AFFIRMED and Opinion Filed July 13, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00375-CV

No. 05-20-00377-CV

IN THE BEST INTEREST AND PROTECTION OF E.P.

On Appeal from the Probate Court No. 3
Dallas County, Texas
Trial Court Cause No. MED-20-80112

MEMORANDUM OPINION

Before Chief Justices Burns, Justices Molberg, and Nowell
Opinion by Chief Justice Burns

In three issues and two appeals,[1] appellant E.P. challenges the legal and factual sufficiency of the evidence supporting his involuntary commitment (Commitment Order) for inpatient mental health services and an order directing administration of psychoactive medication (Medication Order). By cross-appeal, the State challenges the jury's verdict concluding the evidence did not support two alternative criteria which would also have supported commitment; the trial court's rulings on pretrial motions by which extensive

[1] Cause No. 05-20-0377-CV challenges a civil commitment order and Cause No. 05-20-00375 challenges the order authorizing psychoactive mediation. We resolve both appeals in this memorandum opinion.

evidence was excluded; limitations imposed on testimony and examination; the arbitrary one-hour time limitation imposed for the State's evidence; and, rulings regarding the State's Offer of Proof and Bill of Exceptions. We affirm both the Commitment Order and the Medication Order.

BACKGROUND

E.P., an adult, lives with his parents. On February 10, 2020, E.P.'s father submitted a mental illness warrant requesting E.P.'s emergency detention. After the trial court approved the warrant, on the same date, E.P. was detained by Dallas County sheriff's officers at his parent's home and transported to Parkland Hospital. The next day, Parkland psychiatrist Dr. Kevin Brown diagnosed E.P. with psychosis and ordered further observation. A Parkland social worker filed an application for temporary court-ordered mental health services for E.P., supported by Dr. Brown's affidavit. The State then obtained an Order of Protective Custody pending trial. E.P. was also transferred to Zale Lipshy Hospital. On February 13, 2020, an associate judge conducted the statutory probable cause hearing following which the court entered an order finding probable cause for E.P.'s detention.

Five days later, Dr. Kayla Bailey, E.P.'s treating psychiatrist at Zale Lipshy, signed an application to administer psychoactive medication to E.P., which was filed together with the certificate of medical examination for mental illness. Dr. Bailey diagnosed E.P. with

schizophrenia, and as Dr. Brown had, certified E.P. was mentally ill, and specified additional criteria warranting his continued hospitalization and treatment.

On March 5, 2020, the trial court conducted a jury trial regarding the State's request for inpatient mental health treatment. The evidence included Dr. Bailey's testimony,[2] which was premised on her personal knowledge, E.P.'s medical history, and discussions with other treating medical staff. Dr. Bailey testified E.P. was suffering from paranoid schizophrenia, a mental illness, which she specified causes a severe and abnormal mental, emotional, or physical distress. She testified that when first taken to the emergency room, E.P. was shadowboxing the air and talked about how the officers who detained him were not real. Dr. Bailey described E.P.'s behavior, including disorganized behavior, while at Zale Lipshy: removing cushions from a bench in his room and spreading papers and many of his belongings all over his room; rattling or attempting to open locked doors and cabinets; crawling on the floor; leaning sideways while walking down a hallway; and requesting shrink-wrapped meals, which she also testified was a request premised on E.P.'s belief that the hospital food served to other patients was not safe to eat. E.P. also treated staff in an intrusive and demanding manner, interrupting doctors' meetings with other patients or family members and refusing to leave when requested to do so. Dr. Bailey testified about E.P.'s high degree of paranoia, and stated that the paranoia together with

[2] The parties stipulated to Dr. Bailey's qualification as an expert.

E.P.'s heightened concern for what was occurring around him could result in his perception of imagined threats, which in turn could provoke someone else to injure E.P. or result in an altercation by which E.P. was injured,[3] which Dr. Bailey testified had occurred previously.

She believed E.P. was deteriorating in his ability to function independently and did not think E.P. was able to make a rational and informed decision as to whether or not to submit to treatment. Specifically, Dr. Bailey testified that E.P.'s insistence on shrink-wrapped food was evidence of a perceived threat not based on reality, which could lead him to stop eating, or seek out the person he believed was altering his food. Further, although E.P. reported a variety of physical concerns, such as problems urinating and pain in his back, he would not allow a physical exam and refused to provide a urine sample for several days so that treatment was either impossible or delayed.

She discussed E.P.'s belief that psychiatric treatment and medications for his condition were the equivalent of a lobotomy, or like "grease for the brain," and testified that the day before the hearing, E.P. had yelled "long live meat and oil" at her, which she believed was related to his "threat" that he would force her to become a vegetarian. Dr.

[3]Although these facts are direct evidence regarding the provisions of section 574.34 which authorize involuntary commitment premised on the likelihood that a patient may cause serious harm to himself or others, criteria the jury determined did not support E.P.'s commitment, we include these facts in our discussion of the alternative criteria provided by the statute, because they also provide circumstantial support for the severity of E.P.'s condition and potentially his ability to function independently. *See e.g., K.E.W.,* 315 S.W.3d 16 (concluding that the proposed patient's words can be relevant both to determining whether he is mentally ill and predicting what actions he might or will take in the future as a result of his mental illness.)

Bailey opined that psychoactive medications would be helpful for E.P., but except for medication prescribed to alleviate sleep issues, while at Zale Lipshy E.P. had refused all medication. She also testified that prior to his hospitalization, E.P. was not taking the medication prescribed for his schizophrenia.

E.P.'s father also testified that E.P. did not recognize or accept his illness and he had sought E.P.'s commitment to ensure E.P. received treatment. E.P.'s father testified that the night before he signed the warrant for E.P.'s commitment, E.P. had informed his parents that he was leaving their home, which E.P.'s father also explained caused grave concerns for E.P.'s safety based on former and similar trips by E.P.[4] In the two weeks immediately prior to E.P.'s detention, E.P.'s father testified E.P.'s condition had progressively worsened in terms of his paranoia, which E.P.'s father said included E.P.'s belief that the family's lawn service crew and long-time housekeeper was spying on him; that the housekeeper was sending harmful telepathic messages to the dog; that someone was operating a non-existent electronic device, which E.P. called a stingray, to interfere with E.P.'s work as an UBER driver; and E.P. tearing up an insurance settlement check, which he believed was fake and sent by "Mexicanos" to interfere with E.P.'s ability to leave the country. E.P.'s father also told the jury that although E.P. drives for UBER and UBER Eats, E.P. was wholly dependent on his parents for his room and board, gas, car insurance, and "everything," and

[4] The trial court excluded other relevant and significant evidence which would have provided helpful context to E.P.'s father's concerns. Given the exclusion of that evidence, however, we do not consider it here.

that in prior instances when E.P. had attempted living independently he had been unsuccessful.

E.P.'s brother, who is a physician, also testified. Although the trial court excluded a recording of a voice message E.P. left his brother approximately one month before E.P.'s detention, E.P.'s brother testified about the contents of the message, which the brother characterized as long and rambling and in which E.P. asked about the protocol for keeping up with death certificates for illegal immigrants who are murdered, and during which E.P. threatened a group of people. E.P.'s brother also testified E.P. would not seek medical treatment on his own, and stated he was worried about what E.P. would do if he did not receive medical help.

E.P. testified he had never been mentally unwell, disagreed that he had schizophrenia, or any paranoia that was "unwarranted," and stated he would not take steps to deal with his diagnosis, including refusing treatment, because he believed the medication was more dangerous than any "negative stressful consequences" of what others perceived to be his mental illness. He also admitted to two recent arguments with his father, which E.P. conceded had gone beyond mere verbal exchanges. E.P. testified he was employed as an UBER driver and could find a shelter if he needed one, but also testified about immediate plans to leave home, travel around the world (although he admitted he did not have much money) and work in foreign countries.

E.P.'s mother testified that about a week before E.P. was hospitalized, he asked her why she had not killed him when he was a little boy. She also testified that she locked her bedroom door at night out of fear related to E.P.'s untreated schizophrenia.

The jury answered two of the four questions submitted, affirmatively: Question 1, by which it found E.P. mentally ill, and Question 4, by which it also determined that if not treated, E.P. would continue to suffer severe and abnormal mental, emotional, or physical distress and would continue to experience deterioration of his ability to function independently, and was unable to make a rational and informed decision as to whether or not to submit to treatment. After the jury returned its verdict, the trial court granted the commitment application, ordering E.P. to receive inpatient mental health services at Zale Lipshy Hospital for not more than 90 days from the date of the trial. The court also conducted a hearing regarding the State's application for an order to administer psychoactive medication during E.P.'s commitment, and following the admission of live testimony, entered the Medication Order.

Because the trial court had excluded or limited extensive evidence in support of the State's case at a pre-trial hearing and also during trial, and because the time limitation for the trial required a separate setting, the State made an Offer of Proof several days later. Although the trial court sustained E.P.'s objections to much of the evidence offered at the hearing for the Offer of Proof, it overruled his objection premised on a Class C assault citation issued to E.P. as a basis for setting aside the Order of Commitment. Because the

trial court excluded evidence at the Offer of Proof, the State also filed a formal Bill of Exceptions.

Pursuant to an agreement and an order modifying the Commitment Order, after this appeal was filed E.P. was released from confinement.[5] Although he does not contest the jury's determination that he is mentally ill, E.P. challenges the jury's affirmative answer to Question 4, and the trial court's denial of his motion to set aside the Commitment Order based on a misdemeanor charge pending at the time of trial. E.P. also challenges the Medication Order.

DISCUSSION

1. Burden of proof and standard of review

When seeking a court-ordered mental commitment, the State's burden requires proving by clear and convincing evidence that the patient is mentally ill and that as a result of that mental illness, in the alternative to other criteria, the patient is:

> (i) Suffering severe and abnormal mental, emotional, or physical distress;
> (ii) Experiencing substantial mental or physical deterioration in his ability to function independently; and
> (iii) Unable to make a rational and informed decision as to whether to submit to treatment.

TEX. HEALTH & SAFETY CODE § 574.034(a)(C); *State ex rel. M.P.*, 418 S.W.3d 850, 853 (Tex. App.—Dallas 2013, no pet.) ("trial court may order temporary inpatient mental

[5] Nonetheless, these appeals are not moot. *State v. K.E.W.*, 315 S.W.3d 16, 20 (Tex. 2010).

health services if it finds by clear and convincing evidence that the proposed patient is mentally ill and also meets at least one of the additional criteria set forth in section 574.034(a)(2) of the Texas Health and Safety Code."). The heightened burden of proof requires that we also utilize a heightened standard of review. *In re C.H.,* 89 S.W.3d 17, 25 (Tex. 2002).

Clear and convincing evidence is "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) (per curiam); *K.E.W.*, 315 S.W.3d at 20. Evidence that merely exceeds a scintilla is not legally sufficient when the burden of proof is clear and convincing. *See In re J.F.C.,* 96 S.W.3d 256, 264–65 (Tex. 2002).

Satisfying the clear and convincing standard requires expert testimony, TEX. HEALTH & SAFETY CODE § 574.034(d), which includes the expert's opinion regarding the necessity of committing the patient, as well as the factual support for the opinion. *K.E.W.*, 315 S.W.3d at 20; *State ex rel. D.W.*, 359 S.W.3d 383, 386 (Tex. App.—Dallas 2012, no pet.). Additionally, satisfying the clear and convincing burden requires the State to provide evidence of a recent overt act or a continuing pattern of behavior that tends to confirm the distress and deterioration of the proposed patient's ability to function. TEX. HEALTH & SAFETY CODE § 574.034(d); *K.E.W.*, 315 S.W.3d at 20; *State ex. rel. E.D.*, 347 S.W.3d 388 392–93 (Tex. App.—Dallas 2011, no pet.) (evidence of a recent physical or verbal

overt act, which if perceived objectively is probative of the jury's findings, will satisfy the State's burden). Verbal statements as well as physical actions are "overt acts," *K.E.W.*, 315 S.W.3d at 24, and such verbal statements may support a finding of mental illness and predict future actions resulting from such mental illness. *Id*. at 22. On the other hand, evidence that a person has a mental illness or exhibits psychotic behavior alone fails to justify commitment on the grounds of mental distress and the deterioration of the ability to function independently. *T.G. v. State,* 7 S.W.3d 248, 252 (Tex. App.—Dallas 1999, no pet.).

2. Legal and Factual Sufficiency

In his first issue, E.P. challenges the legal and factual sufficiency of the evidence supporting the jury's answer to Question 4. When 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. *See In re J.F.C.,* 96 S.W.3d 256, 266 (Tex. 2002). We resolve disputed fact 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. *City of Keller v. Wilson,* 168 S.W.3d 802, 817 (Tex.2005); *In re J.F.C.,* 96 S.W.3d at 266.

Similarly, in conducting a factual sufficiency review, we consider the evidence that the factfinder could reasonably have found clear and convincing, and then based on the

entire record, determine whether the factfinder could reasonably have formed a firm belief or conviction that the allegations in the application were proven. *In re J.F.C.*, 96 S.W.3d at 266; *State ex rel. M.P.*, 418 S.W.3d at 853.

In challenging the legal and factual sufficiency of the evidence, some of E.P.'s arguments focus on whether this evidence was sufficient to demonstrate the likelihood that E.P. would harm himself or others. We need not decide that issue, however, because E.P.'s commitment was premised solely on the alternative criteria provided by section 574.034(C) and included in the jury's affirmative answer to Question 4, which do not rely on the likelihood of E.P. harming himself of others.

Although we question whether the trial court improperly excluded additional evidence for the jury to consider and are concerned about the extreme time-limitation imposed for a jury trial, giving due weight to the limited evidence permitted by the trial court and considering it in the light most favorable to the jury's finding, we conclude a reasonable trier of fact could have formed a firm belief or conviction that if not treated, E.P.'s mental illness would cause him to continue to suffer severe and abnormal mental, emotional, or physical distress, would continue deterioration of his ability to function independently, and would continue to make him unable to make a rational and informed decision as to whether or not to submit to treatment. In particular, E.P.'s admission that he would not obtain treatment for his schizophrenia, his refusal to allow examination or treatment for other medical complaints, his plan to travel as he had in the past which both

his father and Dr. Bailey testified caused great concern for his safety, his delusional statements about the family's housekeeper and lawn crew, and his father's testimony that E.P.'s condition was progressively worsening, all supported Dr. Bailey's testimony regarding satisfaction of the statutory criteria for commitment. *See State ex rel. E.D.*, 347 S.W.3d at 391–93 (affirming commitment judgment where patient did not contest mental illness finding, and evidence supported jury's finding that patient met distress and deterioration criterion of section 574.034(a)(2)(C)); *State for K.S.*, No. 14-18-00394-CV, 2019 WL 2589879, at *9 (Tex. App.—Houston [14th Dist.] June 25, 2019, no pet.) (mem. op.) (finding clear and convincing evidence supporting commitment premised on doctor's assessment that if recommended psychoactive medications were not administered, because of patient's refusal to voluntarily accept such medications, further decline in patient's ability to function was inevitable result); *State ex rel. R.P.*, 511 S.W.3d 71, 79 (Tex. App.—El Paso 2014, no pet.) (finding legal and factual sufficiency for involuntary commitment premised on patient's inability to make rational and informed decision, where patient also exhibited lack of understanding regarding mental illness); *In re T.J.H.*, No. 2-10-149-CV, 2010 WL 3433049, at *8 (Tex. App.—Fort Worth Aug. 31, 2010, no pet.) (mem. op.) (affirming commitment order where patient's inconsistent words about housing and working situation, as well as patient's testimony regarding her noncompliance with treatment which contradicted her behavior, supported doctors' testimony regarding patient's deterioration and inability to function independently).

Similarly, based on all of the evidence admitted at trial, including E.P.'s testimony contesting his ability to function independently and his implied contention that his condition was not deteriorating, we also conclude the jury could reasonably have formed a firm conviction as to the truth of the allegations supporting the State's request for E.P.'s commitment. *See State for K.S.*, 14-18-00394-CV, 2019 WL 2589879, at *9 (concluding factually sufficient evidence supported commitment order).[6] We overrule E.P.'s first issue.

3. Motion to set aside premised on section 574.034(h)

When the State made its Offer of Proof it introduced testimony regarding a criminal citation for a Class C assault issued to E.P. and outstanding at the time of trial, regarding E.P.'s assault of an UBER passenger. After the Offer of Proof concluded, E.P. moved to set aside the Commitment Order premised on section 574.034(h) of the Health & Safety Code. The trial court denied the motion.

The statute provides "[a] judge may not issue an order for temporary inpatient mental health services for a proposed patient who is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person." TEX. HEALTH & SAFETY CODE § 574.034(h). In comparison, a Class C assault occurs when a person: "(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the

[6] Because we affirm the Commitment Order based on the jury's determination that the State satisfied the criteria provided by section 574.034(C), we omit discussion regarding the alternative criteria provided by section 574.034(A) and (B), and overt acts supporting those criteria. *See* TEX. HEALTH & SAFETY CODE § 574.034(2)(A) and (B) (providing for involuntary commitment where patient's mental illness is likely to cause patient to seriously injure himself or others).

person's spouse; (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative." TEX. PEN. CODE § 22.01.

Our record does not include the Citation. Based on the statutory definition of the crime charged, however, we conclude E.P was not charged with a criminal offense that involves an act, attempt, or threat of "serious bodily injury to another person." *See* TEX. PENAL CODE § 1.07(a)(46) ("serious bodily injury" means "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."). Accordingly, we overrule E.P.'s second issue.

4. Medication Order

In one issue, E.P. also argues we must reverse the Medication Order if we reverse the Commitment Order. A court may "issue an order authorizing the administration of one or more classes of psychoactive medication to a patient who ... is under a court order to receive inpatient mental health services . . . ." TEX. HEALTH & SAFETY CODE § 574.106(a)(1).

Because we conclude that the evidence is legally and factually sufficient to support the Commitment Order, we also conclude the evidence is sufficient to support the Medication Order. *See State for Best Interest & Prot. of H.V.*, No. 04-18-00291-CV, 2018

WL 6069861, at *5 (Tex. App.—San Antonio Nov. 21, 2018, no pet.) (mem. op.); *In the Best Interest and Protection of B.J.*, No. 05-18-01452 & 05-18-01453 (Tex. App.—Dallas April 5, 2019, no pet.) (mem. op.); *see also State ex rel. D.V.*, Nos. 04-12-00511-CV & 04-12-00512-CV, 2012 WL 6618217, at *3 (Tex. App.—San Antonio Dec. 19, 2012, no pet.) (mem. op.). We overrule E.P.'s issue challenging the Medication Order.

5. Cross-appeal

In its cross-appeal, the State challenges the trial court's imposition of a one hour time limit for its trial presentation, and the jury's failure to find sufficient cause for E.P.'s detention based on the likelihood that he would harm himself or others. It also challenges multiple pre-trial or evidentiary rulings contending those rulings led to the jury's challenged determinations. Additionally, the State asserts the trial court erred in limiting the evidence, based on the same relevancy evaluation imposed at trial, submitted by the State in its Offer of Proof and subsequent Bill of Exceptions.[7]

Because we affirm the Commitment Order based on the criteria provided by section 574.034(C), we need not address the jury's failure to also justify commitment premised on

[7] Before the trial, the court heard E.P.'s motion to quash the State's rule 176 subpoenas to non-party witnesses, including a subpoena duces tecum to the custodian of records for all of E.P.'s medical records related to his admission and detention. E.P. argued that the State had improperly failed to file any notice of its subpoenas or provide 10 days advance notice as required by rule 205. The trial court also excluded the video from the body camera of the sheriffs who transported E.P. to Parkland as too remote in time to be relevant, and limited testimony offered on behalf of the State regarding E.P.'s continuing pattern of behavior during prior travels to foreign countries during which he had been severely injured, had become destitute and homeless and following which he was detained and deported, although E.P.'s statements to his family about his intent to embark on the same travels prompted E.P.'s father's execution of the warrant. The trial court limited testimony regarding the same facts offered during the State's Bill of Exceptions, again finding the evidence too remote in time to be relevant.

the additional criteria provided by section 574.034(A) and (B). Further, although we are deeply troubled by the time allotted by the trial court for the State to put on its case, and we question the propriety of each of the rulings challenged by the State, because we affirm the Commitment Order and the Medication Order, any further "guidance" regarding these issues as requested by the State would be nothing more than an impermissible advisory opinion. *See Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (courts lack jurisdiction to issue advisory opinions); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) ("The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties.").

We **AFFIRM** both the Commitment Order and the Medication Order.

/Robert D. Burns, III/
ROBERT D. BURNS, III
CHIEF JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE BEST INTEREST AND PROTECTION OF E.P., Appellant	On Appeal from the Probate Court No. 3, Dallas County, Texas Trial Court Cause No. MED-20-80112.
No. 05-20-00375-CV	Opinion delivered by Chief Justice Burns. Justices Molberg and Nowell participating.

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

Judgment entered July 13, 2020

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE BEST INTEREST AND PROTECTION OF E.P., Appellant	On Appeal from the Probate Court No. 3, Dallas County, Texas Trial Court Cause No. MI-20-00463. Opinion delivered by Chief Justice Burns. Justices Molberg and Nowell participating.
No. 05-20-00377-CV	

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

Judgment entered July 13, 2020