

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00360-CV

IN RE COMMITMENT OF FELTON B. BRADY

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 08-12-11340 CV

MEMORANDUM OPINION

The State of Texas filed a petition to commit Felton B. Brady as a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001-.150 (West 2010). A jury found that Brady suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. The trial court rendered a final judgment and an order of civil commitment. On appeal, Brady challenges: (1) the sole jury question submitted in the trial court’s charge and (2) the denial of his motion for directed verdict and motion for new trial. We affirm the trial court’s judgment.

The Jury Charge

In issue one, Brady contends that the jury question in the trial court’s charge improperly used the word “predisposes[:]”

Do you find beyond a reasonable doubt that FELTON B. BRADY suffers from a behavioral abnormality that *predisposes* him to engage in a predatory act of sexual violence?

(emphasis added). Brady contends that the trial court should have submitted the following jury question:

Do you find beyond a reasonable doubt that FELTON B. BRADY suffers from a behavior abnormality that *makes him likely* to engage in a predatory act of sexual violence?

(emphasis added). Brady submitted this question in his proposed jury charge and submitted a separate request for an additional jury question pertaining to whether Brady “has a serious difficulty in controlling his behavior.” At trial, Brady did not object to the use of the word “predisposes” in the trial court’s charge.

Although a jury charge request may be included in a complete proposed charge, it cannot be obscured and it must be brought to the trial court’s attention. *See In re Commitment of Miller*, 262 S.W.3d 877, 892 (Tex. App.—Beaumont 2008, pet. denied), *cert. denied*, 130 S.Ct. 156, 175 L.Ed.2d 99 (2009). The record does not indicate that Brady filed a separate request for a question using the word “likely,” or brought such a request to the trial court’s attention. Because Brady failed to make the trial court reasonably aware of his request, his complaint is not preserved for appellate review.¹ *Id.*

We overrule issue one.

¹ Brady also contends that he preserved error by raising the issue in a motion for new trial. A motion for new trial does not preserve error in the jury charge. *See Tex. R. Civ. P. 272, 274; Kirkpatrick v. Mem’l Hosp.*, 862 S.W.2d 762, 769-70 (Tex. App.—Dallas 1993, writ denied).

Motion for Directed Verdict and Motion for New Trial

In issues two, three, and four, Brady contends that the trial court improperly denied his motion for directed verdict and motion for new trial because the evidence was legally and factually insufficient to show that he was a sexually violent predator, is likely to engage in a predatory act of sexual violence for the primary purpose of victimization,² and has serious difficulty controlling his behavior.³

Under the SVP statute, the State must prove, beyond a reasonable doubt, that “the person is a sexually violent predator.” Tex. Health & Safety Code Ann. § 841.062(a). The “burden of proof at trial necessarily affects appellate review of the evidence.” *In the Interest of C.H.*, 89 S.W.3d 17, 25 (Tex. 2002); *In the Interest of J.F.C.*, 96 S.W.3d 256 (Tex. 2002); *see City of Keller v. Wilson*, 168 S.W.3d 802, 817 (Tex. 2005). Because the SVP statute employs a beyond-a-reasonable-doubt burden of proof, when reviewing the legal sufficiency of the evidence, we assess all the evidence in the light most favorable to

² “[P]rimary purpose of victimization” is not an element that the State is required to prove under the SVP statute. *See* Tex. Health & Safety Code Ann. § 841.003(a) (West 2010).

³ After the State rested, Brady moved for a directed verdict, which the trial court denied. Brady did not re-urge his motion after presenting his own evidence. His motion for directed verdict did not preserve error. *See In re Commitment of Johnson*, No. 09-08-00489-CV, 2009 Tex. App. LEXIS 7330, at **4-5 (Tex. App.—Beaumont Sept. 17, 2009, no pet.) (mem. op.); *see also Ratsavong v. Menevilay*, 176 S.W.3d 661, 667 (Tex. App.—El Paso 2005, pet. denied). His motion for new trial, however, preserved his legal and factual sufficiency challenges for appellate review. *See* Tex. R. Civ. P. 324(b); *Cecil v. Smith*, 804 S.W.2d 509, 512 (Tex. 1991); *see also Johnson*, 2009 Tex. App. LEXIS 7330, at *5.

the verdict to determine whether any rational trier of fact could find, beyond a reasonable doubt, the elements required for commitment under the SVP statute. *In re Commitment of Mullens*, 92 S.W.3d 881, 885 (Tex. App.—Beaumont 2002, pet. denied). It is the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* at 887.

In reviewing the factual sufficiency of the evidence in a civil case in which the burden of proof is beyond a reasonable doubt, an appellate court weighs the evidence to determine whether a verdict that is supported by legally sufficient evidence nevertheless reflects a risk of injustice that would compel ordering a new trial.

In re Commitment of Day, No. 09-10-00218-CV, 2011 Tex. App. LEXIS 3573, at *51 (Tex. App.—Beaumont May 12, 2011, no pet. h.) (not yet released for publication).

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.” Tex. Health & Safety Code Ann. § 841.003(a). “‘Behavioral abnormality’ means 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.* at § 841.002(2). “‘Predatory act’ means an act directed toward individuals, including family members, for the primary purpose of victimization.” *Id.* at § 841.002(5).

“A condition which affects either emotional capacity or volitional capacity to the extent a person is predisposed to threaten the health and safety of others with acts of sexual violence is an abnormality which causes serious difficulty in behavior control.” *In re Commitment of Almaguer*, 117 S.W.3d 500, 506 (Tex. App.—Beaumont 2003, pet. denied). A person’s “‘current’ difficulty controlling his behavior can be inferred from his past behavior, his own testimony, and the experts’ testimony.” *In re Commitment of Burnett*, No. 09-09-00009-CV, 2009 Tex. App. LEXIS 9930, at *13 (Tex. App.—Beaumont Dec. 31, 2009, no pet.) (mem. op.); *In re Commitment of Wilson*, No. 09-08-00043-CV, 2009 Tex. App. LEXIS 6714, at *14 (Tex. App.—Beaumont Aug. 27, 2009, no pet.) (mem. op.); *In re Commitment of Grinstead*, No. 09-07-00412-CV, 2009 Tex. App. LEXIS 228, at *20 (Tex. App.—Beaumont Jan. 15, 2009, no pet.) (mem. op.).

Brady pleaded no contest to two sexual offenses and was sentenced to ten years in prison for each offense. Brady testified that the first offense, burglary of a habitation with intent to commit sexual assault, occurred on March 28, 1998. Brady lived in the same apartment complex as the victim. The offense involved the use of force and multiple sexual acts. Brady denied committing the assault, but admitted that the victim identified him as her assailant. Brady testified that the second offense, sexual assault, occurred on April 19, 1998, and involved a fourteen-year-old victim. Brady claimed that he knew the victim and that she consented to “fooling around,” but not “sexual intercourse.” He denied using force.

Brady testified that he has a lengthy criminal history, including disciplinary cases in prison and physical fights with girlfriends. He has a girlfriend, has a friendship with the mother of his children, has a relationship with his children, is taking a “Changes” class, is a prison janitor, and plans to live with his mother and work for a small business upon release. He denied being addicted to marihuana or alcohol. Brady testified that he would not reoffend because he does not enjoy hurting people and knows that it is “wrong.” In addition to being unaware of the risk that he poses, he also does not consider himself to be a sexually violent predator.

The State read Brady’s admissions into evidence, including his admissions to physically abusing girlfriends; engaging in physical fights with women; slapping, punching, and choking women; and striking a woman with his hand. Nonetheless, Brady denied having difficulty controlling his temper and needing sex offender treatment.

The State also admitted the report of Dr. Stephen A. Thorne into evidence. Dr. Thorne’s diagnostic impressions of Brady include sexual abuse of an adult, paraphilia not otherwise specified, alcohol-related disorder not otherwise specified, cannabis-related disorder not otherwise specified, and antisocial personality disorder. Dr. Thorne further identified several factors that place Brady at risk of reoffending: (1) history of sexually deviant behaviors, (2) antisocial orientation and criminal versatility, (3) history of alcohol and drug abuse, (4) inability to comply with mandatory supervision, (5) use or threat of force when committing sexual offenses, (6) multiple acts of sexual deviation with at least

one of the victims, (7) commission of an offense in “what can be considered a public setting,” and (8) his young age. Dr. Thorne also noted some mitigating factors: (1) no “sexually inappropriate behavior” with young males, (2) no “sex-related disciplinary charges,” (3) no history of “severe psychiatric impairment,” (4) ability to maintain steady employment, (5) ability to be involved in romantic relationships, and (6) no psychopathy. Brady scored a fifteen on the Hare Psychopathy Checklist, placing him in the low range. Brady scored a thirteen on the Minnesota Sex Offender Screening Tool-Revised (“MnSOST-R”), placing him in the recidivism range of “88% within six years of release.” Brady scored a one on the Static-99, placing him at a low risk for recidivism or a rate of “6%, 7% and 7% over 5, 10, and 15 years[.]” Dr. Thorne concluded that

based on this examiner’s own interview with Mr. Brady, past and present assessment results, and a review of Mr. Brady’s records and history, it is the opinion of this examiner that Mr. Brady does suffer from a behavior abnormality that makes him likely to engage in a predatory act of sexual violence. This conclusion is based, in large part, due to Mr. Brady having engaged in acts of sexual deviation on what have been documented as multiple extrafamilial victims, his choice of a 14-year old victim, his relatively young age, his history of antisocial and/or illegal behavior (beginning at a young age), and his previous difficulties complying with conditions of Mandatory Supervision.

Dr. Jason Dunham, a forensic psychologist, testified that he reviewed Brady’s records, which are records typically relied upon by experts in the field of forensic evaluations, interviewed Brady, conducted a risk assessment, and performed actuarial tests. Dr. Dunham diagnosed Brady with sexual abuse of an adult, sexual abuse of a child, and antisocial personality disorder. Dr. Dunham testified that Brady had early

behavior problems, has a lengthy criminal history, and has received thirteen disciplinary cases in prison. Dr. Dunham testified that Brady's history demonstrates "criminal versatility" and violence against women.

Dr. Dunham also performed a risk assessment, which involves "looking at the data and providing [an] opinion about what's going to happen in the future," or gives an "opinion about what would happen as far as a possible sex offense in the future." Dr. Dunham identified several risk factors for Brady: (1) two sexual offenses, (2) violence used to commit the offenses, (3) young age at the time of the offenses and current young age, (4) difference in age of victims, one adult and one minor, (5) multiple acts of sexual deviancy and pre-planning associated with the first offense, (6) spontaneity associated with the second offense, (7) commission of the offenses while living with his pregnant girlfriend, (8) commission of offenses against non-familial and stranger victims, (9) lack of discrimination regarding choice of victims, (10) "sexual preoccupation at a young age," (11) antisocial personality disorder, (12) poor institutional adjustment, (13) lack of remorse and level of honesty, *i.e.*, denial, minimization, or failure to take full responsibility, (14) failure to participate in sex offender treatment, and (15) poor appraisal of risk of his ability to reoffend. Dr. Dunham also identified positive factors: Brady is not a psychopath, he has no male victims, he has some social support, he has good social skills, he has a relationship with his family and children, and he has plans that

seem realistic. Dr. Dunham testified that protective factors “mitigate somebody’s risk for reoffending in the future,” but Dunham found these factors absent in Brady’s case.

Dr. Dunham also performed actuarial tests, which are used to evaluate a person’s future risk for sexual offending and are generally accepted and commonly used by forensic psychologists. First, the MnSOST-R measures the “probability or [] risk level, for somebody’s risk of being rearrested for a hands-on sexual offense[.]” Brady scored “Plus 13” on the MnSOST-R, which places him at a “high risk” or a “category elevated beyond the high risk” for reoffending. Second, the Static-99 “measures the risk of being reconvicted for a sex offense.” Brady scored a two on the Static-99, which places him in the “moderate low category” for reoffending.

Dr. Dunham also performed the Hare Psychopathy Checklist. The test did not show that Brady is a psychopath. Dr. Dunham testified that Brady’s serious sexual assaults, pervasive criminal history, antisocial personality disorder, young age, and failure to mitigate his risk place him at a high risk for reoffending. Dr. Dunham concluded that Brady suffers from a behavioral abnormality that predisposes him to commit predatory acts of sexual violence.

Dr. Michael Arambula, a forensic psychiatrist, also reviewed records that experts in his field review and rely on to make evaluations, interviewed Brady, and evaluated Brady’s risk factors. Dr. Arambula diagnosed Brady with paraphilia not otherwise specified (“NOS”), which increases Brady’s risk of reoffending because paraphilia is a

“condition of sexual deviance” that “tends to recur.” Dr. Arambula testified that paraphilia NOS affects Brady’s emotional or volitional capacity. Dr. Arambula also diagnosed Brady with personality disorder NOS with features of antisocial behavior, which means that Brady has a “significant history of antisocial behavior that interfered with his ability to function in society.” Dr. Arambula testified that “individuals who have antisocial personalities are at a higher risk of sexually assaulting women.” Dr. Arambula further gave Brady a “V Code” because of sexual abuse of a minor. He explained that minors are more vulnerable victims. Finally, Dr. Arambula diagnosed Brady with history of marihuana abuse, which relates to Brady’s behavioral abnormality because “[c]annabis abuse can aggravate underlying sexual urges.”

Dr. Arambula defined “risk factors” as “elements of historical information that has emerged in research that increased the risk that somebody either has a condition or that they’re going to relapse or recidivate.” Dr. Arambula identified several risk factors for Brady, including paraphilia, two sexual assaults, force used during the assaults, a history of physical and verbal aggression towards women, a history of substance abuse, a history of not getting along with others, a history of getting into trouble with the law, a lack of fully accepting responsibility, and possible gang affiliation. Dr. Arambula saw some positive factors, such as support from family, no more alcohol abuse, reasonable plans upon release, and acquirement of a GED.

Based on the facts and data, his education, training, experience, and procedures, and Brady's diagnosed conditions, risk factors, and history, Dr. Arambula concluded that Brady suffers from a behavioral abnormality that predisposes him to engage in predatory acts of sexual violence.

Dr. Paul Hamilton, a psychologist and Brady's expert witness, interviewed Brady, conducted a risk evaluation, reviewed records accepted in the field of forensic psychology, and conducted actuarial tests. Dr. Hamilton testified that Brady does not have an antisocial personality disorder and does not fit the criteria for paraphilia NOS. Dr. Hamilton testified that the absence of paraphilia or antisocial personality disorder supports the idea that Brady is less likely to have a behavioral abnormality. Dr. Hamilton gave Brady a "V Code" for sexual abuse of a minor.

Dr. Hamilton testified that Brady's risk factors include the two sexual assaults, minimization and justification regarding the second offense, and the lack of sex offender treatment. Dr. Hamilton found that Brady has the following protective factors: emotional connection, maturation, low score on the Static-99, no antisocial personality disorder, and no evidence of paraphilia. Dr. Hamilton testified that Brady's relationship with his children is a positive factor because it shows an "emotional connectiveness." He concluded that Brady is at a low risk of reoffending.

Dr. Hamilton testified that someone, possibly the Counsel on Sex Offender Treatment, administered the Personality Assessment Inventory which did not show that

Brady met the criteria for antisocial personality disorder. Dr. Hamilton administered four tests when evaluating Brady. First, the Inventory of Offender Risk, Needs, and Strengths test, which “looks at criminal orientation and antisocial personality factors,” did not indicate that Brady is likely to reoffend. Second, Brady scored a fourteen on the Hare Psychopathy Checklist, which places him at the low end for psychopathy. The score is low in terms of offenders, but is generally higher than that compared to the general public. Dr. Hamilton concluded that Brady is not a psychopath, which is important because psychopathy is believed to increase the risk of recidivism. Third, Brady scored one on the Static-99. A score of one means about a four percent risk of reoffending in five years after prison and six percent in the ten years after release. Finally, Brady scored a “plus five” on the MnSOST-R, which places him in the “moderate range” or a twenty-five percent risk of reoffending over six years. Had Dr. Hamilton classified the second victim as a stranger, Brady’s score would become an eight, which places him in the high risk category.

Dr. Hamilton explained that Brady does not have a behavioral abnormality because he does not have a “diagnosable condition that might be associated with a behavior abnormality” and the actuarial tests did not show that he is at a high risk for reoffending. Dr. Hamilton testified that Brady does not have the persistent or pervasive pattern of behavior required for a behavioral abnormality. Based on his review of records, training, experience, and interview with Brady, Dr. Hamilton concluded that

Brady does not have a behavioral abnormality that predisposes him to commit acts of sexual violence.

The record contains legally and factually sufficient evidence by which the jury could determine that Brady is a sexually violent predator. Based on actuarial tests, risk assessments, interviews with Brady, Brady's records and history, and Brady's diagnosed conditions, the State's experts testified that Brady has a behavioral abnormality that predisposes him to commit predatory acts of sexual violence.⁴ The jury heard evidence of Brady's risk factors, actuarial test scores, criminal history, repeated assaults of women and minors, "lifelong" and "chronic" antisocial personality disorder, substance abuse that can aggravate sexual urges, impulsive history, paraphilia NOS that affects his "emotional or volitional capacity" and is a "condition of sexual deviance" that "tends to recur," and failure to mitigate his risk to society. The jury could reasonably conclude that Brady has difficulty controlling his behavior and is likely to engage in a predatory act of sexual violence directed toward individuals for the primary purpose of victimization. *See Mullens*, 92 S.W.3d at 887; *see also Almaguer*, 117 S.W.3d at 506; *Burnett*, 2009 Tex.

⁴ Brady complains that Dr. Dunham failed to "quantify" the phrase "'high' risk" and Dr. Arambula based his opinion on a "'reasonable medical probability'" instead of a "'reasonable medical certainty.'" Brady cites no authority for these arguments. *See* Tex. R. App. P. 38.1(i). Assuming without deciding that quantification is necessary, the record contains other evidence regarding the recidivism rate for offenders in the "high" range category. Moreover, Dr. Arambula's use of the "reasonable medical probability" standard merely goes to the weight of his testimony. *See generally In re Commitment of Kirsch*, No. 09-08-00004-CV, 2009 Tex. App. LEXIS 5436, at **18-19 (Tex. App.—Beaumont July 16, 2006, pet. denied) (mem. op.) (citing *In re Commitment of Gollihar*, 224 S.W.3d 843, 851 (Tex. App.—Beaumont 2007, no pet.)).

App. LEXIS 9930, at *13. Such conclusions are entailed in the jury's finding that Brady suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. *See Grinstead*, 2009 Tex. App. LEXIS 228, at *16 (citing *Almaguer*, 117 S.W.3d at 505); *see also In re Bailey*, No. 09-09-00353-CV, 2010 Tex. App. LEXIS 6685, at **12-13 (Tex. App.—Beaumont Aug. 19, 2010, no pet.) (mem. op.).

Reviewing all the evidence in the light most favorable to the verdict, a rational jury could have found, beyond a reasonable doubt, that Brady has a behavioral abnormality that predisposes him to commit a predatory act of sexual violence; therefore, the evidence is legally sufficient. *See Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002); *see also Mullens*, 92 S.W.3d at 885. Moreover, weighing all of the evidence, the verdict does not reflect a risk of injustice that would compel ordering a new trial. *See Day*, 2011 Tex. App. LEXIS 3573, at *51. We overrule issues two, three, and four.

Conclusion

Having overruled Brady's four issues, we affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on November 17, 2010
Opinion Delivered June 16, 2011
Before McKeithen, C.J., Gaultney and Kreger, JJ.