

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00228-CV

IN RE COMMITMENT OF CHARLES RAYMOND SPRAGUE

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 09-10-09477 CV

MEMORANDUM OPINION

The trial court ordered the civil commitment of appellant Charles Raymond Sprague after the jury found him to be a sexually violent predator (“SVP”). *See* Tex. Health & Safety Code Ann. §§ 841.001-841.150 (West 2010). In this appeal, Sprague raises five issues for our consideration. Specifically, Sprague argues that the evidence was legally and factually insufficient to show that he had a serious behavioral abnormality “that distinguishes him from the dangerous but typical recidivist convicted in an ordinary criminal case[;]” the State “did not offer any assurance of the validity of its experts’ testimony; the trial “was so infected by prejudicial evidence and improper argument that he was denied a fair trial[;]” and the civil commitment order

“unconstitutionally delegates judicial authority to the Council on Sex Offender Treatment.” We affirm the trial court’s judgment.

BACKGROUND

Dr. Jason Dunham, a licensed forensic psychologist, testified that when he conducts an evaluation of an alleged SVP, he receives a file containing information about the person, such as descriptions of the offenses the person has committed, time served, police reports, victim statements, court judgments and documents, parole case summary evaluations, medical records, prison records, and deposition transcripts. Dunham explained that he relied upon the facts and data contained in such records in forming the basis of his opinion. According to Dunham, experts in his field rely upon the same type of records in conducting forensic examinations.

Dunham explained that he prepares a list of questions he intends to ask during his interview with the person. Dunham testified that he conducts a one-on-one interview with the person, which typically lasts for two-and-a-half to three hours. Dunham testified that after the interview, he sometimes gathers additional information by conducting collateral interviews with other individuals. Dunham then administers two to four tests to the person, gathers the information into a “case formulation,” and gives his opinion about the person. When asked whether that methodology is followed by experts in his field who are performing forensic evaluations, Dunham responded, “I would say in general, yes.” Dunham testified that he followed that methodology in evaluating Sprague, except

he did not conduct any collateral interviews. Dunham explained that he evaluated Sprague in accordance with accepted standards in the field of forensic psychology. Upon completing his evaluation of Sprague, Dunham concluded that Sprague suffers from a behavioral abnormality that predisposes him to commit predatory acts of sexual violence.

Dunham explained that the facts of Sprague's offenses were important in evaluating Sprague because past behavior is important in predicting future behavior. According to Dunham, Sprague had two victims, and he committed aggravated sexual assault with a deadly weapon and aggravated kidnapping with intent to commit sexual assault. Dunham explained that Sprague's first offense occurred on April 1, 1990, and it involved the aggravated kidnapping of L., a college acquaintance of Sprague's. L. agreed to give Sprague a ride, and shortly after Sprague entered L.'s car, Sprague produced a gun, held it to L.'s head, and instructed her to drive to an isolated area.

When they reached the location, Sprague ordered L. to lock the doors, and he attempted to penetrate L. vaginally after putting L. on his lap. Sprague then took L. out of the car, laid L. on the hood of the car, and attempted to penetrate L. both vaginally and anally. Sprague then took L. back into the car, forced her to perform oral sex, and then penetrated her. Dunham testified that "there w[ere] just different sexual positions that he kept putting her in, and he was feeling all over her body at the same time." Dunham testified that L. asked Sprague how Sprague usually got his victims, and Sprague responded that he usually follows them around at the mall, "gets into their car[,] and then

shows them the gun when they get into the car.” Eventually, Sprague took L. to a convenience store, and a cashier called the police.

Dunham testified that when he interviewed Sprague concerning the offense, Sprague denied vaginal or anal penetration, but he admitted that he forced L. to perform oral sex, that he showed L. a gun, and that he used force. Dunham explained that upon conviction of the offense, Sprague was sentenced to seven years in prison. According to Dunham, Sprague received parole after serving three years of his sentence, and Sprague “was on parole only about three months when he committed his next sex offense.”

Dunham testified that Sprague’s next offenses were aggravated sexual assault with a deadly weapon and aggravated kidnapping. According to Dunham, Sprague was paroled from his first offense in July of 1995, and he committed the next offenses in October of 1995. C., the victim of Sprague’s offense, was one of Sprague’s co-workers. Sprague asked C. to give him a ride home after work, and C. agreed to do so. When Sprague entered C.’s vehicle, he pulled a gun out of his backpack, put the gun to C.’s head, and instructed C. to continue driving and to do what he said if she wanted to see her daughter again. Sprague directed C. to a secluded area, instructed her to stop the car and turn off the ignition, and Sprague instructed the victim to remove her shirt and bra. Sprague fondled C., forced C. to perform oral sex, and penetrated C. with his fingers.

When Dunham interviewed Sprague, Sprague told Dunham that he had intended to sexually assault C., and Sprague admitted that he used the gun and forced the victim to

perform sexual acts. Dunham testified that during Sprague's deposition, Sprague "pretty much admitted to the gun and to the force. But . . . he denied that he had intended to rape her until they were in the car, and then he said that he intended to steal the car." According to Dunham, Sprague's parole for the first offense was revoked after Sprague pled guilty to the second offense, and Sprague received fifteen years for both counts of the offense against C.

Dunham testified that he diagnosed Sprague with paraphilia not otherwise specified, with sexually sadistic features, as well as antisocial personality disorder, alcohol abuse, and marijuana abuse. According to Dunham, the paraphilia diagnosis means "that [Sprague] has a problem with being aroused or behaviors, fantasies, urges of having nonconsensual sex[,]” and “[t]he sexually sadistic features of that have to do with the extreme use of violence, the weapons, the fear that he's instilled in his victims by putting the gun to their head, things kind of above and beyond what's necessary to get somebody to comply with the sexual assault.”

Dunham explained that antisocial personality disorder describes a "person who has a criminal mind-set, the bad boy, the person who breaks the law, violates the norms of society, [has] disregard for the safety of others, gets into fights, lies, lacks remorse or concern for other people.” According to Dunham, Sprague "meets pretty much all the features [of antisocial personality disorder] clinically.” Dunham explained that Sprague admitted to committing acts of vandalism and getting into fights at a young age, as well

as using drugs and stealing from other people as an adolescent. According to Dunham, Sprague's criminal history involved the offenses against L. and C., as well as public intoxication, stealing and selling stolen property, and use of Ecstasy, LSD, cocaine, and marijuana.

According to Dunham, the pervasive nature of Sprague's criminal conduct, which included both violent and non-violent offenses, is indicative of antisocial personality disorder, as is Sprague's history of aggression. Dunham explained that while incarcerated, Sprague had twenty-one disciplinary cases, seven of which were considered to be major cases. Dunham testified that four or five of Sprague's disciplinary cases involved violence, and that Sprague had one violent disciplinary case after he completed an anger management course.

According to Dunham, others who have evaluated Sprague within approximately the last year described Sprague as "verbally abusive, hostile, easily angered, [and] easily agitated." Dunham characterized these descriptions of Sprague as follows:

[I]t's evidence that his antisocial personality disorder is continuing, it's ongoing. I wouldn't have expected it to change. That's not to say he doesn't have the ability to behave properly. And I think that's probably what's happened. I think he's understood the seriousness of what's going on right now, and he totally has the ability to sit in front of an evaluator and be polite. And he was polite and cooperative with me.

Dunham testified that he found it significant that Sprague has not had any sex offender treatment during his incarceration. According to Dunham, Sprague's drug and alcohol use did not cause Sprague to sexually assault the victims; rather, Sprague's paraphilia,

sexual deviancy, and antisocial personality disorder caused him to commit the offenses. Dunham opined that Sprague's paraphilia with sexually sadistic features and Sprague's antisocial personality disorder make him "likely to commit sex offenses again in the future." On cross-examination, Dunham testified that Sprague "has the ability to control himself[.]"

Dunham testified that he also conducted a risk assessment concerning Sprague's risk of reoffending. Dunham explained that the assessment process is known as "a clinically adjusted actuarial approach[.]" and it involves two or three tests to identify some of the main risk factors for reoffending. According to Dunham, the assessment involves several risk factors that must be examined. Dunham testified that the first category of risk factors concerns the objective information associated with the sexual offenses; the second category concerns sexual preoccupation; the third category concerns any personality disorders, such as antisocial personality disorder; the fourth category concerns life stability issues; and the fifth category involves "dynamic risk factors." Dunham explained that while the first four categories are historical, the dynamic risk factors considered in the fifth category "are more current beliefs and behaviors and attitudes, something that one has control over."

According to Dunham, with respect to the first category, the first risk is that Sprague is a repeat sex offender, and Dunham testified that reoffending after being incarcerated is also significant. Dunham explained that the second risk factor is "the

force and violence associated with the offenses.” Dunham testified that another risk factor is that Sprague committed his first sexual offense at nineteen years of age, and Sprague reoffended at age twenty-four after being out of prison for only a few months. In addition, Dunham opined that the variety of sexual acts Sprague forced upon his victims also “increases the deviancy[.]” Dunham explained that the last factor in the first category is that Sprague’s victims were not related to him, since “incestual offenders are at a lower risk for reoffending than people who go outside the family.”

Dunham testified that Sprague had admitted to paying for sex, calling “900 numbers,” and attending topless bars. With respect to lifestyle factors, Dunham explained that Sprague’s alcohol consumption could lower his inhibitions, as well as make it harder for Sprague to find and maintain employment. Dunham testified that Sprague told him that Sprague intended to continue to drink alcohol, but during his deposition, Sprague testified that he does not intend to drink again. With respect to Sprague’s dynamic risk factors, Dunham identified lack of remorse and lack of empathy toward the victims; “grievance thinking,” which Dunham explained means that Sprague views himself as the victim; “poor appraisal of his own risk” for reoffending; dysfunctional thinking style, such as believing that his victims enjoyed the offenses; rape attitudes, such as believing that some women, including his victims, enjoy being raped; and recent sexual deviancy, which Dunham testified includes Sprague’s fantasizing about L. while masturbating.

Dunham testified that he also scored some actuarials on Sprague, including the Static-99, Static-99R, and the Minnesota Sex Offender Screening Tool, and he also tested Sprague for psychopathy. Dunham explained that these tests have been studied in his field, peer reviewed, and are generally accepted and commonly used by forensic psychologists. Dunham testified that the Static-99 measures an individual's risk of "being reconvicted of a sexual offense." According to Dunham, Sprague scored a five on the Static-99, which means that Sprague is "at moderate-high risk for being reconvicted of a sexual offense." Dunham testified that the Static-99R indicated that Sprague scored the same on the Static-99.

Dunham explained that the Minnesota Sex Offender Screening Tool Revised estimates a person's risk of being re-arrested within six years, and Sprague scored a plus ten, which "places him in a high risk category for being rearrested within six years for a hands-on sex offense[.]" Dunham testified that the actuarials "probably underestimate the risk, because neither test is accounting for his current attitudes and beliefs[.]" and he opined that Sprague actually poses a high to very high risk. With respect to the Hare psychopathy checklist, Dunham testified that Sprague "scored in the moderate level." Dunham explained that the actuarials do not measure the ultimate issue of whether a person has a behavioral abnormality; rather, they measure an individual's risk "specific to sexual reoffending. Behavioral abnormality is a legal term."

When asked why he believes Sprague currently has a behavioral abnormality, Dunham testified, “Because I believe that . . . he has this antisocial personality disorder and this sexual deviancy, this paraphilia, and I think that those contribute to him having a very difficult time controlling his desires and his impulses which makes him at risk for committing a sex offense today and in the future.” Dunham opined that Sprague has a behavioral abnormality as defined by the Health and Safety Code.

After Dunham’s testimony, the State read into evidence some of Dunham’s responses to requests for admissions. Specifically, Sprague admitted that he was convicted of aggravated kidnapping with intent to commit aggravated sexual assault, and aggravated sexual assault with a deadly weapon; and he thinks about sex three or more times per day. Sprague also admitted that he used methamphetamines, LSD, and prescription drugs prior to incarceration; he smoked marijuana while incarcerated and drank alcohol excessively before incarceration; and he is an alcoholic and intends to drink upon his release from prison.

Dr. Lisa Clayton testified that she is “a medical doctor specializing in the field of psychiatry with a subspecialty in forensic psychiatry.” Clayton explained that she met with Sprague, and her role was to assist the jury in determining whether Sprague has a behavioral abnormality. Clayton testified that she has done civil commitments for approximately ten years, and has testified approximately fifty times in cases of behavioral abnormality determinations. Clayton explained that before meeting with an offender, she

reviews a packet that contains information about the offender, including a referral packet from the multidisciplinary team which usually includes a psychological evaluation of the offender, parole reviews, pen packets, educational records, sex offender treatment program records or evaluations, medical records, and disciplinary records from prison. According to Clayton, experts in her field typically rely on the same records in conducting behavioral abnormality evaluations, and she relied upon the facts and data contained in the records in forming her opinion about Sprague. Clayton explained that records are important to the evaluation “[b]ecause past behavior is very indicative of future behavior.” Clayton testified that a paraphilia is a lifelong condition, and “it’s virtually impossible for someone to change . . . what they get excited by sexually.”

Clayton testified that she met with Sprague for approximately three hours, and she performed her forensic evaluation of Sprague in accordance with her training and with the accepted standards in the field of psychiatry. Clayton testified that she believed Sprague was being honest during parts of the interview, but she also believed that Sprague was “kind of hedging and minimizing” during other portions of the interview.

According to Clayton, Sprague seemed to enjoy talking about his sexual offenses, particularly the sexual assault of L. Clayton testified that when she confronted Sprague with L.’s handwritten statements about the offense, Sprague claimed that L. was lying, and that at trial, L. was overly dramatic on the stand and wanted everyone to feel sorry for her. Clayton described Sprague’s tendency to blame L. as follows:

[T]hat's a very high risk factor. And that's kind of the thinking that sexual sadists or rapists like to think about with their victims is that it's somehow their fault. It's not that they have a sexual deviancy, it's the victim's fault for being there and that the victim wanted it or that it was consensual.

Clayton explained that dishonesty and manipulation are significant because "it's just part of the whole . . . package of who the person is, not only do they have this very dangerous sexual deviant predatory behavior where they enjoy sexually assaulting women, that they also are able to kind of con and deny and attempt to get out of the consequences of their actions."

Clayton testified that Sprague lacked empathy for his victims. Clayton also testified that Sprague's inability to comply with the terms of his parole was "very concerning." Clayton opined that, based upon her education, training, experience, and evaluation of Sprague, Sprague has "a behavioral abnormality that predisposes him to commit future acts of predatory sexual violence." According to Clayton, Sprague has a mixed personality disorder with both narcissistic and antisocial traits. Specifically, Clayton explained that using the DSM-IV-TR, she diagnosed Sprague with sexual sadism, alcohol and marijuana dependence, and personality disorder not otherwise specified with narcissistic and antisocial traits. Clayton testified that Sprague's diagnoses are "essentially building blocks of the wall put into him having a behavioral abnormality. All of them together make up the behavioral abnormality as the Texas Legislature defined it." Clayton explained that although she and Dunham worded their diagnoses

differently, they “both diagnosed him as a rapist with drug and alcohol problems that has antisocial features.”

Clayton testified that the criteria required for a diagnosis of sexual sadism are an overall period of at least six months of recurrent, intense, sexually arousing fantasies, sexual urges or behaviors involving acts in which the psychological or physical suffering of the victim is sexually exciting to the person, and acting on these sexual urges with a non-consenting person or experiencing marked distress or interpersonal difficulty as a result of the urges or fantasies. Clayton explained that sexual sadism is a type of paraphilia. Clayton testified that she diagnosed Sprague with sexual sadism because he enjoyed capturing or kidnapping victims, pointing a weapon at victims, and threatening victims with death if they did not submit to sex acts with him. She explained that he “was sexually excited by this and had sexual pleasure.”

With respect to the diagnosis of personality disorder not otherwise specified, Clayton testified that the diagnosis applies “essentially when someone has traits of more than one personality disorder and you’re only supposed to diagnose someone [with] one specific personality disorder. And while Mr. Sprague has antisocial personality traits, he also has strong components of narcissistic personality traits.” Clayton explained that she diagnosed Sprague with that personality disorder based upon

his grandiose sense of self, his using others for his own gain, his failure to conform to social norms with respect to lawful behavior, deceitfulness, irritability and aggressiveness as indicated by repeated physical fights or

assault, his reckless disregard for the safety of self or others, his lack of remorse, . . . [and] lack of empathy.

Clayton testified that personality disorders continue throughout a person's life.

Clayton opined that Sprague is sexually preoccupied, which is a concern "because that's what causes him to go out and rape women is this sex drive and urge and . . . some of his sexual pleasure is by threatening a woman with death and holding a weapon to her and making her submit to sex with him." Clayton also characterized Sprague's adjustment to prison life as "poor to fair[,] " and she testified that Sprague did not conform to prison rules. Clayton testified that inability to follow rules even while incarcerated is "indicative of someone with antisocial personality traits[,] " and she opined that "once he gets in the free world and has less restrictions[,] it's very concerning that he won't be able to control his law-breaking behavior, and add that with his sexual deviancy and he'll be back raping women." According to Clayton, the fact that Sprague has not had sex offender treatment and does not believe he needs treatment constitutes a significant risk that Sprague will reoffend. In addition, Clayton testified that Sprague's intent to consume alcohol upon his release from prison is a risk factor because alcohol may lower Sprague's inhibitions and make him "more confident that he can pull it off. And in both of the [previous] offenses he admits that he had been drinking prior."

Clayton testified that she did not perform actuarials of Sprague, but she reviews any actuarials that are included in the records she receives. According to Clayton, Sprague's risk factors for reoffending included the fact that he had multiple victims, he

lacked remorse and empathy for the victims, he denied he did anything wrong, he used a weapon, he had a history of antisocial personality disorder, he had a history of being assaultive in prison, he is young, he reoffended while on parole, and he has a tendency to blame the victims and to minimize the offenses. Clayton opined that Sprague has done nothing to indicate that he had changed during his incarceration.

Sprague testified that the aggravated kidnapping of L. with intent to commit sexual assault occurred while he was a college student. Sprague related that he held a BB gun to L.'s head while she drove, and he forced L. to stop the car in an isolated area. Sprague indicated that he forced L. onto his lap and made her remove her clothes, but he denied forcing her onto the hood of the car. Sprague explained that his deposition testimony that he forced L. onto the hood of the car was incorrect. In addition, Sprague denied attempting to penetrate L. vaginally or anally, but he admitted that he forced L. to perform oral sex. Sprague also denied that he currently thinks of L. while masturbating.

With respect to the offense of aggravated sexual assault of C. with a deadly weapon, Sprague testified that he was on parole for sexually assaulting L. when the offense against C. occurred. According to Sprague, "basically the circumstances were pretty much parallel to the first crime. . . ." Sprague explained that C. was his co-worker, and he asked C. for a ride and held a gun to C.'s head while she drove to an isolated area. Sprague testified that he forced C. onto his lap, forced C. to remove her clothes, fondled C.'s breasts and vagina, and forced C. to perform oral sex. Sprague testified that he pled

guilty to the aggravated sexual assault and aggravated kidnapping of C. Sprague testified that he was under the influence of alcohol when he assaulted both L. and C. Sprague testified that “since I’ve been incarcerated I’ve gone so long without [alcohol] I’ve learned to basically not have a need for it anymore[.]”

Sprague explained that he has “no problem” controlling his behavior, and that he does not foresee reoffending “in any way.” Sprague also testified that while incarcerated, his fear of being sexually assaulted by another inmate led him to see his offenses from the victims’ points of view, to feel remorse, and to understand that they would have been terrified. Sprague testified that he now feels sorry for committing the offenses. Sprague also testified that during his incarceration, he requested several times to be placed in the sex offender treatment program, but his requests were denied. Sprague explained that although he initially planned to drink alcohol occasionally upon his release, he made the decision “in the past year to cold turkey, totally abstain from alcohol and marijuana.” Sprague testified that he does not have difficulty controlling his behavior, and he does not believe that he has a behavioral abnormality.

ISSUES ONE AND TWO

In his first issue, Sprague argues that the State offered legally insufficient evidence that he has serious difficulty controlling his behavior that distinguishes him from “the dangerous but typical recidivist convicted in an ordinary criminal case.” In his second issue, Sprague argues that the State offered factually insufficient evidence that he has

serious difficulty controlling his behavior that distinguishes him from a typical recidivist. We consider these issues together.

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 SVP 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. The statute 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). The inability to control 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.” *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002).

“[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 also In the Interest of J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002); *see City of Keller v. Wilson*, 168 S.W.3d 802, 817, 827 (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 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 WL 1805356, at *17 (Tex. App.—Beaumont May 12, 2011, no pet. h.) (not yet released for publication).

Dr. Dunham testified that he believes Sprague suffers from a behavioral abnormality that predisposes him to commit predatory acts of sexual violence. Dunham testified that he diagnosed Sprague with paraphilia not otherwise specified, with sexually sadistic features, antisocial personality disorder, alcohol abuse, and marijuana abuse. Dunham explained that Sprague's paraphilia caused Sprague to be aroused by nonconsensual sex acts, and that Sprague's sexual sadism caused him to use weapons to instill fear in his victims. In addition, Dunham testified that Sprague disregards societal norms and the safety of others, and he lacks remorse or concern for others.

Dunham also testified that Sprague had a history of aggression, had committed both violent and non-violent offenses, and had seven major disciplinary cases while incarcerated. In addition, Dunham explained that although Sprague had the ability to be polite to the professionals who evaluated him, Sprague's paraphilia and antisocial personality disorder make him likely to reoffend sexually. Furthermore, Dunham identified as risk factors Sprague's status as a repeat sex offender, reoffending after being incarcerated, use of force and violence, young age when he committed his first sexual offense, and the fact that Sprague reoffended after being out of prison for only a few months. Dunham testified that the variety of sexual acts Sprague forced upon his victims made Sprague more deviant. Dunham also identified as risk factors Sprague's alcohol consumption and stated intention to continue drinking, lack of remorse and lack of empathy toward the victims, grievance thinking, dysfunctional thinking style, rape attitudes, and recent sexual deviancy.

Dunham indicated that Sprague's scores on the Static-99 and Static-99R placed Sprague at a moderate to high risk for being reconvicted of a sexual offense, and Sprague's score on the Minnesota Sex Offender Screening Tool Revised placed Sprague at high risk for being rearrested within six years for a sex offense. Dunham testified that Sprague also scored "in the moderate level" on the Hare psychopathy checklist.

Like Dr. Dunham, Dr. Clayton testified that past behavior is indicative of future behavior. Clayton testified that she diagnosed Sprague with sexual sadism, alcohol and

marijuana dependence, and personality disorder not otherwise specified with narcissistic and antisocial traits. Clayton explained that all of Sprague's diagnoses together comprise a behavioral abnormality as defined by the Legislature. In addition, Clayton noted that paraphilia is a lifelong disorder. Clayton identified as risk factors Sprague's tendency to blame his victims, lack of empathy for his victims, dishonesty and manipulation, inability to comply with the terms of parole, inability to conform to prison rules, sexual preoccupation, lack of sex offender treatment, intent to use alcohol, history of antisocial personality disorder, history of being assaultive, and his young age.

Reviewing all of the evidence in the light most favorable to the verdict, a rational jury could have found, beyond a reasonable doubt, that Sprague has a behavioral abnormality that predisposes him to commit a predatory act of sexual violence. *See Crane*, 534 U.S. at 413; *Mullens*, 92 S.W.3d at 885. In addition, weighing all of the evidence, the verdict does not reflect a risk of injustice that would compel ordering a new trial. *See Day*, 2011 WL 1805356, at *17. Accordingly, we overrule issues one and two.

ISSUE THREE

In his third issue, Sprague contends that the State "did not offer any assurance of the validity of its experts' testimony." Specifically, Sprague argues that "[t]he fundamental problem with the expert testimony . . . is that the experts offered no specific authority relied upon to reach the essential conclusions and final opinions the experts offered." Sprague asserts that the experts discussed numerous factors and facts consistent

with their opinions, but did not explain the methodology that links that information to their conclusions.

“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 (quoting *Coastal Transp. Co. v. Crown Cent. Petrol. Corp.*, 136 S.W.3d 227, 233 (Tex. 2004)); see *In re Commitment of Barbee*, 192 S.W.3d 835, 843 (Tex. App.—Beaumont 2006, no pet.).

Sprague’s complaints concern the foundational data used or relied on by Drs. Dunham and Clayton in reaching their opinions. Sprague did not object to the experts’ use of records or actuarial tests. Accordingly, to the extent Sprague challenges the

reliability of the experts' testimony, his complaint is not preserved for appeal. *See Pollock*, 284 S.W.3d at 816-17; *In re Commitment of Burnett*, No. 09-09-00009-CV, 2009 WL 5205387, at **1-2 (Tex. App.—Beaumont Dec. 31, 2009, no pet.); *see also Barbee*, 192 S.W.3d at 843.

To the extent Sprague challenges the experts' opinions as baseless, the testimony of Dr. Dunham and Dr. Clayton is neither conclusory nor speculative. According to the record, both Dr. Dunham and Dr. Clayton are licensed in their respective fields. *See Burnett*, 2009 WL 5205387, at *5. They interviewed Sprague, conducted risk assessments, and reviewed records regarding Sprague'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 testified that they based their opinions on the facts and data gathered from the records they reviewed, their interviews with Sprague, the risk assessments they conducted, and 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 Sprague suffers from a behavioral abnormality as defined by the SVP statute. *See id.*

Their testimony is not so speculative or conclusory as to be completely lacking in probative value. *See id.* Accordingly, we overrule issue three.

ISSUE FOUR

In his fourth issue, Sprague argues that his trial was so infected by prejudicial evidence and improper argument that he was denied a fair trial. The record does not reflect that Sprague raised this complaint at trial. Additionally, the record reflects that Sprague did not object at trial to the testimony and argument of which he now complains. Therefore, Sprague did not preserve this issue for appellate review. *See* Tex. R. App. P. 33.1(a)(1)(A). Accordingly, we overrule issue four.

ISSUE FIVE

In issue five, Sprague contends that the civil commitment order unconstitutionally delegates judicial authority to the Council on Sex Offender Treatment. *See* Tex. Const. art. II, § 1; Tex. Const. art. III, § 1. Sprague did not present his separation of powers challenge to the trial court. Therefore, the issue is not preserved for appellate review. *See* Tex. R. App. P. 33.1(a)(1)(A). Accordingly, we overrule issue five and affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on December 8, 2010
Opinion Delivered June 16, 2011
Before McKeithen, C.J., Gaultney and Kreger, JJ.