

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00540-CV

IN RE COMMITMENT OF MICHAEL EDWARD MOSQUEDA

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 10-05-05155 CV

MEMORANDUM OPINION

The State of Texas filed a petition to commit Michael Edward Mosqueda as a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001-.151 (West 2010 & Supp. 2011). A jury found that Mosqueda suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. The trial court rendered a final judgment and an order of civil commitment. In his sole issue on appeal, Mosqueda contends that the evidence is legally insufficient to support the jury's verdict because the State's expert testimony was conclusory regarding whether Mosqueda suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence, has serious difficulty controlling his behavior, and is likely to re-offend. We affirm the trial court's judgment.

When reviewing the legal sufficiency of the evidence, we assess all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could find, beyond a reasonable doubt, the elements required for commitment under the SVP statute. *In re Commitment of Mullens*, 92 S.W.3d 881, 885 (Tex. App.—Beaumont 2002, pet. denied). It is the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* at 887.

Under the SVP statute, the State must prove, beyond a reasonable doubt, that “the person is a sexually violent predator.” Tex. Health & Safety Code Ann. § 841.062(a) (West 2010). A person is a “sexually violent predator” if he: “(1) is a repeat sexually violent offender; and (2) suffers from a behavioral abnormality that makes [him] likely to engage in a predatory act of sexual violence.” *Id.* § 841.003(a). “‘Behavioral abnormality’ means 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). “‘Predatory act’ means an act directed toward individuals, including family members, for the primary purpose of victimization.” *Id.* § 841.002(5).

“A condition which affects either emotional capacity or volitional capacity to the extent a person is predisposed to threaten the health and safety of others with acts of

sexual violence is an abnormality which causes serious difficulty in behavior control.” *In re Commitment of Almaguer*, 117 S.W.3d 500, 506 (Tex. App.—Beaumont 2003, pet. denied). A person’s “‘current’ difficulty controlling his behavior can be inferred from his past behavior, his own testimony, and the experts’ testimony.” *In re Commitment of Burnett*, No. 09-09-00009-CV, 2009 Tex. App. LEXIS 9930, at *13 (Tex. App.—Beaumont Dec. 31, 2009, no pet.) (mem. op.); *In re Commitment of Wilson*, No. 09-08-00043-CV, 2009 Tex. App. LEXIS 6714, at *14 (Tex. App.—Beaumont Aug. 27, 2009, no pet.) (mem. op.); *In re Commitment of Grinstead*, No. 09-07-00412-CV, 2009 Tex. App. LEXIS 228, at *20 (Tex. App.—Beaumont Jan. 15, 2009, no pet.) (mem. op.).

Conclusory or speculative opinion testimony is not relevant evidence because it does not tend to make the existence of a material fact more probable or less probable. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009). “Bare, baseless opinions will not support a judgment even if there is no objection to their admission in evidence.” *Id.* “[I]f no basis for the opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection.” *Id.* at 818. “[A] party may complain that conclusory opinions are legally insufficient evidence to support a judgment even if the party did not object to the admission of the testimony.” *Id.* at 816.

According to the record, Mosqueda has been convicted of aggravated sexual assault of a child, indecency with a child in two cases, and indecent exposure, and has

been charged with committing sexual offenses against several other children. Mosqueda denied sexually assaulting a child or acting inappropriately with a child. He admitted that it may have been inappropriate to place himself in some situations, but he testified that he does not intend to place himself in those situations again and does not want to be in those situations again.

During his incarceration, Mosqueda testified that he obtained two associate's degrees, began studying for a bachelor's degree, worked various jobs, had no sexual misconduct or disciplinary cases, participated in various programs, participated in classes through Exodus Bible School and Right Way Ministries, and participated in substance abuse classes. Upon his release from prison, Mosqueda plans to live with his sister, open a restaurant, complete his bachelor's degree, and participate in any recommended treatment, including sex offender treatment.

Dr. Antoinette McGarrahan, a clinical psychologist, interviewed Mosqueda and testified that Mosqueda often gave evasive and vague responses, and often responded with "I don't know" or "I don't remember." McGarrahan particularly noticed the evasiveness when discussing Mosqueda's childhood, relationships, and sexual offenses. McGarrahan testified that Mosqueda's charges for sexual offenses "show[] the pervasiveness and chronicity of his problem." McGarrahan saw evidence that Mosqueda hid behind his Christianity or used Christianity as an excuse or as a tool to manipulate others. McGarrahan testified that Mosqueda failed to take responsibility for his actions,

claimed to be the victim, stated that he held no grudges against the victims for reporting him, has no insight into his actions, the harm he caused, or his responsibility for that harm, blamed others for his sexual offending, denied having sexual fantasies about children, and wanted to reconcile with the victims.

McGarrahan diagnosed Mosqueda with pedophilia, a chronic condition that she explained requires extensive treatment and does not go away on its own. McGarrahan considers Mosqueda to be an untreated sex offender. McGarrahan identified several factors that place Mosqueda at risk of reoffending: commission of an offense while on probation, use of force, young age of victims, grooming victims, non-contact sexual offenses, commission of offenses in a public place, acquaintance and stranger victims, impulsivity, charges for other sexual offenses, lack of appropriate relationships with an adult, number of offenses, failure to take responsibility, belief that he is a victim, and lack of insight. Positive factors include: lack of a general criminal history, absence of antisocial personality disorder, no substance abuse history, a relatively stable work history, high school diploma, college education, wise use of time in prison, absence of major disciplinary cases, good institutional adjustment, no history of psychiatric problems, and older age. McGarrahan testified that Mosqueda scored in the low range on the Hare Psychopathy Checklist-Revised and is not a psychopath. On the Static-99R actuarial test, Mosqueda scored an eight, which places him at a high risk of engaging in sexually violent acts in the future. On the Minnesota Sex Offender Screening Tool-

Revised actuarial test, Mosqueda scored an eleven, which places him at a high risk for reoffense. McGarrahan concluded that Mosqueda has a behavioral abnormality that makes him likely to engage in predatory acts of sexual violence.

Dr. Sheri Gaines, a medical doctor with a specialty in psychiatry, also diagnosed Mosqueda with pedophilia, a lifelong illness that is difficult to treat and control. She explained that Mosqueda has a pervasive pattern of behaviors and an inability to stop those behaviors despite getting into trouble and despite supervision. Gaines testified that it is difficult for a person to change when he fails to acknowledge that he did wrong and caused harm. Gaines explained that it is not unusual for a pedophile to do well in prison because incarceration prevents access to prepubescent girls. She testified that Mosqueda is an untreated sex offender.

Gaines identified several risk factors: vulnerable and young victims, multiple victims, criminal history, use of force, lack of insight and remorse, blaming victims, denial, commission of an offense while on probation, and lack of an intimate relationship with an adult. She also identified positive factors: employability, family support, education, wise use of time in prison, good institutional adjustment, and participating in classes while incarcerated. She testified that Mosqueda's offenses were predatory acts committed for the primary purpose of victimization and that he has serious difficulty controlling his behavior. Gaines concluded that Mosqueda has a behavioral abnormality that makes him likely to commit a predatory act of sexual violence.

The testimony of Drs. McGarrahan and Gaines is not conclusory. Both doctors are licensed in their respective fields. They interviewed Mosqueda and reviewed records regarding his background, offenses, and incarceration. Dr. McGarrahan administered actuarial tests and testified that these types of tests are generally accepted in the field of psychology. The experts relied on the types of records relied on by experts in their respective fields and performed their evaluations in accordance with their training as professionals in their respective fields. They based their opinions on the facts and data gathered from the records they reviewed, their interviews with Mosqueda, the risk assessments they conducted, and the actuarial tests administered. They explained in detail the facts and evidence they found relevant in forming their opinions and how those facts affected their evaluations. Both experts concluded that Mosqueda suffers from a behavioral abnormality as defined by the SVP statute. Their testimony is not so conclusory as to be completely lacking in probative value.

We conclude that the record contains legally sufficient evidence by which the jury could determine that Mosqueda is a sexually violent predator. The jury heard the experts' opinions that Mosqueda has a behavioral abnormality that makes him likely to engage in predatory acts of sexual violence, as well as evidence of Mosqueda's risk factors, actuarial test scores, criminal history, repeated sexual offenses against minors, chronic and pervasive behavior, and pedophilia diagnosis. The jury could reasonably conclude that Mosqueda has serious difficulty controlling his behavior and is likely to

commit predatory acts of sexual violence directed toward individuals for the primary purpose of victimization. *See* Tex. Health & Safety Code Ann. § 841.002(5); *see also* *Mullens*, 92 S.W.3d at 887; *Almaguer*, 117 S.W.3d at 506; *Burnett*, 2009 Tex. App. LEXIS 9930, at *13. Such conclusions are implicit in the jury’s finding that Mosqueda suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See* *Grinstead*, 2009 Tex. App. LEXIS 228, at *16 (citing *Almaguer*, 117 S.W.3d at 505); *see also* *In re Bailey*, No. 09-09-00353-CV, 2010 Tex. App. LEXIS 6685, at **12-13 (Tex. App.—Beaumont Aug. 19, 2010, no pet.) (mem. op.).

Reviewing all the evidence in the light most favorable to the verdict, a rational jury could have found, beyond a reasonable doubt, that Mosqueda is a sexually violent predator. *See* *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002); *see also* *Mullens*, 92 S.W.3d at 885. Because the evidence is legally sufficient to support the jury’s verdict, we overrule Mosqueda’s sole issue and affirm the trial court’s judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on November 15, 2011
Opinion Delivered December 1, 2011

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