# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-18-00723-CR**

**Kristopher Orna, Appellant**

**v.**

**The State of Texas, Appellee**

**FROM THE COUNTY COURT AT LAW NO. 4 OF TRAVIS COUNTY**
**NO. C-1-CR-17-211789, THE HONORABLE MIKE DENTON, JUDGE PRESIDING**

## M E M O R A N D U M  O P I N I O N

Appellant Kristopher Orna was convicted of the class A misdemeanor offense of assault causing bodily injury, family violence. *See* Tex. Penal Code § 22.01(b). The trial court sentenced him to ninety days' confinement in the county jail and imposed a $2,000 fine but suspended imposition of sentence and placed him on community supervision for nine months. In one point of error, appellant challenges the trial court's admission of expert testimony. We affirm the trial court's judgment of conviction.

### Background

Appellant does not challenge the sufficiency of the evidence to support his conviction. Therefore, we limit our discussion to the evidence that is necessary to understand his point of error on appeal. *See* Tex. R. App. P. 47.1, 47.4. The victim of appellant's assault was his girlfriend, Laura Guerrero. On August 4, 2017, they were living together at Guerrero's

apartment. On that night, Guerrero, appellant, and appellant's daughter, who was asleep, were driving back to the apartment when Guerrero and appellant began fighting, and appellant "grabbed" Guerrero's face. They both had been drinking. After they pulled into a parking spot at the apartment, they fought over the keys with "both of [their] hands on each other"; Guerrero bit appellant "in order for him to let [her] go"; she threw the keys; and appellant retrieved the keys and went to the apartment with his daughter. Guerrero did not go to the apartment but hid and called 911 because she was "scared." A short time later, appellant also called 911 from the apartment. Guerrero testified that she did not want to press charges or to be at the trial, that she was currently "on" with appellant, that he had been staying with her, that the August 2017 incident "was just an isolated event," and that there had never been prior violence. The trial court admitted as exhibits recordings of the 911 calls and photographs taken shortly after the incident that showed appellant's and Guerrero's injuries.

Besides Guerrero, the State called two deputies with the Travis County Sheriff's Office who responded to the 911 calls. Deputy William Seely testified that Guerrero was "visibly shaken" and hiding to make sure appellant "didn't return to hurt her" and that she had "minor pin size bruises" and "down the left side of her ear she had real deep like black and blue abrasions." He also testified that Guerrero expressed hesitation to press charges because appellant had intimate pictures and videos of her but that she had decided to press charges because she "[didn't] want him to hurt her any more and she thinks he finally needs to be held accountable." He also testified that she told him that appellant had "hit her in the past." Deputy Bryan Lee testified similarly that Guerrero was hiding and that she was crying and "seemed fearful." He testified that Guerrero told him that appellant "grabbed" her by the face and neck. Lee observed "some red marks and some abrasions on her neck." Lee also described his

interactions with appellant and appellant's injuries. He testified that appellant was a "bit aggressive," that appellant told him that Guerrero "attacked" him, and that appellant had a "scratch" on the right side of his neck that was consistent with a defensive wound.

The State's expert witness was Jeannie Tomanetz, who was employed as a counselor with the Austin Police Department victim's services unit. Shortly after she began testifying, the parties questioned her during a voir dire examination outside the presence of the jury about the basis of her opinions as an expert in the field of domestic violence. She testified that she had a Master's degree in clinical psychology and had talked to "tens of thousands of women in domestic violence situations" and that she "was going to be talking about the general principles of domestic violence." She referred to the "power and control wheel," the "Duluth model," and the "cycle of violence." She explained that the "Duluth model has the power and control wheel which was—is the most commonly used tactics that batterers use in domestic violence situations" and that she had read "hundreds" of studies on it, but she was unable to state "exact titles" of documents or articles that formed the basis of her opinions.

After the voir dire examination, appellant's attorney sought to exclude Tomanetz's testimony under "702 *Daubert* and *Kelly* and their progeny." *See* Tex. R. Evid. 702; *see generally Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992); *see also Nenno v. State*, 970 S.W.2d 549, 560–61 (Tex. Crim. App. 1998), *overruled in part on other grounds by State v. Terrazas*, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999) (discussing *Daubert* and *Kelly* and requirement that expert evidence be reliable). The attorney argued that Tomanetz had not stated a "single scientific basis for her expert testimony," "a single study, a single peer review article, [or] a single peer reviewed journal." The trial judge, however, advised the parties that he would allow her to testify as "an

expert in the area of the general dynamics of domestic violence to explain some of the things that a common juror would not be able to understand about domestic violence relationships."

Tomanetz then testified to the jury about domestic violence relationships. She explained typical behaviors of victims and batterers, referring to the "cycle of violence"[1] and the "power and control wheel." She explained that: (i) the power and control wheel "was developed in Duluth Minnesota in regards to a coordinated response to deal with battering behavior in the community"; (ii) the "power and control wheel depicts the most commonly used tactics by batterers to keep a victim in a situation that makes them vulnerable to the power and control"; and (iii) examples of batterers' common tactics included exerting control like "taking someone's keys." She explained that victims often are reluctant to press charges because they "love this person" and "don't want them to go to jail" and that they are reluctant to talk about their experiences because of "embarrassment, fear of not being believed, feelings of guilt, self-blame, [and] not wanting people to know about their intimate details in their relationship."

The jury found appellant guilty of the class A misdemeanor offense of assault causing bodily injury, family violence. *See* Tex. Penal Code § 22.01(b). The trial court sentenced appellant to ninety days' confinement in jail and imposed a $2,000 fine but suspended

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[1] Tomanetz testified about the cycle of violence as follows:

> Commonly when I speak to victims they talk about things that lead up to a violent incident which is usually arguing, disagreements, then you have the—they call it the incident acute incident, explosion which is usually the incident that precipitates the police being called. And then after that is the remorseful seduction phase, I call it seduction phase [and] this time is when the person who is perpetrating the violence is apologizing, trying to make things better, promises to go to counseling, says it won't happen again. Once the victim in the relationship forgives they move on and it continues.

imposition of sentence and placed him on community supervision for nine months. Appellant's motion for new trial was overruled by operation of law, and this appeal followed.

## Analysis

In one point of error, appellant argues that the trial court erred by allowing Tomanetz to testify about the "Duluth model power and control wheel" because the State did not prove that it is "a legitimate field of expertise and that Tomanetz properly relied on those principles."[2]

### Applicable Law and Standard of Review

Texas Rule of Evidence 702 provides that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Tex. R. Evid. 702. Before admitting expert testimony under Rule 702, a trial court must determine that: (1) the witness is qualified as an expert by reason of her knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and (3) admitting the expert testimony will actually assist the factfinder in deciding the case. *Davis v. State*, 329 S.W.3d 798, 813 (Tex. Crim. App. 2010). "These conditions are commonly

[2] In its appellee's brief, the State argues that appellant has not preserved his point of error for review because "[t]he trial court was not asked to rule and did not rule that Tomanetz was an expert on the Duluth model power and control wheel." *See* Tex. R. App. P. 33.1(a) (setting out procedure for preservation of error). For purposes of resolving this appeal, we will assume without deciding that appellant adequately preserved the complaint that he raises on appeal.

referred to as (1) qualification, (2) reliability, and (3) relevance." *Vela v. State*, 209 S.W.3d 128, 131 (Tex. Crim. App. 2006).

Relevant to this appeal, when evaluating the reliability of expert testimony in fields of study outside the hard sciences, the appropriate inquiries are 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 principle involved in that field. *See Rhomer v. State*, 569 S.W.3d 664, 671 (Tex. Crim. App. 2019) (explaining that "*Nenno* set forth a framework for evaluating the reliability of expert testimony in fields of study outside the hard sciences" and listing questions for determining reliability in this context (citing *Nenno*, 970 S.W.2d at 560–61)); *see also Tillman v. State*, 354 S.W.3d 425, 435–36 (Tex. Crim. App. 2011) (explaining that *Nenno* analysis for determining reliability was "'merely an appropriately tailored translation of the *Kelly* test to areas outside of hard science'" (quoting *Nenno*, 970 S.W.2d at 561)).

We review a trial court's ruling on the admissibility of expert testimony for an abuse of discretion. *Wolfe v. State*, 509 S.W.3d 325, 335 (Tex. Crim. App. 2017). "An abuse of discretion does not occur unless the trial court acts 'arbitrarily or unreasonably' or 'without reference to any guiding rules and principles.'" *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016) (quoting *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990)). We will not disturb the trial court's ruling "if it is within the zone of reasonable disagreement." *Wolfe*, 509 S.W.3d at 335; *see Blasdell v. State*, 470 S.W.3d 59, 62 (Tex. Crim. App. 2015).

**Tomanetz's testimony**

Appellant's point of error challenges the reliability of Tomanetz's testimony. In particular, appellant assumes that her expertise is in a soft science and argues that "[t]he State did not prove by clear and convincing evidence (1) that the Duluth model power and control wheel is a legitimate field of expertise, (2) the subject matter of Tomanetz's testimony was within the scope of that field, or (3) that Tomanetz's testimony properly relied upon or utilized the principles involved in the Duluth model power and control wheel." *See Rhomer*, 569 S.W.3d at 671; *Tillman*, 354 S.W.3d at 435–36 (explaining that expert testimony in field of psychology was "soft science"). Appellant contends that Tomanetz "could not give any information on the actual Duluth model power and control wheel that proved that it is a legitimate field of expertise"; she "was unable to state a basis for her to be an expert on the Duluth model power and control wheel, assuming it is a legitimate field of expertise"; and she "could not state any basis for having any specialized knowledge of the Duluth model power and control wheel." Tomanetz's area of expertise, however, was the dynamics of domestic violence, a specialized area of psychology. The power and control wheel is not an area of expertise but a concept or model that is used to explain the dynamics of domestic violence.

This Court addressed a similar challenge to the reliability of Tomanetz's testimony. *See Runels v. State*, No. 03-18-00036-CR, 2018 Tex. App. LEXIS 9995 (Tex. App.—Austin Dec. 6, 2018, pet. ref'd) (mem. op., not designated for publication). In *Runels*, the appellant had been convicted of assaulting his girlfriend, and this Court described Tomanetz's expert testimony, including her testimony about the power and control wheel, as follows:

> After finishing her testimony regarding the cycle of violence, Tomanetz discussed "the power and control wheel." Specifically, Tomanetz related that she uses the

> wheel as a way to discuss with domestic-violence victims "the tactics that" abusers use "to keep their power and control over their victims." When elaborating on those tactics, Tomanetz stated that abusers use coercion, intimidation, emotional abuse, and threats to control their victims between incidents of violence. . . . In addition, during her testimony, Tomanetz discussed what can occur after an abuser has been arrested. In particular, Tomanetz related that the victims may seek to have the charges dismissed and may continue to communicate with the abusers . . . .

*Id.* at *9–10. Similar to appellant's point of error in this case, the appellant in *Runels* contended that Tomanetz's testimony was not reliable, "highlight[ing] that [she] was not able to describe the methodology that was used to develop the concepts of the cycle of violence and the power-and-control wheel that formed the basis of her testimony, to explain whether those studies had been peer reviewed, and to relate whether attempts had been made to replicate the findings from those studies." *Id.* at *17.

We concluded in *Runels* that the trial court did not abuse its discretion when it determined that Tomanetz's testimony "was reliable, or stated differently, appropriate for expert testimony." *Id.* at *19–20. In reaching our conclusion, we relied on Tomanetz's testimony that "those concepts were developed decades ago" and "have been studied for years" and other court decisions that have "found testimony by counselors regarding those concepts to be sufficiently reliable to uphold determinations that the counselors should be allowed to testify as experts." *See id.* at *18–19 (collecting cases in which trial courts allowed counselors to testify as experts); *see also Nwaiwu v. State*, No. 02-17-00053-CR, 2018 Tex. App. LEXIS 6290, at *4 (Tex. App.—Fort Worth Aug. 9, 2018, pet. ref'd) (mem. op., not designated for publication) (determining that trial court did not abuse its discretion in allowing testimony from counselor, including portion explaining power and control wheel, and noting that, because "the average juror will not typically be familiar with the effect of domestic violence on victims and the

dynamics of the relationship between abuser and victim," expert testimony on domestic violence relationships "has generally been held to be admissible to explain recantations, delays in reporting, lies to the police, and why a complainant would continue living with a family member after an alleged assault"); *Brewer v. State*, 370 S.W.3d 471, 474 (Tex. App.—Amarillo 2012, no pet.) (upholding trial court's ruling allowing counselor to provide expert testimony regarding delayed reporting and cycle of violence, concluding testimony was reliable, and collecting cases in which courts found expert testimony concerning dynamics of domestic violence admissible).

Informed by our opinion in *Runels*, we similarly conclude that the trial court in this case did not abuse its discretion when it concluded that Tomanetz's expert testimony was reliable, including her testimony about the power and control wheel. *See Runels*, 2018 Tex. App. LEXIS 9995, at *19–20. We overrule appellant's sole point of error.

**Conclusion**

Having overruled appellant's sole point of error, we affirm the trial court's judgment of conviction.

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Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Baker

Affirmed

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