Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-19-00240-CV

IN RE COMMITMENT OF Oscar **LARES**
From the 144th Judicial District Court, Bexar County, Texas
Trial Court No. 2018CI12443
Honorable Ray Olivarri, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: May 13, 2020

AFFIRMED

Appellant Oscar Lares appeals the trial court's judgment and order of commitment following a jury's finding that Lares is a sexually violent predator (SVP). Lares raises five issues on appeal: (1) whether the evidence is legally sufficient to support a finding of behavioral abnormality, (2) whether the evidence is factually sufficient to support a finding of behavioral abnormality, (3) whether the trial court erred in allowing testimony regarding the statutory screening process for SVPs, (4) whether the trial court erred in allowing a forensic psychologist to testify about the report and opinion from the initial screening psychologist, and (5) whether the trial court erred in refusing to instruct the jury that it could return a non-unanimous verdict.

We affirm the trial court's judgment.

BACKGROUND

When Lares was nineteen years old and on probation, he raped his nine-year-old niece. Eight months later, when Lares was twenty years old, still on probation, and on release in another case, he raped his five-year-old niece. He was later convicted of both sexual assaults and sentenced to twenty-five and thirty years in prison, respectively, with the sentences to be served concurrently.

While in prison, Lares was screened for behavioral abnormality because he had two convictions for sexually violent offenses. Two mental health physicians, Dr. Jason Dunham and Dr. Paul Hamilton, found Lares had a behavioral abnormality that would make him more likely to commit a violent sexual offense in the future.

One of the psychologists who evaluated Lares, Dr. Dunham, testified at trial, offering his opinion and the basis for it, which included Dr. Hamilton's opinion. After hearing all the evidence, including Lares's testimony, the jury unanimously found that Lares is a sexually violent predator.

Lares now appeals.

SUFFICIENCY OF THE EVIDENCE

A. Arguments of the Parties

Lares argues that the evidence is legally and factually insufficient to support the jury's finding. The State responds that the evidence in this case meets both standards to support the jury's SVP finding. Citing *Brooks v. State*, 323 S.W.3d 893, 898–902 (Tex. Crim. App. 2010), the State further argues that we should consolidate factual and legal sufficiency standards for SVP cases because SVP verdicts, like criminal verdicts, require the State to provide proof beyond a reasonable doubt. The State notes that consolidation of review standards for SVP cases is an issue currently before the Texas Supreme Court in *In re Commitment of Stoddard*, No. 02-17-00364-CV, 2019 WL 2292981 (Tex. App.—Fort Worth May 30, 2019, pet. filed) (mem. op. on reh'g).

Because we ultimately conclude that the evidence meets both standards, we set forth both standards below without deciding whether a factual sufficiency review is appropriate in this context.

B. Standards of Review

The State must prove beyond a reasonable doubt that a defendant is an SVP. TEX. HEALTH & SAFETY CODE ANN. § 841.062(a); *In re Commitment of Williams*, 539 S.W.3d 429, 437 (Tex. App.—Houston [1st Dist.] 2017, no pet.). Accordingly, the legal sufficiency standard of review in SVP cases is the same as in criminal cases. *Williams*, 539 S.W.3d at 437; *In re Commitment of Stuteville*, 463 S.W.3d 543, 551 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). "We review the evidence in the light most favorable to the verdict to determine whether any rational fact finder could find, beyond a reasonable doubt, the elements required for commitment under the SVP Act." *Williams*, 539 S.W.3d at 437 (citing *Stuteville*, 463 S.W.3d at 551). The jury remains the sole judge of credibility and weight regarding witness testimony. *Id*.

Assuming without deciding that a factual sufficiency review is appropriate, we weigh the evidence to determine whether the verdict reflects a risk of injustice that would require a new trial. *See Williams*, 539 S.W.3d at 437; *In re Commitment of Day*, 342 S.W.3d 193, 213 (Tex. App.—Beaumont 2011, pet. denied). This analysis requires viewing the evidence in a neutral light, rather than a deferential one, to determine whether a jury was rationally justified in reaching its verdict. *Williams*, 539 S.W.3d at 437 (citing *Stuteville*, 463 S.W.3d at 552).

C. Applicable Law

A person is an SVP if he is a repeat sexually violent offender and suffers from a behavioral abnormality that causes serious lack of behavioral control and makes him likely to engage in

predatory acts of sexual violence. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.003(a); *Stuteville*, 463 S.W.3d at 552.[1]

D. Facts Relevant to the Arguments

The facts relevant to Lares's issues of legal and factual insufficiency are contained in Lares's and Dr. Dunham's trial testimony.

1. Lares's Testimony

At trial, Lares admitted to committing and being convicted and sentenced for two sexual assaults of children under fourteen years of age, specifically against his nieces. He said he believes he is ready to be reintegrated into society because he is a mature person now. But contrary to the record, Lares testified that he did not penetrate his older niece's vagina. He said he raped her anally, and that she did not resist and did not cry.

In his deposition, Lares testified that he was happy and excited during his assault of his older niece. At trial, he denied the statement until the prosecutor showed him the deposition transcript. Lares also testified at trial that he is not sexually attracted to children; however, he admitted that he paid his older niece special attention and bought her candy and ice cream to gain her trust so he could have sex with her.

While in prison, Lares masturbated at or onto female guards, a behavior Lares does not think is abnormal for prison. Although he has been disciplined in prison for fighting, as well as for threatening and assaulting guards, Lares testified that he would not describe himself as violent. Lares also believes that he does not have a substance abuse problem, though he started drinking

[1] Although Lares emphasizes that he was not sexually violent during 99.9972% of the days surrounding his sex offenses, a serious lack of behavioral control has no particularly narrow or technical meaning, and it is not a mathematical standard. *See Kansas v. Crane*, 534 U.S. 407, 413 (2002); *In re Commitment of Riojas*, No.04-17-00082-CV, 2017 WL 4938818, at *3 (Tex. App.—San Antonio Nov. 1, 2017, no pet.) (mem. op.). In an SVP case, prior criminal conduct can be used to predict future dangerousness. *See In re Commitment of Dodson*, 434 S.W.3d 742, 748 (Tex. App.—Beaumont 2014, pet. denied).

alcohol and smoking marijuana when he was about nine years old and continued using those substances until he went to prison. In addition, Lares has been caught with alcohol in prison; however, he testified at trial that he was holding the alcohol for a friend and never drank it.

2. Dr. Dunham's Opinions

Dr. Dunham testified at trial for the State. Dr. Dunham, a forensic psychologist licensed in Texas since 2006 and with extensive experience in evaluating sex offenders, evaluated Lares. Dr. Dunham submitted Lares to two tests to measure psychopathy and likelihood to recidivate. He also interviewed Lares, and he reviewed Lares's criminal record as well as other documents related to Lares's case, such as Dr. Hamilton's evaluation of Lares.

Dr. Dunham diagnosed Lares with antisocial behavior disorder and pedophilic disorder, which are both considered chronic. According to Dr. Dunham, Lares's antisocial behavior may manifest as aggressive or manipulative. In Lares, both forms of behavior are manifest. For example, Lares has bragged about winning fights and being called "Rock" by fellow inmates, and he also reported being good at lying and manipulating. In fact, according to Dr. Dunham, Lares's inability to admit the details of the assaults he committed against his nieces impeded Lares's progress in the prison sex offender treatment program.

In sum, Dr. Dunham agreed with Dr. Hamilton's opinion that Lares has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence in the future.

E. Analysis

Having reviewed all the evidence presented, we conclude the evidence is legally and factually sufficient to support the jury's finding that Lares is an SVP.

We overrule Lares's first and second issues.

ADMISSIBILITY OF SVP STATUTORY SCREENING PROCESS

A. Standard of Review

"We review a trial court's [decision to admit] evidence in a civil commitment proceeding for an abuse of discretion. A trial court abuses it discretion when it acts without regard for any guiding rules or principles." *In re Commitment of Mares*, 521 S.W.3d 64, 69 (Tex. App.—San Antonio 2017, pet. denied) (citation omitted) (citing *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241–42 (Tex. 1985); *In re Commitment of Browning*, 113 S.W.3d 851, 866 (Tex. App.—Austin 2003, pet. denied)).

B. Applicable Law

To be admissible, evidence must be relevant, meaning that "it has any tendency to make a fact more or less probable than it would be without the evidence; and . . . the fact is of consequence in determining the action." TEX. R. EVID. 401; *accord Mayes v. State*, 816 S.W.2d 79, 85 (Tex. Crim. App. 1991). This can include background evidence that "acts as 'an aid to understanding'" when "it illuminates a circumstance otherwise dimly perceived by the factfinder." *Mayes*, 816 S.W.2d at 85 (citing Advisory Committee's Note to Federal Rule 401; *Burns v. State*, 556 S.W.2d 270, 282 (Tex. Crim. App. 1977)). Background evidence should not provide elaborate detail, as it could become more prejudicial than probative. *See Langham v. State*, 305 S.W.3d 568, 580 (Tex. Crim. App. 2010). But the purpose of allowing background evidence under Texas Rule of Evidence 401 is to avoid endless questions about admissibility, and to avoid requiring the State to try a case in a factual vacuum. *See Mayes*, 816 S.W.2d at 85.

C. Arguments of the Parties

Lares argues the trial court erred in admitting testimony regarding the SVP screening process because it lets the jury know that others with experience and authority in this area believed

that Lares fit the criteria for an SVP. He cites out-of-state cases to support his argument that the jury was unfairly influenced by testimony regarding the SVP screening process.

The State argues that SVP screening testimony was approved in *In re Commitment of Barnes*, No. 04-17-00188-CV, 2018 WL 3861401 (Tex. App.—San Antonio Aug. 15, 2018, no pet.) (mem. op.), and that Lares did not properly preserve his issue for appeal.

D. Preservation

At trial, Lares's attorney raised the following objections to the admissibility of the SVP screening process: "We can start with misleading. And, Your Honor, it creates a false impression in the minds of the jury. The screening process is not contested."

An objection is sufficient to preserve error for review if the complaining party made "a timely request, objection, or motion to the trial court that states the grounds for the ruling sought with sufficient specificity to make the trial court aware of the complaint." *In re Commitment of Fontenot*, 536 S.W.3d 906, 914 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (citing TEX. R. APP. P. 33.1(a)(1)(A)). We conclude that the objections made by Lares's attorney at trial were sufficient to preserve error.

E. Analysis

At trial, the State elicited basic foundational testimony regarding the statutory screening process:

> Q. And what is the MDT?
>
> A. The multidisciplinary team. There's a team that handles the—basically the sex offender treatment program in the prison system and it kind of starts the process of whether somebody's going to qualify for their treatment and may possibly be referred for these types of evaluations out to our office.
>
> Q. And is there a process that the MDT follows in this screening? Can you explain that process to the jury?

> A. The first from my—from my [perspective], the first thing is the person has to qualify for an evaluation, the—the inmate, and they have to meet the initial criteria of having those two convictions, et cetera. And then they ask one of the—there's a screening process to see who needs an evaluation.
>
> So then they would ask one of the psychologists on contract to do an evaluation, which I have done in the past and other people do as well. They do a behavioral abnormality evaluation, submit the report. Then the MDT team has to decide whether they are going to forward that case along to the Special Prosecution Unit if that doctor had found that they did have a behavioral abnormality. So once it gets forwarded to your [office], then you can speak. You probably go through another process.

This testimony was relevant in providing context for the jury about the process by which a convicted sex offender becomes eligible to stand trial as an SVP after completing his criminal sentence and how Dr. Dunham became involved in the case as a witness. *See Mayes*, 816 S.W.2d at 85. It also explained how Dr. Hamilton was the first psychologist to evaluate Lares, and why Dr. Dunham would have relied on Dr. Hamilton's opinion as basis evidence. Dr. Dunham's testimony about the statutory screening process provided insight as to the foundation of his opinion, which could have helped the jury evaluate Dr. Dunham's testimony during deliberation. *See id.*

On this record, we conclude it was not an abuse of discretion for the trial court to allow testimony regarding the SVP statutory screening process to provide context for Dr. Dunham's opinion. *See* TEX. R. EVID. 401; *Langham*, 305 S.W.3d at 580; *Mayes*, 816 S.W.2d at 85; *cf. Barnes*, 2018 WL 3861401 (distinguishing the defendant's out-of-state case and concluding that screening process testimony did not constitute fundamental error in an SVP trial).

Lares's third issue is overruled. We turn to the next issue.

ADMISSIBILITY OF DR. HAMILTON'S OPINION

A. Standard of Review

We review the trial court's decision to admit an out-of-court expert opinion for an abuse of discretion. *See In re Commitment of Talley*, 522 S.W.3d 742, 748 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *In re Commitment of Winkle*, 434 S.W.3d 300, 315 (Tex. App.—Beaumont 2014, pet. denied).

B. Applicable Law

Texas Rule of Evidence 801 generally excludes out-of-court statements offered for the truth of the matter asserted. TEX. R. EVID. 801; *Fischer v. State*, 252 S.W.3d 375, 378 (Tex. Crim. App. 2008). But experts may testify to the facts and data underlying their opinions even if that basis includes hearsay if the probative value outweighs the prejudicial effect. TEX. R. EVID. 705(d); *Winkle*, 434 S.W.3d at 315; *In re Commitment of Day*, 342 S.W.3d 193, 197–98 (Tex. App.—Beaumont 2011, pet. denied). If the court allows evidence under Rule 705(d), then it must also "upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly." *See* TEX. R. EVID. 705; *In re Commitment of Grice*, 558 S.W.3d 323, 327 n.4 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

C. Arguments of the Parties

Lares argues that although Dr. Hamilton's out-of-court expert opinion was not offered for the truth of the matter asserted, and although the court gave a limiting instruction, the out-of-court expert opinion may still have been considered for the truth of the matter asserted by the jury, causing its prejudicial effect to outweigh its probative value under Rule 705(d). Therefore, Lares maintains, it was reversible error to overrule his hearsay objection and admit testimony regarding Dr. Hamilton's out-of-court opinion. He also argues there was no testimony indicating that Dr.

Dunham, the testifying expert, relied on Dr. Hamilton's screening opinion, and allowing testimony about the initial screening was an abuse of discretion.

The State responds that the trial court did not abuse its discretion by admitting Dr. Hamilton's opinion as foundational evidence by a testifying expert. It further argues Dr. Dunham did testify that he relied in part on Dr. Hamilton's opinion.

D. Analysis

Without a non-hearsay purpose, the introduction of an out-of-court expert's opinion would be deemed inadmissible hearsay. *See* TEX. R. EVID. 801; *Fischer*, 252 S.W.3d at 378. But the rules of evidence allow an out-of-court expert's opinion if it helps to form the basis of a testifying expert's opinion. *See* TEX. R. EVID. 705(d); *Winkle*, 434 S.W.3d at 315. In an SVP case, an expert's opinion regarding risk assessment is pivotal, and it is important for a jury to be able to consider and scrutinize how the testifying expert arrived at his opinion in order for the jury to arrive at its own conclusion. *See Winkle*, 434 S.W.3d at 315; *Day*, 342 S.W.3d at 199.

In this case, Dr. Dunham described his methodology for arriving at a risk assessment, which included reviewing Dr. Hamilton's report. Dr. Dunham also incorporated Dr. Hamilton's experiences with Lares into his opinion and testimony. For example, Lares would not admit wrongdoing to Dr. Hamilton, which factored into Dr. Dunham's opinion.

Ultimately, any prejudicial effect of providing "basis" evidence was mitigated by the trial court's limiting instruction, which explained the evidence's scope and purpose. *See Winkle*, 434 S.W.3d at 315. The trial court told the jury at the time of the testimony and outlined it in the charge that testimony about a non-testifying expert's opinion was meant to show the basis of Dr. Dunham's opinion and that the jury should not consider it for the truth of the matter asserted. In fact, during trial, the trial court read the limiting instruction provided by defense counsel. In the

absence of evidence to the contrary, we presume the jury followed the court's limiting instructions. *See Stuteville*, 463 S.W.3d at 555; *Day*, 342 S.W.3d at 199.

We overrule Lares's fourth issue and move on to his fifth.

NON-UNANIMOUS VERDICT INSTRUCTION

A. Standard of Review

We review de novo whether the trial court has interpreted the law correctly and properly instructed the jury. *See In re Commitment of Gipson*, 580 S.W.3d 476, 481 (Tex. App.—Austin 2019, no pet.); *In re Commitment of Jones*, 571 S.W.3d 880, 889 (Tex. App.—Fort Worth 2019, pet. filed). We will only reverse if error occurred and "it probably caused rendition of an improper judgment." *Jones*, 571 S.W.3d at 891 (citing TEX. R. APP. P. 44.1(a)(1)).

B. Applicable Law

Section 841.062(b) of the Texas Health and Safety Code provides "A jury determination that the person is a sexually violent predator must be by unanimous verdict." However, section 841.146(b) states "Except as otherwise provided by this subsection, a civil commitment proceeding is subject to the rules of procedure and appeal for civil cases. To the extent of any conflict between this chapter and the rules of procedure and appeal for civil cases, this chapter controls." TEX. HEALTH & SAFETY CODE ANN. § 841.146(b). Civil rules and procedures provide for a non-unanimous "no" verdict of ten or more jurors. TEX. R. CIV. P. 292(a); *Gipson*, 580 S.W.3d at 485; *Jones*, 571 S.W.3d at 890.

C. Arguments of Parties

Lares asked the trial court to instruct the jury that it could return a non-unanimous "no" verdict of ten or more jurors under Rule 292(a) of the Texas Rules of Civil Procedure, and the trial court denied the request. Lares contends since there is no requirement that all SVP verdicts be unanimous, the trial court should have submitted his requested jury instruction under the reasoning

in *Jones*. *See Jones*, 571 S.W.3d at 889. Lares also argues that the omission amounts to reversible error because the jury's verdict might have been different if the trial court had given the requested instruction.

The State argues that any SVP verdict should be unanimous, and that split "no" verdicts should not be permitted in this type of case. According to the State, since the SVP Act specifically states that the jury must be made up of 12 individuals and their finding of SVP must be unanimous, then unanimous verdicts must be required for any verdict.

The State also points out that the Fort Worth court's decision in *Jones* is pending review by the Texas Supreme Court. However, the Austin court of appeals has decided two recent cases, which also support Lares's position. *See In re Commitment of Garcia*, No. 03-18-00331-CV, 2019 WL 3367547, at *2 (Tex. App.—Austin July 26, 2019, no pet.) (mem. op.); *Gipson*, 580 S.W.3d at 486.

D. Analysis

The law clearly states that certain provisions apply to SVP proceedings but that if not stated, civil rules apply. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 841.062, 841.146(b); *Gipson*, 580 S.W.3d at 484–85. Although the SVP statute requires a unanimous "yes" verdict, it does not specifically require a unanimous "no" verdict. Applying the plain wording of the statute, we conclude the trial court erred in refusing to provide Lares's requested 10-2 jury instruction under Texas Rule of Civil Procedure 292(a). *Cf. Gipson*, 580 S.W.3d at 484–85. We must now decide whether the error resulted in harm.

To establish harm, an appellant must show that the error "probably caused rendition of an improper judgment or probably prevented the appellant from properly presenting the case to this court." *Jones*, 571 S.W.3d at 891 (citing TEX. R. APP. P. 44.1(a); *Romero v. KPH Consolidation, Inc*., 166 S.W.3d 212, 225 (Tex. 2005)). "Charge error is generally considered harmful if it relates

to a 'contested, critical issue.'" *Jones*, 571 S.W.3d at 891 (quoting *Transcon. Ins. v. Crump*, 330 S.W.3d 211, 225 (Tex. 2010)). But if we are reasonably certain that the jury was not influenced by the error, we will not reverse. *See id.* (citing *Romero*, 166 S.W.3d at 227–28).

In *Jones*, the court reversed because the record showed that the jury had been split before it returned a finding of SVP. *See id.* In this case, there has been no indication from the record that the jury was split at any point. Furthermore, the weight of the evidence does not suggest that the verdict might have been different if the trial court had read the requested jury instruction for a non-unanimous "no" verdict. Therefore, we conclude that no reversible harm occurred as a result of the trial court's error.

We overrule Lares's fifth issue.

CONCLUSION

Having reviewed the entire record, we conclude the evidence is sufficient to support the jury's SVP finding. As for the inclusion of testimony relating to the SVP screening process, the record does not reflect that the trial court abused its discretion. The trial court also did not abuse its discretion by allowing testifying psychologist Dr. Dunham to refer to Dr. Hamilton's opinion as a basis for his opinion, particularly because the trial court included Lares's requested limiting instruction. Finally, although the trial court erred in refusing to provide Lares's requested jury instruction regarding a non-unanimous "no" verdict under Texas Civil Rule of Procedure 292(a), the record does not show that the jury was unfairly influenced by the omission. Therefore, we affirm the trial court's judgment.

Patricia O. Alvarez, Justice