In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00487-CV

IN RE COMMITMENT OF JOSEPH DAVID MILLER

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 15-04-03834-CV

MEMORANDUM OPINION

Joseph David Miller appeals from a judgment on a jury verdict that resulted in his civil commitment as a sexually violent predator. *See* Tex. Health & Safety Code Ann. § 841.081(a) (West Supp. 2016).[1] In two issues brought on appeal, Miller argues that the trial court erred by overruling Miller's hearsay objections and by excluding cross-examination of the State's expert regarding material the expert

[1] Amendments to the statute became effective after the date the commitment order was signed, but because the amendments do not affect our analysis in this case, we refer to the current version of the statute.

relied upon in forming her opinion. We overrule Miller's issues and affirm the trial court's judgment and order of civil commitment.

In issue one, Miller contends that the trial court erred by overruling Miller's objections to questions and comments by counsel for the State which Miller argues contains hearsay regarding unadjudicated offenses. The State's expert testified that she relied upon certain records of Miller's when forming her opinion in this case, including, among others: records that showed Miller was convicted in 1992 for two counts of aggravated sexual assault—one committed in 1979 and another committed in 1991; records that showed that Miller was out on bond when he re-offended; and records that showed that after his release from prison, Miller was convicted of attempted indecency with a child for an offense committed in 2013. Miller was released from prison in 2015. In his appeal, Miller complains that the trial court overruled a series of hearsay objections to arguments and evidence that he committed unadjudicated offenses. Subjects that Miller claims concern inflammatory statements that were either unsupported or false include whether Miller used a deadly weapon while assaulting the victim of his 1979 aggravated sexual assault, whether Miller abused this victim over a period of years, whether Miller engaged in "peeping" into a neighbor's yard after his most recent release from prison, and whether he sexually abused a niece and a nephew.

Miller complains that in opening arguments, counsel for the State informed the jury that the State's expert, a psychiatrist, Dr. Sheri Gaines, relied on facts and details of criminal offenses Miller had committed, including holding a gun to one six-year-old victim's head. When Miller objected that the statement was hearsay and assumed facts not in evidence, the trial court noted that argument of counsel is not evidence. This ruling was correct. *See Tex. Dep't of Pub. Safety v. Mendoza*, 952 S.W.2d 560, 564 (Tex. App.—San Antonio 1997, no pet.). Of course, "[t]o the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means." Tex. R. Evid. 103(d). Nevertheless, the argument was not "offer[ed] in evidence" as required by the hearsay rule. *See* Tex. R. Evid. 801(d)(2),[2] and because it occurred during opening statements, the trial court had no duty to determine its admissibility at that stage of the trial.

Miller contends the State's questions to Miller during the evidentiary portion of the trial, asking if he held a gun to a six year old victim's head, sought to elicit inadmissible hearsay. Hearsay, though, is not a statement that the declarant makes while testifying during the current trial, but an out-of-court statement. Tex. R. Evid. 801(d). Miller was testifying in court and the question did not seek to elicit testimony

[2] In his reply brief, Miller suggests that counsel's remarks during opening argument are germane to a harm analysis. *See* Tex. R. App. P. 44.1(a)(1). We need not conduct a harm analysis if we find no error. *See id.*

about an out-of-court statement made by the declarant or the defendant. *See* Tex. R. Evid. 801(d), (e). In his reply brief, Miller argues that asking a person if he did an act is hearsay. The cases he cites, however, concern questions that ask the witness to acknowledge an out-of-court statement had been made by a third party concerning a matter on which the witness lacked first-hand knowledge. *See Crawford v. State*, 603 S.W.2d 874, 875 (Tex. Crim. App. [Panel Op.] 1980) ("Did you and your father ever have an occasion to discuss an attempt on your mother's part to poison him?"); *Cavender v. State*, 547 S.W.2d 601, 602 (Tex. Crim. App. 1977) (". . . but your mother has told your uncle Paul . . . that; isn't that the reason that he is . . . so angry?"); *Romero v. State*, No. 01-11-00974-CR, 2013 WL 4477995, at *2 (Tex. App.—Houston [1st Dist.] Aug. 20, 2013, pet. ref'd) (mem. op., not designated for publication) (". . . is that why you checked to make sure that those experts were able to conclude that the gun was working properly?").

Miller complains that the State was allowed to ask him if he recalled assaulting this victim at various different ages. This line of questioning did not seek to elicit any out-of-court statement made by another and did not call for hearsay. *See* Tex. R. Evid. 801(d). Miller further complains that the trial court erred when it permitted the State to ask him if he had ever been accused of sexually assaulting two other children, but these questions were not the subject of an objection. Miller

contends that during his examination by the State, the trial court allowed inadmissible hearsay concerning an alleged incident said to have occurred a few months before the trial, when police investigated Miller for allegedly peeping into his neighbor's yard. However, Miller did not make a hearsay objection when the questions were asked. Therefore, he failed to preserve error. *See* Tex. R. Evid. 103(a).

In her testimony, Dr. Gaines stated that in forming her opinion regarding behavioral abnormality, she relied on records concerning Miller, including a psychologist's report, indictments, prison records, parole records, and criminal history records. The trial court granted a running objection to hearsay in the records and the trial court instructed the jury that the evidence had been admitted for the limited purpose of showing the basis of the expert's opinion and that it could not be considered for the truth of the matter asserted. Miller approved of the instruction and did not lodge any objection to the trial court's instruction to the jury or request further instructions. Later, Dr. Gaines was allowed to testify that Miller's records indicated that he had been investigated for peeping on some children, even though Dr. Gaines acknowledged that the police dropped the investigation without filing charges after it was proven that Miller was several miles away from the residence when the alleged act was said to have occurred. Miller characterizes it as a false

record, but Dr. Gaines was not asked whether the records indicated that the investigation was contemporaneous such that Miller could not have looked into his neighbor's yard at some other moment. In his reply brief, Miller concedes that Dr. Gaines did not give false testimony but he argues she left a false impression with the jury. Miller's testifying psychiatrist, Dr. John Tennison, stated that he saw in the records that Miller was investigated for the incident but nothing came of it, so Dr. Tennison did not consider it in forming his expert opinion. Dr. Gaines was not asked how much weight she gave the event in her evaluation. The ambiguity would undermine Dr. Gaines' reliance on that particular record as a basis for her opinion, but it did not make the underlying facts inadmissible. We conclude that the trial court could reasonably determine that the probative value of this underlying fact outweighed the prejudicial effect. *See* Tex. R. Evid. 705(d). We conclude that the trial court did not err in ruling on Miller's various hearsay objections. Issue one is overruled.

In issue two, Miller contends the trial court erred by prohibiting cross-examination of Dr. Gaines regarding "contradictory statements" in the records she professed to have relied upon when giving her direct testimony regarding her opinion. In the trial, Miller asked Dr. Gaines, "And didn't the records indicate that a rape counselor believed the victim to be embellishing the facts?" The State objected,

"hearsay, relevance, misleading, and a collateral attack on the judgment." The trial court did not rule on the State's objection at the time. Miller made an offer of proof at the conclusion of testimony, and the trial court denied his request to present it to the jury. Several of the questions and answers in the offer of proof had already been asked and answered in front of the jury. The excluded testimony that the jury did not hear consists of the following:

> Q. And these records included police reports from the offense related to [the victim]?
>
> A. Correct.
>
> Q. And isn't it true that in those records a police officer indicates that he thought the victim was manipulative?
>
> A. Yes.
>
> Q. And isn't it also true that a rape counselor believed [the victim] to be embellishing?
>
> A. Yes.

In his appeal brief, Miller argues that it is unfair to allow Dr. Gaines to testify that the records indicate that Miller held a gun to his six-year-old victim's head and not allow Miller to ask Dr. Gaines to explain why she relied on that information when the same records contained information that when they investigated the accusation eleven years after the offense occurred, a police officer thought the victim was manipulative and a rape counselor thought the victim was embellishing. Miller

concedes he cannot collaterally attack his aggravated sexual assault conviction in this civil commitment proceeding, but he argues the use of a deadly weapon was not conclusively established in his criminal case because use of a deadly weapon was not included in the indictment. Miller contends his purpose was not to collaterally attack his conviction but for the permissible purpose of discrediting Dr. Gaines by showing that she ignored a "cautionary caveat" in the records she relied upon in forming her opinion about whether Miller has a behavioral abnormality.

"A witness may be cross-examined on any relevant matter, including credibility." Tex. R. Evid. 611(b). "The trial court, however, has discretion to impose limitations on the examination of witnesses." *In re Commitment of Butler*, No. 09-13-00358-CV, 2014 WL 4364526, at *4 (Tex. App.—Sept. 4, 2014, no pet.) (mem. op.). Miller sought to attack Dr. Gaines' reliance on a police report that included subjective opinions that were critical of the victim's character. Miller suggests the omitted evidence would have explained why the police report was unreliable. *See generally* Tex. R. Evid. 107 ("An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent."). We perceive no probative value in expressions of skepticism that are neither facts nor evidence in the underlying criminal investigation that culminated in Miller's

conviction for aggravated sexual assault. The trial court properly exercised its discretion. We overrule issue two.

We affirm the trial court's judgment and order of civil commitment.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on June 28, 2016
Opinion Delivered March 23, 2017

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