**Affirmed As Modified in Part, Reversed and Remanded in Part and Opinion filed August 2, 2001.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-01004-CR**

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**NATHAN GEORGE HOWARD, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 85th District Court**
**Brazos County, Texas**
**Trial Court Cause No. 26,421-85**

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## O P I N I O N

Appellant, Nathan George Howard, was originally charged by indictment with two counts of indecency with a child. Appellant's motion for severance of the offenses was granted. A jury trial commenced on count one of the indictment charging appellant with indecency with N.C., a child younger than seventeen years and not appellant's spouse. The jury found appellant guilty of the offense charged and assessed punishment at ten years' confinement in the Texas Department of Criminal justice, Institutional Division and a $10,000 fine. The jury recommended suspension of confinement and placement of

appellant on community supervision. The trial court assessed punishment at ten years' community supervision, a $10,000 fine, and ordered appellant to serve 180 days' confinement in the Brazos County jail as a condition of community supervision. In nine points of error, appellant appeals his conviction. The judgment is affirmed as modified in part, and reversed and remanded in part.

**B A C K G R O U N D**

Appellant was charged with indecency with a child,[1] N.C. which, according to N.C.'s testimony, occurred numerous times while appellant was babysitting in her home. The touching of N.C.'s genitals was through her clothing.

At a hearing held prior to the start of testimony, the State informed the court of its intent to offer evidence of similar acts allegedly committed by appellant against three other children while he was employed as their babysitter. The State's purpose for offering this extraneous evidence was to rebut an anticipated defense of accident because the touching was over the clothes, and to prove that the touching of N.C. was done with the intent to gratify the sexual desire of appellant. Specifically, the State argued that the jury might have difficulty understanding that touching over the clothes can be with the intent to arouse and gratify a person's sexual desire. After hearing the State's argument, the trial court overruled appellant's objection to the extraneous offense evidence and admitted the evidence to prove intent.

Subsequently, three other children, under the direct supervision of appellant, testified that he touched them over their clothing. A.C. testified that appellant touched her in the vaginal area through her clothing on at least three occasions and that appellant touched her breasts under her shirt. S.H. testified that appellant, while babysitting him, tickled him in his groin area. Also, S.H. testified that he observed appellant, on about five occasions, in bed with his sister, H.H., touching her on her vaginal area. H.H., a five year old girl, testified that appellant touched her on her "bad spot." H.H.'s father was seated

[1] *See* TEX. PEN. CODE ANN. § 21.11(a)(1) (Vernon Supp. 2001).

at the prosecution table during H.H.'s testimony because, the State argued, H.H. was terrified of appellant.

Appellant's counsel called N.C.'s father to the stand. He was the first person N.C. told of the molestation. In addition to the outcry testimony, N.C.'s father testified that he was convicted in 1990 of four counts of credit card fraud and sentenced to eighteen months confinement in a federal prison. Appellant's counsel also called witnesses who testified that N.C.'s father had a reputation for being untrustworthy, as did his children. In addition, appellant called five character witnesses who testified that during appellant's volunteer activities at church, there were never any allegations of impropriety with the children there.

Appellant testified and denied that he molested N.C. or the other children. The court's charge to the jury included an instruction limiting the jury's consideration of the extraneous offenses to the intent of the appellant at the time of the offense charged. After the jury returned a verdict of guilty, appellant brought this appeal.

## I.
## Notice Under Rule 404(b)

In his fourth point of error, appellant claims the trial court erred in admitting the extraneous offense testimony of H.H. and S.H. because the State failed to provide adequate notice of its intent to use it at trial, in accordance with Evidence Rule 404(b). Specifically, appellant contends the May 21, 1999 filing by the State of a document entitled "State's Notice of Intent to Offer Extraneous Offenses" constituted inadequate notice under 404(b). Voir dire of the jury began on May 24, 1999, but trial before the jury did not begin until the next day.

### A. Standard of Review

In determining whether a trial court erred in admitting evidence, the standard for

review is abuse of discretion. *Mozon v. State*, 991 S.W.2d 841, 846–47 (Tex. Crim. App. 1999). "A trial court abuses its discretion when its decision is so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *Foster v. State*, 909 S.W.2d 86, 88 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd) (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g)). This standard of review will also be applied in part II below.

**B. Rule 404(b)**

The purpose behind the notice provision of this rule is to adequately make known to the defendant the extraneous offenses the State intends to introduce at trial and to prevent surprise to the defendant. *Self v. State*, 860 S.W.2d 261, 264 (Tex. App.—Fort Worth 1993, pet. ref'd). Rule 404(b), which governs the admissibility of character evidence, provides:

> Evidence of other crimes, wrongs, or acts may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, *provided, upon timely request by the accused, reasonable notice is given in advance of trial of intent to introduce in the State's case in chief* such evidence other than that arising in the same transaction.

TEX. R. EVID. 404(b) (emphasis added). Rule 404(b) uses the term "reasonable" to refer to the contents of the notice and that it be in advance of trial. Generally, what constitutes "reasonable notice" under Rule 404(b) depends on the facts and circumstances of the case. *Sebalt v. State*, 28 S.W.3d 819, 822 (Tex. App.—Corpus Christi 2000, no pet.). Here, appellant argues that the State did not give reasonable notice of its intent to admit H.H. and S.H.'s testimony regarding extraneous offenses. Appellant relies on *Hernandez v. State*, which holds that filing a 404(b) response on a Friday is not adequate or reasonable notice for a trial that begins the following Monday. 914 S.W.2d 226, 234 (Tex. App.—Waco 1996, pet. ref'd). Although some courts have found this period of time to be unreasonable notice, it is not per se unreasonable. *See Sebalt v. State*, 28 S.W.3d 819, 821–22 (Tex. App.—Corpus Christi 2000, no pet.); *see also Ramirez v. State*, 967 S.W.2d 919, 923 (Tex.

App.—Beaumont 1998, no pet.) (finding that it is not an abuse of discretion if a trial judge holds that three days is adequate notice). "The reasonableness of the notice is determined by all of the facts and circumstances of the case." *Sebalt*, 28 S.W.3d at 822. We do not disagree with appellant's contention a one day notice period is inadequate. *Neuman v. State*, 951 S.W.2d 538, 540 (Tex. App.—Austin 1997, no pet.) (holding notice of extraneous offenses provided to defendant on Monday morning when jury selection began, where first witness was called on Tuesday, was not reasonable). However, neither *Hernandez* nor *Neuma*n control this point of error.

**C. Analysis**

On May 10, 1999, fifteen days before the first witness was called, the State provided appellant's attorney with a letter that states, in part, as follows:

> Below is a summary of outcries made by other child victims of Nathan Howard. They are sent both as notice under Rule 404(b), and as notice of outcry under Article 38.072. We intend to call the outcry witnesses to testify for any purposes under which this evidence becomes relevant.

The letter then proceeded to describe sexual contact between appellant and S.H. and appellant and H.H. on June 22, 1998. It also described sexual contact between appellant and H.H. on July 1, 1998.

On May 21, 1999, eleven days later, the State filed its "Notice of Intent to Introduce Extraneous Offenses." This notice expressed the State's intention to introduce extraneous offenses pursuant to Rule 404(b) and Article 37.07 of the Code of Criminal Procedure, and its intention to use the extraneous offenses listed in the notice in its case-in-chief and/or at the punishment phase of the trial. The two listed extraneous offenses are:

> 1. On June 22, 1998, defendant engaged in sexual contact by touching the genitals of H.H., a child younger than 17 years of age.
>
> 2. On June 22, 1998, defendant engaged in sexual contact by touching the genitals of S.H., a child younger than 17 years of age.

The two notices of the State's intent to introduce evidence of extraneous offenses committed by appellant refer to the offenses that occurred between appellant and S.H. and appellant and H.H on June 22, 1998. Moreover, both notices refer to Rule 404(b), thus establishing the documents as responsive to appellant's request for notice of extraneous offense evidence filed January 20, 1999.

While the reasonableness of the State's notice filed and served on appellant's counsel on May 21, 1999, just four days before the first witness was called, might be legitimately questioned, the timing of the notice on May 10, 1999 is unquestionably reasonable. Appellant contends that the notice on May 10 is not satisfactory because it refers to article 38.072 and asserts the State's intent to call only the outcry witnesses at trial. This argument is of no moment. Evidence of a victim's outcry is admissible under article 38.072 in the prosecution of an offense under chapter 22 of the Penal Code if committed against a child 12 years of age or younger. *Jones v. State*, 817 S.W.2d 854, 857 (Tex. App.—Houston [1st Dist.] 1991, no pet.). Here, the prosecution of appellant is for sexual contact with N.C. Article 38.072, Section 2, permits hearsay statements, made by the child against whom the offense was allegedly committed, by the first person 18 or more years old to whom the child made a statement about the offense. TEX. CODE CRIM. PROC. ANN. art. 38.072, §2(a) (Vernon Supp. 2001). The outcry statute exception to hearsay testimony does not extend to an outcry of a child respecting an extraneous offense. *Beckley v. State*, 827 S.W.2d 74, 78 (Tex. App.—Fort Worth 1992, no pet.). Therefore, the State could not have used the testimony of the outcry witnesses referred to in the May 10 letter because the children were not the victims, and thus any outcry witness testimony involving statements by these non-victims would constitute hearsay. However, the State could present the extraneous offense evidence directly through the victims, H.H. and S.H., because the May 10 letter was timely notice to appellant that the State intended to use the evidence for 404(b) purposes. Accordingly, we hold the State provided appellant reasonable notice under Rule 404(b) of its intent to introduce non-hearsay extraneous

offense evidence at the guilt stage of trial. The trial court did not, therefore, abuse its discretion in overruling appellant's objection to the 404(b) evidence based on the abbreviated notice period. We overrule appellant's fourth point of error.

**II.**
**Admission of Extraneous Offense Evidence**

In his first, second, and third points of error, appellant asserts that the trial court erred in admitting evidence of extraneous offenses involving A.C., H.H., and S.H., during the guilt-innocence phase of trial. The State argues that the evidence is admissible to show intent under Rule 404(b). *See* TEX. R. EVID. 404(b). A person commits an offense of indecency with a child "if, with a child younger than 17 years and not his spouse, whether the child is of the same or opposite sex, he: (1) engages in sexual contact with the child. TEX. PEN. CODE ANN. 21.11(a)(1) (Vernon Supp. 2001). "Sexual contact" means "any touching of the anus, breast, or any part of the genitals of another person with the intent to arouse or gratify the sexual desire of any person." *Id.* at § 21.01(2) (Vernon 1994). The indecency offense requires the "intent to arouse or gratify the sexual desire" because legitimate, non-criminal, contact may occur between parents, nurses, doctors, or other care-givers and a child, particularly a young child, on the relevant body parts. *Caballero v. State*, 927 S.W.2d 128, 130-31 (Tex. App.—El Paso 1996, pet. ref'd). The offense, however, does not require that arousal or gratification actually occur. *Id.* Instead, the offense is complete upon the contact accompanied by the requisite intent. *Id.* Specific intent to arouse or gratify sexual desire can be inferred from the defendant's conduct, his remarks, and all surrounding circumstances. *Lozano v. State*, 958 S.W.2d 925, 930 (Tex. App.—El Paso 1997, no pet.).

Appellant argues that any extraneous offenses should not be admitted because the intent can be inferred from the act against complainant, N.C. Conversely, the intent to arouse or gratify appellant's sexual desire cannot be gleaned from the acts of appellant because he contends that if he did touch the anus, breast, or any part of the genitals of N.C., it was done inadvertently. This argument is somewhat plausible because of the close

relationship that appellant had with the complainant, NC. Further, appellant and the complainant were clothed at the time of the acts, thus making it more difficult for the fact-finder to determine whether appellant's touching occurred the intent to arouse or gratify his sexual desire.

In *Plante v. State*, the Court of Criminal Appeals thoroughly addressed the issue of admitting extraneous offenses to show intent. 692 S.W.2d 487, 489–92 (Tex. Crim. App. 1985). For extraneous offenses to be admitted they: (1) must have occurred within a reasonably close time frame to the crime charged; and (2) must be sufficiently similar in plan design or scheme. *Id.* at 490. Further, the extraneous offenses must be relevant and their relevance must outweigh any inflammatory or prejudicial effect. *Id.* at 491. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Id.*

Also particularly pertinent to this analysis is the doctrine of chances, which states that:

> [T]he instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. [Further,] . . . an unusual and abnormal element might perhaps be present in one instance, but that the oftener [sic] similar instances occur with similar results, the less likely is the abnormal element to be the true explanation of them.

*Id.* at 491–92 (quoting 2 WIGMORE, EVIDENCE § 302 (Chadbourn rev. ed. 1979)).

**B. Analysis**

In this case, N.C. testified that appellant touched her genital area almost every time he came to babysit, usually after being asked to rub her back. On every occasion, appellant and N.C. were clothed. Appellant contends that if he did touch N.C.'s genital area it was only by accident, and thus an "unusual or abnormal event." However, A.C. testified that appellant, while rubbing one of her legs would pass over her genital area to

rub the other. A.C. and appellant were clothed during this incident. S.H. testified that appellant, while playing a game, tickled his genital area through his clothes. H.H. also testified that appellant touched her genital area during her nap time. Again, H.H. and appellant were clothed. Clearly the instances of touching of the genitals are very similar in that they occurred over the clothing and usually in combination with rubbing other non-sexual body parts. Most importantly, they repeatedly occurred over time and involved four different children.

Because the evidence was admitted "merely to discover the intent accompanying the act in question; and the prior doing of other acts . . . is useful [to reduce] the possibility that the act in question was done with innocent intent." *Id.* at 492 (quoting 2 WIGMORE, EVIDENCE § 302 (Chadbourn rev. ed. 1979)); *see also Morgan v. State,* 692 S.W.2d 877 (Tex. Crim. App. 1985). In *Morgan*, the appellant was also charged with indecency with a child when he picked up the complainant and briefly touched her genital area over her clothes. *Id.* at 878. There, the court recognized that where the defendant's conduct, his remarks and all surrounding circumstances fail of themselves to establish the requisite intent, the need on the part of the State to present some alternate indicia of that intent will more than likely transcend any prejudice resulting therefrom. *Id.* at 880. As in *Morgan*, there is no circumstantial evidence here that the touching was accompanied by the requisite intent.

The only facts here indicating appellant intended to arouse or gratify his sexual desire are the acts of touching, which appellant contends were accidental. There are no other facts that could have been used to suggest his intent such as asking N.C. not to tell anyone or physical signs of arousal since appellant was clothed. Thus, inasmuch as there are no other facts to suggest intent, the State's need to present some alternate indicia of intent is great because intent will almost have to be established by showing the commission of similar acts. Intent may then be inferred from the fact such acts are repeated. *Id.* at 880 n.3. In *Morgan*, the court looked to acts sufficiently similar to prove

intent because appellant's conduct there, as here, was as consistent with accident as with a specific lascivious intent. *Id.* at 881 (admitting evidence that the appellant touched the complainant in the same manner the night before and also touched complainant's sister a month before as "facts of indubitable probative value as to appellant's intent.").

Here, because the extraneous offenses were repeated and very similar to the act in question, they can be used to seek an objective inference of appellant's intent. Therefore, we find the extraneous acts of misconduct were relevant to prove appellant's specific intent to arouse and gratify his sexual desire in the instant offense, and hold the admission of such evidence was not an abuse of discretion. *See Aitch v. State*, 879 S.W.2d 167, 174 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (holding evidence of extraneous offenses or acts is admissible when intent is an essential element of the State's case and where such intent cannot be inferred from the act itself).

Appellant's first, second, and third points of error are overruled.

**III.**

**Comment on the Weight of Evidence**

In his fifth point of error, appellant contends the trial court erred by commenting on the weight of the evidence in its instructions to the jury in the guilt phase of the trial. Specifically, the trial court defined the term "touching" as "to perceive by the sense of feeling and includes, but is not limited to flesh to flesh contact between two individuals." Appellant argues that because appellant was accused of touching the complainant and the other witnesses while clothed that this is a comment on the evidence, and that touching is a common sense term that does not need to be defined by the trial court.

The Code of Criminal Procedure addresses the issue of the judge's charge to the jury. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 2001) (stating that the judge shall not, in the charge, express any opinion as to the weight of the evidence, sum up the testimony, discuss the facts or use any argument in the charge calculated to arouse the sympathy or excite the passions of the jury). However, unlike the Rules of Civil

Procedure, it does not specifically address the issue of definitions to the jury. *See* TEX. R. CIV. P. ANN. 277 (Vernon Supp. 2001) (stating that the "court's charge shall not be objectionable on the ground that it *incidentally constitutes a comment on the weight of the evidence* or advises the jury of the effect of their answers when it is properly *part of an* instruction or *definition*.") (emphasis added).

The trial court's charge included a definition not provided in the Penal Code, but it does not reveal the trial court's opinion as to the weight of any evidence, sum up testimony, discuss the facts or appear calculated to arouse sympathy or excite the passions of the jurors. The trial court apparently determined that the word touching, in the context of "sexual contact," could be interpreted *not* to include touching while clothed. This argument has been presented before. In *Guia v. State*, the court rejected defendant's argument that no sexual contact had occurred because the individual he touched was fully clothed at the time of the touching. 723 S.W.2d 763, 766 (Tex. App.—Dallas 1986, pet ref'd); *see also Resnick v. State*, 574 S.W.2d 558, 559–60 (Tex. Crim. App. 1978) (rejecting the argument that flesh-to-flesh contact is required under the meaning of sexual contact).

A trial court has broad discretion in submitting proper definitions and explanatory phrases to the jury. *Macias v. State*, 959 S.W.2d 332, 336 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd). Appellant's contention that the "definition could be interpreted as a comment on the weight of the evidence" is mistaken. Here, if the trial court had stated that touching over the clothes was included in the definition of sexual contact, then it might be perceived as a comment on the weight of the evidence. For example, in *Santos v. State*, the appellant groped the complainant and ran when she started screaming. 961 S.W.2d 304, 305 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd). The trial court's instruction stated that the jury could consider "that flight from the scene of an offense may be considered" when determining intent. *Id.* at 306. The *Santos* court held that this constituted a comment on the weight of the evidence because it singled out the particular fact that appellant fled the scene. *Id.* Here, by using the term "flesh-to-flesh" touching,

the trial court avoided commenting on the facts in this case; specifically, the trial court did not use the term over-the-clothes in its definition of touching. Therefore, the trial court's definition of touching stated in the jury charge was not an opinion as to the weight of the evidence, did not sum up the testimony, did not discuss the facts or use any argument calculated to arouse the sympathy or excite the passions of the jury. Accordingly, appellant's fifth point of error is overruled.

**IV.**

**Improper Jury Argument**

In the his sixth point of error appellant contends that the trial court reversibly erred in overruling defense counsel's objection regarding some of the prosecutor's comments during closing argument.

Proper jury argument falls within the following categories: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) responding to opposing counsel's argument; and (4) plea for law enforcement. *Long v. State*, 823 S.W.2d 259, 267 (Tex. Crim. App. 1991). Further, a prosecutor is entitled to draw all inferences from the evidence that are reasonable, fair, legitimate, and offered in good faith. *McFarland v. State*, 845 S.W.2d 824, 840 (Tex. Crim. App. 1992).

Here, appellant argues that the following comments by the State amounted to improper jury argument:

> STATE: And so what is the defense? Apparently, it's Robert Cottrell, as far as I can tell. And so what did Robert Cottrell add or subtract from this case, I guess, is what you have to ask yourself because this case is not about Rob Cottrell as much as Mr. Bryan [defense counsel] might like it to be. It's about [appellant]. So you have to ask yourself, "Why did they call him to the stand? Do you think maybe they wanted to trash him? Do you think maybe they thought that would distract you from the truth?" If you think that Robert Cottrell–"

Then defense counsel objected to the argument. However, these comments were directly in response to comments made earlier during defense counsel's closing argument, as

follows:

DEFENSE: Why did this happen? I don't think [appellant] knows why this happened, why they're accusing him of this. Is it because the children are trying to get attention? Is it for money? Maybe some lawsuit? Is it because they're mad at [appellant]? Or did Robert Cottrell molest them?
Who knows what happened? Robert Cottrell takes them back and puts them in bed, closes the door.

Then the State objected and the trial court sustained the objection. Defense counsel continued:

DEFENSE: This is a weird man, ladies and gentleman, I'm telling you. [Robert Cottrell] runs a weird household. He's done some things in his past. And you know, sometimes people that molest children that [sic] ask them over and over and over every two months, "Have you been touched," are doing that to protect themselves and maybe shift the blame on somebody else.

The State objected once more, and the court again sustained the objection.

The State was only responding to the accusations made by defense counsel during his closing argument. Therefore, the trial court did not err in overruling appellant's objection. *See Nance v. State*, 946 S.W.2d 490, 494 (Tex. App.—Fort Worth 1997, pet ref'd); *see also Miller v. State*, 479 S.W.2d 670, 672 (Tex. Crim. App. 1972) (stating that a response to argument by opposing counsel does not present reversible error even though referring to a matter not in evidence). Accordingly, we overrule appellant's sixth point of error.

**V.**

**Confrontation**

In his seventh point of error appellant argues that the trial court reversibly erred by allowing H.H.'s father to sit at the prosecution table while she testified before the jury. H.H. was five years old at the time of trial, and the State claimed that she was terrified of appellant and became more afraid of him as the trial approached. The State claims appellant did not preserve error because he failed to specifically object about the father's

location in the court room.

To preserve error for appellate review, the complaining party must make a timely, specific objection. TEX. R. APP. P. 33.1(a). The policy underlying specific objections serves two purposes: (1) a specific objection is required to inform the judge of the basis of the objection and afford him an opportunity to rule appropriately; and (2) a specific objection will allow opposing counsel an opportunity to remove the objection or supply other testimony. *Villareal v. State*, 811 S.W.2d 212, 217 (Tex. App.—Houston [14th Dist.] 1991, no pet.). The objection must be made at the earliest possible opportunity and set forth the specific grounds for the objection in order to preserve error. *Turner v. State*, 805 S.W.2d 423, 431 (Tex. Crim. App. 1991).

Here, appellant initially objected at trial to H.H.'s father standing beside her as she testified in the courtroom on the basis that it denied appellant the right to confront the witness under the United States and Texas Constitutions, thus, violating appellant's right to due process of law. The trial court sustained appellant's objection. Subsequently, the trial court decided that the father could walk his daughter up to the stand, not talk to her, but take a seat at the prosecution table during the course of her testimony. Appellant, however, did not renew his objection to the new procedure at any time or specify why or how this procedure was unconstitutional as applied to him. Instead, appellant moved on to an issue of hearsay. Thus, appellant has failed to properly preserve his complaint for appellate review. Appellant's seventh point of error is overruled.

**VI.**

**Condition of Probation**

In his eighth point of error, appellant contends that the trial court abused its discretion by informing appellant that the 180 day confinement in jail would be suspended if he confessed to the commission of the offense. Further, appellant asks this Court to reform the judgement by deleting the 180 day confinement condition. However, appellant waived his right to have the jury consider community supervision. Criminal Procedure

article 42.12, Section 4(e) provides:

> A defendant is eligible for community supervision [probation] under this section *only if before the trial begins the defendant files a written sworn motion* with the judge that the defendant has not previously been convicted of a felony in this or any other state, and the jury enters in the verdict a finding that the information in the defendant's motion is true.

TEX. CODE CRIM. PROC. ANN. art. 42.12 § 4(e) (Vernon Supp. 2001) (emphasis added); *see also Wyle v. State*, 777 S.W.2d 709, 717 (Tex. Crim. App. 1989) (stating "a defendant raises the issue of probation by timely filing an application for probation before trial begins."); *Beyince v. State*, 954 S.W.2d 878, 879–80 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (stating there is no ambiguity in article 42.12 section 4(e)).

Here, appellant's application for felony probation was signed on June 1, 1999 and filed on June 3 of 1999. However, the trial started with voir dire on May 24, 1999. Because appellant failed to timely file his application allowing the jury to recommend probation, he was not eligible for the imposition of community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 4(e). Appellant's ineligibility for community supervision vitiates the punishment imposed here. To the extent that appellant's point of error challenges the validity of community supervision, his eighth point of error is sustained.

## VII.

## Sentence Modification

In point of error nine, appellant asserts the judgment and sentence erroneously reflects that appellant was convicted of the offense of indecency with a child, specifically N.C. and another child, thereby reflecting "X2", or times two. Appellant, however, was tried and convicted for the offense committed in Count One of the indictment, involving only N.C. Since the judgment and sentence are in error, appellant requests reformation of

the judgment by deleting the "X2" reference. The State agrees that appellant was convicted only on Count One of the indictment, involving N.C. Therefore, we sustain appellant's point of error nine, and will modify the judgment to delete the "X2" reference.

## VIII.
## Conclusion

We have held appellant was not eligible for community supervision. Accordingly, the trial court erred when, pursuant to article 42.12, Section 4(a), appellant was placed on community supervision. During the sentencing hearing the trial court stated he was required under the law to follow the jury's recommendation for community supervision. However, it is manifest the trial court was operating under the mistaken assumption appellant had filed a motion before the trial began stating the defendant had not previously been convicted of a felony in this or any other state, thus making appellant eligible for community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4(e). The error here necessitates a new punishment hearing.[2]

Accordingly, we affirm the portion of the trial court's judgment as to appellant's guilt, reverse the punishment and community supervision portions of the judgment, modify the judgment to delete the "X2" reference, and remand the cause to the trial court for a new punishment hearing not inconsistent with this opinion.

/s/ John S. Anderson
Justice

[2] Because no timely motion was filed pursuant to § 4(e), appellant will not be eligible for jury recommended community supervision. Similarly, because appellant was convicted of indecency with a child, an offense under Penal Code section 21.11(a)(1), appellant will not be eligible for judge ordered community supervision pursuant to article 42.12, § 3. *See* TEX. CODE CRIM. PROC. Ann. art. 42.12, § 3 (Vernon Supp. 2001).

Judgment rendered and Opinion filed August 2, 2001.

Panel consists of Justices Anderson, Fowler, and Edelman.

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