

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-09-00353-CV**

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**IN RE COMMITMENT OF ARTHUR LEE BAILEY, JR.**

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**On Appeal from the 435th District Court**  
**Montgomery County, Texas**  
**Trial Cause No. 09-01-00168 CV**

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**MEMORANDUM OPINION**

The State filed a petition seeking to involuntarily civilly commit Arthur Lee Bailey, Jr. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 841.001-.150 (Vernon 2010). The jury found he is a sexually violent predator. *See id.* § 841.003 (Vernon 2010). In two issues, Bailey argues the evidence is legally and factually insufficient to support the jury's finding that he is a sexually violent predator as defined by the statute, and that he suffers from a behavioral abnormality that makes him likely to engage in predatory sexual violence. After a review of the record, we conclude the evidence is sufficient to support the findings. We affirm the court's judgment.

Bailey previously pled guilty to the offense of aggravated sexual assault of a child. Bailey crawled through the window of a six-year-old girl's room at night, held a knife

underneath her nose, and committed the sexual assault. The child's grandmother came into the room and he left through the window. He received six years probation, subsequently revoked. He was released in 1995.

Bailey pled guilty to a 2005 offense of burglary of a habitation with intent to commit sexual assault. Bailey had been under the influence of marijuana and alcohol and broke into an 84-year-old woman's house in his neighborhood. He threatened to sexually assault her and then wrestled her to the ground. She was able to get away and call 911. The woman's daughter drove up in the driveway and saw Bailey in the backyard. The daughter and the victim later identified Bailey through photo identification. He received a five-year prison sentence, and he has been incarcerated since the 2005 conviction.

The SVP statute defines "sexually violent predator" as a person who "(1) is a repeat sexually violent offender; and (2) suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence." *Id.* § 841.003(a); *see also* § 841.002(9). The Act defines "[b]ehavioral abnormality" as "a congenital or acquired condition that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person." *Id.* § 841.002(2). The Act defines "[p]redatory act" as "an act directed toward individuals, including family members, for the primary purpose of victimization." *Id.* § 841.002(5).

Chapter 841 requires that the State prove beyond a reasonable doubt that a person to be committed under the Act is a sexually violent predator. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.062(a). Although this is a civil case, we nevertheless have adopted the legal sufficiency standard of review applied in criminal cases for legal sufficiency, because of the burden of proof. *In re Mullens*, 92 S.W.3d 881, 885 (Tex. App.--Beaumont 2002, pet. denied) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). We review the evidence at trial to decide if a rational jury could have found beyond a reasonable doubt that Bailey suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See id.* at 887. We also apply the factual sufficiency standard applied in criminal cases with respect to our factual sufficiency review in this case. *In re Gollihar*, 224 S.W.3d 843, 846 (Tex. App.--Beaumont 2007, no pet.). Viewing the evidence in a neutral light, we determine whether a jury was rationally justified in finding beyond a reasonable doubt the statutory requirements. *See id.* “To reverse a case on a factual sufficiency challenge, we must be able to say that the great weight and preponderance of the evidence contradicts the jury’s verdict or that the verdict is clearly wrong or manifestly unjust.” *Id.* (citing *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006)).

Dr. Stephen Thorne, a forensic psychologist, testified he reviewed records normally relied on by experts in the field to arrive at his opinion. He interviewed Bailey and scored three psychological tests taken by Bailey. Thorne testified that the three tests

he used have been studied by individuals in his field, have been peer reviewed, and are generally accepted as valid by forensic psychologists. He explained that, when evaluating someone in behavioral abnormality cases, these instruments give information about an individual's risk level for future sexual offenses, and "they're kind of a statistical way to look at how likely somebody is to commit a sexual offense in the future."

Thorne defined a risk factor as "something that has shown to be related to somebody's risk for committing a sexual crime in the future." He used sexual deviancy and criminal background as examples. Thorne identified several risk factors for Bailey: (1) his wide age range of victims; (2) use of force and weapons in committing his offenses; (3) at least one offense was triggered in part by use of drugs or alcohol; (4) a greater degree of deviancy based on the fact that he has both extra-familial victims as well as one stranger victim; (5) other acts of sexual deviancy related to his high number of sexual partners; (6) his refusal to participate in sex offender treatment; (7) multiple acts of sexual deviancy with the same victim during the same instance; and (8) the lack of indication that he has changed. Thorne identified the following factors that are believed to decrease the likelihood that Bailey would reoffend in the future: (1) his ability to maintain employment; (2) his ability to be in an adult relationship; (3) he does not appear to be a psychopath; and (4) he is getting to the age where one could expect his risk of reoffending to decrease. Thorne also identified the fact that Bailey did not have any young male victims as a mitigating factor because offenders with young male victims are

thought to be at a higher risk for recidivism. Thorne considers the totality of the risk factors and the mitigating factors, combined with everything else he knows about the person, in determining whether that person has a behavioral abnormality.

Thorne administered the Static-99 test which, he explained, gathers the risk factors that are significant and rates that individual on each risk factor. Bailey scored a “four” on the Static-99 test, which places Bailey in the moderate to high risk range for future sex offenses.

Thorne also administered the MnSOST-R test, (the Minnesota Screening Tool-Revised test), which is similar to the Static-99 test but involves more and different factors in determining someone’s risk of reoffending. Bailey scored a “positive ten” on the MnSOST-R test, which places him in the high range of risk for future sexual offenses. According to Thorne, it is thought that seventy percent of those scoring a “positive ten” would reoffend within six years.

Bailey scored a “21” on the Hare Psychopathy Checklist, a checklist that Thorne explained is the most prominent tool in his field in determining whether someone is a psychopath. This score indicates Bailey is not a psychopath.

Thorne did not base his opinion in this case solely on the actuarials, but considered them along with other tools used regularly by those in his profession. Thorne testified that considering the testing, the interview, and the records in this case, his overall impression is that Bailey appears to be someone who on multiple occasions sought out

vulnerable victims and abused those individuals. Thorne also was concerned that Bailey has not exhibited any indication that he has changed, he consistently states he is not a criminal or sex offender, and he has declined over the years to participate in any sex offender treatment, even when ordered by the court. Thorne noted other aspects of Bailey's sexual deviancy, including his acknowledgement that he has paid prostitutes to engage in sexual intercourse and "some information" from the records indicating that the same night Bailey attacked the elderly victim, he was intoxicated and grabbed a "baby by the head and attempt[ed] to pull the baby down...as if to have the baby perform oral sex." The records indicated this possible third offense did not result in a conviction.

Based on the testing, the interview, and a review of the various records, Thorne diagnosed Bailey as having a behavioral abnormality, as defined by the Health and Safety Code, which predisposes him to commit predatory acts of sexual violence. He also diagnosed him with sexual abuse of an adult, sexual abuse of a child, adult antisocial behavior, an alcohol disorder not otherwise specified, and a cannabis-related disorder not otherwise specified. These diagnoses were from the DSM-IV, which Thorne explained is a book of diagnoses published by the American Psychiatric Association and used by psychologists, psychiatrists and other mental health professionals in identifying whether someone meets criteria for a diagnosis.

On cross-examination, Thorne explained that the actuarial tests he used in this case were not designed to assess a behavioral abnormality, but are used as a "part of"

determining whether a person has a behavioral abnormality. He acknowledged that the Static-99 test is focused on past behavior and that some research suggests that one of the potential weaknesses of the test is that it may not take into account some current positive behavioral changes. When questioned about the MnSOST-R, Thorne stated that the test is different from the Static-99 in that twenty-five percent of the test is made up of dynamic variables. Thorne admitted that although he questioned Bailey about current sexual deviancies, he did not score a formal test on Bailey regarding current sexual deviancies. Thorne pointed out that Bailey has not had access in prison to the type of victims he has offended against. There is nothing in his current incarceration records that indicates current sexual deviancy.

Dr. Michael Arambula also evaluated Bailey. Arambula stated that the evaluation was conducted in accordance with his training as a forensic psychiatrist and with the accepted standards in the field of psychiatry. He testified that he reviews records and conducts an interview when determining whether a person suffers from a behavioral abnormality. He explained other experts in his field utilize the same methodology in doing similar evaluations.

Arambula diagnosed Bailey with paraphilia not otherwise specified with features of pedophilia, abuse of an adult, and personality disorder not otherwise specified, with features of narcissism and antisocial personality disorder. Based on the records and his interview with Bailey, Arambula concluded that, based on the legal definition of

behavioral abnormality under the Texas Health and Safety Code, Bailey has a behavioral abnormality that predisposed him to engage in predatory acts of sexual violence.

Arambula identified the following risk factors for Bailey's risk for reoffending: (1) he chooses vulnerable victims; (2) he threatened one victim with life threatening force; (3) he has a long history of antisocial behavior; (4) his probation had been revoked twice; (4) he has refused to work in prison; (5) he offended while in a relationship; (6) problems cooperating in prison; (7) not complying with his nutrition and diabetes medication; and (8) his lack of accepting responsibility and refusal of sex offender treatment. Although Arambula explained that Bailey's potential to be in a relationship, have family support, and have employment capabilities are factors mitigating his risk of reoffending, Arambula stated he did not see any consistent evidence that Bailey would use those factors to his advantage.

On cross-examination, Arambula stated he used the DSM-IV in diagnosing Bailey. He explained mental health professionals utilize the book, which is published by the American Psychiatric Association. He stated the book "contains the criteria that have emerged through research such that the validity of diagnosing someone that has those symptoms is very high." He stated that there are "too many [studies] to count" that provide methods to assess behavioral control, depending on the condition being assessed. He testified nothing in Bailey's records indicate any current abnormal sexual fantasies or



behaviors. Arambula did not score any actuarials on Bailey, and does not use actuarials in performing evaluations.

Bailey testified at trial. Bailey acknowledged that the girl he was convicted of sexually assaulting used to play with his girlfriend's children and lived on his girlfriend's street. He denied climbing through her window, putting a weapon to her nose, sexually assaulting her, and then climbing out of the window when the child's grandmother came into the room. He stated the woman whose home he was accused of breaking into, lived in his neighborhood. He knew her daughter. He denied breaking into the house, threatening her, knocking her down, and running away after she called 911. He does not believe he is a criminal and does not believe he needs sex offender treatment, anger management treatment, or behavior modification treatment.

In his first issue, Bailey argues the evidence is legally and factually insufficient to establish that he is a "sexually violent predator" as defined by the Texas Health and Safety Code. Specifically, Bailey asserts that in order to commit him, the State must prove that he was a repeat sexually violent offender, that he suffers from a behavioral abnormality that predisposes him to commit a sexually violent offense, and that he is likely to commit a predatory act of sexual violence for the primary purpose of victimization. Bailey maintains the State presented no evidence that he is likely to commit a predatory act of sexual violence for the primary purpose of victimization.

In broad-form submission, the charge asked the jury, “Do you find beyond a reasonable doubt that ARTHUR LEE BAILEY, JR. suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence?” The charge submitted to the jury defined “PREDATORY ACT” as “an act directed toward individuals, including family members, for the primary purpose of victimization.” TEX. HEALTH & SAFETY CODE ANN. § 841.002(5). By answering the question “yes,” the jury found that Bailey suffers from a behavioral abnormality that predisposes him to engage in an act of sexual violence directed toward individuals for the primary purpose of victimization. Both Drs. Thorne and Arambula testified that using the definition of behavioral abnormality as defined by the Health and Safety Code they believed Bailey suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. *See id.* § 841.003(a)(2). The jury heard Bailey testify that he pled guilty to aggravated sexual assault of a 6-year-old girl and burglary of a habitation with intent to sexually assault an 84-year-old woman. The judgments were introduced into evidence. Thorne testified that, considering the actuarial tests, the interview, and the records in this case, Bailey appears to be someone who on multiple occasions sought out vulnerable victims and abused those individuals. Arambula testified that in assessing Bailey’s risk factors for reoffending, he considered that fact that Bailey chooses vulnerable victims as evidenced by his offenses against a child and an elderly woman. A

rational jury could find beyond a reasonable doubt that Bailey is likely to commit a predatory act of sexual violence for the primary purpose of victimization.

Bailey also argues in issue one that the broad-form question submitted to the jury used the word “predisposed” (taken from §841.002(2)), rather than “likely,” as required by section 841.003(a)(2) of the Texas Health and Safety Code, and thereby impermissibly lowered the State’s burden of proof. Bailey did not object to the use of the word “predisposed” during the jury charge conference, and Bailey’s proposed jury charge, refused by the trial court, included this same language. *See generally General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993) (Parties may not invite error by requesting an issue and then objecting to its submission.); *see also* TEX. R. CIV. P. 274 (“A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection.”). Issue one is overruled.

In his second issue, Bailey argues the evidence is legally and factually insufficient to support a finding that he suffers from a behavioral abnormality that makes him likely to engage in acts of predatory sexual violence, because the expert witnesses’ testimony was conclusory, speculative, and lacked probative value. Bailey contends on appeal that Dr. Thorne’s testimony should have been excluded and was unreliable because he did not rely on any research, he did not show that his theory about Bailey’s behavioral abnormality had been or could be tested, and he simply expressed his subjective judgment. Bailey claims Thorne recited facts he found significant, but made no attempt to

link those facts to his conclusion, or explain how they formed the basis of his opinion. Bailey also states that Thorne admitted that the actuarial tests measured groups and not individuals and do not test for a behavioral abnormality.

As for Dr. Arambula, Bailey argues he listed risk factors for Bailey without explanation, made diagnoses without connecting them to future dangerousness, and used Bailey's failure to diligently follow his treatment for diabetes as a risk factor that was somehow important to Bailey's future dangerousness.

The Supreme Court has explained that "conclusory opinions are legally insufficient evidence to support a judgment even if the party did not object to the admission of the testimony." *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009) (citing *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004)). If there is no basis offered for the expert's opinion or if the basis offered provides no support, the opinion is considered conclusory and not probative evidence. *Id.* at 818. By contrast, if the opinion has a supporting basis, but there is a reliability challenge that requires the court to evaluate the underlying methodology, technique, or foundational data, then an objection "must be timely made so that the trial court has the opportunity to conduct this analysis." *Id.* at 817 (quoting *Coastal Transp. Co.*, 136 S.W.3d at 233).

Expert testimony based on technical or other specialized knowledge should ordinarily have some basis in principles, research, and methodology to demonstrate its

reliability. *See generally Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998). Expert testimony is considered unreliable if there is “too great an analytical gap between the data and the opinion proffered.” *Id.*; *see In re Martinez*, No. 09-05-493 CV, 2006 Tex. App. LEXIS 7459, 2006 WL 2439752, at \*3 (Tex. App.--Beaumont Aug. 24, 2006, no pet.) (mem. op.); *In re Estate of Robinson*, 140 S.W.3d 782, 792 (Tex. App.--Corpus Christi 2004, pet. denied).

Bailey objected to the reliability of Thorne’s testimony prior to Thorne testifying to his opinions, specifically as to the hearsay nature of documents Thorne relied on in forming his opinion. After the trial court noted that the content of the purported hearsay had not been mentioned, the trial court overruled the objection. The court assured Bailey that, if necessary, the trial court would give a limiting instruction upon request. *See TEX. R. EVID. 705(d)*. Appellant does not complain on appeal about a lack of a limiting instruction. After a discussion with the court, counsel withdrew the objection and told the court it would be renewed if Dr. Thorne testified to “some actual hearsay[.]” At the close of the State’s evidence, Bailey moved for a directed verdict based on the unreliability of the State’s experts’ testimony. To the extent that Bailey complains about the foundational data for the opinions of the State’s two expert witnesses, other than the reliability objection based on hearsay as noted above, Bailey did not object before trial or when the opinion evidence was offered and so did not ask for the court to evaluate the data. His objection was not sufficiently specific to preserve the complaint he makes on appeal. *See*

TEX. R. APP. P. 33.1; *see also generally Pollock*, 284 S.W.3d at 817; *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409-11 (Tex. 1998); *Harris v. Belue*, 974 S.W.2d 386, 393 (Tex. App.--Tyler, 1998, pet. denied) (motion for directed verdict after plaintiff rested its case is insufficient to preserve foundational complaints). Much of Bailey's argument in issue two challenges the respective methodologies of the State's experts. Nevertheless, to completely address Bailey's legal sufficiency challenge, we reviewed the record to determine if Bailey has demonstrated that analytical gaps in the opinions of Drs. Thorne and Arambula deprive their respective opinions of probative value.

Both of the State's experts explained the methodology they employed in determining whether Bailey suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. Both examined historical records regarding Bailey's offenses, reviewed his prison disciplinary history, made risk assessments, and interviewed Bailey. Thorne administered actuarial tests. We conclude that the record demonstrates that the expert testimony supporting the verdict has probative value. The record contains legally and factually sufficient evidence. A rational jury could have found beyond a reasonable doubt that Bailey suffers from a behavioral abnormality that makes him likely to engage in predatory acts of sexual violence. Issue two is overruled. We affirm the judgment and order of civil commitment.

AFFIRMED.

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DAVID GAULTNEY  
Justice

Submitted on July 15, 2010  
Opinion Delivered August 19, 2010

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