AFFIRM; and Opinion Filed September 25, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00466-CR

COREY ARLYN SMITH, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 296th Judicial District Court
Collin County, Texas
Trial Court Cause No. 296-82354-2014

MEMORANDUM OPINION

Before Justices Lang-Miers, Brown, and Boatright
Opinion by Justice Brown

Following a jury trial, Corey Arlyn Smith appeals his conviction for attempted assault family violence by impeding breath or circulation. In a single issue, he contends the trial court abused its discretion in denying his motion for new trial because he presented evidence of jury misconduct. We affirm.

Appellant was charged with family violence assault by impeding breath or circulation. The indictment alleged he intentionally, knowingly, and recklessly caused bodily injury to Danielle Savoy, a member of his family or his household or a person with whom he had a dating relationship, by intentionally, knowingly, and recklessly impeding Savoy's normal breathing and blood circulation by applying pressure to her throat and neck. *See* TEX. PENAL CODE ANN. § 22.01(b)(2)(B) (West Supp. 2016). At trial, Savoy testified that she married appellant in July 2013. On September 21, 2013, Savoy repeatedly asked appellant to leave their house because

he was intoxicated. When appellant refused to leave, Savoy dialed 911 on her cell phone, which was plugged into the living room wall with a ten-foot cord. Appellant "snapped the phone cord out of the wall" and wrapped it around Savoy's neck. The cord also went around her arm and pressed the phone against her face. Savoy testified the cord crossed in the front of her neck. Appellant lifted up the cord, and she could not breathe for a bit. Appellant left the house after Savoy's grandmother entered the room.

The jury found appellant guilty of the lesser included offense of attempted assault family violence by impeding breath or circulation. It assessed his punishment at confinement in state jail for twelve-and-a-half months.

Appellant timely filed a motion for new trial in which he asserted he was entitled to a new trial under rule of appellate procedure 21.3(f). That rule provides that a defendant must be granted a new trial when, after retiring to deliberate, the jury has received other evidence. TEX. R. APP. P. 21.3(f). Appellant supported the motion with the affidavit of his attorney. In the affidavit, the attorney stated that he and the prosecutor met with the jurors after sentencing to answer questions and get their critiques. Two jurors pointed out there was a conflict about whether the phone cord was "wrapped around the neck or just the front of the neck." The jurors told counsel they used "an iPhone cord to try and demonstrate if the cord was wrapped around the neck and if it could impede breath and or cause choking." It appeared to appellant's counsel that the experiment "influenced the jurors in a negative way" towards appellant. Appellant's motion for new trial was overruled by operation of law.

In this appeal, appellant argues the trial court abused its discretion in denying his motion for new trial because he presented evidence the jury used an outside influence to reach a verdict. The State contends appellant failed to preserve this issue for our review because the record does not show he presented the motion to the trial court within ten days of filing it as required by rule

of appellate procedure 21.6. *See* TEX. R. APP. P. 21.6. Mere filing of a motion for new trial is insufficient to show presentment. *Stokes v. State*, 277 S.W.3d 20, 21 (Tex. Crim. App. 2009). A defendant must give the trial court actual notice that he timely filed a motion for new trial. *Obella v. State*, No. PD-1032-16, 2017 WL 510568, at *1 (Tex. Crim. App. Feb. 8, 2017). The rationale for requiring presentment is the same as that which supports preservation of error generally. *Id.* Presentment must be apparent from the record, and it may be shown by such proof as the judge's signature or notation on the motion or proposed order, or an entry on the docket sheet showing presentment or setting a hearing date. *Gardner v. State*, 306 S.W.3d 274, 305 (Tex. Crim. App. 2009).

The trial court pronounced sentence on April 6, 2016, and signed the judgment on April 18, 2016. Appellant filed his motion for new trial on April 19, 2016. The motion included a "certificate of presentment" by which defense counsel certified that a true and correct copy of the motion was hand-delivered to the "Office for the 296th Judicial District Court of Collin County" on April 12, 2016. In addition, an entry on the court's docket sheet shows a motion for new trial was filed on April 19th. Neither the certificate of presentment nor the docket sheet entry, however, shows appellant gave the trial court actual notice of his motion for new trial. *See Burris v. State*, 266 S.W.3d 107, 115–16 (Tex. App.—Fort Worth 2008, no pet.) (certificate of presentment and docket sheet notation that motion was filed are insufficient to establish presentment under rule 21.6); *Longoria v. State*, 154 S.W.3d 747, 762–63 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (same); *cf. Stokes*, 277 S.W.3d at 25 (entry on docket sheet stating "Motion New Trial presented to court no ruling per judge" sufficient to show presentment). There is nothing in the record to show the trial judge ever saw appellant's motion for new trial, which was overruled by operation of law. Because the record does not show the motion was

actually presented to the trial court, the issue of whether the court erred in denying appellant a new trial is not preserved for our review. *See Longoria*, 154 S.W.3d at 762–63.

Even if appellant preserved his complaint for our review, it is without merit. We review a trial court's denial of a motion for new trial under an abuse of discretion standard. *McQuarrie v. State*, 380 S.W.3d 145, 150 (Tex. Crim. App. 2012). A motion for new trial must be granted if, after retiring to deliberate, the jury has received other evidence. TEX. R. APP. P. 21.3(f). To prove the jury received other evidence, the defendant is limited by rule of evidence 606(b) to juror testimony of an outside influence. *See Garza v. State*, 82 S.W.3d 791, 794 (Tex. App.—Corpus Christi 2002, no pet.). Rule 606(b) provides that during an inquiry into the validity of a verdict, a juror may not testify about any statement made or incident that occurred during the jury's deliberations, the effect of anything on that juror's or another juror's vote, or any juror's mental processes concerning the verdict. TEX. R. EVID. 606(b)(1). An exception permits a juror to testify about whether an outside influence was improperly brought to bear on any juror. *Id.* 606(b)(2)(A). An outside influence is something originating from a source outside of the jury room and other than from the jurors themselves. *McQuarrie*, 380 S.W.3d at 154.

Appellant argues that the jury's use of a "foreign object," the cell phone charger cord, was an outside influence. But the jury's use of the cord occurred during deliberations. Because the experiment originated inside the jury room and from the jurors themselves, it was not an outside influence. *Cf. id.* (juror's internet research, which occurred at her home during overnight break, about effects of date rape drugs was outside influence). The jurors were prohibited under rule 606(b) from testifying about the incident that formed the basis for appellant's motion for new trial because it did not involve an outside influence. Accordingly, the trial court did not abuse its discretion in failing to grant appellant a new trial. We overrule appellant's sole issue.

We affirm the trial court's judgment.

/Ada Brown/
ADA BROWN
JUSTICE

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TEX. R. APP. P. 47.2(b).

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

COREY ARLYN SMITH, Appellant	On Appeal from the 296th Judicial District Court, Collin County, Texas
No. 05-16-00466-CR V.	Trial Court Cause No. 296-82354-2014.
	Opinion delivered by Justice Brown, Justices
THE STATE OF TEXAS, Appellee	Lang-Miers and Boatright participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 25th day of September, 2017.