In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00246-CV

IN RE COMMITMENT OF TERRY MCCLANAHAN

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 09-08-08246 CV

MEMORANDUM OPINION

The State of Texas filed a petition to commit Terry McClanahan as a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001-.150 (West 2010). A jury found that McClanahan suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. The trial court rendered a final judgment and an order of civil commitment. On appeal, McClanahan challenges: (1) the State's use of his answers to requests for admissions, (2) the trial court's explanation to the jury regarding requests for admissions, (3) the State's decision to call him as an adverse witness, and (4) the State's solicitation of testimony from its experts regarding McClanahan's truthfulness. We affirm the trial court's judgment.

In issue one, McClanahan contends that the requirement that he respond to requests for admissions and the State's use of his answers to those requests conflicts with section 841.062(a) of the Texas Health and Safety Code by reducing the State's burden of proof in violation of his due process rights. In issue two, McClanahan argues that the trial court improperly commented on the weight of the evidence by *sua sponte* giving the jury an explanation regarding requests for admissions.

Section 841.062(a) requires the factfinder to determine, beyond a reasonable doubt, whether a person is a sexually violent predator. Tex. Health & Safety Code Ann. § 841.062. A matter admitted in response to requests for admissions is conclusively established, unless the trial court permits the party to withdraw or amend the admission. Tex. R. Civ. P. 198.3; *In re Commitment of Frazier*, No. 09-10-00033-CV, 2011 Tex. App. LEXIS 4896, at **3-4 (Tex. App.—Beaumont June 30, 2011, no pet. h.) (mem. op.). To preserve error regarding the admission of evidence, a party must timely object, stating the specific ground of objection, if the specific ground is not apparent. Tex. R. Evid. 103(a)(1). Moreover, an objection to an allegedly improper comment by the trial court must be made when it occurs, unless the comment cannot be rendered harmless by a proper instruction. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001).

At trial, before the State read McClanahan's admissions into evidence, the trial court provided the following explanation to the jury:

> . . . In certain types of cases there's a discovery process called request for admissions. What that means is that either side could send

> requests for admissions that are basically phrased admit or deny. And you either admit it or deny it.
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> Requests for admissions that are admitted can then be read to the jury. Those facts that are admitted are to be taken as conclusively proved by the party that is offering the admission. Additionally, they're so conclusively proved that the other side is not allowed to offer any contravening evidence to the requests for admission that were proved.

Although he did not object to the State's use of his admissions or to the trial court's explanation, McClanahan contends that no objection was necessary because the fundamental-error doctrine applies.

This Court has previously declined to address the type of unpreserved error assigned by McClanahan. In *Frazier*, Frazier argued that: (1) the State's use of his answers to requests for admissions conflicted with section 841.062 and lowered the State's burden of proof in violation of due process, and (2) the trial court's explanation regarding the requests for admissions was an impermissible comment on the weight of the evidence and amounted to fundamental error. *Frazier*, 2011 Tex. App. LEXIS 4896, at **1-3. We noted that 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." *Id.* at *4. However, Frazier failed to object to the State's reading of his admissions into evidence or to the trial court's explanation; thus, Frazier's complaints were not preserved for appellate review. *Id.* at **1-4.

As in *Frazier*, the trial court's explanation in this case did not indicate approval of the State's argument, indicate disbelief in McClanahan's position, or diminish the

credibility of McClanahan's approach. Like Frazier, McClanahan failed to object when the State read his admissions into evidence and when the trial court gave its explanation to the jury. Because McClanahan failed to preserve his complaints for appeal, we overrule issues one and two. *See* Tex. R. Evid. 103(a)(1); *see also* Tex. R. App. P. 33.1; *Francis*, 46 S.W.3d at 241; *Frazier*, 2011 Tex. App. LEXIS 4896, at **1-4.

In issue three, McClanahan contends that the State's decision to call him as an adverse witness required him to testify against himself and conflicted with section 841.062(a) by lowering the State's burden of proof in violation of his due process rights. McClanahan did not object to being called as a witness. *See* Tex. R. App. P. 33.1. Even were error preserved, the State explained the applicable burden of proof and the jury charge included the proper burden of proof under the SVP statute; thus, calling McClanahan to testify as an adverse witness did not lower the State's burden of proof. *See In re Commitment of Serna*, No. 09-10-00029-CV, 2011 Tex. App. LEXIS 2371, at *10 (Tex. App.—Beaumont March 31, 2011, no pet.) (mem. op.); *see also Frazier*, 2011 Tex. App. LEXIS 4896, at *4. We overrule issue three.

In issue four, McClanahan contends that his substantial rights were impacted when the State elicited testimony from its experts regarding McClanahan's truthfulness. Specifically, Dr. Timothy Proctor testified that he did not believe McClanahan's accounts of prior offenses. Dr. Sheri Gaines testified that McClanahan is "denying his offenses[,]" has "poor insight," and shows no remorse. McClanahan contends that the experts'

testimony was inadmissible under Rule of Evidence 702 because it did not assist the jury and, instead, invaded the jury's province. *See* Tex. R. Evid. 702. However, McClanahan did not object to the State's questions or to the experts' testimony. In the absence of timely objections, McClanahan has failed to preserve his complaint for appellate review. *See* Tex. R. Evid. 103(a)(1); *see also* Tex. R. App. P. 33.1; *Frazier*, 2011 Tex. App. LEXIS 4896, at *5; *In re Commitment of Tolleson*, 2009 Tex. App. LEXIS 3660, at **12-13 (Tex. App.—Beaumont May 28, 2009, no pet.) (mem. op.). We overrule issue four.

Having overruled McClanahan's four issues, we affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on July 26, 2011
Opinion Delivered August 11, 2011

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