In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00548-CV

IN RE COMMITMENT OF RAYMOND SCOTT HINKLE

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 08-12-11341-CV

MEMORANDUM OPINION

A jury found Raymond Scott Hinkle 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. We hold that the evidence was legally sufficient, but that the trial court committed reversible error by excluding the testimony of Hinkle's expert witness after the State had cross-examined the expert as an adverse witness during its case in chief. Accordingly, we reverse the judgment and remand the case for a new trial.

LEGAL SUFFICIENCY

In his first issue, Hinkle contends the evidence is legally insufficient to support the jury's verdict because the State's expert testimony is merely conclusory and incompetent to support a conclusion that Hinkle suffers from a behavioral abnormality. We review all the evidence in a light most favorable to the verdict to determine whether a rational factfinder could have found, beyond a reasonable doubt, that Hinkle suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See In re Mullens*, 92 S.W.3d 881, 885, 887 (Tex. App.—Beaumont 2002, pet. denied) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). Conclusory or speculative expert testimony does not make the existence of a material fact more probable or less probable. *Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837, 839 (Tex. 2010).

The State presented two expert witnesses: forensic psychologist Jason Dunham and psychiatrist Sheri Gaines. Both Dunham and Gaines expressed a professional opinion that Hinkle has a behavioral abnormality that predisposes him to engage in predatory acts of sexual violence. Hinkle does not challenge the qualifications of either expert. On appeal, Hinkle argues that Dunham's and Gaines's expert opinions were so speculative and conclusory in nature that they are incompetent and legally insufficient to support the jury's verdict.

Dr. Dunham's Testimony

Dunham explained that "behavioral abnormality" is a legal term, not a medical term. Dunham reviewed Hinkle's file, which contained over one thousand pages of records, including police reports and victim statements, criminal history, evaluations for parole and for sex offender treatment, medical records, school records, and depositions of Hinkle and four experts involved with the case. Dunham interviewed Hinkle for approximately three hours, six months before the trial. Dunham stated that he evaluated Hinkle in accordance with the accepted standards in the field of forensic psychology. Hinkle had two convictions for sexual assault. The first sexual assault occurred on March 15, 1992, while Hinkle was on probation. The victim was an eighteen year old female high school student and Hinkle was twenty-two years old. Hinkle met the victim one week before and the assault occurred on their first date. At the conclusion of the date, the victim rebuffed Hinkle's advances, but Hinkle forced the victim to perform a sex act on him then engaged in intercourse. Afterward, Hinkle urinated on the victim's car. Hinkle claimed they engaged in a consensual sexual encounter, but he pled no contest to the crime and received a fifteen year sentence.

The second sexual assault occurred while Hinkle was released on bond for the first sexual assault. This victim was also eighteen years old and the assault occurred approximately nine days after Hinkle met her. Hinkle expressed a desire to engage in sex. When she refused, Hinkle forcibly engaged in sexual intercourse with her.

Afterward, he left threatening messages on her answering machine. He denied that they engaged in sex, but he pled no contest to the criminal charges and received a fifteen year sentence.

Hinkle's first arrest, at age fourteen, was for burglary of a habitation with intent to commit theft. Hinkle was attending an unauthorized party at a friend's home and stole a gun. Hinkle admitted to stealing the gun at the time, but later denied that the offense occurred. In August 1984, Hinkle was convicted of theft after he admitted that he broke into a house and stole a bicycle. He admitted to the offense at the time but now claims to have no recollection of the case. While on probation, Hinkle was arrested for criminal mischief in April 1985 and for theft in December 1986. In November 1989, Hinkle was convicted for driving while intoxicated and unlawfully carrying a weapon. An escape charge arising out of the same incident was dismissed. In March 1990, he was charged with assault causing bodily injury. The victim was Hinkle's girlfriend, who Hinkle claimed was the aggressor because she caught him with another woman. Hinkle pled guilty and received probation. In May 1990, Hinkle was charged with another assault causing bodily injury and again received probation. The sexual assaults occurred in 1992. He also committed criminal mischief in June 1992 and theft by check in October 1992. He committed another assault with bodily injury in August 1993. The victim was Hinkle's girlfriend. Hinkle went to prison in December 1994.

Dr. Dunham identified various characteristics that relate to Hinkle's personality. According to Dunham, Hinkle engaged in irresponsible behavior. In addition to committing crimes while he was on probation, Hinkle failed to report to his probation officer or to pay his fees, failed to maintain steady employment, and denied the existence of a child he knew that he had fathered.

Hinkle is manipulative. While he was in prison, Hinkle engaged in relationships with several female guards, two of whom were fired after the relationship was discovered. One female officer has been criminally prosecuted for having sex with Hinkle. After one of the officer's was fired, Hinkle had the former officer obtain contact information on one of Hinkle's rape victims.

Hinkle is a pathological liar. He speaks dishonestly not only about his sexual and nonsexual criminal history, but also about his employment history, education, and substance abuse. He also lied about events that occurred in the course of his interview with Dunham.

Hinkle is impulsive. Hinkle dropped out of school in ninth grade because he was, in his words, too busy partying. He frequently changed jobs and relationships. His behavior in the commission of the sexual assaults showed that he attempted to obtain consensual sex but completed the act anyway despite the woman's refusal.

Hinkle is irresponsible. He was fired from his last job because he was too hung over to show up for work. He committed sexual offenses while he was on probation. He

lied to his probation officer and failed to pay required fees. He failed to accept responsibility for his crimes.

Hinkle is narcissistic. He lacks empathy and has a feeling of superiority over others. During the interview, Hinkle displayed condescension towards his interviewer, victims, lawyer, and judge. Hinkle displayed his sense of sexual entitlement in the rapes. During the interview, Hinkle tried to control the conversation and tried to determine what Dunham was writing down.

Dunham used an actuarial tool, the PCL-R, to determine psychopathy. Hinkle's score of "35" placed him in the very high range for psychopathy. That score lies in the top "97.7" percentile for all inmates who have been administered the PCL. Dunham diagnosed Hinkle with antisocial personality disorder and narcissistic personality disorder.

Dunham also performed the Static-99 and the Minnesota Sex Offender Screening Tool-Revised ("MnSOST-R") on Hinkle. Hinkle's MnSOST-R score of "six" placed Hinkle in the moderate risk category. The Static-99 score of "four" placed Hinkle in the moderate-high risk category. Dunham felt these tests underestimated Hinkle's risk because they did not account for Hinkle's psychopathy.

In performing a sex offender risk assessment, Dunham considered the sexual deviancy of the sexual offenses that Hinkle committed, the violence involved in the assaults, the pattern displayed in the similarity between the offenses, the impulsivity of

the offenses and the fact that they occurred while Hinkle was on probation. He considered it important that the victims were not related to Hinkle. Dunham also found it significant that Hinkle became sexually active at age eleven, claimed to have had "30 to 50" sexual partners by age twenty-four, and lived with five different women to whom he was unfaithful. Dunham also considered Hinkle's antisocial personality disorder, narcissistic personality disorder, and psychopathic personality disorder to be significant risks for reoffending. Hinkle's life instability, including his employment history, was significant. Dynamic risk factors include Hinkle's lack of remorse, his feeling that he had been victimized by his victims, his dishonesty, his lack of sex offender treatment, and his sense of sexual entitlement.

Hinkle argues that Dunham failed to explain to the jury how his reading of Hinkle's record led him to conclude that Hinkle is predisposed to commit acts of sexual violence. To the contrary, the appellate record contains a detailed explanation both of the factors Dunham considered and the process Dunham employed in reaching his conclusion. Dunham's opinion testimony does not lack objective, evidence-based support for his conclusions. Dunham's testimony presents a reasoned judgment based upon established research and techniques for his profession and not the mere *ipse dixit* of a credentialed witness. *See Merrell*, 313 S.W.3d at 840.

Dr. Gaines's Testimony

Gaines testified that she reviewed the file, which included police reports, victim statements, prison records, education records, and medical records, and she interviewed Hinkle for two hours. She compared the self-reported information from the interview with the records in the file. Hinkle appeared charming in a superficial way. Gaines diagnosed Hinkle with antisocial personality disorder, sexual abuse of an adult, and polysubstance abuse. She based the finding of sexual abuse of an adult on Hinkle's criminal history. Gaines determined that Hinkle met the criteria for antisocial personality disorder. For instance, the fact that after Hinkle assaulted his first victim Hinkle urinated on her car and told her he would call her showed his sense of entitlement. Hinkle demonstrated aggression in the assaults. His extensive criminal history began at age fourteen. Hinkle established romantic relationships with security officers in prison, then used those relationships for personal gain. For instance, Hinkle obtained extra time out of his cell and obtained access to cell phones. According to Gaines, Hinkle's PCL score indicated a huge risk factor.

Hinkle did not take responsibility for his actions, but blamed other people and either claimed the sexual assaults were consensual or that they did not occur at all. Hinkle's demonstrated lack of empathy was a risk factor. Impulsivity was established by his unstable work history. Childhood behavior problems were evidenced from the criminal activity and from Hinkle's self-reported trouble living with his mother.

According to Gaines, Hinkle would establish a relationship but would become dangerous if he was rejected. Hinkle claims that Gaines cites no textual authority to support her conclusions, but the record shows that Gaines used the DSM to help form her diagnosis of the psychiatric conditions that furnished the risk factors for reoffending with an act of sexual violence. Gaines's testimony presents a reasoned judgment based upon established research and techniques for her profession and not the mere *ipse dixit* of a credentialed witness. *See id.* Having considered Hinkle's arguments, and having reviewed the record in the light most favorable to the verdict, we conclude the evidence is legally sufficient to support the jury's verdict. We overrule issue one.

EXCLUSION OF EXPERT TESTIMONY

Issue two contends that the trial court erred in not permitting Hinkle's expert, Dr. John Tennison, to testify that Hinkle did not commit the crimes for which he had been convicted. The trial court signed a pre-trial order that stated "Testimony as to Defendant's Plea Agreement, Reaonable Doubt as to Defendant's Guilt, False Rape Allegations and/ or Wrongful Conviction is Barred by the Doctrine of Collateral Estoppel." Before jury selection began, the trial court notified the parties that it would not permit Tennison to testify that Hinkle does not have a behavioral abnormality because Tennison believes Hinkle had not committed the crimes for which Hinkle had been finally convicted. Hinkle's counsel sought clarification of the trial court's ruling. Counsel explained that "[t]he Respondent doesn't have any intent of saying Mr. Hinkle

didn't commit the offenses." Counsel for the State expressed her understanding that Hinkle wanted to be able to attack the hearsay found in the records and relied upon by the State's experts. The trial court stated that the experts could refer to the records. The trial court ultimately granted the State's challenge to all of Tennison's testimony for reasons addressed in issue three, and Hinkle presented an offer of proof at the conclusion of the trial. In his testimony, Tennison noted that he unsuccessfully attempted contact with Hinkle's two sexual assault victims. He explained that

> generally of the people that I interviewed, with regard to collateral estoppel, I realize some of that wasn't admissible, but it was one of those catch 22s where the State experts were attempting to make a diagnosis for which lying and deceitfulness were the diagnostic criteria, and yet they were citing Mr. Hinkle's denial of the rapes as being an example of that. But that's also inconsistent with the Hare manual.
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> . . . .
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> …[P]eople who are guilty of crimes that -- for which they have been convicted, people who are truly guilty will frequently deny those crimes for, you know, personal gain or otherwise, and that's not considered an example of pathological lying.

Tennison returned to the subject later in the offer of proof when he explained why he did not agree with the other experts' assessment of Hinkle as a pathological liar. Tennison stated that

> I also gave Scott a zero on "pathological lying." In every single example that I've been able to investigate contradictory claims for which Scott claims something and the other experts claimed something else, I have been able to demonstrate that he was telling the truth. There are some examples where he recalled different things at different times during his

> teenage years and might have said something at one time or another which were taken to be lies.
>
> But those examples are perfectly within normal limits of the infallibility of the human memory. There are studies that I can cite, specific studies that will demonstrate that. The magnitude of the inconsistencies in his recall, the consistency of his denial of the rape charges, even though I can't talk about that in front of the jury, in no way paint a picture of a pathological liar. And Dr. Hare has said explicitly in the reports, even if someone is guilty of the conviction, lying about the conviction is not in and of itself to be used to make a case for pathological lying, because people often lie about their convictions because there's something to be gained with that.

Later, Tennison explained why he gave Hinkle a score of "one" for "failure to accept responsibility for actions" on the PCL-R.

> Now, this score of one was because of maybe. I want to clarify that. There -- I believe to a reasonable degree of medical probability that Mr. Hinkle was wrongfully convicted. However, I'm not absolutely certain of that. So it's a maybe. You know, if the rape convictions happened, then I would say he's not accepted responsibility for those -- for that action. So it's a maybe, but I still have serious doubt. It's not to some degree, it's a maybe.

Collateral estoppel applies if the party asserting the bar establishes "that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action." *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994). Hinkle argues the issue of whether he committed the sexual assaults was not fully and fairly litigated in his criminal cases. Hinkle has two final convictions that have not been successfully challenged in later proceedings. He

cannot challenge the fact of his conviction in this proceeding. But Tennison made two points about the underlying convictions: (1) Hinkle continued to deny that he committed the offenses notwithstanding having pled guilty or no contest in the criminal proceedings; and (2) Tennison believes Hinkle may have been wrongfully convicted. Neither of these facts was established in the criminal prosecutions. The doctrine of collateral estoppel does not apply to these facts because those facts were neither litigated in the first actions nor essential to the first judgments. *See id*. Likewise, the discrete issue of whether Hinkle is a pathological liar was not determined in the prosecution of the criminal cases. *See id*. Moreover, facts found in the records that form the basis for the experts' testimony are not offered for the truth of the matter stated. *See* Tex. R. Evid. 703. Tennison is no more proscribed from relying on the description of the offense found in Hinkle's deposition to form the basis of his opinion that Hinkle lacks a behavioral abnormality than Dunham is from relying on the victim's statement regarding the same events in forming his opinion that Hinkle does have a behavioral abnormality. *See* Tex. R. Evid. 704.

Whether Hinkle was wrongfully convicted was not decided in the underlying criminal cases, but the issue of whether Hinkle was wrongfully convicted is not at issue in this case either. The convictions are final and have not been set aside. *See generally In re Eeds,* 254 S.W.3d 555, 558 (Tex. App.—Beaumont 2008, no pet.) (finding respondent in a commitment proceeding could not attack accuracy of statement in

criminal judgment that conviction was for indecency by contact, where that judgment had not been reversed, corrected, or set aside). The particular statement at issue on appeal is Tennison's statement that "I believe to a reasonable degree of medical probability that Mr. Hinkle was wrongfully convicted[.]" That statement is not relevant in this proceeding, where the validity of Hinkle's sexual assault convictions is not being and cannot be contested. *See* Tex. R. Evid. 401. Evidence that is not relevant is not admissible. *See* Tex. R. Evid. 402. Further, because Hinkle had previously pled "no contest" and was convicted of such charges, the particularly worded statement by Dr. Tennison may have confused the jury on the issues and would not have assisted the jury to understand the evidence. Thus, such statement was properly excludable pursuant to Rule 702 of the Rules of Evidence. *See* Tex. R. Evid. 702. The trial court did not err in excluding irrelevant testimony. We overrule issue two.

EXCLUSION OF EXPERT WITNESS

Issue three contends the trial court abused its discretion "in ruling, in the middle of trial, and after, in effect, permitting the prosecution to cross-examine him, that . . . Tennison could not testify as an expert witness on behalf of Appellant." During its case-in-chief, the State called Tennison as an adverse witness. The State did not ask to take Tennison on voir dire. Tennison testified as an expert witness without objection. Hinkle reserved his questions for his case-in-chief. The State recalled Dr. Gaines, who testified that the proper methodology that is accepted in the field of forensic psychiatry is to

"follow the law." Before the State rested, counsel for the State moved to strike Tennison's testimony on the ground that "[Tennison's] testimony is unreliable because he stated on the record that he cannot follow the law." According to the State, Tennison "said that no sex offender can meet the definition for behavioral abnormality" and "he believes that behavioral abnormality does not even exist." The State claimed that Tennison's methodology and reasoning were both flawed. Counsel for the State stated that Gaines established the proper methodology and argued that Tennison's expert opinion was unreliable because he stated that no sex offender could ever have a behavioral abnormality as defined under the Texas statute. The trial court ordered that Tennison's testimony be stricken and instructed the jury to disregard it. Hinkle presented an offer of proof from Tennison, after which the trial court restated its ruling excluding Tennison's testimony. The trial court found that Tennison was an expert, but excluded the testimony because it would confuse the jury, "especially the part about nobody being able to meet the statute in the state of Texas."

Tennison's Testimony

The State argued, and the trial court evidently believed, that Tennison stated that Tennison could not follow the law and that no person could meet the criteria for a behavioral abnormality required for commitment as a sexually violent predator. A careful examination of Tennison's testimony shows that Tennison was actually stating that a diagnosis under the DSM alone would not satisfy the legal standard for behavioral

abnormality. Counsel for the State asked Tennison, "[I]sn't it true that you don't actually think that behavioral abnormality as defined by the Texas Sexually Violent Predator Statute even exists?" Tennison replied, "No. I would not say that it doesn't exist. I would say that there's no scientific evidence for its existence, there's no evidence from anywhere that shows that it -- has existence." Counsel asked, "[S]o basically you're saying you don't think there's any way that an individual could have a behavioral abnormality?" Tennison replied, "No, I didn't say that. I'm saying we don't have any scientific evidence that any such thing exists. The law declares the existence. But there's no science anywhere that would suggest that it had existence. It's not just a legal term, it's a declaration of existence for which there is no scientific evidence." Counsel asked, "So following that line of thinking that no sex offender could meet the statute requirements of behavioral abnormality for -- in the state of Texas?" Tennison replied, "Yes, based on science it doesn't appear that that can happen."

Tennison further explained his position in the offer of proof, as follows:

> I don't know if I recall exactly my response, but my clarification that I attempted to make was to speak to what the scientific method shows and to say that there was no evidence from the scientific method of something that would be synonymous with what is described here.
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> That's not to say there are not other methodologies by which one would find a behavioral abnormality. Indeed, one has to use a methodology other than the scientific method to find that the behavioral abnormality as defined exists. And I'm perfectly okay with that.
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> But my point was that the method of science does not show that, but rather the method of inference or verbal report as in the case of Mr.

> Hendricks from Kansas, which is a famous case relied upon by experts. Mr. Hendricks said that when he got stressed out, that he could not help himself from molesting children. And the Supreme Court as well as experts such as myself would be perfectly willing to rely on that verbal report.
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> But that is not the scientific method. That is not science. That is a verbal report, which is a method of inference of an internal state for which the scientific method cannot shed light on. That was my point, and it was severely distorted by the prosecution.

Tennison explained that "the scientific method shows that there are some general brain conditions that result in general impulsivity." According to Tennison,

> there are, you know, potentially acquired brain injuries that might predispose someone to impulsive behavior in general. But the type of complex behaviors that are attributed and regarded as examples of this behavioral abnormality, the methods of science at this time do not have anything which has come to be persuasive or regarded as being scientific evidence of such an abnormality. Therefore, it's -- one has to use other methods than the scientific method to make that conclusion that someone has a behavioral abnormality.

Tennison explained

> that term "emotional or volitional capacity" has come to be regarded as having substantial difficulty, if not impossible abilities, to control one's behavior. And that's generally regarded as there being disconnection between what one is willing their body to do versus what it's doing at a particular moment. That is to say here at any given moment if you are experiencing your body as not behaving as a response to the choice you have made or the intention you are engaging in, then you lack volitional capacity.
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> But, also, the whole expression "emotional or volitional capacity" has been collapsed into a single meaning because the Supreme Court in Kansas versus Crane has determined that emotional capacity alone is not sufficient. There must be volitional incapacity present.

> And that's binding in the state of Texas. As experts in my field understand the caselaw, which is part of the formal training of forensic psychiatry, and which is frequently quoted in courts and relied upon for professional opinions in courts other than this one.

Counsel asked, "[I]s there such a condition that affects a person's emotional or volitional capacity, serious difficulty controlling their behavior, a congenital or acquired condition that predisposes a person to commit a sexual offense? Tennison replied, as follows:

> Well, with regard to what the methods of science show, the methods of science do not show the evidence for such condition. It is still possible through inference and professional judgment using nonscientific methods to conclude, as in the case of Mr. Hendricks, that a behavioral abnormality exists.
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> And, by the way, Kansas uses the exact same definition for their disorder, even though they don't call it a behavioral abnormality, the wording used in Texas is a carbon copy of Kansas and Washington State. So, if it could be found that Mr. Hendricks had it in Kansas, then I likely would have the same conclusion that he also had that same behavioral abnormality in the State of Texas, but I would infer it from his verbal report, not from the scientific evidence.

Tennison noted that

> [t]he American Psychiatric Association and even, probably more importantly, the Group for the Advancement of Psychiatry as early as 1977, have a very long history of being very critical of the kind of ontological claim that's inherent or implicit in this description precisely because there's no scientific evidence for it. And it's not that psychiatrists are not willing, and ethically so, to give an opinion to a behavioral abnormality based on inference. But a competent psychiatrist would make the distinction between inferential judgments versus scientific judgments.

Tennison quoted a publication called the Task Force Report of the American Psychiatric Association, as follows:

> "In the opinion of the Task Force, a sexual predator commitment law established a nonmedical definition of what purports to be a clinical condition without regard to scientific and clinical knowledge. In doing so, legislators have used psychiatric commitment to effect nonmedical societal ends that cannot be openly avowed. In the opinion of the Task Force, this represents an unacceptable misuse of psychiatry."

According to Tennison, a 2009 publication titled "Sex Offenders: Identification, Risk Assessment, Treatment, and Legal Issues" demonstrates "the very limited degree of relevance that actuarial tests, such as the Static-99 and the MnSOST have, as well as the very limited degree of relevance that the PCL-R has." Tennison stated that neither the Static-99 nor the MnSOST can test for volitional capacity. According to Tennison, mental health professionals "still do not have any scientific instruments that have been validated[,]" through a process used by psychiatrists or psychologists to assure that the instrument measures what it claims to measure. Similarly, the PCL-R does not test for behavioral abnormality. As for assessing volitional capacity, Tennison explained

> I wouldn't necessarily have to see it myself. If someone else had documented it and I trusted their opinion, that would be comparable to me having seen it myself or if I saw a video of it or other documentation that I found to be reliable, then I would find that persuasive as well. But there's no scientific method in terms of actually doing an experiment according to the method of science.

According to Tennison, "[t]he inability to control behavior is not a criteria for any DSM disorder." Such evaluations have "an existence from inferential processes, but not from the scientific method."

Appellate Review

On appeal, the State argues that the trial court acted within its discretion because in ruling that Tennison could not testify, the trial court was relying on *In re Commitment of Fisher* and the cases cited therein. 164 S.W.3d 637, 655-56 (Tex. 2005). The discussion in *Fisher* that the State relies on provides neither precedent nor guidance on the admissibility of expert testimony. *Fisher* concerned a constitutional challenge to the sexually violent predator commitment statute. *Id.* The court held that the statute was not unconstitutionally vague, as follows:

> Second, Fisher asserts that the Act is vague because it predicates commitment on a "behavioral abnormality" rather than a "medically recognized and diagnosable mental illness." The Texas legislature defined behavioral abnormality as:
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> > 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.
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> Tex. Health & Safety Code § 841.002(2). This definition is virtually identical to the Kansas statute's definition of "mental abnormality," a definition that the United States Supreme Court has held "satisfies 'substantive' due process requirements." *Hendricks*, 521 U.S. at 356, 117 S.Ct. 2072; *see also* Kan. Stat. Ann. § 59-29a02(b) (defining "mental abnormality" as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others"); *Beasley v. Molett*, 95 S.W.3d 590, 597 (Tex.App.—Beaumont 2002, pet. denied) (holding that the Texas Act's "behavioral abnormality" requirement was "virtually the same" as the "mental abnormality" definition examined in *Hendricks*). Moreover, the United States Supreme Court has "never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, [it has] traditionally left to legislators the task of defining terms of a medical

> nature that have legal significance." *Hendricks*, 521 U.S. at 359, 117 S.Ct. 2072. We conclude that Fisher has failed to demonstrate that the Act's behavioral abnormality definition is unconstitutionally vague in every application.

Id. (footnote omitted).

The State argues that the courts have recognized that a behavioral abnormality exists, and Tennison would confuse the jury with testimony that behavioral abnormality, as defined in the statute, did not exist. Both the State and the trial court appear to have either ignored or disregarded Tennison's unequivocal denial of the State's questions about whether Tennison thinks that behavioral abnormality as defined by the Texas Sexually Violent Predator Statute even exists and whether Tennison thinks there is any way that an individual could have a behavioral abnormality. The record shows that Tennison distinguished scientific method from legal analysis. According to Tennison, what does not exist is scientific evidence and validated scientific measurements for determining whether a person meets the legal standard for behavioral abnormality. Rather than testify that no determination could be made, Tennison stated that such a conclusion would require the application of inferential processes as opposed to scientific method. The basis for excluding the evidence -- that the witness stated that he could not follow the law and that the witness claimed that behavioral abnormality, as defined in the statute, did not exist -- is not supported by the record. Instead, the record establishes that the witness testified that behavioral abnormality is not the equivalent of any specific mental or personality disorder and consequently a diagnosis of a mental or personality

disorder will not justify a conclusion that a particular subject has a behavioral abnormality absent the application of inferential processes that are not determinable through scientific method.

The State's experts agreed with this essential point of Tennison's. Gaines agreed that the DSM does not say that either antisocial personality order or narcissistic personality disorder is a congenital or acquired condition that predisposes a person to commit a sexual offense. Instead, she considers the DSM diagnosis, actuarial tests, and her training and expertise to form her opinion regarding behavioral abnormality. Dunham agreed that the DSM does not speak in terms of behavioral abnormality and that the actuarial instruments were not designed for the purpose of identifying behavioral abnormality.

"We review a trial court's exclusion of expert testimony for an abuse of discretion." *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000). "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Tex. R. Evid. 702. Here, the trial court acknowledged that Tennison qualified as an expert, but the trial court excluded the witness because the trial court concluded that Tennison's testimony would confuse the jury. *See id.*; *see also* Tex. R. Evid. 403. In reaching that determination, the trial court presumed that Tennison believed

and would testify that behavioral abnormality does not exist. This assumption was incorrect, as Hinkle's offer of proof demonstrated. The offer of proof established that Tennison would have told the jury that the ultimate issue in the case -- whether Hinkle suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence -- cannot be determined by scientific method alone. We hold it was error to exclude Tennison's testimony on the record before the court.

Having found error, we must determine whether the trial court's error in excluding Tennison's testimony probably caused the rendition of an improper judgment. Tex. R. App. P. 44.1(a)(1). As the trial court acknowledged and the State stipulated at trial, Tennison possessed the appropriate qualifications. Tennison had performed testing and interviews and had reviewed the testing and reports prepared by the State's experts. His testimony would have provided the jury insight on one of the critical issues in the case, namely the risk that Hinkle would reoffend in a sexually violent manner. The bill of proof showed that Tennison had detailed criticism of Gaines's and Dunham's analyses of Hinkle's risk of reoffending. Without his testimony, the State's experts' testimony regarding their diagnoses of personality disorders and their scoring of the actuarial instruments went unchallenged by any expert in the field of psychiatry or psychology.

The State argues that Hinkle could have retained his right to have an expert testify by filing a written motion for continuance. *See* Tex. R. Civ. P. 252. Hinkle did request a continuance when the trial court excluded Tennison's testimony in the midst of trial, but

Hinkle did not reduce the request into writing supported by affidavit and the trial court denied the motion. The issue here is harm, not preservation.[1] Assuming for the sake of argument that Hinkle could have obtained the services of another expert witness if he had obtained a continuance of the trial, the fact is no continuance was granted and no expert testified on Hinkle's behalf. Because the trial court erroneously excluded admissible expert testimony concerning a critical issue in the case, we hold that the trial court's error probably resulted in an improper judgment. *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 870 (Tex. 2009). Because the trial court erred by excluding relevant and material testimony on a critical issue, and because no other expert testified for Hinkle on the critical issues for which expert testimony was required, we reverse the judgment and order of commitment and remand the case to the trial court for a new trial. *See* Tex. R. App. P. 44.1(a)(1).

REVERSED AND REMANDED.

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CHARLES KREGER
Justice

Submitted on March 31, 2011
Opinion Delivered June 16, 2011

Before McKeithen, C.J., Kreger and Horton, JJ.

[1] A request for a continuance is not required to preserve error on the erroneous exclusion of evidence. *See generally* Tex. R. App. P. 33.1. Hinkle preserved error by presenting an offer of proof. *See* Tex. R. Evid. 103(a)(2).