

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00334-CV

IN RE COMMITMENT OF ELUTERIO CHAPA

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 09-10-10587-CV

MEMORANDUM OPINION

The State of Texas filed a petition to civilly commit Eluterio Chapa as a sexually violent predator under the Sexually Violent Predator Act. *See* Tex. Health & Safety Code Ann. §§ 841.001-.150 (West 2010 & Supp. 2011). A jury found Chapa suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. *Id.* § 841.003 (West 2010). The trial court entered final judgment and an order of civil commitment under the Act. We affirm the judgment of the trial court.

JURY CHARGE

In issue one, Chapa argues that the jury question in the trial court's charge improperly used the word "predisposed" instead of the word "likely," which Chapa

contends lowered the State's burden of proof. The State argues that Chapa waived this issue by stating at trial that the defense had "no objection" to the jury charge. Chapa contends that he preserved error by filing a motion for new trial. Chapa's motion for new trial does not assert any error with regard to the jury charge. Moreover, a motion for new trial is generally insufficient to preserve charge error. *In re Commitment of Brady*, No. 09-09-00360-CV, 2011 WL 2420862, at *1 n.1 (Tex. App.—Beaumont June 16, 2011, no pet.) (mem. op.); *see also* Tex. R. Civ. P. 272 (objections to charge must be in writing or made on the record outside the presence of the jury); Tex. R. Civ. P. 274 ("A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection."). "[A]ny complaint to a jury charge is waived unless specifically included in an objection." *In re Commitment of Miller*, 262 S.W.3d 877, 891 (Tex. App.—Beaumont 2008, pet. denied) (quoting *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003)). "A party must make the trial court aware of the complaint, timely and plainly, and obtain a ruling." *Id.* (quoting *In re B.L.D.*, 113 S.W.3d at 349). Chapa did not object to the jury charge prior to this appeal. Issue one is not preserved for review. *See* Tex. R. App. P. 33.1. We overrule issue one.

SUFFICIENCY OF EVIDENCE

In issues two and three Chapa argues that the trial court erred in failing to grant his motion for directed verdict and motion for new trial because the evidence was legally and factually insufficient to prove beyond a reasonable doubt that Chapa is a "sexually

violent predator” or that he would engage in a predatory act “for the primary purpose of victimization.” Because the SVP statute employs a beyond-a-reasonable-doubt burden of proof, when reviewing the legal sufficiency of the evidence, we must assess all the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could find, beyond a reasonable doubt, the elements required for commitment under the statute. *In re Commitment of Myers*, No. 09-10-00507-CV, 2011 WL 3925506, at *8 (Tex. App.—Beaumont Aug. 25, 2011, no pet.) (not yet released for publication). “The jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony.” *In re Commitment of Mullens*, 92 S.W.3d 881, 887 (Tex. App.—Beaumont 2002, pet. denied). “The jury may resolve conflicts and contradictions in the evidence by believing all, part, or none of the witnesses’ testimony.” *Id.* “Further, a jury may draw reasonable inferences from basic facts to ultimate facts.” *Id.* In reviewing the factual sufficiency of the evidence in an SVP commitment case, we must weigh the evidence to determine whether a verdict that is supported by legally sufficient evidence nevertheless reflects a risk of injustice that compels ordering a new trial. *Myers*, 2011 WL 3925506, at *8.

The SVP statute defines “sexually violent predator” as a person who “(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)(1)-(2) (West 2010), § 841.002(9) (West Supp. 2011). The

Act defines “[b]ehavioral abnormality” as “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) (West Supp. 2011). The Act defines “predatory act” as “an act directed toward individuals, including family members, for the primary purpose of victimization.” *Id.* § 841.002(5).

At trial, the jury heard testimony from Dr. Jason Dunham, a licensed forensic psychologist, and Dr. Lisa Clayton, a forensic psychiatrist. Dr. Dunham reviewed all the records he was provided on Chapa, including offense records, prison records, victim statements, court documents, sex offender treatment records, an evaluation done by another expert, and Chapa’s deposition. Dunham also met with Chapa for two hours and forty-five minutes and performed actuarial tests. Dunham testified that he believes Chapa has a behavioral abnormality that predisposes him to commit predatory acts of sexual violence.

Dunham testified regarding Chapa’s sexual offenses and the variations between what the records reveal about those offenses and Chapa’s explanation of those offenses. The evidence established that Chapa pled guilty to two offenses for aggravated sexual assault and two offenses for indecency with a child, for committing sexual offenses against four different girls between the ages of six and eight years old. Chapa received a sentence of twenty years for each offense to run concurrently. Dunham explained that

Chapa also obtained a number of sexual misconduct cases while in prison. Dunham testified there was evidence that Chapa had fourteen total victims, including the officers he offended against while incarcerated. Dunham also testified regarding Chapa's nonsexual offenses, which include six arrests and five convictions for driving while intoxicated. Dunham explained how Chapa's criminal history and the details regarding his sexual offenses support Dunham's conclusion that Chapa suffers from a behavioral abnormality.

Dunham diagnosed Chapa with pedophilia, nonexclusive type, exhibitionism and alcohol dependence in remission in a controlled environment, and explained his diagnoses to the jury. Dunham explained risk factors to the jury and testified regarding some of the risk factors he found to be present in Chapa, such as, the total number of victims, a "prolonged pattern of behavior," grooming evidence, offending while on probation, offending while in a relationship with another woman, offending while in sex offender treatment, and offending with individuals outside his family. Based on his evaluation, Dunham stated that it "seems [Chapa has] been preoccupied with sex for most of his life." The testimony at trial established that Chapa had not made progress in sex offender treatment, and Dunham explained that Chapa had not reduced his risk through treatment and had not accepted responsibility for his offenses. Dunham testified that in Chapa's mind "he's never done anything wrong[,] and he does not believe he is at risk to reoffend.

Dunham explained the actuarial tests to the jury. Dunham testified that Chapa scored a two on the Static-99R and a “positive six” on the Minnesota Sex Offender Screening Tool (“MnSOST”). Dunham stated that Chapa’s score on the MnSOST put him in a moderate risk category to reoffend and his score on the Static-99R put him in a low to moderate risk category for reoffense. Dunham stated that he believes the scores under-represent Chapa’s risk of reoffense. Dunham explained that he does not rely solely on actuarial tests, and that he considers other factors under a clinical approach to adjust the risk of reoffense upward or downward. For example, Dunham found significant that Chapa is sixty-four years old and still committing sexual offenses while incarcerated. Dunham stated that Chapa is an “untreated sex offender who doesn’t understand his problem.” Dunham testified that Chapa was at high risk to reoffend when he entered prison, and in Dunham’s opinion Chapa’s risk has only increased since he has been in prison.

The jury also heard testimony from Dr. Lisa Clayton. Like Dunham, Clayton reviewed Chapa’s records. She also met with Chapa for two and a half hours. Clayton also testified that in her opinion Chapa suffers from a behavioral abnormality that predisposes him to commit future acts of predatory sexual violence. Clayton explained to the jury that the number of Chapa’s sexual convictions shows a “pattern of behavior.” Clayton stated that the records establish that Chapa admitted to being sexually attracted to little girls and began offending against them as early as 1980. Clayton also explained

the significance of Chapa's nonsexual criminal history. Clayton diagnosed Chapa with pedophilia nonexclusive type, alcohol abuse in remission, personality disorder NOS with narcissistic and antisocial personality traits. Clayton explained her diagnoses to the jury and the significance of her diagnoses.

Clayton testified that according to Chapa, the offenses were not his fault. Clayton explained that the minimization and denial she observed makes Chapa "a very dangerous individual as far as being a future predator towards children." According to Clayton, pedophiles can only gain insight into controlling their behavior once they have accepted that what they have done is wrong. Clayton testified that Chapa told her he was innocent and did not commit any sexual offenses. Clayton also testified regarding the significance of Chapa's committing offenses while on probation. Clayton explained this shows a "general inability to control his sexual acting out[.]" Clayton testified that Chapa had not made any progress in sex offender treatment and does not believe he needs to be in sex offender treatment. Clayton found significant that Chapa received his last sexual misconduct case while incarcerated, only a few weeks before his commitment trial, which according to Clayton, shows "he still can't control [himself.]" Clayton further stated that upon release, Chapa planned to go live with his common law wife who he has not been in contact with for several years.

The jury also heard testimony from Chapa. At trial, Chapa admitted to certain aspects of his sexual offenses and denied others. He also disputed what he said in his

voluntary statement to police regarding the four offenses in 1992. He admitted to lying while receiving sex offender treatment and changing his story regarding his sex offenses. At trial, he claimed that some of the admissions he made while in treatment, such as realizing he was attracted to little girls in 1980, were lies he told to appease the sex offender treatment counselor to get through the program. Chapa admitted he was removed as a peer leader in sex offender treatment for asking inappropriate questions. Chapa explained that his release plan was to ask parole if he could return to Corpus Christi to live with his common law wife. According to Chapa, the last time he spoke on the phone with his common law wife was in 2003 and the last time she visited was in 1997.

The charge asked the jury “Do you find beyond a reasonable doubt that ELUTERIO CHAPA suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence?” The charge included the statutory definitions of “behavioral abnormality” and “predatory act.” By answering “yes,” the jury found that Chapa suffers from a behavioral abnormality that predisposes him to engage in an act of sexual violence directed towards individuals for the primary purpose of victimization. *See* Tex. Health & Safety Code Ann. § 841.003(a)(2); *see also In re Commitment of Simmons*, No. 09-09-00478-CV, 2011 WL 2420832, at *7 (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 toward individuals for the

primary purpose of victimization is implicit in this finding[]” that the offender suffers from a behavioral abnormality.); *In re Commitment of Bailey*, No. 09-09-00353-CV, 2010 WL 3259987, at *5 (Tex. App.—Beaumont Aug. 19, 2010, no pet.) (mem. op.). “Primary purpose of victimization” is not a separate element in section 841.003. *See* Tex. Health & Safety Code Ann. § 841.003(a); *see also Simmons*, 2011 WL 2420832, at *1 n.1.

Chapa complains that Dunham did not attempt to quantify Chapa’s risk of reoffense, and Clayton did not offer any research or literature in support of her opinion. We have previously concluded that it is not necessary to quantify the risk of reoffending. *See Simmons*, 2011 WL 2420832, at *6 (citing *In re Commitment of Johnson*, No. 09-08-00489-CV, 2009 WL 2973109, at *4 (Tex. App.—Beaumont, Sept. 17, 2009 no pet.) (mem. op.)). Dunham performed actuarial tests and explained his assessment to the jury. Dunham stated that the actuarial tests are a “statistical formula” that “plug[s] in numbers to some of the higher risk factors,” and compares the numbers of the individual being evaluated to those of other sex offenders who have been followed after release. Dunham further explained that he used a clinical approach and considered other factors in addition to the actuarial tests. Additionally, both experts applied the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (“DSM-IV”) to Chapa and explained their diagnoses to the jury. Clayton stated that the DSM-IV is a manual that lists various criteria for mental disorders. Clayton explained the DSM-IV is used by the medical

community, psychologists, psychiatrists, and counselors, to create consistent diagnoses across these fields. Moreover, both experts' opinions were based on assessments performed using standards and methodologies recognized and used in their respective fields. We reject Chapa's contention that the State failed to meet its burden because it failed to quantify Chapa's risk of reoffense or cite to specific research or literature in support of its experts' opinions.

Both Drs. Dunham and Clayton testified that based on the definition of behavioral abnormality, as defined by the Health and Safety Code, they believed Chapa suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. *See* Tex. Health & Safety Code Ann. § 841.003(a)(2). The jury heard Chapa testify that he pled guilty to four sexual offenses against four different girls between the ages of six and eight. Additionally, Dunham testified that Chapa had a "prolonged pattern of behavior" and has admitted to grooming his victims. Clayton also told the jury she saw evidence that Chapa had groomed his victims, which she testified is "indicative of the predatory behavior." Based on our review of the record, we conclude a rational jury could find beyond a reasonable doubt that Chapa is a sexually violent predator. *See generally Simmons*, 2011 WL 2420832, at *7; *Bailey*, 2010 WL 3259987, at *5. Moreover, weighing all the evidence, the verdict does not reflect a risk of injustice that would compel ordering a new trial. *Myers*, 2011 WL 3925506, at *8. We overrule issues two and three.

Having overruled all Chapa's appellate issues, we affirm the judgment of the trial court.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on September 28, 2011
Opinion Delivered December 15, 2011

Before Gaultney, Kreger, and Horton, JJ.