In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00456-CR

DAVID TODD BURKE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 09-07066

MEMORANDUM OPINION

David Todd Burke appeals his conviction for official oppression. Burke contends the trial court erred in denying the challenges for cause that he lodged against three of the prospective jurors during jury selection. Burke also asserts that the trial court erred by refusing to use the language he requested in an instruction concerning the standard to be used to judge Burke's conduct in assisting another officer in making an arrest. We affirm the trial court's judgment.

Challenges for Cause

In issues one through three, Burke argues that the trial court erred in denying the challenges for cause against prospective jurors one, twelve, and fourteen. During voir dire, each of these three prospective jurors indicated that a past bad experience with law enforcement would impact his or her ability to serve as a fair and impartial juror.

Under the Texas Code of Criminal Procedure, a defendant may challenge any prospective juror who has a bias or prejudice against "any of the law applicable to the case upon which the defense is entitled to rely[.]" Tex. Code Crim. Proc. Ann. art. 35.16(c)(2) (West 2006). "A challenge for cause is an objection made to a particular juror, alleging some fact which renders the juror incapable or unfit to serve on the jury." *Id*. art. 35.16(a) (West 2006). Bias against the law includes a potential juror's refusal to consider or apply the relevant law because the potential juror's beliefs or opinions would prevent or substantially impair the performance of the juror's duties. *Sadler v. State*, 977 S.W.2d 140, 142 (Tex. Crim. App. 1998).

Determining whether a belief or opinion might create a disqualifying bias is straightforward. Before a prospective juror may be excused for cause, the law must be explained to the prospective juror, and the prospective juror "must be asked whether [the prospective juror] can follow that law, regardless of [the prospective juror's] personal views." *Gardner v. State*, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009). The burden of establishing that the challenge is proper is on the party who is proposing the challenge for

cause. *Id.* The party challenging the prospective juror for cause does not meet the burden until he shows that the prospective juror "understood the requirements of the law and could not overcome his prejudice well enough to follow the law." *Id.* "When the record reflects that [the prospective juror] vacillated or equivocated on his ability to follow the law, the reviewing court must defer to the trial judge." *Id.*

Because the trial judge is in a better position than an appellate court to evaluate a prospective juror's demeanor and response, the trial court's decision to deny a challenge for cause is reviewed with considerable deference. *Id.* at 295-96. A trial judge's ruling on a challenge for cause may be reversed only for a clear abuse of discretion. *Id.* at 296. In reviewing a complaint that the trial court abused its discretion in refusing to strike a prospective juror, we review the entire record of the voir dire to determine if there is sufficient evidence to support the trial court's ruling. *Feldman v. State*, 71 S.W.3d 738, 744 (Tex. Crim. App. 2002).

Burke's first issue asserts that the trial court erred when it denied his challenge of prospective juror one. At the beginning of voir dire, this prospective juror stated that, based on his prior "run-ins with the law," he did not think he could be impartial and he did not want to be on the jury. Later, when defense counsel asked whether the prospective jurors could make a decision based on the evidence and follow the law given to them by the trial judge, prospective juror one first nodded his head up and down, and then, when asked individually, answered in the affirmative. The array was then asked if

any of them had previous bad experiences with law enforcement. Several of the prospective jurors, including prospective juror one, answered yes, and these prospective jurors were asked to stay in the courtroom while the other jurors were allowed a break. At the bench, prospective juror one described an incident when, as a youth, he felt that a police officer had used excessive force against him. The following exchange then ensued:

> [Defense]: Okay. What happened to you, in your opinion, keep you from being a fair and impartial juror in this case or following the oath that you would take and make your decision based upon the evidence?
>
> [Prospective juror one]: It would be – I think it would be difficult to be fair. I mean, even with the oath, you know, I think it – just I think maybe subconsciously it would bring back – you know, even though it – so, I wouldn't want it to be –
>
> [Defense]: You don't think you could be fair and impartial in this case and give Officer Burke – the same kind of case you were involved in –
>
> [Prospective juror one]: Right.
>
> [Defense]: -- and have personal experience. You don't think you could give him a fair shake?
>
> [Prospective juror one]: I don't, sir. No.
>
> [Defense]: That's all the questions I have.
>
> The Court: [State's counsel]?

State's counsel did not ask prospective juror one any further questions.

Based on the record as a whole, we cannot say that the trial court abused its discretion when it refused to strike prospective juror one. While prospective juror one, after being questioned at the bench, indicated that he did not think he could be fair, he

had earlier stated that he could follow the law as given to him by the trial judge and decide the case based on the evidence presented. At no time did prospective juror one indicate that he would not try to follow his oath. Considered in a vacuum, prospective juror one's responses at the bench could be interpreted to infer that he would be unable to follow his oath; however, he was not directly asked while at the bench whether he would be unable to follow the instruction the court ultimately gave the jury, which stated that "you must not consider, discuss, nor relate any matters not in evidence before you."

In cases in which a prospective juror's answers are vacillating or contradictory, we defer to the trial court's decision. *Gardner*, 306 S.W.3d at 296. Additionally, in the absence of a "clearly objectionable declaration" by a prospective juror, we defer to the trial judge's decision to deny a challenge for cause. *Swearingen v. State*, 101 S.W.3d 89, 98 (Tex. Crim. App. 2003). A clearly objectionable declaration is one that indicates the prospective juror has a bias that "would substantially impair the prospective juror's ability to carry out his oath and instructions in accordance with law." *Feldman*, 71 S.W.3d at 744.

Because the trial court, on the record before us, could reasonably conclude that prospective juror one's declaration did not clearly evince a bias against the law, the trial court was entitled to conclude that prospective juror one could actually follow its instructions if he were to be chosen to serve on the jury. *Gardner*, 306 S.W.3d at 295; *Feldman*, 71 S.W.3d at 744. We overrule Burke's first issue.

Burke's second issue asserts that the trial court erred by not granting Burke's challenge for cause against prospective juror twelve. Defense counsel asked that prospective juror twelve provide the trial court with her past experiences with law enforcement that "might, you know, be important for us to know about." Prospective juror twelve related that she had been subjected to a search under circumstances that she thought were unfair, although she stated she was not mistreated. When asked if she could follow her oath and base her verdict "upon the evidence and the law[,]" prospective juror twelve stated that she did not think that she "would have a problem following [her] oath." Then, when told by defense counsel that the State had alleged that the defendant struck the person being arrested thirteen times, prospective juror twelve stated: "I don't think I could be fair." When the State followed-up and asked whether she was stating that she could not follow her oath, the prospective juror stated: "If I were up there and had the oath I would to my best ability follow the oath."

The trial court refused the defendant's request to strike prospective juror number twelve for cause. In light of the particular deference given to trial courts with respect to vacillating jurors, we are required to defer to the trial court's decision regarding its denial of Burke's request to strike prospective juror twelve. *See Ladd v. State*, 3 S.W.3d 547, 559, 560 (Tex. Crim. App. 1999) (determining that the trial court did not err by not dismissing juror for cause when juror stated during voir dire that he "leaned" towards believing the defendant was guilty because of the juror's past experiences but further

stated that he could follow the law, "hold the State to its burden of proof, and presume the defendant innocent"). We overrule Burke's second issue.

Issue three asserts that the trial court erred by denying Burke's challenge for cause against prospective juror fourteen. During voir dire, prospective juror fourteen stated that she had police officer friends and that would make it hard for her to be fair to the State. However, prospective juror fourteen also indicated during voir dire that she had a previous unfavorable experience with law enforcement. Later, when asked to explain to the trial court her unfavorable experience, prospective juror fourteen related that approximately ten years ago, she felt she had been unreasonably detained after being stopped for speeding. Prospective juror fourteen then advised the court that her experience "could" affect her. Again, the State did not follow-up with any questions, and again defense counsel did not specifically show that prospective juror fourteen would be unable to follow the trial court's instructions and base her verdict on the evidence admitted at trial if she were chosen as a juror. Because the record is insufficient to sustain the defendant's claim that the juror held a disqualifying bias based on her prior experience–consisting of one that would render her unable to follow the trial court's instructions–we are required to defer to the trial judge's decision as her responses were vacillating and contradictory. *See Gardner*, 306 S.W.3d at 296. We overrule Burke's third issue.

Charge Error

In his fourth issue, Burke contends the trial court erred by denying, in part, his requested instruction relating to the "objective reasonableness" of his conduct. Before the trial court read the jury charge, Burke requested the following instruction:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, *rather than with the 20/20 vision of hindsight*. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments–in circumstances that are tense, uncertain, and rapidly evolving–about the amount of force that is necessary in a particular situation. The "reasonableness" inquiry is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer's evil intentions will not make a violation out of an objectively reasonable use of force; nor will an officer's good intentions make objectively unreasonable use of force justified. (emphasis added).

The requested language of Burke's proposed instruction is based entirely on the United States Supreme Court's discussion of a case involving whether an officer had used excessive force in violation of 42 U.S.C.A. § 1983 (West 2003). *See Graham v. Connor*, 490 U.S. 386, 388-90, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). In Burke's case, the State objected to the proposed use of the phrase "rather than with the 20/20 vision of hindsight" that we have italicized, and asserted that it constituted a comment on the weight of the evidence. After considering the issue, the trial court gave Burke's requested instruction, but over Burke's objection, removed the "rather than with the 20/20 vision of hindsight" phrase from the jury charge. Although the trial court refused to include this

additional language in the charge, it informed Burke's attorney that he would be allowed to argue that Burke's decision should not be judged with 20/20 hindsight.

Arguing that his requested instruction did not violate article 36.14 of the Texas Code of Criminal Procedure, Burke contends that the trial court's ruling to exclude the phrase "impermissibly infringed [Burke]'s Sixth and Fourteenth Amendment rights to present a defense at *every* stage of trial, one that includes his fundamental right to give jurors a vehicle through which to give meaningful effect to his defensive theory." *See* Tex. Code Crim. Proc. Ann. art. 36.14 (West 2007). Appellate review of complaints alleging charge error involves a two-step process. *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994); *Sakil v. State*, 287 S.W.3d 23, 25-26 (Tex. Crim. App. 2009). Initially, we determine whether error occurred; if so, we evaluate whether sufficient harm resulted from the error to require reversal. *Abdnor*, 871 S.W.2d at 731-32.

Article 36.14 requires the trial court to provide the jury with a "written charge distinctly setting forth the law applicable to the case[.]" *See* Tex. Code Crim. Proc. Ann. art. 36.14. The determination of what is reasonable is not precise and can vary, as the United States Supreme Court recognized in *Graham*. 490 U.S. at 396 (noting that "'[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application'") (quoting *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)).

With respect to the offense of official oppression, we note that the statute defines the offense from the standpoint of conduct that the public servant "knows is unlawful[,]" which is a subjective, not an objective standard. Tex. Penal Code Ann. § 39.03(a)(1) (West 2011). However, a standard that views a public servant's behavior from the standpoint of objective reasonableness is relevant in cases involving a peace officer who claims that he was justified in using force to make an arrest. *See Walters v. State*, 247 S.W.3d 204, 209 (Tex. Crim. App. 2007) (holding that when a defensive theory is raised by the evidence from any source and a charge is properly requested, it must be included in the court's charge, regardless of whether the evidence is strong, feeble, unimpeached, or contradicted, and regardless of what the trial court may think about the credibility of the evidence); *Woodfox v. State*, 742 S.W.2d 408, 409-10 (Tex. Crim. App. 1987); *see also* Tex. Penal Code Ann. § 9.51 (West 2011).[1] A "reasonable belief" is defined in the

[1]Section 9.51 of the Penal Code provides in relevant part as follows:

> (a) A peace officer, or a person acting in a peace officer's presence and at his direction, is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest or search, or to prevent or assist in preventing escape after arrest, if:
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> (1) the actor reasonably believes the arrest or search is lawful or, if the arrest or search is made under a warrant, he reasonably believes the warrant is valid; and
>
> (2) before using force, the actor manifests his purpose to arrest or search and identifies himself as a peace officer or as one acting at a peace officer's direction, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested.

Penal Code as "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." Tex. Penal Code Ann. § 1.07(42) (West 2011). Thus, an objective standard of reasonableness can become relevant as a standard to judge a police officer's use of force in some cases involving claims of mistreatment during a person's arrest. *See Graham*, 490 U.S. 386. Without deciding whether the instruction the trial court used in Burke's case, which employed language found in *Graham*, constitutes either an appropriate or the only method to instruct the jury on an officer's use of reasonable force to make an arrest, we underscore the observation made in *Graham* that the concept of reasonableness is not capable of precise definition. *See id.* at 396. Nevertheless, the criminal statutes that apply to Burke's offense do not, by their terms, require a definition of reasonableness that includes the phrase the trial court decided to omit.[2]

In summary, a standard measuring a police officer's justification to use force in making an arrest under Texas law is based on the standard of an ordinary and prudent man in the same circumstances as the officer involved in making an arrest. *See* Tex. Penal Code Ann. §§ 1.07(42), 9.51. The instruction the trial court gave in this case allowed Burke's decision to use force to be judged from an objective standard. Even if

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Tex. Penal Code Ann. § 9.51 (West 2011).

[2]The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, "*rather than with the 20/20 vision of hindsight*." (The charge submitted by the trial court in Burke's case omitted the italicized portion of the quoted language.).

the omitted phrase constitutes a correct statement of the law, trial courts are allowed to refuse instructions that are merely a shade, variation, or repetition of an instruction already given. *See Riley v. State*, 802 S.W.2d 909, 910 (Tex. App.—Fort Worth 1991), *aff'd*, 830 S.W.2d 584 (Tex. Crim. App. 1992). Generally, it is not considered error when a trial court refuses to give a superfluous instruction or variations of the same instruction if the substance of it already exists in the jury's charge. *See id*.; *see also Philen v. State*, 683 S.W.2d 440, 445 (Tex. Crim. App. 1984) (holding that the refusal to give a requested charge which is repetitious of main charge is not error); *Davis v. State*, 651 S.W.2d 787, 792 (Tex. Crim. App. 1983) (holding that there is no harm if the refused charge is adequately covered by the charge given).

We conclude that the language the trial court refused to include in the charge regarding Burke's claim that he was justified constitutes a variation of the statutory definition of "reasonable belief." Because the charge required Burke's justification in using force to be measured from the standard of an ordinary and prudent man under the same or similar circumstances, the language that Burke requested and the trial court omitted was merely a shade of the same objective standard which the trial court had in substance given to the jury in the submitted charge. As a mere variation, we hold the trial court did not abuse its discretion by refusing Burke's requested instruction. We overrule Burke's fourth issue, and we affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on June 17, 2011
Opinion Delivered August 24, 2011
Do Not Publish

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