

AFFIRMED and Opinion Filed June 8, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-00068-CV

IN RE: THE COMMITMENT OF ANTHONY HENDERSON

**On Appeal from the 195th Judicial District Court
Dallas County, Texas
Trial Court Cause No. CV1770004**

MEMORANDUM OPINION

Before Justices Bridges, Whitehill, and Nowell
Opinion by Justice Bridges

The State of Texas filed a petition to civilly commit Anthony Henderson as a sexually violent predator (SVP). *See* TEX. HEALTH & SAFETY CODE ANN. §§ 841.001–.150. A jury found Henderson suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. *Id.* § 841.003(a). The trial court entered final judgment and an order of civil commitment. In three issues, Henderson argues the evidence is legally and factually insufficient to support the jury’s finding that he suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence, and the trial court erred in refusing

his requested charge that the jury could render a verdict in his favor by a 10-2 vote. We affirm the trial court's judgment.

In its petition filed in August 2017, the State alleged Henderson was convicted of aggravated sexual assault in October 1993 and again in March 2014. The petition stated Henderson was incarcerated but set to discharge his sentence in February 2020. The petition alleged Henderson suffers from a behavioral abnormality and is a sexually violent predator. Therefore, the State requested the court to commit Henderson for treatment and supervision to be coordinated by the Texas Civil Commitment Office.

At trial in October 2018, Henderson testified he committed his first crime when he was "17 or 18," and he and his cousin stole a car. Henderson was placed on probation for ten years. In 1990, Henderson was convicted of sexual assault and placed on deferred adjudication probation for ten years. In 1992, Henderson was convicted of a drug charge. Henderson's probation was revoked, and he was sentenced to five years' confinement for the sexual assault and two years' confinement for the drug offense. The sentences ran concurrently.

Henderson got out of prison in 1998, and he was required to register as a sex offender. In 2011, Henderson was convicted of failing to register as a sex offender, and he was sentenced to two years' confinement. In 2014, Henderson was convicted of an aggravated sexual assault that occurred in 2009 and sentenced to six years' confinement; he was again convicted of failure to register as a sex offender, and he

was sentenced to two years' confinement, which ran concurrently; and he was convicted of misdemeanor assault, family violence, and he was sentenced to 180 days' confinement, which also ran concurrently.

Henderson testified that, in 1990, he had a girlfriend, but he saw a woman as he was "cruising around." Henderson asked the woman if she needed a ride, and she said she did. Henderson took the woman back to his house, "pulled a knife on her and . . . had sex." In 2009, Henderson was at a stop light, and he saw a woman and asked if she needed a ride. The woman "said sure," and Henderson took the woman to her house and "had oral sex with her." The woman later told police that Henderson "raped her" and "pulled a knife and all that on her," but Henderson denied the woman's accusation. Nevertheless, Henderson was "identified as the rapist" in the 2009 offense "through DNA." Henderson was "in prison at the time the police came and identified" him.

Henderson testified he was in sex offender therapy at the time of trial. When asked what he had learned about his "triggers" during therapy, Henderson testified he learned "to avoid them." Henderson identified his trigger as "women." Henderson initially denied having a smart phone, a telephone, access to the Internet, or accounts on social media. Henderson also denied "looking at women on the Internet." Upon further questioning, Henderson admitted he has "a phone out there in the world" and a Facebook account. The prosecutor showed Henderson screen shots of a Facebook account which Henderson confirmed showed a picture of him

and belonged to him. Henderson admitted he looked at pictures on his Facebook account that depicted “scantily clad women,” and the pictures were “triggers based on [his] understanding of [his] sex offender therapy treatment.”

Dr. Randall Price testified he is a forensic psychologist licensed as a psychologist and sex offender treatment provider for the State of Texas, and he is board certified in the fields of forensic psychology and clinical neuropsychology. In response to questioning, Price reviewed the definition of behavioral abnormality found in the Texas Health and Safety Code. Price testified he reviewed Henderson’s records for all of his offenses and a previous psychological evaluation performed in July of the previous year. Price also interviewed Henderson in March 2018 and conducted a formal risk assessment. Price testified it was his opinion that Henderson “does have a behavioral abnormality” that predisposes him to commit sexually violent offenses. At the conclusion of the evidence, the jury found unanimously that Henderson is a sexually violent predator, and the trial court entered final judgment and an order of civil commitment. This appeal followed.

In his first and second issues, Henderson argues the evidence is legally and factually insufficient to support a finding beyond a reasonable doubt that he has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. In a suit to commit a person as a sexually violent predator, the State must prove beyond a reasonable doubt that the person (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.” TEX. HEALTH & SAFETY CODE ANN. §§ 841.003(a), 841.062(a). A person is a repeat sexually violent offender if he has been convicted of more than one sexually violent offense and a sentence was imposed for at least one of the offenses. *Id.* § 841.003(b); *see also id.* § 841.002(8) (defining “sexually violent offense”). 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.” *Id.* § 841.002(2). Predatory act means “an act directed toward individuals, including family members, for the primary purpose of victimization.” *Id.* § 841.002(5).

In reviewing civil commitments, we use the criminal test for legal sufficiency. *In re Commitment of Brown*, No. 05-16-01178-CV, 2018 WL 947904, at *8 (Tex. App.—Dallas Feb. 20, 2018, no pet.) (mem. op.). Thus, we review all admitted evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the required elements beyond a reasonable doubt. *Id.* It is the factfinder’s responsibility to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic to ultimate facts. *Id.*

Although factual sufficiency has been abandoned in criminal cases, as an intermediate appellate court with final authority over factual sufficiency challenges in civil cases, we will perform a factual sufficiency review in civil commitment cases when the issue is raised on appeal. *Id.* In our factual sufficiency review, we consider

whether the verdict, though supported by legally sufficient evidence, nevertheless reflects a risk of injustice that compels a new trial. *Id.* We view all the evidence in a neutral light and determine whether the jury was rationally justified in finding the required elements beyond a reasonable doubt. *Id.* We reverse only if the risk of an injustice is too great to allow the verdict to stand. *Id.*; *see also In re Commitment of Johnson*, No. 05-17-01171-CV, 2019 WL 364475, at *2 (Tex. App.—Dallas Jan. 30, 2019, no pet.) (mem. op.); *In re Commitment of Stuteville*, 463 S.W.3d 543, 551 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). The jury is the sole judge of the witnesses’ credibility and the weight to be given their testimony. *Brown*, 2018 WL 947904, at *9.

In making his argument, Henderson asserts “[t]his statutory definition of “behavioral abnormality” also “implicitly” includes a “serious difficulty in controlling behavior” component which the United States Supreme Court has decided is constitutionally required in these cases, citing *Kansas v. Crane*, 534 U.S. 407, 413 (2002) and *In re Commitment of Almaguer*, 117 S.W.3d 500, 502–06 Tex. App.—Beaumont 2003, pet. denied). Henderson argues the State’s evidence conclusively proves that he “‘likely’ or ‘probably’ would still be able to control himself from committing sex offenses about 99.9995% of the time with the State’s evidence (again viewed in the best possible light to the State) showing that [he] is no more dangerous now than he was before when he committed a sex offense one day in 1990 and another sex offense one day in 2009 during his 12-year free-world

adult life.” In a footnote, Henderson states this 99.9995% figure was arrived at by “dividing the number of days (2) that [he] committed a sex offense over this 12-year period by the approximate number of days in 12 years (4,380) which is approximately .0005% and then subtracting this .0005% from 100.0000%.”

Here, Price testified it was his opinion that Henderson “does have a behavioral abnormality” that predisposes him to commit sexually violent offenses. Henderson argues the record shows he is “no more dangerous now than he was before he committed a sex offense” on two separate days. Henderson cites no authority, and we have found none, supporting his calculation of the percentage chance he “‘probably’ would still be able to control himself from committing sex offenses about 99.9995% of the time.” Accordingly, we decline to adopt appellant’s calculation in our review. The jury was free to believe Price’s testimony and find that Henderson has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See Brown*, 2018 WL 947904, at *8. We conclude the evidence is legally and factually sufficient to support the jury’s finding. *See id.* at *8–9. We overrule Henderson’s first and second issues.

In his third issue, Henderson argues the trial court erred in failing to instruct the jury that it could render a verdict in Henderson’s favor by a 10-2 vote. On this precise issue, the Supreme Court of Texas has recently held that “a unanimous verdict is required to find that a defendant is an SVP, but only ten votes are necessary to reach a verdict for the defendant declining to find that the defendant is an SVP.”

In re Commitment of Jones, 2020 WL 1966936, at *3 (Tex. April 24, 2020). The court therefore determined the trial court erred when it denied Jones’s request for a jury instruction explaining that only ten out of twelve votes were required to render a verdict in Jones’s favor. *Id.*

However, in addressing whether the error was harmful, the court determined that “the jury’s unanimous verdict finding that Jones is an SVP shows that the trial court’s error did not probably cause the rendition of an improper judgment.” *Id.* at *5. Similarly, in this case, although the trial court erred in refusing Henderson’s request for a jury instruction explaining that only ten out of twelve votes were required to render a verdict in his favor, the error was harmless because the jury’s unanimous verdict finding that Henderson is an SVP shows that the trial court’s error did not probably cause the rendition of an improper judgment. *Id.* We overrule Henderson’s third issue.

We affirm the trial court’s judgment.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

IN RE: THE COMMITMENT OF
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No. 05-19-00068-CV

On Appeal from the 195th Judicial
District Court, Dallas County, Texas
Trial Court Cause No. CV1770004.
Opinion delivered by Justice Bridges.
Justices Whitehill and Nowell
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered June 8, 2020.