Opinion issued July 28, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00581-CR

JOSE GUILLERMO MENDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Case No. 1627628

O P I N I O N

A jury convicted appellant, Jose Guillermo Mendez, of the first-degree felony offense of continuous sexual abuse of a child younger than fourteen years of age and sentenced him to life in prison. *See* TEX. PENAL CODE ANN. § 21.02(b), (h). In one issue, appellant contends that the trial court violated his right to an impartial jury

under the United States and Texas Constitutions by permitting the State to ask an improper commitment question during jury selection.

We affirm.

Background

Appellant was indicted for continuous sexual abuse of his granddaughter, who was under fourteen years of age, between 2012 and 2016. Appellant pleaded not guilty and proceeded to trial. During jury selection, after the trial court informed the jury of the charged offense, the State began by discussing the "one witness rule," the concept of "delayed outcry," and ways that sexually abused children generally behave, all without objection from the defense. Then, the State asked, "Let me ask you this, show of hands, how many of your children lied about being sexually abused?" After one venire member answered that her eighteen-year-old daughter had lied about being sexually abused, the State asked:

> So even though children lie, at least in this room we haven't had many whose children have lied about being sexually abused. . . . So which do you believe is more common? All right. So I'm asking you what you believe is more common. All right. 1 is, [a] child denies being sexually abused when they actually were. That is 1, [a] child denies being sexually abused when they actually were. Or 2, [a] child makes up a false allegation of sexual abuse.

Appellant objected, asked to approach the bench, and, outside of the jury's presence, argued, "I feel like it's an improper commitment question . . . . I feel like the State seems to be trying to—in a roundabout way of basically saying or trying to

figure out—put people in a box and say, [']Will you believe them or will you not believe them?[']" The State responded, "I haven't provided any information to get a commitment. I'm generally asking just their general, gut opinion regarding the subject of whether a child could be found credible." The trial court overruled appellant's objection and permitted the question. The State then asked each venire member in turn which of the two responses they believed to be more common.

After the jury was selected and the parties presented their cases, the jury convicted appellant and, after the punishment phase of trial, sentenced him to life imprisonment. The trial court entered a judgment of conviction, and this appeal followed.

Commitment Question

In his sole issue on appeal, appellant contends that the trial court erred in allowing the State, over his objection, to pose an improper commitment question to the venire panel.

A. Standard of Review and Governing Law

We review a trial court's ruling on an allegedly improper commitment question during voir dire for an abuse of discretion. *Barajas v. State*, 93 S.W.3d 36, 38 (Tex. Crim. App. 2002); *see Jacobs v. State*, 560 S.W.3d 205, 210 (Tex. Crim. App. 2018) ("The Supreme Court of the United States has long held that a trial judge has broad discretion in the manner it chooses to conduct voir dire, both as to the

topics that will be addressed, and the form and substance of the questions that will be employed to address them.") (citing *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991); *Ristaino v. Ross*, 424 U.S. 589, 595–98 (1976); and *Aldridge v. United States*, 283 U.S. 308, 310 (1931)).

In all criminal prosecutions, both the United States and the Texas Constitution guarantee the accused a right to a trial "by an impartial jury." U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. The impartial jury guarantee in the Texas Constitution provides the same level of protection as the Sixth Amendment to the United States Constitution, and we construe both provisions equally. *Jacobs*, 560 S.W.3d at 210. Improper commitment questions are prohibited to "ensure that the jury will listen to the evidence with an open mind—a mind that is impartial and without bias or prejudice—and render a verdict based upon that evidence." *Sanchez v. State*, 165 S.W.3d 707, 712 (Tex. Crim. App. 2005). Commitment questions "require a venireman to promise that he will base his verdict or course of action on some specific set of facts before he has heard any evidence, much less all of the evidence in its proper context." *Id.*; *see Standefer v. State*, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001) (stating that commitment questions "are those that commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact").

Not all commitment questions, however, are improper. *Standefer*, 59 S.W.3d at 181. "When the law requires a certain type of commitment from jurors, the attorneys may ask the prospective jurors whether they can follow the law in that regard." *Id.* When the law does not require the commitment, a commitment question is improper. *Id.* For example, a defendant may "legitimately ask prospective jurors whether they could follow a law that requires them to disregard illegally obtained evidence, whether they could follow an instruction requiring corroboration of accomplice testimony, or whether they could follow a law that precludes them from holding against the defendant his failure to testify" because "[t]hese types of questions test the prospective jurors' ability to follow various legal requirements." *Id.* at 181 n.16 (citing TEX. CODE CRIM. PROC. ANN. arts. 38.23 & 38.14 and U.S. CONST. amend. V).

The Court of Criminal Appeals has articulated a three-part test for determining whether a voir dire question is an improper commitment question. *Id.* at 179–83; *Bravo v. State*, 471 S.W.3d 860, 872 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd). First, the trial court must determine whether the particular question is a commitment question at all. *Standefer*, 59 S.W.3d at 179. A question is a commitment question if "one or more of the possible answers is that the prospective juror would resolve or refrain from resolving an issue in the case on the basis of one or more facts contained in the question." *Id.* at 180. Second, if the question seeks a

commitment, the trial court must determine whether the question is proper because one of the possible answers to the question would give rise to a valid challenge for cause and, third, the trial court must determine whether the question "contain[s] *only* those facts necessary to test whether a prospective juror is challengeable for cause." *Id.* at 181–82 ("When the law requires a certain type of commitment from jurors, the attorneys may ask the prospective jurors whether they can follow the law in that regard.").

B. Analysis

Appellant argues that he was not tried by a fair and impartial jury because the trial court permitted the State to question the prospective jurors about whether children more commonly deny actual sexual abuse or more commonly falsely allege sexual abuse. Appellant argues that the State's question improperly committed the potential jury to deciding a fact question. The State responds that the trial court did not abuse its discretion by allowing the question, which was not a commitment question.[1]

[1] The State also argues that appellant did not preserve error because his "'commitment' objection did not mention constitutional rights or the right to an impartial jury." We disagree with the State. Appellant expressly objected that the State's question was "an improper commitment question," which is the focus of his claim on appeal that the question violated his constitutional rights. *See Sanchez v. State*, 165 S.W.3d 707, 712 (Tex. Crim. App. 2005) (explaining that purpose for prohibiting improper commitment questions is to ensure impartial jury that has not been biased or prejudiced before hearing the evidence). Thus, appellant's objection

At the beginning of voir dire, the trial court informed the jury that appellant was being tried for continuous sexual abuse of a young child. During its voir dire questioning, the State discussed the "one witness rule"[2] and the concept of "delayed outcry"[3] without objection from the defense. The State then asked each venire person to choose which statement they believed to be more common: (1) "[a] child denies being sexually abused when they actually were[;]" or (2) "[a] child makes up a false allegation of sexual abuse." Appellant objected and, outside of the jury's presence, argued, "I feel like it's an improper commitment question, Your Honor. I feel like the State seems to be trying to—in a roundabout way of basically saying or trying to figure out—put people in a box and say, ['']Will you believe them or will you not believe them?['']" The State responded, "I haven't provided any information to get a commitment. I'm generally asking just their general, gut opinion regarding the

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was sufficiently specific to raise the issue with the trial court, which overruled the objection. *See* TEX. R. APP. P. 33.1(a)(1)(A).

[2] A prospective juror may be challenged for cause by indicating that she could not convict based upon the testimony of one witness whom she believed beyond a reasonable doubt, and whose testimony proved every element of the indictment beyond a reasonable doubt. *See Lee v. State*, 206 S.W.3d 620, 623 (Tex. Crim. App. 2006) (citation omitted).

[3] "'Delayed outcry' means that in some cases, victims of sexual abuse do not reveal the abuse to anyone until much later." *McDonald v. State*, 186 S.W.3d 86, 89 n.2 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *Gurka v. State*, 82 S.W.3d 416, 419–20 (Tex. App.—Austin 2002, pet. ref'd)); *see Buentello v. State*, 512 S.W.3d 508, 519 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) ("'[D]elay in the report of sexual abuse is to be expected when there is a close personal relationship between the victim and the perpetrator . . . .'") (citation omitted).

subject of whether a child could be found credible." The trial court overruled the objection, and the State asked each venire person in turn which statement each person believed was more common.

In *McDonald v. State*, this Court held that the State's question to a venire panel—"Do you feel that children likely will make up sexual abuse or unlikely?"—was not a commitment question. 186 S.W.3d 86, 90 (Tex. App.—Houston [1st Dist.] 2005, no pet.). McDonald was indicted for aggravated sexual assault of a child and, as here, the State's case depended in part on the jury's understanding of the "one witness rule" and the concept of "delayed outcry." *Id.* at 89. McDonald complained that the trial court erred by allowing the State to ask the venire panel, "Do you feel that children likely will make up sexual abuse or unlikely?" *Id.* at 88–89. This Court held that the question was not a commitment question because it "[did] not ask the venire members to resolve, or to refrain from resolving, an issue a certain way after being informed of a *particular* set of facts" but rather "merely ask[ed] the prospective jurors whether they [thought] it [was] likely or unlikely that children *generally* will fabricate allegations of sexual abuse." *Id.* at 90 (citing *Standefer*, 59 S.W.3d at 179, and *Vrba v. State*, 151 S.W.3d 676, 678–79 (Tex. App.—Waco 2004, pet. ref'd)).

The question at issue here—"[W]hich do you believe is more common . . . [a] child denies being sexually abused when they actually were . . . [o]r . . . [a] child

makes up a false allegation of sexual abuse[?]"—is substantially similar to the question in *McDonald*—"Do you feel that children likely will make up sexual abuse or unlikely?" As in *McDonald*, the State's question here did not ask any venire person to resolve or refrain from resolving an issue a certain way after being informed of a particular set of facts, but merely asked whether the venire members believed children were more likely to deny that sexual abuse had occurred when it actually did occur or were more likely to fabricate allegations of sexual abuse. *See id.* (citing *Standefer*, 59 S.W.3d at 179). "An improper commitment question attempts to create a bias or prejudice in the venireman before he has heard the evidence, whereas a proper voir dire question attempts to discover a venireman's preexisting bias or prejudice." *Id.* (quoting *Sanchez*, 165 S.W.3d at 712). As in *McDonald*, the State's question here "attempts to discover whether any of the prospective jurors harbor a pre-existing bias or prejudice concerning the likelihood of children in general fabricating sexual abuse allegations." *Id.* And finally, as in *McDonald*, we note that the Court of Criminal Appeals in *Standefer* approved a similar "question in a child-molestation case [that] inquires whether the juror believes that no child could/would lie about such a thing[.]" 59 S.W.3d at 183 n.28 (citations omitted); *see McDonald*, 186 S.W.3d at 90 n.3.

Appellant relies on the Court of Criminal Appeals' 2018 decision in *Jacobs v. State*, which involved the trial court prohibiting the defendant from asking a question

during voir dire. *See* 560 S.W.3d at 206. In that case, Jacobs was indicted for sexual assault of a twelve-year-old girl and was subject to an automatic life sentence if he was found guilty because he previously had pleaded guilty to a similar felony offense in Louisiana. *Id.* at 207. "Jacobs therefore quite understandably wanted to identify any potential jurors who, because of an implicit or explicit bias against repeat sexual offenders, would not hold the State to its burden of proving the instant offense beyond a reasonable doubt." *Id.* To that end, Jacobs wanted to ask each potential juror whether they would require the State to prove each element of the charged offense beyond a reasonable doubt even if evidence of an unrelated sexual offense was proven beyond a reasonable doubt. *Id.* This was a commitment question because it asked the jurors whether they would require the State to prove all elements of the case beyond a reasonable doubt if a certain fact (whether the defendant had committed an unrelated sexual offense) was proved beyond a reasonable doubt. *See Standefer*, 59 S.W.3d at 180. The trial court allowed Jacobs to ask if the venire members would require the State to prove the elements of the charged offense beyond a reasonable doubt if the State proved beyond a reasonable doubt that he had committed a prior assaultive or unrelated offense, but the trial court did not allow Jacobs to specify that the prior offense was sexual in nature. *Jacobs*, 560 S.W.3d at 207. After the jury found him guilty, Jacobs challenged the trial court's limitation of his question. *Id.* at 206–07.

The court determined that the commitment question was proper because it sought to expose prejudice against repeat offenders. *See id.* at 213 ("There is certainly a logical connection between the more-detailed questions Jacobs hoped to ask and the 'specific prejudice' he hoped to expose.") (quoting *Ristaino*, 424 U.S. at 595). The court also determined that the additional specificity of the word "sexual," as Jacobs had hoped to ask the venire, would only marginally benefit Jacobs and such a marginal benefit would be outweighed by exposing the jury to the facts of the case before they were sworn. *Id.* Thus, the court determined that the trial court did not abuse its discretion by prohibiting Jacobs' proposed questions because adding the word "sexual" was not necessary to test whether a prospective juror was challengeable for cause. *Id.*; *see Standefer*, 59 S.W.3d at 182.

Here, by contrast, we have determined that the State's question was not a commitment question because it did not ask the jurors to resolve or abstain from resolving the case a certain way based on the facts contained in the question. *See Standefer*, 59 S.W.3d at 180. Because the State did not seek to pose a commitment question, we need not consider the issues raised in *Jacobs*, *i.e.*, whether the question was proper because it could give rise to a challenge for cause or whether the question was limited to only the necessary facts. *Jacobs*, 560 S.W.3d at 213; *see Standefer*, 59 S.W.3d at 179–83. Thus, *Jacobs* does not control our resolution of this case.

We conclude that the State's question was not a commitment question because it did not ask the prospective jurors to resolve or refrain from resolving an issue a certain way after being informed of a particular set of facts. *See Standefer*, 59 S.W.3d at 179–80. Therefore, we hold that the trial court did not abuse its discretion by allowing the State to ask each member of the venire panel whether they believed that a child more commonly will deny actual sexual abuse or will falsely allege sexual abuse.[4]

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of conviction by the trial court. We dismiss any pending motions as moot.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Kelly, and Landau.

Publish. TEX. R. APP. P. 47.2(b).

[4] Because we hold that the trial court did not err, we need not conduct a harm analysis. *See Wingo v. State*, 189 S.W.3d 270, 272 (Tex. Crim. App. 2006) ("Having determined that the trial court did not err, we do not reach the issue of harm, of which we also granted review.").