

Opinion issued March 5, 2009



In The
Court of Appeals
For The
First District of Texas

NOS. 01-07-01031-CR
01-07-01032-CR
01-07-01033-CR

EDWIN KENNETH TUCKER, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Cause Nos. 07CR3011, 07CR3012, 07CR3013**

MEMORANDUM OPINION

A jury convicted appellant, Edwin Kenneth Tucker, of the offenses of

indecent with a child by exposure,¹ aggravated sexual assault of a child,² and indecent with a child by exposure.³ The jury then assessed punishment at 12 years' confinement on the aggravated sexual assault charge and 10 years' confinement on each of the indecent charges. In three related points of error, appellant complains that the trial court erred by asking questions about the "one witness rule" during voir dire, and that trial counsel was ineffective for failing to object to the State's remarks about the "one witness rule" during voir dire. We affirm.

VOIR DIRE ON THE "ONE-WITNESS RULE"

Texas Code of Criminal Procedure article 38.07 provides as follows:

(a) A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred.

(b) The requirement that the victim inform another person of an alleged offense does not apply if at the time of the alleged offense the victim was a person:

(1) 17 years of age or younger[.]

TEX. CODE CRIM. PROC. ANN. art 38.07 (Vernon Supp. 2008). This statute applies

¹ See TEX. PENAL CODE ANN. § 21.11(a)(2) (Vernon 2003). The trial court cause number for this offense is 07CR3011, and the appellant cause number is 01-07-01031-CR.

² See TEX. PENAL CODE ANN. § 22.021(a)(2)(B) (Vernon Supp. 2008). The trial court cause number for this offense is 07CR3012, and the appellant cause number is 01-07-01032-CR.

³ See TEX. PENAL CODE ANN. § 21.11(a)(1) (Vernon 2003). The trial court cause number for this offense is 07CR3013, and the appellant cause number is 01-07-01033-CR.

the “one-witness rule” to child sexual assault and indecency cases. Specifically, the statute provides that the testimony of a child victim alone is sufficient to support a conviction for indecency with or sexual assault of a child. *See Lee v. State*, 176 S.W.3d 452, 458 (Tex. App.—Houston [1st Dist.] 2004), *aff’d*, 206 S.W.3d 620 (Tex. Crim. App. 2006).

During voir dire, the trial court instructed the prospective jurors as follows:

You have to be able to follow the instructions that I give and the statement that in order to convict the State must prove each and every element of the offense and it can be done with only one witness, if you believe that person as to each and every element. If you don’t believe that person, then you wouldn’t be able to convict.

If you believe each and every element and that’s all you have, is the word of one witness and nothing else, then it depends on whether or not you believe that person has proven all of the elements beyond a reasonable doubt, but the case can go to a jury with just—I’ll put it this way: If testimony is offered by one witness in the case and in my mind the witness has testified about all the elements of an offense and, even then, it’s up to the jury whether or not they believe that person or not, then I’ll let that juror make that decision and because the law permits that. That’s what we mean about the one-witness rule.

So, but ultimately the jury is the one that determines: Is that person telling the truth[?] Do I believe that person and did that person testify as to all the elements of the offense. And that’s what that means. If you cannot follow that rule, and it’s perfectly all right if you tell me that you cannot follow that rule, then you wouldn’t be qualified to sit on the jury. So I guess you can ask your questions again.

The prosecutor also, without objection, questioned the venire members about their ability to follow the “one-witness rule.”

[I] have to prove each and every element to you beyond a reasonable

doubt. If I don't prove one element to you, you'd have to acquit. That's my job, is to bring you all the facts that will support each element that I have to prove. That's why the burden is on me to prove each and every case beyond a reasonable doubt.

One of the things that the legislature also allows me to do is present a witness to you and if that one witness can testify to all the elements that I have to prove to you beyond a reasonable doubt, and you believe that witness, you can convict on the testimony of one witness. The law allows that. The kicker to that is they have to testify to all the elements and you have to believe them. So they come, some testify to all of the elements, but you might not believe them and if its just one witness I produce to you, then I haven't proven my case; does everybody understand that? Can everyone follow the law? If I produce one witness that can testify to all of the elements and you believe that witness, can you—is that enough for you?

After voir dire, all witnesses who indicated that they could not follow the “one-witness” rule, as explained to them by the Court and the prosecutor, were struck from the jury for cause.

In his first point of error, appellant contends the trial court erred by instructing the prospective jurors on the “one-witness rule” because by doing so, he lessened the State's burden of proof. In points of error two and three, appellant contends his trial counsel was ineffective for not objecting to the voir dire discussions regarding the “one-witness rule.”

Both the Court of Criminal Appeals and this Court have held that it is proper for the State to ask during voir dire if jurors can convict based on the testimony of one witness if the jurors believe that witness beyond a reasonable doubt on all of the necessary elements establishing an offense because a negative answer by a juror to

the question renders the prospective juror challengeable for cause. *See Lee v. State*, 206 S.W.3d 620, 623–24 (Tex. Crim. App. 2006), *Castillo v. State*, 913 S.W.2d 529, 533 (Tex. Crim. App. 1995); *Blackwell v. State*, 193 S.W.3d 1, 19 (Tex. App.—Houston [1st Dist.] 2006, pet. ref’d).

The voir dire questions in this case are also proper because they inform the prospective jurors that they may convict based on the testimony of a single witness if the witness provides evidence on each element of the offense and if the prospective jurors believe the witness. Under *Lee*, *Castillo*, and *Blackwell*, the voir dire questions in this case were not objectionable, thus the trial court did not abuse its discretion by permitting the questions. *See Blackwell*, 193 S.W.3d at 19 (holding that we will not disturb trial court’s ruling on propriety of voir dire questions absent abuse of discretion.) Similarly, trial counsel is not ineffective for failing to object to a proper voir dire question.

We overrule points of error one, two, and three.

CONCLUSION

We affirm the judgments of the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Alcala and Hanks.

Do not publish. TEX. R. APP. P. 47.2(b).