COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

GERARDO HECTOR MUNOZ,	§	No. 08-20-00020-CR
Appellant,	§	Appeal from the
v.	§	41st Judicial District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC#20180D01588)

O P I N I O N

Appellant Gerardo Hector Munoz was found guilty by a jury of one count of burglary of a habitation, with the use of a deadly weapon, and sentenced to 13 years in prison. In a single issue, Appellant contends that the trial court erred by allowing his case to be tried by a jury of less than 12 persons, in violation of the Texas Constitution and the Texas Code of Criminal Procedure. We agree with the State, however, that because Appellant expressly consented to have his case tried by a 10-person jury, after two jurors who had previously been sworn in were excused, his rights were not violated. The trial court therefore did not err in allowing the matter to proceed to trial with fewer than 12 jurors. Accordingly, we affirm the trial court's judgment of conviction.

I. BACKGROUND

Appellant was indicted on one count of the second-degree felony offense of burglary of a

habitation with the use of a deadly weapon. His case was set for trial on Monday, January 13, 2020. Jury selection was held the Friday before, on January 10, 2020. Immediately after the jury was sworn in, two jurors informed the trial court and parties that they had previously undisclosed grounds for being excused from serving on the jury.

The first juror informed the trial court that she did not speak English, and had not understood her obligation to come forward with this information prior to being sworn in as juror. After the trial court ascertained that the juror was unable to communicate in English, the State's attorney urged that the juror should be excused, but that the trial could go forward with only 11 jurors. Appellant, however, initially objected to excusing the juror, as well as to going forward with only 11 jurors, and requested a mistrial. The trial court excused the juror, and while the court and the attorneys were discussing Appellant's request for a mistrial, a second juror came forward and informed the trial court that she could not serve on the jury for religious reasons. In particular, she explained that during a break in the proceedings, she had consulted with "some spiritual people from [her] congregation," which led her to believe that her faith would not allow her to "pass judgment" on others. The trial court excused the juror, and informed the parties that she intended to declare a mistrial and would reset the matter to the following Monday to select a new jury.

However, before the trial court excused the jury, Appellant's attorney approached the court, stating that he was willing to waive his right to have 12 jurors hear his client's case, as he liked the "favorable" composition of the remaining 10 jurors. In addition, he expressed concern that if jury selection began anew on Monday he might encounter a "worse selection" of jurors at that time. Counsel then put Appellant on the stand, who stated that he had consulted with his attorney and agreed with the decision to waive his right to a 12-person jury, as he was also "happy" with the remaining 10 jurors, believing they would be "sympathetic" to his case. After counsel

informed the court that he intended to discuss the decision further with Appellant over the weekend, the trial court reconvened the case to the following Monday, indicating that it would make a final decision at that time regarding how to proceed.

When the trial court reconvened the case on Monday, the attorneys advised the court that they had reached an agreement to allow the trial to go forward with only the remaining 10 jurors. In addition, defense counsel stated on the record that he had engaged in several conversations with Appellant about the situation over the weekend, and they both believed it would be in Appellant's "best interest to move forward with the 10 jurors that are in this case," and that they were therefore waiving their "right to have a jury of 12 people." After questioning Appellant to ascertain that he understood and agreed to the waiver, the trial court approved of the parties' agreement, and directed them to enter into a written stipulation reflecting the agreement. The stipulation, which was signed by Appellant and both attorneys, stated that: "After each considering the law and their trial strategy, both the State of Texas and the Defendant waive their statutory right that the case be tried by twelve jurors and consent to a trial with ten jurors." It further stated that: "The DEFENDANT expressly states that he has consulted with his counsel and has made this decision freely and voluntarily."

After a week-long trial, the jury found Appellant guilty of one count of burglary of a habitation with the use of a deadly weapon as alleged in the indictment, and assessed his punishment at 13 years in prison. All 10 jurors signed the three verdict forms submitted to them, finding Appellant guilty of burglary, finding that he had used a deadly weapon in the commission of the burglary, and assessing his punishment. Appellant filed a motion for new trial, arguing that the verdict was contrary to the law and the evidence, which was overruled by operation of law. This appeal followed.

II. DISCUSSION

In his sole issue on appeal, Appellant contends that the trial court erred by not declaring a mistrial after excusing the two jurors from the original jury panel, and by instead allowing his case to be heard by the remaining 10 jurors. We disagree.

A. Applicable Law

The Texas Constitution grants a defendant in a felony case the right to be tried by a jury composed of twelve persons. TEX.CONST. ART. V, § 13 ("Grand and petit juries in the District Courts shall be composed of twelve persons."). However, the Constitution provides that: "When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict." TEX.CONST. ART. V, § 13. Pursuant to this grant of authority to change or modify the requirement of a 12-person jury, the state legislature enacted two separate statutory exceptions to the requirement that are in play in this appeal.

First, article 36.29 of the Texas Code of Criminal Procedure, states that "[n]ot less than twelve jurors can render and return a verdict in a felony case," but that if "a juror dies or, as determined by the judge, becomes disabled from sitting at any time before the charge of the court is read to the jury, the remainder of the jury shall have the power to render the verdict." TEX.CODE CRIM.PROC.ANN. ART. 36.29(a). Article 36.29 further states that "when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it." *Id.*

Second, the legislature enacted section 62.201 of the Texas Government Code, which provides that: "The jury in a district court is composed of 12 persons, except that the parties may

agree to try a particular case with fewer than 12 jurors." TEX.GOV'T CODE ANN. § 62.201. The Court of Criminal Appeals has expressly held that this provision applies to both civil and criminal proceedings. *See Hatch v. State*, 958 S.W.2d 813, 815 (Tex.Crim.App. 1997) (en banc) (noting that section 62.201 "makes no distinction between civil and criminal cases."); *see also Hill v. State*, 90 S.W.3d 308, 314 (Tex.Crim.App. 2002) (en banc) (recognizing that section 62.201 applies in criminal proceedings).

In addition, the Code of Criminal Procedure contains various general provisions allowing defendants in a noncapital felony case to waive virtually any right granted to them by law, including the right to a jury trial, which the Court of Criminal Appeals has recognized "carries with it the further right to agree to trial by a jury composed of less than twelve persons." *Hatch*, 958 S.W.2d at 815, *citing* TEX.CODE CRIM.PROC.ANN. ART. 1.15 ("No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded, unless the defendant, upon entering a plea, has in open court in person waived his right of trial by jury in writing in accordance with Articles 1.13 and 1.14[.]"); TEX.CODE CRIM.PROC.ANN. ART. 1.13 (a "defendant in a criminal prosecution for any [non death penalty case] shall have the right, upon entering a plea, to waive the right of trial by jury."); TEX.CODE CRIM.PROC.ANN. ART. 1.14 (a "defendant in a criminal prosecution for any offense may waive any rights secured him by law . . ."). Accordingly, the Court of Criminal Appeals has recognized that there is "no constitutional or statutory impediment" to allowing a case to proceed to trial with less than the required number of jurors, "so long as the defendant waives his right to trial by a complete jury," in accordance with the applicable rules, and the State and the trial court are willing to consent to the waiver. *See Ex parte Garza*, 337 S.W.3d 903, 915 (Tex.Crim.App. 2011), *citing* TEX.CODE CRIM.PROC.ANN. ART. 1.13(a) (when defendant waives his right to a jury trial, "the consent and approval by the court shall be entered

of record on the minutes of the court, and the consent and approval of the attorney representing the state shall be in writing, signed by that attorney, and filed in the papers of the cause before the defendant enters the defendant's plea.").

B. Analysis

Appellant correctly points out that the exception to a 12-person jury set forth in article 36.29 of the Code does not apply to his case, as the two jurors in his case neither died nor were declared disabled within the meaning of this provision, and were instead excused for other, unrelated reasons. *See Brooks v. State*, 990 S.W.2d 278, 286 (Tex.Crim.App. 1999) (en banc) (recognizing that the "language of Article 36.29 of the Texas Code of Criminal Procedure and the cases applying it make clear that the Legislature's intent was to limit the Article's application to those cases where the juror was physically or mentally impaired in some way which hindered his ability to perform his duty as a juror."); *see also Scales v. State*, 380 S.W.3d 780, 783 (Tex.Crim.App. 2012) (to be declared disabled under article 36.29, a trial court must find that the juror suffers from a "physical illness, mental condition, or emotional state that would hinder or inhibit the juror from performing his or her duties as a juror.") (internal quotation marks omitted).

However, as the State points out, the exception to a 12-person jury set forth in section 62.201 of the Government Code does apply to Appellant's case. As explained above, section 62.201 permits the parties in district court proceedings in both civil and criminal cases to "agree to try a particular case with fewer than 12 jurors." TEX.GOV'T CODE ANN. § 62.201; *Hatch*, 958 S.W.2d at 815. And, in the present case, both Appellant and the State's attorney expressly agreed, both orally and in writing, to have the case tried with the 10 remaining jurors, and Appellant expressly stated that he was entering into the agreement "freely and voluntarily" after consulting

with his attorney.[1]

Although Appellant appears to recognize that section 62.201 allows a defendant to agree to have his case heard by "fewer than 12 jurors," he contends that it only allows a defendant to agree to have his case heard by 11 jurors, and no fewer. He therefore argues that the court was not permitted to accept his agreement to have his case heard by only 10 jurors. His argument in this regard is two-fold. First, he asserts that article 36.29 of the Code of Criminal Procedure only applies to situations in which *one* juror has died or has been declared disabled, and therefore only permits a trial to go forward when there are 11 jurors remaining. Second, he argues that section 62.201 of the Government Code must be read in conjunction with article 36.29, to impose a similar restriction of only allowing a defendant to agree to have his case heard by 11 jurors, but no fewer. On this second point, he relies on *Cantu v. State*, 842 S.W.2d 667 (Tex.Crim.App. 1992) (en banc), for the proposition that when a provision in the Government Code Provision conflicts with, or otherwise "deals with the same issue," as a provision in the Code of Criminal Procedure, the Code of Criminal Procedure takes precedence.

The first prong of Appellant's argument--that article 36.29 is limited to *one* juror who has died or has been declared disabled--is tenuous at best.[2] But even if we were to agree with that

[1] Appellant does not challenge on appeal that his consent to the agreement was made freely and voluntarily as reflected in the parties' stipulation.

[2] In particular, Appellant focuses on article 36.29's reference to "a juror" who has died or become disabled, and interprets this to mean that a trial may only continue to verdict when "one juror" has died or become disabled. In this regard, he relies primarily on *Ex parte Hernandez*, 906 S.W.2d 931, 932 (Tex.Crim.App. 1995) (en banc), *overruled* by *Hatch v. State*, 958 S.W.2d 813 (Tex.Crim.App. 1997) (en banc), in which the court stated that: "Article 36.29(a) commands that a felony verdict may not be returned by fewer than twelve jurors unless *one* of the jurors 'may die or be disabled from sitting at any time before the charge of the court is read to the jury (emphasis supplied)." There are several problems with Appellant's reliance on *Hernandez*. First, when *Hernandez* was decided, article 36.29(a) expressly referred to situations in which "one juror" had died or had become disabled during a trial, but that provision was amended in 2001 to substitute the term "one juror" for "a juror." *See* Act of May 22, 2001, 77th Leg., R.S., ch. 1000, § 2, 2001 TEX.GEN.LAWS 2177. In addition, the court in *Hernandez* did not actually rely on article 36.29 in its analysis, as the juror in that case neither died nor became disabled, but had instead been disqualified due to a bias or prejudice, rendering article 36.29 inapplicable. *Id.* at 932. The court in *Hernandez* went on to hold that the defendant therein--who had offered to agree to proceed with the remaining 11 jurors--could not waive his right to a 12-person

proposition, there is no conflict between article 36.29 of the Code of Criminal Procedure and section 62.201 of the Government Code, as the two provisions are not in conflict and do not deal with the same issue. As the Court of Criminal Appeals has noted, these Code provisions address two entirely different instances: one when a juror dies or becomes disabled, and the second when a defendant consents--regardless of the reasons--to allow his trial to go forward with fewer than 12 jurors. *See, e.g.*, *Hill*, 90 S.W.3d at 314 (recognizing that Texas law provides for "two instances in which a trial can proceed with eleven jurors: (1) when the parties consent under § 62.201 [of the Government Code], and (2) regardless of the parties' consent, when a juror dies or becomes disabled under article 36.29(a) [of the Texas Code of Criminal Procedure]."). In addition, the court has expressly rejected the argument that the two provisions "deal with the same subject and cannot be reconciled," noting that section 62.201 permits a party to consent to fewer jurors than the number specified in article 36.29, and that the two provisions may therefore exist "side by side." *Hatch*, 958 S.W.2d 816 n.4. Accordingly, regardless of whether article 36.29 only permits a criminal trial to proceed if 11 jurors remain, as Appellant believes, this in no way limits a defendant's right under section 62.201 of the Government Code to agree to allow a lesser number of jurors to hear his case.

In addition, there is nothing in the language of section 62.201 itself that would limit the right of a defendant to only agree to allow 11 jurors to hear his case, rather than a lesser number as the circumstances might warrant. To the contrary, the express language of 62.201 of the Code provides that a defendant has the right to agree to allowing "fewer than 12 jurors" to hear his case, without specifying the minimum number of jurors that must remain to hear his case pursuant to

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jury, and that the trial court therefore had no choice but to declare a mistrial. *Id*. at 923-33. However, as the State points out, the Court of Criminal Appeals expressly overruled *Hernandez* in its opinion in *Hatch* when, as discussed above, it held that a defendant could in fact waive his right to a 12-person jury. *Hatch*, 958 S.W.2d at 814.

any such agreement. TEX.GOV'T CODE ANN. § 62.201. In interpreting this Code provision, we must presume that if the legislature had intended to impose a requirement that a defendant could only agree to have 11 jurors hear a case, it would have done so; we may not add to the statute by imposing such a requirement when the legislature itself has chosen not to do so. *See generally Ritz v. State*, 533 S.W.3d 302, 304-05 (Tex.Crim.App. 2017) (recognizing that as long as a statute is constitutional, a court must enforce the statute as it is written, "not as it might or even should have been written," and therefore, "[w]here a statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from the statute."). Moreover, Appellant has not cited any cases that have interpreted section 62.201 of the Government Code in the manner he proposes, nor are we aware of any.

And finally, we note that the Texas Constitution clearly allows a felony case to proceed to trial with less than 11 jurors, and in fact as few as nine, as it provides that when as many as three jurors die or become disabled from sitting on a jury, "the remainder of the jury shall have the power to render the verdict." TEX.CONST. ART. V, § 13. Accordingly, we find no state constitutional or statutory prohibitions that would limit a defendant's right to agree to have his case heard by only 10 jurors.[3] We therefore conclude that the trial court did not err by consenting to the parties' agreement to have Appellant's case heard by a 10-person jury.[4] Appellant's sole issue on appeal is overruled.

[3] Appellant wisely does not claim that his federal constitutional rights were violated by having his case heard by fewer than 12 jurors. *See Williams v. Florida*, 399 U.S. 78, 86 (1970) (holding that a "12-man panel is not a necessary ingredient of 'trial by jury'" under the United States Constitution).

[4] The State also argues that Appellant should be precluded from arguing on appeal that the trial court erred by allowing his case to be heard by only ten jurors, based on the doctrine of "invited error," noting that it was Appellant's attorney who first proposed the idea of going to trial with only 10 jurors *See Cary v. State*, 507 S.W.3d 750, 755 (Tex.Crim.App. 2016) ("the law of invited error estops a party from making an appellate error of an action it induced."). However, because we have determined that the trial court did not err in allowing Appellant's case to be heard by a 10-person jury, we need not address this argument in our analysis.

III. CONCLUSION

The trial court's judgment is affirmed.

JEFF ALLEY, Justice

August 12, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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