In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00589-CV

IN RE COMMITMENT OF CLARENCE DEWAYNE BROWN

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 10-03-02609-CV

MEMORANDUM OPINION

The State of Texas filed a petition to civilly commit Clarence Dewayne Brown as a sexually violent predator under the Sexually Violent Predator Act. *See* Tex. Health & Safety Code Ann. §§ 841.001-.151 (West 2010 & Supp. 2012) (SVP statute). A jury found Brown suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *Id.* § 841.003. The trial court entered final judgment and an order of civil commitment under the Act. We affirm the judgment of the trial court.

Brown complains on appeal that (1) the evidence is legally and factually insufficient to support a finding beyond a reasonable doubt that Brown has serious

difficulty controlling his behavior, (2) the evidence is legally and factually insufficient to support a finding beyond a reasonable doubt that Brown is likely to engage in a predatory act of sexual violence, (3) the trial court erred in denying Brown's request for a jury instruction on emotional or volitional capacity, and (4) the trial court erred in striking Brown's designated expert as a discovery sanction.

I. SUFFICIENCY OF THE EVIDENCE

Under the SVP statute, the State must prove beyond a reasonable doubt that "the person is a sexually violent predator." *Id.* § 841.062(a). The 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(a). 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).

Because the SVP statute employs a beyond-a-reasonable-doubt burden of proof, when reviewing the legal sufficiency of the evidence, we must assess all the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could find, beyond a reasonable doubt, the elements required for commitment under the statute. *In re Commitment of Mullens*, 92 S.W.3d 881, 885 (Tex. App.—Beaumont 2002,

pet. denied); *In re Commitment of Myers*, 350 S.W.3d 122, 130 (Tex. App.—Beaumont 2011, pet. denied). It is the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Mullens*, 92 S.W.3d at 887. In reviewing the factual sufficiency of the evidence in an SVP commitment case, we must weigh the evidence to determine whether a verdict that is supported by legally sufficient evidence nevertheless reflects a risk of injustice that compels ordering a new trial. *In re Commitment of Day*, 342 S.W.3d 193, 213 (Tex. App.—Beaumont 2011, pet. denied); *Myers*, 350 S.W.3d at 130.

A. The Testimony

Dr. Timothy Proctor, a forensic psychologist, and Dr. Michael Arambula, a psychiatrist, testified for the State. The State also called Brown as a witness at trial. Proctor testified that he attempted to meet with Brown as part of his evaluation in this case, however, Brown refused to participate in the evaluation. Despite Brown's refusal to cooperate, Proctor told the jury he was still able to form an opinion and that he "[had] a lot of additional information to bolster [his] opinion" in this case. Proctor explained that in addition to voluminous records he reviewed in this case, he was able to review another evaluation of this type that had previously been performed on Brown, as well as Brown's deposition transcript.

Proctor testified that Brown's records contained five instances of allegations of sexual assault committed by Brown, three of which resulted in convictions. Though only

three of the allegations resulted in convictions, Proctor explained that he gave weight to the evidence of non-conviction offenses because the records established a similar pattern in all five cases. Proctor testified that the first sexual assault complaint against Brown was made in 1988, while Brown was on probation for aggravated assault of a peace officer. Records indicated the first complaint may have been no-billed. Allegations were made by a second complainant resulting in a conviction for sexual assault in 1989. Brown was sentenced to fifteen years in prison for this offense. Brown served eighteen months and was released on supervision. Allegations of sexual assault were made against Brown by a third complainant in 1994, while Brown was still on parole. Proctor stated that the third complaint was dismissed because the complaining witness was unwilling to cooperate. According to Proctor, the allegations of the third complainant established a pattern similar to Brown's prior offenses. Allegations of sexual assault were made against Brown again in December 1995 and January 1996, while Brown was still on parole. The fourth and fifth complaints against Brown resulted in separate convictions.

Proctor explained that similar to his prior offenses, with his fourth and fifth victims, Brown took steps to get the victims into a car with him willingly. Also similar to some of the prior instances, drugs and alcohol were involved, he took the victims to a remote location or somewhere other than where he originally told the victim he would take her, and initially he told her if she would kiss him it would be over. Just as in the other instances, Brown continued to pursue sexual relations until he forcibly sexually assaulted

both victims. According to Proctor, as Brown continued committing offenses, Brown began taking steps to prevent detection, such as threatening to tell the police that the victims had engaged in drug use and by using an alias.

Proctor discussed the risk factors he observed during the course of his evaluation. Proctor testified that all the victims were unrelated to Brown. Proctor explained that research indicates a higher rate of recidivism for offenders who have unrelated victims. In addition, Brown committed all the offenses while on supervision. The first few offenses occurred while Brown was on probation for a non-sexual offense and the last two occurred while he was on parole for his first sexual assault conviction. Proctor explained that committing sexual offenses while you are under supervision for those same types of offenses raised his concern regarding Brown's risk for re-offending in the future. With regard to his last victim, Proctor explained that Brown engaged in multiple sex acts. According to Proctor, this is also a risk factor for re-offense. Evidence that Brown has committed five sexual offenses also increases his risk. In addition, Proctor told the jury that Brown "seems to have had quite a few sex partners, many of which were . . . one-night stands, casual sex partners[,]" which also increases his risk to reoffend.

Proctor testified that Brown's sexual offenses were predatory acts as defined by the statute and the offenses were committed for the primary purpose of victimization. Proctor explained that Brown's version of these offenses "varies greatly from what the

complainants stated" happened. Proctor also acknowledged prior testimony by Brown, in which he stated his belief that the offenses involved consensual sexual activity. Proctor explained, however, that "[t]his was not a situation where there's any indication that these women were consenting to this." Proctor explained to the jury why Brown's use of an alias concerned him and how the use of drugs and alcohol factored into his analysis. Proctor stated that he believed Brown had lived an antisocial lifestyle, which "began at an early age." But, Proctor also testified regarding positive factors he observed in Brown against re-offending such as his age, the lack of male victims, lack of sexual misconduct in prison, and the fact that he had long-term live-in relationships in the past and had completed the sex offender treatment program.

Proctor testified that he performed actuarial tests and explained the use of these instruments to the jury. On the Static-99R, Proctor scored Brown at a plus four, which put him at a moderate-high risk for re-offense. On the MnSOST, Proctor gave Brown a score of ten, which falls into a "high risk range." Though Proctor observed many psychopathic traits in Brown, he "stopped short" of labeling Brown as a psychopath. Proctor explained to the jury that he observed evidence that Brown is a pathological liar, and described him as conning and manipulative. According to Proctor, as recently as a month before the commitment proceeding, notes from Brown's sex offender treatment provider indicate that Brown was struggling with lack of victim empathy. Proctor also explained that minimization and denial were current concerns, especially given that

Brown had completed sex offender treatment and was still exhibiting these symptoms. Using the DSM, Proctor diagnosed Brown with paraphilia not otherwise specified, sexual deviance, cocaine and alcohol abuse, and personality disorder, not otherwise specified with antisocial traits. Proctor explained his diagnoses and how they factored into his over-all opinion.

Proctor testified that he believes Brown suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. Proctor explained the meaning of emotional and volitional capacity as set forth in the SVP statute. Proctor stated that "emotional capacity is more capacity in terms of just, . . . affect in terms of emotion; volitional capacity deals with decision making and . . . the behaviors and choices you make." Proctor testified that in his opinion, the issues Brown has dealt with in regard to his sexual offending affect his emotional and volitional capacity. He explained that Brown continues to exhibit traits that support his behavioral abnormality diagnoses; Brown continues to minimize his sexual offenses, exhibit denial, and still struggles with lack of victim empathy. Proctor found significant that even at the trial, Brown continued to characterize the sexual assaults as consensual. According to Proctor, the continued exhibition of these symptoms by Brown was even more significant because Brown has completed sex offender treatment. Proctor told the jury that Brown has not progressed in treatment to a point where his behavioral abnormality is not present.

Like Proctor, Dr. Arambula testified that Brown would not cooperate with his evaluation. Brown refused to discuss with Arambula his past history or offenses but did briefly discuss his sex offender treatment. Like Proctor, Arambula testified that Brown's refusal to cooperate did not prevent him from performing his evaluation. Arambula also testified that Brown suffers from a behavioral abnormality that affects his volitional or emotional capacity and predisposes him to commit a sexually violent offense to the extent that he is a menace to the health and safety of others. Arambula discussed Brown's sexual offenses and explained that, like Proctor, he also considered the two complaints of sexual assault that did not result in convictions because "it looked like the same MO, almost as if it was a serial-type of behavior."

Arambula testified that in each instance, Brown was initially cordial and friendly, drugs were sometimes involved and Brown ultimately became more coercive. All five complainants alleged they were raped, and Arambula believed that as Brown repeated the behavior he became "more skilled each time." Arambula testified that the records indicated that anger was a trigger for Brown and that while he did make "some beginning progress" in treatment, as late as one month prior to trial, Brown still lacked insight into his offenses, lacked victim empathy and continued to deal with anger issues. Arambula testified that one of Brown's sex offender treatment providers noted Brown's ongoing anger toward women, the instructor felt threatened by him, to the point where she had to have him removed from the treatment setting. Other records from Brown's sex offender

treatment indicated that when he acted as a group leader, he exhibited insensitivity to other group members and exhibited anger and hostility toward women. Arambula testified that he believes Brown continues to need further sex offender treatment.

Using the DSM-IV-TR, Arambula diagnosed Brown with paraphilia not otherwise specified, cocaine and alcohol abuse, in remission, and personality disorder, not otherwise specified. Arambula explained each of these diagnoses to the jury. Arambula also testified that he saw traits of antisocial behavior in Brown. According to Arambula, Brown has "exhibited problems with authority in prison." Arambula testified regarding Brown's risk factors, as well as positive factors. Arambula stated that Brown's risk factors include: a chronic paraphilia condition, three convictions and five complainants, a similar pattern with all the offenses, the use of drugs and alcohol, problems with authority, the fact that he committed offenses while under supervision, a history of aggressive behavior towards others, a lack of sufficient progress in sex offender treatment, and continued issues with anger and minimization of his offenses.

Arambula explained that "emotional capacity" can have broad meanings but deals with the way someone feels, whereas "volitional capacity" "has to do with decision making, problem solving, weighing risks and benefits, and using tools by either experience or whatever in order to decide what to do." When determining if someone's volitional capacity is affected, Arambula stated he "look[s] for a mental condition [that affects] . . . things like decision-making and processing emotions[.]" Arambula explained

that he believes Brown's paraphilia and personality disorder affect Brown's emotional or volitional capacity. Arambula testified that he believes Brown is at "significant risk for reoffending." Arambula stated that using the definition of behavioral abnormality as set forth in the SVP statute, he believes Brown has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence.

Brown was called to testify both by the State and in his own defense. Brown acknowledged that he had been convicted of sexual assault on three occasions for sexually assaulting three different women. When asked about the incidents involving the two additional complainants, he pleaded the Fifth Amendment. He explained that in his deposition, taken in conjunction with this proceeding, he testified that the sex between he and the victims was consensual, however, at trial he stated he believed it was "initially" consensual, but acknowledged that he took advantage of the women. According to Brown, sex offender treatment has taught him to avoid distorted thinking. At trial, Brown's version of his conviction offenses differed largely from the three victims' accounts. Brown denied that his first victim did not know him prior to the night of the offense, that he forced her into his apartment, that he told her not to scream, that he forced her clothes off, and forced her to engage in sexual intercourse. According to Brown, they were having consensual sex when she asked him to stop, and he refused. With regard to his second victim, he denied that he first met her on the night of the incident or that he used an alias. He testified that they had consensual sex in exchange

for drugs. With regard to his third victim, Brown denied forcing her clothes off and forcing her to engage in multiple sex acts, including sexual intercourse. Brown admitted that he sexually assaulted his third victim but testified that she had originally made a deal to give him sex in exchange for drugs and then "went back on it." Brown admitted that he still has anger issues and that he has been violent with women in the past. He also acknowledged that he has had trouble controlling his sexual urges in the past.

When questioned by his own attorney on direct examination, Brown testified that his sexual encounters with the victims were non-consensual. When cross-examined by the State regarding his earlier testimony that the sex with these women was consensual, he clarified that what he meant was that it was "initially" consensual. Brown testified, "[w]ith all of them, sir, I believe it was all initially – initially I thought it was consensual." He testified that he did not target the victims but that he knew them. He testified that he did not use force with any of the victims, and that the last two offenses involved a prearranged deal for sex in exchange for drugs. He denied ever using an alias.

B. Analysis

In issues one and two, Brown challenges the legal and factual sufficiency of the evidence to support a finding beyond a reasonable doubt that Brown has serious difficulty controlling his behavior. In issues four and five, Brown argues the evidence is legally and factually insufficient to support a finding beyond a reasonable doubt that Brown is likely to engage in a predatory act of sexual violence. "[P]roof of serious difficulty in

controlling behavior" is required in order to civilly commit a defendant under the SVP statute. *See Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). 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." *Id.* Brown argues in issues one and two that the evidence presented at trial "does not either directly or inferentially support a finding beyond a reasonable doubt that [Brown] currently has serious difficulty controlling his behavior." Brown asserts that the evidence establishes that Brown "was in control of his behavior when he was committing the prior offenses[,]" and that Brown "has not committed any sexual offenses or any other sexual misconduct during the approximately thirteen years that he spent in prison after committing the prior offenses."

Serious difficulty controlling behavior can be inferred from an individual's past behavior, his own testimony, and the experts' testimony. *In re Commitment of Mosqueda*, No. 09-10-00540-CV, 2011 WL 5988361, at *1 (Tex. App.—Beaumont Dec. 1, 2011, no pet.) (mem. op.); *see also In re Commitment of Martinez*, No. 09-05-493 CV, 2006 WL 2439752, at *4 (Tex. App.—Beaumont Aug. 24, 2006, no pet.) (mem. op.). The record contains evidence of five sexual assaults, all of which were committed while Brown was on some type of supervision and two followed a prison sentence for Brown's first sexual assault conviction. Both experts explained that in committing all five

offenses, Brown exhibited a pattern of serial-type behavior. During his own testimony, Brown acknowledged that he has had difficulty controlling his sexual urges in the past. The jury heard expert testimony concerning Brown's risk factors, actuarial test scores, criminal history, diagnoses, repeated sexual offenses, problems with authority in prison, and his continued exhibition of risk factors despite his completion of sex offender treatment. The record established that Brown still has issues with anger and hostility towards women, and that one of his sex offender treatment providers felt threatened to the degree that she removed him from the treatment setting. Arambula testified that anger was a trigger for Brown. The record also established that Brown is still struggling with minimization, denial, and lack of victim empathy. Both Proctor and Arambula testified that Brown has not progressed in treatment to a point where his behavioral abnormality is no longer present. Both experts testified that Brown has a behavioral abnormality that affects his emotional or volitional capacity, and both experts explained the meaning of emotional and volitional capacity to the jury.

On the record before us, viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational jury could have found beyond a reasonable doubt that Brown has serious difficulty controlling his behavior because of a behavioral abnormality. *See Mullens*, 92 S.W.3d at 885-86. We also find the evidence in the record sufficient to support a finding beyond a reasonable doubt that Brown has a behavioral abnormality that makes him likely to commit a predatory act of sexual violence. *See id.*

at 885, 887. In addition, weighing all the evidence, the verdict does not reflect a risk of injustice that would compel ordering a new trial. *See Day*, 342 S.W.3d at 213. Accordingly, we overrule issues one, two, four, and five.

II. JURY INSTRUCTION

The jury charge defined "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." In issue three, Brown argues that the trial court erred in denying Brown's request to include an instruction defining the phrase "affecting a person's emotional or volitional capacity" to mean "serious difficulty in controlling behavior." Brown objected to the charge on this basis. Brown also presented a proposed charge, which included the requested instruction. The trial court overruled Brown's objection and denied his proposed submission to the charge.

The trial court is to submit such instructions and definitions as shall be proper to enable the jury to render a verdict. Tex. R. Civ. P. 277. The trial court has considerable discretion in determining the necessity and propriety of explanatory instructions and definitions. *See Tex. Workers' Comp. Ins. Fund v. Mandlbauer*, 34 S.W.3d 909, 911 (Tex. 2000). The trial court may refuse to give a requested instruction or definition that is not necessary to enable the jury to render a verdict, even if the instruction or definition is a correct statement of the law. *White v. Liberty Eylau Indep. Sch. Dist.*, 920 S.W.2d

809, 812 (Tex. App.—Texarkana 1996, writ denied). Any error by the trial court in refusing a proposed instruction or definition is reversible only if it "probably caused the rendition of an improper judgment[.]" Tex. R. App. P. 44.1(a)(1); *Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002).

Brown argues that "it is not clear that the jury understood that it was required to find that [Brown] currently has serious difficulty controlling his behavior[,]" and "[t]he testimony of the State's experts to the effect that [Brown's] mental issues 'affect his volitional capacity' . . . did not clearly convey this information to the jury." In broad form submission, the jury charge asked the jury if Brown "suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence?" The jury charge clearly defined "behavioral abnormality" as defined in the SVP statute. Tex. Health & Safety Code Ann. § 841.002(2); *see also In re Commitment of Fisher*, 164 S.W.3d 637, 649 (Tex. 2005) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 362-63, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997)) (stating, the individuals "'committed under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that prevents them from exercising adequate control over their behavior.'").

We have addressed the issue raised by Brown in previous cases and held the trial court's refusal to submit a separate jury instruction on volitional control did not constitute error. *See In re Commitment of Almaguer*, 117 S.W.3d 500, 505-06 (Tex. App.—Beaumont 2003, pet. denied); *see also In re Commitment of Taylor*, No. 09-10-00231-

CV, 2010 WL 4913948, at *3 (Tex. App.—Beaumont Dec. 2, 2010, no pet.) (mem. op.) (cases cited therein). In *Taylor* we concluded:

> When, as here, a case is governed by a statute, the jury charge should track the language of the statutory provision as closely as possible. Rule 277 requires the trial court, 'whenever feasible,' to submit the cause on broad-form questions. Here, the charge tracked the language of the statute, broad-form submission was used, and definitions were submitted to assist the jury in answering the question of whether Taylor is a sexually violent predator. The trial court did not err in refusing to include in the jury charge a definition of 'emotional or volitional capacity' as meaning 'serious difficulty controlling behavior,' because the jury charge adequately presented the issue of volitional control to the jury.

Taylor, 2010 WL 4913948, at *3 (citations omitted); *see also Almaguer*, 117 S.W.3d at 505-06. We conclude the issue of volitional control was adequately presented to the jury; therefore, the trial court did not abuse its discretion in refusing to submit Brown's proposed instruction. *See id.* We overrule issue three.

III. STRIKING EXPERT WITNESS

In issue six, Brown argues that the trial court erred in imposing a discovery sanction that prohibited him from offering expert testimony. After filing its petition in this case, the State filed a motion to have Brown evaluated by an expert, which the trial court granted. The trial court's order required Brown to participate in the State's experts' evaluations. The State later filed a motion for sanctions, informing the trial court that both of the State's experts had attempted to examine Brown, but Brown refused to cooperate with the evaluations. In response, Brown filed a motion to compel the State's experts to videotape or audiotape the examination. The motion to compel stated that it

was the understanding of Brown's counsel that Brown's expressed reason for not participating in the evaluation related to distrust. The trial court never ruled on the motion to compel. Thereafter, the trial court signed a notice of sanctions against Brown for failing to cooperate with the State's experts. The notice stated that Brown's failure to submit to the experts' examinations may result in the following sanctions:

1. May be used as evidence against you at trial.
2. You may be prohibited from offering into evidence the results of any expert examination performed on your behalf.
3. You may be subject to contempt proceedings if you violate a court order by failing to submit to an expert examination on the State's behalf.

See Tex. Health & Safety Code Ann. § 841.061(f). The trial judge, Brown, and Brown's attorney all signed the notice. Later, the State filed a first amended motion for sanctions stating that Brown continued to refuse to participate in the evaluations of State's experts. Brown responded to the amended motion, requested that he not be sanctioned, and asserted that he had cooperated with the State by giving a deposition. The trial court signed the State's order to impose sanctions, which provided in part that Brown was "prohibited from offering into evidence the results of an expert evaluation performed on [Brown's] behalf." On appeal, Brown contends that the trial court erred in prohibiting Brown from presenting the testimony of his designated expert, Dr. Walter Quijano.

As a general rule, a trial court's decision to admit or exclude testimony of a witness is subject to an abuse of discretion standard of review. *Owens-Corning Fiberglas*

Corp. v. Malone, 972 S.W.2d 35, 43 (Tex. 1998). An appellate court should not determine whether a trial court abused its discretion in excluding evidence unless the complaint has been preserved for review. *See McInnes v. Yamaha Motor Corp., U.S.A.*, 673 S.W.2d 185, 187 (Tex. 1984); *Sink v. Sink*, 364 S.W.3d 340, 346 (Tex. App.—Dallas 2012, no pet.). To preserve error on appeal, a party must present to the trial court a timely request, motion, or objection, wherein the party states the specific grounds therefore; and obtain a ruling that appears in the record. Tex. R. App. P. 33.1(a); *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999). To challenge the trial court's exclusion of evidence on appeal, the complaining party must present the excluded evidence to the trial court by an offer of proof unless the substance of the evidence is apparent from the context within which the questions were asked. Tex. R. Evid. 103(a), (b); *see* Tex. R. App. P. 33.1; *see also In re Commitment of Day*, 342 S.W.3d 193, 199 (Tex. App.—Beaumont 2011, pet. denied); *In re Commitment of Briggs*, 350 S.W.3d 362, 368 (Tex. App.—Beaumont 2011, pet. denied) (To preserve error regarding a trial court's ruling excluding evidence, the substance of the evidence must be made known to the trial court through an offer of proof unless the substance of the evidence was apparent from the context of the question asked); *Langley v. Comm'n for Lawyer Discipline*, 191 S.W.3d 913, 915 (Tex. App.—Dallas 2006, no pet.) (concluding appellant failed to preserve error when no offer of proof or bill of exception was made). "'[T]he record should indicate the questions that would have been asked, what the answers would have

been and what was expected to be proved by those answers.'" *Day*, 342 S.W.3d at 199-200 (quoting *Lopez v. S. Pac. Transp. Co.*, 847 S.W.2d 330, 336 (Tex. App.—El Paso 1993, no writ)). An offer of proof must be made as soon as practicable after the trial court's ruling excluding the evidence. Tex. R. Evid. 103(b); *see also Smith v. Smith*, 143 S.W.3d 206, 211 (Tex. App.—Waco 2004, no pet.). When the complaining party fails to make an offer of proof in the trial court, the party must introduce the excluded testimony into the record by a formal bill of exception. Tex. R. App. P. 33.2. An appellate court may be able to discern from the record the nature of the evidence and the propriety of the trial court's ruling; however, without an offer of proof we can never determine whether the exclusion of the evidence was harmful. *Bobbora v. Unitrin Ins. Servs.*, 255 S.W.3d 331, 335 (Tex. App.—Dallas 2008, no pet.); *see also In re Commitment of Dees*, No. 09-11-00036-CV, 2011 WL 6229555, at *5 (Tex. App.—Beaumont Dec. 15, 2011, pet. denied) (mem. op.).

Brown has not shown that he made an offer of proof in the trial court that made the substance of the purported testimony by Quijano known or that he perfected a bill of exception. *See Day*, 342 S.W.3d at 200. It is unclear from the record whether Quijano even performed an evaluation of Brown. Because Brown has not preserved error regarding the exclusion of Quijano as an expert witness, we overrule issue six.

Having overruled all Brown's appellate issues, we affirm the judgment of the trial court.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on June 27, 2012
Opinion Delivered September 27, 2012

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