HOUSE OF REPRESENTATIVES

TWENTY-SECOND LEGISLATURE
COMMONWEALTH OF THE NORTHERN MARIANAS COMMONWEALTH LEGISLATURE
P.O. BOX 500586 SAIPAN, MP 96950

CELINA R. BABAUTA
CHAIRPERSON
JUDICIARY AND GOVERNMENTAL OPERATIONS COMMITTEE

STANDING COMMITTEE REPORT NO. 22-25
DATE: JULY 13, 2021
RE: H.B. 22-38

The Honorable Edmund S. Villagomez
Speaker of the House of Representatives
Twenty-Second Northern Marianas
Commonwealth Legislature
Capitol Hill
Saipan, MP 96950

Dear Mr. Speaker:

Your Committee on Judiciary and Governmental Operations to which was referred:

H. B. NO. 22-38:

> "To amend Title 6, Division 5, Chapter 3, Article 2. Protection of Abused Children, to enact a new §5326. Discovery of evidence of child abuse or recordings of child witnesses, and for other purposes."

begs leave to report as follows:

I. RECOMMENDATION:

After considerable discussion, your Committee recommends that H. B. NO. 22-38 be passed by the House in its current form.

II. ANALYSIS:

A. Purpose:

The purpose of House Bill No. 22-38 is to amend Title 6, Division 5, Chapter 3, Article 2. Protection of Abused Children, to enact a new §5326. Discovery of evidence of child abuse or recordings of child witnesses, and for other purposes.

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B. Committee Findings:

Your Committee finds that Child Abuse comes in several different forms, and includes physical, emotional, sexual, and psychological abuse.[1] The signs of child abuse includes unexplained bruises, overly aggressive behaviors, lack of necessities, drastic changes in behavioral and eating habits, and so forth. Despite such occurrences and behaviors, child abuse throughout the world, especially in the United States, continues to remain common. In the event of an investigations, these cases involving children contains materials that are considered highly sensitive and must be protected from the general public. Cognizant of such sensitive material, your Committee finds that restricting the release of such material is crucial in protecting the integrity of both the abused child and the criminal justice system.

Your Committee also finds that in today's day and age, the use of technology has become prevalent in our daily lives. Such technological devices include cellphones, tablets, laptops, computers, and so forth. Due to the easy access of such devices, the usage of social media has increased significantly. When a video, photo, or other special material is uploaded on the internet, the spread of such material can be limitless. Your Committee finds that special precautions are needed to prevent damage to sensitive materials being made public. It is imperative to protect the well-being of child abuse, especially those with sensitive material that can cause immeasurable harm if revealed.

Your Committee further finds that 12 states and the District of Columbia prohibit the disclosure of any information that will endanger a child, or is otherwise not in the child's best interest.[2] Such states include Texas, Ohio, Alaska, Illinois, New York, New Jersey, and so forth. Your Committee finds that it would be highly appropriate to enact the same provisions as these other U.S. jurisdictions. Furthermore, your Committee also finds that there are a few court cases, specifically *Ohio v. Clark* and *Gonzales v. the State of Texas* (see attached documents), in which providing copies of certain material for cases regarding sexual abuse of a minor was restricted. Similar to those states and the District of Columbia, your Committee finds that it would be in the CNMI's best interest to withhold such sensitive material to protect all abused children. Therefore, your Committee agrees with the intent and purpose of House Bill No. 22-38 and recommends its passage in its current form.

C. Public Comments/Public Hearing:

The Committee received comments from the following:

- Mr. Douglas W. Hartig, Chief Public Defender, Office of the Public Defender
- Honorable Edward Manibusan, Attorney General, CNMI Office of the Attorney General

[1] https://www.statista.com/topics/5910/child-abuse-in-the-united-states/
[2] https://www.childwelfare.gov/pubPDFs/confide.pdf

D. Legislative History:

House Bill No. 22-38 was introduced by Representative Celina R. Babauta on March 16, 2021 to the full body of the House and was referred to the House Standing Committee on Judiciary and Governmental Operations for disposition.

E. Cost Benefit:

The enactment of House Bill No. 22-38 will result in minimal cost to the CNMI government in the form of additional equipment, staff and training needed to ensure the protection of such materials. However, the benefits of restricting the copying and/or dissemination of inappropriate material regarding children heavily outweigh the costs.

III. CONCLUSION:

The Committee is in accord with the intent and purpose of H. B. No. 22-38, and recommends its passage in its current form.

Respectfully submitted,

8/4/21

Rep. Celina R. Babauta, Chairperson

Rep. Blas Jonathan "BJ" T. Attao, Vice Chair

Rep. Vicente C. Camacho, Member

Rep. Richard T. Lizama, Member

Rep. Donald M. Manglona, Member

Rep. Christina M.E. Sablan, Member

Rep. Edwin K. Propst, Member

Reviewed by:

House Legal Counsel

Attachment:

- Letter dated April 30, 2021 from the Chief Public Defender;
- Letter dated May 5, 2021 from the CNMI Attorney General;
- Ohio v. Clark Court Documents; and
- Gonzales v. the State of Texas Court Documents.

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April 30, 20210

Rep. Celina R. Babauta
Chair, Judiciary and Governmental Operations Committee
22nd House of Representatives

Re: HB 22-7, 22-35, 22-37, 22-38, 22-39, 22-40, 22-41

Dear Chair;

Thank you for the opportunity to comment on these bills.

Several bills recently proposed in the House and the Senate will, if passed, move the CNMI criminal justice system in the wrong direction. The Senate is already considering a number of problematic bills, including ones that seek to keep more people in jail without the right to bail, impose mandatory minimum sentences for certain crimes, and increase the maximum and minimum penalties for other crimes. In contrast, the nationwide trend based on evidence has been to try to eliminate unfair cash bail systems, delete mandatory minimums, and reduce lengthy prison sentences that have been empirically shown not to deter or reduce crime. The bills before the Senate and the House currently stand in stark contrast to attempts at criminal justice reform in the rest of the country.

There are certainly issues that are in need of reform in our criminal justice system, but the proposed bills before this committee do not address the actual issues that need reform. These bills would simply perpetuate a criminal justice system that is overly costly, that fails to address the root problems that lead to criminal behavior, that is punitive rather than rehabilitative, and that uniquely harms low-income people. While the rest of the United States is largely moving away from mandatory minimum sentences and jail time for minor infractions, these

proposed bills will move the CNMI n the wrong direction, and it would not have the intended effects of making the CNMI a safer place or making the legal system more "just."

The bills before the House do not meet the best practices being implemented in other jurisdictions; moreover, there is no demonstrated need for most of the changes proposed in these bills. The author of the bills makes unsupported assertions about purported rises in criminal activity by felons and by prisoners and a rise in incidences of failures to appear in court. But none of these claims are based in data or in reality. These bills are the subject of the following comments.

H.B. 22-7 Contraband Reform Act of 2021

The Office of the Public Defender opposes this bill because it is unnecessary and redundant, overly broad, and overly harsh.

First, the proposed bill is unnecessary and redundant because Title 57 of the Administrative Code already provides Department of Corrections rules and regulations that adequately address and punish possession of contraband within the corrections facility. Section 57-20.1-810 prohibits possession of contraband and makes the prisoner involved subject to disciplinary action. Section 57-20.1-1105 makes visitors to the facility subject to search and "Any weapons, illegal substances, or other contraband found on a visitor as the result of the search will make the visitor subject to criminal prosecution." There is no need to criminalize possession of contraband when the issue of contraband is already adequately addressed by existing DOC Regulations and criminal statutes.

Second, the proposed amendment is vague and overly broad. Subsections (a)(1)(D) ("Any item or article not authorized by the Department of Corrections regulations or in excess of the maximum quantity permitted or obtained from unauthorized source") and subsection (a)(1)(E) are unconstitutionally vague. They criminalize the possession of anything not expressly permitted, or anything in however slightly too great a quantity, or anything that was once permitted but suddenly isn't. This opens the door for abusive, arbitrary and capricious enforcement. Subsection (a)(1)(F) is also too broad and vague. It bans any

authorized property that has been altered. If a detainee sharpens a pencil, they have altered it: so have they committed a crime? What if a detainee hems their pants? This proposed bill is clearly intended to prevent defendant from altering items to turn them into weapons, but it is too vague to do so in an effective or constitutional way.

Third, the proposed punishment for any violation of contraband is a minimum of 30 days incarceration. This overly harsh provision allows no discretion for the Judge to look at the circumstance of the violation and whether it warrants 30 days in jail. This is an attempt to move the CNMI criminal justice system in the wrong direction, against the momentum of other states that have recognized the need for evidence-based reform. It is now widely understood that mandatory minimum sentences do not deter crime.[1] Most states and the Federal government are repealing mandatory minimum sentences.[2] Yet this bill runs completely counter to the bipartisan criminal justice reform occurring in other jurisdictions.

H.B.22-35 Unlawful Possession of a Firearm or Ammunition by a Felon.

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[1] The U.S. Department of Justice has said that mandatory minimums do not deter crime. *https://www.ojp.gov/pdffiles1/nij/247350.pdf*. Studies by investigative organizations and not for profits have confirmed this. *https://www.pbs.org/newshour/politics/5-charts-show-mandatory-minimum-sentences-dont-work*. And yet this bill, on the other hand, has no basis in research or statistics and goes against the research trends in criminal justice reform.

[2] The Federal justice system as well as the states are abolishing archaic mandatory minimum sentences because it is now widely understood they don't deter crime and far too often have unintended consequences. Prof. Michael Tonry of the University of Minnesota School of Law and Public Policy has written that

> *There is no credible evidence that the enactment or implementation of such sentences has significant deterrent effects, but there is massive evidence, which has accumulated for two centuries, that mandatory minimums foster circumvention by judges, juries, and prosecutors; reduce accountability and transparency; produce injustices in many cases; and result in wide unwarranted disparities in the handling of similar cases. ... If policy makers took account of research evidence, existing laws would be repealed and no new ones would be enacted.*

https://www.jstor.org/stable/10.1086/599368?seq=1. The National Institute of Justice has found that increased punishments do not deter crime. *https://nij.ojp.gov/topics/articles/five-things-about-deterrence*. Many studies have come to the same conclusion. See: https://newsroom.unsw.edu.au/news/business-law/do-harsher-punishments-deter-crime.

The Office of the Public Defender opposes this bill. It purports to be about "felons in possession of a firearm". But while the title of the proposed amendment and the findings speak about felons, the actual amendment sneaks in a provision to apply also to certain minor misdemeanor convictions.

In addition to prohibiting people convicted of a felony from possessing firearms, the bill also includes language that will prohibit citizens convicted of certain minor misdemeanors from being able to own a gun in the CNMI. Under the proposed legislation, conviction of the relatively minor offense of disturbing the peace of a family member—an offense that carries a maximum punishment of no more than six months—would expose the convicted person to a felony punishable by up to 10 years in prison for possessing a firearm that currently they are not barred from possessing. No other state imposes such a harsh sentence even for those with felony convictions. The majority of states have a 2-4 year range of punishment.

The Findings misleadingly claim that legislation is needed to stop events such as the police shootout that occurred last year where a female hostage was shot and killed. But this proposed law would have done nothing to prevent that situation, or to keep it from happening again. The gun involved in the referenced shooting was already illegally possessed, because it was a government-issued service weapon traded away by a corrections officer. What is worth considering is legislation to address the misuse of government-issued firearms by corrections officers.

HB 22-36 Sentencing.

The Office of the Public Defender opposes this bill because it conflicts with existing court rules, is likely unconstitutional, and runs counter to fundamental American principles of defendants' rights to fairness in the legal process. The explanation that follows is somewhat technical in its legal arguments. But that simply proves that complex considerations of defendants' rights are more properly addressed by the Commonwealth Supreme Court, the highest authority on legal interpretation in this jurisdiction. HB-22-36 should be rejected.

The Findings section of HB 22-36 misleadingly suggests that the Commonwealth Supreme Court decision in *Commonwealth v. Martin*, 2020 MP 10, invited the legislature to "clarify whether. . . individualized sentencing review should be altered." The proposed bill demonstrates a fundamental misreading of the Court's decision in *Martin* and a misunderstanding about appellate review of criminal sentences.

Notably, the Commonwealth Supreme Court in Martin pointed out that the practice of individualized sentencing in federal courts did not stem merely from statute, but from more fundamental principles of fairness that have been enforced by federal courts for decades.[3] The mandate for individualized sentencing comes from modern principles of fairness and justice that were explained by the United States Supreme Court as far back as 1949.[4] The legislature cannot and should not simply negate such a bedrock principle of modern criminal justice, nor can it negate Supreme Court Due Process jurisprudence.[5]

HB 22-36 proposes to overhaul the existing sentencing statute by eliminating the requirement that a Superior Court judge give "specific findings" to justify a sentence. This creates a dangerous window for abuse. It would permit a judge, for example, to give one defendant a maximum sentence simply because they were

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[3] *Martin*, 2020 MP 10 ¶ 16.

[4] "A sentencing judge. . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. . . . [There is] a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial. . . . Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence. . . [A] strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship. This belief to a large a large extent has been justified." *Williams v. New York,* 337 U.S. 241, 247–49 (1949) (emphasis added) (internal citations omitted).

[5] "[I]ndividualized sentencing is not inextricably tied to a statute. Whether our sentencing rules emerge from case law or statute should not affect its force as law. Our lack of a statutory basis for such law, therefore, does not render our jurisprudence invalid." *Martin*, 2020 MP 10 ¶ 16 (emphasis added).

Chamorro, and to give a different defendant convicted of the same crime a minimum sentence simply because they were Filipino. Under the proposed legislation, the judge would not have to give any reason for the different sentences, and it would thus make it very difficult for the Chamorro defendant to know what happened or challenge it.

Even more troubling, HB 22-36 proposes to go even further by removing the Supreme Court's jurisdiction to review a trial court's decision on sentencing "unless it involves an alleged preserved constitutional or procedural defect." The next sentence in the proposed legislation states that "[s]uch defect must be preserved by a timely, specific objection." This portion of the proposed legislation is blatantly unconstitutional. The legislature cannot pass a law that undermines a person's constitutional right to due process of law.[6] HB 22-36 is also incompatible with existing court rules and with the CNMI Constitution. When it comes to court procedure, the procedural rules of court control.[7] Moreover, the Commonwealth Supreme Court has the constitutional authority and duty to review final judgments from the Commonwealth Superior Court.[8] HB 22-36 cannot and should not take that away.

There are, unfortunately, prosecutors who believe that finality of a court judgment is more important than fairness. This proposed bill is an example of that.

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[6] In *Martin*, the Commonwealth Supreme Court pointed out that objections to the substantive reasonableness of a sentence—a Due Process constitutional challenge—are preserved simply by "inform[ing] the court what action it wishes the court to take. . ." *Martin*, 2020 MP 10 ¶ 9 (quoting *Commonwealth v. Reyes*, 2020 MP 6 ¶ 10-11 and *United States v. Holguin-Hernandez*, 140 S. Ct. 762, 766 (2020)). This standard is based on Criminal Rule of Procedure 52(b), which protects the right of a person to appeal their sentence because certain mistakes made in sentencing may undermine the fundamental fairness of the proceedings. "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458 (1938). The CNMI legislature may not legally take away appellate review of constitutional or procedural errors simply because of a defendant's failure to make a "timely, specific objection."

[7] "[T]he procedural rules of a court take precedence over statutes, to the extent that there is any inconsistency." *Reyes v. Reyes*, 2004 MP 1 ¶ 99. NMI Rule of Criminal Procedure 52(b) permits appellate review of Superior Court decisions under the plain error standard even where no objection was preserved.

[8] *See* N.M.I. Const. art. IV section 3 ("The Commonwealth supreme court shall hear appeals from final judgments and orders of the Commonwealth superior court." (emphasis added)).

A much better reform would be, as the *Martin* case suggests, for the legislature to give guidance to the courts in the form of a suggested list of aggravating and mitigating factors that court should consider. The legislation could ensure checks and balances and protect the court's discretion by permitting the court to consider other factors not on that list, but should continue to require, as it currently does, that the sentencing court explain how the factors were used in making a sentencing decision. This would eliminate confusion and allow all parties and the public to know why a particular sentence was given. It would also supply the supreme court with the information it needed, if the sentence is appealed, to decide if the sentence should be overturned. Instead, the proposed legislation does just the opposite of what openness and farness demands.

HB 22-37 Failure to Appear.

The first line of the Findings is incorrect. A criminal penalty for failure to appear already exists in the CNMI. It is called Contempt, 9 CMC § 3307: "*Every person who unlawfully, knowingly, and willfully interferes directly with the operation and function of a court, ... or who resists or refuses or fails to comply with a lawful order of the court... is guilty of criminal contempt...*" And beyond criminal contempt charges, there already exist substantial penalties for a failure to appear in court, including forfeiture of bail money, revocation of release conditions, and withdrawal of plea offers. (Also, the "Findings" offer no data or statistics to support the assertion that there is little consequence for failing to appear in court—as seen above, this is incorrect. Nor does the Findings offer any factual data to support its argument that the current process wastes time or resources, or that many criminals become fugitives and just disappear.)

The punishment must fit the crime. There is no justification why a simple failure to appear in court is as serious an offense as the underlying crime that the defendant is charged with. Yet this proposed bill would punish failure to appear by up to five years in prison, even when the maximum sentence is much less or when the defendant may have been offered a year or less on the underlying felony. In

theory, this means that the failure to appear in court could be punished five times more harshly than the actual crime alleged to have been committed. Similarly, failure to appear on a traffic ticket could result in one year in prison, even where the traffic ticket itself was punishable by no more than a $50 fine. If someone goes off island and misses court on a traffic ticket, then returns five weeks later and tries to go to court, they could face a year in prison. In addition to being patently disproportionate and unfair, this penalty would have the unintended effect of strongly discouraging people who innocently miss court from coming forward to get their case back on track.

Worst of all is the proposed 30-day requirement to put forth a defense. This is clearly unconstitutional and unjustifiable. Under the current statute of limitations, the prosecutor can file charges up to four years after the crime of "failure to appear" happens. But this bill would require the defense to put forth a defense within 30 days. *So a person has to defend himself more than three years before he is even accused?* This is nonsensical. If the court hears the person's explanation for their absence 32 days after the fact and finds the explanation reasonable, the fact that it is explained 32 days later does not negate that reasonableness. Imagine if a person has a serious injury or illness (e.g. heart attack, stroke, traffic accident) and is hospitalized or evacuated for medical care, they may not think to file an affidavit with the court within 30 days. Under the proposed legislation, they will have no excuse, and they may be put on trial and imprisoned, effectively because they got sick. And under the proposed legislation, they would not be allowed to put on a defense that explained their absence. The CNMI cannot create a crime and then bar someone from defending against it. To do so would be un-American and contrary to everything our legal system stands for.

People miss court for a myriad of innocent reasons: illness; family issues; car problems; fear of losing their job if they miss work; mental illness; forgetfulness. Most are not trying to avoid taking responsibility; many if not most simply make the very human mistake of forgetting a scheduled event. Under current law and practice, when a defendant misses court without an excuse, a bench warrant for their arrest is issued. If that person subsequently appears before the judge—which

they usually do—the judge always asks why the defendant missed court. If the judge finds that the defendant had a reasonable excuse the judge will forgive the absence and quash the warrant, and the case will continue. If the judge finds that the excuse was not reasonable, the judge already has a number of sanctions at their disposal, including revocation of bail and or charges of contempt of court.

The Public Defender's Office represents the vast majority of criminal defendants in the CNMI. A review of PDO's records shows that the vast majority of people who miss hearings are defendants charged with traffic offense, not serious crimes. There have been criminal cases where bench warrants were issued, but virtually all of those cases were resolved or are again active on the court docket after the defendant reappeared. The system clearly works. Defendants' failure to appear in court in the CNMI is not a significant problem.

Furthermore, there is a better way. A recent study, entitled "Reducing Courts' Failure to Appear Rate: A Procedural Justice Approach" funded by the U.S. Department of Justice, found that "It is possible to reduce the risk of FTA (failure to appear) with a simple postcard reminder system. FTA rates varied across a number of offender and offense characteristics, such as geographic location, offense type and number of charges, and race/ethnicity. It is important to consider various offense and offender characteristics when devising and implementing pretrial services programs."[9]

For these reasons The Office of the Public Defender opposes this bill.

H.B. 22-38 Discovery Of Evidence Of Child Abuse.

This bill is an attempt to adopt a statute from Texas that has little precedent in other state or federal jurisdictions. It should be rejected. It is wholly unreasonable and unnecessary to pass such an extreme bill. The *PDO agrees* that sensitive material pertaining to children should carry additional protections and that the Court should have the authority to limit or prevent its dissemination to the *public*. The Court already has such authority. However, it would be improper to

[9] *https://www.ojp.gov/pdffiles1/nij/grants/234370.pdf.*

prevent defense counsel from having access to these materials, which are necessary for trial preparation purposes.

Defense counsel require access to statements from victims and witnesses in order to adequately investigate and prepare their cases. Defense counsel has no incentive for such material to get into the public's hands—in fact, just the opposite! Furthermore, a licensed attorney is bound by ethical and legal obligations not to spread any of these materials. Instead, defense counsel's interest in obtaining a copy of these materials is to allow for more intensive review. For instance, in the case of an interview of a child witness reporting abuse, a defense attorney may go through the interview to transcribe what is being said. Defense counsel may also need to share such a video with an expert witness, such as a psychologist trained in interviewing techniques for victims of child abuse.

The Texas case cited in the Findings that indicates such a law does not violate the Texas constitution has no bearing in the CNMI. In that Texas case, a defense expert was still allowed to see the video. Here, the majority of expert witnesses that an attorney on Saipan might consult would be based off-island, so it would be particularly important to obtain a copy of the discovery to be able to share with the expert for review. An off-island expert would be unable to view the relevant materials at the prosecutor's office.

Rather than completely preventing defense counsel from obtaining a copy of these discovery materials, a more practicable approach, practiced in many jurisdictions[10], would be for the prosecutor to provide the sensitive discovery pursuant to a protective order or signed stipulation that prohibits defense counsel and defendant's expert from unauthorized dissemination of the material. This solution can be accomplished without legislation, as most defense attorneys would readily agree to this. Also, a judge can place reasonable limitations on how the discovery in question can be shared with the defense.

The Court should not lose its discretion to order that relevant evidence be turned over to the defense. The Court can be trusted to make appropriate rulings to

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[10] *See, e.g.*, Ohio Rule of Criminal Procedure 16; *State v. Boyd*, 158 P.3d 54, 62 (Wash. 2007); *U.S. v. Hill*, 322 F.Supp.2d 1081, 1092-93 (C.D. Cal. 2004).

protect the privacy of any child victims. The proposed legislation does not address a real problem here in the CNMI and concerns a subject that can be fairly dealt with by the judges in our courts.

H.B. 22-39 Allowing Hearsay Statements In Certain Cases.

The Office of the Public Defender opposes this bill, which would allow previously inadmissible hearsay statements to be used as evidence in criminal trials. The bill attempts to create an exception to the hearsay rules for certain statements made by individuals 16 years old or younger or with certain disabilities. But hearsay rules serve a very important purpose in our courts: they weed out unreliable evidence that would not tend to support a finding of the truth. These rules are necessary to promote truth-seeking in court and to protect the constitutional rights of a defendant to due process and a fair trial. Moreover, these rules are codified in the Rules of Evidence and cannot be overridden by the legislature, as that is a function reserved for the judiciary.[11]

In addition to attempting to address subject matters more properly (and authoritatively) dealt with in Court rules, the proposed bill fails to provide sufficient background research to support the creation of a new rule that would have serious implications for the conduct of a fair trial. Although the proposed bill appears to be closely modeled after Article 38.072 in the Texas Code of Criminal Procedure, it tries to broaden the scope of the exception even more than the rule in Texas, while failing to provide any justification. For example, the proposed bill seeks to make admissible statements by individuals *16 years old and younger*, whereas the Texas statute only applies to minors less than 14 years old. No data or argument is provided as to why a court could not rely on the sworn testimony of a 16-year-old witness in court just as it would for a 17-year-old witness. Another change from the Texas statute is that this bill proposes to allow in the first "substantive" statement by someone under 16 to an adult rather than the actual

[11] *Reyes v. Reyes*, 2004 MP 1 ¶ 99.

first statement made to an adult. Instead, what this bill would do is make otherwise-inadmissible statements made to forensic examiners admissible in court. This is unconstitutional: the admission of such testimony would run afoul of the Confrontation Clause of the U.S. and CNMI Constitutions because the statement could be considered "testimonial" in nature when made to adults involved in the investigation.[12]

The proposed bill also deviates from the Texas statute upon which it is based in that it would apply in a prosecution for *any offense* committed against a child 16 years of age or younger or a person with a disability. In contrast, the Texas statute only applies in cases involving child abuse, sexual abuse, or assaultive crimes against children or persons with disabilities. There is no rational explanation offered in the proposed bill for why a hearsay exception such as this one would ever be necessary in a prosecution for other types of crimes against minor victims, such as theft or burglary.

The proposed bill is also too broad in its definition of "person with a disability." The definition provided is "a person 17 years of age or older who because of age or physical or mental disease, disability, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self." This definition is so overbroad that it would encompass individuals who are mentally sound and capable but have physical ailments that merely require mobility assistance. Finally, there is no research cited to show why the initial statement made by a person with a mental disability to an adult would have sufficient reliability to be admissible in court.

Statements by children and individuals with mental illness or learning disabilities pose difficulties in criminal trials because they can be inherently unreliable and can also be heavily influenced by interviewer bias and suggestive

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[12] See *Ohio v. Clark*, 576 U.S. 237 (2015). Even so, the fresh complaint rule already allows some statements to be allowed into evidence to counter an allegation that was said in court was recently made.

interviewing techniques.[13] Therefore, it is particularly important not to permit the introduction of out-of-court hearsay statements made by such witnesses without allowing the defendant the opportunity to cross-examine the witness. Any hearsay exception that can potentially take away the defendant's constitutional right to confront his or her accuser in court should not be promulgated without a much closer look at the ways in which various jurisdictions across the United States handle this issue and without a more thorough understanding of the social science and legal principles that might support such rule changes, if any. The CNMI should not look to a regressive jurisdiction such as Texas for guidance and then modify Texas law in a way to make it even more unfair, unjust and unconstitutional.

HB 22-040 Jay walking.

In theory, this jaywalking bill seems perfectly acceptable. It makes jaywalking a payable offense; it carves out an exception if the crosswalk is more than 200 feet away; and it seems to apply only to those "crossing" the street rather than walking along it.

But there is a risk of abuse of this provision by DPS. This bill could incentivize police to prey upon tourists to gain money for their department and unnecessarily exposes tourists to the requirement that they appear in traffic court, thereby disrupting travel plans and exposing them to the penalties of failure to appear that the legislature is considering criminalizing in HB 22-37.

A tourist could end up with jail time and a criminal record simply because they crossed the street to take a picture of the sunset. If a tourist gets a ticket but can't read English, they may not understand how or where to pay the ticket. In such an instance, a warrant could be issued, the person could be found guilty of failing to appear in court and they could face a year in prison.

I oppose this bill in its current form, but if such a bill is to become law, the fines should be more manageable such as $20, $30 and $50 respectfully. People are more likely to pay a fine and deal with a ticket if they can afford to do so.

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[13] Bruck, M., & Ceci, S. J. (1997). The Suggestibility of Young Children. Current Directions in Psychological Science, 6(3), 75-79.

HB 22- 41 Removal Of Grace Period For Uninsured Motorist.

The Office of the Public Defender opposes this bill because it is based on a false premise. Contrary to what is said in the legislative Findings and Purpose, currently there is no grace period for uninsured motorists. Under current law, every person who operates a motor vehicle must have insurance (9 CMC §8203). They must also have an insurance card in their car (9 CMC § 8204). If someone is stopped by DPS and they don't have a card in the vehicle to show the officer, they will be given a ticket for violation of *both* §8203 (no insurance) and §8204 (no insurance card in possession).

There is no grace period in which to get insurance. There is no time when someone is allowed to drive without insurance. But the current statutes provide a person charged with §8203 (no insurance) to show that they did have insurance at the time of the traffic stop but simply didn't have the card with them in their car. Often, the driver has lost their insurance card or left it at their house, but they actually did have valid, up-to-date auto insurance. Such individuals will still be charged for not having the card in the vehicle (§8204), but they need not be charged with not having insurance (§8204). A person should not be charged for a violation that the Commonwealth knows they did not commit.

Reforms are certainly needed in the criminal justice system here in the CNMI, but the bills proposed to the House this session do not address any real concerns in the community. They are founded on faulty reasoning and a lack of data.

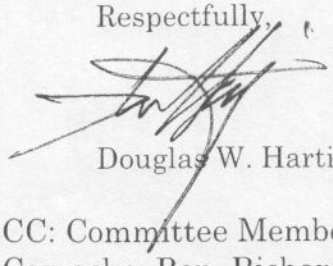
The legislature should however consider changing the definition of felony theft so that our citizens will not be excluded from the military, denied the right to vote, disqualified for loans and be branded a felon for life simply for taking a used cell phone. We should increase the right to pretrial bail to preserve the family, jobs and the principal of innocent until proven guilty. We do not have a grand jury as guaranteed by the U.S. constitution but we could at least require a finding of probable cause to believe someone is guilty of a felony at a preliminary hearing to

weed out illegitimate allegations before they face the stress of a trial and the Commonwealth incurs the costs. We should not disallow courts from having latitude in sentencing but should require them to explain their rulings for the benefit of the accused and the general public. Through legislation the courts should be limited in their ability to deny someone's right to petition for parole so that a prison is encouraged rather than discouraged to reform and so that a convicted person's release is based of reformation as found by a board, not just the running of the clock.

The PDO would be happy to work together with the House Standing Committee on Judiciary and Governmental Operations to identify and propose evidence-based bills that can effectuate progress towards a fairer and just legal system and a safer community.

Thank you for the opportunity to submit these comments.

Respectfully,



Douglas W. Hartig

CC: Committee Members, Rep. Blas Jonathan Attao, Vice Chair, Rep.Vicente Camacho, Rep. Richard Lizama, Rep. Donald Manglona, Rep. Edwin Propst, Rep Christina Marie Sablan

Commonwealth of the Northern Mariana Islands
Office of the Attorney General
2nd Floor Hon. Juan A. Sablan Memorial Bldg.
Caller Box 10007, Capitol Hill
Saipan, MP 96950

EDWARD MANIBUSAN
Attorney General

LILLIAN A. TENORIO
Deputy Attorney General

VIA EMAIL: repcelinababauta@gmail.com

May 5, 2021

OAGHOR: 2021-037
LSR No. 21-126

Hon. Celina R. Babauta
Chairperson, House Standing Committee
on Judiciary & Governmental Operations
House of Representatives
22nd Northern Marianas Commonwealth Legislature
Saipan, MP 96950

Re: HB 22-38: "To amend Title 6, Chapter 5, Division 3, Article 2. Protection of Abused Children, to enact a new § 5326. Discovery of evidence of child abuse or recordings of child witnesses, and for other purposes."

Dear Chairperson Babauta:

Thank you for requesting the comments of the Office of the Attorney General on House Bill 22-38. This bill prevents the release of certain evidence related to child abuse cases, including pornography and recordings of interviews of children in abuse cases. The bill provides for a reasonable method for a defense attorney to view those materials in preparation for trial.

In the modern age of the internet, information is easily distributed online. This bill recognizes that even releasing copies during the course of a criminal case can compromise the privacy of children. Digital information can easily be uploaded and streamed and cannot be recovered.

A majority of states have adopted some form of protection for such information, especially child pornography and child interviews. Courts have found that this approach properly balances the need for discovery by a criminal defendant and the need to protect the privacy of a child.

HB 22-38 provides the necessary protection of information that can compromise the privacy of children. For that reason, the Office of the Attorney General supports House Bill 22-38.

Sincerely,

EDWARD MANIBUSAN
Attorney General

cc: All Members, House of Representatives

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

OHIO *v.* CLARK

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 13–1352. Argued March 2, 2015—Decided June 18, 2015

Respondent Darius Clark sent his girlfriend away to engage in prostitution while he cared for her 3-year-old son L. P. and 18-month-old daughter A. T. When L. P.'s preschool teachers noticed marks on his body, he identified Clark as his abuser. Clark was subsequently tried on multiple counts related to the abuse of both children. At trial, the State introduced L. P.'s statements to his teachers as evidence of Clark's guilt, but L. P. did not testify. The trial court denied Clark's motion to exclude the statements under the Sixth Amendment's Confrontation Clause. A jury convicted Clark on all but one count. The state appellate court reversed the conviction on Confrontation Clause grounds, and the Supreme Court of Ohio affirmed.

Held: The introduction of L. P.'s statements at trial did not violate the Confrontation Clause. Pp. 4–12.

(a) This Court's decision in *Crawford* v. *Washington*, 541 U. S. 36, 54, held that the Confrontation Clause generally prohibits the introduction of "testimonial" statements by a nontestifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A statement qualifies as testimonial if the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." *Michigan* v. *Bryant*, 562 U. S. 344, 369. In making that "primary purpose" determination, courts must consider "all of the relevant circumstances." *Ibid.* "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.*, at 359. But that does not mean that the Confrontation Clause bars every statement that satisfies the "primary purpose" test. The Court has recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the

Syllabus

time of the founding. See *Giles* v. *California*, 554 U. S. 353, 358–359; *Crawford*, 541 U. S., at 56, n. 6, 62. Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause. Pp. 4–7.

(b) Considering all the relevant circumstances, L. P.'s statements were not testimonial. L. P.'s statements were not made with the primary purpose of creating evidence for Clark's prosecution. They occurred in the context of an ongoing emergency involving suspected child abuse. L. P.'s teachers asked questions aimed at identifying and ending a threat. They did not inform the child that his answers would be used to arrest or punish his abuser. L. P. never hinted that he intended his statements to be used by the police or prosecutors. And the conversation was informal and spontaneous. L. P.'s age further confirms that the statements in question were not testimonial because statements by very young children will rarely, if ever, implicate the Confrontation Clause. As a historical matter, moreover, there is strong evidence that statements made in circumstances like these were regularly admitted at common law. Finally, although statements to individuals other than law enforcement officers are not categorically outside the Sixth Amendment's reach, the fact that L. P. was speaking to his teachers is highly relevant. Statements to individuals who are not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than those given to law enforcement officers. Pp. 7–10.

(c) Clark's arguments to the contrary are unpersuasive. Mandatory reporting obligations do not convert a conversation between a concerned teacher and her student into a law enforcement mission aimed at gathering evidence for prosecution. It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution. And this Court's Confrontation Clause decisions do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony. Instead, the test is whether a statement was given with the "primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, *supra*, at 358. Here, the answer is clear: L. P.'s statements to his teachers were not testimonial. Pp. 11–12.

137 Ohio St. 3d 346, 2013–Ohio–4731, 999 N. E. 2d 592, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined. THOMAS, J., filed an opinion concurring in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 13–1352

OHIO, PETITIONER *v.* DARIUS CLARK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

[June 18, 2015]

JUSTICE ALITO delivered the opinion of the Court.

Darius Clark sent his girlfriend hundreds of miles away to engage in prostitution and agreed to care for her two young children while she was out of town. A day later, teachers discovered red marks on her 3-year-old son, and the boy identified Clark as his abuser. The question in this case is whether the Sixth Amendment's Confrontation Clause prohibited prosecutors from introducing those statements when the child was not available to be cross-examined. Because neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution, the child's statements do not implicate the Confrontation Clause and therefore were admissible at trial.

I

Darius Clark, who went by the nickname "Dee," lived in Cleveland, Ohio, with his girlfriend, T. T., and her two children: L. P., a 3-year-old boy, and A. T., an 18-month-old girl.[1] Clark was also T. T.'s pimp, and he would regularly send her on trips to Washington, D. C., to work as a prostitute. In March 2010, T. T. went on one such trip,

[1] Like the Ohio courts, we identify Clark's victims and their mother by their initials.

and she left the children in Clark's care.

The next day, Clark took L. P. to preschool. In the lunchroom, one of L. P.'s teachers, Ramona Whitley, observed that L. P.'s left eye appeared bloodshot. She asked him "'[w]hat happened,'" and he initially said nothing. 137 Ohio St. 3d 346, 347, 2013–Ohio–4731, 999 N. E. 2d 592, 594. Eventually, however, he told the teacher that he "'fell.'" *Ibid.* When they moved into the brighter lights of a classroom, Whitley noticed "'[r]ed marks, like whips of some sort,'" on L. P.'s face. *Ibid.* She notified the lead teacher, Debra Jones, who asked L. P., "'Who did this? What happened to you?'" *Id.*, at 348, 999 N. E. 2d, at 595. According to Jones, L. P. "'seemed kind of bewildered'" and "'said something like, Dee, Dee.'" *Ibid.* Jones asked L. P. whether Dee is "big or little," to which L. P. responded that "Dee is big." App. 60, 64. Jones then brought L. P. to her supervisor, who lifted the boy's shirt, revealing more injuries. Whitley called a child abuse hotline to alert authorities about the suspected abuse.

When Clark later arrived at the school, he denied responsibility for the injuries and quickly left with L. P. The next day, a social worker found the children at Clark's mother's house and took them to a hospital, where a physician discovered additional injuries suggesting child abuse. L. P. had a black eye, belt marks on his back and stomach, and bruises all over his body. A. T. had two black eyes, a swollen hand, and a large burn on her cheek, and two pigtails had been ripped out at the roots of her hair.

A grand jury indicted Clark on five counts of felonious assault (four related to A. T. and one related to L. P.), two counts of endangering children (one for each child), and two counts of domestic violence (one for each child). At trial, the State introduced L. P.'s statements to his teachers as evidence of Clark's guilt, but L. P. did not testify. Under Ohio law, children younger than 10 years old are

incompetent to testify if they "appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." Ohio Rule Evid. 601(A) (Lexis 2010). After conducting a hearing, the trial court concluded that L. P. was not competent to testify. But under Ohio Rule of Evidence 807, which allows the admission of reliable hearsay by child abuse victims, the court ruled that L. P.'s statements to his teachers bore sufficient guarantees of trustworthiness to be admitted as evidence.

Clark moved to exclude testimony about L. P.'s out-of-court statements under the Confrontation Clause. The trial court denied the motion, ruling that L. P.'s responses were not testimonial statements covered by the Sixth Amendment. The jury found Clark guilty on all counts except for one assault count related to A. T., and it sentenced him to 28 years' imprisonment. Clark appealed his conviction, and a state appellate court reversed on the ground that the introduction of L. P.'s out-of-court statements violated the Confrontation Clause.

In a 4-to-3 decision, the Supreme Court of Ohio affirmed. It held that, under this Court's Confrontation Clause decisions, L. P.'s statements qualified as testimonial because the primary purpose of the teachers' questioning "was not to deal with an existing emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution." 137 Ohio St. 3d, at 350, 999 N. E. 2d, at 597. The court noted that Ohio has a "mandatory reporting" law that requires certain professionals, including preschool teachers, to report suspected child abuse to government authorities. See *id.*, at 349–350, 999 N. E. 2d, at 596–597. In the court's view, the teachers acted as agents of the State under the mandatory reporting law and "sought facts concerning past criminal activity to identify the person responsible, eliciting statements that 'are functionally identical to live, in-court testimony,

doing precisely what a witness does on direct examination.'" *Id.*, at 355, 999 N. E. 2d, at 600 (quoting *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305, 310–311 (2009); some internal quotation marks omitted).

We granted certiorari, 573 U. S. ___ (2014), and we now reverse.

II

A

The Sixth Amendment's Confrontation Clause, which is binding on the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980), we interpreted the Clause to permit the admission of out-of-court statements by an unavailable witness, so long as the statements bore "adequate 'indicia of reliability.'" Such indicia are present, we held, if "the evidence falls within a firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Ibid.*

In *Crawford* v. *Washington*, 541 U. S. 36 (2004), we adopted a different approach. We explained that "witnesses," under the Confrontation Clause, are those "who bear testimony," and we defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.*, at 51 (internal quotation marks and alteration omitted). The Sixth Amendment, we concluded, prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.*, at 54. Applying that definition to the facts in *Crawford*, we held that statements by a witness during police questioning at the station house were testimonial and thus could not be admitted. But our decision in *Crawford* did not offer an exhaustive definition of "testimonial" statements.

Instead, *Crawford* stated that the label "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*, at 68.

Our more recent cases have labored to flesh out what it means for a statement to be "testimonial." In *Davis* v. *Washington* and *Hammon* v. *Indiana*, 547 U. S. 813 (2006), which we decided together, we dealt with statements given to law enforcement officers by the victims of domestic abuse. The victim in *Davis* made statements to a 911 emergency operator during and shortly after her boyfriend's violent attack. In *Hammon*, the victim, after being isolated from her abusive husband, made statements to police that were memorialized in a "'battery affidavit.'" *Id.*, at 820.

We held that the statements in *Hammon* were testimonial, while the statements in *Davis* were not. Announcing what has come to be known as the "primary purpose" test, we explained: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.*, at 822. Because the cases involved statements to law enforcement officers, we reserved the question whether similar statements to individuals other than law enforcement officers would raise similar issues under the Confrontation Clause. See *id.*, at 823, n. 2.

In *Michigan* v. *Bryant*, 562 U. S. 344 (2011), we further expounded on the primary purpose test. The inquiry, we emphasized, must consider "all of the relevant circumstances." *Id.*, at 369. And we reiterated our view in *Davis*

that, when "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." 562 U. S., at 358. At the same time, we noted that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Ibid.* "[T]he existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry." *Id.*, at 374. Instead, "whether an ongoing emergency exists is simply one factor . . . that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Id.*, at 366.

One additional factor is "the informality of the situation and the interrogation." *Id.*, at 377. A "formal station-house interrogation," like the questioning in *Crawford*, is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused. *Id.*, at 366, 377. And in determining whether a statement is testimonial, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.*, at 358–359. In the end, the question is whether, in light of all the circumstances, viewed objectively, the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." *Id.*, at 358. Applying these principles in *Bryant*, we held that the statements made by a dying victim about his assailant were not testimonial because the circumstances objectively indicated that the conversation was primarily aimed at quelling an ongoing emergency, not establishing evidence for the prosecution. Because the relevant statements were made to law enforcement officers, we again declined to decide whether the same analysis applies to statements made to individuals other than the police. See *id.*, at 357, n. 3.

Thus, under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.*, at 359. But that does not mean that the Confrontation Clause bars every statement that satisfies the "primary purpose" test. We have recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. See *Giles* v. *California*, 554 U. S. 353, 358–359 (2008); *Crawford*, 541 U. S., at 56, n. 6, 62. Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause.

B

In this case, we consider statements made to preschool teachers, not the police. We are therefore presented with the question we have repeatedly reserved: whether statements to persons other than law enforcement officers are subject to the Confrontation Clause. Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach. Nevertheless, such statements are much less likely to be testimonial than statements to law enforcement officers. And considering all the relevant circumstances here, L. P.'s statements clearly were not made with the primary purpose of creating evidence for Clark's prosecution. Thus, their introduction at trial did not violate the Confrontation Clause.

L. P.'s statements occurred in the context of an ongoing emergency involving suspected child abuse. When L. P.'s

teachers noticed his injuries, they rightly became worried that the 3-year-old was the victim of serious violence. Because the teachers needed to know whether it was safe to release L. P. to his guardian at the end of the day, they needed to determine who might be abusing the child.[2] Thus, the immediate concern was to protect a vulnerable child who needed help. Our holding in *Bryant* is instructive. As in *Bryant*, the emergency in this case was ongoing, and the circumstances were not entirely clear. L. P.'s teachers were not sure who had abused him or how best to secure his safety. Nor were they sure whether any other children might be at risk. As a result, their questions and L. P.'s answers were primarily aimed at identifying and ending the threat. Though not as harried, the conversation here was also similar to the 911 call in *Davis*. The teachers' questions were meant to identify the abuser in order to protect the victim from future attacks. Whether the teachers thought that this would be done by apprehending the abuser or by some other means is irrelevant. And the circumstances in this case were unlike the interrogation in *Hammon*, where the police knew the identity of the assailant and questioned the victim after shielding her from potential harm.

There is no indication that the primary purpose of the conversation was to gather evidence for Clark's prosecution. On the contrary, it is clear that the first objective was to protect L. P. At no point did the teachers inform L. P. that his answers would be used to arrest or punish his abuser. L. P. never hinted that he intended his statements to be used by the police or prosecutors. And the

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[2] In fact, the teachers and a social worker who had come to the school *were* reluctant to release L. P. into Clark's care after the boy identified Clark as his abuser. But after a brief "stare-down" with the social worker, Clark bolted out the door with L. P., and social services were not able to locate the children until the next day. App. 92–102, 150–151.

conversation between L. P. and his teachers was informal and spontaneous. The teachers asked L. P. about his injuries immediately upon discovering them, in the informal setting of a preschool lunchroom and classroom, and they did so precisely as any concerned citizen would talk to a child who might be the victim of abuse. This was nothing like the formalized station-house questioning in *Crawford* or the police interrogation and battery affidavit in *Hammon*.

L. P.'s age fortifies our conclusion that the statements in question were not testimonial. Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system. Rather, "[r]esearch on children's understanding of the legal system finds that" young children "have little understanding of prosecution." Brief for American Professional Society on the Abuse of Children as *Amicus Curiae* 7, and n. 5 (collecting sources). And Clark does not dispute those findings. Thus, it is extremely unlikely that a 3-year-old child in L. P.'s position would intend his statements to be a substitute for trial testimony. On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all.

As a historical matter, moreover, there is strong evidence that statements made in circumstances similar to those facing L. P. and his teachers were admissible at common law. See Lyon & LaMagna, The History of Children's Hearsay: From Old Bailey to Post-*Davis*, 82 Ind. L. J. 1029, 1030 (2007); see also *id.*, at 1041–1044 (examining child rape cases from 1687 to 1788); J. Langbein, The Origins of Adversary Criminal Trial 239 (2003) ("The Old Bailey" court in 18th-century London "tolerated flagrant hearsay in rape prosecutions involving a child victim who was not competent to testify because she was too

young to appreciate the significance of her oath"). And when 18th-century courts excluded statements of this sort, see, *e.g.*, *King* v. *Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (K. B. 1779), they appeared to do so because the child should have been ruled competent to testify, not because the statements were otherwise inadmissible. See Lyon & LaMagna, *supra*, at 1053–1054. It is thus highly doubtful that statements like L. P.'s ever would have been understood to raise Confrontation Clause concerns. Neither *Crawford* nor any of the cases that it has produced has mounted evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding. Certainly, the statements in this case are nothing like the notorious use of *ex parte* examination in Sir Walter Raleigh's trial for treason, which we have frequently identified as "the principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U. S., at 50; see also *Bryant*, 562 U. S., at 358.

Finally, although we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment, the fact that L. P. was speaking to his teachers remains highly relevant. Courts must evaluate challenged statements in context, and part of that context is the questioner's identity. See *id.*, at 369. Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. See, *e.g.*, *Giles*, 554 U. S., at 376. It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police. We do not ignore that reality. In light of these circumstances, the Sixth Amendment did not prohibit the State from introducing L. P.'s statements at trial.

III

Clark's efforts to avoid this conclusion are all off-base. He emphasizes Ohio's mandatory reporting obligations, in an attempt to equate L. P.'s teachers with the police and their caring questions with official interrogations. But the comparison is inapt. The teachers' pressing concern was to protect L. P. and remove him from harm's way. Like all good teachers, they undoubtedly would have acted with the same purpose whether or not they had a state-law duty to report abuse. And mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution.

It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution. The statements at issue in *Davis* and *Bryant* supported the defendants' convictions, and the police always have an obligation to ask questions to resolve ongoing emergencies. Yet, we held in those cases that the Confrontation Clause did not prohibit introduction of the statements because they were not primarily intended to be testimonial. Thus, Clark is also wrong to suggest that admitting L. P.'s statements would be fundamentally unfair given that Ohio law does not allow incompetent children to testify. In any Confrontation Clause case, the individual who provided the out-of-court statement is not available as an in-court witness, but the testimony is admissible under an exception to the hearsay rules and is probative of the defendant's guilt. The fact that the witness is unavailable because of a different rule of evidence does not change our analysis.

Finally, Clark asks us to shift our focus from the context of L. P.'s conversation with his teachers to the jury's perception of those statements. Because, in his view, the "jury treated L. P.'s accusation as the functional equivalent of testimony," Clark argues that we must prohibit its

introduction. Brief for Respondent 42. Our Confrontation Clause decisions, however, do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony. The logic of this argument, moreover, would lead to the conclusion that virtually all out-of-court statements offered by the prosecution are testimonial. The prosecution is unlikely to offer out-of-court statements unless they tend to support the defendant's guilt, and all such statements could be viewed as a substitute for in-court testimony. We have never suggested, however, that the Confrontation Clause bars the introduction of all out-of-court statements that support the prosecution's case. Instead, we ask whether a statement was given with the "primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, *supra*, at 358. Here, the answer is clear: L. P.'s statements to his teachers were not testimonial.

IV

We reverse the judgment of the Supreme Court of Ohio and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13–1352

OHIO, PETITIONER *v.* DARIUS CLARK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

[June 18, 2015]

JUSTICE SCALIA, with whom JUSTICE GINSBURG joins, concurring in the judgment.

I agree with the Court's holding, and with its refusal to decide two questions quite unnecessary to that holding: what effect Ohio's mandatory-reporting law has in transforming a private party into a state actor for Confrontation Clause purposes, and whether a more permissive Confrontation Clause test—one less likely to hold the statements testimonial—should apply to interrogations by private actors. The statements here would not be testimonial under the usual test applicable to informal police interrogation.

L. P.'s primary purpose here was certainly not to invoke the coercive machinery of the State against Clark. His age refutes the notion that he is capable of forming such a purpose. At common law, young children were generally considered incompetent to take oaths, and were therefore unavailable as witnesses unless the court determined the individual child to be competent. Lyon & LaManga, The History of Children's Hearsay: From Old Bailey to Post-*Davis*, 82 Ind. L. J. 1029, 1030-1031 (2007). The inconsistency of L. P.'s answers—making him incompetent to testify here—is hardly unusual for a child of his age. And

the circumstances of L. P.'s statements objectively indicate that even if he could, as an abstract matter, form such a purpose, he did not. Nor did the teachers have the primary purpose of establishing facts for later prosecution. Instead, they sought to ensure that they did not deliver an abused child back into imminent harm. Nor did the conversation have the requisite solemnity necessary for testimonial statements. A 3-year-old was asked questions by his teachers at school. That is far from the surroundings adequate to impress upon a declarant the importance of what he is testifying to.

That is all that is necessary to decide the case, and all that today's judgment holds.

I write separately, however, to protest the Court's shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in *Crawford* v. *Washington*, 541 U. S. 36 (2004). For several decades before that case, we had been allowing hearsay statements to be admitted against a criminal defendant if they bore "'indicia of reliability.'" *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980). Prosecutors, past and present, love that flabby test. *Crawford* sought to bring our application of the Confrontation Clause back to its original meaning, which was to exclude unconfronted statements made by *witnesses—i.e.,* statements that were *testimonial*. 541 U. S., at 51. We defined testimony as a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact,'" *ibid.*—in the context of the Confrontation Clause, a fact "potentially relevant to later criminal prosecution," *Davis* v. *Washington*, 547 U. S. 813, 822 (2006).

Crawford remains the law. But when else has the categorical overruling, the thorough repudiation, of an earlier line of cases been described as nothing more than "adopt[ing] a different approach," *ante,* at 4—as though *Crawford* is only a matter of twiddle-dum twiddle-dee

preference, and the old, pre-*Crawford* "approach" remains available? The author unabashedly displays his hostility to *Crawford* and its progeny, perhaps aggravated by inability to muster the votes to overrule them. *Crawford* "does not rank on the [author of the opinion's] top-ten list of favorite precedents—and . . . the [author] could not restrain [himself] from saying (and saying and saying) so." *Harris* v. *Quinn*, 573 U. S. ___, ___ (2014) (KAGAN, J., dissenting) (slip op., at 15).

But snide detractions do no harm; they are just indications of motive. Dicta on legal points, however, can do harm, because though they are not binding they can mislead. Take, for example, the opinion's statement that the primary-purpose test is merely *one* of several heretofore unmentioned conditions ("necessary, but not always sufficient") that must be satisfied before the Clause's protections apply. *Ante,* at 7. That is absolutely false, and has no support in our opinions. The Confrontation Clause categorically entitles a defendant *to be confronted with the witnesses against him*; and the primary-purpose test sorts out, among the many people who interact with the police informally, *who is acting as a witness and who is not.* Those who fall into the former category bear testimony, and are therefore acting as "witnesses," subject to the right of confrontation. There are no other mysterious requirements that the Court declines to name.

The opinion asserts that future defendants, and future Confrontation Clause majorities, must provide "evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding." *Ante*, at 10. This dictum gets the burden precisely backwards—which is of course precisely the idea. Defendants may invoke their Confrontation Clause rights once they have established that the state seeks to introduce testimonial evidence against them in a criminal case

without unavailability of the witness and a previous opportunity to cross-examine. The burden is upon the prosecutor who seeks to introduce evidence *over* this bar to prove a long-established practice of introducing *specific* kinds of evidence, such as dying declarations, *see Crawford*, *supra*, at 56, n. 6, for which cross-examination was not typically necessary. A suspicious mind (or even one that is merely not naïve) might regard this distortion as the first step in an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause—in other words, an attempt to return to *Ohio* v. *Roberts*.

But the good news is that there are evidently not the votes to return to that halcyon era for prosecutors; and that dicta, even calculated dicta, are nothing but dicta. They are enough, however, combined with the peculiar phenomenon of a Supreme Court opinion's aggressive hostility to precedent that it purports to be applying, to prevent my joining the writing for the Court. I concur only in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 13–1352

OHIO, PETITIONER *v.* DARIUS CLARK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

[June 18, 2015]

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that Ohio mandatory reporters are not agents of law enforcement, that statements made to private persons or by very young children will rarely implicate the Confrontation Clause, and that the admission of the statements at issue here did not implicate that constitutional provision. I nonetheless cannot join the majority's analysis. In the decade since we first sought to return to the original meaning of the Confrontation Clause, see *Crawford* v. *Washington*, 541 U. S. 36 (2004), we have carefully reserved consideration of that Clause's application to statements made to private persons for a case in which it was squarely presented. See, *e.g.*, *Michigan* v. *Bryant*, 562 U. S. 344, 357, n. 3 (2011).

This is that case; yet the majority does not offer clear guidance on the subject, declaring only that "the primary purpose test is a necessary, but not always sufficient, condition" for a statement to fall within the scope of the Confrontation Clause. *Ante*, at 7. The primary purpose test, however, is just as much "an exercise in fiction . . . disconnected from history" for statements made to private persons as it is for statements made to agents of law enforcement, if not more so. See *Bryant*, *supra*, at 379 (THOMAS, J., concurring in judgment) (internal quotation marks omitted). I would not apply it here. Nor would I leave the resolution of this important question in doubt.

Instead, I would use the same test for statements to

private persons that I have employed for statements to agents of law enforcement, assessing whether those statements bear sufficient indicia of solemnity to qualify as testimonial. See *Crawford, supra,* at 51; *Davis* v. *Washington*, 547 U. S. 813, 836–837 (2006) (THOMAS, J., concurring in judgment in part and dissenting in part). This test is grounded in the history of the common-law right to confrontation, which "developed to target particular practices that occurred under the English bail and committal statutes passed during the reign of Queen Mary, namely, the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.*, at 835 (internal quotation marks omitted). Reading the Confrontation Clause in light of this history, we have interpreted the accused's right to confront "the witnesses against him," U. S. Const., Amdt. 6, as the right to confront those who "bear testimony" against him, *Crawford*, 541 U. S., at 51 (relying on the ordinary meaning of "witness"). And because "[t]estimony . . . is . . . a solemn declaration or affirmation made for the purpose of establishing or proving some fact," *ibid.* (internal quotation marks and brackets omitted), an analysis of statements under the Clause must turn in part on their solemnity, *Davis, supra,* at 836 (opinion of THOMAS, J.).

I have identified several categories of extrajudicial statements that bear sufficient indicia of solemnity to fall within the original meaning of testimony. Statements "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" easily qualify. *White* v. *Illinois*, 502 U. S. 346, 365 (1992) (THOMAS, J., concurring in part and concurring in judgment). And statements not contained in such materials may still qualify if they were obtained in "a formalized dialogue"; after the issuance of the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966); while in police custody; or in an attempt to evade confrontation. *Davis*,

supra, at 840 (opinion of THOMAS, J.); see also *Bryant*, 562 U. S., at 379 (same) (summarizing and applying test). That several of these factors seem inherently inapplicable to statements made to private persons does not mean that the test is unsuitable for analyzing such statements. All it means is that statements made to private persons rarely resemble the historical abuses that the common-law right to confrontation developed to address, and it is those practices that the test is designed to identify.

Here, L. P.'s statements do not bear sufficient indicia of solemnity to qualify as testimonial. They were neither contained in formalized testimonial materials nor obtained as the result of a formalized dialogue initiated by police. Instead, they were elicited during questioning by L. P.'s teachers at his preschool. Nor is there any indication that L. P.'s statements were offered at trial to evade confrontation. To the contrary, the record suggests that the prosecution would have produced L. P. to testify had he been deemed competent to do so. His statements bear no "resemblance to the historical practices that the Confrontation Clause aimed to eliminate." *Ibid.* The admission of L. P.'s extrajudicial statements thus does not implicate the Confrontation Clause.

I respectfully concur in the judgment.

522 S.W.3d 48
Court of Appeals of Texas, Houston (1st Dist.).

Roel David GONZALEZ, Appellant

v.

The STATE of Texas, Appellee

NO. 01-15-00902-CR, NO. 01-15-00903-CR

Opinion issued May 16, 2017

Synopsis

Background: Defendant was convicted in the 177th District Court, Harris County, Nos. 1325153 and 1325154, of aggravated sexual assault of a **child** and indecency with a **child**, based on incidents in which defendant allegedly placed his mouth and tongue on genitals of nine-year-old victim and stuck two fingers into victim's vagina. Defendant appealed.

Holdings: The Court of Appeals, Laura Carter Higley, J., held that:

[1] victim's uncorroborated testimony was sufficient to support jury's finding that defendant placed his mouth and tongue on victim's genitals and stuck two fingers into victim's vagina, as required for convictions;

[2] defendant had reasonable access to **forensic interviews** of victim and victim's minor sisters, under statute that prohibited defendant from copying **interviews**;

[3] statute that prohibited defendant from copying **forensic interviews** did not deny defendant access to information necessary to allow him to confront victim and sisters, and thus statute did not violate defendant's rights under Confrontation Clause;

[4] trial court's instruction to jury was sufficient to cure prosecutor's purportedly improper argument that defendant "bashed [victim's mother in the] head in with a beer bottle";

[5] defendant invited State's purportedly improper comment during closing argument at punishment phase, that jury should not "let anyone tell you or make you feel bad about your verdict," and thus defendant was not entitled to mistrial based upon comment; and

[6] State's purportedly improper comment did not strike over shoulders of defendant's counsel, as required to overcome presumption that jury followed trial court's curative instruction, and thus defendant was not entitled to mistrial based upon comment.

Affirmed.

West Headnotes (28)

[1] **Infants** ⇐ Weight and Sufficiency

Sex Offenses ⇐ Sex offenses against minors in general

Uncorroborated testimony of nine-year-old victim was sufficient to support jury's finding that on first occasion defendant placed his mouth and tongue on victim's genitals, and that on second occasion he stuck two fingers into victim's vagina, as required for convictions for aggravated sexual assault of a **child** and indecency with a **child**, notwithstanding any contradictions between victim's live testimony and victim's earlier **forensic interview**, where victim testified that on first occasion defendant pulled her underpants aside to put his mouth and tongue on her genitals, and that on second occasion she awoke to defendant unbuttoning her shorts and sticking two fingers into her vagina. Tex. Penal Code Ann. §§ 21.11(a)(1), 21.11(c)(1), 22.021(a)(1)(B)(i), 22.021(2)(B); Tex. Crim. Proc. Code Ann. art. 38.07(b)(1).

2 Cases that cite this headnote

[2] **Criminal Law** ⇐ Sufficiency to support conviction in general

Evidence is legally insufficient to support a conviction when the only proper verdict is acquittal.

[3] **Criminal Law** ⇐ Province of jury or trial court

An appellate court defers to the fact finder's resolution of conflicting evidence unless the resolution is not rational.

[4] **Criminal Law** ⇐ Conflicting evidence

Reconciliation of conflicts in the evidence is within the exclusive province of the jury.

1 Cases that cite this headnote

[5] **Infants** ⇐ **Child** statements and testimony

Sex Offenses ⇐ Sex offenses against minors

The uncorroborated testimony of a **child** victim is alone sufficient to support a conviction of aggravated sexual assault of the **child**. Tex. Crim. Proc. Code Ann. art. 38.07(b)(1); Tex. Penal Code Ann. § 22.021(a)(1)(B)(i),(2)(B).

7 Cases that cite this headnote

[6] **Infants** ⇐ Indecent contact, touching, or assault in general

Sex Offenses ⇐ Sex offenses against minors in general

A person commits the offense of indecency with a **child** if, among other things, he touches the breast or genitals of someone younger than 17 years of age with the intent to arouse or gratify the sexual desire of anyone. Tex. Penal Code Ann. §§ 21.11(a)(1), 21.11(c)(1).

3 Cases that cite this headnote

[7] **Infants** ⇐ Intent, state of mind, and motive

Sex Offenses ⇐ Intent or knowledge

The required intent to support a conviction for indecency with a **child** may be inferred from the surrounding circumstances. Tex. Penal Code Ann. § 21.11.

3 Cases that cite this headnote

[8] **Infants** ⇐ **Child** statements and testimony

Sex Offenses ⇐ Sex offenses against minors

The uncorroborated testimony of either the **child** or an outcry witness suffices to support a conviction for indecency with a **child**. Tex. Penal Code Ann. § 21.11; Tex. Crim. Proc. Code Ann. art. 38.07(b)(1).

1 Cases that cite this headnote

[9] **Criminal Law** ⇐ Accuracy or inclusiveness of reproduction; form

Defendant had reasonable access to **forensic interviews** of nine-year-old victim and victim's minor sisters regarding defendant's alleged sexual assault of victim, under statute which prohibited defendant from copying **interviews**, where State provided *Brady* notices for **forensic interviews**, defendant's counsel watched videos of **forensic interview** multiple times, including three times over weekend before trial, defendant's expert reviewed all three **interviews** prior to trial, and all three **interviews** were admitted by trial court and published to jury when State called **forensic interviewer** during its rebuttal case. Tex. Crim. Proc. Code Ann. art. 39.15.

[10] **Criminal Law** ⇐ Right of Accused to Confront Witnesses

Criminal Law ⇐ Cross-examination and impeachment

While the goal of the Confrontation Clause is reliability of evidence, it commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. U.S. Const. Amend. 6.

[11] **Criminal Law** ⇐ Necessity and scope of proof

State and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.

[12] **Witnesses** ⇐ Control and discretion of court

The trial court maintains broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion of the issues, endangering the witness, and the injection of cumulative or collateral evidence. U.S. Const. Amend. 6; Tex. R. Evid. 101(d).

[13] **Criminal Law** ⇐ Necessity and scope of proof

The evidence rules should not infringe upon defendant's ability to present a complete defense.

[14] **Criminal Law** ⇐ Failure to produce or disclose witnesses or evidence

Statute that prohibited defendant from copying **forensic interviews** of nine-year-old victim and victim's minor sister regarding defendant's alleged sexual assault of victim did not deny defendant access to information necessary to allow him to confront victim and sister, and thus statute did not violate defendant's rights under Confrontation Clause; defendant was not impeded from using inconsistencies in **forensic interviews** to impeach victim and sister because statute did not prevent defendant from confronting victim and sister regarding their motivation or bias in testifying, and by bringing the inconsistencies in victim's and sister's testimony to jury's attention, defendant provided jury with sufficient evidence to assess any bias of victim and sister against defendant. U.S. Const. Amend. 6; Tex. Crim. Proc. Code Ann. art. 39.15.

[15] **Criminal Law** ⇐ Statements as to Facts and Arguments

Proper jury argument generally must occupy one of four areas: (1) a summation of the evidence presented at trial; (2) a reasonable deduction drawn from that evidence; (3) an answer to the opposing counsel's argument; or (4) a plea for law enforcement.

1 Cases that cite this headnote

[16] **Criminal Law** ⇐ Arguments and conduct of counsel

In reviewing whether jury argument falls within a permitted area, the Court of Appeals considers the argument in light of the entire **record**.

[17] **Criminal Law** ⇐ Statements as to Facts, Comments, and Arguments

Even if improper, a jury argument does not constitute reversible error unless, in light of the **record** as a whole, the argument is extreme or improper, violates a mandatory statute, or injects new harmful facts about the accused into the trial proceeding.

[18] **Criminal Law** ⇐ Necessity of ruling on objection or motion

To preserve error in prosecutorial argument, a defendant must pursue to an adverse ruling his objections to jury argument.

1 Cases that cite this headnote

[19] **Criminal Law** ⇐ Requests for correction by court

Criminal Law ⇐ Arguments and conduct of counsel

When complaining about improper jury argument, the proper method of pursuing an objection to an adverse ruling is to: (1) object; (2) request an instruction to disregard; and (3) move for a mistrial. Tex. R. App. P. 33.1.

2 Cases that cite this headnote

[20] **Criminal Law** ⇐ Requests for correction by court

If an objection to an improper jury argument is sustained, the failure to request an instruction for the jury to disregard forfeits appellate review of errors that could have been cured by such an instruction.

1 Cases that cite this headnote

[21] **Criminal Law** ⇐ Arguments and conduct of counsel

If an instruction for the jury to disregard an improper jury argument could not have "cured" the objectionable event, a motion for mistrial is the only essential prerequisite to presenting the complaint on appeal.

[22] **Criminal Law** ⇐ Action of Court in Response to Comments or Conduct

A prompt instruction for the jury to disregard an objectionable event ordinarily cures any harm from improper argument.

[23] **Criminal Law** ⇐ Issues related to jury trial

The Court of Appeals reviews a trial court's ruling on a motion for mistrial for an abuse of discretion.

[24] **Criminal Law** ⇐ Matters not sustained by evidence

Trial court's instruction to jury was sufficient to cure prosecutor's purportedly improper argument that defendant "bashed [victim's mother in the] head in with a beer bottle," notwithstanding defendant's argument that prosecutor's statement was outside the evidence because bottle was "thrown," where defendant objected to prosecutor's statement, trial court overruled objection, and trial court then immediately instructed jury that "what the attorneys say in closing arguments is not evidence, and the jury will rely on what the testimony was presented."

[25] **Criminal Law** ⇐ Rebuttal Argument; Responsive Statements and Remarks

Criminal Law ⇐ Sentencing phase arguments

Defendant invited State's purportedly improper comment during closing argument at punishment phase of trial, that jury should not "let anyone tell you or make you feel bad about your verdict … [t]hat's not right," and thus defendant was not entitled to mistrial based upon comment, since defendant's argument noted that jury took ten hours to reach guilty verdicts, suggested that jury had doubts about verdicts, and revived such doubts to achieve lesser punishment, and thus defendant invited State's comment that long deliberations were part of jury deliberation process and that jury need not feel guilty about taking ten hours, and even if State's comment was not invited, trial court sustained defendant's objection and immediately issued instruction to disregard comment.

[26] **Criminal Law** ⇐ Rebuttal Argument; Responsive Statements and Remarks

During closing argument the State may argue subjects that would otherwise be improper when invited to do so by the defendant's own remarks.

[27] **Criminal Law** ⇐ Sentencing phase arguments

State's purportedly improper comment during closing argument at punishment phase of trial, that jury should not "let anyone tell you or make you feel bad about your verdict … [t]hat's not right," did not strike over shoulders of defendant's counsel, as required to overcome presumption that jury followed trial court's instruction for jury to disregard comment, and thus defendant was not entitled to mistrial based upon comment, since State's comment, which was made in response to defendant's argument that jury had doubts about guilty verdict because it deliberated for ten hours, was more akin to calling defendant's argument ridiculous than it was to calling defense counsel a liar, and thus State's comment attacked defendant's arguments, rather than his counsel personally.

1 Cases that cite this headnote

[28] **Criminal Law** ⇐ Attacks on opposing counsel

> Striking over counsel's shoulders involves the State calling defense counsel a liar or accusing counsel of suborning perjury.

***51 On Appeal from the 177th District Court, Harris County, Texas, Trial Court Case No. 1325153 & 1325154**

Attorneys and Law Firms

Wayne T. Hill, Houston, TX, for Appellant.

Jessica Caird, Assistant District Attorney, Kim K. Ogg, District Attorney, Houston, TX, for State.

Panel consists of Justices Keyes, Higley, and Lloyd.

OPINION

Laura Carter Higley, Justice

A jury found Appellant, Roel David Gonzalez, guilty of the offense of aggravated sexual assault of a **child** on the first offense and indecency with a **child** on the second.[1] Appellant elected for the jury to assess punishment, and it assessed his punishment at confinement for twenty years on ***52** the first offense and five years on the second offense, to run concurrently. Appellant raises the following five issues: "Evidence was insufficient as a matter of law to sustain Appellant's conviction for" (1) "the offense of aggravated sexual assault of a **child** [and (2)] for the offense of indecency with a **child**"; (3) "[t]he trial court erred in denying Appellant's motion [for] mistrial for the constitutional challenge to article 39.15 of the Texas Code of Criminal Procedure;" (4) "[t]he trial court erred when it overruled Appellant's objection to the improper argument of the prosecutor injecting evidence outside the **record**"; and (5) "[t]he trial court erred in denying Appellant's motion for mistrial based upon the prosecutor's improper jury argument."

We affirm.

Background

Mother testified that she met Appellant through work, began dating him, and eventually they moved into a house along with Mother's three daughters in 2008. At the time, Alice was almost twelve, Belle was ten, and Cici, the complainant, was age eight.[2] Appellant became the family's primary supporter because, as Belle and Cici testified, Mother contracted multiple sclerosis. They lived together happily until one night when Appellant and Mother argued and threw beer containers at each other.

According to Mother's testimony, Appellant was outside drinking with friends. After she asked them to come inside, she went outside where she and Appellant argued. Mother conceded that, after they argued, she threw a six-pack of beer at Appellant, and then he threw a twelve-pack of beer at her, cutting her forehead and cheek. Alice testified that she heard Mother go outside, and then she heard a loud boom. Alice went outside, smelled beer and blood, and saw her mother on the floor next to broken glass beer bottles with a bleeding gash on her forehead. Belle testified that, after Alice woke her, she ran outside to the garage and saw her mother bleeding and beating on Appellant's car window. Cici also saw her mother bleeding after the beer bottle incident.

Following this incident, the relationship between the girls and Appellant was strained. Mother testified that, before the beer bottle incident, the girls would greet Appellant, but afterwards, they did not want to be home with him on the weekends. Priscilla Mango and Bryanna Gonzalez, Appellant's daughters, also observed the change in behavior. Mango testified that the girls initially called her father "Daddy," but stopped after the beer bottle incident. Gonzalez testified that "[the girls] loved him like their own father," but became cold and distant after the incident. Also, during cross-examination, an investigator for the Texas Department of Family and Protective Services (DFPS) testified that Alice told her that she wanted Appellant out of the house and that she wanted her Mother and her biological father to reconcile. According to the investigator, Alice's dislike for Appellant increased after the beer bottle incident. The investigator also confirmed that Mother knew her daughters did not like Appellant. Belle and Cici both conceded on the stand that they did not like Appellant.

In 2009, on the night of the first incident, Belle testified that she, Cici, and Appellant were up late playing Monopoly, as they often were, and Mother had gone to sleep. Belle lost. While the game continued, she fell asleep. She testified that she ***53** woke up as Appellant tried to unzip her blue jean

shorts to the light of a camouflage-colored flashlight, but she rolled over, dissuading him. She also testified that she saw Appellant move towards Cici with a flashlight, and then stand over her. Belle said that she thought Appellant did the same thing to Cici.[3]

Cici testified that Appellant stood over her and pulled her nightgown up and underpants aside to put his mouth and tongue on her genitals. Cici defined her genitals as the part of her body she uses to go to the bathroom. Cici was scared and "didn't know what to do."

Cici further testified that, after a while, Appellant stopped, retrieved a beer from the kitchen, and came back. Appellant re-opened her legs by grabbing her ankles, and returned to licking her genitals. Cici kept her eyes shut, so that Appellant would not know she was awake.

Cici also testified that, on a second night, she awoke to Appellant unbuttoning her shorts and sticking two fingers into her vagina, which she demonstrated during trial using a Kleenex box. She was in the room where all three girls slept. Unlike the last time, Cici said it hurt her, so she opened her eyes, but she did not try to wake her sisters. Cici testified that Appellant stopped, went to the bathroom, and washed his hands.

On a third night, Cici testified that she saw Appellant enter their room, but Cici shook Alice awake. Alice questioned Appellant's presence. Also, the noise woke Mother, who asked Appellant to turn off the light. Appellant left the room.

Alice testified that she learned of the abuse from Belle and Cici in the summer of 2010, and she started a rumor at school that Appellant had raped her. She testified that the point of the rumor was to remove Appellant from the house or to call attention to Appellant's wrongdoing. When confronted by a school counselor, Alice conceded that she lied when she said that Appellant raped her. The DFPS investigator testified that she received a report about suspected abuse in April of 2011, and that both Belle and Cici told her about the sexual abuse.

All three girls were transported to, and participated in, **forensic interviews** at the **Children**'s Assessment Center. Stephanie Jones, the **forensic interviewer**, testified that Cici was 10 years old at the time of the **interview** and made the comment "my stepfather raped me."

The State provided *Brady* notices for the **forensic interviews** to Appellant. Prior to and during trial, Appellant moved for copies of the **forensic interviews** in order to fully prepare his defense. The trial court allowed access to the **interviews**, but did not allow Appellant to copy the **interviews**. Both Appellant's counsel and expert reviewed all three videos prior to trial. Appellant also asked for a mistrial on the basis that the lack of copies hindered his right to prepare and confront witnesses, and the trial court denied the mistrial request. During its rebuttal case, the State called the **forensic interviewer**, and, after Appellant waived his objections, all three **interviews** were admitted by the trial court and published to the jury.

During his cross-examination of the girls, Appellant highlighted inconsistencies between their testimony on the stand and their **forensic interviews**. Belle conceded on the stand that in the **forensic interview** she did not mention the flashlight, did not ***54** remember telling Cici to go to her room, did not see Appellant get a beer after the initial abuse of Cici, and did not see Appellant go back and touch Cici again. Cici testified that she did not remember Appellant using a flashlight, and still did not remember the flashlight after reviewing her **forensic interview** testimony in which she said she woke up to a bright light. Cici did not tell the **forensic interviewer** about Appellant's massaging her feet before she fell asleep

Appellant, on appeal, calls our attention to discrepancies between Belle and Cici's testimony: Cici did not remember falling asleep on the couch, nor did she remember anyone else being awake, even though Belle had testified to being awake. Also, Belle said the girls did not wear shorts around Appellant, but Cici said she was wearing shorts during the second assault.

Concerning the third night, Appellant also points out on appeal that Cici testified in the **forensic interview** that her older sister, Alice, was at her grandmother's house, not at home, as she testified at trial.

Dr. Reena Isaac, a **child** abuse pediatrician and the medical director of the **forensic** nurse team at Texas **Children**'s Hospital, conducted the medical examinations for the DFPS investigation, and specifically of Cici. Isaac testified that Cici told her that Appellant touched "in my private parts" and pointed to her genitals. Isaac related that Cici said Appellant touched her genitals with his mouth and his fingers two times, but Cici never saw Appellant's private part. Isaac further

testified that she found no damage in Cici's genital area, which was expected because any damage could have repaired itself within days. On cross-examination, Isaac conceded that, even though the exam itself is not dispositive, she did not see any physical signs of abuse.

Dr. Gilbert Garcia, a pediatrician with Northeast Pediatric Associates of Humble, testified that Cici visited his office twice in 2011. The first was a normal visit, where everything "looked fine." On a second visit for an upper respiratory infection several months later, Mother and Cici met with one of Dr. Garcia's physician's assistants. Dr. Garcia read the assistant's notes to the jury, which indicated Mother was very concerned about **child** abuse dating back two years, and she asked for a referral to a psychiatrist:

> Mom states that patient was sexually abused for over two years. She found out this April that her boyfriend was sexually abusing [Belle] and her sister. Mom had gone to the police and both girls had been examined by CPS physicians. The boyfriend is no longer in the picture. Mom is pressing charges. Mom is very concerned, crying in the office. She states that the girls do not talk about what happened and are very withdrawn. Mom would like for them to be seen by a psychiatrist.

Dr. Garcia testified that his office did make a referral, but Mother never updated them about any treatment CiCi was receiving.

Dr. Mathew Ferrara, a licensed psychologist and licensed sex offender treatment provider, suggested on the stand that about 42% of sexual abuse allegations are unfounded. He stated that false allegations most typically occur in older **children** who either have specific motives or who are coached for custody or divorce hearings by a parent. Motives may include lying to protect a parent from being hurt by another. Ultimately, he asserted that contradictions in the testimony of **children** are the key to identifying whether a statement is false. Dr. Ferrara suggested that if one **child** says she saw someone touching another's genitals with his fingers, but another *55 **child** felt or saw the offender touching her genitals with his mouth, that would be a major contradiction.

Dr. Ferrara also confirmed, on cross-examination, a few basic truths about **child** sexual abuse: victims and offenders usually know one another; offenders can have active sexual relationships with their spouses while committing sexual offenses with **children**; and intoxication could encourage an offender.

Appellant provided three character witnesses: his ex-wife, a relative, and a neighbor. Appellant's ex-wife testified that she had known him for 30 years, and he was a good person, despite her having filed a protective order against him in the past. His ex-wife testified she filed the protective order after three death threats. First, Appellant threatened to kill his ex-wife when he caught her alone. Second, he followed his ex-wife into a neighbor's house, and told everyone that they could neither leave nor use a phone. He, then, shoved her into a wall, while grabbing and squeezing her wrists, saying that if he hit her, she would not get up. Third, he grabbed her arm while she was leaving work and threatened to kill her because he said that she was having a relationship with another man.

Enedelia Pina, who identified Appellant as her husband's nephew, testified that she knew Appellant, and knew he was a peaceful and law abiding citizen. Michael Santos, Appellant's neighbor since 1977 and a sergeant with the Harris County Sheriff's Office, testified that Appellant was a peaceful, law-abiding citizen and a good neighbor. Both Pina and Santos were aware of the beer bottle incident, but it did not change their opinion of Appellant.

In June 2012, the State indicted Appellant for the offenses of aggravated sexual assault of and indecency with Cici, a **child** under the age of fourteen. The indictments for aggravated sexual assault and indecency with a **child** alleged, respectively:

> The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, ROEL DAVID GONZALEZ, hereafter styled the Defendant, heretofore on or about JANUARY 1, 2009, did then and there unlawfully, intentionally and knowingly cause the sexual organ of [Cici], a person younger than fourteen years of age, to contact the MOUTH of THE DEFENDANT.
>
> The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, ROEL DAVID GONZALEZ, hereafter styled the Defendant, heretofore on or about JANUARY 30, 2009, did then and there unlawfully, intentionally and knowingly cause the penetration of the SEXUAL ORGAN of [Cici], hereinafter called the Complainant, a person younger than fourteen years of age, by placing HIS FINGER in the SEXUAL ORGAN of the Complainant.

Later, in closing argument, both Appellant and the State revisited the night when Appellant struck Mother on the head with a beer bottle. In his closing argument in the guilt phase, Appellant suggested that the girls had lied about the sexual abuse in order to protect their Mother from Appellant. During the punishment phase, after recounting Appellant's mistreatment of his ex-wife, the State suggested he continued the same pattern of behavior with Mother because Appellant "bash[ed] her head in with a beer bottle." Appellant objected that the State's statement was outside the evidence because the bottle was "thrown." The trial court overruled the objection and instructed the jury to rely on testimony as evidence.

***56** Also in closing argument for the punishment phase, Appellant and the State also discussed what impact the length of jury deliberation should have on Appellant's punishment. Appellant suggested that the jurors could use any residual doubts they had when they considered Appellant's punishment. The State responded in their argument "Don't let anyone tell you or make you feel bad about your verdict. That's not right." Appellant objected. The trial court sustained the objection and instructed the jury to disregard the last comment. Appellant then asked for, but the trial court denied, a request for mistrial.

The jury found Appellant guilty of aggravated sexual assault of and indecency with a **child** and assessed punishment at twenty years' confinement on the first offense and five years' confinement on the second offense. The trial court entered judgment on the jury's verdict and punishment sentence. Appellant now brings this appeal.

Sufficiency of the Evidence

[1] In his first and second issues, Appellant argues that the evidence is insufficient to support the offense of aggravated sexual assault of a **child** or of indecency with a **child** because enough factual inconsistencies proliferate the **record** to prevent a rationale juror from finding Appellant guilty beyond a reasonable doubt. Appellant contends that the **children** were motivated by anger, after Appellant bloodied their mother with a beer bottle. The State asserts that Appellant is asking this Court to re-weigh the evidence, which is the jury's responsibility. Instead, the State argues that the **children**'s testimony combined with the **forensic interview** videos and medical **records** was sufficient for the jury to find Appellant placed his mouth on Cici's sexual organ and two fingers into Cici's sexual organ while she was younger than fourteen years of age.

[2] **[3]** In evaluating the sufficiency of the evidence, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (***citing*** *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd); ***but see*** *Johnson v. State*, 419 S.W.3d 665, 671 n.2 (Tex.App.—Houston [1st Dist.] 2013, pet. ref'd) (suggesting the Court of Criminal appeals should revisit whether legal and factual sufficiency standards of review are indistinguishable). Evidence is legally insufficient when the "only proper verdict" is acquittal. *Tibbs v. Florida*, 457 U.S. 31, 41–42, 102 S.Ct. 2211, 2218, 72 L.Ed.2d 652 (1982). We examine sufficiency under the direction of *Brooks*, while giving deference to the responsibility of the jury "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19, 99 S.Ct. at 2788–89). We defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

[4] Jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given the witness's testimony. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981); *Jaggers v. State*, 125 S.W.3d 661, 672 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). And, they may choose to believe or disbelieve any part of a witness's testimony. ***57** *See Davis v. State*, 177 S.W.3d 355, 358 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Likewise, "reconciliation of conflicts in the evidence is within the exclusive province of the jury." *Wyatt v. State*, 23 S.W.3d 18, 30 (Tex. Crim. App. 2000) (citing *Losada v. State*, 721 S.W.2d 305, 309 (Tex. Crim. App. 1986)).

[5] A person commits the offense of aggravated sexual assault of a **child** if the person intentionally or knowingly causes the penetration of the anus or sexual organ of a **child** by any means, and the victim is under the age of fourteen. *See* Tex. Penal Code Ann. § 22.021 (a) (1) (B) (i), (2) (B) (Vernon Supp. 2016). The uncorroborated testimony of a **child** victim is alone sufficient to support a conviction of aggravated sexual assault of the **child**. *See* Tex. Code Crim. Proc. Ann. art. 38.07

(Vernon Supp. 2016) (providing that if victim is age seventeen or younger, requirement that victim inform another person of alleged offense within one year does not apply); *Johnson*, 419 S.W.3d at 671–72.

[6] [7] [8] A person commits the offense of indecency with a **child** if, among other things, he touches the breast or genitals of someone younger than 17 years of age with the intent to arouse or gratify the sexual desire of anyone. Tex. Penal Code Ann. § 21.11(a)(1), (c)(1). Touching a **child** through her clothing is encompassed by the offense. § 21.11(c)(1). The required intent may be inferred from the surrounding circumstances. *Navarro v. State*, 241 S.W.3d 77, 79 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). The uncorroborated testimony of either the **child** or an outcry witness suffices to support a conviction for indecency with a **child**. *Jones v. State*, 428 S.W.3d 163, 169 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

Here, Cici was nine years old at the time of the offenses. Cici testified that Appellant pulled her underpants aside to put his mouth and tongue on her genitals. Cici defined her genitals as the part of her body she uses to go to the bathroom. Belle testified that on the same night, Appellant tried to unzip her shorts, but she rolled over, dissuading him. Belle testified that she also saw Appellant move towards Cici with a flashlight, and then stand over her.

Cici testified that another night, she awoke to Appellant unbuttoning her shorts and sticking two fingers into her vagina, which she demonstrated during trial using a Kleenex box. Cici's testimony that Appellant placed his mouth on and finger inside her vagina is alone sufficient to support Appellant's convictions for aggravated sexual assault of and indecency with a **child**. *See* Tex. Code Crim. Proc. Ann. art. 38.07; *Jones*, 428 S.W.3d at 169; *Johnson*, 419 S.W.3d at 671–72.

Viewing the evidence in the light most favorable to the jury's verdict, as we must, we conclude that a rational trier of fact could have found that Appellant committed the offense of aggravated sexual assault of and indecency with a **child**, and we defer to that finding. The jury could resolve any contradictions between the girls' live testimony and earlier **forensic interviews** in favor of the girls' account. *See Wyatt*, 23 S.W.3d at 30. Accordingly, we hold that the evidence is sufficient to support Appellant's conviction for aggravated sexual assault of and indecency with a **child**.

We overrule Appellant's issues error one and two.

Constitutionality of Article 39.15

In issue three, Appellant asserts "[t]he trial court erred in denying Appellant's motion [for] mistrial for the constitutional challenge to article 39.15 of the Texas Code of Criminal Procedure." Appellant argues that his limited access to the girls' **forensic interviews** under of the Texas ***58** Code of Criminal Procedure interfered with his counsel's and his expert's preparations, and he was unable to confront the **child** witnesses as allowed by the Confrontation Clause and Article I Section 10 of the Texas Constitution. *See* U.S. Const. amends. VI, XIV; Tex. Const. art. I, § 10; Tex. Code Crim. Proc. Ann. art. 39.15 (Vernon Supp. 2016). Appellant asserts he should have been given copies of the videos, not access to them. The State argues that Article 39.15 is constitutional because Appellant was able to view the **forensic interviews** and use the information within them against the girls when they testified in the trial court. We must, therefore, determine whether the **records** were made reasonably available to Appellant, satisfying the statutory requirements, and then whether the statute violates the Confrontation Clause.

A. Reasonable Availability of Forensic Records under Article 39.15

Article 39.15 of the Texas Code of Criminal Procedure provides that a court should make a **child** victim's **forensic interviews** reasonably available for inspection, but should not allow the defendant's team to copy them:

> (a) In the manner provided by this article, a court shall allow **discovery** under Article 39.14 of property or material:
>
> ....
>
> (3) that is described by Section 2 or 5, Article 38.071, of this code.
>
> (b) Property or material described by Subsection (a) must remain in the care, custody, or control of the court or the state as provided by Article 38.45.
>
> (c) A court shall deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce any property or material described by Subsection (a), provided that the state makes the property or material reasonably available to the defendant.

> (d) For purposes of Subsection (c), property or material is considered to be reasonably available to the defendant if, at a facility under the control of the state, the state provides ample opportunity for the inspection, viewing, and examination of the property or material by the defendant, the defendant's attorney, and any individual the defendant seeks to qualify to provide expert testimony at trial.

Tex. Code Crim. Proc. Ann. arts. 39.15 & 38.071 (Vernon Supp. 2016).

The State provided *Brady* notices for the **forensic interviews** to Appellant. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Accordingly, three times prior to trial, Appellant filed motions requesting production of the **forensic interviews** of Belle and Cici, which the State opposed because it was statutorily prevented from producing the videos:

> 1. In Texas, defendants have no general right of **discovery** as governed by Article 39.14 of the Texas Code of Criminal Procedure.
>
> 2. The Texas legislature amended both Article 39.15 of the Code of Criminal Procedure and § 264.408 of the Family Code to prohibit a court from ordering that videotaped **interview** of a **child** made at a **child** advocacy center (CAC) be copied or otherwise reproduced for a defendant, as long as it is made available to the defendant as required under Article 39.15(d) of the Code of Criminal Procedure.

See Tex. Code Crim. Proc. Ann. art. 39.15, § (c); Tex. Fam. Code Ann. § 264.408 (Vernon Supp. 2016) ("(d-1) ... A court shall deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce a video **recording** of an **interview** described by Subsection (d)," including ***59 child forensic** videos). The trial court partially granted the motions, allowing for access to the **interviews** but not to copies.

During a break in Belle's trial testimony, Appellant moved for the State to provide copies of all three **forensic interviews** as sealed exhibits. He asserted that Article 39.15, as applied to his case, violated his due process and confrontation rights because any witness impeachment using the information on the tapes required that he play back part of the tape **recording** or a transcript. He also asked for a mistrial because it "hinder[ed] the defendant's right to prepare and confront witnesses." Appellant's counsel conceded to watching the **forensic interview** videos multiple times, including three times over the weekend before trial. Appellant's expert also reviewed all three **interviews** prior to trial. The trial court denied the motions, but ordered the **forensic interviews** sealed and placed in the **record** for appellate purposes. Appellant proceeded to cross-examine Belle and Cici, pointing out inconsistencies between their present testimony and the **forensic interviews**.

During its rebuttal case, the State called the **forensic interviewer**, and, after Appellant waived his objections, all three **interviews** were admitted by the trial court and published to the jury.

Our sister courts, considering reasonable availability in the light of the Sixth Amendment, have consistently held that making available **forensic interviews** for defense counsel constitutes making the **records** reasonably available. In *In Matter of W.E.J.*, the Waco Court of Appeals held that a trial court did not abuse its discretion when it interpreted Article 39.15 to bar the creation of a translated transcript of **children**'s **forensic interviews** to play before the jury. 494 S.W.3d 178, 180 (Tex. App.—Waco 2015, pet. denied). Instead, the **forensic interviews** were reasonably available when: "appellant's counsel viewed the video of the **forensic interviews** and used his own translator to transcribe and translate word for word the **interviews** of the **child** victims from Spanish to English." *See id.* Similarly, in *Flores v. State*, the videos were reasonably available when "he received full access to the video **interview** and did in fact inspect the video and was able to refer to specific times and statements on the video during his trial questioning." No. 04-14-00915-CR, 2015 WL 5730263, at *3 (Tex. App.—San Antonio Sept. 30, 2015, pet. ref'd) (mem. op., not designated for publication). Finally, in *Loveday v. State*, the court said that having "ample opportunity to review the **recording** before it was shown to the jury" was reasonable availability, but rejected Appellant's request for copies of the **recording** or to view the **recording** outside a "State[-]controlled facility." No. 09-12-00240-CR, 2013 WL 5874280, at *5–6 (Tex. App.—Beaumont Oct. 30, 2013, pet. ref'd) (mem. op., not designated for publication).

One sister court has held that the right to access the videos is statutorily limited to defense counsel and an expert, and a court reporter cannot do so on behalf of a defendant. *In re Ligon*, No. 09-14-00262-CR, 2014 WL 2902324, at *1–2 (Tex. App.—Beaumont June 26, 2014, no pet.) (mem. op., per curiam, not designated for publication) (granting mandamus to prevent court reporter from transcribing **child**'s video despite Appellant's argument that transcription is not reproduction).

Prior to trial and during trial, in the instant case, Appellant moved for copies of all three **forensic interviews**, but the trial court only granted access to them and did not provide copies. His counsel reviewed all three **forensic interview** videos, including three times over one weekend break, and used inconsistencies against Belle and ***60** Cici during their trial testimony. Appellant's expert also reviewed the videos.

[9] We conclude that access was reasonable under Article 39.15. However, Appellant does not argue that his access was unreasonable as defined by the statute, but that the limitation that prevented him from copying the **forensic interviews** was unconstitutional. *See* art. 39.15. We therefore turn to whether the limitation violated the Confrontation Clause in the Constitution of the United States and, therefore, whether Article 39.15 places an unconstitutional limitation on a defendant's access to evidence needed for cross-examination.

B. Constitutionality of Article 39.15 as Applied Under the Confrontation Clause

[10] The Confrontation Clause of the Sixth Amendment guarantees an accused the right "to be confronted with the witnesses against him" by having an opportunity to cross-examine the witnesses. U.S. Const. amends. VI, XIV; *see also Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986); *Lopez v. State*, 18 S.W.3d 220, 222 (Tex. Crim. App. 2000). While admitting that the goal of the Confrontation Clause is reliability of evidence, "[i]t commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61, 124 S.Ct. 1354, 1370, 158 L.Ed.2d 177 (2004); *see also Henley v. State*, 493 S.W.3d 77, 95 (Tex. Crim. App. 2016) (summarizing the interaction of the Confrontation Clause and the Texas Rules of Evidence) (upholding *Lopez v. State*, 18 S.W.3d 220, 225 (Tex. Crim. App. 2000)).[4]

[11] **[12]** "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006). Also, "[t]he trial court maintains broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion of the issues, endangering the witness, and the injection of cumulative or collateral evidence." *Henley v. State*, 493 S.W.3d at 95; Tex. R. Evid. 101(d); *Holmes*, 547 U.S. at 326, 126 S.Ct. at 1732.

[13] The evidence rules should not, however, infringe upon defendant's ability to present a complete defense. *Holmes*, 547 U.S. at 324, 126 S.Ct. at 1731; *see Smith v. State*, 236 S.W.3d 282, 292 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd); *see e.g.*, *Coronado v. State*, 351 S.W.3d 315, 324–31 (Tex. Crim. App. 2011) (holding admission of **child**'s written interrogatories in lieu of live testimony, under Tex. Code Crim. Proc. Ann. art. 38.071 § 2, was unconstitutional); *compare with Thomas v. State*, 837 S.W.2d 106, 112–14 (Tex. Crim. App. 1992) (holding in camera review by trial court to determine whether crime stoppers information contained *Brady* information would meet the balance of defendant's constitutional rights against the State's interest in fostering law enforcement).

Appellant, argues that his inability to copy the **forensic interviews** prevented his counsel and expert from preparing for confrontation of the witnesses, and therefore Article 39.15 is unconstitutional. He cites *Davis v. Alaska* for the proposition that confidentiality must give way to a defendant's ***61** right to cross-examination. 415 U.S. 308, 320, 94 S.Ct. 1105, 1112, 39 L.Ed.2d 347 (1974).

In *Davis*, the Supreme Court of the United States faced the question of whether a defendant's rights under the Sixth Amendment's Confrontation Clause could trump a state's interest in keeping juvenile **records** confidential. *Id.* at 309, 94 S.Ct. at 1107. The Supreme Court held that, under the specific facts presented, Davis's confrontation rights would be violated if he could not show the potential bias of the juvenile witness against him. *Id.* at 319, 94 S.Ct. at 1112. Specifically where the juvenile witness, Green, was on probation for burglarizing two cabins, Green had the potential for bias when an emptied safe was found near his family's property. *Id.* at 310–11, 317–18, 94 S.Ct. at 1107–08, 1111.

The Court found Green to be "a crucial witness for the prosecution" because he testified that he saw Davis near where the safe was discovered "with something like a crowbar," and he identified Davis in a photographic lineup and at trial. The Court stated:

> Richard Green was a crucial witness for the prosecution. He testified at trial that while on an errand for his mother he confronted two men standing beside a late-model metallic blue Chevrolet, parked on a road near his family's house. The man standing at the rear of the car spoke to Green asking if Green lived nearby and if his father was home. Green offered the men help, but his offer was rejected.

> On his return from the errand Green again passed the two men and he saw the man with whom he had had the conversation standing at the rear of the car with 'something like a crowbar' in his hands. Green identified petitioner at the trial as the man with the 'crowbar.' The safe was discovered later that afternoon at the point, according to Green, where the Chevrolet had been parked.

Id. at 310, 94 S.Ct. at 1107. When he was brought in to identify the individuals on a six person photo-array, Green identified Davis "within 30 seconds to a minute." *Id.* at 309–10, 94 S.Ct. at 1107.

Before Green testified, the State sought a protective order to prevent reference to Green's juvenile **record** in cross-examination. *Id.* at 310, 94 S.Ct. at 1107. Davis opposed the motion because he wanted to argue that Green might have been pressured to make his identifications under the fear of possible probation revocation. *Id.* at 311, 94 S.Ct. at 1108. The trial court granted the State's motion. *Id.*

On cross-examination, "counsel for petitioner did his best to expose Green's state of mind at the time Green discovered that a stolen safe had been discovered near his home." *Id.* at 312, 94 S.Ct. at 1108. When asked whether he was worried about police suspicions, Green answered, "No," but he "did admit that it crossed his mind that the police might have thought he had something to do with the crime." *Id.* The Alaskan Supreme Court affirmed Davis' conviction, suggesting that this cross-examination was sufficient to resolve any bias or motive issue. *Id.* at 314–15, 94 S.Ct. at 1109–10.

The Supreme Court of the United States did not agree that the testimony adequately developed the issue of bias. *Id.* at 318, 94 S.Ct. at 1111. It suggested that Green's bold 'No' would not have been given but for the protective order and that the police probably did question Green concerning his prior burglaries prior to Green's identification of Davis. *Id.* at 314, 94 S.Ct. at 1109. "While counsel was permitted to ask Green whether he was biased, counsel was unable to make a **record** from which to argue why Green might have been biased ***62** or otherwise lacked that degree of impartiality expected of a witness at trial." *Id.* at 318, 94 S.Ct. at 1111. The jury might have thought the inquiry was a "baseless line of attack" on a "blameless witness" or repetitive cross-examination. *Id.* Therefore, the jury needed access to the protected facts to draw "inferences relating to the reliability of the witness." *Id.*

Thus, the Court held that the State's interest in protecting the anonymity of juvenile offenders was outweighed by Davis' right of cross-examination, stating,

> Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile **record**—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

Id. at 319, 94 S.Ct. at 1112.

While the Texas Court of Criminal Appeals has addressed the *Davis* holding in earlier cases, in *Carmona v. State*, it sought to clarify that *Davis*'s holding was limited by its facts. 698 S.W.2d 100, 104 (Tex. Crim. App. 1985). "The opinion in Davis is replete with references to 'on the facts of this case,' 'in this setting,' and other such references." *Id. Davis*'s holding is distinguishable from other cases in which cross-examination occurred because in *Davis* "the defendant was completely deprived of the opportunity to develop his theory of the witness' bias or motive for testifying." *Id.* The Court of Criminal Appeals held in *Carmona* that *Davis* was not a per se rule mandating the reversal of a conviction limiting cross-examination into juvenile offenses, but a rationale that criminal defendants be allowed an effective cross-examination. *Id.* at 103–04.

The Court also distinguished *Davis* because "the bias and prejudice of the witness [was] so patently obvious" in *Carmona*. *Id.* at 105. The cross-examination of the juvenile witness, Garcia, took over a day and a half by four defense attorneys. *Id.* His testimony revealed that he received "great leniency" and a grant of immunity from the State in exchange for favorable testimony; a "chilling picture" of drug and alcohol abuse along with prior crimes since the age of four; and to a prior aggravated perjury before a Travis County grand jury, to which he was not immune. *Id.* In that case, the defendant, along with Garcia and other co-defendants, were accused of abducting, raping, and killing a woman. *Id.* at 102. "In sum, Garcia's testimony vividly portrayed the life of a habitual juvenile miscreant." *Id.* at 104. Thus, the *Carmona* court held that a trial court can prohibit questions about an unrelated pending charge when the defendant has otherwise been afforded an effective cross-examination and the bias and prejudice of the witness is patently obvious. *Id.* at 104–05.

The Court of Criminal Appeals again clarified *Davis* in *Irby v. State* to mean that a defendant must show the logical connection between the witnesses' testimony and the

witnesses' probationary status. 327 S.W.3d 138, 146, 154 (Tex. Crim. App. 2010). In *Irby*, Irby wanted to cross-examine the testifying complainant, W.P., about the fact the W.P. was on deferred-adjudication probation for aggravated assault with a deadly weapon to show bias and motive, but the trial court did not allow the impeachment. *Id.* at 140. Irby was charged with sexual assault of the minor W.P. *Id.* Specifically, Irby cited *Davis* and "explained that, on the day that W.P. told the police about the sexual encounters, W.P. believed that he could get into trouble because William had planned to rob [Irby]" to retrieve W.P.'s money. *Id.* at 142, 153. The trial court disallowed the proposed cross-examination because it held ***63** the probation and sexual assault matters were completely separate. *Id.* at 140. The Dallas Court of Appeals upheld the trial court's ruling. *Id.* at 144–45. The Court of Criminal Appeals agreed with the trial court's holding that the defendant failed to show the logical connection between the complainant's testimony and the complainant's probationary status. *Id.* at 154. Factually, W.P. had already told other people of the sexual encounters, and the robbery had already been foiled before W.P. spoke to the police. *Id.* As the court explained, Irby "fails to suggest how William's conduct would be attributable to W.P. or how a false story of W.P.'s consensual sexual encounters would exonerate or ameliorate the conduct of either of them." *Id.*

The Court of Criminal Appeals pointed out that the Supreme Court of the United States had held that Davis should be allowed to cross-examine the juvenile witness on probation because the State could leverage the juvenile's probationary status, raising the questions of bias and motivation in the witness, but that was not always the case. *Id.* at 146. It stated,

> [Green] may have felt that the police would suspect him of the burglary both because he had a prior burglary adjudication and because the emptied safe was found on his family's property. Based upon these particular facts, [Green] had a possible motive to divert suspicion from himself to another[, such as Davis]. Further, the police might also have brought undue pressure upon [Green] to make an identification of someone—anyone—because he was in "a vulnerable relationship" by virtue of being on probation for burglary, a fact that the investigating officers may also have known and used in questioning him.

Id. at 146.

The Court of Criminal Appeals went on to explain that *Davis* is not "a blunderbuss," but a "rapier" allowing for admissible evidence to impeach on bias and motive, stating:

> In sum, *Davis v. Alaska* is not a blunderbuss that decimates all other evidentiary statutes, rules, and relevance requirements in matters of witness impeachment. It is a rapier that targets only a specific mode of impeachment —bias and motive—when the cross-examiner can show a logical connection between the evidence suggesting bias or motive and the witness's testimony.

Id. at 152. Thus, *Davis* addresses the admissibility of testimony when the questioner can show a logical connection between the testimony and the witness bias, not the access a defendant must have to impeachment evidence in general in order to prepare for cross-examination. *See Davis*, 415 U.S. at 320, 94 S.Ct. at 1112. The *Irby* Court held that *Davis* did not apply in that case because a mere showing that the witness was vulnerable to the State only through his probationary status was insufficient to show the witness harbored bias in favor of the State. *Irby*, 327 S.W.3d at 154. Thus, the trial court did not abuse its discretion in excluding the impeachment evidence because it was irrelevant. *Id.*

[14] Like *Davis*, neither *Carmona* nor *Irby* presents the issue before us in this case—whether access to evidence without being afforded the opportunity to copy it is sufficient to allow for a defendant to prepare for cross-examination. By contrast we find that *In Matter of W.E.J.* is similar to this case. 494 S.W.3d at 178. In *In Matter of W.E.J.*, the defendant argued that *Davis* allowed for transcription of **children**'s **forensic interviews** under the Confrontation Clause. *Id.* at 180. The Waco Court of Appeals held, like our present case, that 39.15 did not prevent defense counsel from confronting the juvenile accusers because counsel had viewed the **forensic interviews**, ***64** had them translated, and cross-examined the victims about the **interviews**. *Id.* Therefore, the Waco Court held that Article 39.15 did not damage the defendant's "right to confront and cross-examine witnesses to the degree shown in *Davis*." *Id.* We agree with the reasoning of the Waco Court of Appeals, and we find it applicable here.

Appellant argues his limited access interfered with his trial preparation, but, unlike *Davis*, we have already shown that, in fact, his counsel was not impeded from using inconsistencies in the **forensic interviews** in his impeachment of the trial testimony of Belle and Cici because Article 39.15 did not prevent Appellant from confronting these juvenile accusers regarding their motivation or bias in testifying. *See generally Davis*, 415 U.S. at 320, 94 S.Ct. at 1112; *Irby*, 327 S.W.3d at 146, 154. Also, like *Carmona*, by bringing the inconsistencies in the girls' testimony and the change in the girls' behavior towards Appellant following the beer bottle incident to the

jury's attention, Appellant provided the jury with sufficient evidence to assess any bias of the girls against Appellant. *Carmona*, 698 S.W.2d at 104–05. We conclude that *Davis* does not support Appellant's argument.

We conclude that Appellant has not shown that Article 39.15 denied Appellant access to information necessary to allow him to confront the juvenile witnesses. Therefore, he has not shown that Article 39.15 is unconstitutional because it denies defense attorneys the evidence they need to confront juvenile witnesses for their possible bias or motive.

We overrule his third issue.

Improper Jury Argument

In issues four and five, Appellant argues that the trial court erred by failing to grant a mistrial in light of the State's improper jury argument.

[15] **[16]** **[17]** Proper jury argument generally must occupy one of the following areas: (1) a summation of the evidence presented at trial; (2) a reasonable deduction drawn from that evidence; (3) an answer to the opposing counsel's argument; or (4) a plea for law enforcement. *Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999); *Acosta v. State*, 411 S.W.3d 76, 93 (Tex.App.—Houston [1st Dist.] 2013, no pet.). In reviewing whether jury argument falls within one of these four areas, we consider the argument in light of the entire **record**. *Acosta*, 411 S.W.3d at 93. Even if improper, the argument does not constitute reversible error unless, in light of the **record** as a whole, the argument is extreme or improper, violates a mandatory statute, or injects new harmful facts about the accused into the trial proceeding. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000); *Acosta*, 411 S.W.3d at 93.

[18] **[19]** **[20]** **[21]** "To preserve error in prosecutorial argument, a defendant must pursue to an adverse ruling his objections to jury argument." *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). When complaining about improper jury argument, the proper method of pursuing an objection to an adverse ruling is to (1) object, (2) request an instruction to disregard, and (3) move for a mistrial. Tex. R. App. P. 33.1; *Sawyers v. State*, 724 S.W.2d 24, 38 (Tex. Crim. App. 1986), *overruled on other grounds by Watson v. State*, 762 S.W.2d 591, 599 (Tex. Crim. App. 1988); *Ashire v. State*, 296 S.W.3d 331, 343 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). If the objection is sustained, the failure to request an instruction for the jury to disregard forfeits appellate review of errors that could have been cured by such an instruction. *See Young v. State*, 137 S.W.3d 65, 70 (Tex. Crim. App. 2004); ***65** *Ashire*, 296 S.W.3d at 343. If such an instruction could not have "cured" the objectionable event, a motion for mistrial is the only essential prerequisite to presenting the complaint on appeal. *Young*, 137 S.W.3d at 70.

[22] Moreover, a prompt instruction to disregard ordinarily cures any harm from improper argument. *Wesbrook*, 29 S.W.3d at 115–16. And, on appeal, we generally presume the jury followed the trial court's instructions. *See Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005).

[23] We review a trial court's ruling on a motion for mistrial for an abuse of discretion. *See Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004).

A. Injection of Evidence Outside the Record

[24] In issue four, Appellant asserts "[t]he trial court erred when it overruled Appellant's objection to the improper argument of the prosecutor injecting evidence outside the **record**." For issue number four, Appellant asserts that the State's statement that Appellant "bashed [Mother's] head in with a beer bottle" was outside the evidence when the bottle was "thrown." Appellant asserts that the trial court's instruction to the jury was insufficient to cure the comment.

The State contends that "bashing" is a logical inference of the evidence. The State also asserts that both comments were invited by defense counsel's argument. Even if the comments were harmful, the State argues Appellant's substantive rights were not affected because the harm was not severe, the trial court's jury instructions were curative, and any effect was minimal because the sentence was on the lower end of the sentencing range.

During the guilt phase of the trial, Mother conceded that she threw a six-pack of beer at Appellant, and then he threw a twelve-pack of beer at her. Alice also testified that she heard a loud boom, and then saw her mother on the floor next to broken glass beer bottles, with a bleeding gash on her forehead, and smelling of beer and blood.

During the sentencing phase, the State argued that the jury could consider Appellant's violent history because they could consider his character. After recounting Appellant's mistreatment of his ex-wife, the State suggested he continued

the same pattern of behavior with Mother because "when she starts acting up, [he] bash[ed] her head in with a beer bottle." Appellant objected, "There's no evidence he bashed her head with a beer bottle. He threw the beer bottle after she threw beer cans at him." The trial court overruled the objection with an instruction, "Okay. Overruled. The jury—what the attorneys say in closing arguments is not evidence, and the jury will rely on what the testimony was presented." The State continued with its argument that Appellant was a "violent, violent person."

On Appeal, Appellant argues that the trial court erred when it overruled Appellant's objection to the improper argument of the State because "there was no evidence that Appellant "bashed [Mother's] head in with a beer bottle." Because Appellant's objection resulted in an adverse ruling, his objection is preserved without the necessity of requesting a curative instruction or asking for a mistrial. *See* Tex. R. App. P. 33.1; *Sawyers*, 724 S.W.2d at 38; *Young*, 137 S.W.3d at 70; *Ashire*, 296 S.W.3d at 343.

The trial court, then, immediately offered a curative instruction. And on appeal, we presume the jury followed the trial court's instructions, curing any harm from improper argument. *Thrift*, 176 S.W.3d at 224; *Wesbrook*, 29 S.W.3d at 115–16. Moreover, the Texas Penal Code ***66** does not distinguish between throwing and bashing, so while factually distinguishable, the distinction is legally meaningless—legally Appellant hit Mother with a beer bottle. *See* Tex. Penal Code Ann. §§ 1.07, 21.01 (Vernon Supp. 2016), 21.02 (Vernon 2016). Because we presume the jury followed the curative instruction, we must presume an error, if any, was cured.

We overrule Appellant's fourth issue.

B. Invited Argument

[25] In issue number five, Appellant argues, "The trial court erred in denying Appellant's motion for mistrial based upon the prosecutor's improper jury argument." Appellant asserts that the State struck over the defense counsel's shoulders against Appellant, as improper jury argument, when the State said, "Don't let anyone tell you or make you feel bad about your verdict. That's not right." For this issue, Appellant asserts that the trial court's instruction to the jury was insufficient to cure either comment.

During closing argument at the punishment phase, Appellant suggested that, because the jurors took ten hours to reach their verdicts, some jurors "had doubts about whether or not he was guilty of either of these two charges." Appellant suggested to the jury "[t]hat residual doubt that you may have had is something you can consider in determining whether you should give him a long time in prison or a short." Later in his argument, Appellant reminded the jury to "[t]hink about the questions you had about whether or not he was guilty."

The State responded that the jury "took [ ] a long time to deliberate," because "[y]'all have processed days and days of testimony." The State went on to say, "Don't let anyone tell you or make you feel bad about your verdict. That's not right." But Appellant objected, and the trial court sustained the objection. Appellant requested an instruction, and the trial court instructed to the jury to disregard the last comment. Appellant then asked for, but the trial court denied, a request for mistrial. Because Appellant (1) objected, (2) requested an instruction to disregard, and (3) moved for a mistrial, he has preserved his issue for our review. *See* Tex. R. App. P. 33.1; *Sawyers*, 724 S.W.2d at 38; *Ashire*, 296 S.W.3d at 343.

[26] The State may argue subjects that would otherwise be improper when invited to do so by the defendant's own remarks. *Acosta*, 411 S.W.3d at 93 (citing *Albiar v. State*, 739 S.W.2d 360, 362 (Tex. Crim. App. 1987)). Appellant asserted that ten hours of deliberations suggested the jury had doubts about the guilty verdict and revived those feelings within the jury to achieve a lesser punishment. Appellant invited the State's argument that the jury need not feel guilty about taking ten hours because that was part of the jury deliberation process. *See Wesbrook*, 29 S.W.3d at 115; *Albiar*, 739 S.W.2d at 362; *Acosta*, 411 S.W.3d at 93. Even if the argument was not invited, the trial court sustained the objection, and at Appellant's request, immediately issued an instruction to disregard the last comment. We presume the jury follows a curative instruction. *Thrift*, 176 S.W.3d at 224; *Wesbrook*, 29 S.W.3d at 115–16.

[27] **[28]** Appellant, however, argues that the comment was extreme enough to overcome the presumption that the jury followed the instruction because the comment struck over the shoulders of counsel. Specifically, Appellant asserts, "Striking at a defendant over defense counsel's shoulders is impermissible, as it falls outside the generally permissible areas of jury argument," citing *Davis v. State*, in support. 268 S.W.3d 683, 712–13 (Tex. App.—Fort Worth 2008, pet. ref'd). Striking over counsel's ***67** shoulders involves the State calling defense counsel a liar or accusing counsel of suborning perjury. *Id.* (citing *Gomez v. State*, 704 S.W.2d

770, 772 (Tex. Crim. App. 1985)). However, claiming the defense counsel is arguing "something ridiculous" is directed at defense counsel's argument, not at defense counsel. *Id.* at 713.

Telling the jury that they shouldn't feel bad about taking a long time for a verdict is more akin to calling Appellant's argument ridiculous than calling his counsel a liar. *See id.* Because the State's comments attacked Appellant's arguments, rather than his counsel personally, the argument did not strike over his shoulders. *See Acosta*, 411 S.W.3d at 93 (stating that State's comments suggesting jury not be "fooled" by defense's "good lawyering" and that argument was "just words from the defense attorney's mouth," attacked defense counsel's arguments, not defense counsel personally); *Garcia v. State*, 126 S.W.3d 921, 925 (Tex. Crim. App. 2004) (holding that State's comment that defense was "argu[ing] that hogwash that you've heard" was State's opinion of defense's arguments, not an attack on counsel's personal integrity). Because the argument did not strike over the shoulders of counsel, the conduct did not rise to a level sufficient to overcome the presumption that the jury followed the curative instruction. *Thrift*, 176 S.W.3d at 224; *Wesbrook*, 29 S.W.3d at 115–16. As the instruction was curative, we conclude the trial court did not abuse its discretion in denying the mistrial. *See Hawkins*, 135 S.W.3d at 77.

We overrule Appellant's fifth issue.

Conclusion

We affirm the judgment of the trial court.

All Citations

522 S.W.3d 48

Footnotes

1 *See* Tex. Penal Code Ann. §§ 21.11 (Vernon 2011) & 22.021 (Vernon 2016).

2 For the purpose of this appeal, we refer to the **children** using the pseudonyms Alice, Belle, and Cici, rather than using their initials, and their mother as Mother. *See* Tex. Code Crim. Proc. Ann. art. 57.02(h) (Vernon Supp. 2016).

3 Belle also testified that on another date, Appellant attempted to kiss her on the mouth, but she pulled away from him. She did not mention this during her **forensic interview**.

4 Parties do not contest the testimonial nature of the **forensic** examinations. *See Woodall v. State*, 336 S.W.3d 634, 642 (Tex. Crim. App. 2011) (holding that, in reviewing Confrontation Clause challenge, appellate courts must "first determine whether the Confrontation Clause is implicated.").

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TWENTY-SECOND NORTHERN MARIANAS COMMONWEALTH

LEGISLATURE

IN THE HOUSE OF REPRESENTATIVES

_____ Regular Session, 2021 H. B. 22-38

A BILL FOR AN ACT

To amend Title 6, Division 5, Chapter 3, Article 2. Protection of Abused Children, to enact a new §5326. Discovery of evidence of child abuse or recordings of child witnesses, and for other purposes.

BE IT ENACTED BY THE 22ND NORTHERN MARIANAS COMMONWEALTH LEGISLATURE:

Section 1. Findings and Purpose. The Legislature finds that certain evidence developed during cases involving children contain sensitive matters that must be protected from release into the public. Given the ease in which photographs and video can be uploaded onto the internet and circulated through social media, special precautions need to be in place to prevent the damage that can come from sensitive recordings becoming available in public.

The Legislature also finds that numerous states have addressed this problem by restricting access to such information. In particular, states have prohibited the possession, copying or distribution of such materials and limited access to reasonable viewing during the discovery process of a civil or criminal case. Such

restrictions have been found to be constitutionally acceptable. See Gonzales v. State, 522 S.W.3d 48 (Tex. App. – Houston [1st Div.] 2017).

The Legislature further finds that in the CNMI, for example, the Department of Youth Services provides forensic interviews of children during investigations and records those interviews for use by the Office of the Attorney General in civil and criminal litigation. Without this protection, these recordings could be released to the public by defense counsel or an accused. The current practice is to provide defense counsel with reasonable access to the recording in preparing for trial. However, recently, some defense counsel are demanding copies of the recordings. Therefore, this Act would protect children from that invasion of privacy and prevent the release of sensitive materials while providing the accused with reasonable access.

Section 2. Amendment. Title 6, Division 5, Chapter 3, Article 2 of the Commonwealth Code is hereby amended by adding a new section 5326 to read as follows:

"§ 5326. Discovery of evidence of child abuse or recordings of child witnesses.

(a) During the course of a criminal or civil hearing or proceeding, the court may not make available or allow to be made available, for copying or dissemination to the public, property or material that:

(1) constitutes child pornography;

(2) is a recording that depicts child abuse; or

(3) is a recording of an interview or statement of a child.

(b) Property or material described by Subsection (a) must remain in the care, custody, or control of the court or the state.

(c) A court shall deny any request by a defendant to possess, copy, photograph, duplicate, or otherwise reproduce any property or material described by Subsection (a), provided that the state makes the property or material reasonably available to the defendant.

(d) For purposes of Subsection (c), property or material is considered to be reasonably available to the defendant if, at a facility under the control of the state, the state provides ample opportunity for the inspection, viewing, and examination of the property or material by the defendant, the defendant's attorney, and any individual the defendant seeks to qualify to provide expert testimony at trial.

(e) The court shall place property or material described by Subsection (a) that has been admitted into evidence under seal of the court on conclusion of the criminal hearing or proceeding.

(f) A court that places property or material described by Subsection (a) under seal may issue an order lifting the seal on a finding that the order is in the best interest of the public and will not cause any harm to the child."

Section 3. Severability. If any provision of this Act or the application of any such provision to any person or circumstance should be held invalid by a court

of competent jurisdiction, the remainder of this Act or the application of its provisions to persons or circumstances other than those to which it is held invalid shall not be affected thereby.

Section 4. Savings Clause. This Act and any repealer contained herein shall not be construed as affecting any existing right acquired under contract or acquired under statutes repealed or under any rule, regulation or order adopted under the statutes. Repealers contained in this Act shall not affect any proceeding instituted under or pursuant to prior law. The enactment of this Act shall not have the effect of terminating, or in any way modifying, any liability civil or criminal, which shall already be in existence at the date this Act becomes effective.

Section 5. Effective Date. This Act shall take effect upon its approval by the Governor or upon its becoming law without such approval.

Prefiled: 3/11/2021

Date: 3/11/2021 Introduced by:

Rep. Celina R. Babauta

Rep. Christina Marie E. Sablan

Reviewed for Legal Sufficiency by:

House Legal Counsel