YEAR 2005 CASE SUMMARIES

By
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Jury instructions considered proper in capital murder adjudication. [Vargas v. State](05-2-23B)

On March 31, 2005, the Houston Court of Appeals (1st Dist.) held, in a capital murder adjudication, that since the jury instruction was a correct statement of the law, it was not a comment on the weight of the evidence.

05-2-23B. Vargas v. State, No. 01-03-00870-CR, 2005 Tex.App.Lexis 2417 [Tex.App.– Houston (1st Dist.) 3/31/05].

Facts: A jury found appellant, Thomas Vargas, guilty of capital murder, and the trial court sentenced him to life in prison, the only possible sentence for a juvenile certified to be tried as an adult. In six points of error, appellant contends that the trial court erred (1) in admitting his statements that were involuntarily made, (2) in admitting unduly prejudicial photographs of the complainant, (3) in allowing a jury charge that commented on the weight of the evidence, and (4) in denying his request for lesser included offenses. We affirm.

For additional facts of offense see ¶ 05-2-23A.

Held: Affirmed

Memorandum Opinion: In point of error five, appellant contends that the trial court erred by allowing, despite appellant's objection, a jury charge that commented on the weight of the evidence. The complained-of charge contained the following instruction concerning the admissibility of appellant's taped confession:

An oral statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made.

No oral statement made by an accused juvenile as a result of custodial interrogation (while the accused was in jail or other place of confinement or in the custody of a peace officer) is admissible as evidence against him in any criminal proceeding unless:

. . . .

(b) Prior to the statement but during the recording the accused is given the [*24] following warning by a magistrate:

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used in evidence against him;

(2) he has the right to have a lawyer present to advise him prior to or during any questioning;

(3) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to him to advise him prior to or during any questioning or interviews with peace officers or attorneys representing the state;

(4) he has the right to terminate the interview at any time; and

(5) the juvenile must knowingly, intelligently, and voluntarily waive each right stated in the warning;

. . . .

A statement invoking one of the rights above must be clear and unambiguous. A statement is not voluntarily made if prior to or during the statement, the accused invokes one of the rights set out above.

So in this case, if you find from the evidence, or if you have a reasonable doubt thereof, that prior to the time the defendant gave the alleged statement to Detective Armando Garza, if he did give it, the foregoing provisions were not complied with or if you find the oral statement, if any, was not freely and voluntarily [*25] made, then you will wholly disregard the alleged statement and not consider it for any purpose; if, however, you find beyond a reasonable doubt that the defendant was warned in the respects outlined above prior to his having made such statement, if he did make it, still, before you may consider such statement as evidence in this case, . . .

(Emphasis added.) Appellant specifically complains of the italicized portion of the charge.

Standard of Review

In reviewing a trial court's charge to the jury, we must engage in a two-step analysis to determine: (1) whether the charge was erroneous and, if so, (2) whether the error was harmful. *Gibson v. State, 726 S.W.2d 129, 133 (Tex. Crim. App. 1987)*; *Nguyen v. State, 811 S.W.2d 165, 167 (Tex. App.--Houston [1st Dist.] 1991, pet. ref'd)*. The degree of harm required to reverse an individual case depends upon whether the error was preserved in the trial court. *Gibson, 726 S.W.2d at 133*. If the error was properly preserved at trial, any actual harm, regardless of degree, is sufficient to require a reversal of the conviction. *Almanza, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)*; [*26] *Jones v. State, 962 S.W.2d 96, 98 (Tex. App.--Houston [1st Dist.] 1997)*, *aff'd*, *984 S.W.2d 254 (Tex. Crim. App. 1984)*. If the error is not properly preserved, the harm must be so egregious that it deprives the accused of a "fair and impartial trial." *Almanza, 686 S.W.2d at 171*; *Jones, 962 S.W.2d at 98*. To preserve error related to the jury charge, the appellant must either object or request a charge at trial. *Vasquez v. State, 919 S.W.2d 433, 435 (Tex. Crim. App. 1996)*.

Here, because appellant objected to the jury charge, the alleged error was properly preserved, and a finding of any actual harm is sufficient to reverse appellant's life sentence. However, any harm must be evaluated in light of the entire charge, the arguments of counsel, the state of the evidence, and any other relevant information revealed by the trial record as a whole. *Saunders v. State, 913 S.W.2d 564, 574 (Tex. Crim. App. 1995)*; *Blok v. State, 986 S.W.2d 389, 391 (Tex. App.--Houston [1st Dist.] 1999, pet. ref'd)*.

The Jury Charge

The function of the jury charge is to instruct the [*27] jury on the law applicable to the case. *Abdnor v. State, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994)*. The statement of the law in the charge must be correct because it is the instrument by which the jury convicts. *Benson v. State, 661 S.W.2d 708, 713 (Tex. Crim. App. 1982)*. Generally, when evidence at trial raises a defensive issue and the defendant properly requests a jury charge on that issue, the trial court must submit the issue to the jury. *Mendoza v. State, 88 S.W.3d 236, 239 (Tex. Crim. App. 2002)*. Specifically, when evidence presented at trial raises a factual dispute over whether a defendant's statement was voluntary, the defendant is entitled to an instruction in the jury charge advising the jury generally on the law relevant to the statement. *Dinkins v. State, 894 S.W.2d 330, 353 (Tex. Crim. App. 1995)*. The evidence that raises the issue may be strong, weak, impeached, undisputed, or even beyond belief. *Mendoza, 88 S.W.3d at 239*.

Section 51.095 of the Texas Family Code allows the statement of a child to be used as evidence only if it appears that the statement was [*28] freely and voluntarily made. *TEX. FAM. CODE ANN. § 51.095* (Vernon 2002). Under *article 38.23*, the jury shall be instructed that, if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the laws of Texas, including *section 51.095*, then the jury shall disregard such evidence. *TEX. CODE CRIM. PROC. ANN. art. 38.23* (Vernon 1979). The terms of *article 38.23* are mandatory. *Mendoza, 88 S.W.3d at 239*.

The instruction that "a statement invoking one of the rights above must be clear and unambiguous" does not involve a recitation of specific facts or call attention to a specific piece of evidence. Rather, it is a correct statement of the law, under *Dowthitt*, that cannot be construed as a comment on the weight of the evidence. *See Dowthitt, 931 S.W.2d at 257*.

We overrule point of error five.

Conclusion: Jury instructions proper, case affirmed.