the Jasuta / Schulman report

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TIBA's Case of the Week

Austin Court of Appeals

Case Name: ***Nicholas Gonzales v. The State of Texas***

- **OFFENSE**: Continuous-Sexual-Abuse-of-a-Child
- **COUNTY**: Hays
- **C/A CASE No**. 03-24-00376-CR
- **DATE OF OPINION**: September 11, 2025 **OPINION**: Justice Chari Kelly
- **DISPOSITION**: Conviction Affirmed
- **TRIAL COURT**: 22nd D/C; Hon. Bruce Boyer
- **LAWYERS**: Donald Edwards (Defense); Landon Campbell (State)

(**Background Facts**): During an "Adam and Eve" talk, J.T. (then age 8), outcried to her Mother that Appellant (then Mother's fiancé), had shown her videos of "a boy's middle going into a girl's middle" "multiple times" and had put his "finger in her middle." At the time of the outcry, the family had lived at a house in Kyle for around three months; before that they lived in a duplex in San Marcos. Mother immediately confronted Appellant, and he admitted that while he was downloading movies on his laptop in front of J.T. and her younger sister, R.T., an advertisement for pornography popped up. He used it as an example to explain the "birds and the bees" but otherwise denied the conduct. Mother brought J.T. into the room, and J.T. repeated her allegations in front of Appellant; Appellant tried to "cut her off" and "kept on denying it." Mother called R.T. (then age 7) into the room and, when questioned, she too said Appellant had shown her "a video of how babies were made" and "would put his fingers in her middle." R.T. also clenched her fist and moved it up and down and said Appellant would make her do that to "his middle." Both girls said it happened "back at the old house" in San Marcos. R.T. said it had also happened at the Kyle house, about a week ago, when Mother went to get her nails done for Easter. Appellant left the house and Mother called the police. At Roxanne's House, a Children's Advocacy Center in San Marcos, Forensic Interviewer Maggie Ortuno interviewed the girls and forensic sexual assault nurse examiner (SANE) Noella Hill examined the girls; neither girl submitted to a genital exam. A grand jury indicted Appellant on two counts of continuous sexual abuse of a child, one alleging abuse of J.T., the other alleging abuse of R.T.

[301.01 **Expert Witnesses / Qualifications**]: At trial the jury heard from (among others) Mother; J.T. (then 11); R.T. (then 10); Maggie Ortuno; and Noella Hill. Before Ortuno testified, the trial court held a hearing outside the presence of the jury. She testified about child sexual abuse and investigations, including delayed outcries, types of disclosures by children of abuse, grooming, and coaching. At the end of it, Appellant objected to her testimony as an expert. Defense counsel stated that Ortuno "had a problem with the scientific method," "hasn't published any articles," and "doesn't know what the potential rate of error" is for the studies she relies on; he also stated her testimony "might be more confusing to the jury than helpful." The trial court overruled the objections, designated Ortuno as an expert witness in child-sexual-abuse investigations and interviews and permitted her to testify. Appellant argues that the trial court abused its discretion in permitting an unqualified "expert" to testify about patterns of behavior in victims of alleged child abuse to bolster the girls' testimony.

Holding (**Qualifications**): Before admitting expert testimony under Rule 702, the trial court must be satisfied that three conditions are met: (1) the witness qualifies as an expert by reason of her knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and (3) admitting the expert testimony will assist the factfinder in deciding the case. ***Rodgers v. State***, 205 S.W.3d 525 (Tex.Cr.App. 2006)(see , Vol. 14, No. 17; 05/08/2006). "The specialized knowledge that qualifies a witness to offer an expert opinion may be derived from specialized education, practical experience, a study of technical works or a combination of these things." ***Rhomer v. State***, 569 S.W.3d 664 (Tex.Cr.App. 2019)(see , Vol. 27, No. 3; 02/04/2019). *** Ortuno testified on voir dire about her specialized knowledge in child sexual abuse investigations and interviewing, derived from a combination of education, training, and practical experience. *** Second, Ortuno's background went to the very matter on which she was to testify. Her proposed testimony covered general concepts intrinsic to child-sexual-abuse investigations and interviews. *** Third, Ortuno's field of expertise was not complex but rather a soft science based on experience and training, closer to the jury's common understanding. And Ortuno's proposed testimony was neither conclusive nor dispositive. Ortuno explained that she did not intend to testify that the girls were or were not telling the truth and that she understood that was the jury's role, not hers. Ortuno's testimony was not the only evidence tying [Appellant] to the crimes. Rather, by the time the State offered her as an expert witness, Mother had testified about the girls' outcries, both girls had testified about the abuse, and Hill had read aloud the unredacted parts of the statements that she had taken from the girls for purposes of medical diagnosis and treatment. *** On this record, the trial court did not abuse its discretion in determining Ortuno possessed sufficient qualifications to assist the jury as an expert on concepts intrinsic to child sexual-abuse investigations and interviews.

Sidebars

(**Stanley Schneider**): A forensic interviewer based on training and experience may be qualified to testify as an expert based on the intricacies of conducting a proper forensic interview and the purpose of the procedures employed/ But can a forensic interviewer

testify as an expert concerning other issues grooming or delayed disclosure that are associated with child sex cases without a showing of knowledge or training in the subject? This opinion appears so say "yes, she can." I respectfully disagree.

(**John G. Jasuta**) Old law.

(**David A. Schulman**) I know some defense attorneys believe this to be a dangerous holding, but I agree with John --- it's nothing new. The witness had a level of specialized knowledge. Where she got it is not as important as whether that knowledge would help the jury. The bottom line is that the Courts believe that her specialized knowledge qualifies her as an expert.

Holding (**Reliability**): In determining whether a soft science is an appropriate one for expert testimony we ask "(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." ***Nenno v. State***, 970 S.W.2d 549 (Tex.Cr.App. 1998)(see ☙, Vol. 6, No. 25; 06/29/1998). First, the subject of child sexual abuse is a legitimate subject within the field of psychology. ***Cohn v. State***, 849 S.W.2d 817, 819 (Tex. Crim. App. 1993); ***Jessop v. State***, 368 S.W.3d 653 (Tex.App. - Austin 2012)(see ☙, Vol. 20, No. 18; 05/07/2012). *** Second, the subject matter of Ortuno's testimony, the common behavioral traits exhibited by child victims (such as delayed outcries) and perpetrators (such as grooming), was within the scope of that field. ***Morris v. State***, 361 S.W.3d 649 (Tex.Cr.App. 2011)(see ☙, Vol. 19, No. 48; 12/12/2011). *** Third, Ortuno's testimony properly relied upon and utilized the principles involved in the field. In addition to her testimony outlined above, Ortuno testified about the "semistructured narrative process of forensic interviewing," "developed to minimize suggestibility in children" and "maximize their ability to tell something that they have experienced." She also testified about the interview stages -- introduction and rapport-building; developmental assessment of communication; the truth/lie oath; the topic of concern; the detail-gathering portion; focus/recall questions; sensory detail questions; a break; and closure with a safety talk and then a neutral talk. She testified she followed this process in her interviews with J.T. and R.T. We conclude that the trial court did not abuse its discretion in finding the subject matter of Ortuno's testimony appropriate for expert testimony.

Holding (**Relevance**): Under Texas Rule of Evidence 401, evidence is considered relevant if it meets two criteria: (a) it has any tendency to make a fact more or less probable than it would be without the evidence, and (b) the fact is of consequence in determining the action. *** The Court of Criminal Appeals long ago explained why testimony like Ortuno's is relevant and admissible. ***Duckett v. State***, 797 S.W.2d 906 (Tex.Cr.App. 1990). So too here, Ortuno's specialized information was of value in assisting the jury to understand the evidence regarding the conduct of the girls and of [Appellant]. *** The ***Duckett*** court specifically rejected the notion that the kind of testimony Ortuno gave necessarily improperly bolsters the credibility of child complainants. *** And after ***Cohn***, the relevance of such evidence is not dependent upon it serving some kind

of rehabilitative function; nor does its corroborating effect unfairly prejudice the defendant for purposes of Rule 403. *** Once Ortuno imparted her specialized knowledge concerning the behavioral characteristics typically exhibited by sexual-abuse victims and predators, the jurors were appropriately left to draw their own conclusions concerning the credibility of the witnesses. See ***Yount v. State***, 872 S.W.2d 706 (Tex.Cr.App. 1993). The trial court did not abuse its discretion in determining the testimony was relevant to assist the factfinders.

[209 **Trial Courts / Proceedings (Right to Allocution)**]: Appellant contends the trial court violated his right to due process by denying him the common-law right to allocution before sentencing.

Holding: Before pronouncing sentence, [Appellant] was not "asked whether he has anything to say why the sentence should not be pronounced against him" (as required by Art. 42.07, C.Cr.P.). And [Appellant] does not here contend that he has received a pardon, is incompetent, or is not the person who has been convicted. He acknowledges that he failed to notify the trial court of his desire to exercise his common-law right to allocation before the imposition of sentence, and that Appellate courts have held that such a failure waives any complaint on appeal. See ***McClintick v. State***, 508 S.W.2d 616 (Tex.Cr.App. 1974). *** [Appellant] nevertheless argues that he should not be held to have forfeited any error because the right to allocution should be considered a right "which must be implemented by the system unless expressly waived." In ***Marin v. State***, 851 S.W.2d 275 (Tex.Cr.App. 1993), the Court of Criminal Appeals recognized that most rules fall into one of three distinct categories: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request. *** [Appellant] is thus arguing that the right to allocution is a Category 2 ***Marin*** right. *** It is unclear whether the common law right to allocution survives article 42.07, much less that the common law right is a Category 2 ***Marin*** right. The Texas Code of Criminal Procedure provides that, "If this Code fails to provide a rule of procedure in any particular state of case which may arise, the rules of the common law shall be applied and govern." *** Article 1.27 could provide for continued application of the common-law right. No court has yet said so. See ***Hunter v. State***, 691 S.W.3d 247 (Tex.App. - Dallas 2024)(see , Vol. 32, No. 23; 06/17/2024)(expressing no opinion as to whether common-law right of allocution exists in Texas; noting question of whether statute supplanted any potential broader reach of common-law right remains unanswered). Regardless, we agree with the many courts before us that have, like ***McClintick***, held that the failure to assert the common law right to allocation at trial forfeits error.

Sidebars

(**David A. Schulman**) "Common law right to allocution?" Sure. So, what is it that you were going to say . . . after the sentence has been determined but before it's actually imposed? This isn't even grasping at straws.

(**John G. Jasuta**) Allocution is very limited in Texas.