

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-11-00099-CV

IN RE COMMITMENT OF RICHARD LEE HAYDEN

**On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 10-05-05152 CV**

MEMORANDUM OPINION

The State filed a petition to involuntarily civilly commit Richard Lee Hayden as a sexually violent predator (SVP). *See* Tex. Health & Safety Code Ann. §§ 841.001-.151 (West 2010 & Supp. 2011). 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) (West 2010). 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) (West Supp. 2011). The jury found that Hayden has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See id.* § 841.003(a). Hayden filed this appeal of the trial court's commitment order.

THE EVIDENCE

Hayden was previously convicted of the aggravated sexual assault of his nine-year-old step-niece. He pleaded guilty. During his prison sentence, Hayden was investigated for sexual abuse against cellmates. One of the complaints resulted in a conviction. Hayden also was indicted for sexually abusing another inmate. That inmate dropped criminal charges.

Dr. Stephen Thorne, a licensed clinical psychologist, testified in the commitment proceeding. Thorne reviewed Hayden's offense reports, prison records, criminal records, and medical records. Thorne explained that these are the types of records normally relied on by experts in his field in evaluating someone for a behavioral abnormality. He interviewed Hayden. Thorne explained at trial that his evaluation of Hayden was in accordance with Thorne's training as a psychologist and within the accepted standards in the field of forensic psychology. Based on Thorne's education, training, experience, review of Hayden's records, and interview of Hayden, Thorne concluded that Hayden has a behavioral abnormality that makes him likely to commit a predatory act of sexual violence.

Thorne administered actuarial tests that are peer-reviewed and generally accepted by forensic psychologists. Hayden scored a “19” on the Psychopathy Checklist Revised, Second Edition, which is a score in the moderate range but does not indicate Hayden is a psychopath. Hayden scored a “positive 2” on the Static-99R test which places him in the low-to-moderate range for reoffending. Thorne explained that although Hayden scored in this range on the Static-99R, he would have scored a “positive 4” on the Static-99. On the MnSOST test, Thorne scored Hayden a “positive 10,” which is in the high range for risk of reoffending. Thorne testified that he had concerns that Hayden would sexually reoffend.

Dr. David Self, a licensed psychiatrist, also testified. Self evaluated Hayden to determine if he has a behavioral abnormality. The methodology was in accordance with his training as a psychiatrist and within the accepted standards in the field of forensic psychiatry. Self reviewed approximately fourteen hundred records, including records relating to Hayden’s offenses, his conduct while in prison, health, parole options, and education. Self reviewed one written report from one psychologist and he reviewed the deposition of another psychologist. Self testified that the records he reviewed are the kind relied upon by experts in his field for this type of evaluation. He interviewed Hayden. Using the DSM-IV-TR as a guideline, Self diagnosed Hayden with paraphilia not otherwise specified, alcohol dependence, marijuana dependence, polysubstance dependence, and antisocial personality disorder. Self determined that Hayden suffers

from a behavioral abnormality that makes him likely to commit a predatory act of sexual violence.

HAYDEN'S ADMISSIONS

In his first issue, Hayden argues he should not have been required to respond to the State's requests for admissions and the State should not have been permitted to read his admissions to the jury. He contends that these actions conflict with section 841.062(a) of the Texas Health and Safety Code. *See* Tex. Health & Safety Code Ann. § 841.062(a) (West 2010). He argues that the use of this discovery undermines the Act's requirement that the State prove its case beyond a reasonable doubt, thereby "depriving [him] of his liberty interest in violation of due process." Hayden concedes that he did not object to the requests for admissions or to the State's reading of his responses at trial, but he argues that the fundamental-error doctrine applies "so as to preserve this error" for this Court's review. This Court recently stated that "[t]o preserve error concerning the admission of evidence at trial, the appellant must make a timely objection that states the specific ground of the objection[,]” and we declined to address the appellant's argument that we should consider his claim of error regardless of whether he preserved it. *See In re Commitment of Frazier*, No. 09-10-00033-CV, 2011 Tex. App. LEXIS 4896, at *2 (Tex. App.—Beaumont June 30, 2011, no pet.) (mem. op.). We overrule Hayden's first issue.

In his second issue, Hayden states that his Fifth Amendment rights were violated when he was forced to answer requests for admissions and to testify against himself. He

argues that his discovery responses and testimony could incriminate him in a future criminal proceeding. Hayden does not identify any specific questions that elicited information that would subject him to future criminal prosecution. Blanket assertions of the Fifth Amendment privilege in civil cases are impermissible. *In re Commitment of Lowe*, 151 S.W.3d 739, 744-45 (Tex. App.—Beaumont 2004, pet. denied); *In re Commitment of Browning*, 113 S.W.3d 851, 862 n.10 (Tex. App.—Austin 2003, pet. denied). The privilege must be asserted on a question-by-question basis. *Lowe*, 151 S.W.3d at 745; *Browning*, 113 S.W.3d at 862 n.10. The trial court then determines whether the assertion of the privilege is in good faith and justifiable under the totality of the circumstances. *Lowe*, 151 S.W.3d at 745. Hayden did not follow that process. His second issue is overruled.

EVIDENTIARY RULINGS

In his third issue, Hayden maintains the trial judge abused his discretion by improperly delegating the determination of relevance to the jury, and that the abuse of discretion amounts to reversible error. Hayden focuses on the following exchange at trial when the State attempted to ask Hayden a question about events that occurred after the crime for which he was incarcerated:

[Defense counsel]: Objection, Your Honor, this line of questioning is not relevant to whether or not [Hayden] has a behavioral abnormality in regards to the aftermath of involving the police.

[State's counsel]: Your Honor, he got a resisting arrest out of this incident.

[Defense counsel]: Which none of the doctors used in their evaluation for behavioral abnormality.

The Court: We're going to let the jury make the determination of what's relevant about the behavioral abnormality, so I'll overrule your objection.

Hayden testified that he ran from law enforcement officers, and that an officer had to restrain him in a choke-hold in order to arrest him. In considering whether evidentiary error requires a new trial, the entire record is reviewed to determine whether the judgment turns on the particular evidence admitted. *In re Commitment of Dodson*, 311 S.W.3d 194, 203 (Tex. App.—Beaumont 2010, pet. filed). Even if error occurred in the trial court's ruling, we are not persuaded that the judgment turns on this particular evidence or that the error resulted in an improper judgment. *See id.* Issue three is overruled.

In his fourth issue, Hayden argues the trial court abused its discretion by allowing Dr. Thorne to testify that he changed his opinion between deposition and trial. Hayden argues that the trial judge “failed to perform his gatekeeper function to rule whether expert testimony was admissible” and “allowed the disputed, changed, and un-supplemented evidence to be submitted to the jury with no finding of good cause or of the lack of unfair surprise or unfair prejudice[,]” thereby requiring reversal. A party may not present a material alteration of an expert's opinion at trial that would constitute a surprise attack. *Norfolk S. Ry. Co. v. Bailey*, 92 S.W.3d 577, 581 (Tex. App.—Austin 2002, no

pet.) (citing *Exxon Corp. v. West Tex. Gathering Co.*, 868 S.W.2d 299, 304-05 (Tex. 1993)).

In Dr. Thorne's deposition prior to trial, he testified Hayden was diagnosed with paraphilia not otherwise specified and adult antisocial behavior. At trial, Thorne testified that he believed Hayden suffers from sexual abuse of a child and sexual abuse of an adult instead of paraphilia not otherwise specified, and that he suffers from antisocial personality disorder instead of adult antisocial behavior. Dr. Thorne testified that, after his deposition and upon subsequently reading Hayden's deposition, he had more information and refined his diagnoses. Dr. Thorne explained that the differing diagnoses in his deposition and at trial were based on the same behaviors. He did not change his opinion as to whether Hayden suffers from a behavioral abnormality. We are not persuaded that the judgment turns on the changes in his testimony, or that any error in admitting the testimony resulted in an improper judgment. *See Dodson*, 311 S.W.3d at 203. Issue four is overruled.

LEGAL SUFFICIENCY

In his fifth issue, Hayden contends the expert testimony offered by the State's witness is speculative, conclusory, and legally insufficient to support the jury's finding. Hayden argues that the expert witnesses had no basis for their opinions and that their testimony "fails to disclose any methodology, research, or principles" that support their opinions. *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232

(Tex. 2004). He asserts that the actuarials and DSM-IV diagnoses here are insufficient without expert testimony connecting the data to the opinion reached.

Both experts are licensed in their respective fields. Both interviewed Hayden and reviewed the records related to his history. The records they reviewed were of the type relied upon by experts in their fields. Both experts performed their assessments in accordance with their training as professionals in their fields. They explained how the evidence in those records played a role in their assessments. Thorne also reviewed actuarial test results he had scored to evaluate Hayden. Each expert concluded that Hayden suffers from a behavioral abnormality. The expert testimony is not so speculative or conclusory as to be lacking in probative value.

Expert testimony may be unreliable if there is too great an analytical gap between the data and the opinion proffered. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998) (citing *General Electric Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)); see also *In re Commitment of Martinez*, No. 09-05-493-CV, 2006 Tex. App. LEXIS 7459, at*10 (Tex. App.—Beaumont Aug. 24, 2006, no pet.). Dr. Thorne explained that actuarial tests have been studied by individuals in his field, have been peer-reviewed, and are generally accepted by forensic psychologists. He uses “actuarial instruments where we plug in data to kind of get a sense of . . . what might this individual’s risk for reoffending be when compared to other sex offenders.” Thorne stated that he would not use actuarials alone in evaluating for a behavioral abnormality

because the actuarials do not take into consideration certain facts relating to the offenses and other relevant information. His diagnoses for Hayden were not the only reasons he concluded Hayden has a behavioral abnormality. Thorne explained that “[i]t’s much more about the behaviors, the choices, the selection of victims that led to those diagnoses than the actual diagnosis itself [T]he fact that he had multiple victims that led to those diagnoses and the characteristics of those victims and the offenses . . . that played a large part in my opinion with respect to behavioral abnormality.” Dr. Self testified that the diagnoses assist in assessing behavioral abnormality because when “there’s sexual deviance, sexual crime, and that there’s an unstable antisocial lifestyle, and that when those things are combined that’s where the risk accumulates big time.” The record does not demonstrate that the expert testimony regarding the actuarials and diagnoses was without probative value. The evidence is sufficient to support the jury’s verdict. Issue five is overruled. We affirm the trial court’s judgment and order of civil commitment.

AFFIRMED.

DAVID GAULTNEY
Justice

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

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