NO. 14-24-00798-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

STATE OF TEXAS,
APPELLANT

V.

BRIAN KEITH PAYNE
APPELLEE

ON APPEAL FROM CAUSE NUMBER 1820812
FROM THE 339TH DISTRICT COURT OF HARRIS COUNTY, TEXAS

APPELLEE'S BRIEF

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ORAL ARGUMENT RESPECTFULLY REQUESTED

IDENTITY OF PARTIES AND COUNSEL

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PRESIDING JUDGE:	Hon. Te'iva Bell 339th District Court Harris County, Texas

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE CASE

The government indicted Appellee Brian Payne with continuous sexual abuse of a child, alleging in an overly broad charging instrument that Appellee committed an act of indecency with a child on or about Feb. 24, 2013; and an act of aggravated sexual assault of a child on or about April 1, 2022, without alleging the specific underlying offenses. C.R. at 69. The government also indicated its intention to use extraneous offenses and prior convictions, alleging twenty-five (25) acts of sexual abuse by Appellee against Complainant on or about Feb. 24, 2013. *Id.* at 123-29.

Appellee, seeking clarity as to which offenses were alleged and which were extraneous, moved to quash the overly broad indictment on Sept. 19, 2024. C.R. at 206-13. Appellee amended his motion on Oct. 2, 2024. *Id.* at 254-61. After the government responded in writing[1] and Appellee replied to the government's response,[2] the trial court granted Appellee's motion. *Id.* at 214. The trial court did not issue findings of fact and conclusions of law.

[1] C.R. at 264-77.
[2] C.R. at 278-84.

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument because the Court of Appeals's decision would be significantly aided by oral argument. TEX. R. APP. PROC. 38.1(e).

ISSUES PRESENTED

RESPONSES TO APPELLANT'S SOLE COMPLAINT:

ONE: APPELLANT'S SINGLE POINT OF ERROR IS MULTIFARIOUS AND THEREFORE PRESENTS NOTHING FOR REVIEW

TWO: THE TRIAL COURT DID NOT ERR IN GRANTING APPELLEE'S MOTION TO QUASH.

STATEMENT OF FACTS

The only issue the Appellant/government complains about on appeal is that the trial court granted Appellee's motion to quash the indictment. Appellant's Brief at p. 16. Therefore, the only relevant factual background is the language of the indictment itself, which reads:

> [I]n Harris County, Texas, BRIAN KEITH PAYNE ALSO KNOWN AS PAYNE, BRIAN, hereafter styled the Defendant, heretofore on or about February 24, 2013, did then and there unlawfully, during a period of time of thirty or more days in duration, commit at least two acts of sexual abuse against a child younger than fourteen years of age, including an act constituting the offense of indecency with a child by contact, committed against K.P. on or about [F]ebruary 24, 2013, and an act constituting the offense of aggravated sexual assault of a child, committed against K.P. on or about [A]pril 1, 2022, and the Defendant was at least seventeen years of age at the time of the commission of those acts[;]

and perhaps the government's notice of intent to use extraneous offenses and prior convictions, which includes the following allegations pleaded with more specificity than the indictment itself:

> That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause the penetration of

the female sexual organ of K.P., hereafter called the Complainant, a person younger than fourteen years of age and not the spouse of the Defendant, by placing his sexual organ in the female sexual organ of the Complainant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause the penetration of the anus of K.P., hereafter called the Complainant, a person younger than fourteen years of age and not the spouse of the Defendant, by placing his sexual organ in the anus of the Complainant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause the penetration of the female sexual organ of K.P., hereafter called the Complainant, a person younger than fourteen years of age and not the spouse of the Defendant, by placing his finger in the female sexual organ of the Complainant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause the penetration of the anus of K.P., hereafter called the Complainant, a person younger than fourteen years of age and not the spouse of the Defendant, by placing his finger in the anus of the Complainant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause the sexual organ of K.P., a person younger than fourteen years of age and not the spouse of the Defendant, to contact the sexual organ of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause the sexual organ of K.P., a person younger than fourteen years of age and not the spouse of the Defendant, to contact the sexual organ of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct,

the Defendant did intentionally and knowingly cause the anus of K.P., a person younger than fourteen years of age and not the spouse of the Defendant, to contact the sexual organ of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause the sexual organ of K.P., a person younger than fourteen years of age and not the spouse of the Defendant, to contact the mouth of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause the sexual organ of K.P., a person younger than fourteen years of age and not the spouse of the Defendant, to contact the finger of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause the anus of K.P., a person younger than fourteen years of age and not the spouse of the Defendant, to contact the finger of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause the breasts of K.P., a person younger than fourteen years of age and not the spouse of the Defendant, to contact the mouth of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause the mouth of K.P., a person younger than fourteen years of age and not the spouse of the Defendant, to contact the sexual organ of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause the mouth of K.P., a person younger than fourteen years of age and not the spouse of the Defendant, to contact the anus of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause the anus of K.P., a person younger than fourteen years of age and not the spouse of the Defendant, to contact the mouth of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly engage in sexual contact with K.P., a child under the age of seventeen years and not the spouse of the Defendant, by touching the genitals of K.P. with the intent to arouse and gratify the sexual desire of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly engage in sexual contact with K.P., a child under the age of seventeen years and not the spouse of the Defendant, by touching the anus of K.P. with the intent to arouse and gratify the sexual desire of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly engage in sexual contact with K.P., a child under the age of seventeen years and not the spouse of the Defendant, by touching the breast of K.P. with the intent to arouse and gratify the sexual desire of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly engage in sexual contact with K.P., a child under the age of seventeen years and not the spouse of the Defendant, by touching through clothing the genitals of K.P. with the intent to arouse and gratify the sexual desire of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly engage in sexual contact with K.P., a child under the age of seventeen years and not the spouse of the Defendant, by touching through clothing the anus of K.P. with the intent to arouse and gratify the sexual desire of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly engage in sexual contact with K.P., a child under the age of seventeen years and not the spouse of the Defendant, by touching through clothing the breast of K.P. with the intent to arouse and gratify the sexual desire of the Defendant.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly, with intent to arouse the sexual desire of the Defendant, have sexual contact with K.P., hereafter styled the Complainant, a child under the age of seventeen years and not his spouse, by having the Complainant touch the Defendant's genitals.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause K.P., hereafter called the Complainant, a person younger than seventeen years of age and not the spouse of the Defendant, to engage in sexual contact, namely by touching through clothing the hand of the Complainant with the anus of the Complainant, with intent to arouse and gratify the sexual desire of the Defendant, by placing the Complainant's hand on the Complainant's anus.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause K.P., hereafter called the Complainant, a person younger than seventeen years of age and not the spouse of the Defendant, to engage in sexual contact, namely by touching through clothing the hand of the Complainant with the breast of the Complainant, with the intent to arouse and gratify the sexual desire of the Defendant, by placing the Complainant's hand on the Complainant's breast.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly cause K.P., hereafter called the Complainant, a person younger than seventeen years of age and not the spouse of the Defendant, to engage in sexual contact, namely by touching through clothing the hand of the Complainant with the genitals of the Complainant, with the intent to arouse and gratify the sexual desire

of the Defendant, by placing the Complainant's hand on the Complainant's genitals.

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That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally knowingly, with intent to arouse and gratify the sexual desire of the Defendant, intentionally and knowingly expose the Defendant's genitals, knowing that K.P., a child younger than seventeen years of age and not the spouse of the Defendant was present.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly, with intent to arouse and gratify the sexual desire of the Defendant, intentionally and knowingly expose the Defendant's anus, knowing that K.P., a child younger than seventeen years of age and not the spouse of the Defendant was present.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly, with intent to arouse and gratify the sexual desire of the Defendant, intentionally and knowingly cause K.P., hereafter called the Complainant, a child younger than seventeen years of age and not the spouse of the Defendant, to expose the anus of the Complainant, by removing the Complainant's clothing which covered her anus.

That in Harris County, Texas, on or about February 24, 2013 and on other, multiple occasions, pursuant to a continuing course of conduct, the Defendant did intentionally and knowingly, with intent to arouse and gratify the sexual desire of the Defendant, intentionally and knowingly cause K.P., hereafter called the Complainant, a child younger than seventeen years of age and not the spouse of the Defendant, to expose the genitals of the Complainant, by removing the Complainant's clothing which covered her genitals. C.R. at 123-29.

Seeking more clarity as to which offenses comprised the charge and which offenses were extraneous, Appellee filed his motion to quash the indictment on Sept. 19, 2024. C.R. at 206-13. Appellee amended the motion on Oct. 2, 2024. *Id.* at 254-

62. On Oct. 21, 2024, the trial court granted Appellee's motion. Appellant filed its notice of appeal on the same date.

SUMMARY OF ARGUMENT

The trial did not err in quashing the indictment for a continuing offense which failed to plead the underlying offenses with specificity.

ARGUMENTS

ONE: APPELLANT'S SINGLE POINT OF ERROR IS MULTIFARIOUS AND THEREFORE PRESENTS NOTHING FOR REVIEW

Appellant's single point of error raises three to six separate grounds—depending on how you slice it—attacking the trial court's ruling using multiple legal theories, and thereby presenting nothing for review.

A multifarious point is one that embraces more than one specific ground. *Foster v. State*, 101 S.W.3d 490, 499 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (citing *Stults v. State*, 23 S.W.3d 198, 205 (Tex. App.—Houston [14th Dist.] 200, pet. ref'd)). By combining more than one contention in a single point of error, an appellant risks rejection on the ground that nothing will be presented for review. *Id.* Although an appellate court may address a multifarious point, it may only do so if the point is sufficiently developed in the brief. *Id.*

Appellant's brief argues the following errors in one multifarious issue, applying the wrong standard of review in the process by arguing that "the trial court abused its

discretion by granting the motion to quash": (1) the indictment gives sufficient notice; (2) the remainder of the record gives the appellee sufficient notice of what he is charged with (sic); (3) the indictment has no obligation to delineate between the charged offense and extraneous offense; (4) *Williams* is inapt because the appellee's argument relies on judicial dissents; (5) *Apprendi* is inapt and does not support the appellee; (6) an overwhelming amount of case law holds Section 21.02 facially constitutional for jury unanimity purposes; and (7) nothing else supports the trial court's ruling. These multiple points of error presented in one issue create a multifarious point. To the extent that this Court may choose to review the appellant's brief notwithstanding this problem, the issue is inadequately briefed. Case in point, in presenting its "overwhelming amount of case law," the appellant does not actually explain how the case law supports its position, opting instead for three pages of string citations without much explanation. In terms of actual briefing, Appellant relies almost exclusively on *Buxton*, a pre-*Ramos* case affirming a denial of a motion to quash that argued that the indictment failed to allege specific manner and means. *Buxton v. State*, 526 S.W.3d 666 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). It does not address the actual argument appellee made in the trial court, that the indictment alleges not mere manner and means, but separate underlying offenses, requiring more specific notice.

Because the appellant raises a multifarious point of error that is inadequately briefed, it presents nothing for review. As such, the trial court's ruling should be affirmed.

TWO: THE TRIAL COURT DID NOT ERR IN GRANTING APPELLEE'S MOTION TO QUASH.

The trial court did not err in granting Appellee's Motion to Quash Indictment, where the indictment failed to plead the underlying offenses with specificity.

A. Standard of Review

Courts of Appeals review a trial court's ruling on a motion to quash an indictment de novo because the sufficiency of a charging instrument is a question of law. *State v. Rousseau*, 398 S.W.3d 769, 778 (Tex. App.—San Antonio 2011, pet. granted and decision affirmed) (citing *Smith v. State*, 309 S.W.3d 10, 13-14 (Tex. Crim. App. 2010); *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004)). In general, an indictment must track the language of a statute to satisfy constitutional requirements. *Id.* (citing *State v. Mays*, 967 S.W.2d 404, 406 (Tex. Crim. App. 1998)).

B. Analysis: The Indictment fails to give Appellee sufficient notice, where it fails to track the language of the statutes for the underlying *offenses*, a claim that was raised in neither *Buxton* nor *Williams*.

The trial court correctly applied Appellee's arguments, that the underlying offenses are not plead with sufficient specificity to give proper notice and satisfy the need for jury unanimity under *Ramos v. Louisiana*, 590 U.S. 83, 140 S.Ct. 1390 (2020). The Appellant asked the trial court and now asks this Court to apply a pre-*Ramos* manner-and-means analysis as opposed to an offense-based analysis, which is distinct from what the Appellee argued in the trial court. This Court should affirm the trial court's order based on the Appellee's actual position.

Because the proper jury charge will be the one authorized by the indictment, the underlying offenses alleged in this case must be pleaded with more specificity to ensure jury unanimity and proper review of the sufficiency of the evidence if Appellee is convicted. *Bin Fang v. State*, 544 S.W.3d 923, 926 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

As the Appellee argued in his pleadings and arguments before the trial court, the Sixth Amendment right to jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict an accused of a serious offense. *Ramos v. Louisiana*, 590 U.S. 83, 140 S.Ct. 1390 (2020). Evangelisto Ramos was charged with capital murder and convicted by a guilty verdict reached by 10 out of 12 jurors, which was then allowed under the laws of Louisiana and Oregon. *Id.* at 87, 1394. As is its custom, the Court rewound it back to medieval England, quoted Blackstone, and fast forwarded to the Founding Fathers, essentially referencing half of a millennium's worth of common law requirements for jury unanimity. *Id.* at 89-92, 1395-97. The Court underscored the fact that *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628 (1972), and *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620 (1972), were anomalous, non-binding plurality opinions. *Ramos*, 590 U.S. at 94, 140 S.Ct. at 1398. The Court sharply criticized the *Apodaca* and *Johnson* Court's cost-benefit analysis that allowed Louisiana and Oregon to spend the next 50 years convicting citizens by non-unanimous verdicts. *Id.* at 99-100, 1401-1402. Ultimately, the Court reasoned that stare

decisis and the Constitution demanded overturning the pluralities of *Apodaca* and *Johnson*. *Id.* at 111, 1408.

Since *Ramos*, the Court has recognized the invalidity of similar opinions that would allow for non-unanimous jury verdicts based on *Apodaca*'s reasoning. See, e.g., *Edwards v. Vannoy*, 593 U.S. 255, 265 fn. 4 (2021) (acknowledging that *Ramos* overturned *Schad v. Arizona*, 501 U.S. 624, 634 (1991)). This is particularly salient when taking into account that one of the few state appellate court decisions upholding Section 21.02(d) and its non-unanimous jury verdict provision relies heavily on *Schad*, which relied heavily on *Apodaca*. *Jacobsen v. State*, 325 S.W.3d 733, 737 (Tex. App.—Austin 2010, no pet.). As the *Ramos* Court discussed, the practice of non-unanimous jury verdicts "always stood on shaky ground." *Ramos*, 590 U.S. at 95. That ground is now a sinkhole, particularly where cases like *Jacobsen* rely on the same type of cost-benefit analysis as *Apodaca* in allowing the State more latitude for continuing offenses.

The Appellant wants to argue that Section 21.02(d)—which allows for a non-unanimous verdict as to which two acts of sexual abuse the accused committed—absolves the State of its duty to plead those acts of sexual abuse in its indictment. C.R. at 274-75. However, allowing the government to plead the offenses as broadly as it has in this case and yet introduce unlimited evidence of extraneous offenses under Article 38.37 not only invites variances, but relies on them.

Furthermore, without decisions like *Jacobsen*, Texas is brought back to more robust protections of jury unanimity such as those invoked in *Ngo v. State*, 175 S.W.3d

738 (Tex. Crim. App. 2005). In *Ngo*, the accused was charged with credit card abuse under 32.31 of the Texas Penal Code. *Id.* at 741. The statute prohibited three distinct criminal acts: stealing a credit card, receiving a stolen credit card, and fraudulently presenting a credit card to pay for goods or services. "The three application paragraphs in the jury charge permitted the jury to convict appellant if some of the jurors found that he stole the credit card, others believed he received a stolen credit card, and still others thought that he fraudulently presented it." *Id.* at 741. Although the jury instruction also contained the word "unanimous," the Court of Criminal Appeals reasoned that it impermissibly allowed for a non-unanimous jury verdict in violation of Texas law and affirmed the Court of Appeals's reversal of the conviction. *Id.* at 752.

Were the Appellant permitted to proceed with an indictment which merely listed the title of the statute enumerated under Section 21.02(c) and not the specific underlying offense itself (e.g., indecency with a child by touching the complainant's vagina), the jury charge itself would be equally as vague and defective. As a result, it leads to an impermissible situation where each juror might find the Appellee committed two extraneous offenses—including indecency by touching a breast, which is specifically excluded—and still find Appellee guilty of an offense under Section 21.02. This is but one example of a fatal variance which would go undetected on appellate review due to the overly broad indictment leading to a fallacious "hypothetically correct jury charge." There are countless others wherein each juror might find that Appellee committed two

separate acts that are actually extraneous and still convict. This violates the fundamental rights to notice and jury unanimity.

The State relies heavily on *Buxton v. State*, 526 S.W.3d 666 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd), wherein the Appellant did not argue that the State failed to allege a specific offense, but rather that the State failed to allege the specific manner and means of the offense, an evidentiary matter. In his motion to quash and his brief, Mr. Buxton specifically referred to "acts" and "manner and means," forfeiting the due process argument that Section 21.02 and the other penal statutes it incorporates are comprised of myriad offenses, of which the State failed to give notice. Indeed in its analysis, the Court of Appeals repeatedly discussed the "manner or means" and "evidentiary facts," citing to multiple other intermediate court of appeals' decisions. *Id.* at 679 (citing *Jacobsen v. State*, 325 S.W.3d 733, 737 (Tex. App.—Austin 2010, no pet.); *Holton v. State*, 487 S.W.3d 600, 606-07 (Tex. App.—El Paso 2015, no pet.)).

Further echoing *Buxton*, the Appellant also analogizes Section 21.02 with the offense of continuous family violence under Section 25.11. However, Section 25.11 is not analogous to Section 21.02 in that it only incorporates one underlying offense set forth in Section 22.01(a)(1) of the Texas Penal Code. It does, however, provide an example of a statute which contains more than one offense within its text. In drafting Section 25.11 to include only offenses under Section 22.01(a)(1), the legislature implicitly acknowledges that Sections 22.01(a)(2), (a)(3), (b), (b-1), (b-2), (b-3), (b-4),

(c)(1), (c)(2), and (c)(3) are separate offenses. Such is the case with the statutes containing the underlying offenses alleged in this indictment: Sections 21.11(a)(1) and Section 22.021, as further illustrated by the legislature's delineation between indecency by touching the breast of a child from other touching offenses in Section 21.02(c)(2). Simply put, one statute does not equal one offense.

What the Appellant fails to do, apart from dismissing persuasive authority, is reconcile its position with the apparent emergence of a more offense-based analysis of statutes that contain underlying offenses as elements. The only Texas Court of Criminal Appeals case with any discussion of an offense-based argument, *Williams v. State*, 685 S.W.3d 110 (Tex. Crim. App. 2024), strongly suggests in dicta and dissents that the outcome might have been different had Mr. Williams argued that the indictment failed to allege the offense, rather than failed to allege manner or means.

Judge Bert Richardson, in the Texas Bar's 2024 Advanced Criminal Law CLE, stated that "maybe the biggest mistake, as noted in the appeal, is that the defendant represented himself."

During the same CLE presentation, Judge David Newell echoed Judge Yeary's dissent, noting that "we are sort of ***assuming*** that these are manner and means and not different offenses. So [Judge Yeary] would say that you need to decide whether or not these are different offenses instead of different ways to commit a single offense. And, uh, the Court leaves that open. Just decides the election issue without actually

addressing this offense, uh, so you could see later opinions in aggravated promotion of prostitution cases saying that owning is one thing, and operating is another offense and things like that. Keep that in mind when you are thinking about that. This really is a case about election and manner and means than it is about the substantive offense that it was addressing."

Appellee seeks to focus the discussion on the non-evidentiary matter of the underlying offenses alleged in the indictment, and not the manner and means of commission.

Inexplicably, the Appellant cites nearly 70 cases without discussing them, most of which are either pre-*Ramos* or non-binding, to support the proposition that an "overwhelming amount of case law holds Section 21.02 facially constitutional for jury unanimity purposes." Appellee did not raise a facial challenge to the statute in his motion to quash, but rather a challenge to the indictment itself.

Because the Appellant's indictment merely lists the title of statutes and not the specific underlying offenses that would comprise the prohibited "acts of sexual abuse," the trial court properly granted Appellee's motion to quash the indictment. Where the instrument fails to give proper notice, it creates a domino effect which allows for an erroneous jury instruction, a non-unanimous jury verdict, and a fatal variance that would elude judicial review. As such, the order should be affirmed.

C. Harm Analysis

Appellant cannot demonstrate that it was harmed by the trial court's order, and the order must therefore be affirmed.

Generally, a trial court's decision to grant or deny a motion to quash an indictment is reviewed pursuant to Texas Rule of Appellate Procedure 44.2(b), to determine whether it affects a defendant's substantial rights. *Mercier v. State*, 322 S.W.3d 258 (Tex. Crim. App. 2010); *Lewis v. State*, 693 S.W.3d 453 (Tex. App.—Houston [14th Dist.] 2023, pet. ref'd).

Even if the trial court erred in granting Appellee's motion to quash the indictment, the Appellant has not demonstrated what—if any—harm it suffers by either re-indicting the case to plead the underlying offenses with specificity or moving to amend the indictment to achieve that same purpose. If anything, the Appellant has demonstrated that it possesses detailed information in its file to allow it to make an intelligent and strategic decision as to which precise offenses it intends to plead. Appellant's Brief at pp. 25-28.

The only semblance of harm the Appellant has suffered are several opportunities to deprive Appellee of his substantive rights. The indictment under Section 21.02 that fails to allege the underlying offenses with specificity deprives Appellant (Defendant) of the substantial right to have proper notice of what theory the State intends to pursue,[3]

[3] *Montoya v. State*, 906 S.W. 528, 529 (Tex. Crim. App. 1995, en banc).

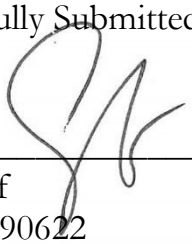
notice of what instruction the trial court gives the jury,[4] and the ability to have this Court or another court of appeals determine the sufficiency of the evidence at trial by the proper measure.[5] Each of these are substantial rights of the accused, which the trial court surely considered when granting Appellee's motion to quash.

This Court should affirm the trial court's order, where Appellant has failed to demonstrate harm.

PRAYER

Appellant asks this Court to reverse the conviction and remand the case to the trial court for a new trial.

Respectfully Submitted,



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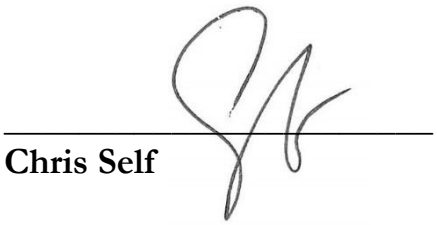
[4] *Curry v. State*, 30 S.W.3d 394, 398 (Tex. Crim. App. 2000) (jury charge must track language in indictment).

[5] *Bin Fang v. State*, 544 S.W.3d 923, 926 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (sufficiency of the evidence compared to the elements of the offense as defined by the "hypothetically correct jury charge," which 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").

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been delivered via e-service to the following:

Fletcher_Andrew@dao.hctx.net
DAOeservice@dao.hctx.net



Chris Self

CERTIFICATE OF COMPLIANCE

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Chris Self

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