In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-22-00182-CV

IN RE: THE COMMITMENT OF VANCE S. PIPKIN

On Appeal from the 137th District Court
Lubbock County, Texas
Trial Court No. 2020-540,367, Honorable John J. "Trey" McClendon III, Presiding

June 28, 2023

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and YARBROUGH, JJ.

A jury found Appellant, Vance S. Pipkin, to be a "sexually violent predator" under chapter 481 of the Texas Health and Safety Code, known as the Texas Civil Commitment of Sexually Violent Predators Act.[1] Pursuant to that finding, the trial court entered an *Order of Commitment* providing that following Pipkin's release from the Texas Department of Criminal Justice, he be transported to an approved Texas residential facility for sex offender treatment. Pipkin challenges his commitment by the following eight issues:

[1] TEX. HEALTH & SAFETY CODE ANN. § 841.001 - .153.

(1) the Act is unconstitutional as applied to him;

(2) the trial court abused its discretion in admitting Dr. Jason Dunham's diagnosis of paraphilia because it is not accepted in the field of forensic psychology and he did not properly utilize the principles thereof;

(3) the term "behavioral abnormality" is so vague and indefinite that it applies no rule at all and is therefore void;

(4) the trial court abused its discretion in excluding evidence on the legislative intent of the Act;

(5) the State made a misstatement of the law during voir dire that was so prejudicial it prevented the jury's ability to carry out the law;

(6) the trial court's jury instruction shifted the burden of proof from the State to him and deprived him of his due process rights;

(7) the trial court violated his constitutional right to a fair trial by ignoring and overruling a potential juror's self-proclaimed bias; and

(8) the verdict is unconstitutional because it is contrary to the law and evidence.

For the reasons expressed herein, we affirm.

BACKGROUND

Pipkin is an educated individual in his fifties. He has a supportive family. He has been incarcerated since 2003, and his projected discharge date is March 15, 2027, with a possibility of earlier release via parole pending entry into a sex offender treatment program.

Between the ages of fourteen and nineteen, he engaged in various acts of voyeurism. He began abusing alcohol in his twenties and his conduct escalated. In 2003, he was convicted of aggravated sexual assault and burglary of a habitation with intent to commit sexual assault. Sentences were assessed at twenty-five years confinement for each conviction, to be served concurrently. In 2007, he was again convicted of

aggravated sexual assault for an offense he committed in 2001 and was assessed a twenty-one-year sentence, also to be served concurrently with the prior sentences. The convictions are for sexually violent offenses.

The State petitioned for Pipkin, following his release, to be committed for treatment and supervision pursuant to chapter 841 of the Texas Health and Safety Code. The case was tried to a jury which unanimously found that Pipkin is a sexually violent predator. Based on the jury's finding, the trial court signed an *Order of Commitment*. Pipkin challenges the order via this appeal.

APPLICABLE LAW

The Act addresses a civil commitment procedure for long-term supervision and treatment of a "small but extremely dangerous group of sexually violent predators" who suffer from a behavioral abnormality deemed to be a threat to society. TEX. HEALTH & SAFETY CODE ANN. § 841.001. For the State to obtain a civil commitment, it must show that a person is a sexually violent predator. § 841.003(a). A person is a sexually violent predator if he (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. § 841.003(a). A behavioral abnormality is statutorily defined 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." § 841.002(2). The State's burden of proof in a civil commitment proceeding is beyond a reasonable doubt. § 841.062(a).

The Texas Civil Commitment Office (TCCO) developed a five-tier program to determine the level of restrictions imposed on a resident with tier one being the most

restrictive and tier five the least restrictive.[2] The program is intended to provide a seamless transition from total confinement to less restrictive housing and supervision and eventual release from civil commitment based on the committed individual's behavior and progress in treatment.[3]

ISSUE ONE—ACT UNCONSTITUTIONAL "AS APPLIED"

Pipkin argues the Act is unconstitutional as applied to him. The gist of his argument is an attack on the "for-profit" scheme provided by the TCCO which "is designed to keep citizens incarcerated in a tiered system until they die." He criticizes the staff and the various suits brought against them. He also asserts the treatment provided is inadequate to help residents of the facility obtain release.

Our review of the constitutionality of a statute presumes the statute is valid and that the Legislature was neither unreasonable nor arbitrary in enacting it. TEX. GOV'T CODE ANN. § 311.021; *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 701 (Tex. 2014). An "as applied" challenge asserts a statute, while generally constitutional, operates unconstitutionally as to the claimant who raises the issue because of his particular circumstances. *Rivera*, 445 S.W.3d at 702.

The Texas Supreme Court has determined the Act is constitutional. *In re Commitment of Fisher*, 164 S.W.3d 637, 645-53 (Tex. 2005). The United States Supreme Court has held that civil commitment statutes, such as the Texas statutes, do not violate a person's constitutional due process rights if the Act requires proof of at least two

[2] *See* TEX. HEALTH & SAFETY CODE ANN. § 841.0831; TEX. ADMIN. CODE ANN. § 810.153 (authorizing the TCCO to develop a tiered program for supervision and treatment of committed individuals). *See In re Bluitt*, 605 S.W.3d 199, 201 (Tex. 2020).

[3] TEX. HEALTH & SAFETY CODE ANN. § 841.0834.

elements: "proof of dangerousness" and "proof of some additional factor, such as 'mental illness' or 'mental abnormality.'" *Kan. v. Hendricks*, 521 U.S. 346, 361-62, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). "[T]he Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence." *Id.* It is not retributive because it does not fix liability for prior criminal conduct. *Id.* at 362. Instead, prior conduct is used for evidentiary purposes, either to demonstrate that a "behavioral abnormality" exists or to support a finding of future dangerousness. *In re Commitment of Fisher*, 164 S.W.3d at 648. The fact the Act is tied to criminal activity is insufficient to render it punitive. *Hendricks*, 521 U.S. at 362. Another non-punitive factor of the Act is the lack of scienter typically found in criminal statutes. *In re Commitment of Fisher*, 164 S.W.3d at 649. Civil commitment is based on a "mental abnormality" or "personality disorder" instead of criminal intent. *Id.*

Pipkin had the burden of explaining why the Act's operation is unconstitutional as applied to him. *See Lockard v. State*, 364 S.W.3d 920, 922 (Tex. App.—Amarillo 2012, no pet.). Although his "as-applied" challenge is sprinkled with complaints on how the Act affects him, the prevalent theme in his issue is an attack on the overall scheme of civil commitments. He presents generalizations that the Act is unconstitutional as to him because it requires a finding of scienter based on his past non-consensual behavior, his alleged behavioral abnormality is amenable to traditional treatment modalities, the Act is not rationally connected to a non-punitive purpose, and the Act is excessive in relation to its purpose.

Pipkin, however, pontificates that there is no treatment "provided to these *citizens* to assist *them* in controlling their behavioral abnormality" and "biennial reviews are

nothing more than a false sense of hope for *citizens* subjected to the [Act]."[4] (Emphasis added). He declares the "Judiciary can no longer turn a blind eye on these *citizens* just because they have been convicted of violent sex crimes." Pipkin concludes the "Texas Civil Commitment scheme is so punitive in effect that it negates its own civil intentions."

A litigant who raises an as-applied challenge concedes a statute's general constitutionality. *City of Corpus Christi v. PUC of Tex.*, 51 S.W.3d 231, 241 (Tex. 2001). Pipkin does not concede the Act's constitutionality; rather, he attacks the Act as it applies to "citizens." Such an attack is irrelevant to an as-applied challenge. Assuming Pipkin has been transferred to a civil commitment facility, he has not demonstrated the particular circumstances in which the civil commitment scheme provides treatment that is punitive as applied to him. His condemnation of the Act does not meet the requirements for an as-applied challenge. We agree with the State that Pipkin's arguments fail to show how the Act operates unconstitutionally as applied to his unique circumstances. Issue one is overruled.

ISSUE TWO—ADMISSION OF DR. DUNHAM'S TESTIMONY

Pipkin contends the trial court abused its discretion and failed to perform its gatekeeping function by admitting Dr. Dunham's testimony on his alleged sexual deviancy and paraphilia. He claims the testimony was not reliable or relevant and misled the jury to believe it was an actual diagnosis that would predict his behavior. We disagree.

We review a trial court's ruling admitting expert testimony for abuse of discretion. *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 347 (Tex. 2015). A trial court

[4] *See* § 841.101(b) (providing for a biennial examination report that determines whether to modify requirements imposed on a person and whether to release all requirements).

abuses its discretion when it fails to follow guiding rules and principles. *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012). Reversal for erroneously admitted evidence is warranted only if the error probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(1).

Rule 702 of the Texas Rules of Evidence provides an expert may testify if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. TEX. R. EVID. 702. The expert's opinion is, however, inadmissible if the trial court determines the underlying facts or data do not provide a sufficient basis for the opinion. TEX. R. EVID. 705(c). To be admissible, an expert's opinion must be both relevant and reliable. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556-58 (Tex. 1995). *See also Daubert v. Merrell Dow Pharms.*, *Inc.*, 509 U.S. 579, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

The reliability of soft science evidence,[5] such as was offered in the instant case, may be established by showing (1) the field of expertise involved is a legitimate one, (2) the subject matter of the expert's testimony is within the scope of that field, and (3) the expert's testimony properly relies on or utilizes the principles involved in that field. *See Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000) (citing *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998)). *See also In re Bohannan*, 388 S.W.3d 296, 304 (Tex. 2012).

An expert in a civil commitment case involving a sexually violent predator may disclose the underlying facts or data on which the expert bases his opinion if it is a type

[5] Predicting a person's future dangerousness in civil commitment cases involves a soft science. *In re Commitment of Gollihar*, 224 S.W.3d 843, 853-54 (Tex. App.—Beaumont 2007, no pet.).

relied on by experts in the field informing opinions on the subject. *In re Talley*, 522 S.W.3d 742, 748 (Tex. App.—Houston [1st Dist.] 2017, no pet.); TEX. R. EVID. 703, 705(c). This is so to assist the jury in weighing the expert's opinion that the person has a behavioral abnormality, which is the ultimate issue the jury must determine. *In re Butler*, No. 05-19-01007-CV, 2021 Tex. App. LEXIS 4929, at *27 (Tex. App.—Dallas June 21, 2021, no pet.) (mem. op.).

Dr. Dunham, a forensic psychologist, testified he reviewed numerous documents consisting of thousands of pages in preparation for his interview with Pipkin. He testified his opinion was based on literature and objective research. According to Dr. Dunham, records are most important in conducting evaluations because they are reliable and factual. He also testified research has established that historical information is the "best predictor of what's going to happen going forward."

The documents Dr. Dunham reviewed in assessing Pipkin included his educational records, medical records, police reports, victims' statements, parole summaries, and prior convictions. He conducted an online interview of Pipkin for approximately one hour and forty-five minutes, which he described as the typical range.[6]

Dr. Dunham diagnosed Pipkin with nonconsent paraphilia,[7] which he described as a chronic sexual deviance probably not amenable to treatment by traditional modalities. The diagnosis was made based on the records reviewed, various tests, and the interview

[6] Dr. Dunham explained that approximately seventy percent of interviews by experts are conducted via Zoom because they are not allowed in the Texas Department of Criminal Justice.

[7] The diagnosis concerns an expression of sexual deviance through obtaining arousal and having sex with nonconsenting partners through threats of violence. *In re Bradshaw*, No. 09-12-00570-CV, 2013 Tex. App. LEXIS 13511, at *20 (Tex. App.—Beaumont Oct. 31, 2013, pet. ref'd) (mem. op.).

with Pipkin. Although there is no test for determining a behavioral abnormality, Dr. Dunham utilized the DSM-5, a handbook used in evaluations and the Static-99R test, which includes ten static factors for determining the likelihood of reoffending. He assessed risk factors as well as protective factors to form his opinion.

Some risk factors he observed included the victims being strangers, easy detection during commission of the offenses, a level of planning of the offenses, persistence in reoffending after punishment, committing new offenses while on bond, violence beyond what is needed for compliance by a victim, aggression toward females, sexual fantasies, escalation from voyeurism to sexual deviance, and intoxication during commission of the offenses. Some protective factors he detected, which can lower the risk of reoffending, included family support, positive institutional adjustment—he had no major violations in prison for twenty years, and sex offender treatment.[8]

Dr. Dunham reviewed the circumstances involving six of Pipkin's victims of sexual offenses beginning in 1990 and concluding in 2002. He testified the details of the sexual offenses were important in his evaluation because they established a significant pattern.[9] As a teenager, Pipkin engaged in voyeurism which then escalated to violent sexual assaults which included threats. Some of his offenses were adjudicated and others were not either as the result of a plea agreement or because there was not enough evidence to pursue a case. Dr. Dunham explained that Pipkin experienced excitement from sexual

[8] Although Pipkin was enrolled in sex offender treatment program in prison, he was unable to complete it after he was bench warranted to the Lubbock County Jail for trial. According to Dr. Dunham, completion of the program is critical to reducing the risk of reoffending.

[9] During a pretrial hearing, Pipkin asked to stipulate that he was a sexually violent offender rather than have the prejudicial details disclosed at trial. The State did not agree to a stipulation because Dr. Dunham relied on the details of the offenses to form his opinion.

deviance despite being caught and punished. He lacked self-control and became anxious if he could not engage in sexual misconduct. He reoffended while on deferred adjudication and while out on bond.

Dr. Dunham concluded from reviewing records, test scores, and his interview with Pipkin that even though he had been incarcerated for twenty years, he was at a moderate to high risk of reoffending. He assumed Pipkin's paraphilia did not resolve itself simply because he had no access to reoffend while incarcerated. It is a chronic condition. He opined Pipkin suffers from a behavioral abnormality that affects his volitional capacity and causes him to be a menace to the health and safety of others in the future.

Pipkin contends Dr. Dunham's testimony does not satisfy the second and third prongs of *Weatherred* and *Nenno* for establishing the reliability of a soft science like forensic psychology. His challenge to the admission of Dr. Dunham's testimony regarding his diagnosis has no merit. Dr. Dunham testified the methodology described above to form his opinion is followed by experts in his field and is highly recommended. He further testified the methodology has been found to be reliable and has the best predictive validity. This Court has previously rejected an argument similar to Pipkin's that Dr. Dunham's reliance on test results lacked scientific support in determining that an offender has a paraphilic disorder. *In re Commitment of Fant-Caughman*, No. 07-20-00084-CV, 2021 Tex. App. LEXIS 5591, at *13-14 (Tex. App.—Amarillo July 14, 2021, no pet.) (mem. op.). Additionally, Pipkin places great emphasis on Dr. Dunham's diagnosis as having no basis in the principles of forensic psychology. The Act, however, does not require a diagnosis to conclude a sexual offender has a behavioral abnormality. *In re Commitment*

of Fielding, No. 08-22-00026-CV, 2022 Tex. App. LEXIS 8937, at *24 (Tex. App.—El Paso Dec. 27, 2022, no pet.) (mem. op.).

Dr. Dunham's expert testimony was within the parameters set by *Weatherred* and *Nenno* for determining reliability. The trial court did not abuse its discretion in admitting Dr. Dunham's expert testimony. Issue two is overruled.

ISSUE THREE—"BEHAVIORAL ABNORMALITY"

Pipkin contends the Act's definition of "behavioral abnormality" is void for vagueness and constitutes no rule at all because it hinges on past behavior rather than reliable and definitive terms. We disagree.

"Behavioral abnormality" is defined 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." § 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 Watts*, No. 09-14-00404-CV, 2015 Tex. App. LEXIS 8485, at *12 (Tex. App.—Beaumont Aug. 13, 2015, no pet.) (mem. op.).

At a pretrial hearing, Pipkin argued the definition of "behavioral abnormality" is so vague because its interpretation is "left to the personal predilection of prosecutors" to decide what a behavior[al] abnormality is." He also asserted the definition is "pretty broad" because it requires proof of the likelihood of reoffending. Here, Pipkin's argument on

vagueness is based on Dr. Dunham's diagnosis of "paraphilia sexual deviancy" which he contends is based solely on his past behavior.[10]

Pipkin's issue on appeal does not comport with the complaint lodged in the trial court. As such, it is procedurally defaulted. *See Moser v. Davis*, 79 S.W.3d 162, 169 (Tex. App.—Amarillo 2002, no pet.). *See also* TEX. R. APP. P. 33.1(a).

Assuming, arguendo, that Pipkin had preserved his vagueness argument, precedent has held the definition of behavioral abnormality satisfies due process purposes. *See In re Commitment of Fisher*, 164 S.W.3d at 655-56 (rejecting an argument that the definition of behavioral abnormality is unconstitutionally vague) (citing *Hendricks*, 521 U.S. at 360 (reviewing the definition of "mental abnormality" under a Kansas Act)). Issue three is overruled.

ISSUE FOUR—EXCLUSION OF LEGISLATIVE INTENT OF THE ACT

Pipkin maintains the trial court abused its discretion in excluding his own expert's proffered evidence relating to the legislative intent of the Act and the manner in which the TCCO functions. He surmises the court's failure to allow his expert to testify to the legislative intent of the Act prevented him from presenting a defense in violation of his constitutional rights. We disagree.

Section 841.001 of the Act provides the legislative findings as follows:

> [t]he legislature finds that a small but extremely dangerous group of sexually violent predators exists and that those predators have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities and that makes the predators likely to engage in repeated predatory acts of sexual violence. The legislature finds that the existing

[10] A constant thread in Pipkin's arguments is a criticism of Dr. Dunham's diagnosis of paraphilia. However, neither the Act nor the definition of "behavioral abnormality" require a diagnosis for purposes of civil commitment. The Act requires only a finding that the person is a repeat sexually violent offender and suffers from a behavioral abnormality.

> involuntary commitment provisions of Subtitle C, Title 7, are inadequate to address the risk of repeated predatory behavior that sexually violent predators pose to society. The legislature further finds that treatment modalities for sexually violent predators are different from the traditional treatment modalities for persons appropriate for involuntary commitment under Subtitle C, Title 7. Thus, the legislature finds that a civil commitment procedure for the long-term supervision and treatment of sexually violent predators is necessary and in the interest of the state.

TEX. HEALTH & SAFETY CODE ANN. § 841.001.

The State filed a motion in limine to exclude testimony regarding section 841.001 in the jury's presence until the trial court determined the admissibility and relevancy of those findings. The trial court "potentially granted" the motion and instructed Pipkin to approach the bench before any questioning on the issue. Pipkin's expert testified without objection that there is a small group of sex offenders who are known to have behavioral abnormalities but there was no mention of section 841.001.

When a trial court's ruling excludes evidence, there must be an offer of proof to advise the trial court of the desired testimony to preserve a claim of error. TEX. R. EVID. 103(a)(2). Pipkin did not make an offer of proof on the legislative findings. Because the trial court was never given the opportunity to rule on the admissibility of the legislative findings, Pipkin waived his complaint for appellate review.

Even if the error had been preserved, the Supreme Court has concluded the Act's legislative findings are not an element to be considered by the jury in determining the ultimate issue of whether a person is a sexually violent predator. *In re Stoddard*, 619 S.W.3d 665, 677 (Tex. 2020). Issue four is overruled.

ISSUE FIVE—MISSTATEMENT OF LAW DURING VOIR DIRE

During voir dire, the State was explaining it was required to prove Pipkin was a repeat sexually violent offender and had a behavioral abnormality. In doing so, the prosecutor stated, "if you were to hear evidence that Mr. Pipkin is that repeat sexually violent offender, that's going to be 95 percent of your jury determination, and the 5 percent can be the behavioral abnormality." Defense counsel objected the comment was a misstatement of the law which the trial court sustained. Pipkin did not, however, request an instruction to disregard the misstatement. The trial court instructed the prosecutor to "re-explain" the misstatement which was accomplished without further objection. Despite the favorable ruling obtained by Pipkin and his failure to object to the prosecutor's renewed explanation, he asserts he suffered harmed.

A party waives error by not following up a sustained objection with a request for an instruction to disregard. *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009) (citing *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839-41 (Tex. 1979)). When a valid objection is made and sustained, the parties have a lawful trial. *In re C.D.H.*, 273 S.W.3d 421, 425 (Tex. App.—Texarkana 2008, no pet.). Pipkin has defaulted review of any potential harm by the prosecutor's alleged misstatement of law. Issue five is overruled.

ISSUE SIX—WHETHER TRIAL COURT'S INSTRUCTION SHIFTED BURDEN OF PROOF

Pipkin asserts the trial court's comments following closing arguments shifted the burden of proof to him to negate that he suffered from a behavioral abnormality. We disagree.

> The charge asked the jury the following question:
>
> Do you find beyond a reasonable doubt that Vance S. Pipkin is a sexually violent predator?
>
> Answer "Yes" or "No."

Following closing arguments, the court commented as follows: "I want you to take your time, do your job, find the answer to [this question] beyond a reasonable doubt as the lawyers have told you." Defense counsel responded as follows: "I don't think the Court intended to say that a 'no' answer is required to be found beyond a reasonable doubt." The exchange concluded with the trial court noting "the charge will speak for itself."

Pipkin claims improper communication by the trial court to the jury acted as an outside influence that denied him his due process rights by shifting the burden of proof to him. Despite the arguments raised in Pipkin's brief, this Court has previously found the record was inadequate to support an allegation of improper communication by the trial court to the jury. *See In re Pipkin*, No. 07-00182-CV, 2022 Tex. App. LEXIS 8642, at *3 (Tex. App.—Amarillo Nov. 17, 2022, order). Prior to filing his brief, Pipkin pursued abatement of this appeal to order the trial court to conduct a hearing on his motion for new trial regarding, among other issues, improper communication by the trial court. In denying his request, we noted that his motion for new trial, which was supported by his counsel's affidavit, was incompetent evidence to support his complaint of improper communication. *Id.*

Additionally, an appellate court presumes the jury followed the trial court's instructions. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 771 (Tex. 2003). In the underlying trial, the charge unequivocally provided "[t]he burden of proof in this

case rests solely on the [State]. And the burden never shifts to [Pipkin] to prove that he is not a sexually violent predator." Additionally, as the State points out, over the course of the proceedings, the State's burden of proof was referenced dozens of times. Pipkin's allegation that he was wrongfully encumbered with the burden of proof is without merit. Issue six is overruled.

ISSUE SEVEN—JUROR'S BIAS RESULTED IN DENIAL OF RIGHT TO FAIR TRIAL

Pipkin asserts the trial court erred by denying him two additional peremptory challenges and overruling his challenge for cause as to Juror 57 who specifically expressed a bias. We disagree.

During voir dire in the underlying trial, defense counsel asked whether an accused having two or more sexually violent offenses in the past alone would be sufficient to show a propensity for future offenses. Juror 57 answered, "I'm not saying that it's an absolute that they're going to do it again in the future, but you're inclined to. If you've done it once, you're more likely to do it again . . . ." Defense counsel then asked Juror 57 if his "mind is made up" to which he answered, "[n]o." The exchange continued with the juror responding, "I would be more inclined to believe that he would do it again." And when asked if his answer was "yes," he responded, "[p]robably."

The prosecutor then asked Juror 57 if he could follow the law on the two elements the State must prove: (1) Pipkin is a repeat sexually violent offender and (2) he has a behavioral abnormality. Juror 57 replied, "[y]ou would have to prove it, and I can follow the law. That's not a problem."

The trial court expressed confusion on Juror 57's answers and inquired whether he had an open mind on the two elements the State was required to prove. He advised

the trial court he could be open minded and "make a good judgment accordingly. But all I'm saying is that if it's proven that he's done it before, in my mind, likely, he's going to do it again." The trial court inquired whether he could "set aside his thinking and listen only to the evidence" to which he responded "[s]ure." The trial court asked if he could base his decision on the case and not on his thoughts and he again answered, "[s]ure."

Thereafter, defense counsel asked Juror 57 "[s]o your answer would not be yes because they've done it before" and he answered, "I can follow the law and do as I'm instructed to do." His answer notwithstanding, counsel challenged Juror 57 for cause which the trial court denied.[11]

At the conclusion of voir dire, defense counsel asked for two additional peremptory challenges after the trial court denied his challenges for cause to Juror 57 and another juror. The trial court denied the request for additional peremptory challenges.

We review a trial court's rulings on challenges for cause for abuse of discretion, in light of the entire jury selection process. *In re Talley*, 522 S.W.3d at 747. The Texas Government Code disqualifies a person from serving as a petit juror if he has a bias or prejudice in favor of or against a party in a case. TEX. GOV'T CODE ANN. § 62.105(4). Bias sufficient to disqualify a juror means it must appear that the state of mind of the juror leads to the inference he will not act with impartiality. *Pennington v. Cherry*, No. 07-99-0485-CV, 2001 Tex. App. LEXIS 5181, at *16 (Tex. App.—Amarillo July 31, 2001, no pet.) (mem. op.). If a potential juror's bias is established as a matter of law, the trial court must

[11] The transcription of the voir dire portion of the trial reflects "inaudible" just before the prosecutor states, "I oppose it, Judge. He said that he will listen to the evidence." The trial court then ruled, "your challenge for cause is denied." We presume based on the colloquy that "inaudible" is when defense counsel made his challenge for cause.

disqualify the juror. *Id.* If it is not established as a matter of law, the trial court must make a factual determination as to whether the juror should be disqualified. *Id*. (citing *Malone v. Foster*, 977 S.W.2d 562, 564 (Tex. 1998)). The trial court's factual determination must be viewed in the light most favorable to its ruling and should not be disturbed absent an abuse of discretion. *Pennington*, 2001 Tex. App. LEXIS 5181, at *16-17. We afford great deference to the trial court's evaluation of a juror because "trial judges are present in the courtroom and are in the best position to evaluate the sincerity and attitude" of the juror. *Murff v. Pass*, 249 S.W.3d 407, 411 (Tex. 2008).

The key response in support of a challenge for cause is that the juror cannot be fair and impartial because his feelings are so strong in favor or against a party that the verdict will be based on those feelings and not on the evidence. *Gant v. Dumas Glass & Mirror*, *Inc.*, 935 S.W.3d 202, 207 (Tex. App.—Amarillo 1996, no writ). Jurors may be disqualified even if they say they can be fair and impartial if the record shows they cannot. *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 93 (Tex. 2005). But a juror is not necessarily disqualified if he confesses bias so long as the record shows that is not the case. *Id.*

Juror 57 never expressed he could not be fair and impartial. The entirety of the questioning clarified that despite his personal thoughts, he could keep an open mind, follow the law and the court's instructions, and make a decision based on the evidence. We find no abuse of discretion by the trial court in denying Pipkin's challenge for cause to Juror 57. Issue seven is overruled.

ISSUE EIGHT—VERDICT IS UNCONSTITUTIONAL BASED ON FACTUAL INSUFFICIENCY OF THE EVIDENCE

In a very brief and conclusory argument, Pipkin maintains the verdict is contrary to the evidence presented and, relying on *Watson v. State*, 204 S.W.3d 404 (Tex. Crim. App. 2006), he contends this Court may exercise its authority to overrule the lower court's verdict. The State contends Pipkin inadequately briefed the issue. We agree.

First, we note that *Watson* was overruled by *Brooks v. State*, 323 S.W.3d 893, 911-12 (Tex. Crim. App. 2010), which eliminated factual sufficiency review in criminal cases. Thus, Pipkin's reliance on *Watson's* factual sufficiency analysis is irrelevant. Second, the Texas Supreme Court clarified the standard for reviewing factual sufficiency in a civil commitment case in *In re Stoddard*, 619 S.W.3d 665 (Tex. 2020). "The appellate standard governing a factual-sufficiency review of a finding that a person is a sexually violent predator is whether, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the verdict, along with undisputed facts contrary to the verdict, is so significant that the factfinder could not have found beyond a reasonable doubt that the statutory elements were met." *Id.* at 677.[12]

Pipkin's final issue is inadequately briefed resulting in default of his contention that the verdict is unconstitutional due to factual insufficiency of the evidence. *See* TEX. R.

[12] In *In re Stoddard*, the State urged the Court to abolish factual sufficiency review in civil cases as the Court of Criminal Appeals had done in criminal appeals in *Brooks*. Disagreeing with the State, the Court saw no reason to treat sexually violent predator cases differently and held that the "right of courts of appeals to review for factual insufficiency" under the current standard "must continue undisturbed." *In re Stoddard*, 619 S.W.3d at 676 (citing *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986)). In reversing a finding for factually insufficient evidence, an appellate court is "required to explain why the evidence that the jury *could not reasonably have credited* in favor of the finding was so significant that the jury could not have found beyond a reasonable doubt" that the defendant suffered from the requisite behavioral abnormality that made him likely to engage in a predatory act of sexual violence. *In re Stoddard*, 619 S.W.3d at 677. (Emphasis in original).

APP. P. 38.1(i); *Sunnyside Feedyard*, *L.C. v. Metro. Life Ins. Co.*, 106 S.W.3d 169, 173 (Tex. App.—Amarillo 2003, no pet.) (noting Rule 38.1(i) requires a party to "advance substantive analysis" to prevent waiver of an issue). *See also Lee v. AG Tex. Farm Credit Servs.*, No. 07-21-00129-CV, 2021 Tex. App. LEXIS 9789, at *2-3 (Tex. App.—Amarillo Dec. 8, 2021, pet. denied) (mem. op.) (providing that issues were waived because they were not accompanied by substantive application of authority to the evidence, facts, or circumstances deemed pertinent by the appellant). Issue eight is overruled.

CONCLUSION

The trial court's *Order of Commitment* is affirmed.

Alex L. Yarbrough
Justice

Quinn, C.J., concurring in the result.
Parker, J., concurring in the result.