NUMBER 13-18-00621-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

SANTIAGO JACOBO MARTINEZ, Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 92nd District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Perkes, and Tijerina
Memorandum Opinion by Justice Benavides

Appellant Santiago Jacobo Martinez appeals from his conviction of two counts of aggravated sexual assault of a child, a first-degree felony. *See* TEX. PENAL CODE ANN. § 22.021(a)(2)(B). Martinez challenges his conviction on seven grounds that we group into three: (1) Martinez was not allowed to testify during the guilt/innocence phase; (2) during punishment, the prosecutor commented on Martinez's right to remain silent; and

(3) the trial court abused its discretion by disallowing the defense's witness to testify as an expert. We affirm.[1]

I. BACKGROUND

M.L.A. testified at trial that she worked on the weekend selling shrimp at the flea market for Martinez who paid her $65 for both days. She almost always brought her daughter, Clarissa Rendon,[2] who was approximately six years old when M.L.A. started working for Martinez. M.L.A. met Martinez through a former boyfriend who worked with Martinez. After the boyfriend left their household, Martinez continued to employ M.L.A. on weekends. M.L.A. did not drive. Martinez and his wife Letty often helped M.L.A. with transportation.

Martinez and Letty had four children, including a daughter Ashlie, who was about the same age as Clarissa. Clarissa and Ashlie played together on weekends and at other times too and attended the same school. Martinez often included Clarissa on trips with his children to McDonald's, on other outings, and to their house to play with Ashlie and her brothers. Martinez also bought Clarissa toys.

According to Clarissa's testimony at trial, when she was ten years old, Martinez purchased a cell phone for her. Hermelinda Garza, Clarissa's godmother, testified that M.L.A. asked Garza to talk to Clarissa in late February 2016 because Clarissa had been rude, talking back, and misbehaving. M.L.A. did not know what to do with her because this was new behavior. Clarissa was visiting at her godmother's house and they were talking when Clarissa's cell phone rang. Garza could hear that it was a man's voice on

[1] Any pending motions will be dismissed as moot.

[2] The indictment assigned the minor a pseudonym to protect her identity. *See* TEX. CODE CRIM. PROC. ANN. art. 57.02. We refer to her mother by her initials to protect the minor's identity.

the other end, wanting to come pick her up and asking where she was. When Clarissa told the caller she was at her godmother's house, the man got mad and hung up. Clarissa appeared to be very nervous after the call and identified the caller as "the shrimper." Garza was suspicious and asked for Clarissa's phone so she could see her photos. Clarissa said the photo and text applications did not work. When Garza looked at the phone, she noted it had a passcode. Garza and her husband drove Clarissa home, but kept her phone for their grown daughter, Genesis, to look at. Genesis Perez testified that she obtained the passcode from Clarissa and went through Clarissa's phone that night. She found text messages and photos between Martinez and Clarissa that suggested an improper relationship between them.

The following day, Garza and her husband picked up Clarissa and took her to their home. Clarissa and Garza went into the bedroom and Garza testified that she asked Clarissa to tell her if something had happened. Clarissa appeared very nervous again. She told Garza that Martinez, who she called Jacobo, pulled down his pants and then pulled down hers and put his part in her part in the front and in the back. It happened in his house while the other children were outside playing. While Clarissa was telling Garza about the assault, she was upset and started crying. Clarissa told Garza she tried to push him off her, and he would not back off and it hurt a lot. She told her that Jacobo told her not to say anything because "it would go really bad for her and her mom," that he was going to "throw her mom to Mexico" and that was why she had not said anything. Genesis then called the City of Pharr police who came. The next morning Garza and her husband took Clarissa and M.L.A. to the hospital in Mission where Clarissa had an examination by a sexual assault nurse examiner (SANE). Garza took Clarissa and M.L.A. to Estrella's

House, the Child Advocacy Center, for Clarissa to give a statement on March 7, 2016.

Pharr patrol officer Gregorio Medrano responded to the call reporting Clarissa's abuse. He spoke to Garza and M.L.A. and called Investigator Alex Alvarez to the house. Medrano received Clarissa's cell phone and processed it into evidence. Investigator Alvarez testified he responded to patrol officer Medrano's call to investigate the sexual assault of a child. When he arrived at the Garza house, he interviewed M.L.A., and Garza. He then contacted Investigator Ruben Pequeno who specializes in crimes involving children. Pequeno set up appointments for Clarissa for a SANE examination and interview at the Children's Advocacy Center. Pequeno also arranged for the Department of Homeland Security to extract data from Clarissa's phone which included numerous text messages between Martinez and Clarissa over a two to three-month period, many late at night. Although there were the usual family type photos, there were "selfies" that Clarissa sent to Martinez that emphasized her breasts and buttocks.

Martinez was arrested the day of Clarissa's SANE examination and outcry to the SANE, Sally Aguirre. Shortly thereafter, Pequeno took written statements from Garza and M.L.A.

Araceli (Sally) Aguirre testified that she performed the sexual assault examination on Clarissa. While Aguirre was taking her history, Clarissa repeated the outcry she previously made against Martinez and described penetration of her vagina and anus by his penis in age-appropriate language. According to Clarissa, the assault took place approximately two weeks before the exam. As part of the history she gave, Clarissa told Aguirre that she loved Martinez like a father, and she did not want anything to happen to him. Aguirre testified she found no evidence of trauma which was normal. Aguirre

explained that in over 70% of the exams she has conducted over the past six years, there was no evidence of trauma. Aguirre described Clarissa's voice throughout the exam as very soft, almost a whisper, and she did not look at Aguirre.

Sara Mungia, a child forensic interviewer, from Estrella's House testified that she conducted an interview with Clarissa that lasted for an hour and forty minutes. Mungia stepped out twice during the interview, once because the recording equipment malfunctioned, and the other time because CPS requested clarification of something Clarissa said. Mungia described Clarissa as very soft-spoken and teary-eyed during the interview. During the interview, Clarissa wrote and drew to help Mungia understand her outcry. Defense counsel cross-examined Mungia extensively focusing on Clarissa's lengthy delay in the interview before making an outcry.

At the time of trial Clarissa was thirteen years old. She testified about her relationship with the Martinez family which had been part of her life since she was six years old when her mother went to work for Martinez. She described a family that incorporated other children in their family events as she was. Martinez even picked her up from school sometimes and sometimes Letty took her places as well. Clarissa remembered the day of the assault was a Saturday because they had all been to the flea market. Her mother went home because she was tired, but Clarissa went to the Martinez's house to play with Ashlie. After she got there, Letty took the youngest boy to the doctor so there were just Martinez, Clarissa, Ashlie, Abraham, aged eight, and the baby who was less than a year-old home. Martinez and the baby were inside the house when Martinez called for Clarissa to come inside and get the baby's clothes while he changed her diaper. The baby's clothes were in a high wardrobe adjacent to the bed in the master

bedroom. Clarissa crawled across the bed to get to the drawer. Martinez followed Clarissa into the master bedroom and turned off the light. He did not say anything. He took off his pants and then he pulled her pants and underwear down. He put his private part into her private part from behind. It hurt. He said it would hurt at first "but later it wouldn't" and "[t]hat I better not tell anybody." He also put "his private part into her part in the back" and it hurt. But Clarissa pushed him away after a bit and ran to the bathroom in the hallway. In the bathroom she cleaned herself because she was bleeding. Jacobo also told her he could have her mother deported and Clarissa would go to the government. Clarissa believed him and was sad and scared. Clarissa then went back out to play with Ashlie in the playhouse. She was crying, but she told Ashlie she fell. She did not tell anyone what happened. She saw Martinez again the next day at the flea market.

The following week on Sunday, Martinez assaulted her again when he took her to her house to pick up some clothes because she was spending the night with his family. Ashlie and Abraham were in the car waiting when Martinez and Clarissa went into the house. Martinez stayed in the living room. When she came downstairs from getting her things and before she went outside, Martinez grabbed her wrists, from behind her and pulled down her pants and underwear and penetrated her vaginally and anally with his penis, just like before. This time, Clarissa was bent over the sofa; the previous time he bent her over the bed. He stopped because Ashlie was coming into the house. Clarissa ran upstairs to change because she was bleeding. Before the jury, Clarissa marked anatomical drawings showing the body parts of Martinez and where he penetrated her on a different anatomical drawing.

The defense case consisted of Martinez's family members stating that Martinez

was never alone with Clarissa. In addition, Ashlie and one of her friends testified that at school Clarissa was loud and ran with a bad crowd. The defense also had a witness, Meliton Moya, PhD that they sought to use as an expert to testify generally about children who grow up in poor, single-family households.

The jury convicted Martinez of two counts of aggravated sexual assault of a child. In a separate punishment hearing, Martinez, his pastor, and his wife testified. The jury sentenced him to twenty years' imprisonment on each count that the trial court ordered to run concurrently. This appeal followed.

II. MARTINEZ'S RIGHT TO TESTIFY

By his first three issues, Martinez argues: (1) his counsel provided ineffective assistance of counsel in failing to allow Martinez to testify during the guilt/innocence phase of the trial; (2) during the guilt-innocence phase of trial, Martinez's Sixth Amendment right to testify was violated; and (3) structural error occurred when Martinez was not allowed to testify. *See* U.S. CONST. amend. VI.

A. Standard of Review

For Martinez's claim of ineffective assistance of counsel, we review under the *Strickland v. Washington* standard. *See Johnson v. State*, 169 S.W.3d 223, 228 (Tex. Crim. App. 2005) (citing *Strickland v. Washington*, 466 U.S. 686, 691 (1986)). The *Strickland* analysis is in two parts: (1) did counsel provide reasonably effective counsel, or was "counsel's performance 'so deficient that "counsel" was not functioning as the counsel guaranteed by the Sixth Amendment'"; and (2) counsel's deficient performance prejudiced the defense, i.e. "the errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

As to Martinez's claim that his Sixth Amendment right was violated and its violation was structural error, that error must be attributable to the trial court. *See Johnson*, 169 S.W.3d at 232. "[F]or there to be an error attributable to the trial court, the trial court would have to have a duty to ensure, *sua sponte*, that the defendant understands his constitutional right to testify." *Id.* "Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018). "Structural error 'affect[s] the framework within which the trial proceeds,' as distinguished from a lapse or flaw that is 'simply an error in the trial process itself.'" *Id.* (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

B. Discussion

A defendant has a right to testify at his own trial, and such a right is fundamental and personal to the defendant. *Johnson*, 169 S.W.3d at 232, 235 (citing *Rock v. Arkansas*, 483 U.S. 44, 52 (1987)); *see Agosto v. State*, 288 S.W.3d 113, 116 (Tex. App.—Houston [1st Dist.] 2009, no pet). "Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *See Turner v. State*, 570 S.W.3d 250, 274 (Tex. Crim. App. 2018). However, a defendant may knowingly and voluntarily waive this right. *See Smith v. State*, 286 S.W.3d 333, 338 n. 9 (Tex. Crim. App.2009) (citing *Rock*, 483 U.S. at 51–52).

1. Ineffective Assistance of Counsel

The *Johnson* court held that defense counsel is responsible for informing a defendant of his choice to testify or not and the consequences of each:

> We agree with the majority of jurisdictions that defense counsel shoulders the primary responsibility to inform the defendant of his right to testify,

> including the fact that the ultimate decision belongs to the defendant. Because imparting that information is defense counsel's responsibility, *Strickland* provides the appropriate framework for addressing an allegation that the defendant's right to testify was denied by defense counsel.

Johnson, 169 S.W.3d at 235.

The record before us does not reveal what conversations, if any, defense counsel had with Martinez during the guilt/innocence phase of the trial. Based upon the defense presented, it was apparent Martinez disputed that the alleged assault occurred. During punishment, Martinez testified in part:

> I want to express that I was patiently waiting and I was respectful with the Judge. And I wanted to take the chair so I could explain a little bit, so it could influence the decision of the persons. I took this place in court under God but I saw how in this place there was lies. And I couldn't say anything in respect to the Court. I have so much to say. I don't know how much time I have to say it.
>
> . . .
>
> I just want them to be fair with my life and whatever it is I will respect it. But I will say that I am innocent. That I leave everything in God's hands. But we are down here but he sees everything. I wish I could have spoke before y'all took your decision but I don't understand the law. There was a lot of confusion. I couldn't make the decision. That means that a lot of people believed in my innocence. This was a mistrial. We all know that y'all took since yesterday at 2:00 in the afternoon yesterday until today. I will continue fighting for my innocence. I will go to jail but I will never take fault for what I didn't do. God bless you.

Martinez's counsel filed a motion for new trial that was heard on the issue of alleged jury misconduct, but no issue was raised on Martinez's desire to testify during the first phase of the trial.

"[A] reviewing court on direct appeal will rarely be able to fairly evaluate the merits of an ineffective-assistance claim, because the record on direct appeal is usually undeveloped and inadequately reflective of the reasons for defense counsel's actions at

trial." *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). For an appellate court to find on direct appeal that counsel was ineffective, counsel's deficiency must be affirmatively demonstrated in the trial record. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). When the record is silent as to counsel's reasons for her conduct, finding counsel ineffective would call for speculation by the appellate court. *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Thus, claims of ineffective assistance of counsel are better suited to an application for writ of habeas corpus or motion for new trial where the record can be developed to include defense counsel's insight into his decisions. *Jackson v. State*, 877 S.W.2d 768, 772 & n.3; *see Mata*, 226 S.W.3d at 430; *see also Garza v. State*, No. 13-18-00202-CR, 2019 WL 1565326, at *2 (Tex. App.—Corpus Christi–Edinburg Apr. 11, 2019, no pet.) (mem. op., designated not for publication). Because there is an absence of any supporting evidence in the record of counsel's alleged failure to advise Martinez of his fundamental right to testify, or any evidence that counsel actually prevented Martinez from testifying, we cannot determine whether counsel's performance was deficient.

We overrule Martinez's first issue.

2. Trial Court's Responsibility

Martinez relies on *McCoy* to argue that the trial court's error is structural, and this Court should reverse without conducting a harm analysis. *McCoy*, 138 S. Ct. at 1511. Texas courts have not treated denial of the right to testify as structural error:

> [W]e hold that a complete denial of the right to testify at trial is not a structural defect but is the type of violation that can be subjected to a harm/prejudice inquiry. Consequently, the usual *Strickland* prejudice analysis applies: the defendant must show a reasonable probability that the outcome of the proceeding would have been different had his attorney not

precluded him from testifying.

Johnson, 169 S.W.3d at 239.

However, Texas does not require a trial court to address a claim of *McCoy* error until it is brought to its attention. *See Turner*, 570 S.W.3d at 276. In *McCoy*, before counsel admitted McCoy's guilt to the jury in a triple murder capital trial, McCoy's vehement objections to that strategy and his insistence on his plea of not guilty were made clear to the trial court. 138 S. Ct. at 1511. "The trial court's allowance of [counsel's] admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment." *Id.*

> [C]ounsel's admission of a client's guilt over the client's express objection is error structural in kind. Such an admission blocks the defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt. McCoy must therefore be accorded a new trial without any need first to show prejudice.

Id.

Although *McCoy* provides a good example of structural error, it does not apply here. The trial court was not made aware that Martinez allegedly wished to testify during the guilt/innocence phase of the trial and counsel allegedly prevented him from doing so. As we previously discussed, in Texas, the trial court does not have a responsibility to advise a represented defendant of his right to testify. *See Johnson*, 169 S.W.3d at 235.

We overrule issues two and three.

III. RIGHT TO REMAIN SILENT

By issues four, five and six, Martinez argues that the State infringed on his right to remain silent in violation of the Texas and United States Constitutions and Texas statute.

See U.S. CONST. amend. VI; TEX. CONST. art. 1, § 10; TEX. CODE CRIM. PROC. ANN. art. 38.08. According to Martinez, during closing argument, the State commented on his failure to testify during guilt/innocence. However, nowhere in Martinez's brief does counsel identify the alleged comment.

"A prosecutor's comment on a defendant's failure to testify offends both our State and Federal Constitutions." *Davis v. State*, 670 S.W.2d 255, 256 (Tex. Crim. App. 1984); *Nickens v. State*, 604 S.W.2d 101 (Tex. Crim. App. 1980). The language of such a comment must be either manifestly intended, or of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify. *Davis*, 670 S.W.2d at 256; *Griffin v. State*, 554 S.W.2d 688 (Tex. Crim. App. 1977).

We have reviewed the State's punishment argument which was brief and included the following:

> This man came before you today, made that decision and now you can use it. He made the decision to tell you that you made the wrong decision is basically what he did. He clearly is not going to take responsibility for his actions, for the way he violated that child and for the danger that he possess [sic] to his community.

In that argument, the State referenced Martinez's testimony during punishment earlier that afternoon. There was no violation of Martinez's right to remain silent by the State. *See Randolph v. State*, 353 S.W.3d 887, 891 (Tex. Crim. App. 2011).[3] Furthermore, defense counsel made no objection to the State's argument on that basis

[3] "[A] defendant has a separate Fifth Amendment privilege not to testify at either the guilt or punishment phases of trial. A waiver of the privilege at the guilt phase does not waive the privilege for the punishment phase. Thus, a comment on the defendant's silence at the punishment phase is improper even if the defendant testified at the first phase of trial." *Randolph v. State*, 353 S.W.3d 887, 891 (Tex. Crim. App. 2011). Conversely, if a defendant testifies during punishment, but not during the guilt/innocence phase, the State may comment on the testimony he gives at punishment but may not comment on his silence during the first phase of the trial. *See id.*

and thereby waived these issues. *See* TEX. R. APP. P. 33.1(a). "To preserve error in prosecutorial argument, a defendant must pursue to an adverse ruling his objection to jury argument." *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007); *Hopper v. State*, 483 S.W.3d 235, 236–37 (Tex. App.—Fort Worth 2016, pet. ref'd) (holding that failure to object to State's second improper comment on defendant's failure to testify waived issue).

We overrule Martinez's fourth, fifth and sixth issues.

IV. FAILURE OF TRIAL COURT TO ALLOW DEFENSE EXPERT TESTIMONY

By his seventh issue, Martinez argues that the trial court erred by excluding the testimony of Meliton Moya, PhD as an expert witness. Moya was allowed to testify as a lay witness.

A. Standard of Review and Applicable Law

We review a trial judge's decision to admit or exclude evidence under an abuse of discretion standard. *Burden v. State*, 55 S.W.3d 608, 615 (Tex. Crim. App. 2001); *Green v. State*, 934 S.W.2d 92, 101–02 (Tex. Crim. App. 1996). A trial court abuses its discretion if it acts without reference to guiding rules and principles. *Petriciolet v. State*, 442 S.W.3d 643, 650 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd); *State v. Reyna*, 89 S.W.3d 128, 130 (Tex. App.—Corpus Christi–Edinburg 2002, no pet.).

Under rule 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." TEX. R. EVID. 702. Before expert evidence is admitted, the proponent of the evidence has the burden to show, by clear and

convincing proof, that the evidence he is proffering under rule 702 is sufficiently reliable and relevant to assist the jury in accurately understanding other evidence or in determining a fact in issue. *See Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). In *Nenno v. State*, the court of criminal appeals held that when assessing the reliability of expert testimony concerning the so-called "soft sciences," those that are based on experience or training as opposed to scientific method, "[the] requirement of reliability applies but with less rigor than to the hard sciences." 970 S.W.2d 549, 561 (Tex. Crim. App. 1998), *overruled on other grounds*, *State v. Terrazas*, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999). The appropriate considerations 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 or utilizes the principles involved in that field. *Id.*

B. Discussion

The trial court held a hearing outside the jury's presence regarding the witness's qualifications to testify as an expert witness. Moya has a doctorate in psychology but is not licensed by the State of Texas and has never been. He is self-employed and his business is called "The Process Manager." He has worked in Hidalgo County with the Probation Department and has assessed competency of adults; has worked with school systems and with children, some of whom had been sexually abused; has worked with Child Protective Services as part of a civilian review board studying cases of child abuse, and is in the process of publishing a book on the school system. Moya described himself as a process manager. He stated that he uses "clinical psychology, social psychology, organizational psychology, . . . philosophy. I'm a personality theorist, I have my own theory

of personality. I have my own research and I use all of this in process management." Moya testified at the hearing,

> I do have a story in terms of what happened. . . .You put together a story based on all the details kind of like an investigator. You know, that's part of process management. You get data from here and data from here and then put a story together. And I do have a story in terms of what happened. . . . . I have a story about how the idea of what happened could have happened.

Moya reviewed the police files, Clarissa's videotape from Estrella's House, her medical records, and the district attorney's discovery. Defense counsel described the testimony she sought to elicit as follows: "I want him to testify on—I want him to give an opinion of what happens to different little girls, not this—not her but what happens if this little—somebody grows up without a father." The State objected that the testimony would not be reliable nor helpful and would usurp the role of the jury. The State made the further point that Moya would be looking at much the same evidence the jury would see and would add nothing.

"[E]xpert testimony must aid—not supplant—the jury's decision. Expert testimony does not assist the jury if it constitutes "a direct opinion on the truthfulness" of a child complainant's allegations." *Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997) (citing *Yount v. State*, 872 S.W.2d 706, 708 (Tex. Crim. App. 1993)). "[E]vidence that a person's allegations are the result of manipulation or fantasy is inadmissible. Such evidence never assists the jury because the jury is just as capable as the expert of drawing the conclusions involved." *Schutz*, 957 S.W.2d at 70–71.

Based upon the evidence before the trial court at the hearing outside the jury's presence, defense counsel did not establish that the evidence that Moya would testify to was reliable, relevant, or would be helpful to the jury. As a result, the trial court did not

abuse its discretion in disallowing the testimony. *See Yount*, 872 S.W.2d at 708.

We overrule issue seven.

V. CONCLUSION

We affirm the trial court's decision.

GINA M. BENAVIDES,
Justice

Do not publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed the
30th day of July, 2020.