In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00033-CV

IN RE COMMITMENT OF DANIEL DALE FRAZIER

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 09-06-05807 CV

MEMORANDUM OPINION

The State filed a petition seeking to involuntarily civilly commit Daniel Dale Frazier as a sexually violent predator (SVP). *See* Tex. Health & Safety Code Ann. §§ 841.001-.150 (West 2010). The jury found that Frazier has a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. *See id.* § 841.003. Frazier filed this appeal.

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).

In his first issue, Frazier argues he should not have been required to respond to the State's requests for admissions and the State should not have been permitted to read to the jury his responses. He contends that this use of discovery in an SVP case conflicts with Section 841.062(a) of the Texas Health and Safety Code. *See id.* § 841.062(a). He argues his admissions lowered the State's burden of proof in violation of statutory due process rights.

Frazier did not object to the reading of his responses at trial. *See* Tex. R. App. P. 33.1. To preserve error concerning the admission of evidence at trial, the appellant must make a timely objection that states the specific ground of the objection. Tex. R. Evid. 103(a)(1); *see also* Tex. R. App. P. 33.1. Frazier argues that we should consider his claim of error regardless of whether he preserved it. We decline to do that. Issue one is overruled.

In his second issue, Frazier states the trial judge egregiously harmed Frazier when the trial judge *sua sponte* explained the State's requests for admissions to the jury. Frazier argues the following explanation of requests for admission amounted to an improper comment on the weight of evidence:

> . . . I'm going to just tell the jury what requests for admissions mean. In cases, there are different types of discovery processes. In this case,

> one of the types of discovery process is what's called requests for admissions. Requests for admissions can be sent from one side to the other. In this case, both sides can send requests for admissions if they want to. And, when something has been admitted and once it's read in front of the jury, so it's admitted by one side and read in front of the jury by the other, the other side -- it is deemed to be conclusively proven, so much so that the other side is not allowed to offer evidence in contradiction to it.

Citing Texas Rule of Evidence 103(d), Frazier concedes he failed to object, but argues that the trial court's comment amounted to fundamental error that did not require an objection. Frazier argues that "[b]y stating that the 'admissions' were conclusively proved so much so that [Frazier] could not contradict his admissions, [the trial judge] went beyond merely explaining what 'requests for admissions' were, he emphasized the weight of that evidence, thus diminishing the credibility of [Frazier]'s defense or approach to the case."

Any matter admitted in response to a request for admission is conclusively established unless the court permits withdrawal or amendment of the admission. Tex. R. Civ. P. 198.3; *Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989). The trial court's explanation did not indicate approval of the State's argument, indicate disbelief in the defense's position, or diminish the credibility of the defense's approach. Because Frazier did not object to the trial court's explanation, Frazier waived his complaint. *See* Tex. R. App. P. 33.1. Issue two is overruled.

Frazier's third issue challenges the State's action in requiring Frazier to testify against himself. Frazier argues that calling him to testify against himself impermissibly lowers the State's burden of proof in violation of Frazier's statutory due process right.

This Court recently addressed and rejected a similar argument in another SVP case. *See In re Serna*, No. 09-10-00029-CV, 2011 Tex. App. LEXIS 2371, at *10 (Tex. App.—Beaumont March 31, 2011, no pet.) (mem. op.). In this case, during voir dire, opening argument, and closing argument, the State explained the applicable burden of proof. The jury charge properly placed the burden of proof. *See* Tex. Health & Safety Code Ann. § 841.062(a). Issue three is overruled.

In his fourth issue, Frazier maintains the State should not have been permitted to solicit testimony from two experts that they did not believe Frazier. This testimony, Frazier argues, is inadmissible under Rule 702 because it does not assist the jury but instead invades the province of the jury. Frazier cites to several occasions on which one of the State's expert witnesses testified he did not believe Frazier. Frazier did not object to the testimony on any of the referenced occasions, or raise the issue in his motion for new trial. Frazier did not preserve this complaint for appellate review. *See id.*; *see also* Tex. R. App. P. 33.1. Issue four is overruled.

Frazier's fifth issue asserts that the trial judge showed partiality for the State in overruling defense counsel's hearsay objections. The State, in an attempt to impeach Frazier, questioned him regarding information in certain documents. Frazier objected

three times that the documents were hearsay. The trial court overruled the first two hearsay objections. The State continued questioning Frazier regarding the documents and Frazier objected a third time, this time requesting an instruction to the jury "about the hearsay documents[.]" The Court then responded with the following statement:

> Well, the hearsay instruction that you're asking for normally deals with expert witnesses and right now what [State's counsel is] doing is trying to impeach this witness with statements, which, Counselor, it is hearsay because they're out-of-court statements you're asking the witness to testify about. So you can impeach him with it, but you can't, you know, put them into evidence word for word like you're doing. Okay?

Frazier argues the trial court's statement demonstrated that the trial judge knowingly overruled a valid objection to assist the State in attempting to impeach Frazier with the hearsay documents. He maintains that the trial judge's comments demonstrate that he knew Frazier's objections were valid, and that the trial judge guided State's counsel on the presentation of the State's case. Frazier contends this violated his right to a fair trial.

Hearsay is a statement, other than one made by the declarant while testifying at trial, that is offered to prove the truth of the matter asserted. Tex. R. Evid. 801(d). Hearsay statements are inadmissible except as provided by statute or rule. Tex. R. Evid. 802. The first objection was made when the State showed Frazier a progress report written by Frazier's sex offender treatment provider. After the objection, the trial court questioned whether the State was asking Frazier to read the document into evidence. The State clarified that the documents were not going to be read into evidence, but that the

State would be asking questions based on the documents. The State then questioned Frazier as to whether certain statements were made in a letter written by his sex offender treatment provider to Frazier's probation officer. The second hearsay objection occurred after the State asked Frazier if the letter stated that Frazier seemed to be exploring patterns of fantasies, grooming, and planning. The State was using the document to attempt to impeach Frazier with prior statements he allegedly had made. A party's own statements are not hearsay. *See* Tex. R. Evid. 801(e)(2). But the letter was not written by Frazier.

When the State continued questioning Frazier about the letter, he objected again. He requested a hearsay instruction and the trial court made the statement which Frazier complains guided the State. Frazier did not object to the trial court's statement, however, and failed to preserve that complaint he makes on appeal. *See* Tex. R. App. P. 33.1. As for Frazier's claim that he was deprived of a fair trial as a result of the trial judge's instruction, an objection to a trial court's alleged improper conduct must be lodged when the comment is made in order to preserve error for appellate review unless the comment made by the trial judge was incurable error or would excuse Frazier's failure to preserve error. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). Frazier has not explained how the trial judge's alleged improper comment was incurable or excuses his failure to preserve error. *See id.* To the extent Frazier is complaining about the evidentiary ruling, we conclude that the error did not cause the rendition of an improper

judgment and does not otherwise justify reversal of the judgment for a new trial. *See* Tex. R. App. P. 44.1(a). Issue five is overruled.

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

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on June 7, 2011
Opinion Delivered June 30, 2011

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