

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00383-CV

IN RE COMMITMENT OF DANNY BRUCE CONLEY

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 09-10-10592 CV

MEMORANDUM OPINION

The State of Texas filed a petition to commit Danny Bruce Conley as a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001-.150 (West 2010). A jury found that Conley is a sexually violent predator. The trial court rendered a final judgment and an order of civil commitment. On appeal, Conley challenges the admission of expert testimony and alleges the trial judge “show[ed] partiality” at trial. We affirm the trial court’s judgment.

Admission of Expert Testimony

In issues one and two, Conley challenges the trial court’s failure to exclude the testimony of the State’s experts, Drs. Timothy Proctor and Sheri Gaines.

We review the trial court's determination regarding the admission of expert testimony under an abuse of discretion standard. *In re Commitment of Polk*, No. 09-10-00127-CV, 2011 Tex. App. LEXIS 1323, at *9 (Tex. App.—Beaumont Feb. 24, 2011, pet. denied) (mem. op.). “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” Tex. R. Evid. 702. Expert testimony must also be relevant and reliable. *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 870 (Tex. 2009). “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.” *Id.*

“Conclusory or speculative opinion testimony is not relevant evidence because it does not tend to make the existence of material facts more probable or less probable.” *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex. 2009). “Bare, baseless opinions will not support a judgment even if there is no objection to their admission in evidence.” *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009). “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. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004)).

Dr. Proctor, a forensic psychologist, testified that he based his evaluation on the statutory definition of “behavioral abnormality.” Proctor reviewed records, completed psychological tests, interviewed Conley, and subsequently formed an opinion about whether Conley has a behavioral abnormality. Proctor testified that this methodology is followed by experts in his field. The documents he reviews for purposes of an evaluation include criminal history and offense records, police records, victim statements, prison records, medical records, disciplinary records, and court records. According to Proctor, these records are typically relied on by experts in his field, and he relied on the facts and data contained in the records when formulating his opinion. Proctor testified that, based on his training as a forensic psychologist and the standards in the field of forensic psychology, he conducted an interview with Conley.

Using the DSM-IV, a manual commonly used to make a mental health diagnosis, Proctor diagnosed Conley with paraphilia not otherwise specified (“NOS”), alcohol dependence, cannabis abuse, and personality disorder NOS with antisocial traits and psychopathy. Proctor explained that paraphilia NOS is a disorder of sexual deviancy that is based on Conley’s sexual offenses against non-consenting adults. Proctor testified that

Conley's alcohol dependence has been in remission during his incarceration and that Conley has a history of marijuana use. Proctor testified that alcohol played a role in Conley's sexual offenses and that Conley needs more comprehensive alcohol treatment. Proctor did not make a full diagnosis of antisocial personality disorder because he lacked evidence that Conley had a conduct disorder before the age of fifteen. Proctor explained that Conley's personality disorder involves conduct that is harmful to others, "criminal-type things." Proctor testified that although personality disorders typically can be managed with treatment, they tend to be present throughout a person's lifetime. Proctor testified that the diagnoses show that Conley "has an antisocial psychopathic disposition, [] breaks rules, has done things that have harmed other people, has been violent, maybe even takes some pleasure -- sexual pleasure in that violence" and is "willing to force others into sex and may even be gratified by the forced aspect of it and that contributing to this is alcohol, which disinhibits people, and . . . adds to his risk."

As part of his evaluation, Proctor administered the Hare Psychopathy Checklist-Revised ("PCL-R"), the Static-99, the Static-99R, and the Minnesota Sex Offender Screening Tool-Revised ("MnSOST-R"). Proctor testified that the PCL-R is a list of twenty factors of a psychopath and that Conley scored a thirty on the test. Proctor identified the factors that contributed to Conley's score and testified that Conley would be classified as a psychopath, an "extreme type of antisocial personality." Proctor explained that the Static-99 and Static-99R address factors that do not tend to change

much over time and might be related to commission of future offenses. Proctor testified that Conley scored a four on the Static-99, which places him in the moderate high range for reoffending. Proctor testified that the Static-99R places greater emphasis on age; thus, Conley, age sixty, scored a one on the Static-99R, which places him in the low range for reoffending. In Proctor's opinion, the Static-99R underestimated Conley's risk. Given Conley's "age when he committed the sexual offenses, the psychopathy, the other actuarials," and information Proctor learned from Conley, Proctor concluded Conley's risk of reoffending would be high. Proctor testified that Conley scored a nine on the MnSOST-R, which places Conley in the high range of risk for reoffending. In Proctor's opinion, Conley's MnSOST-R score accurately reflects Conley's risk because, based on all the available information, Proctor believed that Conley does not fall in the low range. Proctor testified that the four tests he conducted are typically used in behavioral abnormality evaluations and have been studied, peer reviewed, and accepted as valid by experts in his field.

Proctor testified that he conducted a risk assessment that considers factors related to sexual reoffending. Proctor identified the following risk factors regarding Conley: (1) sexual deviance, (2) sexual promiscuity, (3) multiple sex offenses, (4) unrelated victims, (5) lengthy sex offending history, (6) sex offending while under supervision, (7) use of force during sexual offenses, (8) multiple sex acts with a single victim, (9) lack of sex offender treatment, (10) alcohol dependence, (11) lack of full substance abuse treatment,

(12) some adolescent antisocial behavior, (13) significant adult antisocial behavior and lifestyle, (14) history of non-sexual violence, (15) presence of psychopathy, (16) lack of remorse and failure to take responsibility, and (17) unstable employment history. Proctor also considered the following protective factors, which lower a person's risk of reoffending: (1) age, (2) a long-term live-in relationship, (3) absence of non-contact sex offenses, (4) no stranger victims, (5) no male victims, (6) no history of sexual offenses in public places, and (7) absence of victims in multiple age groups. Proctor testified that Conley's risk factors outweigh his protective factors.

Proctor testified that no book exists to tell a person how to conduct a behavioral abnormality evaluation and that actuarial tests do not say that a person has a behavioral abnormality. Proctor explained that the actuarial test scores and diagnoses are "piece[s] of the puzzle" for the behavioral abnormality determination. Proctor testified that he looks at the "whole picture" to determine if a person has a behavioral abnormality. Proctor explained that the diagnoses, actuarial scores, and risk factors show that Conley is a significant risk for reoffending. Based on his education, training, experience, and the procedures used, Proctor concluded that Conley suffers from a behavioral abnormality.

Dr. Gaines, a forensic psychiatrist, testified that she evaluated Conley to determine whether he suffers from a behavioral abnormality. Gaines explained that her testimony is within the scope of psychiatry and forensic psychiatry. She testified that when conducting an evaluation, she utilizes the principles of forensic psychiatry, her training,

and her experience as a psychiatrist. She indicated that she has training in risk assessment, and she has been found to be an expert in determining whether a person has a behavioral abnormality. To conduct an evaluation, Gaines testified that she reviews documents, such as psychological evaluations, prison records, police records, victim statements, medical records, and deposition transcripts. She indicated that these types of documents are relied on by experts in her field and that she relies on the facts and data in these documents when forming her opinion. Gaines explained that Conley's history is important because "past behaviors are the best predictor of future behaviors." During her interview of Conley, Gaines used her training as a psychiatrist and the accepted standards in the field of psychiatry. She testified that the methodology she followed when evaluating Conley is also the methodology followed by experts in her field. Gaines testified that she based her opinion on her knowledge, training, continuing education, articles, and other sources.

Using the DSM-IV, which Gaines described as a guidebook for mental health professionals, Gaines diagnosed Conley with sexual abuse of an adult, alcohol dependence, cannabis dependence, and antisocial personality disorder. Gaines explained that her diagnosis of sexual abuse of an adult is based on Conley's severe maltreatment and abuse of people and violent offenses. Gaines testified that alcohol and cannabis dependence interferes with a person's "functioning ability." Gaines testified that Conley's alcohol abuse contributed to his sexual offenses, affects his impulsivity, and

lowers his inhibitions. Gaines described antisocial personality disorder as “[d]ifficulty conforming to societal norms, lying, stealing, doing something to infringe upon a person or infringe upon property[.]” Gaines testified that a personality disorder is usually a “lifelong pattern of behaviors” that will likely continue. Gaines testified that her expertise allowed her to think broadly enough to reach this diagnosis, even though the records do not show whether Conley had a conduct disorder before the age of fifteen. Gaines indicated that these diagnoses would affect Conley’s volitional and emotional capacity such that he is predisposed to commit a predatory act of sexual violence.

Gaines testified that she considers Conley an untreated sex offender. Gaines identified several risk factors, such as poor insight, lack of remorse, victim blame, violent offenses, substance abuse, “poor future plans,” disciplinary cases in prison, reoffending while on parole, and difficulty following rules. Gaines testified that Conley’s protective factors include his age and high school diploma. Gaines indicated that Conley had failed to take responsibility, which means he is not likely to improve. Based on her expertise, the records, and her interview with Conley, Gaines concluded that Conley suffers from a behavioral abnormality.

On appeal, Conley challenges Gaines’s and Proctor’s testimony as conclusory, non-probative, speculative, and legally insufficient. He contends that an analytical gap exists between the facts and the experts’ conclusions, the experts’ opinions are lacking in methodology and authoritative support, Gaines relied on facts that were not in the record,

and Gaines was unfamiliar with some of the facts of Conley's case. Conley contends that Gaines's testimony was lacking in scientific support or methodology and, therefore, unreliable. Conley asserts that Proctor misapplied the actuarial tests, which Conley argues have not been validated for behavioral abnormality purposes and do not "evaluate the risk of re-arrest or reconviction for a *sexually violent offense*." (Emphasis in original).

Conley's complaints regarding Proctor's use of actuarial tests and the experts' failure to provide authoritative support for their opinions concern the foundational data used or relied on by the experts in reaching their opinions. *See In re Commitment of Sprague*, No. 09-10-00228-CV, 2011 Tex. App. LEXIS 4503, at **28-29 (Tex. App.—Beaumont June 16, 2011, no pet.) (mem. op.). Likewise, a complaint that an analytical gap exists in an expert's testimony or a complaint that the expert's testimony is not based on the facts of the case is a challenge to the methodology used by the expert. *In re Commitment of Robertson*, No. 09-09-00307-CV, 2010 Tex. App. LEXIS 7421, at **28-29, 31 (Tex. App.—Beaumont Sept. 9, 2010, pet. denied) (mem. op.). Conley did not object to Proctor's testimony on the grounds he now raises on appeal.

Although Conley objected to Gaines's testimony, Conley's objection was made after the deadline in the trial court's docket control order for challenging expert testimony. The trial court stated that Conley had not shown any reason why he should be allowed to untimely object to Gaines's testimony. *See* Tex. R. Civ. P. 166 (A trial court has the discretion to enter a docket control order to assist in the disposition of the case.);

see also Closs v. Goose Creek Consol. Indep. Sch. Dist., 874 S.W.2d 859, 868 (Tex. App.—Texarkana 1994, no writ) (“A docket control order controls the subsequent course of the action unless modified at trial to prevent manifest injustice.”). Accordingly, Conley’s objection to Gaines’s testimony was untimely. *See* Tex. R. App. P. 33.1(a)(1). Under these circumstances, Conley’s reliability challenge to the experts’ testimony is not preserved for appellate review. *See Pollock*, 284 S.W.3d at 816-17; *see also Sprague*, 2011 Tex. App. LEXIS 4503, at *29; *Robertson*, 2010 Tex. App. LEXIS 7421, at *29; *In re Commitment of Barbee*, 192 S.W.3d 835, 843 (Tex. App.—Beaumont 2006, no pet.).

To the extent Conley challenges the experts’ opinions as baseless, the experts’ testimony is neither conclusory nor speculative. Both Proctor and Gaines are licensed in their respective fields. They interviewed Conley, Proctor conducted risk assessments, and both experts reviewed records regarding Conley’s background, offenses, and incarceration. Proctor administered actuarial tests and testified that these 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 and the standards in their respective fields. Proctor and Gaines based their opinions on the facts and data gathered from the records they reviewed, their interviews with Conley, and the results of risk assessments and actuarial tests. They explained in detail the facts and evidence they found relevant in forming their opinions and the role those facts played in their evaluations. Both experts concluded that Conley

suffers from a behavioral abnormality as defined by the SVP statute. Their testimony is not so speculative or conclusory as to be completely lacking in probative value. *See Sprague*, 2011 Tex. App. LEXIS 4503, at **29-30; *see also Barbee*, 192 S.W.3d at 843.

In addition to the experts' opinions that Conley suffers from a behavioral abnormality, the jury heard about Conley's risk factors, actuarial test scores, criminal history, violent sexual assaults, sexual deviancy, alcohol dependence that disinhibits and contributed to Conley's sexual offenses, harmful conduct towards others, "antisocial psychopathic disposition," classification as a psychopath, status as an untreated sex offender, various diagnoses, and lifetime personality disorder. "The jury is the sole judge of 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 jury may resolve conflicts and contradictions in the evidence by believing all, part, or none of the witnesses' testimony. *Id.* The jury could conclude, beyond a reasonable doubt, that Conley is a sexually violent predator. *See* Tex. Health & Safety Code Ann. § 841.062(a) (West 2010); *In re Commitment of Burnett*, No. 09-09-00009-CV (Tex. App.—Beaumont Dec. 31, 2009, no pet.). The evidence is legally sufficient to support the jury's verdict. We overrule issues one and two.

Partiality of the Trial Court

In issue three, Conley contends that the trial court showed partiality by belittling Conley's counsel and sustaining the State's objections on grounds that had not been raised.

“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, writ 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. United States*, 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, ‘[n]ot 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 (citing *State v. Wilemon*, 393 S.W.2d 816 (Tex. 1965)); *In re Commitment of Vanzandt*, 156 S.W.3d 671, 674 (Tex. App.—Beaumont 2005, no pet.).

According to Conley, on various occasions, the trial court made comments to Conley’s counsel in an “overbearing and disrespectful manner” and in an attempt to disparage counsel’s abilities and suggest to the jury that counsel was not adept. Conley further contends that the trial court showed partiality to the State by sustaining the State’s objections on grounds different from those asserted by the State. The record does not demonstrate that Conley objected to the trial court’s actions. Our review of the trial court’s allegedly improper conduct, in the context of the record, does not show that Conley was denied a fair trial. *See Liteky*, 510 U.S. at 555-56; *see also Francis*, 46 S.W.3d at 240-41; *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.), *cert. denied*, *Fields v. Texas*, 131 S.Ct. 912, 178 L.Ed.2d 762, 79 U.S.L.W. 3399 (2011). We do not find error that, in the absence of Conley’s objection, would require 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 847-48; *Vanzandt*, 156 S.W.3d at 674. We overrule issue three.

Having overruled Conley's three issues, we affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on September 20, 2011
Opinion Delivered September 29, 2011

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