

the Jasuta / Schulman report

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TIBA's Case of the Week First Court of Appeals

Case Name: [Jose Alberto Rodriguez v. The State of Texas](#)

- **OFFENSE:** Indecency with a Child
- **COUNTY:** Harris
- **C/A CASE No.** 01-23-00721-CR
- **DATE OF OPINION:** May 13, 2025 **OPINION:** [Justice Kristin Guiney](#)
- **DISPOSITION:** Conviction Affirmed as Modified
- **TRIAL COURT:** 337th D/C
- **LAWYERS:** [Curtis Barton Jr.](#) (Defense); [John Crump](#) (State)

(Background Facts): Dr. Ashley Gibson testified that she conducted the Complainant's sexual assault examination. A copy of the Complainant's medical records related to the sexual assault examination were admitted into evidence at trial. The Complainant was born in 2010, and she was eleven years old at the time of the examination. Gibson testified that during her examination, the Complainant reported that a couple of years earlier, she started being touched by her stepfather. According to the Complainant, her stepfather would touch her where he wasn't supposed to. One time he put one of his fingers inside of her. The Complainant reported that her stepfather "would come to [her] room" in the morning, lie down in her bed, and "put [her] on top of him." He would then touch her "butt." The Complainant had clothes on at the time, and she would pretend that she was asleep because she was uncomfortable. The Complainant also stated that when she was five years old, she was lying down in her bed with her face on her pillow. Her stepfather "pulled down [her] pants and underwear and put one of his fingers inside of [her]." When he heard one of the Complainant's siblings crying, "he pulled [her] pants up and left." (Internal quotations omitted.) Her stepfather only "put one of his fingers inside of [her]" that one time. The Complainant also reported that she told her aunt about the touching, and her aunt told her maternal grandmother, who called law enforcement officers. The Complainant's mother did not believe the Complainant and ran away with her stepfather.

[§§ 321.04 Court's Charge / Application Paragraph (Unanimity)]: The jury found Appellant guilty of the felony offense of indecency with a child. The trial court's charge to the jury instructed that "a person commits the offense of indecency with a child if, with a child younger than seventeen

years of age, whether the child is of the same or opposite sex, he engages in sexual contact with the child or causes the child to engage in sexual contact.” The charge defined “sexual contact” as “any touching by a person, including through clothing, of the anus, breast, or any part of the genitals of a child” or “any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person with the intent to arouse or gratify the sexual desire of any person.” The charge also instructed the jury that they could find Appellant guilty if they believed that “on or about the 10th day of February 2018” . . . Appellant engaged “in sexual contact with [the complainant], a child under the age of seventeen years, by touching the genitals of [the complainant] . . .” On appeal, Appellant argues that the trial court erred in instructing the jury because the trial court’s charge did not “instruct the jury that it must . . . be unanimous as to a particular act.”

Holding: The Complainant testified that when she was about eight years old, she was lying down on her stomach in the living room of a guest house. On that occasion, Appellant touched her vagina and put one of his fingers inside her vagina. Such an incident would constitute “sexual contact” as defined by [Penal § 21.11(c)] and the trial court’s charge to the jury. *** Appellant, in his briefing, asserts that other “extraneous offenses” that were introduced at trial could “meet the requirements for a conviction of indecency [with a child] by contact.” This evidence purportedly includes “an accusation that some nights [Appellant] would have [the Complainant] lay on top of him and he would grab her butt under her underwear.” But such evidence does not meet the definition of “sexual contact” (“sexual contact” means “any touching by a person, including through clothing, of the anus, breast, or any part of the genitals of a child.” *** Here, the State did not present evidence that Appellant committed the offense of indecency with a child on multiple but separate occasions. Instead, a review of the record shows that there was only one incident constituting “sexual contact” upon which Appellant’s conviction for the offense of indecency with a child could be based. As such, we conclude that an instruction on unanimity as to the incident forming the basis of the conviction was not required; the jury’s finding of guilt for the offense of indecency of a child was necessarily unanimous regarding the incident forming the basis of the conviction. *** Accordingly, we hold that the trial court did not err in failing to include an instruction in its charge that the jury must “agree upon a single and discrete incident that would constitute the commission of the offense alleged.”

Sidebars

([Troy McKinney](#)) Unless I have missed something, the court's opinion recites multiple instances of conduct that could easily amount to indecency, but nonetheless rejects the necessity of a unanimity charge on the basis that there was only evidence of one incident of indecency.

([David A. Schulman](#)) I believe Troy is correct. The 02/10/2018 incident does not appear to have been the only time when Appellant might have done something that constituted indecency --- but you'll have to read the opinion for yourself to decide, and the recitation of the facts is probably too long and somewhat disjointed.