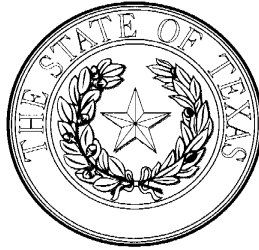


Opinion issued August 24, 2021



In The
Court of Appeals
For The
First District of Texas

NO. 01-20-00152-CV

IN RE COMMITMENT OF ARTHUR JACKSON, III, Appellant

**On Appeal from the 338th District Court
Harris County, Texas
Trial Court Case No. 1120623-0101Z**

MEMORANDUM OPINION

The State filed a civil petition to commit appellant Arthur Jackson, III for involuntary treatment and supervision as a sexually violent predator. *See* TEX. HEALTH & SAFETY CODE §§ 841.001–.153. The jury found that Jackson is a sexually violent predator, and the trial court rendered a final judgment and an order of civil

commitment. Jackson appeals, contending in a single issue that the trial court erred by admitting expert testimony. We affirm.

Background

The Civil Commitment of Sexually Violent Predators Act (“SVP Act”) provides for the civil commitment of sexually violent predators based on legislative findings that “a small but extremely dangerous group of sexually violent predators exists and that those predators have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities and that makes the predators likely to engage in repeated predatory acts of sexual violence.” TEX. HEALTH & SAFETY CODE § 841.001. The Legislature found it was in the State’s interest to provide a civil commitment procedure for the long-term supervision and treatment of sexually violent predators. *Id.* A person is a sexually violent predator under the SVP Act if the person “(1) is a repeat sexually violent offender; and (2) suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence.” *Id.* § 841.003(a). A person is a repeat sexually violent offender if the person is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses. *See id.* §§ 841.002(6), 841.003(b).

It is undisputed that Jackson has three previous convictions in Texas for sexually violent offenses: (1) a 2007 conviction for indecency with a child;¹ (2) a 2008 conviction for indecency with a child; and (3) a 2008 conviction for aggravated sexual assault of a child. Each of these offenses was committed against a different complainant—respectively, the daughter of Jackson’s friend, the daughter of Jackson’s cousin, and Jackson’s stepdaughter. Jackson pleaded guilty to each offense and, as punishment, received a ten-year sentence for the 2007 conviction and concurrent sentences of five and fifteen years for the 2008 convictions. Jackson was charged with committing another sexually violent offense against a child in 2007, but that charge was dismissed and did not result in a conviction. Before he was charged for any of these sexually violent offenses, Jackson also pleaded no contest to a charge of displaying pornographic material to a child in 2003 and was placed on community supervision. Displaying pornographic material to a child, a misdemeanor, is not a sexually violent offense as defined by the SVP Act. *See id.* § 841.002(8).

In 2018, the State filed suit against Jackson, seeking a determination that he is a sexually violent predator under the SVP Act and subject to civil commitment

¹ The trial court initially entered an order of deferred adjudication in connection with this offense in 2006, placing Jackson on community supervision. In 2007, on the State’s motion, the trial court revoked the community supervision, adjudicated Jackson guilty, and assessed punishment at ten years’ confinement.

upon his release from the Texas Department of Criminal Justice (“TDCJ”). The State’s expert, Dr. Timothy Proctor, a forensic psychologist, evaluated Jackson and testified it was his opinion that Jackson suffers from a behavioral abnormality making him likely to engage in a predatory act of sexual violence. Based on his evaluation of Jackson and his review of the records of Jackson’s history of sexual offending, Dr. Proctor diagnosed Jackson with pedophilic disorder, or the sexual attraction to prepubescent children. Dr. Proctor characterized the pedophilia underlying Jackson’s disorder as a “lifelong condition,” and noted Jackson had a history of “persisting with sexual offending,” even after being “detected, punished, [and] put on probation and treatment.”

In his testimony to the jury, Dr. Proctor discussed the details of the sexual offenses committed by Jackson against children, which began in 2001, when Jackson was thirty years old and showed a pornographic video to his ten-year-old neighbor, a girl.² Jackson invited the child into his home, showed her the pornographic video, and then offered her money to show her buttocks, which she refused. In his interview with Dr. Proctor, Jackson denied offering money in exchange for viewing the child’s buttocks but admitted other details of this offense, including that he tried to “have some kind of sexual interaction” with the child.

² As already noted, Jackson was charged in connection with this offense, pleaded no contest in 2003, and was placed on community supervision.

After this incident, Jackson committed a series of sexually violent offenses by engaging in a pattern of conduct described by Dr. Proctor as escalating from showing pornographic videos, to fondling, and ultimately to aggravated sexual assault. While Jackson was on community supervision for showing the pornographic video to his neighbor, he committed the offense that resulted in his 2007 conviction for indecency with a child. Jackson offered to take a friend's eight-year-old daughter to buy nail polish but instead took her to his home, where he pulled up her dress and "rubbed her vagina skin-to-skin . . . with his hand." Again, Jackson admitted some of this conduct in his interview with Dr. Proctor. Although he denied the nature of the errand, claiming he took the child to a McDonald's restaurant instead of to buy nail polish, and the nature of the touching, claiming he touched the child's buttocks in the car instead of her genitals in his home, Jackson acknowledged that "something sexually inappropriate happened."

At the time Jackson was charged with this offense, he was also charged with a separate offense against the child's nine-year-old sister. Dr. Proctor testified that, as had happened before, Jackson allegedly took the nine-year-old to his home while purporting to run an errand, and there, he showed her a pornographic video before removing her shorts, touching and penetrating her vagina with his finger, and penetrating her anus with his penis. Dr. Proctor explained that although Jackson was charged based on these allegations, the charge did not result in a conviction.

Dr. Proctor also described the details of the two sexually violent offenses committed against children in Jackson's family, which resulted in his two convictions in 2008. Jackson committed the first of these offenses against his cousin's four-year-old daughter. With the child seated on his lap, Jackson "pulled out his penis and put [the child's] hand on his penis." Jackson denied this occurrence in his interview with Dr. Proctor, though he pleaded guilty to the resulting charge of indecency with a child. Jackson told Dr. Proctor that any touching was non-sexual in nature and occurred only because the child extended her hand as she passed him in a hallway, inadvertently touching his groin.

The final offense to which Dr. Proctor testified was the aggravated sexual assault of Jackson's thirteen-year-old stepdaughter. Dr. Proctor testified that Jackson's stepdaughter claimed she was continuously abused by Jackson from the age of six until thirteen. Jackson initially showed her pornographic videos. But on later occasions, Jackson "masturbate[ed] in her presence to ejaculation," had her "touch his penis," and bit her on the buttocks. Dr. Proctor testified that Jackson's conduct further escalated when he used his finger to penetrate his stepdaughter's vagina and attempted penetration with his penis. In addition, Jackson's stepdaughter reported waking up to Jackson "performing oral sex on her."

In his interview with Dr. Proctor, Jackson acknowledged engaging in sexual activity with his stepdaughter, though he claimed this happened only once and under

different circumstances. Jackson told Dr. Proctor that on a single occasion, he “led [his stepdaughter] into a bedroom and had sex with her.” Jackson denied that he had continuously abused his stepdaughter, shown her a pornographic video, masturbated in her presence, or engaged in oral sex with her.

Jackson objected to Dr. Proctor testifying about the details of these sexual offenses. He argued that the details should not be disclosed to the jury because the “source material”—police reports, court records, victim statements, penitentiary packets, and sex-offender treatment records—contained hearsay and was so inflammatory that its prejudicial effect outweighed any probative value in helping the jury evaluate Dr. Proctor’s opinion. Jackson further argued that the information Dr. Proctor relied on in forming his behavioral-abnormality opinion must have “some indicia of reliability,” and it would be error for the trial court “to allow evidence of an unreliable nature” through expert testimony.

The trial court conducted a hearing outside the presence of the jury before ruling on Jackson’s objections. After the State previewed Dr. Proctor’s anticipated testimony, the trial court asked Dr. Proctor why he “need[ed] to know the specific details of each charge . . . to render an opinion.” Dr. Proctor responded that the details of the sexual offenses established a pattern of offending, which, as to Jackson, involved escalating conduct in offenses committed against prepubescent girls. Dr. Proctor also relied on the details of the sexual offenses to apply the research and

rating scales commonly used by forensic psychologists in assessing a person's risk of reoffending.

The trial court also asked Dr. Proctor how he weighed the allegations against Jackson or determined their veracity in forming his opinion, particularly those allegations that did not result in a conviction and, thus, were unadjudicated.

Dr. Proctor answered:

[I]t's all . . . about the totality of the circumstances. I commonly say in these proceedings when it comes up about unadjudicated offenses or unconvicted [sic] offenses. If all that is in a person's history is that they were alleged [to have committed] a sexual offense and it didn't result in a charge, or didn't result in a conviction, you don't put a lot of weight on that. I mean, it's not that important.

But if you have a pattern of somebody who has been on multiple occasions convicted of sexual offending against . . . a particular type of child[] . . . there is a clear pattern here. He's admitting to much of it. So we know that he's saying, yes. I mean, there were three prepubescent females I sexually offended against. That tells me there was a proclivity for this[.]

Dr. Proctor confirmed that the information he gathered from the records of Jackson's sexual offenses, including hearsay statements, was the type of information reasonably relied upon by experts in the field of forensic psychology.

The trial court concluded that the probative value of the objected-to testimony outweighed any prejudicial effect the evidence might have, and overruled Jackson's objections. Jackson obtained a running objection to hearsay, and before the

objected-to testimony was presented, the trial court orally gave the jury the following limiting instruction requested by Jackson:

Hearsay is a statement made by a person at some time other than while testifying at the current trial or hearing, which a party offers into evidence to prove the truth of the matter asserted in a statement. Generally, hearsay is not admissible as evidence during trial. However, in this case, certain hearsay information contained in records was reviewed and relied upon by experts and will be presented to you through that expert's testimony.

Such hearsay evidence is being presented to you only for the purpose of showing the basis of the expert's opinion and cannot be considered as evidence to prove the truth of the matter asserted.

You may not consider this hearsay information for any other purpose, including whether the facts alleged in the records are true.

The trial court included a similarly worded instruction on hearsay in the jury charge.

At the conclusion of the commitment proceeding, the jury unanimously found beyond a reasonable doubt that Jackson is a sexually violent predator, as defined by the SVP Act. In accordance with the jury's verdict, the trial court signed a final judgment and an order civilly committing Jackson upon his release from TDCJ. Jackson filed a motion for new trial that was overruled by operation of law.

Standard of Review

We review the trial court's ruling admitting expert testimony for an abuse of discretion. *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 347 (Tex. 2015); *Eagle Oil & Gas Co. v. Shale Exploration, LLC*, 549 S.W.3d 256, 275 (Tex. App.—Houston [1st Dist.] 2018, pet. dismiss'd). A trial court abuses its discretion

when it fails to follow guiding rules and principles. *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012). Reversal for erroneously admitted evidence is warranted only if the error probably resulted in the rendition of an improper judgment. See TEX. R. APP. P. 44.1(a)(1); *Waldrip*, 380 S.W.3d at 136. While recognizing the “impossibility of prescribing a specific test” for harmless-error review, the Texas Supreme Court requires that we evaluate the entire case, considering the evidence as a whole, the strength or weakness of the case, and the verdict. *Waldrip*, 380 S.W.3d at 136. In doing so, we look to the role the evidence played in the context of the trial and the efforts made by counsel to emphasize the erroneously admitted evidence, as well as whether contrary evidence existed that the improperly admitted evidence was calculated to overcome. *Id.*

Expert Testimony

In a single issue on appeal, Jackson contends the trial court abdicated its responsibility to act as the gatekeeper of expert testimony. Jackson asserts that Dr. Proctor’s opinion testimony rested on unreliable hearsay statements in the records of Jackson’s sexual offenses, and that his hearsay objection imposed upon the trial court a duty to independently examine the reliability of the facts underlying Dr. Proctor’s opinion. Jackson argues that by simply accepting Dr. Proctor’s word that the hearsay details of the sexual offenses were reliable, the trial court

erroneously “allowed [Dr. Proctor] to become the gatekeeper” of his own expert testimony.

A. Preservation of Error

We first consider whether Jackson has preserved his complaint that the trial court abdicated its role as gatekeeper. The gist of Jackson’s complaint is that the trial court did not sufficiently evaluate the facts underlying Dr. Proctor’s opinion, i.e., the hearsay details in the records of Jackson’s sexual offenses reviewed by Dr. Proctor. We understand this to be a complaint directed at the reliability of Dr. Proctor’s expert testimony. *See Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 713 (Tex. 1997) (expert opinion must be supported by an adequate foundation of relevant facts, data, or opinions, and court must independently evaluate this predicate to ensure it is reliable); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998) (courts not required to rely on *ipse dixit* of expert witness). A party must raise objections to the reliability of expert testimony before the evidence is admitted and obtain a ruling from the trial court. *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004) (“When a reliability challenge requires the court to evaluate the underlying methodology, technique, or foundational data used by the expert, an objection must be timely made so that the trial court has the opportunity to conduct this analysis[.]”).

The State argues that Jackson has not preserved this complaint because he did not object at the commitment proceeding that the hearsay details in the records of his sexual offenses were not a reliable foundation for Dr. Proctor's opinion. The State asserts that Jackson's objection to hearsay and the prejudicial effect of Dr. Proctor's testimony raised only the issue of whether Dr. Proctor should be allowed to transmit the hearsay details to the jury, not whether Dr. Proctor could rely on those details in forming his opinion. And so, Jackson neither informed the trial court of the need for a gatekeeping hearing nor made an objection that comports with his complaint on appeal. *See* TEX. R. APP. P. 33.1(a)(1)(A) (objection must be made with "sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context"); *see also Religious of Sacred Heart of Tex. v. City of Hous.*, 836 S.W.2d 606, 614 (Tex. 1992) (complaint made on appeal must comport with objection made at trial).

We agree that, under the rules governing the admissibility of expert testimony, whether an expert may rely on inadmissible hearsay evidence as a basis for the expert's opinion is a separate issue from whether the expert may transmit that hearsay to the jury. While Rule of Evidence 703 allows an expert to rely on inadmissible hearsay if it is "of a type reasonably relied upon by experts in the particular field," Rule of Evidence 705(d) may yet prohibit the expert from disclosing the inadmissible hearsay in his testimony to the jury if, on balance, the

probative value is outweighed by the prejudicial effect. *Compare* TEX. R. EVID. 703, with TEX. R. EVID. 705(d); *see* Harvey Brown & Melissa Davis, *Eight Gates for Expert Witnesses: Fifteen Years Later*, 52 HOU. L. REV. 1, 185 (2014) (noting different analyses under Rules 703 and 705(d)).

By objecting to hearsay before the State examined Dr. Proctor on Jackson's history of sexual offenses and arguing that the hearsay details of the sexual offenses were more prejudicial than probative, Jackson invoked Rule 705(d)'s balancing test for determining when an expert may disclose otherwise inadmissible facts to the jury. *See* TEX. R. EVID. 705(d). But in arguing his objection, Jackson also asserted that the information Dr. Proctor relied on in forming his opinion lacked "some indicia of reliability" and challenged whether Dr. Proctor could reasonably rely on the "unvetted" allegations of unadjudicated sexual offenses, such as the allegation that he had continuously offended against his stepdaughter between the ages of six and thirteen. And the record reveals that the trial court understood Jackson's objection as requiring some evaluation of the foundational reliability of Dr. Proctor's opinion. At the hearing on Jackson's objection, the trial court asked Dr. Proctor questions aimed not only at (1) whether the probative value of the hearsay details of the sexual offenses was outweighed by their prejudicial effect, *see* TEX. R. EVID. 705(d), but also (2) whether the hearsay details were the type of information reasonably relied on by experts in the field of forensic psychology, *see* TEX. R. EVID.

703.³ In this context, we conclude that Jackson’s complaint that the trial court failed to fulfill its gatekeeping role in ensuring the reliability of Dr. Proctor’s opinion is preserved for our review. *See* TEX. R. APP. P. 33.1(a)(1)(A).

B. Trial Court as Gatekeeper

Turning to the merits of Jackson’s complaint, we consider whether the trial court failed to fulfill its gatekeeping function before admitting Dr. Proctor’s expert testimony. Jackson argues that the trial court abused its discretion when, despite having concerns about the reliability of the hearsay details contained in the records reviewed by Dr. Proctor and whether Dr. Proctor could reasonably rely on those details in reaching his opinion, the trial court “threw up its hands,” “capitulated[,] and yielded” its role as gatekeeper to Dr. Proctor.

The trial court’s responsibility as gatekeeper to initially assess the reliability of an expert opinion is well established. *See, e.g., Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) (trial court acting as “gatekeeper” must “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable”); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 553 (Tex. 1995) (trial court has “heightened responsibility to ensure that expert testimony

³ We note that Jackson does not complain on appeal that the trial court incorrectly balanced the probative value and prejudicial effect of the hearsay details under Rule 705(d). His complaint on appeal is limited to the trial court’s alleged abdication of its gatekeeping responsibilities.

show[s] some indicia of reliability”); *Southland Lloyds Ins. Co. v. Cantu*, 399 S.W.3d 558, 563 (Tex. App.—San Antonio 2011, pet. denied) (trial court “serves as an evidentiary gatekeeper by screening out irrelevant and unreliable expert evidence”). In its performance of this gatekeeping function, the trial court enjoys “wide latitude.” *Hernandez v. State*, 53 S.W.3d 742, 751–52 (Tex. App.—Houston [1st Dist.] 2001, pet. ref’d).

Relevant to the reliability assessment in this case is the reasonable-reliance standard set out in Rule of Evidence 703. TEX. R. EVID. 703. Rule 703 specifies the bases on which an expert may rest his testimony, and specifically allows that “[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data [relied on] need not be admissible in evidence.” TEX. R. EVID. 703. Although Jackson acknowledges that, under this Rule, Dr. Proctor could base his opinion on the hearsay details he reviewed in the records of Jackson’s sexual offenses, Jackson asserts the trial court was required to do more as gatekeeper than simply accept Dr. Proctor’s word that it was reasonable to do so.

The record in this case does not support Jackson’s assertion that the trial court “threw up its hands” and failed to meaningfully inquire about the reliability of Dr. Proctor’s opinion. To the contrary, the record shows that upon Jackson’s objection to Dr. Proctor’s testimony, the trial court excused the jurors for the day and conducted a gatekeeping hearing outside their presence. At the hearing, the trial

court listened to the testimony the State wished to present from Dr. Proctor, asked Dr. Proctor questions about the basis of his opinion, and considered the arguments of counsel. Through its own independent examination of Dr. Proctor, the trial court evaluated:

- the extent to which Dr. Proctor had relied on the hearsay details in the records of Jackson's sexual offenses,
- the specific reason or need for that reliance in this case,
- how Dr. Proctor weighed the allegations of the unadjudicated sexual offenses in forming his opinion, and
- whether other forensic psychologists would reasonably rely on the same type of information in determining whether a person suffers from a behavioral abnormality.

The record therefore does not establish the trial court abdicated its gatekeeping role to Dr. Proctor.

To the extent Jackson's appellate brief can be read to complain that the trial court abused its discretion by finding that Dr. Proctor's testimony was sufficiently reliable, we disagree. In response to the trial court's questioning, Dr. Proctor testified that the hearsay details in the records of Jackson's sexual offenses are the type of information reasonably relied on by experts in forensic psychology. *See* TEX. R. EVID. 703. He explained that those details are used by experts in forensic psychology to identify patterns of offending and predict future behavior; to properly score the tests that aid in determining the risk a person will reoffend; and to apply the research

on sexual reoffending. There was no evidence to the contrary. Jackson did not cross-examine Dr. Proctor or otherwise attempt to demonstrate that experts in the field of forensic psychology do not rely on hearsay or that Dr. Proctor's reliance on such hearsay was unreasonable under the particular facts of this case, even if reliance on the same type of evidence might be reasonable in other cases. The record therefore does not show an abuse of the trial court's discretion. *See Hernandez*, 53 S.W.3d at 752 ("We will respect the discretion of trial court judges in performing their gatekeeping function and will not disturb their rulings on the reliability of expert testimony unless it appears from the record they acted without reference to the pertinent guiding rules or principles."); *see also Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 182 (4th Cir. 2010) (holding trial court did not abuse its discretion by permitting damages expert to base opinion on six spreadsheets when expert testified spreadsheets were of type experts in field "normally rely" on to reach opinion and objecting party "did not present any evidence to contradict that testimony").

We overrule Jackson's sole issue on appeal.

Conclusion

We affirm the trial court's final judgment and order of civil commitment.

Amparo Guerra
Justice

Panel consists of Justices Kelly, Guerra, and Farris.