

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00462-CV

IN RE COMMITMENT OF JOHN BERNARD

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 09-12-11609-CV

MEMORANDUM OPINION

The State of Texas filed a petition to commit John Bernard as a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001-.151 (West 2010 & Supp. 2011). A jury found that Bernard suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. The trial court rendered a final judgment and an order of civil commitment. In one appellate issue, Bernard challenges the trial court's decision to exclude the expert testimony of Dr. John Tennison. We affirm the trial court's judgment.

Expert testimony is admissible when the expert is qualified to testify about scientific, technical, or other specialized knowledge, and the expert's testimony is relevant and based upon a reliable foundation. *TXI Transp. Co. v. Hughes*, 306 S.W.3d

230, 234 (Tex. 2010). Expert testimony is relevant when it assists the jury in determining an issue or in understanding other evidence. *Id.*; Tex. R. Evid. 702. When expert testimony is based on an unreliable foundation or flawed methodology, it is unreliable and does not satisfy the relevancy requirement. *Hughes*, 306 S.W.3d at 234.

We review the exclusion of expert testimony for abuse of discretion. *In re Commitment of Day*, 342 S.W.3d 193, 218 (Tex. App.—Beaumont 2011, pet. denied). A trial court abuses its discretion by excluding expert testimony that is relevant to the issues in the case and is based on a reliable foundation. *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 870 (Tex. 2009). The erroneous exclusion of evidence constitutes reversible error when the complaining party shows that the trial court committed error and the error probably caused the rendition of an improper judgment. *Id.* “[T]he exclusion of evidence is likely harmless if the evidence was cumulative, or the rest of the evidence was so one-sided that the error likely made no difference in the judgment.” *Id.* If erroneously admitted or excluded evidence was crucial to a key issue, the error is likely harmful. *Id.*

Bernard designated Tennison, a psychiatrist, as an expert witness. The State moved to exclude Tennison’s testimony as unreliable and irrelevant. The State argued that Tennison’s opinions are based on the flawed reasoning that behavioral abnormalities do not exist and are, therefore, unreliable. The State explained that testimony regarding Bernard’s future treatment, the lack of scientific data for risk assessment, and medical or

ethical issues associated with the SVP statute are irrelevant to whether Bernard suffers from a behavioral abnormality. The State concluded that Tennison's opinions could not aid the jury in determining whether Bernard suffers from a behavioral abnormality.

At a hearing on the State's motion, Tennison explained that he reviewed Bernard's records and the depositions of Bernard and the State's experts, conducted an in-person evaluation of Bernard, and applied standardized criteria. Tennison testified that he addressed the sexually violent predator issue, which includes a behavioral abnormality determination, while the State's experts solely addressed the behavioral abnormality issue. According to Tennison, he used the same methodology as that applied by the State's experts. Tennison diagnosed Bernard with undifferentiated schizophrenia, polysubstance dependence in remission, and mental retardation. Tennison testified that Bernard has an IQ in the sixties, has "borderline intellectual functioning or mild retardation[,]" has an ability no greater than that of a three-year-old, does not respond appropriately emotionally, and suffers from a "continuing psychotic state[,]" "ongoing delusions[,]" and "auditory and visual hallucinations." He testified that it is impossible to maintain a meaningful conversation with Bernard. Tennison testified that Bernard is a repeat sexually violent predator and has 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." Tennison did not believe that Bernard "shows evidence of

having committed sexual acts . . . for the primary purpose of victimization[.]” nor did Tennison believe that Bernard is capable of committing such acts. Tennison believed that Bernard has an “impulsive process[.]” Tennison further testified that Bernard would be unable to comply with an order of civil commitment because of the order’s complexity and Bernard’s “impulsivity and childlike cognitive ability[.]” At the conclusion of the hearing, the trial court granted the State’s motion.

On appeal, Bernard contends that Tennison’s testimony was reliable and relevant. According to Bernard, whether he would reoffend was a critical issue in the case, and Tennison’s testimony was necessary to challenge the State’s expert testimony regarding Bernard’s diagnoses and actuarial test scores. Bernard argues that Tennison would have testified that the legal standard for a behavioral abnormality requires both a diagnosis and “a method of inference or verbal report[.]” *i.e.*, “something that supports a conclusion regarding a person’s internal state.” Bernard contends that the exclusion of Tennison’s testimony caused harm because Tennison’s testimony would have assisted the jury by explaining that Bernard “is so psychotic that he cannot form the intent or purpose to engage in a predatory act of sexual violence,” but instead acts on impulse.

A behavioral abnormality is a “congenital or acquired condition that, by affecting a person’s emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person.” Tex. Health & Safety Code Ann. § 841.002(2) (West Supp. 2011).

Tennison believed that Bernard met this definition. Nevertheless, he did not believe that Bernard's behavioral abnormality made him likely to engage in a predatory act of sexual violence for the primary purpose of victimization. *See id.* § 841.002(5).

The SVP statute's terms overlap in some ways. "Sexually violent predator" is defined as a repeat sexually violent offender who suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence. *Id.* § 841.003(a) (West 2010). The "likely to engage" phrase "makes explicit what could be considered implicit in the definition of behavioral abnormality." *In re Commitment of Myers*, 350 S.W.3d 122, 128 (Tex. App.—Beaumont 2011, pet. denied). Implicit in the definition of "behavioral abnormality" is the concept of victimization. The definition includes the phrases "sexually violent offense" and "menace to the health and safety of another person." Tex. Health & Safety Code Ann. § 841.002(2). The predator is a "menace" because of the danger he may commit a "sexually violent offense." Similarly, "predatory act" is defined as an act directed towards individuals for the primary purpose of "victimization." *Id.* § 841.002(5). "Victimization," like the phrase "sexually violent offense" in the definition of behavioral abnormality, assumes a victim. Whether someone is a victim is not determined from the subjective point of view of the victimizer. In testifying that Bernard has a behavioral abnormality, Tennison essentially suggested that Bernard is predisposed to commit a sexually violent offense to the extent that he is a menace. To then also provide testimony that Bernard would not likely engage in a

predatory act of sexual violence could reasonably be seen by the trial court as contradictory. The trial court could reasonably conclude that Tennison's testimony confused the issues and would not assist the jury with its assigned task under the SVP statute. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 553-56 (Tex. 1995); *see also In re Commitment of Simmons*, No. 09-09-00478-CV, 2011 Tex. App. LEXIS 4500, at *18 (Tex. App.—Beaumont June 16, 2011, no pet.) (mem. op.) (“A conclusion that [an offender] is likely to engage in a predatory act of sexual violence directed towards individuals for the primary purpose of victimization is implicit in [the] finding [that the offender has a behavioral abnormality]”). The Supreme Court has noted that “[b]ecause expert evidence can be hard to evaluate, it can be both powerful and misleading.” *Robinson*, 923 S.W.2d at 553. The trial court may exclude evidence because its probative value is outweighed by the danger of issue-confusion or the danger of misleading the jury. *See id.* at 557.

Even assuming that the trial court abused its discretion by excluding Tennison's testimony, we cannot say that any error probably caused the rendition of an improper judgment. The record reflects that Bernard was previously convicted of attempted aggravated sexual assault with a deadly weapon and aggravated sexual assault with a deadly weapon. The nature of the offenses demonstrates that they were committed for the purpose of victimization. *See In re Commitment of Bailey*, No. 09-09-00353-CV, 2010 Tex. App. LEXIS 6685, at **12-14 (Tex. App.—Beaumont Aug. 19, 2010, no pet.)

(mem. op.). Moreover, Bernard's ability to follow and understand a civil commitment order was not crucial to the key issue of whether he suffers from a behavioral abnormality.

Additionally, the State's experts testified that Bernard suffers from a behavioral abnormality, diagnosed Bernard with schizophrenia, paraphilia not otherwise specified, exhibitionism, obsessive compulsive disorder, mild mental retardation, history of polysubstance abuse, and anti-social personality disorder, and explained that Bernard's actuarial test scores show that he is at a moderate to moderately high risk of reoffending. Through the testimony of Dr. Anna Shursen, Bernard had the opportunity to challenge the testimony of the State's experts and present testimony that he is neither capable of committing a sexually violent offense for the primary purpose of victimization nor capable of following a civil commitment order. Shursen, a sex offender evaluator and treatment provider, conducted actuarial tests and diagnosed Bernard with sexual abuse of an adult, schizophrenia, and obsessive-compulsive disorder. She testified that Bernard's actuarial test scores reflect a recidivism rate of twenty-six percent over five years on one test and over six years on another test. Shursen opined that Bernard does not know what a rule is and she testified that she could not complete her interview with Bernard because of his "flight of ideas and thoughts[,]” confusion, incoherence, repetition, and inability to answer questions. Shursen testified that she establishes special programs and treatments

for mentally-challenged individuals, but she could not imagine a program that could be established for Bernard.

Shursen admitted that in her deposition she testified Bernard suffered from a behavioral abnormality at the time of his offenses, but that she could not determine whether he suffers from a behavioral abnormality today. At trial, however, Shursen opined that Bernard does not have a behavioral abnormality. She testified that, at the time of his sexual offenses, Bernard was predisposed to commit predatory acts of sexual violence for the primary purpose of victimization. She testified that Bernard could “act out in a sexual way” because of his lack of control over his impulses. She explained that Bernard “does not have enough organized thought or behavioral or cognitive ability to have a primary purpose to victimize someone else[.]” and that she did not believe any doctor could accurately say otherwise.

Given the evidence submitted to the jury, we conclude that Bernard has not shown that any error in excluding Tennison as an expert probably caused the rendition of an improper judgment. *See Cent. Expressway Sign Assocs.*, 302 S.W.3d at 870. We overrule Bernard’s sole issue and affirm the trial court’s judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on March 29, 2012
Opinion Delivered June 14, 2012
Before McKeithen, C.J., Gaultney and Horton, JJ.