COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00351-CV

IN THE MATTER OF P.W.

FROM THE PROBATE COURT OF DENTON COUNTY
TRIAL COURT NO. MH-2016-456

MEMORANDUM OPINION[1]

Appellant P.W. appeals the trial court's judgment temporarily committing him to a state hospital for the receipt of inpatient mental health services. In one issue, he contends that the evidence is legally insufficient to substantiate the trial court's findings supporting the commitment. Because there is not clear and convincing proof of the statutory elements required to sustain the trial court's judgment, we reverse the judgment and render judgment ordering appellant's release.

[1]*See* Tex. R. App. P. 47.4.

Background Facts

In the middle of June 2016, a mental health professional filed an application for mental health services[2] concerning appellant, who is twenty-eight years old. In the application, the professional alleged that appellant was homeless and mentally ill. The professional alleged that as a result of appellant's mental illness, he was likely to cause harm to himself and others. The professional also contended that appellant was suffering severe mental, emotional, or physical distress; that appellant was experiencing substantial deterioration of his ability to function independently; and that appellant was unable to make a rational and informed decision as to whether to submit to treatment. Finally, the professional asserted that appellant was unable to participate in outpatient treatment services effectively and voluntarily. To his application, the professional attached an affidavit in which he alleged that appellant had made threats to "the public."

Soon after the filing of the application, a doctor filed a certificate of medical examination[3] concerning appellant. The doctor diagnosed appellant with psychosis, explaining,

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[2]*See* Tex. Health & Safety Code Ann. § 574.001(a) (West Supp. 2016) (stating that any adult may file a sworn, written application for court-ordered mental health services).

[3]"A hearing on an application for court-ordered mental health services may not be held unless there are on file with the court at least two certificates of medical examination for mental illness completed by different physicians each of

> The patient was found at a local hospital making threats to kill others that did not believe in the same God he did. The patient then evaded police and presented to the local Denton County court house making similar threats to the staff both inside and outside of the court house."[4]

The doctor described appellant as "hyper religious" and recommended long-term inpatient care at a state hospital.

Upon appellant's confinement on an emergency basis, he wrote a letter to the trial court. In the letter, he described himself as the "king of the Americas"[5] and "order[ed]" the trial court to read the Quran or "listen to it on [YouTube]." He also stated in the letter,

> [T]he first commandment is that God is one[.] I am commanded to send this warning to everyone in this land that if they say God is a trinity or three . . . they are breaking the first commandment hence they will not have the key to heaven[.] [T]herefore . . . you . . . and anybody that stands in my way will [receive] a big punishment from our creator. . . . I order you to release me as soon as possible or face capital punishment with damnation.

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whom has examined the proposed patient during the preceding 30 days." Tex. Health & Safety Code Ann. § 574.009(a) (West 2010).

[4]A police report in the clerk's record states that after appellant had been taken into custody for threatening others, he told a police officer that he had been living in his vehicle and spoke "unsolicited [and] at length about religion." The report states that complainants had reported appellant "talking about the Quran and . . . about punishment or people would die. All complainants feared for their safety due to [appellant's] behavior." Another document in the clerk's record indicates that appellant told a woman that he hoped that God would kill her "because [she was] doing something bad."

[5]On another occasion, appellant referred to himself as the "King of the Western [H]emisphere."

One day after the filing of the original application, the trial court signed a temporary order authorizing appellant's forced treatment and detention and setting a hearing on the application for June 27, 2016. Before the hearing, another doctor signed a certificate of medical examination. The doctor diagnosed appellant as being bipolar with "psychotic features" and noted that he had become "violent [while] trying to escape."[6]

On June 27, 2016, following a hearing, the trial court signed a judgment ordering appellant to undergo temporary inpatient mental health services. The court committed appellant to a state hospital until September 25, 2016.

After the judgment and during appellant's original commitment, he told a treatment team that he was ready to be released. He stated that he wanted "to go back to his life, get his car[,] and continue with his preaching."

One doctor's note written during the time of appellant's original commitment states, "Our biggest concern is the patient puts himself in danger when he preaches and threatens people when they don't listen to his preaching. He continues to be actively psychotic." Another note, written later, states, "[Appellant] is a 'model patient' and does not cause any difficulties on the unit. He goes to classes regularly and is hoping to be able to leave the hospital soon. . . . He says that he realizes he cannot preach to everyone and needs to

[6]A document in the clerk's record states that on June 16, 2016, appellant banged on a conference room door at the state hospital, kicked other doors, and struggled when staff attempted to subdue him.

be careful in what he says." A third note, written a week after the previous note, states, "Patient has been very quiet and compliant on the unit and goes to all his classes. He continues to ask repeatedly to be discharged from the hospital and, at times, asks people if they have already looked on the YouTube [concerning] the [Quran]." That note also stated, "Patient has improved some. He is not as vociferous about his need to change other people's beliefs, but he continues to be very disturbed by the fact that others are not changing their beliefs . . . ." Doctors' notes after that note emphasized appellant's continued desire to preach and a lack of clarity about where he would go if released, including whether he would return to Virginia.[7] One doctor's note, based on an assessment that occurred on September 7, 2016, states,

> Patient was alert and oriented. His thinking was organized and he denied any hallucinations or delusions. His affect is sad and anxious. . . . He denies any suicidal or homicidal ideation. Insight to illness is fair; judgment continues to be questionable.
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> . . . .
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> Patient is doing somewhat better. His urge to preach seems to have been reduced some[,] and he limits it only to people he had not seen earlier.

In September 2016, while appellant was still confined, a social worker filed a new application for temporary mental health services. The social worker alleged that appellant was not ready to discharge. In the affidavit supporting the

[7]The record reflects that appellant was born in Iraq but moved to Virginia during his childhood.

application, the social worker expressed a belief that appellant was not at risk of harming himself or others, but the social worker stated that appellant "gets agitated at times when other patients will not listen to him." The social worker also stated, "[Appellant] can be intrusive and loud at times. He gets obsessed with preaching [and] wanting others to follow his beliefs so he can get points to enter heaven. When they do not respond like he wants them to he just gets louder and more intrusive."

To accompany the new application, a new doctor filed a certificate of medical examination. The doctor stated that appellant continued to be psychotic and had poor judgment and grandiose delusions. The doctor stated,

> Patient continues to be obsessed by the idea that he needs to get points in order to go to heaven. He will get the points by preaching to people that they need to follow his beliefs. He can be very intrusive. He claims that he will stop taking medications once he leaves the hospital, which in my opinion will cause the psychosis to return in full force. He refuses to follow the plan to go back home to [Virginia]. He can't understand the danger he places himself in because of his preachings.

The trial court held a hearing on the new application.[8] After the hearing, on September 15, 2016, the court signed another judgment ordering inpatient mental health services for a period of up to ninety days (until December 14, 2016). Like in the first judgment, the trial court did not find that appellant was likely to cause harm to himself. Unlike in that judgment, the court did not find in the second judgment that appellant was likely to harm others. Instead, the court

[8]We detail the evidence presented at this hearing below.

based its decision only on findings that appellant was suffering severe and abnormal mental, emotional, or physical distress; was experiencing substantial mental or physical deterioration of his ability to function independently; and was unable to make a rational and informed decision on whether to submit to treatment.[9] From this judgment, appellant brought this appeal.

Evidentiary Sufficiency

In his only issue, appellant contends that the evidence is legally insufficient to support the trial court's second judgment ordering his inpatient commitment. A trial court may order a person to receive temporary inpatient mental health services only when it finds that there is clear and convincing evidence of one of the circumstances described in section 574.034(a) of the health and safety code. *See* Tex. Health & Safety Code Ann. § 574.034(a); *see also In re A.J.W.*, Nos. 02-15-00028-CV, 02-15-00029-CV, 2015 WL 1407890, at *2 (Tex. App.—Fort Worth Mar. 26, 2015, pet. denied) (mem. op.) ("Because an involuntary commitment is a drastic measure, the statutory requirements and evidentiary standards for involuntary commitment . . . are high."). Due process requires this higher standard of proof. *In re C.H.*, 89 S.W.3d 17, 22 (Tex. 2002).

As we have explained in a case applying section 574.034(a),

> Clear and convincing evidence is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

[9]*See* Tex. Health & Safety Code Ann. § 574.034(a)(1), (2)(C)(i)–(iii) (West Supp. 2016).

> This intermediate standard of proof falls between the preponderance standard of proof applicable to most civil proceedings and the reasonable doubt standard of proof applicable to most criminal proceedings. While the proof must be of a heavier weight than merely the greater weight of the credible evidence, there is no requirement that the evidence be unequivocal or undisputed.

In re S.S., No. 02-15-00163-CV, 2015 WL 4561884, at *2 (Tex. App.—Fort Worth July 28, 2015, no pet.) (mem. op.) (citations omitted).

To review the legal sufficiency of evidence when the burden of proof is clear and convincing evidence, we consider all of the evidence in the light most favorable to the finding to determine whether a reasonable factfinder could have formed a firm belief or conviction that its findings were true. *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002); *A.J.W.*, 2015 WL 1407890, at *3. We must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so, and we must disregard all evidence that a reasonable factfinder could have disbelieved or found to be incredible. *J.F.C.*, 96 S.W.3d at 266; *A.J.W.*, 2015 WL 1407890, at *3.

A trial court may order an individual involuntarily confined to receive temporary inpatient mental health services if the court finds that clear and convincing evidence shows that the patient is mentally ill[10] and is

> (i) suffering severe and abnormal mental, emotional, or physical distress;

[10]Appellant expressly does not dispute the sufficiency of the evidence to prove his mental illness.

> (ii) experiencing substantial mental or physical deterioration of the proposed patient's ability to function independently, which is exhibited by the proposed patient's inability, except for reasons of indigence, to provide for the proposed patient's basic needs, including food, clothing, health, or safety; and
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> (iii) unable to make a rational and informed decision as to whether or not to submit to treatment.

Tex. Health & Safety Code Ann. § 574.034(a)(1), (2)(C)(i)–(iii); *see also State ex rel. D.L.S.*, 446 S.W.3d 506, 518 (Tex. App.—El Paso 2014, no pet.) ("The three subparts of this statutory ground are read conjunctively, not disjunctively.").

To be clear and convincing under these requirements, the evidence must "include expert testimony and, unless waived, evidence of a recent overt act or a continuing pattern of behavior that tends to confirm" the "proposed patient's distress and the deterioration of the proposed patient's ability to function." Tex. Health & Safety Code Ann. § 574.034(d)(2); *see S.S.*, 2015 WL 4561884, at *2 ("Proof of mental illness, such as evidence of psychosis, hallucinations, or delusions, without more, does not fulfill the statutory requirement for ordering involuntary inpatient mental health services. There must also be an overt act or continuing pattern of behavior that tends to confirm the likelihood of either serious harm or deterioration." (citations omitted)); *A.J.W.*, 2015 WL 1407890, at *2 (explaining that "[e]xpert testimony is essential" but that an expert's diagnosis of a mental illness "is not sufficient to confine a patient for compulsory treatment"). The State cannot meet its burden of proof without expert opinions and recommendations "supported by a showing of the factual bases on which

they are grounded." *A.J.W.*, 2015 WL 1407890, at *2 (quoting *Mezick v. State*, 920 S.W.2d 427, 430 (Tex. App.—Houston [1st Dist.] 1996, no writ)); *see In re J.M.*, No. 02-14-00398-CV, 2015 WL 600951, at *3 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.) (mem. op.). Facts that appear in the clerk's record—such as facts that we recited above that appear in medical records or certificates of medical examination—but that are not also admitted as evidence at trial cannot support the trial court's judgment of commitment.[11] *A.J.W.*, 2015 WL 1407890, at *4 (holding that because two certificates of medical examination that appeared in the court's file were not admitted as evidence at trial, they could not be considered in the determination of whether temporary mental health services should be ordered); *J.M.*, 2015 WL 600951, at *4 ("[W]e may consider only the evidence presented at the hearing.").

Considering only the evidence admitted by the trial court at the hearing, we cannot conclude that it is legally sufficient to support the judgment of commitment. The trial court received testimony from two witnesses: appellant and Dr. James Shupe, a psychiatrist. Dr. Shupe testified that he had met with appellant only once and that the visit occurred on the day of the hearing. During Dr. Shupe's visit with appellant, they discussed the reason for appellant's admission to the state hospital, his treatment there, and his desire to be

[11]We emphasize that we base our conclusion below on the evidence presented at the hearing; we cannot consider facts that the State could have presented but did not.

released. During the visit, appellant was calm and reserved and did not have difficulty responding to questions.

Dr. Shupe testified that appellant has been diagnosed with bipolar disorder but conceded that appellant is not dangerous to himself or others. He opined that appellant is suffering from severe and abnormal mental, emotional, and physical distress; that appellant is experiencing substantial mental or physical deterioration of his ability to function independently; and that appellant cannot make a rational and informed decision on whether to submit to treatment. When asked about the facts he based those opinions on, Dr. Shupe stated, "His statements that he does not think he needs medication, that no one would want to be on medication, and that he doesn't think there was a reason for him to be in the hospital in the first place." Dr. Shupe testified that appellant did not refuse to acknowledge his mental illness but "just stated that anyone would want to be off medication."

Dr. Shupe acknowledged that appellant was progressing in his treatment and had been compliant with it; he explained that appellant was "less intrusive about . . . preaching to others" and "wasn't as easily agitated when confronted about his behaviors." But Dr. Shupe stated that appellant "continues to get fixated on his need to preach to other people. He has a hard time being redirected from that." Based on this testimony, Dr. Shupe asked the trial court to continue appellant's inpatient treatment, although Dr. Shupe expressed his belief that appellant's mental condition could be treated inside of ninety days.

Concerning the possibility of the trial court ordering outpatient treatment rather than inpatient treatment, Dr. Shupe stated,

> I don't think he's yet ready. I don't think his organization is good enough. The hospital has been in touch with his family and is trying to work out arrangements to get him back to where they live. But at this point, none of that's put in place and I believe he would just stop his medicine and again become even more psychotic if he were in outpatient treatment.

On cross-examination by appellant's counsel, Dr. Shupe acknowledged that appellant had recently acted like a "model patient" at the state hospital and was not causing difficulties there. Dr. Shupe also acknowledged that when appellant lived on his own near the time that he moved from Virginia to Texas, he remained safe and met his own basic needs. On re-direct examination, Dr. Shupe testified,

> I think, in general, [appellant has shown] improvement, yeah. I mean, day to day, there might be a little backsliding here and there, but, generally, overall, he's improving.
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> . . . .
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> . . . [But] he still doesn't really believe he needs medication and . . . doesn't understand his illness.

Appellant testified that he has a degree in biology from George Mason University. He explained that during his time at the hospital, he had taken prescribed medications; had met with a psychiatrist weekly; and had attended physical therapy, cinema therapy, and creative expression classes. Appellant acknowledged that the treatment he had received at the state hospital had helped him, but he opined that he was ready to be released.

Concerning his preaching, appellant testified that he had learned to be "precautious [and] give people their space. [A] [l]ot of times, people are too scared to listen, so it's better just to leave them alone." Appellant said directly to the trial court, "Judge, sorry for the way I acted, how I got into this situation, but I'm well. I'm capable of making good decisions that won't put me back in trouble, and I'm trying to go back to my family." Appellant testified that upon his release, he would go back to Virginia, where his family lives. He testified that he would continue taking medication upon his release, although he would "like to stop" taking the medication eventually and in accordance with a doctor's orders.

The trial court also received evidence through exhibits that contained some of appellant's medical records. Those records indicate that as of August 10, 2016 (a little more than a month before the hearing), appellant had stabilized and was acting as a "model patient." He acknowledged at that time that he needed to be "careful in what he says."

The records show that in late August 2016 (approximately two weeks before the hearing), appellant expressed his desire to be released and believed that he could persuade his sister to take him to Virginia. Appellant stated at that time that he could "control" his preaching and take a "vacation" from it. He also stated that he had decided to dedicate his life to the Quran after he had read it three times and that he could provide clarification about the Quran to the world. The records show that appellant preached about the Quran to individuals at the

state hospital at “inappropriate times” but give no details about why the “times” were “inappropriate.”

The medical records also indicate that as of September 7, 2016 (approximately one week before the hearing), appellant admitted that he “still has a need to preach” and acknowledged that the preaching could be dangerous. But the records from that date show that appellant was alert and oriented and displayed organized thinking.

A social assessment that the trial court admitted states that appellant’s strengths include “Independent Self-Care Skills, Intelligence, Physical Health, [and] Verbal Skills.” The social assessment lists his weaknesses as “No Insight, Poor Financial/Work Pattern, Poor Interpersonal/Coping Skills, Severe Degree of Dysfunction, [and] Strong Negative Symptom Pattern.”

Even viewing all of this evidence in the light most favorable to the trial court’s commitment decision, we cannot conclude that the court could have reasonably formed a firm belief or conviction of the requirements for commitment under section 574.034. Specifically, we cannot conclude that the State presented clear and convincing evidence of (1) a “recent overt act or a continuing pattern of behavior that tends to confirm” appellant’s “distress and the deterioration of [his] ability to function” or (2) appellant’s inability to function independently, as exhibited by a failure to “provide for [his] basic needs, including food, clothing, health, or safety.” Tex. Health & Safety Code Ann. § 574.034(a)(2)(C)(ii), (d)(2).

Rather, Dr. Shupe's testimony and the documents that the trial court admitted established that on the day of the hearing and in the weeks leading to it, appellant remained calm, was not agitated,[12] had been compliant with treatment (including taking medication), was an overall good patient, and was progressing rather than deteriorating. *See id.* Furthermore, while Dr. Shupe emphasized appellant's continuing belief that he needs to preach, we cannot conclude that a fervent desire to preach to others, standing alone, necessarily shows psychosis, much less distress and the deterioration of an ability to function. *Cf. In re State ex rel. K.D.C.*, 78 S.W.3d 543, 550–51 (Tex. App.—Amarillo 2002, no pet.) (holding that evidence was legally insufficient to support a commitment order under section 574.034 despite the patient's religious ideations and psychotic behavior accompanying the ideations); *see also State ex rel. R.J.R.*, No. 06-13-00054-CV, 2013 WL 3421942, at *4–6 (Tex. App.—Texarkana July 3, 2013, no pet.) (mem. op.) (holding similarly when a patient had religious ideations and suffered from psychosis but the State presented no evidence that the patient could not provide for his basic needs). The trial court did not receive evidence

[12]While one statement in a physician's note indicates that appellant experienced anxiety, that note also indicates that the anxiety was focused on his desire to be released from confinement. We cannot conclude that appellant's anxiety about his confinement justifies further confinement under the standards of section 574.034. *See* Tex. Health & Safety Code Ann. § 574.034(a)(2)(C)(ii), (d)(2).

concerning the recent content[13] of appellant's preaching or linking the preaching to any inability to provide for his basic needs, including food, clothing, health, or safety. *See K.D.C.*, 78 S.W.3d at 551 (noting that no evidence linked the patient's religious ideations with evidence of inability to function, such as malnourishment, refusal to eat or sleep, or bad hygiene); *see also* Tex. Health & Safety Code Ann. § 574.034(a)(2)(C)(ii). And Dr. Shupe's testimony established that appellant had met his basic needs while living by himself and preaching before his admission to the state hospital. *Cf. D.L.S.*, 446 S.W.3d at 518 ("Proof of the ability to care for one's basic needs defeats a deterioration finding even in the presence of serious mental illness symptoms."); *State ex rel. J.W.*, 312 S.W.3d 301, 307 (Tex. App.—Dallas 2010, no pet.) ("There is no evidence in the record that, as a result of mental illness, J.W. could not provide for her own food, clothing, or health."); *State ex rel. Best Interest & Prot. of E.B.*, No. 12-06-00112-

[13]A social assessment that the trial court admitted shows that in June 2016—three months before the hearing at issue—appellant made "hyper-religious statements" and "threats to kill anyone who [did] not believe his religion." The social assessment also states that at that time, appellant was agitated and attempted to throw a chair through a window. Finally, the social assessment states that appellant "threatened a judge . . . with Capital Punishment."

But the State did not present evidence that appellant's recent preaching contained such threats or that his recent acts were violent; rather, the evidence shows that he was not "caus[ing] any difficulties on the unit." Thus, we cannot conclude that the facts in the social assessment qualify as recent overt acts or as continuing patterns of behavior. Moreover, the trial court did not find that appellant was likely to harm others as a ground justifying his detention. *See* Tex. Health & Safety Code Ann. § 574.034(a)(2)(B).

CV, 2006 WL 2361363, at *5 (Tex. App.—Tyler Aug. 16, 2006, no pet.) (mem. op.) ("[T]here was no testimony or evidence that E.B. was unable to provide for his basic needs, including food, clothing, health, or safety.").

Next, while appellant expressed a desire to stop taking medication and while Dr. Shupe expressed concern about what might occur if appellant did so, the possibility that appellant might not take medication does not qualify as a recent overt act or continuing pattern of behavior that shows a deterioration of his current ability to function.[14] *See State ex rel. E.R.*, 287 S.W.3d 297, 306 (Tex. App.—Texarkana 2009, no pet.) ("Evidence of refusal to take medication, alone, is not an overt act or continuing pattern of behavior tending to confirm a proposed patient's distress or a deterioration of the ability to function. We add that evidence that the proposed patient will experience substantial mental or physical deterioration in the future does not establish this element." (citations omitted)); *see also State ex rel. E.R.*, No. 06-10-00124-CV, 2011 WL 61878, at *7 (Tex. App.—Texarkana Jan. 7, 2011, no pet.) (mem. op.) ("Evidence that the proposed patient will experience substantial mental or physical deterioration in the future does not establish the patient's current inability to function."); *Armstrong v. State*, 190 S.W.3d 246, 252 (Tex. App.—Houston [1st Dist.] 2006,

[14]We note that appellant expressed that he understood the importance of continuing to take medication, clarified that he would stop taking medication only in accordance with a doctor's orders, and stated that his "dad would monitor [his] medication." The record contains no evidence of appellant's past failures to take medication when it is prescribed for him.

no pet.) ("Evidence that the person will experience 'substantial mental or physical deterioration' in the future is not sufficient."). And although appellant's statement to Dr. Shupe that he did not believe there was a reason for his admission to the hospital is indicative of his continuing mental illness, the State did not link this statement to any current inability to function. *See* Tex. Health & Safety Code Ann. § 574.034(a)(2)(C)(ii), (d)(2).

For all of these reasons, we conclude that the evidence is legally insufficient to support the requirements for involuntary commitment under section 574.034. *See id.* We sustain appellant's only issue.

Conclusion

Having sustained appellant's only issue, we reverse the trial court's judgment ordering temporary inpatient mental health services, render judgment denying the application for temporary inpatient mental health services, and order appellant's immediate release from involuntary confinement.[15] *See S.S.*, 2015 WL 4561884, at *4.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; MEIER and GABRIEL, JJ.

DELIVERED: November 10, 2016

[15]The State did not seek alternative plans or request a remand to the trial court for consideration thereof.