

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-14-00391-CV**

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**IN RE COMMITMENT OF GEORGE PICKENS JR.**

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**On Appeal from the 435th District Court**  
**Montgomery County, Texas**  
**Trial Cause No. 14-02-01838-CV**

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**MEMORANDUM OPINION**

George Pickens Jr. appeals from a jury verdict that resulted in his civil commitment as a sexually violent predator. *See* Tex. Health & Safety Code Ann. § 841.081(a) (West Supp. 2015). In four issues, Pickens challenges the legal and factual sufficiency of the evidence supporting the jury’s verdict, argues that the trial court erred by failing to instruct the jury that a “no” finding does not require a unanimous verdict, and contends the civil commitment statute is unconstitutional as applied to him because it impairs the State’s contractual plea bargain obligation. We overrule the issues and affirm the trial court’s judgment.

## Sufficiency of the Evidence

Pickens challenges the legal and factual sufficiency of the evidence supporting the jury's finding that he is a sexually violent predator. He argues that the State failed to prove, beyond a reasonable doubt, that he has a behavioral abnormality. According to Pickens, the assessment of the State's expert was based solely upon her diagnosis of a personality disorder. Pickens argues that a finding that a person is a sexually violent predator must be based upon a diagnosis of a disorder where the person has abnormal sexual interests. We address these issues together.<sup>1</sup>

Under a legal sufficiency review, 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 civil commitment as a sexually violent predator. *In re Commitment of Mullens*, 92 S.W.3d 881, 885 (Tex. App.—Beaumont 2002, pet. denied). Under a factual sufficiency review in a civil commitment proceeding, we weigh the evidence to determine “whether a verdict that is supported by legally sufficient evidence nevertheless reflects a risk of

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<sup>1</sup> These complaints were presented to the trial court only through a motion for new trial.

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).

In a civil commitment proceeding under Chapter 841 of the Texas Health and Safety Code, the State must prove, beyond a reasonable doubt, that a person is a sexually violent predator. Tex. Health & Safety Code Ann. § 841.062(a) (West 2010). A person is a “sexually violent predator” if he is a repeat sexually violent offender and he suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. Tex. Health & Safety Code Ann. § 841.003(a) (West Supp. 2015). A “[b]ehavioral abnormality” is “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). “A condition which affects either emotional capacity or volitional capacity to the extent a person is predisposed to threaten the health and safety of others with acts of sexual violence is an abnormality which causes serious difficulty in behavior control.” *In re Commitment of Almaguer*, 117 S.W.3d 500, 506 (Tex. App.—Beaumont 2003, pet. denied).

In this case, the jury heard Pickens admit that he was convicted of aggravated rape in 1981 and sentenced to twenty-five years in prison. He also

admitted that approximately nine days after his release on parole for aggravated rape, he was then arrested for sexual assault of a child, which resulted in a conviction and a twenty-five year sentence that he was serving at the time of the trial. The jury also heard Pickens's admissions to having convictions for bribery and numerous convictions for possession of marijuana. Additionally, Pickens admitted to past marijuana and alcohol abuse. He admitted that he was a sex offender, that he had not participated in sex offender treatment, and that he believed he did not need sex offender treatment. Pickens admitted that while in prison, he received twenty disciplinary actions, seven of which were major.

Pickens testified that in 1990, he sexually assaulted his fourteen-year-old daughter nine days after he was released on parole. Except for the time he spent on parole, Pickens has been imprisoned for thirty-three years. The Texas Department of Criminal Justice approved him for sex offender treatment, but Pickens chose not to participate.

The State's expert, Dr. Sheri Gaines, a psychiatrist, testified that in her opinion, Pickens has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence.<sup>2</sup> Dr. Gaines diagnosed Pickens with antisocial personality disorder, sexual abuse of a child, sexual abuse of an adult, cannabis use

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<sup>2</sup> Neither Dr. Gaines's credentials nor her methodology is subject to a challenge by Pickens.

disorder, and alcohol use disorder. Dr. Gaines identified Pickens's risk factors for sexually reoffending as: (1) the use of a weapon to perpetrate multiple sex acts against a stranger in the 1981 offense; (2) dishonesty and minimizing the facts of his sexual offenses; (3) presenting himself as a victim; (4) the rapidity with which he re-offended previously; (5) offending while on parole; (6) having victims in different relationship and age categories; (7) offending while intoxicated; and (8) an unstable and versatile criminal lifestyle.

According to Dr. Gaines, antisocial personality disorder is a pattern of disregard for people and property, beginning as a juvenile and continuing into adulthood. In Pickens's case, this disorder is evidenced by his criminal convictions and arrests, his inability to follow the rules while in prison, and his lying and lack of remorse for his crimes. Dr. Gaines explained that antisocial personality disorder can attenuate over time, but Dr. Gaines saw no evidence that Pickens's disorder has attenuated. Dr. Gaines indicated that she might have had sufficient information of extraneous sexual offenses to give a diagnosis of paraphilia, but she used the more conservative diagnoses of sexual abuse of a child and sexual abuse of an adult. She testified that Pickens is sexually deviant, meaning that he has sexual thoughts, urges, and behaviors that interfere with his life and his relationships, and

his sexual deviance and antisocial personality disorder are risk factors for reoffending with sexually violent conduct.

Pickens relies upon a case from another jurisdiction, which held that a diagnosis of antisocial personality disorder together with testimony about the person's sex crimes, but without evidence of some independent mental abnormality diagnosis, was insufficient to support a finding of mental abnormality within the meaning of that state's civil commitment statute. *See State v. Donald DD.*, 21 N.E.3d 239, 249-50 (N.Y. 2014). In Texas, however, "[a] medical diagnosis of a person's mental health may certainly inform an assessment of whether he has an SVP's behavioral abnormality, but the principal issue in a commitment proceeding is not a person's mental health but whether he is predisposed to sexually violent conduct." *In re Commitment of Bohannan*, 388 S.W.3d 296, 306 (Tex. 2012). A diagnosis of a mental disorder is not a prerequisite for civil commitment. *See In re Commitment of Richard*, No. 09-13-00539-CV, 2014 WL 2931852, at \*2 (Tex. App.—Beaumont June 26, 2014, pet. denied) (mem. op.), *cert. denied*, 135 S. Ct. 1747 (2015).

The jury was entitled to infer that Pickens is predisposed to sexually violent conduct from Gaines's testimony, Pickens's past behavior, and Pickens's own testimony. *See In re Commitment of Lopez*, 462 S.W.3d 106, 116 (Tex. App.—

Beaumont 2015, pet. denied). The jury, acting in its exclusive role as the sole judge of the credibility of the witnesses and the weight to be given their testimony, resolved any conflicts and contradictions in the evidence and accepted the opinion of the State’s expert. *See In re Commitment of Kalati*, 370 S.W.3d 435, 439 (Tex. App.—Beaumont 2012, pet. denied). Viewing the evidence in the light most favorable to the verdict, a rational jury could have found, beyond a reasonable doubt, that Pickens is a sexually violent predator; thus, the evidence is legally sufficient. *See* Tex. Health & Safety Code Ann. § 841.062(a); *see also Kansas v. Crane*, 534 U.S. 407, 413 (2002); *Mullens*, 92 S.W.3d at 885, 887. Weighing all of 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. We overrule issues one and two.

### **Jury Charge**

In issue three, Pickens contends that the trial court erred by overruling his objection to the charge and instructing the jury that a “no” answer to whether he is a sexually violent predator must be unanimous. Section 841.062(b) of the Texas Health and Safety Code states that “[a] jury determination that the person is a sexually violent predator must be by unanimous verdict.” Tex. Health & Safety Code Ann. § 841.062(b). He argues that Texas Rule of Civil Procedure 292 applies

to a determination that a person is not a sexually violent predator.<sup>3</sup> *See generally* Tex. R. Civ. P. 292 (“[A] verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten or more members of an original jury of twelve[.]”).

A judgment may be reversed if the error complained of: “(1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals.” Tex. R. App. P. 44.1(a). A jury charge error is harmless unless it probably caused the rendition of an improper judgment. *Thota v. Young*, 366 S.W.3d 678, 693 (Tex. 2012). In this case, the jury’s unanimous verdict found that Pickens is a sexually violent predator. There is no indication from the record before us that, had the instruction requested by Pickens been included or otherwise changed to more closely track the language of section 841.062(b), the verdict would have been different. *See In re Commitment of Perez*, 09-15-00126-CV, 2015 WL 8470522, at \*7 (Tex. App.—Beaumont Dec. 10, 2015, no pet.) (mem. op.); *In re Commitment of Hatcher*, No. 09-15-00068-CV, 2015 WL 6745399, at \*3-6 (Tex. App.—Beaumont Nov. 5, 2015, no pet.) (mem. op.). Under the facts of this case, we cannot say that the

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<sup>3</sup> We note that a “no” finding would merely establish that the jury had determined that the State failed to meet its burden of proof. *See C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966).



instruction probably caused the rendition of an improper judgment. *See* Tex. R. App. P. 44.1(a)(1). We overrule issue three.

### **Constitutionality**

In his fourth and final issue, Pickens argues that Chapter 841 of the Texas Health and Safety Code is unconstitutional as applied to him because it impairs the State's contractual obligation from the plea-bargain agreement in the prosecution for sexual assault of a child. Civil commitment is a collateral consequence of a conviction for a sexually violent offense, and thus cannot be part of his plea-bargained punishment in the criminal case. *See In re Commitment of Cox*, 09-13-00316-CV, 2014 WL 1400667, at \*5 (Tex. App.—Beaumont Apr. 10, 2014, no pet.) (mem. op.). We overrule issue four and affirm the trial court's judgment and order of commitment.

AFFIRMED.

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CHARLES KREGER  
Justice

Submitted on May 19, 2015  
Opinion Delivered March 3, 2016

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