In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00557-CV

IN RE COMMITMENT OF THOMAS LEE ELKINS

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 10-02-01834 CV

MEMORANDUM OPINION

Thomas Lee Elkins appeals the civil commitment ordered by the trial court after a jury found that Elkins is a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001–.151 (West 2010 & Supp. 2011) (SVP statute). Elkins challenges the legal and factual sufficiency of the evidence supporting the jury's verdict and contends the trial court erred in submitting a broad-form charge. We affirm the trial court's judgment.

Legal Sufficiency

Elkins's first issue, which challenges the legal sufficiency of the evidence supporting the jury's verdict, requires that we assess all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could find, beyond

a reasonable doubt, the elements required for commitment under the SVP statute. *See In re Commitment of Mullens*, 92 S.W.3d 881, 885 (Tex. App.—Beaumont 2002, pet. denied). In jury trials, the jury determines the credibility of the witnesses, weighs the testimony and the other evidence, resolves conflicts in the testimony, and draws reasonable inferences from basic facts to ultimate facts. *Id*. at 887. To review the evidence in the proper light, we "must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

Elkins argues that we should disregard the opinion testimony presented by the State of a psychiatrist, Dr. David Self, and a psychologist, Dr. Timothy Proctor. The opinions of these two doctors were presented by the State to prove that Elkins suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See* Tex. Health & Safety Code Ann. § 841.002(2) (West Supp. 2011). Elkins argues that the opinions of the State's experts lacked adequate foundational support because both experts considered criminal behavior for which Elkins had not been convicted in forming their respective opinions.

The records reviewed by the experts in forming their professional opinions include background information about offenses for which Elkins had been convicted, information about additional offenses that resulted in an arrest but the charges were dropped, and additional offenses for which Elkins had been a suspect but had not been arrested or

charged. Before his incarceration, Elkins worked as a long-haul truck driver. The records that the State's doctors reviewed reflect that Elkins had been accused in several other states of sexually assaulting young women that he picked up while travelling. Elkins's records also reflect that he had been convicted of five prior crimes, including a 1981 conviction in Illinois on a charge of contributing to the sexual delinquency of a child; a 1986 aggravated kidnapping case in Tennessee; a 1991 conviction in Texas for aggravated sexual assault; and two convictions that occurred in 1992 in Florida, one for sexual battery and the other for aggravated battery. The offenses relating to Elkins's Texas and Florida convictions were committed while Elkins was still serving parole for his conviction from the State of Tennessee. Elkins also admitted that he was arrested for rape in connection with the charge of aggravated kidnapping in Tennessee, but the rape charge was dismissed. Elkins's records also reflect that he was arrested in Louisiana in 1980 for aggravated rape, aggravated kidnapping, crimes against nature, and simple battery; however, he was never prosecuted on those charges.

The convictions and arrests were admitted by Elkins in his responses to requests for admissions, and those admissions were read to the jury. Matters that are admitted in response to requests for admission are considered conclusive as to the admitting party. *DeSoto Wildwood Dev., Inc. v. City of Lewisville*, 184 S.W.3d 814, 822 (Tex. App.—Fort Worth 2006, no pet.). It is uncontroverted that Elkins's criminal history included the arrests and convictions that the State's doctors reviewed in preparing to testify. But,

Elkins contends Dr. Proctor used the history of Elkins's arrests improperly when scoring Elkins's actuarial assessment. However, Elkins's own expert, Dr. Walter Quijano, agreed with the scores that Dr. Proctor assigned to Elkins on the actuarial tests that Dr. Proctor administered.

Elkins also argues that Dr. Self's opinion is unreliable because Dr. Self considered Elkins's arrests in Louisiana as evidencing Elkins's pattern of sadistic behavior. Dr. Self acknowledged during his testimony that there was scant information about the Louisiana charges because Elkins had not been prosecuted on these charges. Dr. Self also stated that he based his diagnosis of sexual sadism on the offenses for which the records he reviewed contained details. Dr. Self's testimony does not indicate that Elkins's Louisiana arrests were significant with respect to Dr. Self's diagnosis. In our opinion, the fact that Elkins's arrest history may have been considered by the State's doctors in forming their respective opinions does not render either opinion inadmissible, either in whole or in part. Based on the evidence before the jury, we conclude that reasonable jurors could find, beyond a reasonable doubt, that a behavioral abnormality makes Elkins likely to engage in a predatory act of sexual violence. *See In re Commitment of Mullens*, 92 S.W.3d at 885. Because the evidence is legally sufficient to support the jury's verdict, we overrule issue one.

Factual Sufficiency

Elkins's factual sufficiency challenge requires us to weigh the evidence to determine whether a verdict that is supported by legally sufficient evidence nevertheless reflects a risk of injustice that compels granting a new trial. *In re Commitment of Day*, 342 S.W.3d 193, 213 (Tex. App.—Beaumont 2011, pet. denied). Elkins argues that Dr. Proctor's and Dr. Self's opinions lack probative value because they are based on assumed facts. Elkins also contends that the opinion of his expert, Dr. Quijano, should have been given greater weight by the jury than it was because he considered only the offenses resulting in convictions as relevant to his analysis.

Dr. Quijano's testimony, however, reflects that he did consider the allegations not resulting in convictions, but chose to weigh them slightly or to give them no weight in his analysis. The fact that different experts weighed various historical data differently does not mean the jury's verdict reflects a risk of injustice that compels granting a new trial. The subjective differences between the experts' approaches were developed for the jury. On this record, we cannot say that the jury could not have discredited Dr. Quijano's professional opinion, or that the opinions of the State's doctors were so weak that it was unreasonable for the jury to have credited them in reaching its verdict. *See In re Mullens*, 92 S.W.3d at 887. Having reviewed the testimony, we are not persuaded that Elkins suffered an injustice based on the jury's verdict; therefore, we conclude he is not entitled to a new trial. *See In re Commitment of Day*, 342 S.W.3d at 213. We overrule issue two.

Submission of Jury Questions

In his third issue, Elkins challenges the trial court's use of a broad-form charge. In a single question, the charge asked: "Do you find beyond a reasonable doubt that THOMAS LEE ELKINS suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence?" During the charge conference, Elkins requested that the submission be divided into two separate questions: (1) "Do you find beyond a reasonable doubt that Thomas L. Elkins suffers from a behavioral abnormality?" and (2) "If a behavioral abnormality does exist, do you find beyond a reasonable doubt that the behavioral abnormality makes Thomas L. Elkins likely to engage in a predatory act of sexual violence?"

We recently approved the broad-form submission of the controlling issue in a single question. *See In re Commitment of Campbell*, No. 09-11-00407-CV, 2012 Tex. App. LEXIS 5125, at **19-22 (Tex. App.—Beaumont June 28, 2012, no pet. h.) (mem. op.). According to Elkins, the charge the trial court submitted to the jury prevented the jury from giving adequate consideration to his defensive evidence and arguments. Nevertheless, the charge the trial court submitted required the jury to consider each of the controlling elements relevant to a sexually violent predator commitment proceeding; additionally, the charge the trial court submitted contains an instruction the jury was required to follow regarding the statutory definition of the term "behavioral abnormality."

See id.; see also Tex. Health & Safety Code Ann. § 841.062(a) (West 2010), § 841.002(2).

Finally, the charge which the jury used in its deliberations did not prohibit Elkins from arguing that he could control his sexual behavior, nor did it prevent him from arguing that he had successfully controlled his sexual behavior while incarcerated. A review of counsel's argument reflects that Elkins's counsel made these arguments to the jury. We conclude the charge did not prevent the jury from considering fully Elkins's arguments. *See In re Commitment of Campbell*, 2012 Tex. App. LEXIS 5125, at **21-22.

We hold the trial court did not abuse its discretion by submitting the case to the jury in a single question. We overrule issue three, and we affirm the judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on March 30, 2012
Opinion Delivered July 12, 2012
Before Gaultney, Kreger, and Horton, JJ.