

No. 01-24-00801-CR

In The Court of Appeals
For the First District of Texas at Houston

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DEBORAH M. YOUNG
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ISAIAS BENITEZ,
Appellant

v.

THE STATE OF TEXAS,
Appellee

On Appeal from Cause Number 1704178
From the 482nd District Court of Harris County, Texas

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Oral Argument Not Requested

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STATEMENT OF THE CASE

Isaias Benitez was indicted on April 7, 2021, on a charge of Aggravated Sexual Assault Child—Under 14 occurring on August 31, 2017. (CR 58).¹ A jury convicted him of a lesser included offense of Indecency with a Child on October 11, 2024. (CR 610-612; 7RR 44).² The court sentenced him to life imprisonment. (CR 610-612; 7RR 48). On October 11, 2024, he filed a Notice of Appeal, and the trial court certified his right to appeal. (CR 618-619). No motion for new trial was filed.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 38.1(e), Appellant's counsel does not request oral argument.

¹ The Clerk's Record on appeal is designated by "CR" followed by page number.

² The Reporter's Record on appeal is designated by volume number, followed by "RR," followed by page number.

ISSUES PRESENTED

1. Whether the trial court abused its discretion under Rule 403 by admitting evidence of appellant's twenty-year-old prior conviction for indecency with a child where the State presented no evidence of the circumstances of the prior offense and the conviction's temporal remoteness substantially diminished its probative value?
2. Whether the trial court erred in admitting the complainant's hearsay statements through Dr. Donaruma under the medical diagnosis or treatment exception where the examination occurred three years after the alleged incident at a law enforcement referral facility and the State failed to establish that the eleven-year-old complainant understood she was making statements for medical treatment purposes?
3. Whether the trial court abused its discretion in finding the complainant's outcry statement reliable under Article 38.072 where the complainant waited over two years to make allegations against appellant after making allegations against another person, the outcry emerged through multiple extended conversations, and the outcry witness could not clearly recall the circumstances of the disclosure?
4. Whether the trial court's erroneous qualification of Dr. Whitney Crowson as an expert in substance abuse and memory effects—despite her lack of expertise in toxicology, pharmacology, or addiction medicine—created a credibility spillover that improperly bolstered all of her testimony, particularly regarding memory reliability, thereby violating the trial court's gatekeeping duty under Rule 702 and prejudicing Appellant's right to a fair trial?

STATEMENT OF FACTS

On August 31, 2017, eight-year-old Abi-Maria³ spent her birthday at her mother's apartment—a day that would later become the center of allegations that emerged three years later, and only after a series of troubling circumstances that cast doubt on their reliability.

The Family Dynamic

Abi-Maria lived primarily with her father, Thomas D., following her parents' 2015 separation. She visited her mother, Staci Palomo, every other weekend at the two-bedroom apartment Ms. Palomo shared with her boyfriend, Isaias Benitez. (5RR 60-62, 90-91, 167-168). Ms. Palomo had begun dating Mr. Benitez in January 2016, and he moved into her apartment shortly after. (5RR 130-131, 167-168).

During these weekend visits, Ms. Palomo worked grueling night shifts at Whataburger—often 50-55 hours per week—leaving

³ An alias will be used to protect the identity of the complaining witness, minor children, and the last names shared with the complainant who was a minor when the allegations were made. *See* Tex. R. App. P. 9.10(a)(3).

Mr. Benitez to care for the children. (5RR 375-380). This arrangement continued without incident for years.

The Prior Unsubstantiated Allegations

The path to the current charges began not with Abi-Maria, but with allegations against Mr. Benitez’s son Nick in February 2018. Despite police involvement, those allegations went nowhere—no forensic interview was conducted, no medical examination performed, and the case remained dormant for over two years. (5RR 375-380).

Notably, during this same 2018 timeframe when Abi-Maria was comfortable reporting allegations against Nick, she made no mention of any abuse by Mr. Benitez—even though she would later claim abuse by him had already occurred. (6RR 213).

The Delayed Disclosure

It was not until July 23, 2020—more than two years after the Nick⁴ allegations and three years after the alleged incident—that Abi-Maria first accused Mr. Benitez. The timing was significant: the

⁴ An alias.

disclosure came late at night following Ms. Palomo’s birthday party, after Mr. Benitez had appeared at the celebration. (5RR 42, 149-150, 183, 220).

The disclosure itself emerged through an unusual process. Eleven-year-old Abi-Maria first told her brother Rupert⁵, who then urged her to tell their mother. (5RR 109, 111, 114-115). Even then, the disclosure was not immediate—Ms. Palomo confirmed Abi-Maria “did not” say anything right after Mr. Benitez left, instead waiting until Rupert came to her room. (5RR 150).

The outcry witness, Ms. Palomo, later struggled to remember basic details about how the disclosure unfolded, admitting she “was not thinking” that day and had unclear memory of the specifics. (4RR 61-62; 5RR 226).

The Investigation

Detective Littler, assigned to the case in November 2020, brought minimal experience to this sensitive investigation—having completed only nine weeks of training before working

⁵ An alias.

independently in the Special Victims Unit. (5RR 349-350). His investigation yielded no physical evidence. (5RR 359).

The forensic interview, conducted in October 2020—three months after the initial report—became the primary basis for the charges. (5RR 338-339). During this interview, Abi-Maria made statements that differed from what she had previously told anyone, including during her initial outcry. (6RR 213). Most significantly, she admitted under oath at trial that she had “not always” identified Mr. Benitez as the second perpetrator and had said otherwise “when I was in the room with the lady.” (6RR 213).

The Medical Evidence

Dr. Marcella Donaruma examined Abi-Maria on October 16, 2020, at the Children’s Assessment Center—three years after the alleged incident and following a law enforcement referral. (4RR 72, 106). The examination’s primary purpose was forensic rather than medical, as evidenced by its documentation on a “sexual abuse interview and medical exam referral” form. (4RR 88).

The Expert Testimony

The State also presented Dr. Whitney Crowson, a clinical psychologist who testified after reviewing trial testimony and case materials. (6RR 249-250, 257). During the Rule 702 hearing, the State sought to qualify Dr. Crowson to testify about nine different areas, including “substance abuse impact on memory.” (6RR 39).

Dr. Crowson’s qualifications consisted of degrees in psychology and clinical psychology, with no advanced training in toxicology, pharmacology, or substance abuse treatment. (6RR 9, 249-250). When pressed during voir dire, she acknowledged:

- She was not a toxicologist, chemist, or substance abuse counselor (6RR 29-30)
- She was not a physiologist or medical doctor (6RR 30)
- Her only background in substance abuse was a college minor in addiction studies and unspecified work experience at a hospital chemical dependency unit (6RR 29)

Despite defense objection that Dr. Crowson lacked the necessary expertise, the trial court qualified her to testify in all nine areas requested by the State, including substance abuse effects on memory. (6RR 29-42). While Dr. Crowson ultimately did not testify

about substance abuse during trial, she provided extensive testimony about memory and trauma, testifying that children who experience abuse have difficulty with timelines and memory recall. (6RR 265-266).

The Trial Setting

Before any evidence was heard, the State moved to introduce Mr. Benitez's 2003 conviction for indecency with a child—a conviction from approximately 20 years before the current allegations. (4RR 6, 9). The bare fact of this decades-old conviction, presented without any contextual details about the prior offense, would cast a prejudicial shadow over the entire trial. (8RR 13).

Against this backdrop of delayed disclosure, evolving allegations, and admitted falsehoods, the jury was asked to determine what, if anything, happened on August 31, 2017—the date alleged in the indictment, which coincided with Abi-Maria's eighth birthday. (CR 58; 5RR 61-62).

SUMMARY OF THE ARGUMENT

1. The trial court abused its discretion in admitting evidence of Appellant's prior conviction for indecency with a child under Tex. Code Crim. Proc. art. 38.37. While Article 38.37 provides an exception to the general rule against character propensity evidence, such evidence remains subject to exclusion under Tex. R. Evid. 403 if its probative value is substantially outweighed by the danger of unfair prejudice. The trial court failed to properly conduct this balancing test in several respects.

First, the probative value of the prior conviction was minimal due to its remoteness in time—occurring approximately 20 years before the current allegations—and the lack of contextual details about the prior offense. Second, the inherently inflammatory nature of sexual offenses against children created an unacceptable risk that the jury would make its decision on an emotional rather than factual basis. Third, given the availability of alternative evidence, including the complainant's testimony, medical evidence, and corroborating witnesses, the State's need for the prior conviction evidence was limited. The erroneous admission of

this highly prejudicial evidence likely affected the outcome of the trial and constitutes harmful error requiring reversal.

2. The trial court abused its discretion in admitting hearsay statements through Dr. Donaruma's testimony under Tex. R. Evid. 803(4), the medical diagnosis or treatment exception. For statements to qualify under this exception, the proponent must show that: (1) the declarant was aware the statements were made for medical purposes; (2) the statements were reasonably pertinent to diagnosis or treatment; (3) truth-telling was vital to treatment; and (4) the declarant understood this importance.

The record fails to demonstrate that these requirements were met. First, Dr. Donaruma's examination was primarily forensic rather than medical in nature, occurring at the Children's Assessment Center after a law enforcement referral. Second, no evidence established that the complainant understood her statements were for medical treatment. Third, statements identifying the alleged perpetrator were not reasonably pertinent to treatment, as Dr. Donaruma failed to articulate how such information informed her treatment plan or assessment decisions.

Fourth, the record shows the examination served investigative rather than medical purposes. The trial court's improper expansion of Tex. R. Evid. 803(4) beyond its intended scope constitutes an abuse of discretion requiring reversal

3. The trial court abused its discretion in finding the complainant's outcry statement reliable under Tex. Code Crim. Proc. art. 38.072. This statute requires the court to find "that the statement is reliable based on the time, content, and circumstances of the statement." The temporal aspects of the outcry statement raise significant reliability concerns, as the complainant first made allegations against the defendant's son in 2018, yet waited until July 23, 2020, to make allegations against the defendant regarding the same general period.

The content of the outcry statement demonstrates significant reliability issues, as the allegations emerged only after extended conversations with the outcry witness spanning multiple discussions over approximately 16 hours. The circumstances under which the outcry was made further undermine reliability, as it occurred during an emotionally charged extended stay rather than

arising from a neutral interaction. During the period between the initial disclosure and formal report, the witness and complainant engaged in extensive private discussions without documentation or third-party observation. The totality of factors surrounding the time, content, and circumstances of the outcry statement demonstrates its unreliability, and the trial court's finding to the contrary represents an abuse of discretion requiring reversal.

4. The trial court abused its discretion by qualifying Dr. Whitney Crowson as an expert in substance abuse and memory despite her lack of credentials in toxicology, pharmacology, or addiction medicine. Although she did not testify about substance abuse at trial, the erroneous qualification created a “credibility spillover” effect that improperly enhanced her authority on memory reliability—an issue central to the State's case. Her testimony rationalized inconsistencies and delays in the complainant's account, and the court's gatekeeping failure prevented the defense from effectively impeaching her expertise. This overqualification misled the jury and affected the verdict, requiring reversal under Rule 702 and *Tillman v. State*.

ARGUMENT AND AUTHORITIES

ISSUE NUMBER ONE

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION UNDER RULE 403 BY ADMITTING EVIDENCE OF APPELLANT’S TWENTY-YEAR-OLD PRIOR CONVICTION FOR INDECENCY WITH A CHILD UNDER TEX. CODE CRIM. PROC. art 38.37 WHERE THE STATE PRESENTED NO EVIDENCE OF THE CIRCUMSTANCES OF THE PRIOR OFFENSE AND THE CONVICTION’S TEMPORAL REMOTENESS SUBSTANTIALLY DIMINISHED ITS PROBATIVE VALUE?

A. Standard of Review and Preservation of Error

A trial court’s ruling on the admissibility of extraneous offense evidence is reviewed for abuse of discretion. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991). This issue was preserved through defense objection and hearing. (4RR 6-31).

B. Applicable Law

Article 38.37 of the Texas Code of Criminal Procedure permits admission of certain prior sexual offenses in child sex offense cases, but such evidence remains subject to Rule 403’s balancing test. *See Bradshaw v. State*, 466 S.W.3d 875, 882 (Tex. App.—Texarkana 2015, pet. ref’d) (the broad allowance under article 38.37 is limited by Rule 403’s balancing test). Under Rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Tex. R. Evid. 403.

Courts must consider: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Gigliobianco v. State*, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006); *See also* Tex. R. Evid. 403.

C. The Trial Court Abused Its Discretion

1. Twenty Years Destroys Probative Value

The State's prior conviction evidence suffered from a fatal flaw: it was twenty years old. This near two-decade gap between the 2003 conviction and the 2017 allegations obliterates any meaningful probative value. Courts recognize that temporal remoteness significantly diminishes the probative force of prior bad acts.⁶ *See Gaytan v. State*, 331 S.W.3d 218, 226 (Tex. App.—Austin 2011, pet.

⁶ While Texas appellate courts have not specifically addressed twenty-year old convictions under Article 38.37, several relevant authorities support the temporal remoteness argument. Federal Authority: Federal courts routinely exclude dated convictions. *See, e.g., United States v. Caldwell*, 760 F.3d 267, 276 (3d Cir. 2014) (fifteen-year-old conviction's probative value "substantially diminished"); *United States v. Rogers*, 542 F.3d 197, 201 (7th Cir. 2008) (noting "staleness" of prior convictions affects probative value). The "Bare Conviction" problem: *Gigliobianco*, cited above, extensively discusses how the manner of proof affects the Rule 403 balance. Presenting only a judgment, without details, maximizes prejudice while minimizing probative value.

ref'd) (remoteness diminishes probative value while the prejudicial effect remains constant, creating an imbalance that often violates Rule 403).

Making matters worse, the State presented only the bare fact of conviction—no details about the victim’s age, the nature of conduct, or any circumstances that might show similarity to the current allegations. (4RR 6-14). The jury received State’s Exhibit 9, a penitentiary packet containing nothing more than the conviction itself. (8RR 13). Without context, this decades-old conviction served no legitimate purpose under Article 38.37 beyond improper character conformity. Tex. Code Crim. Proc. Art. 38.37.

2. Inflammatory Nature Created Overwhelming Prejudice

Sexual offenses against children carry unique prejudicial weight. *Wheeler v. State*, 67 S.W.3d 879, 889 (Tex. Crim. App. 2002) (extraneous sexual offenses “will always carry emotional weight and danger of impressing the jury in an irrational and indelible way”). This inherent prejudice was demonstrated during voir dire when 28 potential jurors were struck for cause merely upon hearing the nature of the charges. (3RR 158).

The absence of details amplified rather than mitigated this prejudice. Without knowing the actual circumstances of the prior offense, jurors were free to imagine the worst. As recognized in *Pawlak v. State*, bare conviction evidence “invite[s] the jury to convict Appellant” based on inflammatory assumptions rather than facts. 420 S.W.3d 807, 811 (Tex. Crim. App. 2013).

3. The State Had No Need for This Evidence

The State’s case included:

- Complainant’s direct testimony
- Medical evidence and expert testimony
- Multiple corroborating witnesses
- Detailed forensic interview testimony

Given this substantial evidence, the State’s need for remote prior conviction evidence was minimal, particularly when weighted against its prejudicial impact.

4. The Limiting Instruction Magnified the Harm

Rather than cure the prejudice, the court’s instruction explicitly told jurors they could consider the prior conviction for “the character of the defendant” and “acts performed in conformity with the character of the defendant.” (CR 605). This invited the precise

propensity reasoning that Rule 403 exists to prevent. Tex. R. Evid. 403.

The instruction included no cautionary language about:

- The twenty-year gap
- The lack of details about the prior offense
- The limited purposes for which such evidence could properly be considered

Generic instructions cannot cure the prejudice from inherently inflammatory evidence, particularly decades-old convictions presented without context.

D. Harmful Error Analysis

The erroneous admission constitutes harmful error under Texas Rule of Appellate Procedure 44.2(b). Tex. R. App. P. 44.2(b). The error affected Appellant's substantial rights because:

Substantial Impact on Verdict: Given the inflammatory nature of child sexual offense convictions, there is a reasonable likelihood the prior conviction evidence substantially influenced the jury's decision-making process. *See Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

State's Emphasis: State emphasized the prior conviction during trial, amplifying its prejudicial effect. (7 RR 43). By emphasizing this highly prejudicial evidence, the State leveraged its inflammatory nature and increased the likelihood that it influenced the jury's decision-making process.

Close Case on Evidence: Without the improper propensity inference from the prior conviction, the jury might reasonably have reached a different verdict based solely on the available evidence regarding the charged offense.

Overwhelming Prejudice: The 20-year-old conviction served no legitimate purpose other than to suggest Appellant was the type of person who commits such offenses—precisely the forbidden inference Rule 403 is designed to prevent.

E. Conclusion and Prayer

Article 38.37 does not eliminate Rule 403's protections—it merely permits certain evidence to be considered for admission. The trial court's failure to conduct any meaningful balancing analysis, combined with its admission of a bare conviction from two decades

past, constitutes reversible error. The conviction must be reversed and remanded for a new trial.

ISSUE NUMBER TWO

WHETHER THE TRIAL COURT ERRED IN ADMITTING THE COMPLAINANT’S HEARSAY STATEMENTS THROUGH DR. DONARUMA UNDER THE MEDICAL DIAGNOSIS OR TREATMENT EXCEPTION, WHERE THE EXAMINATION OCCURRED THREE YEARS AFTER THE ALLEGED INCIDENT AT A LAW ENFORCEMENT REFERRAL FACILITY AND THE STATE FAILED TO ESTABLISH THAT THE ELEVEN-YEAR-OLD COMPLAINANT UNDERSTOOD SHE WAS MAKING STATEMENTS FOR MEDICAL TREATMENT PURPOSES?

A. Introduction

The trial court committed reversible error by admitting the complainant’s hearsay statements through Dr. Donaruma under the medical diagnosis exception. This Court’s analysis must focus on four critical failures, each independently fatal to the State’s attempt to satisfy Rule 803(4):

First, the examination’s primary purpose was forensic investigation, not medical treatment—occurring three years after any alleged incident at a law enforcement referral facility following a police investigation.

Second, the State presented zero evidence that eleven-year-old Abi-Maria understood she was making statements for medical treatment purposes, a requirement this Court emphasized in *Taylor v. State*. Indeed, the complainant’s own sworn admission that she lied

during the examination definitively proves she did not understand the importance of truthfulness for medical treatment.

Third, the statements identifying Mr. Benitez as the perpetrator were not “reasonably pertinent” to any treatment, as Dr. Donaruma failed to articulate how knowing the specific identity—as opposed to the relationship or household status—informed any medical decision.

Fourth, the examination served law enforcement’s investigative needs, not the child’s medical needs, as evidenced by the three-year delay, the forensic setting, and documentation as a “sexual abuse interview and medical exam referral.”

Each failure independently requires exclusion. Together, they demonstrate why admitting this hearsay through the medical exception violated fundamental evidentiary principles and denied Mr. Benitez a fair trial.

B. Standard of Review and Preservation

The admission of hearsay evidence is reviewed for abuse of discretion. *Taylor v. State*, 268 S.W.3d 571, 578-79 (Tex. Crim. App. 2008). This issue was preserved through objection during the Rule 702 hearing. (4RR 67-89). The trial court abused its discretion in

admitting hearsay statements through Dr. Donaruma's testimony under Texas Rule of Evidence 803(4) because the statements failed to meet the requirements for the medical diagnosis or treatment exception to hearsay. Tex. R. Evid. 803(4).

C. Legal Framework

Texas Rule of Evidence 803(4) provides a hearsay exception for statements:

1. Made for purposes of medical diagnosis or treatment; and
2. Describing medical history, symptoms, or their inception or general cause.

Under *Taylor*, the proponent must establish:

1. The declarant was aware statements were made for medical diagnosis or treatment;
2. The statements were reasonably pertinent to diagnosis or treatment;
3. Truth-telling was vital to treatment; and
4. The declarant understood truth-telling's importance to treatment.

Taylor at 589.

Once an opponent of hearsay evidence makes a proper objection, the proponent bears the burden of establishing that an exception applies. *Taylor* at 578-79. In reviewing whether a trial

court erred in admitting hearsay evidence, an appellate court examines whether the trial court's ruling was "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Id.* at 579 (citing to *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003)).

D. The State Failed to Meet Rule 803(4) Requirements.

1. Primarily Forensic Rather Than Medical Purpose

Dr. Donaruma's examination was primarily forensic rather than medical in nature. The examination occurred at the Children's Assessment Center following a law enforcement referral, and Dr. Donaruma testified she was seeing "children who are referred for concern for sexual abuse"—an inherently investigative purpose. (4RR 67, 89-90). The timing of the examination further demonstrates its forensic nature, occurring three months after the law enforcement report and three years after the alleged incidents. (4RR 106). This significant delay demonstrates investigative rather than immediate medical necessity. Moreover, the information was recorded on a "sexual abuse interview and medical exam referral" form (4RR 88), explicitly indicating the primary investigative purpose of the

examination. This investigative purpose falls outside the scope of Rule 803(4)'s medical treatment exception.

Additionally, the setting and context of the examination further support its forensic nature. The examination occurred at the Children's Assessment Center, a facility that works in coordination with law enforcement, rather than in a traditional medical setting. The information was documented in a "*sexual abuse interview* and medical exam referral" form (4 RR 88) (emphasis added), further indicating the primary investigative purpose of the examination.

2. No Evidence of Medical Treatment Understanding

The most damning evidence that Abi-Maria did not understand the medical purpose comes from her own sworn testimony. When asked about her statements during the examination, she admitted: "I have not always said it was [Appellant] first" and that she said otherwise "when I was in the room with the lady." (6RR 213). This admission—that she knowingly provided false information during the medical examination—definitively establishes she did not understand that truthfulness was vital for medical treatment. A child who lies

during a medical examination cannot possibly have understood the medical purpose that Rule 803(4) requires.

Dr. Donaruma failed to establish that she explained the treatment purpose or importance of truthfulness for medical care. (4RR 76-77). *Taylor* requires clear evidence that the child-declarant understands “truth-telling was a vital component of the particular course of therapy or treatment involved” and that the child-declarant was aware that this was the case. 268 S.W.3d at 589.

Unlike *Taylor*, where the court found reliability because the child understood the importance of truthfulness for treatment, here we have direct evidence of the opposite. Abi-Maria’s admission that she lied to “the lady” demonstrates she viewed the examination as just another interview where she could change her story—not as a medical consultation where truthfulness was vital for her health and treatment.

3. Perpetrator Identity Not Reasonably Pertinent to Treatment

The trial court abused its discretion in admitting statements identifying the perpetrator because the State failed to establish these

statements were reasonably pertinent to medical diagnosis or treatment. This failure is evidenced in several ways:

3.1. No Connection to Treatment Plan

Dr. Donaruma failed to articulate how knowing specifically that Benitez was the perpetrator informed her treatment decisions. While she testified about gathering information for treatment planning (4RR 68), she could not explain why perpetrator identity was necessary for her identified treatment goals.

This falls short of *Taylor's* requirement that the proponent must show “it was important to the efficacy of the treatment that the mental-health professional know the identity of the perpetrator.” 268 S.W.3d at 589. Dr. Donaruma did not explain how knowing that it was specifically Isaias Benitez, as opposed to any other individual, was necessary for making medical treatment decisions.

Unlike cases where perpetrator identity is medically relevant due to ongoing household contact, here Abi-Maria was no longer

living with the defendant.⁷ The alleged incidents occurred three years earlier, eliminating safety concerns that might justify medical necessity of identity evidence. Dr. Donaruma's stated treatment concerns—trauma resolution, family relationship issues, anger management, and behavioral control (4RR 76)—did not require knowledge of the perpetrator's specific identity.⁸

This was not a case involving ongoing abuse or household contact with the perpetrator that would justify the admission of identity evidence under Rule 803(4). The examination's timing, setting, and documentation demonstrate its primary investigative purpose, distinguishing it from legitimate medical treatment contexts where perpetrator identity might be medically necessary.

⁷ As noted in *Taylor*, perpetrator identity is primarily relevant when “the perpetrator might be a family or household member, and it is important to remove the child from the abusive environment.” 268 S.W.3d at 581

⁸ Dr. Donaruma testified that she asks about perpetrator identity “to the extent that I understand the child is safe or not” (4 RR 69)

3.2 Focus on Investigation Rather Than Treatment

The record demonstrates that Dr. Donaruma's questioning about perpetrator identity served investigative rather than medical purposes. This is evidenced by:

1. The examination occurred after a law enforcement referral (4 RR 89)
2. The information was documented in a "sexual abuse interview and medical exam referral" form (4 RR 88)
3. Dr. Donaruma acknowledged she does not "set myself up as a lie detector (SIC) or a truth identifier" (4 RR 71)

As *Taylor* emphasizes, "knowing who is at fault for the emotional or psychological trauma may not be critical to every treatment plan, especially if the perpetrator was not a family or household member." 268 S.W.3d at 591. The record does not establish that knowing the perpetrator's identity was critical to Dr. Donaruma's treatment plan.

3.3 Lack of Treatment Necessity

The State failed to establish that identification of the perpetrator was "reasonably pertinent" to treatment as required by Rule 803(4). Dr. Donaruma testified that her primary treatment concerns were:

1. Resolution of the sexual assault trauma
2. Resolution of mother/daughter issues
3. Anger management
4. Behavioral control

(4 RR 76).

None of these treatment objectives required knowledge of the perpetrator's identity. This stands in stark contrast to cases where courts have found perpetrator identity statements admissible because they were necessary for ongoing medical or psychological treatment. *See Taylor*, 268 S.W.3d at 589-90.

Furthermore, the mere fact that statements were made to a medical professional does not automatically render them admissible under Rule 803(4). As *Taylor* instructs, the proponent must demonstrate that the specific statements at issue were “made for—and [were] reasonably pertinent to—medical diagnosis or treatment.” 268 S.W.3d at 589 (*citing* Tex. R. Evid. 803(4)). The State failed to meet this burden with respect to statements identifying the perpetrator.

4. Improper Expansion of the Exception

The trial court's admission of these statements improperly expanded Rule 803(4) beyond its intended scope. As *Taylor* warns, not every statement to a medical professional is admissible merely because it might be truthful. 268 S.W.3d at 590. The exception's reliability foundation—patient motivation for truthful medical disclosure—is significantly weakened in forensic examinations conducted years after alleged incidents for investigative purposes.

E. The Complainant's Admission of Lying Destroys Any Presumption of Reliability

Perhaps most tellingly, the complainant herself demolished any argument for reliability under Rule 803(4). During trial, she testified:

- She had “not always” identified Mr. Benitez as the perpetrator (6RR 213)
- She gave different information “when I was in the room with the lady” (6RR 213)
- This admission referred to her examination with Dr. Donaruma.

This creates an evidentiary impossibility: the State cannot simultaneously argue that Abi-Maria understood the importance of truthfulness for medical treatment while she admits to lying during

that same examination. Her admission is not merely impeachment—it fundamentally undermines the theoretical basis for admitting statements under the medical treatment exception.

F. Harmful Error Analysis

The harmful impact of admitting these unreliable hearsay statements cannot be overstated. The jury heard Dr. Donaruma repeat allegations from a child who later admitted she lied during that very examination. The medical exception exists because patients have incentive to be truthful for treatment—but here, the complainant’s own testimony destroys that foundational assumption. The jury received unreliable hearsay cloaked in medical authority, creating prejudice that likely determined the verdict.

The erroneous admission of Dr. Donaruma’s hearsay testimony constitutes harmful error because it played a central role in the State’s case. Dr. Donaruma’s testimony provided crucial corroboration for the complainant’s allegations, and her repetition of the complainant’s statements identifying Benitez as the perpetrator carried substantial weight with the jury as apparent medical confirmation. The hearsay statements gained improper credibility by

being presented through a medical expert, suggesting medical validation of the accusations that was not legitimate under Rule 803(4). The court failed to provide limiting instructions that would have mitigated the prejudicial impact of this improperly admitted evidence. Without the improperly admitted medical hearsay, which served to corroborate the complainant's allegations through an authoritative source, there is a reasonable probability the jury would have reached a different verdict.

G. Conclusion

The trial court abused its discretion in admitting hearsay statements through Dr. Donaruma because the statements failed to meet the requirements established in *Taylor* for admission under Rule 803(4). The record lacks evidence that the statements were made for medical treatment purposes, that the complainant understood the treatment purpose, or that the identifying information was reasonably pertinent to treatment. Therefore, the statements should have been excluded as inadmissible hearsay, and their admission constitutes reversible error. The remedy to reverse the conviction and remand for a new trial.

ISSUE NUMBER THREE

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THE COMPLAINANT’S OUTCRY STATEMENT RELIABLE UNDER ARTICLE 38.072 WHERE THE COMPLAINANT WAITED OVER TWO YEARS TO MAKE ALLEGATIONS AGAINST APPELLANT AFTER MAKING ALLEGATIONS AGAINST ANOTHER PERSON, THE OUTCRY EMERGED THROUGH MULTIPLE EXTENDED CONVERSATIONS, AND THE OUTCRY WITNESS COULD NOT CLEARLY RECALL THE CIRCUMSTANCES OF THE DISCLOSURE?

A. Standard of Review and Preservation

The trial court abused its discretion in finding the complainant’s outcry statement reliable under Article 38.072 because the time, content, and circumstances of the statement demonstrate significant indicia of unreliability. Tex. Code Crim. Proc. art. 38.072. The record from the outcry hearing reveals multiple factors that undermine the reliability determination required by statute. These factors, when properly analyzed, place this case in stark contrast to those where Texas courts have found outcry statements sufficiently reliable. This issue was preserved through defense motion to suppress the outcry statement. (4RR 61-65).

B. Legal Framework

Article 38.072 requires the trial court to find “that the statement is reliable based on the time, content, and circumstances

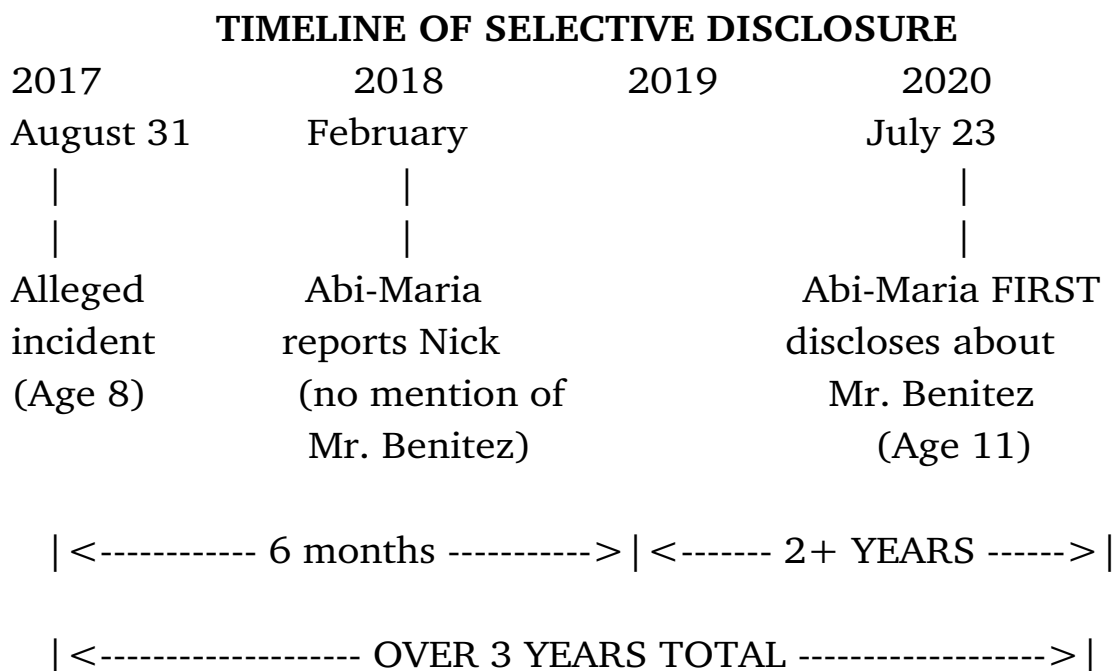
of the statement.” Tex. Code Crim. Proc. art. 38.072 § 2(b)(2). As clarified in *Koury v. State*, this refers specifically to “the time the child's statement was made to the outcry witness, the content of the child's statement, and the circumstances surrounding the making of that statement.” 684 S.W.3d 537, 545-546 (Tex. App.—Austin 2024).⁹

The focus of the reliability inquiry must remain “exceptionally narrow,” and should not include inquiries into the circumstances of the abuse allegations themselves, the biases or credibility of an outcry witness, or evidence admitted following the trial court’s reliability ruling. *Koury*, 684 S.W.3d at 547. This narrow focus provides the proper framework for analyzing the trial court’s reliability determination in this case.

The reliability inquiry must remain “exceptionally narrow” and focus on these three statutory factors. *Martinez v. State*, 178 S.W.3d 806, 811 (Tex. Crim. App. 2005).

⁹ *Koury* is quoting *Broderick v. State*, 89 S.W.3d 696, 699 (Tex. App. – Houston [1st Dist.] 2002, pet. ref’d), which is quoting *MacGilfrey v State*, 52 S.W.3d 918, 921 (Tex. App. –Beaumont 2001, no pet.).

C. Timeline



KEY FACTS:

- ✓ Complainant comfortable reporting abuse in 2018
- ✓ Claimed at trial that Benitez abuse had already occurred by 2018
- ✓ Yet waited 2+ more years to disclose about Benitez
- ✓ Disclosure only after Benitez appeared at mother's birthday party

D. Analysis of Reliability Factors

1. The Two-Year Delay Fatally Undermines Reliability

The most compelling evidence of unreliability is not merely the three-year delay from the alleged incident, but the selective nature of the complainant's disclosures. The undisputed timeline reveals a

fundamental reliability problem that distinguishes this case from any other outcry case in Texas jurisprudence:

February 2018: Abi-Maria makes allegations against Mr. Benitez's son Nick. She demonstrates comfort and ability to report alleged abuse. (5RR 375-380).

Critical Fact: During trial, Abi-Maria admitted that by this time, she claims Mr. Benitez had already abused her. (6RR 213). Yet she said nothing about him.

July 23, 2020: More than two years later, Abi-Maria finally accuses Mr. Benitez—but only after he appeared at her mother's birthday party. (5RR 183, 220).

This is not a case where a child struggled to disclose abuse. This is a case where a child selectively disclosed, choosing to report against one person while inexplicably remaining silent about allegedly more serious abuse by another. No Texas court has found an outcry statement reliable under such circumstances.

The two-year gap raises unavoidable questions:

- Why would a child report against Nick but not Benitez?
- What changed between 2018 and 2020?

- How can a delayed disclosure be reliable when the child demonstrated ability and willingness to report during the delay period?

Unlike cases where delay stems from fear, shame, or lack of opportunity, here the complainant affirmatively demonstrated her comfort with disclosure—just not about Mr. Benitez. This selective silence over two years creates precisely the type of reliability concern that Article 38.072 requires trial courts to address. *See* Tex. Code Crim. Proc. Art. 38.072.

2. The Circumstances of Eventual Disclosure Confirm Unreliability

When the disclosure finally came in July 2020, the circumstances further undermine reliability:

Triggering Event: The disclosure occurred only after Mr. Benitez appeared at Ms. Palomo’s birthday party (5RR 149), suggesting external motivation rather than spontaneous outcry.

Delayed Reaction: Even after Benitez left the residence, Abi-Maria “did not” immediately disclose. Instead, her brother Rupert came to her room, and only then did the process begin. (5RR 150).

Extended Process: Rather than a spontaneous outcry, the disclosure involved prolonged discussions over multiple sessions—approximately 16 hours of conversation. (5RR 226).

Failed Memory: The outcry witness herself could not clearly remember the details, admitting she “was not thinking” that day. (5RR 226).

3. Time Factor Demonstrates Unreliability

The temporal aspects of the outcry statement raise significant reliability concerns that distinguish this case from those where courts have found outcry statements reliable. The complainant made allegations against defendant’s son Nick in 2018, yet waited until July 23, 2020—over two years later—to make allegations against Benitez regarding the same general period. (5RR 183, 220).¹⁰ This selective disclosure pattern fundamentally undermines reliability because it demonstrates the complainant felt comfortable making allegations against one individual while inexplicably not disclosing

¹⁰ This is being generous as she actually changed her position when she was on the stand and admitted she disclosed about Nick at a time when, according to her testimony under oath, she had already been abused by Benitez. (6RR 213).

allegedly more serious conduct by the defendant during the same timeframe.

In *Carty v. State*, this court distinguished between cases where a delay could be attributed to fear, embarrassment, or other explicable factors and those where the delay suggests fabrication or manipulation. 178 S.W.3d 297, 306-07 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). The present case falls into the latter category, as the complainant clearly felt comfortable making allegations against one individual (the defendant's son) while inexplicably not disclosing the allegedly more serious conduct by the defendant.

The initial disclosure emerged under problematic circumstances, occurring late at night after a day of birthday parties when the complainant was tired. (5RR 42, 149). The outcry witness confirmed the complainant “did not” immediately disclose after defendant left the residence, and instead her son came to her room. (5RR 150). This delayed reaction, even after the alleged perpetrator's departure, undermines the spontaneous nature typically associated with reliable outcry statements. The prolonged period between the alleged incidents in 2017 and disclosure in 2020 raises additional

reliability concerns, particularly given the complainant's earlier willingness to make allegations against a different individual in 2018.

4. Content Issues Undermine Reliability

The content of the outcry statement demonstrates significant reliability problems that the trial court failed to adequately consider. Rather than providing a spontaneous narrative—often cited as a reliability indicator in Texas cases—the disclosure involved prolonged discussions over multiple sessions, creating extensive opportunities for suggestion and influence. (5RR 226). The outcry witness acknowledged having unclear memory regarding specifics of how the disclosure unfolded (4RR 61-62), and testified she “was not thinking” that day (5RR 226). This lack of clear recollection by the outcry witness undermines the reliability of the content as recounted to the court.¹¹

¹¹ In *Garcia v. State*, the court warned that outcry statements void of specific details could be an issue. 792 S.W.2d 88, 91-92 (Tex. Crim. App. 1990).

More troubling, the complainant later provided trial testimony that differed from what she had told anyone previously, including during the outcry. (6RR 213). This demonstrates evolving and inconsistent content that calls the reliability of the original outcry statement into serious question. The defense raised legitimate concerns about potential suggestions made to the child during these extended discussions, but the record provides no indication these concerns were adequately addressed in the trial court's reliability determination.

5. Circumstances Indicate Unreliability

The circumstances surrounding the outcry statement present multiple factors that indicate unreliability. The historical context includes prior 2018 allegations against defendant's son that remained unsubstantiated despite police involvement, with no forensic interview, no medical examination, and minimal follow-up over two years. (5RR 375-380). This creates a concerning pattern that affects the circumstances of the current disclosure and suggests potential motivational factors unrelated to truthful disclosure.

The timing of the outcry is particularly problematic because it occurred only after defendant appeared at the mother's birthday dinner (5RR 149), suggesting external motivation rather than the spontaneous disclosure typical of reliable outcry statements. This timing raises questions about whether the disclosure was prompted by seeing the defendant rather than by an internal need to report abuse. Additionally, the extended disclosure process lacked documentation or third-party observation, distinguishing it from cases where courts have found outcry statements reliable due to contemporaneous corroboration or multiple consistent disclosures.

E. Contrast with Reliable Outcry Cases

This case lacks the indicia of reliability found in cases where courts have upheld outcry admissions:

- **Consistency with physical evidence:** In *Gonzales v. State*, the court found reliability where the outcry was: (1) consistent with physical evidence, (2) corroborated by the child's emotional state at the time of disclosure, (3) made in response to general rather than leading questions, and (4) provided with details a child would not likely fabricate, and other factors. 477 S.W.3d 475, 479 (Tex. App.—Fort Worth 2015, pet. ref'd).
- **Spontaneous disclosure** rather than extended conversations

- **Multiple consistent disclosures:** in *Shaw v. State*, the court found an outcry statement reliable despite some delay because she made an outcry to multiple adults, (mother, school principal, and grandmother). 329 S.W.3d 645, 651 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd).
- Clear temporal coherence rather than chronological confusion.

The present case lacks such the factors these cases have that might overcome the substantial reliability concerns.

F. Trial Court's Inadequate Analysis

The trial court's ruling overruling the defense's motion to suppress the outcry statement failed to adequately address the significant reliability concerns raised by the defense. The court merely concluded that the outcry statement met reliability requirements (4 RR 64-65) without conducting the thorough analysis required by Article 38.072 and established case law.

In particular, the trial court failed to address:

1. The unexplained two-year delay between allegations against the defendant's son and similar allegations against the defendant himself
2. The complainant's fatigue and emotional vulnerability during the initial disclosure

3. The mother's unclear memory of details surrounding the outcry
4. The lack of contemporaneous documentation or third-party observation
5. The prior unsubstantiated allegations as relevant contextual circumstances

In *Josey v. State*, the Sixth Court of Appeals emphasized that trial courts must establish the alleged offense in a “discernable way”. 97 S.W.3d 687, 693 (Tex. App.—Texarkana 2003, no pet.). The trial court's cursory analysis in this case falls far short of this requirement.

G. Harmful Error Analysis

The erroneous admission of the unreliable outcry statement constitutes harmful error because outcry testimony provides essential foundation for the State's case in child sexual abuse prosecutions where physical evidence is typically absent. The outcry evidence served as crucial corroboration for the complainant's allegations, and its admission improperly bolstered the complainant's credibility by allowing the jury to hear her allegations repeated by her mother. This created an impression of consistency and reliability that was not supported by the record evidence regarding the time, content, and circumstances of the statement.

Given the central role of outcry evidence in child sexual abuse cases, there is a reasonable probability that exclusion of this unreliable evidence would have resulted in a different verdict. The unreliable outcry statement, when combined with the other evidentiary errors in this case, created a prejudicial cumulative effect that undermined the fairness of the trial and denied Appellant his right to due process.

H. Prayer

The totality of factors surrounding the time, content, and circumstances of the outcry statement demonstrate its unreliability in ways that distinguish this case from those where Texas courts have found outcry statements reliable. The trial court's finding of reliability represents an abuse of discretion because it failed to properly consider these factors within the exceptionally narrow focus required by Article 38.072 and established case law.

The delayed timing, problematic content development process, and concerning circumstances of the statement's making render it insufficiently reliable for admission under Article 38.072. The trial court's ruling was so clearly wrong as to lie outside the zone within

which reasonable people might disagree, and therefore constitutes an abuse of discretion requiring reversal of conviction for a new trial.

ISSUE NUMBER FOUR

WHETHER THE TRIAL COURT'S ERRONEOUS QUALIFICATION OF DR. WHITNEY CROWSON AS AN EXPERT IN SUBSTANCE ABUSE AND MEMORY EFFECTS—DESPITE HER LACK OF EXPERTISE IN TOXICOLOGY, PHARMACOLOGY, OR ADDICTION MEDICINE—CREATED A CREDIBILITY SPILLOVER THAT IMPROPERLY BOLSTERED ALL OF HER TESTIMONY, PARTICULARLY REGARDING MEMORY RELIABILITY, THEREBY VIOLATING THE TRIAL COURT'S GATEKEEPING DUTY UNDER RULE 702 AND PREJUDICING APPELLANT'S RIGHT TO A FAIR TRIAL?

A. Standard of Review and Preservation

A trial court's decision to admit expert testimony is reviewed for abuse of discretion. *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008). A trial court abuses its discretion when it allows expert testimony without sufficient showing of the expert's qualifications or relevance to the subject matter. Tex. R. Evid. 702; *Vela v. State*, 209 S.W.3d 128, 133–34 (Tex. Crim. App. 2006). The defense timely objected to Dr. Crowson's qualifications during the Rule 702 hearing. (6RR 29–42).

B. Legal Standard: Expert Qualification and the Gatekeeping Function

Under Rule 702, expert testimony is admissible only when the witness is qualified by "knowledge, skill, experience, training, or education" and the testimony will assist the trier of fact. Tex. R. Evid. 702. The trial court acts as gatekeeper to prevent jurors from being

misled by unreliable or overstated expert opinions. See *Taylor*, 268 S.W.3d at 578–79; *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011) (“[W]hen expert testimony carries an aura of scientific credibility, there is a risk that the jury will defer to it without scrutiny”).

C. Dr. Crowson Was Improperly Qualified as an Expert on Substance Abuse and Memory

The State sought to qualify Dr. Crowson as an expert on substance abuse and its effects on memory. (6RR 39). Yet, she admitted on voir dire that:

- She is not a toxicologist, substance abuse counselor, chemist, medical doctor, or pharmacologist. (6RR 29–30).
- Her only background in substance use was a college minor and general work experience. (6RR 29).
- She could not articulate any specialized knowledge of how substances physiologically impact memory. (6RR 30–31).

Despite these concessions, the trial court granted the State’s broad qualification request. This ruling directly contravenes Rule 702’s requirement that experts be qualified “in the particular field in which the opinion is offered.” *Vela*, 209 S.W.3d at 133.

**D. THE QUALIFICATION ERROR CREATED A “CREDIBILITY SPILLOVER”
THAT TAINTED ALL MEMORY-RELATED TESTIMONY**

Though Dr. Crowson did not testify specifically about substance abuse during trial, the court’s pretrial qualification ruling materially affected how the jury perceived her testimony on memory and trauma. She testified extensively about:

- Memory fragmentation in trauma victims (6RR 265),
- Why children struggle with timelines (6RR 266),
- Whether inconsistent memory recall is consistent with abuse (6RR 265–266).

Her testimony served to rationalize and normalize the complainant’s conflicting and delayed allegations—an issue at the heart of the trial.

By qualifying her as an expert on substance-related memory impairment, the trial court lent her an undeserved aura of credibility across all memory-related testimony. This type of overbroad qualification created a “credibility spillover”, where expertise in one area improperly bolstered credibility in others.

In *Tillman*, the Court of Criminal Appeals acknowledged that expert testimony cloaked in scientific legitimacy can unduly influence a jury, especially when the expert speaks beyond her demonstrated

competence. 354 S.W.3d at 435. That is precisely what occurred here: the jury was never told that Crowson lacked formal qualifications in memory science, neuroscience, or substance-related cognition. Instead, they saw her as a clinical psychologist qualified to speak on complex memory issues, including those involving intoxication or trauma.

E. THE TRIAL COURT’S ERROR IMPAIRED THE DEFENSE AND INFLUENCED THE VERDICT

The defense was doubly harmed by the trial court’s ruling:

1. **Restricted Cross-Examination:** Once Dr. Crowson was formally qualified in all nine areas, including substance abuse effects on memory, defense counsel’s ability to impeach her as overreaching or unqualified was neutered. Counsel had to cross-examine as though the court had validated her authority, despite the lack of actual expertise.
2. **Improper Bolstering of Memory Testimony:** Memory accuracy was a central factual issue in this case. The complainant admitted to prior inconsistent statements and even to lying during her forensic interview. (6RR 213). Dr. Crowson’s testimony functioned as a scientific explanation to rehabilitate the complainant’s credibility. The erroneous expert qualification heightened the perceived authority of that explanation.

While Dr. Crowson did not testify about substance abuse during trial, she testified extensively about memory, including:

- How trauma affects memory recall: “sexual abuse or really anytime you’re faced with a significant threat... the brain will hone in and focus on the details that are essential to that moment” (6RR 265)
- Memory limitations in children: “Do children have perfect memory?” A. No.” (6RR 265)
- Timeline difficulties: “Would it be difficult for a child who’s been a victim of child sexual abuse to have a timeline of events and say exactly when things happened?” A. “I think that would be difficult” (6RR 266).

This prejudice was particularly harmful because memory was a central issue in the case. Defense counsel’s cross-examination during trial were forced to focus on her lack of knowledge and expertise:

Q. So basically your opinions are anecdotal based on your experience as a clinical psychologist, things you’ve read, things you’ve seen, correct?

A. Well, I’m not necessarily providing any opinions. I’m just providing information based on experience and research.

Q. Okay. So they’re anecdotal. They’re not specific to the facts of this case?

(6RR 279-280).

Had the court properly limited her qualifications during the 702 hearing, this line of cross-examination would have been more effective.

F. The Error Was Not Harmless

Under Tex. R. App. P. 44.2(b), non-constitutional error requires reversal if it affects substantial rights. Tex. R. App. P. 44.2(b). Here, the improper qualification enhanced the credibility of a key prosecution witness on a core issue—memory reliability—and prevented effective impeachment. This error likely influenced the jury’s perception of the complainant’s inconsistencies and thus the ultimate verdict.

Even if Crowson did not testify explicitly about substance abuse, the improper qualification still cast a wide halo over her opinions. The risk that jurors deferred to her testimony as scientifically authoritative—when it was not—cannot be dismissed as harmless

G. Conclusion and Prayer

The trial court abused its discretion by qualifying Dr. Crowson as an expert on substance abuse and memory without requiring the necessary foundation. This qualification error allowed the jury to

view her as an authoritative voice on memory reliability—an issue central to the case—and precluded the defense from effectively challenging her overreach. The resulting “credibility spillover” improperly bolstered her testimony and denied Appellant a fair trial. Reversal is required.

CUMULATIVE ERROR

Even if individual errors might not require reversal standing alone, the cumulative effect of these three evidentiary errors denied Appellant a fair trial. The combination of:

1. Highly prejudicial 20-year-old conviction evidence with minimal probative value
2. Improperly admitted medical hearsay that appeared to corroborate allegations
3. Unreliable outcry testimony that provided foundational support for the charges

created a trial atmosphere where the jury's decision was based on improper character inferences, unreliable evidence, and inflammatory prejudice rather than proof beyond a reasonable doubt of the charged offense.

The cumulative prejudicial impact of these errors substantially affected Appellant's substantial rights and requires reversal.

Chamberlain v. State, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999).

CONCLUSION AND PRAYER

The trial court's evidentiary rulings individually and cumulatively denied Benitez a fair trial. Each error substantially affected his rights, and their combined impact requires reversal. Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing brief was e-filed with the First Court of Appeals, was served electronically upon the Appellate Division of the Harris County District Attorney's Office, and was also sent on the same date by first-class mail to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), the undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(i).

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