Opinion issued November 14, 2019.

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00447-CR

LEE THOMAS KRAUSE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 235th District Court
Cooke County, Texas
Trial Court Case No. CR17-00003

MEMORANDUM OPINION

A jury convicted appellant Lee Thomas Krause of continual sexual abuse of a child and the trial court assessed his punishment at twenty-five years' incarceration. In three issues, appellant argues on appeal that: (1) the trial court abused its

discretion by admitting uncorroborated evidence of extraneous bad acts and the State violated his rights by discussing this evidence during its closing argument; (2) the trial court abused its discretion by admitting expert testimony that he had groomed the complainant; and (4) the trial court violated his rights under Article 5 of the Texas Constitution by submitting an inadequate *Allen*[1] charge to the jury. Finding no reversible error, we affirm the trial court's judgment.

Background

A. The Assault and the Relationship between Appellant and the Complainant

The complainant testified that appellant sexually abused her for two years, beginning when she was nine years old. Specifically, the complainant testified that appellant would lay on the couch with her and penetrate her vagina with his fingers. During this time, appellant was dating the complainant's mother and lived with the complainant, her mother, and her four siblings.

The complainant testified that at the beginning of the relationship appellant gave her special attention and bought her lots of gifts. Although she liked getting the attention, it also made her uncomfortable. According to the complainant, her younger brothers would get mad at her because they believed that appellant spoiled her.

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[1] *Allen v. United States*, 164 U.S. 492, 501 (1896).

The complainant's older sisters also testified that appellant lived with them and their brothers when he was dating their mother. Appellant treated the girls better than the boys and he was especially nice to their younger sister, the complainant. According to one sister, appellant bought more gifts for the complainant than he did for the other siblings, and he was always "cuddling up next to her on the couch or in his room." Both sisters agreed that appellant paid more attention to the complainant than he did to any of the other children in the household.

One sister also observed appellant going in and out of the bathroom where the complainant was naked and taking a shower. The complainant told one sister about the abuse, which ultimately led to criminal charges being filed.

B. Expert Testimony

One of the officers assigned to the case, Investigator Young with the Gainesville Police Department, offered expert testimony on the topic of grooming in child sexual assault cases. Investigator Young testified that he had been a peace officer for over 19 years and had worked as a patrol officer, a K9 handler, and an investigator over the course of his career. He had been working in the crimes against people division for the last three years and his duties included investigating sexual assault cases.

> Q. (The State) Okay. Have you gone to specialized training about child abuse cases?
>
> A. Yes, I have.

Q. Okay. What is that -- some of that training consist of?

A. I've been to numerous sexual assaults, child abuse classes, crimes against children several times and just -- throughout my career, I've had extensive training.

On cross-examination, appellant's counsel asked Investigator Young about what his investigation revealed about appellant's and the complainant's relationship.

Q. (Appellant's Counsel) During your investigation, did it come out that [the complainant] was the one that wanted to be near [appellant]?

A. She loved [appellant]. She wanted to be close to him.

Q. Was it revealed to you that, in fact, she would try to push her siblings out of the way and fight with them to be near [appellant]?

A. It was stated that she loved [appellant], and that they were the closest, yes.

On redirect examination, the State asked Young to explain the concept of grooming and how he "saw it in this case." Appellant objected: "I don't believe that this expert has been qualified as an expert witness in this matter." The court then questioned Young about his expertise with respect to the grooming of child sexual assault victims:

Q. (The Court) Does your training that you've received over the many years you've been an investigator include training in grooming and sexual assault --

A. Yes, ma'am.

Q. Behaviors?

A. Yes, ma'am, it does.

The State continued this line of questioning after the court overruled appellant's objection.

> Q. (The State) Okay. Could you tell us how -- how you saw grooming in this case?
>
> A. In this case, the suspect would have to obviously be very, very close to his victim, would have to gain the trust, have to gain the love of the victim or it doesn't work in their advantage. I mean, they can't do this type of stuff if they don't have the love and trust, you know, of the children they do this to.
>
> Q. Okay. So grooming – I guess what you're saying is, if a child isn't groomed by a defendant like this, the child's more likely to blow the whole thing up right away?
>
> A. Immediately.
>
> Q. Okay. So is it common for victims like this to want to be around the suspect -- or the defendants?
>
> A. Absolutely.
>
> Q. And love them?
>
> A. Absolutely.
>
> Q. Is that what you saw in this case?
>
> A. Yes, sir.
>
> Q. In fact, all of the kids seemed to like [appellant], didn't they?
>
> A. Yes, they loved him very much.

C. *Allen* Charge[2]

After deliberating the case for less than three hours, the jury notified the trial court that they were deadlocked. The judge instructed them to continue deliberations. When the jury informed the trial court approximately an hour later that they were still deadlocked, the trial court conferred with counsel and the State regarding the need for an *Allen* charge.

Both appellant and the State agreed with the necessity of an *Allen* charge and the content of the specific charge submitted to the jury. After submission of the *Allen* charge, the jury returned a guilty verdict. This appeal followed.

Extraneous Bad Acts and Improper Jury Argument

In his first issue, appellant argues that the trial court abused its discretion by admitting uncorroborated evidence that he possessed pornographic images depicting persons approximately eighteen years of age because the complainant was only eleven years old when the last assault occurred, and the State's discussion of this evidence during its closing argument violated his fundamental rights.

Specifically, the complainant's mother testified that she found pornographic images on appellant's cell phone while they were living together.

Q. (The State) What were y'all fighting about, do you remember?

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[2] *Barnett v. State*, 189 S.W.3d 272, 277 n.13 (Tex. Crim. App. 2006) (stating that *Allen* charge is supplemental charge sometimes given to jury that declares itself deadlocked).

A. Me finding porn on his phone.

Q. Okay.

A. Again.

Q. Do you know what type of porn it was?

A. Teen porn, 18 porn.

Q. Okay. So this type of pornography that depicts 18 year-olds as being young?

A. Yeah. Most of them didn't look 18.

Q. Okay. Did they look younger than 18?

A. Yes.

Appellant did not object to this testimony, or the State's discussion of this evidence during its closing argument, and the State argues that he failed to preserve any error for our review.

Generally, a party must object to preserve error on appeal. *See* TEX. R. APP. P. 33.1(a). However, pursuant to Rule 103(e) of the Texas Rules of Evidence, appellate courts may take "notice of a fundamental error affecting a substantial right, even if the claim of error was not properly preserved." TEX. R. EVID. 103(e). Fundamental errors fall into "two relatively small categories of errors: violations of 'rights which are waivable only' and denials of 'absolute systemic requirements.'" *Saldano v. State*, 70 S.W.3d 873, 888 (Tex. Crim. App. 2002) (quoting *Marin v. State*, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993), *overruled on other grounds by*

Cain v. State, 947 S.W.2d 262 (Tex. Crim. App. 1997)). "Waivable only" rights include the right to the assistance of counsel and the right to trial by jury. *Saldano*, 70 S.W.3d at 888. "Absolute, systemic rights" include, among other things, jurisdiction of the person and subject matter, a penal statute's compliance with the separation of powers section of the state constitution, the constitutional prohibition of ex post facto laws, and certain constitutional restraints on the comments of a judge. *Id.* at 888–89. Neither of the fundamental error categories includes the admission or exclusion of evidence, regardless of how probative or prejudicial the evidence might be. *See id*. Because the admission of the mother's testimony does not rise to the level of fundamental error, appellant was required to present to the trial court a timely request, objection, or motion stating the specific grounds for the desired ruling. *See* TEX. R. APP. P. 33.1(a)(1). Having failed to do so, appellant has not preserved this issue for appellate review.

Similarly, "[t]he right to a trial untainted by improper jury argument is forfeitable." *Hernandez v. State*, 538 S.W.3d 619, 622 (Tex. Crim. App. 2018). To preserve a complaint about improper jury argument for appellate review, the defendant must pursue his objection to an adverse ruling from the trial court. *Id.*; *Hinojosa v. State*, 433 S.W.3d 742, 761 (Tex. App.—San Antonio 2014, pet. ref'd). Appellant did not object when the State referred to the mother's testimony about the pornographic images of young-looking teenaged girls that she found on appellant's

cell phone or to the State's reasonable deduction from that evidence that, "Evidently, [appellant] had something for young looking girls." Because appellant did not object to the State's arguments, he has not preserved this issue for our review. *See Hernandez*, 538 S.W.3d at 622. Furthermore, even if appellant had preserved this issue for our review, he would still not prevail because the State can summarize the evidence during its closing argument and make reasonable deductions that can be drawn from that evidence. *See Westbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000) (stating proper jury arguments include, among other things, summation of evidence and reasonable deductions drawn from that evidence).

We overrule appellant's first issue.

Expert Testimony

In his second issue, appellant argues that the trial court abused its discretion by allowing Investigator Young to offer expert testimony that appellant groomed the complainant.

A. Standard of Review

We review a trial court's ruling on the admissibility of expert testimony for an abuse of discretion. *Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009); *Bryant v. State*, 340 S.W.3d 1, 7 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

An expert witness may offer an opinion if he is qualified to do so by his knowledge, skill, experience, training or education and if scientific, technical or

other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue. TEX. R. EVID. 702; *see also Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019); *Rodgers v. State*, 205 S.W.3d 525, 527 (Tex. Crim. App. 2006).

A trial court has great discretion in determining whether a witness is qualified to offer expert testimony on a given topic. *See Rodgers*, 205 S.W.3d at 527–28 ("Because the possible spectrum of education, skill, and training is so wide, a trial court has great discretion in determining whether a witness possesses sufficient qualifications to assist the jury as an expert on a specific topic in a particular case."). Such rulings will rarely be disturbed by an appellate court. *Vela v. State*, 209 S.W.3d 128, 136 (Tex. Crim. App. 2006); *Bryant*, 340 S.W.3d at 7 (citing *Rodgers*, 205 S.W.3d at 528 n.9). We will uphold the trial court's decision unless it lies outside the zone of reasonable disagreement. *Layton*, 280 S.W.3d at 240; *Bryant*, 340 S.W.3d at 7.

To determine whether a trial court has abused its discretion in ruling on an expert's qualifications, an appellate court may consider three questions: (1) Is the field of expertise complex? (2) How conclusive is the expert's opinion? (3) How central is the area of expertise to the resolution of the case? *See Rhomer*, 569 S.W.3d at 669–70 (citing *Rodgers*, 205 S.W.3d at 528). "Greater qualifications are required

for more complex fields of expertise and for more conclusive and dispositive opinions." *Rhomer*, 569 S.W.3d at 670 (citing *Rodgers*, 205 S.W.3d at 528).

B. Analysis

Investigator Young testified that he had been a licensed peace officer for over nineteen years at the time of trial and, for the three years prior to trial, he had been working in the crimes against persons division, which has responsibility for sexual assault cases. Young further testified that he had attended numerous trainings and conferences on child abuse and had extensive training in child abuse investigations.

"Grooming" is a legitimate subject of expert testimony. *Morris v. State*, 361 S.W.3d 649, 650, 669 (Tex. Crim. App. 2011). It is not, however, a complicated subject. *Bryant v. State*, 340 S.W.3d 1, 9 (Tex. App.—Houston [1st Dist.] 2010, pet. dism'd). "Grooming" evidence is at "its most basic level, testimony describing the common behaviors of child molesters and whether a type of evidence is consistent with" that behavior. *Morris*, 361 S.W.3d at 666. "The degree of education, training, or experience that a witness should have before he can qualify as an expert is directly related to the complexity of the field about which he proposes to testify." *Rodgers*, 205 S.W.3d at 528. Given the great discretion trial courts have in determining whether a witness is qualified to offer expert testimony on a given topic, we cannot say that the trial court abused its discretion by concluding that Investigator Young

possessed sufficient qualifications to assist the jury as an expert on the topic of grooming in child sexual assault cases. *See Rodgers*, 205 S.W.3d at 527–28.

Appellant also argues that the trial court abused its discretion by allowing Investigator Young to testify on the topic of grooming because the substance of his testimony did not increase the depth of understanding of the jurors. Although it is not a complex topic, the Court of Criminal Appeals has recognized that expert testimony about grooming in child sexual assault cases is useful to a jury because it is beyond a jury's common knowledge and understanding. *Morris*, 361 S.W.3d at 668–69. In this case, Investigator Young's testimony provided the jury with background information that helped the jury understand that abusers can groom children for sexual abuse by getting the child to trust and love them. The testimony also explained to the jury that a child's affection for her abuser is consistent with the concept of grooming. *See generally Morris*, 361 S.W.3d at 666. Investigator Young's testimony is not directly relevant to the elements of the charged offense, continuous sexual abuse of a child, and it is not conclusive of the main issue in this case, i.e., appellant's guilt or innocence. *See Rhomer*, 569 S.W.3d at 669–70 (citing *Rodgers*, 205 S.W.3d at 528 (stating court can consider whether expert's opinion was conclusive and how central area of expertise is to resolution of case when evaluating whether trial court abused its discretion by admitting expert testimony). Further, the testimony was in response to, and explained cross-examination of the

officer directed towards, the complainant's seeming affection for appellant. At most, Investigator Young's testimony could have indirectly influenced the jury's determination of the complainant's credibility. *See Bryant*, 340 S.W.3d at 10 (holding trial court did not abuse its discretion by admitting grooming testimony that could have influenced jury's credibility determinations but was not directly relevant to element of charged offense).

We overrule appellant's second issue.

Allen Charge

In his third issue, appellant argues that the *Allen* charge submitted in this case violated his right to a unanimous verdict under Article V of the Texas Constitution because it did not emphasize that each juror was entitled to reach his or her own decision regarding guilt or innocence, endorsed the jury's majority position, and indicated to the minority that it should distrust its opinion and accede to the majority view.

A. Standard of Review and Applicable Law

An *Allen* charge "is designed to blast loose a deadlocked jury." *Green v. United States*, 309 F.2d 852, 854 (5th Cir. 1962). As the Court of Criminal Appeals has explained,

> An *Allen* charge is given to a deadlocked jury to inform them of the consequences if a verdict is not reached. An *Allen* charge is a supplemental charge sometimes given to a jury that declares itself deadlocked. It reminds the jury that if it is unable to reach a verdict, a

> mistrial will result, the case will still be pending, and there is no guarantee that a second jury would find the issue any easier to resolve.

Barnett v. State, 189 S.W.3d 272, 277 n.13 (Tex. Crim. App. 2006); *see Allen v. United States*, 164 U.S. 492, 501 (1896).

An *Allen* charge will constitute reversible error only if, on its face, it is so improper as to render jury misconduct likely. *Howard v. State*, 941 S.W.2d 102, 123 (Tex. Crim. App. 1996). A charge is "unduly coercive and therefore improper only if it pressures jurors into reaching a particular verdict or improperly conveys the court's opinion of the case." *West v. State*, 121 S.W.3d 95, 107–08 (Tex. App.—Fort Worth 2003, pet. ref'd); *see also Arrevalo v. State*, 489 S.W.2d 569, 571 (Tex. Crim. App. 1973).

B. Analysis

The record reflects that appellant's counsel agreed with the content of the *Allen* charge and asked the charge to be submitted to the jury.

> The Court: At this point would the attorneys for both sides like for the Court to send them the *Allen* charge that we have discussed previously?
>
> Appellant's Attorney: The one with - - the short one that - -
>
> The Court: The short one.
>
> Appellant's Attorney: Yes, please.
>
> Prosecutor: Yes, Your Honor.

The *Allen* charge the parties agreed to submit to the jury stated:

> Members of the Jury: You are instructed that in a large proportion of cases, absolute certainty cannot be expected. Although the verdict must be the verdict of each individual juror and not mere acquiescence in the conclusion of other jurors, each juror should show a proper regard to the opinion of the other jurors.
>
> You should listen, with a disposition to be convinced, to the arguments of the other jurors. If a large number of jurors are for deciding the case one way, those in the minority should consider whether they are basing their opinion on speculation or surmise and not on the evidence in the case. Keeping in mind the impression the evidence has made on a majority of the other jurors, who are as equally honest and intelligent as those in the minority.
>
> Also bear in mind that if you do not reach a verdict in this case, a mistrial will be granted. The case can be tried again to a different jury, but the next jury will be in no better position to decide the case than you are.
>
> Therefore, you are instructed that it is your duty to decide the case if you can conscientiously do so. You will now retire and continue your deliberations.

Because appellant did not object to the submission of the *Allen* charge, he has not preserved his challenge to the charge for appellate review. *See Thomas v. State*, 312 S.W.3d 732, 740 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). The doctrine of invited error also precludes appellant from seeking appellate relief based on any alleged error in the submission of a charge because he affirmatively agreed to submit the charge to the jury. *See, e.g.*, *Druery v. State*, 225 S.W.3d 491, 505–06 (Tex. Crim. App. 2007) (applying law of invited error to claim of jury-charge error and concluding that defendant was estopped from raising claim that failure to include instruction on lesser-included offense in jury charge amounted to fundamental error because defendant "not only did not object to the omission of the lesser-included

instruction" but "affirmatively requested, after inquiry by the trial judge, that the lesser-included instruction not be given").

Furthermore, even if appellant had not agreed to the content of the *Allen* charge and objected to its submission to the jury, appellant would still not prevail on appeal because the charge did not instruct the jury that the majority possessed superior judgment and therefore, the minority should distrust their own judgment when deciding upon a verdict, or otherwise pressure jurors into reaching a particular verdict.

Specifically, the *Allen* charge submitted in this case instructed the jury that "the verdict must be the verdict of each individual juror and not mere acquiescence in the conclusion of other jurors." Jurors were also admonished to "show a proper regard to the opinion of the other jurors" and to "listen, with a disposition to be convinced, to the arguments of the other jurors." *See Green*, 309 F.2d at 854 (stating that outermost limit of *Allen* charge's permissible use is to remind jurors that 'they should listen, with a disposition to be convinced, to each other's arguments") (quoting *Allen*, 164 U.S. at 501). The jury was also instructed that, "If a large number of jurors are for deciding the case one way, those in the minority should consider whether they are basing their opinion on speculation or surmise and not on the evidence in the case." *See, e.g.*, *West*, 121 S.W.3d at 108–09 (holding *Allen* charge containing virtually identical language was not coercive). The jury was further

instructed to "keep[] in mind the impression the evidence has made on a majority of the other jurors, who are as equally honest and intelligent as those in the minority." *See, e.g.*, *Allen*, 164 U.S. at 501 (" . . . a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself."). The charge concluded by instructing the jury that it was the jury's "duty to decide the case if you can conscientiously do so."

Relying on *Green*, appellant argues that the *Allen* charge in this case is improper because it endorses the validity and integrity of the majority position and fosters a distrust of the minority position. In *Green*, however, the Fifth Circuit Court of Appeals held that the *Allen* charge submitted in that case was improper because it instructed the jury that, "[I]t is the duty of the minority to listen to the argument of the majority with some distrust of their own judgment because the rule is that the majority will have better judgment than the mere minority." *Green*, 309 F.2d at 853. The charge in this case does not include this language or suffer from the same infirmity.

Accordingly, we conclude that the trial court did not commit reversible error by submitting the *Allen* charge to the jury because, on its face, the charge is not unduly coercive. *See Howard*, 941 S.W. 2d at 123; *West*, 121 S.W.3d at 108–09.

We overrule appellant's third issue.

Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Justices Lloyd, Goodman, and Landau.

Do Not Publish. TEX. R. APP. P. 47.2(b).