In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-07-345 CV

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IN RE COMMITMENT OF JOSE SALAZAR

On Appeal from the 284th District Court
Montgomery County, Texas
Trial Cause No. 06-09-09200-CV

MEMORANDUM OPINION

The State of Texas filed a petition to civilly commit Jose Salazar as a sexually violent predator pursuant to Chapter 841 of the Texas Health & Safety Code. *See* TEX. HEALTH & SAFETY CODE ANN. §841.001-.150 (Vernon 2003 & Supp. 2008). A jury found that Salazar was a sexually violent predator who suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. The trial court entered a final judgment and order of civil commitment, from which Salazar appeals. On appeal Salazar argues (1) it was error for the court to allow expert-witness testimony that was hearsay within hearsay and was calculated to inflame the minds of the jurors; (2) the court erred in allowing

hearsay testimony from Clayton regarding statements made by the victims where her notes of the interviews she conducted with the victims were not produced in discovery; and (3) the court erred in denying Salazar's request for continuance sought in order to depose the victims Clayton interviewed. We hold that the trial court's evidentiary rulings were proper and that the court did not abuse its discretion in denying Salazar's motion for continuance. We affirm the judgment of the court below.

BACKGROUND

On April 30, 2007, a jury trial commenced and the State presented evidence through several witnesses: A.P. Merillat, Jose Salazar, Dr. Michael Gilhousen, and Dr. Lisa Clayton. The State presented evidence of Salazar's two convictions for aggravated sexual assault and one conviction for burglary of a habitation through the testimony of Merillat, a fingerprint expert. The State presented testimony from Salazar by video deposition.

During his deposition Salazar testified that he was sexually assaulted numerous times as a minor. He testified that the sexual abuse he experienced caused him to commit his sex crimes and that his victims were chosen out of revenge. Salazar testified that he had been addicted to marijuana, alcohol, cocaine, and heroin, and that drugs and alcohol had played a role in all his prior sexual offenses. Salazar admitted that he was guilty of the prior offense of burglary of a habitation with the intent to commit sexual assault, but then denied forcing the victim to have sex with him on that particular occasion. When asked about his other

sexual convictions, Salazar admitted that he was guilty of those offenses. Stating that he was under the influence of drugs and alcohol when he committed those acts, Salazar denied any recollection of the details of those events. He testified that he was a vengeful person and that his victims were chosen because they were related in some way to persons who had sexually assaulted him. Salazar testified that he began to enjoy forcing sex on women. He acknowledged that in his last two sexual assault convictions, he pled guilty as part of a plea bargain agreement where the charges were dropped on other sexual assaults for which he had been charged.

Following Salazar's deposition testimony, the State presented testimony through Dr. Michael Gilhousen ("Gilhousen"), a psychologist. Gilhousen was under contract with the State to provide evaluations of sex offenders being considered for civil commitment. Specifically, Gilhousen was employed to determine whether sex offenders possess a behavioral abnormality and to assess the level of risk an offender poses for reoffense. Gilhousen testified that he diagnosed Salazar with the following: sexual abuse of adult and sexual abuse of child; polysubstance dependence (meaning he was dependent upon alcohol and drugs of various types); major depressive disorder by history only, and antisocial personality disorder. Gilhousen testified that in his opinion Salazar has a behavioral abnormality as defined by Chapter 841 of the Texas Health & Safety Code, which makes

Salazar more likely than the average sex offender to engage in predatory acts of sexual violence in the future.

The State also presented expert testimony through Dr. Lisa Clayton ("Clayton"), a board certified forensic pyschiatrist. Clayton testified that she evaluated Salazar and found that he suffers from a behavioral abnormality. Clayton testified that she diagnosed Salazar with sexual sadism, pedophilia, and antisocial personality disorder. With regard to Salazar's sex offender treatment, Clayton testified that the eighteen months of treatment that Salazar received while incarcerated were not enough to enable him to master the control techniques relating to his sexual behavior.

After the State rested, Salazar made a motion for mistrial and a motion for directed verdict. Both motions were denied by the trial court. Salazar presented evidence through one witness, Joe Bixenman. Bixenman testified that he was Salazar's legal guardian around 1979 and told the jury about the problems Salazar had when he was younger. After Bixenman's testimony, Salazar rested. The jury determined that Salazar suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence.

INADMISSIBLE HEARSAY TESTIMONY

The trial court's decision about the admissibility of evidence is subject to an abuse of discretion standard of review. *Dalworth Trucking Co. v. Bulen*, 924 S.W.2d 728, 735 (Tex. App.--Texarkana 1996, no writ). "To obtain a reversal of a judgment based on the admission

of evidence, the appellant must show that the trial court's ruling was in error and that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment." *Stam v. Mack*, 984 S.W.2d 747, 749 (Tex. App.--Texarkana 1999, no pet.) (citing TEX. R. APP. P. 44.1); *see also McCraw v. Maris,* 828 S.W.2d 756, 757 (Tex. 1992).

At trial, Gilhousen explained that in making his determination as to whether a sex offender possesses a behavioral abnormality, he considers various risk factors which have been established to be related to reoffense. The number of risk factors that are present in an individual are added up to determine their risk of reoffending. On direct examination, Gilhousen testified that Salazar stated he chose his victims out of revenge. According to Salazar, all his victims were associated with or had some knowledge of his sexual abuse as a child, and as a result he was seeking revenge against them.

Salazar's revenge motive was an issue at trial because whether Salazar knew his victims prior to the assault was a relevant risk factor in determining the likelihood that Salazar would reoffend. Gilhousen explained as follows:

> [S]ome sex offenders offend, you know, only people within their families or acquaintances; and certainly they are dangerous people, no question. But if you're willing to sexually assault or attempt to sexually assault a stranger, well, then that broadens the number of potential victims that are out there and, therefore, makes you more risky. . . .

Gilhousen testified that in his opinion Salazar's revenge-motive assertion was not credible or consistent with the records Gilhousen reviewed. On redirect examination, the State

elicited additional testimony from Gilhousen regarding the credibility of Salazar's revenge motive.

On redirect, Gilhousen was asked if he had a professional opinion about whether Salazar raped his victims out of revenge for what happened to him. Gilhousen testified that in his opinion that was not why Salazar had committed the rapes. Gilhousen was asked if he reviewed the parole case summary and whether the parole report played an important part in his opinion of Mr. Salazar. Gilhousen replied, "I think it played a part in terms of my determining about the revenge motive to some extent." Gilhousen stated that "the statements . . . [Salazar] made to the parole officer would suggest that--that it wasn't a revenge motive." When the State asked Gilhousen specifically what statements Salazar made that led Gilhousen to conclude the revenge motive testimony was not credible, counsel for Salazar objected stating, "Your Honor, I'm going to object to the hearsay of the statements in the document. He's already established that Dr. Gilhousen has used the statements to rely on for his opinion. I think that anything else is prejudicial and is not relevant."

The court overruled counsel's objection, and allowed Gilhousen to read from the paragraph in the parole report that he relied upon in forming his opinion. Gilhousen responded to the State's question as follows:

> Well, he indicated that he displayed an aggressive attitude and he would say things like,

> "Those bitches deserve what they got. If women tease me, then they deserve what they get." Then later he stated, "When a woman wears certain clothing that show their body, then they deserve what they get." And he meant--by deserving what they get, he meant sex. When asked if he meant forced sex, the offender stated, "If it has to be."

Counsel for Salazar did not request a limiting instruction; however, the court provided one *sua sponte* as follows:[1]

> Again, I'll instruct the jury that the fact that this worker for the parole board says [Salazar] said that doesn't mean that he said it. But this witness relied on it in determining various things in connection with revenge or whatever. So it's being offered to you under those terms, that he relied on it; but you're instructed that it's not being offered for the truth of it. Okay? All right.

The following day, prior to presentation of evidence, Salazar's counsel made a motion for mistrial arguing that Gilhousen's testimony was so prejudicial that it could not be cured by the court's limiting instruction. The court denied counsel's motion. On appeal, Salazar contends that the admission of Gilhousen's testimony was error because it constitutes hearsay within hearsay and because the prejudicial effect of the testimony outweighed any probative value to the extent that the court's limiting instruction was insufficient to cure the error of admitting the testimony. We disagree. We find, under Rules 703 and 705 of the Texas Rules of Evidence, the trial court properly admitted Gilhousen's testimony. *See* TEX. R. EVID. 703, 705.

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[1]In addition, the jury was provided an additional limiting instruction in the jury charge.

An expert may base his opinion upon and testify to facts or data that would not be admissible in evidence if the facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject. *See id.* Rule 703 states as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

TEX. R. EVID. 703. Rule 705 provides in pertinent part:

> (a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.
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> . . . .
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> (d) Balancing test; limiting instructions. When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

TEX. R. EVID. 705(a),(d).

When an expert relies upon hearsay in forming his opinion, and it is of a type reasonably relied upon by such experts, the jury is generally permitted to hear it. *See* TEX. R. EVID. 703; *see also Decker v. Hatfield,* 798 S.W.2d 637, 638 (Tex. App.--Eastland 1990,

writ dism'd w.o.j.). Inadmissible evidence relied upon by an expert should be excluded only "if the danger that [the evidence] will be used for a purpose other than as explanation or support for the expert's opinion outweighs [its] value as explanation or support or [is] unfairly prejudicial." TEX. R. EVID. 705(d). The rule further provides for the use of a limiting instruction by the court to ensure that otherwise inadmissible evidence is not improperly used by the jury. *Id.* On the evidence presented we hold the trial court's ruling was not an abuse of discretion.

On direct examination Dr. Gilhousen explained that determining whether Salazar chose his victims as part of a revenge motive, or whether they were strangers, was important in assessing the risk that he would reoffend. Gilhousen further testified that parole records and summaries detailing the defendant's crimes and "the kinds of things they've said about their crimes . . ." are the types of records normally relied upon by experts in his field to make such assessments. Gilhousen testified that the parole report "played a part" in his assessment of the credibility of Salazar's revenge motive contention.

Disclosing the statements Gilhousen relied upon in forming his opinion assisted the jury in evaluating the weight to give Gilhousen's opinions. *See Austin v. State*, 222 S.W.3d 801, 812 (Tex. App.--Houston [14th Dist.] 2007, pet. ref'd), *cert. denied*, __U.S. __, 128 S.Ct. 1230, 170 L.Ed.2d 79 (2008) (citing *Ramirez v. State*, 815 S.W.2d 636, 651 (Tex. Crim. App. 1991)). Although the statements were prejudicial and there was some risk the jury might use them for another purpose, we conclude this risk did not outweigh their value as

explanation and support for Gilhousen's opinions. *See Austin*, 222 S.W.3d at 812. Without reaching the question of whether the statements were admissible, in light of the instructions, we find the trial court did not abuse its discretion in admitting the statements upon which the expert formed his opinion. *See* TEX. R. EVID. 705(d), 801, 803.

In addition, we conclude that even had the court erred in admitting the testimony, such error was not reasonably calculated to cause and probably did not cause rendition of an improper judgment. TEX. R. APP. P. 44.1; *Stam*, 984 S.W.2d at 749. Although the statements referenced from the parole report were prejudicial, the jury had already been presented substantial evidence that Salazar's revenge motive was not credible, including other comments Salazar made about his crimes. In its initial questioning of Gilhousen regarding the credibility of Salazar's revenge motive, the State asked, "Did you see any indication in the records reviewed of why he chose those people as his victims?" Gilhousen replied, "I think that he indicated in one interview, I think it was with parole--I'm not sure exactly who it was--but that he chose his victims because they were easy, easy prey, so to speak." Salazar's counsel did not object to this testimony. The following testimony was also elicited from Gilhousen:

> The State: Were the records--without going into the details, Doctor, were the records that you reviewed about the offenses, did they indicate whether or not the person that perpetrated that crime would have been a friend or an acquaintance or a stranger just by the nature of the offense?
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> Gilhousen: Could you repeat that question? I didn't understand it.

The State: Yes, sir. Without going into the details of the crime, when you looked at the details of the crime in your review of the records, did the details of that crime, the way that crime was carried out, indicate whether or not the person that carried out that crime would have been an acquaintance or a stranger?

Gilhousen: No, it looked pretty strongly like they would have been a stranger.

The State: With the exception of the juvenile that you previously mentioned, did you see any evidence that indicated that the victims knew him prior to being assaulted?

Gilhousen: No, none.

In addition, Gilhousen testified that the fact that Salazar's sex offenses were all against women discredited Salazar's revenge motive, as the sexual abuse allegedly committed against him as a child was forced anal sex by males. Finally, Salazar admitted during his deposition testimony that he began to enjoy his activities in the rapes and forcing sex on women.

The erroneous admission of evidence that is cumulative of other evidence in the record is ordinarily not reversible error. *See Thornhill v. Ronnie's I-45 Truck Stop Inc.*, 944 S.W.2d 780, 793 (Tex. App.--Beaumont 1997, writ dism'd by agr.) (citing *Mancorp., Inc. v. Culpepper*, 802 S.W.2d 226, 230 (Tex. 1990)); *see also Sosa v. Koshy*, 961 S.W.2d 420, 428 (Tex. App.--Houston [1st Dist.] 1997, writ denied). Because the testimony elicited from Gilhousen, regarding his reliance on statements referenced in the parole report, was cumulative of other evidence discrediting Salazar's revenge motive, we find any error by the

trial court in admitting that testimony was harmless. *See Thornhill*, 944 S.W.2d at 793; *see also Sosa*, 961 S.W.2d at 427-28. We overrule issue one.

FAILURE TO SUPPLEMENT DISCOVERY RESPONSES

On direct examination, Dr. Clayton was asked whether she found Salazar's allegations of sexual abuse against him to be credible. She testified as follows:

> About some of--some of it, yes. I do believe that he was sexually abused by his brother's gay lover when he was probably about six or seven years old. I do think there were probably--maybe the other instances in Amarillo were true. One of the things that he claimed as, I think, a way for him to rationalize why he raped all the women that he did was he claimed that all the women, all the different victims, that someone in their family had sexually molested him at one time or another.
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> So I don't think he was true--I don't think that actually happened. And the victims that I spoke to in the telephone interviews adamantly denied that anybody in their family had ever sexually abused Mr. Salazar. And they said no one in their family ever knew Mr. Salazar until after he had sexually assaulted them, except for one of the victims.

Clayton was then asked whether she had discussions with Salazar regarding his criminal history, other than his sexual offenses. In the middle of Clayton's answer, Salazar's counsel asked to approach the bench. Counsel stated that they had not received any notes in discovery from the victim interviews that Clayton referenced in her testimony. Counsel asked that any such notes be produced, that Clayton's testimony be stricken from the record, and that a limiting instruction be provided. The State responded that it did not have copies of any such notes and did not know if any existed. The trial court denied counsel's requests to strike the testimony and to provide a limiting instruction.

On cross-examination Salazar's counsel questioned Clayton about her interviews with the victims. Clayton testified that she had independently contacted some of the victims over the telephone to interview them after her deposition. Clayton explained that her assistant had contacted an investigator for the Special Prosecution Unit and obtained the telephone numbers of three of Salazar's victims. During her testimony regarding the dates upon which she interviewed the three victims, Salazar's counsel asked Clayton if she was referencing notes that she had made when she conducted the interviews with the victims. Clayton stated that she was. Counsel requested, and was given, an opportunity to examine Clayton's notes. Thereafter, counsel moved for a mistrial, which was denied, and a bench conference ensued. In addition to a request for mistrial, Salazar's counsel requested a continuance in order to depose the victims interviewed by Clayton.

The State responded that failing to produce the interview notes in discovery did not result in prejudice or surprise because each of the victims was listed by the State in discovery responses as persons with knowledge of relevant facts. In addition, the State explained that because Clayton had never produced the notes to the District Attorney's Office, the State never had the notes to produce to counsel. Additionally, the State contended that the information gathered from Clayton's interviews "was nothing but consistent with what she found in the records." Therefore, according to the State, Salazar had not been prejudiced. The trial court recognized that under the rules there is a duty to supplement discovery responses, but acknowledged the State's position that the State was not aware of the notes

prior to trial and, therefore, could not have produced them. The court also found significant that Salazar had the opportunity to depose the victims prior to trial. Counsel's motion for mistrial and request for a continuance were both denied.

On redirect examination, the State questioned Clayton further about her victim interviews and notes as follows:

State: Did you ever send those notes to me or my office?

Clayton: No, sir.

State: Okay. Did I in any way request that you not send those notes to me?

Clayton: No, we never had any type of communication about any kind of notes.

State: Okay. Did your interviews of those individuals in any way change your opinion as to whether or not Jose Salazar has a behavior abnormality?

Clayton: No, it did not change my opinion in any way.

State: Did your interviews of those individuals in any way change your opinion as to whether or not Jose Salazar's behavior abnormality makes him likely to engage in predatory acts of sexual violence?

Clayton: No, it did not change my opinion.

State: Were the reports that you got through the use of those interviews consistent with the statements that you had reviewed previously in the documentation provided to you?

Clayton: Yes. It was just a reiteration, basically, of what I had read in the packet. There was no difference.

State: At the time of your deposition in this cause, had you already formed your professional opinion?

Clayton: Yes.

On appeal, Salazar argues that the trial court erred in allowing into evidence Clayton's testimony regarding her telephone interviews with the victims. The linchpin of Salazar's argument is that the State violated the rules of civil procedure by not supplementing its discovery responses with Clayton's notes, and, as a result, Clayton's testimony should have been excluded or a limiting instruction provided. We review whether the trial court erred in declining to strike testimony or to provide a limiting instruction for an abuse of discretion. *Vela v. Wagner & Brown, Ltd.*, 203 S.W.3d 37, 52 (Tex. App.--San Antonio 2006, no pet.) (citing *Anderson Producing, Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 425 (Tex. 1996)). A trial court abuses its discretion when it acts without reference to any guiding rules and principles. *Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004).

We find that under Rule 193.5 of the Texas Rules of Civil Procedure the trial court did not abuse its discretion in allowing Clayton's testimony. "The general rule in Texas is that a party must make a full and complete response to proper discovery requests, and this obligation includes the duty to timely supplement discovery." *Vela*, 203 S.W.3d at 53 (citing TEX. R. CIV. P. 193.5). However, the duty to supplement discovery does not arise until a party learns that its response is no longer complete and correct. *See* TEX. R. CIV. P. 193.5. Rule 193.5 provides:

> (a) Duty to Amend or Supplement. If a party learns that the party's response to written discovery was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct, the party must amend or supplement the response:
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> > (1) to the extent that the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, and
> >
> > (2) to the extent that the written discovery sought other information, unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses.

Id. "This duty to supplement applies to information concerning expert witnesses, and the trial court must exclude the testimony of an expert witness when the duty to supplement has been violated, absent a showing of good cause or no unfair surprise." *Vela*, 203 S.W.3d at 53 (citing TEX. R. CIV. P. 193.6, 195.6). Moreover, "[t]o the extent a party's retained testifying expert changes or modifies his opinion, the party must amend or supplement the expert's deposition testimony or written report with regard to his mental impressions or opinions and their basis." *Id.*

Even if a duty to supplement discovery did arise, the trial court properly found that good cause existed for the failure to supplement. The trial judge stated, "[W]hat you're saying is there's a duty to supplement? . . . And in this case the counselor for the State says he wasn't aware of the matter, so therefore he couldn't." *See* TEX. R. CIV. P. 193.6(a)(1); *see also Tri-State Motor Transit Co. v. Nicar*, 765 S.W.2d 486, 490 (Tex. App.--Houston [14th Dist.] 1989, no writ)(good cause finding implicit in trial court's comments and questions to

counsel). The court's finding of good cause is supported by the record. TEX. R. CIV. P. 193.6(b). Additionally, this is not a situation in which one party presented a material alteration of an expert's opinion at trial. The record shows that the information obtained in the victim interviews was a "reiteration" of information Clayton had already been provided and did not change Clayton's opinion. We hold that Clayton's testimony was properly admitted under the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 193.5, 193.6(a). We overrule issue two.

DENIAL OF MOTION FOR CONTINUANCE

Salazar contends that the trial court erred in failing to grant his motion for continuance, sought in order to depose the victims interviewed by Clayton. A court may grant a continuance or temporarily postpone a trial to allow a discovery response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by an amended response. TEX. R. CIV. P. 193.6(c). The trial court's denial of a motion for continuance will not be disturbed absent a clear abuse of discretion. *Snider v. Stanley*, 44 S.W.3d 713, 718 (Tex. App.--Beaumont 2001, pet. denied).

Here the motion for continuance was made in the middle of trial after testimony from several witness had already been presented. Clayton testified that information provided by the victims was "just a reiteration" of information she had already been provided and did not change her opinion. Clayton's testimony regarding her interviews with the victims was minimal. She testified only that the victims denied that they or their family members knew

Salazar prior to the crimes committed against them. Moreover, the victims were all listed as persons with relevant knowledge in the State's disclosures. The trial court's failure to grant the continuance did not prevent Salazar from cross-examining Clayton or from otherwise presenting his defense. Under the circumstances, we hold the trial court did not abuse its discretion in denying Salazar's motion for continuance. We overrule issue three. Having overruled all issues presented, we affirm the judgment of the trial court.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on July 29, 2008
Opinion Delivered November 26, 2008

Before McKeithen, C.J., Kreger and Horton, JJ.