

COURT OF APPEALS OF TEXAS, SECOND DISTRICT, FORT WORTH

Hodges v. State

No. 02-13-00073-CR, 2014 WL 7204668 (Tex. App.—Fort Worth Dec. 18, 2014) (mem. op.) · No. 02-13-00073-CR · Decided April 16, 2015

OPINION

PER CURIAM.

PD-0258-15 COURT OF CRIMINAL APPEALS AUSTIN, TEXAS Transmitted 4/15/2015 3:21:49 PM Accepted 4/16/2015 12:07:13 PM ABEL ACOSTA CAUSE NUMBER PD-0258-15 CLERK IN THE COURT OF CRIMINAL APPEALS OF TEXAS CHARLES LEE HODGES, Petitioner, vs. THE STATE OF TEXAS, Respondent. SEEKING REVIEW OF THE ELEVENTH COURT OF APPEALS' JUDGMENT AND OPINION IN CAUSE NUMBER 02-13-00073-CR SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW WM.

REAGAN WYNN SBN: 00797708 KEARNEY | WYNN April 16, 2015 ONE MUSEUM PLACE 3100 WEST 7TH STREET, SUITE 420 FORT WORTH, TEXAS 76107 (817) 336-5600 (817) 336-5610 (fax) rwynn@kearneywynn.com ORAL ARGUMENT IS REQUESTED ATTORNEY FOR PETITIONER IDENTITY OF JUDGE, PARTIES, AND COUNSEL The trial court judge: Hon. Everett Young, Judge Presiding of the 297th Judicial District Court The parties to the trial Charles Lee Hodges Defendant court's judgment are: The State of Texas Prosecution Trial counsel were: Hon. Samuel W. Pettigrew, Jr. Defense Counsel 840 S. Carrier Parkway Grand Prairie, Texas 75051 Hon. Lisa A. Callaghan Prosecutor Hon. Dawn N. Ferguson Prosecutor Tarrant County District Attorney's Office 401 West Belknap Fort Worth, Texas 76196 (817) 884-1400 Appellate counsel are: Wm.

Reagan Wynn Appellant/Petitioner Kearney | Wynn One Museum Place 3100 West 7th Street, Suite 420 Fort Worth, Texas 76107 (817) 336-5600 (817) 336-5610 (fax) Hon. Edward L. Wilkinson State of Texas Tarrant County District Attorney's Office Appellate Section Address above i HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW TABLE OF CONTENTS IDENTITY OF JUDGE, PARTIES, AND COUNSEL..... i INDEX OF AUTHORITIES..... iv STATEMENT REGARDING ORAL ARGUMENT..... v STATEMENT OF PROCEDURAL HISTORY..... vi QUESTION PRESENTED FOR REVIEW.....

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iv HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS OF TEXAS: COMES NOW CHARLES LEE HODGES, Petitioner, by and through his attorney of record, WM. REAGAN WYNN, and pursuant to Rule 68, Texas Rules of Appellate Procedure, files this PETITION FOR DISCRETIONARY REVIEW, and for such Petition would show this Court as follows: STATEMENT REGARDING ORAL ARGUMENT This Petition challenges the court of appeals’ application of the egregious harm standard set required for unobjected to jury charge error rather than the harmless beyond a reasonable doubt standard applicable to errors implicating fundamental Constitutional principles of unanimity and notice to a trial court’s total failure to inform the jury of the specific conduct elected by the State to support a conviction.

The court of appeals’ decision in this case is in direct conflict with a decision from another court of appeals and resolves an important issue of Texas law that has never been directly resolved by

this Court. Therefore, this Court should grant oral argument so that counsel for both sides may more fully present their positions and answer any questions this Court may have after preliminarily reviewing this case. v HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW STATEMENT OF THE CASE Petitioner was convicted by a Tarrant County jury of one count of indecency with a child by contact for touching the female sexual organ of his biological daughter with his hand.

Testimony was presented at trial concerning several alleged instances of conduct that, if believed beyond a reasonable doubt, could have supported a conviction for indecency with a child. Outside the presence of the jury, counsel for the State “elected” to proceed with the testimony concerning the “first time” the alleged injured party claimed Petitioner touched her in this manner, i.e., a time when she was nine years old.

However, the jury was never informed of this “election” and the trial court took no action to limit the jury’s consideration the specific instance elected by the State. The State conceded that the trial court erred by failing to instruct the jury on the State’s election and the court of appeals held that the trial court erred by failing to do so.

However, the court of appeals determined that the proper harm standard is the egregious harm standard set out for unobjected to jury charge error and, applying that standard, held that the error was harmless. STATEMENT OF PROCEDURAL HISTORY By an indictment filed March 17, 2010, Petitioner was charged two counts of indecency with a child alleged to have been committed on or about August 1, 2009, vi HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW against his biological daughter.[C.R.

6] Count One of the Indictment alleged that Petitioner, acting with the intent to arouse and gratify his own sexual desire, engaged in sexual contact by touching his daughter’s female sexual organ. [C.R. 6] Count Two alleged that Petitioner, acting with the intent to arouse and gratify his own sexual desire, engaged in sexual contact by touching his daughter’s breast.[C.R.

6] On November 6, 2012, Petitioner appeared in court with his counsel, was arraigned, and entered a plea of “not guilty” to both of the allegations in the Indictment. [2 R.R. 6-8] Thereafter, a jury was selected,[2 R.R. 16-237] seated,[6 R.R. 237] and sworn.[6 R.R. 237] The Indictment was read in the presence of the jury and Petitioner again entered pleas of “not guilty” to both of the allegations against him.[2 R.R.

245- 46] Trial on the merits was conducted over two days from November 7-8, 2012.[3 R.R. 6-219; 4 R.R. 6-209] On November 9, 2012, the court gave the case to the jury.[C.R. 89-82; 15 R.R. 90] On November 12, 2012, the jury returned verdicts of “guilty” to the allegation in Count One of the Indictment and “not guilty” to the allegation in Count Two of the Indictment.[6 R.R.

7; C.R. 93] vii HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW The trial on punishment was conducted on January 22, 2013. After hearing testimony and considering a Presentence Investigation Report, the trial court assessed Petitioner's punishment on Count One at incarceration for eight years.[7 R.R. 106] The trial court entered its Judgment of Conviction by Jury in accordance with the jury's verdict on Count One on January 24, 2013.[C.R.

108-09] The trial court entered its Judgment of Acquittal by Jury in accordance with the jury's verdict on Count Two on the same date.[C.R. 111] Petitioner timely filed his Notice of Appeal on February 19, 2013.[C.R. 121-22] The Second Court of Appeals affirmed the trial court's judgment and sentence on July 26, 2006. See Hodges v. State, No. 02-13-00073-CR, 2014 WL 7204668 (Tex.

App.–Fort Worth December 18, 2014, no pet. h.) (mem. op., not designated for publication).1 After receiving two extensions of time, Petitioner timely filed his Motion for Rearing on January 26, 2015. The Second Court of appeals denied the Motion for Rehearing on February 5, 2015.2 On March 10, 2015, this Court entered an order granting Petitioner's First Motion for Extension of Time to File Petition for Discretionary Review.

Pursuant to 1 A copy of the Court of Appeals' Opinion is attached to this Petition as Appendix 1. See TEX. R. APP. P. 68.4(i). 2 A copy of the Court of Appeals' Order Denying Rehearing is attached to this Petition as Appendix 2. viii HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW the Order, this Petition was timely if filed in this Court on or before April 8, 2015.

Undersigned counsel timely submitted a Petition for Discretionary Review for filing on April 8, 2015. On April 15, 2015, this Court rejected the Petition for Discretionary Review submitted by undersigned counsel because it failed to contain the identity of the trial court judge as required by Rule 68.4(a), Texas. Rules of Appellate Procedure. This Court directed that undersigned counsel had 10 days to tender a corrected Petition.

On April 15, 2015, undersigned counsel submitted a Corrected Petition for Discretionary Review for filing, but subsequently discovered that he had failed to attach the two appendices. This Second Corrected Petition for Discretionary Review is now being submitted for filing on April 15, 2015. ix HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW QUESTION PRESENTED FOR REVIEW Petitioner was convicted of one count of indecency with a child by contact, but testimony was presented of several separate incidents of conduct alleged to have been committed by Petitioner against the alleged injured party that could have supported conviction for that single count.

Petitioner's trial counsel requested that the State be forced to elect a specific instance of alleged conduct, the trial court purported to grant this request, and, outside the presence of the jury, the State announced its election.

However, the election was erroneously never communicated in any way to the jury. Did the court of appeals err by analyzing the harm arising from this error under the egregious harm standard set required for unobjected to jury charge error rather than the harmless beyond a reasonable doubt standard applicable to errors implicating fundamental Constitutional principles of unanimity and notice?

1 HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW REASONS FOR REVIEW, ARGUMENTS, AND AUTHORITIES I. THE COURT OF APPEALS ERRED BY APPLYING THE ARTICLE 36.19/ALMANZA EGREGIOUS HARM STANDARD RATHER THAN THE CONSTITUTIONAL ERROR RULE 44.2(a) HARMLESS BEYOND A REASONABLE DOUBT STANDARD TO THE TRIAL COURT'S FAILURE TO INFORM THE JURY OF THE STATE'S ELECTION OF THE SPECIFIC INSTANCE OF CONDUCT UPON WHICH IT WAS RELYING FOR CONVICTION AFTER THE DEFENSE REQUESTED THE ELECTION.

A. The Record Below Count One of the indictment alleged that, on or about August 1, 2009, Petitioner, acting with the intent to arouse and gratify his own sexual desire, engaged in sexual contact by touching the alleged injured party's female sexual organ.[C.R. 6] As set forth in the court of appeals' opinion, at trial, the alleged injured party testified that Petitioner touched her breasts and crotch "many times" starting when she was "nine years old." [3 R.R.

70-73] See Hodges, 2014 WL 7204668, at *2-3. Further, the alleged injured party's "outcry statement" described "multiple events" or "multiple scenarios" of "touching." [4 R.R. 174] See id. at *1. Finally, Petitioner described both to the police Detective and during his trial testimony, a single event occurring during his first weekend visitation with the alleged injured party in August 2009 (when she would have been 11 years old, just about to turn 12) wherein she placed his hand in 2 HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW her crotch area, but effectively explained that he had no intent to arouse or gratify his sexual desire during the event.

See id. at *4. In short, there was evidence presented from several different sources indicating that multiple occurrences of the alleged conduct – i.e., touching the alleged injured party's female sexual organ – occurred.

The day before jury selection, Petitioner filed a Motion requesting that State be required to elect "what offenses the State will rely on to convict on each count" of the Indictment.[C.R. 65-66] During a discussion outside the presence of the jury just prior to the State calling its last rebuttal

witness to testify, the trial court took up the issue of Petitioner's request that the State be required to "elect" and the following exchange occurred: THE COURT: One other thing that was discussed, and this may be the appropriate time to bring it up or put it on the record, [Petitioner's trial counsel], you had previously asked or inquired about the State making an election on offenses; is that right?

[Petitioner'S TRIAL COUNSEL]: Yes, Your Honor. THE COURT: You would still like to do that?

[Petitioner'S TRIAL COUNSEL]: Yes. THE COURT: It's my understanding that the State is going to make some sort of election. I mean, are y'all prepared to do that at this time? [STATE'S TRIAL COUNSEL]: Yes, Your Honor.

The witness testified that the first fondling offense and the first breast offense occurred in 2009 -- I'm sorry, occurred when she was nine years of age, and it 3 HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW occurred on the couch at her father's house on Olympia Drive.

The first incident she described is the primary offense that we will be pursuing in each count. THE COURT: So will that be adequate for the defendant? For purposes of double jeopardy or whatever, the State is relying upon the first alleged incident of misconduct when she was nine years old, as I understand it from the State. Is that correct? [STATE'S TRIAL COUNSEL]: Yes, Your Honor.

THE COURT: And with that being placed on the record and I understand the State will be then arguing that to the jury in its argument. [STATE'S TRIAL COUNSEL]: Yes, Your Honor. THE COURT: With that being placed on the record, will that be adequate for the defense? [Petitioner'S TRIAL COUNSEL]: Yes. THE COURT: All right. [4 R.R. 197-98] This election was never mentioned, in any way, to the jury.

There is no mention of the State's election in the Court's written charge to the jury.[C.R. 89-92] Further, review of the record reveals that the State's election was never mentioned in the presence of the jury. Petitioner's counsel below made no objections to the court's charge.[5 R.R. 6] 4 HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW B. The Court of Appeals' Opinion In his first point of error below, Petitioner argued that the trial court erred by failing to limit the jury's consideration to the particular act designated by the State as the conduct that would support conviction for the offense alleged in count one of the Indictment.

The State conceded that the trial court erred by failing to instruct the jury on the State's election and the court of appeals held that the trial court erred by failing to do so. See Hodges, 2014 WL 7204668, at *4.

The court of appeals then determined that the proper harm standard is the egregious harm standard set out for unobjected to jury charge error³ and, applying that standard, held that the error was

harmless. See *id.* at *5-6. C. Analysis In determining that the egregious harm standard for unobjected to jury charge error applies to this particular error, the court of appeals relied on this Court's decision in *Cosio v. State*, 353 S.W.3d 766 (Tex.

Crim. App. 2011) and their own prior decision in *Reza v. State*, 339 S.W.3d 706 (Tex App.–Fort Worth 2011, pet ref'd). The court of appeals' decision in *Reza* is directly in conflict with the decision of the Fifth Court of Appeals in *Duffey v. State*. See *Duffey v. State*, 326 S.W.3d 627, 3 See, e.g., TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 2006); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.

Crim. App. 1985) (op. on reh'g). 5 HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW 631-32 (Tex. App.–Dallas 2009, no pet.). In *Duffey*, the court of appeals applied the reasoning of this Court's decisions in *Phillips v. State*, 193 S.W.3d 904 (Tex. Crim. App. 2006), and *Dixon v. State*, 201 S.W.3d 731 (Tex. Crim. App. 2006), to hold that for this exact type of error – failure to in any way instruct the jury on the State's election in a child sex case – is subject to Constitutional harm analysis under Rule 44.2(a), Texas Rules of Appellate Procedure, because the error implicates fundamental Constitutional principles of unanimity and notice.

See *Duffey*, 326 S.W.3d at 631-32. *Duffey* has never been expressly overruled or disavowed by this Court. Petitioner respectfully asserts that the court of appeals erred by evaluating the harm arising from the trial court's erroneous failure to instruct the jury on the State's election under the egregious harm standard and instead should have reversed the trial court's judgment unless it determined beyond a reasonable doubt that the error did not contribute to Petitioner's conviction.

See *Duffey*, 326 S.W.3d at 632 (citing TEX. R. APP. P. 44.2(a)). Further, the facts underlying this Court's decision in *Cosio* are distinguishable from the facts in this case. *Cosio* was convicted of four separate counts of sexual assault of/indecency by contact with a minor female. See *Cosio*, 353 S.W.3d at 769- 70.

The evidence presented at trial was such that there were two different incidents of conduct that could have satisfied the allegations in Count One, two different 6 HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW incidents of conduct that could have satisfied the allegations in Count Two, and three different incidents of conduct that could have satisfied the allegations in Counts Three and Four.

See *id.* at 770-71. *Cosio*'s attorney did NOT request that the State be required to elect a specific instance of conduct for each specific count. See *id.* at 776- 77. Therefore, this Court determined that the error was purely a jury charge error for failing to require jury unanimity – not for failing to implement the State's election.

As such, Cosio does not directly address the situation in this case. Under these circumstances, this Court should grant review in this matter to settle an important open question of State law resolved by the court of appeals that has not previously been addressed by this Court: does a trial court's erroneous failure to somehow instruct the jury on the State's election of the specific conduct to support a conviction amount to a Constitutional error reviewable under Rule 44.2(a) or is it simply jury charge error reviewable under the article 36.19/Almanza standard?

See TEX. R. APP. P. 66.3(b). Further, this Court should grant review in this matter to resolve the conflict between the Second Court of Appeals' decisions in this case and Reza and the Fifth Court of Appeals' decision in Duffey. See TEX. R. APP. P. 66.3(a). PRAYER WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Court will grant this Petition for Discretionary Review, order a full briefing of the 7 HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW issues presented herein, and after considering the merits, reverse the judgment of the court of appeals, remand this cause to the trial court for a new trial, and grant such other and further relief as he may show himself deserving, at law and in equity.

Respectfully submitted, /s/ Wm. Reagan Wynn WM. REAGAN WYNN State Bar No. 00797708 KEARNEY | WYNN One Museum Place 3100 West 7th Street, Suite 420 Fort Worth, Texas 76107 (817) 336-5600 (817) 336-5610 (fax) rwynn@kearneywynn.com ATTORNEY FOR PETITIONER CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION I certify that this Petition was prepared with WordPerfect X5 using Times New Roman 14 point font, and that, according to that program's word-count function, the sections covered by TEX. R. APP.

P. 9.4(i)(1) contain 1,466 words. /s/ Wm. Reagan Wynn WM. REAGAN WYNN 8 HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW CERTIFICATE OF SERVICE This is to certify that a copy of this Second Corrected Petition has been forwarded to: Edward L. Wilkinson Tarrant County District Attorney's Office 401 W. Belknap Fort Worth, Texas 76196-0201 coapellatealerts@tarrantcounty.com Lisa C. McMinn State Prosecuting Attorney P.O.

Box 12405 Austin, Texas 78711 on the 15th day of April, 2015. /s/ Wm. Reagan Wynn WM. REAGAN WYNN 9 HODGES v. STATE SECOND CORRECTED PETITION FOR DISCRETIONARY REVIEW APPENDIX 1 Hodges v. State, Not Reported in S.W.3d (2015) 2014 WL 7204668 II. FACTUAL AND PROCEDURAL BACKGROUND Only the Westlaw citation is currently available. Hodges dated and eventually lived with Sally 2 for several SEE TX R RAP RULE 47.2 FOR years beginning in 1994, and Sally became pregnant with DESIGNATION AND SIGNING OF OPINIONS.

Hodges's child during that time. Hodges and Sally separated before the child was born. Sally gave birth to Mary in MEMORANDUM OPINION September 1997; Hodges went to the hospital for the birth but DO NOT PUBLISH TEX. R. APP. P. 47.2(B) had no further contact with Mary until she initiated contact Court of Appeals of Texas, with him 2004, when she was approximately six and a half or Fort Worth. seven years old.

Charles Lee Hodges, Appellant v. 2 To protect the anonymity of the child in this case, we The State of Texas, State will use aliases to refer to all individuals named herein with the exception of the appellant. See Tex.R.App. P. NO. 02–13–00073–CR | 9.10(a)(3); McClendon v. State, 643 S.W.2d 936, 936 n.1 DELIVERED: December 18, 2014 | (Tex.Crim.App. [Panel Op.]

1982). Rehearing Overruled February 5, 2015 Hodges began having supervised visitations with Mary in 2004. He was married to Lana by that time. After several FROM THE 297TH DISTRICT COURT OF TARRANT months, Hodges was awarded standard visitation, with Mary COUNTY TRIAL COURT NO. 1181223D staying with him and Lana every other weekend. Attorneys and Law Firms In 2007, Mary saw photographs of Hodges' wedding and Wm Reagan Wynn, Kearney Wynn, Fort Worth, TX, asked him about “French kissing.” Hodges explained what it Attorney for Appellant. was and demonstrated by kissing her and putting his tongue in her mouth.

Mary later “French kissed” her mother and Joe Shannon, Jr., Crim. Dist. Atty., Charles Mallin, Asst. said that Hodges had shown her how to kiss. Sally reported Crim. Dist. Atty., Chief, App. Div., Edward Wilkinson, Lisa the incident to Child Protective Services (CPS), and after an Callaghan, Dawn Ferguson, Asst. Crim. Dist. Attys., Fort investigation, CPS “ruled out” sexual abuse.

Worth, TX, Attorney for State. In 2009, when Mary was nine years old, Sally began to notice PANEL: DAUPHINOT, GARDNER, and WALKER, JJ. that Mary was clingy when she came home from weekends at Hodges's house. Mary often called Sally from her bedroom in Hodges's house and asked Sally to stay on the line in case MEMORANDUM OPINION 1 Mary needed her. That year, Mary attended a church youth retreat at Great Wolf Lodge.

At the retreat, Mary confided to 1 See Tex.R.App. P. 47.4. her small group leader, Ann, that she was confused about her sexuality and said that it was because of her dad. Mary told SUE WALKER, JUSTICE Ann that Hodges had shown her “inappropriate places” on her body, had touched her there, and had expected her to do the *1 I. Introduction Appellant Charles Lee Hodges appeals his same.

Mary also said that Hodges “had French-kissed her on conviction for indecency with a child. See Tex. Penal Code the cheek at Six Flags and expected her to do the same thing Ann. § 21.11(a)(1) (West 2011). In three points, he argues that back.” Ann took Mary to find the children's pastor

from the the trial court erred by failing to include an instruction in the charge, Jessie, who was also at the retreat.

Mary told Jessie jury charge on the State's election and abused its discretion that she thought she was a lesbian because she did not like it by admitting inadmissible opinion and hearsay testimony. We when boys touched her. When Jessie asked which boys had will affirm. touched her, Mary said, "not boys... my dad." Jessie then consulted with another adult leader at the retreat, Mark.

While talking to Jessie and Mark, Mary said that Hodges "had kissed © 2015 Thomson Reuters. No claim to original U.S. Government Works. 1 Hodges v. State, Not Reported in S.W.3d (2015) her with his tongue, that he had touched her down there, which [ed]" her ear, and told her to do the same to him. When Mary she motioned with her hands to [be] her private parts, and that told him that she did not know how to do that, he "seemed a he helped her with her bra." Mary also said that Hodges had little mad," which made Mary feel bad.

Sometimes Hodges kissed her "mouth to mouth" and that his tongue had touched would be in Mary's room when she got out of the shower and her tongue. Mary said that anything that happened between would watch her get dressed. Hodges would get mad if she her and Hodges occurred "over a year ago." Mark and Jessie ever locked her bedroom door. 3 contacted Sally and CPS.

3 At trial, Lana testified that the doorknob to Mary's *2 Sally went to Great Wolf Lodge and found her daughter bedroom did not have a lock on it, and a photograph of crying and "extremely upset." Mark and Jessie told Sally what the door was introduced into evidence. Mary had told them. Mary kept apologizing to her mother and said that she could not remain silent any longer but did not Mary said that Hodges gave her the "birds and the bees talk" want to hurt her dad. when she was nine.

Hodges explained sexual intercourse and masturbation to her. Hodges touched himself to demonstrate Hodges called Sally after the retreat to say he was coming masturbation, or as he called it, "pleasurization." He told to visit Mary, but Sally refused.

After Hodges got angry, Mary that all guys will want her body, and he moved his hands Sally told him "that there was an investigation going on" and "[o]ver [her] curves." gave him the phone number for the investigating detective. Sally did not tell Hodges what the investigation was about. Regarding the evidence to support count one of the Hodges called Detective Aaron Martinez, and the detective indictment, which alleged that Hodges committed indecency recorded the conversation.

Although the detective had not with a child by touching Mary's female sexual organ, Mary yet told Hodges the subject of the investigation, Hodges testified, made comments that made the detective realize that Hodges Q. Now, were there times that [Hodges] touched you on

“automatically assum[ed]” that the investigation involved your body parts in a way that made you feel uncomfortable? “something sexual” with Mary.

Hodges told the detective that Mary had been acting out sexually. He said that Mary ran A. Yes, ma'am. around naked at her mother's house and tried to do the same at his house. Hodges also told the detective about an incident *3 Q. And can you tell us where you were when this when Mary “put [his] hand on her crotch” while the two were would happen? sitting next to each other watching TV.

Hodges said that he A. In the living room at his house. immediately pulled his hand back and told Mary that he was not comfortable with that behavior. Hodges told the detective Q. So do you mean in the living room of [his] house...? that he was going to stop contact with Mary “out of self-preservation” because her conduct scared him. A. Yes, ma'am. Hodges was ultimately charged with one count of indecency Q. And where would you be in the living room? with a child by touching Mary's female sexual organ and A. We would be sitting on the couch and we would be on with one count of indecency with a child by touching Mary's the left side of the couch. breast.

Q. Did he sit there a lot? At trial, Mary testified that the first incident with Hodges that made her “uncomfortable” occurred when she asked him A. Yes, ma'am. how people “kissed at weddings” when she was nine years old. Hodges demonstrated by putting his tongue in her mouth. Q. And what would you be doing? Mary testified that Hodges “French kissed” her “almost every A. I would be watching TV. other weekend.” He kissed her in public once while at Six Flags; they were in line for a snack, he was holding her in Q. So would he be watching TV as well? his arms, and he kissed her cheek with his tongue.

Another time, Hodges lay on top of her in his bedroom, “tongue kiss A. Yes, ma'am. © 2015 Thomson Reuters. No claim to original U.S. Government Works. 2 Hodges v. State, Not Reported in S.W.3d (2015) Detective Martinez also testified at trial, and the recorded Q. So the two of you are on the couch watching TV, and conversation between him and Hodges was admitted into what would he do? evidence.

Detective Martinez testified that sex offenders commonly blame their actions on the child victim. A. He would put his arm around me down my breast and down to my private. Hodges testified at trial that he talked to Mary about sexuality Q. When you say your private, are you referring to your when she was nine because she was infatuated with a boy genitals or female sexual organ? across the street and Hodges was worried that she “might try something sexual with him.” Hodges said he read about A. Yes, ma'am. how to talk to children about sex on the Planned Parenthood website.

He told Mary that “masturbation is a perfectly Q. Because you're 15 now and you know what that is. normal thing that you do by yourself in private,” but he did not describe or demonstrate the act

of masturbation. Hodges A. Yes, ma'am. denied ever showing Mary how to French kiss or kissing her Q. And you said he would put his hand down so that it cheek or tongue with his tongue. touched your breast and then touched your genitals? *4 Hodges testified regarding the incident in 2007 that A. Yes, ma'am. resulted in the CPS investigation.

He and Mary were wrestling on the couch, Mary was on top of him, they grabbed Mary explained that this happened "[m]any" times, beginning each other's hands and legs so "there was nothing left but our when she was nine years old. She said that she would be mouths," and they started biting each other. Mary "stuck her wearing either a big T-shirt and underwear or jeans and a T-tongue down in [his] mouth," and Hodges "jerked back and shirt and that Hodges would rub his hand on her female sexual said no." He later discovered that Mary had also French kissed organ on top of her clothing.

She testified that she would try Sally. to avoid being near Hodges by sitting on the other side of the couch but that Hodges would act upset or mad so she would Hodges testified that during Mary's first August weekend go over to where he was sitting. Mary remembered that on visitation in 2009, he and Mary were watching television on three occasions while sitting on the couch, Hodges asked her the couch when Mary "took [his] hand and put it down in her to touch his "male parts" and took her hand and placed it on crotch area." Hodges testified that he "jerked [his] hand back his "male genital parts" over his clothing.

When Mary moved and said no." He said that he was in shock and later told his her hand, he placed it back and told her it was okay to touch mother about the incident, although he did not tell Sally. After him there. that incident, he would not allow Mary to sit next to him or kiss him. He also told Mary that he could not be around her Mary said that she remembered telling Hodges "no" once if she did "that kind of stuff" again. when he kissed her neck down to her fingertips and him responding by "saying something along the lines of this is Hodges also presented evidence that thyroid problems what daddies and daughters do." Hodges also told Mary that can cause depression and that depression can lead to if she ever told anyone, he would not want to see her again. hallucinations and delusions that can be sexual in nature.

On cross-examination, Mary agreed that she had told her During the State's case on rebuttal, the trial court required the counselor that she "had used this alleged sex abuse for State to elect what incidents of criminal conduct it relied on bragging rights to get sympathy," as an excuse for bad for each count of the indictment per Hodges's request for an behavior, and to get attention.

She also agreed that Hodges election. The State elected "the first fondling offense" that used to get upset with her when she walked around the house occurred on Hodges's couch in 2009, as testified to by Mary. without clothes on. Mary agreed that her father gave her the The jury was never informed of the State's election by the trial "birds and the bees" talk because she was "infatuated" with court or by the parties.

And the jury charge did not inform the a boy across the street. Mary also said on cross-examination jury of the State's election. Hodges did not object to the lack that she has a thyroid disease that can cause depression and of a specific unanimity instruction in the jury charge. can affect her emotional feelings. © 2015 Thomson Reuters. No claim to original U.S. Government Works.

3 Hodges v. State, Not Reported in S.W.3d (2015) The jury convicted Hodges of count one of the indictment, which alleged that on or about August 1, 2009, Hodges *5 An egregious harm determination must be based on a “intentionally, with the intent to arouse or gratify [his] sexual finding of actual rather than theoretical harm. Cosio, 353 desire..., engage[d] in sexual contact by touching the female S.W.3d at 777.

In conducting our harm analysis, we must sexual organ of [Mary], a child younger than 17 years and decide whether the error was so egregious and created such not the spouse of [Hodges].” The jury found him not guilty harm that Hodges was deprived of a fair and impartial trial of the second count, which alleged that on or about August—in short, that “egregious harm” has occurred.

See Celis 1, 2009, Hodges “intentionally, with the intent to arouse or v. State, 416 S.W.3d 419, 423 n.3 (Tex.Crim.App.2013); gratify [his] sexual desire..., engage[d] in sexual contact by Almanza v. State, 686 S.W.2d 157, 171 (Tex.Crim.App.1985) touching the breast of [Mary], a child younger than 17 years (op. on reh'g); see Tex.Code Crim. Proc. Ann. art. 36.19 and not the spouse of [Hodges].” The trial court sentenced (West 2006).

When assessing harm based on the particular Hodges to eight years' confinement for count one. facts of the case, the reviewing court should consider the charge, the state of the evidence, including the contested issues and the weight of the probative evidence, the parties' arguments, and all other relevant information in the record. III. ELECTION INSTRUCTION See Cosio, 353 S.W.3d at 777.

In his first point, Hodges argues that the trial court erred by Because the harm in this case stems from the trial court's failing to instruct the jury of the State's election. 4 The State failure to inform the jury of the State's election, we will also concedes error but argues that Hodges was not egregiously analyze any potential harm in light of the four purposes of the harmed by the trial court's error. election requirement: (1) the appellant's need to be protected from the admission of extraneous offenses; (2) the risk that 4 Because the jury acquitted Hodges of count two of the jury found the appellant guilty of the charged offense not the indictment, alleging indecency by touching Mary's because it was proven beyond a reasonable doubt but because breast, this issue relates only to count one, alleging of the admission of the extraneous offenses; (3) the risk of a indecency by touching Mary's female sexual organ. nonunanimous verdict; and (4) whether the admission of the When an indictment alleges one sexual assault, but more than extraneous

offenses deprived the appellant of adequate notice one assault is shown by the evidence at trial, the State is regarding which offense to defend against.

Reza, 339 S.W.3d required, upon timely request by the defense, to elect as to at 713, 715; see also Dixon v. State, 201 S.W.3d 731, 734— the specific incident of sexual assault that the State will use 36 (Tex.Crim.App.2006). to convict. See Phillips v. State, 193 S.W.3d 904, 909–10 (Tex.Crim.App.2006); O'Neal v. State, 746 S.W.2d 769, 772 Here, the jury charge required only that the jurors (Tex.Crim.App.1988).

Following the State's election of the “unanimously agree[] upon a verdict,” without requiring act on which it will proceed for conviction, the defendant unanimity based on the evidence presented in the case. Thus, is entitled to an instruction charging the jury to consider the charge permitted a non-unanimous verdict. See Cosio, 353 only the elected act in deciding guilt and limiting the jury's S.W.3d at 777.

Neither party mentioned the State's election consideration of all other unelected acts to the purposes during closing arguments, but neither party “added to the for which they were admitted. Duffey v. State, 326 S.W.3d charge error[] by telling the jury that it did not have to be 627, 630 (Tex.App.—Dallas 2009, no pet.), disagreed with unanimous about the specific instance of criminal conduct.” on other grounds by Reza v. State, 339 S.W.3d 706 (Tex.

Id. App—Fort Worth 2011, pet. ref'd); see Cosio v. State, 353 S.W.3d 766, 776 (Tex.Crim.App.2011). No such instruction Regarding the state of the evidence, Mary described how, was included in the jury charge in this case, and because beginning when she was nine years old, Hodges would put Hodges did not object to the lack of a proper unanimity his arm around her while they watched TV on his couch and instruction, we must evaluate the error for egregious harm. would touch her breast and her “private.” Hodges testified See Cosio, 353 S.W.3d at 776–77 (holding that appellant and admitted to touching Mary's sexual organ, explaining that forfeited any constitution-based jury charge claim by not Mary was the one who grabbed his hand and placed it there. objecting that charge allowed for non-unanimous verdict); The jury heard Hodges's recorded telephone conversation Reza, 339 S.W.3d at 714. with Detective Martinez, in which Hodges said that Mary had © 2015 Thomson Reuters.

No claim to original U.S. Government Works. 4 Hodges v. State, Not Reported in S.W.3d (2015) grabbed his hand and placed it on her sexual organ. Detective — Fort Worth Aug. 27, 2010, no pet.) (not designated for Martinez testified that sex offenders commonly blame their publication).

In other words, here, if the jury found Mary's actions on their child victims. testimony about the offenses of indecency by touching her female sexual organ on several occasions was credible as We will also consider the four purposes of the election rule in to one of those occasions, then the jury likewise must have our harm analysis. See Reza, 339 S.W.3d at 715.

Regarding believed that her testimony was credible as to all of them. 5 the first purpose—Hodges's need to be protected from the See Dixon, 201 S.W.3d at 735; Reza, 339 S.W.3d at 716. admission of extraneous offenses—the lack of a specific unanimity instruction in the jury charge was harmless in 5 And although the jury was not convinced beyond a regard to this purpose because evidence of other extraneous reasonable doubt that Hodges committed indecency by sexual acts between him and Mary were admissible to show touching Mary's breast, a review of the record reveals their relationship and states of mind under article 38.37.

See that the testimony focused on touching Mary's sexual Tex.Code Crim. Proc. Ann. art. 38.37, § 2 (West Supp.2014); organ, not her breast. Mary testified generally that see Dixon, 201 S.W.3d at 734; Phillips, 193 S.W.3d at 909– Hodges “would put his arm around me down my breast 10; Reza, 339 S.W.3d at 715. and down to my private.” Similarly, regarding the risk of a nonunanimous verdict, The risk that the jury found Hodges guilty of indecency Mary's testimony regarding Hodges touching her female by touching Mary's sexual organ based on the admission of sexual organ was general in nature; she testified that it extraneous offenses, rather than proof of the charged offense happened on his couch while watching TV and differentiated beyond a reasonable doubt—the second purpose of the between incidents only by what she was wearing on different election requirement—was low in this case.

Mary herself was occasions—a big T-shirt and underwear or a T-shirt and the one who recounted the multiple acts of indecency here, jeans. We perceive little to no risk that any juror would have and she testified generally that Hodges fondled her “many believed that Mary's testimony as to the incidents of Hodges times” on his couch while they were watching television, with touching her sexual organ was credible as to one incident but the first occurring when she was nine years old.

The jury was not as to another. See Dixon, 201 S.W.3d at 735; Reza, 339 not persuaded by Hodges's explanation that Mary initiated the S.W.3d at 716–17. touching. As the court of criminal appeals explained in Dixon, *6 This case is not concerned Regarding the final purpose of the election requirement— with evidence of different activities to provide the defendant with adequate notice about which from different sources that a jury offense to defend against—when the State made its election might perceive to “add up” to the at trial, the trial court asked defense counsel if the election defendant being guilty even though was “adequate,” and defense counsel agreed.

Hodges has not no individual offense was proven indicated that he was adversely affected by not receiving beyond a reasonable doubt. Moreover, notice of the State's election earlier in the trial. The notice the child complainant did not testify purpose of the election requirement does not weigh in favor about a number of varied incidents of a finding of egregious harm.

See Duffey, 326 S.W.3d at 634 with differing details that might have (holding due process concerns not implicated when defendant incrementally added to the idea that the received timely

notice of State's election upon request and defendant must have done something when counsel expressly acknowledged understanding the to provoke the plethora of stories about election and did not indicate that the defense was adversely his activities. affected).

201 S.W.3d at 735. And as we have stated before, “in cases Having considered the harm to Hodges in light of the charge, involving ‘complainant testimony of a continuing course of the state of the evidence, the parties' arguments, and the the same type of nonspecific, indistinguishable conduct over purposes of the election rule, we hold that the trial court's error a long time period, the issue is typically whether the jury in failing to instruct the jury regarding the State's election believes the complainant generally or not at all.’ ” Reza, 339 was not so egregious and did not create such harm as to deny S.W.3d at 715 (quoting *Smith v. State*, Nos. 02–08–00394– Hodges a fair and impartial trial.

See *Almanza*, 686 S.W.2d at CR, 02–08–00395–CR, 2010 WL 3377797, at *13 (Tex. App 171; see also *Cosio*, 353 S.W.3d at 777; *Dixon*, 201 S.W.3d © 2015 Thomson Reuters. No claim to original U.S. Government Works. 5 *Hodges v. State*, Not Reported in S.W.3d (2015) at 734–36; *Phillips*, 193 S.W.3d at 913–14; *Reza*, 339 S.W.3d *State*, 402 S.W.3d 252, 254 (Tex.Crim.App.2013); *Sample* at 717.

We overrule Hodges's first point. *v. State*, 405 S.W.3d 295, 300 (Tex.App.—Fort Worth 2013, pet. ref'd). Further, the trial court must have ruled on the request, objection, or motion, either expressly or implicitly, or the complaining party must have objected to the trial court's IV. ADMISSIBILITY OF OPINION TESTIMONY refusal to rule. Tex.R.App. P. 33.1(a)(2); *Pena v. State*, 353 *7 In his second point, Hodges argues that the trial court S.W.3d 797, 807 (Tex.Crim.App.2011).

A reviewing court abused its discretion by allowing the State to present, in its should not address the merits of an issue that has not been case on rebuttal, opinion evidence concerning Mary's good preserved for appeal. *Wilson v. State*, 311 S.W.3d 452, 473 character for truthfulness when her character for truthfulness (Tex.Crim.App.2010) (op. on reh'g); *Sample*, 405 S.W.3d at had not been attacked.

Hodges's complaint concerns the 300. following testimony of Jessie, one of the adult leaders at the church retreat: Here, defense counsel objected to relevancy, “capab[ility] or competen[cy] to answer the question,” and nonresponsive, Q. What is your opinion of [Mary]'s character for and he obtained a ruling on only his nonresponsive objection. truthfulness?

Defense counsel did not preserve his rule 608 argument for appeal. See Tex.R.App. P. 33.1(a)(1); *Landers*, 402 S.W.3d [DEFENSE COUNSEL]: Objection, Your Honor. That's at 254; *Sample*, 405 S.W.3d at 300; see also Tex.R. Evid. not—that's not relevant, or she's not capable or competent 608(a) (setting forth requirements for admission of character to answer that question.

Not a proper question. evidence). We overrule Hodges's second point. THE COURT: I think there may be a preliminary question in front of that. You may rephrase at this point if you would like to. V. ADMISSIBILITY OF HEARSAY TESTIMONY Q. (BY [THE STATE]) In your experiences with [Mary], In his third point, Hodges argues that the trial court abused have you formed an opinion as to her character for its discretion by admitting Sally's testimony about certain truthfulness? statements made by Mary in violation of the hearsay rule.

Specifically, he complains of Sally's testimony that she once A. Yes. saw Mary "tugging her shirt down to show her cleavage and part of her breasts because that's what Daddy said he liked." Q. And is it good or bad?

After the trial court overruled defense counsel's hearsay and A. I would say she's been truthful with me. nonresponsive objections, Sally explained that Mary had said she showed her cleavage [DEFENSE COUNSEL]: Objection. That's nonresponsive, Your Honor. because that's what Daddy liked and that made Daddy happy and turned THE COURT: Just listen carefully. Just respond to the Daddy on, because he pointed out question. somebody at Golden Corral that had on a low-cut shirt and was showing off THE WITNESS: Sorry. her breasts, and that [Mary] wanted to Q. (BY [THE STATE]) So it's a good one? make Daddy happy and please Daddy.

And that's what made Daddy happy A. Yes. and pleased him. To preserve a complaint for our review, a party must have " 'Hearsay' is a statement, other than one made by the presented to the trial court a timely request, objection, or declarant while testifying at the trial or hearing, offered in motion that states the specific grounds for the desired ruling evidence to prove the truth of the matter asserted." Tex.R. if they are not apparent from the context of the request, Evid.

801(d). The "hearsay rule" excludes the admission of objection, or motion. Tex.R.App. P. 33.1(a) (1); Landers v. hearsay evidence, but the rules of evidence also provide that © 2015 Thomson Reuters. No claim to original U.S. Government Works. 6 Hodges v. State, Not Reported in S.W.3d (2015) many types of hearsay evidence are not excluded by the Here, we have detailed the evidence presented at trial, hearsay rule.

See Tex.R. Evid. 802, 803, 804. including Mary's testimony about how Hodges fondled her on many occasions, French kissed her, demonstrated *8 In this case, we need not decide whether the complained- masturbation to her, and watched her change clothes. of statements constitute inadmissible hearsay because, even Hodges vigorously cross-examined Mary and Sally about the assuming that they were, any error in their admission allegations and presented evidence in an attempt to contradict was harmless.

Error in the admission of hearsay evidence Mary's testimony, such as evidence that her door did not have is subject to harmless error analysis under rule 44.2(b). a lock and that her shower had an opaque shower curtain. Tex.R.App. P. 44.2(b); see Mosley v. State, 983 S.W.2d The jury heard

Hodges's testimony denying or explaining 249, 259 (Tex.Crim.App.1998) (op. on reh'g), cert. denied, the allegations against him, including his explanation of 526 U.S. 1070 (1999); Moon v. State, 44 S.W.3d 589, 594 the Golden Corral incident.

Hodges said that Mary had (Tex.App.—Fort Worth 2001, pet. ref'd). A substantial right asked what “sexy” meant and he had pointed out a woman is affected when the error had a substantial and injurious at Golden Corral who was wearing a low-cut blouse and effect or influence in determining the jury's verdict. King said that the woman was “trying to be sexy.” The State v. State, 953 S.W.2d 266, 271 (Tex.Crim.App.1997) (citing did not mention the Golden Corral incident during closing Kotteakos v. United States, 328 U.S. 750, 776, 66 S.Ct. argument, instead emphasizing Mary's testimony, Hodges's 1239, 1253 (1946)).

Conversely, an error does not affect a incriminating statements to the detective, and Hodges's substantial right if we have “fair assurance that the error did explanation of the August 1, 2009 incident. We conclude that, not influence the jury, or had but a slight effect.” Solomon v. in the context of the entire case against Hodges, any error in State, 49 S.W.3d 356, 365 (Tex.Crim.App.2001); Johnson v. the admission of Sally's testimony set forth above did not have State, 967 S.W.2d 410, 417 (Tex.Crim.App.1998). a substantial or injurious effect on the jury's verdict and did not affect Hodges's substantial rights.

See King, 953 S.W.2d In making this determination, we review the record as a at 271. Thus, we disregard the alleged error. See Tex.R.App. whole, including any testimony or physical evidence admitted P. 44.2(b). We overrule Hodges's third point. for the jury's consideration, the nature of the evidence supporting the verdict, and the character of the alleged error and how it might be considered in connection with other evidence in the case.

Motilla v. State, 78 S.W.3d 352, VI. CONCLUSION 355 (Tex.Crim.App.2002). We may also consider the jury instructions, the State's theory and any defensive theories, Having overruled Hodges's three points, we affirm the trial whether the State emphasized the error, closing arguments, court's judgment. and even voir dire, if applicable. Id. at 355–56. End of Document © 2015 Thomson Reuters.

No claim to original U.S. Government Works. © 2015 Thomson Reuters. No claim to original U.S. Government Works. 7 APPENDIX 2 FILE COPY COURT OF APPEALS SECOND DISTRICT OF TEXAS FORT WORTH NO. 02-13-00073-CR CHARLES LEE HODGES APPELLANT V. THE STATE OF TEXAS STATE FROM THE 297TH DISTRICT COURT OF TARRANT COUNTY TRIAL COURT NO. 1181223D ORDER We have considered “Appellant’s Motion For Rehearing.” It is the opinion of the court that the motion for rehearing should be and is hereby denied and that the opinion and judgment of December 18, 2014, stand unchanged.

The clerk of this court is directed to transmit a copy of this order to the attorneys of record.n FILE
COPY SIGNED February 5, 2015. /s/ Sue Walker SUE WALKER JUSTICE PANEL:
DAUPHINOT, GARDNER, and WALKER, JJ. 2

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