

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-19-00540-CR
NO. 03-19-00541-CR**

Ivan Hernandez Ramirez, Appellant

v.

The State of Texas, Appellee

**FROM THE 299TH DISTRICT COURT OF TRAVIS COUNTY
NOS. D-1-DC-17-100058 & D-1-DC-300365
THE HONORABLE KAREN SAGE, JUDGE PRESIDING**

MEMORANDUM OPINION

Ivan Hernandez Ramirez was convicted of continuous sexual abuse of a young child and indecency with another child by contact and was sentenced to 38 years' confinement for the continuous sexual abuse offense and to 20 years' confinement for the indecency offense with the sentences running concurrently. *See* Tex. Penal Code §§ 21.02, .11(a)(1). In one issue on appeal, Ramirez argues that the trial court erred by permitting an expert to testify without first determining that he was qualified. We will affirm the trial court's judgments of conviction.

BACKGROUND

Ramirez was charged with one count of continuous sexual abuse of a child, two counts of aggravated sexual assault of a child, and three counts of indecency with a child by contact. In a separate case, Ramirez was charged with one count of indecency with a child by

contact. On the State's motion, the cases were consolidated for trial. Before trial, Ramirez filed a motion for a pre-trial hearing "pursuant to Rule 705, Texas Rules of Evidence" to "determine the admissibility of any expert testimony offered by the State." *See* Tex. R. Evid. 705(b) (before expert states opinion or discloses facts or data underlying that opinion, adverse party in criminal case must be permitted to examine expert outside presence of jury about underlying facts or data). In his motion, Ramirez argued that expert testimony is admissible under Texas Rule of Evidence 702 only if it is relevant and reliable. *See id.* R. 702; *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000) (reliability of "soft" science evidence may be established by showing that field of expertise involved is legitimate one, subject matter of expert's testimony is within scope of that field, and experts' testimony properly relies on or utilizes principles involved in that field). Ramirez further asserted that if the trial court determined that the expert testimony was relevant and reliable, it should also determine whether the testimony should be excluded because the danger of unfair prejudice substantially outweighs its probative value. *See* Tex. R. Evid. 403. Ramirez requested that the trial court conduct the hearing prior to trial to determine the admissibility of any expert testimony. Although the trial court granted the motion, there is nothing in the record to indicate that it conducted a pretrial hearing on the admissibility of any of the State's expert testimony.

During its case in chief, the State called Dr. William Carter as a witness. Counsel for Ramirez requested that the court hold a hearing on the admissibility of his testimony outside the presence of the jury. The jury was removed from the courtroom, and counsel for Ramirez then conducted the following voir dire examination of Dr. Carter.

Counsel: Tell me why you're here to testify today.

Dr. Carter: It's assumed that child sexual abuse cases are complicated and not something that the general public fully understands. Of course, the jury is drawn from the public. Therefore, it's common sense in cases of this nature for one side or the other or both to put on expert testimony to help them better understand all the nuances and dynamics and complexities of how to break down and understand a case like this so they will be better informed when they draw their—do their deliberations.

Counsel: Okay. What's your ultimate opinion going to be in this case?

Dr. Carter: I won't offer opinions about the bottom line, you know, guilt or innocence. I will simply explain what I know through my work experience and my knowledge of the professional literature, you know, various aspects of this case and the investigation and the fact patterns.

Counsel: Are you here to tell us whether a witness is potentially lying or not?

Dr. Carter: I will talk about—the issue of false testimony or false allegations may come up, and I will talk about those matters, if necessary, but that's not my intent to say that somebody is telling the truth or not telling the truth.

Counsel: Okay. And you would agree with me that psychology is a soft science, right?

Dr. Carter: Yes. Certain aspects of it are, you know, hard—harder than others, but as a general rule, it's a soft science.

Counsel: With respect to this case, it's a soft science certainly, right?

Dr. Carter: Yes.

Counsel: So, again, just to sum up: You're going to testify about just general nuances regarding the complexity of child sex abuse cases?

Dr. Carter: Yes.

Counsel: How will that aid the jury in determining guilt in this case?

Dr. Carter: I hope to educate the jury about how an expert, like myself, takes the fact patterns of the testimony and the investigative information and breaks it down, what things carry more weight and

significance and what research tells us about how the outcry process unfolds, what to look at, what to look for in that process, the relationships between the parties, how that influences a child's statement or not. Those kinds of things.

Counsel: How is that outside the scope of what a layperson would already know?

Dr. Carter: It's—there's a lot of research about why children don't talk readily and easily about, you know, traumatic events like child sex abuse. Things that seem to be common sense or common knowledge may or may not be brought out—borne out by research. So it behooves us, I think, to educate them so they won't, you know, make assumptions that aren't backed up by good, sound—good, solid research.

Counsel: Okay. I think that's enough.

After completing this examination, counsel for Ramirez objected to Dr. Carter's being called as a witness, stating, "I think the Court is well aware that the State's got to prove by clear and convincing evidence that the evidence they're proffering is sufficient and reliable to assist the jury in their determine—deliberations. I just don't think he's going to add anything to it, Judge. I don't think he advances the ball. The jury can use their normal knowledge to determine whether the witness is lying or not. I don't think he adds anything. So I do object to him being called." The court overruled the objection, and Dr. Carter was permitted to testify.

On direct examination, Dr. Carter testified about his qualifications, including that he has a doctorate degree in counseling and psychology, and is licensed to practice psychology. Dr. Carter performs approximately 300 psychological evaluations and testifies in approximately 40 to 50 criminal trials per year. Dr. Carter stated that the purpose of his testimony was not to give an opinion on guilt or innocence but, rather, to provide information about the dynamics of sexual abuse and sexual assault to assist the jurors, who typically have little exposure to child

sex abuse, in their deliberations. The State then tendered Dr. Carter as an expert, and counsel for Ramirez raised no objection. Dr. Carter then testified about the commonalities that exist among perpetrators of sexual assault and abuse, including that they typically have a preexisting relationship with their child victim. Dr. Carter stated that knowing what the relationship is between the perpetrator and the child victim can illuminate how the child's outcry might unfold. Dr. Carter testified that while it is never easy for a child to report sexual abuse, it is particularly difficult when the perpetrator is closely related to the child and is in a position of authority over the child. The child is very aware of the repercussions of making an outcry and fear of those repercussions can cause the child to hesitate to report sexual abuse or to never report it at all. Dr. Carter testified that perpetrators of sexual assault and sexual abuse choose as victims vulnerable children over whom the perpetrator can exercise control and whose protectors are also within the perpetrator's control. Dr. Carter testified about the outcry process and the dynamics of why a child might delay reporting sexual abuse and also discussed the rarity of false outcries. After the State completed its direct examination, counsel for Ramirez cross-examined Dr. Carter.

The jury convicted Ramirez of continuous sexual abuse of a young child and indecency with a child by contact and assessed punishment. This appeal followed. In his sole point of error, Ramirez asserts that the trial court erred in allowing Dr. Carter to testify as an expert because it "failed to make a proper determination of Dr. Carter's qualifications as an expert."

DISCUSSION

Before admitting testimony under evidence Rule 702, the trial court should determine that the expert is qualified, the opinion is reliable, and the evidence is relevant. *See* Tex. R. Evid. 702; *Vela v. State*, 209 S.W.3d 128, 131 (Tex. Crim. App. 2006). These three

requirements—qualification, reliability, and relevance—raise distinct questions and issues. See *Jessop v. State*, 368 S.W.3d 653, 688-89 (Tex. App.—Austin 2012, no pet.); *Shaw v. State*, 329 S.W.3d 645, 655 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). Accordingly, a party may challenge expert testimony on at least three specific grounds. *Jessop*, 368 S.W.3d at 689. First, a party may allege that the witness does not qualify as an expert because the witness lacks the requisite knowledge, skill, experience, training, or education in the subject matter of his testimony. *Vela*, 209 S.W.3d at 131; *Jessop*, 368 S.W.3d at 689; see Tex. R. Evid. 702. Second, a party may allege that the subject matter of the testimony is inappropriate because it is unreliable. *Vela*, 209 S.W.3d at 131, 133-34; *Jessop*, 368 S.W.3d at 689; see Tex. R. Evid. 705(c); *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992). Third, a party may allege that the testimony will not assist the fact finder in deciding the case. *Vela*, 209 S.W.3d at 131; *Jessop*, 368 S.W.3d at 689; see Tex. R. Evid. 401, 702. Because these three requirements raise distinct questions and issues, an objection based on one of these requirements does not preserve error as to another. *Salinas v. State*, 426 S.W.3d 318, 323 (Tex. App.—Houston [14th Dist.] 2014), *rev'd on other grounds*, 464 S.W.3d 363 (Tex. Crim. App. 2015); *Jessop*, 368 S.W.3d at 688-89; *Shaw*, 329 S.W.3d at 654; see *Vela*, 209 S.W.3d at 131; see e.g., *Turner v. State*, 252 S.W.3d 571, 584 n.5 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (holding that objection based on expert's qualifications did not preserve reliability issue).

Moreover, to preserve error, generally, a party must timely object and state the grounds for the objection with enough specificity to make the trial judge aware of the complaint, unless the specific grounds were apparent from the context. Tex. R. App. P. 33.1(a)(1)(A); see *Thomas v. State*, 505 S.W.3d 916, 924 (Tex. Crim. App. 2016); *Yazdchi v. State*, 428 S.W.3d 831, 844 (Tex. Crim. App. 2014). The objection must be sufficiently clear to give the judge and

opposing counsel an opportunity to address and, if necessary, correct the purported errors. *Thomas*, 505 S.W.3d at 924; *Ford v. State*, 305 S.W.3d 530, 533 (Tex. Crim. App. 2009); *see also Smith v. State*, 499 S.W.3d 1, 7-8 (Tex. Crim. App. 1996); *Yadzchi*, 428 S.W.3d at 844.

A review of the record here reflects that Ramirez did not object to Dr. Carter's qualifications as an expert. During trial, Ramirez requested that the trial court conduct a hearing on the admissibility of Dr. Carter's testimony. At the conclusion of the hearing, Ramirez stated that the evidence Dr. Carter would proffer was not "sufficient and reliable" to help the jury determine a fact in issue and that Dr. Carter's testimony would not "advance[] the ball." These are not objections to Dr. Carter's qualifications as an expert. When the State tendered Dr. Carter as an expert, Ramirez raised no objection. On appeal, Ramirez contends that the trial court abused its discretion in admitting Dr. Carter's testimony because the court did not determine that he was qualified to testify as an expert. However, Ramirez never complained about Dr. Carter's qualifications as an expert at trial, nor did he inform the trial court or the State that he was asserting that Dr. Carter's testimony should be excluded because he was not qualified to testify as an expert. He raises this concern for the first time on appeal. Accordingly, Ramirez has failed to preserve his complaint for appellate review. *See* Tex. R. App. P. 33.1(a); *Thomas*, 505 S.W.3d at 924; *Yadzchi*, 428 S.W.3d at 844.¹

To the extent Ramirez's complaint on appeal is that Dr. Carter's testimony should not have been admitted on relevancy grounds because it would not "advance the ball" or assist the trier of fact in determining a fact in issue, the Court of Criminal Appeals has recognized "the experience-based study of 'the behavior of offenders who sexually victimize children' as a

¹ Moreover, during Dr. Carter's direct examination the State elicited evidence of Dr. Carter's education and experience sufficient to qualify him as an expert.

legitimate field of expertise,” *Morris v. State*, 361 S.W.3d 649, 656 (Tex. Crim. App. 2011) (citing *Nenno v. State*, 970 S.W.2d 549, 562 (Tex. Crim. App. 1998)), as well as that research concerning the behaviors that are commonly observed in sexually abused children is a legitimate field of expertise, *see Cohn v. State*, 849 S.W.2d 817, 818-19 (Tex. Crim. App. 1993). We overrule Ramirez’s sole point of error.

We note, however, that the trial court’s judgment in each case does not accurately reflect the proceedings in the case. The judgment reflects that Ramirez pleaded guilty to both offenses for which he was convicted. However, Ramirez pleaded not guilty. We have the power to modify the trial court’s judgment to correct a clerical error when we have the necessary information to do so. *See Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref’d). Accordingly, we modify the portion of the trial court’s judgments entitled “plea to offense” to state “not guilty.”

CONCLUSION

As modified, we affirm the trial court’s judgments of conviction.

Chari L. Kelly, Justice

Before Chief Justice Byrne, Justice Baker and Kelly

Modified, and as Modified, Affirmed

Filed: April 21, 2021

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