In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00127-CV

IN RE COMMITMENT OF JOE NATHAN POLK

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 09-07-06844-CV

MEMORANDUM OPINION

The State of Texas filed a petition to civilly commit Joe Nathan Polk as a sexually violent predator under the Sexually Violent Predator Act. *See* Tex. Health & Safety Code Ann. §§ 841.001-.150 (West 2010). A jury found Polk suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. *Id.* § 841.003(a). The trial court entered final judgment and an order of civil commitment under the Act. We affirm the trial court's judgment.

VOIR DIRE

In his first issue, Polk argues that the trial court abused its discretion during voir dire

by prohibiting the defense attorney from telling the jury that this was a civil commitment case.[1] In a pretrial hearing, the following discussion took place regarding the State's motion in limine:

> THE COURT: . . . "Any mention of the result or consequences of a jury's answer to the question posed in the jury charge."
>
> Let me [] read No. 9 here, "Any mention of the civil commitment of sexually violent predators including, but not limited to, costs to taxpayers; conditions; what constitutes a violation of conditions; Defendant's ability or inability to comply with conditions" --
>
> [Defense counsel]: I'll tell you what we're concerned about here is only this, is that we have no intention of saying to a jury: "The consequence of your answering this question is X." We're not going to do that. We agreed that's not a problem.
>
> We're not going to talk about all of this stuff about the cost . . . . But in terms of whether or not the existence of a civil commitment comes out that may or may not come out.

[1] Polk also argues that the trial court abused its discretion by prohibiting defense counsel from telling the jury during opening statement, after the jury was selected, that this was a civil commitment proceeding. However, no objections were made during defense counsel's opening statement to the jury. Polk complains of the trial court's ruling on the State's motion in limine. A trial court's ruling on a motion in limine is a preliminary ruling that preserves nothing for review. *Hartford Accident & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963); *Kaufman v. Comm'n for Lawyer Discipline*, 197 S.W.3d 867, 873 (Tex. App.—Corpus Christi 2006, pet. denied); *Fort Worth Hotel Ltd. P'ship. v. Enserch Corp.*, 977 S.W.2d 746, 757 (Tex. App.—Fort Worth 1998, no pet.). Additionally, Polk's record references refer us to the statement defense counsel made to the venire panel at the beginning of voir dire. Polk cites no legal authority in support of his position that the trial court improperly limited his opening statement to the jury. *See* Tex. R. App. P. 38.1(h), (i). To the extent Polk argues that the trial court improperly limited his opening statement made at trial, this issue has not been properly briefed or preserved. Tex. R. App. P. 33.1(a), 38.1(h), (i).

. . . .

THE COURT: Okay. Well, don't -- I mean, I understand it has come out before during trial accidentally. And when I read the jury charge I state it twice because it's in the actual jury charge, and the jury does get to see it. But, I mean, if you tell the jury that -- don't tell them what -- I mean, this is whether or not he has a behavioral abnormality. That's the issue in front of the jury. Okay?

. . . .

THE COURT: . . . Let's make sure, especially during voir dire, that you don't use those words [civil commitment]. Okay? Because that opens up a gigantic can of worms that would have to require an explanation to the jury. Okay?

[Defense counsel]: Well, Your Honor, I may have a disagreement with you, but we'll handle the objections necessary.

THE COURT: No. Listen to me. When you're up there during voir dire I do not want to hear the words "civil commitment" come out of your mouth. Okay? I'm ordering you to not do that. If you do that I'm going to hold you in contempt, because then you're going to have problems with the jury. If you want to make a record of what you want to do, do it right now but do it outside the presence of the jury. . . .

[Defense counsel]: Your Honor, I certainly have no intention of undermining this process. I do believe that this jury is entitled to know what the case is about. And it's just like if we were talking about an arson case we get to say it's an arson case. This is a civil commitment case. I think we get to use the words "civil commitment." I'm asking the Court for permission to use the words "civil commitment."

THE COURT: And I'm denying that.

Polk argues on appeal that the trial court abused its discretion by restricting voir dire, which denied Polk effective assistance of counsel and violated his constitutional

rights under the United States and Texas Constitutions. Specifically, Polk contends the trial court improperly limited the areas of questioning by defense counsel during voir dire, preventing counsel from discovering possible bias and intelligently using his challenges for cause.

Voir dire examination protects the right of an accused to an impartial jury by exposing potential improper juror biases that form the basis of statutory disqualification. *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 749 (Tex. 2006). The primary purpose of voir dire is to question potential jurors about specific views that may prevent or substantially impair them from properly performing jury duty. *Id.* In civil cases in Texas, the trial court has broad discretion in conducting voir dire. *Id.* at 753. Counsel's latitude to question the venire panel, while broad, is subject to reasonable restraints by the trial court. *Id.* at 750 (citing *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 92 (Tex. 2005)). The test for determining whether a trial court erred in placing restrictions on counsel's voir dire is an abuse of discretion. *See Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 707 (Tex. 1989) (op. on reh'g). A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998); *see also Babcock*, 767 S.W.2d at 709.

In order for an appellate court to determine whether a trial court abused its discretion by restricting voir dire, the complaining party must "'adequately apprise[] the trial court of the nature of the inquiry'" they wish to make of the venire panel. *Hyundai*,

189 S.W.3d at 758 (quoting *Babcock*, 767 S.W.2d at 707); *Odom v. Clark*, 215 S.W.3d 571, 574 (Tex. App.—Tyler 2007, pet. denied); *In re Commitment of Barbee*, 192 S.W.3d 835, 847 (Tex. App.—Beaumont 2006, no pet.) ("Because Barbee's counsel did not propose alternative questions, or articulate a desired line of inquiry, we cannot know whether the trial judge would have allowed proper questions[.]"). The Court in *Hyundai* explained as follows:

> If it is necessary to discuss the facts in the case to probe for potential biases, counsel must frame corresponding inquiries to avoid jury confusion and ensure that the question does not seek to preview the verdict. When the trial court determines that a proffered question's substance is confusing or seeks to elicit a pre-commitment from the jury, counsel should propose a different question or specific area of inquiry to preserve error on the desired line of inquiry; absent such an effort, the trial court is not required to formulate the question.
>
> Thus, to preserve a complaint that a trial court improperly restricted voir dire, a party must timely alert the trial court as to the specific manner in which it intends to pursue the inquiry. Such a requirement provides the trial court with an opportunity to cure any error, obviating the need for later appellate review, and further allows an appellate court to examine the trial court's decision in context to determine whether error exists, and if so, whether harm resulted.

Hyundai, 189 S.W.3d at 758 (footnotes omitted); *see also* Tex. R. App. P. 33.1.

Generally, where counsel merely states a subject area in which he wishes to propound questions, "but fails to present the trial court with the specific questions he wishes to ask, the trial court is denied an opportunity to make a meaningful ruling and error is not preserved." *Odom*, 215 S.W.3d at 574 (citing *Caldwell v. State*, 818 S.W.2d 790,

794 (Tex. Crim. App. 1991)); *see also Sells v. State*, 121 S.W.3d 748, 756 (Tex. Crim. App. 2003) ("To preserve error, appellant must show that he was prevented from asking *particular* questions that were proper. That the trial court generally disapproved of an area of inquiry . . . is not enough[.]"). However, "[t]here is no requirement to place specific questions in the record if the nature of the questions is apparent from the context." *Babcock*, 767 S.W.2d at 708 (concluding that language in the motions in limine along with the recorded voir dire of one of the excused jurors on the subject matter in issue made it "obvious" what questions the Babcocks sought to ask the venire panel).

In this case, Polk did not accept the trial court's invitation to make a record of those questions he would have asked. Further, Polk did not re-urge his objection to the restriction on voir dire at any time during or after jury selection. The record does not reflect what questions Polk would have asked the venire panel regarding the topic of civil commitment. Because Polk's potential questions were neither before the trial court nor apparent from the context of Polk's pretrial request, Polk has failed to preserve this issue for review. *See Babcock*, 767 S.W.2d at 708; *Odom*, 215 S.W.3d at 575; *Barbee*, 192 S.W.3d at 847. We overrule issue one.

EXPERT TESTIMONY

In issue two, Polk argues that the expert testimony submitted by the State was not reliable; therefore, the evidence was legally insufficient to prove beyond a reasonable doubt that Polk suffers from a behavioral abnormality. At trial, the State submitted

testimony from two experts, Dr. Jack Randall Price, a psychologist, and Dr. David Self, a psychiatrist. On appeal, Polk contends that the State failed to establish that Dr. Price "had sufficient expertise and adequate training and experience within the relevant field of evaluating and treating sex offenders." Additionally, Polk argues that both experts failed to tie their opinions to the facts of the case. We review the trial court's determination regarding the admission of expert testimony under an abuse of discretion standard. *See State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 870 (Tex. 2009).

When "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify" at trial. Tex. R. Evid. 702. Whether an expert witness is qualified under Rule 702 is a preliminary question to be determined by the trial court. Tex. R. Evid. 104(a); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998). The party offering the evidence bears the burden to prove the expert qualifications. *Gammill*, 972 S.W.2d at 718. "The offering party must demonstrate that the witness 'possess[es] special knowledge as to the very matter on which he proposes to give an opinion.'" *Id*. (citing *Broders v. Heise*, 924 S.W.2d 148, 152-53 (Tex. 1996) (quoting 2 Ray, *Texas Law of Evidence: Civil and Criminal* § 1404 at 32 (Texas Practice 3d ed. 1980)). A trial court's acceptance of a witness's qualifications as an expert is reviewed under an abuse of discretion standard. *Id.* at 718-19.

In addition to showing an expert witness is qualified, Rule 702 requires the proponent of expert testimony to show the testimony is relevant and is based upon a reliable foundation. *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995); *see also TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 234 (Tex. 2010). "To be relevant, the expert's opinion must be based on the facts; to be reliable, the opinion must be based on sound reasoning and methodology." *Cent. Expressway*, 302 S.W.3d at 870 (citing *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002)). When a party challenges the reliability of expert testimony, courts "'should ensure that the [expert's] opinion comports with the applicable professional standards.'" *Hughes*, 306 S.W.3d at 235 (quoting *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001)).

Under Texas law, various factors (the "Robinson factors") are considered when assessing the reliability of expert testimony. *See Gammill*, 972 S.W.2d at 720 (citing *Robinson*, 923 S.W.2d at 556-57).[2] However, the Texas Supreme Court has recognized that some cases involve situations that are not susceptible to scientific analysis, and the *Robinson* factors may not apply. *See id.* at 724; *see also Taylor v. Tex. Dep't of Protective & Regulatory Servs.*, 160 S.W.3d 641, 650 (Tex. App.—Austin 2005, pet. denied)

[2] The factors set forth in *Robinson* include, but are not limited to the following: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557.

("[S]ome cases involve situations that are not susceptible to scientific analysis, and the *Robinson* factors are not appropriate and do not strictly govern in those instances."); *see also Hughes*, 306 S.W.3d at 235 ("[T]hese factors are non-exclusive, and [] they do not fit every scenario."). The Court of Criminal Appeals adopted a variant test for what it has termed "soft" sciences, such as the social sciences. *See Nenno v. State*, 970 S.W.2d 549, 560-61 (Tex. Crim. App. 1998), *overruled on other grounds by State v. Terrazas*, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999). When assessing the reliability of an expert's opinion in fields of social science, the *Nenno* Court concluded that courts should consider whether: (1) the field of expertise is a legitimate one; (2) the subject matter of the expert's testimony is within the scope of that field; and (3) the expert's testimony properly relies upon the principles involved in that field of study. *Id.* at 561. The *Nenno* factors have been applied to analyze testimony related to soft science in civil cases. *See, e.g.*, *Taylor*, 160 S.W.3d at 650-51.

Polk's trial objections challenged the methodology of the experts.[3] Polk did not object at trial that Dr. Price was unqualified; therefore, the challenge to Dr. Price's qualifications is not preserved for review. Tex. R. App. P. 33.1. Polk does not reassert

[3] At trial, Polk objected to the expert testimony of Drs. Price and Self on the ground that it was not reliable because: (1) the theory has not been tested; (2) the experts had not testified regarding potential rate of error; (3) the experts had not testified that the theory has been subject to peer review; (4) the experts had not testified that the theory is generally accepted in the scientific community; and (5) the theory relies too heavily on the experts' subjective opinions. The trial court overruled the objections.

his specific trial objections on appeal. Rather, Polk argues that the testimony of Drs. Price and Self is unreliable because it (1) failed to provide relevant evidence that assisted the jury; (2) did not tie facts to the experts' diagnoses and opinions; and (3) was conclusory and not probative on its face.

"To be relevant, the proposed testimony must be 'sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" *Robinson*, 923 S.W.2d at 556 (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)). Evidence that has no relationship to any of the issues in the case does not satisfy the requirement that the testimony be of assistance to the jury and is irrelevant. *Id.* Additionally, the Supreme Court has held that "conclusory opinions are legally insufficient evidence to support a judgment even if the party did not object to the admission of the testimony." *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009). If no basis is offered for an expert's opinion or if the basis offered provides no support, the opinion is considered conclusory and not probative evidence. *Id.* at 818. "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.'" *Id.* (quoting *Coastal Transp. Co. v. Crown Cent. Petrol. Corp.*, 136 S.W.3d 227, 232 (Tex. 2004)).

Dr. Price testified regarding the basis of his opinion that Polk suffers from a behavioral abnormality. Dr. Price testified that he interviewed Polk for approximately three hours, performed actuarial tests, and reviewed records normally relied upon by

experts in his field. Dr. Price explained that he performed his assessment in accordance with his training as a psychologist and in accordance with accepted standards in the field of psychology. Dr. Price stated that the field of forensic psychology has been accepted as legitimate by the American Psychological Association and the American Board of Professional Psychology. Dr. Price further testified that the scope of his testimony was within the scope of forensic psychology and that he utilized the principles of forensic psychology in forming his opinion.

Dr. Price testified that the records established two criminal convictions for sexual offenses by Polk. Dr. Price discussed the details of those offenses as set forth in the records. Dr. Price explained to the jury that Polk's account of two sexual assault offenses has varied considerably over the years. With regard to the first sexual offense, Polk told Dr. Price he did not know what happened, but at other times had stated that he did not touch the victim or that the sexual intercourse was consensual. A jury found Polk guilty of this offense and sentenced him to twenty years in prison. He served two years and was then paroled. He lived in a halfway house for six months and then absconded. Dr. Price related to the jury that Polk's parole violations were significant because they indicate he cannot control his behavior, even when the consequences are immediate.

With regard to the second offense, Polk told Dr. Price the sexual intercourse was consensual. However, Dr. Price explained that the records showed that Polk broke into the victim's apartment, threatened her and her infant child with a butcher knife, slapped

her, forced her to have sexual intercourse twice, and ultimately passed out after taking drugs, at which time the victim grabbed her child and ran from the apartment completely unclothed. Polk pled guilty to this offense and was sent back to prison. Dr. Price stated that the status of the victims of the sexual assaults, a homeless woman and a prostitute, factored into his opinion because they were "opportunistic people to victimize," Polk showed no remorse for the offenses, and Polk disregarded their status as humans with feelings.

Dr. Price explained to the jury that each actuarial test looks at certain factors to determine whether or not a person is likely to reoffend. Dr. Price told the jury that he performed the Static-99 and the MnSOST-R (Minnesota Sex Offender Screening Test-Revised) actuarial tests and explained the type of factors each test takes into account. Dr. Price testified that the Static-99 and the MnSOST-R have been accepted in the field of forensic psychology and subjected to peer review. Dr. Price stated that Polk scored a "3" on the Static-99, which put him in the moderate to low risk of reoffending. Polk scored a "10" on the MnSOST-R, which put Polk at a high level of risk for reoffense. According to Price, both actuarials have been tested for use in the assessment of whether someone has a behavioral abnormality under the Texas Health and Safety Code. Price explained that he used the actuarial tests as another piece of data considered when formulating his opinion.

Dr. Price testified that he also performed the Hare Psychopathy Checklist. Polk scored a "17 out of 40," which meant Polk was not a psychopath. However, Dr. Price

observed psychopathic traits that he found to be significant. Dr. Price found Polk to have no remorse for his crimes or empathy for his victims, a trait that factored into Price's opinion that Polk suffers from a behavioral abnormality. Dr. Price also explained that Polk's substance abuse and lack of ability to control his behavior was a concern that also factored into his analysis. Dr. Price considered Polk to be a pathological liar, which is a psychopathic trait.

Dr. Price also discussed positive factors he observed in Polk, which would reduce the risk of reoffense, such as his age and lack of psychiatric history. Dr. Price noted that the records indicated that Polk claimed to have heard voices and had other psychotic symptoms. However, Dr. Price believed Polk to be "malingering," i.e., faking mental illness for some external incentive. Dr. Price explained how this finding factored into his opinion. Finally, Dr. Price testified that he used the DSM-IV (Diagnostic and Statistical Manual for Mental Disorders-Fourth Edition), which is used to diagnose mental and personality disorders, to diagnose Polk with paraphilia not otherwise specified nonconsensual, polysubstance dependence in remission due to a controlled environment, and personality disorder with antisocial features. Dr. Price explained each diagnosis to the jury.

Dr. Price also identified the following risk factors with regard to Polk: (1) the failure to follow conditions of parole in the past, (2) alcohol and drug abuse, (3) use of physical force with the victims, (4) the denial of the sexual offense behavior, (5) lack of

acceptance of responsibility for the sexual conduct, (6) lack of empathy, (7) traits of antisocial personality, (8) commission of a sex offense in a relatively public place, (9) relatively poor employment history in the free world, (10) a bad disciplinary history while incarcerated, and (11) relatively low levels of intelligence and education. Dr. Price elaborated on a couple of these factors explaining in detail how each played a role in his assessment. Dr. Price testified that in his opinion, Polk suffers from a behavioral abnormality, as that term is defined in the Texas Health and Safety Code.

Dr. Self also testified regarding the basis of his opinion that Polk suffers from a behavioral abnormality. Dr. Self testified that in making his assessment he met with Polk for approximately two hours, and reviewed records normally relied upon by experts in the field of forensic psychiatry. Self testified that this methodology is followed by experts in his field in performing forensic evaluations. Dr. Self explained that in reviewing the records as part of this type of assessment he was "not just interested in how somebody looks at one point in time[,] [he's] interested in a longitudinal view of their life and things that are more stable and enduring, patterns of behavior." Dr. Self stated that his evaluation was done in accordance with his training as a psychiatrist and in accordance with the accepted standards in the field of forensic psychiatry.

Dr. Self told the jury that he diagnosed Polk based on diagnostic criteria found within the DSM-IV, which is typically used in his field. Dr. Self explained that Polk has a history of polysubstance dependence, personality disorder not otherwise specified "with

very prominent antisocial tendencies[,]" and paraphilia not otherwise specified. Dr. Self explained his diagnoses to the jury.

Dr. Self explained that Polk has two convictions for sexual offenses. Dr. Self told the jury he saw traits of sexual sadism in reviewing the offense reports of Polk's sexual assault convictions. Specifically, Dr. Self explained that "the central theme of sexual sadism is suffering" and in both offenses the victims were "threatened and put in fear of their lives and were emotionally tortured in that fashion." Dr. Self explained that he considered Polk to be "a serial rapist" and did not believe Polk's accounts of what occurred during the offenses. Dr. Self stated, "there was tremendous inconsistency across everything he told me and everything he told everybody else. [Polk's] accounting for various things in his life from situation to situation was not the same ever." Dr. Self explained to the jury how this played a role in his assessment of Polk.

Dr. Self found significant that the records showed Polk was also inconsistent with regard to his sexual orientation. Dr. Self stated that he found conflict between Polk's stated sexual orientation and his sexual fantasies and explained to the jury how that related to his opinion that Polk suffers from a behavioral abnormality. Dr. Self characterized Polk's "institutional adjustment" as "not that great." Dr. Self stated that Polk had nineteen disciplinary cases, thirteen of which involved fights with other inmates. Dr. Self explained the significance of feeling guilt or remorse towards a victim and stated that Polk did not exhibit remorse toward his victims. Dr. Self stated that Polk's "proclivity for

using aggression to get what he wants and specifically this sexual sadistic acting out" makes Polk a danger to society. Dr. Self testified that in his opinion Polk suffers from a behavioral abnormality, as defined by the Texas Health and Safety Code.

The record establishes that both experts were experienced and licensed in their respective fields. Both experts interviewed Polk and reviewed records typically relied upon by experts in their fields, including offense records and prison records. Both experts conducted their assessments in accordance with the accepted standards within their fields. Both experts explained in detail the factors that were significant in their assessment and how those factors played a role in their assessment. The opinions of Drs. Price and Self have a reliable basis in the record. Drs. Price and Self connected the data relied upon (the records reviewed, the interview, and actuarial tests) with their opinions. 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 881, 887 (Tex. App.—Beaumont 2002, pet. denied). The opinions offered by the State's experts were reliable and adequately tied to relevant facts. The evidence is legally sufficient to support the verdict. We overrule issue two.

Having overruled both issues on appeal, we affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on January 24, 2011
Opinion Delivered February 24, 2011

Before Gaultney, Kreger, and Horton, JJ.