

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

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**NO. 09-09-00387-CV**

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**IN RE COMMITMENT OF MARK RICHARD HALL**

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**On Appeal from the 435th District Court**  
**Montgomery County, Texas**  
**Trial Cause No. 08-12-12024 CV**

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**MEMORANDUM OPINION**

The State filed a petition seeking to involuntarily civilly commit Mark Richard Hall. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 841.001-.150 (Vernon 2010). The jury found that Hall suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. *See id.* § 841.003(a)(2). Addressing the issues raised by appellant, we conclude the trial court did not err in its application of the statute, the evidence is legally sufficient, and the trial court did not err in refusing Hall’s requested jury question. We affirm the judgment of the trial court.

**REPEAT SEXUALLY VIOLENT OFFENDER**

In issue one, Hall argues that, given the applicable commitment statute’s meaning and the circumstances of this case, the State cannot and did not show him to be a repeat

sexually violent offender. See TEX. HEALTH & SAFETY CODE ANN. § 841.003(a). “Statutory construction is a legal question that we review de novo, ascertaining and giving effect to the Legislature’s intent as expressed by the plain and common meaning of the statute’s words.” *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 683 (Tex. 2007).

Specifically, Hall argues the trial court did not have jurisdiction over the case, because the State could not show that Hall was a repeat sexually violent offender, as required by section 841.003. See TEX. HEALTH & SAFETY CODE ANN. § 841.003(b). Absent clear legislative intent, we generally do not address a statutory provision as jurisdictional. See *City of DeSoto v. White*, 288 S.W.3d 389, 393 (Tex. 2009); see also *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000). “[J]ust because a statutory requirement is mandatory does not mean that compliance with it is jurisdictional.” *Albertson’s, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999). Section 841.003(b) does not contain any express language indicating the “repeat sexually violent offender” requirement is jurisdictional, and we do not believe that it is. See generally *In re Commitment of Browning*, 113 S.W.3d 851, 860 (Tex. App.--Austin 2003, pet. denied) (“[P]rimary purpose of requiring proof of prior convictions is evidentiary.”).

Section 841.003 provides as follows:

(a) A person is a sexually violent predator for the purposes of this chapter if the person:

(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.

(b) A person is a repeat sexually violent offender for the purposes of this chapter if the person is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses or if:

- (1) the person:
  - (A) is convicted of a sexually violent offense, regardless of whether the sentence for the offense was ever imposed or whether the sentence was probated and the person was subsequently discharged from community supervision;
  - (B) enters a plea of guilty or nolo contendere for a sexually violent offense in return for a grant of deferred adjudication;
  - (C) is adjudged not guilty by reason of insanity of a sexually violent offense; or
  - (D) is adjudicated by a juvenile court as having engaged in delinquent conduct constituting a sexually violent offense and is committed to the Texas Youth Commission under Section 54.04(d)(3) or (m), Family Code; and
- (2) after the date on which under Subdivision (1) the person is convicted, receives a grant of deferred adjudication, is adjudged not guilty by reason of insanity, or is adjudicated by a juvenile court as having engaged in delinquent conduct, the person commits a sexually violent offense for which the person:
  - (A) is convicted, but only if the sentence for the offense is imposed; or
  - (B) is adjudged not guilty by reason of insanity.

TEX. HEALTH & SAFETY CODE ANN. § 841.003. Hall asserts that “repeat sexually violent offender” does not mean “one who committed the same offense twice in the same criminal episode with the same person on the same day.”

Hall relies on two sections of the Texas Penal Code and certain statutes from other states. Section 22.021 of the Penal Code sets out various ways of committing aggravated sexual assault. *See* TEX. PEN. CODE ANN. § 22.021 (Vernon Supp. 2010). The statute does not require the offenses to have been committed on different days in order to be classified separate offenses. *Id.* Section 12.42 of the Penal Code is an enhancement statute that sets out punishment provisions for “[r]epeat and [h]abitual [f]elony [o]ffenders.” *See* TEX. PEN. CODE ANN. § 12.42 (Vernon Supp. 2010). Hall asserts that subsections of section 12.42 require proving prior convictions that are sequential. *See id.*, § 12.42(a), (c), (d). Hall argues that similar requirements should apply here -- that the State should be required to show the second offense occurred after the first offense became final. This language is not found in the portion of section 841.003 applicable here. Although Hall also points to Florida and Minnesota statutes to support his argument, we must apply the Texas statute as written.

The sexually violent predator commitment statute is civil in nature, not criminal. *See Kansas v. Hendricks*, 521 U.S. 346, 369, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); *see also Beasley v. Molett*, 95 S.W.3d 590, 607-08 (Tex. App.--Beaumont 2002, pet. denied). A non-punitive statute, the purpose of the SVP Act is to protect the public from, and to treat persons found to be, sexually violent predators. *See In re Commitment of Miller*, 262 S.W.3d 877, 888 (Tex. App.--Beaumont 2008, pet. denied). In contrast, section 12.42 is a criminal statute; the primary purposes of criminal punishment are

retribution and deterrence. *See In re Commitment of Browning*, 113 S.W.3d at 859 (purposes of punishment). The statutes do not reference each other expressly or implicitly, and the SVP Act does not deal with the same general subject matter or have the same general purpose as section 12.42. Section 12.42 does not apply in this context.

The applicable portion of section 841.003 does not indicate that the offenses must have occurred in a certain sequence, or that they must have occurred on different days. The first part of subsection (b) of section 841.003 states: “A person is a repeat sexually violent offender for the purposes of this chapter if the person is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses[.]” TEX. HEALTH & SAFETY CODE ANN. § 841.003(b). The text of the statute is not ambiguous.<sup>1</sup> The record is undisputed. Hall was convicted of two sexually violent offenses (aggravated sexual assault of a child). The trial court sentenced Hall to eight years in prison for each offense and ordered the sentences to run concurrently. We overrule issue one.

#### LEGAL SUFFICIENCY OF THE EVIDENCE

In issue two, Hall argues the evidence is legally insufficient to support the verdict. Because the statute employs a beyond-a-reasonable-doubt standard, we use the appellate standard of review in criminal cases for challenges to the legal sufficiency of the evidence. *See In re Commitment of Mullens*, 92 S.W.3d 881, 885 (Tex. App.--Beaumont

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<sup>1</sup>The second part of section 841.003(b) provides another definition for “repeat sexually violent offender.” *See* TEX. HEALTH & SAFETY CODE ANN. § 841.003(b)(1)-(2).

2002, pet. denied) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). We review all the evidence in a light most favorable to the verdict, and we consider whether a rational factfinder could have found, beyond a reasonable doubt, that Hall suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See id.*, at 885, 887.

Hall argues the testimony of the State's expert witnesses is unreliable, conclusory, and speculative, and is legally insufficient to support the finding that he suffers from a behavioral abnormality. Hall focuses on the experts' reliance on actuarial tests and on errors they made in scoring the instruments; he maintains that the scoring errors raise a reasonable doubt as a matter of law and prevent the State from meeting its burden of proof.

The Texas 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 the opinion has a supporting basis, but there is a reliability challenge that requires the trial court to evaluate the underlying methodology, technique, or foundational data, an objection must be timely made so that the trial court has the opportunity to conduct this analysis. *Id.* at 817-18 (citing *Coastal Transp. Co.*, 136

S.W.3d at 233). Here, there was no objection on reliability grounds at trial to the testimony of the State's expert witnesses.

Dr. Price, a clinical psychologist, testified regarding the basis of his opinion: he interviewed Hall, performed actuarial tests on Hall, and reviewed records normally relied on by experts in the same field to arrive at his opinion. He reviewed criminal history records, information regarding the offense, police reports, the prosecutor's trial proceedings or pleas, medical records in prison, and conduct in prison. Based on these materials and his training, experience, and education, Dr. Price concluded that Hall has a behavioral abnormality that predisposes him to commit predatory acts of sexual violence in the future.

The records reviewed show that, at age eighteen, Hall lived with his sister for four to seven months; his sister had three daughters, ages five, six, and eight. Hall babysat the three girls on a daily basis. The records reveal that Hall focused his attention on the six-year-old. He took her into a bedroom and blocked the door to keep the other two children out of the room. Removing the child's clothes, he tied her up with a rope, placed her on the bed, and sexually assaulted her. The child's statement revealed the conduct had happened a number of times. Dr. Price stated that in Hall's confession, which was contained in the records, Hall "also admitted to tying all three of the girls up with a rope and taking off their clothes. . . ." Dr. Price testified that Hall stated during the interview he had been using cocaine and smoking marijuana on that day.

Price described Hall's juvenile criminal history: a prior assault with bodily injury; two cases of criminal mischief; and several cases of a minor in possession of alcohol. Hall was placed on probation for some of the offenses, and violated the probation. Dr. Price found significant the fact that Hall's criminal history began at a young age, and that Hall's conduct revealed an inability to follow the rules.

In reviewing the records, Dr. Price found factors indicating a risk that Hall would reoffend and certain protective factors that would tend to reduce that risk. Price testified that Hall's risk factors for reoffending are numerous: two aggravated sexual assault convictions; a dense pattern of offending within a short time frame; likely substance abuse during the offenses; use of threats and physical coercion during the sex offenses with the children; the use of the rope; telling the children not to tell; the denial and minimization of his sex offense behavior during the interview; low victim empathy; non-contact sex offense while incarcerated; antisocial personality disorder (tendency to not follow the rules and the law); lack of participation in a sex offender treatment program; bad disciplinary history while incarcerated; and relatively poor employment history.

During his incarceration, Hall has had "eighteen or so" disciplinary cases. At the time of the non-contact sex offense conduct, he was in administrative segregation, and even under this strict form of supervision, he continued to violate the rules. As Price explained, Hall has "continued to engage in sexually deviant behavior while in prison and while under . . . the strictest conditions of -- possible of supervision." Dr. Price



characterized Hall's position as minimizing his offenses and blaming drugs for his behavior. Price explained that these are "indicators that there's an increased chance of this happening again."

Dr. Price relied on two tests in ascertaining certain risk factors for reoffending with a sexually violent offense and one test to determine any psychopathy. Dr. Price administered the Hare Psychopathy to Hall and scored him at twenty-two, an average level. On the Static-99 and the MnSOST, Dr. Price acknowledged there were scoring errors. He testified that even with the score reduction on the Static-99, the result still indicated a high risk of reoffending. Price rescored the MnSOST as a five, which is a "moderate risk of reoffending" within the next seven years. Dr. Price explained he did not use the actuarial alone to arrive at his opinion. Those instruments are "kind of a baseline from which to operate." Dr. Price testified that "you look at all the information, all the records, at the offenses, at the background, at everything you have."

Using the DSM-IV (a set of guidelines for making diagnoses of mental and personality disorders), Dr. Price diagnosed Hall with pedophilia, paraphilia not otherwise specified, abuse of drugs, and antisocial personality disorder. Based on the interview, Price concluded Hall failed to take responsibility for all the conduct he had previously admitted. Price stated, "It is my opinion that he has a behavioral abnormality, a sexually abnormal behavior and condition that predisposes him to commit sexually violent offenses in the future."

Dr. Bailey, a forensic psychiatrist, testified that he reviewed all relevant records (medical, health, and legal records, including depositions), conducted actuarial testing, and interviewed Hall. Dr. Bailey testified that in his professional opinion Hall meets the criteria under the Texas statute for having a behavioral abnormality that makes him likely to engage in future acts of sexual violence.

In reviewing the records of the predicate offenses, Dr. Bailey observed in Hall a behavioral tendency for escalation of intensity in his conduct toward the three girls. Bailey described Hall's conduct as predatory. The records describe the child, who was the subject of the aggravated assault convictions, as being "tied on her stomach with her hands behind her back. . . ."

Like Dr. Price, Dr. Bailey considered both risk factors and protective factors for reoffending. Under risk factors, Bailey noted that Hall used marijuana periodically and was under the influence of marijuana on the date of the offense. "[T]he use of alcohol and drugs is a huge issue for us because they've been shown . . . to very often disinhibit persons, make persons more likely to do something they wouldn't have done otherwise, less likely to have that internal light that goes on that says stop." Dr. Bailey testified Hall also has a fairly extensive history of assaultive behavior both before and during incarceration. The assaultive behavior was directed at peers and at authority figures. Hall committed crimes as a juvenile, and he violated probation during that time. The drugs, alcohol, assaultive behavior, and probation violations are risk factors for reoffending.

Other risk factors include Hall's high school drop-out status; lack of gainful, long-term employment history; multiple acts during an offense; sexual offense while in prison; and breaking rules while in prison. Bailey explained "persons who have difficulty when they know they've been watched very carefully . . . [and] still violate[] the rules when they know they're at a highly likelihood to be caught when doing so . . . I call it some type of a brain filter that doesn't tell them to stop when many others are told to stop. So that can be a cautionary red flag for an evaluating clinician like myself when asked about their relative subsequent risks."

Dr. Bailey found certain protective factors that would tend to lower the risk of reoffending. Hall is not psychotic. Those who engage in sexualized behaviors towards boys, rather than girls, are at a higher risk of doing it again in the future. Bailey indicated that Hall blames himself for his behavior, and many of Hall's violations in prison were "turf battles."

Bailey reviewed Hall's prison records. Hall has had multiple documented offenses while in prison. Bailey testified that seventeen were major infractions, and others were minor. Seven of the major infractions were against law enforcement officers. In addition, there was also a documented sexual offense. "For there to be a documented sexual offense would seem to imply . . . that the thought processes were still going on even during the prison time. . . ." Dr. Bailey indicated that Hall has not received sex offender

treatment, and Bailey saw nothing in the records indicating Hall has changed and learned how to handle any issues or urges regarding sex offending.

Like Dr. Price, Dr. Bailey performed actuarial tests on Hall. Actuarials are psychological tests used in conjunction with the records and the “clinical face-to-face evaluation.” Bailey testified he hopes he does a “better job scientifically by using several tools than if we just use one.” Dr. Bailey acknowledged that the various psychological tests are a “hotly contested scientific item” in his profession.

Dr. Bailey testified to scoring errors on two of the psychological tests. He rescored the Static-99 from a four to a two (a moderate low risk) and the MnSOST from a seven to a four (a mild or lower risk). Even with the lowered scores, Dr. Bailey concluded that, with all the factors he employed in the evaluation, Hall would still meet the criteria. Dr. Bailey testified Hall has a “long, extensive history of a variety of actions that represent very poor behavioral self-control.”

Using the Diagnostic and Statistical Manual of Mental Disorders (DSM), Bailey diagnosed Hall with paraphilia NOS (not otherwise specified) with features of pedophilia. Bailey indicated there was evidence of Hall’s sexual activity involving the victim and Hall’s acting on the urges he had.

Dr. Bailey stated that “the final determination by a professional is based on a summary of all of the information.” Even after the correction of the actuarial test scores to indicate a lower risk of reoffending, Dr. Bailey concluded, based on “all of the

information,” that Hall has a behavioral abnormality that makes him likely to engage in a sexual act of violence.

Dr. Roger Saunders, a clinical psychologist, testified as an expert for the defense. He explained he interviewed Hall and reviewed various records. Those included the pen packet, prison records, medical records, records from the sex offender treatment program unit, police reports on the offense, disciplinary reports, and actuarial instruments. Based on the interview and on his “integration of all the material that [he] reviewed,” Saunders concluded Hall does not have a behavioral abnormality under the sexually violent predator act, because the events occurred in a “single time period versus recurrent or persistent over time.” Rather than a behavioral abnormality, Dr. Saunders characterized the conduct as both “sexual experimentation” and “sexual assaults[.]” In addition, Saunders testified he does not believe Hall is a sexual predator, because the access was opportunistic, and in Saunders’s view Hall did not hunt or look for a victim.

In Dr. Saunders’s opinion, Hall has experienced a “significant maturation process. . . over the last few years, where he has, basically, in his words, grown up in prison.” Dr. Saunders found Hall to be very remorseful for his conduct; Hall blamed himself for what happened, not alcohol or drugs. In the last few years, Hall has had a decrease in the record of major and minor infractions he has incurred while in prison. Dr. Saunders explained, “[Hall]’s in a very hostile environment, and he has learned what he has to do to avoid trouble and for self-protection.” Saunders finds these to be protective factors.

Dr. Saunders testified he relied very little on the actuarial instruments. He explained “there have been multiple problems with them. . . . both with the test construction, their reliability, their validity. . . .” “[T]here’s a host of problems with those instruments, and especially in the use in this case.” He acknowledged that for some clinicians, these actuarials are still the standards.

Dr. Saunders concluded that Hall does not have an antisocial personality disorder, and he is not a pedophile because his sexual offenses against the girls did not occur over a long enough period of time. Most of the infractions in prison for fighting were defensive, self-protective, and adaptive. Based on his training, experience, and education, Dr. Saunders testified Hall is at low risk to reoffend and does not suffer from a behavioral abnormality that predisposes him to commit a sexually violent offense.

From their review of the records, interviews with Hall, and results of actuarial testing, Dr. Price and Dr. Bailey testified that Hall’s characteristics and conduct demonstrate his behavioral abnormality, as defined in the Act. They explained in detail the risk factors that make Hall likely to reoffend. The opinions they expressed have a reliable basis in the record. Drs. Price and Bailey connected the data relied upon (the records reviewed, the interview, and the actuarials) with their opinions. They showed how the data provides valid support for their opinion that Hall suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. The jury determines the credibility of the witnesses and the weight to be give their testimony,

and resolves conflicts and contradictions in the evidence. *In re Commitment of Mullens*, 92 S.W.3d at 887. The testimony of the State’s experts is not conclusory or speculative, and the evidence is legally sufficient to support the verdict.

#### THE REQUESTED JURY QUESTION

In issue three, Hall argues the trial court erred by refusing his requested jury question. Hall requested the following jury question: “Do you find beyond a reasonable doubt that Mark Richard Hall has a serious difficulty controlling his behavior?” The trial judge denied Hall’s request. This Court has previously addressed and overruled this issue in *In re Commitment of Almaguer*, 117 S.W.3d 500, 505-06 (Tex. App.--Beaumont 2003, pet. denied). *See also In re Commitment of Browning*, 113 S.W.3d at 862-63.

The jury was asked, “Do you find beyond a reasonable doubt that Mark Richard Hall suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence?” The question closely tracks the statute. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.003(a). The requested question refused by the trial court would “merely have emphasized one aspect of the case already implicit in the statutory definition and broad-form question” submitted to the jury. *In re Commitment of Riojas*, 220 S.W.3d 195, 196 (Tex. App.--Beaumont 2007, no pet.); *In re Commitment of Almaguer*, 117 S.W.3d at 505-06). We overrule issue three. The judgment is affirmed.

AFFIRMED.

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DAVID GAULTNEY  
Justice

Submitted on August 30, 2010  
Opinion Delivered October 7, 2010

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