NO. 01-25-01015-CR;

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

MANUEL PONCE
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1874643
From the 182nd District Court of Harris County, Texas

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Appellant was charged with multiple cases of alleged sexual abuse. (Causes 1806545, 1806546, 1806547, 1833541, 1822048) (*See* C.R. 1-188). On June 28, 2024, the State indicted Appellant in a refiled cause that effectively consolidated all of the prior allegations into a single offense of "Continuous Sexual Abuse of a Child" involving four distinct complainants. (C.R. 189, 195). Appellant entered a plea of not guilty on December 11, 2024, with punishment to be assessed by the jury. (R.R. Vol. 4 at 22; C.R. 273). The jury found Appellant guilty as charged in the indictment. (R.R. Vol. 9 at 87). The jury then assessed punishment at life imprisonment without the possibility of parole. (R.R. Vol. 10 at 12). Appellant filed a timely notice of appeal on the same day as his sentencing, and the Trial Court's Certification of Defendant's Right of Appeal ensures Appellant has the right to appeal. (C.R. 334, 332).

Appellant's brief is due on June 20, 2025 and timely filed.

REQUEST FOR ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 39.7, Appellant does not request oral argument in this cause.

ISSUE PRESENTED

THE TRIAL COURT COMMITTED HARMFUL JURY CHARGE ERROR BY AUTHORIZING A CONVICTION BASED ON AN ALLEGED ACT OF SEXUAL ABUSE AGAINST AN UNPLEADED COMPLAINANT.

STATEMENT OF FACTS

Manuel Ponce was a popular teacher at Sutton Elementary, twice named Teacher of the Year, before leaving to pursue a doctorate in education at the University of Houston. (R.R. Vol. 8 at 205-06). In the fall of 2022, within a few months of his departure, the first complainant, Y.R., alleged Appellant had repeatedly touched her while she was his student. (R.R. Vol. 6 at 12). This initial complaint triggered an investigation by the Houston Independent School District ("HISD") eventually leading to additional outcries from other students that Y.R. claimed were also abused. (R.R. Vol. 6 at 22-23). The investigation ultimately resulted in 11 different children testifying to sexual abuse allegations against Appellant. (R.R. Vol. 7-8).

The allegations from each complainant were all strikingly similar, though each alleged victim was strangely inconsistent in their claims. Nearly every child alleged Appellant had either touched them or caused them to expose themselves while they were students in his classroom. (R.R. Vol. 7 at 135, 198). Some of the alleged abuse purportedly took place amidst a full classroom of children, but most

of it, however, purportedly took place with Appellant and an alleged victim alone in a classroom while the classroom door was open, and the rest of the class was just outside in the hallway awaiting their restroom break. (R.R. Vol. 7 at 198).

Each named complainant in the indictment was processed through various interviews with multiple agencies: school officials, law enforcement, Children's Protective Services ("CPS"), the Children's Assessment Center ("CAC"), and medical professionals. The inconsistencies in their descriptions of the abuse became extraordinary, and the details changed significantly. These inconsistencies were not minor details but went to the heart of whether the alleged abuse occurred at all:

1. V.M. testified Appellant touched her one time, though she previously claimed the abuse happened five or even ten times. (R.R. Vol. 6 at 238).
2. Two alleged victims had the initials A.R.[1] (R.R. Vol. 7 at 103, 264). The first A.R. (hereinafter "A.R.1.") told the C.A.C. that Appellant touched her vagina "almost every day" during first grade but testified at trial that Appellant's only act of abuse during first grade was a single occasion when he had her sit on his lap. (R.R. Vol. 7 at 135-37).

[1] It is notable that one—and only one— of these witnesses was a named complainant, but it is unclear which one. (C.R. 189).

3. The second A.R. (hereinafter "A.R.2.") testified Appellant touched her every day but told a doctor it was "more than twice, a few times." (R.R. Vol. 7 at 290).
4. C.H. repeatedly denied any abuse to investigators and forensic interviewers before being pressured into making an outcry due to her mother's false claims of video surveillance. (R.R. Vol. 7 at 200-03).
5. K.M. initially testified the abuse happened on only one single occasion, before being reminded she had told interviewers that the abuse was a weekly occurrence. (R.R. Vol. 7 at 226-27).
6. Y.R. told the jury the abuse happened more than 10 times, though she had previously indicated it may have only been four times. (R.R. Vol. 7 at 257-58).
7. I.M. told the jury she was certain Appellant had abused her on two occasions, though she previously told an interviewer the abuse had been on a single occasion. (R.R. Vol. 8 at 27-28).
8. H.R. told the jury the abuse happened more than 30 times, though she initially told interviewers it happened on three specific occasions. (R.R. Vol. 8 at 52-53).

9. E.V. initially told interviewers the abuse happened, "kind of every day" over the course of a school year but then told the forensic interviewer at the C.A.C. that it "only happened a couple of times." (R.R. Vol. 8 at 76).
10. J.M. testified she was touched one time (R.R. Vol. at 91), but then acknowledged she did not "remember very well." (R.R. Vol. 8 at 103).
11. And M.L. claimed Appellant would pull her from her classes two to three times a week with the permission of other teachers, bringing her to his classroom to abuse her without explanation. (R.R. Vol. 8 at 132, 136). No teacher, of course, verified this claim.

Of the eleven alleged victims who testified against Appellant, only four were named in the indictment and referenced in the jury charge: A.R.1., Y.R., C.H., and K.M. (C.R. 189, 311). The remaining seven alleged victims were introduced by the State as extraneous offense evidence. Four of the alleged victims— A.R.2., V.M., H.R. and J.M., were allowed to testify under Texas Code of Criminal Procedure Article 38.37 as "same or similar offenses" based on their claims that Appellant had contacted them. Tex. Code Crim. Proc. art. 38.37. M.L. was also permitted to testify under Tex. Code Crim. Proc. art. 38.37 based on her claim that Appellant caused her to expose her sexual organ, though he never contacted her. (R.R. Vol. 3 at 200). The remaining two alleged victims, "I.M." and "E.V.", did not actually describe criminal offenses, telling the court only that Appellant looked at them in their underwear.

(R.R. Vol. 3 at 168; 181-82). They were excluded from testifying under Tex. Code of Crim. Proc. art. 38.37 but they were ultimately allowed to testify under Texas Rules of Evidence 404(b) as evidence of Appellant's "motive, opportunity, intent, preparation, plan, knowledge or identity." (C.R. 313). Appellant took the stand in his own defense and denied all misconduct. (R.R. vol. 8 at 193-94).

At the charging conference, Appellant objected to the application paragraph of the jury charge on the grounds that it failed to ensure jury unanimity. (R.R. Vol. 8 at 342). This charge permitted him to be convicted based on his alleged abuse of "A.R."—without distinguishing which of the two A.R. complainants was the one for which Appellant was standing trial. (C.R. 311). The jury found Appellant guilty and sentenced him to life without the possibility of parole. (C.R. at 326).

SUMMARY OF THE ARGUMENT

Appellant was convicted based on an erroneous jury charge that fundamentally violated his constitutional right to a verdict on the offense alleged in the indictment and approved by the Grand Jury. The trial court's application paragraph failed to distinguish between two witnesses who shared the same initials: A.R.1., who was named in the indictment, and A.R.2., who testified only as an extraneous witness. This allowed the jury to convict Appellant based on "acts of sexual abuse" committed against an unpleaded complainant, violating Appellant's right to be tried only for the offense with which he is charged. By failing to specify

which "A.R." supported the alleged "manner and means" in the indictment, the charge denied Appellant a constitutionally required verdict tied to the actual indictment.

This confusion was made worse by the State's closing arguments, which repeatedly emphasized that jurors did not need to agree on "which kid," "which act," or "when it happened." While Texas Penal Code §21.02(d) permits jury disagreement about specific acts or dates in "Continuous Sexual Abuse" cases, this flexibility only applies to the "manner and means" of committing the offense against *pleaded* complainants. It does not extend to acts involving individuals not alleged in the charging instrument. The complaining witnesses remain essential elements of the offense, and allowing a conviction based on an act against an unindicted complainant was harmful error.

ISSUE PRESENTED

THE TRIAL COURT COMMITTED HARMFUL JURY CHARGE ERROR BY AUTHORIZING A CONVICTION BASED ON AN ALLEGED ACT OF SEXUAL ABUSE AGAINST AN UNPLEADED COMPLAINANT.

Applicable Law

Under Texas Penal Code §21.02, a person commits an offense if, during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, and at the time of the commission of each of the acts of sexual abuse,

the actor is 17 years of age or older and the victim is a child younger than 14 years of age. Tex. Pen. Code. Ann. § 21.02(b). The statute defines "act of sexual abuse" as including "Indecency with a Child" by contact with a sexual organ. *Id*. § 21.02(c). Members of a jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. *Id*. § 21.02(d). However, the jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse. *Id*. § 21.02(b).

Although jury unanimity is generally a constitutional requirement, Texas courts have repeatedly affirmed convictions for "Continuous Sexual Abuse of a Child" despite jury charges that permit jurors to be less than unanimous about specific instances of abuse. *See McMillian v. State*, 388 S.W.3d 866, 871–73 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Martin v. State*, 335 S.W.3d 867, 871–73 (Tex. App.—Austin 2010, pet. ref'd); *Jacobsen v. State*, 325 S.W.3d 733, 736–39 (Tex. App.—Austin 2010, no pet.); *Navarro v. State*, 535 S.W.3d 162, 165–66 (Tex. App.—Waco 2017, pet. ref'd); *Pollock v. State*, 405 S.W.3d 396, 404–05 (Tex. App.—Fort Worth 2013, no pet.); *Fulmer v. State*, 401 S.W.3d 305, 310–13 (Tex. App.—San Antonio 2013, pet. ref'd); *Kennedy v. State*, 385 S.W.3d 729, 731–32 (Tex. App.—Amarillo 2012, pet. ref'd); *Casey v. State*, 349 S.W.3d 825, 827–30 (Tex. App.—El Paso 2011, pet. ref'd); *Render v. State* 316 S.W.3d 846, 855–58

(Tex. App.—Dallas 2010, pet. ref'd). This is because, under the law of "Continuous Sexual Abuse of a Child", specific acts of "sexual abuse" are considered the "manner and means", rather than "factual elements." *See Richardson v. United States*, 526 U.S. 813 (1999). When an offense may be proved with any of several different "manner and means," unanimity about which "manner and means" amongst the jurors is not necessary so long as the jury is unanimous that the requisite number of "manner and means" has been proven beyond a reasonable doubt against the charged complainant. *Id*.

With a "Continuous Sexual Abuse of a Child" charge, acts of alleged "sexual abuse" are the "manner and means," allowing juries to disagree about the specific act of "sexual abuse" so long as they agree that two acts of "sexual abuse" took place. Tex. Pen. Code. Ann. § 21.02(b).

In *O'Brien v State*, the Court of Criminal Appeals reiterated well-established law on jury unanimity. *O'Brien v. State,* 544 S.W.3d 382 (Tex. Crim. App. 2018). A jury in Texas must reach a unanimous verdict. *Id.* The jurors must agree that the defendant committed one specific crime, but not that the defendant committed the crime in one specific way or even with one specific act. *Id.* The jurors must agree on each essential element of the crime. *Id.* But the requirement of unanimity is not violated when the jury charge "presents the jury with the option of choosing among

various alternative manner and means of committing the same statutorily defined offense." *Id.; Jourdan v State*, 428 S.W.3d 86, 94 (Tex. Crim. App. 2014).

Courts decide a jury unanimity challenge by answering two questions. *Id.* at 383. First, courts look to the language of the penal offense to determine whether the legislature has created a single offense with multiple or alternate modes of commission. *Id.; See Jefferson v. State,* 189 S.W.3d 305, 311–12 (Tex. Crim. App. 2006). If acts supporting an offense are manner and means, jury unanimity is not required; if they are elements, jury unanimity is required. *Id.* at 384. Second, courts consider whether jury unanimity is nonetheless required as a matter of due process "because the alternate means are so disparate as to become two separate offenses." *Id.* at 383.

In this case, the plain language of the statute answers the first question. *See Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (discussing application of plain-meaning rule). Tex. Pen. Code Ann. § 21.02(d) specifically states the jury is "not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed." This leaves no doubt about the legislature's intention. The plain language makes clear that the jury is not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed.

The responsibility for properly instructing the jury on the law applicable to the case falls on the trial court, not the litigants. *Alkayyali v. State,* 2025 WL 1318487 n.26 (Tex. Crim. App. 2025).Tex. Code. Crim. Proc. art. 36.14.

Jury charges are meant to inform the jury of how to apply the applicable law to the facts of the case. *Alcoser,* 663 S.W.3d 164-65. The charge "must contain an accurate statement of the law and *must set out all the essential elements of the offense*." (emphasis added) *Vasquez v. State,* 389 S.W.361, 366 (Tex. Crim. App. 2012). The application paragraph is the "heart and soul" of the jury charge because it "specifies the factual circumstances under which the jury should convict or acquit." *Id.* The application paragraph is the section of the jury charge that applies "'the pertinent penal law, abstract definitions, and general principles to the particular facts and the indictment allegations.'" *Campbell v. State,* 664 S.W.3d 240, 246 (Tex. Crim. App. 2022).

The Supreme Court has recognized that the failure of a jury instruction to require a finding of an element of an offense beyond a reasonable doubt is not structural error and is subject to a harm analysis. *Neder v. United States,* 527 U.S. 1 (1999). *Niles v. State,* 555 S.W.3d 562, 570 (Tex. Crim. App. 2018). When there is a claim as to jury charge error, there are two standards of review based on whether a defendant objected to the charge. *Alcoser v. State,* 663 S.W.3d 160, 165 (Tex. Crim. App.2022). When a defendant objects to error in the jury charge, reviewing

courts consider whether the error at issue resulted in some harm. *Id.* "Some harm" requires reversal "if the error is 'calculated to injure the rights of the defendant,' " meaning the error cannot be "harmless." *Reeves v. State,* 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). When a defendant fails to object to error in the jury charge, reviewing courts consider whether the error results in "egregious harm." *Id.* "An erroneous jury charge is egregiously harmful if it affects the very basis of the case, deprives the accused of a valuable right, or vitally affects a defensive theory." *Alcoser,* 663 S.W.3d at 164-65.

Egregious harm is a fact-specific analysis and is a difficult standard to meet. *Id.* To determine whether jury charge error resulted in egregious harm an appellate court must look at the entire record; specifically, (1) the entirety of the charge; (2) the state of the evidence, including the contested issues and weight of probative evidence; (3) the arguments of counsel; and (4) any other relevant information revealed by the trial record as a whole. *Villareal v. State,* 453 S.W.3d 429, 433 (Tex. Crim. App. 2015).

An imperfect objection is sufficient to preserve error if the record indicates that the trial judge understood the request to encompass that matters about which Appellant now complains. *Rue v. State,* 288 S.W.3d 107, 110 (Tex. App.—Houston [1st Dist.] 2009 pet. ref'd.). The accused need not invoke any "magic words" in the

jury charge request so long as it is enough to bring the issue to the court's attention. *Bennett v. State,* 235 S.W.3d 241, 243 (Tex. Crim. App. 2007).

Analysis

The jury charge in this case contained a fundamental flaw that prevented the jurors from understanding which complainant's allegations could lawfully serve as the basis for conviction, allowing the jury to convict Appellant based on acts committed against an unpleaded complainant. Appellant was charged with "Continuous Sexual Abuse of a Child", naming four distinct complainants: A.R.1., C.H., K.M., and Y.R. (C.R. 189). The indictment alleged that Appellant committed an unspecified form of "Indecency with a Child" against each named complainant. *Id*. At trial, the State introduced extraneous testimony from five additional complainants under Tex. Code Crim. Proc. art. 38.37, and from two others under Tex. R. Evid. 404(b). Notably, one extraneous complainant shared the same initials as a named complainant--"A.R."-- creating significant confusion. (R.R. Vol. 7 103-156; 264-291.)

At the charging conference, Appellant objected to the application paragraph of the jury charge because it denied Appellant his right to a unanimous verdict. (R.R. Vol. 8 at 342-43). Appellant's objection was based on the language used in the application paragraph of the jury charge which instructed the jury that:

> You are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. However, in order to find the defendant guilty of the offense of continuous sexual abuse of a child, you must agree unanimously that the defendant, during a period that is 30 days or more in duration, committed two or more acts of sexual abuse. (C.R. 310).

The application paragraph then instructed:

> If you find from the evidence beyond a reasonable doubt that, in Harris County, Texas, the defendant, Manuel Ponce, heretofore on or about the 26th day of August, 2019, did then and there unlawfully, during a period of time of thirty or more days in duration, commit at least two acts of sexual abuse against a child younger than 14 years of age, including an act constituting the offense of indecency with a child, *committed against A.R.* [**emphasis added**] on or about August 26, 2019 and an act constituting the offense of indecency with a child committed against Y.R. on September 1, 2021, (sic) and an act constituting the offense of indecency with a child, committed against C.H. on or about October 1, 2021 and an act constituting the offense of indecency with a child, committed against K.M. on or about June 1, 2022...then you will find the defendant guilty of continuous sexual abuse of a child, as charged in the indictment." (C.R. 310-11).

Problematically, the application paragraph of the jury charge fails to specify which individual with the initials "A.R." it is referring to. Whether it is A.R.1.— the complainant named in the indictment or A.R.2.—the separate individual who testified to uncharged extraneous acts under Tex. Code Crim. Proc. art. 38.37. This created a legally significant problem that allowed the jury to convict Appellant based on conduct involving a person not alleged in the charging instrument. The indictment named four complainants by initials, including A.R.1. However, because A.R.2. also testified to alleged acts of indecency that were not included in the "indictment as

charged", the trial court should have clarified for the jury which "A.R." it could consider in reaching a verdict. But the charge provided no such guidance. It failed to distinguish between the two individuals with the initials "A.R.," and the application paragraph referred generically to "a child or children younger than 14 years of age," without identifying the complainants by name or by reference to the indictment. This invited the jurors to convict Appellant based on evidence related to an unindicted complainant, which is prohibited under Texas law. *See Johnson v State*, 364 S.W.3d 292, 295 (Tex. Crim. App. 2012) (a defendant has a constitutional right to be tried only for the offense with which he is charged).

Adding to the confusion, both prosecutors made closing arguments which suggested the jury could find the defendant guilty regardless of which "A.R." was the potential basis for conviction. In fact, the State appeared to argue that the jury could convict based on offenses that involved *any* of the 11 children who testified against Appellant, even if they were not named complainants. The first prosecutor told the jury:

> You're either going to be telling these 11 girls, "We believe you. We believe you. We believe you," or you'll be telling these girls, "You're all liars and nothing you said matters." The only way you find him not guilty is to be calling them liars. You either call him a liar or you call them liars. (R.R. Vol. 9 at 40-41).

This same prosecutor went on to say:

> Ya'll don't have to agree which specific acts happened. So two of you can think it happened to these three kids, two of you can think these three kids, two of you can think just this kid. It doesn't matter which kid or which act or when it happened…You just have to believe at least two acts happened outside of 30 days. You don't have to agree on the kid, the act, or the date. (R.R. Vol. 9 at 42-43).

The second prosecutor doubled down on that message. For dramatic effect, she began her argument by reciting the testimony of all 11 girls, one by one, placing equal weight on charged and uncharged allegations. The first three girls she referenced—Y.R., C.H., and K.M.—were named in the indictment. A.R.2.—who was not named in the indictment—was referenced sixth. (R.R. Vol. 9 at 61-62). A.R.1.—who was a named complainant in the indictment—was referenced tenth. (R.R. Vol. 9 at 61-64). That sequencing blurred any meaningful distinction between the two "A.R." witnesses. Furthermore, the second prosecutor erroneously argued:

> In the moment that this man decided to look at a first grader's vagina, the moment that he decided to touch the vaginas of all these second graders, the moment that he touched the vagina of second graders and also looked at the vaginas of second graders in a whole nother (sic) year, that's the moment that he decided to become a child molester. And the moment that all 11 of these girls were required to get on the stand and tell you under oath about what they remember happening to them in front of a room full of strangers and in front of their abuser, that's the moment that the presumption of innocence popped, that's where this case was proven, and that's where this should end. (R.R. Vol. 9 at 65).

At one point, the State did briefly clarify which girls were named in the indictment. The prosecutor stated, "Just so there's no confusion, the complainants that are named in the indictment are A.R., Y.R, C.H. and K. M. [using their complete names]. And all of the other testimony can be considered for other reasons." (R.R. Vol. 9 at 66). But the prosecutors quickly undercut that clarification by again insisting that unanimity on the victim or the specific acts was unnecessary:

> And the important part about the law is not all of you have to agree which incidents you believe. As long as each one of you believes that at least two acts happened outside of a period of 30 days, then that is enough to convict him of continuous sexual abuse of a child. If each of you believe that at least two acts occurred, no matter the kid, no matter the location, then that is enough. (R.R. Vol. 9 at 75-76).

The State also attempted to explain that the jury could use the testimony of extraneous alleged victims to prove the allegations in the indictment. For example, the prosecutor argued:

> The testimony of V.M., A.R., H.R., J.M., and M.L. [using first names], the law allows you to consider what Mr. Ponce did to them in considering whether or not he's guilty of sexually assaulting Y.R., C.H., K.M., and A.R. [using first names]. (R.R. Vol. 9 at 76). ...[Y]ou can use the other girls—that would be V.M., A.R., H.R., J.M., M.L.—you can say it's more likely he did it to the four charged girls in the offense because he also did it to these other girls, too. (R.R. Vol. 9 at 44-45).

But at no point were the jurors clearly instructed that their verdict had to rest solely on the allegations involving the four named complainants: A.R.1., C.H., K.M., and

Y.R. Nor were they told that A.R.1.—and not A.R.2.—was the complainant referenced in the indictment. As a result, the jury had no reliable way to distinguish between the two or to understand that only A.R.1.'s allegations could be used as a "manner and means" for Appellant's conviction.

Despite the statutory framework allowing juror disagreement about the specific acts or dates of abuse under Tex. Pen. Code Ann. § 21.02(d), this flexibility does not extend to acts involving individuals *not alleged* in the indictment. *See Johnson*, 364 S.W.3d 292, 295. The gravamen of the offense remains the continuous abuse of a child *named* in the charging instrument and evidence of abuse against an unindicted complainant cannot serve as the basis for a conviction.

Appellant did not object to this issue at trial, as a result reversal will only be required if egregious error resulted. *Alcoser,* 663 S.W.3d at 164-65. To determine whether jury charge error resulted in egregious harm an appellate court must look at the entire record; specifically, (1) the entirety of the charge; (2) the state of the evidence, including the contested issues and weight of probative evidence; (3) the arguments of counsel; and (4) any other relevant information revealed by the trial record as a whole. *Villareal,* 453 S.W.3d 429, 433.

Under the first criterion, the entirety of the jury charge, Appellant would note that the charge fundamentally misled the jury and never corrected itself. Based on a reading of the charge, the jury was permitted to convict Appellant if it was

convinced beyond a reasonable doubt that Appellant committed an act of "sexual abuse" against A.R.2.—who was not named in the indictment. (C.R. at 311). The charge went on to explain the uses and limitations of extraneous evidence, both under Tex. R. Evid. 404(b) and Tex Code Crim. Proc. art. 38.37. But neither of these instructions made clear that A.R.2's allegations could only be considered for propensity purposes—and not as direct evidence of the sexual abuse for which Appellant faced trial. In other words, the jury was not instructed that A.R.2's allegations could not be used as a basis for conviction. (C.R. 312-313.) The jury charge in its entirety therefore weighs in favor of reversal.

The second criterion, the state of the evidence, including the contested issues and the weight of probative evidence, also supports reversal. Appellant protested that he was innocent of all the claims of abuse against him, both from the named complainants and from the extraneous witnesses. Yet the State never sought to distinguish which "A.R." the jury could lawfully consider for purposes of conviction. Instead, the State generally sought to admit testimony of all alleged victims almost interchangeably. A.R.1. and A.R.2. both described virtually identical qualifying acts of "sexual abuse." Both alleged that Appellant made them kiss him and that he had touched them with his hand on their "lower part" ("private part") in the classroom while other students were in the hall waiting to go to the bathroom. (R.R. Vol. 7 at 114-15; R.R. Vol. 7 at 271). Nothing about their testimony would

have triggered or alerted the jury to understand that A.R.1.'s allegations, as a named complainant, could be a basis for conviction, while A.R.2's could not. This confusion directly affected the jury's ability to properly apply the law. Therefore, this factor weighs in favor of Appellant, supporting reversal.

The third criterion, the arguments of counsel, is the criterion that most dramatically demonstrates the harm and favors reversal. As noted above, the State repeatedly asserted that, "[N]o matter the kid," if any abuse against any of the 11 alleged victims were believed, it could serve as the basis for conviction. (R.R. Vol. 9 at 75-76). The State's arguments directly invited the jury to convict based on extraneous allegations, exacerbating the problem.

The final criterion, any other relevant matters, also weighs in favor of reversal. The State was not required to allege four complainants in a single indictment. In fact, the State originally charged Appellant in separate cases and then chose to consolidate those charges into a single indictment, alleging four named complainants at once. (C.R. at 189). In doing so, the State dismissed other charges that involved only a single complainant, presumably because no single accuser was credible or detailed enough to support a conviction on their own. Evidently, the State sought to leverage the *quantity* of alleged victims, knowing none of them standing alone could provide sufficient *quality* testimony for a conviction. Thus, the State sought to bolster its

case through volume rather than strength, inviting the jury to convict without agreeing on which complainants they believed had been abused.

It is clear then that the State overreached. It charged four complainants in one indictment, then added five more alleged victims under Tex. Code Crim. Proc. art. 38.37, then piled on with two more alleged victims under Tex. R. Evid. 404(b), despite knowing that some could not even describe a chargeable offense. All 11 girls who testified against Appellant gave wildly inconsistent accounts. In a calculated approach, the State sought to use the extraneous evidence rules to amplify the emotional impact of the weak accusations presented in their case. In doing so, they attempted to steer the jury away from the gravamen of the offense. Given the State's strategic and calculated use of weak, extraneous allegations, and its apparent effort to blur the lines between charged and uncharged conduct, reversal is warranted.

In *Bowen v. State*, the Court of Criminal Appeals held that when an appellate court reverses a conviction, it is not necessarily limited to ordering an acquittal or remanding for a new trial. *Bowen v. State*, 374 S.W.3d 427 (Tex. Crim. App. 2012). It may, instead, reform the judgment to reflect a conviction as to any lesser-included offense established by the evidence and remand for a new punishment hearing. *Id.* at 431-32. Under this precedent, in an appropriate circumstance, an intermediate appellate court may reform a judgment if two conditions are met: (1) the jury necessarily found every element necessary to convict the accused of the lesser-

included offense when it convicted the accused of the reversed offense and (2) there is sufficient evidence to support a conviction as to that lesser-included offense.

Both conditions are met here. It is impossible to know which two complainants formed the basis of each juror's decision to find Appellant guilty of Continuous Sexual Abuse of a Child. Given the verdict, the jury necessarily believed at least one of the other three named complainants suffered an instance of sexual abuse. (C.R. at 189). More specifically, because the indictment alleges each complainant suffered an act of "Indecency with a Child (by contact)," the jury must have been unanimously convinced that Appellant committed this specific offense. Each named complainant gave testimony meeting the elements of "Indecency with a Child (by contact)". C.H. testified being touched on her "private part" by Appellant. (R.R. Vol. 7 at 172). K.M. testified Appellant touched her on her "front part." (R.R. Vol. 7 at 214-5). And Y.R. testified Appellant touched her "vagina." (R.R. Vol. 7 at 242).

Thus, even if the jury's verdict on the charged offense under Tex. Pen. Code. § 21.02 is compromised by confusion about which complainant's allegations could support conviction, "the jury necessarily found every element necessary to convict the accused of the lesser included offense" of "Indecency with a Child by Contact." Tex. Pen. Code Ann. § 21.11(a)(1). In cases where the alleged "manner and means" are predicate offenses to the charged offense and the jury verdict is compromised by

questions of unanimity, the appropriate remedy is to reform the conviction to the lesser included offense and remand the case for a punishment hearing. *See Estrada v. State,* 609 S.W.3d 311, 320 (Tex. App.—Amarillo 2020, no pet.).

In sum, the jury charge in Appellant's case allowed for conviction based on an unpleaded complainant. Because of this flaw, on appeal this Honorable Court cannot be assured that the State proved two acts of "sexual abuse" took place against two named complainants. Reversal is therefore required with a reformed judgment indicating that Appellant was convicted of "Indecency with a Child (by contact)". 21.11(a)(1).

PRAYER

For the reasons stated above, Appellant prays this Honorable Court will reform Appellant's conviction to Indecency with a Child by Contact and remand Appellant's case to the trial court for a punishment hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I provided a copy of the foregoing brief to the Harris County District Attorney via electronic service on the day the brief was filed.

/s/ Mark Hochglaube
MARK HOCHGLAUBE

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(i).

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