COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

	§	No. 08-18-00220-CV
IN RE: THE COMMITMENT OF	§	Appeal from the
ANTHONY CORDOVA.	§	205th District Court
	§	of El Paso County, Texas
	§	(TC# 2017DCV4050)
	§	

O P I N I O N

The State of Texas filed a petition to commit Appellant Anthony Cordova as a sexually violent predator. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 841.001 - .153 (the SVP Act). At trial, after the court entered a directed verdict finding that Cordova was a repeat sexually violent offender, the jury returned a verdict finding that Cordova suffers from a behavioral abnormality that makes him likely to engage in predatory acts of sexual violence. Based on these findings, the trial court rendered a final judgment and an order of civil commitment. Cordova timely appealed. In five issues, Cordova challenges the legal and factual sufficiency of the evidence, the admission

at trial of 911 calls[1] placed by a victim of one of his prior sexual assaults (State's Exhibit 4), and the court's granting of a directed verdict on one of the two required elements of the SVP Act. Finding no error, we affirm the trial court's judgment and order of civil commitment.

I. BACKGROUND

A. The Civil Commitment of Sexually Violent Predators

This appeal arises out of a civil commitment proceeding to determine whether Cordova is a sexually violent predator (SVP) for the purposes of Chapter 841 of the Texas Health and Safety Code. *See* The Civil Commitment of Sexually Violent Predators Act, 76th Leg., R.S., ch. 1188, § 4.01, 1999 Tex. Gen. Laws 4143 (codified as amended at TEX. HEALTH & SAFETY CODE ANN. §§ 841.001-.153). In enacting the SVP Act, the Legislature found:

> [T]hat a small but extremely dangerous group of sexually violent predators exists and that those predators have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities and that makes the predators likely to engage in repeated predatory acts of sexual violence . . . Thus, the legislature finds that a civil commitment procedure for the long-term supervision and treatment of sexually violent predators is necessary and in the interest of the state.

TEX. HEALTH & SAFETY CODE ANN. § 841.001; *see also In re Commitment of Fisher*, 164 S.W.3d 637, 639-40 (Tex. 2005). An SVP is defined by two elements that must be proven at trial: (1) the person is a "repeat sexually violent offender"; and (2) the person "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(a)(1), (2). The State bears the burden of proving beyond

[1] State's Exhibit 4, which is presented in two parts, Part 1 and Part 2, is an audio recording that includes a total of three 911 calls all made by the same female caller who repeatedly requests police assistance at her present location. All three calls are a continuation of the caller's attempt to communicate with 911 operators and to adequately describe her location. Part 1 of the recording, which is 5 minutes and 10 seconds in length, contains two calls as the initial call is interrupted by a hang-up but then quickly resumes as a second call. Part 2 of the recording, which is three minutes and twenty-five seconds in length, contains a single call that is a continuation of the discussion of the prior call.

a reasonable doubt that a person is an SVP. TEX. HEALTH & SAFETY CODE ANN. § 841.062(a).

Here, the State filed a petition against Cordova, who was by then close to completing a nine-year concurrent sentence for two convictions of sexual assault and one conviction of aggravated sexual assault, alleging that Cordova was a repeat sexually violent predator who suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.041 (setting forth requirements for petition). Cordova generally denied the allegations and asserted several defenses to include an assertion that Chapter 841 did not apply to him as he was amenable to traditional treatment modalities. Both parties demanded a jury trial. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.061(b) (providing for a jury trial on demand of either party).

At trial, the State presented two experts who both testified that, in their expert opinion, Cordova currently suffers from a behavioral abnormality as required by the elements of the SVP Act, while another expert testified for Cordova offering a contrary opinion. Each side also admitted a curriculum vitae from their respective experts to accompany their trial testimony. In its case-in-chief, the State also presented testimony from Cordova to include deposition testimony given by him prior to trial.[2] At his deposition, Cordova maintained he did not commit the prior sexual offenses and had no personal knowledge of certain details of the offenses. Nonetheless, at trial he acknowledged he had pleaded guilty to each of the offenses. Supplementing the experts' testimony,

[2] Before trial, Cordova filed a federal writ of habeas corpus claiming actual innocence. Cordova's counsel instructed him not to answer many questions posed throughout his testimony based on his Fifth Amendment privilege against self-incrimination due to his pending habeas claim. The State argued at trial that a statutory bar of limitations would preclude him from proceeding with his federal claim.

the State also admitted a penitentiary packet[3] of Cordova's convictions for the prior sexual offenses, as well as a recording of a 911 call made by a female caller who was the victim of one of those convictions.

B. The expert testimony

1. The experts

Jason D. Dunham, Ph.D., a forensic psychologist, testified as the State's first witness. Dr. Dunham testified he had practiced as a licensed psychologist since 2001. During his career, he had conducted over 200 SVP evaluations in Texas cases.

Michael Arambula, M.D., Pharm.D., also testified for the State. Dr. Arambula testified he was a licensed medical doctor and a licensed pharmacist and was board certified in both general psychiatry and forensic psychiatry. He had practiced forensic psychiatry since 1992 and conducted over 150 SVP evaluations.

John Fabian, Psy.D., also a forensic psychologist and neuropsychologist, testified for Cordova. Dr. Fabian testified he was board certified in forensic psychology and clinical psychology. Although Dr. Fabian had conducted less than 15 SVP evaluations in Texas, he had conducted about 600 similar evaluations in total when considering his work in other states.

2. Methodology applied

All three experts reviewed voluminous documents relating to Cordova, conducted separate face-to-face interviews with him, and either employed commonly used testing instruments – in the case of Dr. Dunham and Dr. Fabian who were trained as psychologists – or utilized the test results

[3] At trial, Cordova objected to the admission of the penitentiary packet due to his pending habeas petition, which was overruled. On appeal, Cordova does not challenge that ruling.

of other experts pursuant to their training – in the case of Dr. Arambula who was trained as a medical doctor. In evaluating Cordova, each expert followed the methodologies upon which they were educated and trained.

3. Materials reviewed

The records reviewed by the experts included police reports from Cordova's offenses, victim and witness statements, court documents, parole summaries, prison disciplinary records, jail records, medical records, and prior evaluations. Once depositions had been taken of witnesses, the experts reviewed those as well.

a. Cordova's nonsexual criminal history

Cordova's criminal history began with a nonsexual offense. Over time, Cordova was arrested on more than 40 occasions, but many of those arrests were for nonviolent offenses. Eventually, he served prison time in Louisiana on three occasions. His final prison sentence in Louisiana was for a violent robbery. This robbery was the first sign of violence in Cordova's criminal history. Once Cordova completed his parole in Louisiana, he moved to El Paso in 2007 where he began his spree of sexual crimes.

b. Cordova's sexual criminal history

After moving to El Paso, Cordova committed three sexually violent offenses between 2007 and 2010, and he was convicted of all three upon his pleas of guilt. All three of Cordova's victims were strangers to him. He was 46-years' old at the time he committed his first sexual assault in 2007. The victim, M.F.,[4] was intoxicated and walking to a convenience store at about 2:30 a.m.

[4] We identify victims by using initials. *See* TEX. CONST. art. I, § 30(a)(1) (granting crime victims the "right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process[]").

when Cordova drove by and grabbed her off the street. M.F. only remembered waking up in a bed while Cordova was on top of her. Although she tried to fight off Cordova, he vaginally raped her. Once Cordova fell asleep, M.F. retrieved her clothes, escaped, and despite having outstanding warrants, called police and reported that Cordova had raped her. Police were able to obtain DNA evidence from M.F., and the DNA later matched to Cordova.

Cordova's second conviction was for aggravated sexual assault committed in 2008, only three months after his first sexual assault. At about 2:30 a.m., Y.M., a 22-year-old female, was walking home after finishing a show as a mariachi singer. As she walked past a motel, Cordova grabbed her neck, threatened to kill her if she woke anyone up, and dragged her to a nearby apartment. Over the course of four hours, Cordova forced alcohol down her throat, forced her to inhale cocaine smoke, repeatedly punched her in her face, pulled her by her hair, forced his penis into her mouth, and attempted to force his penis into her vagina. Eventually, Y.M. managed to kick Cordova, and as he recoiled, she escaped the apartment, and soon called 911. When police arrived, Y.M. directed them to Cordova's apartment, and once there, she identified him on-scene, which led to his immediate arrest. At trial, a recording of Y.M.'s three-part call to 911 was admitted into evidence over Cordova's objections.

While on bond for his second offense, Cordova committed his third sexual assault in 2010. The victim, M.R., had been at a bar with friends, but as the bar closed and she stood outside with her friends, Cordova approached her, struck up a conversation, and offered her a drink. Once she took a drink out of Cordova's black bottle, she lost her memory and remembered waking up in a trailer park with Cordova on top of her and attempting to rape her. The next thing she recalled was waking up in his living room at about 6:30 a.m. with a laceration on her vagina and bruises on her

body. Although she saw that the tires on her car outside had been slashed, she nonetheless drove it from the scene and sought help. Eventually, a rape kit was completed at a hospital, and police matched DNA evidence obtained from M.R. to Cordova.

4. Conditions diagnosed

The experts diagnosed Cordova using the Diagnostic and Statistical Manual of Mental Disorders, fifth edition – the DSM-5. The experts explained that the term "behavioral abnormality" does not appear in the DSM-5 because it is a legal definition and not a mental disorder. Thus, a diagnosis is not required to civilly commit someone as an SVP. However, diagnoses help communicate to the jury features of an individual's congenital or acquired condition, as relevant to a behavioral abnormality.

a. The State's experts opined that Cordova suffers from a sexual disorder

The experts explained that paraphilia is a lifelong chronic sexual deviance and that a sexual deviance is a preference considered pathologic or abnormal compared to the rest of the population.

According to Dr. Dunham, Cordova suffers from "[o]ther paraphilic disorder . . . nonconsensual type." Dr. Dunham also noted that Cordova displayed features of sexual sadism based on the details of his sexual assaults. According to Dr. Arambula, Cordova suffers from "paraphilic disorder with sadistic traits."

By contrast, Dr. Fabian contended that Cordova did not display features of sexual sadism and disputed Dr. Dunham's diagnosis.

b. All three experts opined that Cordova suffers from a personality disorder

The experts explained that antisocial people take advantage of others, exploit others, are aggressive, lie, cheat, steal, and disregard community rules. Narcissism is a component of

antisocial behavior, and it is defined by arrogance, controlling or manipulative behavior, a lack of empathy toward others, and a need to feel superior.

Dr. Dunham diagnosed Cordova with an "unspecified personality disorder with antisocial and narcissistic features." Dr. Arambula also diagnosed Cordova with a personality disorder with antisocial features. Even Dr. Fabian diagnosed Cordova with "other specified personality disorder with antisocial traits." Dr. Dunham testified that Cordova's criminal history was evidence of his personality disorder.

5. Risk factors and protective factors identified

The experts explained that risk factors are research-based factors used when assessing the risk of sexually reoffending. The presence of risk factors increases the likelihood of recidivism for a sexual offender. By contrast, protective factors are considerations that statistically reduce an individual's risk of re-offending. Some examples are aging and treatment.

a. Risk factors

Based on Cordova's three convictions, Dr. Dunham identified the following risk factors: Cordova's re-offending after being in prison three times, his re-offending while on bond, his "easy detection" based on the way he abducted his victims in public spaces, his escalation of violence against the victims, and his callousness towards the victims. Dr. Dunham opined that Cordova's commission of his third offense demonstrated his complete inability to control his behavior and placed him within a small group of sex offenders who reoffend after being detected. Additionally, Dr. Dunham considered "dynamic" risk factors that focus on an individual's current attitudes and beliefs and whether they are remorseful of their actions. Dr. Dunham identified the following dynamic risk factors that reflected Cordova's then-current attitude at the time of trial: his denial of

his crimes, his lack of awareness about his own risk of recidivism, his lack of remorse, and his lack of empathy for the victims.

In Dr. Arambula's evaluation, he identified the following risk factors for Cordova: Cordova's sexual deviance, his antisocial lifestyle, his commission of sexual assault against three different stranger victims, and his re-offending while on bond. Particularly, Dr. Arambula testified that having three victims was significant to Cordova's risk for future recidivism.

Finally, in relation to their diagnoses of Cordova, both Dr. Arambula and Dr. Dunham observed that Cordova's sexual deviance and antisocial orientation were significant because those were the two biggest possible risk factors an individual could have. Dr. Dunham explained that Cordova's chronic sexual deviance was a significant risk factor for re-offending that related to Cordova's behavioral abnormality because it affected his emotional or volitional capacity. Furthermore, Dr. Dunham explained that personality disorders are chronic and that a sex offender with a criminal mindset is at a higher risk for re-offending sexually. Likewise, Dr. Arambula testified that Cordova's personality disorder was a part of his behavioral abnormality, and that it was a congenital or acquired condition that affected his behavior. And based on Cordova's criminal history, lack of remorse, callousness, blaming of others, and continuous offending even while on supervision, Dr. Arambula opined that Cordova was not a garden-variety sex offender but, rather, was part of a smaller population that was a menace to the health and safety of others. Both experts also testified that Cordova's denial that he sexually assaulted his victims was a dynamic risk factor and indicative of an antisocial personality.

By contrast, Dr. Fabian testified that none of the risk factors shown by Cordova were significant.

b. Protective factors

The experts noted some positive considerations favoring Cordova, but none of the experts identified a single protective factor for Cordova. And although Cordova was 49-years' old when he committed his latest offense, the experts all agreed that his age was not a protective factor based on other circumstances.

6. Psychological assessment tools

The experts explained that no testing exists to determine a behavioral abnormality because it is strictly a legal term. Different assessment tools consider different risk factors, but no test considers all of them. Dr. Dunham and Dr. Fabian scored the Psychopathy Checklist-Revised (PCL-R) and the Static-99R for Cordova.

Dr. Dunham's scoring revealed that Cordova had an above-average risk for re-offending and a high level of psychopathic traits. Dr. Dunham explained that psychopathy is an extreme level of antisocial personality disorder and that it is the level of manipulation, callousness, lack of remorse, and grandiosity that separates psychopaths from others with antisocial personality disorder. Dr. Dunham also testified that individuals like Cordova were at risk for seriously injuring victims and possibly killing someone.

Dr. Fabian's scoring reflected that Cordova had only some moderate psychopathic traits, but Dr. Fabian agreed with Dr. Dunham's scoring on recidivism.

7. Cordova's sex-offender treatment history

At the time of trial, Cordova was in a nine-month sex-offender treatment program within the Texas Department of Criminal Justice. Although the experts testified that such treatment can be a protective factor if someone is doing well in it, treatment notes reflected that Cordova was

still in denial and generally feeling sorry for himself due to feeling duped by the court system.

8. Experts' opinions on whether Cordova suffers from a behavioral abnormality

Based on their education, training, experience, and methodologies employed in Cordova's case, both Dr. Dunham and Dr. Arambula opined that Cordova suffers from a behavioral abnormality that would make him likely to engage in a predatory act of sexual violence.

By contrast, Dr. Fabian opined that Cordova did not suffer from the requisite behavioral abnormality.

C. Cordova's testimony

At the time of trial, Cordova was 57-years' old. In response to most of the State's questions about his sexual offenses in El Paso, Cordova pleaded his Fifth Amendment privilege in front of the jury. However, while he did not contest the fact that he was convicted for three sexual offenses, Cordova denied that he sexually assaulted any of his three victims and claimed that he never engaged in sexual activity or otherwise claimed that the sex was consensual.

D. The directed verdict and the jury verdict

At the close of both parties' cases, the State moved for a directed verdict only on the repeat-sexually-violent-offender element. Cordova objected to a directed verdict on the basis that he was "entitled to a trial by a jury" under the SVP Act and, accordingly, both elements required for an SVP determination should be decided by the jury. The trial court granted the directed verdict.

At the conclusion of the case, the jury returned a unanimous verdict finding Cordova a sexually violent predator beyond a reasonable doubt. Accordingly, the trial court entered a judgment and order civilly committing Cordova pursuant to the SVP Act.

II. ISSUES ON APPEAL

In five issues, Cordova argues that: (1) the evidence is legally insufficient to establish that Cordova is a sexually violent predator; (2) the evidence is factually insufficient to support a finding beyond a reasonable doubt that Cordova is a sexually violent predator; (3) the trial court erred in admitting a highly prejudicial 911 recording that was of little consequence to issues of fact; (4) the trial court erred in admitting the 911 calls where the court had failed to listen to them before ruling on their admissibility; and (5) the trial court erred by granting a directed verdict on the repeat-sexually-violent-offender requirement of the SVP statute given the conflict between that statute and Texas Rule of Civil Procedure 268.

Given the common focus of Cordova's first four contentions, we pair the first issue with the second, and the third issue with the fourth, and address paired issues together, before we then turn to the fifth and final issue.

III. DISCUSSION

A. Issues One and Two: Whether the evidence was legally and factually sufficient to establish that Cordova is a sexually violent predator.

In Cordova's legal-sufficiency argument, he contends that the evidence is insufficient to support the jury's finding that Cordova is a sexually violent predator because "the opinions of the State's experts amounted to no evidence and, without these misleading, conclusory, and speculative testimony, no rational fact finder could have found, beyond a reasonable doubt, the elements required for commitment under the SVP statute." Specifically, Cordova argues that both Dr. Dunham and Dr. Arambula offered speculative and conclusory opinions, and he further criticizes Dr. Dunham's opinion by asserting that he "either did not know, and/or chose to ignore,

statistical data directly applicable to the likelihood of recidivism, which is the essence of a behavioral abnormality finding." Cordova argues that no reasonable jury could have found him to be an SVP because he was not shown beyond a reasonable doubt to be likely to commit a sexually violent offense nor that he is a part of the small but extremely dangerous group of sexually violent predators from whom the law was designed to protect the public from.

And in his factual-sufficiency argument, Cordova argues that even if his prior convictions were found to meet legal sufficiency requirements, his three attacks late in life do not constitute "a history of multiple sexual offenses over an extended period of time" or a pattern of well-ingrained offending behavior. Cordova contends that his age, his single incarceration for all his prior sexual convictions, and his "minimal" sentence of eight years' confinement for those convictions, all demonstrate, together, a risk of injustice in the jury's verdict so compelling that this Court must order a new trial.

In response to Cordova's legal-sufficiency issue, the State argues that Cordova failed to object in the trial court to the reliability of its experts' opinions and, consequently, that its experts' opinions were legally sufficient to prove Cordova was a sexually violent predator where their opinions were not wholly baseless. In response to Cordova's factual-sufficiency issue, the State makes the following arguments: (1) factual sufficiency reviews should be abandoned in cases involving the civil commitment of sexually violent predators because these cases require proof beyond a reasonable doubt, rendering meaningless any difference between legal and factual sufficiency review under that burden of proof; and (2) the evidence was factually sufficient.

1. Standards of review for legal- and factual-sufficiency claims

For both issues, Cordova relies heavily on the intermediate court of appeal's decision in *In*

re Commitment of Stoddard, 601 S.W.3d 879, 880 (Tex. App.—Fort Worth 2019), *rev'd*, No. 19-0561, 2020 WL 7413723 (Tex. Dec. 18, 2020), but that decision was recently reversed on review by the Texas Supreme Court in a decision issued after Cordova submitted his briefing. Given this new decision, we begin our review with a discussion of the standards governing both legal-sufficiency reviews and factual-sufficiency reviews as recently articulated by our highest court. *In re Commitment of Stoddard*, No. 19-0561, 2020 WL 7413723, at *5-8 (Tex. Dec. 18, 2020). As *Stoddard* recently described, "[a] commitment proceeding under the SVP Act is the unusual civil case incorporating the 'beyond a reasonable doubt' burden of proof typically reserved for criminal cases." *Stoddard*, 2020 WL 7413723, at *5; *see also In re Commitment of Fisher*, 164 S.W.3d at 639-41; TEX. HEALTH & SAFETY CODE ANN. § 841.062. And thus, this elevated burden of proof necessarily affects the appellate review of the evidence. *Stoddard*, 2020 WL 7413723, at *5. Yet, as *Stoddard* further observed, "[t]he legal-sufficiency standard in criminal cases is consistent with the civil standard . . . ." *Stoddard*, 2020 WL 7413723, at *6 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (describing the legal sufficiency standard in a criminal case: "the reviewing court must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'")).

Accordingly, when conducting a legal sufficiency review in an SVP case, we review the evidence in the light most favorable to the verdict to determine whether any rational fact finder could find, beyond a reasonable doubt, the elements required for commitment under the SVP statute. *See id*.; *In re Commitment of Williams*, 539 S.W.3d 429, 437 (Tex. App. – Houston [1st Dist.] 2017, no pet.); *In re Commitment of Wirtz*, 451 S.W.3d 462, 464 (Tex. App. – Houston [14th

Dist.] 2014, no pet.). Under this standard, it is the fact finder's responsibility to fairly resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *See Williams*, 539 S.W.3d at 437; *In re Commitment of Mullens*, 92 S.W.3d 881, 887 (Tex. App. – Beaumont 2002, pet. denied). Essentially, an appellant must demonstrate that no evidence supports the jury's finding to prevail on a legal-sufficiency challenge to the evidence. *In re Commitment of H.L.T.*, 549 S.W.3d 656, 661 (Tex. App. – Waco 2017, pet. denied); *In re Commitment of Soto*, No. 09-12-00606-CV, 2014 WL 887142, at *1 (Tex. App. – Beaumont Mar. 6, 2014, no pet.) (mem. op.).

Given the recognition that an SVP case presents the rare civil case in which the burden of proof is beyond a reasonable doubt, *Stoddard* explicitly clarified the factual-sufficiency standard governing an appellate challenge of the evidence supporting an individual's commitment under the SVP Act. *Stoddard*, 2020 WL 7413723, at *1. To begin, *Stoddard* first clarified that it rejected any argument, such as the one made here by the State, that it should follow the Court of Criminal Appeals' approach and abandon factual sufficiency reviews altogether in favor of a single legal-sufficiency standard. *Stoddard*, 2020 WL 7413723, at *7. In declining to do so, the Supreme Court held that, "a properly conducted factual-sufficiency review in an SVP case requires the court of appeals to determine whether, on the entire record, a reasonable factfinder could find beyond a reasonable doubt that the defendant is an SVP." *Id*., at *1. In so doing, *Stoddard* further instructs that an appellate court may not usurp the jury's role of determining the credibility of witnesses and the weight to be given their testimony; and further, such court must presume that the fact finder resolved disputed evidence in favor of the challenged finding if a reasonable fact finder could do so. *Id*. Lastly, "[i]f the remaining evidence contrary to the finding is so significant in light of the

entire record that the factfinder could not have determined beyond a reasonable doubt that its finding was true, the evidence is factually insufficient to support the verdict." *Id*. Ultimately, *Stoddard* summarized this standard as follows: "[t]he appellate standard governing a factual-sufficiency review of a finding that a person is a sexually violent predator is whether, in light of the entire record, the disputed evidence a reasonable factfinder could not have credited in favor of the verdict, along with undisputed facts contrary to the verdict, is so significant that the factfinder could not have found beyond a reasonable doubt that the statutory elements were met." *Id*., at *9.

2. Applicable law

a. The two required elements

To establish that an individual is an SVP, the State must prove that the individual: "(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(a). For the first element under the SVP statute, a person is a "repeat sexually violent offender" if "the person is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses . . . ." *Id*. § 841.003(b). And as relevant here, sexual assault and aggravated sexual assault are sexually violent offenses. *Id*. § 841.002(8)(A); *see also* TEX. PENAL CODE ANN. §§ 22.011, 22.021. For the second element under the SVP statute, a "[b]ehavioral abnormality" is "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." TEX. HEALTH & SAFETY CODE ANN. § 841.002(2). Only these two elements need to be proven by the State, and courts have uniformly rejected attempts by appellants to incorporate additional sub-

requirements into these elements. *See, e.g.*, *Stoddard*, 2020 WL 7413723, at *8; *Williams*, 539 S.W.3d at 438-39; *In re Commitment of Hall*, No. 09-09-00387-CV, 2010 WL 3910365, at *2-3 (Tex. App. – Beaumont Oct. 7, 2010, no pet.) (mem. op.).

The State bears the burden of proving these two elements beyond a reasonable doubt. TEX. HEALTH & SAFETY CODE ANN. § 841.062.

b. Evidentiary challenges to expert testimony

Conclusory testimony cannot support a judgment because it is considered no evidence. *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 222 (Tex. 2019). An expert's testimony is conclusory when the expert asserts a conclusion with no basis. *Id*. at 223. The expert must link his conclusions to the facts, explaining the basis of his assertions. *Id*. Additionally, an expert's experience alone may be a sufficient basis for expert testimony. *Id*. at 227. But asking the jury to take the expert's word for it because of his status as an expert will not suffice. *Id*. at 223. Thus, a judgment may not be supported by conclusory expert testimony even if a party did not object to admission of such testimony. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009). However, the reliability of expert testimony may not be challenged for the first time on appeal if no objection was made on that basis in the trial court. *Id*. at 818. An objection is required to give the proponent a fair opportunity to cure any deficit and thus prevent trial by ambush. *Id*. at 817.

3. Application

a. Cordova's arguments

Cordova concedes he is a repeat sexually violent offender as the SVP Act defines that term. In briefing, however, he argues that his three prior offenses do not constitute "'a history of multiple

sexual offenses over an extended period of time' or a pattern of well-ingrained offending behavior." However, this argument which purports to impose an additional requirement beyond the statutory elements required of TEX. HEALTH & SAFETY CODE ANN. § 841.003(a)(1) and (2), was soundly rejected by *Stoddard*, 2020 WL 7413723, at *5. Thus, we overrule this part of Cordova' argument.

As to the remaining part, Cordova does not deny his convictions for two prior sexual assaults and one aggravated sexual assault, but he complains that the evidence is legally and factually insufficient to support the beyond-a-reasonable-doubt finding that he suffers from the requisite behavioral abnormality that makes him likely to engage in a predatory act of sexual violence.

b. Legal sufficiency of the evidence

At the outset, we hold that Cordova cannot challenge the reliability of the State's experts' opinions on appeal because he did not object on that basis in the trial court. *See Pollock*, 284 S.W.3d at 818. But, nonetheless, a party may challenge an expert's testimony as conclusory, by means of a no-evidence challenge, even when the party did not object to its admissibility at trial. *Id*. at 816. Our review of his legal-sufficiency issue is therefore restricted to determining only whether there is some basis to support the State's experts' opinions such that the opinions at issue were not conclusory. *See Bombardier Aerospace*, 572 S.W.3d at 222-23; *Pollock*, 284 S.W.3d at 816.

In this case, the opinions given by the State's experts were amply supported with underlying bases. First, both Dr. Dunham and Dr. Arambula testified about their credentials and their vast experience in conducting over 200 SVP evaluations and 150 SVP evaluations,

respectively. Second, aside from their vast experience, both experts testified that they based their opinions on the methodologies upon which they were trained and that these methodologies included a review of voluminous documents, a face-to-face interview with Cordova, and the consideration of commonly employed testing instruments, namely the PCL-R and Static-99R. Third, the experts considered Cordova's nonsexual and sexual criminal history. Fourth, they diagnosed Cordova, considered both risk and protective factors, and considered Cordova's progress – or lack thereof – in his sex-offender treatment at the time of trial.

Both Dr. Dunham and Dr. Arambula testified that, based on their education, training, experience, and methodology employed, Cordova suffers from the requisite behavioral abnormality under the SVP Act. From the multitude of foundational underpinnings upon which the experts based their testimony, we hold that the opinions of Dr. Dunham and Dr. Arambula were amply linked to the facts and not otherwise conclusory. *See In re Commitment of Manuel*, No. 01-18-00650-CV, 2019 WL 2458986, at *5 (Tex. App. – Houston [1st Dist.] June 13, 2019, pet. denied) (mem. op.) (holding that there was a basis to support the expert's opinion that the appellant had the requisite behavioral abnormality where the expert testified about: (1) his methodology, which included reviewing trial and prison records, interviewing appellant, conducting a Static-99R test, considering non-static-test factors, and considering protective factors that weighed in appellant's favor; and (2) what factors he considered and why those factors were important); *In re Commitment of Sawyer*, No. 05-17-00516-CV, 2018 WL 3372924, at *7 (Tex. App. – Dallas July 11, 2018, pet. denied) (mem. op.) (holding that the expert's opinion that the appellant suffered from a behavioral abnormality was not conclusory or without foundation where the expert testified that: (1) she was a forensic psychologist who had performed more than 60

evaluations of the type performed on appellant; (2) she used the same methodology followed by other experts; (3) she reviewed many records related to appellant, including documents from his convictions and prison records; (4) she interviewed appellant; and (5) she used risk assessment measuring tools, namely, the PCL-R, STATIC-99R, and SVR-20).

In Cordova's legal sufficiency argument, he essentially criticizes the State's experts' evaluation of certain details and items of data in their ultimate calculus of whether he had a behavioral abnormality. However, the true nature of such an argument is a reliability challenge to those experts' testimony, and Cordova is precluded from advancing such a challenge on appeal where he did not timely object at trial, on that basis, to the admissibility of such expert testimony. *See Pollock*, 284 S.W.3d at 816-18. Even assuming that Cordova's criticisms could be properly considered in this appeal, an expert's opinion is not rendered conclusory simply because it is not perfect or beyond all reproach. *See Bombardier Aerospace*, 572 S.W.3d at 227 (holding that the expert sufficiently linked his conclusions to facts even though his reasoning "could have been more substantive"); *In re Commitment of Gray*, No. 03-16-00662-CV, 2018 WL 911863, at *4 (Tex. App. – Austin Feb. 16, 2018, no pet.) (mem. op.) (reasoning that an expert's opinion was not precluded from being otherwise factually supported by his testimony even where he acknowledged that his sexually-violent-predator determination was one on which "reasonable professionals may disagree" and that the case presented "a close call").

Therefore, the State's experts' opinions that Cordova had the requisite behavioral abnormality provided some evidence to support the jury's verdict that Cordova was an SVP, and we hold that the evidence was legally sufficient to prove the behavioral-abnormality element. *See H.L.T.*, 549 S.W.3d at 661; *Soto*, 2014 WL 887142, at *1 (cases instructing that an appellant must

demonstrate that no evidence supports the jury's finding to prevail on a legal-sufficiency challenge).

We thus overrule Cordova's first issue presented for review in its entirety.

c. Factual sufficiency of the evidence

Cordova relies primarily on three facts for his argument that the evidence was factually insufficient to show he had a behavioral abnormality: (1) his sexual crimes consist of three offenses all committed within a few years, as opposed to a history of many sexual offenses over a long period of time; (2) he received "only minimal consequences" when he was sentenced to eight years' confinement for his three sexual offenses; and (3) he was 46-years' old at the time he committed his first sexual offense.

Although we perceive that a long history of sexual offenses would be an aggravating factor, we do not perceive the commission of three crimes in quick succession as a factor favoring Cordova, and at the very least, we do not find it to be a consideration that undermines the sufficiency of the evidence here. Similarly, the fact that a sex offender received "only minimal consequences" from his crimes says nothing about the factual sufficiency of an expert's opinion as to whether that sex offender has the requisite behavioral abnormality. Furthermore, all three experts agreed at trial that Cordova's age was not a protective factor, and his age thus does not undermine the sufficiency of the evidence here.

As discussed in our background recitation of the facts and in our legal-sufficiency analysis above, the State presented ample evidence supporting its experts' ultimate conclusions on the behavioral-abnormality element. Of course, in our factual sufficiency review, we must further take into account the disputed evidence a reasonable fact finder could not have credited in favor of the

verdict, along with undisputed facts contrary to the verdict, and determine whether such evidence, in light of the entire record, is so significant that the fact finder could not have found beyond a reasonable doubt that such behavioral-abnormality element had been met. *See Stoddard*, 2020 WL 7413723, at *9. Dr. Fabian's testimony served to contradict some of the factual underpinnings of the State's experts' testimony, contending as he did that Cordova did not suffer from the requisite behavioral abnormality. Additionally, Cordova testified with narratives favorable to himself regarding his past offenses wherein he maintained that he did not sexually assault any of the prior victims. Nonetheless, the jury was faced with two competing narratives about Cordova and competing opinions about whether he suffers from a behavioral abnormality, and by its verdict, the jury chose to believe the State's evidence and disbelieve Cordova's evidence. Even in a factual sufficiency review, we may not substitute our judgment for that of the jury, which is the sole judge of the credibility and the weight to be given to witnesses' testimony. *See Stoddard*, 2020 WL 7413723, at *1. And most importantly, we do not find that the remaining evidence contrary to the behavioral-abnormality finding is so significant in light of the entire record such that the jury could not have determined beyond a reasonable doubt that its finding was true. *Id*.

Accordingly, we hold that the evidence here was factually sufficient to prove Cordova had the requisite behavioral abnormality under the SVP Act, and we overrule his second issue presented for review.

B. Issues Three and Four: Whether the trial court erred in admitting the recording of a three-part 911 call from victim Y.M.

In his third issue, Cordova argues that the 911 calls were inadmissible under Rule 403 because the calls were "substantially more unfairly prejudicial than probative" where he was not on trial for the underlying sexual assault being reported, where the matter of his prior convictions

had already been established, where the calls had "little, if any, relevance" to whether Cordova had a behavioral abnormality, and where the calls "served only to inflame the passions of the jury." In response, the State argues that the 911 calls were admissible for the following reasons: (1) the calls generally provided a framework within which the State's evidence could be developed; (2) the calls were probative evidence that not only supported the experts' opinions, but also probative to show Cordova's sexual deviance and antisocial personality, two of the risk factors for sexually reoffending; and (3) the calls helped the jury evaluate his credibility in light of his denial that he had sexually assaulted the female victim and his further claim that she had not called police.

In his fourth issue, Cordova argues that, under the Texas Supreme Court's opinion in *Diamond Offshore Serv. Ltd. v. Williams*, the trial court was required to listen to the 911 calls before the court could conduct a proper 403 balancing test. *See Diamond Offshore Serv. Ltd. v. Williams*, 542 S.W.3d 539, 545-46 (Tex. 2018). In response, the State argues that: (1) Cordova failed to preserve this issue for appellate review where, even though he lodged an objection to the 911 calls on several other bases, he did not complain about the trial court's failure to listen to the calls before ruling on them; and (2) *Diamond Offshore* concerned a situation where the contents of a videotape were disputed and thus it can be distinguished from this case where there was no dispute about the content of the three-part 911 call from Y.M.

1. Underlying facts

The State called Cordova to testify in its case-in-chief and proceeded to ask him detailed questions about testimony he had given during his deposition which was taken prior to trial. Cordova confirmed certain testimony he had given but also asserted his Fifth Amendment right to remain silent as to other questions posed. At the deposition, when asked about the sexual assault

he committed against Y.M., he denied having had sex with her and instead offered a distinct counter-narrative. Cordova testified at deposition that he had met Y.M. on the street when she asked to use his restroom. He described that she was falling-down drunk; and he thought something was wrong with her. After she went to his bathroom, she came back having stolen items. When Cordova told her to leave, she refused. Eventually, Cordova walked her back to the spot where he met her, where she jumped into a white van and left. Cordova testified that he never had sex with her and that she probably lied because she was on drugs.

At the end of the first day of trial, outside the presence of the jury, Cordova's counsel raised several objections to the admission of the 911 call (State's Exhibit 4) when the State initially offered the exhibit. Cordova objected based on hearsay, that Cordova's voice was not captured on the recording, that no expert testified to having relied on the recording to form opinions, and that the recording would be unduly prejudicial versus its probative value given the underlying offense was not being relitigated. The court then asked for a description of the content of the call. Responding, the State described that its Exhibit 4 contained two different calls, one five-minutes in length and the other three minutes, and both calls were made by Cordova's second victim, Y.M. The State further described that the caller sounded panicked and terrified, that she says she had been held hostage, and she was trying to get away. The court indicated that, even though it was inclined to allow the calls to come in based on its reading of authorities presented, it would look at the exhibit and revisit with the parties in the morning as the court session soon ended for the day.

The next morning, outside the presence of the jury, the State reminded the court it had planned to listen to the CDs containing the 911 calls of Y.M. overnight. Although the court

responded that it did not have an opportunity to listen to the calls, nonetheless, it had decided that the calls would be admitted into evidence. Again, Cordova's counsel objected and stated, "I thought once we heard what was on the tape and then we were going to revisit it today, so I apologize for the misunderstanding." The court then permitted counsel to proceed with argument. Cordova objected on the basis that the calls were not relevant, lacked foundation, that res judicata applied as the offense had already been adjudicated, that the only voices present on the recordings included the 911 operator and the victim in the case, that hearsay applied, and that Cordova would be denied his right to confront all witnesses. More specifically, Cordova objected that "the audio is basically of a woman extremely distressed, extremely crying and yelling and in very grave distress, and it is our belief that for the jury to hear that tape would greatly harm Mr. Cordova in – and present a bias that would not be able to be refuted once the jury hears it." Throughout the lengthy exchange with the court, Cordova did not object based on the trial court's failure to listen to the call before ruling on its admissibility, nor did he offer a competing version of the calls' contents. Ultimately, the trial court overruled Cordova's objections, and the State played State's Exhibit 4 for the jury.

On review of the approximately eight-and-a-half-minute recording, the female caller of the three calls sounded exasperated, she was crying to the point that she was out of breath, and much of her speech was indecipherable and difficult to hear. The caller pleaded for help and reported to the dispatcher that a man she did not know was holding her hostage. She said that he forced her to do things, took off her underwear, tried to rape her, and would not let her go.

2. Standard of review for admissibility of evidence

Evidentiary rulings are committed to the trial court's sound discretion. *U-Haul Intern., Inc.*

v. Waldrip, 380 S.W.3d 118, 132 (Tex. 2012). A trial court abuses this discretion when it acts without regard for guiding rules or principles. *Id*.

3. Issue Three: Whether the trial court abused its discretion under Rule 403 by admitting the three-part 911 call.

a. Applicable law

The Texas Rules of Evidence provide for the general admissibility of all evidence having any tendency to make a fact of consequence more or less probable. TEX. R. EVID. 401, 402. Even if relevant, however, evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX. R. EVID. 403.

When a Rule 403 objection is at issue, the trial court must balance: (1) the inherent probative force of the evidence; along with (2) the proponent's need for that evidence; against (3) any tendency of the evidence to suggest a decision on an improper basis; (4) any tendency of the evidence to confuse or distract the jury from the main issues; (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence; and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006); *see also Diamond Offshore*, 542 S.W.3d at 544-45. Testimony is not inadmissible on the sole ground that it is "prejudicial" because, in our adversarial system, most of a proponent's evidence is legitimately intended to wound the opponent; but rather, *unfair* prejudice is the proper inquiry under Rule 403. *Diamond Offshore*, 542 S.W.3d at 549; *see also Manning v. State*, 114 S.W.3d 922, 928 (Tex. Crim. App. 2003) (observing that "unfair prejudice" refers only to the capacity of some concededly relevant evidence to lure the fact finder into resting

their verdict on a ground different from proof presented in support of the claim). In addition, there is a presumption that relevant evidence is more probative than prejudicial under Rule 403. *In Interest of M.G.N.*, 491 S.W.3d 386, 403 (Tex. App. – San Antonio 2016, pet. denied); *Murray v. Tex. Dep't of Family and Protective Servs.*, 294 S.W.3d 360, 368 (Tex. App. – Austin 2009, no pet.).

When offered as a supporting framework or to otherwise develop other evidence, "911 tapes are generally admissible, even if not necessary to establish a material fact . . . ." *Yi v. State*, No. 01-05-01147-CR, 2007 WL 2052064, at *4 (Tex. App. – Houston [1st Dist.] July 19, 2007, no pet.) (mem. op., not designated for publication); *see also, e.g.*, *Estrada v. State*, 313 S.W.3d 274, 300 (Tex. Crim. App. 2010) (holding 911 recording admissible over a Rule 403 objection, even though it did not establish any material facts, where the recording provided a framework for developing evidence).

In addition, evidence is relevant where it rebuts a defensive theory or where it helps the jury evaluate a witness's credibility. *See Wheeler v. State*, 67 S.W.3d 879, 887-88 (Tex. Crim. App. 2002); *Torres v. State*, 543 S.W.3d 404, 421-22 (Tex. App. – El Paso 2018, pet. ref'd) (evidence relevant where it rebuts a defensive theory); *see also Diamond Offshore*, 542 S.W.3d at 548; *In re T.S.H.*, No. 08-01-00485-CV, 2003 WL 22023576, at *3 (Tex. App. – El Paso Aug. 28, 2003, no pet.) (mem. op.) (evidence relevant where it undermines or supports credibility).

b. Application

The three-part 911 call had inherent probative force because it provided a framework and otherwise developed the State's evidence on the nature of Cordova's prior sexually violent offenses. *See, e.g.*, *Estrada*, 313 S.W.3d at 300; *Yi*, 2007 WL 2052064, at *4. Although the

elements of an alleged sexual offense were not at issue, the experts in this case testified that an understanding of Cordova's sexual deviance, consisting of "nonconsensual" and "sadistic" features, his antisocial personality, and his lack of remorse and empathy were relevant to their opinions that he had the requisite behavioral abnormality for civil commitment.

The call established that one of Cordova's prior convictions originated from a female victim who called 911 while sounding distressed and fearful. Mostly, the caller communicated repeatedly that she needed police help at her location, but she struggled to identify an address for the operator. At least twice the call hung-up only to resume with the caller asking for police help. The 911 call factually supported the experts' testimony about their risk assessments where the caller described, in her exasperated pleas for help, that she had been held hostage and a man had forced her to do things as he tried to rape her. Even if the experts had not expressly tied the content of the call to the behavioral-abnormality element, the plain wording of the SVP Act makes clear that the call was relevant to the contested issue of whether Cordova suffers from "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." TEX. HEALTH & SAFETY CODE ANN. § 841.002(2). Thus, the three-part call was germane to the underlying basis of the experts' opinions on the behavioral-abnormality element.

Furthermore, the 911 call had inherent probative force by serving to rebut Cordova's claims of innocence and helped the jury evaluate his credibility where Cordova outright denied having sex with the caller and instead told the jury a detailed counter-narrative about the incident. *See Wheeler*, 67 S.W.3d at 887-88; *Torres*, 543 S.W.3d at 421-22 (evidence relevant where it rebuts a

defensive theory); *see also Diamond Offshore*, 542 S.W.3d at 548; *T.S.H.*, 2003 WL 22023576, at *3 (evidence relevant where it undermines or supports credibility).

Based on the other available evidence in this case, we agree that the State's need for the recording was not as great as it is in other cases. Even still, we cannot say that the 911 call's probative value was substantially outweighed by the countervailing Rule 403 factors. Although we recognize that the 911 call contained emotional pleas for help, we conclude that the emotion and content of the call was not of the sort to amount to unfair prejudice such that it would prompt a jury to decide the case on an improper basis. *See Diamond Offshore*, 542 S.W.3d at 549; *Manning*, 114 S.W.3d at 928. In addition, as discussed above, the 911 call was directly germane to the jury's determination of the behavioral-abnormality element. Finally, the eight-and-a-half-minute three-part call was not of excessive length nor was it of a nature – such as it is with scientific evidence – that jurors would not be properly equipped to evaluate it.

The crux of Cordova's argument boils down to a single point: "playing the tape was overkill." As he contends, "[h]earing and feeling the victim's distress added nothing to the decision of whether or not Mr. Cordova has a behavioral abnormality." Regardless of whether the 911 call was "overkill" based on its emotional nature, the call was germane to the behavioral-abnormality element at issue based on both its verbal and non-verbal content, and thus, we hold that the 911 call was admissible over Cordova's Rule 403 objection. *See Estrada*, 313 S.W.3d at 300 (rejecting appellant's contention that the "approximately seven-minute 9–1–1 recording was 'charged with emotion' and was 'grossly prejudicial and inflammatory'" and, instead, holding that it was admissible to "'provide a framework within which the particulars of the State's evidence could be developed' even though the evidence 'did not of itself establish any material fact not otherwise

proven in the balance of the State's case.'"); *Yi*, 2007 WL 2052064, at *4 (rejecting appellant's Rule 403 contention that the 911 call was "unduly prejudicial and had the jurors in tears because the jurors could hear '[the caller's] voice and experience first hand the terror, grief, trauma, and tears of the eleven-year-old boy, as he discovers his mother's blood soaked body'" and, instead, holding that the 911 call was admissible where: (1) it verified other evidence; (2) the call did not unfairly implicate the appellant; and (3) the tape, while dramatic, was relevant because it provided a framework for the State's evidence and its relevance was not substantially outweighed by the danger of unfair prejudice toward the defendant).

Thus, the trial court did not abuse its discretion by admitting the 911 call, and we overrule Cordova's third issue presented for review.

4. Issue Four: Whether the trial court erred by not playing the 911 call prior to ruling on its admissibility.

a. Applicable Law

Generally, a trial court should view video evidence before ruling on admissibility when the contents of the video are at issue, even though circumstances might arise where such viewing is unnecessary. *Diamond Offshore,* 542 S.W.3d at 546-47.

But to preserve a complaint for appellate review, a party must timely object and state the specific grounds for the ruling sought. TEX. R. APP. P. 33.1(a)(1)(A). A complaint on appeal that does not comport with the party's objection at trial is not preserved for review. *See, e.g., Martinez Jardon v. Pfister*, 593 S.W.3d 810, 831 (Tex. App. – El Paso 2019, no pet.); *In re N.T.*, 335 S.W.3d 660, 670 (Tex. App. – El Paso 2011, no pet.).

b. Application

We reject Cordova's contention that the trial court erred in failing to play the 911 recording

before ruling on it for two reasons. First, Cordova waived his complaint because the basis on which he objected in the trial court (i.e., a Rule 403 complaint) – does not comport with the complaint he now asserts on appeal. *See, e.g.*, *Martinez Jardon*, 593 S.W.3d at 831; *N.T.*, 335 S.W.3d at 670. After the court indicated it would admit the 911 calls without having yet heard them, Cordova's counsel remarked that she misunderstood but she then merely asked for an opportunity to argue further, which the court permitted. During this argument, counsel provided a verbal description stating, "the audio is basically of a woman extremely distressed, extremely crying and yelling and in very grave distress, and it is our belief that for the jury to hear that tape would greatly harm Mr. Cordova in – and present a bias that would not be able to be refuted once the jury hears it." Providing a verbal description, Cordova does not object to the court not hearing the call, as he does so here, but instead argues the legal basis against its admissibility. Thus, Cordova waived his complaint by not presenting it first to the trial court.

Second, *Diamond Offshore* is inapplicable here because the contents of the 911 call was not disputed and, consequently, the trial court was not faced with a situation where it would have been impossible to assess the 911 call without having listened to it beforehand. *Compare Diamond Offshore*, 542 S.W.3d at 547 (holding that the proper exercise of discretion when faced with a Rule 403 objection required the trial judge to watch the video at issue where, among other things, fully assessing the probative value of the video was impossible based solely on the parties' descriptions because "each side offered its own spin."). For both reasons, we overrule Cordova's fourth issue presented for review.

C. Issue Five: Whether the trial court erred by granting a directed verdict on the repeat-sexually-violent-offender element.

In his fifth issue, Cordova argues that a directed verdict was not allowable on the repeat-

sexually-violent-offender element where: (1) the SVP Act "provides that either side is entitled to trial by jury and that the 'beyond a reasonable' doubt standard of proof and a unanimous jury are required"; (2) where, even though directed verdicts are permitted under the Texas Rules of Civil Procedure, allowing directed verdicts in commitment cases would conflict with the Act's statutory right to a jury trial; and (3) where "[t]he Texas Legislature decreed that the provisions of the SVP Act control when there is a conflict between the Act and the Rules of Civil Procedure." To be clear, Cordova does not argue there was an actual issue of material fact on the repeat-sexually-violent-offender element in this case.

In response, the State points out that every appellate court that has considered this same issue has rejected it. Cordova graciously concedes the State properly describes the current state of affairs on this issue, but he disagrees with those holdings and asks us to hold otherwise. The State argues that we should follow the precedent and rationale established by our sister courts and reject Cordova's argument here.

1. Applicable Law

The Rules of Civil Procedure apply to SVP cases, but if there is a conflict between the SVP Act and the rules, the SVP Act controls. TEX. HEALTH & SAFETY CODE ANN. § 841.146(b). The Rules of Civil Procedure provide for directed verdicts. TEX. R. CIV. P. 268. In an SVP Act case, a person is entitled to a jury trial on demand. TEX. HEALTH & SAFETY CODE ANN. § 841.061(b). In a jury trial, the jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. TEX. HEALTH & SAFETY CODE ANN. § 841.062(a).

In civil cases, a party has a right to a jury trial to determine questions of fact. *In re Commitment of Harris*, 541 S.W.3d 322, 330 (Tex. App. – Houston [14th Dist.] 2017, no pet.).

"Uncontroverted questions of fact need not be and should not be submitted to the jury for its determination." *Id*.; *see also City of Keller v. Wilson*, 168 S.W.3d 802, 815 & n.52 (Tex. 2005). A partial directed verdict is a procedure for removing parts of a civil case from the jury when there are no fact issues to resolve. *Harris*, 541 S.W.3d at 330.

As the SVP Act is civil and not punitive, partial verdicts may be granted on the question of whether a person is a repeat sexually violent offender, and no conflict is created between the SVP Act and the Rules of Civil Procedure by allowing partial directed verdicts in civil commitment cases. *Id*. No conflict exists because "[w]hen undisputed evidence demonstrates that a person is a repeat sexually violent offender, reasonable jurors can make only one finding as to that element– a conclusion that remains true whether the burden of proving the element is by a preponderance of the evidence or beyond a reasonable doubt." *Id.*; *see also In re Commitment of Perdue*, 530 S.W.3d 750, 754 (Tex. App. – Fort Worth 2017, pet. denied) ("We agree with our sister courts that Rule 268 does not conflict with health and safety code section 841.062(a) and that a directed verdict is available in a civil-commitment trial on the repeat-sexually-violent-offender element when it is conclusively established and is not a contested issue for the jury to decide.").

All seven of our sister courts that have thus far addressed whether a directed verdict on the repeat-sexually-violent-offender element is permissible have unanimously determined that a directed verdict on that element is permissible where warranted. *See In re Commitment of Shelton*, No. 02-19-00033-CV, 2020 WL 1887722, at *12 (Tex. App. – Fort Worth Apr. 16, 2020, no pet.) (mem. op. on reh'g); *In re Commitment of Flores*, No. 13-19-00093-CV, 2020 WL 1613418, at *10 (Tex. App. – Corpus Christi Apr. 2, 2020, pet. denied) (mem. op.); *Harris*, 541 S.W.3d at 330; *In re Commitment of Decker*, No. 11-17-00007-CV, 2017 WL 2869847, at *4 (Tex. App. –

Eastland June 30, 2017, no pet.) (mem. op.); *In re Commitment of Talley*, 522 S.W.3d 742, 750 (Tex. App. – Houston [1st Dist.] 2017, no pet.); *In re Commitment of Black*, 522 S.W.3d 2, 6 (Tex. App. – San Antonio 2017, pet. denied); *In re Commitment of Lemmons*, No. 09-13-00346-CV, 2014 WL 1400671, at *3 (Tex. App. – Beaumont Apr. 10, 2014, pet. denied) (mem. op.).

2. Application

Like our sister courts, we subscribe to the logic that there is no conflict between the Rules of Civil Procedure and the SVP Act where a partial verdict is directed on the repeat-sexually-violent-offender element in a case with undisputed evidence establishing that element. *See Harris*, 541 S.W.3d at 330; *Perdue*, 530 S.W.3d at 754. Falling into line with these uniform precedents—and not having found the argument to the contrary to be persuasive—we also hold that a partial directed verdict may be granted on the repeat-sexually-violent-offender element.

Yet, in addition to asserting that a conflict exists between directed verdicts in commitment cases and the right to a jury trial in such cases, Cordova also suggests that criminal-law protections should be afforded to him where his "liberty is at stake" and where "verdicts may not be directed against defendants in criminal cases." We disagree with this argument as this proceeding is not a criminal case. *See Stoddard*, 2020 WL 7413723, at *1; *Williams*, 539 S.W.3d at 437; *Wirtz*, 451 S.W.3d at 464. As pointed out by the State, the United States Supreme Court in *Allen v. Illinois* has held that criminal protections do not apply in the context of a civil commitment proceeding. *See Allen v. Illinois*, 478 U.S. 364, 372 (1986) ("[T]he State has indicated quite clearly its intent that these commitment proceedings be civil in nature; its decision nevertheless to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions requiring the full panoply of rights applicable there."). We thus reject this additional

contention, and having rejected both contentions of this issue, we overrule Cordova's fifth and final issue presented for review.

IV. CONCLUSION

The trial court's judgment is affirmed.

GINA M. PALAFOX, Justice

February 22, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.