NO. 12-10-00402-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

JUAN HERNANDEZ-MORA, APPELLANT	***§***	***APPEALS FROM THE 241ST***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Juan Hernandez-Mora appeals his conviction for aggravated sexual assault of a child, for which he was sentenced to imprisonment for fifty years and fined $10,000. Appellant raises four issues on appeal. We affirm.

BACKGROUND

Appellant resided in Sherman, Texas, but frequently visited his daughter in Lindale where he would care for his grandchildren, including his granddaughter. During one such visit, Appellant sexually assaulted his granddaughter.[1] She eventually told her mother, who then told law enforcement, and Appellant was arrested.

Appellant was charged with aggravated sexual assault of a child, and the case proceeded to trial. Following the voir dire examination of prospective jurors, the State used three of its peremptory challenges to strike Hispanic potential jurors. Appellant, who is Hispanic, made a ***Batson***[2] motion complaining of the State's strikes. After an evidentiary hearing, the trial court

[1] Appellant does not challenge the sufficiency of the evidence.

[2] ***Batson v. Kentucky,*** 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69 (1986).

denied the motion.

During the trial, Appellant sought to introduce the opinions of Evangeline Barefoot, a trained sexual assault nurse examiner. The State objected to Barefoot offering an opinion that injuries to Appellant's granddaughter's hymen were not indicative of a sexual assault because Barefoot neither examined Appellant's granddaughter nor inspected photographs from the examination.[3] The trial court conducted a hearing on the matter, and Barefoot eventually conceded that she could not opine that the injuries to Appellant's granddaughter's hymen were not caused by sexual abuse. Accordingly, the trial court restricted Barefoot from testifying that the injuries were not caused by sexual abuse.

Following the presentation of evidence, the matter was submitted to the jury, and the jury was asked to find Appellant either not guilty, guilty of the lesser included offense of indecency with a child, or guilty of the charged offense of aggravated sexual assault of a child. The jury found Appellant guilty of aggravated sexual assault of a child as charged and assessed Appellant's punishment at imprisonment for fifty years and a fine of $10,000. The trial court sentenced Appellant accordingly. Appellant filed a motion for new trial that was overruled by operation of law without a hearing. This appeal followed.

***BATSON* MOTION**

In his first issue, Appellant contends that the trial court erred in denying his ***Batson*** motion. Specifically, Appellant alleges that the State engaged in purposeful discrimination when it used its peremptory challenges to excuse three Hispanic individuals, identified as Jurors 5, 7, and 11, from the venire.

Applicable Law

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids a party from challenging potential jurors on the basis of their race. U.S. CONST. amend. XIV; ***Batson v. Kentucky***, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69 (1986). A trial court follows a three step process to evaluate a claim that a litigant has made a peremptory strike based on race. *See* ***Snyder v. Louisiana***, 552 U.S. 472, 476, 128 S. Ct. 1203, 1207, 170 L. Ed. 2d 175 (2008). First, a defendant must make a prima facie showing that the state

[3] Susan Hinson, another sexual assault nurse examiner, conducted an examination of Appellant's granddaughter and photographed her injuries. However, because of bad film, the photographs were unusable.

has used a peremptory challenge to remove a potential juror on account of race. ***Id***., 552 U.S. at 476–77, 128 S. Ct. at 1207; ***Purkett v. Elem***, 514 U.S. 765, 767, 115 S. Ct. 1769, 1770, 131 L. Ed. 2d 834 (1995). A defendant may establish a prima facie case solely on evidence concerning the state's exercise of peremptory challenges at trial. ***Batson***, 476 U.S. at 96, 106 S. Ct. at 1723. He must also show that these facts and any other relevant circumstances raise an inference that the state has excluded potential jurors from the petit jury on account of their race. ***Id***., 476 U.S. at 96-97, 106 S. Ct. at 1723.

Once the defendant has made a prima facie showing, the burden shifts to the state to come forward with a race neutral explanation for challenging the jurors. ***Snyder***, 552 U.S. at 476-77, 128 S. Ct. at 1207-1208; ***Batson***, 476 U.S. at 97-98, 106 S. Ct. at 1723-24. If the state offers race neutral reasons for the strikes, the defendant has the opportunity to rebut the state's explanations and to show that the state's race neutral explanations for the strikes are contrived or a pretext to conceal a racially discriminatory intent. *See* ***Shuffield v. State***, 189 S.W.3d 782, 785 (Tex. Crim. App. 2006); ***Jasper v. State***, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001). The credibility of the prosecutor who offers race neutral explanations for disparate striking of jurors can be measured by "among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." ***Miller–El v. Cockrell***, 537 U.S. 322, 339, 123 S. Ct. 1029, 1040, 154 L. Ed. 2d 931 (2003).

We will disturb a trial court's ruling on a ***Batson*** motion only if it is "clearly erroneous." ***Snyder***, 552 U.S. at 477, 128 S. Ct. at 1207; ***Guzman v. State***, 85 S.W.3d 242, 254 (Tex. Crim. App. 2002). Generally, a fact finder's decision is clearly erroneous when it leaves an appellate court with a "definite and firm conviction that a mistake has been committed." ***Guzman***, 85 S.W.3d at 254. We review the evidence in the light most favorable to the trial court's ruling and afford great deference to that ruling. ***Jasper***, 61 S.W.3d at 422. Furthermore, a claim that the proffered race neutral reasons for strikes are pretextual presents a question of fact, not law, and the trial court is in the best position to evaluate such claims. ***Watkins v. State***, 245 S.W.3d 444, 447 (Tex. Crim. App.), *cert. denied*, 555 U.S. 846, 129 S. Ct. 92, 172 L. Ed. 2d 78 (2008); ***Gibson v. State***, 144 S.W.3d 530, 534 (Tex. Crim. App. 2004). The ultimate plausibility of a race neutral explanation is to be considered in the context of whether the defendant has satisfied his burden to show that the strike was the product of the prosecutor's purposeful discrimination. ***Watkins***, 245 S.W.3d at 447.

Analysis

At trial, Appellant objected to the petit jury on the basis that the State had impermissibly exercised peremptory challenges on three Hispanic members of the prospective jury panel. The State responded that it had legitimate, race neutral reasons for the strikes. According to the State, it struck Juror 5 because she failed to completely fill out her juror information card, Juror 7 because he too failed to completely fill out his juror card and because he had a prior misdemeanor conviction, and Juror 11 because he wore a short sleeved shirt buttoned all the way to the top of the collar even though he was not wearing a tie.

After hearing the State's race neutral reasons, Appellant argued that the reasons proffered were contrived and pretextual. The trial court found that the State's strikes were racially neutral and denied Appellant's ***Batson*** motion.

We examine all relevant factors bearing upon the trial court's decision when evaluating racially neutral explanations for strikes that are alleged to be pretextual. *See*, *e.g.*, ***Miller-El v. Dretke***, 545 U.S. 231, 253, 125 S. Ct. 2317, 2332, 162 L. Ed. 2d 196 (2005) (examining actual strikes, use of jury shuffle, disparity in questioning, and history of excluding racial minorities from juries). First, from our review of the record, it appears that there were only three Hispanics in the jury strike zone.[4] Given the small number of Hispanics in the jury strike zone, the analysis of the statistical data pertaining to the State's peremptory strikes is questionable, but striking of three prospective jurors is not too great to attribute merely to happenstance. *Cf.* ***Miller-El v. Cockrell***, 537 U.S. at 342, 123 S. Ct. at 1042 (happenstance unlikely to explain prosecutor using ten of fourteen strikes to exclude 91% of black venire members). Second, a comparative juror analysis indicates that while a few other potential jurors left portions of the juror information card blank, Jurors 5 and 7 had the most incomplete juror information cards. During the ***Batson*** hearing, the State similarly asserted that Jurors 5 and 7 had the most incomplete cards, and Appellant did not challenge the State's assertion. With regard to Juror 11, the record does not identify any other potential juror who wore a short sleeved shirt buttoned to the top of the collar without wearing a tie. The State identified two other potential jurors that it felt were dressed in a similar nonconforming manner, one with a Mohawk haircut and another with a tie dye shirt. Both of

[4] Juror 26 failed to fill out his juror information card completely by leaving his race blank. No mention was made of his race, and it appears that he was struck by Appellant. All other jurors indicated their race on their juror information card.

these potential jurors were Caucasian and were also struck by the State.

Third, the record does not indicate that the State requested a jury shuffle. Fourth, a review of the State's voir dire examination shows no contrasting voir dire questions posed respectively to minority and nonminority panel members. Fifth, there is no evidence offered in this case to show a history of the State's systematically excluding Hispanics from juries. Sixth, the reasons provided by the State for the strikes are facially race neutral. Appellant was on trial for aggravated sexual assault of a child. It is reasonable for the State to seek to exclude potential jurors who do not conform to societal norms. Jurors who fail or refuse to respond to questions posed in a juror information card certainly choose not to conform to societal norms. Wearing a short sleeved shirt buttoned to the top button is a different type of nonconformity, but it is nonconformity nonetheless.

Having reviewed the entire record, we conclude the trial court's decision to deny Appellant's ***Batson*** motion was not clearly erroneous. The State provided racially neutral explanations for its use of peremptory challenges, and Appellant failed to carry his burden to show that the stated reasons were pretextual. The trial court was in the best position to assess the reasonableness of the State's assertions regarding the strikes. Such an assessment would rely on a number of intangible judgments made by the trial court. *See* ***Miller–El v. Cockrell***, 537 U.S. at 339-40, 123 S. Ct. at 1040-41. Giving, as we must, deference to the trial court's ruling, we do not have a "definite and firm conviction that a mistake has been committed." *See* ***Guzman***, 85 S.W.3d at 254. We overrule Appellant's first issue.

EXCLUSION OF EVIDENCE

In his second issue, Appellant argues that the trial court improperly limited Evangeline Barefoot's expert testimony by not allowing her to testify that notches on Appellant's granddaughter's hymen were not consistent with sexual assault.

Standard of Review and Applicable Law

We review a trial court's decision to admit or exclude scientific expert testimony under an abuse of discretion standard. *See* ***Sexton v. State***, 93 S.W.3d 96, 99 (Tex. Crim. App. 2002). The trial court ruling will be upheld if it is within the zone of reasonable disagreement. ***Id***.

A witness may offer an opinion if she possesses specialized knowledge, skill, experience, training, or education related to a fact in issue. TEX. R. EVID. 702. The trial court serves as the gatekeeper to determine whether the proffered scientific evidence is sufficiently reliable and

relevant. ***Sexton***, 93 S.W.3d at 99. For scientific evidence to be reliable, the proponent must show that the underlying scientific theory is valid, the technique applying the theory is valid, and the technique was properly applied on the occasion in question. ***Id***. at 100.

Application

During a lengthy examination outside the presence of the jury, Barefoot admitted that she could not opine that the notches "did not happen from penetrative trauma." She was asked again by the trial court whether she was "able to give this jury an opinion that [the notches] were not caused by sexual abuse," and she responded that she was not. She further conceded that she could not provide an opinion that the notches were consistent or inconsistent with sexual abuse because she did not see them.

After hearing Barefoot's basis for her opinions, the trial court restricted Barefoot from testifying that the notches described by Hinson on Appellant's granddaughter's hymen were not caused by sexual abuse. The trial court properly fulfilled its role as gatekeeper, and did not err. We overrule Appellant's second issue.

IMPROPER VERDICT FORM

In his third issue, Appellant argues that the trial court improperly charged the jury because it did not include a separate and independent option for the jury to find Appellant not guilty of the lesser included offense of indecency with a child and of the charged offense of aggravated sexual assault of a child.

Standard of Review and Applicable Law

In criminal jury trials, the trial court must deliver "a written charge distinctly setting forth the law applicable to the case." TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007). Because the charge instructs the jury on the law applicable to the case, it must contain an accurate statement of the law and set out all essential elements of the offense. ***Dinkins v. State***, 894 S.W.2d 330, 339 (Tex. Crim. App. 1995).

Similarly, "the jury shall be instructed to return a finding of guilty or not guilty in a separate verdict as to each count and offense submitted to them." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 1(c) (West Supp. 2011). The trial court must instruct the jury that it may return either a "guilty" or "not guilty" verdict for any charged offenses and for any lesser included offenses submitted to the jury. ***Jennings v. State***, 302 S.W.3d 306, 309 (Tex. Crim. App. 2010). The trial

court is not required to submit a written verdict form with the jury charge. ***Id***. When a trial court does include a verdict form, however, it must set out every "guilty" or "not guilty" option that is available to the jury. ***Id***. at 310. When a trial court submits a verdict form to the jury, the verdict form becomes a part of the charge. ***Id***.

Where an appellant has properly preserved an issue related to the jury charge for review, we must ascertain if error actually occurred. *See* ***Posey v. State***, 966 S.W.2d 57, 60 (Tex. Crim. App. 1998). If error occurred and was properly preserved, reversal is required if the error was calculated to injure the rights of the defendant. ***Almanza v. State***, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). In other words, an error that has been properly preserved will require reversal only if the error is not harmless. ***Id.*** We evaluate the issue of harm "in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." ***Id.***

Application

Appellant argues that in the ***Jennings*** decision, the court of criminal appeals clearly required a separate not guilty option on the verdict form for any lesser included offense submitted to the jury. *See* ***Jennings***, 302 S.W.3d at 309-10. In ***Jennings***, the jury was given the option to find the defendant not guilty of burglary of a habitation with intent to commit aggravated assault, guilty of burglary of a habitation with intent to commit aggravated assault, or guilty of burglary of a habitation with intent to commit assault. ***Id***. at 308. At oral argument, the State conceded that "a 'not guilty' of any offense, including lesser-included offenses, was a necessary part of the jury verdict form." ***Id***. at 311, n.29. In essence, the trial court's verdict form in ***Jennings*** did not allow the jury to find the defendant not guilty of the lesser included offense submitted to the jury. *See* ***id***.

Here, Appellant was charged with aggravated sexual assault of a child. He requested and received inclusion in the charge of a lesser included offense, indecency with a child. In the charge, the trial court instructed the jury that "[i]f you have a reasonable doubt as to whether [Appellant] is guilty of any offense defined in this charge, then you should acquit [Appellant] and say by your verdict 'not guilty.'" Thus, on the verdict form, the jury was given the option of finding Appellant (1) not guilty of any offense, (2) guilty of the lesser included offense of indecency with a child, or (3) guilty of the charged offense of aggravated sexual assault of a child.

Appellant objected to the verdict form because "there's just one not guilty part of the verdict form, and I think that [Appellant] should have a not guilty for each of the charges." The trial court overruled Appellant's objection.

We hold that the trial court followed ***Jennings*** by setting out every "guilty" or "not guilty" option available to the jury. *See* ***id***. at 310. The jury had only three options in this case, and the verdict form gave the jury all three of those options. We hold that the trial court did not commit error in composing its verdict form.

Even if the trial court committed error by not including a separate "not guilty" option for each charge submitted to the jury, Appellant cannot demonstrate harm. The jury found Appellant guilty of the charged offense. Therefore, by definition, Appellant also was guilty of the lesser included offense. Any error arising from the failure to have separate "not guilty" options for the charged offense and the lesser included offense was harmless. *See* ***Almanza***, 686 S.W.2d at 171. We overrule Appellant's third issue.

HEARING ON MOTION FOR NEW TRIAL

In his fourth issue, Appellant claims that the trial court erred in not holding a hearing on his motion for new trial.

Standard of Review

We review a trial court's failure to conduct a hearing on a motion for new trial for an abuse of discretion. ***Smith v. State***, 286 S.W.3d 333, 339 (Tex. Crim. App. 2009). We must ask "whether, on this record, the trial court could have reasonably denied appellant *a hearing* on his motion for new trial." ***Wallace v. State***, 106 S.W.3d 103, 108 (Tex. Crim. App. 2003). A hearing is not required when the matters raised in the motion for new trial are subject to being determined from the record. ***Reyes v. State***, 849 S.W.2d 812, 816 (Tex. Crim. App. 1993). Further, as a prerequisite to a hearing on a motion for new trial, to avoid "fishing expeditions," the motion must be supported by affidavit showing the truth of the grounds of attack. ***Id***. If affidavits attached to the motion for new trial place the trial court on notice that reasonable grounds exist for a new trial, it is an abuse of discretion to fail to conduct a hearing on the motion. *See* ***Martinez v. State***, 74 S.W.3d 19, 22 (Tex. Crim. App. 2002). But if the motion and accompanying affidavits do not show that the movant could be entitled to relief, then no abuse of discretion occurs by failing to conduct a hearing on the motion. *See* ***Wallace***, 106 S.W.3d at 108.

Application

Appellant argues that he was entitled to a hearing on his motion for new trial because he alleged ***Brady***[5] violations in that, only a few days before the trial commenced, the State turned over information that Appellant's granddaughter had alleged that her uncle, Appellant's son, had sexually abused her. Thus, Appellant argues that he was provided information that his granddaughter, if assaulted, was assaulted by her uncle rather than by him.

The state has a constitutional duty under both the United States and Texas constitutions to disclose evidence favorable to the defendant. *See* ***Thomas v. State***, 841 S.W.2d 399, 403 (Tex. Crim. App. 1992). Evidence is favorable if, when used effectively, it may make the difference between conviction and acquittal. ***Little v. State***, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999). Thus, to show reversible error, a defendant must show that (1) the state failed to disclose evidence, (2) the withheld evidence is favorable to him, and (3) the evidence is material, "that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different." *See* ***Pena v. State***, 353 S.W.3d 797, 809 (Tex. Crim. App. 2011)

Here, the trial court could determine from the record that no ***Brady*** violation occurred because Appellant admits that the information was disclosed by the State. In fact, the record shows that the State provided Appellant with a statement from the victim's mother several months prior to trial that included the allegation that both Appellant and the victim's uncle had sexually assaulted the victim. Because the trial court was able to determine from the record that no ***Brady*** violation occurred, the trial court did not err by failing to conduct a hearing on Appellant's motion for new trial. Appellant asserted other bases for a new trial in his motion. However, he failed to advance an argument in his appellate brief that any of those allegations required the trial court to hold a hearing. *See* TEX. R. APP. P. 38.1(i). We have reviewed the other allegations contained in Appellant's motion for new trial and concluded that the trial court could have determined that those issues could also be resolved without the necessity of a hearing. We overrule Appellant's fourth issue.

IMPOSITION OF A FINE

Although not raised by Appellant, during our review of the record, we discovered a variance between the oral pronouncement of sentence and the trial court's written judgment.

[5] ***Brady v. Maryland***, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Specifically, the trial court ordered Appellant fined $10,000 in accordance with the jury's verdict, but the trial court's written judgment does not include a fine.

As a general rule, when an oral pronouncement of sentence and a written judgment differ, the oral pronouncement controls. ***Ex parte Madding***, 70 S.W.3d 131, 135 (Tex. Crim. App. 2002). Further, when it has the necessary information before it, an appellate court may correct a trial court's written judgment to reflect its oral pronouncement. ***Thompson v. State***, 108 S.W.3d 287, 290 (Tex. Crim. App. 2003); ***Ingram v. State***, 261 S.W.3d 749, 754 (Tex. App.–Tyler 2008, no pet.). The Texas Rules of Appellate Procedure expressly authorize us to modify the judgment of the trial court. TEX. R. APP. P. 43.2(b).

The jury assessed Appellant's punishment at imprisonment for fifty years and a fine of $10,000. The trial court's oral pronouncement of sentence accurately set out Appellant's punishment in accordance with the jury's verdict. However, the trial court's written judgment does not include a fine. Therefore, the judgment should be modified to include the fine of $10,000 assessed by the jury.

DISPOSITION

We have overruled Appellant's first, second, third, and fourth issues. Having determined that the trial court's written judgment differs from its oral pronouncement, we ***modify*** the trial court's judgment to include a fine of $10,000. We ***affirm*** the trial court's judgment ***as modified***.

BRIAN HOYLE
Justice

Opinion delivered August 22, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, Jr.

(DO NOT PUBLISH)