

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-11-00291-CV

IN RE COMMITMENT OF BRIEN ARTHUR MASON

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 10-07-07538 CV

MEMORANDUM OPINION

The State of Texas filed a petition to commit Brien Arthur Mason as a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001-.151 (West 2010) and Act of May 23, 2011, 82nd Leg., R.S., ch. 1201, § 16, 2011 Tex. Sess. Law Serv. 3197, 3202-03 (West) (to be codified at Tex. Health & Safety Code § 841.151). A jury found that Mason suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. The trial court signed a final judgment and an order of civil commitment. In this appeal, Mason raises four issues regarding whether the State's expert witness testimony was conclusory, speculative, and legally insufficient to support the verdict; and whether the evidence was legally and factually sufficient to prove that he

has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. We affirm the trial court's judgment.

ISSUE ONE

In his first issue, Mason argues that the State's expert-witness testimony was speculative, conclusory, and therefore legally insufficient to support the jury's finding that Mason has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. "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., Inc. v. Crown Central Petrol. Corp.*, 136 S.W.3d 227, 232 (Tex. 2004)); Tex. R. Evid. 401. "Bare, baseless opinions will not support a judgment even if there is no objection to their admission in evidence." *Pollock*, 284 S.W.3d at 816. "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*, 136

S.W.3d at 233); *see In re Commitment of Barbee*, 192 S.W.3d 835, 843 (Tex. App.—Beaumont 2006, no pet.).

To the extent that Mason's complaints concern the foundational data used or relied on by Drs. Timothy Proctor and Sheri Gaines in reaching their opinions. Mason did not object to the experts' use of records or actuarial tests. Accordingly, to the extent Mason challenges the reliability of the experts' testimony, his complaint is not preserved for appeal. *See Pollock*, 284 S.W.3d at 816-17; *see also Barbee*, 192 S.W.3d at 843; *In re Commitment of Burnett*, No. 09-09-00009-CV, 2009 Tex. App. LEXIS 9930, at **4-5 (Tex. App.—Beaumont Dec. 31, 2009, no pet.) (mem. op.).

To the extent Mason challenges the experts' opinions as baseless, the testimony of Dr. Proctor and Dr. Gaines is neither conclusory nor speculative. According to the record, both Dr. Proctor and Dr. Gaines are licensed in their respective fields. *See Burnett*, 2009 Tex. App. LEXIS 9930, at *14. They interviewed Mason, conducted risk assessments, and reviewed records regarding Mason's background, offenses, and incarceration. *See id.* Dr. Proctor administered actuarial tests, and he testified that these types of tests are generally accepted in his field. The experts relied on the types of records that are relied on by experts in their respective fields, and they performed their evaluations in accordance with their training as professionals in their respective fields. *See id.*

Drs. Proctor and Gaines testified that they based their opinions on the facts and data gathered from the records they reviewed, their interviews with Mason, 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 Mason 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 one.

ISSUES TWO, THREE, AND FOUR

In issues two and four, Mason argues that the evidence was legally and factually insufficient to prove that he is unable to control his behavior. In his third issue, Mason contends the evidence was factually insufficient to prove beyond a reasonable doubt that he has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. We address 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(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). 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).

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, 342 S.W.3d 193, 213 (Tex. App.—Beaumont 2011, pet. denied).

The record contains legally sufficient evidence from which the jury could determine that Mason is a sexually violent predator and is unable to control his behavior. Board-certified psychiatrist Dr. Gaines and forensic psychologist Dr. Proctor testified that based on actuarial tests, risk assessments, interviews with Mason, Mason's records and history, and his diagnosed conditions, Mason has a behavioral abnormality that makes him likely to commit predatory acts of sexual violence. The jury heard evidence concerning Mason's risk factors, actuarial test scores, criminal history, repeated sexual

offenses, and diagnoses of pedophilia, polysubstance dependence, major depressive disorder, and borderline personality disorder with antisocial personality traits.

The jury could reasonably conclude that Mason is likely to engage in a predatory act of sexual violence. *See In re Commitment of Mullens*, 92 S.W.3d 881, 887 (Tex. App.—Beaumont 2002, pet. denied); *see also In re Commitment of Almaguer*, 117 S.W.3d 500, 506 (Tex. App.—Beaumont 2003, pet. denied); *Burnett*, 2009 Tex. App. LEXIS 9930, at *13. The conclusion that Mason is unable to control his behavior is implicit in the jury's finding that Mason suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See In re Commitment of Grinstead*, No. 09-07-00412-CV, 2009 Tex. App. LEXIS 228, at *16 (Tex. App.—Beaumont Jan. 15, 2009, no pet.) (mem. op.) (citing *Almaguer*, 117 S.W.3d at 505).

Reviewing all of the evidence in the light most favorable to the verdict, a rational jury could have found, beyond a reasonable doubt, that Mason is a sexually violent predator; therefore, the evidence is legally sufficient. *See Crane*, 534 U.S. at 413; *Mullens*, 92 S.W.3d at 885. In addition, weighing all of the evidence, including Mason's testimony that he is not a pedophile, he would not commit another sexual offense, and he would continue participating in sex offender treatment after his release, as well as the experts' testimony concerning Mason's protective factors, the verdict does not reflect a risk of injustice that would compel ordering a new trial. Therefore, the evidence is

factually sufficient. *See Day*, 342 S.W.3d at 213. We overrule issues two, three, and four, and we affirm the trial court's judgment and order of civil commitment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on October 17, 2011
Opinion Delivered October 27, 2011

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