In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00295-CV

IN RE COMMITMENT OF JONATHAN IRVING HITT

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 09-10-09978-CV

MEMORANDUM OPINION

The State of Texas filed a petition to commit Jonathan Irving Hitt as a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001-.150 (West 2010 & Supp. 2011). A jury found that Hitt 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. In four issues, Hitt appeals the trial court's judgment and order of civil commitment. We affirm the trial court's judgment.

I. Requests for Admissions

Hitt first argues the State committed reversible error in submitting requests for admissions at trial, thereby undermining the statutory requirement that the State prove the

ultimate issues in its case beyond a reasonable doubt. *Id.* § 841.062(a) (West 2010). Hitt further contends that the State violated his due process rights, and denied him his statutory right to a jury and a unanimous verdict. In his third issue, Hitt complains that the trial court erred in informing the jury that the admissions were conclusively proven and that Hitt could not offer any evidence to contradict them. Hitt argues that the court's comments amounted to an improper comment on the weight of the evidence, revealing the trial court's lack of impartiality, thereby harming Hitt. Hitt contends the State bolstered this evidence by calling Hitt to testify against himself and asking him the same questions from the requests for admissions that the State had just read to the jury.

Section 841.062(a) provides that "[t]he judge or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." *Id.* When a party admits a matter in response to requests for admissions, the admission conclusively establishes the matter, unless the trial court allows the admitting party to withdraw or amend the admission. Tex. R. Civ. P. 198.3; *see also In re Commitment of Frazier*, No. 09-10-00033-CV, 2011 WL 2566317, at *2 (Tex. App.—Beaumont June 30, 2011, no pet.) (mem. op.).

To preserve error concerning the admission of evidence, a party's objection must be timely and specifically state the grounds on which the objection is based if not apparent from the context. Tex. R. Evid. 103(a)(1). To preserve error concerning a trial judge's comments, a party must make an objection to an allegedly improper comment

when the comment occurs, unless the comment cannot be rendered harmless by a proper instruction. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001).

At trial, before the State read Hitt's admissions into evidence, the trial court gave the following explanation of requests for admission to the jury:

> I'll tell you what that means. In certain types of trials there's a discovery process called Requests for Admissions. What that means is one side can send the other side Requests for Admissions. And then the other side either admits or denies it. If one of the sides admits Request for Admissions the side that they were admitted to, in this case the Petitioner's side, is then allowed to read the Requests for Admissions that were admitted to you, the jury. You are to take those matters as conclusively proved, and they're conclusively proved so much that in this case the Respondent's side is then not allowed to offer any contravening evidence as to those Requests for Admissions that are admitted.

Hitt did not object to the State's use of his admissions or to the trial court's explanation, but he contends that no objection was necessary because the fundamental error doctrine applies. We have previously declined to address the type of unpreserved error assigned by Hitt. In *Frazier*, the respondent asserted that the State's use of his answers to requests for admission conflicted with section 841.062 and lowered the State's burden of proof in violation of his due process rights, and that the trial court's explanation regarding the requests for admissions was an impermissible comment on the weight of the evidence that amounted to fundamental error. *Frazier*, 2011 WL 2566317, at *1-2. We concluded that the trial court's explanation "did not indicate approval of the State's argument, indicate disbelief in the defense's position, or diminish the credibility of the defense's approach." *Id*. at *2. We held that Frazier failed to preserve the error for appellate review

because he failed to object to either the State's reading of his admissions into evidence or to the trial court's explanation. *Id*. at *1-2.

In this case, the trial court's explanation likewise did not indicate approval of the State's argument or disapproval of Hitt's position. *See id*. at *2. Hitt failed to object when the State read his admissions into evidence and when the trial court gave his explanation of requests for admissions. Hitt has failed to preserve his complaints for appeal; therefore, we overrule issues one and three. *See* Tex. R. Evid. 103(a)(1); *see also* Tex. R. App. P. 33.1; *Francis*, 46 S.W.3d at 241; *Frazier*, 2011 WL 2566317, at *1-2.

II. Fifth Amendment

In his second issue, Hitt argues that requiring him to answer requests for admissions or having the requests deemed admitted, and then calling him to testify against himself using his admissions, was a violation of his Fifth Amendment privilege not to be forced by an official to give testimony that might incriminate him in future criminal proceedings. The Fifth Amendment prohibition against compelled self-incrimination "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S. Ct. 1136, 1141, 79 L. Ed. 2d 409 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S. Ct. 316, 322, 38 L. Ed. 2d 274 (1973)). However, the Fifth

Amendment "'does not preclude a witness from testifying voluntarily in matters which may incriminate him.'" *Id*. at 427 (quoting *United States v. Monia*, 317 U.S. 424, 427, 63 S. Ct. 409, 410, 87 L. Ed. 376 (1943)). Therefore, if a witness desires the protection of privilege, he must claim the privilege. *Id*. Hitt did not assert the Fifth Amendment during his commitment hearing, though he could have at any time. Hitt's failure to invoke his constitutional privilege prevents him from now complaining that he was compelled to give testimony against himself. *See id.* Issue two is overruled.

III. Exclusion of Expert Testimony

In his fourth issue, Hitt argues that the trial court abused its discretion in excluding the testimony of Dr. Ana Shursen. The trial court appointed Dr. Shursen as a consulting expert and Hitt timely designated her to testify as an expert at trial. The State filed a motion to exclude Dr. Shursen on the basis that she was not qualified to be an expert and that she uses unsound methodology. After a hearing, the trial court granted the State's motion and excluded Dr. Shursen, less than a month before trial. The trial court issued findings of fact and conclusions of law regarding the State's challenge to Dr. Shursen. Therein the trial court concluded that Dr. Shursen was not qualified to offer an expert opinion as to whether Hitt suffered from a behavioral abnormality that predisposes him to commit predatory acts of sexual violence. The trial court further concluded that Dr. Shursen's testimony was not reliable.

A. Standard of Review

We will not disturb a trial court's ruling regarding the qualification of a witness as an expert, absent an abuse of discretion. *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996). "The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles." *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995). "A trial court abuses its discretion in excluding expert testimony if the testimony is relevant to the issues in the case and is based on a reliable foundation." *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 870 (Tex. 2009). The party seeking to offer the expert's testimony has the burden to prove that the witness qualifies as an expert under Rule 702 of the Texas Rules of Evidence. *Broders*, 924 S.W.2d at 151; *see also* Tex. R. Evid. 702.

B. Expert Qualifications

We have twice examined Dr. Shursen's qualifications and both times found that she possessed the necessary qualifications to provide an opinion regarding the risk that an individual would commit a future act of sexual violence, which is a component of the broad-form issue the jury must evaluate and answer in SVP cases. *See In re Commitment of Bohannan*, No. 09-09-00165-CV, 2010 Tex. App. LEXIS 5737, *14-15 (Tex. App.—Beaumont July 22, 2010, pet. granted); *In re Commitment of Dodson*, 311 S.W.3d 194, 202 (Tex. App.—Beaumont 2010, pet. filed). During the *Daubert* hearing conducted by the trial court, Dr. Shursen testified regarding her qualifications as an expert. *See Daubert*

v. Merrell Dow Pharms. Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). According to Dr. Shursen, she has a bachelor's degree of science, a master's degree in counseling, and a doctorate in family therapy. She testified that she has performed eighteen civil commitment evaluations. Dr. Shursen is a licensed sex offender treatment provider. She receives training and education in the assessment and treatment of sexual offenders yearly to maintain her licensure. She testified that she receives three to four new patients a month. She has education and training to administer actuarials, and uses actuarials in performing risk assessments on her patients. Specifically, Dr. Shursen testified that she often administers the Static-99, the Minnesota Sex Offender Screening Tool (MnSOST), and the Hare Psychopathy Checklist-Revised (PCL-R) to her clients. On this record, we again conclude that Dr. Shursen offered sufficient foundation to establish that her opinion would have assisted the jury in its resolution of whether, beyond a reasonable doubt, Hitt is likely to commit a future act of sexual violence. *See Bohannan*, 2010 Tex. App. LEXIS 5737, at *15-16; *see also Dodson*, 311 S.W.3d at 202.

C. Reliability

The State further argued that Dr. Shursen's testimony was unreliable because her expert opinion was based on flawed methodology in that she only uses part of the definition of behavioral abnormality to reach her opinion. The State argues that Dr. Shursen has testified that she fundamentally disagrees with the definition of behavioral abnormality within the statute because she does not believe that someone is born a sex

offender, i.e. that a behavioral abnormality can be a congenital condition. She testified that she has always believed that it is hard to find cases where individuals say they were born a sex offender. However, in this case, Dr. Shursen testified that she accepts the State's statutory definition of behavioral abnormality.

For an appellate court to find reversible error, the complaining party must show that the committed error probably caused the rendition of an improper judgment. *Cent. Expressway*, 302 S.W.3d at 870. The trial court's exclusion or admission of evidence is "likely harmless if the evidence was cumulative, or the rest of the evidence was so one-sided that the error likely made no difference in the judgment." *Id.* "[I]f erroneously admitted or excluded evidence was crucial to a key issue, the error is likely harmful." *Id.*

In her deposition, Dr. Shursen testified regarding her evaluation of Hitt. She conducted a personal interview of Hitt that lasted approximately five hours. She testified that she performed two MnSOST tests on Hitt because of an alleged discrepancy in the record regarding the age of one of Hitt's victims. If the victim had reached his "16th" birthday at the time of the assault then Dr. Shursen would score Hitt with a "3," which indicates a low risk. If the victim had not reached his "16th" birthday, then she scored Hitt with a "5," which indicates a moderate risk of re-offense. She also performed the Static-99 on Hitt and gave him a score of "4," which places Hitt in the moderate to high risk category. She testified that even with this result she does not believe Hitt is at a high risk to re-offend because "a person who scores low would have the same recidivism rate

as a nonsexual offen[der], which is less than 3 percent after five years." She further explained that while a person with a moderate risk is noticeably higher than a person with low risk, recidivism is unexpected in both. She also performed the Static 2002-R test, and gave Hitt a score of "4," which indicates a low to moderate risk. She performed the PCL-R on Hitt, and gave him a score of "4." She further performed the Stable-2007 test on Hitt, which is a "dynamic risk assessment." She testified that she uses this test to determine risk at the time the test is scored. She scored Hitt with a three, which indicates a low risk of recidivism.

After the court struck Dr. Shursen, Hitt filed a motion for continuance for additional time to replace Dr. Shursen. On March 9, 2010, the court heard Hitt's motion for continuance, denied the motion, but offered to help Hitt obtain a substitute expert. Hitt accepted the court's offer to help obtain Dr. Quijano.

At trial, Dr. Michael Arambula testified on behalf of the State as a physician specializing in general and forensic psychiatry. He testified that behavioral abnormality assessment is an evaluation of sexual dangerousness. He interviewed Hitt for two and a half hours. He also reviewed Hitt's records. Based on his evaluation, Arambula testified that Hitt has a behavioral abnormality.

Dr. Stephen Thorne also testified as a clinical forensic psychologist for the State. Thorne testified that Hitt met the criteria for behavioral abnormality. He diagnosed Hitt pursuant to the DSM-IV-TR with pedophilia with sexual abuse of a child, and with

cannabis abuse. He testified that he tested Hitt with the Static-99R, the Minnesota Sex Offender Screening Tool Revised (MnSOST-R), and the PCL-R, second edition. The MnSOST-R evaluates risk factors for sexual recidivism. Thorne scored Hitt with a "positive 8." Thorne testified that Hitt falls in the high range of reoffending, explaining that seventy percent of individuals in this range are thought to reoffend within six years. He scored Hitt under the Static-99R with a "positive 3," which places Hitt in the low to moderate range for reoffending. Thorne also performed the PCL-R on Hitt, not to determine risk, but to measure psychopathy or general violence. He scored Hitt with a "10" on this test, which indicates that Hitt is likely not a psychopath.

Dr. Quijano testified at trial on behalf of the defense that he was first contacted about Hitt's case two to three weeks prior to trial. Dr. Quijano testified that he is a clinical psychologist, as well as a licensed sex offender treatment provider. Dr. Quijano testified he was retained to evaluate Hitt for a behavioral abnormality. He personally interviewed Hitt for about an hour and a half and then reviewed his test results with him for about an hour and a half. Dr. Quijano reviewed Hitt's records and the deposition transcripts of the State's experts, Drs. Arambula and Thorne. In disagreement with the State's experts, Dr. Quijano testified that he does not believe Hitt is a pedophile because he did not see evidence that Hitt had offended against a prepubescent child for six months or more. Dr. Quijano diagnosed Hitt with paraphilia NOS on his first victim, and sexual abuse of a child on the second victim. He also diagnosed him with cannabis abuse. Dr.

Quijano did not personally administer any actuarials to Hitt, but did rescore the tests that others administered using existing records and testified that they were "pretty accurate." He indicated he did not feel the need to repeat the other doctor's work. Dr. Quijano further explained that someone with a behavioral abnormality has serious difficulty controlling his behavior. He testified that Hitt's grooming of his victims played an important role in his evaluation because grooming shows deliberateness through the process of setting the victim up for the offense. Grooming indicates a degree of calculation, which is not a characteristic of a person that is out of control. Dr. Quijano concluded that he did not believe Hitt suffers from a behavioral abnormality.

Here the record reflects that after the trial court struck Dr. Shursen, in lieu of a continuance, the trial court helped Hitt retain Dr. Quijano to testify at trial. Dr. Quijano testified that he completed his evaluation of Hitt, despite his late retention. Dr. Quijano countered State's experts by testifying that Hitt did not suffer from pedophilia and did not have a behavioral abnormality. Hitt did not request a continuance on the basis that Dr. Quijano could not be prepared for trial. Assuming the trial court erred in striking Dr. Shursen's testimony, the alleged error was harmless. *Compare Dodson*, 311 S.W.3d at 203; *Bohannan*, 2010 Tex. App. LEXIS 5737, at *16-18; *see also* Tex. R. App. P. 44.1(a)(1). In light of the rest of the evidence submitted to the jury, Hitt has not shown that the alleged error probably caused the rendition of an improper judgment. Issue four is overruled.

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

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on May 26, 2011
Opinion Delivered December 1, 2011

Before Gaultney, Kreger, and Horton, JJ.