

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00478-CV

IN RE COMMITMENT OF CHRISTOPHER DOUGLAS SIMMONS

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 09-02-01393 CV

MEMORANDUM OPINION

The State of Texas filed a petition to commit Christopher Douglas Simmons as a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001-.150 (West 2010). A jury found that Simmons 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, Simmons contends in four issues that: (1) the evidence is legally and factually insufficient; and (2) the trial court abused its discretion by showing partiality at trial. We affirm the trial court's judgment.

Sufficiency of the Evidence

In issues one, two, and three, Simmons challenges the denial of his motion for directed verdict and motion for new trial on grounds that the evidence is legally and factually insufficient because (1) the State failed to show he is likely to engage in a predatory act of sexual violence for the primary purpose of victimization;¹ (2) the State's experts failed to quantify Simmons's risk of reoffending; and (3) the State's experts provided conclusory and non-probative testimony.²

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). “[T]he 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); *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 the verdict to determine whether any rational trier of fact could find, beyond a reasonable doubt, the elements required for

¹ “[P]rimary purpose of victimization” is not a specified element in section 841.003. *See* Tex. Health & Safety Code Ann. § 841.003(a) (West 2010).

² Simmons moved for a directed verdict after the State rested, but he did not re-urge his motion at the close of his own evidence. His motion for directed verdict does not preserve his sufficiency challenge for appeal. *See In re Johnson*, No. 09-08-00489-CV, 2009 Tex. App. LEXIS 7330, at **4-6 (Tex. App.—Beaumont Sept. 17, 2009, no pet.) (mem. op.). His motion for new trial does preserve error. *See id.* at *5. The record indicates that this motion was denied by operation of law. *See* Tex. R. Civ. P. 329b(c).

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).

Simmons was convicted of two sexual offenses for which he is currently incarcerated. Simmons testified that, while intoxicated on alcohol, he drove his cousin to

Village Creek and offered to pay her for sex. When she refused, Simmons became violent and sexually assaulted her. The victim attempted to escape. He apologized to the victim. Simmons pleaded guilty and received deferred adjudication. Simmons was on community supervision for this offense and in sex offender treatment when he committed a second offense. While intoxicated on alcohol, Simmons removed his girlfriend's clothing, forced her to take an XTC pill and drink alcohol, placed her in a headlock, pulled her hair, and sexually assaulted her. The victim tried to escape, cried, and asked Simmons to stop. Simmons pleaded guilty to the assault.

Simmons admitted using alcohol and marijuana, but testified that he is no longer addicted to either substance. He admitted that, in the past, he had trouble controlling his anger. He has been arrested at least eight times, has had over fifteen traffic violations, has received several disciplinary cases in prison, and has been investigated for bribery, money trafficking, and an inappropriate relationship with corrections staff. Regarding disciplinary cases for sexual misconduct toward female corrections officers, Simmons testified that he used masturbation as a substitute for sex.

Simmons has taken a cognitive intervention class, but has not received formal substance abuse treatment, anger management, or sex offender treatment. Simmons testified that he does not need substance abuse treatment because he plans to no longer use alcohol or drugs. Simmons admitted that he is a sex offender, but testified that he does not need sex offender treatment and has no risk of reoffending. Simmons testified

that he feels remorse for the two sexual offenses he committed and feels sympathy for the victims.

Dr. Jason Dunham, a licensed psychologist, practices forensic psychology. To conduct a behavioral abnormality evaluation, Dr. Dunham reviews the person's records, interviews the person, conducts actuarial tests, and sometimes performs collateral interviews. Dr. Dunham testified that experts in his field follow this methodology for forensic evaluations and, with the exception of collateral interviews, he followed this methodology when evaluating Simmons. He reviews criminal history, prison records, evaluations, parole summaries, medical records, and depositions, all typically reviewed and relied on by experts in his field. Dr. Dunham relied on the facts and data contained in these records when formulating his opinion. He conducted his evaluation in accordance with his training and experience and the accepted standards in the field of forensic psychology.

Dr. Dunham testified that Simmons has a total of seven victims, including the two sexual assault victims and five female corrections officers who were victims of Simmons's sexual misconduct. Simmons did not take responsibility for these offenses. Simmons has also engaged in other illegal non-sexual behavior for which he does not take responsibility.

Dr. Dunham explained that the more violence used to commit a sexual assault, the more deviant the offense: in Simmons's case, the violence was borderline sadism. Dr.

Dunham testified that Simmons's commission of an offense while on community supervision suggests that he either cannot control himself or does not care about the consequences. Dr. Dunham feels that Simmons believes he is owed sex and is entitled to have sex whenever he wants. Dr. Dunham testified that nothing seems to inhibit Simmons from victimizing women.

Using the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"), a book used by mental health professionals to diagnose clinical, personality, and psychotic disorders, Dr. Dunham diagnosed Simmons with paraphilia not otherwise specified ("NOS") nonconsent, personality disorder NOS with antisocial features, and alcohol and cannabis use by history. Dr. Dunham testified that paraphilia refers to the sexual disorder or deviancy and antisocial is about the "law breaking behavior and the criminal mindset[.]" Both antisocial personality disorder and paraphilia are chronic conditions. Dr. Dunham testified that Simmons will have a "tendency or a propensity for resuming [his substance abuse] when he gets out [of prison]."

Dr. Dunham testified that a risk assessment considers future risk. He identified the following risk factors associated with Simmons: (1) the number of victims, (2) the force and violence associated with the sexual offenses, (3) a pattern of sexual offending, (4) Simmons's young age, (5) the different types of sexual acts, (6) an offense that occurred in a public place, (7) offenses with elements of planning, (8) a sexual offense committed while on probation, while undergoing sex offender treatment, and while in a

relationship, (9) offenses against related and stranger victims, (10) sexual experiences at a young age, (11) numerous sexual partners, (12) personality disorder, (13) criminal versatility, (14) violence against women, (15) poor institutional adjustment, (16) lack of sex offender treatment, (17) lack of remorse, responsibility, and honesty, (18) victim stance, *i.e.*, blaming the victims, (19) poor appraisal of risk for reoffending, and (20) sexual entitlement.

Dr. Dunham also administered the Static-99 and the Minnesota Sex Offender Screening Tool-Revised (“MnSOST-R”) actuarial tests, which have been studied, peer reviewed, widely accepted in his field, and commonly used by forensic psychologists when performing behavioral abnormality evaluations. Dr. Dunham explained that the Static-99 estimates a person’s risk of reconviction for a sexual offense. Simmons scored a five on the Static-99, which places him in the moderate high risk category. Dr. Dunham explained that the MnSOST-R supplements the Static-99 and measures the risk of re-arrest for sexual offenses. Simmons scored a positive eight on the MnSOST-R, which places him in the high risk category. Using a “clinically adjusted actuarial approach,” which considers risk factors beyond the actuarial scheme, Dr. Dunham opined that Simmons is in the high risk category.

Dr. Dunham also administered the Hare Psychopathy Test. Dr. Dunham testified that Simmons has strong characteristics of psychopathy, but does not rise to the level of a complete psychopath.

Dr. Dunham described the “big picture” regarding Simmons:

[Simmons] . . . has sexually victimized women on a pretty consistent basis throughout his adult life, starting at age 19 continuing at current age of 31, who has had sex offender treatment and wasn't successful and doesn't think he needs it now even though he continues to victimize women, who doesn't think there's anything wrong with him, thinks he just needs to be faithful. He's not taking responsibility for what he did. And that he's at a very young age and probably pretty dangerous when he gets released.

Based on his education, training, experience, and procedures used, Dr. Dunham concluded that Simmons suffers from a behavioral abnormality that predisposes him to engage in predatory acts of sexual violence.

Dr. Lisa Clayton is a medical doctor with a specialty in psychiatry and a subspecialty in forensic psychiatry. To conduct a behavioral abnormality evaluation, she reviews records and interviews the person. She reviews referral packets, educational records, any sex offender treatment records, medical records, and penitentiary packets. These records are typically relied on by experts in her field for conducting behavioral abnormality evaluations, and Dr. Clayton relied on the facts and data found in these records when forming her opinion. Dr. Clayton conducts her evaluation in accordance with her training as a forensic psychiatrist and the accepted standards in the field of psychiatry.

Based on the DSM-IV, which is generally relied on by psychiatrists, Dr. Clayton diagnosed Simmons with sexual sadism, alcohol abuse, and personality disorder NOS with antisocial personality traits. Dr. Clayton testified that sexual sadism refers to

“intense recurrent arousing[] fantasies, sexual urges or behaviors . . . in which psychological and/or physical suffering, including humiliation of the victim, is sexually exciting to the person and that the person has acted on these.” Dr. Clayton testified that Simmons beat, threatened, and attempted to humiliate his victims. She testified that Simmons has a pattern of sexually sadistic behavior, including his offenses against female corrections officers. She explained that sexual sadism can be controlled, but is a lifelong diagnosis or trait. Dr. Clayton diagnosed Simmons with personality disorder NOS because of his inability to “conform to social norms[.]” Dr. Clayton testified that Simmons will be able to move around in society because he will not be perceived as a violent rapist. Dr. Clayton testified that Simmons’s inability to control his behavior in prison shows that he will have trouble controlling his deviancy when in the free world. She testified that personality disorder NOS is a lifelong condition. Dr. Clayton further testified that persons with alcohol abuse may exhibit more impulsive behavior.

Dr. Clayton observed several risk factors associated with Simmons: (1) antisocial personality traits, (2) lack of victim empathy, remorse, responsibility, and honesty (3) history of assaultive behavior, (4) inability to control sexual acting out behaviors against women, (5) Simmons’s young age, (6) commission of an offense while intoxicated, while on probation, and while undergoing sex offender treatment (7) criminal versatility, (8) widening scope of victims, (9) lack of understanding of risk, and (10) lack of sex

offender treatment. She testified that family support and intelligence are positive factors for Simmons.

Dr. Clayton testified that Simmons minimizes his offenses. Dr. Clayton testified that Simmons's criminal history shows that he is a violent rapist and, he has escalated from victimizing a relative and a girlfriend to strangers, *i.e.*, corrections officers. She testified that Simmons is unable to control his need to act out sexually, so once incarcerated, Simmons used emotional violence and humiliation to dominate his victims. Dr. Clayton testified that Simmons has become bolder because he is acting out aggressively toward corrections officers, when he knows that he will be identified. She has not seen Simmons exhibit any of the characteristics or behaviors required to show change. Simmons's non-sexual offenses show that if he is angry, he will act out violently, and that he is criminally versatile. Based on her education, training, experience, and procedures used, Dr. Clayton concluded that Simmons had a behavioral abnormality that predisposes him to commit predatory acts of sexual violence.

Simmons argues that the testimony of Dr. Dunham and Dr. Clayton is conclusory and non-probative because neither expert showed how the data supported their opinions. He further contends that Dr. Dunham's use of actuarials is non-probative because it "is an attempt to infer future actions of [Simmons] from the past actions of others."

"Opinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact 'more probable or less

probable.’” *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009) (quoting Tex. R. Evid. 401). “Bare, baseless opinions will not support a judgment even if there is no objection to their admission in evidence.” *Id.* “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.” *Id.* at 818. “But if no basis for the opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection.” *Id.* “[W]hen a reliability challenge requires the court to evaluate the underlying methodology, technique, or foundational data used by the expert, an objection must be timely made so that the trial court has the opportunity to conduct this analysis.” *Id.* at 817; *see In re Commitment of Barbee*, 192 S.W.3d 835, 843 (Tex. App.—Beaumont 2006, no pet.).

Simmons’s complaint regarding actuarials concerns the foundational data used or relied on by Dr. Dunham when reaching his opinion. Simmons did not object to Dr. Dunham’s use of actuarials. To the extent Simmons challenges the reliability of Dr. Dunham’s testimony, his complaint is not preserved for appeal. *See Pollock*, 284 S.W.3d at 816-17; *see also Barbee*, 192 S.W.3d at 843; *In re Commitment of Burnett*, No. 09-09-00009-CV, 2009 Tex. App. LEXIS 9930, at **4-5 (Tex. App.—Beaumont Dec. 31, 2009, no pet.) (mem. op.).

The testimony of Dr. Dunham and Dr. Clayton is not conclusory. Both Dr. Dunham and Dr. Clayton are licensed in their respective fields. *See Burnett*, 2009 Tex. App. LEXIS 9930, at *14. They interviewed Simmons and reviewed records regarding Simmons's background, offenses, and incarceration. *See id.* Dr. Dunham administered actuarial tests and testified that these types of tests are generally accepted in his field. The experts relied on the types of records relied on by experts in their respective fields and performed their evaluations in accordance with their training as professionals in their respective fields. *See id.* Dr. Dunham and Dr. Clayton both based their opinions on the facts and data gathered from the records they reviewed, their interviews with Simmons, the risk assessments they conducted, or the actuarial tests administered. *See id.* They explained in detail the facts and evidence they found relevant in forming their opinions and how those facts played a role in their evaluations. *See id.* Both experts concluded that Simmons suffers from a behavioral abnormality as defined by the SVP statute. *See id.* Their testimony is not so conclusory as to be completely lacking in probative value. *See id.*

Simmons further complains that Dr. Dunham and Dr. Clayton failed to quantify his risk of reoffending. Simmons cites no authority for this argument. *See* Tex. R. App. P. 38.1(i). In *In re Commitment of Johnson*, No. 09-08-00489-CV, 2009 Tex. App. LEXIS 7330 (Tex. App.—Beaumont Sept. 17, 2009, no pet.) (mem. op.), Johnson complained that “neither of the State’s experts placed any numeric percentage on

predicting the likelihood of sexual violence.” *Johnson*, 2009 Tex. App. LEXIS 7330, at **8, 10. We explained that the experts used actuarial instruments to “evaluate the probability of either re-conviction or re-arrest based upon statistical rates across populations.” *Id.* at *10. The experts scored the tests and explained the assessment to the jury. *Id.* Both experts applied the DSM-IV to Johnson and explained their diagnosis of Johnson. *Id.* at **10-11. Accordingly, the “experts did apply evaluations validated by peer-reviewed research.” *Id.* at *11. Neither expert “determined that Johnson was likely to commit an act of sexual violence based upon the mere fact of his conviction; rather, both referred to specific examples of behavior by Johnson that were either self-reported by Johnson in sex offender treatment or through interviews or details of the offenses that were contemporaneously reported by his victims.” *Id.* Because the same is true of the experts in this case, we reject Simmons’s contention. *See id.*

In addition to the experts’ opinions that Simmons has a behavioral abnormality that predisposes him to commit predatory acts of sexual violence, the jury heard evidence of Simmons’s admissions, risk factors, actuarial test scores, criminal history, violent sexual assaults against women, sexual misconduct towards female corrections officers, victimization of women, chronic antisocial personality disorder and paraphilia NOS, sadistic behavior, substance abuse history that affects impulsivity, and inability to control his behavior. The jury could reasonably conclude that Simmons has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See*

Burnett, 2009 Tex. App. LEXIS 9930, at *13; *see also In re Commitment of Almaguer*, 117 S.W.3d 500, 506 (Tex. App.—Beaumont 2003, pet. denied). A conclusion that Simmons is likely to engage in a predatory act of sexual violence directed toward individuals for the primary purpose of victimization is implicit in this finding. *See In re Commitment of Bailey*, No. 09-09-00353-CV, 2010 Tex. App. LEXIS 6685, at **12-14 (Tex. App.—Beaumont Aug. 19, 2010, no pet.) (mem. op.); *see also In re Commitment of Grinstead*, No. 09-07-00412-CV, 2009 Tex. App. LEXIS 228, at *16 (Tex. App.—Beaumont Jan. 15, 2009, no pet.) (mem. op.); *Almaguer*, 117 S.W.3d at 505.

Reviewing all the evidence in the light most favorable to the verdict, a rational jury could have found, beyond a reasonable doubt, that Simmons has a behavioral abnormality that predisposes him to commit a predatory act of sexual violence; therefore, the evidence is legally sufficient. *See Mullens*, 92 S.W.3d at 885, 887; *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002). 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 one, two, and three.

Partiality

In issue four, Simmons contends that the trial court abused its discretion by showing partiality during trial.³

³ Simmons's motions to recuse the trial court judge were denied.

“A judge should be fair and impartial and not act as an advocate for any party” or as “any party’s adversary.” *Metzger v. Sebek*, 892 S.W.2d 20, 38 (Tex. App.—Houston [1st Dist.] 1994, pet. denied). “The judge is responsible for the general conduct and management of the trial.” *Id.* “[A] trial court may properly intervene to maintain control in the courtroom, to expedite the trial, and to prevent what it considers to be a waste of time.” *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). “[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion,” and opinions the judge forms during a trial do not necessitate recusal ‘unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.’” *Id.* at 240 (quoting *Liteky v. U.S.*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994)). “Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.” *Id.* “Further, ‘not establishing bias or partiality . . . are expressions of impatience, dissatisfaction, annoyance, and even anger. . . . A judge’s ordinary efforts at courtroom administration -- even a stern and short-tempered judge’s ordinary efforts at courtroom administration -- remain immune.’” *Id.* (quoting *Liteky*, 510 U.S. at 555-56) “[O]bjection to a trial court’s alleged improper conduct or comment must be made when it occurs if a party is to preserve error for appellate review, unless the conduct or comment cannot be rendered harmless by proper instruction.” *Id.* at 241; *In re Commitment of Vanzandt*, 156 S.W.3d 671, 674 (Tex. App.—Beaumont 2005, no pet.).

Simmons cites numerous instances in which the trial court allegedly showed partiality by criticizing his trial counsel, assisting the State with its case, treating trial counsel unequally, speaking aggressively to his trial counsel, and disrespecting his trial counsel. Simmons contends that the trial court's conduct and comments were biased and prejudiced both the venire and jury against him. Simmons did not object to the allegedly improper conduct and comments by the trial court. Our review of the trial court's allegedly improper conduct and comments, in the context of the entire record, does not show that Simmons was denied a fair trial. *See Liteky*, 510 U.S. at 555-56; *see also Francis*, 46 S.W.3d at 241; *In re Commitment of Fields*, No. 09-09-00005-CV, 2009 Tex. App. LEXIS 9548, at **12-13 (Tex. App.—Beaumont Dec. 17, 2009, pet. denied) (mem. op.). Under the circumstances of this case, we do not find any error that requires reversal. *See Francis*, 46 S.W.3d at 241; *see also Fields*, 2009 Tex. App. LEXIS 9548, at **13-14; *Barbee*, 192 S.W.3d at 848; *Vanzandt*, 156 S.W.3d at 674. We overrule issue four. Having overruled Simmons's four issues, we affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on December 27, 2010
Opinion Delivered June 16, 2011

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