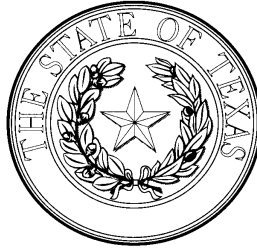


Opinion issued July 12, 2018.



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-17-00649-CV

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**IN RE COMMITMENT OF EDGAR MANUEL BARRIENTOS, Appellant**

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**On Appeal from the 56th District Court  
Galveston County, Texas  
Trial Court Case No. 16-CV-1368**

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**MEMORANDUM OPINION**

This case involves a civil commitment pursuant to the Sexually Violent Predator Act (“the SVP Act”).<sup>1</sup> A jury found that Edgar Manuel Barrientos is a sexually violent predator as defined in the SVP Act, and the trial court rendered a

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<sup>1</sup> See TEX. HEALTH & SAFETY CODE ANN. §§ 841.001–.151 (West 2017).

final judgment and an order of civil commitment. In two appellate issues, Barrientos argues that: (1) the trial court erred by granting the State's motion for a directed verdict on the issue of whether he is a "repeat sexually violent offender"; and, (2) the trial court committed reversible error by admitting evidence of his unadjudicated offenses. We affirm the trial court's judgment.

### **Background**

On June 3, 2011, Barrientos pleaded guilty to one charge of aggravated sexual assault and the court assessed his punishment at seven years' confinement in the Institutional Division of the Texas Department of Criminal Justice ("TDCJ"). Prior to his release from TDCJ, the State filed suit against Barrientos in Galveston County to civilly commit Barrientos as a sexually violent predator under the SVP Act, alleging that he was a repeat sexually violent offender 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. § 841.003(a) (West 2017). While at TDCJ, Barrientos was evaluated by the State's expert, Dr. Stephen Thorne, who concluded that Barrientos met the statutory requirement of behavioral abnormality.

At trial, Barrientos testified that he had been previously convicted of aggravated sexual assault and indecency with a child and sentenced to prison for both offenses. The State placed into evidence pen packets containing certified copies of the judgments for these two offenses. Specifically, Barrientos had pleaded guilty

to indecency with a child by contact in 2000 and was placed on ten years' deferred community supervision. However, Barrientos's community supervision was subsequently revoked after he failed to comply with the terms of his supervision, and he was sentenced to four years' imprisonment. In 2011, Barrientos pleaded guilty to aggravated sexual assault and was sentenced to seven years' imprisonment. Although he admitted having been convicted of and sentenced to prison for these crimes, Barrientos repeatedly denied having committed the underlying offenses.

The State's expert, Dr. Thorne, testified that he conducted a behavioral-abnormality review of Barrientos. Based on Dr. Thorne's education, training, experience, and the methodology that he employed, it is his expert opinion that Barrientos suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. Dr. Thorne's opinion was formed after he reviewed records, conducted a face-to-face interview with Barrientos, scored actuarial instruments, and applied research relating to sexual recidivism.

Dr. Thorne testified that, in his expert medical opinion, Barrientos suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence based, in part, on his opinion that Barrientos has antisocial personality traits. According to Dr. Thorne, the two main risk factors that experts in his field look at when evaluating whether someone has a behavioral abnormality are (1) sexual deviancy and (2) antisocial behavior. Dr. Thorne testified that "these two

big categories are consistently shown to be important risk factors when evaluating how likely somebody is to be sexually deviant or violent in the future.” Dr. Thorne opined that Barrientos has both risk factors.

Someone who is antisocial “breaks the law, violates the health, safety, the rights of other individuals, [and is] impulsive, rebellious, [and] irresponsible.” According to Dr. Thorne, a diagnosis of antisocial personality disorder requires evidence of conduct disorder before the age of fifteen. He opined that Barrientos met this requirement based on Barrientos’s statements that he had been in dozens of fights when he was a juvenile and that he stabbed someone when he was approximately fourteen years old. Dr. Thorne explained that he did not have any records or other evidence corroborating Barrientos’s statement, and he was not certain enough to make the diagnosis based on the limited information.

Although he stopped short of diagnosing Barrientos with an antisocial personality disorder, Dr. Thorne opined that Barrientos has antisocial personality traits and a pattern of engaging in antisocial behavior based in part on his review of Barrientos’s prison disciplinary record, admissions Barrientos made regarding his prior conduct, and Barrientos’s other convictions for nonsexual criminal conduct.

With regard to the unadjudicated offenses, Dr. Thorne explained that such conduct is important for him to consider as part of his evaluation because it may be indicative of antisocial behavior, or a predisposition towards antisocial behavior. In

this case, Dr. Thorne noted that Barrientos acknowledged that he had engaged in dozens of fights and had stabbed another person when he was a teenager, although he claimed that all of these were acts of self-defense. Dr. Thorne also testified that the records he reviewed reflected that Barrientos had been arrested for possession of marijuana when he was fifteen years old, and criminal trespass, criminal mischief, and assault when he was in his early twenties. Dr. Thorne testified that Barrientos acknowledged being a gang member, exchanging drugs for sex with prostitutes, and violating prison rules in various ways. Dr. Thorne explained that he relies on this type of information, i.e., a person's admissions to prior criminal conduct or bad acts and their record of nonsexual criminal conduct, when forming his opinion as to whether that person has a behavioral abnormality.

Dr. Thorne explained that a person's prison disciplinary record can contain evidence of antisocial orientation and that he relies upon these records when forming his opinion as to whether that person has a behavioral abnormality. Although the number of Barrientos's disciplinary actions did not alarm Dr. Thorne, the underlying behavior gave him cause for concern. Specifically, Dr. Thorne testified that Barrientos was written up during his first incarceration for masturbating in public, in front of a female officer. During his second incarceration, Barrientos was a member of a gang that typically engages in negative, unsafe, and unhealthy

behaviors. Although Barrientos claims that he disengaged from the gang, his prison records reflect otherwise.

Barrientos objected to Dr. Thorne testifying about his nonsexual criminal history, his gang membership, and his prison disciplinary history on the basis of hearsay and argued that because the alleged offenses had not been adjudicated, they were more prejudicial than probative. The trial court noted that the information was being admitted to show the basis of Dr. Thorne's opinion and was not being offered for the truth of the matter asserted, and overruled the objection. The trial court included a limiting instruction in the charge, instructing the jury that the information contained in records reviewed and relied upon by Dr. Thorne was being admitted only for the purpose of showing the basis of the doctor's opinion and to allow the jury to assess the weight and credibility of his opinion.

After both sides rested, the State moved for a partial directed verdict on the issue of whether Barrientos is a repeat sexually violent offender. Barrientos objected on the basis that the jury should determine this element beyond a reasonable doubt because the testimony that he denied committing either sexual offense created a question of fact for the jury to resolve. The trial court overruled the objection and granted the State's motion for a partial directed verdict.

The jury found that Barrientos is a sexually violent predator, and the trial court rendered a final judgment and an order of civil commitment. This appeal followed.

## Civil Commitment of Sexually Violent Predators

Although SVP Act cases are civil proceedings, the State’s burden of proof is the same as in a criminal case—beyond a reasonable doubt. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.062(a); *see also In re Commitment of Stuteville*, 463 S.W.3d 543, 552 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). Therefore, the State must prove beyond a reasonable doubt that the person is a sexually violent predator as defined by the SVP Act. TEX. HEALTH & SAFETY CODE ANN. § 841.062(a). A person is a sexually violent predator under the SVP Act if the person: (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. *Id.* § 841.003(a). 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); *see also id.* § 841.002(8)(A) (defining “sexually violent offense” to include, among other things, offense of aggravated sexual assault and indecency with a child). The SVP Act defines “behavioral abnormality” as “a congenital or acquired condition that, by affecting a person’s emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person.” *Id.* § 841.002(2).

## Directed Verdict

In his first issue, Barrientos argues that the trial court erred by granting the State's motion for a directed verdict on the issue of whether he is a "repeat sexually violent offender" because the evidence created a question of fact that only the jury could decide.

### A. Standard of Review and Applicable Law

Although a defendant has an absolute right to a jury trial in SVP Act cases, *see* TEX. HEALTH & SAFETY CODE ANN. § 841.061(b) (West 2017), this court and others have consistently held that when there is undisputed evidence establishing that the defendant has been convicted of more than one sexually violent offense and a sentence was imposed for one of them, "a person's status as a sexually violent offender is a legal determination appropriate for partial directed verdict." *In re Commitment of Talley*, 522 S.W.3d 742, 750–51 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (holding trial court did not err by granting directed verdict on repeat sexually violent offender element); *see also In re Commitment of Harris*, 541 S.W.3d 322, 332 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (same); *In re Commitment of Perdue*, 530 S.W.3d 750, 754 (Tex. App.—Fort Worth 2017, pet. denied) (same); *In re Commitment of Decker*, No. 11-17-00007-CV, 2017 WL 2869847, at \*3–4 (Tex. App.—Eastland June 30, 2017, no pet.) (mem. op.) (same); *In re Commitment of Black*, 522 S.W.3d 2, 6 (Tex. App.—San Antonio 2017, pet.



denied) (same); *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.) (same).

We review the grant of a directed verdict in the light most favorable to the party against whom the verdict was rendered and disregard all contrary evidence and inferences. *Talley*, 522 S.W.3d at 750.

## **B. Analysis**

Barrientos argues that although he pleaded guilty to aggravated sexual assault and indecency with a child by contact, he has consistently denied committing the underlying sexual offenses, and that his repeated denials create a fact issue as to whether he qualifies as a “repeat sexually violent offender.” The plain language of the statute, however, defines “a repeat sexually violent offender” as someone who has been “convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses.” TEX. HEALTH & SAFETY CODE ANN. § 841.003(b). Thus, the State is only required to prove that Barrientos was convicted of more than one qualifying offense and a sentence was imposed for at least one of those convictions. Section 841.003(b) does not require that Barrientos admit he committed the underlying offenses.

In this case, the undisputed evidence establishes that Barrientos qualifies as a repeat sexually violent offender for purposes of the SVP Act. Barrientos admitted

that he had been convicted of aggravated sexual assault and indecency with a child and he was sentenced to TDCJ for both offenses. The State also offered uncontroverted evidence establishing these facts, namely, copies of the judgments documenting each conviction and the sentence imposed. Although he denies committing either offense, Barrientos's denials of guilt do not raise a question of fact as to whether he was convicted of these offenses and sentenced for at least one of them. Accordingly, we hold that no fact question existed for the jury to decide as to Barrientos's status as a repeat sexually violent offender, and the trial court did not err by granting a directed verdict on this element. *See Talley*, 522 S.W.3d at 750–51.

We overrule Barrientos's first issue.

### **Admission of Evidence**

In his second issue, Barrientos argues that the trial court abused its discretion by admitting evidence of unadjudicated bad acts and offenses, namely, nonsexual criminal conduct when he was a young teenager. According to Barrientos, this evidence should have been excluded because its probative value is substantially outweighed by the danger of unfair prejudice. *See* TEX. R. EVID. 705(d).

## **A. Standard of Review**

We review evidentiary rulings using an abuse of discretion standard. *See Stuteville*, 463 S.W.3d at 554 (citing *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 906 (Tex. 2000)).

Under Texas Rule of Evidence 705, an expert in a SVP Act civil commitment proceeding may disclose the underlying facts or data upon which the expert bases his or her opinion if it is of a type of information relied on by experts in the field when forming opinions on the subject. *See* TEX. R. EVID. 705; *Stuteville*, 463 S.W.3d at 554–55. But the expert’s disclosure of these facts and data is subject to the same relevancy constraints that govern the admission of other kinds of evidence. *See* TEX. R. EVID. 705(d) (“If 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.”); *see also* TEX. R. EVID. 403.

Under Rule of Evidence 403, relevant evidence may be excluded “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.” TEX. R. EVID. 403. “Factors considered when applying the Rule 403 balancing test include the probative value of the evidence, the potential of the evidence to impress the jury in some irrational

way, the time needed to develop the evidence, and the proponent's need for the evidence." *Stuteville*, 463 S.W.3d at 555 (quoting *In re Commitment of Anderson*, 392 S.W.3d 878, 882 (Tex. App.—Beaumont 2013, pet. denied)).

Texas law presumes that relevant evidence is admissible. *See In re Commitment of Winkle*, 434 S.W.3d 300, 309 (Tex. App.—Beaumont 2014, pet. denied) (citing TEX. R. EVID. 402). While Rule 403 of the Rules of Evidence allows the exclusion of relevant evidence on special grounds, it should be used sparingly. *See Winkle*, 434 S.W.3d at 309.

Evidence of unadjudicated offenses may be admissible in civil commitment cases when such evidence assists the jury in understanding an expert's testimony that the person has a behavioral abnormality, which is the ultimate issue that the jury must determine. *See Stuteville*, 463 S.W.3d at 556. Such evidence may also be helpful to the jury in weighing the expert's opinion. *Id.*; *see also Talley*, 522 S.W.3d at 749.

## **B. Analysis**

Barrientos argues that evidence of unadjudicated criminal conduct he engaged in when he was a young teenager should have been excluded because its probative value is substantially outweighed by the danger of unfair prejudice. *See* TEX. R. EVID. 705(d). Specifically, Barrientos argues that: (1) the evidence is irrelevant and has no probative value with regard to whether he has antisocial personality disorder

because Dr. Thorne did not diagnose him with this disorder; (2) the State did not need this information to prove that he has a behavior abnormality; and (3) the criminal conduct is unadjudicated.

Barrientos argues that the evidence of these unadjudicated offenses is not probative of whether he has a behavioral abnormality because Dr. Thorne did not diagnose him with an antisocial personality disorder. Dr. Thorne's opinion that Barrientos suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence is based, in part, on Dr. Thorne's opinion that Barrientos has antisocial traits, as reflected by the records he reviewed and Barrientos's statements. According to Dr. Thorne, antisocial behavior is one of the two main risk factors that experts in his field look at when evaluating whether someone has a behavioral abnormality. Although he could not diagnose Barrientos with an antisocial personality disorder based on the record before him, Dr. Thorne's testimony indicates that his opinion is not dependent upon an official medical diagnosis. Furthermore, the fact that Dr. Thorne was unable to diagnose Barrientos with an antisocial personality disorder based on the evidence available to him is a factor for the jury to consider when determining Dr. Thorne's credibility and the weight to give his testimony and opinion.

Barrientos also argues that the State did not need evidence of his unadjudicated offenses to explain the basis of Dr. Thorne's opinion that he suffers

from a behavioral abnormality because the State introduced other evidence supporting Dr. Thorne's opinion, namely, Barrientos's prison disciplinary records. Dr. Thorne explained that someone who is antisocial "breaks the law, violates the health, safety, the rights of other individuals, [and is] impulsive, rebellious, [and] irresponsible." Although Barrientos's prison disciplinary records are some evidence supporting Dr. Thorne's opinion that Barrientos has antisocial traits and lives an antisocial lifestyle, Dr. Thorne explained that Barrientos's behavior over time and in different settings shows "a pattern of antisocial behavior and rule violation" that is also important for purposes of his evaluation.

Barrientos also argues that his unadjudicated offenses, including testimony that he admitted to stabbing someone when he was a juvenile, are unfairly prejudicial precisely because they have not been adjudicated. Unadjudicated offenses, however, are not necessarily more prejudicial than probative. *See Stuteville*, 463 S.W.3d at 555–56 (holding trial court did not abuse its discretion by admitting evidence of uncharged sexual offenses defendant allegedly perpetrated against 27 to 43 other victims for limited purpose of explaining basis of expert's opinion that defendant suffered from behavioral abnormality). In this case, the court included a limiting instruction in the jury charge instructing the jury that they could only consider information derived from the records Dr. Thorne reviewed and relied on for purposes of evaluating the basis of Dr. Thorne's opinion and assessing the weight and

credibility of his opinion. There is nothing in the record indicating that the jury did not follow the judge's instructions. *See In re Commitment of Day*, 342 S.W.3d 193, 199 (Tex. App.—Beaumont 2011, pet. denied) (appellate courts presume jury followed trial court's limiting instruction).

Based on this record, the trial court could have reasonably concluded that evidence of these unadjudicated offenses and extraneous bad acts would be helpful to the jury in weighing Dr. Thorne's testimony, and in explaining the basis for Dr. Thorne's opinion that Barrientos suffers from a behavioral abnormality, based in part on his opinion that Barrientos has antisocial traits and an antisocial orientation. *See Stuteville*, 463 S.W.3d at 556. Given the purpose for admitting the evidence under Rule 705, and the trial court's limiting instruction, the trial court did not abuse its discretion by concluding that the evidence was admissible and would not be unfairly prejudicial. *See Winkle*, 434 S.W.3d at 309 (stating Rule 403 should be used sparingly).

We overrule Barrientos's second issue.

## **Conclusion**

We affirm the trial court's judgment.

Russell Lloyd  
Justice

Panel consists of Chief Justice Radack and Justices Jennings, and Lloyd.

Justice Jennings, concurring.