In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00279-CV

IN RE COMMITMENT OF ROBERT C. GRUNSFELD

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 08-10-10066 CV

MEMORANDUM OPINION

The State filed a petition seeking to involuntarily civilly commit Robert C. Grunsfeld as a sexually violent predator (SVP). *See* Tex. Health & Safety Code Ann. §§ 841.001-.150 (West 2010). The jury found that Grunsfeld has a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. *See id*. § 841.003. We conclude the evidence is legally sufficient to support the jury's finding; the State's opening and closing arguments did not cause the rendition of an improper judgment; and the trial court did not abuse its discretion when it denied appellate counsel's motion to withdraw. The trial court's judgment is affirmed.

THE LAW

The SVP commitment statute defines "sexually violent predator" as a person who "(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) (West 2010). The 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).

JURY ARGUMENT

In issue one, Grunsfeld argues the prosecutor referred to him as an animal during opening and closing argument.[1] During her opening statement, the State's attorney, over the defendant's objection, stated that "[t]his is a case that's exposing the wolf in sheep's clothing." The attorney commented to the jury that "under the surface and under that sheep's clothing is a cunning, manipulative and violent individual . . . ." During closing argument, the State's attorney, over defendant's objection, stated, "We're all thought to be afraid of the big, bad wolf." To obtain a reversal based on improper jury argument, Grunsfeld must show "'(1) an error (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, and (4) was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the judge.'" *In re Commitment of Eeds*, 254 S.W.3d 555,

[1]The State argues Grunsfeld waived his complaint of improper jury argument.

560 (Tex. App.—Beaumont 2008, no pet.) (quoting *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979)). Arguments addressed to the jury must be confined "strictly to the evidence and to the arguments of opposing counsel." Tex. R. Civ. P. 269(e).

In the instances in which the figure of speech was used, Grunsfeld's objection was to being referred to as a "wolf" or as "an animal," and on appeal his challenge is to being called an animal. When he made that objection in opening argument, the judge stated "Well, I don't think she's saying he's a wolf. I think she's using that as an example. And I think the jury is aware of that." When Grunsfeld objected in closing argument, the judge stated "Because she's just getting into her argument[,] she's actually not calling him a wolf."

The figure of speech, "wolf in sheep's clothing," conveys the idea that appearances may be deceiving: the description is of a person who cloaks a hostile intent with an appearance of friendliness. The State's attorney argued to the jury that even though Grunsfeld appeared "well-mannered, well-spoken, charming, even good-looking[,]" he was in reality "a cunning, manipulative and violent individual[.]" The victims described Grunsfeld as "charming and good looking, articulate, dressed nice, somebody who looked like they had money." One expert witness believed that Grunsfeld employed positive characteristics to gain the victims' trust. The sexual offenses were violent. Grunsfeld used various devices, including a stun gun, a rope, mace, a gun, and

handcuffs in the commission of the sexual assaults. The State's trial theme was that while Grunsfeld presented himself as a charming, articulate person, he was, in reality, a cunning, manipulative, violent sexual predator. *See generally Reese*, 584 S.W.2d at 838 (discussing evidence and use of hyperbole "to make a point").

The argument does not present reversible error under the circumstances. The argument was not so extreme that a "'juror of ordinary intelligence could have been persuaded by that argument to agree to a verdict contrary to that to which he would have agreed but for such argument."' *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009) (quoting *Goforth v. Alvey,* 153 Tex. 449, 271 S.W.2d 404, 404 (1954)). When presented with the objection in opening argument, the trial court commented that the attorney was just using that "as an example. And I think the jury is aware of that." We cannot conclude that the argument complained of "probably caused the rendition of an improper judgment." *See* Tex. R. App. 44.1(a). We overrule issue one.

LEGAL SUFFICIENCY OF THE EVIDENCE

In issue two, Grunsfeld argues the evidence is legally insufficient to support the jury's verdict. Because the statute employs a beyond-a-reasonable-doubt standard, we use the appellate standard of review adopted in *Mullens* for challenges to the legal sufficiency of the evidence. *See In re Commitment of Mullens*, 92 S.W.3d 881, 885 (Tex. App.—Beaumont 2002, pet. denied) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). We review all the evidence in a light most favorable to

the verdict, and we consider whether a rational factfinder could have found, beyond a reasonable doubt, that Grunsfeld suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See id.* at 885, 887.

Grunsfeld presents three arguments in his legal sufficiency point. He contends the State's experts' opinions are conclusory and without foundation. He argues the evidence is insufficient to show his lack of control of his behavior. He maintains that actuarial tests are not appropriate measures of behavioral abnormality.

Grunsfeld argues that the testimony of the State's expert witnesses is conclusory, speculative, and without basis. *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004). Grunsfeld argues the experts' opinions are conclusory for various reasons. He complains of Dr. Dunham's belief that a behavioral abnormality does not require a physical or mental health diagnosis. Grunsfeld asserts that statistics do not establish a behavioral abnormality beyond a reasonable doubt. He contends that Dr. Dunham cannot conclude that a person is predisposed to commit a sexual act when Dunham does not know what causes a person to commit a sexual offense in the first place. Grunsfeld contends that no one can validly predict future behavior when there are no statistics to back it up.

The record demonstrates that the experts' testimony provides a basis or foundation for their opinions and is not conclusory. Both experts were licensed in their respective fields. Both interviewed Grunsfeld and reviewed the records related to Grunsfeld's

history. The records they reviewed were of the type relied upon by experts in their fields, and both experts performed their assessments in accordance with their training as professionals in their fields. They explained how the evidence in those records played a role in their assessments. Dunham also relied on actuarial tests he had scored to evaluate Grunsfeld's risk for re-offending. Dunham spoke to some of the victims of Grunsfeld's offenses. Each expert testified that Grunsfeld suffers from a behavioral abnormality. Based on the record before us, we conclude the expert testimony has a basis or foundation, and is not speculative, conclusory, or completely lacking in probative value.

Grunsfeld also contends the evidence is legally insufficient to support a jury finding of lack of control. A person's serious difficulty with controlling his behavior is implicit in the jury's finding that a person suffers from an emotional or volitional defect so grave as to predispose him to threaten the health and safety of others with acts of sexual violence. *See In re Commitment of Almaguer*, 117 S.W.3d 500, 505-06 (Tex. App.—Beaumont 2003, pet. denied).

Grunsfeld relies on the following testimony from Dr. Bailey, one of the State's expert witnesses:

> Q. [Defense Counsel]: So Mr. Grunsfeld, he was in control of his criminal behavior?
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> A. [Dr. Bailey]: I clearly think that he will be in control of his choices. We feel pretty strongly about that in psychiatry. I think there are a variety of factors involved as to whether somebody is in control of their behavior. Clearly we talked a lot today about alcohol and drugs, how they can influence behavior. That might disinhibit someone or affect their

> control, total control. Clearly, I think institutionalization affects their control. Access to people are limited. So we're just reluctant to say that Mr. Grunsfeld was like anybody, in full control of the final acts. We do think, though, he is in control of his thoughts and his choices or behavior.

Grunsfeld also argues that evidence that he is a manipulative person who planned the offenses, as well as evidence that he is not impulsive, demonstrates that he is in control of his behavior. He maintains that someone who is able to control others cannot be said to have difficulty in controlling his own behavior.

Simply because an offender chooses to do certain discrete, preparatory acts leading up to the commission of a sexually violent offense does not mean he has no serious difficulty in controlling his behavior. Grunsfeld committed two sexual assaults and one aggravated sexual assault within six months of each other. Dr. Dunham, a psychologist, stated Grunsfeld was cunning, manipulative, violent, and dangerous.

The records reviewed by Dr. Dunham reveal that Grunsfeld sexually assaulted the first victim in multiple ways and repeatedly used a stun gun on her during the sexual assault. He tried to tie her to a piano with a rope. Dunham testified that during the interview, Grunsfeld told him that "it was all about doing drugs and Ecstasy," that the woman was the one with the stun gun, and that she used it on him before he used it on her.

The second sexual assault occurred approximately six months later. Grunsfeld sprayed the victim in the face with mace, handcuffed her hands behind her back, and repeatedly sexually assaulted her. There is also evidence he put a gun to her face and

throat, and punched her in the face. Grunsfeld told Dr. Dunham that the woman consented to having sex with him. At trial, Grunsfeld testified he raped her.

Approximately three weeks later, Grunsfeld committed another sexual assault. He testified he was out on bond when the offense occurred. He tried to handcuff the woman, sprayed her in the face with mace, and sexually assaulted her. Dr. Dunham testified that Grunsfeld stated he and the woman were doing drugs and any sex that occurred was consensual. Grunsfeld acknowledged he used violence with the three victims. Dr. Dunham also reviewed records that linked Grunsfeld to three uncharged, unadjudicated sexually violent offenses with similar fact patterns. Grunsfeld denied any involvement in the extraneous offenses.

Grunsfeld was also convicted of criminal trespass. Approximately two months after the first sexual assault Grunsfeld entered a neighbor's apartment one night while she was asleep. She awoke and saw someone putting on a ski mask and gloves. The intruder pushed her down on the bed and got on top of her. When she recognized him and called his name, he left. Police found mace and a stun gun by the woman's sofa, but they were not used. Dr. Dunham stated that during the interview Grunsfeld denied he had been convicted of criminal trespass. Dr. Dunham concluded Grunsfeld was lying and engaging in "gross extreme minimizations" in his accounts of these unadjudicated offenses.

Dunham testified Grunsfeld was "just out of control and just kind of setting things up however he wanted." Explaining that there was "a lot of sexually sadistic behavior"

and "sexual sadism[,]" Dunham stated, "[I]t's not just about the sex that they're aroused to but also to the violence or the pain or the suffering of the other individual. . . . [Grunsfeld] goes above and beyond the sex in using weapons or using devices or tools or props." He engages in multiple sex acts with the victims. Given the presence of violence, along with the sexual offenses and Grunsfeld's personality disorder, Dunham believed that the conduct tended to "escalate[] further, [and] there's only one other place that it could go."

Dr. Dunham scored three actuarial tests on Grunsfeld and found him to have psychopathic characteristics. As Dunham explained, "Psychopathy is a very dangerous personality disorder. . . . [W]hen you add it on to a paraphilia and especially the sexual sadism, I think that there's not a more dangerous combination than psychopathy plus sexual sadism."

Dr. Dunham diagnosed Grunsfeld with sexual sadism, polysubstance abuse, adult antisocial behavior, and "psychopathic character[istic]s." In terms of diagnoses and risk factors for reoffending, Dunham found significant Grunsfeld's use of violence, his planning of the offenses, commission of offenses while out on bond, use of weapons, commission of crimes against strangers, use of threats against his victims, minimization of the details of the offenses, blaming his victims for the crimes, lack of remorse, blaming drugs and alcohol, and lack of sex offender treatment. Explaining that Grunsfeld had no

concern about the consequences of his actions, Dunham characterized Grunsfeld's behavioral pattern as "dangerous."

Dr. Bailey, a psychiatrist, diagnosed Grunsfeld with paraphilia not otherwise specified and described paraphilia as "aberrant sexualized thought and behavior." He also diagnosed Grunsfeld with personality disorder or "maladaptive pattern of behavior." Bailey considered sadism as a fairly consistent theme in Grunsfeld's sexual assaults. Grunsfeld's repeated use of the stun gun and mace indicated that causing pain was part of the enjoyment.

Like Dunham, Dr. Bailey found significant Grunsfeld's use of violence, use of weapons, prior history of multiple offenses, commission of sexually violent offenses while out on bond for another sexual assault, planning of the offenses, minimization of the details of his offenses, blaming the victims for the crimes, heavy chemical dependence, and manipulative conduct even while in prison. Bailey found the planning indicative of Grunsfeld's behavioral abnormality. Bailey stated, "A behavioral abnormality is an abnormal thought process that leads to abnormal sexualized behavior. By definition, it violates the rules of society, the laws of society, and including the rights of another." There were records Bailey reviewed that connected Grunsfeld with three additional assaults. Dr. Bailey testified he thought Grunsfeld indicated he did not need sex offender treatment.

The record also reveals Grunsfeld had one major disciplinary action in his twenty years in prison. He had a romantic relationship for four or five years. He had family support. Dr. Bailey testified Grunsfeld was forty-seven at the time of trial, and the risk of reoffending becomes less as a person ages. He testified nonetheless men who are Grunsfeld's age do at times reoffend.

"[P]roof of serious difficulty in controlling behavior" is required in order to civilly commit a defendant. *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002). The inability to control one's behavior "must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Id*. Dunham and Bailey testified to Grunsfeld's risk factors for reoffending. Diagnoses of the two experts included sexual sadism, polysubstance abuse, adult anti-social behavior, psychopathic characteristics, paraphilia NOS, and personality disorder.

The jury determines the credibility of the witnesses and the weight to be given their testimony, and whether to believe some testimony and disbelieve other testimony. *In re Commitment of Mullens*, 92 S.W.3d at 887 (citing *Barnes v. State*, 876 S.W.2d 361, 321 (Tex. Crim. App. 1994)). The jury may draw reasonable inferences from the evidence. *See Lacour v. State*, 8 S.W.3d 670, 671 (Tex. Crim. App. 2000). The jury heard the opinions of the State's experts. A lack of control could reasonably be inferred from

their testimony and the other evidence in this case, including Grunsfeld's past behavior, his history of committing two other sexually violent offenses while out on bond for the first one, and his own testimony. We conclude a rational jury could find beyond a reasonable doubt that Grunsfeld has serious difficulty in controlling his behavior.

As a last legal sufficiency argument, Grunsfeld asserts that the use of actuarial tests in this context is neither probative nor relevant in determining whether he suffers from a congenital or acquired condition. Actuarial testing is one tool used by psychologists and psychiatrists in evaluating a defendant whom the State is seeking to involuntarily civilly commit. *See In re Commitment of Hall*, No. 09-09-00387-CV, 2010 WL 3910365, at **4-6 (Tex. App.—Beaumont Oct. 7, 2010, no pet.). Relying on *Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837 (Tex. 2010), Grunsfeld argues that just because there is a sample study of sex offenders who generally reoffend at a particular rate does not mean that he will do so. He contends this type of testing is not probative of whether he suffers from a behavioral abnormality. *Merrell* is a wrongful death case based on the allegation that a halogen lamp failed and caused a fire that killed two people. *Id*. at 838-40. There, the Supreme Court held that the fact there is "[e]vidence that halogen lamps can cause fires generally . . . does not establish that the lamp in question caused *this* fire." *Id*. at 840.

If an expert opinion has a supporting basis, but there is a reliability challenge that requires the trial court to evaluate the underlying methodology, the defendant must make

a timely objection so that the trial court has the opportunity to conduct this analysis. *In re Commitment of Hall*, 2010 WL 3910365, at *3 (citing *City of San Antonio v. Pollock*, 284 S.W.3d 809, 817-18 (Tex. 2009)). Essentially, Grunsfeld is arguing the actuarials are unreliable. We find no reliability objection in the record.

Expert testimony is unreliable if there is "too great an analytical gap between the data and the opinion proferred." *Gammill v. Jack Williams Chevrolet, Inc.* 972 S.W.2d 713, 726 (Tex. 1998) (quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed. 508 (1997))*; see also In re Commitment of Martinez*, No. 09-05-493 CV, 2006 WL 2439752, at *3 (Tex. App.—Beaumont Aug. 24, 2006, no pet.). Dr. Dunham testified that actuarials are risk-assessment tools that are used in the field to evaluate the risk of the defendant's reoffending. Similarly, Dr. Bailey testified that actuarials test a relative degree of risk of offending. Dr. Dunham indicated that his evaluation of the actuarials was conducted in accordance with his training and the accepted standards for his field. The experts explained the risk factors that make Grunsfeld likely to engage in a predatory act of sexual violence.

The jury determines the credibility of the witnesses and the weight to be given their testimony. *In re Commitment of Mullens*, 92 S.W.3d at 887. Contradictions and conflicts in the evidence may be resolved by believing all, part, or none of the witnesses' testimony. *Id*. A jury may draw reasonable inferences from basic facts to determine ultimate fact issues. *Lacour*, 8 S.W.3d at 671. The jury was free to weigh the assessment

results. The record does not demonstrate that the expert testimony regarding the actuarials was without probative value.

Reviewing the record in the light most favorable to the jury's verdict, we conclude a rational jury could have found beyond a reasonable doubt that Grunsfeld suffers from a behavioral abnormality that predisposes him to commit future acts of sexual violence. Issue two is overruled.

WITHDRAWAL OF APPELLATE COUNSEL

In issue three, Grunsfeld argues that the trial court erred in refusing to permit the State Counsel for Offenders (SCFO) to withdraw as appellate counsel for Grunsfeld and thereby denied him his constitutional and statutory right to effective assistance of counsel. In response to the withdrawal motion, this Court abated the appeal and remanded the case to the trial court for a hearing. Grunsfeld informed the trial court that he wanted to raise on appeal the ineffective assistance of his SCFO at trial, and, therefore, SCFO should withdraw as counsel. This Court recently noted in *In re Commitment of Williams* that the Texas Supreme Court has not addressed whether a sexually violent predator may obtain a remedy for ineffective assistance in a direct appeal, and we did not reach the question in that case. *See In re Commitment of Williams*, No. 09-09-00539-CV, 2010 WL 4264283, at **1-2 (Tex. App.—Beaumont, Oct. 28, 2010, pet. filed). We concluded that, even if such a remedy were available, Williams made no showing that would support an ineffective assistance claim. *Id.*

Grunsfeld presented evidence at the hearing. He testified to specific instances he claims demonstrate ineffective assistance of counsel. First, he testified he told his trial attorney he wanted a bench trial, but his attorney informed him that he would not receive one; trial counsel had filed a request for a jury trial. Grunsfeld did not explain at the hearing whether he had originally requested a jury trial and then changed his mind. We do not know the strategy for requesting a jury trial.

Next, Grunsfeld testified his trial attorney did not object to the experts' testimony on unadjudicated extraneous offenses until Grunsfeld prompted him to object. The expert witness testified he relied on the records relating to Grunsfeld's conduct, including adjudicated and unadjudicated offenses to formulate his opinion. Rule 703 of the Texas Rules of Evidence provides that the "facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing." Tex. R. Evid. 703. The rule further states, "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." *Id.* Dr. Dunham testified that the information contained in these records is of a type reasonably relied upon by experts in his field. He indicated he considered the unadjudicated offenses, along with other evidence in the reviewed records, in forming his opinion that Grunsfeld has a behavioral abnormality. *See In re Commitment of Polk*, 187 S.W.3d 550, 555 (Tex. App.—Beaumont 2006, no pet.) (Under Rule 703, the facts or

data on which an expert bases his opinion or inference, if of a type that experts in the field reasonably rely on, need not be admissible in evidence.).

Grunsfeld contends his trial counsel was ineffective because his expert witness was not allowed to testify. Under *Strickland v.Washington*, 466 U.S. 668, 687-88, 693 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the reviewing court indulges a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance, and that the challenged action might be considered sound trial strategy. 466 U.S. at 689.

The record does not reveal the reasons why the defendant's expert witness did not testify or why trial counsel requested a jury trial. Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *See generally Thompson v. State*, 9 S.W.3d 808, 813-14 (Tex. Crim. App. 1999). The record does not affirmatively make that demonstration. Grunsfeld was not entitled to separate counsel, other than SCFO appellate counsel, to make a claim against trial counsel that is not arguable. We conclude the trial court did not abuse its discretion in denying the motion to withdraw. Issue three is overruled.

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

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on December 8, 2010
Opinion Delivered February 24, 2011

Before McKeithen, C.J., Gaultney and Kreger, JJ.