GENERAL LEGAL ISSUES CONCERNING EXPERTS IN COURT

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Intersection of Family Law and Psychology

Given a sufficiently large portion of the population is affected by mental illness either directly or indirectly, family lawyers are often required to deal with such illnesses and disorders on a more frequent basis than other forms of litigation. For example, the National Alliance on Mental Illness in 2008, *What is Mental Illness: Mental Illness Facts* (2008), opined that around 1 in 5 families in the United States are affected by some form of mental illness. Family lawyers are required to deal with cases where one or more of the parties have a mental illnesses such as abnormalities in thoughts, feelings and moods, some arguably situational (e.g. abusive relationship, codependency, etc.) and some biologically based (alcoholism, bipolar, borderline, etc.). Similarly, mental illnesses and disorders are often found in children which further complicate parenting issues and custody awards.

Family law practitioners who have represented a client with a mental illness, or have dealt with the issue of mental illness in their own personal lives, are well aware that there is often a stigma associated with a diagnosis of mental illness. As lawyers, it is imperative to understand the terminology and the criteria associated with the specific mental disorder so that you can properly utilize and/or defend against court appointed or retained experts. An expert psychologists is the primary window through which lawyer

How are Psychologists Most Often Utilized In Family Law?

When the Court suspects a mental issue, the Court may Sua Sponte ("of their own accord") appoint a psychologist to conduct psychological evaluations that address custody, access, and possession issues. Issues effecting custody, access and possession can encompass a parent's depression, substance abuse, or a child's emotional state. Given the cost of appointing a psychologist, which is almost always borne by one or more of the parties, the Court will generally avoid Sua Sponte appointments unless the need is obvious. This does not apply to social studies performed by licensed professional counselors or social workers. Such appointments are liberally made.

In addition to the Court's prerogative, attorneys may retain psychologists to educate the court about the professional literature on a particular issue affecting the family, or about practice methods of a proposed treatment remedy. Attorneys may retain psychologists to conduct evaluations of their clients that may be used in court or that may help the attorney make more informed case decisions. Likewise, it is not uncommon for an attorney to retain a non-testifying psychologist (a consulting-only expert) for the purposes of refuting either a Court appointed psychologist or a testifying psychologist retained by an opposing counsel. A consulting-only psychologist can often help plan for jury selections, and for the examination of witnesses.

As a summary, psychologists in family law will find themselves testifying or working with lawyers generally in the following circumstances:

1) Court Appointed Testifying Expert;

2) Attorney Selected Testifying Expert; or
3) Attorney Selected Consulting-Only Non-Testifying Expert.

Daubert – What is it?

The 1993 *Daubert v. Merrell Dow Pharmaceuticals* standard as set forth by the United States Supreme Court was adopted by the Texas Supreme Court in *E. I. duPont De Nemours & Company, Inc. v. C. R. Robinson*, 913 S.W.2d 549 (Tex. 1995). *Robinson* evaluated the reliability technique/theory of a "scientific expert." *Robinson* held that a proponent of scientific expert testimony must demonstrate to the judge, as the evidence "gatekeeper," that the testimony is relevant and legally reliable before the judge will admit the testimony. The Court explained that scientific testimony is relevant if it is "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Id.* at 556. Scientific testimony is considered reliable if it is grounded in the methods and procedures of science. *Id.* at 557. Testimony without such grounding is no more than "subjective belief or unsupported speculation." *Id*. The Texas Supreme Court then adopted and expanded a list of factors of reliability enumerated by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharm.,Inc.*, 509 U.S. 579 (1993). The nonexclusive factors set forth in *Robinson* for determining the reliability of a scientific expert's technique/theory include:

1. the extent to which the theory can be or has been tested;
2. the extent to which the expert testimony relies on the expert's subjective interpretation;
3. the potential rate of error of the technique;
4. whether the expert's theory has been subjected to peer review or publication;
5. whether the underlying theory or technique is considered generally accepted by the relevant scientific community; and
6. the non-judicial uses which have been made of the theory or technique.

The *Daubert* and *Robinson* factors each stemmed from specific facts that centered around expert witnesses who were from traditional "hard sciences." The Petitioners in *Daubert* sued for birth defects caused by the ingestion of an anti-nausea medication called Bendectin. *Daubert v. Merrell Dow Pharms.* 509 U.S. 579, 582 (1993). In *Daubert*, the Supreme Court of the United States grappled with the testimony of medical doctors, chemists, and FDA consultants over whether Bendectin was a human teratogen. *Id.* At 582-84. Similarly, in *Robinson*, the court considered the testimony of an expert with degrees in science, horticulture, plant ecology, and agronomy. *Robinson* at 551. The expert in *Robinson* sought to give his opinion on whether the an application of Benlate 50 DF, a fungicide, damaged the Robinson's pecan orchard. *Robinson* 923 S.W.2d at 551.

Trial courts may consider other factors which are helpful to determining the reliability of the scientific evidence. The factors a trial court will find helpful in determining whether the underlying theories and techniques of the preferred evidence are scientifically reliable will differ with each particular case.

The Texas Supreme Court has further attempted to give some guidance to the trial courts

concerning how they should handle those experts whose testimony really cannot be governed by the *Daubert* and *Robinson* standards:

> "Experience alone may provide a sufficient basis for an expert's testimony in some cases, but it cannot do so in every case. A more experienced expert may offer unreliable opinions, and a lesser experienced expert's opinions may have solid footing. The court in discharging its duty as gatekeeper must determine how the reliability of particular testimony is to be assessed."

Quoting the United States Supreme Court in *General Electric Co. v. Joiner*, 118 S.Ct.512, 139 L.Ed.2d. 508 (1997):

> "Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."

Daubert – Begin With the End in Mind

As in most things we do, begin with the end in mind. Attorneys must know who engaged the psychologist, and for what purpose that psychologist has been engaged. Likewise, the psychologist must understand the scope of the representation, and the likelihood of testifying in Court.

Before any work begins, the Attorney and Psychologist must, at a minimum, be certain of the following:

1. Confirm whether the role will be as a testifying expert. If so, the supply of all relevant records to the expert will be crucial. If the attorney withholds relevant documents, the expert's testimony may be compromised if they are later cross-examined on an important issue for which that document is relevant;

2. The psychologist expert should have professional experience in the areas related to the specific issues they are retained to address. Experts with such experiences outside the courtroom will understand the professional literature in those areas which they are asked to address. Unless the attorney and the expert can agree that the psychologist has such requisite expertise, such expert is certain to face a *Daubert* challenge wherein they would be disqualified. Trial courts must ensure that those who hold themselves out as experts are, in fact, experts for the subject matter on which they opine;

3. Be mindful of any contact/communication between the testifying expert and the consulting expert. If the testifying expert reviews the consulting expert's work or if these two experts interact with each other, the consulting expert's opinions may be discoverable. In that case, your work product to which your consulting expert may have been privy may also be discoverable;

4. If the psychologist is to testify, be clear with them about their role in the case as a

testifying expert. For instance, a psychologist hired to assess the family dynamics would approach a case much differently than if they were hired to assess a father's or mother's opiate addiction recovery status. If the attorney has not been clear, by all means get the direction clarified early on in the process. Similarly, if a psychologist exceeded the scope of representation, for any reason whatsoever, tell the attorney as soon as possible so he can mitigate any issues which may arise from the additional analysis done; and

5. Both the attorney and the testifying psychologist must assume that all communications between themselves are discoverable. It is imperative that the attorney and psychologist avoid at all times communications which are inappropriately self serving, or give the appearance of collusion. Attorney retained experts are often viewed as a hired gun, so there needs to be an effort to avoid anything that lends credence to that view.

"The Rule" and How to Stay in the Court Room During Live Testimony

Rule 614 of the Texas Rules of Evidence, "commonly referred to as 'the rule' provides for the exclusion of witnesses from the courtroom so that they cannot hear and be influenced by the testimony of other witnesses." See *Elbar, Inc. v. Claussen*, 774 S.W.2d 45 (Tex. App. - Dallas 1989, writ dism'd). The rule states:

> "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." See TEX.R. EVID.614.

Ordinarily, a psychologist would be required to leave the courtroom during the testimony of other witnesses. However, the family law practitioner can use the rule's exception to request that his or her psychologist remain in the courtroom throughout the entire case. The language of the rule's exception reads:

> "This rule does not authorize the exclusion of a person whose presence is shown by a party to be essential to the presentation of the party's cause." See TEX.R. EVID.614(3).

The practitioner can argue that his or her psychologist has evaluated the parties or children involved and that he or she would benefit from hearing from all of the witnesses. Listening to all of the testimony will give the psychologist the ability to piece together the entire story and get the full impression of the facts as it relates to the case. The practitioner can further his or her argument by coupling rule 614 with rule 703 of the Texas Rules of Evidence. Rule 703 reads:

> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." TEX.R. EVID. 703. (emphasis added).

If a testifying psychologist's opinion testimony can benefit from hearing all or part of the testimony, then it should be urged as a matter of course.

Hearsay Exception Applicable to Psychologists/Therapists

The family law practitioner can sometimes use what would normally be excluded as "hearsay evidence". As example, the plaintiff in *Sosa v. Koshy*, 961 S.W.2d 420, 423 (Tex.App.–Houston [1st Dist.] 1997, pet. denied), was hit by a car in a restaurant parking lot. Litigation was brought against McDonald's for her injuries as well as the driver. *Id.* Officer Null was called as a witness, the officer who investigated the accident, to testify in an expert capacity as to accident reconstruction. *Id.* at 425. During the trial, the officer testified concerning reports given to him by unidentified declarants at the scene of the accident. *Id.* Although the plaintiff objected to the testimony as hearsay, the evidence was admitted over such objection.

The Appellate Court concluded that the testimony of Officer Null was in the capacity of an expert on accident reconstruction. It further opined that "the Rules of Civil Evidence provide that an expert may rely on inadmissible evidence, and may disclose the basis for his opinion." *Id.*at 426:

> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inference upon the subject, the facts or data need not be admissible in evidence." TEX. R. EVID. 703. (emphasis added).

The expert may testify in terms of opinion or inference and give the expert's reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. *The expert may in any event disclose on direct examination*, or be required to disclose on cross-examination, *the underlying facts or data*. TEX. R. EVID. 705(a) (emphasis added).

The court held that under rules 703 and 705 an expert witness could:

1. rely on hearsay evidence to reach a conclusion; and

2. testify about the basis for his conclusion. *Id.* at 427.

PREDICATES

SCIENTIFIC EVIDENCE

Courts look to numerous factors in determining whether to admit scientific evidence, including but not limited to:

1. Whether the theory or technique can be and has been tested;
2. Whether the theory or technique has been subjected to peer review and publication;
3. The known or potential rate of error and standards controlling a technique's operation;
4. General acceptance in the scientific community;
5. The existence and maintenance of standards controlling the technique's operation;
6. The relationship of the technique to the methods which have been established to be reliable;
7. The qualifications of the expert witness testifying on the methodology;
8. The nonjudicial uses to which the method has been put;
9. The qualifications of the testifying expert;
10. The existence of literature supporting or rejecting the underlying scientific theory and technique;
11. The availability of other experts to test and evaluate the technique;
12. The clarity with which the underlying scientific theory and techniques can be explained to the court; and
13. The experience and skill of the person(s) who applied the technique on the occasion in question.

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

E.I. Du Pont De Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995). Rule 702 requires a showing that the expert witness is qualified and that the testimony is relevant to the issues in the case and based upon reliable foundation.

North Dallas Diagnostic v. Dewberry, 900 S.W.2d 90 (Tex. App.-Dallas 1995, wit denied). Provides civil litigants with guidance regarding the predicates required for admission of scientific evidence and mandates that the "trial court shall focus solely on the validity of the principals and methodology underlying the testimony, not the conclusions generated."

Kelly v. State, 824 S.W.2d 568 (Ct. Crim App. 1992, no pet).

T.R.E. 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

STATEMENT FOR PURPOSE OF MEDICAL DIAGNOSIS OR TREATMENT

1. Declarant made statement to physician or other health functionary;

2. Statement made for purpose of making some form of medical diagnosis or treatment;

3. Statement described:

    a. present symptoms, pain or sensation;
    b. past symptoms, pain or sensation;
    c. declarant's medical history; or
    d. inception or character of the cause or external source thereof; and

4. Statement made is reasonably pertinent to diagnosis or treatment.

T.R.E. 803(4) HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof as reasonably pertinent to diagnosis or treatment.

Reyna v. State, 797 S.W.2d 189, 193-194 (Tex. App.-Corpus Christi 1990, no writ). Permitting a physician to repeat a child's statement that someone had touched her.

Marriage of D.B.B. and R.L.B., 798 S.W.2d 399 (Tex. App.-Amarillo 1990, no writ). Psychologist's record reflecting child's custodial preference and feelings towards father cannot be admitted without establishing that the declarant child would be competent to testify.

In re L.S., 748 S.W.2d 571, 576 (Tex. App.-Amarillo 1998, writ denied). "The crucial issue under 803(4) is whether the out-of-court statement was reasonably pertinent to diagnosis or treatment. [¶] [A] statement made by a victim of child abuse identifying the alleged perpetrator is pertinent to both physical and psychological diagnosis and treatment."

SAMPLE CASES

1 of 1 DOCUMENT

IN THE INTEREST OF A.J.L. AND C.R.L., CHILDREN

NO. 2-03-040-CV

COURT OF APPEALS OF TEXAS, SECOND DISTRICT, FORT WORTH

136 S.W.3d 293*; *2004 Tex. App. LEXIS 3825

April 29, 2004, Delivered

PRIOR HISTORY: [**1] FROM THE 211TH DISTRICT COURT OF DENTON COUNTY.

DISPOSITION: Affirmed.

COUNSEL: For Appellant: David Wacker, Denton, TX.

For State: Bruce Isaacks, Criminal District Attorney, Charles E. Orbison, Bill Kuykendall, Assistant Criminal District Attorneys, Denton, TX., Matthew Paul, State Prosecuting Attorney, Austin, TX.

JUDGES: PANEL A: LIVINGSTON, DAUPHINOT, and MCCOY, JJ.

OPINION BY: TERRIE LIVINGSTON

OPINION

[*295] Appellant Michelle L. appeals the trial court's order terminating her parental rights to her children, A.J.L. and C.R.L. In two points, she complains that: (1) the trial court erred by allowing the attorneys for respondent, Donald "Bobby" Wall, and intervenors, Jose and Yolinda Trevino, to present closing arguments to the jury; and (2) the trial court abused its discretion by allowing expert opinions when there were no grounds for admissibility under a *Daubert/Robinson* analysis or because the opinions were based upon hearsay. In three supplemental points, appellant argues that: (1) the evidence is legally and factually insufficient to prove appellant knowingly placed or allowed the children to remain in conditions and surroundings that endangered their physical or emotional well being; (2) the evidence is legally and factually insufficient to prove appellant engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered their physical or emotional well being; and (3) the evidence is factually insufficient to prove [**2] that termination of appellant's parental rights was in the best interest of the children. We affirm.

FACTS

Appellant grew up in foster care and had a lifetime history of violence and an [*296] inability to control her temper and emotions. Child Protective Services in Kansas (KCPS) and Texas Department of Family and Protective Services (DFPS) had removed appellant's children from her care on multiple occasions because they had bruises, burns, and bites on them. Appellant also had a criminal and drug abuse history and an unstable home life and employment history. After the third removal, DFPS petitioned to terminate appellant's parental rights to her two children.

At trial, the Trevinos, paternal grandparents of A.J.L., intervened asking to be named joint managing conservators of A.J.L. The natural father of C.R.L., Donald "Bobby" Wall, filed an original answer to the termination petition and filed a counter-petition asking to be named the sole managing conservator of C.R.L.

During the trial, the court allowed play therapist Brigitte Iafrate to testify on play therapy she conducted with A.J.L. Using puppets in a play acting scenario, it was her opinion that A.J.L. felt that he [**3] needed to protect his baby sister and that he had been traumatized at home. Before allowing Iafrate to testify, the trial court conducted a *Daubert* hearing to determine the admissibility Iafrate's expert testimony as a professional counselor. Appellant objected to portions of Iafrate's testimony, contending it was unreliable and based on hearsay. The trial court overruled her objections.

Prior to closing arguments, appellant objected to the Trevinos and Wall making closing arguments to the jury. The trial court overruled her objection, and both presented closing arguments to the jury. The trial court charged the jury only on termination, not conservatorship. The trial court terminated appellant's parental rights based on the jury's findings of endangerment and conduct as to both children.

CLOSING ARGUMENTS

In her first point, appellant complains that the trial court erred by allowing the attorneys for Wall and the Trevinos to present closing arguments to the jury. The State filed its first amended petition alleging that Wall was the biological father of C.R.L. and asked the court to find that, if reunification could not be achieved, the court terminate his parental [**4] rights. Wall, as a respondent, answered with a general denial and filed a counter-petition affirming that he was the biological father of C.R.L., asking that appellant's parental rights to C.R.L. be terminated, and that the trial court award him custody of C.R.L. As a respondent, Wall is also a party to the suit. The Trevinos intervened and filed a petition in intervention requesting custody of A.J.L. The family code expressly provides grandparents with standing to intervene subject to the trial court's discretion. *TEX. FAM. CODE ANN. § 102.004* (Vernon 2002). Unless the trial court does not allow the intervention, the intervenors become parties to the suit for all purposes. *In re D.D.M., 116 S.W.3d 224, 232 (Tex. App.--Tyler 2003, no pet.).* Because the trial court approved the intervention, the Trevinos are also parties to the suit.

After all the evidence is presented in the case, the parties may argue the case to the jury. *TEX. R. CIV. P. 269.* Where there are several parties to a case, the trial court may prescribe the order of argument between them. *Id.*

Appellant argues that because the jury charge addressed only termination issues, [**5] Wall and the Trevinos should not have been allowed to make closing arguments. Because they only sought custody of the children and the jury charge did not address custody, appellant contends they had no issues before the jury and should [*297] not have been allowed to argue. Appellant contends that the holding of *City of Houston v. Sam P. Wallace & Co., 585 S.W.2d 669, 22 Tex. Sup. Ct. J. 499 (Tex. 1979)* applies to the present case because the supreme court held that parties without issues before the jury should not be allowed to make closing arguments. *Id. at 673.* However, *Wallace* can be distinguished from this case because *Wallace* involved a settlement agreement.

In *Wallace*, both the city and employee had actions against the contractor as their common adversary and were both designated as plaintiffs. *Id.* The supreme court held that because the employee secretly settled with the contractor and agreed not to argue negligence against it, the trial was not a fair adversary proceeding. *Id.* Moreover, the court concluded that because after settling with the contractor, the subcontractor's employee had no further claims against anybody and no other party had any [**6] claim against him, his counsel had no purpose in making a jury argument. *Id. at 672.*

The present case does not involve a settlement agreement, nor was there an unfair shift in the adversarial alignment of the parties at closing argument. To the contrary, the alignment of these parties remained consistent throughout the trial. Contrary to appellant's assertions, both Wall and the Trevinos filed pleadings. Additionally, both had an interest regarding termination of appellant's parental rights. Wall specifically requested that appellant's rights to C.R.L. be terminated and the Trevinos asked to be appointed managing conservators of A.J.L. Upon the termination of parental rights, the trial court shall appoint a managing conservator of the child. *TEX. FAM. CODE ANN. § 161.207* (Vernon 2002). Thus, the termination of appellant's rights was a matter of interest to both Wall and the Trevinos. Thus, we conclude that the holding in *Wallace* is inapplicable to the present case because the parties still had an interest in the termination of appellant's parental rights. We hold that the trial court did not err by allowing Wall and the Trevinos to make [**7] closing arguments to the jury. Appellant's first point is overruled.

EXPERT WITNESS TESTIMONY

Under her second point, appellant complains that the trial court erred by admitting the expert testimony given by licensed professional counselor Brigitte Iafrate because (1) it was not scientifically reliable under *Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, and (2) the evidence was based, in part, on hearsay. Iafrate testified about play therapy that she conducted on A.J.L.

Rule of evidence 702 governs the admissibility of expert testimony. *TEX. R. EVID. 702*; *Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 718, 41 Tex. Sup. Ct. J. 1117 (Tex. 1998)*; *E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 554, 38 Tex. Sup. Ct. J. 852 (Tex. 1995)*. *Texas Rule of Evidence 702* provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

TEX. R. EVID. 702.

Once the [**8] opposing party objects to proffered expert testimony, the proponent of the witness's testimony bears the burden of demonstrating its admissibility. *Guadalupe-Blanco River Auth. v. Kraft, 77 S.W.3d 805, 807, 45 Tex. Sup. Ct. J. 628 (Tex. 2002)*; *Robinson, 923 S.W.2d at 557*. To be admissible, the proponent must demonstrate: (1) that the expert is qualified; and (2) that the expert's testimony is relevant and reliable. [*298] *See Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 499, 44 Tex. Sup. Ct. J. 675 (Tex. 2001)*; *Robinson, 923 S.W.2d at 556*; *see also Kraft, 77 S.W.3d at 807*.

At the *Daubert* hearing, Iafrate testified that she had been a licensed professional counselor in Texas since 1993. She received a bachelor's degree in psychology from Texas A&M, a master's degree in counselor education, with an emphasis on play therapy, from the University of North Texas (UNT), and had regularly attended continuing education seminars focusing on play therapy and techniques. She received special training in these methods at UNT and at continuing education conferences. She testified that play therapy was one of her areas of expertise and that she had worked with a minimum [**9] of one-hundred preschool children. She evaluated A.J.L. using these methods over the course of fourteen different therapy sessions.

The supreme court has identified a non-exclusive list of factors which can be considered in assessing the reliability of scientific evidence. [1] *See Gammill, 972 S.W.2d at 720*; *see also Daubert, 509 U.S. at 593-95, 113 S. Ct. at 2796-98*. In *Nenno v. State*, the court of criminal appeals divided "scientific" expertise into two subcategories: "hard" sciences and "soft" sciences. *970 S.W.2d 549, 560 (Tex. Crim. App. 1998), overruled on other grounds by, State v. Terrazas, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999)*.

> 1 (1) the extent to which the theory has been or can be tested;
>
> (2) the extent to which the technique relies upon the subjective interpretation of the expert;
>
> (3) whether the theory has been subjected to peer review and/or publication;
>
> (4) the technique's potential rate of error;
>
> (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
>
> (6) the non-judicial uses which have been made of the theory or technique.

Gammill, 972 S.W.2d at 720.

[**10] The court in *Nenno* provided a framework by which to test the reliability of the fields outside of hard science, such as social sciences or other fields based upon experience and training as opposed to scientific method (soft sciences). *Id. at 561*; *In re J.B., 93 S.W.3d 609, 629-31 (Tex. App.--Waco 2002, pet. denied)* (explaining why *Nenno* framework should be used to evaluate "soft science" testimony in civil cases pending

guidance from the supreme court); *see also In re G.B., 2003 Tex. App. LEXIS 8737, No. 07-01-0210-CV, 2003 WL 22327191, *2 (Tex. App.--Amarillo Oct. 10, 2003, no pet.)* (memo op.) (applying *Nenno* to a parental termination case). In assessing the reliability of fields outside of hard science, the trial court looks at whether (1) the field of expertise is a legitimate one, (2) the subject matter of the expert's testimony is within the scope of that field and (3) the expert's testimony properly relies upon or utilizes the principles involved in that field. *Nenno, 970 S.W.2d at 561*.

We review the court's determination under an abuse-of-discretion standard. *See Kraft, 77 S.W.3d at 807*; *Helena Chem. Co., 47 S.W.3d at 499*; [**11] *Robinson, 923 S.W.2d at 558*. To determine whether a trial court abused its discretion, we must decide whether the trial court acted without reference to any guiding rules or principles; in other words, whether the act was arbitrary or unreasonable. *See Carpenter v. Cimarron Hydrocarbons Corp., 98 S.W.3d 682, 687, 46 Tex. Sup. Ct. J. 305 (Tex. 2002)*; *Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42, 29 Tex. Sup. Ct. J. 88 (Tex. 1985), cert. denied, 476 U.S. 1159, 90 L. Ed. 2d 721, 106 S. Ct. 2279 (1986)*. Merely because a trial court may decide a matter within its discretion in a different manner than an appellate court [*299] would in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Downer, 701 S.W.2d at 241-42*.

An abuse of discretion does not occur where the trial court bases its decisions on conflicting evidence. *Davis v. Huey, 571 S.W.2d 859, 862, 22 Tex. Sup. Ct. J. 8 (Tex. 1978)*; *see also Goode v. Shoukfeh, 943 S.W.2d 441, 446, 40 Tex. Sup. Ct. J. 487 (Tex. 1997)*. Furthermore, an abuse of discretion does not occur as long as some evidence of substantive and probative character exists to support the trial court's decision. *Butnaru v. Ford Motor Co., 84 S.W.3d 198, 211, 45 Tex. Sup. Ct. J. 916 (Tex. 2002)*; [**12] *Holley v. Holley, 864 S.W.2d 703, 706 (Tex. App.--Houston [1st Dist.] 1993, writ denied)*. An appellate court must uphold the trial court's evidentiary ruling if there is any legitimate basis in the record for the ruling. *Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 43, 41 Tex. Sup. Ct. J. 877 (Tex. 1998)*.

First, we focus on whether the trial court abused its discretion in determining that play therapy is a legitimate field of expertise. Iafrate testified that play therapy is highly regarded and is a generally accepted method for counseling children. She reviewed the research in the area of play therapy and testified that the research showed that play therapy is a successful and effective way to work with children. She found no studies that challenged the reliability of play therapy. Moreover, she noted that it has been used for decades and is widely accepted in the counseling community. Additionally, caselaw illustrates that play therapy is often used as a basis for expert testimony. [2] Based upon this evidence, we conclude that the trial court did not err in determining that play therapy is a legitimate field of expertise.

2 *See In re A.V., 849 S.W.2d 393, 401 (Tex. App.--Fort Worth 1993, no writ)*; *Puderbaugh v. State, 31 S.W.3d 683, 685-86 (Tex. App.--Beaumont 2000, pet. ref'd)*; *In re M.T., 21 S.W.3d 925, 929 (Tex. App.--Beaumont 2000, no pet.)*; *see also Campos v. State, 977 S.W.2d 458, 463-64 (Tex. App.--Waco 1998, no pet.)*(allowing expert testimony based upon play therapy in child sexual assault case).

[**13] Play therapy uses toys as "therapeutic metaphors" to help children express themselves and their feelings. Iafrate described the types of play therapy that she used. First, she built a safe environment and rapport with the child using the client-centered method. Eventually she switched to the more directive Alderian method where the therapist is more interactive in helping the child identify important aspects of their environment. She used these techniques in a manner consistent with her training during her fourteen counseling sessions with A.J.L.

With respect to whether Iafrate's testimony was within the scope of her legitimate field of expertise and whether she properly utilized the principles of play therapy, we look to her testimony at trial. She testified that A.J.L. came to therapy with her in order to learn how to cope with the abuse that he had suffered. According to Iafrate, when A.J.L. first started coming to her he behaved unusually for a three-year-old because he lacked spontaneity, was obsessive about cleanliness and order, was always putting things away, and was hyper-aware of how Iafrate was reacting to him before he did anything. Comparatively, normal three-year-olds [**14] are very spontaneous, carefree, and are not very concerned with making sure that everything is returned to its proper place.

Iafrate initiated play therapy with A.J.L. using a scenario given to her by A.J.L.'s foster mother. She created a scene with puppets that was similar to what the foster mother had described to her. Iafrate designated [*300] one larger turtle puppet as the mother, and smaller turtles as the little boy and the baby girl. When A.J.L was unwilling to tell the story himself, Iafrate began the story saying that the boy turtle puppet was busy doing something and the mom turtle puppet wanted him to do something else. The boy turtle puppet wanted to keep doing what he was doing, so the mom turtle puppet began to approach the baby girl turtle puppet and the boy turtle puppet said, "No, no, no. Stop. I'll do it. I'll do it."

After Iafrate told that story, she asked A.J.L. if he would like another puppet to help the little boy. A.J.L. chose a mouse. Iafrate described this as a therapeutic technique where the child chooses a puppet that can be a type of counselor, or someone to help him. Because Iafrate had observed that the boy turtle puppet had acted to stop the mom turtle puppet [**15] before she got to the baby girl turtle puppet, she asked A.J.L. to show her what the mom turtle puppet did to the baby girl turtle puppet that he felt he had to stop. In response, A.J.L. made a fist with his left hand, made a grabbing motion on the table top, and then returned his hand to a fist. At the end of the same session, A.J.L. initiated the puppet play and had the mom turtle puppet pounce on the baby girl turtle puppet and then grab the baby girl turtle puppet with its hands.

At another session, when A.J.L. came in he pointed to the turtle puppet family and said that he wanted Iafrate to tell the same story with the puppets as before. So she took the boy turtle puppet and the mouse puppet and told the story again. This time the boy turtle puppet was coloring and the mom turtle puppet wanted him to take out the trash. When the boy turtle puppet said he would do it later, the mom turtle puppet started to approach the baby girl turtle puppet. The boy turtle puppet said, "Okay, mom. I will do it. Don't hurt." When Iafrate asked, "what would the mom do to the boy turtle?", A.J.L. took the mom turtle puppet and used it to pounce on the baby girl turtle puppet.

He then put the baby [**16] girl turtle puppet on his right hand, and she had him put the boy turtle puppet on the other. Iafrate used the mouse puppet to ask him questions, but A.J.L. would not say yes or no, so they established that, using the turtle puppets, two taps would be "yes" and one tap would be "no." First she used the mouse puppet and asked the *baby girl* turtle puppet, "Does mom ever hurt you?" He tapped twice with the puppet for yes. [3] Iafrate continued stating that the mouse puppet then asked the *baby girl* turtle puppet, "Do you ever tell her to stop?" and the baby girl turtle puppet tapped once for no. She asked, "Do you ever try to run away?" and he tapped twice for yes.

3 At this point in the testimony, appellant objected on the basis of hearsay and the trial court overruled her objection.

Next, she had the mouse puppet say to the *boy* turtle puppet, "Well, do you ever try to stop the mom from hurting the baby?" and he tapped twice for yes. With regard to hurting the baby, she asked, "Do you ever tell her to [**17] stop?" He tapped twice for yes. She then asked, "Do you ever try to run away?" and he tapped twice for yes.

When they worked with the puppets during the next few visits, A.J.L directed Iafrate to use the mom turtle puppet to pounce and jump on the baby girl turtle puppet. When she would do this, A.J.L. would use the boy turtle puppet to grab the baby girl turtle puppet away before the mom turtle puppet could get her. Iafrate [*301] opined that this play indicated that A.J.L. felt like he had to protect his little sister from something going on at home.

When asked to contrast A.J.L.'s behavior when he first came to therapy with Iafrate with his behavior after fourteen sessions of therapy, Iafrate stated that, at the start, A.J.L. was fairly rigid, not spontaneous, and obsessive about things being clean and put away. At the end he was spontaneous, carefree, bouncy, had stopped seeking approval for his actions, and was very much into what he was doing. She noted that his rapid behavioral improvement was likely due to the fact that, in foster care, he was in a home environment where he felt safe and secure.

Based upon Iafrate's education, experience and training, her interaction and observations [**18] of children using play therapy, together with a total absence of any evidence to refute the validity of play therapy, we hold that the trial court did not abuse its discretion in qualifying Iafrate as an expert witness and allowing her to testify regarding her therapy sessions with A.J.L. Moreover, we hold that her testimony was sufficiently reliable under *Nenno* and the trial court did not err by

allowing it.

Appellant also complains that Iafrate's opinion testimony was based upon hearsay. Specifically, she complains of the testimony regarding the session where A.J.L. tapped on the table in response to yes and no questions. An expert may form opinions or make inferences on facts that are not otherwise admissible into evidence if those facts are of the kind reasonably relied upon by experts in the field. *TEX. R. EVID. 703*; *Stam v. Mack, 984 S.W.2d 747, 750 (Tex. App.--Texarkana 1999, no pet.)*; *Sosa ex rel. Grant v. Koshy, 961 S.W.2d 420, 427 (Tex. App.--Houston [1st Dist.] 1997, no pet.)*. An expert may testify regarding the underlying facts and data supporting an expert opinion. *Stam, 984 S.W.2d at 750*; *Sosa, 961 S.W.2d at 427*. [**19] We hold that the trial court did not err by admitting this portion of Iafrate's testimony. Accordingly, we overrule appellant's second point.

FACTUAL SUFFICIENCY

In her supplemental points one, two and three, appellant complains that the evidence is factually insufficient to support the jury's findings under *family code sections 161.001(1)(D)* (endangerment by conditions or surroundings), *(E)* (endangerment by conduct) and *161.001(2)* (best interest of the child). *Tex. Fam. Code Ann. §§ 161.001 (1)(D), (2)*. [4] To preserve a challenge to the factual sufficiency of the evidence for appellate review, the party must file a motion for new trial in the trial court. *TEX. R. CIV. P. 324(b)(2)*, (3); *Cecil v. Smith, 804 S.W.2d 509, 510, 34 Tex. Sup. Ct. J. 383 (Tex. 1991)*; *In re J.M.S., 43 S.W.3d 60, 62 (Tex. App.--Houston [1st Dist.] 2001, no pet.)*; *In re C.E.M., 64 S.W.3d 425, 428 (Tex. App.--Houston [1st Dist.] 2000, no pet.)*. Appellant [*302] did not file a motion for new trial. Therefore, she has waived her right to complain about the factual sufficiency of the evidence to support the jury's findings. *See J.M.S., 43 S.W.3d at 62* [**20] (holding that sufficiency issues must be properly preserved in termination of parental rights case just as in any other civil case); *C.E.M., 64 S.W.3d at 427-28* (same). The portions of supplemental points one and two that complain of factual insufficiency are waived. Supplemental point three only challenges the factual insufficiency of the evidence to support the jury's best interest finding. Because appellant waived all of her factual sufficiency challenges on appeal, we overrule appellant's supplemental point three in its entirety.

4 In appellant's brief, she cites "*Tex. Fam. Code, Sec. 161.003(D)*" and "*Tex. Fam. Code Sec. 161.003(E)*" when discussing legal and factual insufficiency on the grounds for termination. However, she tracks the language used in *sections 161.001(1)(D),(E) and 161.001(2). TEX. FAM. CODE ANN. §§ 161.001(1)(D),(E), (2). Section 161.003 of the family code* does not have a section (E), and *section 161.003(d)* states, "An attorney appointed under Subsection (b) shall represent the parent for the duration of the suit unless the parent, with the permission of the court, retains another attorney." *TEX. FAM. CODE ANN. § 161.003(d)*. Appellant does not complain that there was any error regarding representation by her attorney. Therefore, we presume that appellant intended to refer to *family code sections 161.001(1)(D),(E) and 161.001(2)* and will conduct our analysis accordingly.

[**21] **LEGAL INSUFFICIENCY**

In appellant's supplemental points one and two, she also complains that the evidence was legally insufficient to prove that she knowingly placed or allowed the children to remain in conditions and surroundings that endangered their physical or emotional well being, and engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered their physical or emotional well being.

A parent's rights to "the companionship, care, custody and management" of his or her children are constitutional interests "far more precious than any property right." *Santosky v. Kramer, 455 U.S. 745, 758-59, 102 S. Ct. 1388, 1397, 71 L. Ed. 2d 599 (1982)*. "While parental rights are of constitutional magnitude, they are not absolute. Just as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right." *In re C.H., 89 S.W.3d 17, 26, 45 Tex. Sup. Ct. J. 1000 (Tex. 2002)*. In a termination case, the State seeks not just to limit parental rights but to end them permanently--to [**22] divest the parent and child of all legal rights, privileges, duties, and powers normally existing between them, except for the child's right to inherit. *TEX. FAM. CODE ANN. § 161.206(b)* (Vernon Supp. 2004); *Holick v. Smith, 685 S.W.2d 18, 20, 28 Tex. Sup. Ct. J. 230 (Tex. 1985)*. We

strictly scrutinize termination proceedings and strictly construe involuntary termination statutes in favor of the parent. *Holick, 685 S.W.2d at 20-21*; *In re D.T., 34 S.W.3d 625, 630 (Tex. App.--Fort Worth 2000, pet. denied)* (op. on reh'g).

Termination of parental rights is a drastic remedy and is of such weight and gravity that due process requires the petitioner to justify termination by "clear and convincing evidence." *TEX. FAM. CODE ANN. §§ 161.001, 161.206(a)*; *In re G.M., 596 S.W.2d 846, 847, 23 Tex. Sup. Ct. J. 262 (Tex. 1980)*. This intermediate standard falls between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings. *G.M., 596 S.W.2d at 847*; *D.T., 34 S.W.3d at 630*. It is defined as the "measure or degree of proof that will [**23] produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *TEX. FAM. CODE ANN. § 101.007* (Vernon 2002).

The higher burden of proof in termination cases alters the appellate standard of legal sufficiency review. *In re J.F.C., 96 S.W.3d 256, 265, 46 Tex. Sup. Ct. J. 328 (Tex. 2002)*. The traditional no-evidence standard does not adequately protect the parent's constitutional interests. *Id.* In reviewing the evidence for legal sufficiency in parental termination cases, we must determine "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction" that the grounds for termination were proven. *Id. at 265-66*. We [*303] must review all the evidence in the light most favorable to the finding and judgment. *Id. at 266*. This means that we must assume that the factfinder resolved any disputed facts in favor of its finding if a reasonable factfinder could have done so. *Id.* We must also disregard all evidence that a reasonable factfinder could have disbelieved. *Id.* We must, however, consider undisputed evidence even if it does not [**24] support the finding. *Id.*

ENDANGERMENT BY CONDUCT

First, we will review the evidence of endangerment by conduct under family code *section 161.001(1)(E). TEX. FAM. CODE ANN. § 161.001(1)(E)*. When appellant was approximately seven months to a year old, her mother abandoned her, leaving her with her grandmother. Her grandmother went to George and Betty Tidwell for help in caring for appellant. The Tidwells helped care for appellant part-time until they got full custody of her at age eleven or twelve. Appellant began sneaking out, having behavioral problems, and using drugs. The Tidwells eventually placed her in a long-term residential psychological treatment facility for a year. By age fourteen she was in the custody of DFPS.

Appellant ran away from custody often and got involved with drugs and prostitution by age sixteen. By age twenty-five, appellant had an extensive criminal history. At age nineteen, in 1995, she was convicted of theft and was placed on probation. She was also convicted of theft in 1996 and received probation to be served concurrently with the 1995 offense. However, the probation was revoked and she went to jail for a month [**25] in October of 2000. She was again convicted of theft in July 2001, this time a felony offense, and received three years' probation. At the time of the termination trial, appellant had been incarcerated for seventy-six days because the State had filed a motion to revoke her probation for the felony offense.

Appellant gave birth to her first child, A.J.L., while living in Kansas in September of 1998. Appellant's history with KCPS began in December of 1998 and continued as follows:

> (1) A.J.L. was three months old in December 1998 when KCPS first investigated appellant for possible abuse because A.J.L. had a bruise or scratch on his cheek. Appellant claimed that a two-year-old girl was jumping on the bed and hit A.J.L. with her shoe and caused the mark.
>
> (2) During the same investigation, KCPS asked appellant about a bite mark on A.J.L.'s leg and an accident that sent A.J.L. to the emergency room with a bloody nose. Appellant claimed a girl at daycare bit him and that he got the bloody nose when she was carrying him and fell.
>
> (3) A.J.L. was four months old when KCPS investigated appellant again for physical abuse of A.J.L. because he had a bump on his head. Appellant claimed that [**26] he had fallen off the couch and hit his head.
>
> (4) KCPS removed A.J.L. from

appellant's custody in 1999.

After KCPS removed A.J.L., the Tidwells went to Kansas and convinced the Kansas trial court to release appellant and A.J.L. into their custody. The trial court agreed, and appellant and A.J.L. moved back to Denton, Texas with the Tidwells for six months.

The Texas DFPS began investigating appellant in September 2000 because of an allegation of abuse of A.J.L. Specifically, A.J.L. had a burn on his hand and a bite mark on his chest. Appellant claimed that she had left the iron on the floor, plugged in, but set on "off." She assumed that [*304] while she was taking a nap on the couch, A.J.L. turned the iron on and burned his hand by accident. The burn covered the back of his hand and his first three fingers. Appellant woke up to A.J.L. crying. He pointed to the iron and said, "Hurt."

Appellant claimed that the bite on A.J.L.'s chest occurred when she bit him in her sleep because she was having a nightmare. DFPS removed A.J.L. from appellant's custody and placed him with the Tidwells. However, after appellant completed the required DFPS service plan, DFPS returned A.J.L. to appellant [**27] in June 2001.

Meanwhile, appellant gave birth to C.R.L. in March 2001. C.R.L.'s father was Donald Wall. [5] DFPS investigated appellant again in December 2001. At the time, A.J.L. was three years old and C.R.L. was nine months. This time, DFPS investigated appellant for abuse of C.R.L. when daycare workers reported that C.R.L. had a large two-inch bruise on her forehead when she was dropped off at daycare. Appellant claimed that C.R.L. did not have the bruise when she dropped her off that morning. Appellant told the investigators that the injury must have been caused by "bedhead," sleeping pressed against her blankets, or by hitting her head on the playpen.

5 A.J.L.'s father was Randall "Scotty" Trevino.

DFPS called the police in to investigate. During their investigation, the police noted that the playpen did not have any hard parts and the sides were made of mesh. Additionally, the police spoke to many witnesses who had heard A.J.L. say that appellant had caused C.R.L.'s injury. DFPS removed the children from [**28] appellant's custody in December 2001. The children were initially placed with the Tidwells, and DFPS brought termination proceedings against appellant. By September 2002, appellant had been incarcerated because the State initiated proceedings to revoke her probation for her prior felony offense.

At trial, multiple witnesses testified to appellant's violent nature. Both Betty and George Tidwell testified at trial and described appellant as violent. Betty Tidwell stated that when appellant was a baby she bit people all the time. Appellant admitted that at age fourteen, while she was living with the Tidwells, she bit Betty Tidwell during an argument. The bite was severe enough to leave a permanent scar. George Tidwell testified that on one occasion when appellant lived at their house, she cut the neighbor's arm with a pocket knife. Additionally, both of the Tidwells described a fight that appellant had with their daughter after A.J.L. was born during which appellant attempted to blind her by clawing her eyes out.

The Tidwells also described two instances in which appellant had threatened to kill them. After appellant lived in the long-term residential treatment facility, the Tidwells [**29] dropped their suit to get custody of her and relinquished her into DFPS custody. Around this time, appellant called Betty Tidwell and told her that she was going to come back to their house on her seventeenth birthday and kill her. Years later, after the birth of her children, appellant called the Tidwells in June of 2002 and told George, "I swear to God, if I lose these kids, I'm going to kill you and your family." In response to this threat, the Tidwells got a protective order against appellant. Both Betty and George Tidwell believe appellant was capable of killing them during one of her fits of rage.

Denton Police officer Tim Scott testified that he investigated appellant for assault in August 2002. The incident occurred at William Fields's house. Apparently, appellant [*305] went to his house, argued with Fields and bit his upper arm during the argument. The officer saw the bite and noted that it was bloody and that the blood ran all the way down Fields's arm to his fingers, the skin was gnarled, and the bite was the type that grabbed hold and ripped the skin loose. He opined that it was a "nasty" bite. Officer Scott noted that appellant seemed high on drugs. The police arrested appellant [**30] for assault/family violence. At another time, appellant got into a fight with a friend named Linda Nabors. While the two were arguing, appellant got into her car and left, and

Nabors followed in her own car. Nabors decided to give up the chase and passed appellant as she drove away, when appellant began following Nabors. Eventually, Nabors pulled over onto the side of the road to attempt to talk to appellant. As she stood in front of appellant's car, appellant accelerated and hit Nabors, throwing her up onto the hood of the car and causing serious injuries.

After a review of the evidence, we hold that the physical symptoms of abuse on the children, appellant's admitted drug abuse, her criminal history and incarceration, the expert witness testimony regarding A.J.L., appellant's long history with DFPS and KCPS, and her continuing course of violent conduct are all sufficient to support the jury's finding that appellant engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered their physical or emotional well being. We overrule the remainder of appellant's supplemental point two.

ENDANGERMENT BY ENVIRONMENT OR SURROUNDINGS

To [**31] support the trial court's order terminating appellant's parental rights, the State only had to present sufficient evidence to support one of the *section 161.001(1)* factors and show that termination was in the best interest of the child under *section 161.001(2). TEX. FAM. CODE ANN. § 161.001*; *In re C.A.J., 122 S.W.3d 888, 892-93 (Tex. App.--Fort Worth 2003, no pet.)*; *In re W.J.H., 111 S.W.3d 707, 714 (Tex. App.--Fort Worth 2003, pet. denied)*; *In re W.S., 899 S.W.2d 772, 776 (Tex. App.--Fort Worth 1995, no writ)*. Because we hold that there was sufficient evidence to support the jury's findings under *family code section 161.001(1)(E)* and because appellant waived her complaint regarding best interest under *section 161.001(2)*, we need not address appellant's supplemental point one complaining of legal insufficiency under *section 161.001(1)(D). See TEX. FAM. CODE ANN. § 161.001*; *TEX. R. APP. P. 47.1*; *In re S.F., 32 S.W.3d 318, 320 (Tex. App.--San Antonio 2000, no pet.)*. We overrule the remainder of supplemental point one.

CONCLUSION

Having overruled all [**32] of appellant's points, we affirm the trial court's order of termination.

TERRIE LIVINGSTON

JUSTICE

1 of 1 DOCUMENT

ROBERT FERDINAND FOWLER, Appellant v. THE STATE OF TEXAS, Appellee

No. 10-96-190-CR

COURT OF APPEALS OF TEXAS, TENTH DISTRICT, WACO

958 S.W.2d 853*; *1997 Tex. App. LEXIS 6161

November 26, 1997, Delivered
November 26, 1997, Filed

PRIOR HISTORY: [**1] From the 54th District Court McLennan County, Texas. Trial Court # 96-198-C.

This Opinion Substituted by the Court for Withdrawn Opinion of November 5, 1997, Previously Reported at: *1997 Tex. App. LEXIS 5702*.

DISPOSITION: Affirmed.

JUDGES: Before Chief Justice Davis, Justice Cummings, and Justice Vance.

OPINION BY: BILL VANCE

OPINION

[*856] **OPINION**

Robert Fowler was indicted for and charged with the offense of aggravated kidnapping. *TEX. PEN. CODE ANN. § 20.04* (Vernon Supp. 1997). Following a jury trial, Fowler was found guilty and withdrew his election for the jury to assess punishment. The court sentenced him to life in prison. Fowler appeals on five points of error. His first three points argue that the court erred [*857] in admitting the testimony of Donna Gregory, a family violence counselor, when such testimony was not shown to be reliable, bolstered the testimony of the victim, was not relevant to any issue in the case, and was not on a subject beyond the experience and knowledge of most jurors. His fourth point complains of egregious harm resulting from the submission of a theory in the charge which was not alleged in the indictment. Finally, Fowler asserts [**2] that the finding that he did not voluntarily release the victim was against the great weight and preponderance of the evidence. We will affirm the judgment.

FACTS

Robert and Carol Fowler married in June of 1994. After filing for divorce in October of 1995, Carol attempted a reconciliation with Fowler. Determining that their marriage would not work, Carol left him again on December 3. On Tuesday, December 5, Fowler followed her to work, honking his horn and driving recklessly while trying to run her off the road. When she finally stopped her vehicle, he forced her to leave it behind and get into his truck. He continuously threatened Carol's life, hitting her and scaring her with a shotgun. It was his goal, he told Carol, that they die together. Once he began to calm down, Fowler threw the gun out of the truck and drove to the Bellmead Police Department. He offered to let Carol go, but she did not leave for fear, she testified, that he would run over her once she got out of the truck. Fowler eventually drove to a motel where he intended for them to stay overnight before leaving town. The next morning, they were awakened by a phone call from the police indicating that they were surrounded [**3] and requesting that Fowler release Carol. He begged Carol to

tell the police that she was with him willingly, but she refused. Fowler eventually opened the door and surrendered, leaving Carol alone in the motel room.

THE CHARGE

In his fourth point, Fowler asserts that the trial court erred in submitting a theory in the charge that was not alleged in the indictment. *See Gooden v. State, 576 S.W.2d 382 (Tex. Crim. App. 1979)*. We agree. *Section 20.03 of the Penal Code* defines kidnapping as intentionally or knowingly abducting another person. Abduction occurs by restraining a person with intent to prevent his liberation by 1) secreting or holding him in a place where he is not likely to be found or 2) using or threatening to use deadly force. *TEX. PEN. CODE ANN. § 20.01(2)* (Vernon 1994). Kidnapping is aggravated when the defendant:

(a) intentionally or knowingly abducts another person with the intent to:

(2) use him as a shield or hostage; . . .

(5) terrorize him or a third person; . . .

(b) intentionally or knowingly abducts another person and uses or exhibits a deadly weapon during the commission of the offense.

Id. § 20.04. The indictment alleged in pertinent [**4] part:

[Fowler] did then and there with intent to use Carol Fowler as a hostage and to terrorize [her], and did then and there intentionally and knowingly abduct Carol Fowler by restricting [her] movements. . . without her consent, so as to interfere substantially with her liberty, by moving her from one place to another, with the intent to prevent her liberation by secreting and holding her in a place where she was not likely to be found,

DEADLY WEAPON ALLEGATION

And it is further presented to said Court that during the commission of the above described felony, the said Defendant did use and exhibit a deadly weapon, to-wit: a firearm, that in the manner of its use and intended use was capable of causing death and serious bodily injury.

The charge instructed the jury that aggravated kidnapping was kidnapping "committed with the intent to use [the victim] as a hostage, or to terrorize her; *or if the actor uses or exhibits a deadly weapon in the commission of the offense*." Thus, the application paragraph authorized a conviction if the jury found that Fowler used or exhibited a deadly weapon when he abducted Carol. This was [*858] improper. Although [**5] each of these are theories supported by the penal code under which one could be convicted of aggravated kidnapping, the indictment fails to charge Fowler with using or exhibiting a deadly weapon and, as a result, he could not be convicted on this basis.

Because the deadly weapon allegation was not included as part of the substantive offense in the indictment, *i.e.* it was not listed as an element of the crime, it could not support a conviction if the jury found Fowler used or exhibited a deadly weapon, but did not find that he used Carol as a hostage or terrorized her. Rather, the deadly weapon assertion in the second paragraph of the indictment served only to put Fowler on notice of the State's intention to seek a finding under *Article 42.18 of the Code of Criminal Procedure.* [1]

1 *Article 42.18, section 8(b)(3) of the Code of Criminal Procedure* reads in relevant part:

> if the judgment contains an affirmative finding under [Article 42.12(3g)(2)], [a prisoner] is not eligible for release on parole until his actual calendar time served, without consideration of good conduct time, equals one-third of the maximum sentence or thirty calendar years, whichever is less, but in no event shall he be eligible for release on parole in less than two calendar years.*TEX. CODE CRIM. PROC. ANN. art. 42.18* (Vernon Supp. 1997).

[**6] A defendant is entitled to some form of notice that the use of a deadly weapon will be a fact issue at trial. *Ex parte Beck, 769 S.W.2d 525, 526 (Tex. Crim. App. 1989)*. In a jury case, the court is authorized to enter an affirmative finding as to whether a deadly weapon was used or exhibited during the commission of a felony in only three situations: when the jury has (1) found guilt as alleged in the indictment and the deadly weapon has been specifically pled as such using "deadly weapon" nomenclature in the indictment; (2) found guilt as alleged in the indictment but, though not specifically pled as a deadly weapon, the weapon pled is per se a deadly weapon; or (3) affirmatively answered a special issue on deadly weapon use. *Davis v. State, 897 S.W.2d 791, 793*

(Tex. Crim. App. 1995). Although due process does not require that such notice appear in the indictment, it "probably should appear there." *Ex parte Patterson, 740 S.W.2d 766, 776 (Tex. Crim. App. 1987)*. Thus, to ensure that the defendant receives adequate notice, it is advisable to allege the use or exhibition of a deadly weapon in the indictment. In the present case, the indictment has been used for dual [**7] purposes. On one hand, it is the written statement of the grand jury accusing Fowler of aggravated kidnapping under *section 20.04(a) of the Penal Code*. *See id at 775*. On the other hand, the indictment gives Fowler notice of the State's intention to seek a finding under *Article 42.18 of the Code of Criminal Procedure.* Because the indictment did not allege aggravated kidnapping by using a deadly weapon as is authorized under 20.04(b), but rather alleged only that Fowler kidnapped Carol with the intent to terrorize her, or use her as a hostage, the charge should have been limited to those theories.

Because there was no objection to the charge, we must review the record to see if the charge error--authorizing a conviction on a theory not alleged in the indictment--was so egregious that Fowler was denied a fair and impartial trial. *Almanza v. State, 686 S.W.2d 157, 160 (Tex. Crim. App. 1984)*. In *Ross v. State*, a similar question was held to be "fundamental and calculated to injure the rights of the appellant to the extent that he has not had a fair trial." *487 S.W.2d 744, 745 (Tex. Crim. App. 1972)*. The court went on to say that the harm required reversal because the evidence [**8] was insufficient to support a conviction under the allegations in the indictment. *Id*. However, in *Lang v. State* the Dallas Court reached a different result under *Almanza* [2] when the evidence was found to be sufficient to support the conviction under the allegations of the indictment. *Lang v. State, 698 S.W.2d 223, 226* (Tex. App.--Dallas 1985, no pet.).

2 The harm test under *Almanza* had not yet been determined when *Ross* was decided.

We find the evidence sufficient to support a conviction of the offense alleged in the indictment. First, the evidence that Fowler intended to terrorize Carol is overwhelming. There is Carol's corroborated testimony that Fowler forced her off the road and into his [*859] truck. She testified that he threatened to kill her multiple times, claiming that they were going to die together, that she would never see her children again, and that her brains would be "splattered all over the place" if she resisted. Second, there is sufficient evidence to warrant [**9] a finding that Fowler intended to use Carol as a hostage. Once the police had him surrounded, Fowler spent approximately forty-five minutes with Carol trying to convince her to tell the police she was there voluntarily. During this entire time, he refused to let Carol speak with the police or leave the room. Both the hostage theory and the theory that he terrorized her are supported by the evidence.

Recently, the Court of Criminal Appeals held in *Malik v. State* that the sufficiency of the evidence should be measured by the elements of the offense as defined by the "hypothetically correct jury charge for the case." *953 S.W.2d 234, , 1997 Tex. Crim. App. LEXIS 60,* *19 (Tex. Crim. App. 1997). Such a charge would be one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Id*. Using this analysis, we would reach the same answer. The evidence is sufficient to sustain the conviction for the indicted offense using a hypothetically correct charge.

One other [**10] factor requires examination. In *Lang*, the Dallas Court held that having determined the evidence to be sufficient was not enough. "Further analysis is required because the converse of the *Ross* holding does not necessarily follow: a charge authorizing conviction on a theory not alleged in the indictment is not necessarily free from egregious error, even though the evidence is sufficient to support the allegations of the indictment." *Lang, 698 S.W.2d at 225*. The *Lang* opinion then addressed the appellant's claim that he was denied notice of and an opportunity to defend against the theory submitted in the charge. Fowler does not, however, complain of any lack of notice or opportunity to defend, rather, he suggests that the fact that there was no dispute as to the presence of a weapon allowed the jury to avoid the truly contested issue of whether Carol went with him and stayed with him voluntarily. He asserts that merely because the verdict may have been based on the improperly submitted theory, he has suffered egregious harm.

When determining whether a defendant suffered egregious harm, we must examine whether the error affected the very basis of the case, deprived the [**11]

defendant of a valuable right, or vitally affected his defensive theory. *Hutch v. State, 922 S.W.2d 166, 172 (Tex. Crim. App. 1996)*. We believe that because the evidence is sufficient to support a conviction under the indictment, it cannot be said that the basis of the case was affected nor that Fowler was deprived of a valuable right. Id; *Lang, 698 S.W.2d at 226*. Egregious harm could have occurred only if Fowler's defensive theory was affected. We find that it was not. Because he could not dispute the presence of the gun, Fowler's only line of defense was to attack Carol's credibility, whether the charge included the additional theory or not. Thus, any harm he suffered as a result of the erroneous charge was not egregious and does not require reversal. *Almanza, 686 S.W.2d 157*. Point four is overruled.

SUFFICIENCY OF THE EVIDENCE OF RELEASE

After the jury found Fowler guilty, the court assessed his punishment at life in prison. In his fifth point, Fowler suggests that the court's failure to find that he voluntarily released the victim is against the great weight and preponderance of the evidence. We disagree. *Section 20.04 of the Penal Code* provides that "at [**12] the punishment phase of a trial, a defendant may raise the issue of whether he voluntarily released the victim in a safe place. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree." *TEX. PEN. CODE ANN. § 20.04*. The proper standard is whether "considering all the evidence relevant to the issue at hand, the judgment is so against the great weight and preponderance of the evidence as to be manifestly unjust." *Meraz v. State, 785 S.W.2d 146, 154-55 (Tex. Crim. App. 1990)*; [*860] *Moranza v. State, 913 S.W.2d 718, 724* (Tex. App.--Waco 1995, pet. ref'd).

Once the police surrounded the motel in which Fowler and Carol were staying, they demanded that Fowler release Carol and surrender. After approximately thirty to forty-five minutes, Fowler opened the door and came out, leaving Carol unharmed but crying inside the room. We believe this evidence is sufficient to support a finding that Fowler never "released" the victim. The police asked him to release her, but he did not. When he finally surrendered, the police found Carol in the motel room. Because there was no release, Fowler cannot be said [**13] to have voluntarily released her. Point five is overruled.

EXPERT WITNESS TESTIMONY

Fowler's first three points complain that the trial court erred in allowing Donna Gregory, a family violence counselor, to testify as an expert witness. He initially argues that admitting the testimony was error because it improperly bolstered Carol's testimony. He did not object on this basis at trial and, as a result, waived review of this point. *See Cook v. State, 858 S.W.2d 467, 474 (Tex. Crim. App. 1993)*; *Webb v. State, 899 S.W.2d 814, 818* (Tex. App.--Waco 1995, pet. ref'd)(An objection on one legal theory will not support a point of error on a different theory). Fowler's second and third points question the relevancy and the reliability of the expert's testimony, where the State did not attempt to establish the admissibility of the evidence under *Kelly v. State. 824 S.W.2d 568 (Tex. Crim. App. 1992)*. We will address these points simultaneously.

THE DISPUTED EVIDENCE

Gregory, the State's expert, testified regarding domestic violence and the problems it creates for the victims generally, and also about the specific counseling she had done with Carol Fowler. Her education and [**14] experience consisted of an M.A. in Psychology, a two-thousand hour internship at the Family Abuse Center in Waco, and one year of private practice. She also indicated that she had attended several workshops and seminars. After answering questions regarding her education and experience, Gregory began her testimony regarding family violence, the common long-term responses to that violence, and whether Carol Fowler exhibited those responses. It appears from the record that her testimony was based solely on personal experience.

STANDARD FOR ADMISSIBILITY UNDER RULE 702

Rule 702 of the Rules of Criminal Evidence, which governs the admission of expert testimony, provides as follows:

If scientific, technical, or *other specialized knowledge* will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

TEX. R. CRIM. EVID. 702 (emphasis added). It is

identical to Federal Rule 702 and Texas Rule of Civil Evidence 702.

This rule contains three requirements for the admission of expert testimony: (1) the [**15] witness must be qualified; (2) the proposed opinion testimony must be grounded in "scientific, technical, or other specialized knowledge"; and (3) the testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id; Robinson, 923 S.W.2d 549, 556 (Tex. 1995)* (referring to the Texas Rules of Civil Evidence). The Court of Criminal Appeals has held that testimony regarding scientific evidence offered pursuant to Rule 702 of the Rules of Criminal Evidence must be relevant and reliable. *See Kelly, 824 S.W.2d at 573.*

The threshold determination for a trial court to make regarding the admission of expert testimony based on "scientific knowledge" is whether that testimony will help the trier of fact understand the evidence or determine a fact in issue. *Id at 572*. Once it is determined that the proffered evidence will assist the trier of fact, the trial court must determine whether the testimony is relevant. *Id.* To be relevant, the proposed testimony must be "sufficiently tied to the facts of the case that it will assist the trier of fact in resolving a factual dispute." [*861] *Robinson, 923 S.W.2d at 556*. Next, the [**16] trial court must establish that the evidence is sufficiently reliable to help the jury in reaching accurate results. *Kelly, 824 S.W.2d at 573*. The proponent of scientific evidence has the burden of proving its relevancy as well as the scientific reliability by clear and convincing evidence. *Id*. Unreliable scientific evidence simply will not assist the jury to understand the evidence or accurately determine a fact in issue; such evidence obfuscates rather than leads to an intelligent evaluation of the facts. *Id*. If the judge determines that the testimony is both relevant and reliable, he must then determine whether its probative value is outweighed by the "danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." [3] *Robinson, 923 S.W.2d at 557; see Kelly, 824 S.W.2d at 572*.

3 We note that the Supreme Court does not appear to require a Rule 403 objection prior to the trial court balancing the probative value against unfair prejudice, confusion of the issues, etc. It appears that a Rule 403 balancing test is required in order for the trial court to determine if the testimony will assist the jury.

[**17] To satisfy his reliability burden, the proponent of the evidence must make a technical showing, outside the presence of the jury, demonstrating: (1) a valid underlying scientific theory, (2) a valid technique applying the theory, and (3) that the technique was properly applied on the occasion in question. *See Kelly, 824 S.W.2d at 573*. Additionally, there are several factors that may influence a trial court's determination of reliability. These include: (a) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if ascertainable; (b) the qualifications of the expert testifying; (c) the existence of literature supporting or rejecting the underlying theory and technique; (d) the potential rate of error of the technique; (e) the availability of other experts to test and evaluate the technique; (f) the clarity with which the underlying theory and technique can be explained to the court; and (g) the experience and skill of the person who applied the technique on the occasion in question. *See id.* [4]

4 *This is the same standard used by the United States Supreme Court and the Texas Supreme Court.* See *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-90, 113 S. Ct. 2786, 2795, 125 L. Ed. 2d 469 (1993); E.I. du Pont de Nemours and Co., Inc. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995)*. In *Daubert*, the Court stated that *Rule 702 of the Federal Rules of Evidence* requires scientific expert testimony to be relevant and reliable. *Rule 702*, the Court noted, requires the proffered testimony to be: (1) "scientific knowledge" (2) which will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert, 509 U.S. at 589, 113 S. Ct. at 2795*. To constitute "scientific knowledge," the proffered testimony must be reliable, and to be helpful to the trier of fact, the evidence must be relevant, *i.e.*, have a valid scientific connection to the pertinent inquiry. *Id.*

[**18] PRESERVATION OF COMPLAINT

In *Kelly*, the Court states that once the party opposing the evidence objects, the proponent bears the burden of demonstrating its admissibility. The State urges us to find that Fowler never properly objected, the State never had a burden to demonstrate admissibility under *Kelly*, and error was not properly preserved.

Fowler first raised the admissibility question in a motion in limine, requesting that the court order the State "not to call any expert witness before the jury until the Court has had an opportunity to determine qualifications and such competency of the witness to testify." His motion was granted.

The State attempted to offer Gregory's testimony during its case-in-chief. Fowler objected that she had limited experience, had only testified a few times, and that her testimony referred to family abuse. The State responded that *Fielder* and *Duckett* both recognize the use of experts to explain behavior that would not be ordinarily understandable to the jury. *See Fielder v. State, 756 S.W.2d 309 (Tex. Crim. App. 1988)*; *Duckett v. State, 797 S.W.2d 906 (Tex. Crim. App. 1990)*. [5]

5 Both *Fielder* and *Duckett* were decided prior to *Kelly*.

[**19] The court then indicated reservations about whether the subject matter of Gregory's testimony was outside the understanding [*862] of the jury and expressed concern about its admissibility. Fowler agreed. At this point, the State withdrew its offer of the evidence. On rebuttal, the State re-offered the testimony and Fowler objected to relevancy, hearsay, denial of due process, prejudice, and competency of the evidence.

To preserve a complaint for appellate review, a party must have presented to the trial court a timely objection stating the specific grounds for the objection, if the grounds are not apparent from the context. *TEX. R. APP. P. 33.1*. All a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the court is in a position to do something about it. *Lankston v. State, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)*. Although his objection was far from model, using this test we believe that Fowler sufficiently relayed his objections to the court. Regarding Gregory's lack of experience and the testimony's [**20] inability to assist the jury, Fowler made clear objections. Likewise, he properly objected to the relevancy of the evidence. Essentially, we believe Fowler's objection preserved his complaint about the admissibility of Gregory's testimony under *Kelly*.

SCIENTIFIC KNOWLEDGE VS. SPECIALIZED KNOWLEDGE

Some have suggested that we distinguish between "scientific knowledge" and "specialized knowledge." The testimony in question in this case, should a distinction be necessary, would be categorized as "specialized knowledge." The State urges us to accept the proposition that Kelly does not apply to psychological sciences, as they are not susceptible to the same scrutiny as the "hard sciences" and thus, fall out of the category of "scientific knowledge." [6] Testimony of behavioral sciences, the State claims, may be necessary to assist the trier of fact with the significance of behavior that the jury may not understand. This testimony, it argues, is more like the expert testimony in *Duckett* and *Fielder*, where it was offered to rehabilitate another witness. *Duckett, 797 S.W.2d at 920*; *Fielder, 756 S.W.2d at 320*. The State also urges that, under *Duckett*, the evidence [**21] has greater probative value as rebuttal evidence after the victim has been impeached. However, in *Duckett*, the Court of Criminal Appeals held that the proper inquiry was whether the testimony was "otherwise admissible" under the rules of evidence. *Id.* Because *Kelly* was decided post-*Duckett*, we must examine the evidence in light of *Kelly*.

6 In considering whether *Daubert* applies to the soft sciences, a look at pre-*Daubert* decisions shows that the United States Supreme Court made no distinction between soft and hard scientific evidence. "There is nothing in the decisions of the United States Supreme Court which indicates that expert testimony concerning human motivation and behavioral sciences, or what some call "soft" scientific evidence, is subject to a set of rules different from other expert testimony." Charles Bleil, *Evidence of Syndromes: No Need for a "Better Mousetrap,"* 32 S. Tex. L.J. 37, 74 (1990).

Additionally, relying on Justice Daughinot's concurrence in *Forte v.* [**22] *State*, the State urges that "testimony on subjects such as domestic violence, battered spouse syndrome, and sexual assaults, is not amenable to the *Kelly* test." *935 S.W.2d 172* (Tex. App.--Fort Worth 1996, pet. ref'd). However, in both *Forte* and *Jordan v. State* a majority of the Fort Worth court addressed the issue differently. *Id*; *950 S.W.2d 210* (Tex. App.--Fort Worth 1997, pet. filed) (both cases dealt with the admissibility of expert testimony regarding the reliability of eyewitness testimony). In *Jordan*, because the case was on remand with a directive to "determine whether the testimony was sufficiently reliable under

Rule 702," the court assumed that the Court of Criminal Appeals intended *Kelly* to apply, since it "applies to all scientific evidence offered under *Rule 702*." [7] *Id at 212*. We likewise believe that this was the intention of the Court of Criminal Appeals. Knowing that the testimony in question regarded the reliability of eyewitness testimony, the Court detailed the history of *Rule 702*, including *Kelly*, *Daubert*, and *Robinson*. The State, nevertheless, argues that there is no basis [*863] for conducting a reliability hearing [**23] for psychological evidence because it is unlike scientific knowledge, which must be derived by the scientific method and appropriately validated and no such method is used in the psychological context. *Nations v. State, 944 S.W.2d 795* (Tex. App.--Austin 1997, pet. filed); *Daubert, 509 U.S. at 590, 113 S. Ct. at 2796*. We find this argument to be unpersuasive.

7 *See Jordan v. State, 928 S.W.2d 550 (Tex. Crim. App. 1996)*.

In *Nations*, the Austin Court was directed by the Court of Criminal Appeals to reconsider the exclusion of expert testimony regarding the reliability of eyewitness testimony in light of its remand of *Jordan v. State, 928 S.W.2d 550 (Tex. Crim. App. 1996)*. The Austin Court recognized that *Rule 702* places the trial judge in the role of a "gatekeeper" who must ensure that scientific testimony is not only relevant but reliable, but questioned whether "under the current law in this state interpreting *Rule 702* . . . it is appropriate to conduct a hearing on the reliability of [**24] evidence from the field of psychology." *Nations, 944 S.W.2d at 800*. However, after questioning whether this type of evidence should undergo a *Kelly* analysis, the court in fact subjected it to such an analysis. *See id. at 801-02*.

Additionally, we believe the Court of Criminal Appeal's decision in *Jordan* dictates that *Kelly* applies to "specialized knowledge," specifically the field of psychology. *928 S.W.2d 550*. Likewise, *Daubert*, the federal equivalent of *Kelly*, has been applied to psychological testimony. In *Gier v. Educational Service Unit No. 16, 66 F.3d 940 (8th Cir. 1995)*, the Eighth Circuit Court of Appeals affirmed the trial court's limitation of expert testimony regarding evaluation of mentally retarded students, holding that the testimony was unreliable under *Daubert*. "Under *Daubert*, a district court must engage in an assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *66 F.3d at 943*. Similarly, in *State v. Foret* the Louisiana Supreme Court adopted the *Daubert* standard where a child [**25] psychologist testified to "Child Sexual Abuse Accommodation Syndrome." *628 So. 2d 1116 (La. 1993)*. "Psychodynamic theories on the explanation of human behavior is, at best, a science that is difficult to impossible to test for accuracy. This untestability comes from its very nature as an opinion as to the causes of human behavior, and the fact that the methods for testing the results of psychoanalysis are rife with the potential for inaccuracy." *Id. at 1125*. "This type of evidence is of highly questionable scientific validity, and fails to unequivocally pass the *Daubert* threshold test of scientific reliability." *Id*. Similarly, in *Forte v. State*, *Kelly* was applied to determine the reliability of expert testimony regarding eyewitnesses. *935 S.W.2d 172*. In concluding that the testimony was not reliable, the court held:

> Appellant in the instant case did not meet his burden of proving either the validity of the scientific theories underlying [the] expert testimony or the validity of the method used for applying the theories. There is no evidence that the theories underlying [the] expert testimony are accepted as valid by the relevant scientific community, or [**26] that the alleged existing literature on the theories support or reject these theories. Although [the witness] stated that there was a 'very large body' of literature concerning eyewitness identification, he only mentioned the name of one other person who purports to be an expert in the field and he failed to identify or produce the scientific literature that he allegedly relied on to reach his conclusions.
>
> We can find no reason why evidence regarding the "soft sciences" is not susceptible to *Kelly*. *Rule 702* applies to all testimony given by experts. What the trial court's screening for reliability accomplishes is the elimination of an unsubstantiated, unsupported opinion, *i.e.*, one person's opinion. We cannot legitimately exclude certain expertise from the reliability requirement merely because some critics feel "the criteria used to evaluate scientific testimony cannot be properly applied to fields of expertise which are not based on the scientific method." *Nations, 944 S.W.2d at 800; see Hartman v. State, 946 S.W.2d 60, 63 (Tex. Crim. App. 1997)* (*Rule 702* applies to all scientific evidence, not just "novel" scientific evidence). The fact that it may be more [**27]

difficult to assess [*864] the reliability of testimony regarding the "soft sciences" does not justify eliminating the reliability requirement. We believe that the rule itself extends the responsibility of the trial court as "gatekeeper" to screening evidence from the soft sciences for reliability. *See Nations, 944 S.W.2d at 800*. Whether such evidence will assist the jury in making an intelligent evaluation of the facts rather than obfuscating them depends largely on the reliability of the testimony. *See Kelly, 824 S.W.2d at 573*.

Rule 702 makes no distinction between scientific, technical, or specialized knowledge. The evidence under the rule is treated collectively. Thus, until we are directed (1) how to differentiate between "scientific knowledge" and "specialized knowledge," and (2) what is the appropriate standard for reviewing testimony from an expert with "specialized knowledge," we are not persuaded that this is a necessary distinction. If the specialist who is testifying cannot explain to the court a theory used to reach his or her conclusions, the way that theory is applied by others with the same "specialized knowledge," and the way it will be applied in the [**28] present case, why should such evidence be said to be reliable enough that it will assist a jury? In making this determination about scientific evidence, *Kelly* lists seven *nonexclusive* factors for the trial court to consider. We acknowledge that each of the factors may not be satisfied by the proponent of the evidence. Indeed, all may not apply. There may be others. We believe that if at least some of the *Kelly* factors cannot be satisfied, then the testimony should be excluded.

We conclude that the court should have required that Gregory explain her theory, her technique, and how she applied that technique under the *Kelly* reliability test.

APPLICATION OF KELLY

Our review of the record reveals that the State failed to present sufficient evidence of the validity of the scientific theories underlying Gregory's testimony and the validity of the techniques used to apply the theories. Apart from establishing her qualifications and experience, not a single *Kelly* factor was met. The evidence does not show whether Gregory's theories are accepted as valid, nor whether a single piece of literature has been written to support her testimony. Likewise, whether Gregory has [**29] ever conducted research to test the validity of her theories or been subjected to peer review does not appear in the record. Whether or not the underlying theory and technique could be clearly explained is also unknown, considering that no attempt was made. In short, we find that the State, as the proponent of this evidence, failed to make an adequate showing of a valid underlying scientific theory, a valid technique applying the theory, or that any technique at all was applied in the present case. As a result, we find that the expert testimony fails to meet the *Kelly* test for admissibility and thus was improperly admitted.

HARM ANALYSIS

Having found that there was error in the admission of the testimony, we must determine whether or not it was harmless. *Rule of Appellate Procedure 44.2* governs how harm is assessed after error is found in criminal cases.

CONSTITUTIONAL ERROR

Subsection (a) governs constitutional error, where "the court of appeals must reverse . . . unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." *TEX. R. APP. P. 44.2(a)*. *Chapman v. California*, which governed the harm analysis [**30] under former Rule 81(b)(2) still applies under *Rule 44.2(a)*. *386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)*. Harm is assessed as set forth in *Harris v. State, 790 S.W.2d 568, 583-88 (Tex. Crim. App. 1989)*.

NON-CONSTITUTIONAL ERROR

Subsection (b) provides: "Any [non-constitutional] error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." *TEX. R. APP. P. 44.2(b)*. The language in 44.2(b) mirrors that found in *Federal Rule of Criminal Procedure 52(a)*. [8] [*865] The United States Supreme Court thoroughly considered *Rule 52(a)* in *Kotteakos v. United States*, adopting a standard used by federal courts when doing a harm analysis. *328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)*. Because of the similarity of the rules, we turn to *Kotteakos* and its progeny for guidance in applying our new standard.

8 Federal *Rule 52(a)* states: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." *See FED. R. CRIM. P. 52(a)*.

[**31] In applying the test for "harmless error," our primary question is what effect the error had, or

reasonably may have had, upon the jury's decision. We must view the error, not in isolation, but in relation to the entire proceedings. *Id. at 764, 66 S. Ct. at 1247*; *United States v. Brown, 692 F.2d 345, 350 (5th Cir. 1982)*; *United States v. Rea, 958 F.2d 1206, 1220 (2nd Cir. 1992)*. An error is harmless if the reviewing court, after viewing the entire record, determines that no substantial rights of the defendant were affected because the error did not influence or had only a slight influence on the verdict. *See United States v. DeAngelo, 13 F.3d 1228, 1233 (8th Cir. 1994)* (citing *United States v. Flenoid, 949 F.2d 970, 973 (8th Cir. 1991))*. Stated another way, an error is harmless if the court is sure, after reviewing the entire record, that the error did not influence the jury or had but a very slight effect on its verdict. *Id.; United States v. Heller, 625 F.2d 594, 599 (5th Cir. 1980)*; *United States v. Underwood, 588 F.2d 1073, 1076 (5th Cir. 1979)*; *United States v. Arias--Diaz, 497 F.2d 165, 171 (5th Cir. 1974)*.

The true inquiry, as stated [**32] in *Kotteakos*, is not whether there has been a variance of proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. *328 U.S. at 756, 66 S. Ct. at 1243* (citing *Berger v. United States, 295 U.S. 78, 82, 55 S. Ct. 629, 630, 79 L. Ed. 1314 (1935))*.

If, when all is said and done, the [court] is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of [the legislature]. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

O'Neal v. McAninch, 513 U.S. 432, 130 L. Ed. 2d 947, 115 S. Ct. 992, --, [**33] *513 U.S. 432, 115 S. Ct. 992, 995, 130 L. Ed. 2d 947 (1995)* (citing *Kotteakos*, 328 U.S. at 765, 66 S. Ct. at 1248).

The error must have affected the outcome of the lower court proceedings. *United States v. Olano, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778, 123 L. Ed. 2d 508 (1993)*; *see Bank of Nova Scotia v. United States, 487 U.S. 250, 255-57, 108 S. Ct. 2369, 2373-74, 101 L. Ed. 2d 228 (1988)*. That is to say, if we have "grave doubts" about whether an error did not affect the outcome, we must treat the error as if it did. *United States v. Lane, 474 U.S. 438, 449, 106 S. Ct. 725, 732, 88 L. Ed. 2d 814 (1986)*. "Grave doubt," means that, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *O'Neal*, 513 U.S. at --, *115 S. Ct. at 994*. The uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (*i.e.*, as if it had a "substantial and injurious effect or influence in determining the jury's verdict"). *Id*.

WHO HAS THE BURDEN?

To answer this question, we look to the way other harm analyses are conducted.

In considering [**34] harm flowing from trial error, the United States Supreme Court and the Court of Criminal Appeals have used similar standards. On habeas review of constitutional trial errors, both have applied the *Kotteakos* standard instead of the greater *Chapman* standard because of the nature and purpose of collateral review. *See Kotteakos*, 328 U.S. at 765, 66 S. Ct. at 1248; *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828 (the standard for determining whether a conviction must be set aside because of federal [*866] constitutional error is whether the error "was harmless beyond a reasonable doubt"). Practically, the burden of proving that the error contributed to the conviction or punishment requires the habeas petitioner to show harm by a preponderance of the evidence. *See Brecht v. Abrahamson, 507 U.S. 619, 630, 113 S. Ct. 1710, 1717, 123 L. Ed. 2d 353 (1993)*; *O'Neal*, 513 U.S. at --, *115 S. Ct. at 994-5*; *Ex parte Fierro, 934 S.W.2d 370, 372 (Tex. Crim. App. 1996)*.

Harm flowing from constitutional trial errors on direct review has been considered under the *Chapman* standard, with both courts placing the burden of demonstrating harmlessness on the prosecution. [**35] *See Brecht, 507 U.S. at 630, 113 S. Ct. at 1717*; *Ex parte Fierro, 934 S.W.2d at 372*.

Thus, we look to the federal courts for guidance in placing the burden under our new standard for direct review of non-constitutional trial errors. The United States Supreme Court intentionally phrased the issue of reviewing such errors in terms of "grave doubt." *O'Neal*,

513 U.S. at --, *115 S. Ct. at 994-5*. "The case before us does not involve a judge who shifts a burden to help control the presentation of evidence at a trial, but rather involves judges who apply a legal standard (harmlessness) to a record that the presentation of evidence is no longer likely to affect." *Id*. at --, *115 S. Ct. at 995*. The judge should ask, "Do I, the judge, think that the error substantially influenced the jury's decision?" and not try to put the same question in terms of proof burdens. *Id*. Thus, we believe that neither party should have a burden under *Rule 44.2(b)*.

SUMMARY

In summary, when we assess harm under *Rule 44.2(b)* flowing from non-constitutional error, we review the entire record to determine whether the error had more than a slight influence on the verdict. If we find that [**36] it did, we must conclude that the error affected the defendant's rights in such a way as to require a new trial. If we have grave doubts about its effect on the outcome, we should find that the error was such as to require a new trial. Otherwise, we should disregard the error.

APPLICATION OF THE HARM ANALYSIS

The admission of Gregory's testimony was a non-constitutional error. Applying the new harm analysis, we conclude that the introduction of Gregory's testimony did not have more than a slight influence on the verdict; thus, Fowler's substantial rights were not affected. *TEX. R. APP. P. 44.2(b)*. We recognize that under the old standard, we would reach a different result. Prior to the adoption of new *Rule 44.2(b)*, we would have been compelled to determine beyond a reasonable doubt that the admission of Gregory's testimony made no contribution to the conviction or to the punishment. *See* TEX. R. APP. P. 81(b)(2) (repealed 1997). Because Fowler's sole defense was to impeach Carol's credibility, and the expert testimony served to bolster her testimony, we could not say beyond a reasonable doubt that the testimony did not contribute to the conviction. However, in applying the [**37] less stringent new rule, we reach a different result.

We cannot say that the outcome would have been different without Gregory's testimony because the evidence of Fowler's guilt is overwhelming. Even without the expert testimony, there was sufficient corroborating evidence to support a jury determination that Carol was credible when she testified that she did not go with Fowler voluntarily. Two witnesses testified that they observed Fowler driving in a dangerous and reckless manner. Teresa Kirkpatrick testified that she saw Fowler cut across the lanes of traffic and run Carol off the road. Joseph Stephens testified that he observed Fowler's pickup and Carol's car in his driveway, with Fowler leaning in the driver's side of Carol's car, "pulling and jerking on someone" and yelling "get out of the car, get out of the car now!" He testified that he could hear a female voice inside saying "no" over and over again. Stephens stated that he went inside to call 9-1-1, and when he returned, the two people were gone, the pickup was gone, and the car was left in the middle of the driveway. Finally, there was the testimony of multiple peace officers that it was their belief that Fowler was holding [**38] Carol against her will at the motel and that Carol was not there voluntarily. [*867] The officers testified that their experience with Fowler indicated that he would not allow Carol to leave the motel room, although he did eventually surrender.

The jury was also aware that the Fowler attempted to and in fact did escape from jail while awaiting trial. From this information, the jury could have deduced "consciousness of guilt." Likewise, testimony that Fowler was soliciting someone to convince Carol not to testify against him was introduced. [9] The jury could have accepted this action as evidence of guilt. After a thorough review of the record, we cannot say that Gregory's testimony had more than a slight influence on the verdict. We find that Fowler's substantial rights were not affected; thus, no harm was suffered. *TEX. R. APP. P. 44.2(b)*. Points two and three are overruled.

9 A letter written by Fowler was introduced. The letter read in part:

> I wish you would kick her a--! But what good will that do? What we need to accomplish is getting her not to testify in court. If she don't go to court then they don't have no case. Or if she won't proceed with this, then they have no case. That's why you have to talk to her. Convince her to let me off the hook and I will never go near her again.

[**39] The judgment is affirmed.

BILL VANCE

BRANDON SCOTT BLASDELL, Appellant v. THE STATE OF TEXAS, Appellee

NO. 09-09-00286-CR

COURT OF APPEALS OF TEXAS, NINTH DISTRICT, BEAUMONT

2010 Tex. App. LEXIS 8092

September 15, 2010, Submitted
October 6, 2010, Opinion Delivered

NOTICE: PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

On Appeal from the 9th District Court, Montgomery County, Texas. Trial Cause No. 07-11-11972 CR.

DISPOSITION: AFFIRMED.

JUDGES: Before Gaultney, Kreger, and Horton, JJ.

OPINION BY: HOLLIS HORTON

OPINION

MEMORANDUM OPINION

A jury found Brandon Scott Blasdell guilty of aggravated robbery. The jury then assessed Blasdell's punishment at thirty years' confinement. In a single issue, Blasdell contends the trial court erred by excluding his expert's testimony on eyewitness identification as related to the "weapon focus effect." We affirm the trial court's judgment.

Background

On the evening of February 11, 2007, Katy Hadwin stopped at a gas station to get gas. She got out of her car with her keys and locked her purse inside her car. Before she was able to purchase gas, a man approached her, stuck a gun in her face, and demanded her purse. Katy testified that the man had light colored eyes and a "unibrow." She also stated that the man did not have a beard. Katy attempted to give the man her debit card, but he continued to demand that she give him her purse. After Katy unlocked her car and gave him her purse, the man walked to his "older-model" white truck and left. Katy left the gas station, but returned after she called 911. The police [*2] officers met her at the gas station, and she explained to them what had happened. She also provided them with the man's description.

Approximately a week after the robbery, Katy met with a detective and filled out a suspect description form. Katy identified Blasdell as the perpetrator from a photographic lineup. When she picked Blasdell out of the photographic lineup and when she identified Blasdell at trial, Katy maintained that she was "100 percent sure" that Blasdell had robbed her, because she could not "forget his face."

Standard of Review and Applicable Law

We review a trial court's decision to exclude an expert's testimony for an abuse of discretion. *See Weatherred v. State, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000)*. If the trial court's ruling lies within the zone of reasonable disagreement, the trial court's ruling will not be reversed on appeal. *Id.*

Texas Rule of Evidence 702 governs the admission of expert testimony. *Morales v. State, 32 S.W.3d 862, 865 (Tex. Crim. App. 2000)*. *Rule 702* provides: "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert [*3] by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." *TEX. R. EVID. 702*. The proponent of the expert testimony must show by clear and convincing proof that the evidence he seeks to introduce is sufficiently relevant and reliable to assist the trier of fact in accurately understanding other evidence or determining a fact at issue. *Weatherred, 15 S.W.3d at 542*.

To be relevant, the expert must sufficiently tie pertinent facts of the case to the scientific principles, which are the subjects of the testimony, for the testimony to help the trier of fact resolve the issues in dispute. *Salazar v. State, 127 S.W.3d 355, 360 (Tex. App.--Houston [14th Dist.] 2004, pet. ref'd)* (citing *Jordan v. State, 928 S.W.2d 550, 555 (Tex. Crim. App. 1996))*. Expert testimony addressing the reliability of eyewitness identification is a "soft science;" as such, the proponent of the evidence must show that (1) the field of expertise involved is legitimate, (2) the subject matter of the expert's testimony is within the scope of that field, and (3) the expert's testimony properly relies upon or utilizes the principles involved in that field. *State v. Medrano, 127 S.W.3d 781, 784-86 (Tex. Crim. App. 2004)*; [*4] *Weatherred, 15 S.W.3d at 542*.

Under the Texas Rules of Evidence, the facts in a particular case upon which the expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. *TEX. R. EVID. 703*. These facts need not be admissible in evidence if they are of a type reasonably relied upon by experts in the particular field in forming opinions on the subject. *Id*.

Analysis

Blasdell offered Dr. Rubenzer as an expert on eyewitness identification. Dr. Rubenzer testified during a *Daubert* [1] hearing outside the presence of the jury. Dr. Rubenzer is a board-certified forensic psychologist. He explained that he had read approximately eighty-five to ninety articles in the area of eyewitness identification, but he agreed that he had not authored any peer-reviewed articles or conducted his own studies in the area. Dr. Rubenzer further testified that he had testified as an expert on eyewitness identification in other cases.

1 *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)*.

In preparation for his testimony in Blasdell's case, Dr. Rubenzer reviewed the photographic lineup and the suspect description [*5] form completed by Katy. He also stated that he had discussed the "circumstances of the identification and the crime itself" with defense counsel. However, Dr. Rubenzer acknowledged that he did not interview Katy, Blasdell, or the detective that conducted the photographic lineup. Dr. Rubenzer further explained that he was not present during the testimony of various witnesses who had testified during the trial. Additionally, Dr. Rubenzer commented that he "hope[d] to be informed more about the procedures the police actually followed in the case" through "hypothetical questions" from counsel.

After the trial court requested that he give more specific testimony on how his opinions related to the facts of the case, Dr. Rubenzer addressed photo spread identifications, "cross-race" identifications, and the "weapon focus effect." Dr. Rubenzer explained the "weapon focus effect" as "a tendency, when there is a weapon involved, particularly in brief encounters, for the weapon to essentially attract attention away from the perpetrator's face and, by doing so, result in lesser accuracy for the identification." When asked by the trial court whether Dr. Rubenzer had an opinion about whether the "weapon [*6] focus effect" "played a role in this case or just that it could because we know generally that's something that happens," Dr. Rubenzer replied, "I'd say it would have to be a 'possibly.'"

At the conclusion of the hearing, the trial court ruled that Dr. Rubenzer could testify about the various aspects of photographic lineups and "cross-race" identifications. However, the trial court ruled that Dr. Rubenzer's testimony about the "weapon focus effect" was inadmissible. In explanation of its ruling, the trial court stated: "[E]ither [Dr. Rubenzer] doesn't have an opinion or his opinion is not relevant such that it would provide, as the cases say -- provide information that the jury doesn't have anyway." The trial court added that Dr. Rubenzer's opinion testimony about the "weapon focus effect" would not assist the trier of fact and that the

testimony was not sufficiently tied to the facts of this case. [2]

> 2 Because it is not necessary to the resolution of this appeal, we need not address whether the "weapon focus effect" is based on valid science. *See TEX. R. APP. P. 47.1*.

When deciding whether a trial court abused its discretion in refusing to admit evidence under *Texas Rule of Evidence 702*, [*7] we consider both the relevance of the evidence and its reliability. *See Jordan, 928 S.W.2d at 555*. To be relevant, the expert's testimony must "assist the trier of fact" by relating to a fact in issue and by being sufficiently tied to the facts of the case. *Id.* "The inquiry is not whether there are *some* facts that the expert failed to take into account, but whether the expert took into account *enough* pertinent facts to be of assistance to the trier of fact." *Baldree v. State, 248 S.W.3d 224, 229-30 (Tex. App.--Houston [1st Dist.] 2007, pet. ref'd)* (citing *Jordan, 928 S.W.2d at 556*). Thus, as a reviewing court, we examine whether the expert's testimony is sufficiently tied to the pertinent facts of the case and to the scientific principles about which he was to testify. *Id. at 230* (citing *Morales, 32 S.W.3d at 866*; *Jordan, 928 S.W.2d at 555* ("Establishing this connection is not so much a matter of proof, however, as a matter of application.")).

Here, Dr. Rubenzer did not commit to an opinion that the "weapon focus effect" had impacted Katy's identification of Blasdell. As a juror could have just as easily concluded that the gun possibly impacted Katy's ability to accurately identify [*8] the man who had robbed her, Dr. Rubenzer's testimony about the "weapon focus effect" was not relevant to the juror's resolution of the issues. *See Baldree, 248 S.W.3d at 230*; *Salazar, 127 S.W.3d at 360*. Absent a showing that the expert's testimony is "sufficiently tied" to the pertinent facts of the case, the expert's testimony is not relevant and does not "assist the trier of fact." *See Jordan, 928 S.W.2d at 555-56*; *Salazar, 127 S.W.3d at 360*. We agree with the trial court's conclusion that Blasdell failed to meet his burden of demonstrating by clear and convincing evidence that Dr. Rubenzer's testimony about the "weapon focus effect" was relevant. Without tying the general background on the topic to an opinion pertinent to Katy's identification of Blasdell, the trial court could have reasonably concluded that Dr. Rubenzer's testimony concerning the "weapon focus effect" would not assist the trier of fact. *See Jordan, 928 S.W.2d at 555*; *Salazar, 127 S.W.3d at 360*. Accordingly, excluding Dr. Rubenzer's testimony was within the trial court's discretion, as the admission of the testimony is within the zone of reasonable disagreement. *See Weatherred, 15 S.W.3d at 542*. We overrule Blasdell's [*9] sole issue and affirm the trial court's judgment.

AFFIRMED.

HOLLIS HORTON

Justice

Submitted on September 15, 2010

Opinion Delivered October 6, 2010

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