

**No. 14-24-00633-CR**

IN THE COURT OF APPEALS  
FOURTEENTH JUDICIAL DISTRICT  
AT HOUSTON, TEXAS

FILED IN  
14th COURT OF APPEALS  
HOUSTON, TEXAS  
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**BUCK ODDASSON MCCOY,**  
Appellant,

DEBORAH M. YOUNG  
Clerk of The Court

V.

**THE STATE OF TEXAS,**  
Appellee.

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**ON APPEAL FROM THE 339<sup>TH</sup> DISTRICT COURT  
OF HARRIS COUNTY, TEXAS  
TRIAL COURT CAUSE NO. 1873372**

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**BRIEF FOR APPELLANT**

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ORAL ARGUMENT REQUESTED**

## IDENTIFICATION OF THE PARTIES

Pursuant to Tex. R. App. P. 38.1(a), a list of all interested parties is provided so members of this Court may determine if they are disqualified to serve or should recuse themselves from participating in this matter:

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<sup>1</sup> The names of the complainants are redacted pursuant to Tex. R. App. P. 9.10(a)(3).

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## STATEMENT REGARDING ORAL ARGUMENT

Because this case presents the consequential questions of whether the admission of a prejudicial extraneous offenses and an issue of jury non-unanimity tainted the integrity of this trial, the decisional process will be significantly aided by oral argument.<sup>1</sup>

## STATEMENT OF THE CASE<sup>2</sup>

Appellant was indicted for the offense of continuous sexual abuse of a child alleged to have been committed on or about and between August 31, 2016 through May 3, 2021.<sup>3</sup> The jury found Appellant guilty of continuous sexual abuse of a child on August 22, 2024 as alleged in the indictment.<sup>4</sup> On August 22, 2024, the jury assessed Appellant's punishment at life in prison without the possibility of parole.<sup>5</sup> The trial court's certification of the right to appeal<sup>6</sup> and Appellant's notice of appeal<sup>7</sup> were timely filed.

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<sup>1</sup> See Tex. R. App. P. 39.1 (party who requests oral argument may argue the case "unless the court...decides...the decisional process would not be significantly aided by oral argument").

<sup>2</sup> See generally Clerk's Record.

<sup>3</sup> CR 86.

<sup>4</sup> CR 179.

<sup>5</sup> CR 186-87.

<sup>6</sup> CR 192.

<sup>7</sup> CR 196.

## APPELLANT'S POINTS OF ERROR

### POINT OF ERROR NUMBER ONE

The trial court erred in overruling Appellant's objection to the admission of the extraneous offense of Appellant's disciplining and spanking of AD.G. without a belt and any subsequent, resulting CPS investigation at the guilt-innocence stage in violation of Tex. R. Evid. 404(b).

### POINT OF ERROR NUMBER TWO

The trial court erred in overruling Appellant's objection to the admission of the extraneous offense of Appellant's disciplining and spanking of AD.G. without the belt and any subsequent, resulting CPS investigation at the guilt-innocence stage in violation of Tex. R. Evid. 403.

### POINT OF ERROR NUMBER THREE

Appellant was egregiously harmed by the absence of a mid-trial instruction that jurors could not consider evidence of the extraneous offense involving Appellant's disciplining and spanking of AD.G. without the belt and any subsequent, resulting CPS investigation unless they first found beyond a reasonable doubt that he committed it and that evidence could only be considered for the limited purpose under Art. 38.37 and Rule 404(b) that it was offered.

### POINT OF ERROR NUMBER FOUR

Appellant was egregiously harmed by the absence of a mid-trial instruction that properly limited the jury's consideration of the extraneous offenses of sexual misconduct and grooming involving AI.G., R.W., and W.W. unless they first found beyond a reasonable doubt that he committed it and that evidence could only be considered for the limited purpose under Art. 38.37 and Rule 404(b) that it was offered.

### POINT OF ERROR NUMBER FIVE

Appellant was egregiously harmed by the portion of the jury charge that failed to properly limit the jury's consideration of the extraneous offense of Appellant's disciplining and spanking AD.G. without the belt and any subsequent, resulting CPS investigation and that evidence could only be considered for the limited purpose under Texas Rule of Evidence 404(b) that it was offered.

### POINT OF ERROR NUMBER SIX

Appellant was egregiously harmed by the portion of the jury charge that failed to properly limit the jury's consideration of the extraneous offense of sexual misconduct and grooming involving AI.G., R.W., and W.W. unless they first found beyond a reasonable doubt that he committed it and that evidence could only be considered for the limited purpose under Texas Rule of Evidence 404(b) that it was offered.

### POINT OF ERROR NUMBER SEVEN

Appellant was egregiously harmed by the jury charge error failing to instruct the jury that its verdict for each Court of continuous sexual abuse of a child as indicted must be unanimous and the flawed verdict form that did not provide the jury space to memorialize unanimity for each charge.

### SUMMARY OF THE ARGUMENT

1-2. The trial court erred by admitting evidence of the extraneous offense of Appellant's disciplining and spanking of AD.G. without the belt and any subsequent, resulting CPS investigation at the guilt-innocence stage over Appellant's Texas Rules of Evidence 404(b) and 403 objections. This irrelevant and inherently

prejudicial extraneous offense was not admissible given it was not admissible for any of the reasons jurors were authorized to consider it under Rule 404(b). Three of the four Rule 403 factors prove that any probative value this extraneous offense possessed was substantially outweighed by the danger of unfair prejudice. The erroneous admission of this extraneous offense affected Appellant's substantial rights given the State's reliance on it in its cumulative urging the jurors to convict Appellant.

3-6. Appellant was egregiously harmed by the series of jury charge errors dating back to the absence of critical mid-trial instructions that jurors could not consider evidence of the extraneous offense of 1) Appellant's disciplining and spanking of AD.G. without the belt and any subsequent, resulting CPS investigation, and 2) any extraneous offenses of sexual misconduct and grooming involving AI.G., R.W., and W.W. unless they first found beyond a reasonable doubt that he committed the extraneous offenses and bad acts. Additionally, the mid-trial instructions should have further instructed the jury to only consider this evidence for the limited purpose it was being offered under Art. 38.37 and Rule 404(b). The absence of these critical mid-trial instructions deprived jurors of the meaningful guidance by which to consider the extraneous offense throughout the course of the trial.

Further, Appellant was also egregiously harmed by the absence of a Rule

404(b) limiting jury instruction which dictated that the jury could only consider evidence of the extraneous offenses and bad acts for the limited purposes of “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,” when the State failed to show that it was admissible for any or all these exceptions. This overly expansive and clearly erroneous instruction impermissibly afforded juror’s carte blanche to consider this inherently prejudicial extraneous evidence.

The jury charge as a whole, the arguments of counsel, the state of the evidence, and the record as a whole warrant the conclusion that these critical charge errors caused egregious harm, especially given the State’s emphasis on the extraneous offenses and bad acts in urging jurors to convict Appellant. These material charging errors went to the very basis of the case, deprived Appellant of a valuable right, denied him a fair and impartial trial, resulting in egregious harm.

7. Appellant was egregiously harmed by the lack of jury unanimity on the record for the jury’s verdict regarding each unit of prosecution of continuous sexual abuse of a child presented. With a series of criminal conduct alleged during trial that involved multiple complainants, the jury charge should have instructed its verdict had to be unanimous as it related to each count. Additionally, the verdict form submitted to the jury should have had separate places for the jury to memorialize its verdict to reflect the two-count indictment. Because the record is left unclear as to

jury unanimity, this charging error involved a constitutional requirement, deprived Appellant of a valuable right, denied him a fair and impartial trial, resulting in egregious harm.

#### POINT OF ERROR NUMBER ONE

The trial court erred in the admission of the extraneous offense of disciplining and spanking AD.G. without the belt and any subsequent, resulting CPS investigation at the guilt-innocence stage in violation of Tex. R. Evid.404(b).

#### POINT OF ERROR NUMBER TWO

The trial court erred in overruling Appellant's objection to the admission of the extraneous offense of Appellant's disciplining and spanking of AD.G. without the belt and any subsequent, resulting CPS investigation at the guilt-innocence stage in violation of Tex. R. Evid.403.

#### STATEMENT OF FACTS

- A. *The indictment and the State's lack of notice of its intention to use the extraneous offense of Appellant's disciplining and spanking AD.G. without the belt and any subsequent, resulting CPS investigation under Art. 38.37 and Rule 404.*

The indictment alleged that Appellant committed multiple acts of sexual abuse, to wit: acts of indecency with a child and aggravated sexual assault against S.G. and AD.G. between August 31, 2016-May 3, 2021.<sup>8</sup> The State's notice of its intention to use extraneous offenses pursuant to Texas Rules of Evidence 404 and 609 and Arts.

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<sup>8</sup> CR 86.

37.07 and 38.37 of the Texas Code of Criminal Procedure set out several, possible means of Appellant's commission of the alleged offenses in the indictment against S.G. and AD.G.<sup>9</sup> Neither the indictment nor this pre-trial notice provided Appellant with any notice of its intent to introduce the extraneous alleged offense of Appellant's disciplining and spanking of AD.G. without the belt and any subsequent, resulting CPS investigations into said disciplining during trial in compliance with Art. 38.37 and Rule 404.<sup>10</sup>

**B. *Testimony regarding Appellant's disciplining and spanking of AD.G. without the belt and the subsequent, resulting CPS investigations, and alleged acts of sexual misconduct and grooming involving H.G., R.W., and W.W. in front of the jury.***

Numerous witnesses testified at trial regarding Appellant's discipline and spanking of AD.G. without the belt and the subsequent, resulting CPS investigation, as well as the alleged acts of sexual misconduct involving AI.G., R.W., and W.W. in front of the jury.<sup>11</sup>

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<sup>9</sup> CR 35-55; 61-81.

<sup>10</sup> *Id.* Appellant concedes that as it is related to the alleged extraneous offenses and bad acts of sexual misconduct and grooming involving AI.G., R.W., and W.W., the State complied with the Texas Rules of Evidence 404 and 609, and arts. 37.03 and 38.37 of the Texas Code of Criminal Procedure.

<sup>11</sup> 4 RR 14-59; 5 RR 87-101, 106-128, 135-154.

### C. Final Argument.

The State referenced Appellant's disciplining and spanking of AD.G. and the subsequent, resulting CPS investigation, as well as the other alleged extraneous offenses and acts of sexual misconduct and grooming involving AD.G., R.W., and W.W. in its closing argument, impressing the jury to convict.<sup>12</sup>

### ARGUMENT AND AUTHORITIES

#### A. *The Standard of Review*

The admission of evidence is reviewed for an abuse of discretion.<sup>13</sup> This deferential standard of review does not insulate judicial rulings from meaningful appellate review.<sup>14</sup> “A [trial] court by definition abuses its discretion when it makes an error of law.”<sup>15</sup> “Abuse of discretion does not imply intentional wrong or bad faith, or misconduct, but means only an erroneous conclusion.”<sup>16</sup> “‘Abuse of discretion’ is a phrase which sounds worse than it is. The term does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge.”<sup>17</sup> The trial court lacks

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<sup>12</sup>6 RR 61.

<sup>13</sup> *Colone v. State*, 573 S.W.3d 249, 263-64 (Tex.Crim.App. 2019).

<sup>14</sup> *Montgomery v. State*, 810 S.W.2d 372, 392 (Tex.Crim.App. 1990)(op. on rehr’g); see also *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995) (“proper application of the abuse of discretion standard on appellate review” is not “tantamount to no review at all”).

<sup>15</sup> *Koon v. United States*, 518 U.S. 81, 100 (1996).

<sup>16</sup> *Hebert v. State*, 836 S.W.2d 252, 255 (Tex.App.-Houston [1<sup>st</sup> Dist.] 1992, pet. ref’d).

<sup>17</sup> *United States v. Walker*, 772 F.2d 1172, 1176 n. 9 (5<sup>th</sup> Cir. 1985).

discretion to determine what the law is or in applying the law to the facts and lacks discretion to misinterpret the law.<sup>18</sup> This standard does not give the trial court any “right to be wrong” in admitting evidence.<sup>19</sup>

B. *The State’s pre-trial notice failed to provide notice of the extraneous offense of Appellant’s disciplining and spanking of AD.G. without a belt and any resulting CPS investigation.*

Texas Code of Criminal Procedure Art. 38.37 § 3 requires the State to provide the defendant with notice of its intention to introduce evidence of other offenses he committed at least 30 days before trial.<sup>20</sup> As outlined above, the timeline of relevant events shows the State’s notice failed to comply with the mandates outlined in Art. 38.37 § 3. Accordingly, the extraneous offense was inadmissible under this legal theory, and Art. 38.37 supersedes the application of Rule 404(b), making what would otherwise be inadmissible extraneous acts admissible under Rule 404(b).<sup>21</sup> However, the supercession of Art. 38.37 over Rule 404(b) *only applies if* the State has complied with the notice mandated under Art. 38.37 to warrant the admission of the

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<sup>18</sup> *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

<sup>19</sup> *Reese v. State*, 33 S.W.3d 238, 241 (Tex.Crim.App. 2000)(citation omitted).

<sup>20</sup> “The state *shall* give the defendant notice of the state’s intent to introduce in the case in chief evidence [extraneous acts] *not later than the 30<sup>th</sup> day* before the date of the defendant’s trial.” (emphasis added).

<sup>21</sup> See *Hitt v. State*, 53 S.W.3d 697, 705 (Tex.App.– Austin 2001, pet. ref’d) (Art. 38.37, § 2 supersedes the application of Rules 404 and 402 in certain sexual abuse cases).

extraneous offense to begin with. Because the State failed to sufficiently and properly notice this extraneous offense of Appellant's disciplining and spanking AD.G. without a belt and any subsequent, resulting CPS investigations is evidence that the proper notice was not given for an inherently prejudicial and injurious extraneous offense that is allowed under Art. 38.37 when the State does otherwise provide proper notice.

C. *The extraneous offense was not admissible as any exception to Rule 404(b).*

Evidence that is relevant has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.”<sup>22</sup> Evidence that is not relevant is not admissible.<sup>23</sup> “An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence.”<sup>24</sup> “Even the most

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<sup>22</sup> Tex. R. Evid. 401. While this evidence would have been relevant pursuant to Art. 38.37, because the State’s Art. 38.37 pretrial notice was clearly untimely, this evidence was not admissible pursuant to this provision and if admissible at all, would have only been relevant pursuant to Rule 404(b). As recounted below, because it was not, it was necessarily irrelevant under Rule 402.

<sup>23</sup> Tex. R. Evid. 402.

<sup>24</sup> *Bruton v. United States*, 391 U.S. 123, 131 n. 6 (1968).

comprehensive evidence may not be admitted unless its significance can be ascertained.”<sup>25</sup>

Specifically, Rule 404(b) codifies the fundamentals of our criminal justice system that an accused must only be tried for the offense of which he is charged and not for his character or generally being a criminal.<sup>26</sup> “Because extraneous offense evidence carries with it the inherent risk that a defendant may be convicted because of his propensity for committing crimes generally--i.e., his bad character-- rather than for the commission of the charged offense, courts have historically been reluctant to allow evidence of an individual’s prior bad acts or extraneous offenses.”<sup>27</sup> Aside from the inherent prejudice that extraneous offenses carry and the fact that they have a tendency to confuse issues for the jury, they carry a danger that the accused must often defend himself against crimes not alleged in the indictment.<sup>28</sup>

For the evidence of an extraneous offense to be admissible under Texas Rules of Evidence 404(b) and 403, there is a two-prong test the evidence must satisfy: (1)

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<sup>25</sup> 2 Jack B. Weinstein & Margaret A. Berger, WEINSTEIN’S FEDERAL EVIDENCE, Sec. 401.04[2][d] (2<sup>nd</sup> ed. 2000).

<sup>26</sup>*Owens v. State*, 827 S.W.2d 911, 914 (Tex.Crim.App. 1992).

<sup>27</sup> *Id.* at 914.

<sup>28</sup>*Turner v. State*, 754 S.W.2d at 672; see also *Johnston v. State*, 145 S.W.3d 215, 219 (Tex.Crim.App. 2004)(“[T]he law has, for centuries, rejected such evidence because it injects ‘dangerous baggage of prejudice, distraction from the issues, time consumption, and hazard of surprise.’”).

Is the evidence of an extraneous offense or bad act relevant to a fact of consequence in the case apart from its tendency to prove conduct in conformity with character?, and (2) Is the probative value of the evidence sufficiently strong so that it is not substantially outweighed by unfair prejudice?<sup>29</sup> Thus, the evidence does not become admissible simply because the State might offer the evidence for a purpose other than character conformity or any other Rule 404(b) permission:<sup>30</sup>

In our criminal justice system, the proponent of evidence ordinarily has the burden of establishing the admissibility of the proffered evidence. If no objection is made, the evidence is generally deemed admissible. However, once an objection is made, the proponent must demonstrate that the proffered evidence overcomes the stated objection.

The State, as the proponent of the extraneous evidence, was obligated to offer valid reasons why this inherently prejudicial evidence was admissible under any and all of the exceptions under Rule 404(b).<sup>31</sup>

#### INTENT AND KNOWLEDGE

For a conviction of continuous sexual abuse of a child to be sustained, the

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<sup>29</sup> *Id.* at 220.

<sup>30</sup> *Sandoval v. State*, 409 S.W.3d 259, 298 (Tex.App.– Austin 2013, no pet.).

<sup>31</sup> *Turner v. State*, 754 S.W.2d at 673.

State had the burden of proving that Appellant committed two or more acts of sexual abuse against one or more of the complainants over a period that was 30 days or more.<sup>32</sup> Since a jury could have clearly inferred Appellant's intent from the conduct alleged in the indictment, the extraneous offense of disciplining and spanking AD.G. without a belt and any evidence of the subsequent, resulting CPS investigation was not admissible under this exception.<sup>33</sup> As Appellant's alleged conduct was sufficient to show he acted with the requisite culpable mental state of knowledge, this extraneous evidence was inadmissible under this exception.<sup>34</sup>

#### MOTIVE

Although the State is not required to prove motive as an element of any criminal offense for a conviction to be sustained, motive is an "emotion that would provoke or lead to the commission of a criminal offense and...is the circumstantial evidence that would appear to cause or produce the emotion."<sup>35</sup> Since the State failed to prove how the extraneous evidence of disciplining and spanking AD.G. without a

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<sup>32</sup> CR 86.

<sup>33</sup> See *Jackson v. State*, 320 S.W.3d 873, 885 (Tex.App.– Texarkana 2010, pet. ref'd) ("Because Jackson never contested intent, the extraneous-offense evidence was inadmissible under Rule 404.").

<sup>34</sup> See *Nelms v. State*, 834 S.W.2d 110, 113-14 (Tex.App.– Houston [1<sup>st</sup> Dist.] 1992, pet. ref'd)(extraneous offense erroneously admitted where defendant's knowledge was not an issue).

<sup>35</sup> *Bush v. State*, 628 S.W.2d 441, 444 (Tex.Crim.App. 1982); *Lopez v. State*, 288 S.W.3d 148, 165 (Tex.App.– Corpus Christi 2009, pet. ref'd).

belt and any evidence of a subsequent, resulting CPS investigation produced the emotion that would have provoked Appellant to engage in the conduct alleged in the primary case, this evidence was inadmissible under this Rule 404(b) exception.<sup>36</sup>

### OPPORTUNITY

Evidence of an extraneous offense under this exception is admissible where the accused claims he lacked the opportunity to commit the offense or it was impossible for him to do so.<sup>37</sup> Although the testimony presented Appellant would discipline AD.G. in a physical manner which prompted a subsequent CPS investigation,<sup>38</sup> this testimony was insufficient to establish this extraneous act was admissible under the Rule 404(b) exception of opportunity.<sup>39</sup>

### PREPARATION OR PLAN

This exception “allows admission of evidence to show steps taken by the accused in preparation for the charged offense.”<sup>40</sup> But, evidence is not admissible under this exception “if the proponent is unable to articulate exactly how an

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<sup>36</sup> See *id.* at 165-66 (extraneous offense was inadmissible to show motive where the State failed to explain how the extraneous offense produced the emotion that provoked Appellant to engage in the conduct charged in the primary case).

<sup>37</sup> *Powell v. State*, 63 S.W.3d 435, 438-39 (Tex.Crim.App. 2001).

<sup>38</sup> RR. Vol. 4, pp.31-32, 34, 86, 102, 153, 161; RR Vol. 5, pp. 74, 86-87.

<sup>39</sup> See *Sandoval v. State*, 409 S.W.3d at 299 (“[T]he extraneous conduct was not relevant to the uncontested issue of opportunity.”).

<sup>40</sup> *Daggett v. State*, 187 S.W.3d 444, 451 (Tex.Crim.App. 2005).

extraneous act tends to prove a step toward an ultimate goal or overarching plan.”<sup>41</sup>

Because the State never articulated exactly how the extraneous offense tended “to prove a step toward an ultimate goal or overarching plan,” it was inadmissible under this exception.<sup>42</sup>

#### ABSENCE OF MISTAKE OR ACCIDENT

The admission of an extraneous offense under this exception is an abuse of discretion when this defensive theory is not raised.<sup>43</sup> Because Appellant never raised a claim of accident or mistake, any testimony about the disciplining and spanking of AD.G. without a belt was inadmissible under this exception.<sup>44</sup>

#### D. *The prohibition in Rule 403 and the trial court’s balancing test.*

Because the admission of the extraneous offense was an abuse of discretion, this Court need not address his contention<sup>45</sup> that the admission of this evidence also

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<sup>41</sup> *Pittman v. State*, 321 S.W.3d 565, 573 (Tex.App.—Houston [14<sup>th</sup> Dist.] 2010, no pet.).

<sup>42</sup> See *id.* (extraneous sexual assault was inadmissible under this exception where State failed to show that it was part of a plan or in preparation of the sexual assault of the named complainants).

<sup>43</sup> *Prior v. State*, 647 S.W.2d 956, 959 (Tex.Crim.App. 1983).

<sup>44</sup> See *DeLeon v. State*, 77 S.W.3d at 312 (“In using accident and mistake as a purpose for admitting the extraneous offenses when they were not relevant was error on the part of the trial court which could have served only to confuse the jury.”).

<sup>45</sup> Tex. R. App. P. 47.1 (“The court of appeals must hand down a written opinion that is as brief as possible but that addresses every issue raised and necessary to final disposition of the appeal.”).

violated Rule 403.<sup>46</sup> However if the Court does, its task in finding that this evidence was inadmissible under Rule 403 is not onerous.

Evidence is unfairly prejudicial if it has “an undue tendency to suggest that a decision be made on an improper basis.”<sup>47</sup> Prejudice is not solely a function of whether the jury would likely convict Appellant just for being a criminal generally.<sup>48</sup> The trial court’s Rule 403 balancing test examines: (1) the probative value<sup>49</sup> of the evidence; (2) the potential to impress the jury in some irrational, yet indelible way; (3) the time needed to develop the evidence; and (4) the proponent’s need for the evidence.<sup>50</sup> The prejudicial effect of evidence may be created by its tendency to excite emotions against the defendant.<sup>51</sup> The trial court’s ruling that evidence is admissible “must be reasonable in view of all the relevant facts.”<sup>52</sup>

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<sup>46</sup> Tex. R. Evid. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.”).

<sup>47</sup> *Montgomery v. State*, 810 S.W.2d at 389.

<sup>48</sup> *Hankton v. State*, 23 S.W.3d 540, 547 (Tex.App.—Houston [1<sup>st</sup> Dist.] 2000, pet. ref’d).

<sup>49</sup> See *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex.Crim.App. 2006)(“probative value means more than simply relevance.”).

<sup>50</sup> *State v. Mechler*, 153 S.W.3d 435, 440 (Tex.Crim.App. 2005).

<sup>51</sup> *Casey v. State*, 215 S.W.3d 870, 883 (Tex.Crim.App. 2007)(citation omitted).

<sup>52</sup> *Reese v. State*, 33 S.W.3d at 241.

E. *Three of the four Rule 403 factors weigh in favor of excluding the extraneous offense.*

#### THE PROBATIVE VALUE OF THE EVIDENCE

Any probative value of this extraneous evidence is weakened by the quality and quantity of the testimony from the complainants regarding the primary acts alleged in the indictment.<sup>53</sup>

#### THE EVIDENCE'S POTENTIAL TO IMPRESS JURORS IN AN IRRATIONAL MANNER

This factor favors exclusion of the extraneous act because sexually-related misconduct and misconduct involving children is inherently inflammatory.<sup>54</sup> In the State's closing argument, it urged the jury to convict Appellant as it was related to AD.G. and referenced the disciplinary history Appellant had as it related to this complainant.<sup>55</sup> The prosecution's repeated emphasis on this extraneous evidence weighs in favor for exclusion because it "appeal[ed] to the jury's emotional side and encourage[d] the jurors to make a decision on an emotional basis,"<sup>56</sup> and "caution

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<sup>53</sup> See *Montgomery v. State*, 810 S.W.2d at 390 ("When the proponent has other compelling or undisputed evidence to establish the proposition or fact that the extraneous misconduct goes to prove, the misconduct evidence will weigh far less than it otherwise might in the probative-versus-prejudice balance."); *Avila v. State*, 18 S.W.3d 736, 741 (Tex.App.— San Antonio 2000, no pet.).

<sup>54</sup> *Bjorgaard v. State*, 220 S.W.3d 555, 561 (Tex.App.— Amarillo 2007, pet. dism'd).

<sup>55</sup> 6 RR 61.

<sup>56</sup> *Erazo v. State*, 144 S.W.3d 487, 495 (Tex.Crim.App. 2004).

must be used to avoid again convicting a defendant simply because he may have committed a crime before.”<sup>57</sup>

#### THE TIME NEEDED TO DEVELOP THE EVIDENCE

While Appellant concedes that this factor warrants admission, in a majority of cases where appellate courts have found that the probative value of evidence is substantially outweighed by its danger of unfair prejudice, this factor seems to be the least significant in their analysis.<sup>58</sup>

#### THE STATE’S NEED FOR THE EVIDENCE

This factor under Rule 403 is driven by three questions: (1) Did the State have other available evidence to establish the fact of consequence that the exhibit was relevant to show?, (2) If so, how strong is that other evidence?, and (3) Is the fact of consequence related to an issue that is in dispute?<sup>59</sup>

First, this inherently prejudicial evidence was not necessary for the State to prove the charged offenses in the indictment. The complainants’ testimony, if the

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<sup>57</sup> *Bjorgaard v. State*, 220 S.W.3d at 561; *See Taylor v. State*, 93 S.W.3d 497, 507 (Tex.App.—Texarkana 2002, pet. ref’d)(“[T]his evidence was such as to encourage resolution of material issues on an emotional and improper basis rather than on the basis of the evidence on which he allegations of wrongdoing were grounded.”).

<sup>58</sup> *See Alexander v. State*, 88 S.W.3d 772, 778 (Tex.App.— Corpus Christi 2002, pet. ref’d) (sustaining Rule 403 claim even where this factor favored the State); *see also Newton v. State*, 301 S.W.3d 315, 322 n. \* (Tex.App.— Waco 2009, pet. ref’d)(Gray, C.J., *concurring*) (“counting pages is dangerous because it tends to encourage inappropriate behavior” and is “an unsatisfying way to evaluate this factor because it is an arbitrary but objective measure of a largely subjective factor.”).

<sup>59</sup> *Erazo v. State*, 144 S.W.3d at 495-96 (footnote omitted).

jury believed it, was sufficient on its own to convict Appellant of the offense charged.<sup>60</sup> And, the State’s emphasis in summation as to how powerful its evidence against Appellant proves its lack of need to elicit the inherently prejudicial testimony encompassing this chain of extraneous offenses.<sup>61</sup>

## CONCLUSION

Three of these four factors reinforce the conclusion that whatever probative value the extraneous offense had was substantially outweighed by its danger of unfair prejudice.<sup>62</sup> Appellant need not show that all four Rule 403 “relevant criteria” warranted exclusion of this testimony for this Court to hold its admission was an abuse of discretion.<sup>63</sup> Appellant has shown that at least “one or more such relevant criteria”<sup>64</sup> weighs in his favor, and the “minute peg of relevance” of this inherently

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<sup>60</sup> See *Bjorgaard v. State*, 220 S.W.3d at 561 (“[A]mple evidence nonetheless existed to support conviction. This, in turn, meant that the need for the evidence of appellant’s prior conviction was slight.”).

<sup>61</sup> See *Russell v. State*, 113 S.W.3d 530, 548-49 (Tex.App.–Fort Worth 2003, pet. ref’d) (State’s lack of need for extraneous offense demonstrated in final argument when it argued evidence of charged offense was “overwhelming”).

<sup>62</sup> See *Beham v. State*, 476 S.W.3d 724, 738 (Tex.App. – Texarkana 2015, no pet.) (“[W]e find the record firmly establishes that the danger of unfair prejudice inherent in the extraneous-offense evidence ... substantially outweighed the evidence’s probative value.”).

<sup>63</sup> *Reese v. State*, 33 S.W.3d at 241.

<sup>64</sup> *Id.*

inflammatory testimony is “entirely obscured by the dirty linen hung upon it.”<sup>65</sup> For these reasons, the admission of the witness’ testimony regarding Appellant’s disciplining and spanking of AD.G. without a belt and any subsequent, resulting CPS investigation over Appellant’s Rule 403 objection was an abuse of discretion.<sup>66</sup>

*F. The erroneous admission of the extraneous offense of Appellant’s disciplining and spanking of AD.G. without a belt and any subsequent, resulting CPS investigations for disciplining affected Appellant’s substantial rights.*

The erroneous admission of evidence is typically non-constitutional error<sup>67</sup> that is reviewed through a lens<sup>68</sup> requiring this Court to determine whether the erroneous admission had “a substantial and injurious effect or influence in determining the jury’s verdict.”<sup>69</sup> This harm analysis calls for this Court to also determine whether the erroneous admission of the testimony substantially swayed

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<sup>65</sup> *United States v. Kahaner*, 317 F.2d 459, 471-72 (2<sup>nd</sup> Cir. 1963); *see also Aguillen v. State*, 534 S.W.3d 701, 716 (Tex.App. – Texarkana 2017, no pet.)(admission of extraneous offense over defendant’s Rule 403 objection was an abuse of discretion).

<sup>66</sup> *See Reese v. State*, 33 S.W.3d at 242-43 (concluding the trial court abused its discretion admitting evidence over defendant’s Rule 403 objection even though the first and third factors – probative value of the evidence and the time needed to develop it respectively – fell on the State’s side of the ledger, they were not enough to overcome the other two – the ability of the evidence to impress the jury in some irrational yet indelible way and the State’s need for the evidence).

<sup>67</sup> *See e.g., Delane v. State*, 369 S.W.3d 412, 423 (Tex.App.– Houston [1<sup>st</sup> Dist.] 2012, pet. ref’d)(erroneous admission of evidence in violation of evidentiary rules is non-constitutional error).

<sup>68</sup> Tex. R. App. P. 44.2(b) provides that, “Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”

<sup>69</sup> *King v. State*, 953 S.W.2d 266, 270 (Tex.Crim.App. 1997)(citation omitted).

or influenced the jury's verdict, and not whether there was sufficient, or overwhelming evidence to convict.<sup>70</sup> This Court must examine whether this evidence had significant potential "to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."<sup>71</sup>

If this Court is left with "grave doubt" that Appellant's trial was free from substantial influence of the erroneous admission of the rash of the extraneous offenses, it must treat the errors that they did.<sup>72</sup> "Grave doubt" means that "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to harmlessness of the error."<sup>73</sup> "The determination of harm is little more than an educated guess. What the jurors *actually* thought persuasive or *actually* considered is seldom, if ever, available to us. So, we ... assess potentialities."<sup>74</sup>

To assess the likelihood that the jury's decision was adversely effected by the erroneous admission, this Court considers whether the admission of the evidence

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<sup>70</sup> *Booker v. State*, 103 S.W.3d 521, 538 (Tex.App.– Fort Worth 2003, pet. ref'd); *see also Wells v. State*, 271 S.W.3d 864, 867 (Tex.App.– Amarillo 2008, no pet.) ("The presence of legitimate evidence of guilt should not be seen by the State as a way to slip into the record evidence of dubious legitimacy.").

<sup>71</sup> *Old Chief v. United States*, 519 U.S. 172, 180 (1997).

<sup>72</sup> *United States v. Lane*, 474 U.S. 438, 449 (1986).

<sup>73</sup> *O'Neal v. McAninch*, 513 U.S. 432, 433-36 (1995).

<sup>74</sup> *Brown v. State*, 978 S.W.2d 708, 716 (Tex.App.– Amarillo 1998, pet. ref'd)(emphasis in original).

within the context of the entire record and not merely of whether or not there was sufficient or overwhelming evidence of guilt.<sup>75</sup> In other words, a Rule 44.29(b) analysis is required to focus on whether the error substantially swayed or influenced the verdict rather than whether there is sufficient or overwhelming evidence of guilt.<sup>76</sup>

This Court's harmless error analysis includes three principles: 1) Appellant is not required to show that he was harmed by the admission of the extraneous offense,<sup>77</sup> 2) "By its very nature, an improperly admitted extraneous offense tends to be harmful. It encourages the jury to base its decisions on character conformity, rather than evidence that the defendant committed the offense with which he or she has been charged."<sup>78</sup> The State's reference to this inadmissible evidence in final argument proves that this error affected Appellant's substantial rights,<sup>79</sup> and 3) "In cases of grave doubt as to the harmlessness the [appellant] must win."<sup>80</sup> As another

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<sup>75</sup> *Motilla v. State*, 78 S.W.3d 352, 355 (Tex.Crim.App. 2002).

<sup>76</sup> *Booker v. State*, 103 S.W.3d at 538.

<sup>77</sup> *Johnson v. State*, 43 S.W.3d 1, 4 (Tex.Crim.App. 2001).

<sup>78</sup> *Jackson v. State*, 320 S.W.3d 873, 889 (Tex.Crim.App.—Texarkana, 2010)(pet. ref'd).

<sup>79</sup> 6 RR 61. See *Hankton v. State*, 23 S.W.3d at 548-49 (State's repeated emphasis on improperly admitted extraneous offenses during its final argument had a substantial and injurious effect or influence in determining jury's verdict).

<sup>80</sup> *Burnett v. State*, 88 S.W.3d 633, 638 (Tex.Crim.App. 2002); see also *State v. Cortez*, 543 S.W.3d 198, 210 (Tex.Crim.App. 2018)(Newell, J., concurring), citing *United States v. Santos*, 128 S.Ct.

appellate court opined in a similar situation, when the Court is “unsure whether the admission of the extraneous acts affected the jury’s verdict, we are obligated to treat the error as harmful.”<sup>81</sup>

In this context, this Court should harbor grave doubt that the trial court’s erroneous admission of the extraneous offense of Appellant’s disciplining and spanking of AD.G. without a belt and any subsequent, resulting CPS investigation affected Appellant’s substantial rights. The State’s summative emphasis on this erroneously admitted evidence, including its emphasis in its final argument, gives rise to this Court’s determination of whether this error had a substantial and injurious effect and influence on the jury’s verdict.<sup>82</sup> This principle is especially true where, as here, the prosecution emphasizes the erroneously admitted evidence in its rebuttal closing argument immediately prior to deliberations—as it was one of the last points of information the jury heard before its deliberations.<sup>83</sup>

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2020, 2025 (2008)(Scalia, J.)(in close cases, “Under a long line of our decisions, the tie must go to the [Appellant].”).

<sup>81</sup> *Lopez v. State*, 288 S.W.3d at 179.

<sup>82</sup> See e.g., *Williams v. State*, 27 S.W.3d 599, 603 (Tex.App.— Waco 2000, no pet.) (“The State referred to the [evidence] during its opening statement, final argument, and in its rebuttal.”); *Patterson v. State*, 508 S.W.3d 432, 453 (Tex.App.— Fort Worth 2015, no pet.) (prosecution’s emphasis on erroneously admitted evidence during final argument had a substantial and injurious effect or influence in determining jury’s verdict).

<sup>83</sup> 6 RR 61; See *Erazo v. State*, 167 S.W.3d 889, 890-91 (Tex.App.— Houston [14<sup>th</sup> Dist.] 2005, no pet.)(op. on remand)(erroneously admitted picture about which “the State imparted its final thoughts to the jury just before its deliberations” affected substantial rights); *Brown v. State*, 978 S.W.2d at

The erroneous admission of this testimony made the State's case significantly more persuasive, which is the hallmark of harm, as it "loomed large,"<sup>84</sup> and irreparably tainted the integrity of the jury's decision-making process.<sup>85</sup>

The judgement of conviction entered in this case must be reversed and this cause remanded for a new trial.

#### POINT OF ERROR NUMBER THREE

Appellant was egregiously harmed by the absence of a mid-trial instruction that jurors could not consider evidence of the extraneous offense involving Appellant's disciplining and spanking of AD.G. without the belt and any subsequent, resulting CPS investigation unless they first found beyond a reasonable doubt that he committed it and that evidence could only be considered for the limited purpose under Art. 38.37 and Rule 404(b) that it was offered.

#### POINT OF ERROR NUMBER FOUR

Appellant was egregiously harmed by the absence of a mid-trial instruction that properly limited the jury's consideration of the extraneous offenses of sexual misconduct and grooming involving AI.G., R.W., and W.W. unless they first found beyond a reasonable doubt that he committed it and that evidence could only be considered for the limited purpose under Art. 38.37 and Rule 404(b) that it was offered.

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<sup>715</sup> ("[T]he harm arose immediately before the jury was to retire and deliberate. Thus, its potential effect was not as attenuated as it would have been had the misconduct occurred elsewhere.").

<sup>84</sup> *George v. State*, 959 S.W.2d 378, 383 (Tex.App.– Beaumont 1998, pet. ref'd).

<sup>85</sup> See *Peters v. State*, 31 S.W.3d 704, 723 (Tex.App.– Houston [1<sup>st</sup> Dist.] 2000, pet. ref'd); see also *Aguijón v. State*, 534 S.W.3d at 716 (admission of extraneous offense compelled reversal).

## POINT OF ERROR NUMBER FIVE

Appellant was egregiously harmed by the portion of the jury charge that failed to properly limit the jury's consideration of the extraneous offense of Appellant's disciplining and spanking AD.G. without the belt and any subsequent, resulting CPS investigation and that evidence could only be considered for the limited purpose under Texas Rule of Evidence 404(b) that it was offered.

## POINT OF ERROR NUMBER SIX

Appellant was egregiously harmed by the portion of the jury charge that failed to properly limit the jury's consideration of the extraneous offense of sexual misconduct and grooming involving AI.G., R.W., and W.W. unless they first found beyond a reasonable doubt that he committed it and that evidence could only be considered for the limited purpose under Texas Rule of Evidence 404(b) that it was offered.

## STATEMENT OF FACTS

- A. *The indictment and the State's notice of its intention to use extraneous offenses under Art. 38.37 and Rule 404.*
- B. *Testimony about Appellant's disciplining and spanking AD.G. without a belt and the subsequent, resulting CPS investigation, and the alleged sexual misconduct including H.G., R.W., and W.W. in front of the jury.*
- C. *Final Argument.*

Appellant incorporates by reference pp. 8, 23 *supra*.

- D. *The absence of mid-trial instructions on the State's burden of proof for extraneous offenses and the limited purposes of the extraneous acts.*

At any point prior to each witness testifying about any extraneous offenses,<sup>86</sup>

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<sup>86</sup> 4 RR 14-59; 157-173; 5 RR 6-43, 63-83, 87-101, 106-128, 135-154.

trial counsel did not request that the jury be given a contemporaneous instruction that they could *only* consider evidence of these extraneous offenses for any purpose if they first found the State had proven the Appellant committed these offenses beyond a reasonable doubt.<sup>87</sup>

Further, prior to witnesses testifying about any extraneous offenses, trial counsel did not request that the jury be given a contemporaneous limiting instruction requiring that they were only to consider the extraneous offenses for the limited purpose for which it was offered.<sup>88</sup>

E. *The trial court's jury charge on extraneous offenses.*

As it pertained to extraneous offenses, the trial court only instructed the jury, *inter alia*, that:

You are further instructed that if there is any evidence before you in this case regarding the defendant's committing other crimes, wrongs, or acts against the child who is the victim of the alleged offense in the indictment in this case, you cannot consider such evidence for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other crimes, wrongs, or acts against the child, you may then, only then, consider the same in determining its bearing on relevant matters including (1) the state of mind of the defendant and the child, and (2) the previous and subsequent relationship between the defendant and the child.<sup>89</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> CR 174.

You are further instructed that if there is any evidence before you in this case regarding the defendant committing a separate offense or offenses, specifically Section 21.11 (Indecency of a Child by Contact), Section 22.021(a)(1)(B) and (2) (Aggravated Sexual Assault of a Child), and Section 22.011(a)(2) Sexual Assault of a Child against a child other than the victim of the offense or offenses, if any. If you so find and believe beyond a reasonable doubt that the defendant committed such other offense or offenses, you may then, and only then, consider the same in determining its bearing on relevant matters, including (1) the character of the defendant and (2) acts performed in conformity with the character of the defendant.<sup>90</sup>

### ARGUMENT AND AUTHORITIES

#### A. *The standard of review for jury charge error.*

The trial court has an obligation to provide the jury with “a written charge distinctively setting forth the law applicable to the case.”<sup>91</sup> The trial court’s duty includes instructing the jurors that evidence admitted for a limited purpose may only be considered for that specific purpose and no other reason.<sup>92</sup> An incomplete or erroneous jury charge jeopardizes a defendant’s right to a jury trial because it fails

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<sup>90</sup> CR 175.

<sup>91</sup> *Jenkins v. State*, 468 S.W.3d 656, 671 (Tex.App. – Houston [14<sup>th</sup> Dist.] 2015, pet. dism’d), citing, TEX. CODE CRIM. PROC. art. 36.14.

<sup>92</sup> *Ex parte Varelas*, 45 S.W.3d 627, 631 (Tex.Crim.App. 2001).

to provide guidance to the jury's fact-finding process.<sup>93</sup>

When reviewing claims of jury charge error, this Court must first decide whether error exists in the charge and, after reviewing the entire record, then determine whether this error caused sufficient harm that requires reversal.<sup>94</sup> Whether a claimed charge error was preserved determines the degree of harm necessary for reversal.<sup>95</sup> If charge error was not preserved, Appellant must demonstrate that the error was so egregious and created such a degree of harm that he was deprived of his right to a fair and impartial trial.<sup>96</sup> Charge error that is egregious affects "the basis of the case," "vitally affect[s] a defensive theory," and deprives the defendant of a "valuable right."<sup>97</sup>

An erroneous charge on its own can cause egregious harm.<sup>98</sup> So, it is not necessary to show direct evidence of harm to demonstrate egregious harm.<sup>99</sup> For this Court to determine the Appellant was caused egregious harm by the synergistic

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<sup>93</sup> *Jenkins v. State*, 468 S.W.3d at 671.

<sup>94</sup> *Arteaga v. State*, 521 S.W.3d 329, 333 (Tex.Crim.App. 2017).

<sup>95</sup> *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984)(op. on rehr'g).

<sup>96</sup> *Bailey v. State*, 867 S.W.2d 42, 43 (Tex.Crim.App. 1993).

<sup>97</sup> *Hutch v. State*, 922 S.W.2d 166, 171 (Tex.Crim.App. 1996).

<sup>98</sup> *Id.* at 171.

<sup>99</sup> *Castillo-Fuentes v. State*, 707 S.W.2d 559, 573 n. 2 (Tex.Crim.App. 1986).

effect of charge errors, it must assay the entire trial record and case including the entire jury charge, the state of the evidence (including the weight of the probative evidence and contested issues,) as well as the arguments of counsel and other relevant information in the trial record.<sup>100</sup> The inquiry of harm is “an empirical question . . . primarily contingent on the individual peculiarities of each trial, considered as a whole.”<sup>101</sup>

B. *The absence of a legally correct contemporaneous limiting instruction on the State’s burden of proof and a legally correct limiting instruction on the extraneous offense in the jury charge.*

“If the court admits evidence that is admissible . . . for a purpose- . . . or for another purpose- the court, on a timely request, *must restrict the evidence to its proper scope and instruct the jury accordingly.*”<sup>102</sup> Given this principle, Appellant was entitled to a mid-trial instruction limiting the jury’s consideration of any of the extraneous acts solely to the limited purpose or purposes for which it was admitted when it was offered.<sup>103</sup> The Court of Criminal Appeals has made clear that:

If limiting instructions impede the improper use of evidence, then an instruction given when the evidence is

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<sup>100</sup> *Hutch v. State*, 922 S.W.2d at 171.

<sup>101</sup> *Id.*

<sup>102</sup> Tex. R. Evid. 105(a)(emphasis added). In the absence of such a request, the court’s action in admitting such evidence without limitation shall not be a ground for complaint on appeal. Tex. R. Evid. 105(b)(1).

<sup>103</sup> *Rankin v. State*, 974 S.W.2d 707, 713 (Tex.Crim.App. 1996).

admitted limits that evidence to its proper scope immediately. An instruction given for the first time during the jury charge necessarily leaves a window of time in which the jury can contemplate the evidence in an inappropriate manner. ... [J]urors may also improperly use that evidence to form a negative opinion of the defendant prior to receiving limiting instructions from the judge. Jurors cannot be expected to know exactly how to use the evidence unless we tell them, nor can we guarantee that they will “remain open-minded until the presentation of all the evidence and instructions...”<sup>104</sup>

The State, as the proponent of this inherently prejudicial evidence,<sup>105</sup> had to prove that the extraneous offenses were admissible for all the Rule 404(b) exceptions the court’s charge authorized the jury to consider it for. As the details discussed above show, the evidence of any of the extraneous offenses were not admissible for the limited purposes in the court’s charge to prove:

- Identity because Appellant never contested the issue of identity.<sup>106</sup>
- Motive because the extraneous offenses did not relate or pertain to other

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<sup>104</sup> *Id.* at 712. (emphasis added); see also *Lane v. State*, 822 S.W.2d 35, 40 (Tex.Crim.App. 1991)(“One purpose of limiting instructions ... is to ensure that the jury does not make use of admitted evidence for an impermissible purpose.”)(emphasis added); *Taylor v. State*, 920 S.W.2d 319, 323 (Tex.Crim.App. 1996)(“Appellant argues, correctly, that when a limiting instruction is given, the trial judge, upon request, should instruct the jury that the evidence is limited to whatever specific purpose the proponent advocated.”).

<sup>105</sup> See *Bjorgaard v. State*, 220 S.W.3d 555, 561 (Tex.App.– Amarillo 2007, pet. dism’d) (sexually-related misconduct and misconduct involving a child are inherently inflammatory).

<sup>106</sup> See *DeLeon v. State*, 77 S.W.3d 300, 312 (Tex.App.– Austin 2001, pet. ref’d)(extraneous offenses inadmissible to show identity where “identity was never in issue”).

acts Appellant committed with the complainants.<sup>107</sup>

- Intent and knowledge because these issues can be readily inferred from the charged conduct itself.<sup>108</sup>
- Opportunity because Appellant never raised this defense.<sup>109</sup>
- Preparation or plan because the State did not sufficiently articulate how the extraneous acts tended to prove a step toward an ultimate goal or overreaching plan.<sup>110</sup>
- Accident or mistake because Appellant ever raised this defense.<sup>111</sup>

The inclusion of all the Rule 404(b) exceptions when the State failed to meet its burden of showing that this evidence was admissible for all of them created too great of a risk that jurors would utilize the inherently prejudicial evidence of extraneous offenses for a reason that was impermissible and purposes that caused

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<sup>107</sup> See *Lopez v. State*, 288 S.W.3d 148, 165-66 (Tex.App.– Corpus Christi 2009, pet. ref’d)(“We see no relation between the extraneous acts and the State’s efforts to establish Lopez’s motive for committing the extraneous offenses.”).

<sup>108</sup> See *Jackson v. State*, 320 S.W.3d 873, 885 (Tex.App.– Texarkana 2010, pet. ref’d)(“Because Jackson never contested intent, the extraneous-offense evidence was inadmissible under Rule 404.”); *Nelms v. State*, 834 S.W.2d 110, 113-14 (Tex.App.– Houston [1<sup>st</sup> Dist.] 1992, pet. ref’d)(extraneous offense erroneously admitted where defendant’s knowledge was not an issue).

<sup>109</sup> See *Sandoval v. State*, 409 S.W.3d 259, 299 (Tex.App.– Austin 2013, no pet.)(“[T]he extraneous conduct was not relevant to the uncontested issue of opportunity.”).

<sup>110</sup> *Pittman v. State*, 321 S.W.3d 565, 573 (Tex.App.– Houston [14<sup>th</sup> Dist.] 2010, no pet.), citing, *Daggett v. State*, 187 S.W.2d 444, 454 (Tex.Crim.App. 2005).

<sup>111</sup> See *DeLeon v. State*, 77 S.W.3d at 312 (“In using accident and mistake as a purpose for admitting the extraneous offenses when they were not relevant was error on the part of the trial court which could have served only to confuse the jury”).

Appellant egregious harm.<sup>112</sup>

C. *The absence of a legally correct mid-trial instruction on the State's burden of proof on the extraneous offenses of Appellant's discipline and spanking of AD.G. without a belt, as well as any and all acts alleged to have constituted grooming and sexual misconduct involving A.I.G., R.W., and W.W.*

Of equal, if not greater importance, is that once the trial court ruled that the extraneous offenses were admissible, Appellant was also entitled to the jury being instructed to not consider the evidence unless they first found he had committed the offenses beyond a reasonable doubt.<sup>113</sup> As the Court of Criminal Appeals has noted:

Once an extraneous act has been ruled admissible, the jurors must be instructed about the limits on their use of that extraneous act if the defendant requests. This Court has held for many decades that “when evidence of collateral crimes is introduced for one of the various purposes for which such evidence becomes admissible, the jury should be instructed that they cannot consider against the defendant such collateral crimes, unless it has been shown to their satisfaction that the accused is guilty

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<sup>112</sup> See *Daggett v. State*, 187 S.W.2d at 454 (“Because Hailey’s testimony was admissible only to rebut appellant’s blanket statement of good conduct with minors, the trial court should have given the jury an instruction that it could use that testimony *only* in assessing appellant’s credibility, not as proof that he committed the charged offense or as any proof of some ‘plan’ to have a sexual relationship with Brittany.”); *Abdnor v. State*, 808 S.W.2d 476, 478 (Tex.Crim.App. 1991)(denial of requested instruction limiting jury’s consideration of extraneous offense to explaining inconsistent statements was error); *Jackson v. State*, 320 S.W.3d at 885 (instruction authorizing jury’s consideration of extraneous offense for purpose or purposes not raised by the evidence was error); *Pederson v. State*, 237 S.W.3d 882, 888 (Tex.App.– Texarkana 2007, pet. ref’d)(trial court erred by denying requested instruction limiting jury’s consideration of extraneous offense to limited purpose for which it was admitted); *Speer v. State*, 890 S.W.2d 87, 98 (Tex.App.– Houston [1<sup>st</sup> Dist.] 1994, pet. ref’d)(same).

<sup>113</sup> See e.g., *Straight v. State*, 515 S.W.3d 553, 573 (Tex.App.– Houston [14<sup>th</sup> Dist.] 2017, pet. ref’d)(“[J]urors should be instructed that they are not to consider extraneous offenses unless they believe beyond a reasonable doubt that the defendant committed that act.”); *Heigelmann v. State*, 362 S.W.3d 763, 767 (Tex.App.– Texarkana 2012, pet. ref’d)(same).

thereof.” In other words, a jury should be instructed that they are not to consider extraneous act evidence unless they believe beyond a reasonable doubt that the defendant committed that act. “If a defendant, during the guilt/innocence phase, asks for an instruction to the jury on the standard of proof required for admitting extraneous offenses, the defendant is entitled to that instruction.”<sup>114</sup>

This mid-trial directive was critical to the jury’s proper consideration of any of the alleged extraneous acts. This crucial role that the instruction plays in the overall integrity of the trial has been explained by one appellate court:

Of greatest concern, scholarly studies and anecdotal evidence suggests that jurors conflate reasonable doubt with the civil standard of preponderance of the evidence. The horrifying implication is that American juries may be depriving defendants of their fundamental due process right to have their guilt proved beyond a reasonable doubt.<sup>115</sup>

The cruciality of jurors receiving a legally correct, contemporaneous instruction on the consequential concept of reasonable doubt cannot be stressed enough. One appellate court has noted: “It is also more likely, we believe that the jury was more prone to give consideration and weight to these disputed extraneous activities in the absence of an instruction that they must find them true beyond a reasonable doubt, than they would have if such an instruction had been given.”<sup>116</sup>

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<sup>114</sup> *Ex parte Varelas*, 45 S.W.3d at 631(citations omitted).

<sup>115</sup> *Tuazon v. State*, 661 S.W.3d 178, 193-94 (Tex.App.– Dallas 2023, no pet.).

<sup>116</sup> *Ellison v. State*, 97 S.W.3d 698, 701 (Tex.App.– Texarkana 2003, no pet.)(op. on remand).

Had Appellant's trial counsel sought this crucial mid-trial instruction when the evidence of the extraneous offenses was admitted, the trial court would have then been obligated to give the limiting instruction or risk appellate reversal.<sup>117</sup> This mid-trial instruction was critical to providing the jury guidance on its proper consideration of the evidence of any of the extraneous offenses when it was admitted and the absence of a limiting instruction was consequential to the degree that constitutes egregious charge error.<sup>118</sup>

*D. Egregious harm was caused by the synergistic effect of the errors.*

#### THE ENTIRE JURY CHARGE

The cumulative effect of the error in the trial court's jury charge, in addition to the absence of two critical mid-trial instructions as evidence of the extraneous offenses was admitted bolsters the belief that this factor weighs in favor of finding egregious harm.<sup>119</sup>

#### THE ARGUMENT OF COUNSEL

The State heavily emphasized the evidentiary summation of the extraneous offenses in closing argument urging the jury to convict Appellant which heavily

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<sup>117</sup> See e.g., *Straight v. State*, 515 S.W.3d at 573; *Heigelmann v. State*, 362 S.W.3d at 767.

<sup>118</sup> See *Ellison v. State*, 97 S.W.3d at 701.

<sup>119</sup> See *Fraser v. State*, 593 S.W.3d 883, 892 (Tex.App.– Amarillo 2019, pet. ref'd)(overall review of the charge revealed numerous errors, a factor weighing heavily in finding egregious harm).

weights in favor of a finding of egregious harm, especially when the State's references to the extraneous offenses was the last argument the jury heard before it deliberated.<sup>120</sup>

#### THE STATE OF THE EVIDENCE

When determining egregious harm, one consideration for this Court is whether the error was related to a contested issue.<sup>121</sup> When the error relates to an incidental issue rather than the contested issue, the degree of harm is likely to be determined as less egregious.<sup>122</sup> Whether Appellant was guilty of the offenses charged was clearly a contested issue to which the extraneous offense was indivisibly connected.<sup>123</sup> The magnitude of importance the mid-trial instructions regarding the State's burden of proof to prove Appellant committed the extraneous offenses and limiting the jury's consideration of the evidence for the purpose that it was admitted and as it pertained to any of the Rule 404(b) exceptions played in this

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<sup>120</sup> 4 RR 10-12; 6 RR 50, 59, 61, 65-66. See *Arteaga v. State*, 521 S.W.3d at 339 (State's repeated emphasis on defective portion of charge in argument was a critical component in finding egregious harm); *Trejo v. State*, 313 S.W.3d 870, 873 (Tex.App. – Houston [14<sup>th</sup> Dist.] 2010, pet. ref'd)(op. on remand)(same); *Hall v. State*, 283 S.W.3d 137, 177-78 (Tex.App.– Austin 2009, pet. ref'd)(defendant harmed by admission of improper evidence where jurors heard it immediately before retiring to deliberate).

<sup>121</sup> *Hutch v. State*, 922 S.W.2d at 172.

<sup>122</sup> *Id.*

<sup>123</sup> See *Omoruyi v. State*, 528 S.W.3d 691, 698 (Tex.App.– Texarkana 2017, no pet.)(finding egregious harm where absence of critical instruction in the charge “was central to the case”).

case cannot be overstated.<sup>124</sup> The synergistic effect of the numerous charge errors gave the State an unmerited advantage of persuasiveness related to its proof of the charged offenses and, in effect, significantly disadvantaged Appellant's defense because of the inherent prejudice of the extraneous offenses. This favor weighs very heavily in favor of finding egregious harm.<sup>125</sup>

#### ANY OTHER INFORMATION REVEALED BY THE RECORD AS A WHOLE

The Appellant was deprived of a "valuable right" with the absence of these critical mid-trial limiting instructions on the State's burden of proof in proving the Appellant committed the alleged extraneous offense beyond a reasonable doubt and to instruct the jury they could not consider any of that evidence for any reason other than which it was first offered.<sup>126</sup> With the absence of these vital mid-trial limiting instructions, the evidence of the extraneous offenses impressed the juror's minds with far more uninformed weight than the law permits, especially given the State

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<sup>124</sup> See *Mendez v. State*, 515 S.W.3d 915, 928 (Tex.App.– Houston [1<sup>st</sup> Dist.] 2017, pet. grt'd), aff'd, 545 S.W.3d 548, 555-56 (Tex.Crim.App. 2018)(where a "vital defensive issue was hotly contested" and impacted by the charge error, defendant suffered egregious harm).

<sup>125</sup> See *Zamora v. State*, 432 S.W.3d 919, 925 (Tex.App. – Houston [14<sup>th</sup> Dist.] 2014, no pet.)(egregious harm found where charging error made State's case significantly more persuasive); *Freeman v. State*, 352 S.W.3d 77, 86 (Tex.App.– Houston [14<sup>th</sup> Dist.] 2011, pet. ref'd)(“On this record, we believe rational jurors would have found the State’s case ‘significantly less persuasive’ had they been properly instructed...”).

<sup>126</sup> See *Reynolds v. State*, 227 S.W.3d 355, 365 (Tex.App.– Texarkana 2007, pet. ref'd)(lack of reasonable doubt instruction denied accused the “valuable right” to it and caused egregious harm).

repeatedly emphasized the extraneous offenses throughout its final argument,<sup>127</sup> which is further evidence of egregious harm because of the seriousness of the charge errors.<sup>128</sup> Overall, the series of charge errors, in summative effect, “denied Appellant a fair and impartial trial” and warrants a reversal of his conviction.<sup>129</sup>

The judgement of conviction entered in this case must be reversed and this cause remanded for a new trial.

#### APPELLANT’S SEVENTH POINT OF ERROR

Appellant was egregiously harmed by the jury charge error failing to instruct the jury that its verdict for each Count of continuous sexual abuse of a child as indicted must be unanimous and the flawed verdict form that did not provide the jury space to memorialize unanimity for each Count.

##### *A. Statement of Facts*

1. *The indictment included two separate counts of continuous sexual abuse of a child under sec. 21.02 of the Texas Penal Code.*

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<sup>127</sup> See *Ngo v. State*, 175 S.W.3d 738, 751 (Tex.Crim.App. 2005)(absence of key instruction in charge caused defendant egregious harm); *Clear v. State*, 76 S.W.3d 622, 624 (Tex.App.– Corpus Christi 2002, no pet.) (“For this Court to determine that the harm was not egregious, because the jury would surely have found Clear guilty .. would [improperly] put us in the place of the jurors...”).

<sup>128</sup> See *Palmer v. State*, 222 S.W.3d 92, 96 (Tex.App.– Houston [14<sup>th</sup> Dist.] 2006, pet. ref’d) (defendant suffered egregious harm where erroneous limiting instruction on impeachment evidence vital to accused’s case significantly undermined the defense).

<sup>129</sup> See *Uddin v. State*, 503 S.W.3d 710, 723 (Tex.App.– Houston 14<sup>th</sup> Dist.] 2016, no pet.) (“We hold that the charge errors were egregiously harmful because they affected the very basis of the case and ... effectively denied appellant a fair and impartial trial.).

The indictment in Appellant's case included two separate counts of continuous sexual abuse alleged under Tex. Penal Code § 21.02 for allegations of a series of conduct within specified time frames against I) S.G. and II) AD.G.<sup>130</sup>

*B. Testimony about alleged sexual misconduct and abuse of S.G. and AD.G.*

Throughout the course of trial, the jury heard testimony that Appellant allegedly committed a series of acts constituting sexual abuse over specified periods of time against S.G. and AD.G. separately.<sup>131</sup>

*C. State's presentation of separate counts.*

In support of the two-Count indictment in this case, the State consistently presented evidence to support two separate units of prosecution, with alleging a series of conduct Appellant committed involving separate complainants, S.G. and AD.G. From start to finish, the State's presentation impressed upon the jury to convict Appellant for committing separate offenses of continuous sexual abuse of a child that resulted in separate results of harm to the two alleged complainants.<sup>132</sup>

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<sup>130</sup> CR 86.

<sup>131</sup> 5 RR 6-44; 63-87.

<sup>132</sup> 4 RR 10-13; 5 RR 6-44; 63-87; 6 RR 48-51; 58-67 (First, the State provided an opening statement referencing the alleged sexual abuse involving S.G. and AD.G. as separate units of criminal conduct resulting in different results of harm. In its case-in-chief, the State called both S.G. and AD.G. as witnesses to testify about the conduct accusing Appellant of committing sexual abuse over a course of time. Finally, during closing arguments, the State stressed its position that Appellant solidified its presentation of the two separate Counts of continuous sexual abuse involving S.G. and AD.G.).

*D. The trial court's jury charge.*

The jury charge generally instructed the jury of unanimity as it related to finding beyond a reasonable doubt that Appellant committed two criminal acts:

In order to find the defendant guilty of the offense of continuous sexual abuse of a young child, you are not required to agree unanimously on which specified acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. However, in order to find the defendant guilty of the offense of continuous sexual abuse of a young child, you must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse. . .

. . . Now, if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, the defendant, Buck Oddason McCoy, heretofore on or about the 31<sup>st</sup> day of August, 2016 continuing through on or about the 3<sup>rd</sup> day of May, 2021, 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 and aggravated sexual assault of a child, committed against S.G. on or about August 31, 2016, thru her fourteenth birthday on August 31, 2020 and an act constituting the offense of indecency with a child and aggravated sexual assault of a child, committed against AD.G. on or about August 31, 2016, thru her fourteenth birthday on September 3, 2022, and the defendant was at least seventeen years of age at the time of the commission of each of those acts, then you will find the defendant guilty of continuous sexual abuse of a young child, as charged in the indictment.<sup>133</sup>

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<sup>133</sup> CR 171-72.

However, the jury was never specifically instructed of jury unanimity for finding guilt beyond a reasonable doubt for each of the two separate Counts tried related to each complainant, S.G. and AD.G.

E. *The verdict.*

The jury returned the following verdict:

“We, the jury, find the defendant, Buck Oddason McCoy, guilty  
of continuous sexual abuse of a child, as charged in the  
indictment.”<sup>134</sup>

The verdict was signed by the foreperson, but there is no additional specifications as to which Count in the indictment that this verdict can be attributed to.

**ARGUMENTS AND AUTHORITIES.**

A. *Appellant incorporates by reference the standard of review for jury charge error, pp. 27-29, supra.*

B. *The absence of a charge instructing the jury there must be unanimity for its verdict regarding each unit of prosecution of continuous sexual abuse in the indictment.*

1. *Texas law constitutionally requires jury unanimity.*

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<sup>134</sup> CR179.

As the Texas Constitution dictates, and Texas caselaw echoes, jury unanimity is paramount to the foundation of the criminal justice system in striving to maintain a certainty of jury verdicts, especially under the lens in examining a guilty verdict.<sup>135</sup> Texas law requires that a jury unanimously reach a verdict about a specific crime that the defendant commits.<sup>136</sup> The jury must “agree upon a single and discrete incident that would constitute the commission of the offense alleged.”<sup>137</sup> To ensure unanimity, a charge must present a jury instruction that its verdict must be unanimous as to a single offense.<sup>138</sup>

## *2. Non-unanimity can arise in different ways.*

The Court of Criminal Appeals has acknowledged several different ways non-unanimity can occur:

First, non-unanimity may occur when the State presents evidence demonstrating the repetition of the same criminal conduct, but the actual results of the conduct differed. For example, if the State charges the defendant with the theft of one item and the evidence shows that the defendant had in fact stolen two of the same items, the jury’s verdict may not be unanimous as to which of the two items the defendant stole. To ensure a unanimous verdict in this situation, the jury charge would have to make clear that the

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<sup>135</sup> Tex. Const. art. V § 13; Tex. Code Crim. Proc. Arts. 36.29(a), 37.02, 37.03, 45.034-45.036).

<sup>136</sup> *Cosio v. State*, 353 S.W. 3d 766, 771 (Tex.Crim.App. 2011) (citing *Landrian v. State*, 268 S.W. 3d 532, 535 (Tex. Crim. App. 2008, referring to Tex. Const. art. V § 13; Tex. Code Crim. Proc. Arts. 36.29(a), 37.02, 37.03, 45.034-45.036).

<sup>137</sup> *Cosio*, 353 S.W.3d at 771 (citing *Stuhler v. State*, 218 S.W.3d 706, 717 (Tex.Crim.App. 2007).

<sup>138</sup> *Cosio*, 353 S.W.3d at 772.

jury must be unanimous about which of the two items was the subject of the single theft.

Second, non-unanimity may occur when the State charges one offense and presents evidence that the defendant committed the charged offense on multiple but separate occasions. Each of the multiple incidents individually establishes a different offense or unit of prosecution. The judge's charge, to ensure unanimity, would need to instruct the jury that its verdict must be unanimous as to a single offense or unit of prosecution among those presented.

And third and finally, non-unanimity may occur when the State charges one offense and presents evidence of an offense, committed at a different time, that violated a different provision of the same criminal statute. To ensure unanimity in this situation, the charge would need to instruct the jury that it has to be unanimous about which statutory provision, among those available based on the facts, the defendant violated.<sup>139</sup>

3. *One unit of prosecution under Tex. Penal Code § 21.02 permits conviction based on the repeated acts of sexual abuse that occurred over a period of time against a single complainant.*<sup>140</sup>

In the context of sec. 21.02 of the Texas Penal Code, the *Price* court concluded “the objective of the statute was to hold a defendant criminally liable through a single conviction for all of the sexual acts transpiring between him and the victim during a designated period of time.”<sup>141</sup> Therefore, although prosecution under sec. 21.02

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<sup>139</sup> *Id.* at 771-773.

<sup>140</sup> *Price*, 434 S.W.3d at 605-06.

<sup>141</sup> *Id.* at 609 (the context of the Court's conclusion was in its examination of protecting a defendant's rights against double jeopardy and multiple punishments for the statute's enumerated predicated offense and criminal attempts to commit those predicate offenses).

involves an actor's series of acts of sexual abuse over time, the unit of prosecution is specified "against a single complainant."<sup>142</sup>

C. *The guilty verdict in this case demonstrates vague non-unanimity because the synergistic effect of the lack of jury charge for unanimity as it relates to each complainant and a flawed verdict form fails to distinguish which unit of prosecution the jury's verdict was assigned to.*

Despite the State's presentation of two separate units of prosecution for continuous sexual abuse all throughout trial, which the charge reiterated, the jury instruction that was given for unanimity ends with "you will find the defendant guilty of continuous sexual abuse of a young child, as charged in the indictment" [emphasis added].<sup>143</sup> Without a thorough unanimity instruction for each complainant, the jury was left to render a verdict without doing so unanimously for each of the complainants and harm alleged in the indictment, which is constitutionally required.

Additionally, the flawed verdict form that only called for the jury to return and memorialize one general verdict of "guilty" or "not guilty," instead of itemizing a verdict for each unit of prosecution presented, leaves the record unclear as to whether or not the jury found Appellant guilty of the criminal offense related to S.G. only, or

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<sup>142</sup> *Price*, 434 S.W.3d at 605-06; See *Cisneros v. State*, 622 S.W.3d 511, 521 (Tex. App.—Corpus Christi, 2021).

<sup>143</sup> CR 171-72.

to AD.G. only, or both. Thus, the record does not clearly show this Court the jury unanimously found Appellant guilty as it related to each Count that was tried.

1. *The lack of a jury charge instruction on unanimity and vagueness of the jury's verdict resembles two of the three ways the Cosio Court noted non-unanimity can occur.*

The lack of a jury charge instruction on unanimity and the flawed verdict form submitted to the jury demonstrates the first example of when non-unanimity can occur noted by the *Cosio* Court.<sup>144</sup> Throughout its presentation of a two-Count indictment at trial, the State presented evidence it argued was Appellant's repetitive commission of criminal conduct that constituted sexual abuse of a child. Although a jury does not need to unanimously agree as to which series of acts were proven to constitute the offense under sec. 21.02 of the Texas Penal Code, the verdict provides no certainty as to which unit of prosecution it was attributed to. As the *Cosio* Court noted, to ensure unanimity when repetitive conduct is presented, but the actual results of the conduct differ, here the resulted harm to each complainant, the jury charge "would have to make clear that the jury must be unanimous about which of the two" was the subject of the single unit of conduct.<sup>145</sup>

The lack of a jury charge instruction on unanimity and the flawed verdict form

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<sup>144</sup> *Cosio*, 353 S.W.3d at 771-72.

<sup>145</sup> *Cosio*, 353 S.W.3d at 771-72; *see also Price*, 434 S.W.3d at 605-06.

submitted to the jury also demonstrates the second example of when non-unanimity can occur as noted by the *Cosio* Court.<sup>146</sup> Because the State presented evidence it argued constituted Appellant's commission of the offense on multiple but separate occasions, with each establishing a separate unit of prosecution, the *Cosio* Court noted, under these circumstances, to ensure unanimity, the jury charge "would need to instruct the jury that its verdict must be unanimous as to a single offense or unit of prosecution among those presented".<sup>147</sup>

D. *Egregious harm was caused by the synergistic effect of the charge error that failed to instruct jury unanimity for each separate complainant, S.G. and A.D.G. and the flawed verdict form.*

The synergistic effect of the charge error and flawed verdict form has left Appellant and this Court with a record of uncertainty, which favors a finding of non-unanimity. Given the overwhelming presentation of evidence that was inherently sensitive and inflammatory in nature at trial, the arguments of counsel related to the harm to multiple complainants, and the entire jury charge (*see pp. 34-37, supra*) the fact that Appellant is left with doubt as to the unanimity of the jury's verdict is a result that is a constitutional insult. The incomplete charge error and erroneously simplified verdict form leaves a looming question mark over the outcome that deprived Appellant access to his overall constitutional right to a fair trial. The

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<sup>146</sup> *Cosio*, 353 S.W.3d at 772.

<sup>147</sup> *Id.*

uncertainty embedded in the jury's one, memorialized verdict, when it was intended that the jury deliberate guilt/innocence on a two-Count indictment demonstrates that the charge error and flawed verdict is proof of non-unanimity and is a milestone of egregious harm.

The judgement of conviction entered in this case must be reversed and this cause remanded for a new trial.

#### CONCLUSION AND PRAYER

Appellant respectfully prays that this Honorable Court reverse the judgement of conviction entered below and remand the cause for new trial.

RESPECTFULLY SUBMITTED,  
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**CERTIFICATE OF SERVICE**

Pursuant to Tex. R. App. P. 9.5(d), I hereby certify that a copy of this brief was served upon opposing counsel by e-filing on April 11, 2025.

/s/ Jonathan Zendeh Del

/s/ Natalie C. Holt

/s/ Ryan S. Fremuth

**CERTIFICATE OF COMPLIANCE**

Pursuant to Tex. R. App. P. 9.4(1)(i)(1), I certify that this document complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2)(D):

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/s/ Jonathan Zendeh Del

/s/ Natalie C. Holt

/s/ Ryan Fremuth

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