Appeal No. 14-24-00305-CR

In The Fourteenth Court Of Appeals

ZACHARIAH BARINEAU, Appellant

Vs.

THE STATE OF TEXAS, Appellee.

On Appeal from the 149th Judicial District Court
of Brazoria County, Texas
Cause Number 100293-CR.

BRIEF FOR APPELLANT ZACHARIAH BARINEAU

Oral Argument Requested

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IDENTITY OF PARTIES AND COUNSEL

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On Appeal from the 149th Judicial District Court
of Brazoria County, Texas
Cause Number 100293-CR.

BRIEF FOR APPELLANT ZACHARIAH BARINEAU

To The Honorable Justices of the Fourteenth Court of Appeals:

Comes now appellant, Zachariah Barineau, by and through his attorney of record, Cary M. Faden, and files this his brief to set aside the March 28, 2024, judgments of the 149th Judicial District Court of Brazoria County, Texas in Cause Numbers 100293-CR, and would respectfully show the Court:

STATEMENT OF THE CASE

On February 8, 2024, Appellant, was indicted in counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11. Counts 1, 2, 3, 4, for the first degree felony of aggravated sexual assault of a child; counts 5, 6, 7, 8, 9, 10, 11, for second degree indecency with a child. (1 CR at 7-8). The offenses were alleged to have occurred on or about July 1, 2019. (1 CR at 7-8). On March 25, 2024, Appellant pleaded not guilty to the indictment. (3 RR at 8). 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, 2, 3; counts 5, 6, 7 at twenty (20) years TDCJ-ID; counts 8, 10, 11 at ten (10) years TDCJ-ID, with no fine. (1 CR at 149-151). On April 4, 2024, Appellant timely filed his notice of appeal. (1 CR at 152).

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 NOT HAVING A HEARING IN ACCORDANCE WITH THE TEX. CODE OF CRIM. PROC., ART. 38.072. THE TRIAL COURT DID NOT MAKE THE PROPER FINDINGS PURSUANT TO TEX. CODE CRIM. PROC. 38.072.

STATEMENT OF FACTS

On February 8, 2024, Appellant was indicted in the 149th Judicial District Court in cause number 100293-CR. That indictment alleged that, on or about July 1, 2019, in Brazoria County, Appellant did:

> did then and there intentionally or knowingly cause the penetration of the sexual organ of AB, a child younger than fourteen (14) years of age and not the defendant's spouse, by the defendant's mouth;
>
> **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 ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of July, 2019, and before the presentment of this indictment, in said County and State, did then and there intentionally or knowingly cause the sexual organ of AB, a child younger than fourteen (14) years of age and not the defendant's spouse, to contact the mouth 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 ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of July, 2019, and before the presentment of this indictment, in said County and State, did then and there intentionally or knowingly cause the penetration of the sexual organ of AB, a child younger than fourteen (14) years of age and not the defendant's spouse, by 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 Comt that ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of .July, 2019, and before the presentment of this indictment, in said County and State, did then and there intentionally or knowingly cause the penetration of the sexual organ of AB, a child younger than fou1tecn (14) years of age and not the defendant's spouse, by a hand held device;

COUNT FIVE

And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Court that ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of July, 2019, 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 cause AB, a child younger than 17 years and not the spouse of the defendant, to engage in sexual contact, by causing the said child to touch the genitals of the defendant;

COUNT SIX

And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Court that ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of July, 2019, 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 cause AB, a child younger than 17 years and not the spouse of the defendant, to engage in sexual contact, by touching the breast of said child;

COUNT SEVEN

And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Court that ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about

the 1st day of .July, 2019, 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 cause AB, a child younger than 17 years and not the spouse of the defendant, to engage in sexual contact, by touching the genitals of said child;

COUNT EIGHT

And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Comt that ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of July, 2019, 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 expose the defendant's genitals, knowing that AB, a child younger than 17 years of age and not the spouse of the defendant, was present.

COUNT NINE

And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Court that ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of July, 2019, 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 expose the defendant's anus, knowing that AB, a child younger than 17 years of age and not the spouse of the defendant, was present.

COUNT TEN

And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Court that ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of July, 2019, 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 defendant, cause AB, a chlId younger than

17 years of age and not the spouse of the defendant, to expose her anus.

COUNT ELEVEN

> And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Court that ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of July, 2019, 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 defendant, cause AB, a child younger than 17 years of age and not the spouse of the defendant, to expose her genitals.

(1 CR at 7-8).

A venire of approximately one hundred (100) persons, was subjected to voir dire examination. (3 RR at 8-185). The jury of twelve (12) was selected and seated, with no further objection. (3 RR at 185). The jury was sworn. (3 RR at 185). Appellant was arraigned on the indictment and entered a plea of not guilty. (3 RR at 5).

A motion to suppress/out cry in nature hearing was held outside the presence of the jury. Chesley McDonald was called, Detective McDonald with the Alvin Police Department. I originally met with Amber Smith and AB. And do you remember what their emotional state was at that time? Amber was extremely distraught. She was having a hard time processing the information she had received prior to coming to the police department. It was pretty troubling. I mean, obviously she was going through

a lot. I kind of had to talk her through the process. She was mentally having a hard time. Did it seem like Ms. Smith was familiar with police processes and how the system works essentially? No, sir. Usually in these cases we don't try to talk to the juveniles immediately. We'll try to set them up for a CAC interview; but because she made an outcry to her mother, I was able to talk to her mother and gather information. And did you interview her mother? Yes, sir. I pulled her away from AB. That way there was no issues dealing with everything. I could get the outcry specifically, and there wasn't anything trying to add or her trying to intervene with AB. Everything would have come from the outcry, and I could have got the interview at a later time. And without saying what someone else said, because that's hearsay, can you just explain generally what is an outcry? An outcry is when a victim goes to a third party, whether it's a family member or friend, and tells them that a crime had been committed to them, such as a sexual assault. I can take that information as fact at that point. Now, at some point did someone else show up that night or that day at the police station? Detective Foley was there. She was actually there with me. She was my field training officer for that phase of my detective training program. And who is Amber Smith? Amber is the wife of Mr. Barineau and the mother of AB. Okay. Now, Mr. Barineau and Amber Smith, they have different last names; is that right? Yes, sir. But they are married? So after the first interview, I gave him my information and said

if he needed anybody else to talk to or he wanted to talk more, he could contact me. Then the following day he couldn't get ahold of me, but he was able to get ahold of Detective Foley and said he would like to speak with us further. He came in again; didn't he? Yes, sir. (4 RR at 17-29). Voir dire examination, I believe you testified that at the time you took the statement from Mr. Barineau, he was not under arrest; is that right? Correct. And is it your testimony that he voluntarily appeared to give this statement? Yes, sir. Yeah. And it's also my understanding it's your testimony that it was the wife who called him and not you; is that correct? Yes, sir. So in between and there's two statements. There's a statement, I believe it was taken on June the 30th of 2023; correct? Yes, sir. And do you recall when the second statement was taken? The following day. Which would have been Saturday, July the 1st of 2023? I'll review my report to verify, if you don't mind. I just want to make sure I give you the right date. Yes, sir. It would have been Sunday, July 1st. Well, Friday was June the 30th; correct? And when Mr. Barineau came in and gave you the first statement, was he Mirandized? No, sir. And when he came in and gave you the second statement, was he Mirandized? No, sir. But you definitely had made the decision, based upon the information you had obtained in the first statement, to seek charges against him; is that correct? Yes, sir. And those charges would be for aggravated sexual assault of a child and indecency with a child? Yes, sir. All right. And the electronic recording

that was made, what, if any, steps did you take to determine whether or not the equipment was capable of making an accurate recording? We reviewed the video. That's up to my lieutenant; and he usually handles all the electronic equipment, sir. (4 RR at 29-33). THE COURT: So I am going to find these other acts to be relevant, and I am going to find them to be more probative than prejudicial. (4 RR at 45).

Chesley McDonald, jury in-is it fair to say that the defendant said that AB moved in with them when she was about 6 or 7 years old? Yes, sir. When was AB born? July 23rd, 2009. So if we add six years to 2009, what year does that put us in? 2015, if my math is correct. So would it be fair to say around 2015, 2016 is when she starts living with the defendant? Yes, sir. Detective, so the first interview was on what date again? Friday, January 30th. So he wanted to talk some more; right? Yes, sir. Had you experienced that before? No, no. Usually the first day is the one chance you get. Usually you only get one shot. In my experience in law enforcement, you get one shot to talk to someone. So to have a second chance to talk to someone is pretty rare. And it becomes clearer talking to him. You know, obviously in the first interview, the more we talked with him, you could tell whether it was ashamed, I don't know what feelings he had, but something was preventing him from telling the whole truth, in my opinion. The more we talked to him about these things, the more and more detail we got, the more facts we got, the more we started to get to the truth. So being able to

talk about it and going over it, I felt that the more we talked about it, the more he might actually give us the truth; and we could then move on from there. And when did you hear him referring to the using the massager on, I believe he said, her clit or sweet spot? Yes, sir. What did you take that, what part of the female anatomy did you take that to mean? Her clitoris. It's a promise between him and his daughter, AB, that when she became of age, that he would leave his wife and they would be together. And she had told him that she had to break the promise; is that right? Correct. So she's breaking up with him? Yes, sir. But based on your interpretation of the story he's telling you, did the child cause him to you know, touching him and cause him to ejaculate or did he touching himself cause him to ejaculate? The way I interpreted the story was that he in his initial interview, in the first one, that he caused himself to do it; and in this second interview, it's very vague. He doesn't actually specify whether he did it or the child did it. He just says he does ejaculate in front of the child. After she had been touching his penis? Correct. (4 RR at 45-79). Cross examination, so Ms. Smith was the first witness you interviewed concerning the allegations in this case. Is that fair to say? Yes, sir. And as a result of that interview, you made the determination that you would also like to speak with Mr. Barineau; is that right? Yes, sir. But he voluntarily appeared and came down to speak with you about this investigation about the allegations; correct? Yes, sir. So during this interview, Mr.

Barineau did not tell you that he had penetrated the sexual organ of AB with his mouth, that he had not done that? Correct. Okay. He simply said that there had been a kiss but he didn't admit or tell you that there had been penetration; is that right? Correct. Okay. And he didn't tell you that he had caused the penetration of the sexual organ of AB by using his finger; right? Correct. And with respect to this massager, do you recall when he came back for the interview on July the 1st he talked about the massager? Yes, sir. And I believe he told you the massager had a big, sort of ball-type head; correct? Correct. And that he had placed that massager on the sexual organ of AB; correct? Correct. But he didn't tell you that he had penetrated the sexual organ of AB with that handheld device? Correct, he did not. (4 RR at 79-104).

AB was called, and tell me, how old are you? 14. What grade are you in? Ninth. Where do you go to school at? Angleton High School. And do you remember telling Ms. Nunnley that your dad would do inappropriate things? Uh-huh. Do you remember you told Ms. Nunnley that your dad would give you full-body massages? Yes. And do you remember telling her that you would help him masturbate? Yes. Do you remember telling her that you would touch his private parts? Yes. And you also told Ms. Nunnley that you felt that he was grooming you; didn't you? Yes. When you were 9 or 10 years old, you were living in Alvin at the time; right? Yeah. Was that before you moved to Rosharon? Yes. And do you remember telling Ms. Nunnley that

you felt that your dad was grooming you into a relationship? Yes. And do you remember telling her that you talked that the two of you talked about getting married? Uh-huh. Do you remember that you told Ms. Nunnley that you masturbated him at least two times? Is that right? Yeah. Do you remember telling Ms. Nunnley that one of the times that you masturbated him, your mom was on a trip? Is that right? Uh-huh. Now, when I asked you about him having you masturbate him, is that you touching his penis? Uh-huh. Do you remember if his penis was hard or soft? No. Do you remember telling Ms. Nunnley that stuff came out? Uh-huh. By that, you meant stuff came out of his penis? Uh-huh. Do you remember telling Ms. Nunnley that it was white and that it also got on the bed? Uh-huh. Now, your father would sometimes give you massages; is that correct? (Witness nods head). And oftentimes you would be naked for those massages; is that correct? Yes. During those massages, you told Ms. Nunnley that he would touch your private parts; is that right? Yes. And by "private parts," did you mean "vagina"? Uh-huh. Do you remember telling Ms. Nunnley that he would kiss your private areas? Yes. And by "kiss," was that with his mouth? Do you remember also telling Ms. Nunnley that your father put his finger in your vagina? Yes. And that happened during a massage; didn't it? Uh-huh. Do you remember telling Ms. Nunnley that he tried to put his finger in your butt? No. You don't remember telling her that? No. Do you remember telling her something to the

effect of it was just the tip? Yeah. That you guys would take showers together? Yes. When you took showers together, would he clean you? Yes. Would you use soap? Yes. Where on your body would he clean you? Everywhere. Including your privates? Yes. Did he ever touch your breasts? Yes. During the showers? Yes. Did he ever touch your breasts any other times? Yes. How often did that happen? Often. (4 RR at 104-131). Cross examination and re-direct. (4 RR at 131-141).

Herbert Peters was called, and how long have you known the defendant for? Gosh, let's see, probably not quite two years, maybe a little over a year and a half. Okay. And do y'all have a pretty close relationship, would you say? Yeah, I would say so. In terms of what happened between him and his daughter? The first I knew of anything like that occurred at -- and it's etched in my mind. It was approximately 1:00 p.m. in the afternoon on June 30th, 2022. Okay. Tell me, where were you? 2022 or 2023? What was the nature of the conversation while y'all were sitting at the table? What did he tell you? That past sins had come back to haunt him. Okay. And did he explain to you what those past sins were? He did not elaborate in any great detail. He just said that there was something with his daughter. Okay. And that was the extent of it. Okay. So he told you that past sins had come back to haunt him; correct? Correct. What's going through your mind at this point? Honestly, I wanted to walk out. Why is that? I was angry. Why were you angry? Just not something that I

expected to hear. Okay. And did you walk out? No. To the best of my recollection, it was -- it was just a, hey, I did something wrong. Okay. He told me that he had touched his daughter inappropriately, and that was the extent of it. And did he tell you how he had touched her inappropriately? No. (4 RR at 141-169). Cross examination, And it's my understanding that this matter had been brought to the attention of the church leadership earlier that morning; is that correct? That was my understanding. Okay. You had found out about that. And is that what prompted you to go to Mr. Barineau's house that afternoon? No. It was conversations with Amber who told me that she was concerned about Zachariah and had me call him, and then he invited me to the house. (4 RR at 169-187).

Leah Nunnley was called, works at Brazoria County Alliance for Children. I believe hers was around 45 minutes. That there were allegations against their adoptive father, sexual abuse allegations against their adoptive father. (5 RR at 10-22). Cross examination, I believe you testified that that appointment was scheduled by the Alvin Police Department investigators? I remember we had both CPS and law enforcement there. I don't remember who scheduled it specifically. (5 RR at 22-26).

Amber Smith was called, how do you know the defendant in this case? He's my husband. Who told you something had happened? A child. Okay. And who was that child? AB. Okay. And tell me where were the two of you when she told you this? In

my bedroom. decision to leave the home? I did. Okay. And why did you make that decision? Because it's a child who did an outcry, and I needed to get her out of that environment at that moment. Did he talk to you anything about what happened between himself and AB? No. I did most of the talking. Did he tell you what he had done? He was truthful in yes or no answers. How did that make you feel that he wasn't denying the allegations? I'll go with ashamed. You were ashamed? Ashamed for my the family and, you knew that you hadn't done anything wrong; correct? Yes. Okay. So why did you have shame. Maybe "ashamed" isn't the right word. Heartbroken. Okay. For AB? My family unit. Okay. (5 RR at 26-64). Do you recall saying that, he admitted to all of it; I talked to him? Do I recall that I said that? Yes, ma'am. I don't recall. Okay. You said that he admits to all of it. What would "all of it" be? Everything I knew in the backyard. So it was it your understanding that when you were not at home, your husband was performing these sex acts on your daughter? I don't know the exact timeline for me to say yes to that. Do you remember your husband saying, quote, They got nothing on me, no history or record? Yes. Okay. I mean, beyond all the evidence that points to he sexually assaulted your daughter, I guess, we have nothing on him; right? Correct. Okay. It's kind of an odd statement to make; don't you think? To his wife, no. (5 RR at 66-176). Cross examination, testified that that's when AB came to you and told you about some things that had happened

or occurred between her and Mr. Barineau; is that right? Yes. And then the next day, that is when you went to the Alvin Police Department; correct? Yes. And I just want to make sure I understood. Before you went to the Alvin Police Department, there was also a meeting at the church; correct? Yes. Okay. Do you recall approximately how many people were at that meeting? And I believe you testified that Mr. Barineau had no history of this happening or no type of criminal record. (5 RR at 176-233).

Glenn Cullinane was called, so I met Zachariah when I started attending Life Church, and we went to Palacios on a Bible men's retreat. Okay. That's when I met him; and that was, like, in the fall of 2022. Okay. So about a year and a half -- Yeah, sounds about right. And that's a church here in Angleton; correct? Yes, it is. I need to state for the record that I don't know what Mr. Barineau, Zachariah Barineau is accused of doing. I mean, I know what he's been sentenced with; but I don't know any of the details. And did you become aware that he was involved with some sex assaults of his daughter, AB? I was unaware of that. I mean, somewhere along the way I've heard people talking about that. And did you relay or did you tell Zachariah at some point that all of the evidence that we had was circumstantial and it didn't make any sense? No, sir. You don't recall saying that? No, sir, I do not recall saying that. (5 RR at 233-263). Cross examination, I believe you testified that you have been here when Mr. Barineau has had previous court appearances; correct? Yes. And you've come

with other people before? I've come with Amber. I've come with other people, yeah, probably three or four people at different times, yeah. And he was having you call those folks, my understanding was, so once he was convicted by the jury, they could come talk on his behalf; right? Well, yeah. My understanding is if he is convicted, then, yeah. (5 RR at 263-281). The State rested. (5 RR at 281). Appellant rested. (5 RR at 290).

Appellant's objections to the Court's charge, THE COURT: Have you had sufficient opportunity to review the Charge of the Court? MR. HUGHES: Yes, Your Honor. THE COURT: Any changes, additions, or deletions to it? MR. HUGHES: Yes, Your Honor. We are -- on page 5, "Specific Instructions - Indecency with a Child," we are requesting a definition for the term "anus"; and I will read the definition we're requesting. We're requesting that "anus" be defined as "the opening of the rectum to the outside of the body." And that definition is found on the National Cancer Institute website. THE COURT: State? MR. MARTIN: We're going to object and just ask that it be argued as common usage. THE COURT: Okay. That request is denied. MR. HUGHES: And, Your Honor, we would make the same request with respect to page 8 where there's additional definitions concerning the indecency with a child count. We'd ask that the "anus" definition that I've just requested, that that also be included on page 8. THE COURT: The request is denied. MR. HUGHES: Judge,

we are also requesting, with respect to the indecency with a child by exposure counts -- and maybe Mr. Martin can help me out here. I believe those are count numbers -- MR. GOLDEN: 9 through 11. MR. HUGHES: 9 through 11? MR. MARTIN: Exposure is 8, 9, 10 and 11. MR. HUGHES: Okay. Your Honor, with respect to Counts 8, 9, 10 and 11, we are requesting an instruction on the lesser included offense of indecent exposure found at Section 21.08 of the Texas Penal Code. More specifically we're requesting an instruction that our law provides that a person commits the offense of indecent exposure if he exposes his anus or any part of his genitals with the intent to arouse or gratify the sexual desire of any person and he is reckless about whether another is present who will be offended or alarmed by his act. And, again, we are requesting that lesser with respect to all of the indecency with a child by exposure counts. THE COURT: Yes, sir. State? MR. MARTIN: Just pursuant to the *Briceno* case and the Defense requesting lessers, the evidence has to show that he's guilty and he's only guilty of the lesser; and I don't believe that any testimony has been brought forth to show that this was done recklessly, both in his own -- defendant's own admissions, as well as the complainant where she testified both, explained that he purposely gave -- was giving her massages and purposely took -- showered with her and they both soap each other up. And these both tend to negate a reckless state of mind. MR. HUGHES: May I add one other thing, Your Honor, if

I may? THE COURT: Yes, sir. MR. HUGHES: I'd also like to point out that the Texas Court of Criminal Appeals in 1979 found that indecent exposure is a lesser included offense of indecency with a child; and that's in *Briceno*, B-R-I-C-E-N-O, *v. State*, 580 SW 2d 842. THE COURT: Do you have any response to the only evidence showing is a complaint only? There has been no evidence in response to reckless? MR. HUGHES: No, Your Honor. My only response is that the issue of indecent exposure has been raised by the evidence. THE COURT: All right. Thank you, sir. That request is denied as well. (6 RR at 6-10).

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:

Appellant argues that the trial court erred in admitting the outcry testimony of both the detective and the child advocacy center interviewer aunt and daycare proprietor because the statements lacked reliability and there was no hearing in accordance with Tex. Code. Crim. Proc., art 38.072.

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. Tex. Code Crim. Proc. Ann. art. 38.072, § 1 (West 2011).

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

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

regard to penetration and/or contact, without any specifics time, place and content as to dates, no months and no adequate descriptions 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 distinguishing between touching the mouth-tongue and placement between the legs of the complainant, the child's testimony-even limited ability to articulate the nature of Appellant's alleged sexual abuse-cannot support a finding of the allegations plead in the indictment. 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.").

Appellant acknowledges the above law however the record in this case does not support the convictions, simply not sufficient. All the State did here was lead the alleged victim to agree some alleged acts occurred and where they might have occurred, without any specifics as time, place, content and reliability, to dates, or months. 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.

The Child Testified Through Leading Questions-Tex. Penal Code, sections 22.021(a)(2)(B).

Counts 1-3 allege:

COUNT ONE

> did then and there intentionally or knowingly cause the penetration of the sexual organ of AB, a child younger than fourteen (14) years of age and not the defendant's spouse, by the defendant's mouth;

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 ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of July, 2019, and before the presentment of this indictment, in said County and State, did then and there intentionally or knowingly cause the sexual organ of AB, a child younger than fourteen (14) years of age and not the defendant's spouse, to contact the mouth 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 ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of July, 2019, and before the presentment of this indictment, in said County and State, did then and there intentionally or knowingly cause the penetration of the sexual organ of AB, a child younger than fourteen (14) years of age and not the defendant's spouse, by defendant's finger;

The Child Testified Through Leading Questions-Tex. Penal Code, sections 21.11(d).

Counts 5, 6, 7, 8, 10, 11 allege:

COUNT FIVE

And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Court that ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of July, 2019, 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 cause AB, a child younger than 17 years and not the spouse of the

defendant, to engage in sexual contact, by causing the said child to touch the genitals of the defendant;

COUNT SIX

And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Court that ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of July, 2019, 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 cause AB, a child younger than 17 years and not the spouse of the defendant, to engage in sexual contact, by touching the breast of said child;

COUNT SEVEN

And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Court that ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of .July, 2019, 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 cause AB, a child younger than 17 years and not the spouse of the def end ant, to engage in sexual contact, by touching the genitals of said child;

COUNT EIGHT

And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Comt that ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of July, 2019, 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 expose the defendant's genitals, knowing that AB, a child younger than 17 years of age and not the spouse of the defendant, was present.

COUNT TEN

> And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Court that ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of July, 2019, 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 defendant, cause AB, a chlId younger than 17 years of age and not the spouse of the defendant, to expose her anus.

COUNT ELEVEN

> And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, do further present in and to said Court that ZACHARIAH BARINEAU, hereinafter styled Defendant, on or about the 1st day of July, 2019, 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 defendant, cause AB, a child younger than 17 years of age and not the spouse of the defendant, to expose her genitals.

The extent of AB's testimony regarding the allegations: And do you remember telling Ms. Nunnley that your dad would do inappropriate things? Uh-huh. Do you remember you told Ms. Nunnley that your dad would give you full-body massages? Yes. And do you remember telling her that you would help him masturbate? Yes. Do you remember telling her that you would touch his private parts? Yes. And you also told Ms. Nunnley that you felt that he was grooming you; didn't you? Yes. When you were 9 or 10 years old, you were living in Alvin at the time; right? Yeah. Was that before you moved to Rosharon? Yes. And do you remember telling Ms. Nunnley that

you felt that your dad was grooming you into a relationship? Yes. And do you remember telling her that you talked that the two of you talked about getting married? Uh-huh. Do you remember that you told Ms. Nunnley that you masturbated him at least two times? Is that right? Yeah. Do you remember telling Ms. Nunnley that one of the times that you masturbated him, your mom was on a trip? Is that right? Uh-huh. Now, when I asked you about him having you masturbate him, is that you touching his penis? Uh-huh. Do you remember if his penis was hard or soft? No. Do you remember telling Ms. Nunnley that stuff came out? Uh-huh. By that, you meant stuff came out of his penis? Uh-huh. Do you remember telling Ms. Nunnley that it was white and that it also got on the bed? Uh-huh. Now, your father would sometimes give you massages; is that correct? (Witness nods head). And oftentimes you would be naked for those massages; is that correct? Yes. During those massages, you told Ms. Nunnley that he would touch your private parts; is that right? Yes. And by "private parts," did you mean "vagina"? Uh-huh. Do you remember telling Ms. Nunnley that he would kiss your private areas? Yes. And by "kiss," was that with his mouth? Do you remember also telling Ms. Nunnley that your father put his finger in your vagina? Yes. And that happened during a massage; didn't it? Uh-huh. Do you remember telling Ms. Nunnley that he tried to put his finger in your butt? No. You don't remember telling her that? No. Do you remember telling her something to the

effect of it was just the tip? Yeah. That you guys would take showers together? Yes. When you took showers together, would he clean you? Yes. Would you use soap? Yes. Where on your body would he clean you? Everywhere. Including your privates? Yes. Did he ever touch your breasts? Yes. During the showers? Yes. Did he ever touch your breasts any other times? Yes. How often did that happen? Often. (4 RR at 104-131). Cross examination and re-direct. (4 RR at 131-141).

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. Under the review of the evidence required by *Brooks,* even in the light most favorable to the verdict, a rational jury could not conclude that this evidence is such as to permit it to find beyond a reasonable doubt that Appellant had any intent, nor the *mens rea* to commit aggravated sexual assault of a child. 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 NOT HAVING A HEARING IN ACCORDANCE WITH THE TEX. CODE OF CRIM. PROC., ART. 38.072. THE TRIAL COURT DID NOT MAKE THE PROPER FINDINGS PURSUANT TO TEX. CODE CRIM. PROC. 38.072.

In his second issue, Appellant argues that the trial court erred in admitting the outcry testimony of both the detective and the child advocacy center forensic interviewer because the statements lacked reliability and there was no hearing in accordance with Tex. Code. Crim. Proc., art 38.072.

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. 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). Review of 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). The reversal of 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 argues that the trial court erred in admitting the outcry testimony of both the detective and the child advocacy center forensic interviewer because the statements lacked reliability and there was no hearing in accordance with Tex. Code. Crim. Proc., art 38.072. *Torres v. State*, 424 S.W.3d 245 (Tex. App. 2014).

Article 38.072 of the Texas Code of Criminal Procedure provides an exception to the hearsay rule for testimony by outcry witnesses in cases involving sexual offenses against disabled persons and children under fourteen. Tex. Code Crim. Proc. Ann. art. 38.072 (West Supp. 2016). It applies only to statements made to the first person over eighteen "to whom the [complainant] ... made a statement about the offense or extraneous crime, wrong, or act." Id. art. 38.072, § 2(a)(3). The determination of which witness is a proper outcry witness is event-specific rather than person-specific, meaning that multiple outcry witnesses may testify so long as each of them testifies to only one event and they do not simply repeat the same event. *West v. State*, 121 S.W.3d 95, 104 (Tex. App.–Fort Worth 2003, pet. ref'd) ; *Broderick v. State*, 35 S.W.3d 67, 73–74 (Tex. App.–Texarkana 2000, pet. ref'd) ; see, e.g. , *Polk v. State*, 367 S.W.3d 449, 453 (Tex. App.–Houston [14th Dist.] 2012, pet. ref'd). (holding that trial court did not abuse its discretion by allowing adult brother and

mother to testify about two different types of nonsubsumed touching occurring during same encounter when child did not reveal both types of touching to brother). *Hines v. State*, 551 S.W.3d 771 (Tex. App. 2017). 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).

A motion to suppress/out cry in nature hearing was held outside the presence of the jury. Chesley McDonald was called, Detective McDonald with the Alvin Police Department. I originally met with Amber Smith and AB. And do you remember what their emotional state was at that time? Amber was extremely distraught. She was having a hard time processing the information she had received prior to coming to the police department. It was pretty troubling. I mean, obviously she was going through a lot. I kind of had to talk her through the process. She was mentally having a hard time. Did it seem like Ms. Smith was familiar with police processes and how the system works essentially? No, sir. Usually in these cases we don't try to talk to the juveniles immediately. We'll try to set them up for a CAC interview; but because she made an outcry to her mother, I was able to talk to her mother and gather information. And did you interview her mother? Yes, sir. I pulled her away from AB. That way there was no issues dealing with everything. I could get the outcry specifically, and

there wasn't anything trying to add or her trying to intervene with AB. Everything would have come from the outcry, and I could have got the interview at a later time. And without saying what someone else said, because that's hearsay, can you just explain generally what is an outcry? An outcry is when a victim goes to a third party, whether it's a family member or friend, and tells them that a crime had been committed to them, such as a sexual assault. I can take that information as fact at that point. Now, at some point did someone else show up that night or that day at the police station? Detective Foley was there. She was actually there with me. She was my field training officer for that phase of my detective training program. And who is Amber Smith? Amber is the wife of Mr. Barineau and the mother of AB. Okay. Now, Mr. Barineau and Amber Smith, they have different last names; is that right? Yes, sir. But they are married? So after the first interview, I gave him my information and said if he needed anybody else to talk to or he wanted to talk more, he could contact me. Then the following day he couldn't get ahold of me, but he was able to get ahold of Detective Foley and said he would like to speak with us further. He came in again; didn't he? Yes, sir. (4 RR at 17-29).

Leah Nunnley was called, works at Brazoria County Alliance for Children. I believe hers was around 45 minutes. That there were allegations against their adoptive father, sexual abuse allegations against their adoptive father. (5 RR at 10-

22). Cross examination, I believe you testified that that appointment was scheduled by the Alvin Police Department investigators? I remember we had both CPS and law enforcement there. I don't remember who scheduled it specifically. (5 RR at 22-26).

Accordingly, the above testimony was insufficient to satisfy Tex. Code. Crim. Proc., art 38.072. Appellant challenges the trial court's determination that the outcry statements were reliable, if any determination was made. Appellant argues that the trial court erred in admitting the outcry testimony of both the detective and the child advocacy center forensic interviewer because the statements lacked reliability and there was no hearing in accordance with Tex. Code. Crim. Proc., art 38.072. The trial court abused its discretion. *Schuster v. State*, 852 S.W.2d 766, 768 (Tex. App.–Fort Worth 1993, pet. ref'd). *Hines v. State*, 551 S.W.3d 771 (Tex. App. 2017). The trial court did not make the required findings of Tex. Code. Crim. Proc., art 38.072, and did not act within the zone of reasonable disagreement when it determined that the testimony of the detective and the forensic interviewer was admitted.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant, Zachariah Barineau, 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,

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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 10,343 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 brief for appellant has been served, by U.S. Mail, to Zachariah Barineau, 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 21st day of August, 2024.

/S/CARY M. FADEN
Cary M. Faden

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