In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00307-CV

IN RE COMMITMENT OF GENTRY ROBERTSON

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 08-03-02815 CV

MEMORANDUM OPINION

The State of Texas filed a petition to commit Gentry Robertson as a sexually violent predator. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.001-.150 (Vernon 2010). A jury found that Robertson suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. The trial court entered a final judgment and order of civil commitment. Robertson presents six issues for appellate review. We affirm the trial court's judgment.

TESTIMONY OF DRS. THORNE AND ARAMBULA

Thorne, a licensed clinical psychologist, testified that he was asked by the State to determine whether Robertson met the criteria for a behavioral abnormality. Thorne explained that in evaluating a subject, he typically reviews a file, performs a clinical

interview of the subject, and then prepares a report that addresses the issue of whether the subject has a behavioral abnormality. Thorne attempted to interview Robertson, but Thorne explained, "I didn't feel comfortable proceeding with the interview because I wasn't sure he was able to truly understand why I was there and the purpose of me meeting with him. . . . And I felt that to proceed further might be unethical, so I did not actually continue my interview with him."[1]

Thorne explained that he reviewed Robertson's medical records, offense reports, and various psychological evaluations of Robertson that had been performed during Robertson's incarceration, and Thorne relied on those records in forming his opinion. When the State's counsel elicited Thorne's opinion concerning whether Robertson suffers from a behavioral abnormality that predisposes him to commit predatory acts of sexual violence, defense counsel lodged numerous objections, including a challenge to Thorne's qualifications as an expert. After conducting a *Daubert*[2] hearing, the trial court overruled Robertson's objections to Thorne's qualifications. Thorne then testified that Robertson "does meet [the] criteria for behavioral abnormality." Thorne explained that from his review of the records and his interview of Robertson, he learned the facts of the two offenses of which Robertson was convicted, and he relied upon those facts and circumstances in forming his opinion. According to Thorne, Robertson's first offense involved sexual assault of a fifteen-year-old girl. Thorne testified that after Robertson

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[1]Thorne later explained that he ended the interview after approximately fifteen to twenty minutes.

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

went to the girl's home, "they went back to his apartment and that he forced her into sexual intercourse." Robertson threatened to harm the girl if she told anyone. When asked what he found significant about the offense, Thorne testified as follows:

> The fact that it was a 15-year-old victim. We know that individuals who sexually abuse individuals much younger than them or much older . . . are more likely to reoffend. The fact that again it was forced sexual activity. So, with respect to this specific event, just the age and the forcing of the sexual intercourse was [sic] relevant.

Thorne also testified that Robertson tried to force the victim into prostitution. Thorne explained that he was unable to talk to Robertson about the offense, but he did review Robertson's deposition. Thorne testified that during the deposition, Robertson acknowledged that he had intercourse with the victim, but Thorne did not believe that Robertson took full responsibility for sexually assaulting the victim.

According to Thorne, Robertson's second offense involved sexual assault of a fourteen-year-old girl that Robertson had met at a mall. Thorne testified that Robertson had sex with the victim approximately five times over a six-week period, that Robertson had threatened the victim about leaving him, and that Robertson "had her engage in prostitution[.]" When asked what specific details of the crime he found significant to his evaluation of Robertson, Thorne testified as follows:

> This one was a little different from the first one in that again, her age was definitely very relevant, being 14 years of age. She's what we call a stranger victim. And you know, Mr. Robertson had no previous relationship with this individual. And we know that individuals who engage in sexual offenses against strangers, they are more likely to reoffend in the future. So she was 14, she was a stranger victim. There [were], again from the records, five different acts of sexual intercourse. And again, individuals who commit multiple acts of what we call sexual deviation on the same individual are more likely to reoffend.

Thorne explained that he was unable to interview Robertson concerning the offense, but he reviewed Robertson's deposition. During the deposition, Robertson agreed that he had engaged in sexual intercourse with the victim, and that the victim had lived with him for a number of weeks. In addition, Robertson testified at the deposition that he had bought the victim at the mall from another individual. Thorne testified that Robertson's account of the offense was significant because "one of the big things that we look at in the risk factors is what we call sexual deviancy. And again, purchasing women for some type of sexual, you know, means, prostituting somebody out. Those things are . . . we would characterize as sexually deviant." Thorne also testified that Robertson was suspected of forcing other girls into prostitution.

In addition, Thorne testified that he reviewed Robertson's juvenile history, and that as a juvenile, Robertson had twice been charged with automobile theft and had been charged once with assault. Thorne testified that juvenile history was important in his determination of whether an individual suffers from a behavioral abnormality because antisocial orientation is an important factor, and the earlier someone begins criminal behavior, the more ingrained that behavior becomes. Thorne explained that Robertson committed his second automobile theft while he was on probation for the first automobile theft, and that this fact is significant because when an individual violates the conditions of his mandatory supervision, it is an additional risk factor.

Furthermore, Thorne reviewed Robertson's adult criminal history with respect to nonsexual convictions, and he testified that Robertson was convicted of aggravated

robbery with a deadly weapon. Thorne explained that he found Robertson's conviction for aggravated robbery with a deadly weapon to be significant because it evidenced a continued pattern of violent behavior. Thorne testified that during Robertson's incarceration, Robertson was also found to be in possession of knives, and that from 2002 to 2007, Robertson had forty-six major disciplinary cases, including one sex-related charge and several charges involving violence or the threat of violence. Thorne also testified that Robertson refused to participate in sex offender treatment and substance abuse treatment. Thorne opined that Robertson's disciplinary history during his incarceration is a risk factor that must be considered when evaluating the issue of behavioral abnormality.

Thorne explained that he scored some actuarial instruments concerning Robertson, including the Static-99 and the MnSOST-R. According to Thorne, these tests are used and relied upon by professionals who are conducting an evaluation of an individual for a behavioral abnormality. Thorne testified that Robertson's scores on the MnSOST-R placed him at a high risk to reoffend sexually within six years. In addition, Thorne explained that Robertson's scores on the Static-99 placed him in the high range for risk to reoffend by committing a sexual crime. Thorne testified that he used the DSM-IV (Diagnostic and Statistical Manual for Mental Disorders -- Fourth Edition), upon which psychologists typically rely, to diagnose Robertson with paranoid schizophrenia, cannabis-related disorder not otherwise specified, sexual abuse of a child, and antisocial personality disorder. Thorne explained that Robertson's risk factors included sexual deviancy and a history of "antisocial, illegal, violent behavior." At the conclusion of the

State's direct examination, Thorne again opined, "I believe Mr. Robertson does meet [the] criteria for a behavioral abnormality." During cross-examination, Thorne testified that the report concerning his evaluation of Robertson was based entirely upon the records Thorne had reviewed.

Dr. Michael Arambula, a physician, testified that he specializes in general psychiatry and has a subspecialty in forensic psychiatry. Arambula explained that as a forensic psychiatrist, he evaluates the risk of sexual dangerousness an individual poses to the community and applies his evaluation to the governing law. Arambula explained that in conducting such evaluations, he relies upon his review of the person's records, such as school records, employment history, medical records, arrest records, and statements from victims, as well as information collected from interviewing the person. Arambula testified that as part of his evaluation, he studies "the details of the criminal offenses that an individual has under their belt and look at the degree of force, planning, what kind of injuries have occurred to the victims." In addition, Arambula explained that he also considers the impact of any treatment the individual has received, as well as the individual's behavioral history while incarcerated.

Arambula explained that forensic psychiatrists who evaluate individuals for sexual dangerousness use the same methodology and review the same types of records, and Arambula followed this methodology in evaluating Robertson. Specifically, Arambula testified that he evaluated Robertson in accordance with accepted standards and methods in the field of forensic psychiatry. According to Arambula, he met with Robertson and was able to interview Robertson "[f]or the most part[.]" Arambula testified that his

interviews typically last for two-and-a-half to three hours, but he interviewed Robertson for only about one-and-a-half hours because he felt that time period was "about all [Robertson] could tolerate." Arambula explained that his review of the records indicated that Robertson suffered from schizophrenia and, therefore, Robertson might easily become agitated. Arambula testified that he does not use actuarial instruments such as those utilized by Thorne because "physicians don't usually administer psychological tests[.]"

Arambula determined that Robertson has a behavioral abnormality. Arambula explained that he learned Robertson's criminal history from reviewing records. According to Arambula, Robertson sexually assaulted two minor victims by using force and threats, and that he attempted to force the victims to work for him as prostitutes. Arambula explained that, using the Diagnostic and Statistical Manual (DSM), he diagnosed Robertson with schizophrenia, antisocial personality disorder, and "paraphilia not otherwise specified with features of pedophilia." Arambula explained that he diagnosed Robertson with "features of pedophilia" instead of pedophilia because the relevant conduct had not existed for at least six months. According to Arambula, "research shows that history is the strongest element in assessing risk. And here we have an individual who has had two victims. There is a strong suggestion there are a multitude of other young girls involved." Arambula explained that schizophrenia compromises a person's ability to make decisions and act appropriately. Arambula opined that having schizophrenia, paraphilia, and antisocial personality disorder in combination makes Robertson more dangerous. In addition, Arambula testified that Robertson's history of

automobile theft and physical assaults support the diagnosis of antisocial personality disorder, as does Robertson's lack of remorse and lack of empathy for his victims. Moreover, Arambula testified that Robertson's gang affiliation was important to the diagnosis, but "[i]f it wasn't there, it wouldn't change my opinion."

According to Arambula, Robertson's risk factors included multiple rapes of minors, aggression and threats, impulsivity, lack of good family relationships, lack of a "real history of work," substance abuse issues, disregard for women, inability to comply with behavioral requirements during incarceration, lack of sex offender treatment, the presence of a serious mental illness, antisocial personality, non-compliance with treatment, and lack of "rational" plans once he is released into the community. In addition, Arambula testified that Robertson had no protective factors.

During cross-examination, Arambula acknowledged testifying at his deposition that a behavioral abnormality is a condition that makes an individual more likely to engage in sexually aggressive behavior toward the community. Arambula next testified that he uses the definition contained in the Texas statute in evaluating sexual dangerousness. The following then occurred:

> [Defense counsel]: . . . Dr. Arambula, isn't it true that your expert testimony has been stricken by appellate courts on at least three different occasions for lack of sufficient factual basis[?]
>
> [State's counsel]: Objection, improper.
>
> THE COURT: That's not a proper impeachment question, so I'll sustain the objection.
>
> [Defense counsel]: Dr. Arambula, have you stated that—

> THE COURT: That whole area of questioning we're going to need to do outside the presence of the jury. Okay?
>
> . . . .
>
> [State's counsel]: Your Honor, in fact, can I have a motion to strike that question from the jury and ask that the jury disregard the question?
>
> THE COURT: I'm going to ask that the jury disregard . . . the question that was posed by defense counsel and ask you to ignore that question.

The trial court also sustained the State's objection to questions posed to Arambula regarding whether he complied with the requirements of the ethics code for psychiatrists with respect to his evaluation of Robertson.

ISSUE ONE

In his first issue, Robertson contends the trial court erred by permitting the State to ask an improper commitment question during voir dire concerning Robertson's two prior convictions for sex-related offenses. The pertinent portion of the voir dire is as follows:

> [State's counsel]: Remember when I said that you're not here to determine guilt. You're here to determine whether the defendant has a behavioral abnormality. Are you here to determine whether he has a behavioral abnormality?
>
> [Venireperson]: Yes.
>
> [State's counsel]: Does everyone understand that?
>
> VENIRE PANEL: Yes.
>
> [State's counsel]: You do? Okay. Thank you. Now, I want to do a little hypothetical for you. And, if you agree with this statement, please raise that juror card high up in the air. If I told you that someone has been convicted twice of a sexual offense, who would say he's probably going to do it again? Raise your card up there if you think he's going to do it again.

[Defense counsel]: Your Honor, I'm going to have to object as this is a commitment question and improper commitment.

THE COURT: It's designed to have everyone keep an open mind. So I'm going to allow it. Okay. Start over again, [prosecutor].

[State's counsel]: Yes. Okay. So, if you agree with the statement, if I told you that someone has been convicted twice of a sexual offense, who would say that he's probably going to do it again? Please raise those cards up there again. Okay.

Now, please keep them up and you can –

[Defense counsel]: Can we approach, Your Honor, please? . . .

. . . .

[Defense counsel]: Based on the question that [the prosecutor] just asked, I believe every juror raised their hand, which already demonstrates their bias to predetermine one of the questions that may be – as part of the question that they'll have to answer, they've already said that if they have two convictions for [a] sex offense, they're going to do it again. Nobody on the panel can now be part of this jury because they've already stated what their bias is in how they would answer that question.

THE COURT: Okay. As you know, having tried these cases before, the question is designed for everyone to keep an open mind. So I'm going to allow those kinds of questions.

And number two, this question is appropriate with a follow-up question that comes along with number three, that it's not been proven that Mr. Robertson has been convicted of anything yet. Okay? So they're using it in a hypothetically and correct [sic] manner. So your objection is overruled.

. . . .

[State's counsel]: All right. I know you guys didn't realize you were going to get a workout here today. But I'm going to ask you one more time. If you believe this statement, please raise your cards again. . . .

If I told you that someone has been twice convicted of a sex-related offense, who would say that he's probably going to do it again? Raise your cards for me, please. If you would[,] just keep them up. Unless any of these new facts change your mind, then you lower your cards if they change your mind.

> Okay. What if this hypothetical individual was a high school senior and the girl in those offenses was his high school girlfriend? If that changes your mind, lower your card.
>
> They married shortly after that. They've been married for 50 years.
>
> THE COURT: That's a hypothetical.
>
> [State's counsel]: It's a hypothetical. This hypothetical individual is now bedridden. He can't get out of the bed. He's a quadriplegic. He lives alone on Mars. Oxygen is running out. It just ran out.
>
> All right. . . . You can put your cards down. As you can all see, that all of these additional facts are important. In order to be a fair and impartial juror, you have to hear all the facts. . . . You have to hear all the facts and all the evidence before you make your decision in this case.
>
> . . . .
>
> Now, we talked about [some] of this a little bit. This case does deal with some sex-related offenses, and I want to remind you that I said earlier: You don't have to approve of the act to sit in judgment for that act or of that act, just like those jurors on murder cases every day.
>
> But I also want to remind you that it's a civil case. It's not a criminal one. You're not here to determine guilt, but rather to answer a fact-based question. And to be fair and impartial, you don't [have to] set those feelings aside. You can have feelings. Like I said, you don't have to be for sexual assault, sex offenses, murder, you can have those feelings. You don't have to set those aside.
>
> You're not disqualified because you think sexual assault is wrong. You're not. You don't have to leave common sense at home. You don't have to leave it at the door when you walk in here. You can be influenced by the evidence. That makes sense; right? You can be influenced by the evidence. But the key here is that you have to listen to the evidence from both sides, apply the law and the rules the Judge gives you, and then make your decision.

Trial courts have broad discretion concerning voir dire. *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 753 (Tex. 2006). Accordingly, we review the trial court's decisions concerning voir dire for an abuse of discretion. *In re Commitment of Larkin*, 161 S.W.3d 778, 780 (Tex. App.--Beaumont 2005, no pet.). "Fair and impartial jurors

reach a verdict based on the evidence, and not on bias or prejudice. Voir dire inquiries to jurors should address the latter, not their opinions about the former." *Vasquez*, 189 S.W.3d at 751-52 (footnotes omitted). "As the statutory standards for bias or prejudice in civil and criminal cases are the same, voir dire standards should remain consistent." *Id*. at 753.

Trial courts should allow counsel broad latitude during voir dire to discover any bias or prejudice so that counsel may intelligently exercise peremptory challenges. *Id*. at 749. However, "[c]ounsel's latitude in voir dire, while broad, is constrained by reasonable trial court control." *Id*. at 750 (footnote omitted). "Commitment questions 'commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact.'" *Lydia v. State*, 109 S.W.3d 495, 498 (Tex. Crim. App. 2003). A voir dire question constitutes an improper commitment question when it is intended to create a bias or prejudice in a potential juror before the prospective juror has heard the evidence. *Sanchez v. State*, 165 S.W.3d 707, 712 (Tex. Crim. App. 2005); *see also Vasquez*, 189 S.W.3d at 753. It is improper for counsel to ask prospective jurors what their verdict would be if certain facts were proved. *Vasquez*, 189 S.W.3d at 751. When reviewing an issue concerning whether a question constitutes a commitment question, it is proper to consider the entire voir dire rather than a particular question in isolation. *See Halprin v. State*, 170 S.W.3d 111, 119 (Tex. Crim. App. 2005)

When viewed in isolation, the question posed by the State's counsel initially appears to be a commitment question. However, when we view the question in context along with the rest of the voir dire, we conclude that the question was not intended to test

the weight the prospective jurors would give to Robertson's prior convictions for sex-related offenses. Rather, the question was intended to discover any prejudice or bias on the part of the potential jurors, *i.e.*, whether the jurors would consider all of the evidence from both sides before making a decision. *See id.* (In light of the totality of voir dire record, question was not an improper commitment question because the State explained that the prospective juror should have an open mind and consider all of the evidence.). We overrule issue one.

ISSUE TWO

In his second issue, Robertson argues that the trial court abused its discretion in sustaining "numerous prosecution objections to proper cross-examination" of Dr. Stephen Thorne, thereby denying Robertson due process. To preserve a complaint for appellate review, a party must make a complaint to the trial court that states the grounds for the ruling the party seeks, and the complaint must be sufficiently specific to make the trial court aware of the complaint. TEX. R. APP. P. 33.1(a)(1)(A). Robertson never lodged a complaint with the trial court asserting that the trial court's sustaining of certain objections by the State denied him due process. Therefore, nothing has been preserved for review with respect to Robertson's due process argument. *See id.*

We review a trial court's decisions concerning the admissibility of evidence for an abuse of discretion. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). A trial court abuses its discretion when it acts without reference to any guiding rules and principles, or if it acts arbitrarily and unreasonably. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995); *Downer v. Aquamarine*

Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985). In addition, we will only reverse a judgment if an error by the trial court probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case on appeal. *See* TEX. R. APP. P. 44.1.

When defense counsel asked Thorne during cross-examination whether he was a licensed sex offender treatment provider, the State objected on the grounds that the question was irrelevant, and the trial court sustained the State's objection. Defense counsel asked Thorne whether it is "possible for someone who has the proper medical regimen to go out and be a productive member of society if they suffer from some form of schizophrenia[.]" The trial court sustained the State's objection that the question constituted an "[i]mproper hypothetical" and instructed Thorne not to answer the question. Likewise, the trial court sustained the State's objection to defense counsel's question to Thorne concerning whether one of Robertson's victims stated that she missed the lifestyle she had with Robertson because it was exciting and fun.

Additionally, the trial court sustained the State's relevancy objection to defense counsel's two questions regarding whether one of Robertson's victims gave inconsistent statements. The trial court also sustained the State's relevancy objections to defense counsel's question concerning whether a diagnosis of pedophilia predisposes a person to commit acts of sexual violence, as well as defense counsel's questions regarding whether it is scientifically possible to predict with one hundred percent accuracy how an individual will behave in the future. Moreover, the trial judge sustained the State's relevancy objection to defense counsel's question about whether the creators of the

Static-99 "have been able to create or replicate their results[,]" as well as relevancy objections to questions regarding concerning whether the Static-99 has been replicated on the Texas population.

Finally, the trial judge also sustained the State's objection to defense counsel's questions concerning whether actuarial instruments consider the age the subject individual will be when released from prison, and the trial judge instructed counsel to approach the bench before asking questions on that topic. With the jury not present, defense counsel explained that she wanted to explore with Thorne the issue of Robertson's age upon release because it was

> part of the evaluation and it's also part of the actuarial at the time, the age at the time of release. And, again, that information was put before the jury[.]
> …
> And additionally, again, our issue was we would take it up whether or not we could ask the question of how old he would be at release or discuss the fact that he'll still be incarcerated for an additional four years.

The State argued that Robertson's age would not change his score on the actuarial instruments. The trial judge asked defense counsel for what purpose, other than to inform the jury that Robertson had additional time to serve, she wished to ask the question. The State's counsel argued that Robertson had received a four-year sentence, but received almost a year of good time credit. The trial judge stated, "the jury doesn't need to know that. . . . And so, if it does not change his score, edit your question so they don't know his release from prison. That's my overriding factor here. I'm trying to not let the jury know that." Defense counsel argued that because part of Thorne's evaluation involved

Robertson's age upon release, Robertson's date of release should not be withheld from the jury. The following exchange then occurred:

> THE COURT: I respect that that's your opinion. But you need to respect that my opinion is we're not going to let the jury know his release date from prison. Okay?
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> [Defense counsel]: Your Honor, at this time I would ask for a mistrial for mischaracterizing information in front of the jury.
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> THE COURT: They're not in here.
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> [Defense counsel]: No, you have – Your Honor, I'm going to object that you have repeatedly done desperate treatment of me before the jury including shaking your finger at me, and comments about – reflecting your bias to me in my questions to the extent that it is impossible for me to get a fair and impartial trial for my client in front of this jury.
>
> THE COURT: Okay. I'll tell you this: I try not to do that. I don't remember specifically shaking my finger at you during trial. But I will tell you that it's your conduct in front of this jury which is determining whether your client is getting a fair trial or not. And this jury has been in here now for four hours with one witness. And it's your interpretation of how you want to ask the questions, and it's your ability to ask the questions. But it does not have anything to do with me as to whether or not they're giving you a fair shot here.
>
> . . . .
>
> [Defense counsel]: Okay. As to the question as to his age when he's released is simply relating to Dr. Thorne's testimony. Dr. Thorne in his deposition made the statement that statistically there's a greater likelihood that individuals commit sex crimes at his age at the time that we were taking his deposition, which was – I believe Mr. Robertson is 38 at the time, that you know, in their 40s, 50s and 60s. So Dr. Thorne has made a reference to statistically the likelihood of someone in their 40s committing a sexual offense is reduced, and Mr. Robertson will be in his 40s when he is released from prison[.]
>
> [State's counsel]: Your Honor, first off, we don't know when he will be released. If he has good time . . . [h]e'll be released sooner than that.

> . . . .
>
> [State's counsel]: The deposition that was taken in this case was taken in March. And he was convicted of these crimes in April, Your Honor.
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> THE COURT: I find the probative value of the answer to that statement . . . is outweighed by the prejudicial nature of it because of the fact that the jury could read into things they shouldn't be reading [sic] because. . . again, we don't know when he'll be released from prison[.]
>
> [Defense counsel]: Well, we know he'll be at least in his 40s and additionally, since part of the equation being asked of Dr. Thorne is dealing with likelihood of committing this again in the community, that is an appropriate question and appropriate information for the jury to know.

Defense counsel next moved for a mistrial, and after the court denied counsel's motion, counsel passed the witness.

We conclude that the trial court did not abuse its discretion by sustaining any of the State's objections of which Robertson now complains. The issue before the jury was whether Robertson is a repeat sexual offender who suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 841.002(2), 841.003(a), 841.062(a) (Vernon 2010). The trial court did not abuse its discretion by sustaining objections to defense counsel's questions concerning whether Thorne is a licensed sex offender treatment provider, whether a properly-treated schizophrenic can function in society, whether a victim had stated that she missed her lifestyle with Robertson, and whether a victim gave inconsistent accounts concerning the offense. The trial court also did not abuse its discretion by sustaining the State's objection to the question regarding whether it is scientifically possible to predict with "one hundred percent accuracy" how an individual will behave in the future, since

the State was only obligated to prove "beyond a reasonable doubt" that Robertson was a sexually violent predator. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.062(a). Additionally, the trial court did not abuse its discretion by sustaining the State's relevancy objection concerning whether the creators of the Static-99 had been able to replicate their results or had replicated the Static-99 on the Texas population. In all of these instances, the evidence sought would not make any fact of consequence more or less probable. *See generally* TEX. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); TEX. R. EVID. 402 ("Evidence which is not relevant is inadmissible."). In addition, the trial court did not abuse its discretion by sustaining the State's relevancy objection to a question concerning whether a diagnosis of pedophilia predisposes a person to commit acts of sexual violence, since neither Thorne or Arambula diagnosed Robertson with pedophilia. *See* TEX. R. EVID. 401, 402.

Lastly, we turn to the State's objections to questions concerning what age Robertson will be upon his release from prison. As discussed above, the State argued that Robertson's age would not change his score on the actuarial instruments, and that the precise time for which Robertson would remain incarcerated could not be determined, while defense counsel argued that Robertson's age was relevant because Thorne testified he had considered Robertson's age upon release as part of his evaluation. Robertson did not make an offer of proof concerning how Thorne would have answered the questions had the trial court permitted him to do so. Without an offer of proof, a reviewing court

cannot determine whether the exclusion of evidence was harmful. *Bobbora v. Unitrin Ins. Servs.*, 255 S.W.3d 331, 335 (Tex. App.--Dallas 2008, no pet.). Robertson failed to preserve the issue for review. *See* TEX. R. EVID. 103(a) (To preserve error concerning the exclusion of evidence, a substantial right of the complaining party must be affected, and the complaining party must have made the substance of the evidence known to the trial court by an offer of proof.); *Bobbora*, 255 S.W.3d at 335. We overrule issue two.

ISSUE FIVE

In his fifth issue, Robertson contends Thorne's testimony is legally insufficient because there is no "logical connection" between the records and Thorne's opinion regarding whether Robertson suffers from a behavioral abnormality. A contention that an analytical gap existed between the data relied upon by an expert and the expert's opinion is a challenge to the methodology employed by the expert. *In re Commitment of Ortiz*, No. 09-09-00013-CV, 2010 WL 2854249, at *6 n.1 (Tex. App.--Beaumont July 22, 2010, no pet. h.). Robertson did not assert before the trial court that there was an analytical gap between Thorne's opinion and the data upon which Thorne relied. *See* TEX. R. APP. P. 33.1(a)(1)(A); *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004) ("[W]hen a reliability challenge requires the court to evaluate the underlying methodology, technique, or foundational data used by the expert, an objection must be timely made so that the trial court has the opportunity to conduct this analysis."). Therefore, Robertson did not preserve this issue for our review.

Even if Robertson had preserved the issue, he would not prevail. The evidence established that Thorne was experienced and licensed in his field, and that Thorne

reviewed records pertaining to Robertson and interviewed Robertson. Thorne explained in detail the factual bases for his opinion, including that the victims were minors, Robertson used force, Robertson's juvenile history, Robertson's nonsexual adult offenses, Robertson's disciplinary history during his incarceration, and Robertson's scores on the Static-99 and the MnSOST-R. We overrule issue five.

ISSUE THREE

In his third issue, Robertson contends that the trial court abused its discretion by sustaining prosecution objections to proper cross-examination of Dr. Michael Arambula, thereby denying Robertson due process. As discussed above, the trial judge sustained the State's objection to defense counsel's question to Arambula concerning whether his expert testimony had been "stricken" by appellate courts at least three times. Robertson complains only of this sustained objection. As was the case with respect to Thorne's testimony, Robertson never lodged a complaint with the trial court that the sustaining of the State's objection denied him due process. Therefore, nothing has been preserved for review with respect to Robertson's due process argument. *See* TEX. R. APP. P. 33.1(a)(1)(A). We now turn to the issue of whether the trial court properly sustained the State's objection. Whether Arambula's testimony in three other cases had been found on appeal to be insufficient was not relevant to the jury's evaluation of Arambula's credibility with respect to the facts of Robertson's case. *See generally* TEX. R. EVID. 401, 402. In addition, specific instances of conduct of a witness may not be inquired into on cross-examination for the purpose of attacking the witness's credibility. TEX. R. EVID.

608(b). For all of these reasons, the trial court did not abuse its discretion by sustaining the State's objection. We overrule issue three.

ISSUE FOUR

In his fourth issue, Robertson argues that Dr. Arambula's testimony is legally insufficient because his opinion "is not based on the actual facts of this case[,]" *i.e.*, that Robertson will remain incarcerated for at least three more years. Robertson did not assert before the trial court that there was an analytical gap between Arambula's opinion and the data upon which Arambula relied. Therefore, Robertson did not preserve this issue for our review. *See* TEX. R. APP. P. 33.1(a)(1)(A); *Coastal Transp. Co.*, 136 S.W.3d at 233.

Even if Robertson had preserved the issue, he would not prevail. Arambula testified that in conducting evaluations of an individual's risk for sexual dangerousness, he reviews school records, employment history, medical records, victim statements, arrest records, and information gleaned from interviewing the subject. Arambula testified that he conducted his assessment of Robertson in accordance with the accepted standards within his field. Arambula explained in detail the factual bases of his opinion, including Robertson's use of force; Robertson's victims were minors; Robertson attempted to force the victims to work for him as prostitutes; the coexistence in Robertson of schizophrenia, antisocial personality disorder, and paraphilia not otherwise specified with features of pedophilia; Robertson's lack of a substantive work history; substance abuse issues; inability to comply with behavioral requirements while incarcerated; lack of quality family relationships; and non-compliance with treatment. Nothing in Arambula's

testimony indicated that Robertson's age upon release was a significant factor in his evaluation. We overrule issue four.

ISSUE SIX

In his final issue, Robertson asserts that both the trial court and this Court lack subject matter jurisdiction because chapter 841 "does not contemplate the determination of Robertson's status as a sexually violent predator 3-4 years before his release[,]" and Robertson suffers from a severe mental illness (schizophrenia) that is "amenable to traditional mental illness treatment modalities." The State filed its petition to civilly commit Robertson as a sexually violent predator on March 18, 2008. On April 17, 2009, Robertson filed a motion to dismiss the case for lack of jurisdiction. Robertson alleged in said motion that on May 7, 2008, he was charged with two offenses of possession of a deadly weapon in a penal institution, for which he received a four-year sentence, and he argued that the trial court lacked jurisdiction "because the [State's] claim lacks ripeness." Specifically, Robertson argues that because the purpose of the SVP statute is to protect society from sexually violent predators, and his release is not imminent, the case should be dismissed for lack of jurisdiction.

In enacting chapter 841 of the Health and Safety Code, the Legislature found "that a small but extremely dangerous group of sexually violent predators exists and that those predators have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities and that makes the predators likely to engage in repeated predatory acts of sexual violence" and "a civil commitment procedure for the long-term supervision and treatment of sexually violent predators is necessary and in the interest of the state."

TEX. HEALTH & SAFETY CODE ANN. § 841.001 (Vernon 2010). A person is subject to commitment under chapter 841 if he is a repeat sexually violent offender and suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *Id.* § 841.003(a).

Not later than the first day of the 16th month before the person's anticipated release date, the Texas Department of Criminal Justice must give notice to a multidisciplinary team of the anticipated release date of a person who is serving a sentence for a sexually violent offense and may be a repeat sexually violent offender. *Id.* § 841.021(a), (c). In turn, no later than the 60th day after the date the multidisciplinary team receives such notice, the team must assess whether the person is a repeat sexually violent offender and is likely to commit a sexually violent offense after release or discharge, give notice of its assessment to the Texas Department of Criminal Justice (TDCJ) or the Texas Department of Mental Health and Mental Retardation (MHMR), and "recommend the assessment of the person for a behavioral abnormality, as appropriate." *Id.* § 841.022(c). No later than the 60th day after the recommendation pursuant to section 841.022(c), TDCJ or MHMR must assess whether the person suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence. *Id.* § 841.023(a). The State must file a petition alleging predator status no later than the 90th day after the person is referred to the attorney representing the State. *Id.* § 841.041(b). If at trial a judge or jury determines that a person is a sexually violent predator, the judge shall commit the person for outpatient treatment and supervision. *Id.* § 841.081(a).

> The commitment order is effective immediately on entry of the order, except that the outpatient treatment and supervision begins on the person's release from a secure correctional facility or discharge from a state hospital and continues until the person's behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence.

Id. Nothing in sections 841.021, .022, .023, or .041 indicates that the Legislature intended to divest the trial court or this Court of jurisdiction if the person is convicted of another offense after the State files a petition seeking civil commitment. *See id.* §§ 841.021-.023, 841.041. Those sections that contain notice provisions use the language "not later than" rather than "not earlier than" in describing the required notice. *See id.* In addition, section 841.081(a) explicitly provides that although a commitment order may be entered and become effective before the person's release, treatment does not begin until the person is released. *Id.* § 841.081(a). Furthermore, although Robertson has been diagnosed as schizophrenic, he has also been diagnosed with "paraphilia not otherwise specified with features of pedophilia" and antisocial personality disorder, and he has not demonstrated that those disorders are subject to treatment by traditional modalities. For all of these reasons, we overrule issue six and affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on July 13, 2010
Opinion Delivered September 9, 2010

Before McKeithen, C.J., Gaultney and Horton, JJ.