TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00312-CV

In re the Commitment of Ronny Drew Bailey

FROM THE DISTRICT COURT OF FAYETTE COUNTY, 155TH JUDICIAL DISTRICT
NO. 2016V-238, HONORABLE JEFF R. STEINHAUSER, JUDGE PRESIDING

MEMORANDUM OPINION

A jury found Ronny Drew Bailey to be a sexually violent predator, and the district court signed a final judgment ordering Bailey's civil commitment. *See* Tex. Health & Safety Code § 841.081. In three issues on appeal, Bailey contends that the district court erred by admitting into evidence a voluntary statement, by overruling his objection to the State's expert testifying about the contents of that voluntary statement, and by overruling Bailey's objection asserting that the probative value of the voluntary statement was substantially outweighed by the danger of unfair prejudice. We will affirm the district court's final judgment.

BACKGROUND[1]

Ronny Drew Bailey has four convictions for sexual assault or abuse of a child and is currently incarcerated. He denies committing any of the offenses. In advance of his upcoming release from prison, the State filed a petition alleging that Bailey is a sexually violent predator and

[1] The facts are summarized from the testimony and exhibits admitted into evidence at trial.

requesting his civil commitment for treatment and supervision. The civil-commitment procedure in chapter 841 of the Texas Health and Safety Code is designed to provide long-term supervision and treatment for sexually violent predators who have behavioral abnormalities that are not amenable to traditional mental-health treatment and that increase their likelihood of recidivism. *Stevenson v. State*, 499 S.W.3d 842, 844 (Tex. Crim. App. 2016); *see* Tex. Health & Safety Code §§ 841.001–.153.

Bailey's issues in this appeal challenge the authenticity of, and testimony about, a document admitted into evidence as State's Exhibit 4, a one-page "Voluntary Statement" from the Irving Police Department bearing Bailey's signature and initials in which he confesses in graphic detail to multiple sexual encounters with a four-year-old boy. At a pretrial hearing, the State offered Exhibit 4 into evidence. Defense counsel acknowledged that the signature and initials on the statement were Bailey's, but that Bailey denied the statement's content.

At a later hearing on the first day of the civil-commitment trial, defense counsel told the court that there was no indication the handwriting on the statement was Bailey's. Defense counsel challenged the authenticity of the statement under Rule 901 and said that it had been excluded from Bailey's criminal trial. *See* Tex. R. Evid. 901. However, defense counsel's argument was the only support offered for the proposition that the statement was previously excluded. The State noted that during his deposition, Bailey did not deny that the handwriting at the bottom of the statement—affirming that he had read the statement and that the facts within it were true and correct—was his signature.[2] The district court deferred ruling on the statement's admissibility and

[2] A copy of Bailey's deposition was provided to the district court for its review during the hearing but was not admitted into evidence.

said the State would need to present "whatever predicate you think is necessary for the admission" of the statement at trial.

During the civil-commitment trial, the State's expert witness, forensic psychiatrist Dr. David Self, discussed the information he reviewed in arriving at his opinion. The information included Bailey's prison records, police-department records, district attorney's files, court records, Bailey's deposition, and witness statements, including the "Voluntary Statement" bearing Bailey's initials and signature. Before Dr. Self testified about that statement, Bailey requested a bench conference, noting that there was still a question about the statement's admissibility. After the court sent the jury out, Bailey objected that the statement was not properly authenticated, was more prejudicial than probative, and was unnecessarily cumulative because the jury would have the "pen packets" to prove Bailey's prior convictions. The court overruled the objection, noting that proving the commission of the crimes was only part of the inquiry; the remaining part of the inquiry was whether Bailey had a condition constituting a behavioral abnormality. Bailey requested a running objection to the statement, which the court granted. Dr. Self then summarized some details from the statement when providing the basis for his conclusion that Bailey had a behavioral abnormality that made it likely for him to engage in a predatory act of sexual violence.

Next, the State asked Bailey about his convictions involving sexual offenses against four- and five-year-old boys. The State provided Bailey with a copy of his deposition, taken approximately two months earlier, in which he testified about these offenses. When asked about the circumstances of his conviction for sexual assault of a child—committed while he was on parole for aggravated sexual abuse of a child—and whether he recalled giving a voluntary statement to a

detective, Bailey testified, "He asked. I didn't give no statement." The State requested a bench conference during which it moved to impeach Bailey. The court noted that Bailey "just said he never gave a statement, period." Defense counsel objected that the statement's highly prejudicial nature substantially outweighed its probative value, but the court overruled the objection and the State began questioning Bailey about the statement.

Bailey testified that he had seen the statement, that his initials were next to the paragraphs, and that his signature was on the bottom. The State moved to admit the statement as Exhibit 4, and the court did so, noting the previous objections. After Bailey again denied giving a statement, he reviewed Exhibit 4. The State proceeded to question Bailey about the paragraphs that he admitted initialing and, after reading the rest of the statement to him, asked whether he understood the statement when the detective read it to him. Bailey said no, and the State pointed Bailey to the part of his deposition where he testified to the contrary:

> [Prosecutor:] So when I asked you the question did you understand it when it was read to you, what's the answer?
>
> [Bailey:] As far as I know, I didn't understand it.
>
> [Prosecutor:] So the question in the deposition was, "Okay. So you understood what was in the statement?" Your answer was, "When he read it, yes." Are you changing your answer now?
>
> [Bailey:] I may say yes; but I don't remember reading that, no.
>
> [Prosecutor:] Okay. So the Irving Police Department conspired against you to make this statement?
>
> [Bailey:] I didn't make that statement.
>
> [Prosecutor:] Okay. So the detective made it up?

[Bailey:] Yes, ma'am.

At the conclusion of the trial, the jury found that Bailey is a sexually violent predator who suffers from a behavioral abnormality that makes him likely to engage in predatory acts of sexual violence. The district court entered judgment in accordance with the jury's verdict. Bailey filed a motion for new trial, which the district court denied. This appeal followed.

DISCUSSION

No abuse of discretion by admitting into evidence voluntary statement

In his first issue, Bailey contends that the district court erred by admitting into evidence the voluntary statement. Bailey contends that the statement was not properly authenticated as required by Texas Rule of Evidence 901 and the statement was not an admission by a party opponent.[3] We review a trial court's ruling on the admission of evidence for an abuse of discretion. *Service Corp. Int'l v. Guerra*, 348 S.W.3d 221, 235 (Tex. 2011). We must uphold the trial court's evidentiary ruling if there is any legitimate basis for it. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998).

1. Authentication

The requirement of authentication as a condition precedent to admissibility may be satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent

[3] Bailey did not raise in the trial court—and thus, failed to preserve—his complaint that the voluntary statement should have been excluded because the proper method of impeaching Bailey would have been with his deposition, rather than his statement to a police detective. *See* Tex. R. App. P. 33.1(a).

claims." *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005) (quoting Tex. R. Evid. 901(a)). The predicate for admissibility under Rule 901 may be proved by circumstantial evidence. *Sanchez v. Texas State Bd. of Med. Exam'rs*, 229 S.W.3d 498, 509 (Tex. App.—Austin 2007, no pet.). When a party challenges the authenticity of evidence, the trial court first determines preliminary questions about its admissibility. *Mathis v. State*, 930 S.W.2d 203, 206–07 (Tex. App.—Houston [14th Dist.] 1996, no writ) (citing *Steenbergen v. Ford Motor Co*., 814 S.W.2d 755, 761 (Tex. App.—Dallas 1991, writ denied); *City of Corsicana v. Herod*, 768 S.W.2d 805, 814 (Tex. App.—Waco 1989, no writ)); *see also* Tex. R. Civ. Evid. 104(a) (requiring trial judge to make preliminary determination concerning admissibility of evidence). If the preliminary proof is sufficient to raise a fact issue on the genuineness of the evidence, then the trial court must admit it. *Mathis*, 930 S.W.2d at 206–07. Once the evidence is admitted, the trier of fact determines the weight given to that evidence. *Id*. at 207. Here, before the district court admitted the voluntary statement, Bailey testified that his initials and signature were on it. *See* Tex. R. Evid. 901(b)(1) (testimony of witness with knowledge). The document bears the boldfaced and capitalized title:

IRVING POLICE DEPARTMENT
IRVING, TEXAS
VOLUNTARY STATEMENT

and the bottom of the document shows Bailey's signature below the affirmation that he had read the statement and that the facts it contained were true and correct. Bailey's affirmation is attested to by a witness, and there is no evidence to support Bailey's inference that the contents of the statement were fabricated by a detective. Thus, there was at least circumstantial evidence or a fact question

that the document was Bailey's voluntary statement, as the State claimed it to be. *See In re J.P.B.*, 180 S.W.3d at 575; *Sanchez*, 229 S.W.3d at 509; *Mathis*, 930 S.W.2d at 206–07; *see also Brown v. State*, Nos. 05-14-00807-CR & 05-14-00808-CR, 2015 Tex. App. LEXIS 5521, at *9 (Tex. App.—Dallas June 1, 2015, no pet.) (mem. op., not designated for publication) (noting that defendant offered no evidence of tampering or fraud concerning document and mere possibility that someone other than defendant could have written it did not preclude trial court from finding that reasonable juror could determine document was what State claimed it to be). The district court could have reasonably determined that the evidence at trial was sufficient to support a finding that the statement was Bailey's statement, as the State represented. *See In re J.P.B.*, 180 S.W.3d at 575.

2. Admission by party opponent

Further, the voluntary statement was not hearsay because it was an admission by a party opponent. Under Texas Rule of Evidence 801(e)(2)(A), a statement is not hearsay if it is offered against an opposing party and was made by the party in an individual or representative capacity. *See* Tex. R. Evid. 801(e)(2)(A). Bailey contends that the statement could not have been an admission by a party opponent because of its lack of authentication (meaning that the unauthenticated document would be hearsay). However, as discussed above, the district court could have reasonably determined that after Bailey testified that the handwriting on the statement was his, there was circumstantial evidence that the document was what the State claimed it to be.

We conclude that the district court's admission of the statement was not an abuse of discretion. Accordingly, we overrule Bailey's first issue.

No abuse of discretion by allowing State's expert's testimony about voluntary statement

In his second issue, Bailey contends that the district court erred by overruling his objection to Dr. Self's testimony about the contents of the voluntary statement. Relying on Texas Rule of Evidence 705(d), Bailey contends that the probative value of such testimony was minimal compared to its prejudicial impact on the jury. We review a trial court's ruling on the admission of expert testimony for an abuse of discretion. *Southwestern Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 716–17 (Tex. 2016). We must uphold the trial court's evidentiary ruling if there is any legitimate basis for it. *Malone*, 972 S.W.2d 35, 43 (Tex. 1998).

An expert may disclose the underlying facts or data upon which the expert's opinion is based if it is the type of information typically relied on by experts in the field. *In re Talley*, 522 S.W.3d 742, 748 (Tex. App.—Houston [1st Dist.] 2017, no pet.). Rule 705(d) states that "[i]f the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect." Tex. R. Evid. 705(d).

However, several Texas courts have determined that experts are entitled to testify about the details of a defendant's past sexual offenses that are contained in the records as part of their behavioral abnormality assessment, even over objections that such evidence is too prejudicial. *In re Mares*, 521 S.W.3d 64, 70–71 (Tex. App.—San Antonio 2017, pet. ref'd) (noting that details of offense "have a high probative value" given Sexually Violent Predator Act's purpose of protecting society from sexually violent predators with behavioral abnormality that predisposes them to future predatory acts); *In re Stuteville*, 463 S.W.3d 543, 556 (Tex. App.—Houston [1st Dist.] 2015, pet.

denied) (noting that facts and details of defendant's offenses would be helpful to jury in weighing his testimony and expert's testimony and in explaining basis for expert's opinion that defendant suffered from behavioral abnormality); *In re Day*, 342 S.W.3d 193, 197–99 (Tex. App.—Beaumont 2011, pet. denied) (rejecting defendant's contention that experts' recounting of details of offenses and other bad acts from his records created outrage in jury without adding to determination of behavioral abnormality). Dr. Self testified that he considered the facts of Bailey's offenses when determining whether Bailey had a behavioral abnormality.

Further, the court gave the jury limiting instructions during trial and in the court's charge, stating that the evidence reviewed by Dr. Self was admitted only for the purpose of showing the basis of his opinion and that it could not be considered as evidence to prove the truth of the matter asserted. We presume that the jury followed the court's instructions, and this record does not demonstrate otherwise. *See Mares*, 521 S.W.3d at 71; *Day*, 342 S.W.3d at 199; *see also In re Riojas*, No. 04-17-00082-CV, 2017 Tex. App. LEXIS 10244, at *6 (Tex. App.—San Antonio Nov. 1, 2017, no pet.) (mem. op.).

Accordingly, we conclude that the district court did not abuse its discretion by allowing Dr. Self's testimony about the contents of the voluntary statement. We overrule Bailey's second issue.

No abuse of discretion by overruling Rule 403 objection to voluntary statement

In his third issue, Bailey contends that the district court erred by overruling his Rule 403 objection, asserting that the probative value of the voluntary statement was substantially outweighed by the danger of unfair prejudice. *See* Tex. R. Evid. 403. When conducting a Rule 403

analysis, the trial court must balance the probative value of the evidence against concerns such as unfair prejudice, the potential to mislead the jury, and needless presentation of cumulative evidence. *Diamond Offshore Servs. v. Williams*, 542 S.W.3d 539, 542 (Tex. 2018). Rule 403 favors admission, requiring these countervailing concerns to substantially outweigh the evidence's probative value before it may be excluded. *Id*. We review a trial court's ruling on the admission of evidence for an abuse of discretion. *Guerra*, 348 S.W.3d at 235. We must uphold the trial court's evidentiary ruling if there is any legitimate basis for it. *Malone*, 972 S.W.2d at 43.

Regarding the statement's probative force, we note that the statement pertains to the main issue at Bailey's civil-commitment trial—i.e., whether he suffers from a behavioral abnormality—and that Dr. Self testified about his consideration of the statement in forming his opinion. Dr. Self noted the presence of factors—such as committing sexual offenses against strangers, recklessness, and impulsiveness or inability to control behavior—that are associated with a person's increased risk of having a behavioral abnormality that makes the person likely to engage in a predatory act of sexual offense.

These factors were present in Bailey's statement. The statement showed that Bailey chose a victim who was almost a stranger to him, the son of someone that Bailey had known only a short time. The statement showed Bailey's recklessness, in that the repeated sexual acts with the child occurred in the home where Bailey had been living with the child and the child's mother. The statement showed Bailey's impulsiveness and inability to control his behavior, in that Bailey was unable to restrain himself from continuing to perform sexual acts with the child just two months after the first time that he initiated sexual contact with him. Dr. Self testified that the account in the

statement was "quite congruent with the story the little boy [victim] had told," and "had a ring of truth to it." Moreover, during trial Bailey denied committing any sexual offense against that child, Bailey testified that he never gave a statement to a police detective, and he testified that he was "innocent" of all four sexual offenses for which he was convicted. Thus, the probative value of the statement was high. *See, e.g.*, *Talley*, 522 S.W.3d at 749 (concluding that trial court did not abuse its discretion in admitting defendant's written confession because it assisted jury in understanding expert's testimony that defendant had behavioral abnormality and because defendant disputed veracity of facts recited in confession during his trial testimony); *Stuteville*, 463 S.W.3d at 556 (noting that trial court could have reasonably concluded that facts and details related to defendant's offenses would be helpful to jury in weighing defendant's and expert's testimony and in explaining basis for expert's opinion that defendant suffers from behavioral abnormality); *see also In re Flores*, No. 13-17-00258-CV, 2018 Tex. App. LEXIS 2584, at *10–11 (Tex. App.—Corpus Christi Apr. 12, 2018, no pet.) (mem. op.) (concluding that defendant's prior written statement to police, which contradicted his denial of sexual misconduct with two young boys, had high probative value); *In re Bath*, No. 09-11-00559-CV, 2012 Tex. App. LEXIS 7586, at *9 (Tex. App.—Beaumont Sept. 6, 2012, no pet.) (mem. op.) ("The probative value of the statements includes their tendency to show that at one time Bath had admitted to matters that he would no longer admit during the proceedings that led to his commitment.").

Regarding whether the statement was unfairly prejudicial or potentially misleading to the jury, we note that the sexual acts with the four-year-old set forth in the statement are no more distasteful than Bailey's convictions for his sexual offenses against the three other children, and that

any prejudicial effect of the statement lies in its probative value, rather than an unrelated matter. *See Talley*, 522 S.W.3d at 749; *see also Flores*, 2018 Tex. App. LEXIS 2584, at *12; *Bath*, 2012 Tex. App. LEXIS 7586, at *8–9. There is no basis for Bailey's inference that a detective fabricated the statement, and the statement is not misleading to the jury simply because Bailey says it is. Further, this evidence is not misleading just because it does not support Bailey's view of the case, i.e., that he committed no sexual offense against any child. *See Williams*, 542 S.W.3d at 549–50.

Finally, the district court could have reasonably determined when it admitted the statement that there would be no needless presentation of cumulative evidence. *See Williams*, 542 S.W.3d at 542. The statement contained details that Dr. Self had not summarized in his testimony and were not already in the trial record, including: the date when Bailey last engaged in sexual acts with the child; that Bailey knew the child was four years old; that Bailey had explained ejaculation to the child; and that the child began engaging in sexual acts with his little brother.

We conclude that the district court could have reasonably determined that the statement's probative value was not substantially outweighed by the danger of unfair prejudice and thus, that the court did not abuse its discretion in admitting the statement into evidence. *See* Tex. R. Evid. 403; *Williams*, 542 S.W.3d at 542; *Malone*, 972 S.W.2d at 43; *Talley*, 522 S.W.3d at 749. We overrule Bailey's third issue.

CONCLUSION

We affirm the district court's final judgment.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Pemberton and Goodwin

Affirmed

Filed: August 30, 2018