In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00131-CV

IN RE COMMITMENT OF JESUS DAVID HERNANDEZ

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 10-11-12618 CV

MEMORANDUM OPINION

The State of Texas filed a petition to commit Jesus David Hernandez as a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001-.151 (West 2010 & Supp. 2011). A jury found that Hernandez 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, Hernandez challenges the legal sufficiency of the evidence to show that he has been convicted of more than one qualifying sexually violent offense. 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). To show that a person is a repeat sexually violent offender, the State must present evidence of more than one qualifying sexually violent offense. *Id.* § 841.003(b).

In this case, the State alleged that Hernandez was convicted of aggravated sexual assault of a child and indecency with a child by contact, both of which are sexually violent offenses. *Id.* § 841.002(8)(A). Hernandez contends that the State provided legally insufficient evidence to show that he was convicted of indecency with a child by contact as opposed to indecency with a child by exposure.

According to the record, Hernandez pleaded *nolo contendere* to aggravated sexual assault of a child and indecency with a child, and a Cameron County district court judge placed Hernandez on community supervision. In November 2001, the judge revoked

Hernandez's community supervision and adjudicated his guilt. The record is unclear as to whether Hernandez pleaded to and was later adjudicated guilty of indecency with a child by contact or by exposure. Accordingly, in December 2010, the judge entered a judgment nunc pro tunc, which states that Hernandez was convicted of the second-degree offense of indecency with a child per section 21.11(a)(1) of the Penal Code. Section 21.11(a)(1) defines the second-degree offense of indecency with a child by contact. *See* Tex. Penal Code Ann. § 21.11(a)(1), (d) (West 2011).[1] Indecency with a child by exposure is a third-degree felony offense. *Id.* § 21.11(a)(2), (d).

Hernandez filed a pre-trial motion to dismiss for lack of two qualifying convictions and objected to the December judgment at trial. He argued that he had appealed from the judgment and, consequently, the judgment was inadmissible pursuant to Rule of Evidence 803(22). The trial court expressed concern about the possibility of respondents in SVP proceedings alleging an appeal in every case and opined that Hernandez's right to appeal had expired, he should have filed a writ instead of an appeal, and Rule 803(22) is not designed for "technical problems that occurred in a court 10 years ago." The trial court denied Hernandez's motion and overruled his objections to the judgment. The trial court subsequently directed a verdict in favor of the State on the issue of whether Hernandez had two qualifying offenses.

[1] Although section 21.11 has been amended since the commission of the indecency offense, we cite to the current version of the statute because the changes are not material to this case.

Rule of Evidence 803(22) excludes certain judgments of previous convictions from the hearsay rule, but a pending appeal renders such judgments inadmissible. Tex. R. Evid. 803(22). The record indicates that Hernandez filed a notice of appeal to challenge the validity of the December judgment. Hernandez argues that the trial court abused its discretion by allowing the State to introduce the judgment into evidence when an appeal was pending. He contends that, as a result, the judgment was inadmissible and the evidence is legally insufficient to support the jury's verdict.

Assuming, without deciding, that Rule 803(22) applies and the trial court abused its discretion by admitting the December judgment into evidence, the record contains other evidence showing that Hernandez had been convicted of indecency with a child by contact. Investigator Joe Willis testified, without objection, that Hernandez has a conviction for the second-degree felony offense of indecency with a child by contact.[2] Dr. David Self, a psychiatrist, testified that Hernandez was originally charged with aggravated sexual assault, but the offense was reduced to indecency with a child by contact. Additionally, the record contains evidence that Hernandez engaged in sexual contact with the victim.

Even without the December judgment, the record contains evidence demonstrating that Hernandez was convicted of indecency with a child by contact. *See* Tex. Penal Code Ann. § 21.11(a)(1). Viewing the evidence in the light most favorable to the verdict, we

[2] Hernandez contends that the trial court granted a running objection to the December judgment. The record, however, indicates that Hernandez expressed an intent to request a running objection, but did not do so.

conclude that the record contains legally sufficient evidence establishing that Hernandez has been convicted of more than one qualifying sexually violent offense. *See* Tex. Health & Safety Code Ann. § 841.002(8)(A) (West Supp. 2011), § 841.003(b) (West 2010); *see also Mullens*, 92 S.W.3d at 885. We overrule Hernandez's sole issue and affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on November 23, 2011
Opinion Delivered December 15, 2011

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