

Reverse and Remand and Opinion Filed March 27, 2026



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-24-00222-CV

IN THE MATTER OF A.M., A JUVENILE

On Appeal from the 386th Judicial District Court
Bexar County, Texas
Trial Court Cause No. 2023JUV00213

MEMORANDUM OPINION

Before Chief Justice Koch, Justice Goldstein, and Justice Barbare
Opinion by Justice Goldstein

The State's motion for rehearing is **DENIED**. On the Court's own motion, we **WITHDRAW** our August 22, 2025, opinion and **VACATE** the Court's judgment of that date. The following is now the opinion of the Court.

A.M., a juvenile, was adjudicated to have engaged in delinquent conduct by committing two acts of indecency with a child, A.S., by contact. In four issues, A.M. argues the evidence is legally insufficient to establish every element of the underlying offenses, the State violated his right to confrontation and cross-examination when the State's investigator improperly influenced the complaining child witness' testimony, the State violated his right to due process by withholding evidence related to the State investigator's relationship with the complaining child

witness, and the trial court abused its discretion by denying his motion for new trial. As we determine below that A.M.'s constitutional right to confront a witness against him was violated, and this violation harmed A.M., we reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

BACKGROUND

Trial on the Merits

At trial before a jury in September 2023, the State presented A.S. as its final witness. Immediately upon A.S. taking the stand, the trial court asked her if she knew "the difference between a truth and a lie." The record indicates A.S. gave the following response: "(Shakes head negatively)." The trial court stated it was going to let the prosecutor ask A.S. some questions to establish whether A.S. knew "the difference between a truth or a lie," and then the trial court was "going to ask [A.S.] a question." The following exchange occurred between the prosecutor and A.S.:

MS. FRANCO: Hi, [A.S.]. Do you remember me?

THE WITNESS: (Nods head affirmatively).

MS. FRANCO: Can you use your voice please?

THE WITNESS: (Shakes head negatively).

MS. FRANCO: We've talked a few times; right?

THE WITNESS: (Nods head affirmatively).

* *

MS. FRANCO: Do you remember talking to me?

THE WITNESS: (Nods head affirmatively).

MS. FRANCO: I see you nodding your head. Does that mean yes? Can you use your voice please?

THE WITNESS: (Shakes head negatively).

MS. FRANCO: [A.S.], everybody is so excited to hear what you have to say but the only way they can hear it is with their ears so we are going to need you to use your voice. Can you do that please? Yes? Can you say yes?

THE WITNESS: Yes.

MS. FRANCO: Okay. Very good. Okay, [A.S.]. So what Judge asked you -- right there, sitting up there, that's the Judge. And she just wants to make sure that you understand what it means to tell the truth and what it means to tell a lie. Do you understand what that means?

THE WITNESS: (Nods head affirmatively).

MS. FRANCO: Yes? Okay.

THE WITNESS: (Nods head affirmatively).

MS. FRANCO: Okay. Do you see the color of my jacket?

THE WITNESS: Yes.

MS. FRANCO: What color is that?

THE WITNESS: Black.

MS. FRANCO: Black. Now if I told you I am wearing a pink jacket, would that be telling the truth or would I be telling a lie?

THE WITNESS: Telling the truth.

MS. FRANCO: I'm sorry?

THE WITNESS: Telling the truth.

MS. FRANCO: If I told you my jacket was pink, is that the truth or is that a lie?

THE WITNESS: A lie.

MS. FRANCO: That is a lie. Okay. So do you understand – [A.S.], do you understand the difference between the truth and a lie?

THE WITNESS: (Nods head affirmatively).

MS. FRANCO: I see you're shaking your head. Can you use your voice please?

THE WITNESS: Yes.

The following exchange then occurred between the trial court and A.S.

THE COURT: Okay. So when you're in court and you testify, you have to promise that you're only going to say things that are true. You cannot say things that are a lie. So do you promise while you're testifying here in court today that you will only say things that are true? I have to hear you say it out loud.

THE WITNESS: Yes, ma'am.

THE COURT: Okay. Go ahead.

Upon examination, A.S. testified that she was seven years old and in second grade at the time of trial. A.S. testified that, when she was in A.M.'s room, he "grabbed" A.S. and "grabbed [A.S.'s] hand and he made [A.S.] touch his wee wee." When asked "what is his wee wee," A.S. answered that "he had hair on it and stuff" and "[i]t was hairy." When asked "[d]id you see it or did you feel it, A.S. answered, "I feel it." When asked how she knew it was hairy, A.S. answered, "because I felt it and [A.M.] just touched it and made me touch it." A.S. answered "Yes" when asked if A.M. used any part of his body to touch any part of A.S.'s body. A.S. testified A.M. "touched [her] private," which she described as "right on the bottom." When asked to point to her private, A.S. indicated where it was. The prosecutor asked A.S. to "stand up and walk around to the side," and she again indicated where A.M.

touched her private “under [her] clothes” “[w]ith his hands.” A.S. testified A.M. “was trying to touch it’s [sic] mouth but [A.S.] told him to stop.” A.S. drew a picture of A.M.’s “wee wee” which she described as showing “all his hair on his private” that, “when [A.S.] was touching it, [she] could feel it.” When asked how she knew what the shape of A.M.’s “wee wee” was, A.S. testified “[i]t’s because I felt it like that and it was like this, this little hole comes out.” A.S. clarified as follows:

Yeah, so when he was going potty and stuff, when he was going potty, and then he – when he was going potty sitting on the toilet, he was playing on his phone, on something, and – and his -- his pee comes out. And that’s where it was.

A.S. identified A.M. in open court as the “person who touched you” and the “person who you touched him on his wee wee.” After hearing all the evidence, the jury found A.M. had engaged in delinquent conduct on two counts of indecency with a child by contact, as charged by the State. On November 27, 2023, after the disposition hearing, the trial court placed A.M. on probation in his mother’s custody for two years. The trial court also deferred A.M.’s registration as a sex offender and stated that, if A.M. successfully completed treatment with a licensed sex offender treatment provider, he would be exempt from registering. On December 12, 2023, the trial court entered an order of disposition and an order of adjudication.

Motion for New Trial

After the adjudication hearing, A.M. filed a motion for new trial, amended after investigation, asserting that, after A.M. was adjudicated, “the parties were notified that the jurors who served on A.M.’s jury witnessed a ‘bearded man’ sitting

in the courtroom gallery making hand gestures and signaling to the complainant during her testimony.” The motion for new trial was supported by three affidavits, which we consider in turn.

John Joseph Garcia’s affidavit stated that he was A.M.’s attorney during the adjudication hearing. Garcia’s affidavit continues:

After A.M.’s adjudication hearing, the State and I spoke with the jurors who served on A.M.’s jury. The jurors asked us who the bearded man was sitting in the courtroom gallery that was making hand signals and gestures to the complainant during her testimony. According to the State, the bearded man was an investigator with the Bexar County District Attorney’s Office who acted as the complainant’s support system.

I was unaware that the investigator was signaling to the complainant during her testimony because he sat behind counsel table and not within my line of sight. However, had I known the investigator was signaling to the complainant, I would have immediately objected and asked the Court to inquire about his conduct. I also would have moved for a mistrial based on the investigator’s actions improperly influencing the complainant’s testimony and affecting my ability to adequately defend A.M.

Moreover, despite several discovery requests, the State never disclosed that their investigator was part of the complainant’s support system before A.M.’s adjudication hearing. They also never disclosed any meetings between the complainant and the investigator that would have allowed the two to form a relationship.

Alice Sutton’s affidavit stated that she served as a juror at A.M.’s adjudication hearing. Her affidavit continues:

During the adjudication hearing, I recall witnessing a bearded man sitting in the back of the courtroom who was making hand gestures and signaling to the complainant during her testimony. Specifically, the bearded man was giving the witness a “thumbs up” and was motioning for her to look at him while she was testifying. When the complainant

was responding to the prosecutor's and the defense attorney's questions, the bearded man would redirect her to focus on him.

While the jurors were deliberating, we discussed what the man was doing during the complainant's testimony, and we began to wonder who the man was. After we reached our true verdict, the jury asked the prosecutor about the man making hand gestures. The prosecutor responded that the man was the complainant's support system but nothing else.

Megan Harkins' affidavit stated that she served as a juror at A.M.'s adjudication hearing. Her affidavit continues:

During the adjudication hearing, I recall witnessing a man with a beard sitting in the front row of the courtroom gallery, behind the prosecutors, making hand gestures and signaling to the complainant during her testimony. Most noticeably, while the complainant was on the stand being questioned, the man with the beard would give her a "thumbs up" whenever she would freeze up during her testimony. Based on my experience as a criminal defense attorney, I believed the man worked for the Bexar County District Attorney's Office as either an investigator or a victim's coordinator based on his manner of dress and interaction with the prosecutors and witness. I do not practice in Bexar County, so I was not familiar with either the prosecutors or the bearded man in this case.

I do not recall sharing my belief that the man worked for the DA's office with the other jurors during deliberation, but I cannot be certain about that. During deliberations, we discussed the bearded man's conduct. Ultimately, before confirming who the man was, we as a group concluded that the complainant's testimony was credible and that we believed her, and we therefore rendered a verdict of "true."

Also attached to the motion for new trial were copies of A.M.'s March 2023 request for production of discovery pursuant to article 39.14 of the code of criminal procedure, A.M.'s April 2023 motion for discovery, and a June 2023 letter from

Garcia requesting production of evidence pursuant to articles 37.07, 38.37, and 39.14 of the code of criminal procedure.

At a February 9, 2024, hearing on A.M.'s motion for new trial, Randy Dear testified he started working as an investigator with the Bexar County district attorney's office in November of 2021. Dear described his job as having a "big building side" involving "serv[ing] subpoenas and gather[ing] information" and a "juvenile side" which "was very similar, other than we had a bigger caseload, per se, and we did a lot of other things, you know; escorting the family, the victims, and protecting them and making sure that they were safe and they were secure." Dear testified he did not receive training in child advocacy, but he did not "believe there was a training," and the job was "[j]ust kind of do what you're directed to do and make sure you take care of them and keep them out of harm's way." Dear attended "[q]uite a few" juvenile hearings, including adjudication hearings, but he "couldn't even tell" how many. Dear was never employed as a child advocate.

Dear testified he was in the courtroom at the adjudication hearing in A.M.'s case, and he first met A.S. on the day of the hearing. The meeting occurred in "our little family area . . . in the D.A.'s office." Priscilla Rodriguez, a victim advocate in the Bexar County district attorney's office, introduced Dear to A.S. Dear met with A.S. and family members "two times, maybe three. "The first time was the actual introduction so she could see me." Dear described his involvement in the case "on the day of court" as follows:

And the reason they ask me to be there is like, Hey, you look like Santa Claus, be a safe face, and you kind of take away some of their apprehensions. Cool, I'm in. So we did that. And then as it came closer, they went out here in the outer lobby of the DA's Office. So I came back and checked on them, wanted to make sure, Hey, you're okay, good to go? Came back and then picked them up and brought them into court.

Dear testified he did not "discuss the actual case with" A.S., but the "advocate" filled Dear "in on what was . . . going on" so that Dear "had some general background about the case." Dear never took any notes during his meetings with the family or with any of the prosecutors, and Dear testified "we don't take notes. I mean, it's just word of mouth and, Hey, just go get it done. Cool, let's go." Dear testified "[t]here was never like a format or a process or anything like that." Dear testified that, in the short time he knew A.S., he did not think he built a relationship with A.S. or her family, and "it was more of the fact that she knew I was there to be a rock for her is basically the bottom line."

Dear was "informed" that A.M.'s adjudication hearing was going on and he was "asked" to be at the hearing "within the two days" prior to the hearing. Dear testified he was "asked" to "be with the victim to provide support," and he was present at the adjudication hearing "just during the victim's testimony." Dear "took it upon [him]self to make sure that [he] provided that support to that victim." On the day of the hearing, during A.S.'s testimony, Dear sat in the courtroom "directly across" from A.S. "where we had eyeshot of each other." Dear's seat was "directly behind the State" in a position where A.M.'s trial counsel could not have seen Dear

unless counsel “turned around.” Dear could see A.S., and she could see him “[o]ne hundred percent,” and the jury could see Dear. Dear testified he “[a]bsolutely” recalled giving A.S. a “thumb’s up” during her testimony in response to questioning from both sides. Dear “didn’t decide” that was a proper way to communicate with A.S.; “[i]t just happened.” When asked why Dear thought it was appropriate to give A.S. a thumb’s up while she was testifying, Dear answered:

Because she was totally distraught. This was her first time in court. This is the first time she met her assailant and she was obviously distraught. And I wanted to assure her that, Hey, it’s okay, we got you. It’s good. You’re going to be safe.

In response to further questioning about why Dear believed this was the first time A.S. was meeting A.M., Dear testified “normally with that type of crime, they’re not hanging out together so I assumed.” Dear testified he also nodded his head at A.S., but he did not try to get her to look at him or “redirect her focus” to him. When asked if Dear considered how his gestures might affect A.S.’s testimony, considering Dear did not have training in child advocacy, Dear answered, “Not one bit” “I was just [–] going by my heart [–] making sure she was okay.” Dear explained that “[t]he only thing I was going by was my heart and I saw her hurting. I was just trying to make her -- letting her know it’s okay.” Dear conceded he was “[o]bviously not” trained to know how influenced a child can be by an adult, but he “would go by [his] heart and that’s all [he] was doing.” When Dear was asked whether he considered how “doing that in front of the jury might affect their verdict,” Dear answered that he “didn’t even pay attention to any of the jury” and “was concerned

about that young lady.” Dear testified this was the first time he “had sat in an adjudication hearing and given or made hand gestures to one of the witnesses, complaining witness.” Dear testified it was important to have eye contact with A.S. to “reassure her she’s okay,” but he “did not” believe that would affect her testimony. Dear was “asked” by Rodriguez to come into the courtroom on the day of the hearing, but he “made the decision to sit in eyesight to make sure that she could see me and have that safe space.” Dear had “no conversations” with anyone from the State about comments from the jurors about his hand signals.

On cross-examination, Dear testified he was at the hearing to “help [A.S.] feel safe,” and he was not trying to develop her testimony, did not know what her testimony was going to be, and did not know the “specific way she had been sexually assaulted.” Dear testified he had no way to direct A.S.’s testimony, was not trying to correct or change her testimony or tell her what to say, and did not know the facts of the case or have a “relationship” with A.S. On redirect examination, Dear conceded he did not have “any way of knowing whether [his] conduct actually influenced [A.S.’s] testimony.”

Garcia, A.M.’s trial counsel, testified that he and the prosecutors met with the jury after the jury returned its verdict. “One of the jurors confronted all of the attorneys and asked who was the person that was signaling the child witness on the stand.” One of the prosecutors identified Dear as “our representative of the District Attorney’s Office that was signaling the child witness.” During the adjudication

hearing, Garcia did not see Dear and did not see “hand gestures being made, nodding.” Garcia testified that, if he had known Dear was behind him making hand gestures, he would have asked for a mistrial because he would have been “real concerned that someone was influencing the testimony of a witness on the stand and especially if it was someone that had priorly communicated with that witness.”

Harkins, a juror at the adjudication hearing, testified she is an attorney whose practice involves mostly “family law and criminal.” Harkins saw Dear “sitting in the front row or the second row behind the State” while A.S. was testifying. Harkins “could tell that A.S. was nervous,” and A.S. “kind of struggled to answer.” Harkins “thought she knew who [Dear] was,” and she saw Dear “making hand gestures, like giving [A.S.] a thumps [sic] up and kind of putting his hands up like (indicating), you know, It’s okay, calm down.” Harkins did not recall if Dear made hand gestures throughout A.S.’s testimony, but she “saw it . . . when [A.S.] was struggling.” During A.S.’s testimony, she “would kind of freeze up,” but she “opened up at some point and she really stopped freezing up.” Harkins remembered Dear signaling to A.S. “more than once.” The jurors “discussed [Dear] during the deliberations,” and “the conversation entail[ed] specifically what he was doing, his conduct.” On cross-examination, Harkins testified Dear was “reassuring [A.S.], kind of coaxing her to actually give an answer.” Harkins testified the jury “still all as a group found the victim to be credible” and “that is why [the jury] rendered a verdict of true.” In response to questioning by the prosecutor who spoke with the jury after the

conclusion of the adjudication hearing, Harkins testified the prosecutor “seemed irritated for sure” and agreed the prosecutor was “surprised” and “did not know about it.”

Rodriguez testified she is a victim advocate in the Bexar County district attorney’s office, and her job consists of making the initial call to victims of crime to let them know their case has been set for court, letting them know what their victim rights are, and sitting with them in court if they wish to be present. Rodriguez did not “typically involve our investigators unless there may be a situation I need them in the courtroom for or, I mean, they are there to assist with subpoenas and things of that nature.” However, Rodriguez would involve an investigator “to provide security in essence when there’s a family conflict.” Rodriguez testified Dear was an investigator with the district attorney’s office, and Rodriguez let Dear know on the morning of the hearing that “the family had arrived and that I let him know when we were walking over.” Rodriguez did not know how Dear would have known to come in to the courtroom “at a time for someone to testify,” and she did not recall “anyone going and getting” Dear before A.S. testified. Rodriguez testified she had a conversation with Dear “about how scared and nervous” A.S. was and asked Dear “[t]o come with us to court,” but Rodriguez did not “recall what specifically [she] asked him to do.” Rodriguez was aware of Dear making hand gestures during the adjudication hearing because she “was seated next to him” during A.S.’s testimony. Rodriguez saw Dear “from [her] peripheral” because she was focused on A.S.

Rodriguez “said nothing” to Dear, the judge, the prosecutors, or the defense attorney. Rodriguez saw A.M.’s “mom shaking her head during [A.S.’s] testimony,” so Rodriguez “assumed that if the Judge would have addressed that, if she would have seen either one, then she would have.”

In closing argument, A.M.’s counsel asserted that Dear “actively influenced [A.S.’s] testimony” and thereby violated A.M.’s “right to confront the witnesses under the Sixth Amendment and his right to a fair trial under the Fourteenth Amendment.” The prosecutor argued that:

The simple question comes down to, Was he denied the right to a fair trial based on the fact that someone who looks like Santa Claus gave a child victim reassurance while she was freezing up having to face her assaulter for the first time since being assaulted by him? This does not fit the grounds for a new trial. And, in fact, I mean, a child got reassured by someone in the courtroom who looked like Santa. That’s what it comes down to.

At the conclusion of the hearing, the trial court took the matter under advisement. On February 12, 2024, the trial court denied A.M.’s motion for new trial by written order. This appeal followed.

ANALYSIS

First Issue: Legal Sufficiency

In his first issue, A.M. argues the evidence is legally insufficient to establish every element of the underlying offenses.

Although juvenile proceedings are civil matters, the standard applicable in criminal matters is used to assess the sufficiency of the evidence underlying a finding

the juvenile engaged in delinquent conduct. *In re A.J.R.P.*, 441 S.W.3d 733, 735 (Tex. App.—San Antonio 2014, no pet.). And, the Texas Court of Criminal Appeals has determined that the legal-sufficiency standard as enunciated in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), is the only standard that should apply in determining whether the evidence is sufficient to support each element that the State is required to prove beyond a reasonable doubt. *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). In a *Jackson v. Virginia* evidentiary-sufficiency review, we view all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011). The court of criminal appeals has explained that this standard “recognizes the trier of fact’s role as the sole judge of the weight and credibility of the evidence after drawing reasonable inferences from the evidence.” *Adames*, 353 S.W.3d at 860. Therefore, on appellate review, we determine whether, based on the “cumulative force of all the evidence,” the necessary inferences made by the trier of fact are reasonable. *Id.* We conduct this constitutional review by measuring the evidentiary sufficiency with “explicit reference to the substantive elements of the criminal offense as defined by state law.” *Id.* In Texas, when the victim is seventeen years old or younger, the child's testimony alone is generally sufficient to support a sexual-assault conviction. *See Martinez v. State*, 178 S.W.3d 806, 812 n.23 (Tex. Crim. App. 2005); TEX. CODE CRIM. PROC.

art. 38.07(b)(1); *Rothenay v. State*, No. 04-22-00282-CR, 2023 WL 3611577, at *4 (Tex. App.—San Antonio May 24, 2023, no pet.) (mem. op., not designated for publication).

A.M. was charged by a petition alleging delinquent conduct with two counts of indecency with a child by contact. A person commits the offense of indecency with a child if, “with a child younger than 17 years of age, whether the child is of the same or opposite sex and regardless of whether the person knows the age of the child at the time of the offense, the person . . . engages in sexual contact with the child[.]” TEX. PENAL CODE § 21.11(a). Under section 21.11,

“sexual contact” means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person: (1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child; or (2) 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.

TEX. PENAL CODE § 21.11(c).

The petition alleged that A.M. is a child fourteen years of age. Count one alleged that A.M. intentionally and knowingly engaged in sexual conduct with A.S., a child younger than seventeen years of age, by touching A.S.’s genitals with the intent to arouse and gratify his sexual desire. Count two alleged A.M. intentionally and knowingly engaged in sexual conduct with A.S. by having her touch his genitals with the intent to arouse and gratify his sexual desire.

A.S. testified A.M. “touched [her] private,” which she described as “right on the bottom.” When asked to point to her private, A.S. indicated where it was. A.S.

indicated a second time where A.M. touched her private “under [her] clothes” “[w]ith his hands.”¹ A.S. testified A.M. “was trying to touch it’s [sic] mouth but [A.S.] told him to stop.” A.S. drew a picture of A.M.’s “wee wee” which she described as showing “all his hair on his private” that, “when [A.S.] was touching it, [she] could feel it.” When asked how she knew what the shape of A.M.’s “wee wee” was, A.S. testified “[i]t’s because I felt it like that and it was like this, this little hole comes out.” A.S. identified A.M. in open court as the “person who touched you” and the “person who you touched him on his wee wee.” This is evidence from which a rational fact finder could find that A.M. made sexual contact with A.S. by touching A.S.’s genitals and by having her touch his genitals and did so with the intent to arouse. *Bazanes v. State*, 310 S.W.3d 32, 40 (Tex. App.—Fort Worth 2010, pet. ref’d) (specific intent required for offense of indecency with child can be inferred from defendant’s conduct); *Rothenay*, 2023 WL 3611577, at *4. We overrule A.M.’s first issue.

Second Issue: Right to Confrontation

In his second issue, A.M. argues his right to confrontation was violated when the State’s investigator injected himself into A.M.’s adjudication hearing by signaling to the complainant during her testimony.

¹ The record does not reflect the part of her anatomy she was indicating when asked, but the jury and counsel bore witness, and there is no challenge on this basis; therefore, we do not address it further.

“We review a trial court’s ruling on a motion for new trial under an abuse of discretion standard of review.” *Chavarria v. Valley Transit Co.*, 75 S.W.3d 107, 110 (Tex. App.—San Antonio 2002) (quoting *Rodriguez v. United Van Lines, Inc.*, 21 S.W.3d 382, 384 (Tex. App.—San Antonio 2000, pet. denied). “A trial court abuses its discretion when it acts unreasonably or without regard for any guiding legal principles.” *Rodriguez*, 21 S.W.3d at 384.

The Sixth Amendment’s Confrontation Clause, made applicable to the states through the Fourteenth Amendment, provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI; see *Smith v. Arizona*, 602 U.S. 779, 783 (2024).

We find instructive the court’s reasoning in *Falcon v. State*, 675 S.W.2d 597, 597 (Tex. App.—Houston [14th Dist.] 1984, no pet.). In *Falcon*, during final argument at Falcon’s murder trial, his wife nodded her head in agreement with the district attorney and shook her head in disagreement with the defense attorney. *Id.* Falcon argued that such action constituted testimony and thus violated article 38.11 of the code of criminal procedure that, at the time, prohibited, except in some circumstances, a husband or wife testifying against each other in a criminal prosecution. *Id.* The court concluded that the wife’s actions were the functional equivalent of verbal testimony and that his privilege against having his wife testify against him was violated. *Id.*

In this case, while the privilege against a husband or wife testifying against each other in a criminal prosecution is obviously not at issue, the issue of whether communicative behavior of a third party during trial can constitute “testimony” clearly is. The factual background in *Falcon* bears a striking similarity to the facts of this case. The trial judge in *Falcon* stated that he did not see the actions of the wife, and the attorneys for the State and the defense were positioned with their backs to her. *Id.* at 598. However, at the hearing of a Motion for New Trial, Falcon presented two jurors who testified that they knew who Falcon’s wife was, that she sat on the front row of the audience and nodded affirmatively to statements made by the State and shook her head negatively to statements made by the defense. *Id.* They also testified that she was very obvious in her actions and she “impressed [the juror] against Joe Falcon.” *Id.* During deliberations, other jurors said “Did you see that? Even his wife thinks he’s guilty.” *Id.* One juror stated she was distracted from the arguments by the actions of the spouse. *Id.* The court, however, refused to allow the juror to testify if the wife’s actions were taken as an attempt to testify or communicate with the jury. *Id.* The juror did testify that she did not see how she could not have considered the wife’s actions in determining the guilt or punishment of Falcon. *Id.* The motion for new trial was overruled. *Id.*

The *Falcon* court concluded the wife “testified.” *Id.* Further, she participated in the presentation of the State’s case, distracted the jury, caused them to consider testimony outside the record and prevented Falcon from obtaining a fair trial. *Id.* In

conclusion, the *Falcon* court could not say that the wife's "testimony" was harmless beyond a reasonable doubt. *Id.*

Similarly, Dear was present only for A.S.'s testimony. Dear sat directly behind the State in a position where A.M.'s trial counsel could not have seen Dear unless counsel turned around. Dear could see A.S., and she could see him, and the jury could see Dear. Dear testified he gave A.S. a "thumb's up" during her testimony, and he also nodded his head at A.S. and maintained eye contact with her. The jurors saw Dear's communicative behavior and discussed the matter during their deliberations. Harkins affidavit stated that Dear would give A.S. a "thumbs up" whenever she would freeze up during her testimony. Based on Harkins' experience as a criminal defense attorney, she correctly believed Dear worked for the Bexar County District Attorney's Office as either an investigator or a victim's coordinator based on his manner of dress and interaction with the prosecutors and witnesses. Harkins did not recall sharing her belief that Dear worked for the DA's office with the other jurors during deliberation, but she could not be certain about that. Sutton's affidavit stated that Dear was also motioning for A.S. to look at him while she was testifying.

There are specific rules in Texas related to the testimony of a child, including the provision of a support person identified as "any person whose presence would contribute to the welfare and well-being of a child." TEX. CODE CRIM. PROC. art. 38.074 § 1(2). The court may set any other conditions and limitations on taking a

child's testimony "it finds just and appropriate, considering the interests of the child, the rights of the defendant, and any other relevant factors." TEX. CODE CRIM. PROC.

art. 38.074 § 3(d). The code of criminal procedure provides further:

(b) On the motion of any party, or a parent, managing conservator, guardian, or guardian ad litem of a child or special advocate for a child, the court shall allow the child to have a toy, blanket, or similar comforting item in the child's possession while testifying or allow a support person to be present in close proximity to the child during the child's testimony if the court finds by a preponderance of the evidence that:

- (1) the child cannot reliably testify without the possession of the item or presence of the support person, as applicable; and
- (2) granting the motion is not likely to prejudice the trier of fact in evaluating the child's testimony.

(c) A support person who is present during a child's testimony may not:

- (1) obscure the child from the view of the defendant or the trier of fact;
 - (2) provide the child with an answer to any question asked of the child;
- or
- (3) assist or influence the testimony of the child.

TEX. CODE CRIM. PROC. art. 38.074, §§ 3(b), (c).

These rules specifically avoid the impermissible constitutional taint that is present here. Had these rules been followed, the jury would have known the identity of the support person, said person would have been in close proximity to A.S., and such an individual would not have been permitted to assist or influence the testimony of the child.

Dear was not appointed by the trial court as a support person and, by all accounts, not identified as such to the trial court, the prosecutor, or defense counsel. Although the record is silent regarding the other jurors' impressions of Dear's behavior, the record is clear that the jury discussed Dear during deliberations and may have been aware that he was an investigator with the district attorney's office.

Contrary to the State's argument, this is not a simple question of a child that "got reassured by someone in the courtroom who looked like Santa." If the State thought there was a need for such reassurance, the rules provide for the same in keeping with the preservation and protection of the integrity of the adjudicatory proceedings, jury trials, and rights afforded an accused along with the protection of a child witness.

Rather than being a permissible support person, Dear, looking like Santa, interjected himself in the proceedings during A.S.'s testimony and signaled to A.S. precisely when she "would freeze up." Such interjection was noticed by and was of concern to the jury. As in *Falcon*, we conclude Dear's engagement with A.S. rose to the level of being "testimonial" in that it could be interpreted as Dear's agreement with what A.S. was saying and his approval of her continuing her testimony. See *Falcon*, 675 S.W.2d at 597–98. Said communication and conduct would have been expressly forbidden had Dear been an identified, approved support person. It is undisputed that the trial court, the prosecution, and the defense were unaware of Dear's communicative behavior during the adjudicatory proceedings. After A.M.'s

defense counsel was made aware of Dear's conduct and was able to investigate the matter, counsel's first opportunity to raise objections to the deprivation of A.M.'s constitutional right to confront Dear and cross-examine him was in the motion for new trial.

A denial of physical, face-to-face confrontation is reviewed for harmless error. *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988); *Haggard v. State*, 612 S.W.3d 318, 328 (Tex. Crim. App. 2020); see *Chapman v. California*, 386 U.S. 18, 23 (1967). Constitutional error is harmful unless a reviewing court determines beyond a reasonable doubt that the error did not contribute to the conviction. TEX. R. APP. P. 44.2(a). The State has the burden, as beneficiary of the error, to prove that the error is harmless beyond a reasonable doubt. *Haggard*, 612 S.W.3d at 328; see *Deck v. Missouri*, 544 U.S. 622, 635 (2005) (quoting *Chapman*, 386 U.S. at 24); *Wall v. State*, 184 S.W.3d 730, 746 n.53 (Tex. Crim. App. 2006). In the context of the denial of physical confrontation, the harm analysis "cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation" because "such an inquiry would obviously involve pure speculation." *Haggard*, 612 S.W.3d at 328; *Coy*, 487 U.S. at 1021–22. Instead, harm must be determined based on "the remaining evidence."² *Haggard*, 612 S.W.3d at 328.

² While a reviewing court cannot speculate as to what would have happened had there been a face-to-face confrontation, it should examine the testimony that the witness actually gave when determining

Here, A.S. began her testimony by “shak[ing] [her] head negatively” when the trial court asked her if she knew “the difference between a truth and a lie.” A.S. continued to express herself nonverbally and seemed confused about whether the prosecutor’s jacket was black when, based upon the questioning it was pink.³ A.S. stated that if the prosecutor said the jacket was pink, it was a “lie.” Thus, while it is unclear at what point Dear’s engagement with A.S. may have had some effect on her ability to testify, the record clearly shows a marked distinction between A.S.’s initial nonverbal testimony and her later testimony that was responsive, verbal and more coherent.⁴ As already discussed, the evidence at the hearing on the motion for new

whether there is a reasonable likelihood that the error affected the judgment of the jury. *Haggard*, 612 S.W.3d at 328 n.18.

³ There was no confirmation of the color of the prosecutor’s jacket as A.S. responded to the series of questions as follows:

MS. FRANCO: Black. Now if I told you I am wearing a pink jacket, would that be telling the truth or would I be telling a lie?

THE WITNESS: Telling the truth.

MS. FRANCO: I’m sorry?

THE WITNESS: Telling the truth.

MS. FRANCO: If I told you my jacket was pink, is that the truth or is that a lie?

THE WITNESS: A lie.

MS. FRANCO: That is a lie.

⁴ By way of example is the following:

Q. Did [A.M.] use any part of his body to touch any part of your body?

A. Yes.

Q. Okay. You can just look at me. It’s okay. What did he touch?

A. He touched my private.

Q. And what is your private?

A. It’s right on the bottom.

trial showed that Dear interjected himself in the proceedings at the critical point at which A.S. testified, and he did so without the knowledge of defense counsel but in full view of the jury, who remarked on Dear's behavior. The evidence at the hearing included affidavits from jury members including Harkins' affidavit stating that she did "not recall sharing my belief that the man worked for the DA's office with the other jurors during deliberation, but I cannot be certain about that. During deliberations, we discussed the bearded man's conduct." We conclude that, on this record, the denial of A.M.'s rights under the confrontation clause was harmful error. *See Haggard*, 612 S.W.3d at 328.

We further conclude that, after the record was developed during the hearing on the motion for new trial showing a violation of A.M.'s right to confront Dear and cross-examine him, amounting to harmful error, the trial court abused its discretion in denying the motion for new trial. *See Smith*, 602 U.S. at 783; *Chavarria*, 75 S.W.3d at 110. We sustain A.M.'s second issue. Because of our disposition of A.M.'s second issue, we need not address A.M.'s remaining issues.

Q. Can you point where your private is?

A. (Indicating).

We reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

/Bonnie Goldstein/

BONNIE LEE GOLDSTEIN
JUSTICE