

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00029-CV

IN RE COMMITMENT OF JUAN SERNA

**On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 09-06-05305 CV**

MEMORANDUM OPINION

The State filed a petition seeking to involuntarily civilly commit Juan Serna as a sexually violent predator (SVP). *See* Tex. Health & Safety Code Ann. §§ 841.001-.150 (West 2010). The jury found that Serna has a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. *See id.* Serna filed this appeal.

THE LAW

The SVP commitment 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.” *Id.* § 841.003(a). 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).

LEGAL SUFFICIENCY OF THE EVIDENCE

In his first issue, Serna argues the evidence is legally insufficient to support the jury's verdict. Because the statute employs a beyond-a-reasonable-doubt standard, we use the appellate standard of review adopted in *Mullens* for challenges to the legal sufficiency of the evidence. *See In re Commitment of Mullens*, 92 S.W.3d 881, 885 (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)). We review all the evidence in a light most favorable to the verdict, and we consider whether a rational factfinder could have found, beyond a reasonable doubt, that Serna suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See id.* at 885, 887.

In 2002, Serna pled guilty to two counts of indecency with a child and one count of displaying harmful materials to a minor. The child was his third wife's daughter and the offenses occurred when she was eleven years old. He was sentenced to five years in the Texas Department of Criminal Justice Institutional Division for the indecency counts, and one year in the Webb County Jail for the offense of displaying harmful materials to a minor.

In 2003, Serna pled guilty to three counts of indecency with a child. Serna's offenses against the child began when she was eleven and continued until she was sixteen. Serna was sentenced to eight years in the Texas Department of Criminal Justice Institutional Division. At the time of the commitment hearing, Serna was still serving the eight-year sentence.

The outcries of these two victims resulted in two other victims stepping forward with allegations against Serna. Serna's biological daughter from his first wife and the niece of his first wife made outcries that did not result in any convictions.

Dr. Timothy Proctor, a board-certified forensic psychologist, testified that in evaluating whether Serna suffers from a behavioral abnormality, Proctor used essentially the same methodology that is typically followed by experts in his field for performing forensic evaluations. He stated he reviewed records which included reports from Serna's criminal offenses, victim statements, court documents, prison documents, and Serna's deposition. Proctor also interviewed Serna for approximately three and a half hours. During the interview, Proctor administered actuarial measures, the Static-99 and the MnSOST-R. He also administered the Hare Psychopathy Checklist Revised. He explained that the Static-99 and the MnSOST-R are studied by those in his field, have been peer reviewed, and are generally accepted as valid by forensic psychologists. He stated that these tests measure where a person "falls in terms of their risk for reoffending[.]" Proctor identified Serna's risk factors for reoffending. Although Serna's

score on the Static-99 put him in the “low range” for the risk of reoffending, Proctor explained that he adjusted the actuarial scores for Serna upward because the actuarial scores did not account for the outcries for the two offenses that did not result in charges or convictions. Proctor believed that including those instances “gives you a picture that’s much fuller than what you get from just the actuarials in this case.” Using his clinical judgment in adjusting the score, Proctor stated that Serna “would be compared to the high risk group.” Proctor also identified mitigating factors regarding Serna’s risk of reoffending. Proctor acknowledged that Serna had been involved in adult relationships as evidenced by his three marriages, but Proctor described these relationships as “chaotic[.]”

On the MnSOST-R, Proctor scored Serna a “plus seven” which placed him in a moderate risk group for reoffending. Based on Proctor’s education, training, review of the records, and interview of Serna, Proctor concluded Serna has a behavioral abnormality that predisposes him to engage in predatory acts of sexual violence.

Dr. Lisa K. Clayton, a board-certified forensic psychiatrist, testified that in evaluating someone to determine if they suffer from a behavioral abnormality, she interviews the offender and reviews records regarding the offender’s convictions, any evaluations by psychologists, and prison and medical records. In evaluating Serna, she reviewed police reports, records from the district attorney’s office, victim statements, witness statements, medical reports regarding the victims, Serna’s prison information, his educational history, whether or not he has had sex-offender treatment, and depositions.

Clayton testified that her methodology is the same process that is followed by experts in her field in performing the same type of evaluation. She relied on the facts and data in records she reviewed, along with her evaluation of Serna, in forming the basis of her opinion as to whether Serna suffers from a behavioral abnormality.

Clayton met with Serna for two and a half hours. She used the DSM-IV-TR to help formulate her diagnosis of Serna. She explained that the manual is used by psychiatrists and psychologists in making their diagnoses. Clayton diagnosed Serna with “pedophilia, attracted to females, sexually attracted to females and nonexclusive type. . . . [and] alcohol abuse.”

Although Clayton does not use actuarials to determine whether someone is predisposed to commit predatory acts of sexual violence, she explained she identifies risk factors for reoffending and that most of the concepts on the actuarials are similar to factors that place Serna at an increased risk for reoffending. She identified similar risk factors and mitigating factors as those identified by Proctor.

Clayton testified that Serna, for the most part, denied the offenses and perceived himself as the victim. Clayton also stated that Serna told her he would like sex-offender treatment, not because he is a pedophile, but because he said “it will look good.” She explained that it is a characteristic of a pedophile to deny that they have a problem and need sex-offender treatment. Clayton stated that based on her education, training and experience in the procedures she testified to, she concluded that Serna suffers from a

behavioral abnormality that predisposes him to commit a predatory act of sexual violence.

The State called Serna as an adverse witness. Serna denied most of the offenses against his sister-in-law. He testified that on one instance “she was watching some channel that shows pornographics” and he stood next to her. He testified that he was drunk and that she, unprovoked, put her hand under his shorts. He did not try to stop her or move. He testified he felt bad and apologized. Serna denied the offenses against his stepdaughter and said that he was just “normal tickling” her. He denied the offenses against the other two girls who stepped forward with sexual allegations against him. He acknowledged he is a sex offender, but added, “because of what I did to [my sister-in-law].” He had not participated in sex-offender treatment, but said “[i]t would certainly help” even though he claimed he is not sexually attracted to children.

On appeal, Serna challenges the reliability of the opinions of the State’s experts. He argues that “without information about what specific facts were considered and why those facts were pertinent, the experts’ testimony does not support a jury conclusion that Appellant has a behavioral abnormality ‘beyond a reasonable doubt.’” According to Serna, because neither Proctor nor Clayton stated the particular records or facts that supported their conclusions, their testimony was unreliable and legally insufficient to support the verdict.

After the State rested, Serna moved for a directed verdict, arguing that the State had not “met its burden under Section 841 of the Health & Safety Code.” Serna did not object to the experts’ opinions before trial or when the opinion evidence was offered. His motion for directed verdict was not sufficient to preserve the reliability complaint he makes on appeal. *See* Tex. R. App. P. 33.1; *see also generally* *City of San Antonio v. Pollock*, 284 S.W.3d 809, 817 (Tex. 2009); *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409-11 (Tex. 1998); *Harris v. Belue*, 974 S.W.2d 386, 393 (Tex. App. Tyler—1998, pet. denied) (motion for directed verdict after plaintiff rests its case is insufficient to preserve foundational complaints).

The jury determines the credibility of the witnesses and the weight to be given their testimony, and whether to believe some and disbelieve other testimony. *In re Commitment of Mullens*, 92 S.W.3d at 887 (citing *Barnes v. State*, 876 S.W.2d 316, 321 (Tex. Crim. App. 1994)). The jury may draw reasonable inferences from the evidence. *See Lacour v. State*, 8 S.W.3d 670, 671 (Tex. Crim. App. 2000). The jury heard the opinions of the State’s experts and Serna’s testimony. A rational jury could find beyond a reasonable doubt that Serna has a behavioral abnormality that predisposes him to commit future acts of sexual violence. Issue one is overruled.

APPELLANT’S DEPOSITION AND TRIAL TESTIMONY

Serna’s second and third issues challenge the State’s actions in deposing Serna, and then calling him to testify at trial and using his deposition responses against him. In

his second issue, Serna specifically complains that these actions force Serna to prove the State's case for it, and thereby the State's burden of proof is impermissibly lessened. He also maintains that requiring him to testify violated his constitutional rights to due process and to not incriminate himself in a criminal matter. In his third issue, Serna maintains that these actions violate his Fifth Amendment privilege to not be forced by an official to give testimony in a civil case where that evidence might incriminate him in a future criminal proceeding. He argues the Civil Commitment Order contains a list of requirements, including sex-offender treatment, that might result in a criminal action, where his statements and denial of allegations in this case could be used against him.

Calling Serna to testify as an adverse witness did not lower the State's burden of proof. Serna does not cite to any controlling authority that holds otherwise. *See* Tex. R. App. P. 38.1(i). During voir dire, the State explained the applicable burden of proof, and the jury question included the proper burden of proof under the SVP commitment statute. *See* Tex. Health & Safety Code Ann. § 841.062(a). As for his argument that Section 841.146(b) is unconstitutional in that it allows him to be deposed and called to testify at trial, Serna failed to present this challenge to the trial court. The issue is not preserved for appellate review. Tex. R. App. P. 33.1; *see In re Commitment of Davis*, 291 S.W.3d 124, 129 (Tex. App.—Beaumont 2009, pet. denied) (argument that Chapter 841 is an unconstitutional delegation of legislative authority was not preserved where not presented to the trial court). Issue two is overruled.

Serna did not object on the basis of his Fifth Amendment Privilege at trial and failed to preserve the issue for appellate review. *See* Tex. R. App. P. 33.1(a)(1)(A); *In re Commitment of Shaw*, 117 S.W.3d 520, 525 (Tex. App.—Beaumont 2003, pet. denied). Serna only makes a blanket assertion of his Fifth Amendment privilege on appeal, and blanket assertions of the Fifth Amendment privilege are impermissible in civil cases. *In re Speer*, 965 S.W.2d 41, 46 (Tex. App.—Fort Worth 1998, orig. proceeding). Serna’s argument that if he violates the commitment order his testimony could be used against him in a future criminal proceeding is not ripe for review. *See In re Commitment of Shaw*, 117 S.W.3d at 525-26. Issue three is overruled.

We affirm the trial court’s judgment and order of civil commitment.

AFFIRMED.

DAVID GAULTNEY
Justice

Submitted on February 24, 2011
Opinion Delivered March 31, 2011

Before Gaultney, Kreger, and Horton, JJ.