COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00144-CR

JOSE LUIS ROJAS — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 371ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1410064R

MEMORANDUM OPINION[1]

A jury convicted Appellant of the offense of continuous sexual abuse of a young child or children. *See* Tex. Penal Code Ann. § 21.02(b) (West Supp. 2016). The jury assessed his punishment at ninety years in the penitentiary, and the trial court sentenced him accordingly. Appellant raises three issues on appeal. First, he complains that the trial court erred by not allowing him to cross-

[1]*See* Tex. R. App. P. 47.4.

examine a witness regarding an alleged prior sexual relationship of one of the complainants. Second, he asserts the trial court erred by allowing a child forensic examiner to testify as an expert. Third, he contends that the forensic nurse examiner's testimony violated his right to confrontation. We affirm.

THE INDICTMENT

In Count One of the indictment, the State alleged that Appellant, through September 10, 2013, intentionally or knowingly, during a period of time that was thirty days or more in duration, committed two or more acts of sexual abuse. The State identified the alleged acts of sexual abuse as (1) aggravated sexual assault of a child under fourteen (a) by causing the female sexual organ of D.G. to contact the sexual organ of Appellant and/or (b) by causing the female sexual organ of D.G. to contact the mouth of Appellant and/or (c) by causing the female sexual organ of B.D. to contact the sexual organ of Appellant and/or (d) by causing the sexual organ of Appellant to contact the mouth of B.D. and/or (2) indecency with a child (a) by touching the genitals of D.G. and/or (b) by touching the genitals of B.D., and at the time of the commission of each of these acts of sexual abuse Appellant was seventeen years of age or older and D.G. and B.D. were younger than fourteen years of age.[2] The jury found Appellant guilty of Count One.

[2]Regarding the two complainants in one count, the penal code provides:

(b) A person commits an offense if:

THE EVIDENCE

D.G. and B.D. were sisters and lived with their grandmother and her boyfriend, Appellant. D.G. was fifteen years old at the time of trial in April 2015. B.D. was thirteen years old at the time of trial in April 2015.

D.G. testified that around the time she turned thirteen years old, Appellant began sexually abusing her by touching her vagina over her clothing while her grandmother was in the other room cooking. Appellant then started coming into her bedroom at 1:00 or 2:00 a.m., while her grandmother was asleep, and would take off her underwear and touch her private parts with her clothes off. A few months later, Appellant "inserted his private part." D.G. said this went on for many months.

At some point, D.G. thought Appellant was sexually abusing her younger sister, B.D., because she could hear Appellant's moans coming from B.D.'s bedroom. Once, while her grandmother was taking a shower, D.G. walked into

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> (1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and
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> (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age.

Tex. Penal Code Ann. § 21.02(b)(1), (2).

B.D.'s bedroom and saw her younger sister "on her knees sucking his private part."

B.D. testified that she was unaware of anything happening to her older sister. B.D. testified that Appellant would come into her bedroom and touch her vagina over her clothing at first and, later, under her clothing. B.D. said it happened sometimes before her grandmother came home and sometimes when her grandmother was in the shower. Still later Appellant "got more serious" and started touching her breasts and had his private part touch hers. B.D. testified that something came out of his private part that he called "cum." B.D. said it hurt every time. B.D. said that Appellant wanted her to put her mouth on his private part and "suck it or something like that." She said that she did not want to, but he tried to force her. B.D. stated that Appellant would put his mouth on her private part. B.D. realized the same things were happening to D.G. when D.G. ran away.

B.D. testified that when people came to talk to her about what was going on, she denied that anything was happening. B.D. said that was not the truth. Things had been going on for a while—for longer than a month.

In April 2013, D.G. ran away to the house of her friend, A.M., and told A.M. that Appellant was abusing her and her sister. D.G.'s fourteenth birthday was not until later that year. A.M. persuaded D.G. to tell A.M.'s mother, N.M. N.M. contacted the police, CPS, and D.G.'s grandmother. However, when D.G.'s grandmother did not believe D.G., D.G. eventually recanted.

Later, D.G. missed her period and told Appellant. Appellant bought D.G. a pregnancy test, and she tested positive. D.G. tried to hide her pregnancy, but when she got a physical to play soccer, the physician discovered she was pregnant and informed her grandmother. Appellant and D.G.'s grandmother suggested an abortion, but a doctor determined D.G. was already too far along. D.G. gave birth to a child, and she placed the child up for adoption.

A forensic DNA technologist from the University of North Texas Health Science Center testified that through DNA comparison, 99.9998% of the Caucasian, African-American, and Southwestern Hispanic male population could be excluded as the child's father. The technologist concluded, however, that Appellant was not among those who could be excluded.

EXCLUSION OF EVIDENCE

In his first point, Appellant contends the trial court erred by failing to allow him to cross-examine a witness regarding an alleged prior sexual relationship between D.G. and A.M. under rule 412(b) of the rules of evidence. Evidence of specific instances of a complainant's past sexual behavior is admissible if the past sexual behavior relates to the complainant's motive or bias. Tex. R. Evid. 412(b)(2)(C).

We review the trial court's decision to exclude evidence under an abuse-of-discretion standard. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). A trial court does not abuse its discretion as long as the decision to exclude the evidence is within the zone of reasonable disagreement.

Montgomery v. State, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g).

Rule of evidence 412 governs the admissibility of a complainant's prior sexual relationships with third parties in a sexual assault case. Tex. R. Evid. 412(a). Rule 412(b) provides in relevant part as follows,

> **(b) Exceptions for Specific Instances.** Evidence of specific instances of a victim's past sexual behavior is admissible if:
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> . . .
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> (2) the evidence:
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> . . .
>
> (C) relates to the victim's motive or bias;
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> . . .
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> and
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> (3) the probative value of the evidence outweighs the danger of unfair prejudice.

Tex. R. Evid. 412(b)(2)(C), (b)(3). The rationale behind the rule is that evidence of a complainant's prior sexual activity is of questionable probative value and relevance and is highly embarrassing and prejudicial. *Kissoon v. State*, No. 02-12-00289-CR, 2013 WL 4679195, at *2 (Tex. App.—Fort Worth Aug. 29, 2013, pet. ref'd) (mem. op., not designated for publication) (quoting *Allen v. State*, 700 S.W.2d 924, 929 (Tex. Crim. App.1985)). Often such evidence has been used to harass the complainant. *Id.* The rule encourages sexual assault victims to report

their crimes without the fear of having their past sexual history exposed to the public. *Id.*

While N.M. was being qualified outside the jury's presence as the outcry witness, Appellant asked N.M. on cross-examination whether her daughter, A.M. (who was thirteen at the time of the April 2013 outcry), and D.G. were having a sexual relationship. N.M. denied that A.M. and D.G.'s relationship was sexual. The trial court then interrupted Appellant's cross-examination to address rule 412.

The trial court then cleared the courtroom to allow Appellant (through defense counsel) to make an offer of proof outside the jury's presence. Appellant explained to the trial court that he wanted to show that D.G. had a sexual relationship with A.M. and that it was A.M. who taught D.G. to have sex with Appellant in order to control Appellant by blackmailing him. Appellant argued that, as motives for D.G.'s outcries, the grandmother and Appellant were planning a move to South Texas, and D.G. did not want to be separated from A.M., her lover. Appellant further argued that if Appellant learned about D.G.'s relationship with A.M., D.G. was afraid that Appellant would try to stop it. The trial court found Appellant's theory "incredibly speculative and tenuous" and prohibited Appellant from pursuing that line of questioning based upon rule 412.

Rule 412 creates "an extremely high hurdle" that the proponent of the proposed evidence must clear before the trial court may, in its discretion, admit specific instances of an alleged victim's past sexual behavior. *Todd v. State*, 242

S.W.3d 126, 129 (Tex. App.–Texarkana 2007, pet. ref'd). Under Rule 412, specific instances of a victim's past sexual conduct are admissible only if three conditions are met: (1) the defendant informs the court outside the jury's presence before introducing the evidence or asking questions about the victim's past sexual behavior, and the trial conducts an in camera hearing to determine its admissibility as provided in Rule 412(c); (2) the evidence falls within one of the five exceptions listed in Rule 412(b)(2); and (3) the trial court finds that the probative value of the evidence outweighs the danger of unfair prejudice. Tex. R. Evid. 412(b).

Moreover, to meet his burden, Appellant had to show a definite and logical link between D.G.'s alleged past sexual conduct and her alleged motive to lie. *See Stephens v. State*, 978 S.W.2d 728, 734–35 (Tex. App.–Austin 1998, pet. ref'd); *McDonald v. State*, No. 02-13-00483-CR, 2015 WL 2353307, at *4 (Tex. App.—Fort Worth May 14, 2015, no pet.) (mem. op., not designated for publication) (citing *Stephens*, 978 S.W.2d at 734–35); *Ladesic v. State*, No. 02-05-00444-CR, 2007 WL 2963755, at *4 (Tex. App.—Fort Worth Oct. 11, 2007, no pet.) (mem. op., not designated for publication) (citing *Stephens*, 978 S.W.2d at 735). N.M. denied there was a sexual relationship between A.M. and D.G. Appellant presented no evidence to substantiate his assertion that A.M. and D.G. were having a sexual relationship. We agree with the trial court that Appellant's theory was extremely thin and tenuous. We hold that the trial court did not abuse

its discretion. *See McDonald*, 2015 WL 2353307, at *4; *Ladesic*, 2007 WL 2963755, at *4.

We overrule Appellant's first issue.

WHETHER EXPERT WAS QUALIFIED

In his second point, Appellant maintains that the trial court erred by allowing a child forensic examiner to testify as an expert witness regarding the effects of child sexual abuse because the witness did not establish the proper qualifications under rule 702 of the rules of evidence. We disagree.

Rule 702 provides,

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Tex. R. Evid. 702. When addressing fields of study other than the hard sciences, such as the social sciences, or fields that are based primarily upon experience and training as distinguished from scientific method, the requirements of reliability apply but with less rigor than with the hard sciences. *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998), *overruled on other grounds by State v. Terrazas*, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999). When addressing the fields of social sciences or fields based primarily upon training, the appropriate questions are (1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes

the principles involved in the field. *Id.* Hard science methods of validation, such as assessing the potential rate of error or subjecting a theory to peer review, may often be inappropriate for testing the reliability of fields of expertise outside the hard sciences. *Id.*

The State asserted it was offering Lyndsey Dula, the forensic interviewer, to discuss the dynamics of the investigation and how children disclose abuse. The State added, "We plan on talking to Ms. Dula about child sexual abuse in general, family dynamics, outcries and disclosure and, within that, rolling disclosure or having trouble with disclosure, recants, and then just how the investigations are done at the Alliance for Children, so, procedurally, how the investigations occur." Dula's testimony followed those parameters. Dula testified that she was basing her opinions on her training and expertise.

"No rigid formula exists to evaluate whether a particular witness qualifies as an expert." *Saenz v. State*, No. 04-08-00792-CR, 2010 WL 724381, at *6 (Tex. App.—San Antonio Mar. 3, 2010, pet. ref'd) (mem. op., not designated for publication). "A witness may be qualified by reason of knowledge, skill, experience, or training, regardless of its source." *Id.* Dula had a bachelor's degree and a master's degree in social work. She had an undergraduate degree in psychology. She had worked in the field of child abuse for more than fifteen years. She had interviewed more than 6,500 abused children. She had been recognized as an expert by courts in Tarrant County and other Texas counties. She communicated with other experts in her field. Here, B.D. initially denied any

abuse was occurring, and D.G. made a delayed outcry and subsequently recanted. Dula had extensive education, training, and experience on the dynamics that go into children's failure to make outcries, delayed outcries, and recantations, and she testified on those matters in a way that assisted the jury when evaluating the two girls' contradictory actions regarding whether abuse was or was not occurring. *See Nenno*, 970 S.W.2d at 561. We hold that the trial court did not abuse its discretion. *See Weatherred*, 15 S.W.3d at 542.

We overrule Appellant's second issue.

ADMITTING TESTIMONY OF FORENSIC NURSE EXAMINER

In his third point, Appellant argues that the trial court erred by allowing the forensic nurse examiner to testify over his right-to-confrontation objection. We disagree.

The State designated Stacey Henley, a SANE[3] nurse, as an expert witness. Before allowing Henley to testify, the trial court held a hearing outside of the jury's presence to determine the admissibility of her testimony. During the hearing, Henley testified that, based on her interview with B.D. (D.G.'s younger sister) and her physical examination of B.D., her "diagnosis" was that B.D. was sexually abused. She testified that B.D.'s sexual organ did not exhibit any signs of trauma. Appellant objected that Henley's testimony was not reliable because it

[3]Sexual assault nurse examiner.

was based on testimonial hearsay in violation of *Crawford v. Washington*, 541 U.S. 36, 54, 124 S.Ct. 1354, 1365–66 (2004), and the Sixth Amendment.

One exception to the hearsay rule is the medical diagnosis or treatment exception. Tex. R. Evid. 803(4). Under this exception, statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment are an exception to the hearsay rule. Tex. R. Evid. 803(4). Texas Courts have long supported the admission into evidence of complainants' statements made to medical professionals during examinations. *See Gregory v. State*, 56 S.W.3d 164, 179 (Tex. App.—Houston [14th Dist.] 2001, pet. dism'd) ("[T]his court and others have found that nurses and other medical professionals are qualified as experts in evaluating child abuse cases."), *cert. denied*, 538 U.S. 978 (2003); *Beheler v. State*, 3 S.W.3d 182, 189 (Tex. App.—Fort Worth 1999, pet. ref'd) ("The object of a sexual assault exam is to ascertain whether the child has been sexually abused and to determine whether further medical attention is needed. Thus, statements describing acts of sexual abuse are pertinent to the victim's medical diagnosis and treatment.").

Appellant also complains that Henley's testimony was a violation of *Crawford* and the Confrontation Clause. "A careful reading of the *Crawford* opinion reveals that its holding applies only when the extrajudicial testimonial statements of a witness *who does not testify at trial* are sought to be admitted."

Crawford v. State, 139 S.W.3d 462, 464 (Tex. App.—Dallas 2004, pet. ref'd) (citing *Crawford*, 541 U.S. at 54, 124 S. Ct. at 1365–66). And, when the declarant appears for cross-examination at trial, the Confrontation Clause does not restrict the use of prior testimonial statements. *Id.* at 465 (citing *Crawford*, 541 U.S. at 59 n.9, 124 S. Ct. at 1369 n.9); *see Eustis v. State*, 191 S.W.3d 879, 886 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd); *Hanson v. State*, 180 S.W.3d 726, 731 (Tex. App.—Waco 2005, no pet.). In other words, neither *Crawford* nor the Confrontation Clause bars admission of a prior out-of-court statement provided the declarant is present at trial to defend or explain it. *Eustis*, 191 S.W.3d at 886; *Crawford*, 139 S.W.3d at 465.

Unlike the declarant in *Crawford v. Washington*, the declarant in this case, B.D., appeared, testified, and was subject to cross-examination by Appellant. Therefore, *Crawford* does not apply, and there was no Confrontation Clause violation. *See Eustis*, 191 S.W.3d at 886; *Hanson*, 180 S.W.3d at 731; *Crawford*, 139 S.W.3d at 465.

We hold that the trial court did not abuse its discretion by allowing Henley to give her expert testimony that was partially based on B.D.'s out-of-court statements. *See Eustis*, 191 S.W.3d at 886; *Hanson*, 180 S.W.3d at 731; *Crawford*, 139 S.W.3d at 465; *Gregory*, 56 S.W.3d at 179; *Beheler*, 3 S.W.3d at 189.

We overrule Appellant's third issue.

CONCLUSION

Having overruled all of Appellant's issues, we affirm the trial court's judgment.

/s/ Anne Gardner
ANNE GARDNER
JUSTICE

PANEL: LIVINGSTON, C.J.; GARDNER and WALKER, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: November 10, 2016