In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00451-CV

IN RE COMMITMENT OF KIPP KILPATRICK

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 09-12-11974-CV

MEMORANDUM OPINION

The State of Texas filed a petition to commit Kipp Kilpatrick as a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001-.150 (West 2010). A jury found that Kilpatrick suffers from a behavioral abnormality that predisposes him to engage in a predatory act of sexual violence. The trial court signed a final judgment and an order of civil commitment. In this appeal, Kilpatrick complains regarding (1) the State's use of Kilpatrick's responses to requests for admissions, (2) the trial court's explanation to the jury regarding the requests for admissions, (3) the State's decision to call him to testify against himself, and (4) the trial court's ruling that Kilpatrick's sole expert witness could not discuss the term "serious difficulty controlling his sexual

behavior" when explaining why he believed Kilpatrick did not have a behavioral abnormality. We affirm the trial court's judgment.

In his first issue, Kilpatrick argues that the State improperly utilized his responses to requests for admissions at trial, thereby conflicting 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. Specifically, Kilpatrick asserts that the State used his admissions to prove essential elements of the case, thereby lessening the State's burden of proof. In his second issue, Kilpatrick complains that the trial judge egregiously harmed him, showed partiality for the State, and commented on the weight of the evidence when he informed the jury that the admissions were conclusively proven and that Kilpatrick could not offer any evidence to contradict them. We address issues one and two together.

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 allows the admitting party to withdraw or amend the admission. Tex. R. Civ. P. 198.3; *In re Commitment of Frazier*, No. 09-10-00033-CV, 2011 WL 2566317, at *2 (Tex. App.—Beaumont June 30, 2011, no pet. h.) (mem. op.). To preserve error concerning 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). An objection to an allegedly improper comment by the trial judge 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 Kilpatrick's admissions into evidence, the trial court gave the following explanation to the jury:

> There are certain types of cases such as this. One of the discovery techniques that the lawyers are allowed to use is called Requests for Admissions. That means one side can send the other side Requests for Admissions. If the Requests for Admissions are in so fact [sic] admitted, they're allowed to read them at trial, and you will take them as conclusively proved. They are so in fact conclusively proved that the party making the admission is then prevented from offering any controverting evidence as to those points.

Kilpatrick did not object to the State's use of his admissions or to the trial court's explanation, but he 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 Kilpatrick. In *Frazier*, Frazier asserted 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 improper comment on the weight of the evidence and amounted to fundamental error. *Frazier*, 2011 WL 2566317, at **1-2. We noted in *Frazier* that the trial court's explanation of the requests for admissions "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 *2. Frazier failed to object to

the State's reading of his admissions into evidence or to the trial court's explanation; therefore, we held that Frazier's complaints were not preserved for appellate review. *Id.* at **1-2.

As was the case in *Frazier*, the trial court's explanation in the case at bar did not indicate approval of the State's argument, indicate disbelief in Kilpatrick's position, or diminish the credibility of Kilpatrick's approach. *See id.* at *2. Like Frazier, Kilpatrick failed to object when the State read his admissions into evidence and when the trial court explained the requests for admissions. Therefore, Kilpatrick has failed to preserve his complaints for appeal, and 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 WL 2566317, at **1-2.

In his third issue, Kilpatrick argues that the State's decision to call him as an adverse witness required him to testify against himself and conflicted with section 841.062 by lowering the State's burden of proof in violation of his due process rights. Kilpatrick did not object to being called by the State as a witness. *See* Tex. R. App. P. 33.1. However, even if Kilpatrick had preserved error, the State explained the applicable burden of proof during voir dire and closing, and the jury charge included the proper burden of proof; therefore, calling Kilpatrick 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 WL

1203987, at *3 (Tex. App.—Beaumont Mar. 31, 2011, no pet.) (mem. op.); *see also Frazier*, 2011 WL 2566317, at *2. We overrule issue three.

In his fourth issue, Kilpatrick contends that the trial court erred by ruling that Kilpatrick's sole expert witness, clinical psychologist Dr. Walter Quijano, could not discuss the term "serious difficulty controlling his sexual behavior" when explaining why he believed Kilpatrick did not have a behavioral abnormality. Quijano testified that after reviewing all of the records concerning Kilpatrick, he formed the opinion that Kilpatrick does not have a behavioral abnormality because he does not meet the criteria specified in the statutes. According to Quijano, the statute requires "that there is a condition, a congenital . . . or acquired condition that affected his emotional or volitional capacity. And I don't think that capacity was affected to the extent that he will have serious difficulty in controlling his sexual behavior." Quijano opined that Kilpatrick does not meet the statutory requirement "[t]o the extent that he would have serious difficulty in controlling himself sexually." When Kilpatrick's counsel asked Quijano to explain his reasoning, the State asked to approach the bench, and the following colloquy occurred:

> [State's counsel]: Just to ensure that the caselaw from which serious difficulty controlling behavior isn't brought up, I can see the caselaw on Dr. Quijano's desk, and I know you've ruled on this in the past.
>
> THE COURT: We're not going there, are we?
>
> [Defense counsel]: I'm not bringing up any questions about that.

> THE COURT: Okay. Well, he just started mentioning the terms, and we don't – we don't discuss those terms because they're not in the Texas statute.
>
> [Defense counsel]: Your Honor, I have no intention of bringing up those questions.
>
> THE COURT: Okay. He needs to use the definitions that are in this statute and not other statutes.
>
> [Defense counsel]: Oh, yes, Your Honor.
>
> THE COURT: Okay. Okay.
>
> [State's counsel]: Thank you, Your Honor.

Kilpatrick's counsel did not object to the trial court's ruling, and Quijano's testimony continued. Quijano testified that in forming his opinion, he took into account whether Kilpatrick had a condition that affected his emotional or volitional capacity. Quijano proceeded to explain as follows:

> The emotional capacity means that a person's ability, natural ability to know what is pleasurable and not pleasurable, that's our emotional capacity to approach or to avoid. That's the emotional capacity.
>
> In Mr. Kilpatrick's case, he knows what is pleasurable and what is not pleasurable and he can decide whether to approach the pleasurable or avoid the unpleasurable. That capacity is not destroyed. It is there.
>
> . . . Volitional capacity means the ability to know what is right, to know what is wrong, and to do what is right, to do what is wrong. His ability to decide whether he is doing something that was wrong is intact. He knows what he did was wrong. He chose to do that. He chose to do what is wrong in this case because it was pleasurable, and he knows that capacity to decide whether it's right or wrong, whether to do it or not is intact and there is nothing in his psychological makeup that makes him – other than his decision to do what is right or what is wrong, there is nothing

> that happened to his capacity that incapacitated him to making such a decision.

Kilpatrick's counsel did not object to the trial court's ruling or make an offer of proof. Therefore, Kilpatrick has failed to preserve his complaint for appellate review. *See* Tex. R. App. P. 33.1; *In re Commitment of Day*, No. 09-10-00218-CV, 2011 WL 1805356, at *3 (Tex. App.—Beaumont May 12, 2011, pet. filed) (not yet released for publication) ("When a ruling excludes evidence, to preserve error[,] the appellant must have made the substance of the evidence known to the trial court through an offer of proof, unless the substance of the evidence was apparent from the context within which the question was asked."). Kilpatrick has not shown that he perfected a bill of exception or made an offer of proof. *See Day*, 2011 WL 1805356, at *3 (citing *Smith v. Smith*, 143 S.W.3d 206, 211 (Tex. App.—Waco 2004, no pet.)). Accordingly, we overrule issue four and affirm the trial court's judgment and order of civil commitment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on August 3, 2011
Opinion Delivered August 25, 2011

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