

Affirmed and Opinion Filed June 23, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-18-00822-CR

**WILLIAM TRAVIS HENDRIX, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 366th Judicial District Court
Collin County, Texas
Trial Court Cause No. 366-82997-2017**

MEMORANDUM OPINION

Before Justices Osborne, Partida-Kipness, and Pedersen, III
Opinion by Justice Partida-Kipness

Appellant William Travis Hendrix appeals his conviction for Assault Impeding Breath/Circulation of a Family/House Member under section 22.01(b)(2)(B) of the Texas Penal Code and seeks a new trial. In a single issue, Hendrix contends the trial court abused its discretion by overruling his objection to allowing an alternate juror to remain present during deliberations. We affirm the judgment.

BACKGROUND

Hendrix was convicted of felony assault of a family or household member by strangulation. TEX. PENAL CODE § 22.01(b)(2)(B). The jury found Hendrix used or exhibited a deadly weapon and sentenced him to five years' imprisonment. The jury consisted of twelve jurors and two alternate jurors. At the conclusion of the presentation of evidence at the guilt-innocence phase, immediately after both sides closed but before the jury charge was read and before the parties presented closing arguments, the trial judge gave the following instruction in open court in the presence of the parties, counsel, and the jury:

All right. Ladies and gentlemen, you heard all of the evidence in the guilt innocence phase of this trial that you're going to hear. As I told you earlier, at the conclusion of the evidence, we can take a break to prepare the Court's charge. And after the charge is read, the attorneys are going to be allowed to make closing statements. We are ahead of schedule. We had the charge prepared for you. What I'm going to do is read that to you. And let me tell you, as I read through the charge, you're probably going to be hearing some terminology and some definitions and things that you have not heard before. So let me tell you what I want you to do. As soon as you get back into the jury room and begin your deliberations, to sit down and read the charge. It will make much more sense to you when you have a hard copy in front of you and you have a chance to read it. So if there's any questions about any terminology, I think you'll understand it better if you do that. And, as I said, the charge contains information that you will need in order to reach a verdict. So it's also important to read it for that reason as well.

The trial judge then asked the two alternate jurors to raise their hands and instructed them as follows:

The alternates? Raise your hands if you're an alternate. There you are. I'm going to allow you to be in the jury room when the deliberations take place but you cannot vote. Does that make sense?

The trial judge gave this instruction at 9:42 a.m.¹ Hendrix did not object. One of the alternate jurors, however, questioned why they needed to stay “if we have no say so or no vote.” The trial court explained that the alternates needed to stay in case a juror was excused during deliberations. By staying, the alternate would have all of the knowledge and information that had taken place in the deliberations when the alternate replaced the excused juror. One of the alternates then asked to be released because of personal obligations. After conferring with counsel, the trial judge released the alternate juror. Hendrix lodged no objections.

The trial court then proceeded to read the jury charge. Closing arguments began at 9:57 a.m., the jury retired to deliberate at 10:42 a.m., and the court recessed. Eleven minutes later, at 10:53 a.m., Hendrix objected to the alternate juror's presence in the jury room and participation in jury deliberations:

MR. FARKAS: Your Honor, it's come to my attention that earlier this morning, you excused one of the two alternate jurors for some personal issues, but that you have allowed the other alternate juror in this case to be in the jury room and participate in jury deliberations even though that alternate doesn't have a vote. We object to this and we feel that it allows someone who is not a juror to be deliberating with the jury and assisting them in coming to a vote. We believe that is improper. And we object to allowing an alternate juror who has not been seated as a

¹ Hendrix's counsel, Andrew Farkas, rested and closed at 9:40 a.m., immediately before the trial judge gave these instructions.

juror to be in the jury room participating with the other members of the jury in their deliberations.

The trial court overruled the objection. The jury returned a guilty verdict and, after a recess, the case proceeded to the punishment phase.

At the conclusion of the presentation of evidence in the punishment phase, the trial judge read the punishment charge, and counsel presented closing arguments. The trial judge then instructed the jury to return to the jury room and begin deliberations. The judge reminded the alternate juror that “once again, you can be in the jury room but cannot vote.” Hendrix made no objections regarding the alternate juror. The jury returned a unanimous verdict assessing punishment at five years’ confinement. This appeal followed.

STANDARD OF REVIEW

Hendrix complains the trial court violated Article 36.22 by allowing the alternate jury to be present during jury deliberations. We review a claim of statutory error by determining whether any error affected appellant’s substantial rights. *Trinidad v. State*, 312 S.W.3d 23, 27, n.15 (Tex. Crim. App. 2010) (harm from statutory error is governed by rule of appellate procedure 44.2(b)); TEX. R. APP. P. 44.2(b). Unless the error affected appellant’s substantial rights, it must be disregarded. *See* TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury’s

verdict. *Castillo v. State*, 319 S.W.3d 966, 971 (Tex. App.—Austin 2010, pet. ref'd) (citing *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)).

APPLICABLE LAW

Article V, section 13 of the Texas Constitution provides that “petit juries in the District Court shall be composed of twelve persons[.]” TEX. CONST. art. V, § 13. Courts routinely impanel alternate jurors who can replace a regular juror who must be released from the jury unexpectedly during trial. In a district court, the judge may direct that not more than four alternate jurors be called and impaneled in addition to the regular jury. TEX. CODE CRIM. PROC. art. 33.011(a). “Alternate jurors . . . shall have the same functions, powers, facilities, security, and privileges as regular jurors.” TEX. CODE CRIM. PROC. art. 33.011(b). If an alternate juror is not called upon to replace a regular juror, the alternate juror “shall be discharged after the jury has rendered a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment.” *Id.* The statute does not state whether an alternate juror may be present during and participate in deliberations. However, Article 36.22 of the Texas Code of Criminal Procedure states that “[n]o person shall be permitted to be with a jury while it is deliberating.” TEX. CODE CRIM. PROC. art. 36.22.

In *Trinidad*, the Texas Court of Criminal Appeals held that allowing alternate jurors to be present in the jury room during deliberations did not violate the constitutional prohibition against deliberation by more than twelve jurors. *Trinidad*,

312 S.W.3d at 28. The court declined, however, to determine whether the presence of an alternate juror during deliberations violated article 36.22. *Id.* at 29–30.

ANALYSIS

In his sole issue, Hendrix argues that the alternate juror’s presence in the jury room during deliberations violated Article 36.22 of the Texas Code of Criminal Procedure and caused Hendrix presumptive harm that the State failed to rebut. Hendrix seeks a new trial. The State argues that Hendrix failed to preserve error because his objection to the presence of the alternate juror was untimely. We first address the State’s preservation of error argument.

A. Preservation of error

In order to preserve a complaint for appellate review, a party must timely object, stating the specific legal basis for the objection if it is not apparent from the context of the objection. TEX. R. APP. P. 33.1(a)(1); *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). An objection is timely if made at the earliest opportunity or as soon as the grounds for the objection become apparent and made at a time when the judge is in the proper position to do something about it. *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009). This gives the trial judge an opportunity to correct, or in this case, prevent the error. *E.g.*, *Trinidad*, 312 S.W.3d at 29 (appellant waived complaint regarding violation of Article 36.22 by failing to timely object).

Here, the grounds for Hendrix's objection to the alternate juror being present in the jury room were apparent when the trial judge instructed the alternate jurors that they would be allowed to be in the jury room during deliberations but could not vote. The record shows that Hendrix's counsel was present during that exchange, made no objections, and took part in a bench conference regarding the request of one alternate juror to be released from service, all of which occurred before closing arguments. Hendrix's counsel was again alerted to the issue after closing arguments when the jury left the courtroom to begin deliberations. There is nothing in the record to indicate that Hendrix's counsel was not present or was in some other way unable to observe the jury panel at the time the jury panel was sent to begin deliberations. Because Hendrix did not object at the time the jury was sent to deliberate, his objection was not made at the time the trial court was in the proper position to prevent the error. The objection was, therefore, not timely and not preserved for appellate review. *See Becerra v. State*, No. 10-17-00143-CR, 2019 WL 2479957, at *2 (Tex. App.—Waco June 12, 2019, pet. granted) (objection untimely when made forty-five minutes after jury began deliberating with alternate juror present); *see also Castillo v. State*, 319 S.W.3d 966, 970 (Tex. App.—Austin 2010, pet. ref'd) (objection untimely when made after jury began deliberating with alternate juror present).

Further, the alternate juror was permitted to be present during the jury's deliberations on punishment. Before the jury retired to deliberate punishment, the

trial judge instructed the alternate juror that “once again, you can be in the jury room but cannot vote.” Hendrix made no objections regarding the alternate juror or the court’s instruction. He, therefore, also waived any complaint regarding the alternate juror’s presence during punishment deliberations. *See, e.g., Castillo*, 319 S.W.3d at 970 (appellant waived complaint by failing to object to subsequent oral instruction to the jury that alternate juror may not actively speak or participate in deliberations); *see also Perez v. State*, No. 04-08-00227-CR, 2010 WL 2935785, at *1–2 (Tex. App.—San Antonio July 28, 2010, pet. ref’d) (mem. op., not designated for publication) (complaint about a violation of Article 36.22 forfeited by appellants’ failure to object to court’s instruction to alternate jurors).

In addition, a violation of Article 36.22 is considered juror misconduct. *See Ocon v. State*, 284 S.W.3d 880, 885 (Tex. Crim. App. 2009) (characterizing violation of article 36.22 as complaint of juror misconduct); *Hughes v. State*, 24 S.W.3d 833, 842 (Tex. Crim. App. 2000) (same). To preserve error caused by juror misconduct, the defendant must either move for a mistrial or file a motion for new trial supported by affidavits of a juror or other person in a position to know the facts alleging misconduct. *Castillo*, 319 S.W.3d at 970 (citing *Trout v. State*, 702 S.W.2d 618, 620 (Tex. Crim. App. 1985); *Menard v. State*, 193 S.W.3d 55, 59 (Tex. App.—Houston [1st Dist.] 2006, pet. ref’d)). Here, Hendrix did neither and, therefore, failed to preserve error.

B. Presumption of harm

Hendrix concedes no juror misconduct occurred here. He maintains instead that the mere presence of the alternate juror in the jury room during deliberations raised a rebuttable presumption of harm that the State failed to rebut and entitles him to a new trial. We disagree and, as such, even if Hendrix had preserved error, our conclusion would not be different.

Article 36.22 provides that no person is permitted to be with a jury while it is deliberating, or to converse with a juror about the case on trial except in the presence and by the permission of the trial court. TEX. CODE CRIM. PROC. art. 36.22. Harm to the accused is presumed when a juror converses with an unauthorized person about the case. *See Quinn v. State*, 958 S.W.2d 395, 401 (Tex. Crim. App. 1997); *Castillo*, 319 S.W.3d at 973; *Stults v. State*, 23 S.W.3d 198, 206 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). If the presumption of harm arises, the State has the burden to rebut the presumption by showing no injury or prejudice to the accused. *Stults*, 23 S.W.3d at 206 (citing *Quinn*, 958 S.W.2d at 401). However, the defendant has the initial burden to show that a conversation about the case on trial occurred between a juror and an unauthorized person. *Chambliss v. State*, 647 S.W.2d 257, 265–66 (Tex. Crim. App. 1983); *Castillo*, 319 S.W.3d at 973; *Stults*, 23 S.W.3d at 206–07. The defendant's burden is not satisfied if there is no showing what a reported conversation was about. *Stults*, 23 S.W.3d at 207.

Here, after the jury retired to deliberate, the alternate juror was with the jury for eleven minutes before Hendrix objected. Hendrix made no showing of any conversation about the case between the alternate juror and the regular jurors during that time period or at any time during the deliberations that followed. Rather, his counsel concedes that no misconduct occurred. At trial, Hendrix made no attempt to question the jurors about whether any conversations occurred and made no further objections after the court overruled his first objection. Without a showing that the alternate juror actually participated in deliberations or communicated with the regular jurors about the case, Hendrix has not met his initial burden to raise a presumption of harm. *See Castillo*, 319 S.W.3d at 973 (presumption of harm did not arise because defendant presented no evidence that the alternate jurors conversed with the regular jurors); *see also Patino v. State*, No. 12-18-00327-CR, 2019 WL 4197057, at *2 (Tex. App.—Tyler Sept. 4, 2019, no pet.) (mem. op., not designated for publication) (appellant did not meet his initial burden where he made no showing of any conversation about the case between the alternate juror and the regular jurors during the time period involved); *Jones v. State*, No. 09-15-00092-CR, 2015 WL 6998971, at *5–6 (Tex. App.—Beaumont Nov. 12, 2015, pet. ref'd) (mem. op., not designated for publication) (rejecting appellant's claim that alternate juror's presence during deliberations raised presumption of harm where appellant presented no evidence that the alternate juror "participated" through verbal or non-verbal means with the jurors and, therefore, did not meet his initial burden of showing

harm). As such, we need not determine whether the trial court committed reversible error by allowing the alternate juror to remain with the jury during deliberations. *See Castillo*, 319 S.W.3d at 970, 972-73 (overruling complaint that alternate jurors' presence in jury room violated statutory and constitutional rights where no presumption of harm arose); *see also Klapesky v. State*, 256 S.W.3d 442, 452 (Tex. App—Austin 2008, pet. ref'd) (overruling complaint that trial court allowed alternate jurors to enter jury room to begin deliberations, noting that jury had not begun deliberations in five minutes that alternate jurors were in jury room, and there was no showing of any conversation about the case between alternate jurors and regular jurors during time period involved);

Moreover, even assuming the trial court committed a statutory error by allowing the alternate juror to remain present during deliberations, Hendrix failed to show the error affected his substantial rights. *See Trinidad*, 312 S.W.3d at 27, n.15 (harm from statutory error is governed by rule of appellate procedure 44.2(b)); TEX. R. APP. P. 44.2(b) (unless the error affected appellant's substantial rights, it must be disregarded). Here, Hendrix made no showing that the alternate juror conversed with the regular jurors regarding the case in violation of Article 36.22. Under this record, Hendrix cannot establish his substantial rights were affected. *See, e.g., Castillo*, 319 S.W.3d at 972 (no effect on substantial rights where appellant failed to meet initial burden to show alternate juror conversed about the case with regular jurors).

CONCLUSION

Hendrix failed to preserve error on his claim that the trial court violated Article 36.22 of the code of criminal procedure by permitting an alternate juror to be present during the jury's deliberation. To the extent Hendrix preserved error, he did not meet his initial burden to show that the alternate juror conversed with any juror about the case and, as such, no presumption of harm arose. Accordingly, we overrule Hendrix's sole issue on appeal and affirm the trial court's judgment.

/Robbie Partida-Kipness/

ROBBIE PARTIDA-KIPNESS
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

WILLIAM TRAVIS HENDRIX,
Appellant

No. 05-18-00822-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 366th Judicial
District Court, Collin County, Texas
Trial Court Cause No. 366-82997-
2017.

Opinion delivered by Justice Partida-
Kipness. Justices Osborne and
Pedersen, III participating.

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

Judgment entered this 23rd day of June, 2020.