In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00149-CV

IN RE COMMITMENT OF FREDDIE LEE SCHMIDT

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 09-07-06722-CV

MEMORANDUM OPINION

The State of Texas filed a petition to civilly commit Freddie Lee Schmidt as a sexually violent predator under the Sexually Violent Predator Act. *See* Tex. Health & Safety Code Ann. §§ 841.001-.150 (West 2010). A jury found Schmidt suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. *Id*. § 841.003. The trial court entered final judgment and an order of civil commitment under the Act. We affirm the judgment of the trial court.

Following a trial, the jury answered "yes" to the following question: "Do you find beyond a reasonable doubt that FREDDIE LEE SCHMIDT suffers from a behavioral

abnormality that predisposes him to engage in a predatory act of sexual violence?" On appeal, Schmidt argues that the trial court erred when it overruled his request to word the sole question presented to the jury as follows: "Do you find beyond a reasonable doubt that FREDDIE LEE SCHMIDT suffers from a behavioral abnormality that makes it *likely* for him to engage in a predatory act of sexual violence?" Specifically, Schmidt argues that the word "likely" should have been submitted instead of the word "predisposes."

The State argues in part that Schmidt failed to preserve his issue for review. The following exchange took place during the charge conference:

> THE COURT: Okay. How about Defense, have you had adequate time to look at the proposed Court's jury charge?
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> [Defense Counsel]: Yes, Your Honor.
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> THE COURT: And do you have any objections to it?
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> [Defense Counsel]: The only objection I would have would be the "likely," but I know how the Court is on that, so we'll waive that objection.
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> THE COURT: Well, and, you know, we put the definition of behavior abnormality in here which has "predisposes." So it seems to me that when it was changed by Judge Reiter who put "predisposes" in the question, he wanted it to mirror the definition. So that's why we're sticking with that.
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> [Defense Counsel]: Yes. My understanding is at some point somebody in my office wanted it to be "predisposes," and it was changed from "likely" to "predisposes." I know it's kind of --
>
> THE COURT: Right. Now you want to go back the other way?
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> [Defense Counsel]: I am not responsible for the sins of my

> ancestors.
>
> THE COURT: Well, none of us are; but because the -- and it makes sense to me that the word "predisposes" is in there because in the wording where we define behavior abnormality for the jury it's got "predisposes" in there. So I'd like to keep it consistent, and I'm going to overrule that objection.

To preserve a complaint for appellate review, "the record must show . . . the complaint was made to the trial court by a timely request, objection, or motion that . . . stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint. . . ." Tex. R. App. P. 33.1(a)(1)(A). When objecting to a jury charge, a party must "'point out distinctly the objectionable matter and the grounds of the objection.'" *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 43 (Tex. 2007) (quoting Tex. R. Civ. P. 274). "Preservation of error generally depends on 'whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.'" *Id.* (quoting *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992)); *see also In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003).

The Texas Supreme Court has stated that "[a] party 'should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time.'" *B.L.D.*, 113 S.W.3d at 350 (quoting *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam)). Jury charge error is not preserved when a party "waives, or invites, the alleged error by

acquiescing to submitting a theory" and then complains that such submission is error on appeal. *C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 785 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Likewise, "a party waives claimed error in the charge when that party proposes to submit a substantially similar charge to the jury." *Id.*; *see also S & A Beverage Co. of Beaumont, No. 2 v. DeRouen*, 753 S.W.2d 507, 510 (Tex. App.—Beaumont 1988, writ denied) ("A party cannot complain on appeal when the issues or instructions given the jury are substantially the same as those requested by appellants.").

In the present case, Schmidt's counsel expressly waived the objection to the use of the word "predisposes" during the charge conference. In addition, the proposed jury charge submitted by Schmidt also used the term "predisposes[,]" as opposed to the term "likely." Significantly, the proposed question submitted by Schmidt is identical to the question that the trial court submitted to the jury in the charge. Under these circumstances we find that Schmidt failed to preserve error. *See C.M. Asfahl Agency*, 135 S.W.3d at 785; *DeRouen*, 753 S.W.2d at 510; *see also Cont'l Cas. Co. v. Thomas*, 463 S.W.2d 501, 503-04 (Tex. Civ. App.—Beaumont 1971, no writ) (finding error not preserved where defendant requested the issues complained of on appeal in the exact form that they were submitted to the jury). Having overruled Schmidt's sole issue on appeal, we affirm the judgment of the trial court.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on January 24, 2011
Opinion Delivered February 24, 2011

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