TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00777-CV

J. M. C., Appellant

v.

The State of Texas, Appellee

FROM THE COUNTY COURT AT LAW NO. 5 OF TRAVIS COUNTY
NO. C-1-CR-16-501510,
HONORABLE NANCY WRIGHT HOHENGARTEN, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant J.M.C. appeals from the trial court's order for temporary inpatient commitment. *See* Tex. Health & Safety Code § 574.034 (addressing orders for temporary mental health services). In two issues, he argues that the evidence was insufficient to support the order and that the trial court should have dismissed the State of Texas's application for temporary mental health services because two certificates of medical examination for mental illness were not timely filed. *See id.* § 574.009(d) (requiring trial court to dismiss State's application for court-ordered mental health services if two certificates of medical examination for mental illness are not on file at time hearing on application is set). For the following reasons, we affirm the trial court's order.

BACKGROUND

In 2015, appellant was charged with assault family violence, found incompetent to stand trial, and admitted to the Austin State Hospital for competency restoration. *See* Tex. Code Crim. Proc. arts. 46B.071 (listing court's options on determination of incompetency), .073 (addressing commitment for restoration to competency). On March 3, 2016, the court in that case was informed that appellant had not been restored to competency and that there was no possibility that he would regain competency in the foreseeable future. The State thereafter dismissed the case.

In October 2016, appellant was arrested and incarcerated after being charged with the class A misdemeanor offense of Terroristic Threat. *See* Tex. Penal Code § 22.07 (addressing offense of terroristic threat). Shortly after his arrest, the State filed a motion for psychiatric examination for a certificate of medical examination for mental illness because the "nature of the offense and credible information obtained by the State regarding [appellant]'s mental state [had] raised legitimate concerns on the issue of whether [appellant was] competent to stand trial." The trial court granted the motion and ordered psychiatric examination. The State thereafter filed an application for temporary mental health services, attaching two physicians' certificates of medical examination for mental illness. *See* Tex. Health & Safety Code § 574.009; *see also* Tex. Code Crim. Proc. art. 46B.102 (addressing civil commitment hearing under Subtitle C, Title 7, of Texas Health and Safety Code). Both physicians certified that appellant was mentally ill and diagnosed him with schizophrenia.

A hearing on the State's application occurred on November 4, 2016. The State's witness was one of the physicians who provided a certificate of medical examination for mental

illness. The physician, who was board certified in psychiatry and forensic psychiatry, testified about her review of relevant records, her examination of appellant on October 22, 2016, and her opinions about appellant's mental illness. She opined that appellant was "diagnosed with severe and chronic schizophrenia," that, as a result of that mental illness, he was likely to cause serious harm to others, and that inpatient treatment in a hospital was in appellant's best interest. *See* Tex. Health & Safety Code § 574.034(a) (addressing required findings to order temporary inpatient mental services). Appellant's witness at the hearing was a psychiatrist who was the clinical director at the Austin State Hospital and part of appellant's treatment team from January to March 2016. The psychiatrist opined that appellant was not appropriate for civil commitment because he was not likely to harm himself or others, but he had not examined appellant since before March 2016 and, at that time, appellant "was already on medicine for quite a while, was compliant with treatment, attending meetings, and able to take care of his basic needs."

Following the hearing, the trial court ordered appellant committed and confined to the Austin State Hospital for a period of 90 days, finding "by clear and convincing evidence" that appellant "[was] mentally ill and as a result of that illness [appellant was] . . . likely to cause serious harm to others." *See id.* § 574.034(a)(1), (2)(B); *see also id.* § 574.034(c) ("If the judge . . . finds that the proposed patient meets the commitment criteria prescribed by Subsection (a), the judge . . . must specify which criterion listed in Subsection (a)(2) forms the basis for the decision.). The trial court also entered findings of fact and conclusions of law. This accelerated appeal followed.

ANALYSIS

Sufficiency of the Evidence

In his first issue, appellant challenges the sufficiency of the evidence to support the trial court's order for temporary inpatient commitment.[1] Appellant does not challenge the trial court's finding of mental illness but argues that the evidence was insufficient to prove by clear and convincing evidence that appellant was "likely to cause serious harm to others." *See id.* § 574.034(a)(2)(B).

Standard of review

"Clear and convincing evidence" means "that measure or degree of proof which 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." *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979). "In evaluating evidence for legal sufficiency under a clear and convincing standard, we review all 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 the finding was true." *State v. K.E.W.*, 315 S.W.3d 16, 20 (Tex. 2010) (citing *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002)). "We resolve disputed fact

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[1] Appellant does not specify whether he is challenging the legal or factual sufficiency of the evidence. We, however, construe his challenge as a legal sufficiency challenge based on his argument and requested relief to reverse the order and release appellant from the State's custody. *See Elias v. Mr. Yamaha, Inc.*, 33 S.W.3d 54, 59 & n.6 (Tex. App.—El Paso 2000, no pet.) (construing appellant's challenge as legal sufficiency challenge because he asked appellate court to render judgment in prayer for relief); *see also Dongsheng Huang v. Riverstone Residential Grp. (Alexan Piney Creek)*, No. 14-11-00009-CV, 2011 Tex. App. LEXIS 9432, at *2–3 (Tex. App.—Houston [14th Dist.] Dec. 1, 2011, pet. dism'd w.o.j.) (mem. op.) ("[B]ecause the relief he consistently seeks is rendition in his favor, we construe [appellant's] issues as a challenge to the legal sufficiency of the evidence.").

questions in favor of the finding if a reasonable factfinder could have done so, and we disregard all contrary evidence unless a reasonable factfinder could not have done so." *Id.* (citing *City of Keller v. Wilson,* 168 S.W.3d 802, 817 (Tex. 2005); *In re J.F.C.*, 96 S.W.3d at 266).

Recent Overt Act

Relevant to this appeal, to be "clear and convincing," evidence that a proposed patient is likely to cause serious harm to others must include expert testimony and "evidence of a recent overt act or a continuing pattern of behavior that tends to confirm . . . the likelihood of serious harm to . . . others." Tex. Health & Safety Code § 574.034(d)(1). "The Supreme Court of Texas has concluded that the term 'overt act,' found in subsection 574.034(d), is not limited to physical conduct but may be any action objectively perceivable, including verbal statements." *State ex rel. E.S.R.*, No. 01-15-00784-CV, 2016 Tex. App. LEXIS 6979, at *11 (Tex. App.—Houston [1st Dist.] June 30, 2016, no pet.) (mem. op.) (citing *K.E.W.*, 315 S.W.3d at 22). "More specifically, the court determined that 'a proposed patient's words are overt acts within the meaning of Section 574.034(d).'" *Id.* "A proposed patient's statements 'can be relevant both to determining whether he is mentally ill and also to predicting what actions he might or will take in the future as a result of mental illness.'" *Id.* "The statute permits 'the law's intervention to prevent serious injury to others' when a person with a mental illness makes statements that foreshadow violence." *Id.*

The trial court's findings of fact included:

- [Appellant] is likely to cause serious harm to others due to the following: The examination by [the physician called by the State] revealed risk of future dangerousness factors such as prior acts of violence, identification of specific

victims, paranoid and persecutory delusions, command hallucinations, perceived sexual harassment, refusal to take medicine.

- [Appellant] committed an overt act of threatening to use violence against employees of Lowe's Store in Austin, Texas; namely, attacking employees at Lowe's Store.

Appellant's sufficiency challenge to the evidence attacks the trial court's finding that appellant was likely to cause serious harm to others, primarily focusing on an alleged lack of evidence of a "recent overt act" and arguing that the State failed to present "clear and convincing evidence of any 'prior acts of violence'" by appellant. Appellant further challenges the trial court's reliance on appellant's alleged "identification of specific victims," arguing that the State failed to present clear and convincing evidence of "who these 'specific victims' were'" such as providing "details about these supposed 'specific victims' including their last names, which Lowe's store they allegedly worked at, or even if they existed at all." Appellant also focuses on the lack of evidence of how appellant intended to cause harm to any person to support his position that "the State presented no clear evidence that appellant threatened serious, violent or even physical harm against another person."

Appellant, however, has not cited, and we have not found, authority that would support his asserted level of required specificity as to evidence of verbal threats to support a trial court's finding of a "recent overt act." The physician called by the State testified in detail about her review of relevant records,[2] her examination of appellant in October 2016, her concerns about

[2] Among the records that she reviewed, the physician testified that she reviewed records from the pending charge of terroristic threat, including the probable cause affidavit. In the affidavit, the officer averred that appellant called his former employer Lowe's and told the store loss prevention

appellant's "future dangerousness" based on identified risk factors, and his specific stated verbal threats during the examination, including that he "expressed specifically hurting the people at Lowe's," identified a particular person at Lowe's by that person's full name, and "said that he felt attacked and has to attack back." This evidence of appellant's verbal threats in October 2016 was some evidence of a "recent overt act" that "tends to confirm . . . the likelihood of serious harm to . . . others." *See* Tex. Health & Safety Code § 574.034(d)(1); *K.E.M.*, 315 S.W.3d at 24 (noting that "statute requires evidence of a recent act by the proposed patient, either physical or verbal, that can be objectively perceived and that is to some degree probative of a finding that serious harm to others is probable if the person is not treated" and that "overt act itself need not be of such character that it alone would support a finding of probable serious harm to others"). We also observe that, in contrast to the recent examination of appellant by the physician called by the State, appellant's witness had not examined appellant since before March 2016 and, at that time, appellant was on medication and compliant with treatment.

After examining all of the evidence in the light most favorable to the challenged finding, including all reasonable inferences in support of the finding, we conclude that a reasonable trier of fact could have formed a firm belief or conviction that, as a result of his mental illness, appellant was likely to cause serious harm to others. *See* Tex. Health & Safety Code § 574.034(a)(2)(B), (d); *K.E.M.*, 315 S.W.3d at 26. Accordingly, we hold that the evidence was legally sufficient and overrule appellant's first issue.

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officer "that he was going to kill" the same person who appellant identified by her full name to the physician called by the State. The officer in the affidavit also identified the location of the Lowe's.

Statutory Compliance

In his second issue, appellant argues that the trial court erred in failing to dismiss the State's application because two certificates of medical examination were not on file with the court at the time that the hearing on the State's application was set. Relevant to appellant's second issue, section 574.009 of the Texas Health and Safety Code provides:

> (a) 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 whom has examined the proposed patient during the preceding 30 days. At least one of the physicians must be a psychiatrist if a psychiatrist is available in the county.
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> . . . .
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> (d) If the certificates required under this section are not on file at the time set for the hearing on the application, the judge shall dismiss the application and order the immediate release of the proposed patient if that person is not at liberty.

Tex. Health & Safety Code § 574.009(a), (d). Although the State had filed two certificates prior to 2:30 p.m. on November 4, 2016, the time and date that the hearing was set, appellant argues that only one of the certificates was statutorily compliant, requiring the trial court to dismiss the application and immediately release appellant. *See id.*

Appellant focuses his argument on an amended certificate that was filed by one of the two physicians at 2:45 p.m. on the day of the hearing. The record reflects that the certificate was amended to correct a typographical error in a sentence addressing the "additional criteria" that

appellant met as a result of his mental illness.[3] At the beginning of the November 4 hearing, the trial court stated on the record: "[the physician] did file a [certificate of medical examination], but it had a typographical error in it, according to [the physician], as communicated to the Assistant County

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[3] In the original certificate, the relevant sentences read: "That I am of the opinion that the Patient is mentally ill. However, the patient does not meet at least on [sic] the following additional criteria: . . . ." In the amended certificate, the sentence reads: "That I am of the opinion that the Patient is mentally ill, and that as a result of that illness the patient meets at least one of the following additional criteria: . . . ."

The listed "additional criteria" that follow these quoted sentences were the same in the original and amended certificate. In both, the physician marked the criteria 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, which is exhibited by the proposed patient's inability, except for reasons of indigence, to provide for his basic needs, including food, clothing, health, or safety; and, is unable to make rational and informed decisions as to whether or not to submit to treatment." Both reports also contain the same "'detailed basis' for this opinion," including a description of specific statements made by appellant and his further opinion "that the Patient presents a substantial risk of harm to self or others if not immediately restrained."

The physician also stated the following additional opinion:

> That I am additionally of the opinion that the Patient's condition, as set out [above], is expected to continue for more than 90 days, the detailed basis for this opinion being:
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> [Appellant] has a long history of mental illness that impairs his ability to care for himself independently. He endorsed active symptoms of psychotic illness, including delusions, which have historically responded poorly to treatment. He is unable to provide for his basic safety, as demonstrated by his level of disorganized thought process. Furthermore, because he believes that potentially helpful antipsychotic medications are poison, he cannot make rational and informed decisions as to whether or not to submit to treatment.

See Tex. Health & Safety Code § 574.011 (listing required content for certificate of medical examination for mental illness).

Attorney. For the record, I noted that there was a typographical error when I received the application and notified the parties."[4]

To support his position that the trial court should have dismissed the State's application based on subsection 574.009(d), appellant cites cases in which courts have held that the trial court erred in conducting a commitment hearing because the State had failed to file two statutorily-compliant certificates prior to the time set for the hearing. *See id.*; *see also, e.g.*, *State ex rel. E.A.*, No. 14-14-00980-CV, 2015 Tex. App. LEXIS 9412, at *9 (Tex. App.—Houston [14th Dist.] Sept. 3, 2015, no pet.) (mem. op.) ("Because two certificates of medical examination for mental illness were not on file at the time the application hearing was set as required by section 574.009, the trial court should have dismissed the application."); *State ex rel. L.A.*, No. 06-15-00028-CV, 2015 Tex. App. LEXIS 7396, at *3–5 (Tex. App.—Texarkana July 17, 2015, no pet.) (mem. op.) (concluding that trial court erred in conducting commitment hearing because one of certificates on file was stale: the physician had not examined the proposed patient within 30 days of hearing); *Marroquin v. State*, 112 S.W.3d 295, 303–04 (Tex. App.—El Paso 2003, no pet.) (concluding that conducting commitment hearing "with only one proper certificate on file was harmful error").

In contrast with those cases, however, the State here filed two certificates prior to the time set for the hearing that were "completed by different physicians each of whom [had] examined [appellant] during the preceding 30 days." *See* Tex. Health & Safety Code § 574.009(a); *State ex*

[4] At the hearing on November 4, 2016, counsel for appellant admitted receiving notice of the typographical error prior to the hearing.

rel. L.A., 2015 Tex. App. LEXIS 7396, at *4 (stating that "a statutorily compliant certificate is one which reflects that the submitting physician has examined the proposed patient within thirty days of the hearing"). We also conclude that the trial court could have found that the content of the challenged certificate complied in substance with statutory requirements: it was sworn, signed, and dated by the examining physician and included his name and address, the date and place of his examination of appellant, a diagnosis of schizophrenia, his opinion that appellant was mentally ill and "presents a substantial risk of serious harm to self or others if not immediately restrained," and his detailed reasons for his stated opinions, including that appellant "is unable to provide for his basic safety" and "he cannot make rational and informed decisions as to whether or not to submit to treatment." *See* Tex. Health & Safety Code § 574.011 (listing required content of certificate of medical examination for mental illness). On this record, we conclude that the trial court did not err by considering the State's application and overrule appellant's second issue.

CONCLUSION

Having overruled appellant's issues, we affirm the trial court's order for temporary inpatient commitment.

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Melissa Goodwin, Justice

Before Justices Puryear, Pemberton, and Goodwin

Affirmed

Filed: January 31, 2017