of the text message in Exhibit 23, drawing an objection for misstating the evidence (5 R.R. 36), then argued to the jury that Juan's translated apologies were admissions (5 R.R. 39).

When the jury asked about one of the apologies in a text message, (C.R. 270, 268; 5 R.R.43-44)[4] The court instructed the Jury only that there was no

[4] The Clerk's Record presents the juror's questions, at times un-numbered, in random order and interspersed with a page of the parties' "strike list"(C.R. 263-271). The Reporter's Record clarifies the order in which these questions were submitted to the court: At 5 R.R. 43 the court addressed the question "re transcript translation" at C.R. 270 first and provided a written response on the same form. The second question was not discussed on the record (5 R.R. 44) but by process of elimination, must have been the jury's question about Dr. Shanghvi's testimony at C.R. 266. The "response from the jurors' first note about exhibit 23" at C.R. 268 was discussed third (5 R.R. 44). The Jury's question about Gustavo grabbing Juan's shirt from C.R. 263 was discussed fourth, though largely not on the record (5 R.R. 51).

"official" translation of that message, (5 R.R. 51), and left the jury with only the Spanish language version of the text (8 R.R. 23).[5]

SUMMARY OF THE ARGUMENT

In this case, the trial testimony boiled down to two essential types of evidence: Complainant's outcry statements and Appellant's responses to being confronted. This case is about the words of two people: the Complainant, and the Appellant. Due process demands safeguards to ensure that each is presented and weighed properly to protect the rights of the accused. Nevertheless, errors in Mr. Espinoza's trial allowed the Complainant's words to be amplified and repeated through the testimony of five other adult witnesses recounting her out-of-court statements to the jury. Appellants' words, on the other hand, were allowed to be distorted by both biased witness translation and prohibited juror self-translation. These distortions transpired due to willful misrepresentations by the state and acts of omission by the trial court. Considering these distortions and misrepresentations, Mr. Espinoza cannot be understood to have received a fair trial.

Point of Error 1

[5] For ease of reference, this brief will refer to the State's Exhibits according to their number and according to the PDF page where they appear in the 8th Volume of the Reporters Record.

The State provided vague notice of Gustavo Garcia's potential outcry testimony. When defense counsel objected to the vague notice and asked for Gustavo's testimony to be excluded, the State preempted the court's ruling by doubling-down on their nondisclosure and insisting that their summary was complete, but that Gustavo was not a proper outcry witness after all. Gustavo did not testify at the outcry witness hearing. However, the State later attempted to enter Gustavo's testimony about Complainant's hearsay statement as an "excited utterance." The court admitted the testimony over defense objection and Gustavo's subsequent testimony was much more detailed than the state's notice or representations to the court. Mr. Espinoza was harmed by the admission of this non-disclosed outcry testimony.

Point of Error 2

The State offered Gustavo Garcia's testimony about Complainant's hearsay statements as an "excited utterance." The statements were contained in a journal written by complainant which she handed to Gustavo during an emotional conversation. The State did not establish that either the hearsay (Complainant's statements) or double hearsay (Complainant's journal) were uttered after any specific exciting or upsetting event, merely that Complainant was "upset" for the entirety of her conversation with Gustavo. The admission of this hearsay testimony introduced new and harmful facts into the record and harmed Mr. Espinoza.

Point of Error 3

The Court identified Veronica Garcia as an outcry witness. The Court did so after the State requested to withdraw Gustavo Garcia from consideration despite their notice that Gustavo heard an accusation of indecency by contact at least a month before Veronica. Mr. Espinoza was harmed by this hearsay testimony.

Point of Error 4

The jury submitted a series of two narrowing questions regarding the translation and context of Mr. Espinoza's Spanish-language text message in State's Exhibit 23. The second question stated directly that the jury was having a dispute about the evidence. The question could have been answered with a read back of testimony from Veronica Garcia. Nevertheless, the court did not allow them to hear direct or cross examination about the message in question, and gave the jury an answer nonresponsive to their question: "There is no official translation of Exhibit 23 offered or admitted into evidence."

Point of Error 5

In discussing questions from the Jury, the court recognized that a Spanish-speaking juror could and did translate Spanish-language evidence for herself and other jurors. Despite this recognition, and the fact that juror self-translation would be juror misconduct akin to introducing juror expertise or investigation into the deliberations, the court did not instruct the Spanish-

speaking jurors that it would be misconduct to provide their own translations in deliberation. This impacted Mr. Espinoza's ability to receive a fair trial.

ARGUMENT AND AUTHORITIES

POINT OF ERROR NUMBER ONE

WHEN THE STATE FAILED TO DISCLOSE THE ESSENTIAL FACTS OF GUSTAVO GARCIA'S POTENTIAL OUTCRY WITNESS STATEMENT, THEN ASSURED THE COURT THEIR DISCLOSURE WAS COMPLETE, MR. ESPINOZA WAS SUBJECTED TO SURPRISE OUTCRY TESTIMONY LATER IN TRIAL WHEN THE STATE OFFERED GUSTAVO'S EXPANDED TESTIMONY INCONSISTENT WITH THEIR NOTICE AND THEIR REPRESENTATIONS TO THE COURT.

A. It is error to admit evidence when the State willfully fails to disclose required information to the accused before trial.

Texas caselaw recognizes that it is error to admit evidence when the State willfully fails to disclose required information about that evidence when they were clearly required to do so, See *Oprean v. State*, 201 S.W. 3d 724 (Ct. Crim. App. 2006). When the court allows a witness to testify without adequate notice to the defendant, the standard of review is abuse of discretion. See *Martinez v. State*, 867 S.W.2d 30, 39 (Tex.Crim.App.1993); *Doherty v. State*, 892 S.W.2d 13, 18 (Tex.App.-Houston [1st Dist.] 1994, pet. ref'd).

In determining abuse of discretion for an undisclosed witness or undisclosed evidence, Courts first establish whether disclosure was clearly required. *See Oprean*, 201 S.W. 3d at 727. Next, courts search the record for

"bad faith in the prosecutor's failure to disclose the witness at an earlier time, and whether the defendant could reasonably anticipate that the witness would testify." *Doherty* 892 S.W. 2d at 18; *Nobles v. State*, 843 S.W.2d 503, 514-15 (Tex.Crim.App.1992). [6] In assessing a trial court's decision to admit or exclude evidence as to which the defense was not given required disclosure or inspection, a court of appeals considers whether the noncomplying party's violation was willful. *Francis v. State*, 428 S.W.3d 850, 854-55 (Tex. Crim. App. 2014) (citations omitted); *Oprean*, 201 S.W.3d at 726-27.

B. The State was required by Article 38.071 to disclose the essential facts of the testimony of their outcry witness

Here, the disclosure of the essential facts of Gustavo's expected testimony was required not by a defense request or Code of Criminal Procedure article 39.14, but by Texas Statute under Code of Criminal Procedure Article 38.072. Nondisclosure cases most often arise out of violations of 39.14 as most disclosure obligations arise in the ordinary

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[6] The Court of Criminal Appeals in its recent *Heath* opinion has done away with the search for bad faith and holds the State to an even higher standard when it comes to violations of Article 39.14, *Heath v. State*, 696 S.W.3d 677, 683 (Tex. Crim. App. 2024), as corrected (June 14, 2024), reh'g denied, No. PD-0156-22, 2024 WL 4281049 (Tex. Crim. App. Sept. 25, 2024), but of course this increased accountability for the State should not undercut Appellants' recourse for addressing the State's bad faith when the non-disclosure violates a disclosure obligation separate from Article 39.14.

discovery process—the specialized disclosure required by 38.072 is no less mandatory, and the principles of nondisclosure doctrine should apply in the same way when the State willfully fails to comply with their mandatory disclosure requirements. Pre-disclosure and examination of outcry witnesses are essential safeguards codified by the Texas Legislature for evidence that is otherwise ordinarily inadmissible hearsay. Thus, as in *Oprean*, the State's obligation was "clear to anyone who can read." 201 S.W. 3d at 727. Article 38.072 requires earlier and more detailed disclosures than ordinary discovery obligations:

> (b) A statement that meets the requirements of Subsection (a) is not inadmissible because of the hearsay rule if:
> (1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:
> (A) notifies the adverse party of its intention to do so;
> (B) provides the adverse party with the name of the witness through whom it intends to offer the statement; and
> (C) provides the adverse party with a written summary of the statement;

The purpose of requiring notice is to protect due process rights by preventing surprise; "[t]o achieve this purpose, the written summary must give the defendant adequate notice of the content and scope of the outcry testimony. The notice is sufficient if it reasonably informs the defendant of the *essential facts* related in the outcry statement." *Weeks v. State*, No. 14-08-00137-CR, 2009 WL 1325461, at *2 (Tex. App.—Houston [14th Dist.] May

14, 2009, pet. ref'd)(not designated for publication; emphasis added; internal citations omitted). "To allow important testimony in evidence without notice, where the legislature expressly requires notice, would undermine the legislature's intent to protect a substantial right" *Gay v. State*, 981 S.W. 2d 864, 867 (Tex. App.—Houston [1st Dist..] 1998, pet. ref'd) citing *Biggs v. State*, 921 S.W.2d 282, 286 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd), vacated on other grounds (May 22, 1996).

Article 38.072 notice is a prerequisite to the other requirements for outcry testimony which must be established at a hearing. The hearing facilitates the Court's responsibility to ensure the State's compliance with the Statute and to determine reliability the first adult outcry witness's testimony before admitting what would otherwise be inadmissible hearsay. Tex. Code Crim. Pro. Ann. art. 38.072. The hearing also gives counsel the opportunity to examine the state's witness regarding the full breadth of the witness's expected testimony while testing that testimony for reliability based on the time content and circumstances of the Complainant's statement to the outcry witness. The disclosure prerequisite allows the defendant to prepare for the outcry witness reliability hearing and make objections.

Because of these important purposes, outcry witness notice is broader than other required disclosures— 38.072 requires more than just a witness's name (required upon request under 39.14), but also requires the essential facts

of the outcry statement to inform the defendant and the court of the nature of the testimony.

C. The State's notice identified Gustavo Garcia as the proper outcry witness but failed to disclose the essential facts of his testimony.

1. The State's Notice supported a finding that Gustavo was the first adult witness to hear a discernible outcry from the Complainant.

The outcry witness statute allows the court to admit some hearsay statements of a child complainant so long as statements describing the alleged offense "(1) were made by the child against whom the offense allegedly was committed and (2) were made to the first person, eighteen years of age or older, other than the defendant, to whom the child made a statement about the offense." Art. 38.072 § 2(a). This "has been construed to apply to the first adult to whom the complainant makes a statement that in 'some discernible manner describes the alleged offense.' For the statute to apply, the statement must be more than words that give a 'general allusion' that something in the area of child abuse has occurred." *Polk v. State*, 367 S.W.3d 449, 453 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) citing *See Garcia v. State,* 792 S.W.2d 88, 91 (Tex.Crim.App.1990).

The State's summary of Gustavo's hearsay testimony identified the discernible offense of indecency with a child by contact—an offense in which an adult, "(1) engages in sexual contact with the child or causes the child to engage in sexual contact" Tex. Pen. Code Ann. § 21.11. The State summarized, that Complainant told

Gustavo that her stepfather had been abusing her over and over by touching her inappropriately, and that Complainant had told him "everything" about the abuse (C.R. 60). Inappropriate touching is easily discernible as a layperson's description of engaging in sexual contact.

2. The State's Notice did not provide the essential facts of Gustavo's testimony.

In *Biggs v. State* the Court held that a summary when it "provides little more information than is contained in the indictment, and certainly does not summarize the detailed information" from the witness's actual testimony. *Biggs v. State*, 921 S.W.2d 921 S.W.2d 282, 285 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd), vacated on other grounds (May 22, 1996).

The State's notice was merely copied from Officer J. Garcia's summary of Gustavo's statement to law enforcement. (C.R. 59-60; 3 R.R. 7 "MS. DETOTO: That's a summary of the officer's interview with Gustavo."). When the State's summary did not use Gustavo's own words and did not detail how Complainant made her disclosure or what Gustavo meant by "everything," Counsel made a valid objection—the State's notice failed to give the accused sufficient notice of what Gustavo's testimony would be according to the requirements of 38.072.

When determining if the State's 38.072 notice is sufficient, courts compare the State's notice to the testimony of the witness at the 38.072 hearing.

Ordinarily the Court's analysis is based on a comparison between the State's notice and the witness's testimony at the outcry hearing. *Biggs v. State*, 921 S.W.2d 282, 286; *Gay v. State*, 981 S.W. 2d 864 (Tex. App.—Houston [1st Dist] 1998)(in which the courts compared the witness's hearing testimony to the State's written notice and determined it would be error to allow testimony with inadequate notice).

In *Biggs*, the court found that a notice summary that covered "sexual contact" and exposure of the defendant's genitals did not cover the outcry witness's later more detailed testimony about "games." 921 S.W.2d at 285. This was reemphasized in *Gay v State* under similar facts: "the summary only stated that the appellant had 'kissed and touched' complainant. It did not state appellant had 'bothered' her, made her touch him, or threatened her. It also did not include anything about the complainant telling the outcry witness she wanted to come and live with her." 981 S.W. 2d 864 (Tex. App.—Houston [1st Dist] 1998). In *Gay*, the court ruled that it was error to permit the witness's "expanded statement" when the state's notice of the testimony was insufficient. *Id.*

In this case, before any testimony began, defense counsel objected to the State's vague notice and argued that the correct remedy would be to exclude Gustavo's testimony and the testimony of subsequent outcry witnesses. However, the Court never ruled directly on this objection, and never made a

comparison between the State's notice and Gustavo's testimony, because the State stepped in and withdrew Gustavo from consideration as an outcry witness altogether.

D. The State interfered with the court's outcry witness determination by doubling-down on their nondisclosure and withdrawing Gustavo from the Court's scrutiny.

Rather than disclosing the facts that they had "confirmed" with Gustavo before trial, the state doubled down on their non-disclosure— the State assured the court that Gustavo's actual testimony was as vague as their original notice had suggested and argued that he had no discernible outcry testimony to offer (3 R.R. 11).

The State characterized Gustavo's testimony in this way to the court:

> MS. LOZOYA: At around the age of 7 or 8, the complainant told Gustavo that her stepfather had been touching her inappropriately and that she didn't say anything because she didn't want to split the family apart.
> THE COURT: That's what Mr. Garcia will say
> that she said, he was touching her inappropriately?
> MS. LOZOYA: Yes.
> THE COURT: Is that -- she used a big word,
> "inappropriately"?
> MS. DETOTO: Right. That's a summary --
> MS. LOZOYA: That's what he said, Judge.
> MS. DETOTO: That's a summary of the
> officer's interview with Gustavo.

(3 R.R. 7)

> . . .
> He then tells -- she then tells him again, Judge, when he's 18 that he's been -- he says again that he's been -- everything that was happening is still going on and he's abusing her. That's what she tells him. This is when she was about 15, and he was 18 or 19 years old.

(3 R.R. 8)

> . . .
> MS. LOZOYA: He stated, "A couple of years ago, Complainant [] told him the defendant was still abusing her over and over again. That she came into his room and she was crying, told him that everything was still happening with the defendant." And this was around when she was 15 years old, near her quinceañera.
> THE COURT: All right. So now at the time the notice was sent out, the State believed that would be an outcry statement. But the State's saying no, because it's not particularly described about whether this is a particular offense or not, because you don't think it meets the requirements under 38.072 to be considered an outcry?
> MS. LOZOYA: Yes, Judge.

(3 R.R. 9).

The court relied on the State's representations and allowed them to withdraw him without presenting his testimony at the outcry hearing, though he was present. In doing so the court concluded that Gustavo's testimony would not discern whether Complainant had alleged physical, verbal, or sexual abuse. Ordinarily appellate review of the trial court's ruling after an outcry hearing is conducted in light of what was before the trial court at the time the ruling was made, *Brito Carrasco v. State*, 154 S.W.3d 127, 129 (Tex. Crim. App. 2005) (citations omitted). Here, the State's nondisclosure and withdrawal of Gustavo's outcry testimony impacted the information available to the trial court and thwarted Appellant's ability to argue against the admission of subsequent outcry witnesses based on the lack of notice or how their testimony compared breadth of Gustavo's actual detailed testimony. Appellant's counsel had to act accordingly by

adjusting trial strategy in response to the court's unfavorable rulings made in reliance on the State's arguments. In so adjusting, counsel cannot have anticipated that Gustavo would later deliver the testimony that the State had withdrawn, and in greater detail than their notice disclosed.

If Gustavo had testified at the outcry hearing in the way he testified later in trial, the court would have been satisfied that his testimony described multiple instances of the alleged offense of indecency by contact as charged in the indictment. Gustavo ultimately testified that after reviewing a journal handed to him by the complainant, he came away with knowledge that his sister was being repeatedly "molested," and testified that he viewed graphic descriptions of those incidents. (4 R.R. 69). Complainant's disclosure to him was enough to make him disgusted, angry, to make him confront Appellant to tell him that Complainant had told him "Everything," and to threaten to kill Appellant if he ever touched Complainant again (4 R.R. 71-72).

Unfortunately, neither the court nor Mr. Espinoza was apprised of the contrast between the State's summaries of Gustavo's testimony and the actual essential facts of his anticipated testimony at the time when that those facts would have been crucial to determining the proper outcry witness at the 38.072 hearing. Both Appellant and the Court proceeded with the understanding that Gustavo would not later present detailed outcry testimony.

E. After circumventing the court's proper review the state introduced Gustavo's surprise outcry testimony later in trial as an excited utterance.

The State only offered Gustavo's expanded testimony later in trial after the court had designated subsequent witnesses as the "first" adults to hear a discernible outcry, and after those witnesses had already testified before the jury. On the second morning of witness testimony the State informed the court that they intended to ask Gustavo to testify about the Complainant's hearsay statement to him about the offense; they reiterated that Gustavo would not be an outcry witness, implying again that his testimony was not specific enough to constitute outcry testimony. (4 R.R. 7). Instead, the State signaled that they "would be offering the statements the complainant makes to Gustavo" as hearsay objections [sic] for the effect on the listener." (4 R.R. 7).

When Gustavo ultimately testified, he testified that the Complainant came into his computer room crying and that, "she had this notebook in her hand; and in this little like notebook or journal or whatever, she just handed it to me . . . and she just opened up like to the back part, went a couple of pages down, and there is like just multiple journal entries." (4 R.R. 63-64). After defense counsel objected five times to Gustavo's hearsay testimony, (4 R.R. at 58, 62, 64, 65 ln. 8, 65 ln. 23) the Court ultimately admitted Gustavo's testimony as an excited utterance. He stated that:

> [The Complainant] told me that my stepfather had been abusing her and molesting her, just to put it in short words; but there was an extensive, very graphic, just disgusting amount of literature that she, herself, was writing down.
> Q. And that is what she shared with you?
> A. Yes.

(4 R.R. 69). Gustavo testified that after his conversation with Complainant and review of her journal, he told Mr. Espinoza "[Complainant] told me everything. I know everything." (4 R.R. 71).

It was also clear from Gustavo's testimony that the journal entries were central to his understanding that abuse was happening at all—he testified that he did not even know the abuse was happening until he saw his sister's detailed and graphic journal entries: "So it wasn't like apparent at first; but after she was in there for awhile and she couldn't get any words out, she had this little book in her hand…" (3 R.R. 63).

Nothing in the State's outcry notice or their representations to the court in response to direct questioning revealed that Gustavo was expected to testify about journal entries or that he had viewed detailed and graphic descriptions of the alleged abuse. The State's disclosures omitted these facts and presented only the most general allusions to what Gustavo said he learned from his sister.

F. The prosecutor's actions and statements indicate that the nondisclosure Gustavo's full statement was willful

The prosecutor knew and had "confirmed" Gustavo's testimony with him, and informed the court that he was present at the time of the outcry witness hearing. The prosecutor's actions and statements in failing to disclose his statement indicate that the nondisclosure was willful.

In determining whether the non-disclosing party's failure to disclose constitutes bad faith, courts have examined whether the non-disclosing party intended to deceive the defense. See *Nobles v. State*, 843 S.W.2d 503, 515 (Tex. Crim. App. 1992). Similarly, the inquiry into whether conduct was willful has focused on a specific intent to disobey discovery obligations. *Oprean*, 201 S.W.3d at 727.

The State had the opportunity to disclose the facts of Gustavo's outcry testimony at several moments before witness testimony began:

- Trial prosecutors "confirmed" Gustavo's testimony with him before trial but did not file any amended notice in the 21 months between the original notice and the date trial began. (3 R.R. 4)
- When defense counsel objected to the State's original vague notice and asked the court to consequently exclude the State's outcry witnesses (3 R.R. 4), the State did not provide additional details about Gustavo's anticipated hearsay testimony.
- When the trial judge admonished the State for providing their

summary from an Officer's report about Gustavo's statement about Complainant's statement, and the trial judge told them "I don't want the summary of the officer's understanding. I want exactly what Mr. Garcia told him" (3 R.R. 8), the state did not offer additional facts or call Gustavo to offer his testimony directly.

- When the trial judge expressed her understanding that Gustavo could not distinguish from Complainant's statement whether her outcry was about physical, verbal, or sexual abuse, the State did not correct this understanding. (3 R.R. 12)

When there is affirmative evidence that bad faith was absent, such as proof the State learned of a witness late and notified the defense as soon as it decided to call that witness, this seems to indicate a lack of such "intent." *See Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993) (since prosecutor telephoned defense counsel to inform him of newly located punishment witness as soon as witness was located); *Morales v. State*, 466 S.W.2d 293, 299 (Tex. Crim. App. 1970) (prosecutor did not know names of witnesses until morning of day they testified). "[T]he validity of the explanation offered by the prosecutor is a

relevant factor that should be considered when determining willfulness. *Oprean v. State*, 201 S.W.3d 724, 728 (Tex. Crim. App. 2006).

No such affirmative evidence of innocent or inadvertent nondisclosure is present in this case—quite the opposite; here, the State never offered any justification for their non-disclosure, but instead doubled down and insisted that their disclosure had in fact been complete. Only Gustavo's later testimony revealed the extent of the State's deceit.

In sum, the Court had the opportunity to hold the State accountable for its nondisclosure when Counsel objected to the State's inadequate notice; the State preempted the court's ruling by withdrawing Gustavo altogether, which the Court should not have allowed. When the issue came before the court again with Gustavo's surprise outcry testimony, it became all the more apparent that the State had withheld essential facts of Gustavo's testimony about the journal entries. The Court erred in admitting Gustavo's hearsay testimony over counsel's repeated hearsay objections.

G. Mr. Espinoza was harmed by the state's willful nondisclosure of Gustavo's hearsay testimony

The court's error allowed State to benefit from their own nondisclosure by admitting testimony of second and third outcry witness, then Gustavo's own surprise outcry testimony as well; contrary to law and policy.

Improper admission of evidence is reviewed under Tex. R. App. P. 44.2(b). "[A]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded." Tex. R. App. P. 44.2(b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the verdict." *Nguyen v. State*, 222 S.W.3d 537, 542 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd), citing to *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). "Put another way, if the reviewing court has a grave doubt that the result was free from the substantial influence of the error, then it must treat the error as if it did. Grave doubt means that in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error. Thus, in case of grave doubt as to harmlessness the [appellant] must win." *Burnett v. State*, 88 S.W.3d 633, 638-639 (Tex. Crim. App. 2002) (internal quotations omitted).

When performing a harm analysis, an appellate court should consider the entire record. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2001). "In

determining whether the error was harmless, the test is not whether a conviction could have been had without the improperly admitted evidence, but, rather, whether there is a reasonable possibility that the evidence might have contributed to the conviction or affected the punishment." *Battles v. State*, No. 11-05-00166-CR, 2006 Tex. App. LEXIS 3117 at *12 (Tex. App.—Eastland 2006, no pet.) (mem. op., not designated for publication), citing *Alexander v. State*, 740 S.W.2d 749, 765 (Tex. Crim. App. 1987). "Thus, if there is a reasonable possibility that the evidence might have contributed to either the conviction or punishment assessed, then the error in admission is not harmless error." *Id.*

1. The admission of Gustavo's surprise outcry testimony impaired Mr. Espinoza's substantial rights.

The 1st Court of appeals has explicitly recognized that admitting evidence without the statutorily-required notice affects substantial rights: "to allow important testimony in evidence without notice, where the legislature expressly requires notice, would undermine the legislature's intent to protect a substantial right" *Gay v. State*, 981 S.W. 2d 864, 867 (Tex. App.—Houston [1st Dist..] 1998, pet. ref'd).

In analyzing harm in willful non-disclosure cases, courts take into account the purpose of disclosure: "to prevent surprise and to permit appellant to prepare an adequate defense." *Oprean v. State*, 238 S.W.3d 412, 415 (Tex. App.—Houston [1st

Dist.] 2007, pet. ref'd)(on remand from *Oprean*, 201 S.W. 3d 724, for a harm analysis) *citing Hernandez v. State,* 176 S.W.3d 821, 825 (Tex.Crim.App.2005). In so doing, the court looks to the practical ways in which the nondisclosure "affected appellant's ability to prepare for the [evidence] and to formulate his defense strategy" *Id.* This acknowledges that where complete and timely disclosure would have left the defense with multiple other objections and strategies for their defense, the nondisclosure impacts not only substantial rights, but constitutional rights to prepare and present an adequate defense as well.

2. The State gained an advantage by failing to disclose the essential facts of Gustavo's testimony.

The State's nondisclosure of Gustavo's testimony and withdrawal of their witness from the court's scrutiny had multiple significant consequences.

First, the State's nondisclosure negated defense counsel's valid notice objection, preempted the courts ruling on that objection, and allowed the State to avoid the consequence of exclusion of their witnesses' hearsay statement due to lack of adequate notice.

Second, the State's nondisclosure facilitated the court's decision to admit Complainant's hearsay statements from two subsequent adult witnesses. The Court could not have made the decision to admit a second outcry witness without relying on the State's assertions about the insufficient specificity of Gustavo's expected testimony. If the court had been informed that only the

notice of Gustavo's much more detailed testimony had in fact been insufficient, the proper remedy would have been to deny the exception for at least two witnesses, Gustavo for insufficient notice, and Complainant's mother since she was the second to hear essentially the same outcry statement.

Third, it deprived Mr. Espinoza of the opportunity to test the reliability of Gustavo's testimony before it was given in front of the jury. Like the Court, Defense counsel relied on the State's representations about their witness's expected testimony and the State's assertion that Gustavo did not have much if any detail to offer about his sister's outcry to him. In all, this left Mr. Espinoza (and the trial Court) with the reasonable expectation that Gustavo had no substantial detail to contribute through the hearsay statements of his sister, even if they were later admitted under a different hearsay exception. The later introduction therefore came as surprise outcry witness testimony; testimony that was as un-vetted as it was unexpected.

All of these outcomes had significant impact on Mr. Espinoza's trial preparation and defense strategy.

Because the state willfully disregarded their statutory notice obligations and doubled down on their nondisclosure in the representations to the court, the court erred in admitting the State's surprise additional outcry testimony

from Gustavo Garcia. Mr. Espinoza respectfully asks this Court to sustain his first point of error, reverse his conviction and order a new trial.

POINT OF ERROR NUMBER TWO

THE TRIAL COURT ERRED IN ADMITTING THE OUTCRY TESTIMONY OF GUSTAVO GARCIA AS AN EXCITED UTTERANCE.

A. Relevant Facts

After withdrawing Gustavo Garcia as an outcry witness (discussed above in Point of Error 1), the State presented his hearsay testimony as a "present sense impression" that "prompted further action" and then changed their argument to "not a present sense impression, an excited utterance." (4 R.R. 59). The trial court sustained objections to the question, "What did [Complainant] tell you?" (4 R.R. 58) and a narrative answer that began with "she kind of revealed to me that - - -" (4 R.R. 62), but overruled an objection to the State's question "What do you see when you look in the notebook?" (4 R.R. 64). When the State asked about the topic covered in the journal writings, the court sustained another defense objection "until I hear the proper predicate." The State established that the Complainant was "still upset" while showing her brother the notebook and the trial court, and defense objected again to their follow up question "what did she say to you?" (4 R.R. 65). The court conditionally sustained the objection but prompted the State to establish "if she's under the stress of the situation of whatever happened before she makes

the statement" and if "at the 15-minute mark was he still in the situation to ask those questions again." (4 R.R. 67-68). Once the State established "she's upset the whole time…about the same thing…during that 15-minute period," the Court allowed Gustavo to testify about exactly what his sister said and what was in her journals (4 R.R. 68-69). Despite Counsel's earlier objections to Gustavo's testimony as an outcry witness (*see* point of error 1), and five objections to admitting Gustavo's testimony under another hearsay exception, the court allowed Gustavo to testify about what the Complainant told him and showed him in her journal.

B. Standard of Review and Applicable Law

"The Hearsay doctrine, codified in Rule 801 and Rule 802 of the Texas Rules of Evidence, is designed to exclude out-of-court statements offered for the truth of the matter asserted that pose any of the four 'hearsay dangers' of faulty perception, faulty memory, accidental miscommunication, or insincerity." *Fischer v. State*, 252 S.W.3d 375, 378 (Tex. Crim. App. 2008). "The numerous exceptions to the hearsay rule set out in Rule 803 and Rule 804 are based upon the rationale that some hearsay statements contain such strong independent, circumstantial guarantee of trustworthiness that the risk of the four hearsay dangers is minimal while the probative value of such evidence is high." *Id.* One such exception is the "excited utterance" exception which applies to a statement

relating to a startling event or condition, and that was made while the declarant was under the stress of excitement caused by that event or condition. See Tex. R. Evid. 803 (2). The theory behind this rule is "a psychological one, namely, the fact that when a man is in the instant grip of violent emotion, excitement or pain, he ordinarily loses the capacity for reflection necessary to the fabrication of a falsehood and the 'truth will come out.'" *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex.Crim.App.2003; overruled on other grounds).

Therefore, for the exception to apply:

> (1) the exciting event must be startling enough to evoke a truly spontaneous reaction from the declarant, (2) the reaction to the startling event must be quick enough to avoid the possibility of fabrication, and (3) the resulting statement should be sufficiently "related to" the startling event to ensure the reliability and trustworthiness of that statement.

Sandoval v. State, 409 S.W.3d 259, 284 (Tex. App.—Austin 2013, no pet.) *citing McCarty v. State*, 257 S.W.3d 238, 241–42 (Tex.Crim.App.2008).

Courts have found that a second startling event can "bring up" an accurate accounting of abuse even if the abuse itself was in the more-remote past, *Couchman v. State*, 3 S.W.3d 155, 159(Tex. App.—Fort Worth 1999); *Hunt v. State*, 904 S.W.2d 813, 816 (Tex. App.—Fort Worth 1995, pet. ref'd) ("the testimony showed that the event was startling enough to produce a state of nervous excitement so as to render the remarks spontaneous")—a law review

coined the term "re-excited utterance" to describe this phenomenon, Jone Tran, "Crying Wolf or an Excited Utterance? Allowing Reexcited Statements to Qualify Under the Excited Utterance Exception," 52 Clev. St. L. Rev. 527, 531–32 (2004). However, for the re-excited utterance analysis to apply, the court must still be able to identify a startling or exciting event that prompted the utterance. While "it is natural that [a complainant] would be in a tearful and agitated state while engaged . . . in something so painful as [ ] retelling [a years-long] history of sexual abuse by her own father," recounting a history of abuse is not, on its own, an inherently startling or exciting event such as those contemplated by the rule. *Hughes v. State*, 128 S.W.3d 247, 253 (Tex. App.—Tyler 2003, pet. ref'd)(internal citations omitted). The proponent of the statement must go beyond establishing that a declarant was upset or emotional during a conversation about past events; it is

> necessary to determine whether the complainant's presence in that conversation is an occurrence 'startling enough to produce a state of nervous excitement which would render her statements. . . spontaneous and unreflecting. . .and, if so, [ ] whether the startling event continued to dominate the reflective powers of her mind during that period.'" *Hughes*, 128 S.W.3d at 253.

C. Application.

In this case, the state never identified a startling or exciting event or condition that would inspire the kind of statement contemplated by the excited utterance exception or its extension to some "re-excited" utterances.

Gustavo never testified about what prompted the tearful conversation that Complainant had with him. After several defense objections to hearsay, the court only required the state to establish that the Complainant was "still upset" fifteen minutes into her conversation with her brother. The lack of startling event or condition makes this case unlike *Couchman* or *Hunt* (*supra*) in which the court could clearly identify the inciting incident for the Complainants' spontaneous recounting of past abuses. The State failed to establish that the conversation itself was more than an emotional disclosure.

Even if the State had established that a startling event had prompted Complainant to hand her journal over to her brother, the State never offered evidence or argument to support why, at the time of writing, the *contents of the journal* could be admissible as an excited utterance or under any other hearsay exception. Hearsay within hearsay is governed by Texas Rule of Evidence 805—it is admissible "if each part of the combined statements conforms with an exception to the rule". The journal was not entered into evidence, and there was no testimony about when or why the entries were even written. Writing is an inherently reflective exercise—the excited utterance exception would rarely if ever apply to a written statement, let alone a later moment in which a writing is shared with someone other than the writer.

Rather, the State emphasized the complainant's general emotional state

during the conversation with her brother to justify Gustavo's hearsay and double-hearsay testimony. Being generally upset about a long history of abuse is not enough to ensure the accuracy of statements about it. The "predicate" laid by the state did not give the court any assurance that this was a more truthful or reliable immediate statement as opposed to an account after reflection and opportunity to fabricate.

It was error to admit either the hearsay or double-hearsay statements of the Complainant through her brother Gustavo as excited utterances.

D. Mr. Espinoza was harmed by the admission of Gustavo's hearsay testimony, both for the reasons stated above in Point of Error 1(F), and for the following reasons:

If an appellate court finds that a trial court improperly admitted evidence, the court must decide whether that error affected appellant's substantial rights to a fair trial. See TEX. R. APP. P. 44.2(b) (review of non-constitutional error); *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *Id.* The reviewing court must deem the error harmless if, after reviewing the entire record, the court is "reasonably assured the error did not influence the jury's verdict or had but a slight effect." *West v. State*, 121 S.W.3d 95, 104 (Tex. App.—Fort Worth), citing *Josey v. State*, 97 S.W.3d 687, 698 (Tex. App.—Texarkana 2003, no pet.).

a. Improper Testimony had More than a Slight Effect on the Jury

The trial court erred in failing to sustain Mr. Espinoza's objection to Gustavo designation as an outcry witness and the error was harmful because there is no way his testimony did not influence the jury verdict. Because this case is one that relied primarily on the credibility of Complainant's testimony, Gustavo was one of many witnesses to testify about her out of court statements, and in doing so bolstered her credibility.

b. Gustavo's testimony introduced new and prejudicial information into the record that was not admitted through any other witness.

To determine whether the introduction of witness's outcry testimony was reversible error or possibly influenced the jury, it should be determined whether other, similar evidence was admitted during the trial without objection. *See Lewis v. State*, 693 S.W.3d 453, 468 (Tex. App.—Houston [14th Dist.] 2023, pet. ref'd).

In this case, no other witness testified about the contents of Complainant's journal, not even the Complainant herself.[7] This reference to a trove of detailed entries graphically describing sexual abuse was a new and

[7] Defense examination of witnesses about a journal referred to it as a poetry book and a means of creative self-expression related to a jar of origami stars (5 R.R. 81-82), and once alluded to the journal containing an allegation (3 R.R. 174-175). With that understanding, the State's questioning about where the journal was found, whether pages had been removed, and by whom (3 R.R. 185-87) seemed insignificant-to-irrelevant, but that information was transformed into something sinister with Gustavo's testimony that the journal contained a "disgusting amount" of detailed and graphic chronicles of sexual abuse (4 R.R. 69).

damaging piece of information that no doubt influenced the jury's perception of the credibility of Complainant's other testimony and invited jurors to consider evidence outside the record.

Because the court erred in admitting Gustavo's testimony as an excited utterance, and this caused harm to Mr. Espinoza, he respectfully asks this Court to sustain his second point of error, reverse his conviction, and order a new trial.

POINT OF ERROR NUMBER THREE

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF VERONICA GARCIA AS AN OUTCRY EXCEPTION TO THE HEARSAY RULE AND MR. ESPINOZA WAS HARMED.

A. Statement of Facts

After the State withdrew their notice of Gustavo Garcia as their first outcry witness, the second adult listed in the State's notice was Complainant's mother Veronica Garcia (C.R. 57-8). Though Gustavo was present, (3 R.R. 4) Veronica was the first witness the State called to testify at the 38.072 hearing. At the hearing, the Court only heard and compared testimony from Veronica (3 R.R. 22-28) to the testimony of the CAC interviewer Brittany Dancer (3 R.R. 30-37). Veronica testified that Complainant told her, in a general but discernible manner, that Mr. Espinoza had been "touching" her, gesturing to her breasts, genitals, and buttocks (3 R.R. 23-25). Despite Defense counsel's objection that

Gustavo was the first adult to hear a discernable offense in Complainant's outcry to him, the Court ruled that Veronica was in fact the first. (3 R.R. 44-46). Without hearing testimony from the actual first adult to hear an outcry from the complainant, the court could not be assured that Veronica's testimony was admissible under the Rule.

B. Standard of Review

The appellate court reviews a trial court's admission of outcry testimony under Tex. Code Crim. Proc. § 38.072 using an abuse of discretion standard. *Garcia v. State*, 792 S.W.2d 88, 92 (Tex. Crim. App. 1990).

C. Applicable Law

Article 38.072 is an outcry exception to the hearsay rule. *Chapman v. State*, 150 S.W.3d 809, 812 (Tex. Ap.—Houston [14th Dist.] 2004, pet. ref'd). Article 38.072 of the Texas Code of Criminal Procedure exempts from the hearsay rule certain statements made by a child 14 years of age or younger who is the victim of certain offenses, including continuous sexual abuse. Tex. Crim. Proc. §38.072.

As the proponent of that evidence, the State has the burden of proof to establish the elements of Article 38.072 before the hearsay evidence can be admitted. *See Rosales v. State*, 548 S.W.3d 796, 806 (Tex. App. – Houston [14th Dist.] 2018, pet. ref'd). The State must prove the hearsay statements: (1) were

made by the child against whom the offense was allegedly committed; and (2) were made to the first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense. TEX. CODE CRIM. PROC. ANN. ART. 38.072, § 2(a)(1)(A)(2)(3). The trial court must conduct a hearing outside the jury's presence to determine whether the statement is reliable based on the time, circumstances, and content of the child's statement to the outcry witness. TEX. CODE CRIM. P. ART. 38.072 § 2(b)(2).

a. The State is tasked with proving that their outcry witness is the first adult to whom the child described the alleged offense.

Although the Legislature initially considered creating this hearsay exception for *any* adult to whom a child makes outcry, lawmakers ultimately decided to limit the exception to the first adult to whom the child describes an alleged offense. This was due to concerns about the reliability of statements by children. See *Garcia*, 792 S.W.2d at 93 (Clinton, J., dissenting):

> By limiting the statements of sexual or physical abuse to the child's *first* conversation, the hearsay evidence is made more reliable not only because the child's initial disclosure is more likely a self-motivated account of what the child herself remembers, but also because the original statements are untainted by the subtle influences of subsequent interrogators. **Each time the child relates the story to a new adult, the risks that the story may be altered or nuances added to please the listener multiply**.

(Boldface emphasis added; italics in original).

Once the court has determined the first adult outcry witness, the only exception to this rule is if another adult is the first to hear a separate event-

specific outcry; "[o]utcry testimony is specific to an event instead of 'person-specific.' More than one outcry witness may testify when the outcry statements are about differing events and not a repetition of the same events. *Polk v. State*, 367 S.W.3d 449, 453 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) citing *Lopez v. State,* 343 S.W.3d 137, 140 (Tex.Crim.App.2011). This exception is an awkward fit when outcry statements can be general in nature in terms of events, but nevertheless identify a discernible offense. Nevertheless, a second outcry that does not identify a separate discernible offense cannot be admitted under Article 38.072. Two witnesses may not testify about the same event.

D. Application

a. Veronica Garcia wasn't the first outcry witness, and her testimony did not identify a distinct event from Gustavo Garcia's testimony.

An appellate court must review the trial court's ruling in light of what was before the trial court at the time the ruling was made. *Brito Carrasco v. State*, 154 S.W.3d 127, 129 (Tex. Crim. App. 2005) (citations omitted). In this case, when the Court made its ruling to admit Veronica Garcia's testimony as an outcry witness, it had before it: (1) the State's own notice showing that Ms. Garcia was not the first adult to whom Complainant made an outcry; and (2) Notice of Gustavo Garcia's outcry testimony that identified a discernible offense of indecency by contact (see Point of Error 1(C)(1) *supra*). In light of what was before the trial court, it abused its discretion when it ruled Ms. Garcia's hearsay

testimony admissible.

The facts available to the court at the time of hearing were that Complainant first outcried to her brother Gustavo in May or June of 2019 (4 R.R. 79-80). Gustavo was present at the outcry hearing, but the State did not call him to testify (3 R.R. 5). Rather than present their first adult outcry witness for the court's consideration, the State made representations to the court about the lack of detail in his anticipated testimony and moved on to present the second adult as the first. As discussed at length in Point of Error 1, the only information the court received about the outcry to Gustavo was from the State, not from the witness.

When the State's notice indicated that Gustavo heard an outcry regarding inappropriate touching, the evidence presented could not have satisfied the court that Gustavo was not in fact the first witness to hear an outcry from Complainant. When Gustavo was initially noticed as such, the Court therefore had no basis upon which to decide that Veronica's general-but-discernible testimony-- Veronica's outcry testimony indicated inappropriate touching as well – was the first outcry, or one that was event-distinct in any way from the Complainant's first outcry to Gustavo.

As much leeway as the State receives in presenting successive outcry

witnesses who identify different events, or even different offenses within a single event, 38.072 has never been expanded to allow vague pleading about the first outcry witness to allow the state to just move along to the second and act as if they were the first. Doing so would undermine the letter and the purpose of the law.

E. Harm: Ms. Garcia's hearsay testimony affected Mr. Espinoza's right to a fair trial.

If an appellate court finds that a trial court improperly admitted evidence, the court must decide whether that error affected appellant's substantial rights to a fair trial. See Tex. R. App. P. 44.2(b) (review of non-constitutional error); *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. Id. If the improperly admitted evidence did not influence the jury or had but a slight effect upon its deliberations, the error is harmless. See *Torres v. State*, 424 S.W.3d 245, 260 (Tex. App. – Houston [14th Dist.] 2014, pet. ref'd).

Ms. Garcia's testimony bolstered the complainant's testimony because their stories were so similar. It helped make Complainant's story about Mr. Espinoza more credible—the mere repetition of the story was bound to influence jurors

just as in any other form of communication or media; repetition makes information more fixed in the memory and more credible. Review of the evidence in this case does not lead to a conclusion, under Rule 44.2(b), that Ms. Garcia's outcry testimony did not influence the jury or only had a slight effect. The trial court's decision to admit the testimony was harmful error.

Because Ms. Garcia was not the proper outcry witness, and the court admitted her testimony in error, and because that error harmed Mr. Espinoza, Appellant respectfully asks this Court to sustain his third point of error, reverse his conviction and order a new trial.

POINT OF ERROR NUMBER FOUR

THE COURT ERRED IN DENYING JURY'S REQUEST FOR A READBACK OF EVIDENCE TO RESOLVE A DISPUTE

Summary of the Argument

When the jury asked the court a question about a Spanish-language text message in evidence, the question identified a factual dispute about the English translation of the text that was presented at trial, and the testimony regarding the context of that message. The jury, without a translation or the context before them, did not know whether the Spanish language text message apologized for a specific incident, or in other words, whether the text was a

confession. The court's response was a supplemental jury instruction that ignored the jury's factual dispute: "There is no official translation".

Law and Analysis

A. Texas Law requires the court to allow a readback of testimony when the jury identifies a dispute during deliberations

1. *Tex Crim. Pro. Art 36.28 states that "if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness testimony or the particular point in dispute."*

The trial judge's conclusion as to whether there is a factual dispute between the jurors is reviewed for an abuse of discretion. A trial judge abuses [their] discretion when [their] decision is so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *Howell v. State*, 175 S.W.3d 786, 790 (Tex. Crim. App. 2005). In *Howell* the Court of Criminal Appeals held that the jury was entitled to a readback after they had made increasingly specific requests about the subject of their dispute, and the judge was right in concluding that there was a dispute. 175 S.W.3d 786, 792-93 (Ct. Crim. App. 2005). This was consistent with the court's earlier decision in *Robison v. State*, in which the jury made similarly narrowing requests to identify their dispute and the judge had previously informed the jury that testimony would be read back only in the event of a dispute—in that case, the court also correct in concluding that the jury was entitled to a readback, *Robison v. State*, 888 S.W.

2d 473, 481 (Ct. Crim. App. 1994). Refusing a properly requested readback is reversible error if harmful, *see Thomas v. State*, 470 S.W.3d 577, 587 (Tex. App.—Houston [1st Dist.] 2015), aff'd, 505 S.W.3d 916 (Tex. Crim. App. 2016).

2. The Court instructed the jury on how to request a readback of testimony by "identifying a dispute."

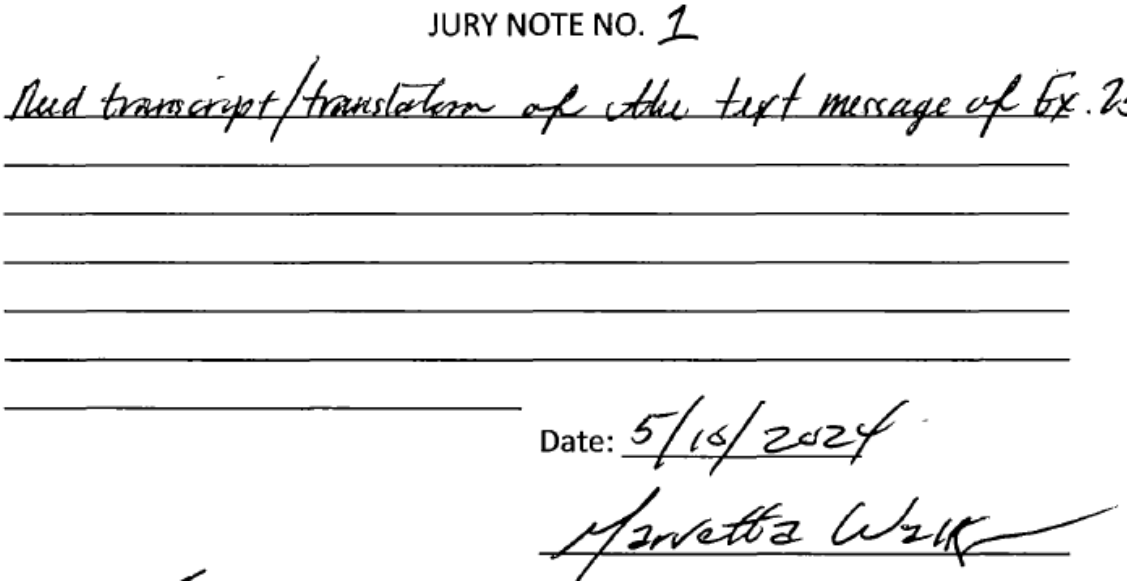
Jurors were instructed about what to do if they had a dispute about testimony during deliberations: "…you will hear me read in the jury instructions about disputes during… deliberations. If there's a dispute amongst you about what the evidence was, you're a juror - - your fellow jurors cannot use their juror notes to try to convince you of what the truth is. You'll have to ask for a…portion of the record read back to you of the disputed issue." (2 R.R. 237-238). The instruction also appeared in the court's charge to the jury: "Occasionally, during jury deliberations, a dispute arises as to the testimony presented. If this should occur in this case, you shall inform the Court and request that the Court read the portion of the disputed testimony to you from the official record (C.R. 279). The State, for better or for worse, even emphasized this entitlement to a readback *specifically as it related to Exhibit 23* in closing argument by saying "You were also introduced that text message in

Spanish, which if you need a read back, you can get one; but I don't think you will because you remember… "(5 R.R. 35). Jurors been repeatedly informed that by identifying a dispute, they could hear a readback of the disputed evidence. Then, in response to the Jury's first question about translation, the court reminded them to identify a dispute "Is there an issue in dispute or do you merely want State's Exhibit 23 translated from Spanish to English?" (C.R. 270." The Jury responded "[t]he jury is having a dispute…" (C.R. 268).

B. The jury properly identified a dispute that could be addressed by a readback of testimony

1. *The jury in this case properly requested a readback of testimony regarding Exhibit 23.*

During deliberation, the Jury sent out their first question stating, "need transcript/translation of the text message of Ex. 23" (C.R. 270).

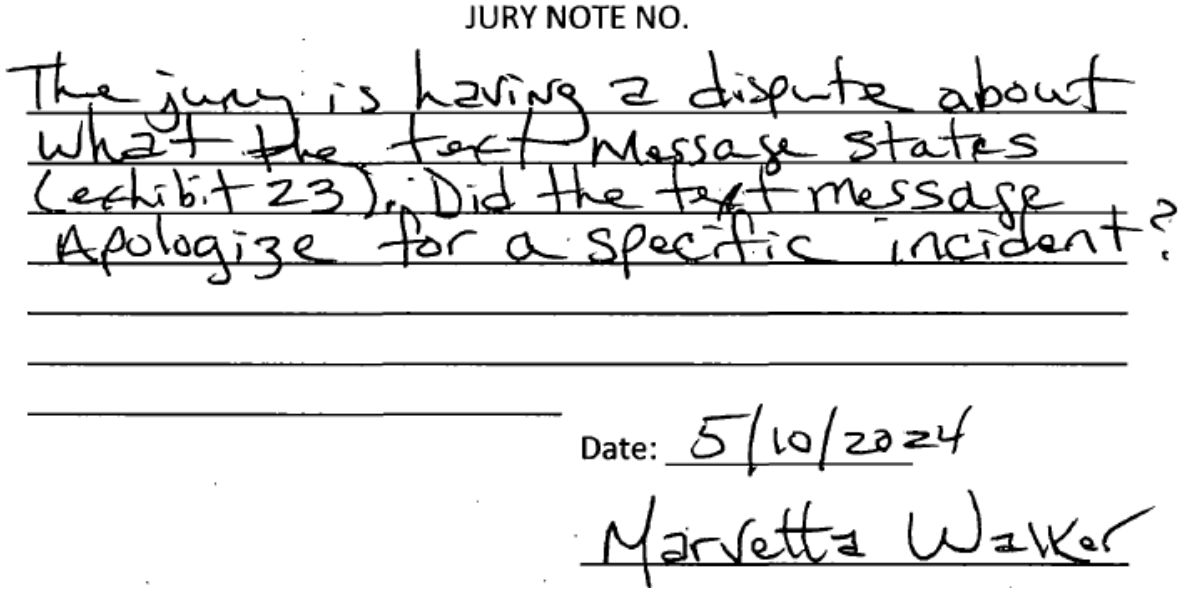

JURY NOTE NO. 1

Need transcript/translation of the text message of Ex. 23

Date: 5/16/2024

Marietta Walk

The court responded with a supplemental instruction reminding them of the procedure for requesting a readback: "To respond to your request there needs to be some clarification. Is there an issue in dispute or do you merely want State's Exhibit 23 translated from Spanish to English?" (C.R. 270). Jurors responded with a clarifying statement and question: "The jury is having a dispute about what the text message states (exhibit 23); Did the text message apologize for a specific incident?" (C.R. 268).


JURY NOTE NO.

The jury is having a dispute about what the text Message states (exhibit 23). Did the text message Apologize for a specific incident?

Date: 5/10/2024

Marvetta Walker

As in *Howell* and *Robison* (*supra*), the jury first asked an imprecise question about translation, then narrowed their question and explicitly stated, "[t]he jury is having a dispute" identifying the dispute as one about the facts in the record regarding exhibit 23 (C.R. 268).

2. *The Jury's question could be addressed directly with a readback of testimony.*

The court recognized that, regarding the subject of the Jury's inquiry "The witness did testify to what was written in Spanish in State's Exhibit 23 by testifying in English, to which that witness believed was written in Spanish and what it meant in English (5 R.R. 43). The Court was referring to Veronica Garcia's testimony: Ms. Garcia testified that this text message was sent during a conversation "when COVID hit" and Mr. Espinoza said "I want you to be okay," but Ms. Garcia responded by telling him she thought he loved them, that he cared for them, and that they could be safe with him, but that she was wrong

(3 R.R. 155-56). Ms. Garcia translated Mr. Espinoza's response to the jury as "I can just ask you for forgiveness. I can't say anything else. And I want to die. But I also -- I have to do so many things for you and I'm already dead in life. I -- I don't have anything of what I want and this is just for me being an ass" (3 R.R. 155-56).

Ms. Garcia admitted on cross-examination that her conclusion about the subject of Mr. Espinoza's apology was a conclusion based on her subjective interpretation, not what he literally said:

> Q. Right. That could mean a lot of things, right? He's sorry that he's not living with y'all anymore, right?
> . . .
> Q. (By Ms. Detoto) He can be sorry that he's lost his family, right?"
> A. Could be. Not to me, though.
> Q. He could be sorry that he doesn't get to see his daughter Vanya, right?
> A. Not to me.
> Q. It can mean he's sorry that he doesn't get to go on vacations with you guys anymore. It can mean a whole lot of things, right?
> A. Again, not to me.
> Q. Okay. And nowhere in here does he say, "I'm sorry I molested Maureen," right?
> . . .
> Q. (By Ms. Detoto) Nowhere on those texts does he say, "I'm sorry I molested Maureen"?
> A. He knew what we were talking about.

(3 R.R. 158-159).

C. The court disregarded the jury's dispute and did not inform counsel of the Jury's actual request.

The Court mischaracterized, or perhaps misread the Jury's narrowing question "Did the text message apologize for a specific incident?" (C.R. 268) as a request for official translation: "'The response is 'Would like official translation of Exhibit 23.' (5 R.R. 44) and elaborated her perception of this request, determining that the jury did not have a dispute or else they would have identified one:

> The Court:. . . So I don't know what they're thinking about whether her testimony was official or not. I think if they had a dispute, then we could send the sheet out; but they don't have a dispute. We asked them. If they had a dispute, they could come out and hear what she said, interpreting from Spanish to English; but that's not the issue. So I believe I said -- they would like an official translation. 'There has been no official translation of Exhibit 23 offered into evidence.'

(5 R.R. 50).

It is unclear that counsel was ever informed of the Jury's actual clarifying question since the court mis-read or mis-characterized it in her discussions with counsel. The record indicates that the court only discussed the translation aspect of the jury's request with counsel and invited argument from the parties based on her understanding of the issue:

> I discussed this with the attorneys, that this would be their request. There is no official translation. There was a witness that interpreted the text messages from Spanish to English during her testimony. So we have no official translation. What is the response from the State?

(5 R.R. 44). The parties and the court engaged in a discussion of "official" translations that stretched for seven pages of the transcript of proceedings. (5 R.R. 44-51). The Jury's actual note reproduced in the Reporter's Record (C.R.

268) did not use the word "official" and did not ask for a translation, but explicitly identified a factual dispute among jurors about what the text message stated and whether it was an apology for a specific incident: "The jury is having a dispute…" (Id.).

D. The Court's instruction denied a redback and did not answer the jury's disputed question.

The Court concluded that, as to translation, the response should be "There is no official translation of Exhibit 23 offered or admitted into evidence" (5 R.R. 51). The court did not address or answer the Jury's question about their factual dispute about whether the text message apologized for a specific incident. By ignoring the jury's request for a readback due to a disputed issue about this testimony, the court tacitly denied the request.

The court disregarded the jury's actual dispute and answered only her incorrect perception of their question, that it was a request for an "official translation." By disregarding the jury's request for a readback to which they were entitled, the trial court abused its discretion.

E. The Court's denial of a readback denied Mr. Espinoza of a fair trial.

Since the Tex Crim. Pro. Art 36.28 rule concerning readbacks is statutory, the court's abuse of discretion in denying a readback is evaluated a non-constitutional error. See *Walker v. State,* 994 S.W.2d 199, 205 (Tex.App.-

Houston [1st Dist.] 1999, pet. ref'd). rule 44.2(b) (other errors), states, "Any other error ... that does not affect substantial rights must be disregarded." Tex.R.App. P. 44.2(b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex.Crim.App.1997). The error had a substantial and injurious effect or influence if it substantially swayed the jury's judgment. See *Kotteakos v. United States*, 328 U.S. 750, 764–65, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) (cited with approval in *King*, 953 S.W.2d at 271). Therefore the proper inquiry is "whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos*, 328 U.S. at 765, 66 S.Ct. 1239. On the other hand, if "the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand." Id.

The core of the question in dispute among the jurors was essentially "did Mr. Espinoza confess?" Multiple witnesses testified that Mr. Espinoza had apologized and asked for forgiveness in various conversations, but none of these statements could be directly characterized as a direct confession. The context of each statement offered in testimony was ambiguous, though witnesses at times were permitted to speculate about the significance of these apologies, none could testify without speculation or inference that Mr.

Espinoza actually confessed. Jurors are particularly interested in confessions as the United States Supreme Court has recognized: "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him" *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

The Prosecutor argued that Mr. Espinoza's apologies, including Exhibit 23, were confessions (5 R.R. 39)[8], and had also argued that the Jury could rely on their memory of the testimony and their "common sense" to conclude the same (5 R.R. 35-36): "You were also introduced that text message in Spanish, which if you need a read back, you can get one; but I don't think you will because you remember. . . 'I'm sorry, I know I messed up' do not leave your common sense at the door").

The Jury in this case needed to know that the text message was not a direct and detailed confession as in *Fulminante*, but instead was a statement that "may be incriminating only when linked to other evidence." 499 U.S. 279 at 296. As to Exhibit 23, the "other evidence" in this case was only Veronica's

[8] The Jury asked another question about the context of another witness-translated apology: "Please provide Gustabo's [sic.] testimony about grabbing Juan's shirt after speaking to Maureen about the abuse (2018)" (C.R. 263). Discussion of this note was not on the record (5 R.R. 53), but it does not appear from the record that any of that testimony was read back to the jury either.

subjective interpretation— evidence that could have been disregarded by the jury if they judged that it was not credible or not supported by the facts. Without a readback of the testimony, the jury told the judge they were having a dispute—they did *not* remember, and in fact disputed, the facts they needed to come to their own conclusion. The jury's question "Did the text message apologize for a specific incident?" (C.R. 268) is precisely why defense counsel asked pointed questions on cross-examination regarding exactly that issue. Because this careful examination was not read back to resolve the jury's dispute, it cannot be said that the Court's failure to read back the testimony did not have a substantial influence on the jury's deliberations.

POINT OF ERROR NUMBER FIVE

THE COURT'S SUPPLEMENTAL INSTRUCTION IN RESPONSE TO THE JURY'S QUESTION ABOUT EXHIBIT 23 WAS INADEQUATE TO PROHIBIT JURORS FROM COMMITTING MISCONDUCT BY SELF-TRANSLATING THE EXHIBIT.

A. The Court identified that translation issues may have led to the Jury's dispute about Exhibit 23.

As discussed above, Exhibit 23 was a text message written in Spanish. (8 R.R. 43-44). The court admitted the Spanish-language exhibit into evidence, then admitted Veronica Garcia's live translation of the message as well. (3 R.R. 155-15). Translation of Spanish language evidence was handled differently in different parts of the trial—some statements were recounted in Spanish and translated by the certified court interpreters (3 R.R. 130; 163-4), while others

were translated by live testimony of the State's witnesses (3 R.R. 145, 154-155, 4 R.R. 72, 119-125).[9] The State did not offer any certified translations of their written exhibits 23 and 28[10] as Tex. R. Evidence 1009 would permit, but chose to have live witnesses translate them instead, which is governed by Tex. C. Crim. P. 38.30. As a result, the jury did not receive the exhibits with written English translations when they retired to deliberate.

The Jury initially asked for a "transcript/translation" of the Exhibit 23 text message, and clarified in their third question that they were "having a dispute about what the text message states (exhibit 23); Did the text message apologize for a specific incident?" (C.R. 268). As discussed above in point of error Four, the Court mischaracterized this request as "asking for an official translation."

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[9] Though not preserved by an objection, the root of this problem is the court's admission of a live interpretation by a lay-interpreters when a certified court interpreter was present and available. *See* Tex. Code Crim. Pro. 38.30, Tex. R. Evidence 1009. The Court belatedly recognized that the State had not followed correct procedure and admonished them on the record during the discussion of the Jury's questions: "Any time you are going to offer any kind of paper that has another language, you-all need to come to an agreement before the trial on what that means and it needs to be certified before you offer it into evidence because of things like that" (5 R.R. 50). The Court may also have given the Jury an instruction regarding the impact of an interpreting witness's bias on the credibility of their interpretation, but this was not raised before the trial court. *See Saavedra v. State*, 297 S.W.3d 342, 348 (Ct. Crim. App. 2009)(a case adopting a language-conduit hearsay doctrine which acknowledges that interpreters supplied by one party may have a motive "to mislead or distort").

[10] State's Exhibit 28 (8 R.R. 74-77) was also a text message conversation written in Spanish.

B. The Court believed Spanish-speaking jurors had self-translated Exhibit 23.

While discussing the issue of "official translation" with counsel, the trial court acknowledged,

> THE COURT: . . .I believe it came up in voir dire that there is at least one person that has Spanish heritage.
> MS. DETOTO: Number eight.
> THE COURT: She is from Mexico. I think she probably can translate it for the jury, but I'm assuming there may be some dispute back there. I'm not certain."

(5 R.R. 45). Juror Number 8 informed the court that she is from Mexico and speaks Spanish (2 R.R. 182) and was seated on the jury in this case (2 R.R. 232-233).

The court further explained that she assumed Juror Number 8 *had already* used her Spanish language skills to self-translate exhibit 23 for her fellow jurors: "There is a juror -- obviously she can understand it, and she's obviously told other people what it means. So there must be an issue. Probably more than one person speaks Spanish, I guess." (5 R.R. 49-50).

With those concerns in mind, the trial court nevertheless responded only, "There is no official translation of Exhibit 23 offered or admitted into evidence." (5 R.R. 51).

C. Self-Translation of exhibits by jurors during deliberation is juror misconduct.

When a trial court admits a translation of a foreign language exhibit, "that translated rendition becomes the only permanent record of what was said." *Flores v. State*, 299 S.W. 3d 843, 855-56 (Tex. App.— El Paso 2009, pet. ref'd). Only a qualified interpreter or sufficiently qualified witness can translate Spanish-language exhibit to the jury. Tex. Crim. Pro. Art. 38.30 (regarding live interpretation); Tex. R. Evid. 1009(regarding written translation). The Court of Criminal Appeals has observed that "[o]ne is not necessarily competent to translate legal proceedings because he or she is bilingual. On the contrary, [c]ourtroom interpretation is a sophisticated art, demanding not only a broad vocabulary, instant recall, and continuing judgment as to the speaker's intended meaning, but also the ability to reproduce tone and nuance, and a good working knowledge of both legal terminology and street slang." *Garcia v. State*, 149 S.W.3d 135, 143 (Tex. Crim. App. 2004).

Allowing jurors to self-translate an exhibit creates a risk that jurors will interject personal knowledge or expertise as new evidence into the proceedings during deliberation. *See Hernandez v. State*, 938 S.W.2d 503, 507 (Tex. App.— Waco 1997, pet. ref'd)(holding that juror's self-translation would be misconduct but was not present in the facts presented). In *Hernandez*, the Waco Court of Appeals drew an analogy between Jurors' self-translation of evidentiary tapes and other examples of juror

misconduct such as injecting personal experience or expertise into deliberations, citing *State v. Scott,* 819 S.W.2d 169, 172 (Tex.App.—Tyler 1991, pet. ref'd), *Cruz v. State,* 838 S.W.2d 682, 687 (Tex.App.—Houston [14th Dist.] 1992, pet. ref'd); or interjecting information from outside research or outside knowledge, citing *Reed v. State,* 841 S.W.2d 55, 60 (Tex.App.—El Paso 1992, pet. ref'd); *Stephenson v. State,* 571 S.W.2d 174, 176 (Tex.Crim.App. [Panel Op.] 1978). Legal scholarship has come to the same conclusion, *see* Clifford S. Fishman, Recordings, Transcripts, and Translations as Evidence, 81 WASH. L. REV. 473 (August 2006)(" bilingual jurors would become , in essence, expert 'witnesses' who, because they share their interpretations (which may not be accurate) with fellow jurors in the jury room rather than on the witness stand, cannot be cross-examined by [an] adverse party.") If a juror in fact self-translates Spanish-language evidence into English during jury deliberations, the defendant would be entitled to a new trial. *Hernandez, citing Stephenson v. State*, 571 S.W. 2d 174 at 176.

Texas courts have warned that failing to instruct jurors against self-translation "could disrupt the trial court's role as the gatekeeper of the evidence and allow the jury to make its own translation of the foreign language, which they cannot do." *Peralta v. State*, 338 S.W.3d 598, 611–12 (Tex. App.—El Paso 2010, no pet.)(concurring opinion).

D. The court gave an inadequate supplemental instruction in light of the jury's self-translation of Exhibit 23

The Court's response to the Jury's questions stated only "there is no official translation of Exhibit 23 offered or admitted into evidence." (5 R.R. 51).

When the trial court responds substantively to a jury question during deliberations, that communication amounts to an additional or supplemental jury instruction. *Villarreal v. State*, 205 S.W.3d 103, 106 (Tex. App.—Texarkana 2006, pet. ref'd) citing *Daniell v. State,* 848 S.W.2d 145, 147 (Tex.Crim.App.1993). When a defendant does not object to an error in the jury charge, such defendant is entitled to reversal of the jury's verdict only if the reviewing court determines that the error caused the defendant such egregious harm that he or she was deprived of a fair and impartial trial. *See Almanza v. State,* 686 S.W.2d 157, 171 (Tex.Crim.App.1984) (op. on reh'g).

With the first and clarifying jury questions about Exhibit 23, the court became aware that the jury had a dispute about the translation and context of the Spanish-language exhibit. The Court also recalled that at least one juror spoke Spanish and believed that the juror had self-translated the exhibit for her fellow jurors.

Knowing that self-translation was or could be occurring, it was incumbent on the trial judge to prevent juror misconduct with a supplemental

instruction on the law prohibiting juror self-translation. The court's actual instruction, "there is no official translation" (5 R.R. 51) was both nonresponsive to the jurors' actual question, and wholly disregarded the risk that a Spanish speaking juror could self-translate the evidence and thus commit misconduct.

While answering the Jury's actual question with a readback of testimony may have mitigated this risk,[11] it was also the judge's duty to instruct the jury not to commit misconduct. The Court's instruction did not do either of these things and created an even greater risk that juror misconduct would occur in deliberations.

E. The Court's failure to instruct against juror misconduct egregiously harmed Mr. Espinoza

The trial court's failure to instruct jurors to refrain from the misconduct of self-translation created an undue risk that Jurors would introduce outside information and expertise into their deliberations. This would taint the deliberation process and undermine the structure of the trial process itself. As discussed in Point of Error Four, this misconduct could lead jurors to come to inaccurate conclusions about whether Mr. Espinoza had confessed to a specific incident, a subject which commands outsized attention from juries. Because the

[11] See Appellant's Fourth point of error.

court's instruction did not cure, but likely exacerbated the risk of misconduct and misinterpretation of the evidence, Mr. Espinoza was egregiously harmed.

Because jurors were not instructed against committing misconduct and as a result Mr. Espinoza was egregiously harmed, he respectfully asks this Court to sustain his fifth point of error, reverse his conviction and order a new trial.

CONCLUSION AND PRAYER

For the reasons stated above, Juan Espinoza prays that this Honorable Court sustain his points of error, reverse the judgement of conviction entered below, and order a new trial.

Alexander Bunin

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/s/Amanda Koons

_____

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CERTIFICATE OF SERVICE

I certify that the foregoing brief was electronically served via Texas e-file on the Harris County District Attorney on the day the brief was filed.

/s/ Amanda Koons
_____
Amanda Koons

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i) (3), undersigned counsel certifies that this brief complies with all form requirements of TEX. R. APP. PROC. 9.4.

Exclusive of the portions exempted by TEX. R. APP. PROC. 9.4 (i)(1), this brief contains 13,877 words printed in Garamond point 14 font, with footnotes in Garamond point 12 font.

/s/ Amanda Koons
_____
Amanda Koons

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