COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00184-CR

ANTONIO PERES NELSON A/K/A ANTONIO PEREZ NELSON — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 372ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1406812D

MEMORANDUM OPINION[1]

A jury found appellant Antonio Peres Nelson a/k/a Antonio Perez Nelson guilty of three counts of aggravated sexual assault of a child younger than 14, found that the complainant was a child younger than six years of age, and assessed his punishment at life imprisonment on each count. Tex. Penal Code Ann. § 22.021(a)(1)(B)(i), (a)(1)(B)(iii), (a)(2)(B), (f)(1) (West Supp. 2016). Nelson

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

must serve the sentences—which are running concurrently—without the possibility of parole. *See* Tex. Gov't Code Ann. § 508.145(a) (West Supp. 2016).

Nelson raises eight issues on appeal that fall into five groups.

- In his first two issues, he contends that the evidence is insufficient to support his convictions on counts 2 and 3. Count 2 alleged digital penetration of the child's sexual organ, and Count 3 alleged digital penetration of the child's anus.

- In issues three and four, Nelson attacks the trial court's decision to excuse a juror after trial began. In issue three, he argues that the trial court abused its discretion by excusing the juror and proceeding with only 11 jurors, and in issue four, he asserts that the trial court erred by overruling his motion for mistrial that was also based on its decision to excuse the juror.

- In issue five, Nelson maintains that the trial court abused its discretion by denying his unrelated motion for mistrial when a witness testified that Nelson had "got out of prison." Nelson contends that the trial court's instruction to disregard was ineffective to cure the error.

- Nelson's sixth and seventh issues attack the admission of DNA testimony. In his sixth issue, he contends that the trial court erred by denying his motion to suppress the DNA analyst's testimony. In issue seven, he contends that trial court violated his right to confrontation because the DNA analyst relied on the work product of another, whom he was not allowed to cross-examine.

- In issue eight, Nelson contends that his three life sentences without parole are cruel and unusual and thus violate the Eighth Amendment of the United States Constitution.

We affirm.

I. The indictment

In count 1 of the indictment, the State alleged sexual-organ-to-sexual-organ contact. *See* Tex. Penal Code Ann. § 22.021(a)(1)(B)(iii). In count 2, the

State alleged digital penetration of the complainant's sexual organ, and in count 3 it alleged digital penetration of the complainant's anus. *See id.* § 22.021(a)(1)(B)(i).

II. Evidence

D.M. and her four- and three-year-old daughters, N.D. and Q.D.,[2] moved in with Nelson in October 2014. While D.M. worked on weekends, Nelson watched the young girls.

After D.M. got home from work on December 7, 2014, N.D. told her that Nelson "stuck his tootie" into her and put his "tootie on my tootie." N.D. also told D.M. that Nelson wiped her off with a washcloth or towel, which concerned D.M. because Nelson would do the same thing to her after they had been intimate.

Nelson begged and pleaded with D.M. not to take N.D. to be examined, but D.M. took her to Cook's Children's Hospital anyway. At the hospital, Nurse Stacey Henley interviewed N.D. to assess her developmentally and for purposes of diagnosis and treatment. N.D. told Nurse Henley that (1) Nelson put his "tootie" on her "tootie"; (2) Nelson's "tootie" went "inside" her "tootie"; (3) Nelson put his finger or hand in her vagina; and (4) Nelson put his finger or hand in her "bootie." While collecting samples from N.D.'s vaginal and anal areas, Nurse

[2]To protect the complainant's identity, we use initials to identify her, her mother, and her sister. *See* Tex. R. App. P. 9.10(a)(3); 2nd Tex. App. (Fort Worth) Loc. R. 7.

Henley observed white secretions. Nurse Henley concluded that N.D. had been sexually abused.

A forensic interviewer also interviewed N.D. at the Alliance for Children. This witness testified that N.D. called "the part where she pees from" her "tootie" and "the part where she boo-boos" her "bootie." N.D. again disclosed sexual abuse and provided both peripheral and sensory details. The forensic interviewer found no signs of coaching.

III. Nelson's appellate issues and arguments

A. Sufficient evidence supports counts 2 and 3

In his first two issues, Nelson contends that the evidence is insufficient to support his convictions on counts 2 and 3, which alleged digital penetration of N.D.'s sexual organ and anus, respectively.[3] Nelson's challenge stems from the fact that the only evidence supporting those convictions came from Nurse Henley. Both D.M. and N.D. testified, but neither testified about any digital penetration of N.D.'s sexual organ or anus. Nelson contends that Nurse Henley's testimony should not be considered because she was not the outcry witness. We disagree.

1. Standard of review

When reviewing the evidentiary sufficiency to support a conviction, we view all the evidence in the light most favorable to the verdict to determine

[3]Nelson does not raise a sufficiency challenge with regard to count 1.

whether any rational factfinder could have found the essential criminal elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016). This standard gives full play to the factfinder's responsibility to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599.

The factfinder alone judges the evidence's weight and credibility. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016). Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the evidence's weight and credibility and substitute our judgment for the factfinder's. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the evidence's cumulative force when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49; *see Blea*, 483 S.W.3d at 33.

2. Discussion

When a child makes more than one outcry and, in the process, discloses abuse not previously disclosed, more than one outcry witness can result. *See*

Tear v. State, 74 S.W.3d 555, 559 (Tex. App.—Dallas 2002, pet. ref'd), *cert. denied*, 538 U.S. 963 (2003). Because N.D. did not make the digital-penetration outcries to anyone else, Nurse Henley was the outcry witness as to those allegations. *See* Tex. Code Crim. Proc. Ann. art. 38.072 (West Supp. 2016); *Hernandez v. State*, No. 02-14-00262-CR, 2016 WL 4903206, at *7–13 (Tex. App.—Fort Worth Sept. 15, 2016, pet. ref'd) (mem. op., not designated for publication).

A child's out-of-court report of abuse is sufficient to support a conviction. *Bledsoe v. State*, 479 S.W.3d 491, 494–95 (Tex. App.—Fort Worth 2015, pet. ref'd) (holding that child's statements to SANE nurse and forensic interviewer shortly after offense occurred that defendant touched her sexual organ with his finger and put his finger inside were sufficient to support penetration conviction despite child's denial while testifying). As shown by the verdict, the jury gave great weight to Nurse Henley's testimony and found her credible. The jury could have excused N.D.'s failure to make digital-penetration outcries to her mother and failure to include digital penetration in her testimony due to her extreme youth. Whatever the explanation, we may not re-evaluate the jury's determinations. *See Montgomery*, 369 S.W.3d at 192. Viewing the evidence in the light most favorable to the verdict, a rational juror—believing Nurse Henley's testimony—could have found digital penetration in both instances beyond a reasonable doubt. *See Jenkins*, 493 S.W.3d at 599.

Nelson also argues that Nurse Henley testified that N.D. described her "bootie" as her "bottom area" or "buttocks," which he asserts is not sufficient to constitute evidence of digital penetration of the anus. An aggravated sexual assault requires anal penetration, not just the touching of the buttocks. *See* Tex. Penal Code Ann. § 22.021(a)(1)(B)(i). Although N.D.'s use of the word "bootie" might arguably be ambiguous, Nurse Henley's testimony was not ambiguous about whether there was penetration and whether there was pain. Specifically, Nurse Henley testified about penetration and pain sequentially in a manner N.D. understood:

> I asked her, "Did he put his tootie in your tootie," and she said, "Yes." I asked, "Did it go inside," and I usually do hand motions with that. And she said, "Yes, it went inside." And that -- I asked if there was pain and bleeding and she said there was -- there was pain, no bleeding. I asked if he put a finger or hand in her vagina and she said yes. And I asked if there was a foreign object that went in and she said no.[4]
>
> I asked if he put his tootie in her bootie and she said no. I asked if he put his finger or hand in her bootie and she said yes. And then I do follow[-]up questions, did it hurt and was there b[l]eeding and she said it hurt and there was no bleeding. I asked if there was a foreign object placed and she said no.

Contextually, penetration and pain are consistent with digital anal penetration and are incongruous with merely fondling the buttocks, which would involve neither penetration nor pain. Additionally, the forensic interviewer testified that

[4]Nurse Henley explained that when speaking with N.D., she used language N.D. could understand. For example, Nurse Henley did not use words like "foreign object" but rather asked whether anything else, like a toy or a stick, "got in there."

N.D. said that her "bootie" was where she "boo-boos." Although there was no explanation about what "boo-booing" meant, contextually the options are limited and all lead back to same orifice.[5] We hold that the evidence was sufficient. *See Mallet v. State*, 9 S.W.3d 856, 863–64 (Tex. App.—Fort Worth 2000, no pet.) (holding evidence sufficient to support aggravated-sexual-assault conviction where complainant used the term "butt" and described penetration and pain); *Saldana v. State*, 287 S.W.3d 43, 60–61 (Tex. App.—Corpus Christi 2008, pet. ref'd) (holding evidence sufficient where complainant testified that defendant touched her where she went "poo").

We overrule Nelson's first and second issues.

B. The trial court properly excused one juror and proceeded with only 11 jurors.

In issues three and four, Nelson argues that the trial court abused its discretion by excusing a juror and proceeding with only 11 and by overruling his motion for mistrial based on excusing that juror. Nelson asserts that the juror, who had just discovered his wife had left him and filed for divorce, was neither dead nor disabled as required by statute.

1. Standard of review

The Texas constitution requires that juries be composed of 12 people in a felony criminal case. Tex. Const. art. V, § 13; *Stillwell v. State*, 466 S.W.3d 908,

[5]This is particularly true in light of the interviewer's testimony that N.D. called "the part where she pees from" the "tootie."

911 (Tex. App.—Fort Worth 2015, no pet.). But that same constitutional provision authorizes the Legislature to modify that requirement when a juror dies or becomes disabled from sitting. Tex. Const. art. V, § 13; *Stillwell*, 466 S.W.3d at 911.

Article 36.29(a) of the Texas Code of Criminal Procedure provides:

> Not less than twelve jurors can render and return a verdict in a felony case. It must be concurred in by each juror and signed by the foreman. . . . [H]owever, after the trial of any felony case begins and a juror dies or, as determined by the judge, becomes disabled from sitting at any time before the charge of the court is read to the jury, the remainder of the jury shall have the power to render the verdict; but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it.

Tex. Code Crim. Proc. Ann. art. 36.29(a) (West Supp. 2016). Determining whether a juror is disabled is within the trial court's discretion. *Brooks v. State*, 990 S.W.2d 278, 286 (Tex. Crim. App.), *cert. denied*, 528 U.S. 956 (1999).

As used in the criminal code, being "disabled" is not limited to physical disease but includes "any condition that inhibits a juror from fully and fairly performing the functions of a juror." *Reyes v. State*, 30 S.W.3d 409, 411 (Tex. Crim. App. 2000); *Griffin v. State*, 486 S.W.2d 948, 951 (Tex. Crim. App. 1972). The disabling condition may result from physical illness, mental condition, or emotional state. *Reyes*, 30 S.W.3d at 411. Moreover, in such a situation the trial court is not required to obtain anyone's consent. *Hill v. State*, 90 S.W.3d 308, 315 (Tex. Crim. App. 2002).

2. What the record shows

On returning to court for the first day of testimony, the juror in question stated that he had been unexpectedly served with divorce papers after returning home from voir dire the day before, lamenting that his wife had taken advantage of the fact that he was in court. When he had gotten home, half his belongings were gone. At first he thought someone had burglarized their home, but after trying to call his wife and then noticing that the cat was missing, he realized that something other than a burglary had occurred. About forty-five minutes later, someone knocked at the door and served him with divorce papers and a restraining order.

The trial court explored how this new development might affect the juror's ability to continue his service. Initially, the trial court asked open-ended questions:

> THE COURT: So how are you doing?
>
> [THE] JUROR: Tired. I'm upset and I don't know of a lawyer. I don't -- you know, we -- we met in '76 and, you know, we've been married for 32 years. So I don't know. I need to do something. I just can't stand around and just twiddle my thumbs. I got problems.
>
> THE COURT: How emotionally are you handling this, truthfully?
>
> [THE] JUROR: Well, I'm not -- I'm not thinking about suicide or anything.

The trial court then asked its first leading question:

> THE COURT: Are you distracted?
>
> [THE] JUROR: Very much so. I'm trying to figure out what I've done wrong.

The trial court and the juror then engaged in a lengthy dialogue during which the trial court asked many leading questions and after which the court made its findings and ruling:

> THE COURT: . . . . It is my opinion that based upon the emotional impact, the numerous and diverse emotions and feelings that you've had to endure for probably the last 12 hours, the concern of the clock is ticking with petitions and protective orders and other matters and time limits, the impact of finding your house half empty, the cat gone, and no warning for this, the law has a term they call it "emotionally disabled from further service[."] And it is my opinion you have reached that point due to circumstances totally outside your control.
>
> Do you agree with that assessment?
>
> [THE] JUROR: Thank you. Yes, sir.

At no point did Nelson object to the trial court's handling of the dialogue, and at no point did Nelson try to rehabilitate the juror.

Nelson did object to excusing the juror and proceeding with the remaining 11 jurors. The trial court responded with these additional comments:

> THE COURT: Okay. All right. Well, first of all, one step at a time. The Court does conclude as a matter of fact and law that under Article 36.29 of the Code of Criminal Procedure that [the juror] is legally and factually disabled based upon being sucker-punched with a divorce decree being served, a protective order being served, and his house being cleaned out while on jury duty. He even made the direct connection, which seriously concerned the Court, about knowing he's on jury duty and using the opportunity of his jury service as a way to get in the house and clean it out because he would be tied up by the courts and unable to interfere. Whether that's true or a coincidence, that was something he articulated.
>
> And based on his demeanor, his voice, the eye contact, the facial expressions, which I do understand aren't visible from your perspective respectfully behind the juror and not from the catbird

> seat, I have absolutely no doubt, much less a reasonable doubt, that he's emotionally disqualified from effective and legal service and being able to follow an oath and to follow the evidence.
>
> And so the objection to him being excused, it will be overruled.

3. Discussion

Many appellate courts, including this one, have found that being emotionally distraught can constitute a disability for article 36.29 purposes. *See Stephens v. State*, 276 S.W.3d 148, 151 (Tex. App.—Amarillo 2008, pet. ref'd) (holding that dismissal of juror was proper when juror became emotionally distraught after hearing first witness and realizing that she had had a similar experience about a year earlier); *Brown v. State*, No. 05-07-01211-CR, 2008 WL 4981635, at *8–9 (Tex. App.—Dallas Nov. 25, 2008, pet. ref'd) (not designated for publication) (holding juror dismissal proper due to juror's "emotional distraction" caused by the presence in the courtroom of a woman the juror knew from church—the defendant's sister—which interfered with the juror's ability to focus on the evidence and potentially interfered with her impartiality); *Castro v. State*, 233 S.W.3d 46, 47–49 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (holding juror dismissal proper when, due to his religious and personal beliefs, juror became physically sick and threw up several times at the thought of passing judgment on another); *Engledow v. State*, Nos. 03-04-00765-CR, 03-04-00768-CR, 2006 WL 357890, at *1–3 (Tex. App.—Austin Feb. 16, 2006, no pet.) (mem. op, not designated for publication) (holding juror dismissal proper when juror's sister fell into a coma and died after second day of trial); *Chambers v.*

State, No. 01-02-00791-CR, 2003 WL 22413477, at *1–2 (Tex. App.—Houston [1st Dist.] Oct. 23, 2003, no pet.) (mem. op., not designated for publication) (holding juror dismissal proper when juror's 16-year-old son suffered serious allergic reaction, was hospitalized, and was not responding to medication); *Ricketts v. State*, 89 S.W.3d 312, 317–19 (Tex. App.—Fort Worth 2002, pet. ref'd) (holding juror dismissal proper when juror's father died the night before the first day of trial and juror was distracted by knowing she would have to miss her father's funeral).

Here, the juror stated that when he had gone home the day before, he discovered that his wife had moved out and filed for divorce, an unexpected development that left him very distracted. On these facts, we hold that the trial court did not abuse its discretion by finding the juror disabled and dismissing him from jury service.

Although Nelson also complains that the trial judge improperly led the juror when questioning him, Nelson never objected to the manner of questioning. We hold that Nelson waived any objections to the judge's posing leading questions to the juror. *See* Tex. R. App. P. 33.1(a).

Finally, a trial court's denial of a motion for mistrial is reviewed under an abuse-of-discretion standard. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1070 (2000). Because we held that the trial court did not abuse its discretion by excusing the juror, we also hold that it did not

abuse its discretion by denying Nelson's motion for mistrial based on the same complaint.

We overrule Nelson's third and fourth issues.

C. The trial court's instruction to disregard cured the "got-out-of-prison" statement

In issue five, Nelson maintains that the trial court abused its discretion by denying his motion for mistrial when D.M. testified that she first introduced her children to Nelson after he "got out of prison." Nelson contends that the trial court's instruction to disregard failed to cure the error and harm. Nelson additionally argues that the error was exacerbated by the fact that the prosecutor had previously warned D.M. not to mention Nelson's incarceration.

1. Standard of review

A mistrial is an appropriate remedy in "extreme circumstances" for a narrow class of highly prejudicial and incurable errors. *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009); *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000). A mistrial halts trial proceedings when error is so prejudicial that expending further time and expense would be wasteful and futile, an inquiry that is fact-specific. *Ocon*, 284 S.W.3d at 884; *Ladd*, 3 S.W.3d at 567.

We review the denial of a motion for mistrial for abuse of discretion. *Ocon*, 284 S.W.3d at 884; *Ladd*, 3 S.W.3d at 567. An appellate court views the evidence in the light most favorable to the trial court's ruling, considering only

those arguments before the court at the time of the ruling. *Ocon*, 284 S.W.3d at 884; *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004). The trial court's ruling must be upheld if it was within the zone of reasonable disagreement. *Ocon*, 284 S.W.3d at 884; *Wead*, 129 S.W.3d at 129.

A witness's reference to a defendant's prior incarceration is improper because it violates the longstanding evidentiary rule against introducing collateral offenses and transactions. Tex. R. Evid. 404(b); *Tennard v. State*, 802 S.W.2d 678, 685 (Tex. Crim. App. 1990), *cert. denied*, 501 U.S. 1259 (1991). A defendant may not be tried for collateral crimes or for generally being a criminal. *Nobles v. State*, 843 S.W.2d 503, 514 (Tex. Crim. App. 1992). Nevertheless, a prompt instruction to disregard will usually cure any prejudice resulting from a witness's inadvertent reference to a defendant's criminal history. *See Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000).

2. D.M.'s testimony and the resulting colloquy

Although D.M.'s remark about Nelson's having gotten out of prison was brief, the discussion that it generated was lengthy:

> [Defense counsel:] And up until this point, how long had you been seeing Tony?
>
> [D.M.:] How long have I known him?
>
> Q. Been seeing him. I mean, however you want to describe it.
>
> A. I met Tony in '07, at the beginning of '07. That's when I met him.
>
> Q. Okay. And when did you introduce your children to Tony?

A. Right after he got out of prison, which was in 2012.

[Defense counsel]: Judge, may I approach? I'm going to object to nonresponsive.

THE COURT: I will overrule that objection, but I will instruct the jury to disregard the last statement of when, other than for a timeframe, but the fact that a person has been arrested, charged, indicted, confined, previously convicted of any offense or not isn't evidence of guilt at a trial of an unrelated accusation.

Does everyone understand that instruction?

SEVERAL JURY MEMBERS: Yes.

THE COURT: Can everyone follow that instruction?

SEVERAL JURY MEMBERS: Yes.

THE COURT: All right.

[Defense counsel]: Judge, we'd also move for a mistrial.

THE COURT: That will be denied based on the jurors' response.

Let's take two minutes. Members of the jury, retire to the jury room for just a second.

(Jury excused from courtroom)

THE COURT: Just so it's clear for the record, I'm not sustaining the objection on nonresponsive. It's sustained on other grounds.

Don't need to hear the words "prison[,"] "jail[,]" or anything else out of your mouth again unless someone asks that as part of their question.

THE WITNESS: Okay.

THE COURT: It's a fair answer of timing. That is a time reference that would be used in normal conversation, but in the courtroom, because of the unfair implication if someone's been in trouble before that it will be held against them in deciding the guilty or innocent of an unrelated charge, because of potential for unintended prejudice, the law just doesn't allow you to talk about those things.

THE WITNESS: I understand.

THE COURT: Because they're not related.

THE WITNESS: I understand.

THE COURT: I don't think you intended to do something wrong, but I need to caution you that that -- don't do it again. Okay?

THE WITNESS: Okay.

THE COURT: And I will caution y'all to make sure that other witnesses know to just don't use that term unless it's answering a leading question.

But from a fair frame of reference without all that, I perceived it as a legitimate answer to a question that I hear answered all the time of who meets people and where and how.

And you are allowed to lead, if you need to, to avoid that again. But I will instruct the State to tell other witnesses don't say it.

[Prosecutor]: And, Judge, for the record, we did discuss that with [D.M.] That just kind of came out on accident.

THE COURT: Well, if that's the case, then I will say shame on you and don't let it happen again, or else.

THE WITNESS: I understand.

[Defense counsel]: And, Judge, just for the record, I guess, since --

THE COURT: You want to renew your motion for mistrial since the witness was instructed to not say anything about prison; is that correct?

[Defense counsel]: Yes. I mean --

THE COURT: All right.

[Defense counsel]: You can't unring that bell and since she was . . . instructed, the question was simply: How long have you known him? I mean, she solicited that on her own.

THE COURT: Read the question back.

THE REPORTER: “Okay. And when did you introduce your children to Tony?”

THE COURT: All right. She’d answered the how long have you known him question. I think when did you introduce question, it could have been answered with “a year.” It could be answered with a time reference, Christmas, Thanksgiving, when he got out of prison, i.e., I couldn’t do it beforehand. I don’t think it was an intentional violation of a court rule based on the way -- the question was phrased the way you said it. It was phrased a little different.

I gave them an instruction. They indicated they could follow it, so I’m going to disregard your -- I’m going to overrule your motion for mistrial and deny at this time, based upon the jury instruction and their demeanor and deportment and looked me in the eye and said they would ignore it. If it happens again, you can re-urge your motion.

[Prosecutor]: Judge, can we just take a minute to talk to her about this just to make sure we’re clear?

THE COURT: I’ll be happy for you to do that.

(Break taken, 11:40 - 11:50 a.m.)

(OPEN COURT, DEFENDANT AND JURY PRESENT)

(Witness on the stand)

THE COURT: All right.

Q. (BY [Defense counsel]) All right. Okay. Let me ask you this. How long had Tony [Nelson] known your children?

A. For about three years, I believe.

3. Discussion

We hold that the prompt instruction to disregard cured any prejudice resulting from D.M.’s inadvertent reference to Nelson’s criminal history. *See id.* Not only did the judge promptly instruct the jury to disregard, but the judge also

explained why a fair trial dictated that the jurors not consider D.M.'s statement. Finally, the judge asked the jurors if they could follow the instruction, thereby getting additional feedback to determine whether the jurors could in fact comply.

Nelson correctly notes that because the prosecutor had warned D.M. not to mention his imprisonment while testifying, her nevertheless mentioning it was an aggravating factor; that is, it suggested that D.M.'s slip was intentional and not inadvertent. *See id.* (holding that instruction to disregard cured error when prosecutor in good faith falsely asserted witness had spent four years in prison). Yet the trial judge weighed that fact when making its ruling and concluded that the error was indeed inadvertent. Viewing the evidence in the light most favorable to the trial court's ruling, we defer to the trial court's finding. *Ocon*, 284 S.W.3d at 884.

We overrule Nelson's fifth issue.

D. The trial court properly admitted the DNA expert's testimony

Nelson's sixth and seventh issues attack the admission of DNA testimony. In his sixth issue, he contends that the trial court erred by denying his motion to suppress the DNA analyst's testimony because she had relied on an outmoded protocol and on an error-filled database.[6] Nelson asserts that the DNA analyst

[6]Technically, Nelson's motion to suppress encompassed only the errors in the database. His changed-protocols complaints became enmeshed with the database arguments during his motion-to-suppress hearing. The trial court denied the motion to suppress. On appeal the State does not dispute that Nelson preserved both his database and changed-protocol complaints.

should not have been allowed to testify as an expert and that the relevance of her testimony was substantially outweighed by the danger of unfair prejudice.[7] Tex. R. Evid. 403, 702. In issue seven, he contends that the trial court violated his right to confrontation because the testifying DNA analyst relied on the work product of another analyst whom he was not allowed to cross-examine. U.S. Const. amend. VI. The trial court overruled this confrontation objection separately from Nelson's motion to suppress.

1. The DNA expert's testimony was reliable and thus not unfairly prejudicial

a. Standard of review

The proponent of expert testimony based on a scientific theory must show by clear and convincing evidence that it is (1) reliable and (2) relevant to assist the trier of fact in its fact-finding duty. *Kelly* v. *State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992). To be considered reliable, the evidence "must satisfy three criteria in any particular case: (a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question." *Id.* at 573. Whether to admit such scientific evidence is within the trial court's sound discretion, and its decision will not be set aside absent an abuse of that discretion. *Griffith v. State*, 983 S.W.2d 282, 287 (Tex. Crim. App. 1998) (citing *Clark v. State*, 881 S.W.2d

[7]We treat Nelson's rule 403 argument as a corollary of his rule 702 argument. That is, if the testimony is based on unreliable data and procedures, it will necessarily be unfairly prejudicial.

682, 698 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1156 (1995)), *cert. denied*, 528 U.S. 826 (1999).

b. Protocol testimony at the suppression hearing

At the suppression hearing, Clare Moyers testified that she had worked as a DPS forensic DNA analyst for almost eight years, had handled hundreds of DNA cases, and had testified as a DNA expert in about thirty-five trials. According to Moyers, the DPS laboratory is accredited by the American Society of Crime Laboratory Directors and by the Texas Forensic Science Commission.

Moyers explained the difference between the former and the current DNA-testing protocols as follows:

> [Defense counsel:] Q. Okay. So has DPS implemented a new protocol for the testing of DNA mixtures?
>
> A. Yes, we have.
>
> Q. And when did you -- or when [did] DPS implement that?
>
> A. March 18th of 2016.
>
> Q. Just a couple weeks or so ago, correct?
>
> A. Yes.
>
> Q. And so you've not revised your report calculations, interpretations, if you will, per the new DPS protocol?
>
> A. No. That was not requested.
>
> Q. And do you have a written copy of this protocol? Is it -- what's the name of the protocol?
>
> A. Which protocol are you referring to?
>
> Q. The new protocol that was implemented on March 18th, 2016.

A. Our software system that we're using, it's a probabilistic genotyping software. It's called STRMIX.

Q. STRMIX. Now, you didn't run the calculations again, or these numbers again, under STRMIX, correct?

A. No, I did not.

Q. And would you have to agree that since the new protocol had been implemented, that it would have been, or would be, a better, more improved, more accurate -- providing a more accurate result, correct?

A. I don't know if I would say that it would be more accurate. It's using -- it's just different. This was what we had at the time. This is valid and was an accurate result. We have a new protocol that allows us to use more information in the DNA profiles. But they're both valid and accepted and accurate results.

Q. But the new method, though, would provide better testing results since it is a new method, correct?

A. It is a new method. I don't -- you know, "better" is subjective. That's not necessarily for me to decide if it's better or not. It is using more of the data that's available to us. But it's just -- it's different. It's a different way of interpretation and it's a different statistic that's provided.

Q. And you don't change to be different, it's more appropriate to use the new protocol, correct?

A. The protocols that we used at the time this report was issued are appropriate. We've applied interpretations and statistics. This is just a different way to do that. They both are used in the forensic science community. The probabilistic genotyping software is something that's very new to the forensic science community.

[Defense counsel]: I've got nothing further. Pass the witness.

[Prosecutor]: Just a couple questions, Judge.

REDIRECT EXAMINATION

BY [Prosecutor]:

Q. Ms. Moyers, you said that you had -- your lab recently, within the last few weeks, had changed, I guess, the methodology that you've used to perform these DNA analys[e]s?

A. Yes. For the interpretation of the processes, yes.

Q. And --

THE COURT: Time out. Does that mean crunching the numbers and what's their significance?

THE WITNESS: Yes, but it is also the actual interpretation as well as comparison to the profiles. It's all encompassed into one. It's using the software system, whereas, this was done with [a] more manual method. All the laboratory processes used to obtain the profiles have not changed. We use the same data.

THE COURT: All right. So the data doesn't change, how the data is interpreted has changed?

THE WITNESS: That is correct.

THE COURT: All right. Carry on.

Q. (BY [Prosecutor]) Now, the Defense asked you if you had redone your interpretation with this new method and you said you had not?

A. That's correct.

Q. What would happen in this case -- what different results would there be if you did use the new method in this case?

A. There are some of the profiles in this case where I was not able to use all -- we look at 16 locations. I wasn't able to use all 16 locations for comparison and statistics given the protocols that were used. Using the probabilistic genotyping software, I would be able to use more of that information. So I would be able to make comparisons at more locations than is reported in this report.

Q. So the method that you were using previous to the change is actually a more conservative method --

A. Yes.

Q. -- than what you're using now?

A. Yes.

Q. Gives more of a benefit to the Defendant?

A. Yes, it does -- well, it's different, but it's using less data so there's less to compare. It is considered a conservative interpretation method.

Moyers's testimony establishes that she used a valid protocol and also shows that the new protocol was implemented because it expanded the number of locations for comparison purposes and could provide more refined analyses. Significantly, it was not implemented because the earlier protocol was somehow invalid or faulty, and in fact that earlier protocol—to the extent it was less refined—was "more conservative" and generally slanted in defendants' favor.

c. FBI-database and DNA-mixture testimony at the suppression hearing

Nelson also complains that Moyers relied on a faulty FBI database and DNA-mixture procedures that contained errors. The trial court and Moyers had this exchange during the hearing:

THE COURT: All right. . . . [A]s I understood your testimony, there's two issues. One, the FBI database, incorrect data, which could give you incorrect numbers on what ratios are of certain genetic markers and different populations in order to determine what's the frequency of someone being excluded or included per 10,000 or four quadrillion, or any other number, depending on what the data showed. That is one issue. Their numbers had issues that needed to be corrected if they were going to be used to make computations and rely on them in court or for scientific purposes?

THE WITNESS: Yes.

THE COURT: Separate issue had to do with methodology and computing what happens when you don't have one person's DNA and you're testing blood from a crime scene but you have a sexual

> assault-type situation or a mixed blood situation where multiple people are shot or something where DNA from multiple individuals are present in the same sample. And there were issues on how is that quantitated, more importantly, drawing the conclusions on the statistics. There were issues with those type[s] of samples that had nothing to do with the generic database issues that the FBI had on their numbers. That's a whole different issue.
>
> THE WITNESS: That's correct.
>
> THE COURT: And that issue was brought to your lab's attention. And did I hear you right, both those issues were addressed and resolved prior to any conclusions that were reached or reduced to writing in [your report in this case] on or about October 30th, 2015?
>
> THE WITNESS: That is correct.

Moyers's testimony shows that she knew of the errors in the FBI database and the DNA-mixture issues and that she worked on Nelson's case after those errors had been corrected. We hold that Moyers's testimony was reliable for rule 702 purposes and was thus not unfairly prejudicial under evidentiary rule 403. *See* Tex. R. Evid. 403, 702; *Griffith*, 983 S.W.2d at 287; *Kelly*, 824 S.W.2d at 572; *see also Hidrogo v. State*, 352 S.W.3d 27, 31–32 (Tex. App.—Eastland 2011, pet. ref'd) (STR protocols used by DPS crime laboratory were scientifically reliable), *cert. denied*, 568 U.S. 855 (2012).

We overrule Nelson's sixth issue.

2. Nelson's right to confrontation was not violated

a. Standard of review

The Confrontation Clause of the Sixth Amendment guarantees the defendant the right to confront the witnesses against him. *Pointer v. Texas*,

380 U.S. 400, 403, 85 S. Ct. 1065, 1067–68 (1965). The Supreme Court has applied this rule to "testimonial" statements and held that such statements are inadmissible at trial unless the witness who made them either takes the stand to be cross-examined or is unavailable and the defendant had an earlier opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 53–54, 124 S. Ct. 1354, 1365–66 (2004). The Supreme Court included in the class of testimonial statements those that were made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial. *Id.* at 52, 124 S. Ct. at 1364; *see also Burch v. State*, 401 S.W.3d 634, 636 (Tex. Crim. App. 2013) ("While the exact contours of what is testimonial continue to be defined by the courts, such statements are formal and similar to trial testimony.").

Admitting a lab report created solely by a nontestifying analyst, without calling that analyst to sponsor it, violates the Confrontation Clause. *Paredes v. State*, 462 S.W.3d 510, 517 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 483 (2015). Doing so deprives the defendant of his opportunity to cross-examine the nontestifying expert about the report's conclusions and how the nontestifying expert arrived at them. *Id.* And a testifying expert's explaining the nontestifying analyst's report does not adequately substitute for cross-examination even if the testifying expert is generally familiar with how the relevant analysis is customarily performed. *Id.* When the testifying expert does not personally know how the testing was conducted, the defendant still cannot adequately challenge through

cross-examination the nontestifying analyst's report's conclusions. *Id.* For an expert's testimony based on forensic analysis performed solely by a nontestifying analyst to be admissible, the expert must testify about his or her own opinions and conclusions. *Id.* While the testifying expert can rely on information from a nontestifying analyst, the expert cannot act as a surrogate to introduce that information. *Id.* at 517–18.

b. Testimony

When Nelson's trial counsel confirmed with Moyers that a woman named Chau Nguyen was involved in Moyers's report, he asked:

> [Defense counsel:] Q. Okay. Who is Chau Nguyen?
>
> A. She performed the laboratory analysis, the extraction quantification, amplification and putting the data on the instrument to obtain the profiles.
>
> Q. Okay. Now, she does the calculations as well or is she just gathering the data?
>
> A. No. She is just doing the lab work portion to obtain the DNA profile.
>
> Q. Okay. But then you are taking that data and then copying that and putting it into your report; is that true?
>
> A. I'm taking the data that was generated by her making interpretations on it, making comparisons, performing statistics, and writing a report.
>
> Q. But using her data that she has created and she has run and you use that in your report; is that true?
>
> A. The data that she obtained, yes, is what I used.

Defense counsel later questioned Moyers about why Nguyen's name appeared on some of the paperwork:

> [Defense counsel:] And what I'm pointing to -- and I have got a copy of mine, but I was wanting to look at your file. There is a document . . . that says Chau Nguyen. Does that ring a bell to you?
>
> . . . .
>
> A. It was printed by Chau and I reviewed it and accepted this as the correct interpretation.
>
> Q. Okay. And so with regards to the actual calculation, the actual work, you didn't do the actual work, you just did the interpreting; isn't that true?
>
> A. I interpreted it and then this is the result of the interpretation that was made. And she actually entered it into the computer, printed it. I reviewed this and determined that I agreed that this was correct and I took ownership of this calculation.
>
> Q. Okay. And these calculations -- but you -- you testified earlier that you didn't do the actual work, but it's your just -- basically your report that you're having typed up and written right here; isn't that true?
>
> A. The report that was issued was interpretations made by me and calculations that I either entered myself or approved and accepted as ones that Chau had entered into the database.
>
> Q. Well, then what is Chau Nguyen's role in this process? What does Chau Nguyen do?
>
> A. She performed the DNA laboratory work and she did enter some of these into our database where I then, after, reviewed them and accepted them as the correct interpretation.
>
> Q. But she was the one that did the -- the entering of the data and the calculation?
>
> A. She did on some of these enter it into the software and then I took over the case at that point.

> Q. Okay. So part of this report is part hers and part of the report is part yours?
>
> A. No. I wrote the entire report.
>
> Q. But part of the calculations that you're basing your opinions on, that you want to give to this jury, are part -- were work that somebody else has done?
>
> A. No. I -- I interpreted all of the profiles after she had looked at them and then I accepted all of these. She had just gotten to a point of entering them into the software to calculate the statistics. I reviewed it, made sure it was correct, that our interpretations had been the same and that I took ownership of these calculations.

Later when questioned by defense counsel, Moyers added:

> A. [Nguyen] calculated -- at the time she made interpretations, calculated something, I came back through -- she left our department, I came back through so that we could actually issue a report. Someone had to interpret this data.
>
> Q. Okay.
>
> A. And I interpreted it, went through the exact same processes she would have gone through, made my own interpretations. For those statistical calculations, they were consistent with what she had done. And so I did not reenter those numbers into the calculator, per se, to recalculate that. It wasn't necessary. They had been entered correctly. There was no need to reprint a paper that said the exact same thing.

The evidence shows that Moyers's conclusions and opinions were her own. Moyers was not acting as a surrogate for a report someone else created; she herself prepared the underlying report. The report itself was not introduced into evidence for the jury's review but was put in the record for our review as Defendant's Exhibit 1. Moyers double-checked Nguyen's work and adopted it as her own. In short, Moyers could answer any questions Nelson had about how

she arrived at the conclusions and opinions she gave in court. Her testimony did not violate Nelson's confrontation rights. *See Paredes*, 462 S.W.3d at 511–19.

We overrule Nelson's seventh issue.

E. Nelson's punishment issue was not preserved

In issue eight, Nelson contends that his three life sentences without parole are cruel and unusual and thus violate the Eighth Amendment of the United States Constitution. U.S. Const. amend. VIII.

To preserve a complaint for appellate review, an appellant must present the trial court with a timely request, objection, or motion stating the specific grounds for his desired ruling. Tex. R. App. P. 33.1(a)(1)(A); *Rhoades v. State*, 934 S.W.2d 113, 119 (Tex. Crim. App. 1996). A defendant must raise a disproportionate-sentencing objection in a timely manner. *Sample v. State*, 405 S.W.3d 295, 303–04 (Tex. App.—Fort Worth 2013, pet. ref'd); *Kim v. State*, 283 S.W.3d 473, 475 (Tex. App.—Fort Worth 2009, pet. ref'd).

When sentenced, Nelson voiced no objection. Nelson later filed a motion for new trial and a pro se motion for new trial in which he complained that his sentences violated the Eighth Amendment because they were cruel and unusual. But there is no showing that Nelson presented either motion to the judge, had a hearing, or otherwise procured an adverse ruling. We hold that Nelson failed to preserve error. *See Means v. State*, 347 S.W.3d 873, 874 (Tex. App.—Fort Worth 2011, no pet.).

We overrule Nelson's eighth issue.

IV. Conclusion

Having overruled all of Nelson's issues, we affirm the trial court's judgment on each of the three counts.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: WALKER, MEIER, and KERR, JJ.

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

DELIVERED: August 17, 2017