

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

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**NO. 09-11-00230-CV**

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**IN RE COMMITMENT OF JAMES TIMOTHY ATKINS**

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**On Appeal from the 435th District Court**  
**Montgomery County, Texas**  
**Trial Cause No. 10-09-09576 CV**

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**MEMORANDUM OPINION**

The State of Texas filed a petition to commit James Timothy Atkins as a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001-.150 (West 2010). A jury found that Atkins suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. The trial court signed a final judgment and an order of civil commitment. In this appeal, Atkins raises four issues regarding the legal and factual sufficiency of the evidence to prove that he is unable to control his behavior, the trial court's refusal of his requested jury instruction explicitly placing the burden of proof on the State, and the trial court's decision to permit the State to call Atkins to testify against himself. We affirm the trial court's judgment.

## ISSUES ONE AND TWO

Under the SVP statute, the State must prove beyond a reasonable doubt that “the person is a sexually violent predator.” Tex. Health & Safety Code Ann. § 841.062(a). 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.” Tex. Health & Safety Code Ann. § 841.003. The statute defines “behavioral 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 inability to control behavior “must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.” *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002).

In reviewing the factual sufficiency of the evidence in a civil case in which the burden of proof is beyond a reasonable doubt, an appellate court weighs the evidence to determine whether a verdict that is supported by legally sufficient evidence nevertheless reflects a risk of injustice that would compel ordering a new trial.

*In re Commitment of Day*, 342 S.W.3d 193, 213 (Tex. App.—Beaumont 2011, pet. denied).

The record contains legally sufficient evidence from which the jury could determine that Atkins is a sexually violent predator and is unable to control his behavior. Board-certified psychiatrist Dr. Sheri Gaines and forensic psychologist Dr. Jason Dunham testified that based on actuarial tests, risk assessments, interviews with Atkins, Atkins's records and history, and his diagnosed conditions, Atkins has a behavioral abnormality that makes him likely to commit predatory acts of sexual violence. The jury heard evidence concerning Atkins's risk factors, actuarial test scores, criminal history, repeated sexual offenses, lack of sex offender treatment, disciplinary cases during his incarceration, as well as his diagnoses of paraphilia not otherwise specified (nonconsent with sexually sadistic features), psychopathy, alcohol dependence in remission, polysubstance dependence, sexual abuse of a child, and "personality disorder, not otherwise specified, with antisocial and narcissistic features."

The jury could reasonably conclude that Atkins is likely to engage in a predatory act of sexual violence. *See In re Commitment of Mullens*, 92 S.W.3d 881, 887 (Tex. App.—Beaumont 2002, pet. denied); *see also In re Commitment of Almaguer*, 117 S.W.3d 500, 506 (Tex. App.—Beaumont 2003, pet. denied); *In re Burnett*, No. 09-09-00009-CV, 2009 Tex. App. LEXIS 9930, at \*13 (Tex. App.—Beaumont Dec. 31, 2009, no pet.) (mem. op.). The conclusion that Atkins is unable to control his behavior is entailed in the jury's finding that Atkins suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See In re Commitment*

*of Grinstead*, No. 09-07-00412-CV, 2009 Tex. App. LEXIS 228, at \*16 (Tex. App.—Beaumont Jan. 15, 2009, no pet.) (mem. op.) (citing *Almaguer*, 117 S.W.3d at 505); *see also In re Bailey*, No. 09-09-00353-CV, 2010 Tex. App. LEXIS 6685, at \*\*12-13 (Tex. App.—Beaumont Aug. 19, 2010, no pet. h.) (mem. op.).

Reviewing all of the evidence in the light most favorable to the verdict, a rational jury could have found, beyond a reasonable doubt, that Atkins is a sexually violent predator; therefore, the evidence is legally sufficient. *See Crane*, 534 U.S. at 413; *Mullens*, 92 S.W.3d at 885. In addition, weighing all of the evidence, including Atkins’s testimony that he is able to control his behavior and the experts’ testimony concerning Atkins’s positive factors, the verdict does not reflect a risk of injustice that would compel ordering a new trial; therefore, the evidence is factually sufficient. *See Day*, 342 S.W.3d at 213. Accordingly, we overrule issues one and two.

### ISSUE THREE

In his third issue, Atkins contends the trial court erred by refusing his requested jury instruction placing the burden of proof on the State. During the charge conference, Atkins requested the following instruction: “The State has the burden of proof in this case. The State must prove its case beyond a reasonable doubt. This means that the State must prove each element of its case beyond a reasonable doubt.” The trial court denied Atkins’s request. The sole question in the trial court’s charge to the jury read as follows: “Do you find beyond a reasonable doubt that JAMES TIMOTHY ATKINS suffers from

a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence?”

The burden of proof may be placed “by instructions rather than by inclusion in the question.” Tex. R. Civ. P. 277. “[T]he Rules of Civil Procedure contemplate that the jury can be instructed about applying the burden of proof in one of two ways: an admonitory instruction *or* by placement of the burden through the question.” *In re Commitment of Beasley*, No. 09-08-00371-CV, 2009 Tex. App. LEXIS 8664, at \*19 (Tex. App.—Beaumont Nov. 12, 2009, no pet.) (mem. op.). As was the case in *Beasley*, the phrasing of the question in the case at bar placed the burden of proof on the State, since an affirmative answer to the question required the State to prove, beyond a reasonable doubt, that Atkins suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See id.* We conclude that the question the trial court posed to the jury in the charge properly placed the burden of proof on the State. *See id.* We overrule issue three.

#### ISSUE FOUR

In his fourth issue, Atkins argues that the trial court erred by permitting the State to call him to testify against himself. Specifically, Atkins contends that “the State’s tactic impermissibly reduced or relaxed its burden of proof.” When the State called Atkins to testify, Atkins’s counsel objected that calling Atkins lowered the State’s burden of proof

and would result in the State eliciting testimony “that will make it easier for them to prove their case than they would otherwise have.” The trial court overruled the objection.

During voir dire, the State explained the burden of proof as follows:

Really it starts with us, with the State of Texas. And we have filed a lawsuit alleging that Mr. Atkins . . . is a repeat sexual offender. And that means that he has more than one . . . conviction for a sex offense, and that he has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. And those are really the two things that we have to prove to you. And as the Judge talked about, those two things are . . . really our end goal. That’s our burden that we’re going to carry and I anticipate we’ll meet at the end of the evidence.

Atkins’s counsel pointed out during voir dire that “[t]he State has to come in with evidence to prove to you that they are entitled to win their case. [Atkins] doesn’t have to bring any evidence, doesn’t have to have any witnesses. The burden is all on the State to prove that they’re entitled to win this case.

During the State’s opening statement, counsel stated, “And we told you in jury selection that we have the burden of proof in this case. And that burden is to prove to you beyond a reasonable doubt that Mr. Atkins has this behavioral abnormality.” In addition, during her opening statement, Atkins’s counsel stated, “Now, it’s the Petitioner’s burden to prove this case beyond a reasonable doubt.” Furthermore, during closing argument, both the State and Atkins’s counsel re-emphasized that the State bore the burden of proving beyond a reasonable doubt that Atkins has a behavioral abnormality that makes him likely to commit predatory acts of sexual violence. The jury charge included the proper burden of proof; calling Atkins as an adverse witness did not

lower the State's burden of proof. *See In re Commitment of Serna*, No. 09-10-00029-CV, 2011 Tex. App. LEXIS 2371, at \*10 (Tex. App.—Beaumont Mar. 31, 2011, no pet.) (mem. op.); *see also In re Commitment of Frazier*, No. 09-10-00033-CV, 2011 Tex. App. LEXIS 4896, at \*4 (Tex. App.—Beaumont June 30, 2011, no pet.) (mem. op.). Accordingly, we overrule issue four and affirm the trial court's judgment and order of civil commitment.

AFFIRMED.

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STEVE McKEITHEN  
Chief Justice

Submitted on October 3, 2011  
Opinion Delivered October 13, 2011

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