

Appeal No. 14-24-00823-CR

In The Fourteenth Court Of Appeals

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TYLER LYNN SMITH, Appellant

Vs.

THE STATE OF TEXAS, Appellee.

**On Appeal from the 149th Judicial District Court
of Brazoria County, Texas
Cause Number 101579-CR.**

**BRIEF FOR APPELLANT
TYLER LYNN SMITH**

Oral Argument Not Requested

Cary M. Faden
54 Sugar Creek Center Blvd., Suite 200
Sugar Land, Texas 77478
Telephone: (281) 491-6182
Facsimile: (281) 491-0049
Texas Bar No. 06768725
E-MAIL: caryfaden@aol.com
Attorney for Appellant

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P., Rule 38.1(a), appellant certifies that the following is a complete list of the parties to the final judgment and the names and addresses of counsel in the trial and on appeal:

Appellant:

Tyler Lynn Smith

Counsel for Appellant:

Crespin Linton (trial)
Attorney At Law
440 Louisiana Street, Suite 900
Houston, Texas 77002

Cary M. Faden
(on appeal)
54 Sugar Creek Center Blvd., Suite 200
Sugar Land, Texas 77478

Counsel for the State of Texas:

Tom Selleck
Brazoria County, Texas
District Attorney
111 E. Locust Street
Angleton, Texas 77515

Trial Judge:

Jessica Pulcher

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Appeal No. 14-24-00823-CR

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TYLER LYNN SMITH, Appellant

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**On Appeal from the 149th Judicial District Court
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BRIEF FOR APPELLANT
TYLER LYNN SMITH

To The Honorable Justices of the Fourteenth Court of Appeals:

Comes now appellant, Tyler Lynn Smith, by and through his attorney of record, Cary M. Faden, and files this his brief to set aside the October 25, 2024, judgments of the 149th Judicial District Court of Brazoria County, Texas in Cause Numbers 101579-CR, and would respectfully show the Court:

STATEMENT OF THE CASE

On July 25, 2024, Appellant, was indicted in counts 1, 2, 3, for the first degree felony of aggravated sexual assault of a child; count 4, indecency with a child. (1 CR at 8-9). The offenses were alleged to have occurred on or about October 15, 2021 and November 26, 2021, respectively. (1 CR at 8-9). On October 21, 2024, Appellant pleaded not guilty to the indictment. (2 RR at 5). After a jury trial, the jury assessed Appellant's punishment at confinement in the Texas Department of Criminal Justice-Institutional Division for a period of life in TDCJ-ID as to counts 1 for thirty years (30), with no fine; count 4 for twenty years (20) with no fine; not guilty on counts 2, 3. (1 CR at 115-116). On October 25, 2024, Appellant timely filed his notice of appeal. (1 CR at 148).

ISSUES PRESENTED

POINT OF ERROR ONE

THE EVIDENCE ADDUCED AT TRIAL WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS.

POINT OF ERROR TWO

THE TRIAL COURT ERRED IN ADMITTING THE OUTCRY TESTIMONY OF BOTH THE GRANDMOTHER AND THE CHILD ADVOCACY CENTER EMPLOYEE BECAUSE THE STATEMENTS LACKED RELIABILITY IN ACCORDANCE WITH TEX. CODE CRIM. PROC. 38.072, SECTION 2-b(2).

STATEMENT OF FACTS

On July 25, 2024, Appellant was indicted in the 149th Judicial District Court in cause number 101579-CR. That indictment alleged, in Brazoria County, Appellant did:

on or about the **15th day of October, 2021**, and before the presentment of this indictment, in the County and State aforesaid, did then and there intentionally or knowingly cause the anus of A B, a child younger than fourteen (14) years of age and not the defendant's spouse, to contact the sexual organ of the defendant;

COUNT TWO

And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Court that **TYLER LYNN SMITH**, hereinafter styled Defendant, on or about the **26th day of November, 2021**, and before the presentment of this indictment, in said County and State, did then and there intentionally or knowingly cause the anus of A B, a child younger than fourteen (14) years of age and not the defendant's spouse, to contact the sexual organ of the defendant;

COUNT THREE

And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Court that **TYLER LYNN SMITH**, hereinafter styled Defendant, on or about the 15th day of October, 2021, and before the presentment of this indictment, in said County and State, did then and there intentionally or knowingly cause the penetration of the anus of A B, a child younger than fourteen (14) years of age and not the defendant's spouse, by the defendant's finger;

COUNT FOUR

And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Court that **TYLER LYNN SMITH**, hereinafter styled Defendant, on or about the **15th day of October, 2021**, and before the presentment of this indictment, in said County and State, did then and there with the intent to arouse or gratify the sexual desire of the defendant, intentionally or knowingly engage in sexual contact with A B, a child younger than 17 years and not the spouse of the defendant, by touching the genitals of said child;

(1 CR at 8-9).

A venire of approximately one hundred (100) persons, was subjected to voir dire examination. (2 RR at 9-171). The jury of twelve (12) was selected and seated, with no further objection. (2 RR at 9-171). The jury was sworn. (2 RR at 181). Appellant was arraigned on the indictment and entered a plea of not guilty. (2 RR at 5).

A pre-trial out cry hearing; Betreace McFatter, Do you know A B? A Yes, sir. Q Are you related to him? A Yes, sir. Q How are you related to do him? A He's my grandson. How old is AB right now? A 7. In June -- did you ever take care of your grandsons? A Yes, sir. Q Okay. Back in June of 2021, did you take care of your grandsons? A Yes, sir. Q Okay. Specifically, did you take care of AB? A Yes, sir. Q Okay. Would you ever give AB a bath or a shower? A Yes, sir. Q Okay. Would AB sometimes stay with you for extended -- multiple days at a time? A Yes, sir. Q Okay.

And do you know Tyler Smith? Yes, sir. Q Or do you know of Tyler Smith? He was dating the boys' mother. Q Okay. And who's the boys' mother? A Kelli Mills. Q Okay. And did the boys ever talk to you about -- specifically AB -- Tyler Smith? A Yes, sir. Q Okay. And you and I have talked, and you've talked to CPS people after all this has happened; correct? A Yes, sir. Q Okay. And do you recall making a statement to CPS people regarding an incident involving what AB told you when -- after you were giving him a shower one day? A Yes, sir. And what do you recall AB telling you? A That Tyler pinched his penis really hard. Q Okay. And just for clarity for the Judge, did he use the word "penis" or use a different word? A He said "tee-tee." Q And did he demonstrate in any way what had happened? A Yes, sir. And where were you located when this happened at? A At my house. Q Okay. And where is your house at? A In Angleton. Q Okay. And you may have already said it, but you mentioned something to the DPS people -- I mean, the child people about him doing something with his teeth when he did it. Do you remember that -- that being AB -- gritting his teeth? A Gritting his teeth. And AB, again, would have been roughly how old at this point in time? A 4. (3 RR at 7-12). Cross examination, you said this was revealed to you by AB in June of 2021? A Somewhere around there, yes. Q Okay. What did do you about it after AB told you this? A Reported it to his father. Q Okay. And do you know if he did anything about it? A You would have to ask him. Q Okay. Did AB say

when this happened? A No, sir. Q Okay. And he demonstrated it with you by grabbing a hold of your thumb and pinching it to say this is what Tyler did to me? A Yes. Q After this June, 2021, time with AB, were there more times that he was with you at your house? A AB was with us off and on. I can't give you exact dates. Q But this was the only time he told you anything, was this one particular day in June of 2021? (3 RR at 12-16).

Marisela Delgado, in March of 2022, where were you working? A I was working for CPS in Angleton. And did you do an interview with AB on the 8th of March of 2022? A Yes, sir. Q Okay. And you and I had an opportunity to listen -- that was an audio recording; correct? A Yes, sir. Q Okay. And did AB make an outcry to you about things -- some things, broadly speaking, that the defendant did to him? Yes, sir. Q Okay. Did he indicate to you that the defendant had touched his butt? A Yes, sir. Q Okay. Did he indicate that it, in fact, was painful or hurt when the defendant touched his butt? A Yes, sir. Q Okay. And in your training and experience -- and this would have been while -- presumably while the defendant was having a relationship with AB's mother; correct? A Yes, sir. Q Okay. And do you remember roughly how old AB was when you interviewed him? A I want to say he was about 5. And when you had that conversation with AB, was it your impression, from what he was saying, that what the defendant had done to him in some way was sexual? A

Yes, sir. And then he said that he was -- that he had been touched on his butt, that it hurt really bad. Q Okay. And so you didn't think he was talking about I've been spanked or something like that. Your impression was something else? A Yes. And he identified the person -- he was able to tell you who Tyler was; correct? A Yes. Q Okay. So you were able to identify that person, and clearly you understood who AB was; right? A Yes, sir. Q And that was the only person that he indicated that had hurt him in that type of way; correct? A Yes. (3 RR at 16-21). Cross examination, you said that your routine or the way it operates with CPS is you ask some basic questions; and if it gets to the point where you believe sexual abuse has occurred, you shut it down and you send it to the Children's Assessment Center for them to actually follow up with more questions; is that correct? A Yes, sir. Q Okay. So you didn't learn any actual details of what had happened after this child just came to you and said, Mr. Smith touched my butt? A No, I didn't learn any details. Q Okay. You leave that for somebody else, to get into the details; correct? A Yes, sir. Okay. And AB's statement to you was limited to, Tyler touched my butt and it hurt; is that right? A Correct. Q You're saying that you believed it was something sexual in nature. But isn't it also quite possible that it could be something other than sexual in nature, since your questioning was -- was shut down after what you believed was an outcry? A Yes. Q Okay. A child's butt could hurt for a number of different reasons other than sexual

abuse; correct? A Correct. (3 RR at 21-28).

Kelli Mills, so I just want to start off, AB is your son; correct? A Correct. Q Okay. And at some point in time you started dating the defendant, Tyler Smith; correct? A Yes, sir. And you would come to find out and come to realize that AB had been sexually assaulted; correct? A Correct. Q Now, do you recall having a conversation with AB after this -- or as this was going on about some sex toys? A Yes. When did the sex box come into the house? Do you remember? A I would say about a year and a half into our relationship. Q Okay. A A year. And so AB is telling you that the purple sex toy came out of that sex box; correct? A Correct. And do you remember he said something to the effect that Tyler made me play with it? A Yes. Q Being either his penis or the sex toy, I guess? A Correct. Because I had told him that it was a back massager. Q Okay. A And he told me different. Q Okay. And he said that it made him -- I guess, Tyler feel good? A Yes. So was it your impression that they were using this sex toy on one another? Tyler was using it on AB? A He made me feel like it was one another. Q Okay. So -- and that, obviously, would probably be inserted into one another; correct? A Correct. Q Sexually. Okay. (3 RR at 29-35). Cross examination, so in your testimony, you're talking about AB revealing to you that sex toys were used between him and Tyler; is that correct? A Correct. And so you're claiming, after Mr. Bingham took you to court, took custody away from you

of your three boys, that then AB reveals this to you – A There was only one thing that he -- me and him really ever talked about it, and that was the first it ever got brought up. Play-by-play what he told me was -- we were sitting at the counter and we were eating lunch and he said, Mama, Tyler loves me the way he loves you. This conversation you had with AB about Tyler loving him like he loved you happened before your ex -- well, before Mr. Bingham went to the police; is that right? Well, like I just said, I did not have that conversation with my son until after they were gone. You lost custody sometime in March or beginning of April of 2022; correct? A I believe so. So you put this phone underneath your bed? A Yeah. Q And instead of catching Mr. Smith having an adulterous relationship with another woman, you believe that you're hearing him having sex with AB? A Well, I know my son was in that room. Q Okay. A My son was in the bed with him whenever I left the house. Q Okay. And while there's no video of this that you could see, there is audio that you heard -- allegedly heard AB saying, you know, something like, Ow, ow, Tyler, that hurts --A Exactly. Q Did you hear that? A I did hear that. Did you think that Tyler was raping your son? A At the time, no. I had no idea what was going on. When I heard the recording, most definitely. Q Okay. You -- after that happened, after you put that phone underneath your bed, I mean, did you pull it out a little bit later on – A I couldn't because he was there. I didn't want him to know. Later on AB tells you

then about the sex toy being used on him; correct? A Correct. (3 RR at 35-53).

Leah Nunley, where do you currently work? A Brazoria County Alliance for Children. Within this video, did AB talk to you about the defendant sexually assaulting him? A Yes. And did AB talk about the defendant putting something in the middle where he pooped? Yes. Q Okay. And was it your belief, based on the conversation you had with AB, that would have been really AB's anus or rectum area? A Yes. Q Okay. Did he talk about how Tyler pulled his clothes down some? A Yes. Q And how the defendant pulled his clothes down some? A Yes. And did Asher talk to you about the defendant using some kind of medicine on him? A Yes. Q Specifically on his butt area; correct? A Yes. Did AB tell you that the defendant did something to his thing? A Yes. Q Okay. And Asher referred to his penis as, quote, "his thing"; correct? A Correct. (3 RR at 53-60). Cross examination, so in this interview you're saying AB told you that Mr. Smith put his thing in his rear end or in his butt; is that right? A In his butt, yes. Q Okay. And who brought AB there that day for your interview? A His father. And it could be that even though the State wants to use you as an outcry witness, if the mother heard about it before, she would have been the first one to hear about it; correct? A Yeah. (3 RR at 60-62). THE COURT: Okay. So Betreace McFatter, I will find that she is the proper outcry witness for the contact. She was the first person that I understand was over the age of 18 that the child came

out to as to a pinch on his penis. Kelli Mills, the only conversation I considered as to outcry would have been the purple sex toy. However, she testified that she had heard about it prior to the conversation, some type of CPS investigation and she had heard about the sex toy being brought up and so she went back and discussed with the caseworker the sex toy. Therefore, she is not the first person over the age of 18 to have any information on the sex toy. And that leaves Leah Nunley. Leah Nunley, in my opinion, is the person who has the specific details about what happened to the child and will be able to testify as to outcry. So grandma and the CAC. (3 RR at 66).

Edward Srebalus, I'm with the Brazoria Police Department. So I want to take you back to March of 2022. Where were you employed during that time? A Sweeny Police Department as a patrol sergeant. Drove over there, met with Dawson Bingham, the father of a few kids. He was making a complaint that he felt that his kids were being abused. Well, there was an interview set up for the CAC. Q Okay. So you called and spoke with CPS, and they set up an interview with CAC? A Yes. (3 RR at 84-88). Cross examination, did you try to reach out to the defendant, Mr. Smith? A Yes. The only thing I had was some phone numbers that I called a couple times and never got anything but voice mail. Q Okay. Did you leave him messages? A I don't remember if I did or didn't, but I never got anything back and I don't know where -- I don't have it written down, but somebody had told me that he was no longer living

at the address. (3 RR at 88-89).

Dawson Bingham, can you tell me who Kelli Mills is? A She's the mother of those three children. Q Okay. And do you guys have a good relationship currently or a not great relationship? A We do not. Q Okay. And do you talk to Kelli very often? A Occasionally. Q Okay. Who do your kids currently reside with? A They reside with my mother. I had walked out of the bedroom; and I was excited, you know, about getting my new job. And whenever I walked out of the bedroom, my son immediately -- from me opening the door quick, it startled him; and he covered his genitalia area. Q So AB -- A AB. Q AB would have been 4 or 5 at this point in time? A He was 4 years old. Q Okay. And what, as a father, is going through your mind at this point in time? A That it was a major red flag for me. Q Okay. And after having that discussion with Kelli, did you form an opinion on whether the defendant would be around the boys anymore or not around them anymore? A I was told that he was not around the boys - Q Okay. So you didn't think that the defendant was around AB anymore, correct, or any of the boys; right? A That's what I was told. Q Okay. And, again, at this point you've got a really odd reaction from AB; right? A Yes. Q And you've got something that Joseph is telling you; right? A Yes. Q And then, obviously, the behavioral changes. And that's what you're going off of; correct? A Yes. Did you learn more things that happened to AB in March of 2022? A Yes. Q Okay. And, also,

would it be fair to say that you're not -- all the allegations and all the information was not -- is not actually as it was presented to you; correct? A Yes. (3 RR at 91-120). Cross examination, if you thought your son was being abused, what was so bad with your police involvement and CPS that would keep you from going to the police? A They didn't do anything the other nine times that drugs and everything was in her home. She didn't even answer the door for welfare checks, the sheriff. They did nothing for me and my family. You eventually did take Ms. Mills back to court and had, as we say, custody flipped. In other words, you have custody of the three boys now; correct? A Yes. Q Okay. But that was after there was a -- the fact that you owed her a lot of back due child support and a lot of what we call medical child support; correct? A Yeah. Q Okay. And it was about 42 grand? A Yep. Q Okay. You don't think that might be incentive enough to have you talking with the children? A No. (3 RR at 120-132).

Betreace McFatter, I don't remember the exact date; but June of 2021, are you taking care of the boys at some point in time? A Yes, sir. Q Okay. How old was AB at that point? A 4. Q Okay. And would you help AB bathe? A Yes, sir. Q Okay. And did you give -- did you give him a bath, shower? What did you normally do? A A shower. AB was taking a shower and I was in there monitoring him, you know, and he got out of the shower. He was standing -- I was sitting on the toilet and he was

standing in front of me on the towel and I was drying him off. And I told him, you know, to kind of spread his legs so that I could dry him down there; and he just popped out and said, Tyler pinches my tee-tee real hard. He grabbed my thumb. I told him to show me and he grabbed my thumb and he just pinched it as hard as he could.

Q And what else did he do when he was pinching your thumb? Do you remember?

A He just had this look on his face like -- I mean, just kind of like, you know, upset about it. (3 RR at 132-159). Cross examination, you don't think it's a coincidence that just a few months before y'all went to the police with these allegations that Mr. Smith was doing something to AB, that there had been a court order that your son owed Ms. Mills 42,000 in back support? A What do you mean, "a court order"? Q That -- A That he was ordered to pay? Q Well, that he hadn't paid. The Court had a judgment against him for 42 grand for unpaid child support. A I don't know if they had a judgment against him, but I know he owed child support. Q Okay. Does 42,000 sound about right? It was a lot of money; wasn't it? A It was a lot, yeah. Q Despite the fact that he was working; correct? A At some times he was. Sometimes he wasn't. Are you asking me if Dawson did this because of the money that he owed? Q Yes. A He accused Tyler of molesting his son? Q Yes. A No. Q Okay. Because he made it clear that he's contacted CPS many times on occasions in the past; correct? A Correct. It's about what their client, Mr. Smith, did to your grandson; correct? A He was 4. He's never

talked about sex. He's never talked about a tee-tee. He's never talked about the things that we talked about. He's 4. He was 4. Q So you're giving him a bath; and as you're getting near his genitals, he says to -- sorry, AB says to you, that's what -- Tyler pinches my tee-tee; right? A Yes. Q And then he demonstrated it on your thumb; right? A Yes. (3 RR at 159-172).

Alicia Alexander, what are you doing now? A Psychiatry and mental health. So back prior to that, in 2022, what were you doing then? A I was working for Texas Children's Hospital. So he was able to articulate to you, I gather, the best he could, areas that nobody should touch; right? A Yes. Q Okay. And what were those areas? A Chest, pee, bottom. I asked the question, "Did he ever hurt you?" Q Yeah. So then you get more -- I guess you're rephrasing the same thing again to him; right? A Yes. Q This time what does he say? "I think yes." Q Okay. And then what was your response to him? A "Can you point to where he hurt you?" Q Okay. And then where -- what did AB point to? A He points to his genital area. So what did you ask AB at that point? A What was he touching you -- "What was he touching you or hurting you with?" Q Okay. And what's his response at that point? A "His finger." And where does he indicate the finger went? A He pointed to his genital area. Q Okay. And then did you ask him -- what was your next question? A "Did you tell Tyler anything when that happened?" Q Okay. And what was Asher's response to you? A "I tell him to

stop." Q Okay. A "He puts his ear pods on and doesn't listen." And so what -- you talked about that, and you said -- you followed up with, "With what"; isn't that correct? A Right. I asked, "With what?" And he replied, "Medicine." Q Okay. And how did that make you -- what's going through your mind at that point? A So in my mind I -- I'm wondering, you know, what his definition of that means. "What did he put medicine on your bottom for?" Q Okay. And this is probably -- what's his response? A "I don't know." Q Okay. And then you asked -- you kind of go back to the same kind of questions again. What do we have next? A "Did he hurt your bottom when he did that?" Q Okay. And what was his response? A "Yeah." Q Okay. And then we talk about it more, about the medicine and what happened to his bottom; correct? A Yes. Q And what would AB tell the defendant? A "I would tell him to stop." Q Okay. And we have it in discussion. What's your next question? A "Did he pull his clothes off when that happened?" Q Okay. And so "A lot"? A He says, "A lot." What's sticking out to you as a professional? A Pointing to the genital area, being touched to those areas, and the medicine to the buttock, clothes, where he talks about the clothes being taken off. Q Uh-huh. A Those are things that would definitely provide a diagnosis for that. Q Okay. And if you were -- A For sexual abuse. (3 RR at 172-209). Cross examination, you're talking to this child, but you're there to gather information. You have no idea if this child is lying or if he's telling the truth; correct?

I mean, you personally. A When they're providing detail, I would believe the child but... Q You personally don't know if he's lying or telling the truth? A I don't know that. (3 RR at 209-220).

Marisela Delgado, I am a case manager with a mental health facility, Gulf Coast Center. So did you conduct an interview back in March of '22? A Yes, ma'am. Q And who was that -- who did you interview? A A young man. He was about 5 years old. There was a lot of them. Q Okay. Do you know his name? A I do not. So during your interview with AB, did he tell you that someone had hurt him? A Yes, ma'am. So I asked if anyone has ever touched him in his private parts. Q Okay. And based on his answer to you, what did you then do? A After he answered, then I -- I stopped. Q Okay. You stopped. So based on your interview with AB, you spoke with him. He provided you with some information that led you to then recommend him for a CAC interview? A Yes, ma'am. (3 RR at 220-229). Cross examination, despite your 30 years of working over at CPS, you have no idea whether or not AB was lying or telling you the truth that day? A Correct. Q Okay. Because you weren't at the home or the apartment to know what happened? A Correct. You're telling this jury that you determined that he had been sexually assaulted despite the fact that after coming to one particular sentence, you just cut off the interview to let someone else do the further investigation? A Yes. (3 RR at 229-233).

Kelli Mills, Can you explain to the jury how you're related to AB? A That's my baby. That's my son. was he normally telling you to give AB baths in the morning like that? A No. Q Okay. So that was a new --A That was something new. Q Okay. So you were going to bathe his two -- the two children that y'all had together. That was your intent, was to bathe them? A Yes, sir. Q And so he told AB to get in the bath? A Yes, sir. Q Did you put him in the bath? A He jumped in there. He usually listened to Tyler. Q Okay. Did you notice anything out of the ordinary? A Not until after I got him out of the bath. Q Okay. What did you notice at that point? A He had bruising around his -- around his anal. Q Okay. And what made you look at his anal area? Because, I mean, I always check my kids. You know, he's got older brothers, you know, and you just got to -- I'm a very -- what's that word called? I just try to look at everything, you know. Q Okay. Had you ever noticed injuries or bruising or anything down there before? A I -- I -- I'm not sure. Q Okay. You just can't remember or what? A I just can't remember, but I'm pretty sure that's probably the reason why I checked because --Q Okay. So you -- and then you noticed something was there. Did you say anything to AB? A I did and he -- he didn't say anything back to me and then Tyler turned around in the hallway and came back and he was like, Let me see. Q Okay. A And he looked at AB, looking down; but I felt like he made eye contact with AB to tell him not to say anything. Q Okay. He didn't say anything. You just

thought he looked at AB? Now, you would end up attempting to catch him kind of having the affair; right? A Right. Q And how did you try to do that? A I put a phone underneath the bed. Q Okay. A And put it on record. Q Okay. And then you put the phone in other places at times and made videos, too? A Yes. Q I think one was in the Christmas tree; right? A Yes, sir. Q Okay. And you're still convinced that he's cheating with a -- with a girl? A Correct. And I think it's fair to say that you can hear the bed and the drawer and all that kind of stuff; right? A Yes, sir. Q What was kept in the drawer by the bed? A My Vaseline. Q Who would use that Vaseline? A Tyler. Q What would he use that Vaseline for? A Our anal. Q Okay. I want to talk about that. I know that's kind of a personal thing. Did Tyler enjoy having anal sex? A Yes, sir. Q Did he enjoy -- seem to enjoy having anal sex more than vaginal sex with you? A Yes. I thought I heard my son say, Ow, stop. And then you can hear my drawer open because you could hear it because there was nothing in it but the Vaseline. Q (By Mr. Golden) Okay. A And the bed -- like, he shut the door. You could hear the dresser drawer. Q Okay. A You can hear and when he opens it and the Vaseline flying around. And then you can hear the bed squeaking. Q Okay. A And then later on in the video you hear my older two go, Where's AB? And he's in the bedroom, obviously really close to the table; and he says, Here. Q The phone is literally under the bed. A Literally. Do you think he was actually cheating somewhere else with a woman, too;

or do you think he would have known that it was AB? A I think that -- I have a feeling that -- God rest on his soul. I don't think it was another female. I think he was just -- had his eye on one prize. Q And that was AB? A Yes, sir. (4 RR at 5-76). Cross examination, are you trying to tell the jury today that you believe your former boyfriend sexually assaulted your youngest -- assaulted AB because you could taste blood on Tyler Smith's penis as you were giving him oral sex? A That's not the only reason; but, yes. Q Okay. So you're claiming that you were not on your period? A I was not. Q Okay. When he was -- when you were performing oral sex on him? A Correct. And you told the jury that you took the sheets off the bed or uncovered him some, and you could see blood all over? A Blood on his penis. Q On his penis. Did you check and see if there was blood on AB? A I didn't think to think of that. It was not even a possibility or thought that it could be a possibility at the time. If Dawson said that during the course of your relationship with Tyler, that you denied Dawson the right to see the three boys; is that true? A Somewhat. Q Okay. Did CPS come out and visit you very often? A Not during our relationship. It didn't happen until afterwards. Q When you say your relationship, with Dawson? A With Tyler. All this broke with the police and CPS and Children's Assessment Center in March of 2022. Is that -- is that your understanding? A Yes, sir. Q Okay. Did you take AB to another interview with the Children's Assessment Center about a year and a half later, in July

of 2023? A No. I think it was my son, T'Lynn, that went and talked to them; and they had him get tested. (4 RR at 76-104).

A B, you were pretty little when they were dating; right? A Yes, sir. Q Okay. And how old were you, about 4? Do you even remember how old you were? A I think I was 4. Q You were 4. Okay. Now, Tyler hurt you; right? A Yes, sir. Q And we talked about it a little bit already, but you don't really like to tell people about that; right? Yes, sir. Now, I want to -- on boys and girls we have private parts; right? A Yes, sir. So Tyler -- what you're telling the jury is -- and we'll get more in detail. Okay? Is that fair? Let's just start with this: Did Tyler touch your wiener? A No, sir. Q He never touched your wiener where you pee? A (Witness shakes head.) Q Do you remember telling people that he did? Do you remember that video we watched about the CAC lady -- A Yes, sir. So did you -- do you remember telling --let me ask you this: Do you remember seeing his wiener and saying that it was bigger than yours? Tyler's, you remember Tyler's wiener being bigger than your wiener? A Yes, sir. And do you remember -- and if I confuse you like I just did -- because we -- you did call it "his thing," didn't you, back then? A Yes, sir. Q Okay. You just tell me that I'm wrong. Okay? Is that a deal? A Yes, sir. Q Okay. Do you remember how you said it was different than your wiener or your thing? A Yes, sir. Q Okay. How did you tell her that it was different than yours? A I don't remember. And do you remember

talking about medicine? A Yes, sir. Q Okay. And did anybody ever put medicine on you? A Yes, sir. Q Who put medicine on you? A Tyler. Q Okay. Where did he put medicine at? A On my butt. Q Okay. What part of your butt did he put medicine at? A Inside. Do you remember telling Ms. Nunley that he put something where the poop comes out? A Yes, sir. Q And that's what hurt? A Yes, sir. What part of his body did he put where you pooped? What part of Tyler's body did he put into you – you okay? You told her that Tyler put something where you poop; right? A Yes, sir. His wiener. Q His wiener. Okay. And how did it feel when he did that? A It hurt. Q It hurt? Okay. Do you remember telling Tyler anything when he did that? A I don't remember. Q You don't remember. Were you scared? A Yes, sir. Q Okay. Were you confused? A Yes, sir. Now, we talked about what that medicine looked like. Do you remember that? A Yes, sir. Q Okay. Tell -- what kind -- was it in a container? A Yes, sir. Q Okay. And do you remember the color -- did it have a lid? A Yes, sir. Q Okay. What color was the lid? A Blue. Q Blue? Okay. What color was the bottle? Do you remember? A Kind of like a yellow. Q Okay. And where -- do you remember where it was that he would get it from? A On my mom's desk. Now, we talked about Tyler putting the medicine on. Did he ever use his finger to put the medicine on -- do you remember talking about that -- where you poop? A I don't remember. Q You don't remember that. Okay. That's fair. So right now what we can talk about is that he put

his wiener into your -- where you poop, into your butt, two or three times; right? A Yes, sir. Where in your mom's bedroom did it happen, like, what area? A On the bed. Q On the bed. Okay. And that's what -- is that the same bed that had her desk next to it with the -- with the medicine? A Yes, sir. Q Okay. And so how many times do you think it happened in the bedroom? A Two or one. Do you remember talking about, at some point, that you think that he put his finger where the poop comes out of? Do you remember that at all? A I'm not sure if I remember that. Q You don't remember it happening, or you don't remember talking about it? A I don't remember talking about it. (4 RR at 162-205). Cross examination, you said that Tyler put his thing in your rear end; is that right? A Yes, sir. Q Okay. Were you facing toward him or facing away from him? A Right now? Q Well, I was wondering, did you have your back to him or your face to him? A My back. Q Okay. So did you actually see him do that? If your back was to him, did you actually see him do anything to you? A I felt it. Q Okay. You felt -- you felt something; is that right? Yes, sir. Q Okay. I'm just wondering, you felt something; but you didn't see anything; is that right? A Yes, sir. Q And you think it was his thing; is that right? A I know it was. Q Okay. But you didn't see it because you had your face the other way? A Yes, sir. And you're saying that Tyler did this, putting his thing in your rear end, two or three times? A Yes, sir. Q Okay. But you didn't see it because you had your head turned the other way? A

Yes, sir. Q Okay. And I wasn't sure from what was -- what was asked of you about the medicine. Did you see him use the medicine or did you feel it or there wasn't any medicine at all? A I felt it because it was burning. Q Okay. Did he put that on afterwards or before? A After. Asher, when he -- when you're saying Tyler was doing this to you, was -- did you start bleeding? A (Witness shakes head.) Q No? A No, sir. (4 RR at 205-215).

Leah Nunley, I work for Brazoria County Alliance for Children. Q Can you explain to the jury kind of what you do at the -- we call it the CAC; right? A Yes. I asked if someone had ever done something to his butt. Q Okay. So you asked him if somebody had ever done anything to his butt? A Correct. Q And what did he tell you? A He said, "I think Tyler." I asked him to explain, and he said more "I don't knows." I asked if Tyler -- just to clarify, did Tyler do something to your butt? He said yes. And then -- what did he say right after that? Can I look tell at my notes? Q Yeah, of course. A Will you repeat the question? Q What did A you that Tyler did to his butt? A Right after that he was saying, "I don't know." Then I asked about his clothes. Q AB's asked me about his clothes when that happened, and he said that he pulled them down. He didn't take them off, but he pulled them down. Q Who is the "he" that he's referring to? Tyler. Q AB told you when Tyler put something in his butt, Tyler pulled AB's clothes down? A Yes. Q Okay. And did he -- did you ask him specifically where

on his butt or where in his butt Tyler put something? A Yes. Q And what did he say? A In the middle. Q Okay. And then did he kind of elaborate on what he meant by "the middle"? A He said where he poops. Did he mention anything else that Tyler did to him? A He mentioned white medicine. Q White medicine? Okay. Did he go into detail on that, or what did he say about this white medicine? A He didn't -- he just said that it burned. Q That the medicine burned? A Yes. So AB tells you Tyler put his thing in his butt, pulled both of their clothes down and then afterwards put medicine on AB's butt? A I don't remember if the medicine was before or after -- Q Okay. Okay. So you're not sure if he told you before or after, just that he put medicine on his butt? A Yes. Q Okay. And did he tell you how it felt when Tyler did this to him? A He said that it hurt. I asked him if it happened one time or more than one time. Q And what was his answer? A He said five times. (4 RR at 215- 243). Cross examination, (4 RR at 243-251). The State rested. (4 RR at 251).

Appellant was called, I want to talk to you about the indictment. You have a four-count indictment in this case. I want to talk to you about the No. 1, that Tyler Smith, hereinafter styled defendant, on or about the 15th day of October, 2021, did then and there intentionally or knowingly cause the anus of AB, a child less than 14 years old, not a spouse, to contact the sexual organ of the defendant. Did you do that? A No, no. I would never even think to do something like that, never. Q Count No. 2,

that Tyler Smith, on or about the 26th day of October, 2021, did then and there intentionally or knowingly cause the anus of AB, a child less than 14 years old, not the defendant's spouse, to contact the sexual organ of the defendant, did you do that? A No. Same thing. I don't know who could even think to do something like that. Q Is that within your character? A No. Q Count 3, that Tyler Smith, on or about 15 October, 2021, intentionally and knowingly caused the penetration of the anus of AB, a child less than 14, not the defendant's spouse, by the defendant's finger, did you do that? A No. Q Is that in your character? A No. Q And on Count 4, that Tyler Smith, on or about October 15th of 2021, with the intent to arouse or gratify the sexual desire of the defendant, intentionally or knowingly engaged in sexual contact with AB, a child younger than 17 years old, not the spouse of the defendant, by touching the genitals of said child, did you do that? A No. I think it's kind of bizarre for anybody to get aroused by grabbing a 4-year-old's penis. Q Is that within your state -- I mean, are you a person that gratifies like this way? A No. (4 RR at 253-262). Cross examination, AB is lying; correct? A Yes. Q Okay. Do you want a copy of the indictment so you can tell the jury exactly what AB is lying about, or was that recitation with your defense attorney enough? A It was mailed to me. I have a copy of it. Q Okay. Good. Only fair. So when Asher sat up there and discussed about how you put it where he poops, that was a lie; is that correct? A Yes. When he said that it

hurt, that was a lie, too? A Yes. I rejected every deal that was offered to me because I was not going to lie and say I did something I did not do. Q Okay. Why didn't you talk -- the police reached out and tried to --A The police never reached out. Q You're saying he's a liar? A The first time -- yes. (4 RR at 262-322). (5 RR at 7-73).

Laura Friedrichs, Have you had an opportunity over the last few years to see Mr. Smith's interaction with the three Bingham children? Yes. They always seemed really happy. He was very involved. Q Okay. And specifically with AB, can you describe for the jury what he -- what Asher is like around Tyler Smith? A Like I said, he always seemed happy, like a happy kid, that he loved Tyler. Q Did you see him go up and hug him? A Yes. (5 RR at 138-139). Cross examination, your testimony was they seemed happy. A Okay. They were happy. Q Okay. My question to you is pretty simple: You testified a moment ago they seemed happy; right? A They were happy. Then why are you here? A Because I'm here to --Q Try to help him out; right? A To prove that he's innocent, yes. (5 RR at 139-145).

Victoria Silvas, the father of my child. Q And his name is Tyler Smith? A Yes. Q And y'all have a child together? A Yes, sir. Q And is that an 8-year-old named Logan? And during a time period of, say, 2020, 2021, 2022, have you been able to see Mr. Smith interact with these three boys? A Yes, sir. Q And can you tell the jury how often would you have that opportunity to see him interact with the boys? A Once or

twice a week during sports events for the -- my son has played sports for four years, so ever since they've been together. He is the type of person they just all want to play with. So they just attach to him, and the kids are always happy. How would you describe AB's behavior around Mr. Smith? A Happy. He's been a father figure for him for three years. (5 RR at 145-147). Cross examination, So just to be clear, how many times do you think that you saw Tyler interact with AB? A It has to be more than, I don't know, a hundred times. (5 RR at 147-151).

Talia Smith, And who is this that is seated to my left? A My brother. Q Have you had an opportunity over the last few years, 2020, 2021, 2022, to see -- to see your brother's interactions with the three Bingham children? A Yes. Q Okay. And can you tell the jury, how often would you be able to see your brother's interaction with these three boys? A Yes. So I would see him about twice a week over the years that they were together. Q Okay. And can you explain to the jury, why were you seeing your brother so often, twice a week? A We're really close. We grew up very close, and we're best friends. Could you describe for the jury how your brother was interacting with these three children? A Yes. He played all the sports with them, catch, football, baseball. Also, board games are a big thing for them. Yeah, they just were always playing together, fishing. He's very active, so he had them being very active as well. Q Did these children seem to enjoy being around Mr. Smith? A Yes. (5 RR at 151-

153). Cross examination, But you don't know what was going on in that house, really; do you? A I mean, I know some stuff that was going on there, yes. Q Some stuff. Okay. A I was there weekly. Q Okay. But you don't know. You're saying -- the crux of your testimony is he didn't act correctly. He didn't act like a sex assault victim; right? A Yes, he didn't. (5 RR at 153-167). Appellant rested. (5 RR at 167).

A charge conference was held on the record as to the charge on guilt/innocence, wherein, the State and Appellant had no objections to the Court's charge. (5 RR at 168). At punishment the State re-called Betreace McFatter, JB and LB. (6 RR at 18-51). Appellant called family members Melissa Smith, Talia Smith, Victoria Silvas and Laura Friedrichs as character witnesses. (6 RR at 51-112).

SUMMARY OF THE ARGUMENT

Point of Error One:

Appellant's convictions are not supported by sufficient evidence. The evidence adduced was insufficient to find that Appellant committed the offense of aggravated sexual assault of a child and indecency with a child. Thus, there was a reasonable doubt as to whether Appellant was guilty, and the evidence was insufficient to find Appellant guilty. Applying, *Brooks v. State*, 323 S.W.3d 893,894-95 (Tex. Crim. App. 2010) (plurality op.); *id.* at 926. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781. *Burden v. State*, 55 S.W.3d 608, 612 (Tex. Crim. App. 2001).

Point of Error Two:

In his second issue, appellant argues that the trial court erred in admitting the outcry testimony of both the grandmother and Child Advocacy Center employee because the statements lacked reliability. Under article 38.072 of the Texas Code of Criminal Procedure.

ARGUMENT

APPELLANT'S POINT OF ERROR ONE:

THE EVIDENCE ADDUCED AT TRIAL WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS.

Sufficiency

Appellant challenges the legal sufficiency of the evidence to support his convictions. The Court of Criminal Appeals has held that only one standard should be used in a criminal case to evaluate the sufficiency of the evidence to support findings that must be established beyond a reasonable doubt: legal sufficiency. *Brooks v. State*, 323 S.W.3d 893,894-95 (Tex. Crim. App. 2010) . Accordingly, the review of the sufficiency of the evidence in this case is under a rigorous and proper application of the legal sufficiency standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks*, 323 S.W.3d at 906. When reviewing the sufficiency of the evidence, it is proper to view all of the evidence in the light most favorable to the verdict to determine whether the fact finder was rationally justified in finding guilt beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 899; *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). This Court will defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *Brooks*, 323 S.W.3d at 902

n.19, 907. Appellant argues the evidence is legally insufficient to support his conviction. The Court of Criminal Appeals has held that only one standard should be used to evaluate the sufficiency of the evidence in a criminal case: legal sufficiency. *Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App.2010). Accordingly, the review of the sufficiency of the evidence in this case under a proper application of the *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), legal sufficiency standard. *Brooks*, 323 S.W.3d at 905.

Standard of Review

When reviewing the sufficiency of the evidence, the view is to all of the evidence in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Id.* at 898. *Dewberry v. State*, 4 S.W.3d 735,740 (Tex. Crim. App.1999); *see also Sharp v. State*, 707 S.W.2d 611,614 (Tex. Crim. App.1986) (stating the jury may choose to believe or disbelieve any portion of the testimony at trial). The duty as a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App.2007).

Aggravated Sexual Assault of a child/Indecency with a Child

The evidence presented by the State is inconsistent and speculative to allow an alleged victim to be lead into testimony that something happened with regard to

penetration; the State's examination of the child was State's testimony testifying for the child which lacked reliability. A pattern of false and inconsistent statements.

It is well established that when an indictment alleges that an offense occurred "on or about" a certain date, the State is allowed to prove that the offense occurred on a date other than the one stated in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory limitations period, and the offense relied on otherwise meets the description of the offense alleged in the indictment. *Yzaguirre v. State*, 957 S.W.2d 38, 39 (Tex. Crim. App. 1997); *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1977). "The primary purpose of the 'on or about' language 'is not to notify the accused of the date of the offense[,]' but instead to show the prosecution that the offense is not barred by the statute of limitations and to provide the defendant with sufficient notice to prepare an adequate defense." *Sanchez v. State*, No. 04-07-00795-CR, 2008 WL 5170199, at *2 (Tex. App.-San Antonio Dec. 10, 2008, no pet.) (mem. op., not designated for publication) (quoting *Garcia v. State*, 981 S.W.2d 683, 686 (Tex. Crim. App. 1998)).

Appellant knows that a child sexual abuse victim's uncorroborated testimony is sufficient to support a conviction for indecency with a child. *See* Tex. Code Crim. Proc. Ann. art. 38.07 (Vernon Supp. 2013); *Martinez v. State*, 178 S.W.3d 806, 814 (Tex. Crim. App. 2005) (noting that article 38.07 "deals with the *sufficiency* of

evidence required to sustain a conviction for "certain sexual offenses) (emphasis in original). The State has no burden to produce any corroborating or physical evidence. *Martines v. State*, 371 S.W.3d 232, 240 (Tex. App.--Houston [1st Dist.] 2011, no pet.); *see also Lee v. State*, 176 S.W.3d 452, 458 (Tex. App.--Houston [1st Dist.] 2004) (holding that medical or physical evidence is not required to corroborate child victim's testimony), *aff'd*, 206 S.W.3d 620 (Tex. Crim. App. 2006). Likewise, a child victim's outcry statement alone can be sufficient to support a sexual abuse conviction. *See Tear v. State*, 74 S.W.3d 555, 560 (Tex. App.--Dallas 2002, pet. ref'd). Courts give wide latitude to testimony provided by child victims of sexual abuse. *Gonzalez Soto v. State*, 267 S.W.3d 327, 332 (Tex. App.--Corpus Christi 2008, no pet.). As long as the child communicates to the jury that the touching occurred on a part of the body within the definition of the statute, the evidence will be sufficient. *Lee*, 176 S.W.3d at 457; *see Gonzalez Soto*, 267 S.W.3d at 332 ("The victim's description of what happened to her need not be precise, and she is not expected to express herself at the same level of sophistication as an adult."). The requisite intent for the offense of indecency with a child can be inferred from the defendant's conduct and remarks and all of the surrounding circumstances. *See Gonzalez Soto*, 267 S.W.3d at 332; *Navarro v. State*, 241 S.W.3d 77, 79 (Tex. App.--Houston [1st Dist.] 2007, pet. ref'd).

Touching ordinarily connotes contact. *See IslasMartinez v. State*, 452 S.W.3d

874, 877-79 (Tex. App.-Dallas 2014, pet. ref'd) (undefined term "contact" synonymous with "touching" in context of aggravated sexual assault). Because the word "mouth" encompasses not only the lips but also the tongue, gums, teeth, and cavity containing these parts, the child's testimony that Appellant touched his mouth with her vagina conceivably could mean either contact or penetration. See *Johnson v. State*, 882 S.W.2d 39, 41 (Tex. App.-Houston [1st Dist.] 1994, pet. ref'd) (affording statutorily undefined term "mouth" its ordinary meaning in context of aggravated sexual assault).

Viewed in the context of the leading questions on this record, a fact finder could do no more than speculate as to whether mere contact occurred, and the fact finder "is not permitted to draw conclusions based on speculation because doing so is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); see also *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007) ("Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented.").

It can be argued that the State's trial attorney was testifying for the child versus asking question. Appellant generally complains about the State's use of leading questions during AB's testimony, it is argued the trial court abused its discretion by permitting leading questions. See *Wyatt v. State*, 23 S.W.3d 18, 28 (Tex. Crim. App.

2000) (discussing the longstanding proposition that “permitting leading questions on direct examination is a matter within the sound discretion of the trial court”). Appellant’s trial attorney attempted to object to the State’s leading questions which were generally sustained, however the State continued.

Appellant acknowledges the above law however the record in this case does not support the convictions, simply not sufficient to support Appellant’s convictions. The State was allowed to lead the alleged victim to agree some alleged acts occurred and where they might have occurred. A pattern of false and inconsistent accusations and testimony. Thus, legally insufficient proof supports Appellant's convictions of the indictment for aggravated sexual assault.

The lack of sufficiency in this case is directly traced to the fact that the child failed to adequately communicate to the jury that the sexual contact occurred, if at all, all the State did here was lead the alleged victim to agree some alleged acts occurred or where they might have occurred, the evidence is insufficient.

As to the State’s inevitable argument as to inadequate briefing and or waiver for the Court not to address Appellant’s arguments, this Court has said many times, we assume without deciding that appellant adequately briefed arguments as to the legal sufficiency of the evidence supporting all of his convictions. See *Garza v. Garcia*, 137 S.W.3d 36, 38 (Tex. 2004) (“We construe the Rules of Appellate

Procedure liberally, so that decisions turn on substance rather than procedural technicality.”).

The Child Testified Through Leading Questions-Tex. Penal Code, sections 22.021(a)(2)(B). Appellant convicted of count one and four only.

Counts 1 and 4 allege:

COUNT ONE

on or about the **15th day of October, 2021**, and before the presentment of this indictment, in the County and State aforesaid, did then and there intentionally or knowingly cause the anus of A B, a child younger than fourteen (14) years of age and not the defendant's spouse, to contact the sexual organ of the defendant;

COUNT FOUR

And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Court that **TYLER LYNN SMITH**, hereinafter styled Defendant, on or about the **15th day of October, 2021**, and before the presentment of this indictment, in said County and State, did then and there with the intent to arouse or gratify the sexual desire of the defendant, intentionally or knowingly engage in sexual contact with A B, a child younger than 17 years and not the spouse of the defendant, by touching the genitals of said child;

(1 CR at 8-9).

The child specifically stated-A B, you were pretty little when they were dating; right? A Yes, sir. Q Okay. And how old were you, about 4? Do you even remember how old you were? A I think I was 4. Q You were 4. Okay. Now, Tyler hurt you;

right? A Yes, sir. Q And we talked about it a little bit already, but you don't really like to tell people about that; right? Yes, sir. Now, I want to -- on boys and girls we have private parts; right? A Yes, sir. So Tyler -- what you're telling the jury is -- and we'll get more in detail. Okay? Is that fair? Let's just start with this: Did Tyler touch your wiener? A No, sir. Q He never touched your wiener where you pee? A (Witness shakes head.) Q Do you remember telling people that he did? Do you remember that video we watched about the CAC lady -- A Yes, sir. So did you -- do you remember telling --let me ask you this: Do you remember seeing his wiener and saying that it was bigger than yours? Tyler's, you remember Tyler's wiener being bigger than your wiener? A Yes, sir. And do you remember -- and if I confuse you like I just did -- because we -- you did call it "his thing," didn't you, back then? A Yes, sir. Q Okay. You just tell me that I'm wrong. Okay? Is that a deal? A Yes, sir. Q Okay. Do you remember how you said it was different than your wiener or your thing? A Yes, sir. Q Okay. How did you tell her that it was different than yours? A I don't remember. And do you remember talking about medicine? A Yes, sir. Q Okay. And did anybody ever put medicine on you? A Yes, sir. Q Who put medicine on you? A Tyler. Q Okay. Where did he put medicine at? A On my butt. Q Okay. What part of your butt did he put medicine at? A Inside. Do you remember telling Ms. Nunley that he put something where the poop comes out? A Yes, sir. Q And that's what hurt? A Yes, sir.

What part of his body did he put where you pooped? What part of Tyler's body did he put into you – you okay? You told her that Tyler put something where you poop; right? A Yes, sir. His wiener. Q His wiener. Okay. And how did it feel when he did that? A It hurt. Q It hurt? Okay. Do you remember telling Tyler anything when he did that? A I don't remember. Q You don't remember. Were you scared? A Yes, sir. Q Okay. Were you confused? A Yes, sir. Now, we talked about what that medicine looked like. Do you remember that? A Yes, sir. Q Okay. Tell -- what kind -- was it in a container? A Yes, sir. Q Okay. And do you remember the color -- did it have a lid? A Yes, sir. Q Okay. What color was the lid? A Blue. Q Blue? Okay. What color was the bottle? Do you remember? A Kind of like a yellow. Q Okay. And where -- do you remember where it was that he would get it from? A On my mom's desk. Now, we talked about Tyler putting the medicine on. Did he ever use his finger to put the medicine on -- do you remember talking about that -- where you poop? A I don't remember. Q You don't remember that. Okay. That's fair. So right now what we can talk about is that he put his wiener into your -- where you poop, into your butt, two or three times; right? A Yes, sir. Where in your mom's bedroom did it happen, like, what area? A On the bed. Q On the bed. Okay. And that's what -- is that the same bed that had her desk next to it with the -- with the medicine? A Yes, sir. Q Okay. And so how many times do you think it happened in the bedroom? A Two or one. Do you

remember talking about, at some point, that you think that he put his finger where the poop comes out of? Do you remember that at all? A I'm not sure if I remember that.

Q You don't remember it happening, or you don't remember talking about it? A I don't remember talking about it. (4 RR at 162-205). Cross examination, you said that Tyler put his thing in your rear end; is that right? A Yes, sir. Q Okay. Were you facing toward him or facing away from him? A Right now? Q Well, I was wondering, did you have your back to him or your face to him? A My back. Q Okay. So did you actually see him do that? If your back was to him, did you actually see him do anything to you? A I felt it. Q Okay. You felt -- you felt something; is that right? Yes, sir. Q Okay. I'm just wondering, you felt something; but you didn't see anything; is that right? A Yes, sir. Q And you think it was his thing; is that right? A I know it was. Q Okay. But you didn't see it because you had your face the other way? A Yes, sir. And you're saying that Tyler did this, putting his thing in your rear end, two or three times? A Yes, sir. Q Okay. But you didn't see it because you had your head turned the other way? A Yes, sir. Q Okay. And I wasn't sure from what was -- what was asked of you about the medicine. Did you see him use the medicine or did you feel it or there wasn't any medicine at all? A I felt it because it was burning. Q Okay. Did he put that on afterwards or before? A After. Asher, when he -- when you're saying Tyler was doing this to you, was -- did you start bleeding? A (Witness shakes head.) Q No?

A No, sir. (4 RR at 205-215).

Appellant's convictions are not supported by sufficient credible evidence. The *Jackson v. Virginia* standard is the only standard a reviewing court should apply to determine whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App. 2010). All of the evidence is viewed in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt, *Brooks*, 323 S.W.3d at 902. The Court will defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *Brooks*, 323 S.W.3d at 907. The convictions should be reversed and this Court should render a judgment of acquittal.

APPELLANT'S POINT OF ERROR TWO:

THE TRIAL COURT ERRED IN ADMITTING THE OUTCRY TESTIMONY OF BOTH THE GRANDMOTHER AND THE CHILD ADVOCACY CENTER EMPLOYEE BECAUSE THE STATEMENTS LACKED RELIABILITY IN ACCORDANCE WITH TEX. CODE CRIM. PROC. 38.072, SECTION 2-b(2).

In his second issue, appellant argues that the trial court erred in admitting the outcry testimony of both the grandmother and Child Advocacy Center employee because the statements lacked reliability. Under article 38.072 of the Texas Code of Criminal Procedure, entitled "Hearsay Statement of Child Abuse Victims," some

hearsay statements are admissible in prosecuting certain offenses, including aggravated sexual assault of a child. See Tex. Code Crim. Proc. Ann. art. 38.072, § 1 (West 2011). The statute applies to statements that describe the alleged offense and that (1) were made by the child against whom the offense allegedly was committed and (2) were made to the first person, eighteen years of age or older, other than the defendant, to whom the child made a statement about the offense. Id. § 2(a). A statement that meets these requirements is not inadmissible because of the hearsay rule if, among other things, the trial court finds, in a hearing outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement. Id. § 2(b)(2). Indicia of reliability that the trial court may consider include (1) whether the child victim testifies at trial and admits making the out-of-court statement, (2) whether the child understands the need to tell the truth and has the ability to observe, recollect, and narrate, (3) whether other evidence corroborates the statement, (4) whether the child made the statement spontaneously in his own terminology or whether evidence exists of prior prompting or manipulation by adults, (5) whether the child's statement is clear and unambiguous and rises to the needed level of certainty, (6) whether the statement is consistent with other evidence, (7) whether the statement describes an event that a child of the victim's age could not be expected to fabricate, (8) whether the child behaves abnormally after the contact,

(9) whether the child has a motive to fabricate the statement, (10) whether the child expects punishment because of reporting the conduct, and (11) whether the accused had the opportunity to commit the offense. See *Norris v. State*, 788 S.W.2d 65, 71 (Tex.App.-Dallas 1990, pet. ref'd). We review the trial court's determination that the statements were reliable under an abuse-of-discretion standard. See *Garcia v. State*, 792 S.W.2d 88, 92 (Tex.Crim.App.1990). We will reverse a trial court's decision only when the court's decision falls outside the zone of reasonable disagreement. *Shaw v. State*, 329 S.W.3d 645, 652 (Tex.App.-Houston [14th Dist.] 2010, pet. ref'd).

Appellant challenges the trial court's determination that the outcry statements were reliable. Appellant asserts that the outcry testimony was tainted because either the complainant's grandmother, who is the mother of the complainant's father, or the Child Advocacy Center employee allegedly manipulated the complainant to state specific details of the alleged conduct based upon issues of unpaid child support, custody issues and allegations that Appellant was suspected of having an affair or affairs on the complainant's mother at the time these allegations surfaced.

A pre-trial out cry hearing; Betreace McFatter, Do you know A B? A Yes, sir. Q Are you related to him? A Yes, sir. Q How are you related to do him? A He's my grandson. How old is AB right now? A 7. In June -- did you ever take care of your grandsons? A Yes, sir. Q Okay. Back in June of 2021, did you take care of your

grandsons? A Yes, sir. Q Okay. Specifically, did you take care of AB? A Yes, sir. Q Okay. Would you ever give AB a bath or a shower? A Yes, sir. Q Okay. Would AB sometimes stay with you for extended -- multiple days at a time? A Yes, sir. Q Okay. And do you know Tyler Smith? Yes, sir. Q Or do you know of Tyler Smith? He was dating the boys' mother. Q Okay. And who's the boys' mother? A Kelli Mills. Q Okay. And did the boys ever talk to you about -- specifically AB -- Tyler Smith? A Yes, sir. Q Okay. And you and I have talked, and you've talked to CPS people after all this has happened; correct? A Yes, sir. Q Okay. And do you recall making a statement to CPS people regarding an incident involving what AB told you when -- after you were giving him a shower one day? A Yes, sir. And what do you recall AB telling you? A That Tyler pinched his penis really hard. Q Okay. And just for clarity for the Judge, did he use the word "penis" or use a different word? A He said "tee-tee." Q And did he demonstrate in any way what had happened? A Yes, sir. And where were you located when this happened at? A At my house. Q Okay. And where is your house at? A In Angleton. Q Okay. And you may have already said it, but you mentioned something to the DPS people -- I mean, the child people about him doing something with his teeth when he did it. Do you remember that -- that being AB -- gritting his teeth? A Gritting his teeth. And Asher, again, would have been roughly how old at this point in time? A 4. (3 RR at 7-12). Cross examination, you said this was revealed

to you by AB in June of 2021? A Somewhere around there, yes. Q Okay. What did do you about it after AB told you this? A Reported it to his father. Q Okay. And do you know if he did anything about it? A You would have to ask him. Q Okay. Did AB say when this happened? A No, sir. Q Okay. And he demonstrated it with you by grabbing a hold of your thumb and pinching it to say this is what Tyler did to me? A Yes. Q After this June, 2021, time with AB, were there more times that he was with you at your house? A AB was with us off and on. I can't give you exact dates. Q But this was the only time he told you anything, was this one particular day in June of 2021? (3 RR at 12-16).

Marisela Delgado, in March of 2022, where were you working? A I was working for CPS in Angleton. And did you do an interview with AB on the 8th of March of 2022? A Yes, sir. Q Okay. And you and I had an opportunity to listen -- that was an audio recording; correct? A Yes, sir. Q Okay. And did AB make an outcry to you about things -- some things, broadly speaking, that the defendant did to him? Yes, sir. Q Okay. Did he indicate to you that the defendant had touched his butt? A Yes, sir. Q Okay. Did he indicate that it, in fact, was painful or hurt when the defendant touched his butt? A Yes, sir. Q Okay. And in your training and experience -- and this would have been while -- presumably while the defendant was having a relationship with AB's mother; correct? A Yes, sir. Q Okay. And do you remember

roughly how old AB was when you interviewed him? A I want to say he was about 5. And when you had that conversation with AB, was it your impression, from what he was saying, that what the defendant had done to him in some way was sexual? A Yes, sir. And then he said that he was -- that he had been touched on his butt, that it hurt really bad. Q Okay. And so you didn't think he was talking about I've been spanked or something like that. Your impression was something else? A Yes. And he identified the person -- he was able to tell you who Tyler was; correct? A Yes. Q Okay. So you were able to identify that person, and clearly you understood who AB was; right? A Yes, sir. Q And that was the only person that he indicated that had hurt him in that type of way; correct? A Yes. (3 RR at 16-21). Cross examination, you said that your routine or the way it operates with CPS is you ask some basic questions; and if it gets to the point where you believe sexual abuse has occurred, you shut it down and you send it to the Children's Assessment Center for them to actually follow up with more questions; is that correct? A Yes, sir. Q Okay. So you didn't learn any actual details of what had happened after this child just came to you and said, Mr. Smith touched my butt? A No, I didn't learn any details. Q Okay. You leave that for somebody else, to get into the details; correct? A Yes, sir. Okay. And AB's statement to you was limited to, Tyler touched my butt and it hurt; is that right? A Correct. Q You're saying that you believed it was something sexual in nature. But isn't it also

quite possible that it could be something other than sexual in nature, since your questioning was -- was shut down after what you believed was an outcry? A Yes. Q Okay. A child's butt could hurt for a number of different reasons other than sexual abuse; correct? A Correct. (3 RR at 21-28).

Kelli Mills, so I just want to start off, AB is your son; correct? A Correct. Q Okay. And at some point in time you started dating the defendant, Tyler Smith; correct? A Yes, sir. And you would come to find out and come to realize that AB had been sexually assaulted; correct? A Correct. Q Now, do you recall having a conversation with AB after this -- or as this was going on about some sex toys? A Yes. When did the sex box come into the house? Do you remember? A I would say about a year and a half into our relationship. Q Okay. A A year. And so AB is telling you that the purple sex toy came out of that sex box; correct? A Correct. And do you remember he said something to the effect that Tyler made me play with it? A Yes. Q Being either his penis or the sex toy, I guess? A Correct. Because I had told him that it was a back massager. Q Okay. A And he told me different. Q Okay. And he said that it made him -- I guess, Tyler feel good? A Yes. So was it your impression that they were using this sex toy on one another? Tyler was using it on AB? A He made me feel like it was one another. Q Okay. So -- and that, obviously, would probably be inserted into one another; correct? A Correct. Q Sexually. Okay. (3 RR at 29-35).

Cross examination, so in your testimony, you're talking about AB revealing to you that sex toys were used between him and Tyler; is that correct? A Correct. And so you're claiming, after Mr. Bingham took you to court, took custody away from you of your three boys, that then AB reveals this to you – A There was only one thing that he -- me and him really ever talked about it, and that was the first it ever got brought up. Play-by-play what he told me was -- we were sitting at the counter and we were eating lunch and he said, Mama, Tyler loves me the way he loves you. This conversation you had with AB about Tyler loving him like he loved you happened before your ex -- well, before Mr. Bingham went to the police; is that right? Well, like I just said, I did not have that conversation with my son until after they were gone. You lost custody sometime in March or beginning of April of 2022; correct? A I believe so. So you put this phone underneath your bed? A Yeah. Q And instead of catching Mr. Smith having an adulterous relationship with another woman, you believe that you're hearing him having sex with AB? A Well, I know my son was in that room. Q Okay. A My son was in the bed with him whenever I left the house. Q Okay. And while there's no video of this that you could see, there is audio that you heard -- allegedly heard AB saying, you know, something like, Ow, ow, Tyler, that hurts --A Exactly. Q Did you hear that? A I did hear that. Did you think that Tyler was raping your son? A At the time, no. I had no idea what was going on. When I

heard the recording, most definitely. Q Okay. You -- after that happened, after you put that phone underneath your bed, I mean, did you pull it out a little bit later on -- A I couldn't because he was there. I didn't want him to know. Later on AB tells you then about the sex toy being used on him; correct? A Correct. (3 RR at 35-53).

Leah Nunley, where do you currently work? A Brazoria County Alliance for Children. Within this video, did AB talk to you about the defendant sexually assaulting him? A Yes. And did AB talk about the defendant putting something in the middle where he pooped? Yes. Q Okay. And was it your belief, based on the conversation you had with AB, that would have been really AB's anus or rectum area? A Yes. Q Okay. Did he talk about how Tyler pulled his clothes down some? A Yes. Q And how the defendant pulled his clothes down some? A Yes. And did Asher talk to you about the defendant using some kind of medicine on him? A Yes. Q Specifically on his butt area; correct? A Yes. Did AB tell you that the defendant did something to his thing? A Yes. Q Okay. And Asher referred to his penis as, quote, "his thing"; correct? A Correct. (3 RR at 53-60). Cross examination, so in this interview you're saying AB told you that Mr. Smith put his thing in his rear end or in his butt; is that right? A In his butt, yes. Q Okay. And who brought AB there that day for your interview? A His father. And it could be that even though the State wants to use you as an outcry witness, if the mother heard about it before, she would have been

the first one to hear about it; correct? A Yeah. (3 RR at 60-62). THE COURT: Okay. So Betreace McFatter, I will find that she is the proper outcry witness for the contact. She was the first person that I understand was over the age of 18 that the child came out to as to a pinch on his penis. Kelli Mills, the only conversation I considered as to outcry would have been the purple sex toy. However, she testified that she had heard about it prior to the conversation, some type of CPS investigation and she had heard about the sex toy being brought up and so she went back and discussed with the caseworker the sex toy. Therefore, she is not the first person over the age of 18 to have any information on the sex toy. And that leaves Leah Nunley. Leah Nunley, in my opinion, is the person who has the specific details about what happened to the child and will be able to testify as to outcry. So grandma and the CAC. (3 RR at 66).

The trial court was vested with discretion to determine whether the complainant's outcry statements were reliable based on the time, content, and circumstances of the statements. See *Shaw*, 329 S.W.3d at 652; *Marquez v. State*, 165 S.W.3d 741, 747 (Tex.App.-Beaumont 2005, pet. ref'd). The trial court's determination was not supported by the evidence and did fall outside the zone of reasonable disagreement. See *Marquez*, 165 S.W.3d at 747 (holding trial court did not abuse its discretion in finding outcry statement reliable despite inconsistency between victim's outcry statement and testimony at trial). Accordingly, the trial court abused

its discretion in finding the outcry statements reliable. See *Shaw*, 329 S.W.3d at 652; *Marquez*, 165 S.W.3d at 747. To qualify as an outcry, "the statement must be more than words which give a general allusion that something in the area of child abuse was going on." *Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990). To determine the sufficiency of a statement for outcry purposes simply by comparing different statements the child gave to different individuals and deciding which person received the most detailed statement about the offense. See *Elder v. State*, 132 S.W.3d 20, 26 (Tex. App.—Fort Worth 2004, pet. ref'd), cert. denied, 544 U.S. 925, 125 S.Ct. 1645, 161 L.Ed.2d 484 (2005). For a statement to qualify as an outcry, however, the record must show that the child described the alleged offense in some discernible manner. *Garcia*, 792 S.W.2d at 91.

The court of criminal appeals has held under similar facts that testimony by a child that she told her teacher "what happened," without more, did not describe the offense alleged in a sufficiently discernible manner to qualify as an outcry under article 38.072. *Id.* *Garcia v. State*, 792 S.W.2d 88, 89 (Tex. Crim. App. 1990).

A review a trial court's decision to admit or exclude evidence for abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). A trial court abuses its discretion only if its decision is so clearly wrong as to lie outside the zone within which reasonable people might disagree. *Taylor v. State*, 268 S.W.3d

571, 579 (Tex. Crim. App. 2008).

Article 38.072 of the Texas Code Criminal Procedure “creates a hearsay exception for a child-complainant’s out-of-court ‘statements’ that ‘describe the alleged offense,’ so long as those statements were made ‘to the first [adult] person . . . to whom the child . . . made a statement about the offense.’” *Bays v. State*, 396 S.W.3d 580, 585 (Tex. Crim. App. 2013) (quoting Tex. Code Crim. Pro. art. 38.072, § 2(a)(1)–(3)). To be admissible under this exception, the statement must provide more than “a general allusion that something in the area of child abuse is going on.” *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011). Among other things, article 38.072 requires that the trial court hold a hearing outside the presence of the jury to determine whether the child’s statement is reliable. See Tex. Code Crim. Pro. art. 38.072, § 2(b)(2).

Harm analysis or lack of complete harm analysis does not create waiver. You don’t have to argue harm. There’s no constitutional or statutory right to be free from harm. “No burden to show harm should be placed on the defendant who appeals.” *Johnson v. State*, 43 S.W.3d 1, 8-9 (Tex. Crim. App. 2001). “We hold that it is the responsibility of the appellate court to assess harm, and that the burden to demonstrate whether the appellant was harmed by a trial court error does not rest on the appellant or the State.” *Id* at 9. See also, *Ovalle v. State*, 13 S.W.3d 774 (Tex.

Crim. App. 2000). “[N]o party should have the burden to prove harm from an error, and there ordinarily is no way to prove actual harm.” *Id* at 787.

Having determined that there was error, we must now address whether *Ruffins* was harmed by that error. *Ngo*, 175 S.W.3d at 743. Neither side has the burden of establishing either the presence or a lack of harm. See *Warner v. State*, 245 S.W.3d 458, 464 (Tex. Crim. App. 2008). Instead, the reviewing court makes “its own assessment” when evaluating what effect an error had on the verdict by looking at the record before it. *Ovalle v. State*, 13 S.W.3d 774, 787 (Tex. Crim. App. 2000) (quoting Wayne R. LaFare & Jerold H. Israel, *Criminal Procedure* 1165 (2d ed. 1992)). In assessing harm, reviewing courts “consider: (1) the jury charge as a whole, (2) the arguments of counsel, (3) the entirety of the evidence, and (4) other relevant factors present in the record.” *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013); see also *State v. Ambrose*, 487 S.W.3d 587, 598 (Tex. Crim. App. 2016); *Ratliff v. State*, No. 03-18-00569-CR, 2020, 604 S.W.3d 65, 85–86, 86–87 (Tex. App.—Austin Feb. 14, 2020, no pet. h.) (applying these factors to issue of whether jury-charge error constituted “an impermissible comment on the weight of the evidence”). *Ruffins v. State*, 613 S.W.3d 192, 199–200 (Tex. App.—Austin 2020, pet. granted). The trial court did not act within the zone of reasonable disagreement when it determined that outcry statements were admissible and reliable in accordance

with Article 38.072 of the Texas Code Criminal Procedure.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant, Tyler Lynn Smith, prays that this Court would reverse Appellant's convictions, remand the matter to the trial court for a new trial. Further, Appellant prays for any and all other relief to which Appellant may be entitled in law and equity.

Respectfully submitted,

/S/CARY M. FADEN

Cary M. Faden

54 Sugar Creek Center Blvd., Suite 200

Sugar Land, Texas 77478

Telephone: (281) 491-6182

Facsimile: (281) 491-0049

Texas Bar No. 06768725

E-MAIL: caryfaden@aol.com

Attorney For Appellant

CERTIFICATE OF COMPLIANCE, T.R.A.P., RULE 9.4(3)

_____ In accordance with TEX. R. APP. P. 9.4(3), I Cary M. Faden, certify that this is a computer generated document and I state that the number of words in this document is 15,745 words. I am relying on the word count of the computer program used to prepare this document.

/S/CARY M. FADEN

Cary M. Faden

CERTIFICATE OF SERVICE

In accordance with TEX. R. APP. P. 9.5, I Cary M. Faden, certify that a true and correct copy of the foregoing amended brief for appellant has been served, by U.S. Mail, to Tyler Lynn Smith, to the attorney for the State Of Texas, Tom Selleck, District Attorney, 111 E. Locust Street, Angleton, Texas 77515, by electronic filing manager, on this 15th day of June, 2025.

/S/CARY M. FADEN

Cary M. Faden

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Cary Faden on behalf of Cary Faden

Bar No. 06768725

caryfaden@aol.com

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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Trey Picard	24027742	treyp@brazoriacountytx.gov	6/15/2025 11:51:01 AM	SENT