

Opinion issued April 14, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-08-00932-CR

COURTNEY JAY SCALES, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 1145246**

MEMORANDUM OPINION

In light of the petition for discretionary review filed by appellee, we withdraw our previous opinion of December 20, 2010. Our judgment of the same date remains unchanged. We substitute the following opinion in its stead.

See TEX. R. APP. P. 50.

A jury found appellant, Courtney Jay Scales, guilty of aggravated robbery and assessed his punishment at 20 years confinement.¹ In two points of error, appellant asserts that the trial court abused its discretion when it dismissed a juror during deliberations, and that he received ineffective assistance of counsel. We reverse and remand for a new trial.

FACTS

During a brief recess at guilt/innocence deliberations, the judge received a note from jury foreman Jim O’Neil which read: “We have one juror who refuses to deliberate this case any further nor take the facts, testimony, of this case into account. I request she be removed from the jury.” Outside the presence of the jury, the foreman was sworn and questioned by the judge regarding the “one juror.”

After the jury foreman left the courtroom, defense counsel requested that the judge take the juror, later determined to be Regina Collins, on voir dire to make his own first-person inquiry as to the foreman’s claim. The judge refused to do so but then summoned the jury foreman back for additional questioning.

Following this second exchange with the jury foreman, and with no first-person examination of juror Collins herself, the judge dismissed Collins and

¹ TEX. PENAL CODE ANN. § 29.03(a)(2), (b) (Vernon 2003).

seated an alternate juror. After seating the alternate juror, the judge summoned Collins and had some sort of discussion with her, the substance of which is unknown because the Court made no record of it. Once Collins departed from the courtroom, the judge dictated a statement on the record that noted his dismissal of juror Collins was “because she was unable to deliberate.”

Within thirty minutes of seating the alternate juror, the jury returned a guilty verdict for appellant. No motion for new trial was filed.

Improper Dismissal of a Juror

Appellant’s first point of error contends that the trial court abused its discretion in dismissing Collins and replacing her with an alternate because Collins had participated in deliberations and reached a decision contrary to her fellow jurors. Appellant further contends that because Collins’ dismissal apparently stemmed from her view of the sufficiency of the evidence, her dismissal deprived him of his constitutional right to a unanimous jury verdict. *See* TEX. CONST. art. V, § 13; *see also Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005) (stating Texas Constitution requires jury unanimity in felony cases); *see generally United States v. Thomas*, 116 F.3d 606, 621 (2nd Cir. 1997) (“to remove a juror because he is unpersuaded by the Government’s case is to deny the defendant his right to a unanimous verdict”).

Under Texas Code of Criminal Procedure Article 33.011, a trial court

may seat an alternate juror to “replace jurors who, prior to the time the jury renders a verdict on guilt or innocence of the defendant and, if applicable, the amount of punishment, become or are found to be unable or disqualified to perform their duties.” TEX. CODE CRIM. PROC. art. 33.011(b) (Vernon Supp. 2010). A trial court, however, may not dismiss a juror under this provision without a finding—supported by the evidence—that the juror was either unable to serve or disqualified from serving. *See id.*; *see also Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991) (trial court abuses its discretion if it rules without supporting evidence). There is no presumption from a silent record that a juror was properly dismissed. *See Valdez v. State*, 952 S.W.2d 622, 624 (Tex. App.—Houston [14th Dist.] 1997, writ ref’d).

As it comes to us, the record contains both a fairly labored two-part voir dire by the judge of the jury foreman and, subsequent to an unrecorded conversation with the dismissed juror, a statement by the judge documenting his action to dismiss juror Collins and seat an alternate juror. The record demonstrates that the evidence before the trial court was not sufficiently developed for the trial court to have been able to determine that Collins was either unable or disqualified from serving on the jury. The only testimony presented to the trial court was that of the jury foreman—the person requesting Collins’ removal. Although she was present at the courthouse and available to

testify, Collins—the person in the best position to explain her conduct to the court—was never questioned prior to her dismissal. Had the trial court questioned Collins on the record prior to her dismissal, as appellant’s counsel suggested, the judge likely would have been able to gather a sufficient amount of evidence which would have enabled him to determine whether Collins was actually unable to serve or disqualified from serving under the statute. *Cf. Hodge v. State*, 896 S.W.2d 340, 342–43 (Tex. App.—Amarillo 1995, pet. ref’d) (trial court’s questioning of juror who was concerned about his mastery of English language showed juror was not subject to disqualification under literacy requirements). Under these circumstances, we cannot say that the trial court was within its discretion to remove Collins based upon such an insufficient record.

Furthermore, although the evidence in the record is insufficient to establish whether Collins was subject to dismissal under the statute, the foreman’s testimony was sufficient to demonstrate that there was—at the very least—a reasonable possibility that his request to remove Collins was due to Collins’ view of the merits of the case. The foreman admitted that Collins, who had “taken the facts and law into account and made up her mind,” was impeding the deliberative process by refusing to “talk about *her side* of the case” and refusing to take the testimony relied upon by the other jurors into

consideration. Thus, at a minimum, the foreman's testimony suggests that Collins' alleged refusal to deliberate could have stemmed from her view of the sufficiency of the evidence.

Under these circumstances, we cannot say that the trial court was within its discretion to remove Collins based upon such an insufficient record, particularly in light of the foreman's testimony which suggested that Collins may have been targeted for removal due to, at least in part, her views of the evidence. *Cf. United States v. Edwards*, 303 F.3d 606, 631 (5th Cir. 2002) (stating "a court may not dismiss a juror based upon its conclusion that the juror is failing to participate in the deliberative process in accordance with law unless there is no possibility that the juror's problem stems from his view of the sufficiency of the evidence") (citing *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999); *Thomas*, 116 F.3d at 622–23; *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987)). Not only did the trial court's dismissal of Collins fail to comply with the statutory requirements of article 33.011, but, more importantly, Collins' dismissal also deprived appellant of his constitutional right to a unanimous jury verdict.

Having determined that the court abused its discretion in dismissing Collins and replacing her with an alternate juror, we must now consider whether the error requires reversal of this trial. *See Cain v. State*, 947 S.W.2d 262, 264

(Tex. Crim. App. 1997) (holding that all errors, except certain federal constitutional errors labeled as “structural” by United States Supreme Court, are subject to harm analysis). Since Collins’ dismissal deprived appellant of his constitutional right to a unanimous jury verdict, the error in this case is constitutional in nature and therefore, subject to analysis under Texas Rule of Appellate Procedure 44.2(a). *See McClellan v. State*, 143 S.W.3d 395, 400–01 (Tex. App.—Austin 2004, no pet.) (applying constitutional harm analysis to trial court’s erroneous dismissal of juror; stating “[t]hat the legislature codified [the right to a twelve-person jury] does not transform it into a statutory, non-constitutional right, and the issue here is not a violation of [Texas Code of Criminal Procedure Article 36.29], but rather of the Texas Constitution”); *Rivera v. State*, 12 S.W.3d 572, 579 (Tex. App.—San Antonio 2000, no pet.) (applying constitutional harm analysis to trial court’s erroneous dismissal of juror when dismissal violated appellant’s constitutional right). The State cites to several cases for the proposition that the error in this case is non-constitutional and therefore, subject to analysis under Texas Rule of Appellate Procedure 44.2(b). *See Chavez v. State*, 91 S.W.3d 797 (Tex. Crim. App. 2002); *Sneed v. State*, 209 S.W.3d 782 (Tex. App.—Texarkana 2006, pet. ref’d); *Ponce v. State*, 68 S.W.3d 718 (Tex. App.—Houston [14th Dist.] 2001, pet. ref’d); *Bina v. State*, No. 01-06-00557-CR, 2008 WL 256897 (Tex. App.—

Houston [1st Dist.] Aug. 20, 2008, pet. ref'd) (mem. op.). *Chavez, Sneed, Ponce, and Bina*² are, however, distinguishable from the present case because in each of those cases, the reviewing court determined that the error involved the violation of a *purely statutory right*, not a constitutional one. *See Chavez*, 91 S.W.3d at 801 (applying non-constitutional harm analysis because appellant complained of violation of statute detailing juror replacement procedure, not violation of his constitutional rights; distinguishing *Rivera* on this basis).

Because the error in this case is constitutional, we must reverse unless we determine beyond a reasonable doubt that the error did not contribute to the conviction. TEX. R. APP. P. 44.2(a); *McQuarters v. State*, 58 S.W.3d 250, 258 (Tex. App.—Fort Worth 2001, pet. ref'd). Given the fact that the evidence in the record indicates that there is a reasonable possibility that the jury foreman's request to remove Collins stemmed from Collins' view of the sufficiency of the evidence, we simply cannot determine—much less beyond a reasonable doubt—that Collins' erroneous removal did not contribute to appellant's conviction.

Accordingly, we sustain appellant's first point of error. Having done so,

² Although this Court included a harm analysis in *Bina*, that portion of the opinion is not binding precedent. *See Bina v. State*, No. 01-06-00557-CR, 2008 WL 256897, *3 (Tex. App.—Houston [1st Dist.] Aug. 20, 2008, pet. ref'd) (mem. op.) (finding no error in trial court's dismissal of juror under Texas Code of Criminal Procedure Article 36.29; stating in dicta that error in application of article 36.29 is non-constitutional error).

we need not address appellant's second point of error.

CONCLUSION

We reverse the judgment of the trial court and remand the case for a new trial.

Jim Sharp
Justice

Panel consists of Chief Justice Radack and Justices Bland and Sharp.

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