No. 14-24-00075-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

JOSE LUIS PENA,

Appellant,

v.

STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE 486th JUDICIAL
DISTRICT OF HARRIS COUNTY, TEXAS
CAUSE NO. 1696435
THE HON. AARON BURDETTE, PRESIDING.

BRIEF OF APPELLANT

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ORAL ARGUMENT NOT REQUESTED

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BRIEF OF APPELLANT

TO THE HONORABLE COURT OF APPEALS:

Appellant Jose Luis Pena, respectfully files this Brief.

Identity of Parties and Counsel

The following is a complete list of all parties, as well as the names, addresses, and emails (if known) of all counsel:

Appellant/Defendant:	Jose Luis Pena
Appellant's Counsel at Trial:	Fred Dahr 405 Main Street, Suite 900 Houston, Texas 77002 PHONE: 713.487.7575
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Appellee/Plaintiff:	The State of Texas
State's Counsel at Trial:	The Honorable Kim Ogg, District Attorney Andrew Sanchez, Wesley Stafford, Assistant District Attorneys Harris County District Attorney's Office 1201 Franklin Houston, Texas 77002
State's Counsel on Appeal:	The Honorable Kim Ogg, District Attorney Harris County District Attorney's Office 1201 Franklin Houston, Texas 77002
Trial Court Judge:	The Hon. Aaron Burdette 486th Judicial District Court Harris County, Texas

Record References

The Clerk's Record, filed March 18, 2024, contains one volume; therefore, references to the Clerk's Record are by page number, indicated as "CR __."

The Reporter's Record, filed April 17, 2024, contains eight volumes; therefore, references to the Reporter's Record are by volume and page number, indicated as "RR__:__."

Party References

Appellant Jose Luis Pena, will be referred to as "Appellant." The State of Texas will be referred to as the "State."

Statement Concerning Oral Argument

Appellate counsel does not believe that oral argument would aid the Court in reaching its decision and does not request oral argument.

Table of Contents

Index of Authorities

CASES

RULES

CODE

Statement of the Case

Cause Number 1696435

The District Court 486th Judicial District of Harris County, Texas

Parties Appellant: Jose Luis Pena

Appellee: The State of Texas

The Nature of the Case

A bill of indictment, dated June 9, 2022, charged Appellant with unlawfully, intentionally and knowingly causing the penetration of the sexual organ of V.P. (Complainant), a person younger than fourteen years of age, by placing finger in the sexual organ of the Complainant. The indictment alleged that before the commencement of the offense alleged (primary offense), on August 16, 1984, in Cause number unknown, in the unknown Court of Dallas County, Texas, Appellant was convicted of the felony offense of Murder. The indictment further alleged that before the commission of the primary offense, and after the conviction in Cause Number unknown was final, Appellant committed the felony offense of possession of a controlled substance and was finally convicted of that offense July 28, 1988, in Cause Number unknown, in the unknown Court of Edinburg County, Texas. (CR 41).

The Course of Proceedings

Appellant pleaded not guilty and elected to have the court assess punishment. (CR 157). The jury found Appellant guilty of the charge. (CR 156).

Disposition of the Case

The Appellant was sentenced as follows: 50 years in the TDCJ. (CR 157). The trial court entered judgment and certified Appellant's right to appeal. (CR 162).

Statement of Issues Presented

POINT I: OVER OBJECTION, THE TRIAL COURT ERRED IN ADMITTING EXTRANEOUS OFFENSE EVIDENCE THROUGH D.L. AND R.C.Q.

POINT II: OVER OBJECTION, THE TRIAL COURT ERRED IN ADMITTING HEARSAY TESTIMONY PROVIDED THROUGH AN UNQUALIFIED OUTCRY WITNESS

POINT III: OVER OBJECTION, THE TRIAL COURT ERRED IN ADMITTING EXPERT TESTIMONY FROM STATE'S WITNESS, KATIE BARTLEY

Statement of Facts

Trial on the Merits

A. State's Witnesses

Cameron King

Sergeant Cameron King works for the Houston Police Department where he was previously assigned to Child Abuse Division. (RR 4:81-82). Sergeant King received relevant training to handle matters involving child physical and sexual abuse. (RR 4:82-84). According to his training, the time frame that is recommended for anyone who reports sexual assault is within 120 hours or 5 days. (RR 4:84). The instant case was filed in November 2019 but was issued to Sergeant King several months later in August 2020. Several months had passed by the time Sergeant King had got the case. There was no movement on the investigation between the first report and until Sergeant King picked up the case. (RR 4:91). The two complainants in the instant case were D.L. and V.P., who were sisters, and the suspect was

Appellant, their father. Statements were obtained from both the suspects but not from the Appellant. (RR 4:92,96). The investigations of the instance case were during the peak of the COVID-19 pandemic, and electronic means of communications were preferred during that time. (RR 4:94). Sergeant King's original communications with D.L. and V.P. were over the phone, but an in-person interview with V.P. was also scheduled. (RR 4:95). After talking to the complainants, Sergeant King tried to reach out to the other family members who were in the household at the time of the alleged incidents. (RR 4:96). The complainants did not participate in a SANE exam because they had a delayed outcry and the general time for getting a SANE exam done is 120 hours or 5 days. In the instant case, there were several years between the incidents and when the accusations were made. (RR 4:102). The classic forensic interviews were also not scheduled for the complainant sisters because forensic interviews are scheduled for children or juveniles, and in the instant case, no accusations were made by the complainants until they were both full adults. (RR 4:103). As the next best option, Sergeant King personally interviewed the complainants one-on-one, with V.P. being interviewed in-person and D.L.'s interview taking place over the phone. (RR 4:104). Sergeant King started to close the investigation between October and November of 2020. Based on the information obtained in his interviews, Sergeant King believed he had probable cause to go forward. (RR 4:104). Sergeant King did a media release, contacted everyone involved, let them know that the case was going

to be closed, and then closed the case out. (RR 4:105). During investigations, Sergeant King requested and obtained records of D.L.'s time with her therapist, Ms. Katie Bartley. The records were also part of Sergeant King's complete evaluation of the case in determining whether to go forward or not. (RR 4:106). After gathering all relevant information obtained, Sergeant King presented the case to a Harris County assistant district attorney, The charges were accepted after reviewing the case. (RR 4:107).

During cross-examination, Sergeant King agreed that 9606 Hannon, where the incidents allegedly occurred, is a small house and during investigation, Sergeant King found out that D.L. and V.P. shared a common bedroom and also shared a bed. (RR 4:108, 109). Sergeant King believed majority of the alleged assaults happened in the same bed. (RR 4:110). Sergeant King never asked D.L. if she saw V.P. getting assaulted in that bed, nor did he ask V.P. if she ever saw D.L. get assaulted. (RR 4:110). Sergeant King didn't discover any evidence that V.P. woke up when D.L. was allegedly getting assaulted. Sergeant King talked to a lot of the Pena family but did not contact Appellant or get his statement. Sergeant King was not present when Appellant was arrested. He just contacted the warrant officer who ran the warrant. (RR 4:111).

Gloria Ramirez

Ms. Gloria Ramirez is the ex-wife of Appellant and mother of the complainants. (RR 4:113). Ms. Ramirez and Appellant were married for 23 years and have 4 children together including the complainants. (RR 4:114-115). Ms. Ramirez has been working at Walmart for 28 years and holds the position of assistant store-manager. (RR 4:115-116). Ms. Ramirez was working at Walmart even when she used to stay with Appellant and her children at 9606 Hannon Drive. (RR 4:116). Ms. Ramirez and her family lived a few years in the address when her children were growing up. (RR 4:117). Ms. Ramirez's job as a manager in Walmart was very demanding and she had to work overnight. When she was at work, Appellant was in charge of raising or supervising the kids at home. (RR 4:117). At his point in time, Appellant did not have a job and he would spend a lot of time at the house. He assisted in cooking and feeding the kids. As a family, they did normal things like going out to eat, going to movies and shopping together, etc. Appellant also got the kids ready for school. (RR 4:118-119). In the house, V.P. and D.L. shared a room and used to sleep in the same bed. The kids were really shy when growing up. Appellant was the one who was more on the discipline side of the house and as a father, he disciplined the children from time to time. (RR 4:120). The environment of the house was strict because of Appellant. On one instance, D.L. brought home a book that Appellant felt was inappropriate, and Appellant took the book from D.L.

and destroyed it. (RR 4:121). As a couple, Ms. Ramirez had arguments with Appellant but mostly in private. When D.L. was between the ages of 14 and 15, she confronted Ms. Ramirez with some concerning information. (RR 4:122). They had already moved to Victoria at this time, and D.L. was upset and crying when she approached Ms. Ramirez. (RR 4:123). Ms. Ramirez did not inform the police nor did she have a follow-up conversation with D.L.. At the time when Ms. Ramirez had the conversation with D.L., Appellant was not staying with them. (RR 4:124).

Around the same D.L.'s aforementioned conversation allegedly took place, V.P. allegedly came forward and had a similar conversation with Ms. Ramirez where V.P. began crying and was upset and overwhelmed with emotions. (RR 4:125) No police report was made around that period of time for either of these alleged conversations between D.L., V.P., and Ms. Ramirez.

Around November 2019, when her daughters were in their 30s, Ms. Ramirez became aware that they were planning to go forward with making a police report. Thereafter, Ms. Ramirez was contacted by a sergeant from the Houston Police Department. (RR 4:126). Ms. Ramirez's daughters V.P. and D.L. had never disclosed to Ms. Ramirez specific details about what happened to them with Appellant. While growing up V.P. and D.L. were very close and had a good relationship. Appellant's relationship was dictatorship-like and they were afraid of him. (RR 4:127). According to Ms. Ramirez, there was a distinction of how

Appellant treated V.P. and D.L. and was more aggressive towards the latter. (RR 4:128). Mr. Ramirez and Appellant have a third daughter in addition to the two complainants. (RR 4:134).

Between 2010 and 2020, Ms. Ramirez continued to see Appellant at events, and she testified at trial that it was possible Appellant let Mr. Ramirez borrow money from him in 2020 as well. (RR 4:131-132).

V.P.

V.P. currently works for the Houston Police Department and is one of the complainants in the instant case. (RR 4:137). She is particularly close to her family and is equally close to all her siblings and communicates with them regularly. (RR 4:138). When she was 10 years old, V.P. lived with her family at 9606 Hannon Drive. The Hannon Drive home is the house where Mr. Pena grew up, and where the alleged incidents occurred. (RR 4:139). V.P. shared a room with her sister D.L. at the Hannon Drive home. (RR 4:139-140).

According to V.P., the alleged incidents began when she was approximately 11 years old. (RR 4:142). Outside of the alleged incidents, V.P. appeared to have a normal relationship with her siblings, her mother and the Appellant. V.P. was the oldest child, so she helped her parents out around the house and also took care of her younger siblings. (RR 4:142). The household was strict with Appellant having a lot of rules that everyone had to follow. The girls were not allowed to talk or dress in a

certain way and were required to go to church a minimum of two times per week. Appellant wanted everything done his way. (RR 4:143). V.P. and her siblings were not allowed to use slang while talking and were expected to be respectful. Appellant even controlled how V.P. would brush her hair. (RR 4:144). Appellant frequently spanked the children as punishment for bad behavior and would occasionally use a belt. V.P. tried to keep everybody out of the pathway of Appellant and tried to stay on his good side. (RR 4:145).

V.P. testified that Appellant's relationship with her was different from that of her sister, D.L.. According to V.P., Appellant would pick on D.L., refer to V.P. as the "good girl" and often reprimand D.L. for the language she used and the clothing she wore. (RR 4:146).

V.P. testified that when the alleged abuse occurred, she felt pressure on her private areas and woke up to see Appellant's face and realized that his hand was inside her underwear and his fingers were inside her body. (RR 4:148). Confused and not knowing what to do, V.P. stayed quiet and started crying to herself. Seeing her cry, Appellant got scared and ran out of the room. (RR 4:151). V.P. did not specifically remember if her sister D.L. was in bed with her during the alleged incident. (RR 4:147).

V.P. further testified that when the alleged incident occurred, she was sleeping closer to the outside of the bed and was not wearing any pants. Appellant had his

clothes on. The alleged incident was more painful emotionally than physically for V.P., and she never specifically disclosed the alleged incident to her sister, D.L.. V.P. does not think that D.L. was awake during the alleged incident or has any memory of the event herself.

According to V.P., Appellant came back in the room after ten minutes and apologized saying that he confused V.P. with her mother. (RR 4:151). V.P.'s mother was mostly at work at nights and never slept in the bed with V.P. and her sister D.L.. (RR 4:152). Appellant took V.P. to a separate room and started apologizing until her mother came back from work. (RR 4:53). Her parents started talking in Spanish and she did not understand their conversation. That night before leaving for work her mother asked her if everything was ok to which V.P. just mentioned that everything was ok and that nothing happened. V.P. did not allege any other instances of abuse. When she was in high school, V.P. found out that her sister, D.L., was also allegedly abused. (RR 4:155).

V.P. did not see Appellant until years after the alleged incident when she and D.L. were living separately with their mother, Gloria Ramirez. It was D.L. who initially made an outcry to V.P., who followed by approaching their mother to inform Mr. Ramirez of the alleged abuse. This precipitated a divorce between Appellant and Ms. Ramirez. (RR 4:156)

Despite the allegations, no reports were made of any kind with any state or local law enforcement agency, nor with Child Protective Services. The abuse allegedly took place between 1998 and 2001, and V.P. and D.L. came forward for the first time with any type of formal complaint or outcry against Appellant in 2019. (RR 4:157). After the initial 2019 report was filed, it sat for several months before finally being assigned to Seargent King with the Harris County Police Department. Seargent King contacted V.P. and met with her to conduct an interview regarding the alleged abuse. (RR 4:158).

During cross-examination, V.P. conceded that her sister, D.L., did not wake up during the alleged incident, nor did D.L. wake up while V.P. was allegedly crying. Similarly, V.P. did not wake up when D.L. was allegedly being assaulted in the same bed. (RR 4:162). Throughout her testimony, V.P. depicted Appellant as an out-of-control monster who used fear and consequences to terrorize her and her siblings. Despite making such harsh allegations, V.P. invited Appellant to her wedding in 2009, she celebrated Christmas with Appellant and her own children, and V.P. always allowed her young son to be around Appellant. (RR 4:164-165). V.P. also attended Appellant's second wedding years after he and Mr. Ramirez had divorced. (RR 4:166-168). Additionally, V.P. testified that her daughter, Penelope, was very comfortable around Appellant. (RR 4:169). V.P. also testified that she left her two

children to be around Appellant when V.P. was not present during extended trips like fishing, or during sleepovers at Appellant's house. (RR 4:170-171).

V.P. testified that Appellant re-entered her life in approximately 2010, but in 2019 she cut all communications. A Father's Day card written by V.P. to Appellant, during the time they reconnected, was presented as evidence while V.P. was examined. (RR 4:175; 177-178).

D.L.

D.L. is one of the complainants in the instant case and a daughter of Ms. Gloria Ramirez and Appellant. (RR 4:182). D.L. works for a tech company based out of Massachusetts. She is married and has two children. (RR 4:183). Back in July 2001, D.L. was 11 years of age and lived at her parents' house at 9606 Hannon Drive, Harris County, Texas. (RR 4:11). Around that time, D.L. alleged that Appellant had inappropriate contact with her. (RR 4:12). The first memory that D.L. had of her father being inappropriate was in the living room of the house. Appellant allegedly pulled her to lay down on top of him on the couch. Appellant allegedly started to fondle her breasts and placed his hand underneath her shirt and touched her inappropriately. She had her clothes on during the alleged incident. (RR 4:13). That was allegedly the first time that she was touched inappropriately by Appellant. Later, Appellant allegedly started coming to D.L.'s room and laying in bed with her. While she would be asleep, Appellant allegedly started to 'dry hump' her i.e. use her body

to satisfy himself sexually with clothes on. (RR 4:14-15). During this movement, she could apparently feel his penis against her vagina over her clothes. (RR 4:15). Appellant allegedly kept doing the movement until he seemed satisfied.

D.L. was just 11 years old at the time of the alleged abuse and she did not know anything about sex. During this episode, D.L. testified that Appellant did not expose his penis, nor did he touch himself, there was no kissing, and her clothes were always on. (RR 4:16). D.L. further alleged another incident where Appellant started 'dry humping' while allegedly putting his hands inside of D.L.'s vagina. D.L. also alleged that Appellant made her touch his penis.

During the third alleged incident, Appellant allegedly touched D.L.'s clitoris and inside of her vagina. (RR 4:17-18). D.L. allegedly saw Appellant's penis for the first time during this incident. She apparently saw him removing his pants and underwear. She remembered him grabbing her hand and putting it on his penis. She was allegedly forced to stroke his penis until he ejaculated on her stomach. (RR 4:198). She alleged that during this incident, his bare hands went under her clothes and inside her vagina. (RR 4:199).

D.L. then described a fourth alleged incident, which happened when she was approximately 13 years old. It allegedly took place in Appellant's bedroom, where Appellant laid on top of D.L. in the bed and allegedly tried to kiss her. D.L. testified that she cried very hard during this alleged incident, and Appellant told her to stop

crying because fathers are supposed to teach this to their daughters. (RR 4:200-201). D.L. testified about other similar alleged incidents where Appellant assaulted her when her mother was at work. Such alleged incidents stopped when D.L. turned 14. (RR 4:204).

D.L. testified that she first told the incidents to her older sister, V.P., when D.L. was around 16 years old. (RR 4:205). She and her sister approached their mother about the alleged abuse, and D.L. testified that their mother was shocked, surprised and sad. (RR 4:206). However, her mother did not call the police. D.L. finally made a police report in 2019 when she was married and had become a mother. (RR 4:207-208). D.L. testified that she went to therapy after becoming a mother, and after speaking with her therapist, D.L. felt like it was important to report the alleged abuse by Appellant. (RR 4:210). During the investigations, D.L. was contacted by Seargent King with the Harris County Police Department and D.L. gave her statement. D.L. admitted that Appellant did not make any sound or speak with her or threaten her in any way. (RR 4:196).

In 2019, when the allegations were made against Appellants, D.L. was living in Austin and was struggling to buy a house. D.L. testified that Appellant had given her $3,000.00 to help with the down payment of her house, and that Appellant had also helped her with her previous residence. (RR 5:4).

D.L. testified that she does not stay in contact with her parents or siblings. (RR 5:183,184). D.L. testified that she was scared of Appellant as a child and hated him since kindergarten due to his violent, erratic, and volatile nature. As a little girl she would often get into trouble with Appellant. In such situations, Appellant allegedly would hit her with a belt to discipline her. (RR 4:187-188). D.L. testified that Appellant would paint her sister, V.P., as the intelligent and "good one", where D.L. was a "bad girl" to her father. (RR 4: 188).

Katherine Bartley

Ms. Katherine Bartley lives in Austin and works as a licensed clinical social worker. She has a private practice. (RR 5:27). Ms. Bartley provided counseling treatment to D.L. from January of 2019 for approximately one year. (RR 5:35). When D.L. first arrived and completed her intake with Ms. Bartley, the primary focus for the therapy sessions was on life transition and not child sexual abuse.

During her initial therapy sessions, D.L. talked about mundane and typical day-to-day things and did not speak about any kind of sexual abuse. (RR 5:63). The issues about sexual abuse came up at approximately the three to four month mark of the sessions. (RR 5:64). Ms. Bartley testified that D.L. initially appeared to be emotionally regulated, but that changed, and heaviness started to appear as each session continued. (RR 5:65). Ms. Bartley testified that D.L. connected her own childhood experience and alleged trauma with abuse to her son being in a vulnerable

position. (RR 5:70). In one of the sessions, dated September 4, 2019, D.L. alleged that Appellant had abused her, and Appellant would often abuse D.L. in her room and lock the door. (RR 5:75). According to Ms. Bartley's notes, D.L. was very slow to warm up during their sessions, and that D.L. mentioned some unspecified fractures in her relationship with her mother as well. (RR 5:78-79).

Ms. Bartley further testified that she identified specific symptoms of trauma and emotional dysregulation when speaking with D.L., and that through therapy, Ms. Bartley helped D.L. become more regulated. (RR 5:39-40). Ms. Bartley further testified that this move from emotional dysregulation to regulation was common amongst patients who go through therapy. (RR 5:41). Ms. Bartley's sessions with D.L. were all documented, although some of Ms. Bartley's records for D.L. were a bit on the vague side. (RR 5:42).

Ms. Bartley testified that in her professional life, she has had handled around 50 to 100 cases involving child sexual abuse. (RR 5:52). Ms. Bartley met complainant D.L. in January of 2019 and treated her for just about a year. When D.L. originally presented to Ms. Bartley, her problem was a typical life transition issue as she and her family were moving out of the country and her son had had a recent diagnosis of autism. (RR 5:54). Ms. Bartley remembered about her sessions with D.L. from her vivid memory and progress reports she noted during the therapy

sessions. (RR 5:55). During cross-examination Ms. Bartley testified that she had never seen V.P. as a patient. (RR 5:82).

Rosa Macklin-Hinkle

Ms. Rosa Macklin-Hinkle is employed as the manager of psychological services and the training director for the therapy and psychological services department at the Children's Assessment Center. (RR 5:85). Ms. Macklin-Hinkle is certified in trauma-focused cognitive behavioral therapy. (RR 5:87-88). Prior to V.P.'s trial, Ms. Macklin-Hinkle had apparently testified multiple times as an expert witness in the field of child sexual abuse and impacts of trauma, psychology. (RR 5:89-90). Ms. Macklin-Hinkle testified as to the concept of grooming, rationalization and normalization in psychology. (RR 5:92-102). In the instant case, Ms. Macklin-Hinkle did not review forensic interviews of any kind. (RR 5:103). During cross-examination, Ms. Macklin-Hinkle also admitted that she had never interviewed V.P. or reviewed any of her therapy notes. (RR 5:112).

R.C.Q

R.C.Q. is a distant cousin of the complainants V.P. and D.L. (RR 5:137). Appellant is R.C.Q.'s uncle. (RR 5:138). R.C.Q. testified to remembering an inappropriate interaction with Appellant when R.C.Q. was 8 years old. (RR 5:139). R.C.Q. further testified that she was living with her parents at the time, but because

the alleged incident happened 42 years earlier, R.C.Q. did not have a complete memory of the alleged interaction. (RR 5:140).

When the alleged abuse occurred, R.C.Q. testified that Appellant had suffered a motorcycle accident leaving him with some facial disfiguration. R.C.Q.'s parents were helping out Appellant during his recovery, and Appellant was staying at their home. (RR 5:141). The alleged incident occurred approximately one week after Appellant came to live with her family.

R.C.Q. testified that one night she was allegedly woken up by Appellant, who asked her to be quiet and follow her to a different room in the house. R.C.Q. testified that Appellant took her in the "middle room" which was one door away from her mother's room. This incident allegedly occurred between one or two o'clock in the morning. (RR 5:145).

According to R.C.Q., Appellant assaulted her that night. (RR 5:146). Appellant led her to lay down on her back and proceeded to climb over her to get on her right side. R.C.Q. knew something was happening, but she did not understand it and she turned her whole body away from him. Appellant took off her shorts and panties but he had his clothes on during the entire interaction. (RR 5:147). When R.C.Q. turned away from Appellant, he got closer to her like they were in a spooning position. R.C.Q. testified that she did not have any memory of what occurred between she and Appellant that night other than Appellant rubbing her butt with his

penis. (RR 5:148). R.C.Q. found semen left on her body, which at the time, she thought was slime.

Appellant also allegedly touched R.C.Q.'s vagina but did not touch her clitoris or penetrate her vagina with his fingers. (RR 5:149). After telling her mother everything that happened the next day, her mother asked R.C.Q. not to tell anybody, especially her father, because Appellant would go to jail. R.C.Q. and her mother never spoke about the alleged incident again.

During her teenage years R.C.Q. became rebellious and testified that she gained a lot of resentment for her mother failing to protect her from Appellant. (RR 5:150). That was the only sexual interaction that allegedly occurred between Appellant and R.C.Q. (RR 5:151).

During cross-examination, R.C.Q. admitted that she did not tell anyone about the alleged incident except to her mother and a cousin. She never filed a police report, and R.C.Q. made the accusations public only after talking with D.L.

After the alleged incident occurred, R.C.Q. testified that she had since visited with Appellant, that Appellant was present during the high-school graduation of R.C.Q.'s daughter, and that Appellant's mother also sees Appellant socially. (RR 5:152-153; 156-157). There were a number of family photographs where Appellant was seen with various family members of R.C.Q. including with her mother and her daughters. (RR 5:157).

When R.C.Q. talked with Seargent King, she only talked about Appellant rubbing his penis in her back and making her dirty. She did not tell Seargent King anything about her mother waking her up. (RR 5:158). R.C.Q. mentioned that during the alleged incident, she blacked out without remembering anything. (RR 5:159). R.C.Q. also testified that during her meeting with the District Attorney in preparation for trial, she did not describe any anal penetration, and only hand on vagina. (RR 5:160)

B. Verdict

The jury found Appellant guilty of the felony offense of aggravated sexual assault of a child under 14 years of age. (CR 156).

C. Punishment Proceedings

State's Witnesses

V.P.

Ms. V.P. was presented as a very reserved person. (RR 7:9). V.P. testified that after Appellant moved out of their home, V.P.'s mother was left alone to provide for her four children. V.P. tried to help her mother with taking care of the family and other siblings. (RR 7:10). V.P. testified that the alleged incidents have left her with a lot of self-doubt. (RR 7:11).

D.L.

Ms. D.L. testified that she felt vindicated to hear the verdict and that she felt confused as a child why Applicant acted the way he did. (RR 7:14). The alleged incidents apparently changed her as a child and as an adult and she became isolated, withdrawn, alienated, lonely and with a low self-esteem. D.L. testified that she does not feel a closeness like she wishes she could have with her mother and other siblings. (RR 7:15)

Defense's Witnesses

Teresa Donaldson

Ms. Teresa Donaldson is a sister of Appellant. (RR 7:21). Ms. Donaldson agreed that Appellant had trouble in his younger days, but since he got out of prison in 2007, he was a totally changed person. Appellant began working as an ironworker immediately after being released from prison years ago, and worked his way from foreman to becoming supervisor. He had a home and a happy marriage with his second wife. (RR 7:22). Ms. Donaldson testified that Appellant was always there when she or their father needed his help, whether it was handyman work or financial help. (RR 7:23).

During cross-examination, Ms. Donaldson admitted that she understood the nature of offenses that the jury decided Appellant to be guilty of. (RR 7:24).

However, Ms. Donaldson testified that if she has any young nieces or nephews, she would feel comfortable with Appellant watching over them. (RR 7:25).

Alicia Pena

Alicia Pena was a schoolteacher for 27 years and is a sister of Appellant. She had been around him since he was released from prison in 2007. Alicia Pena strongly believes that prison had reformed Appellant and that he was very different from his past life. (RR 7:26). Alicia Pena testified that Appellant worked hard and immediately started his own life and worked in the refineries in Baytown, where he was doing very well. Testimony was given stating that Appellant was a spiritual person and used to visit church regularly. Following Appellant's second marriage, everything seemed to be going well. Alicia Pena testified that Appellant was getting along with his previous children and their children as well, and that Appellant had attended weddings, other family events, and at no point in time had anyone historically suspected anything or heard of any alleged abuse committed by Appellant. (RR 7:27-28).

D. Sentencing

The court assessed punishment of 50 years in TDCJ. (CR 157). The trial court entered judgment and certified Appellant's right to appeal. (CR 162).

Summary of the Argument

Appellant respectfully submits that the trial court erred on three grounds, including the following, where the trial court erroneously: (1) admitted extraneous offense evidence through two alleged victims, some dating back to over forty years before trial, when no reports, investigations, or other evidence existed beyond extraneous offense complainant testimony; (2) permitted the State to admit hearsay testimony provided through an unqualifying outcry witness; and (3) permitted testimony from State's expert, Katie Bartley, that had nothing to do with any treatment Ms. Bartley provided to the complainant, V.P..

Argument and Authorities

POINT I

OVER OBJECTION, THE TRIAL COURT ERRED IN ADMITTING EXTRANEOUS OFFENSE EVIDENCE THROUGH D.L. AND R.C.Q.

Standard of Review

Appellate courts review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019). This standard also applies to a trial court's decision to admit or exclude extraneous-offense evidence. *Perkins v. State*, 664 S.W.3d 209, 216-17 (Tex. Crim. App. 2022); *Arevalo v. State*, 675 S.W.3d 833, 843 (Tex. App.-Eastland 2023, no pet.). The trial court's decision will be upheld as long as it was within the "zone of reasonable disagreement." *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App.

2018) (quoting *McGee v. State*, 233 S.W.3d 315, 318 (Tex. Crim. App. 2007)). Further, we will not reverse a trial court's evidentiary ruling, even if the trial court's reasoning is flawed, if it is correct on any theory of law that finds support in the record and is applicable to the case. *Henley v. State*, 493 S.W.3d 77, 93 (Tex. Crim. App. 2016); *Luna v. State*, 687 S.W.3d 79, 95 (Tex. App.-Eastland 2024, pet. ref'd).

Argument

Rule 404(b) prohibits evidence of other crimes, wrongs, or other acts to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character. TEX. R. EVID. 404(b)(1). But extraneous conduct may be admitted for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *De La Paz v. State*, 279 S.W.3d 336, 342-43 (Tex. Crim. App. 2009).

Rule 403 requires the trial court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX. R. EVID. 403. When a trial court conducts a Rule 403 balancing test, it must consider (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency

of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco v. State*, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006).

"Probative value" refers to "how strongly [an item of evidence] serves to make more or less probable the existence of a fact of consequence to the litigation — coupled with the proponent's need for that item of evidence." *Id*. at 641. "[A] successful conviction [on a sexual offense] often depends primarily on whether the jury believes the complainant, turning the trial into a swearing match between the complainant and defendant." *Wheeler v. State*, 67 S.W.3d 879, 888 (Tex. Crim. App. 2002) (citation and brackets omitted). In a prosecution for a sexual offense against a child, testimony of similar events can provide a "small nudge towards contradicting . . . defensive theories" and proving that the event did indeed occur. *Id*. (holding trial court did not abuse discretion by allowing another child's testimony regarding "an event quite similar to the charged event" to counteract testimony "that appellant [was] not the type to abuse children and did not and could not have done so").

D.L.

At trial, the jury was presented with testimony from both D.L. and R.C.Q. Immediately prior to trial, D.L. had a pending case against Appellant, which the State chose *not* to consolidate, and ultimately abandoned after prosecting Appellant in the current matter.

D.L. came forward and alleged that Appellant had abused her over a decade earlier in their home. D.L. testified that she first told the incidents to her older sister, V.P., when D.L. was around 16 years old. (RR 4:205). She and her sister approached

their mother about the alleged abuse, and D.L. testified that their mother was shocked, surprised and sad. (RR 4:206). At no point in time were the police ever called, and incident report created, or an investigation conducted in connection with the alleged abuse that took place over a decade prior to Appellant's trial. The allegations were not brought against Appellant until 2019. (RR 4:207-208).

R.C.Q.

R.C.Q. further testified that she was living with her parents at the time, but because the alleged incident happened 42 years earlier, R.C.Q. did not have a complete memory of the alleged interaction. (RR 5:140). R.C.Q. also testified that she became rebellious during her teen years because of Appellant's alleged abuse, and that she gained a lot of resentment for her mother failing to protect her from Appellant. (RR 5:150). That was the only sexual interaction that allegedly occurred between Appellant and R.C.Q. (RR 5:151). R.C.Q. admitted that she did not tell anyone about the alleged incident except to her mother and a cousin. She never filed a police report, and R.C.Q. made the accusations public only after talking with D.L..

The trial court erred in admitting the testimony and evidence from State's extraneous offense witnesses, D.L. and R.C.Q. The evidence constituted improper character evidence under Texas Rule of Evidence 404(b) and was more prejudicial than probative under Texas Rule of Evidence 403.

Evidence of a person's crime, wrong, or other act is not admissible to prove that person's character to show that the person acted in conformity with that character when allegedly committing the charged offense. Tex. R. Evid. 404(b)(1); *see Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001). Rule 404(b) provides that evidence of other crimes or bad acts is not admissible to prove that the defendant acted in conformity with the bad character shown by the bad acts. While such evidence will mostly have probative value, it forces the defendant to defend himself against uncharged crimes as well as the charged offense and encourages the jury to convict a defendant based on his bad character, rather than proof of the specific crime charged. *Albrecht v. State*, 486 S.W.2d 97, 100 (Tex. Crim. App. 1972). That is the exact situation with the present case. Because the trial court erred in allowing extraneous offense witness testimony from D.L. and R.C.Q., Appellant was stuck defending himself against three complainants at trial: (1) V.P., the complainant in the underlying case, (2) D.L., an extraneous complainant who was not a complainant in the underlying case, and (3) R.C.Q., an extraneous complainant who was not a complainant in the underlying case.

Despite the fact that no formal complaints had ever been made around the time of the alleged abuse, as well as the fact that the alleged abuse took place between ten to over forty years prior to the date of trial, D.L. were allowed to provide the following testimony in front of the jury:

Highly Prejudicial Alleged Extraneous Event Testimony From D.L.

The first memory that D.L. had of her father being inappropriate was in the living room of the house when Appellant allegedly pulled her to lay down on top of him on the couch, fondled her breasts, placed his hand underneath her shirt and touched her inappropriately.(RR 4:13).

While she would be asleep, Appellant allegedly started to 'dry hump' her i.e. use her body to satisfy himself sexually with clothes on. (RR 4:14-15).

D.L. was just 11 years old at the time of the alleged abuse. (RR 4:16)

During the third alleged incident, Appellant allegedly touched D.L.'s clitoris and inside of her vagina. (RR 4:17-18). D.L. allegedly saw Appellant's penis for the first time during this incident. She remembered him grabbing her hand and putting it on his penis. She was allegedly forced to stroke his penis until he ejaculated on her stomach. (RR 4:198). She alleged that during this incident, his bare hands went under her clothes and inside her vagina. (RR 4:199).

D.L. also described a fourth alleged incident, which happened when she was approximately 13 years old. Appellant allegedly laid on top of D.L. in bed and tried to kiss her. When D.L. began to cry, she testified that Appellant told her to stop crying because fathers are supposed to teach this to their daughters. (RR 4:200-201).

Highly Prejudicial Alleged Extraneous Event Testimony From R.C.Q.

R.C.Q. testified that one night she was allegedly woken up by Appellant, who asked her to be quiet and follow her to a different room in the house. (RR 5:145).

Appellant led her to lay down on her back, positioned himself on R.C.Q.'s right side, and then proceeded to take off her shorts and panties. (RR 5:147).

> R.C.Q. testified that she did not have any memory of what occurred between she and Appellant that night other than Appellant rubbing her butt with his penis. R.C.Q. found semen left on her body, which at the time, she thought was slime. (RR 5:148-149).

At trial, Appellant was not only defending himself against the charges brought by the State on behalf of V.P. but also defending himself against highly inflammatory and prejudicial allegations by two additional complainants, both of whom discussed alleged events that were completely separate and apart from what was included in the indictment. Further, some of the alleged events took place over forty years ago, and even R.C.Q. admitted that due to the length of time that had elapsed, she did not have a complete memory of the alleged incident. (RR 5:140).

As previously stated, Rule 404(b) provides that evidence of other crimes or bad acts is not admissible to prove that the defendant acted in conformity with the bad character shown by the bad acts, and the State failed to articulate how these alleged extraneous offenses fell within an exception to Rule 404(b). *See* Tex. R. Evid. 404(b). Specifically, the testimony provided by D.L. and R.C.Q. was irrelevant to proving motive, opportunity, intent, or to rebut a defensive theory, and was used solely for the inappropriate purpose of trying to prove Appellants character by saying "here are some alleged incidents that never rose to a conviction, so if Appellant did this to D.L. and R.C.Q. in the past, then he did it in the instant case to V.P. as well." That is the exact type of argument and character evidence that is prohibited under

Texas Rule of Evidence 404. *see Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001).

The erroneous admission of extraneous offense evidence constitutes nonconstitutional error. *Avila v. State*, 18 S.W.3d 736, 741-2 (Tex. App.—San Antonio, 2000, no pet.). Rule 44.2(b) of the Texas Rules of Appellate Procedure provides that a non-constitutional error "that does not affect substantial rights must be disregarded." Tex. R. App. P. § 44.2(b). A substantial right is not affected by the erroneous admission of evidence if "the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect." *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

In assessing the likelihood that the jury's decision was adversely affected by the error, courts of appeals consider everything in the record, including any testimony admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case. *Id*. In this case, the admission of the extraneous offense was absolutely harmful. As such, harm should be found, and a new trial should be granted.

POINT II

OVER OBJECTION, THE TRIAL COURT ERRED IN ADMITTING HEARSAY TESTIMONY PROVIDED THROUGH AN UNQUALIFIED OUTCRY WITNESS .

Standard of Review

Hearsay is an out of court statement offered at trial for the truth of the matter asserted in the statement. TEX. R. EVID. 801(d). Hearsay is generally inadmissible unless an exception applies. *Id.* R. 802. Article 38.072 of the Texas Code of Criminal Procedure provides a statutory exception that permits the State to introduce certain hearsay statements that a child victim of sexual abuse makes to an outcry witness. TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2. An outcry witness is the first person over the age of eighteen, other than the defendant, to whom the child spoke about the offense. *Id.* art. 38.072, § 2(a)(3). Among other requirements, the trial court must hold a hearing outside the presence of the jury to determine if the hearsay statement is "reliable based on the time, content, and circumstances of the statement." *Id.* art. 38.072, § 2(b)(2). To qualify for the exception, "[t]he statement must be 'more than words which give a general allusion that something in the area of child abuse is going on'; it must be made in some discernable manner and is event-specific rather than person-specific." *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011) (quoting *Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990)).

Hearsay testimony from more than one outcry witness may be admissible under Article 38.072 so long as each of the witnesses testifies to a different instance of sexual abuse. *Id.* ("Hearsay testimony from more than one outcry witness may be admissible under article 38.072 only if the witnesses testify about different events."); *Rosales v. State*, 548 S.W.3d 796, 808 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd) ("The outcry witness designation is event-specific, not person-specific."); *see also Quinones v. State*, No. 13-10-00140-CR, 2011 WL 3841586, at *9 (Tex. App.—Corpus Christi–Edinburg Aug. 25, 2011, no pet.) (mem. op., not designated for publication) ("[S]o long as separate outcry witnesses testify about separate offenses, the testimony of each is admissible."). The testimony of a second outcry witness is not admissible, however, when the witness merely provides additional details regarding the same instance of sexual abuse. *Brown v. State*, 189 S.W.3d 382, 387 (Tex. App.—Texarkana 2006, pet. ref'd) ("[B]efore more than one outcry witness may testify, it must be determined the outcry concerned different events and was not simply a repetition of the same event told to different individuals.").

"A trial court has broad discretion in determining the admissibility of outcry statements pursuant to this statute, and the trial court's exercise of that discretion will not be disturbed on appeal unless a clear abuse of discretion is established by the record." *Marquez v. State*, 165 S.W.3d 741, 746 (Tex. App.—San Antonio 2005, pet. ref'd). A trial court abuses its discretion if it acts arbitrarily or unreasonably,

without reference to any guiding rules or principles. *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019).

The erroneous admission of a hearsay statement constitutes a nonconstitutional error that must be disregarded unless the error affects the appellant's substantial rights. *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011); *see* TEX. R. APP. P. 44.2(b). An appellate court should not overturn a criminal conviction for nonconstitutional error "if the appellate court, *after examining the record as a whol*e, has fair assurance that the error did not influence the jury, or influenced the jury only slightly." *Barshaw*, 342 S.W.3d at 93 (quoting *Schutz v. State*, 63 S.W.3d 442, 444 (Tex. Crim. App. 2001)). "In cases involving the improper admission of outcry testimony, the error is harmless when the victim testifies in court to the same or similar statements that were improperly admitted or other evidence setting forth the same facts is admitted without objection." *Gibson v. State*, 595 S.W.3d 321, 327 (Tex. App.—Austin 2020, no pet.) (collecting cases).

Argument

In the instant case, the complainants did not participate in a SANE exam because they had a delayed outcry and the general time for getting a SANE exam done is 120 hours or 5 days. In fact, there were several years between the alleged incidents and when the accusations were finally made. (RR 4:102). D.L. initially made an outcry to her older sister, V.P. Following that initial outcry, D.L. and V.P.

both approached their mother, Ms. Ramirez, about the alleged abuse. This precipitated a divorce between Appellant and Ms. Ramirez. (RR 4:156). Despite the allegations, no reports were made of any kind with any state or local law enforcement agency, nor with Child Protective Services. The abuse allegedly took place between 1998 and 2001, and V.P. and D.L. came forward for the first time with any type of formal complaint or outcry against Appellant in 2019. (RR 4:157).

Although Courts have held that improper admission of outcry testimony is harmless when the victim testified in court to the same facts without objection, *Allen v. State*, 436 S.W.3d 815 (Tex.App.-Texarkana 2014, pet ref'd), allowing Mr. Ramirez as the outcry witness was not harmless error – it amounted to prejudicial bolstering.

In the instant case, there were several years between the incidents and when the accusations were made. (RR 4:102). The classic forensic interviews were also not scheduled for the complainant sisters because forensic interviews are scheduled for children or juveniles, and in the instant case, no accusations were made by the complainants until they were both full adults. (RR 4:103).

The complainant in the instant case, V.P., was an adult at the time of the trial and the alleged abuse had taken place decades prior to the date of trial. The State initially presented testimony from D.L. (RR 4) on the exact same instance of alleged sexual abuse against V.P. that was later presented through a hearsay statement from

Ms. Ramirez. As previously stated, the testimony of a second outcry witness [Ms. Ramirez] is not admissible, however, when the witness merely provides additional details regarding the same instance of sexual abuse. *Brown v. State*, 189 S.W.3d 382, 387 (Tex. App.—Texarkana 2006, pet. ref'd) ("[B]efore more than one outcry witness may testify, it must be determined the outcry concerned different events and was not simply a repetition of the same event told to different individuals.").

The testimony provided by Ms. Ramirez was genuinely harmful, had a substantial impact on the Jury's verdict, affected Appellant's substantial rights and the outcome of the trial, and requires reversal. *Brown v. State*, 189 S.W.3d 382 (Tex. App. 2006). Even if this Court has grave doubt about the harm caused to Appellant by this error, we must remember that: "in cases of grave doubt as to harmlessness, the petitioner must win." *Burnett v. State*, 88 S.W.3d 633, 638 (Tex.Crim.App.1995).

POINT III
OVER OBJECTION, THE TRIAL COURT ERRED IN ADMITTING EXPERT TESTIMONY FROM STATE'S WITNESS, KATIE BARTLEY.

Standard of Review

"An appellate court reviews a trial court's ruling on the admission of evidence for an abuse of discretion." *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019). "The trial court abuses its discretion when it acts without reference to any guiding rules and principles or acts arbitrarily or unreasonably." *Id*. A witness "qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or

to determine a fact in issue." TEX. R. EVID. 702; *see, e.g., Rhomer*, 569 S.W.3d at 669.2 Specifically, expert testimony is admissible if it meets three requirements: "(1) The witness qualifies as an expert by reason of his 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 actually assist the fact-finder in deciding the case." *Rhomer*, 569 S.W.3d at 669 (quoting *Vela v. State*, 209 S.W.3d 128, 131 (Tex. Crim. App. 2006)) (internal quotation marks omitted).

"These conditions are commonly referred to as (1) qualification, (2) reliability, and (3) relevance." *Id*. However, "a party cannot present a complaint for appellate review unless the record shows that the party made a timely objection or motion stating the grounds for the requested ruling, unless the grounds were apparent from the context." *Null v. State*, 690 S.W.3d 305, 318 (Tex. Crim. App. 2024) (citing TEX. R. APP. P. 33.1). "The party must also obtain a ruling from the trial court or object to the trial court's refusal to rule on the objection or motion." *Id*. (citing TEX. R. APP. P 33.1). Here, Appellant objected during a *Daubert* hearing held by the trial court. (RR 5). Therefore, Appellant preserved the admission of testimony from State's expert, Katie Bartley, for review. *See Null*, 690 S.W.3d at 318 (citing TEX. R. APP. P. 33.1).

Argument

Expert evidence is governed by Article VII of the Texas Rules of Evidence. Rule 702 states:

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

TEX. R. EVID. 702.

"Scientific knowledge" must be reliable. *See Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992) (expert opinion helps the jury if it is reliable and relevant). Reliability of expert opinion about scientific knowledge is assessed in different ways depending on whether the expert opinion is about a hard or soft science. Compare *id*. (hard science), with *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998) (soft science). This case deals with a hard science. When dealing with a hard science, Texas court's determine reliability of the testifying expert's opinions by deciding whether (1) the underlying scientific theory is valid, (2) the methodology applying the underlying scientific theory is valid, and (3) the expert properly applied the correct methodology on the occasion in question. *See Kelly*, 824 S.W.2d at 573.

Expert opinion admissible under Rule 702, might still be inadmissible under Rule 403. *Id*. at 572; see TEX. R. EVID. 403 (otherwise admissible evidence can be

nonetheless inadmissible if its "probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, or . . . presenting cumulative evidence"). Facts or data underlying expert opinion can come from three sources: (1) personal knowledge, (2) facts or data made known to the expert at trial, or (3) inadmissible facts or data so long as they are the kind on which an expert in the field would reasonably rely. *See id*. at 703. The opponent of expert opinion may take the expert on *voir dire* outside the presence of the jury to examine the facts or data underlying the opinion. *Id*. at 705(b). If the facts or data are not admitted, but experts in the field would reasonably rely on them, the proponent cannot disclose the facts or data until the trial court determines whether their "probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect." *Id*. at 705(d). If the facts or data are disclosed, the opponent of the evidence is entitled to a limiting instruction. *Id*.

The court of appeals may rely on what's called the "Confrontation Clause" in their analysis, requiring that for an expert's testimony based upon forensic analysis performed solely by a non-testifying analyst to be admissible, the testifying expert must testify about his or her own opinions and conclusions. While the testifying expert can rely upon information from a non-testifying analyst, the testifying expert cannot act as a surrogate to introduce that information. *Paredes v. State*, 462 S.W.3d

510 (Tex. Crim. App. 2015) (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)).

First, Texas Rule of Evidence 702 provides that a qualified expert may testify to an opinion so long as that opinion will help the trier of fact to understand other evidence or determine a fact is issue. TEX. R. EVID. 702 (emphasis added). Courts have also said that, in order to be helpful to the trier of fact, and thus admissible pursuant to Rule 702, an expert's opinion must be reliable. *Somers v. State*, 368 S.W.3d 528, 535 (Tex. Crim. App. 2012) ("The threshold determination in an inquiry into the admissibility of scientific evidence is whether the evidence is helpful to the trier of fact, and for such evidence to be helpful, it must be reliable."). Moreover, to be reliable, and thus helpful to a jury as required by Rule 702, this Court has said that an expert opinion must meet three specific criteria: (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. *See Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992).

Second, Rule 703 authorizes an expert, in forming his or her opinion, to rely on facts or data, even if such facts or data are not themselves shown to be admissible, so long as "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." TEX. R. EVID. 703. The assessment required by Rule 703 is different than the inquiry required with regard

to testifying experts themselves, under Rule 702. If for example, a testifying expert relied upon facts or data that were definitively unreliable, then it would strain credibility that "experts in the field would reasonably rely upon them." But if an expert is familiar generally with the work and reputation of the source relied upon, and she has no knowledge of any reason to doubt its work, it might not be unreasonable for that expert to rely on that source in developing an opinion. Furthermore, when underlying facts or data are relied upon by a testifying expert, the court must ensure that the facts or data relied upon "provide a sufficient basis for the [expert's] opinion" as required by Rule 705(c). But that is not the same inquiry as is required for determining the reliability (to satisfy the requirement of helpfulness) of the testifying expert's opinion itself under rule 702.

Finally, Rule 705 provides that an expert may be required to disclose underlying facts and data relied upon (1) if the Court requires it as a condition to the admissibility of the expert's opinion (specifically, as explained in the Rule itself: "unless the Court orders otherwise"), or (2) if the expert is called upon to disclose the underlying facts or data while under cross-examination. TEX. R. EVID. 705(a). Also, before admission of an expert's opinion, an adverse party "must . . . be permitted to examine the expert about the underlying facts or data" outside the presence of the jury. TEX. R. APP. 705(b). And Rule 705 provides that, if the

underlying facts or data do not provide a sufficient basis for the opinion, the expert's opinion is inadmissible. TEX. R. EVID. 705(c).

During the *Daubert* hearing held with the trial court, Appellant objected to the State's use of Katie Bartley because: (1) Ms. Bartley never established or provided an understanding of her knowledge of "grooming", (2) how that knowledge comports with education and background experience to qualify her to provide expert opinions on the subject, (3) proof that any opinions provided by Ms. Bartley widely accepted within the psychological community and were subject to peer-review, (4) an explanation on Ms. Bartley's methodology in reaching her final opinions and conclusions, and (5) an explanation on how testifying about events that allegedly happened to D.L. were relevant to any conduct that allegedly occurred between Appellant and V.P.. (RR 5).

For example, Ms. Bartley testified that D.L. initially appeared to be emotionally regulated, but that changed, and heaviness started to appear as each session continued. (RR 5:65). Ms. Bartley further testified that she identified specific symptoms of trauma and emotional dysregulation when speaking with D.L., and that through therapy, Ms. Bartley helped D.L. become more regulated. (RR 5:39-40). Ms. Bartley further testified that this move from emotional dysregulation to regulation was common amongst patients who go through therapy. (RR 5:41). Merely invoking sympathy from D.L., who was *not* the underlying complainant in

this case and whose treatment is not only highly prejudicial, but completely irrelevant to the charges in Appellant's indictment. This testimony regarding perceived "emotional regulation and dysregulation" within D.L. during therapy sessions only attended by D.L., did nothing to further the State's burden of proving beyond a reasonable doubt that Appellant committed the offenses contained in the indictment. Further, as an expert, Ms. Bartley failed to explain (1) her methodology in determining what emotional regulation is versus emotional dysregulation, (2) what emotional regulation is, (3) what emotional dysregulation is, (4) what specifically was observed in D.L. to determine she was emotionally dysregulated, and (5) how any of the aforementioned information applied to the charges contained in the indictment for V.P.'s case. (RR 5).

Additionally, Mr. Bartley was presented by the State as a psychology expert, yet she never met with or treated with V.P. in the treater/patient capacity, and the entire testimony Ms. Bartley provided was related to Ms. Bartley's experience counseling D.L., one of the State's extraneous event witnesses. (RR 5, pg. 84). Finally, Ms. Bartley was allowed to read from and testify about medical records from counseling sessions with D.L., to which V.P. had no role or attendance. This was highly prejudicial to Appellant, and confusing for the jury as they listened to expert testimony and medical records excerpts for a woman who was not the complainant

who brought charges in the instant case. (RR 5). As such, the trial court erred by allowing Katie Bartley to provide testimony at trial.

Prayer

Appellant Jose Luis Pena respectfully requests this Honorable Court to reverse the Judgment of Conviction. Appellant further requests the Court grant him any such other relief to which he may be justly entitled.

Respectfully submitted,

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Certificate of Compliance

In accordance with Rule 9.4 of the TEXAS RULES OF APPELLATE PROCEDURE, the undersigned attorney of record certifies that the Brief of Appellant contains **14-point** typeface for the body of the brief, **12-point** typeface for the footnotes of the body of the brief, and contains 9,699 words, excluding those words identified as not being counted in Rule 9.4 and was prepared on Microsoft Word.

/s/ Matthew James Daher
Matthew James Daher

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I hereby certify that on this_____ day of January, 2025 a true and correct copy of the above and foregoing Brief of Appellant was served electronically to the following:

Jessica Alane Caird
Chief Assistant District Attorney
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/s/ Matthew James Daher

Matthew James Daher

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