In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-14-00394-CV

IN RE COMMITMENT OF JOHN YBARRA

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 14-02-01839 CV

MEMORANDUM OPINION

John Ybarra appeals from a jury verdict that resulted in his civil commitment as a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001-.151 (West 2010 & Supp. 2015) (the SVP statute). In two issues, Ybarra argues that in closing remarks, the State engaged in improper argument, and he complains that the charge failed to advise the jury that a "no" finding was not required to be based on the agreement of all of the jurors. We affirm the trial court's judgment and order of civil commitment.

Closing Argument

In his first issue, Ybarra complains that in closing argument, the State presented an argument that shifted the State's burden of proving its case to him. Ybarra's complaint concerns the following exchange that occurred during closing argument:

> [State's Counsel]: And during closing argument, did you hear anything about how Mr. Ybarra doesn't have the sexual deviance? Or did you just hear an attack on the doctors?
>
> [Ybarra's Counsel]: Your Honor, objection. She's trying to shift the burden of proof.
>
> The Court: Overruled.

In his brief, Ybarra argues that the State's argument created the impression that Ybarra was obligated to present evidence to refute the State's case. In response to Ybarra's argument, the State contends that its argument was proper because it was made in response to Ybarra's argument, which criticized the testimony the State's experts, a forensic psychiatrist and a forensic psychologist. The State also argues that its argument referring to the lack of evidence contradicting its experts was a reasonable deduction from the evidence. Alternatively, the State argues that even if the argument at issue was improper, Ybarra has not shown that it caused any harm.

Generally, proper jury argument falls into one of these areas: (1) a summation of the evidence, (2) a reasonable deduction from the evidence, (3) an answer to an argument made by opposing counsel, or (4) a plea for the enforcement of a law. *See generally* Tex. R. Civ. P. 269(b), (e); *see also Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). Arguments that are presented in summation are to be confined "strictly to the evidence and to the arguments of opposing counsel." Tex. R. Civ. P. 269(e). To obtain a reversal based on improper jury argument, the party who complains the argument was improper must show that the trial court's ruling on its objection to the argument was (1) not invited or provoked, (2) preserved by the proper trial predicate, (3) not capable of being cured by an instruction, a prompt withdrawal of the statement, or a reprimand by the trial court, and (4) by its nature, degree, and extent, constituted reversibly harmful error. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979); *In re Commitment of Garcia*, No. 09-12-00194-CV, 2013 WL 6558623, at *4 (Tex. App.—Beaumont Dec. 12, 2013, pet. denied) (mem. op.).

In the charge submitted to the jury, the trial court instructed the jury that the State "carries the burden of proof." Additionally, on several occasions in Ybarra's trial, the attorneys representing the State reinforced the concept that the State bore the burden of proof. In voir dire, the State's attorney explained to the venire that

the burden of proof remained with the State, emphasizing that "[i]t never passes to Mr. Ybarra." In opening statement, the attorney for the State told the jury that as the State's attorneys, "we carry the burden of proof in this case, as you've heard." Also, at the beginning of her final argument, the State's attorney acknowledged that the State carried the burden of proof. Also, the complained-of argument was not repeated, and reasonable jurors would not have considered the argument to indicate that Ybarra bore the burden of proving that he was not a sexually violent predator. Therefore, even if the complained-of argument was improper, it was not harmful because the jury would not have been confused on the question of who bore the burden of proving that Ybarra is a sexually violent predator. *See Garcia*, 2013 WL 6558623, at *4; *see also* Tex. R. App. P. 44.1(a)(1).

Moreover, the complained-of argument was not improper. The State characterizes the complained-of argument as a reasonable response to the criticism that Ybarra's counsel made of the opinions offered by the State through its experts. In our opinion, the context of the argument shows that it was a response to Ybarra's criticism of the testimony of the State's expert witnesses.

To support its argument, Ybarra cites *Chavers v. State*, 991 S.W.2d 457, 461 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). However, *Chavers* does not support Ybarra's argument that a prosecutor cannot comment on a defendant's

failure to call witnesses other than the defendant. In *Chavers*, the First Court held that it was not improper for a prosecutor to reference the defendant's failure to call witnesses unless the argument could be construed to refer to the defendant's own failure to testify. *Id.*

In our opinion, the trial court could have reasonably interpreted the complained-of argument as a comment that Ybarra failed to call any experts to contradict the testimony of the State's experts. Tex. R. Civ. P. 269(e). Moreover, in civil cases, which include SVP trials, Rule 269 does not prohibit the parties from commenting on another party's failure to testify. *See* Tex. R. Civ. P. 269. We are not persuaded that the complained-of argument was either improper or harmful. *See* Tex. R. Civ. P. 269; Tex. R. App. P. 44.1(a)(1). We hold the trial court acted within its discretion when it overruled Ybarra's objection to the argument at issue. Issue one is overruled.

Jury Charge

In his second issue, Ybarra argues that he was entitled to an instruction in the charge that a "no" finding does not require a unanimous verdict. A trial court's decision to refuse a particular instruction that a party asks the court to include in the charge is reviewed using an abuse-of-discretion standard. *Thota v. Young*, 366 S.W.3d 678, 687 (Tex. 2012). A trial court may refuse to give the jury a requested

instruction or definition when such instruction or definition is not necessary to enable the jury to render a proper verdict, even if the instruction or definition represents a correct statement of the law. *In re Commitment of Taylor*, No. 09-10-00231-CV, 2010 WL 4913948, at *2 (Tex. App.—Beaumont Dec. 2, 2010, no pet.) (mem. op.).

Because the trial court granted a directed verdict on the issue of whether Ybarra is a repeat sexually violent offender, the jury was asked to answer only one question: "Do you find beyond a reasonable doubt that JOHN YBARRA is a sexually violent predator?" The jury returned a unanimous verdict in favor of the State on that question, finding that Ybarra is a sexually violent predator.

Even if we assume the trial court should have given an instruction like the one Ybarra requested during the conference on the charge, that judgment is not required to be reversed unless the trial court's failure to include the requested instruction was harmful. *See* Tex. R. App. P. 44.1(a)(1) (requiring a finding that the error complained of "probably caused the rendition of an improper judgment"); *see also Standard Fire,* 584 S.W.2d at 839 (requiring an appellant to prove that he suffered a reversibly harmful error from the nature, degree, and extent of the argument). We have previously held that when the jury's verdict in an SVP case is unanimous, an error claiming that the jury was not instructed on how to return a

finding of "no" is generally harmless where there is no evidence to show that the error caused the jury to reach an improper result. *See In re Commitment of Perez*, No. 09-15-00126-CV, 2015 WL 8470522, ** 6-7 (Tex. App.—Beaumont Dec. 10, 2015, no pet.).

In Ybarra's case, the record does not show that he was harmed by the fact that the charge lacked any instructions on how many jurors were required to return an answer of "no" on the issue submitted to the jury. The jury unanimously answered the only question they were asked "yes," and there is no indication that even one of the jurors thought the answer should be "no." In our opinion, the evidence on the question presented to the jury in Ybarra's case was not close, as the record includes substantial evidence to support the jury's verdict. For instance, Ybarra had been convicted of four prior sexually violent offenses against victims who were between ages twelve and fifteen, and the record includes expert testimony that he is a sexually violent predator. Additionally, there is nothing in the record indicating the jury struggled in reaching its verdict, such as a request to the judge for instructions based on the jury's inability to agree to a verdict. Moreover, the record does not include any evidence showing that the jurors were confused by the charge. And, after the jury reached its verdict, the jurors collectively answered "yes" when the court asked if the "yes" was their verdict.

Although given the opportunity to do so, Ybarra declined to individually poll each juror.

Given the absence of any evidence to show that the jury verdict would have been different based on the requested instruction about answering "no," we hold the error, if any, in failing to alter the charge constitutes harmless error. Tex. R. App. P. 44.1(a).

We overrule issue two, and we affirm the trial court's judgment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on May 14, 2015
Opinion Delivered February 18, 2016

Before Kreger, Horton, and Johnson, JJ.