In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-17-00364-CV

IN RE: THE COMMITMENT OF JEFFERY LEE STODDARD

On Appeal from the 371st District Court
Tarrant County, Texas
Trial Court No. D371-S-13391-16

Dissenting Memorandum Opinion on Rehearing by Justice Gabriel

DISSENTING MEMORANDUM OPINION ON REHEARING

Sometimes a sexually violent criminal's conduct is so reprehensible that his risk to reoffend is, for all intents and purposes, undisputed and he is properly categorized as a predator and civilly committed. Among others, the majority gives two apt examples in its opinion—Earl Kenneth Shriner in Washington and Leroy Hendricks in Kansas—and recognizes that Shriner's and Hendricks's conduct was so "heinous," a new generation of civil-commitment laws was enacted, including the current Texas statutory scheme. But I respectfully disagree with the majority that because the evidence in appellant Jeffery Lee Stoddard's case is not as extreme as the evidence in the cases selected by the majority as comparators, the Texas Legislature did not intend for the civil-commitment statutory scheme to apply to him, rendering the evidence factually insufficient to support the jury's verdict that Stoddard is a sexually violent predator (SVP).

At trial, the State was required to show beyond a reasonable doubt that Stoddard was an SVP for purposes of the civil-commitment statutes. *See* Tex. Health & Safety Code Ann. § 841.062(a). The legislature defined an SVP as one who (1) "is a repeat sexually violent offender," which is not in dispute here, **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). It is this second element that the majority concludes is supported by "sparse," factually insufficient evidence.

I begin with an explanation of my understanding of the factual-sufficiency standard and scope of review in civil-commitment appeals, which the majority ably discusses. I agree that we apply the civil standard and scope to identify those commitment cases where the "risk of an injustice remains too great to allow the verdict to stand." *In re Commitment of Short*, 521 S.W.3d 908, 911 (Tex. App.—Fort Worth 2017, no pet.). To do so, we are to view all of the evidence in a neutral light and ask whether a jury was rationally justified in finding beyond a reasonable doubt that Stoddard suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *In re Commitment of Golliher*, 224 S.W.3d 843, 846 (Tex. App.—Beaumont 2007, no pet.); *see also* Tex. Health & Safety Code Ann. § 841.003(a)(2); *In re Commitment of Sawyer*, No. 05-17-00516-CV, 2018 WL 3372924, at *8 (Tex. App.—Dallas July 11, 2018, pet. denied) (mem. op.). A conclusion that the evidence was factually insufficient to support an SVP finding requires this court to "be able to say that the great weight and preponderance of the evidence contradicts the jury's verdict or that the verdict is clearly wrong or manifestly unjust." *Golliher*, 224 S.W.3d at 846; *see also In re Commitment of Ramshur*, No. 09-17-00286-CV, 2018 WL 6367529, at *1 (Tex. App.—Beaumont Dec. 6, 2018, no pet.) (mem. op.). But it is the sole province of the jury to credit, weigh, and resolve conflicts in the evidence, and we may not substitute our view of the facts for the jury's. *See Sawyer*, 2018 WL 3372924, at *8; *cf. Clayton v. Wisener*, 190 S.W.3d 685, 692 (Tex. App.—Tyler 2005, pets. denied) (holding in civil factual-sufficiency review that appellate court "is not a fact finder and

may not pass on the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if a different conclusion could be reached on the evidence").

We are to apply this standard to the issue at hand, which is the second element as it is contained in the statute—whether the jury heard sufficient evidence to rationally find that Stoddard "suffers from a behavioral abnormality that makes [him] likely to engage in a predatory act of sexual violence"—not also whether Stoddard is a member of a small and dangerous group. Tex. Health & Safety Code Ann. §§ 841.003(a)(2), .062(a); *see In re Commitment of Johnson*, No. 05-17-01171-CV, 2019 WL 364475, at *3 (Tex. App.—Dallas Jan. 30, 2019, no pet.) (mem. op.); *In re Commitment of Williams*, 539 S.W.3d 429, 438–39 (Tex. App.—Houston [1st Dist.] 2017, no pet.). Whether Stoddard is a member of the group mentioned in the legislature's statutory "findings" is not an element for the jury to find in determining the SVP allegation. Tex. Health & Safety Code Ann. § 841.001; *see Johnson*, 2019 WL 364475, at *3 (concluding legislative findings in section 841.001 did not require the State to prove that Johnson was "extremely dangerous" or one of the "worst of the worst"); *cf. Williams*, 539 S.W.3d at 438–39 (concluding ineffectiveness of "traditional treatment modalities" as mentioned in section 841.001 as legislative finding was not element of State's SVP allegation to be proved beyond a reasonable doubt). Those elements are set forth more specifically in the remainder of the Act. *E.g.*, Tex. Health & Safety Code Ann. §§ 841.002–.003, .062; *accord Johnson*, 2019 WL 364475, at *3 (holding terms "extremely dangerous" and "worst of the worst" do not appear in the

statutory definition of SVP and, thus, are not elements for the State to prove); *Williams*, 539 S.W.3d at 438 ("The Act plainly provides the elements for an [SVP] determination" in sections 841.062(a), 841.003(a), and 841.002, not in section 841.001).

The legislative findings that the majority at least partially considers in its factual-sufficiency review are merely a general statement of why the legislature sought to adequately protect society from the risk posed by SVPs and do not supplement or dilute the more specific requirements laid out in the remainder of the Act. *See Johnson*, 2019 WL 364475, at *3 (noting courts may not engraft additional elements onto statutory causes of action such as civil commitment). *See generally Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000) ("This conclusion is consistent with the traditional statutory construction principle that the more specific statute controls over the more general."). Therefore, I disagree with the majority's implication that the second element of the State's SVP case required additional proof that Stoddard suffers from a behavioral abnormality that renders him a member of the small group identified in section 841.001. The legislature's general findings, explaining why "the existing involuntary commitment provisions . . . are inadequate to address the risk . . . [SVPs] pose to society," do not change the statutory elements the State is required to prove beyond a reasonable doubt, do not add to or dilute the applicable statutory definitions, and do not require the State to introduce evidence supporting the legislature's general findings, as is reflected in the absence of those

findings from the jury charge.[1] Tex. Health & Safety Code Ann. § 841.001; *see id.* §§ 841.003–.004, .062.

I additionally, yet respectfully, disagree with the majority that a failure to fully consider section 841.001 in a factual-sufficiency review would remove Chapter 841 "from its constitutional foundation, thus opening the door to civil commitments of sex offenders based solely on their predicate sex offenses." The statutory definition of an SVP requires the State to prove the predicate offenses as well as the offender's "behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence." *Id.* § 841.003(a). In other words, the State is not allowed to civilly commit someone merely because he is a repeat sexual offender; the State must also show that the offender suffers from a behavioral abnormality. *See In re Commitment of Anderson*, 392 S.W.3d 878, 885–86 (Tex. App.—Beaumont 2013, pet. denied). This does not run afoul of the constitution. *See id.*

The question for this court is whether all of the evidence admitted in this case, viewed in a neutral light, allowed the jury to rationally and justifiably find beyond a reasonable doubt that Stoddard "suffers from a behavioral abnormality that makes [him] likely to engage in a predatory act of sexual violence." Tex. Health & Safety

[1]The majority clarifies that it is not construing the legislative findings in section 841.001 to be elements that the State is required to prove, and I agree that they are not. My comments are meant only to emphasize that section 841.001's findings are not part of the jury's consideration in rendering its SVP verdict, as was reflected in the trial court's jury charge, and should therefore not be part of a review of the factual sufficiency of the evidence to support the jury's verdict.

Code Ann. § 841.003(a)(2). To that end, the legislature defined behavioral abnormality as

- A condition that is congenital or acquired,
- Affecting a person's emotional or volitional capacity, and
- Predisposing the person to commit a sexually violent offense such that he "becomes a menace to the health and safety of another person."

Id. § 841.002(2).

I initially note that the majority's discussion and the State's reconsideration arguments of the comparative meaning of Stoddard's behavioral scores and the resulting percentage of his likely recidivism go beyond what the State is required to prove. The State was not tasked with showing "a specific percentage of risk," and the jury was entitled to credit and weigh Stoddard's testimony, Timothy Proctor's testimony, and Jorge Varela's report regarding Stoddard's likeliness to reoffend as it saw fit. *In re Commitment of Brown*, No. 05-16-01178-CV, 2018 WL 947904, at *9 (Tex. App.—Dallas Feb. 20, 2018, no pet.) (mem. op.). Merely because Stoddard failed to achieve a certain percentage level or score does not mean that the jury could not have reasonably credited that evidence in determining whether he was an SVP. And as the State points out, it does not mean that the jury irrationally concluded, based on the admitted evidence, that Stoddard's scores qualified him as an SVP as statutorily defined.

Further, I respectfully disagree with the majority's holding that Stoddard's sentences, which were the result of a plea bargain, cut against an SVP finding because the 20-year sentences for his two aggravated-sexual-assault convictions were far less than the 99-year maximum accorded to such convictions. Maybe the State did not want to put the young child victims through the ordeal of testifying against their mother's boyfriend. Maybe the children's mother was urging them to recant. Maybe the State weighed its case and determined that the cost of a trial warranted offering lighter, yet still severe, sentences. Maybe Stoddard's age at the time of his pleas—40—meant that two concurrent 20-year sentences and one concurrent 10-year sentence were considered sufficient.[2] The point is we do not know why, and neither did the jury. Again, the jury was entitled to assay this evidence; we may not. And the length of Stoddard's prior sentences and the circumstances surrounding his plea bargain are not express factors in resolving the issue at hand: Stoddard's likelihood to reoffend based on a behavioral abnormality. *See* Tex. Health & Safety Code Ann. §§ 841.002(2), 841.003(a)(2).

[2]The majority asserts that these possible reasons for the plea bargain are impermissible speculations that do not account for the State's responsibility to seek justice. I am unable to conclude, as implied by the majority, that the circumstances surrounding the plea bargain or the reasons the State later sought civil commitment show that the State ignored its duty to see that justice was done, which certainly could have been served while also considering the interests of the victim. *See* Tex. Code Crim. Proc. Ann. art. 2.01. In any event, there is no record evidence indicating that the State sought Stoddard's civil commitment because it was "not satisfied with the original sentence . . . to which it agreed" and therefore abdicated its primary duty to seek justice.

I also cannot agree with the majority's concern that because the facts of Stoddard's underlying offense were considered in his psychiatric diagnoses and were part of the evidence considered by the jury, the risk of injustice to Stoddard is too great to defer to the jury's verdict. The State did not solely rely on Stoddard's underlying offenses in seeking an SVP finding. The State introduced evidence directly addressing Stoddard's predisposition or likelihood to reoffend, which a reasonable jury could have credited. Proof of additional sexually violent actions or ideations after repeat convictions for sexual offenses is not required. The statute requires proof only that Stoddard is "likely" to reoffend based on his predisposition to commit a sexually violent offense, not that he actually has or has come close to committing additional sexually violent acts. *Id.* § 841.003(a)(2); *see also id.* § 841.002(2) (defining behavioral abnormality as condition that predisposes the person to commit sexually violent offense); *In re Commitment of Richards*, No. 09-03-168 CV, 2004 WL 256744, at *1 (Tex. App.—Beaumont Feb. 12, 2004, no pet.) (mem. op.) ("The pen packet [regarding Richards's prior final convictions] is relevant to show Richards suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence.").

I agree with the majority that the evidence against Stoddard is not exactly the same on the SVP issue as the evidence in the cases the majority cites. But I do not agree that a case-to-case, factual comparison is appropriate in a factual-sufficiency review. To do so would seem to impart statutory conclusiveness on the facts in those

cases.[3] Instead, the appropriate comparison under a factual-sufficiency review is to consider all the evidence in **this** case, comparing the evidence tending to prove and disprove the element in question. We must neutrally view the evidence to determine if its great weight and preponderance rationally supported the jury's SVP finding, specifically whether Stoddard had a behavioral abnormality as statutorily defined. In any event, I believe the great weight and preponderance of the evidence heard by the jury and as explained in the trial court's charge allowed the unanimous jury to find that Stoddard was an SVP under sections 841.003 and 841.062(a) beyond a reasonable doubt. Tex. Health & Safety Code Ann. §§ 841.003, .062(a); *e.g.*, *In re Commitment of Mares*, 521 S.W.3d 64, 72–73 (Tex. App.—San Antonio 2017, pet. denied).

The State proffered evidence that Stoddard exhibits a high level of antisocial psychopathy that increases his risk of committing another sexual offense. He was diagnosed with pedophilia, which is an acquired or congenital chronic condition that affects his emotional or volitional capacity and renders his attempts to control his

[3]For example, the majority cites to a case in which the evidence supporting the SVP finding was found factually sufficient where the offender had repeatedly sexually assaulted his girlfriend's children who were one and two. *See In re Commitment of Gomez,* 535 S.W.3d 917, 919 (Tex. App.—Corpus Christi 2017, no pet.). The fact that Stoddard sexually assaulted his girlfriend's children on fewer occasions and that the children were six and seven should not mean Stoddard could not rationally be found to be an SVP by a fact-finder. And merely because Stoddard did not use a weapon, other than withholding food from one of the children if she did not comply with his sexual demands, and had a fewer number of victims does not disqualify him from the statutory definition of an SVP. *See, e.g.*, *Williams*, 539 S.W.3d at 433–34, 440; *In re Commitment of Day*, 342 S.W.3d 193, 202 (Tex. App.—Beaumont 2011, pet. denied). Each case should be evaluated on its own merits based on the governing standards of review.

behavior seriously difficult. *See* Tex. Health & Safety Code Ann. § 841.002(2). These conditions, taken in tandem, led Proctor to conclude that Stoddard suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See id.* § 841.003(a)(2). Proctor categorized Stoddard as a menace to the health and safety of another person. *See id.* § 841.002(2). Proctor's expert opinion was supported by established research and techniques for his profession, and the jury could have reasonably considered this evidence in making its SVP finding. *See, e.g.*, *Mares*, 521 S.W.3d at 72–73.

Even though other offenders might be more "heinous" than Stoddard and even though Stoddard testified that he was not completely at fault for the sexual offenses he was convicted of[4] and that he might or might not continue to be sexually attracted to children, this does not greatly outweigh the evidence supporting the jury's SVP finding. The great weight and preponderance of the evidence in this case, even in light of the admitted evidence recited by the majority, supports a finding beyond a reasonable doubt that Stoddard has a behavioral abnormality, raising his risk to reoffend to unacceptable levels. Such a finding was not clearly wrong or manifestly unjust. This conclusion is buttressed by the majority's holding that the evidence is legally sufficient to support the jury's verdict. *See Day*, 342 S.W.3d at 213 ("[T]he

[4]Strikingly, Stoddard testified that his seven-year-old victim instigated the sexual assaults and enjoyed it.

possibility that the evidence in a particular case will be legally sufficient but factually insufficient essentially decreases as the burden of proof increases.").

In conclusion, the evidence admitted at Stoddard's jury trial, viewed neutrally, could lead to a rational finding beyond a reasonable doubt that Stoddard is a repeat sexually violent offender who suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. This is the very definition of an SVP. *See* Tex. Health & Safety Code Ann. § 841.003(a). Nothing more, nothing less. For all of these reasons, I dissent from this court's opinion and judgment on rehearing, from the majority's decision to not request a response to the State's motion for en banc reconsideration, and from the majority's denial of that motion as moot. *See* Tex. R. App. P. 47.5, 49.2.

/s/ Lee Gabriel
Lee Gabriel
Justice

Delivered: May 30, 2019