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EVIDENCE: ADMISSIBILITY OF EXPERT TESTIMONY

Summary

The Court determined the admissibility of expert testimony on “grooming behavior” by accused sexual offenders and the effect that this behavior has on child victims.

Disposition

Expert testimony on grooming behavior in a case involving sexual conduct with a child must have its admissibility determined on a case-by-case basis, based on the requirements that normally govern the admissibility of expert testimony.² In this case, the district court did not abuse its discretion in admitting the expert testimony.

Factual and Procedural History

Appellant Perez was convicted of six counts of lewdness with a minor under 14 years of age and two counts of sexual assault of a minor under 14 years of age. More than a month before trial, the State filed a notice of expert testimony detailing the qualifications of Dr. John Paglini, with his curriculum vitae and a statement that he would “testify as to grooming techniques used upon children.” Dr. Paglini received a bachelor’s degree in psychology and a doctorate in clinical psychology. In his work over the previous ten years, Dr. Paglini studied sex offenders and their victims, including the presence of “grooming behavior,” which is a deceptive relationship with the intent of sexual contact.

At trial, the victim testified to multiple interactions of escalating intimacy with the appellant. The court admitted Dr. Paglini as an expert witness, who testified that the interactions the victim described could be construed as grooming behavior. Dr. Paglini also testified that the presence of this sort of relationship tends to lower the rate of abuse disclosure, and diminishes a victim’s resistance to the sexual conduct. During his testimony, the State asked Dr. Paglini if certain hypothetical situations, modeled after the accused behavior of the appellant, would be considered grooming behavior.

After the conviction, the appellant claimed that the district court improperly admitted Dr. Paglini’s testimony, that the expert testimony improperly bolstered the victim’s testimony, and that the State’s notice of expert testimony was inadequate. The Court invited amicus briefs from both NACJ and NDAA, and addressed arguments from each.

Discussion

Expert qualification

¹ By Collin Jayne.

² Justice Douglas, with whom Justices Pickering and Cherry agreed, contributed an opinion concurring in part and dissenting in part from the majority of the Court en banc. These three Justices concurred with the majority that expert testimony on grooming behavior should be decided on a case-by-case basis.

“The threshold test for the admissibility of testimony by a qualified expert is whether the expert's specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue.”³ This threshold is evaluated in three separate tests—the “qualification,” “assistance,” and “limited scope” requirements.⁴

Qualification requirement

Hallmark listed several non-exhaustive factors for determining if an expert is sufficiently qualified to testify, including “(1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training.”⁵ Dr. Paglini was formally educated in psychology, and at the time of trial, Dr. Paglini had spent the majority of his career studying the relationship between sexual offenders and their victims, examining the presence of grooming behavior. Based on this formal education and experience, Dr. Paglini possessed the knowledge or experience necessary to render an opinion on grooming behaviors and the effects of such behaviors on victims of sexual abuse.⁶

Assistance requirement

To be admissible, an expert’s knowledge must assist the trier of fact to understand the evidence or determine a fact in issue.⁷ To meet this requirement, the knowledge must be (1) relevant and (2) the product of reliable methodology.⁸ Appellant only questioned Dr. Paglini’s qualification, but the Court invited amici to argue the relevance of expert testimony about grooming behavior in sex offender allegations.

Relevance

Amicus NACJ argued that Dr. Paglini’s testimony was not sufficiently probative because the issue to be decided was whether the appellant committed the accused acts, as opposed to his intent during the purported grooming behavior, and the testimony’s probative value was outweighed by its danger of being unfairly prejudicial because it compared the appellant’s behavior to convicted sex offenders. Additionally, NACJ contended that the testimony should not have been admitted because it was an expert opinion on the appellant’s *mens rea*. Amicus NDAA suggested a case-by-case evaluation of relevance.

The Court concluded that “expert testimony on grooming behaviors and its effect on child victims of sexual abuse may be relevant depending on the circumstances of the case.” Here, Dr. Paglini’s testimony that the goal of grooming is to reduce the resistance to the abuse as well as the likelihood of disclosure was relevant because it helped the jury to evaluate evidence and

³ *Townsend v. State*, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987).

⁴ *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008); NEV. REV. STAT. §50.275 (2013).

⁵ *Id.* at 499, 189 P.3d at 650-51.

⁶ *See Morris v. State*, 361 S.W.3d 649, 666-67 (Tex. Crim. App. 2011). Justice Douglas dissented on this requirement, stating that Dr. Paglini never referenced work with victims of grooming, and “did not demonstrate with sufficient specificity that his formal schooling, employment experience, or practical experience qualified him to testify about grooming and its impact on the victim in this case.”

⁷ NEV. REV. STAT. §50.275 (2013).

⁸ *Hallmark*, at 500, 189 P.3d at 651.

assess the victim's credibility.⁹ Furthermore, the Court rejected NACJ's argument that expert testimony as to an ultimate issue should not be admitted if it is otherwise non-objectionable.¹⁰

Dr. Paglini's testimony did not contain an opinion on the victim's credibility or suggest that he believed that she had been abused; his testimony merely addressed the general purpose and method of grooming, including insight in the form of hypotheticals based on the appellant's behavior. The expert testimony accordingly met the first part of the assistance requirement.

Reliability of methodology

Hallmark also listed five factors to be used in evaluating the reliability of the expert's methodology in forming an opinion: "whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization."¹¹ Depending on the case, these factors may be applied with varying importance.¹²

Dr. Paglini works as a psychotherapist for sex offenders – a recognized field of expertise.¹³ Grooming behavior has been recognized by courts as generally accepted by the scientific community.¹⁴ The testimony was based on specific facts Dr. Paglini observed in his practice. His opinion was not testable, tested, or subject to peer review, but these two factors should be given less significance in the present case's nature. In sum, the expert testimony was based on sufficiently reliable methodology.

Limited scope requirement

The Court agreed that one small portion of the testimony did exceed the scope of Dr. Paglini's specialized knowledge. However, the appellant did not object to the scope of Dr. Paglini's testimony as outside the scope of his qualifications, but rather as outside the scope of his proposed testimony. Accordingly, the Court reviewed this decision for plain error.¹⁵ Due to the brevity of the digression, it did not amount to plain error. Accordingly, the expert testimony cleared all tests to meet the requirements for admittance, and was correctly admitted.

Vouching

Appellant further claimed that Dr. Paglini's testimony improperly reinforced the victim's testimony. Although Nevada law precludes an expert from remarking on whether he or she

⁹ Justice Douglas disagreed with the majority, stating that expert testimony was not necessary to explain the effect of the appellant's actions on the victim, when the victim could, and actually did, describe how the appellant's actions decreased her resistance to his abuse. Because it was not probative, or barely probative, the testimony became unfairly prejudicial.

¹⁰ NEV. REV. STAT. §50.295 (2013).

¹¹ *Hallmark*, at 500-01, 189 P.3d at 651-52.

¹² *Higgs v. State*, 126 Nev. ___, ___, 222 P.3d 648, 660 (2010).

¹³ *See People v. Ackerman*, 669 N.W.2d 818, 825 (Mich. Ct. App. 2003).

¹⁴ *See Morris v. State*, 361 S.W.3d 649, 668 (Tex. Crim. App. 2011).

¹⁵ *See Gallego v. State*, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001) (reviewing for plain error where party fails to object at trial), *abrogated on other grounds by Nunnery v. State*, 127 Nev. ___, ___ n.12, 263 P.3d 235, 253 n.12 (2011).

believes that the victim is telling the truth about the alleged abuse,¹⁶ the expert may offer relevant opinion on whether the victim's behavior is consistent with sexual abuse.¹⁷ However, Dr. Paglini did not vouch for the victim's particular honesty, but instead offered an opinion on the general effect grooming behavior would have on a child victim. Therefore, the testimony did not impermissibly bolster the victim's testimony, and was properly allowed.¹⁸

Sufficiency of expert witness notice

Finally, appellant argues that the State's filing of notice of expert testimony was inadequate. The notice must include "(a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony; (b) A copy of the curriculum vitae of the expert witness; and (c) A copy of all reports made by or at the direction of the expert witness."¹⁹

The filed notice suggested that Dr. Paglini would "testify as to grooming techniques used upon children,"²⁰ and included his curriculum vitae, and zero reports, as Dr. Paglini did not prepare any reports for the trial. This satisfied the NRS requirements, so the State's notice of expert testimony was sufficient, and the lower court did not abuse its discretion by admitting Dr. Paglini's testimony.

Conclusion

Applying the normal tests concerning admissibility of expert testimony to Dr. Paglini's qualification, the lower court did not abuse its discretion in admitting the testimony. Furthermore, Dr. Paglini did not impermissibly vouch for another witness's veracity, and the State offered sufficient notice of the testimony under NRS §174.234(2). Accordingly, the Court confirmed the judgment of conviction from the district court.

¹⁶ *Townsend v. State*, 103 Nev. 113, 118-19, 734 P.2d 705, 709 (1987).

¹⁷ *Id.* at 118, 734 P.2d at 708.

¹⁸ Justice Douglas's opinion agreed that the Court should tolerate expert testimony that incidentally bolsters another witness's testimony, but argued that because the primary purpose of Dr. Paglini's testimony was to corroborate the victim's testimony, it should not have been admitted.

¹⁹ NEV. REV. STAT. §174.234(2) (2013).

²⁰ Justice Douglas argued that this statement was far too brief to notify appellant of the "substance of the testimony" under NRS §174.234(2)(a), including the fact that Dr. Paglini reviewed materials specific to this case, and would testify as to specific conduct at issue in the case.