

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

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**NO. 09-10-00382-CV**

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**IN RE COMMITMENT OF JOHN H. HARTSHORN**

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**On Appeal from the 435th District Court**  
**Montgomery County, Texas**  
**Trial Cause No. 09-10-10595 CV**

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**MEMORANDUM OPINION**

The State filed a petition seeking the involuntary civil commitment of John Henry Hartshorn as a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001-.151 (West 2010 & West Supp. 2011). A jury found Hartshorn suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. *See id.* § 841.003 (West 2010).

**SEXUALLY VIOLENT PREDATOR STATUTE**

The State was required to prove beyond a reasonable doubt that Hartshorn is a sexually violent predator. *See id.* § 841.062(a) (West 2010). The 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). A “behavioral abnormality” is 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) (West Supp. 2011). In order to civilly commit Hartshorn, “proof of serious difficulty in controlling behavior” is required. *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002). A jury determination that Hartshorn suffers from an emotional or volitional defect so grave as to predispose him to threaten the health and safety of others with acts of sexual violence is a determination that he has serious difficulty in controlling behavior. *In re Commitment of Browning*, 113 S.W.3d 851, 863 (Tex. App.—Austin 2003, pet. denied).

#### SUFFICIENCY OF EVIDENCE

Hartshorn filed an amended brief challenging the legal sufficiency of the evidence that he has serious difficulty in controlling his behavior. He argues the State’s experts’ testimony was conclusory.

When a party makes a reliability challenge to the expert’s testimony that requires the trial court to evaluate the expert’s underlying methodology, technique, or foundational data, the party must make a timely objection before trial or when it is offered in order to preserve a sufficiency complaint for appeal. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816-17 (Tex. 2009); *Coastal Transp. Co. v. Crown Cent.*

*Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004). However, when the challenge is that the expert's testimony on its face is conclusory or speculative, a party may challenge the legal sufficiency of the evidence even in the absence of an objection to its admissibility. *Coastal*, 136 S.W.3d at 233 (citations omitted).

A legal sufficiency challenge may be preserved by (a) a motion for directed verdict, (b) a motion for judgment notwithstanding the verdict, (c) an objection to submitting an issue to the jury, (d) a motion to disregard a jury finding on an issue, or (e) a motion for new trial. *See Cecil v. Smith*, 804 S.W.2d 509, 511 (Tex. 1991). The legal sufficiency challenge here was not preserved.

Even if we were to construe Hartshorn's issue as a factual sufficiency challenge, which was preserved in the motion for new trial, the evidence is factually sufficient to support the verdict. In a factual sufficiency review in an SVP case, if, after the appellate court weighs the evidence, the risk of an injustice remains too great to allow the verdict to stand, the appellate court may grant the defendant a new trial. *In re Commitment of Day*, 342 S.W.3d 193, 213 (Tex. App.—Beaumont 2011, pet. denied).

#### EXPERT TESTIMONY

The expert testimony is that of the State's two expert witnesses, Dr. Lisa Clayton and Dr. Timothy Proctor, and Hartshorn's expert witness, Dr. Roger Saunders. The methodology of each expert included reviewing various records and interviewing Hartshorn. The experts relied on the facts and data contained in the records to form their

opinions. The records reviewed by experts in this field are typically offense records, psychologist evaluations, parole case summaries, prison records, medical records, victim statements, pen packets, and depositions. Dr. Proctor and Dr. Saunders also relied on actuarial tests in their evaluations. The experts all described Hartshorn's extensive, prolonged alcohol and illegal drug use, which they considered a factor in evaluating his ability to control his behavior. They accorded great significance to his commission of sexually violent offenses while on probation. The three experts agreed on certain diagnoses for Hartshorn: pedophilia, paraphelia not otherwise specified, polysubstance dependency (in remission because of incarceration), and antisocial personality disorder.

#### DR. CLAYTON

Dr. Lisa Clayton, a physician who is board certified in psychiatry and forensic psychiatry, testified that Hartshorn suffers from a behavioral abnormality. The records reveal Hartshorn had been convicted of three sexually violent offenses: indecency with a thirteen-year-old child, aggravated sexual assault of an eight-year-old child, and sexual assault of a twenty-year-old female. The three offenses were committed within a four year time span, and each involved Hartshorn's going into the room of a sleeping female and committing a sexually violent offense against her. He committed the indecency-with-a-child offense in the late 1980's. While on probation for that offense, he committed the June 1990 aggravated-sexual-assault offense. While on probation for that offense, he

committed the 1991 sexual assault. At the time of the judgment and civil commitment, Hartshorn had been in prison for approximately twenty years.

Dr. Clayton testified that Hartshorn's three sexually violent offenses "show[] a consistent pattern that he hasn't been able to control his sexual violent acting out behavior when he is out in the free world." Clayton testified that Hartshorn is stimulated by coming up on sleeping females and then sexually assaulting them while they sleep. Dr. Clayton described this conduct as sexual deviancy. Hartshorn receives pleasure from observing the victims' shock when they awake and find him there. Hartshorn preys upon children and women who are vulnerable. He is a pedophile. In Clayton's opinion, Hartshorn's conduct demonstrates "his behavioral abnormality that he can't control when he's in the free world and that makes him a danger to society."

Clayton also testified that Hartshorn has an antisocial personality disorder that, in his case, manifests itself as a "total disregard for rules and laws[.]" While Hartshorn was in the Navy, he spent time in the brig on two occasions, because he refused to follow the rules. Both times that he was released from prison on the sexually violent offenses, he reoffended. Although completion of a sex-offender-treatment program was a requirement of his shock probation, Hartshorn completed only one day. Dr. Clayton testified that "part of [Hartshorn's] sexual deviancy and abnormality is he doesn't think he has a problem[.]"

Clayton testified to Hartshorn's risk factors for reoffending. His reoffending while on probation for the sexually violent offenses is a major risk factor. Although he has not

reoffended in the past twenty years, he has been in prison during those years, and, as Dr. Clayton explained, has not had the opportunity to prey upon sleeping women and girls.

Hartshorn relies on Dr. Clayton's testimony that, although Hartshorn was under the influence of drugs and alcohol earlier in his life, he adapted himself to prison life in the last twenty years and has demonstrated he has changed. Clayton testified that Hartshorn "kind of settled down and [was] going with the flow[.]" Clayton explained that changed behavior in a controlled environment like prison is not indicative of the behaviors a person will have when he returns to his former environment.

#### DR. PROCTOR

Dr. Timothy Proctor is a licensed psychologist and licensed sex-offender-treatment provider. Board certified in forensic psychology, he testified that Hartshorn has a behavioral abnormality. Based on the interview of Hartshorn and a review of the records, Proctor testified to actions by Hartshorn that indicate serious difficulty in controlling behavior.

Dr. Proctor conducted psychological and actuarial tests on Hartshorn and found him to be at risk to sexually reoffend for the remainder of his life. Like Clayton, Proctor found significant that each time Hartshorn was on probation, he violated that probation by committing another sexually violent offense. Although Hartshorn's probation terms required him to complete a sex-offender-treatment program, Proctor testified that, as far as he knew, Hartshorn attended "very little of that treatment. He didn't attend." Hartshorn

stated he did not need that type of treatment. Proctor testified to certain protective factors that could diminish the risk of reoffending. Those include Hartshorn's age (sixty-two), lack of nonsexual violent convictions, lack of male victims, some employment stability, and his lack of disciplinary history in prison. As Proctor explained, however, one cannot over-extrapolate from the protective factors because of the difference between the prison environment and the free world environment. In Proctor's view, in spite of the protective factors, there is "an avalanche of factors that speak to his risk."

#### DR. SAUNDERS

Dr. Roger Saunders, the defendant's expert witness, is a licensed psychologist and licensed sex-offender-treatment provider. He concluded that Hartshorn does not have a behavioral abnormality. Saunders employed a methodology similar to that of Dr. Clayton and Dr. Proctor, and agreed with the four major diagnoses. In Saunders's opinion, the Static 99R, an updated actuarial instrument, is a superior instrument to the Static 99 used by Proctor, because the revised test factors in a person's age and applies the "Texas norms," which are more relevant for this case. Dr. Saunders testified that at age sixty-two, Hartshorn has a "substantially lower risk factor." In Dr. Saunders's opinion, the focus should be on that fact that there is recent evidence of a behavioral change in Hartshorn. He has "stellar" institutional adjustment. While in prison, he has had virtually no major or minor infractions. Hartshorn complied with the rules. Dr. Saunders stated, "[S]o there is not a disorder that we can point to say this is impairing his ability to control

himself volitionally, and that's an important part that I'm focusing in on the statute that I think was the basis of my opinion." Dr. Saunders testified that Hartshorn has changed since he committed the offenses.

#### CONCLUSION

The evidence is sufficient to support the verdict. The subjective aspects of the experts' opinions and the points of disagreement between the experts were developed for the jury. The bases of Clayton's and Proctor's opinions were explained, and those opinions were based on accepted techniques. Their opinions were not so weak that it was unreasonable for the jury to consider them in reaching the verdict. The jury rejected Saunders's opinion. A rational jury could find beyond a reasonable doubt that Hartshorn has serious difficulty in controlling his behavior. Appellant's issue is overruled. The judgment is affirmed.

AFFIRMED.

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DAVID GAULTNEY  
Justice

Submitted on October 6, 2011  
Opinion Delivered December 15, 2011

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