

Affirmed; Opinion Filed January 11, 2018.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-17-00010-CV

IN RE COMMITMENT OF DELBERT GLEN ROGERS

**On Appeal from the 204th Judicial District Court
Dallas County, Texas
Trial Court Cause No. CV1670002**

MEMORANDUM OPINION

Before Justices Lang-Miers, Fillmore, and Stoddart
Opinion by Justice Stoddart

This appeal involves a civil commitment pursuant to the Sexually Violent Predator Act (“SVP Act”). A jury found Delbert Glen Rogers is a sexually violent predator as defined in section 841.003 of the Texas Health and Safety Code and the trial court’s judgment orders Rogers committed until his behavior abnormality changes to the extent he no longer is likely to engage in a predatory act of sexual violence. In three issues, Rogers argues the evidence is legally and factually insufficient to support a finding that he is a sexually violent predator and to show he suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. We affirm the trial court’s judgment and order of civil commitment.

FACTUAL BACKGROUND

Before the State filed the petition for civil confinement, Rogers was convicted of and incarcerated for three offenses: (1) on December 30, 1980, he was sentenced to six years’ confinement for aggravated rape with a deadly weapon; (2) on February 9, 1990, he was

sentenced to eight years' confinement for sexual assault; and (3) on August 17, 1993, he was sentenced to 25 years' confinement for sexual assault. Rogers was incarcerated when the instant suit was filed. In its original petition, the State alleges Rogers is a repeat sexually violent offender who suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. The State requests he be committed for treatment and supervision in accordance with chapter 841 of the Texas Health and Safety Code.

The State called two witnesses at trial: Rogers and Christine Reed, the psychologist who evaluated Rogers.

Rogers testified he was convicted of aggravated rape once and sexual assault twice. The trial transcript from the aggravated rape case shows the offense involved two sixteen-year-old girls. The complainant, who was referred to as D, stated Rogers pointed a gun at her during the offense. At trial in the instant case, Rogers testified that although he was convicted of aggravated rape of a woman, D, he actually had consensual sex with two twenty-two-year-old women who were prostitutes. He denied he had a gun, held a gun to D's head, or forced D to have sex. Rather, he stated, one of his "fall partners" had a gun. When asked whether he has "ever committed rape," Rogers replied that he has not. Rogers was sentenced to six years' incarceration for this offense, but was released onto parole, which he successfully completed.

Rogers testified he pleaded guilty to sexual assault against another woman, T. He explained he was in a car with T and another person and T was scratching his face. After T refused to stop scratching him, Rogers testified he got into the back seat and "[g]rabbed her by the hair behind her head. She had on some skimpy shorts on halfway showin' her vagina, and I stuck my finger in her vagina. . . . I let her see how it feel be [sic] scratched, so I give her somethin' - - give her somethin' to think about, maybe give her a east [sic] infection." He explained he did not want to scratch T's face because she was a nice looking woman. Rogers

testified the police report from that incident showed he raped T using his penis while they were alone in a car at a park. Rogers acknowledged his actions against T have had a negative, long-term effect on her. He testified he regrets his actions and “wish[es] [he] could take everything back.” Rogers was sentenced to eight years’ incarceration for sexually assaulting T. He was released on parole after serving fewer than two years. However, his parole was revoked when he was accused of committing a new sexual offense.

At trial, Rogers denied he sexually assaulted a woman referred to as R even though he pleaded guilty to the charge. He testified he lacked knowledge about the allegations in the police report because, at the time of the assault of R, he was at home with his mother, son, and his son’s mother. Although he admitted to the sexual assault during treatment, he explained he lied to his treatment provider to avoid further citations for nonparticipation.

While incarcerated from 1995 through 2009, Rogers received nine citations for sexual misconduct. Rogers admitted he exposed his penis to a correctional officer in 1995. In a separate incident, a female correctional officer may have seen his penis while he was using the bathroom. He explained the correctional officer was at fault because she failed to properly announce her presence in the cell block. Rogers conceded that in 1996 he exposed his penis to a correctional officer with the intent to arouse and gratify himself, but blamed the officer who “was tryin’ to cross me out.” In 1997, he was cited for sexual misconduct after exposing his penis to a correctional officer while masturbating with the intent to arouse and gratify himself, but explained his parents recently died and he was in a bad mood.

He testified: “I have committed sexual misconduct but not sexual assault on nobody.” Further, he stated he is not a rapist and he “never jacked nobody. I never beat nobody. I never taking nobody.” He acknowledged he could benefit from sex offender treatment. He explained he has taken full responsibility for his past and he will “not to do it again ‘cause I done got too

old to be sittin' up there doin' the things that I used to do, and I can't do the things that I used to do anyway due to my injuries." He has problems with his back, legs, and kidneys and walks with a cane. He testified he can get an erection, but when asked whether he can masturbate, he testified "[i]f I tried, it would hurt. I can't." He believes he is not at risk for committing future sex offenses because he will not think about sex in the future. He did, however, state he wanted to "get with one of [his] old ladies and have a relationship."

In addition to the sexual misconduct offenses, Rogers had three physical altercations while incarcerated. As to the first, Rogers testified he bit a person's finger off, explaining:

One of the guys that Ms. Ivy¹ classification paid a esse to come do a number job on me and have me killed. Because whoever been sendin' those papers there for me to sign with my name on it, my handwriting, for to set me up to sign my life away, yes, I have. I had to protect myself. I had to slow 'im down 'cause he was too bigger than me.

The second incident occurred when Rogers attempted to bite off an inmate's nose because he "was part of the Mexican Mafia." In the third incident, he fought a sixty-seven-year-old white supremacist carrying a shank in order to defend himself. There was a formal investigation for injury to an elderly individual resulting from the third incident.

On cross-examination, Rogers testified he was nearly fifty eight years old and was a different person emotionally than when he began his sentence twenty four years ago. He testified he is better, more knowledgeable, and, as an older person, he can respect others. He stated he is "nowhere near a sexually violent predator" and never has been. "I never had no problem with no women in my life. Not that way." He testified he will never feel the urge to rape another woman and he will never commit a sexually violent offense.

¹ Ms. Ivy is not identified.

Christine Reed, a psychologist, performed a risk assessment of Rogers and evaluated him to determine whether he has a behavioral abnormality. When determining whether a person has a behavioral abnormality, Reed considers whether the person has at least two sexually violent offenses, looks for the presence of psychopathy and mental illness, and evaluates the person's sexual history. Reed defined psychopathy as a lack of conscience such that a person will use and manipulate others. The person does not feel empathy and may be a pathological liar. Psychopathy is a behavioral abnormality that has been shown to increase the risk of re-offense.

Reed testified it is unnecessary to make a specific psychological or medical diagnosis in order to reach the opinion that someone has a behavioral abnormality. She explained:

Essentially what you're looking for are things like sexual deviancy or other things that cause a behavioral abnormality. There's no one specific psychological diagnosis, things like bipolar that you would think of, things like that, that equates a behavioral abnormality. So there's nothing I could diagnose him with that absolutely says that he has a behavioral abnormality, and a specific diagnosis of a mental disorder is not required.

Sexual deviance "could be anything from deviant sexual interests, whether it be a sexual disorder, pedophilia, things like that, but it could also be sexual preoccupation, engaging in sexual behaviors with people against their will, all those kinda things." Other indications of a behavioral abnormality include an antisocial orientation, which may be shown by a person breaking rules, impulsivity, aggression, and an antisocial lifestyle.

Reed described the process she undertook to evaluate Rogers, which is the same methodology followed by other experts in the field. Reed reviewed voluminous records related to Rogers, including offense reports, appellate documents from his sexual assault convictions, medical and disciplinary records from his incarceration, and a transcript from his deposition in the instant lawsuit. She explained that past behavior is one of the best predictors of future behavior. Reed conducted a two-hour clinical interview with Rogers during which she reviewed

his background beginning with childhood, discussed the offense for which he was incarcerated and his time in prison, and discussed Rogers's sexual history. While Rogers discussed his sex offenses with Reed, he "minimized quite a bit in those offenses," meaning he downplayed his role in them or denied they occurred as presented in the indictments. Reed explained she includes minimization and denial in her analysis, but they are weak risk factors for reoffending.

When Rogers discussed his convictions with Reed, he told her the complainants in the aggravated rape case were twenty four and twenty two years old. However, records show they were sixteen years old. Rogers told her their "orgy" was entirely consensual and denied using a gun or any threat or force. Although Rogers received a six-year sentence for this offense, he served three years and then was released on parole, which he completed successfully. As to the offense against T, Rogers told Reed he put his finger in T's vagina, but he was convicted of penetrating her vagina with his penis. Although Rogers was released onto parole, his parole was revoked after two years because he committed another sexual assault.

Rogers did not discuss his third conviction with Reed because their interview was interrupted. Reed reviewed Rogers's statements about the offense made to previous evaluators and in his deposition. Rogers originally denied the offense occurred, but in treatment he admitted to aspects of it. Reed testified that Rogers maintains he was falsely charged and was framed even though he pleaded guilty. Reed stated the documents show the offense occurred when Rogers was parked in a car and called a woman over to him. The woman went to the car, he brandished a gun, forced her into the car, and took her to another location. He tried to take off her clothes, she escaped, he chased and caught her, and then threw her to the ground, hit her in the face, dragged her back to the car, and sexually assaulted her. Rogers demanded she perform oral sex on him and penetrated her vagina and anus with his penis. He verbally threatened to kill the complainant as well. He has been incarcerated for this offense since 1993.

After the interview, Reed used numerous assessments to evaluate Rogers: the Hare Psychopathy Checklist (the “Hare PCL-R”), the Static-99R, and the Sexual Violence Risk 20 (“SVR-20”). The Hare PCL-R is a twenty-item checklist on which Rogers scored 30. Reed testified that a person who scores at least 30 meets the criteria for psychopathy. The Static-99R is a list of research-based risk factors for reoffending. After answering a series of prompts, a score is determined, which corresponds with a risk of recidivism. Reed concluded Rogers’s score showed he is in the moderate to high-risk category for sexual reoffending. The SVR-20 provides a list of twenty risk factors for a clinician to consider, but does not provide a score. Reed testified she uses multiple tools to measure a person’s risks because no single tool provides a complete assessment. For example, she explained, the Static-99R does not consider whether a person commits a sex offense while on community supervision, but such an act is a risk factor for reoffending. Reed testified several times that she would never rely on only one source of information to form her opinions.

Reed also considered Rogers’s nonsexual criminal history because a major risk factor for reoffending is an antisocial orientation, which may be shown by breaking rules or laws or engaging in illegal behavior. Reed testified Rogers was convicted of theft in 1980 and has been arrested for several other offenses. He was arrested in 1983 for injury to a child, but the disposition of that case was unclear from the records. Reed testified the injury to a child allegation “supposedly involved his 13-year-old niece that he said he whupped her.”

Reed considered Rogers’s relationship history, noting he previously had relationships with multiple women during the same time period. Rogers reported having numerous consensual sexual relationships in the past and also used prostitutes. Rogers reported having a high sex drive.

Reed testified that while in prison Rogers was in numerous fights, some of which were violent, and committed several sexual misconduct violations by exposing his penis or masturbating in front of guards. Although all of his sexual offenses while incarcerated did not involve contact with another person, noncontact sexual offenses suggest he has a sexual preoccupation and continues to engage in sexual behavior with nonconsenting people. Reed noted that at least one offense report suggested that Rogers masturbated while standing near the bars on his cell when he knew a guard would be nearby. His last sexual infraction was in 2009 and his last fight was in 2012. The fights while in prison involved other inmates. He bit off one inmate's finger at the first knuckle. In another altercation, he bit another man's nose, chest, and back.

After collecting the information, Reed generated a report. She concluded Rogers is a sexual recidivist with a pattern of engaging in sexually deviant behavior, which increases the likelihood he will reoffend. She further concluded Rogers suffers from a behavioral abnormality and an unspecified personality disorder with antisocial traits. She testified another doctor, identified as Dr. Hamilton, also concluded Rogers has a behavioral abnormality. Reed explained a personality disorder "is a lifelong pattern, characterological problems, behavioral problems. It affects the way that you see the world, you get along with other people . . . it impairs your functioning to some extent." Reed testified that Rogers is promiscuous, lacks empathy, lacks ownership of his offenses, exercises poor behavioral control, exhibits aggressive behaviors, and fights other people. Reed stated that Rogers is likely to engage in a predatory act of sexual violence for purposes of victimization in the future.

Although Reed gathered objective information, she conceded her opinions are subjective and another evaluator could reach different conclusions. Reed diagnosed Rogers with an

unspecified personality disorder. She acknowledged a large percentage of the prison population meets the criteria for antisocial personality disorder.

LAW & ANALYSIS

In his first and second issues, Rogers challenges the legal and factual sufficiency of the evidence supporting the finding he is a sexually violent predator. The SVP Act requires the State to prove beyond a reasonable doubt that a person is a sexually violent predator. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.062(a). A person is a sexually violent predator if the person (1) is a repeat sexually violent offender and (2) suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *Id.* § 841.003(a). A behavioral 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.” *Id.* § 841.002(2). A “predatory act” is one that is directed toward individuals for the primary purpose of victimization. *Id.* § 841.002(5).

We review the legal sufficiency of the evidence using the appellate standard of review for criminal cases. *In re Commitment of Dever*, 521 S.W.3d 84, 86 (Tex. App.—Fort Worth 2017, no pet.) (citing *In re Commitment of Mullens*, 92 S.W.3d 881, 885 (Tex. App.—Beaumont 2002, pet. denied)); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We assess the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the elements required for commitment under the SVP Act beyond a reasonable doubt. *Dever*, 521 S.W.3d at 86.

When reviewing the factual sufficiency of the evidence to support the civil commitment order, we weigh the evidence to determine “whether a verdict that is supported by legally

sufficient evidence nevertheless reflects a risk of injustice that would compel ordering a new trial.” *Id.*²

Appellant argues Reed’s opinions are conclusory and speculative and, thus, constitute no evidence. Opinion testimony that is wholly conclusory or speculative amounts to no evidence “because it does not tend to make the existence of a material fact ‘more probable or less probable.’” *In re Commitment of H.L.T.*, No. 10-17-00106-CV, 2017 WL 4413435, at *4 (Tex. App.—Waco Oct. 4, 2017, pet. filed) (quoting *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009)). Thus, “[b]are, baseless opinions will not support a judgment even if there is no objection to their admission in evidence.” *Id.* (quoting *Pollock*, 284 S.W.3d at 816). “When a scientific opinion is admitted in evidence without objection, it may be considered probative evidence even if the basis for the opinion is unreliable.” *Id.* (quoting *Pollock*, 284 S.W.3d at 818). “But if no basis for the opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection.” *Id.* (quoting *Pollock*, 284 S.W.3d at 818).

Rogers did not object that Reed’s opinions were unreliable during trial. Therefore, to prevail on his legal sufficiency claim, he must show in his appeal that the evidence offers no basis to support her opinions. *Id.* (citing *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004); *In re Commitment of Barbee*, 192 S.W.3d 835, 843 (Tex. App.—Beaumont 2006, no pet.)).

Reed is a licensed psychologist who has performed dozens of evaluations such as the one done for Rogers. She testified she uses the same methodology and tools as other professionals in

² Factual sufficiency review has been abandoned in criminal cases in which the burden of proof is beyond a reasonable doubt, see *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010), but the Beaumont Court of Appeals, which until recently handled the bulk of SVP Act appeals, has continued to perform a factual sufficiency review. See *In re Commitment of Day*, 342 S.W.3d 193, 206–13 (Tex. App.—Beaumont 2011, pet. denied) (explaining that as an intermediate appellate court, it has a constitutional duty to review factual sufficiency when the issue is raised on appeal; that the Texas Supreme Court, not the Court of Criminal Appeals, construes the Texas constitution as it is applied in civil cases; and that it would continue to apply the factual sufficiency review until the Texas Supreme Court overrules or distinguishes its binding precedent); see also *Dever*, 521 S.W.3d at 86.

the field. When determining Rogers suffers from a behavioral abnormality, Reed used three risk assessment measuring tools, the Hare PCL-R, Static-99R, and SVR-20, and concluded Rogers meets the criteria for psychopathy and he is at a moderate to high-risk for reoffending. She reviewed voluminous records related to Rogers, including documents from his aggravated rape and sexual assault convictions and his disciplinary records accrued while incarcerated. Examining those records, Reed noted Rogers not only was convicted of three sexual assault offenses, one which occurred while he was on parole, but he continued to commit disciplinary infractions—sexual and not—while incarcerated. Rogers minimized and denied many of these incidents and blamed other people for them during their two-hour interview. Rogers admitted he lied during the sex-offender treatment. Considering all of this information, along with Rogers’s history of having multiple girlfriends and fathering multiple children at the same time, Reed concluded Rogers is a recidivist with a history of sexually deviant behavior who is preoccupied with sex. Reed, along with Dr. Hamilton, concluded Rogers suffers from a behavioral abnormality.

Having reviewed the record, we conclude it supports Reed’s opinions and her opinions cannot be characterized as wholly conclusory or without any foundation. *H.L.T.*, 2017 WL 4413435, at *6. Furthermore, viewing the evidence, including Rogers’s testimony, in the light most favorable to the verdict, we conclude that a rational jury could have found, beyond a reasonable doubt, that Rogers is a repeat sexually violent offender and suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 841.002(2), 841.002(5), 841.003(a); *Dever*, 521 S.W.3d at 86. We conclude that the evidence is legally sufficient to support the jury’s finding that Rogers is a sexually violent predator. *See Dever*, 521 S.W.3d at 86. We overrule Roger’s first issue.

The evidence also is factually sufficient to support the jury's verdict because the record does not reflect a risk of injustice that compels granting a new trial. *See id.* The jury was entitled to draw reasonable inferences from basic facts to determine ultimate fact issues, and to resolve conflicts and contradictions in the evidence by believing all, some, or none of the testimony. *See Barbee*, 192 S.W.3d at 842. The evidence shows Rogers's history of aggravated rape, sexual assault, sexual misconduct while incarcerated, and fighting with other inmates. It also shows that Rogers does not accept responsibility for and blames others for his actions. Weighing the evidence, including Rogers's past offenses and Reed's testimony, we conclude there is not a risk of injustice too great to allow the verdict to stand. We overrule Rogers's second issue.

In his third issue, Rogers argues the evidence is legally and factually insufficient to prove he is likely to engage in a predatory act of sexual violence because the State presented no evidence that Rogers would commit an act directed toward an individual for the primary purpose of victimization. Rogers's brief states:

When writing Texas' [sic] version of a Sexually Violent Predator law, the Legislature chose to define a "Predatory act" as "an act directed toward individuals, including family members, for the primary purpose of victimization." TEXAS HEALTH & SAFETY CODE 841.002(5). The prosecution's case and Dr. Reed's testimony ignored this definition completely and presented no evidence that Rogers was acting with this purpose regarding any of his past crimes, or would change his modus operandi and begin doing so in the future.

The State asked Reed: "Did you find that Mr. Rogers is likely to engage in a predatory act of sexual violence for purposes of victimization?" and Reed answered in the affirmative. Rogers did not offer any contradictory testimony. Additionally, the State presented evidence that Rogers has a behavioral abnormality that makes him likely to engage in predatory acts of sexual violence in the future and the jury heard testimony about Rogers's risk factors, criminal history, sexual crimes, and incidents while incarcerated. Viewing the evidence in the light most

favorable to the verdict, the jury could have reasonably concluded that Rogers has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence for the primary purpose of victimization. *See Dever*, 521 S.W.3d at 86. Weighing all of the evidence to support the civil commitment order, we do not conclude the evidence reflects a risk of injustice that would compel ordering a new trial. *See id.* We overrule Rogers’s third issue.

CONCLUSION

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

/Craig Stoddart/

CRAIG STODDART
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

IN RE THE COMMITMENT OF
DELBERT GLEN ROGERS

No. 05-17-00010-CV

On Appeal from the 204th Judicial District
Court, Dallas County, Texas
Trial Court Cause No. CV1670002.
Opinion delivered by Justice Stoddart.
Justices Lang-Miers and Fillmore
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court and the order of commitment are **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 11th day of January, 2018.