In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00036-CV

IN RE COMMITMENT OF OSIE DEES

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 10-04-03812 CV

MEMORANDUM OPINION

Osie Dees challenges his civil commitment as a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001-.150 (West 2010 & West Supp. 2011) (SVP statute). Dees presents three issues in his appeal from the trial court's judgment and order of civil commitment. We find no error and affirm the trial court's judgment.

Sufficiency of the Evidence

In his first issue, Dees argues there is legally insufficient evidence to show that he suffers from a behavioral abnormality that makes him likely to engage in predatory acts of sexual violence because the opinions of the State's expert witnesses were conclusory and not probative. In support of his issue, Dees attacks the reliability of the opinions of the two experts that testified for the State because each, according to Dees, failed to

explain a valid methodology in reaching his or her respective opinion. Dees also argues that actuarial tests utilized by the State's experts are not appropriate to use in determining whether a person has a behavioral abnormality.

Under the SVP statute, the State must prove, beyond a reasonable doubt, that "the person is a sexually violent predator." *Id.* § 841.062(a) (West 2010). "[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 City of Keller v. Wilson*, 168 S.W.3d 802, 817 (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. *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 to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* at 887.

A person is a "sexually violent predator" if the person: "(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." Tex. Health & Safety Code Ann. § 841.003(a) (West 2010). "'Behavioral abnormality' means 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.* at § 841.002(2) (West Supp. 2011). "'Predatory act' means an act directed toward individuals, including family members, for the primary purpose of victimization." *Id.* at § 841.002(5).

Dees challenges whether the opinions of the State's experts offer evidentiary support to the jury's verdict. "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 *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.,* 136 S.W.3d 227, 232 (Tex. 2004) (footnote omitted)). "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.,* 136 S.W.3d at 233 (citations omitted)); *see In re Commitment of Barbee*, 192 S.W.3d 835, 843 (Tex. App.—Beaumont 2006, no pet.).

The record reflects that Dees did not object to the testimony of either of the State's experts based on a claim that either opinion was unreliable. The record also demonstrates that each of the State's experts explained the supporting basis or foundation for his or her opinion, and thus, the opinions at issue are not conclusory. Each expert is licensed in his or her respective field. Each interviewed Dees and reviewed records that relate to Dees's sexual history. The records reviewed are of the type that psychiatrists and psychologists rely on, and each of the State's experts performed an assessment consistent with assessments using the type of training used by psychiatrists or by psychologists. Each expert explained how the evidence contained in Dees's records contributed to his or her respective assessment. Dr. Price also relied upon actuarial tests he had performed on Dees to evaluate Dees's risk for reoffending. Each of the State's experts testified that Dees suffers from a behavioral abnormality. Based on the record in this case, we conclude the State's experts explained the methodology used to reach the expert's respective opinion and that each of the State's experts had a basis or foundation for his or her respective opinion. We hold that the opinion of each of the State's experts was not speculative, conclusory, or without any probative value.

Dees also complains that the experts used actuarial tests to assist them in reaching their respective opinions about his condition. Dr. Price testified that the actuarial tests are risk-assessment tools used in the field to evaluate the risk of reoffending. Dr. Price explained that his evaluation of the actuarial tests was conducted in accordance with his training and the accepted standards in his field. Similarly, Dr. Gaines testified that, while

she does not perform actuarial tests as a psychiatrist, actuarial tests are typically used in a behavioral abnormality evaluation. The experts explained the risk factors that make Dees likely to reoffend.

Dees contends that actuarial tests are not probative of either the danger of an individual's re-offending or in determining whether an individual has a behavioral abnormality. However, Dees did not object to the methodology of the State's experts at a time the trial court could have conducted an analysis of the methodology the experts employed. We have previously stated that "[i]f an expert opinion has a supporting basis, but there is a reliability challenge that requires the trial court to evaluate the underlying methodology, the defendant must make a timely objection so that the trial court has the opportunity to conduct this analysis." *In re Commitment of Grunsfeld*, No. 09-09-00279-CV, 2011 Tex. App. LEXIS 1337, at *16 (Tex. App.—Beaumont Feb. 24, 2011, pet. filed) (mem. op.); *see also City of San Antonio*, 284 S.W.3d at 817-18. Because the argument that Dees now advances is that actuarial tests are unreliable, he was required to raise his objection in the trial court, but he did not do so. Because the State's experts offered opinions that were probative on the issues in dispute, the jury could, and apparently did, choose to accept the testimony of the State's experts. *See In re Commitment of Mullens*, 92 S.W.3d at 887 (explaining that juries may resolve contradictions and conflicts in the evidence by believing all, part, or none of a witness's testimony, and may draw reasonable inferences from basic facts to determine ultimate fact issues).

Reviewing the record in the light most favorable to the jury's verdict, we conclude a rational trier-of-fact could have found beyond a reasonable doubt that Dees suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. We overrule Dees's first issue.

Jurisdiction

In his second issue, Dees challenges whether the trial court and this Court have subject matter jurisdiction over his case. Dees argues that the courts do not possess subject matter jurisdiction over his case because he "suffers from a severe mental illness, schizophrenia, which is amenable to traditional mental illness treatment modalities." According to Dees, the SVP statute "was instituted to civilly commit sexually violent predators who are not amenable to traditional mental illness treatment modalities." In contrast, Dees contends that his condition, schizophrenia, is a mental illness that can be treated through the use of medicine, making him amenable to traditional treatment modalities.

We have previously addressed a similar argument advanced in another SVP case. *In re Commitment of Hall*, No. 09-09-00387-CV, 2010 Tex. App. LEXIS 8096, at **1-2 (Tex. App.—Beaumont Oct. 7, 2010, no pet.). In *Hall*, we stated that "'just because a statutory requirement is mandatory does not mean that compliance with it is jurisdictional.'" *Id.* at *2 (quoting *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999)). We then addressed whether the evidence was sufficient to satisfy the SVP statute's requirements. *See id.* at **2-3.

Following the statutorily provided assessment of whether a person, prior to his anticipated release date, may be a sexually violent predator, the State may file a petition alleging that the person is a sexually violent predator and stating facts sufficient to support the allegation. *See* Tex. Health & Safety Code Ann. §§ 841.021, 841.022, 841.023 (West Supp. 2011), § 841.041 (West 2010). Here, the State, in accordance with the SVP statutory scheme, filed a petition alleging that Dees is a sexually violent predator, that he had been found guilty on two previous occasions of sexual offenses, and that Dr. Michael Gilhousen found him to have a behavioral abnormality. During the trial, the State's experts testified that Dees has a behavioral abnormality that he is unable to control. Although diagnosed as schizophrenic, Dees was also diagnosed by the State's expert witnesses with schizoaffective disorder, which is a combination of schizophrenia and a mood disorder, making it a bipolar type; paraphilia; and antisocial personality disorder. The evidence does not demonstrate that Dees, who has these disorders, has achieved control by virtue of receiving treatments over his sexual behavior. Dr. Price, for instance, testified that even if Dees did not have schizophrenia, Dees would have a behavioral abnormality. Each of the State's experts testified that Dees's schizophrenia, despite treatment, appears unmanageable. The jury, after hearing all of the evidence concerning Dees's behavioral abnormality and concerning his history of schizophrenia, as well as the prognosis for successful treatments, found Dees to be a sexually violent predator. Because there was evidence to show that Dees was a repeat sexually violent offender, and that he suffers from a behavioral abnormality that makes him likely to

engage in a predatory act of sexual violence, we conclude that both the trial court and this Court properly exercised subject matter jurisdiction over this case. *See In re Commitment of Robertson*, No. 09-09-00307-CV, 2010 Tex. App. LEXIS 7421, **32-36 (Tex. App.—Beaumont Sept. 9, 2010, pet. denied) (rejecting Robertson's claim that diagnosis of schizophrenia divested the trial court of subject matter jurisdiction over Robertson's case in light of his additional diagnoses of "'paraphilia not otherwise specified with features of pedophilia'" and antisocial personality disorder). We overrule issue two.

Limitation of Cross-Examination

In issue three, Dees argues the trial court committed error by restricting his cross-examination of Dr. Price. The trial court's decisions with respect to Dr. Price's examination were based on the State's arguments that Dees could not re-litigate the issues that had led to Dees's prior criminal convictions. Dees–citing Texas Rule of Evidence 705–argues that the trial court refused to allow him to question Dr. Price about Dr. Price's opinion that Dees's conviction for attempted aggravated sexual assault actually amounted to a sexual assault. Dees also complains that the trial court restricted his examination concerning information contained in various records that were reviewed and relied upon by Dr. Price in reaching his opinion.

We review a trial court's decisions concerning the admissibility of evidence for an abuse of discretion. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). A trial court abuses its discretion when it acts without reference to guiding rules and principles, or if it acts arbitrarily and unreasonably. *E.I. du Pont de Nemours & Co.,*

Inc. v. Robinson, 923 S.W.2d 549, 558 (Tex. 1995); *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). With respect to an error in admitting evidence, we will reverse a judgment only if an error by the trial court probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case on appeal. *See* Tex. R. App. P. 44.1.

The record before us includes several instances where the trial court sustained the State's objection to Dees's cross-examination of Dr. Price. In one, the trial court sustained the State's objection to a question posed by defense counsel asking whether Dr. Price would agree with her that Dees was neglected by both his mother and father. The State objected that the question was irrelevant, and the trial court sustained the State's objection, stating "[t]his is about whether he has a behavioral abnormality today, not what happened back then." Later, the trial court sustained the State's relevance objection to a question posed to Dr. Price concerning whether Dees's assignment to a prison psychiatric unit was not a permanent one. Shortly after that, the trial court sustained the State's relevance objection when defense counsel asked Dr. Price whether Dees's conduct disorders that he had as a child might be attributed to Dees having suffered depression as a young child.

With respect to Dees's complaints that concern the restrictions placed on cross-examination, we conclude the trial court did not abuse its discretion. In this case, the issue the jury was required to decide was whether Dees is a repeat sexually violent offender who presently suffers from a behavioral abnormality that makes him likely to

engage in predatory acts of sexual violence. *See* Tex. Health & Safety Code Ann. §§ 841.002(2), 841.003(a), 841.062(a). Dr. Price explained the methodology he used in formulating his opinion. Dr. Price also explained how the records he reviewed impacted his opinion concerning whether Dees has a behavioral abnormality. With respect to the rulings now at issue, it was reasonable for the trial court to conclude that Dees's proposed questions did not address whether Dees presently has a behavioral abnormality that makes him likely to reoffend. Stated another way, the questions Dees was not allowed to ask do not address a fact of consequence that would have made Dr. Price's prognosis more or less probable. *See generally* Tex. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Tex. R. Evid. 402 ("Evidence which is not relevant is inadmissible."). Further, to the extent that Dees's complaints address questions that concern the reliability of Dr. Price's expert opinion, his complaints were waived, as a reliability challenge is required to have been raised in the trial court to be preserve error for appeal. *See In re Commitment of Barbee*, 192 S.W.3d at 843.

Additionally, Dees never made an offer of proof to show how Dr. Price might have answered the questions that are now at issue. In the absence of an offer of proof, a reviewing court cannot 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.). Even if Dees's proposed questions were relevant to an issue in dispute, his failure to

make an offer of proof preserved nothing for us to review on appeal. *See* Tex. R. Evid. 103(a) (stating that to preserve error concerning the exclusion of evidence, a substantial right of the complaining party must be affected, and the complaining party must have made the substance of the evidence known to the trial court by an offer of proof); *Bobbora*, 255 S.W.3d at 334.

Additionally, in issue three, Dees complains that the trial court sustained the State's objection to a question defense counsel posed asking Dr. Price whether he "fe[lt] comfortable going against what a 12-person jury decided[]" concerning a case in which Dees was found guilty of attempted aggravated sexual assault. Just before being asked that question, Dr. Price, in answering defense counsel's questions, explained that he understood the jury's finding on attempted aggravated sexual assault to mean that "there was some kind of sexual contact." When defense counsel asked Dr. Price about "going against" what a jury had found, the State objected on the basis that collateral estoppel prevented the introduction of evidence contradicting Dees's conviction for attempted aggravated sexual assault, and the trial court ruled as follows: "Well, you're also calling for a legal conclusion from this witness. So don't attack the judgments and ask the witness to give legal conclusions. Next question, please."

The existence of Dees's prior conviction for attempted aggravated sexual assault of a child was not disputed. Before the trial began, Dees stipulated to having been convicted for attempted aggravated sexual assault. The indictment pertinent to Dees's attempted aggravated sexual assault conviction indicates that the victim of the sexual

assault was a child. Attempted aggravated sexual assault of a child is a "sexually violent offense" for purposes of the SVP statute, and thus can serve as one of the predicate convictions. Tex. Health & Safety Code Ann. § 841.002(8)(A), (E) (West Supp. 2011). Before trial, Dees also stipulated that he had been convicted on a charge of sexual assault. Thus, it was undisputed that Dees had two final convictions; consequently, he could not challenge the facts concerning those in this proceeding. *See In re Commitment of Eeds*, 254 S.W.3d 555, 557-58 (Tex. App.—Beaumont 2008, no pet.) (concluding that respondent in a commitment proceeding could not collaterally attack prior criminal judgment that served as one of the predicate convictions under the SVP statute). Here, the conviction for attempted aggravated sexual assault is final and has not been set aside. *See id.*, 254 S.W.3d at 557-58 (finding furthermore that respondent could not collaterally attack the accuracy of a statement in the criminal judgment that his conviction was for indecency by contact, where that judgment had not been reversed, corrected, or set aside).

Under the circumstances, the trial court could reasonably conclude that Dr. Price's subjective feelings concerning his level of comfort with the jury's verdict in Dees's attempted aggravated sexual assault case is not a fact of consequence as it relates to Dees's SVP case. *See In re Commitment of Hinkle*, No. 09-09-00548-CV, 2011 Tex. App. LEXIS 4504, **14-15 (Tex. App.—Beaumont June 16, 2011, pet. filed) (concluding that whether the appellant was wrongfully convicted in an underlying case had not been decided in that case, but was not relevant to the civil commitment case); Tex. R. Evid. 401. Additionally, Dees failed to offer a bill of proof or otherwise

demonstrate how an answer by Dr. Price to a question addressing his subjective comfort level relates to a fact of consequence in Dees's SVP case. Because Dees has not demonstrated the trial court abused its discretion in ruling for the State, we overrule Dees's third issue and affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on September 15, 2011
Opinion Delivered December 15, 2011
Before McKeithen, C.J., Kreger and Horton, JJ.