Motion for Rehearing Denied; Motion for En Banc Reconsideration Denied as Moot; Memorandum Opinion of August 6, 2019 Withdrawn; Affirmed and Substitute Memorandum Opinion filed May 18, 2021.

In The

Fourteenth Court of Appeals

NO. 14-18-00167-CV

IN RE COMMITMENT OF CEDRIC AUSBIE

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 1302213-0101Z

SUBSTITUTE MEMORANDUM OPINION

We issued our opinion in this case on August 6, 2019. Thereafter, Cedric Ausbie filed a motion for rehearing and motion for en banc reconsideration; the State filed a response. We withdraw our previous opinion, vacate our previous judgment, and issue this substitute opinion and judgment. We deny Ausbie's motion for rehearing and deny as moot his motion for en banc reconsideration.

In this appeal from a final judgment and an order of civil commitment, a trial court found Cedric Ausbie is a sexually violent predator as defined in the Texas Health and Safety Code and therefore subject to civil commitment. *See* Tex.

Health & Safety Code Ann. §§ 841.001-.151. On appeal, Ausbie contends the evidence is legally and factually insufficient to "support a beyond-a-reasonable-doubt finding that Mr. Ausbie has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence." We affirm.

BACKGROUND

I. The Texas Civil Commitment of Sexually Violent Predators Act

The Texas Civil Commitment of Sexually Violent Predators Act ("SVP Act") provides for the civil commitment of sexually violent predators based on legislative findings that "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 actions of sexual violence." Tex. Health & Safety Code Ann. § 841.001. The Legislature expressly found 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." *Id*.

Under the SVP Act, 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 the person likely to engage in a predatory act of sexual violence. *Id*. § 841.003(a). Before the State files suit, a person must be administratively determined to be a sexually violent predator. *Id*. §§ 841.021-.023; *In re Commitment of Bohannan*, 388 S.W.3d 296, 298 (Tex. 2012). When the administrative determination is made, notice is given to an attorney representing the State. Tex. Health & Safety Code Ann. § 841.023.

Once the person is referred to the State, an attorney representing the State may file a civil commitment proceeding in the court of conviction for the person's

most recent sexually violent offense. *Id*. § 841.041(a). If a judge or jury determines that the person is a sexually violent predator, the trial court must commit the person for treatment and supervision to begin on the date of release from prison and to continue "until the person's behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence." *See id*. § 841.081(a).

II. Ausbie's Trial

The State filed a petition alleging Ausbie is a sexually violent predator and requesting that he be committed for treatment and supervision. The case was tried to the bench in October 2017.

The State presented pen packets which showed Ausbie's convictions for two sexual offenses. Ausbie sexually assaulted a 16-year-old girl in 2004, pleaded guilty to the offense of sexual assault of a child, and was sentenced to two years' confinement. He was released in 2007. In 2011, he was charged with indecency with a child; the victim was a nine-year-old boy. He pleaded guilty and was sentenced to seven years' confinement in 2013.

The State presented two experts, who performed a clinical assessment of Ausbie, to testify concerning their opinion about whether Ausbie suffers from a behavioral abnormality: Dr. Sheri Gaines, a board-certified psychiatrist, and Dr. Timothy Proctor, a board-certified forensic psychologist.

Proctor testified he has been conducting evaluations with regard to behavioral abnormality for ten years and has conducted approximately 70 evaluations. Proctor relied on principles of forensic psychology in his evaluation of Ausbie and testified it was his opinion "Ausbie has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence." To form his

opinion, Proctor stated he reviewed "the standard types of records in these cases," including police reports, victim statements, court documents, judgments, pen packets, "prison records that deal with summaries of him in his history, his behavior in prison, medical and psychiatric treatment in prison"; interviewed Ausbie face-to-face; scored the Static-99R instrument (which is an actuarial test); and reviewed the depositions of Gaines, psychologist Dr. Bauer (who conducted a multidisciplinary report and concluded Ausbie has a behavioral abnormality), psychologist Dr. Mauro (who was asked to evaluate Ausbie's competency and concluded (1) he was incompetent to testify at the commitment trial and (2) he has a psychotic disorder which significantly impairs him), and the deposition of Ausbie (which provided a "continued look" into his psychotic state).

Proctor explained that the records he reviewed are typically reviewed by experts to form an opinion as to whether a person has a behavioral abnormality. He explained he relied on the data in these records because, in order to determine if Ausbie has a behavioral abnormality, Proctor has to know Ausbie's history, behavior, problems, and prior sexual offenses. Proctor testified that "[m]any of the commonly used risk factors in the research are based on the person's history and past. So, in understanding the person right now, it's important that we look back."

Proctor testified he met Ausbie in person at the Skyview unit in March 2017 but was unable to conduct a typical interview in length or scope because of Ausbie's level of impairment and severe mental illness. Proctor could not communicate with Ausbie and did not consider Ausbie at any point during the interview to be competent. Despite Ausbie's inability to communicate with Proctor, Proctor explained the interview was very important because he could observe "how impaired [Ausbie] is and how impaired his thinking is and his behavior is." Ausbie did not understand why Proctor was there and was "very

distracted by things going on in his head"; it was difficult for Proctor to get Ausbie to respond to any questions and Ausbie got "a little bit agitated." Proctor diagnosed Ausbie with "a severe mental disorder called schizoaffective disorder that's a type of schizophrenia." Proctor stated that "a major driver in [Ausbie's] likelihood of committing predatory acts of sexual violence is his very disorganized thinking . . . and he has serious difficulty in controlling his behavior. So, witnessing that firsthand was important and added to my evaluation."

Proctor testified he was unable to score Ausbie under the typical psychopathy checklist called P.C.L.R. because the instrument score is based in part on self-reporting and Ausbie could not provide any information because of his severe mental impairment. Although Proctor was unable to score the psychopathy checklist, he was able to determine that Ausbie's behavioral abnormality is "not driven by psychopathy or him being a psychopath." Proctor stated Ausbie has antisocial traits and a psychotic disorder but psychopathy is not "what's driving his sexual acting out behavior or what is driving this [behavioral abnormality]."

Further, Proctor stated that although "diagnoses" are not "required to find [Ausbie] has a behavioral abnormality," he diagnosed Ausbie with schizoaffective disorder and borderline intellectual functioning. According to Proctor, schizoaffective disorder relates to a finding of behavioral abnormality because the disorder impacts Ausbie's "ability to control his behavior and emotionally manage . . . his behavior. And in particular it deals with how his sexual deviancy comes out in his ability to control sexual deviant thoughts and urges." Proctor stated Ausbie's borderline intellectual functioning contributes to a finding that Ausbie has a behavioral abnormality because "this mental functioning . . . disinhibits him, impacts his decision making choices, emotional functioning, and then leads to the sexual deviancy manifesting itself."

With regard to the antisocial traits cluster of risk factors, Proctor testified he considered Ausbie's psychotic disorder and unstable relationship history. He also considered Ausbie's nonsexual criminal history as an antisocial lifestyle. Proctor testified Ausbie was charged with aggravated assault with a deadly weapon when he was 17 years old. A few months later, Ausbie was charged with aggravated assault causing bodily injury for which he received and completed probation in December 2002. In 2003, Ausbie "was detained and taken to the psychiatric hospital after he jumped out in front of a car and was refusing to get off the car, even when the car started moving." In 2004, "there was a possession of marijuana charge he got some jail time for. Also a criminal trespass with some jail time in [20]04." Ausbie was also charged with public intoxication and criminal mischief before being charged with the 2004 sexual assault of a child and serving a prison sentence until 2011.

With regard to the sexual deviance risk factor, Proctor characterized Ausbie's sexual offenses as sexually deviant because "[o]ne, there's force in both of his sexual offense convictions. Additionally, his second victim was a prepubescent child" which "suggests the pedophilic urges and interests and possibly a pedophilic disorder."

Proctor explained that the details of Ausbie's two sexual offenses were important and allowed Proctor to identify numerous risk factors relative to determining if Ausbie suffers from a behavioral abnormality, including (1) physical coercion during sex; (2) aggressive and agitated behavior; (3) persistence after punishment (*i.e.*, "committing a sex offense after being sanctioned for a sex offense"); (4) age discrepancy between Ausbie and the victims; and (5) the boy was a stranger victim.

Proctor also testified that another factor he considered in forming his opinion

was that Ausbie has a history of substance use problems that are currently "not active because he's in prison." Proctor testified Ausbie used "[c]ocaine, which is a stimulant; marijuana; P.C.P.; and other hallucinogenics, in particular ecstasy." According to Proctor, "[s]ubstance use is something that disinhibits" and "having a prior history of having a problem when in the free world with substance use is a risk factor for re-offense."

Based on the records he reviewed, Proctor also applied the Static-99R, an actuarial test used to evaluate a sex offender's risk of recidivism. He scored Ausbie a "7", and testified the score put Ausbie "in the highest level, well above average risk" on the Static-99R. Proctor testified other evaluators scored Ausbie and similarly found him to be in the "well above average risk" category.

Proctor could not identify any protective factors to mitigate the numerous risk factors. Proctor concluded Ausbie suffers from a behavioral abnormality.

Gaines testified she has been a psychiatrist for 27 years and has evaluated approximately 125 people to assess whether they have a behavioral abnormality. Gaines testified that, according to the statutory definition, "a behavioral abnormality is a congenital or acquired condition that affects one's emotional or volitional capacity and predisposes them to commit a sexually violent act such that they are a menace to society." In her opinion, Ausbie suffers from a behavioral abnormality.

Gaines explained that in evaluating Ausbie she reviewed "a lot of collateral information," conducted a face-to-face interview, and "used [her] knowledge and experience to formulate an opinion," which is the "accepted methodology" used by "psychiatrists in conducting these same evaluations in the State of Texas." Gaines stated she reviewed "lot of records including prison medical records, Sheriff's reports, witness reports," Proctor's deposition, Mauro's deposition, Bauer's

multidisciplinary report and conclusion that Ausbie has a behavioral abnormality, and Ausbie's deposition.

Gaines explained that her records review and interview of Ausbie were both important to her opinion formation that Ausbie has a behavioral abnormality. She stated the "collateral information was important for facts and details. The face-to-face evaluation was important for [her] to evaluate Mr. Ausbie, be able to come up with a psychiatric diagnosis, better understand his level of functioning, understand his thought processes, understand his psychiatric difficulties."

Gaines stated Ausbie's interview was shorter than typical because of his "low level of functioning" and his difficulty with new things, new people, a new routine, sitting still, and being asked questions. Gaines testified "Ausbie became so uncomfortable that he asked to terminate the interview and return to his cell." Although Gaines was not asked to evaluate Ausbie's competency, she concluded Ausbie was incompetent and did not really understand why she interviewed him. To form her opinion that Ausbie suffers from a behavioral abnormality, Gaines testified she considered (1) his clinical presentation (including his inability to communicate factually), (2) the "many risk factors that are included in how I arrived at my opinion", (3) his inability to tolerate stress and change, (4) his "lack of self-awareness", and (5) his "lack of impulse control."

Gaines also testified she diagnosed Ausbie with schizoaffective disorder, unspecified paraphilic disorder,[1] antisocial traits, substance use disorder, and borderline intellectual functioning by using the DSM-5 (Diagnostic and Statistical Manual of Disorders), which is "usually relied upon by psychiatrists in making . . .

[1] Defined by Gaines as "a disorder where there is [sic] deviant sexual thoughts, deviant sexual behaviors, and those things are interfering with someone's life. It is a very nonspecific diagnosis."

conclusions about behavior abnormality." According to Gaines, "[s]omeone with a schizoaffective disorder has psychosis, either auditory hallucinations, delusions, something that is out of touch with reality." And there "is a mood component" to the disorder with symptoms of depression. Gaines testified "[t]he psychotic part of the diagnosis was clear to observe" during her interview of Ausbie because he was "clearly out of touch with reality." Gaines confirmed the mood component by reviewing records, which showed Ausbie had periods of depression and mania with impulsivity and aggression.

Gaines stated she reviewed Sheriffs' records, district attorneys' records, court records, and victim statements; she then diagnosed Ausbie with unspecified paraphilic disorder because Ausbie committed sexual offenses against a male child victim and a female adolescent victim. Gaines stated Ausbie had no recollection of the two sexual offenses he committed and she did not question him long about them during the interview because Ausbie "was on the verge of an aggressive outburst."

Gaines described Ausbie's two sexual offenses in detail and stated the facts of the offenses were important to her forming an "opinion that he has a behavioral abnormality that makes him likely to engage in predatory acts of sexual violence in the future." Based on the details of the offenses she could "identify the factors that are discussed in the literature." She considered the offenses to be violent because they involved physical force, "involved pushing people, punching people, ripping people's clothes off, all of which are violent acts." Gaines opined Ausbie is a sexual deviant because he committed "forceful unwanted sexual acts against" a 16-year-old girl and a nine-year-old boy. She also opined "Ausbie's emotional volitional capacity [has] been affected to the extent that it predisposes him to commit a sexually violent offense so that he is a menace to the health and safety of

another person."

Gaines further stated that records show Ausbie never participated in sex offender treatment programs because he was not "stable enough psychiatrically." Gaines testified that her experience and "the literature shows that completing sex offender treatment is helpful in reducing recidivism." Gaines testified that hypothetically, if "Ausbie were able to complete sex offender treatment and fall into those statistics, it would statistically help with decreasing recidivism." According to Gaines, Ausbie takes antidepressants and antipsychotic medications to target psychotic features like auditory hallucinations, delusions, paranoia, illogical thought processes, disorganized behavior, aggression, impulsivity, and irritability. Ausbie has experienced psychotic episodes since he was about 17 years old and has taken antipsychotic medications since 2004, but none have been successful in treating his psychotic features.

Gaines explained Ausbie receives a lot of supervision on a daily basis because he is "extremely disorganized to the point that he is not able to take care of his activities of daily living such as showering, brushing his teeth, getting up, having a routine, a schedule." According to records, Ausbie has had compliance issues with taking his medications throughout his adulthood and is currently on "long-acting depot injectables."

In reaching her ultimate opinion that Ausbie suffers from a behavioral abnormality, Gaines identified many risk factors — with the two major risk factors being Ausbie's sexual deviancy and his antisocial personality traits. Gaines identified these additional risk factors: serious and persistent mental illness, physical violence in the commission of his offenses, a young child victim in one of his sexual offenses, a stranger victim, persistence after punishment, lack of sex offender treatment, substance use history, nonsexual crime history, lack of

supervision upon a release from prison, lack of insight, lack of awareness, lack of coping skills, and Ausbie's young age. Gaines testified she did not identify any protective factors to mitigate the numerous risk factors (such as completing sex offender treatment). She also testified it is "[n]ot typical at all" for someone to have "zero protective factors."

After considering the evidence presented, the trial court found Ausbie to be a sexually violent predator and signed a final judgment and order of commitment on October 3, 2017. Ausbie filed a motion for new trial arguing, among other things, the evidence is legally and factually insufficient to support the trial court's finding that Ausbie is a sexually violent predator. The motion for new trial was overruled by operation of law. *See* Tex. R. Civ. P. 329b(c). Ausbie filed a timely appeal.

ANALYSIS

Ausbie argues the evidence is legally and factually insufficient to support a beyond-a-reasonable-doubt finding that he has "a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence."

I. Standard of Review and Governing Law

The commitment of a person as a sexually violent predator is a civil proceeding. *In re Commitment of Harris*, 541 S.W.3d 322, 327 (Tex. App.—Houston [14th Dist.] 2017, no pet.). However, the SVP Act requires the State to prove beyond a reasonable doubt that a person is a sexually violent predator, a burden of proof typically reserved for criminal cases. *See* Tex. Health and Safety Code Ann. § 841.062(a); *In re Commitment of Fisher*, 164 S.W.3d 637, 639-41 (Tex. 2005). The Texas Supreme Court has never evaluated the effect of such a high burden of proof on the standards for conducting evidentiary-sufficiency reviews on appeal, but it has clarified those standards with respect to cases

involving an intermediate "clear and convincing" burden. *In re Commitment of Stoddard*, 619 S.W.3d 665, 674 (Tex. 2020) (citing *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002)). A legal sufficiency review of a finding that must be proven by clear and convincing evidence requires that the court review the evidence in the light most favorable to the finding to determine whether a reasonable factfinder could form a firm belief or conviction that the finding was true. *Id*. (citing *J.F.C.*, 96 S.W.3d at 266). The court must "assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so" and "disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *Id*. The court may not disregard undisputed facts that do not support the finding. *Id*.

Although factual sufficiency review has been abandoned in criminal cases, we perform a factual sufficiency review in SVP Act cases when the issue is raised on appeal. *Id*. at 674-76 (rejecting State's argument that SVP Act cases should be reviewed under a single legal sufficiency standard following the Court of Criminal Appeals's approach in criminal cases). The Texas Supreme Court most recently clarified the standard governing a factual sufficiency review in the rare civil cases in which the burden of proof is beyond a reasonable doubt — like cases brought under the SVP Act. *Id.* at 668, 675-78. The supreme court held that a properly conducted factual sufficiency review in a SVP Act 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 a sexually violent predator. *Id*. In so doing, the appellate court may not usurp the factfinder's role of determining the credibility of witnesses and the weight to be given their testimony, and the court must presume that the factfinder resolved disputed evidence in favor of the finding if a reasonable factfinder could do so. *Id*. at 668. If 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*. at 668, 678.

Under the SVP Act, a person is a sexually violent predator if he (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. Tex. Health & Safety Code Ann. § 841.003(a). A person is a repeat sexually violent offender if (as relevant here) 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). A behavioral abnormality is defined 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). A predatory act is defined as "an act directed toward individuals, including family members, for the primary purpose of victimization." *Id*. § 841.002(5).

II. Sufficiency of the Evidence

Within his legal and factual sufficiency challenge, Ausbie presents three distinct arguments. We will address these arguments in turn.

A. Expert Opinions

First, Ausbie argues the experts' opinions in this case are unreliable and constitute legally and factually insufficient evidence because the experts relied on "hearsay information in records (mostly police reports)" and "some prison records" to form their opinions about whether he suffers from a behavioral abnormality. Citing to *Coastal Transport Company v. Crown Central Petroleum Corporation*,

136 S.W.3d 227 (Tex. 2004), Ausbie argues "that he may for the first time on appeal challenge an expert's foundational data when the face of the record shows the unreliability of this foundational data." Ausbie specifically states, "An expert opinion based on what the face of the record shows to be unreliable hearsay falls within this category of challenges to an expert's foundational data that can be raised for the first time on appeal."

Contrary to Ausbie's assertion, *Coastal Transport* does not support his argument that he may for the first time on appeal challenge Proctor's and Gaines's foundational data as unreliable. The supreme court held that an objection in the trial court is required when "a challenge to expert testimony questions the underlying methodology, technique, or foundational data used by the witness." *Id.* at 229. "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." *City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009). Ausbie did not object in the trial court to Proctor's and Gaines's expert testimony specifically challenging the reliability of their foundational data. He cannot do so for the first time on appeal. *See Pollock*, 284 S.W.3d at 818; *Coastal Transport Co.*, 136 S.W.3d at 229, 233.

We note that Ausbie made a hearsay objection to Proctor's and Gaines's testimonies about the facts and details of his sexual assault of a child offense. However, under Texas Rule of Evidence 705(a), experts may disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data upon which they relied; and they may discuss a defendant's prior offense as part of the basis for the experts' opinions, including the details of other sexual assaults even if those assaults are unadjudicated. *See* Tex. R. Evid. 705(a); *see also In re Commitment of Farro*, No. 01-18-00164-CV, 2018 WL 6696567, at *10

(Tex. App.—Houston [1st Dist.] Dec. 20, 2018, pet. denied) (mem. op.); *In re Commitment of Clemons*, No. 09-15-00488-CV, 2016 WL 7323298, at *8 (Tex. App.—Beaumont Dec. 15, 2016, pet. denied) (mem. op.).

Further, we reject Ausbie's contention that the experts' opinions in this case are unreliable because they were based on hearsay in the form of "mostly police reports" which Ausbie claims the Texas Court of Criminal Appeals "described . . . as 'inherently unreliable.'" Texas Rule of Evidence 703 permits an expert to base an opinion on facts or data perceived by, reviewed by, or made known to the expert, and may even consider inadmissible evidence if it is of a type reasonably relied upon by experts in the field. *Gannon v. Wyche*, 321 S.W.3d 881, 889 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *In re Christus Spohn Hosp. Kleberg*, 222 S.W. 3d 434, 440 (Tex. 2007) (orig. proceeding)).

Accordingly, we reject Ausbie's first argument.

B. Serious Difficulty Controlling Behavior

Second, Ausbie contends the evidence is legally and factually insufficient to support a finding that he lacks volitional control or has serious difficulty controlling his behavior. In that regard, Ausbie contends the evidence "conclusively establishes that, even with his severe mental illness and all the other risk factors the State experts said he has, [he] was able to control himself from committing sex offenses for approximately 99.9993% of the time he lived as an adult in the free world before going to prison."[2] Ausbie argues that of the approximately 8 years he lived in the free world, he only committed sexually

[2] Ausbie states in his brief: "This 99.9993% figure was arrived at by dividing the number of days (2) that Mr. Ausbie committed a sex offense over this 8-year period by the number of days in 8 years (2,920), which is approximately .0007%, and then subtracting this .0007% from 100.00000%." For purposes of analysis only, we will assume that Ausbie's calculation is correct.

violent offenses on two days and thus controlled his behavior on 2,918 days. According to Ausbie, "the State could only prove that [he] was not able to control himself for 0.0007% of this time" and therefore the evidence "does not reasonably support an inference" that Ausbie lacks volitional control or has serious difficulty controlling his behavior."

We reject Ausbie's argument. We agree with the Fort Worth Court of Appeals's recent statements that such an argument "belies the magnitude of violent sexual offenses. By [t]his reasoning, the captain of the Titanic might as well have boasted about how many icebergs he avoided." *See In re Commitment of Woods*, No. 02-19-00155-CV, 2020 WL 3969958, at *8 (Tex. App.—Fort Worth June 11, 2020, pet. denied) (mem. op.). We also agree that Ausbie's argument "misses the mark in another sense." *See id*. Ausbie was almost thirty-five years old at the time of trial. "Suppose a thirty-five-year-old man committed a new sexual offense every day for 100 days. Under [Ausbie]'s reasoning, that person would not be subject to civil commitment because he had controlled his behavior on 99.[99]% of the days in his life—because, by far, the most prevalent behavior in that man's life was not committing sexual offenses."[3] *See id*. But the prevalence of ordinary conduct is of limited value in these cases. *Id*. Instead, the question is whether there are sufficient indicia that a person has a condition causing predisposition toward violent sexual conduct, *i.e.*, whether a person has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *Id*.; *see also In re Commitment of Bohannan*, 388 S.W.3d 296, 302-03 (Tex. 2012) ("[A] behavioral abnormality is 'a . . . condition that . . . predisposes' sexually violent conduct. The modifier, 'predisposes', qualifies and describes 'condition'. The required condition *is* the predisposition. The condition has no other qualities, other

[3] We used Ausbie's stated calculation method to compute the 99.99% figure.

than that it can be congenital or acquired. The condition and predisposition are one and the same.") (emphasis in original). For there to be sufficient evidence to support commitment, the SVP Act "does not require a numerical or percentage statement of whether a person is 'likely' to reoffend." *See In re Commitment of Kalati*, 370 S.W.3d 435, 439 (Tex. App.—Beaumont 2012, pet. denied); *see also 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.) ("[T]here is no numeric value or label that can be used to determine whether an offender is 'likely' to reoffend."); *In re Commitment of Riojas*, No. 04-17-00082-CV, 2017 WL 4938818, at *4 (Tex. App.—San Antonio Nov. 1, 2017, no pet.) (mem. op.) ("[T]he term 'likely to engage' as used in the statute does not require an expert to find a specific percentage of risk . . . .").

Here, the State presented testimony from experts Gaines and Proctor who opined that Ausbie suffers from a behavioral abnormality. They based their opinions on their interview with Ausbie, the thousands of pages of records they reviewed, the risk assessment they conducted, and the actuarial tests administered. Both experts testified numerous times that Ausbie lacks volitional control and has serious difficulty controlling his behavior.[4]

Proctor for example testified that "a major driver in [Ausbie']s likelihood of committing predatory acts of sexual violence is his very disorganized thinking, that

[4] A determination that an individual suffers from a behavioral abnormality as defined by the SVP Act encompasses the implicit conclusion that the individual has serious difficulty controlling his behavior. *See In re Commitment of White*, No. 14-17-00115-CV, 2018 WL 344063, at *7-9 (Tex. App.—Houston [14th Dist.] Jan. 9, 2018, no pet.) (mem. op.); *In re Commitment of Stuteville*, 463 S.W.3d 543, 554 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *In re Commitment of Wirtz*, 451 S.W.3d 462, 466 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *In re Commitment of Almaguer*, 117 S.W.3d 500, 505-06 (Tex. App.—Beaumont 2003, pet. denied).

his behavior and his thinking are disorganized, and he has serious difficulty in controlling his behavior." Proctor testified Ausbie's schizoaffective disorder "impacts his ability to control his behavior and emotionally manage, you know, his behavior." Proctor also testified that Ausbie "has significantly impaired emotional and volitional capacity. His psychological and emotional functioning is impaired. His capacity to make decisions, control his behavior, is impaired. And that includes with respect in particular to sexual offenses."

Gaines similarly testified that "Ausbie has serious difficulty controlling his sexual behaviors" based not only on the prior sexual offense convictions but on "his current behavior that demonstrates he continues to have trouble controlling his impulses." Gaines testified she did not identify any protective factors to mitigate the numerous risk factors, such as completing sex offender treatment, "having a good solid discharge plan, and older age." Gaines stated it is "[n]ot typical at all" for someone to have "zero protective factors." Proctor also could not identify a single protective factor to mitigate Ausbie's numerous risk factors.

As stated above, both experts testified several times that Ausbie lacks volitional control and has serious difficulty controlling his behavior. Even considering as contrary evidence that Ausbie spent most of his adult life as a free man not committing sex offenses for which he was convicted, the evidence supporting a finding that Ausbie has serious difficulty controlling his behavior and suffers from a behavioral abnormality is still overwhelming in this case.

In his motion for rehearing,[5] Ausbie asks us to use the SVP Act's

[5] Ausbie also asserts in his motion for rehearing that the State incorrectly claimed "Chapter 841's 'behavioral abnormality' definition is met whenever there is any increased likelihood of offending no matter how small and that courts should take their marching orders from and afford almost total deference to" experts who testify "what 'behavioral abnormality' means." Contrary to Ausbie's assertion, the State has made no such claims.

"legislative findings in Section 841.001" in our analysis to construe "Chapter 841 [to] appl[y] only to the 'worst of the worst' or 'extremely dangerous' sex offenders" following the Fort Worth Court of Appeals's pronouncements in *In re Commitment of Stoddard*, 601 S.W.3d 879 (Tex. App.—Fort Worth 2019), *rev'd*, 619 S.W.3d 665 (Tex. 2020).

In that case, the court of appeals reversed the jury's finding that Stoddard is a sexually violent predator on factual insufficiency grounds and remanded the case for a new trial. *Id*. at 898. In addressing Stoddard's factual sufficiency challenge, the court of appeals described the standard of review as requiring the court to "weigh all of the evidence in a neutral light to determine whether the jury's finding 'is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust'", "'shock[ ] the conscience'", or "'clearly demonstrate[ ] bias.'" *Id*. at 891 (quoting *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986)). The court applied that standard in light of the SVP Act's "require[ment] that Stoddard suffer from a behavioral abnormality that renders him a member of the small group of extremely dangerous sex offenders that require civil commitment because they are likely to engage in future predatory acts of sexual violence." *Id*. at 892. The court determined that permitting the verdict to stand would allow Stoddard's confinement to be extended indefinitely "based upon not much more than the facts related to the underlying crime for which he was convicted," remarking that Stoddard's underlying offenses and criminal history "pale in comparison" to several other sexually violent predators whose commitments had been upheld and do not "establish a pattern of violent offenses." *Id*. at 893-95. Viewing Stoddard's criminal history "in light of the weak evidence of other factors considered by [expert] Proctor," the court concluded that "it is simply not enough to qualify Stoddard as the type of sex offender whom these civil

commitments are constitutionally permitted to restrain." *Id*. at 895.

The Texas Supreme Court reversed the court of appeals decision. *In re Commitment of Stoddard*, 619 S.W.3d at 668, 678. The supreme court clarified the standard governing a factual sufficiency review of a finding that a person is a violent sexual predator[6] and stated the court of appeals failed to employ the articulated standard. *Id*. at 668, 675-78. The supreme court criticized the court of appeals for "largely fail[ing] to apply the required presumption in favor of the jury's determinations as to evidentiary weight and credibility" as it "engaged in 'weigh[ing] all of the evidence in a neutral light' to determine that the evidence was factually insufficient to support the verdict and thus created a risk of injustice too great to allow the verdict to stand." *Id*. at 676. The court specifically disapproved of the fact that "the court of appeals deemed [expert] testimony insufficiently persuasive while ignoring the jury's right to determine the requisite weight to be given that testimony" and reiterated that "a mere disagreement with the jury as to proper evidentiary weight and credibility cannot be the basis of a reversal on factual-insufficiency grounds." *Id*. at 677.

Further, the supreme court determined that "[t]he court of appeals compounded that error by focusing its review on whether Stoddard was a 'member of the small group of extremely dangerous sex offenders' the SVP Act was enacted

---

[6] As we stated above, the supreme court articulated the standard as follows:

> The 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. Further, in reversing for factual insufficiency, the appellate court must detail why it has concluded that a reasonable factfinder could not have credited disputed evidence in favor of the finding.
>
> *Id*. at 678.

to address," even though the "'small but extremely dangerous group' language, contained in the Act's legislative findings, is not part of the statute's definition of 'sexually violent predator' and was not an element the jury was required to find." *Id*.

After the supreme court issued its opinion in *Stoddard*, we invited the parties to submit briefing to address the impact, if any, of the *Stoddard* decision on Ausbie's motion for rehearing and motion for en banc reconsideration. The State filed a supplemental brief asserting that *Stoddard* supports many of the arguments it had already proffered in this appeal. Ausbie filed a supplemental brief asserting the *Stoddard* decision "has no impact on Mr. Ausbie's pending rehearing motions (except maybe to require this Court to ignore Chapter 841's legislative findings which would be contrary to usual and well-settled rules of statutory construction and other Texas Supreme Court case law)."

According to Ausbie, "[t]he issue in this case is purely a legal one requiring this Court to decide whether th[e] undisputed evidence supports a beyond-a-reasonable-doubt finding that [he] meets Chapter 841's definition of 'behavioral abnormality'" by determining "what the Legislature meant by the term 'behavioral abnormality.'" "Ausbie contends that the[] legislative findings reflect that the Legislature intended for Chapter 841 to apply only to a small group of extremely dangerous sex offenders whose 'abnormality' (or sex offending) is manifested only by repeated criminal or otherwise antisocial conduct." He acknowledges "[t]he Texas Supreme Court decided in *Stoddard* that the legislative findings in Chapter 841 stating that Chapter 841 is meant to apply to this small group of extremely dangerous sex offenders have nothing to do with how Chapter 841's 'behavioral abnormality' definition should be construed because these findings are 'not part of the statute's definition of sexually violent predator' and thus 'not an element the

jury was required to find.'" Nonetheless, he contends "[t]his is contrary to the statutory-construction rule that courts are supposed to derive legislative intent from the statute as a whole (which would include any legislative findings) and not from individual provisions in isolation" and asks us "to consider Chapter 841's legislative findings to construe the term 'behavioral abnormality.'"

Stating "[t]he Texas Supreme Court's decision in *Stoddard*, however, might require this Court to ignore Chapter 841's legislative findings and apply a definition of 'behavioral abnormality' that the Legislature clearly did not intend," Ausbie alternatively "claims that Chapter 841's statutory definition of 'behavioral abnormality,' with the Texas Supreme Court's gloss of this term to mean a 'likelihood' or 'likely' to offend, [is] ambiguous since no one seems to know exactly what the mouthful of the statutory definition of 'behavioral abnormality' means and the terms 'likelihood' and 'likely' are susceptible to several different meanings making it especially appropriate for this Court to examine Chapter 841's legislative history in construing the term 'behavioral abnormality.'"

We conclude that the supreme court's decision in *Stoddard* adversely impacts Ausbie's motion for rehearing. The supreme court unambiguously stated that the "small but extremely dangerous group" language contained in the SVP Act's legislative findings is not part of the statute's definition of "sexually violent predator" (and thus not part of the statute's definition of "behavioral abnormality") and is not an element a factfinder is required to find. *See Stoddard*, 619 S.W.3d at 677. Following our high court's precedent, as we must,[7] we decline "to consider Chapter 841's legislative findings to construe the term 'behavioral abnormality.'" We also decline Ausbie's invitation to "examine Chapter 841's legislative history

[7] *See Lubbock Cty. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 585 (Tex. 2002) (requiring intermediate appellate courts to follow supreme court precedent and leave to the supreme court the matter of abrogating or modifying its own precedent).

in construing the term 'behavioral abnormality'" because the statutory definition of "behavioral abnormality" is allegedly ambiguous.[8]

Accordingly, we reject Ausbie's second argument.

C. Applicability of SVP Act

Third, Ausbie asserts the evidence is "insufficient also because it conclusively establishes that, according to the [S]tate experts, a 'major driver' of any behavioral abnormality that [he] may have is his severe mental illness which is treated by traditional mental illness modalities through various medications" and the "Legislature clearly did not make Chapter 841 applicable to such a person." According to Ausbie, "[a]nother indication" that the SVP Act does not apply to him "is the provision in the trial court's commitment order placing [him] in the custody and control of the Health and Human Services Commission (HHSC) purportedly under Section 841.0835" when persons committed under the SVP Act have always been placed in the custody and control of the Texas Civil Commitment Office. Ausbie claims that even the trial court "apparently believed" he should not be committed according to the provisions of the SVP Act because it committed him "to the custody and control of HHSC to provide psychiatric services"; "[t]his further indicates that [he] should be subject to commitment under Chapter 574 of the Texas Health and Safety Code (which provides inpatient traditional mental health services to a mentally ill person) and not Chapter 841."

Assuming Proctor and Gaines testified that Ausbie's severe mental illness is "a 'major driver' of any behavioral abnormality that [he] may have which is treated by traditional mental illness treatment modalities", this does not support Ausbie's claim that the Legislature "did not make" the SVP Act applicable to a mentally ill

[8] We note that the Texas Supreme Court has held that the definition of "behavioral abnormality" is not vague. *In re Commitment of Fisher*, 164 S.W.3d at 655-56.

person such as himself. Ausbie cites as support for his contention the legislative finding which states that the Act applies to "predators [who] have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities." *See* Tex. Health & Safety Code Ann. § 841.001. He takes issue with the State's claim that "[t]raditional treatment modalities do not work for Ausbie" as not being "entirely accurate". In that regard, he admits his "mental illness has been treated over the years by traditional mental illness modalities through various medications which have not 'been successful in treating his psychotic features' or have been only 'partially effective'", yet he still asserts he was amenable to traditional treatment modalities "at least for purposes of 'restoring' his competency to plead guilty" in 2004 and 2011.

Nevertheless, section 841.0835's language does not support Ausbie's contention that the Act does not apply to persons with a severe mental illness who are treated with traditional mental illness modalities because the statute specifically (1) recognizes that some committed persons have not only an intellectual or developmental disability but also a mental illness, and (2) instructs that the Health and Human Services Commission must provide psychiatric disability services for these persons. *See id*. § 841.0835.[9] The statute makes no explicit or implicit

[9] Section 841.0835 specifically provides:

> **§ 841.0835. Committed Persons With Special Needs**
>
> (a) The Health and Human Services Commission, after coordination with the office, *shall provide psychiatric services*, disability services, *and housing for a committed person with an intellectual or developmental disability, a mental illness*, or a physical disability that prevents the person from effectively participating in the sex offender treatment program administered by the office.
>
> (b) For a committed person who the office has determined is unable to effectively participate in the sex offender treatment program because the person's mental illness prevents the person from understanding and internalizing the concepts presented by the program's treatment material, the Health and Human Services Commission shall provide inpatient mental health services until the person is able

exception from which we could determine that the Act excludes persons with a severe mental illness.

We also reject Ausbie's contention that section 841.0835 "does not really apply to a mentally ill person like" him because "[s]ection 841.0835 provides psychiatric services to a person committed as a sexually violent predator under Chapter 841 with a mental illness 'that prevents the person from effectively participating in the sex offender treatment program administered by' TCCO", and the "term 'effectively' implies at least some level of participation." According to Ausbie, the "evidence in this case establishes that, even with these mental health services, [he] would not be able to participate in TCCO's sex-offender treatment program at all," which indicates that neither [s]ection 841.0835 in particular nor Chapter 841 in general apply to a mentally ill person like [him] since they apply to a person who, unlike [him], might have some chance of effectively participating in Chapter 841's sex-offender treatment program." However, Chapter 841.0835 explicitly addresses this argument by stating that for a committed person (like Ausbie) whom "the office has determined is unable to effectively participate in the sex offender treatment program because the person's mental illness prevents the person from understanding and internalizing the concepts presented by the program's treatment material," that the HHSC "shall provide inpatient mental health services until the person is able to participate effectively in the sex offender treatment program."

---

to participate effectively in the sex offender treatment program.

(c) A person who is adjudicated as a sexually violent predator under this chapter and who has a mental illness that prevents the person from effectively participating in a sex offender treatment program presents a substantial risk of serious harm to the person or others for purposes of Chapter 574.

Id. § 841.0835 (emphasis added).

Finally, we conclude Ausbie incorrectly claims the trial court's commitment order is an indication that "even the trial court in this case apparently believed that [he] should not be committed according to the provisions of Chapter 841" because the order allegedly does not commit him pursuant to Texas Health and Safety Code section 841.0835 to the custody and control of the Texas Civil Commitment Office but places him in the custody and control of the Health and Human Services Commission.

Sections 841.082 and 841.0835 set out the requirements for a person's civil commitment under the SVP Act.[10] *See id*. §§ 841.082(a), 841.0835. The trial court's order almost verbatim tracks the language of section 841.0835 and follows the requirements of section 841.082 in compliance with the SVP Act, stating in pertinent part as follows:

> CEDRIC AUSBIE has this day been adjudged a **sexually violent predator** as defined in Section 841.003 of the Texas Health and Safety Code and has been **civilly committed** as such in accordance with Section 841.081 of the Texas Health and Safety Code. Therefore, the following commitment requirements in accordance with Section 841.082 of the Texas Health and Safety Code

[10] Section 841.082 provides in relevant part:

> **§ 841.082. Commitment Requirements**
>
> (a) Before entering an order directing a person's civil commitment, the judge shall impose on the person requirements necessary to ensure the person's compliance with treatment and supervision and to protect the community. The requirements shall include:
>
> (1) requiring the person to reside where instructed by the office;
>
> (2) prohibiting the person's contact with a victim of the person;
>
> (3) requiring the person's participation in and compliance with the sex offender treatment program provided by the office and compliance with all written requirements imposed by the office;
>
> (4) requiring the person to submit to appropriate supervision and . . . .

Id. § 841.082(a).

are necessary to ensure that CEDRIC AUSBIE complies with treatment and supervision, and to protect the community. It is therefore **ORDERED** that:

1. Upon release from any TDCJ-CID facility, CEDRIC AUSBIE shall immediately be transported by a representative of the Texas Civil Commitment Office ("Office") to the contracted Texas residential facility.

2. CEDRIC AUSBIE shall reside where instructed by the Office;

3. CEDRIC AUSBIE is prohibited from having contact with his victims;

4. CEDRIC AUSBIE shall participate in and comply with the sex offender treatment program provided by the Office and shall comply with all written requirements imposed by the Office;

5. CEDRIC AUSBIE shall submit to the treatment and supervision administered by the Office;

* * *

IT IS FURTHER **ORDERED** that the [Texas Civil Commitment] Office shall determine conditions of supervision and treatment for CEDRIC AUSBIE. The Office shall provide treatment and supervision to CEDRIC AUSBIE. The provisions of supervision must include a tracking service and, if determined necessary by the Office, supervised housing.

IT IS FURTHER **ORDERED** that pursuant to Section 841.0835 of the Texas Health and Safety Code, the Health and Human Services Commission, after coordination with the Office, shall provide psychiatric services, disability services, and housing for CEDRIC AUSBIE due to his intellectual disability and mental illness that prevents CEDRIC AUSBIE from effectively participating in the sex offender treatment program administered by the Office until such time that said services are no longer necessary. This shall include psychiatric treatment, medication and counseling specifically designed for CEDRIC AUSBIE'S psychiatric needs, adding any services that are appropriate. If the office has determined that CEDRIC AUSBIE is unable to effectively participate in the sex offender treatment program because CEDRIC AUSBIE's mental illness prevents CEDRIC AUSBIE from understanding and internalizing the concepts presented by the program's treatment

> material, the Health and Human Services Commission shall provide inpatient mental health services until CEDRIC AUSBIE is able to participate effectively in the sex offender treatment program.

Thus, the trial court's commitment order expressly adjudicated Ausbie to be a "sexually violent predator" and there is no indication that the trial court believed Ausbie "should not be committed according to the provisions of Chapter 841."

Accordingly, we reject Ausbie's third argument.

We conclude the evidence is legally sufficient to support the trial court's finding that Ausbie suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See In re Commitment of Stoddard,* 619 S.W.3d at 674. We also conclude the evidence is factually sufficient to support the trial court's finding; here, there is no disputed evidence a reasonable factfinder could not have credited in favor of the finding and there are no undisputed facts contrary to the finding. *Id.* at 668, 675-78. We overrule Ausbie's first and second issues.

III. Motion to Modify Judgment

On March 23, 2021, Ausbie filed a motion to modify judgment "requesting that this Court modify its judgment in this case either by reversing the trial court's judgment and rendering judgment for [him] or by vacating the trial court's judgment and dismissing the State's civil-commitment petition." In his motion, Ausbie states that the "Texas Supreme Court's decision in *Stoddard* could be read to decide that all th[e] 40-word statutory definition of 'behavioral abnormality' means is a 'likelihood' of offending or 'likely' to offend." He then argues that in the event the supreme court's opinion in *Stoddard* is read as defining "behavioral abnormality" as a "likelihood" to offend or "likely" to offend, such a construction of "behavioral abnormality" renders chapter 841 facially unconstitutional and

unconstitutional as applied to him. Ausbie concludes, "[a]ssuming that this definition is construed to mean just some 'likelihood' of offending or 'likely' to offend, the trial court's judgment should still be reversed or vacated because this construction would render Chapter 841 facially unconstitutional and unconstitutional as applied to Mr. Ausbie."

However, nowhere in *Stoddard* did the supreme court state or even as much as imply that behavioral abnormality is defined as merely "a 'likelihood' to offend or 'likely' to offend." In fact, the following statements by the supreme court confirm that *Stoddard* cannot be read as defining behavioral abnormality as Ausbie asserts:

> [C]hapter 841 inherently limits the scope of civil commitment to a limited subset of offenders: those who committed certain enumerated sexually violent offenses, are repeat offenders, and suffer from a behavioral abnormality that makes them likely to engage in a predatory act of sexual violence. In other words, the Act requires evidence of both repeat past sexually violent behavior and a present condition that creates a likelihood of such conduct in the future. A factual-sufficiency review focused on the Act's actual requirements does not threaten its constitutionality.

Id. at 678. We reject Ausbie's hypothetical argument here, and we deny his motion to modify judgment taken with the case.

CONCLUSION

We affirm the trial court's judgment.

/s/ Meagan Hassan
Justice

Panel consists of Chief Justice Christopher and Justices Hassan and Poissant.