

False testimony by a licensed psychologist and registered sex offender treatment provider warranted habeas relief regarding sentencing.[In the Matter of M.P.A.](12-3-2)

On May 18, 2012, the Texas Supreme Court held that the state's use of unreliable expert testimony throughout closing argument at dispositional state of delinquency proceeding contributed to 20-year sentence, thus warranting habeas relief.

¶ 12-3-2. **In the Matter of M.P.A.**, No. 10-0859, --- S.W.3d ----, 2012 WL 1759513 (Tex.Sup.Ct., 5/18/12).

Facts: S.A. and A.A. accused their cousins M.P.A. and J.W.A. of sexually assaulting them. At the time of the alleged acts, S.A. was seven, A.A. was five, M.P.A. was fourteen, and J.W.A. was fifteen. M.P.A. and J.W.A. were charged with three counts of aggravated sexual assault of a child. J.W.A. entered a plea bargain and pleaded true to the allegations regarding S.A. M.P.A. pleaded not true and went to trial.

At trial, A.A. did not testify that M.P.A. had sexually assaulted him, but both S.A. and A.A. testified that M.P.A. sexually assaulted S.A. In addition, Alice Linder, a sexual assault nurse examiner who had examined S.A. and A.A. testified that they told her that M.P.A. and J.W.A. had sexually assaulted them. M.P.A. was the only defense witness and he testified that he did not sexually assault S.A. The trial court granted a defense motion for a directed verdict regarding the count that M.P.A. had sexually assaulted A.A. The jury found that M.P.A. had sexually assaulted S.A.

At the disposition phase, the State presented two witnesses: Dr. Frederick Willoughby, a licensed psychologist and registered sex offender treatment provider, and Kathie Lewis, a probation officer. Willoughby testified regarding an “Abel Assessment” that he had administered to M.P.A. Willoughby testified that the Abel Assessment is a test that predicts which people have an interest in particular sexes and age groups. One portion of the test consists of a questionnaire. M.P.A.'s answers to this portion of the test were “socially desirable.” The portion of the Abel Assessment at issue in this case consists of a series of slides that are shown to the subject. The slides depict individuals of various age and gender, and the subject's sexual interest is measured by how long the subject looks at each slide. The results are computerized and sent to Atlanta, where the test is “scored.”

After the trial court overruled M.P.A.'s reliability objection to the Abel Assessment, Willoughby testified that M.P.A. was a “pedophile” who had a “significant sexual interest in eight to ten year-old females and two to four and eight to ten year-old males .” Lewis testified that probation and home supervision would be inappropriate for M.P.A. The only witness for M.P.A. was his mother, who testified that she would supervise M.P.A. if the jury assessed a sentence of probation. The jury sentenced M.P.A. to twenty years' confinement.

A.A. recanted approximately nine months after the trial and S.A. recanted approximately twenty months after the trial. At the habeas court below, both S.A. and A.A. testified that they falsely accused their cousins because their mother, LaVonna, told them to. J.W.A. also recanted his confession and testified at the habeas court that he did not sexually assault A.A. and S.A. In

addition, the evidence at the habeas hearing showed that approximately four years after M.P. A.'s original trial, Willoughby entered into an agreed order with the Texas State Board of Examiners of Psychologists stating that he “misstated in his court testimony the research that had been conducted with respect to the Abel Assessment.”

M.P.A. filed the writ of habeas at issue in this case, arguing that he was actually innocent, that Willoughby's false testimony contributed to his sentence, and that his trial counsel rendered ineffective assistance. The habeas court found that the recantations were not credible. In so finding, it relied on J.W.A.'s confession and the testimony from all the witnesses. It also found that Willoughby's “misstatements, if any,” did not contribute to M.P.A.'s sentence, and that M.P.A.'s trial counsel was effective. The court of appeals affirmed and M.P.A. appealed to this Court.

Held: Remanded for new disposition

Opinion: Willoughby testified as an expert in this case. A party offering scientific expert testimony must show by clear and convincing evidence that the science is reliable. [Kelly v. State, 824 S.W.2d 568, 573 \(Tex.Crim.App.1992\)](#); see also [In re D. W.P., No. 06-07-00113-CV, 2008 WL 53211, at * 1 \(Tex.App.-Texarkana Jan.4, 2008, no pet.\)](#) (“Even though appeals of **juvenile** court orders are generally treated as civil cases, we believe the criminal standard for the admission of scientific evidence should apply in light of the quasi-criminal nature of **juvenile** proceedings.”(footnote and citation omitted)). “ ‘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.’ “ [Kelly, 824 S.W.2d at 572](#) (alterations in original) (quoting Kenneth R. Kreiling, [Scientific Evidence: Toward Providing the Lay Trier With the Comprehensible and Reliable Evidence Necessary to Meet the Goals of the Rules of Evidence](#), 32 ARIZ. L.REV. 915, 941-42 (1990)).

Kelly governs the reliability determination and specifies several non-exclusive factors to guide the inquiry. 824 S.W.2d 571-73. Two of these factors, the potential error rate and the existence of supporting literature, are the primary issues in M.P.A.'s false testimony claim and the subjects on which Willoughby testified falsely.

Willoughby testified regarding the Abel Assessment outside the presence of the jury. When asked about the Abel Assessment's error rate, he stated that “[f]or classifying people who have significant sexual interest in female children under the age of fourteen, the accuracy rate is 85 percent.” This is particularly significant because at the time of the alleged offense, S.A. fell into this category. In addition, in response to a question regarding the existence of literature supporting or rejecting the Abel Assessment, Willoughby stated that “[t]here is [sic] a number of articles out by Gene Abel and his colleagues. Also researchers at Brigham Young University have established the reliability of the instrument and the classification accuracy of the instrument.”

Much of this testimony was false. In 1998, the accuracy rate of the Abel Assessment, according to Abel and his colleagues, for classifying people with a significant sexual interest in

female children under fourteen was only 65%, not 85%. This weighs against the reliability of the Abel Assessment.

Furthermore, contrary to Willoughby's testimony, the Brigham Young University (BYU) studies failed to establish the Abel Assessment's reliability as applied to adults and actively established that it was unreliable as applied to adolescents. Regarding adults, they found that it was a "promising instrument based on a sound idea," but concluded that "the evidence of its reliability and validity for use with adults is weak as of yet," labeled it a "nonvalidated instrument," and called for "further research" and "refinement."

Regarding the application of the Abel Assessment to adolescents, they found that no research other than their own had been done and that Abel's initial study only included two adolescents. Their own research led them to conclude that data did "not support the reliability of [the Abel Assessment] for use with adolescents," "that the ability of [the Abel Assessment] to discriminate adolescent offenders from nonoffenders was not significantly better than chance," and the Abel Assessment's "ability to screen or diagnose adolescent perpetrators reliably has not been demonstrated."

The State argues that the following evidence supports the admission of Willoughby's testimony:

- The statement in one of the BYU articles that "approximately 300 therapists in 36 states and two foreign countries, as well as 8 states' judicial systems" used the assessment;
- Abel's study of the Abel Assessment;
- Four independent studies supporting the theory underlying the Abel Assessment;
- The inability of M.P.A. and J.W.A.'s attorneys to find an expert to attack the Abel Assessment.

With the exception of Abel's own study, the State did not present this evidence to the trial court. Nor would this evidence have been presented to the trial court had Willoughby testified truthfully regarding the Abel Assessment's error rate and the BYU studies' reliability findings. Therefore, we do not consider it in our determination of whether the trial court would have found the Abel Assessment reliable absent Willoughby's false testimony.

The State argues that we should consider the four independent studies because the State would have used them to rebut the criticisms in the BYU studies if Willoughby had testified truthfully about the BYU studies. The State's framework would require that we assume Willoughby was aware of these studies and speculate as to how he would have testified about them. We reject this approach and do not consider the four studies. *See, e.g., Graves v. Cockrell*, [351 F.3d 143, 156 \(5th Cir.2003\)](#) (referencing the largely speculative nature of allegations of what an uncalled witness would have testified to as a reason why complaints of uncalled witnesses are not favored).

The State additionally argues that we should apply the less stringent standard from [Nenno v. State to this case, 970 S.W.2d 549, 561 \(Tex.Crim.App.1998\)](#), *overruled on other grounds by State v. Terrazas, 4 S.W.3d 720, 727 (Tex.Crim.App.1999)*. *Nenno* held that *Kelly's* reliability requirement applies with less rigor to fields of study aside from the hard sciences. *Id.* *Nenno* noted that “hard science methods of validation, such as assessing the potential error rate or subjecting a theory to peer review, may often be inappropriate for testing the reliability of fields of expertise outside the hard sciences.” *Id.*

This case stands in sharp contrast to *Nenno*. There, an expert testified regarding future dangerousness based on his experience studying cases. *Id.* at 562. That expert “did not contend that he had a particular methodology.” *Id.* Here, the Abel Assessment was subject to peer review and testing of its accuracy rate. Therefore, we consider those factors. See [Mendoza v. State, No. AP-7521, 2008 WL 4803471, at *22 n. 62 \(Tex.Crim.App. Nov.5, 2008\)](#) (applying peer review factor in the soft science context of predicting future dangerousness because expert claimed to have a methodology, and contrasting *Nenno*); [Nenno, 970 S.W.2d at 561 & n. 9](#) (stating that *Nenno* does not preclude employing the error rate and peer review factors in appropriate cases).

In sum, had Willoughby testified truthfully, the trial court would have been faced with testimony regarding a test that had only a 65% accuracy rate as applied to this case, was subject to at least some criticism in the literature as applied to this case, and had no support from independent studies as applied to this case. The only evidence to support admission of the testimony regarding the Abel Assessment would have been a study by its creator that did not address the assessment's application to this case. Given the evidence regarding the Abel Assessment's application to adolescents, had Willoughby testified truthfully, the State would not have established the assessment's reliability under *Kelly*. Therefore, we hold that the trial court would have excluded Willoughby's testimony.

C. Harm Analysis

In order to obtain a new sentencing hearing, M.P.A. must prove by a preponderance of the evidence that Willoughby's testimony contributed to his sentence. *Ex parte Williams, 65 S.W.3d 656, 658 (Tex.Crim.App.2001)*. We review a trial court's legal conclusions de novo, but defer to its fact findings if they are supported by the record. See [Reliance Nat'l Indem. Co. v. Advance'd Temporaries, Inc., 227 S.W.3d 46, 50 \(Tex.2007\)](#) (“Appellate courts review legal determinations de novo, whereas factual determinations receive more deferential review based on the sufficiency of the evidence.”). Applying this standard to the instant case, we conclude that the State's use of Willoughby's testimony throughout its closing argument contributed to M.P.A.'s sentence.

The State argues that the testimony of M.P.A.'s trial counsel, Bobby Barina, supports the habeas court's finding that Willoughby's testimony likely did not sway the jury. Barina stated in his affidavit that Willoughby's testimony had “zero impact” on the jury. At the habeas hearing, he explained that Willoughby's testimony was “boring.” He stated that it “didn't provide any insight to anybody,” but did not remember that Willoughby likened M.P.A. to a pedophile. Barina also described Willoughby as “arrogant” and stated that the jury did not take “much consideration to anything Dr. Willoughby told them ... just because of the nature of Willoughby.”

Barina's observations do not address the State's use of Willoughby's testimony to refer to M.P.A. as a pedophile throughout its closing argument. See [Serv. Corp. Int'l v. Guerra, 348 S.W.3d 221, 236 \(Tex.2011\)](#) (stating that determination of whether error is harmful includes evaluating closing argument and counsel's emphasis of erroneous evidence); [Mathis v. State, 67 S.W.3d 918, 929 \(Tex.Crim.App.2002\)](#) (Johnson, J., concurring) (separately analyzing admission of testimony and State's use of that testimony during closing statements); [LaPoint v. State, 750 S.W.2d 180, 192 \(Tex.Crim.App.1988\)](#) (analyzing whether the State exploited erroneous instruction during closing argument). Here, the State argued:

- “He's been diagnosed as a pedophile by an expert. He is at a high risk to re-offend.”
- “[Y]ou've heard the psychologist tell you he is a pedophile. He is at a high risk to reoffend.”
- “You now know he's been classified as a pedophile by an expert. You now know that he is interested in children, interested in children, in fact, in the same age group as little [S.A.]. Think about her and think about that.”

These references to Willoughby's testimony bolstered the State's closing theme of protecting the community:

- “[I]f you put him on probation, we've already seen that just allows for victims.”
- “Our community simply cannot take that chance by releasing him back in that home. It's a tough decision to make, but it's a decision that's backed up by the evidence and the testimony.”
- “How are you going to protect the public? The evidence has shown that the only way you're going to be able to do that is by putting him away for some time. Because you're going to have to protect other children. And with your verdict, you can at least keep him out of your community for a while.”
- “[Y]ou're also telling him, ‘If I put you on probation, I'm going to walk right out this door with you.’ He could be next to you in the parking lot today and in your neighborhood tomorrow. Think about that.”

In sum, the State utilized Willoughby's testimony throughout its closing theme of protecting the community. In addition, the State emotionally appealed to the jury to think about Willoughby's classification of M.P.A. as a pedophile with a specific interest in S.A.'s age group. Indeed, the State's closing argument made more express references to Willoughby's testimony than to any other testimony in the case. Therefore, we conclude that the State's use of Willoughby's testimony at closing contributed to M.P.A.'s sentence.

Conclusion: M.P.A. is entitled to a new disposition hearing because Willoughby's false testimony contributed to his sentence. We remand this cause to the district court to grant M.P.A.'s writ of habeas corpus in accordance with this opinion.