Affirmed and Opinion filed March 21, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01555-CR
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KAREMETH JOHN HOLIDAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Cause Nos. 99CR1098; 99CR1099; 99CR1100; 99CR1102;
and 00CR1830

O P I N I O N

In this consolidated appeal, appellant Karemeth John Holiday challenges his convictions for: (1) aggravated sexual assault of a child; (2) indecency with a child; and (3) three convictions for sexual assault of a child. As grounds for reversal, appellant argues: (1)

the trial court committed reversible error by failing to grant his motion for new trial; (2) the trial court erred in allowing amendments to the indictments prior to trial; (3) the evidence was legally insufficient to support his convictions; and (4) he was denied effective assistance of counsel. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The complainant, A.H., although a child at the time of the offenses, did not speak out about appellant's sexually abusive conduct until she was twenty-one years old. At that time, A.H. disclosed to her husband that appellant had sexually abused her during her adolescent years. Appellant had been A.H.'s mother's romantic companion during those years and would often spend the night at her mother's home. It was during this time period that appellant allegedly engaged in the sexually abusive conduct.

After A.H. revealed the incidents of sexual abuse to her husband, the two of them disclosed the abuse to A.H.'s mother. Very shortly thereafter, in May 1999, A.H. and her mother reported the sexual assaults to local police. Speaking to Galveston Police Officer John Estilette, A.H. described the many incidents of abuse she suffered at the hands of appellant. Although Officer Estilette could not determine the exact dates of the events A.H. described, he was able to establish a timeline based on the schools A.H. had attended and other events that had occurred during the school year. It was determined that the alleged sexual abuse occurred during A.H.'s eighth grade year. When A.H. began the eighth grade, she was thirteen years old; however, she turned fourteen in February of 1992.

Appellant was charged in five separate indictments with: (1) aggravated sexual assault of a child alleged to have occurred on or about October 1, 1991 in cause number 99CR1098; (2)-(3) two counts of sexual assault of a child alleged to have occurred on or about June 1, 1994 in cause numbers 99CR1099 and 99CR1100; (4) indecency with a child alleged to have occurred on or about August 1, 1991 in cause number 99CR1102; and (5) sexual assault of a child alleged to have occurred on or about October 13, 1994 in cause number 00CR1830.

Appellant pleaded not guilty to all charges. The consolidated cases were presented to a single jury.

At trial, A.H.'s mother testified that she first met appellant in June of 1990, and that the two were romantically involved from June 1990 until October 1996. Although A.H.'s mother and appellant never married or lived together, appellant routinely spent the night at her home. A.H. stated that appellant's sexual assaults began in the summer of 1991, after he disciplined her for having boys stay at the house. A.H. was thirteen years old when the abuse began. A.H. testified that appellant continued to sexually assault her almost every time they were alone, forcing her on various occasions in 1991, to engage in oral sex. The sexual abuse continued until 1996, when A.H.'s mother and appellant ended their romantic relationship and appellant moved to Austin. A.H. explained that she endured appellant's sexual assaults for fear that any noncompliance would cause appellant to engage in similar conduct with her younger sister. A.H. did not tell anyone of the incidents because she was afraid of how her mother would react.

Detective Elizabeth Moore, who worked in the child abuse unit and who actively participated in the police investigation, testified that delayed reporting of sexual assault is very common. Based on her investigation, Detective Moore determined that the sexual assaults began in August of 1991, during the fall football season of A.H.'s eighth-grade year. Detective Moore testified that no medical examination was conducted because it would not have shown any evidence of sexual assault given the delay in reporting and the fact that A.H. had borne a child in the interim.

In each case, the jury found appellant guilty as charged and assessed punishment at sixty years' confinement for the aggravated sexual assault in cause number 99CR1098 and twenty years' confinement in each of the other four causes. Appellant filed a motion for new trial. The trial court held an evidentiary hearing and denied appellant's motion. Challenging his convictions in each of the five cases, appellant now brings five points of error for our review.

II. AGGRAVATED SEXUAL ASSAULT OF A CHILD IN CAUSE NUMBER 99CR1098

In his first point of error, appellant argues the evidence is legally insufficient to support his conviction for aggravated sexual assault of a child in cause number 99CR1098. Appellant does not challenge the factual sufficiency of the evidence.

In evaluating a legal sufficiency challenge, we view the evidence in the light most favorable to the verdict. *Weightman v. State*, 975 S.W.2d 621, 624 (Tex. Crim. App. 1998). The issue on appeal is not whether we, as a court, believe the State's evidence or believe that the defense's evidence outweighs the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1994). Nor is it our duty to reweigh the evidence based on a cold record; rather, it is our duty to act as a due process safeguard, ensuring only the rationality of the fact finder's decision. *Williams v. State*, 937 S.W.2d 479, 483 (Tex. Crim. App. 1996). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). The jury, as the trier of fact, is the sole judge of the credibility of witnesses and of the strength of the evidence. *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

The essential elements of aggravated sexual assault of a child are outlined in Texas Penal Code section 22.021. *See* TEX. PEN. CODE ANN. § 22.021. A person commits an offense if the person intentionally or knowingly: (1) causes the penetration of the anus or female sexual organ of a child by any means; or (2) causes the penetration of the mouth of a child by the sexual organ of the actor . . . and . . . the victim is younger than 14 years of age. TEX. PEN. CODE ANN. § 22.021(1)(B)(i), (ii) and (2)(B).

Appellant argues the evidence is insufficient because it does not show that A.H. was under fourteen years of age at the time of the offense. Appellant's sufficiency complaint is based on the following instruction included in the charge by the court:

> The Court: You [the jury] are instructed that when an indictment alleges an offense occurred on or about a certain date, it means that the defendant may be convicted if you believe beyond a reasonable doubt that the defendant committed the offense within the period of statute of limitations preceding the filing of the indictment. In this case, the indictment was filed July 22, 1999, and the statute of limitations for the offense of aggravated sexual assault of a child is 10 years after the child's 18th birthday.

Appellant argues the trial court was confused between the statute-of-limitations issue and the aggravating element of sexual assault when the victim is less than fourteen years of age. Appellant contends that no limitations issue was before the court, and therefore no instruction regarding it was necessary. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(c) (5). According to appellant, the court's instruction on limitations made it possible for the jury to ignore the burden of proof concerning the age requirement for aggravated sexual assault. Therefore, appellant complains, the evidence is insufficient to show that the aggravating element — under fourteen years of age — was proven beyond a reasonable doubt.

Assuming, without deciding, the trial court erred by including this instruction in the jury charge, appellant cannot prevail because he has not suffered the requisite "egregious harm" necessary for reversal based on jury charge error when there is no objection at trial. Because appellant did not object to the jury charge, any error will result in reversal only if it was so egregious as to deprive appellant of a fair and impartial trial. *Almanza v. State*, 724 S.W.2d 805, 806 (Tex. Crim. App. 1987). The degree of harm is determined by looking to the entire jury charge, the state of the evidence, the arguments of counsel, and any other relevant information revealed by the record. *Id.*

The jury is only authorized to convict on the basis of the application paragraph. *Campbell v. State*, 910 S.W.2d 475, 477 (Tex. Crim. App. 1995). The application paragraph of the charge instructed the jury as follows:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 1st day of October, 1991, in Galveston County, Texas, the defendant, Karemeth John Holiday, did then and there, intentionally and knowingly cause the female sexual organ of a child, A.H., who was not the spouse of the defendant, to contact the mouth of the said Karemeth John Holiday, and the said A.H. was younger than 14 years of age, then you will find the defendant guilty of aggravated sexual assault of a child.
>
> Unless you so find beyond a reasonable doubt thereof, you will acquit the defendant of aggravated sexual assault of a child.

The application paragraph of the charge does not contain any reference to the instruction on limitations. Therefore, the jury was not relieved of its duty to find that A.H. was under the age of fourteen at the time of the offense as required by the application paragraph of the charge. *See Garrison, III v. State,* 726 S.W.2d 134, 139 (Tex. Crim. App. 1987). Likewise, the State was not relieved of its burden of proving this aggravating element beyond a reasonable doubt. *See id.* Appellant has not shown he suffered egregious harm by the inclusion of the statute-of-limitations instruction in the jury charge. *See Almanza*, 724 S.W.2d at 806.

We now address appellant's legal sufficiency challenge. To sustain a conviction of aggravated sexual assault, under a hypothetically correct jury charge, the State had to prove that appellant intentionally and knowingly caused AH.'s female sexual organ to come in contact with his mouth on or about October 1, 1991, and that on the date of the offense, A.H. was younger than fourteen years of age. *See* TEX. PEN. CODE ANN. § 22.021 (2)(B). A.H. was born on February 22, 1978, making her fourteenth birthday, February 22, 1992. A.H. testified that in August of 1991, just before she entered the eighth grade, appellant disciplined her for having boys stay at the house. It was just after this incident that appellant

began to sexually abuse her. A.H. stated appellant's first sexual assault involved touching her breasts and trying to kiss her. Soon thereafter, appellant started forcing A.H. to have oral sex with him and this continued throughout 1991. The evidence is undisputed that A.H. started the eighth grade in 1991,when she was thirteen years old, and was thirteen years old throughout the entire fall of her eighth-grade year. She did not turn fourteen years old until February 22, 1992.

A sexual assault victim's testimony is properly considered in a sufficiency review. *Rodriguez v. State*, 819 S.W.2d 871, 873 (Tex. Crim. App. 1991). Viewed in the light most favorable to the verdict, we find any rational jury could have found the essential elements of sexual assault beyond a reasonable doubt, including the aggravating element that the offense occurred when AH. was under fourteen years of age. *See* TEX. PEN. CODE ANN. 22.021. Accordingly, we find the evidence is legally sufficient to support appellant's conviction for aggravated sexual assault of a child in cause number 99CR1098. We overrule appellant's first point of error.

III. SEXUAL ASSAULT OF A CHILD IN CAUSE NUMBERS 99CR1099 AND 99CR1100

In his second point of error, appellant argues the evidence is legally insufficient to support his convictions for sexual assault of a child in cause numbers 99CR1099 and 99CR1100. Appellant contends both of these convictions should be reversed because the evidence was insufficient based upon the failure to prove by corroboration the facts shown in the original indictments, before the State amended the indictments to change the dates of the offenses. Appellant bases his sufficiency complaint on his assertion that the trial court erred in allowing the State to amend the indictments and thus violated his constitutional rights as well as article 28.10(c) of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 28.10(c). The State counters that because appellant only moved for a continuance and did not specifically object on the grounds he alleges on appeal, he has waived any error as to the amended indictments. For reasons explained below, we find appellant has waived his complaint.

Appellant's point of error is based on article 28.10(c) of the Texas Code of Criminal Procedure, which provides:

> [a]n indictment . . . may not be amended over the defendant's objection as to form or substance if the amended indictment . . . charges the defendant with an additional or different offense *or if the substantial rights of the defendant are prejudiced.*

See TEX. CODE CRIM. PROC. ANN. art. 28.10 (c). Appellant contends the trial court erred in allowing the State to change the date of the offense from 1992 to 1994 in the indictments in cause numbers 99CR1099 and 99CR1100. Both article 28.10 and the rules of the appellate procedure require a defendant to preserve error by objection. *See id.*; TEX. R. APP. P. 33.1. At the hearing on the State's motion to amend, the trial court asked defense counsel if he had any objection to the State's motion to amend the indictments. Defense counsel made the following objection:

> Mr. Holmes [Defense Counsel]: Judge, for the purposes of the record I would object that in light of the fact I've been appointed to the case for less than six weeks, I have met with several or possibly five, six or seven different witness [sic] as to date and I have been focusing under the original indictment which I believe would say 1994 - -[sic] 1992.
>
> Now, they're [the State] bumping me up an additional two years even though the event is alleged to have occurred six or seven years ago. We would ask for a continuance from our October 30th trial setting so that I can re-interview various witnesses so that perhaps we could make a better effort with my investigator and myself to focus in on exactly this particular date.
>
> Mr. Cagle's effort, who was the prior [defense] attorney, has also been focusing on the date under the original indictment. And seeing how we are within two or three weeks of trial, that would be the only legal objections or relative objections I can figure out between yesterday morning and today.
>
> The Court: Thank you. What says the State?
>
> Mr. Sistrunk [Prosecutor]: Your Honor, [if] the State [was] outside the ten-day trial period which [sic] the Defense, of course, would be allowed to have a continuance by statute. Also, the changes that we're seeking to amend, they don't create any new offense other than the original charges. They're still the

> original types of offenses. In other words, we're not turning any indecency or any sexual assault into any type of aggravated sexual assault. All we're doing is changing the year. Not even a specific date but just the year of the offense. We ask that the Court grant our motions and amend the indictments as note.

After considering the arguments, the trial court denied the continuance and granted the State's motion.

To preserve error, it was incumbent on appellant to identify the basis of his complaint to the trial court unless it was readily apparent from the context. *See Ibarra v. State*, 11 S.W.2d 189, 197 (Tex. Crim. App. 1999). A defendant must specifically object to preserve error under article 28.10. *See Jones v. State*, 755 S.W.2d 545, 547 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd). Appellant's counsel moved for a continuance, which appears to be an objection under article 28.10(a), not 28.10 (c). *See* TEX. CODE CRIM. PROC. ANN. Art. 28.10(a) (stating that upon notice of an amendment, and request by the defendant the trial court shall give appellant ten days to respond to the amended indictment).[1] However, because trial was not to begin for almost three weeks, appellant was not entitled to a continuance by statute. *See id.*

Moreover, in the trial court, appellant never voiced the complaint he now makes on appeal – that the amendment prejudiced his substantial rights. *See id.* § 28.10(c). Because article 28.10, by its express terms, allows the substance of an indictment to be amended, appellant failed to state a valid ground for objection. The only two valid objections under article 28.10(c) are that the amendment (1) charges the defendant with an additional or different offense, or (2) prejudices the substantial rights of the accused. *See Villalon v. State*, 805 S.W.2d 588 (Tex. App.—Corpus Christi 1991, no pet.) (stating that a proper objection

[1] Appellant has not raised on appeal whether the trial court abused its discretion in denying his motion for continuance. Therefore, appellant's complaint on appeal relies solely on whether the amendments violated his substantial rights and not whether he was entitled to more time to prepare for trial. Nevertheless, appellant and counsel, on the day trial began, both announced ready and stated specifically that they did not wish to re-urge their prior motion for continuance.

is required to preserve error regarding amendment of information). Appellant's counsel did not timely assert either of these complaints in the trial court. *See Williams v. State*, 848 S.W.2d 777 (Tex. App.—Houston [14th Dist.] 1993, no pet) (stating that if defendant does not object to charging instrument prior to trial, any error is waived). Because appellant's complaint in the lower court fails to correspond to the objection he now asserts on appeal, he has waived error. *See* TEX. R. APP. P. 33.1*; Thomas v. State*, 723 S.W.2d 696, 700 (Tex. Crim. App. 1986); *Todd v. State*, 911 S.W.2d 807, 811 (Tex. App.—El Paso 1995, no pet). Accordingly, we overrule appellant's second point of error.

IV. INDECENCY WITH A CHILD IN CAUSE NUMBER 99CR1102

In his third point of error, appellant argues the trial court erred in allowing the State to amend the indictment for the offense of indecency with a child in cause number 99CR1102. Appellant concedes the amendment does not allege a new or different offense; rather, he argues the amendment reduces the State's burden of proof. Appellant further contends that the indictment prejudiced his substantial rights and, therefore, the amendment was void. Thus, appellant argues, the trial court lacked jurisdiction. *See* TEX. CONST. art. V, § 12 (stating that presentment of an indictment to a court invests the court with jurisdiction of the cause).

Appellant was charged by indictment in cause number 99CR1102 with the offense of indecency with a child alleged to have occurred on or about August 1, 1990. The State subsequently moved to amend this indictment at the same time it moved to amend the other indictments, requesting that the date of the offense be changed to on or about August 1, 1991. The trial court granted the State's motion and amended the indictment. The State contends appellant has failed to preserve error as to his third point because his objection at trial does not comport with his objection on appeal. We agree.

The following discussion as to the amendment of cause number 99CR1102 took place at the hearing on the State's motion to amend:

> The Court: . . . The next one?
>
> Mr. Sistrunk [Prosecutor]: 1102, Your Honor.
>
> The Court: Change the year from- -
>
> Prosecutor: Currently it says one thousand nine hundred and ninety. Our leave to amend request that [sic] that [sic] be reflected to one thousand nine hundred and ninety-one.
>
> Mr. Holmes [Defense Counsel]: Judge, we would, once again, vigorously object. What Mr. Sistrunk now has done is ranged [sic] he now spread it over a two if not a three-year period.
>
> The Court: That motion is granted. I have physically amended the indictment, made my initials thereon.

A defendant must specifically object to preserve error under article 28.10. *See Jones*, 755 S.W.2d at 547. Appellant did not claim at trial, as he does on appeal, that this amendment prejudiced his substantial rights. *See* TEX. CODE CRIM. PROC. ANN. art. 28.10(c). Because appellant's point of error on appeal does not correspond to the objection he made at trial, we find appellant has not preserved it for appellate review. *See Thomas*, 723 S.W.2d at 700. Accordingly, we overrule appellant's third point of error.

V. DENIAL OF APPELLANT'S MOTION FOR NEW TRIAL IN CAUSE NUMBERS 99CR1099, 99CR1100, AND 99CR1102

In his fourth point of error, appellant contends the trial court erred in denying his motion for new trial in cause numbers 99CR1099, 99CR1100, and 99CR1102. We review the trial court's denial of a motion for new trial under an abuse-of-discretion standard of review. *See Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). In determining whether the trial court abused its discretion, we consider whether the court acted without reference to guiding rules and principles; that is, whether the court acted arbitrarily or unreasonably.

Lyles v. State, 850 S.W.2d 497, 502 (Tex. Crim. App. 1993). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990).

Appellant's basic complaint is that he was entitled to a new trial because the amendments of the indictments were changed by the trial court and not by the grand jury, thereby impairing his substantial rights. The State asserts that appellant waived this objection by not properly objecting before trial began. Again, we find waiver.

Appellant argues on appeal that the amendments to the indictments prejudiced his substantial rights. However, prior to trial, his counsel had only moved for a continuance based on the fact he needed more time to prepare. The trial court denied the motion for continuance and amended the indictments. On the day of trial, appellant declined to re-urge his motion for continuance and stated that he wanted to proceed with the trial. Appellant then filed a motion for new trial asserting that the amendment of the indictments prejudiced his substantial rights. [2]

If a defendant does not object to a defect, error, or irregularity of form or substance in an indictment *before* the date on which the trial on the merits commences, he waives the right to object to the defect on appeal. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b); *Duron v. State*, 915 S.W.2d 920, 921 (Tex. App.—Houston [1st Dist.] 1996), *aff'd*, 956 S.W.2d 547 (Tex. Crim. App. 1997). Thus, to preserve error, a defendant must object to the alleged defects in the indictments *before* the day of trial for it to be considered timely under article 1.14(b). *See Ex Parte Gibson*, 800 S.W.2d 548, 551 (Tex. Crim. App. 1990) (stating that objections to defects in indictments must be raised by pretrial objection or be waived in postconviction proceedings). Appellant failed to timely object to any defects in the

[2] Appellant's motion for new trial also alleged the following grounds: (1) factual sufficiency of the evidence; (2) newly discovered evidence; and (3) ineffective assistance of counsel. Under his fourth point of error, appellant fails to argue any of these grounds; thus, he has assigned no error, and these issues are not before this court. *See* Tex. R. App. 33.1

indictment. Because appellant did not preserve error prior to trial and his motion for new trial was not a timely objection as to the amendments of the indictments, we find that appellant has not preserved this issue for appellate review. *See* Tex. R. App. P. 33.1; *see also* TEX. CODE CRIM. PROC. ANN. art. 1.14(b). Thus, we overrule appellant's fourth point of error.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

In his fifth point of error, appellant contends he was denied effective assistance of counsel at trial. He argues that counsel was ineffective for failing to object to the qualifications of the State's rebuttal witness, Trudy Davis.

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. *See* U.S. CONST. AMEND. VI; TEX. CONST. art. I, 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977). This right to counsel includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); *see Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). To prove ineffective assistance of counsel, appellant must show that (1) counsel's representation or advice fell below objective standards of reasonableness and (2) the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland*, 466 U.S. at 688-92. Moreover, the appellant bears the burden of proving his claims by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

In assessing appellant's claims, we apply a strong presumption that trial counsel was competent. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Appellant has the burden to rebut this presumption by presenting evidence illustrating why trial counsel did what she did. *See id.* An appellant cannot meet this burden if the record does not specifically focus on the reasons for trial counsel's conduct. *Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

When there is no proper evidentiary record developed at a hearing on a motion for new trial, it is extremely difficult to show that trial counsel's performance was deficient. *See Gibbs v. State*, 7 S.W.3d 175, 179 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). If there is no hearing, or if counsel does not appear at the hearing, an affidavit from trial counsel becomes almost vital to the success of an ineffective-assistance claim. *See Howard v. State*, 894 S.W.2d 104, 107 (Tex. App.—Beaumont 1995, pet. ref'd.).

Appellant contends that Trudy Davis was allowed to testify without objection or challenge to her qualifications or experience. Davis testified to her extensive background in the area of child abuse, stating that she had worked almost exclusively in that field. At the time of trial, Davis had served as the executive director of the Advocacy Center for Children of Galveston County for more than three years. Prior to holding that position, Davis was a case worker and supervisor for Children's Protective Services in Galveston County for nineteen years. In addition, she had worked as a criminal investigator for the Galveston County District Attorney's office for two years. Davis is also a licensed peace officer with a bachelor's degree in sociology and criminal justice. At the time of trial, Davis had worked on thousands of cases involving the sexual abuse of children and had testified as an expert on many occasions regarding the dynamics and common characteristics of a sexually-abused child.

In this case, Davis explained that children will often retract their stories after a traumatic event happens and that it is common for children to report abuse several years later, as AH. did in this case. Davis described this as "delayed reporting." She explained how child sexual abuse victims feel embarrassed and guilty, change their stories, and tell different details about the abusive events. Davis testified that her analysis was based on her many years' education, training, and experience in personally working with sexually-abused children.

A trial court has discretion whether to allow a witness to testify as an expert. *See Steve v. State*, 614 S.W.2d 137, 139 (Tex. Crim. App. 1981). If a witness has scientific, technical, or other specialized knowledge that will assist the trier of fact and is qualified as

an expert by knowledge, skill, experience, training, or education, that witness may testify about his or her opinions. *See* TEX. R. CIV. P. 702. Moreover, when a witness is an expert in a social science or a field that is based primarily on experience and training, we apply a less rigorous reliability test to the witness's theory than we apply to a witness's theory in a hard science. *See Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998), *rev'd on separate grounds by State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999). When addressing fields of study aside from the physical sciences, we ask the following questions: (1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field. *See id*. The Texas Court of Criminal Appeals has acknowledged research concerning the behavior of sexually-abused children as a legitimate field of expertise. *See Cohn v. State*, 849 S.W.2d 817(Tex. Crim. App. 1993) (recognizing types of expert knowledge concerning the behavioral characteristics typically exhibited by sexual abuse victims).

To support his argument that Davis was not qualified to testify as an expert, appellant relies on a case from the First Court of Appeals. *See Perez v. State*, 25 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2000, no pet.). In that case, the State called Davis, the same witness at issue here, as a rebuttal witness to testify about the five stages of "child abuse accommodation syndrome." *Id*. at 832. The First Court of Appeals found the trial court erred when it allowed Davis to testify as an expert concerning the theories of Dr. Roland Summit, a pediatric psychiatrist. *Id*. at 838. Appellant's reliance on *Perez* is misplaced.

In the court below, Davis did not mention any particular syndrome or scientific theory in her testimony, nor did she refer to another expert's opinion on which she relied. The record does not indicate that Davis was interpreting another professional's theories about a syndrome, as was the case in *Perez*. In this case, Davis testified to her credentials, and then the prosecution began its questioning. It is apparent from the record that Davis's opinions stemmed from her personal experiences working with child abuse victims. It is also apparent that Davis has learned from her personal experience that children tend to be afraid to report

sexual abuse. The court in *Perez* specifically stated in a footnote that it "expressed no opinion regarding Davis's qualifications to testify as an expert regarding her own observations and opinions, without reference to the opinions, observations, and theories of Dr. Summit." *Id*. at 838 n. 2. Moreover, the First Court of Appeals, recently rejected appellant's reading of *Perez* in *Hernandez v. State,* 53 S.W.3d 742 (Tex. App.—Houston [1 st Dist.] 2001, no pet.). The court in *Hernandez,* held that *Perez* applied the more detailed *Kelly* inquiry concerning the reliability of scientific, not nonscientific, expert testimony because the testimony in question was based on testimony from an expert relying on another expert's professional opinion. *Id.*

An expert's testimony concerning general behavioral traits of sex abusers and sexually-abused children as a class is admissible. *See Cohn*, 849 S.W.2d at 819; *Vasquez v. State*, 819 S.W.2d 932, 935 (Tex. App.—Corpus Christi 1991, pet. ref'd). The rationale is that while the common experience of jurors enable them to assess the credibility of alleged assault victims generally, the unique pressures surrounding a child victim, and their concomitant effects on the child's behavior, are such that an expert's testimony is deemed useful in assisting the jurors' assessment of the child's credibility. *Kirkpatrick v. State*, 747 S.W.2d 833, 835 (Tex. App.—Dallas 1987, pet. ref'd). The expert's testimony about these traits, such as a delay in reporting the incident, explains to the jurors that such behavior, which might otherwise be attributed to inaccuracy or falsification, is typical of the class of victims and does not necessarily indicate a lack of credibility. *Id.* at 835-36. Davis's testimony was admissible in order to educate the jurors in this area. The reliability of her testimony was sufficiently established under Rule 702, and therefore, it would have been within the trial court's discretion to overrule any such an objection. At the motion for new trial hearing, appellant's trial counsel testified briefly to this effect. When asked why he had not cross-examined Davis about her qualifications, appellant's counsel replied that because the prosecutor already had qualified her, he did not want to give Davis more of an opportunity to "unload in front of the jury about his client [appellant] or delayed reporting of sexual incidents." Appellant has not shown that an objection to Davis's qualifications

would have been sustained, and thus has failed to establish the first prong of *Strickland*. *See Jensen v. State*, 66 S.W.3d 528, 539 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that appellant did not demonstrate that the trial court would have sustained an objection to Davis's expert witness testimony); *Young. v. State*, 991 S.W.2d 835, 837 (Tex. Crim. App. 1999) (holding that in the absence of sound evidence to the contrary, courts will typically not second-guess a matter of trial strategy); *Varughese v. State*, 892 S.W.2d 186, 196 (Tex. App.—Fort Worth 1994, no pet.) (holding that failure to object to even inadmissible evidence can be part of trial strategy to be open and honest with the jury). Therefore, we overrule appellant's fifth point of error.

Having overruled all of the issues appellant has presented for review, we affirm the judgments of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed March 21, 2002.

Panel consists of Chief Justice Brister and Justices Fowler and Frost.

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