Opinion issued July 22, 2010

In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00481-CR

ROBERT ALAN HARLESTON, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 1205091

MEMORANDUM OPINION

A jury convicted Robert Alan Harleston, Jr., of the felony offense of

aggravated sexual assault of a child. *See* TEX. PENAL CODE ANN. § 22.021(a)(2)(B) (Vernon Supp. 2009). After Harleston pleaded true to the allegations in an enhancement paragraph, the trial court assessed punishment at twenty-five years' confinement. On appeal, Harleston contends that he was denied his right to a jury trial when a juror allegedly slept through a portion of the complaining witness's testimony. Because defense counsel did not object to leaving the allegedly sleeping juror on the jury, move for a mistrial, allege juror misconduct in his motion for new trial, or otherwise attempt to develop a record concerning the identity of the sleeping juror, whether the juror actually slept, and how much, if any, of the testimony the juror missed, we hold that Harleston failed to preserve his complaint for appellate review. We therefore affirm.

Background

The State indicted Harleston for aggravated sexual assault of a child, K.D., who was twelve at the time of the offense and living with Sheila Davis, K.D.'s relative and Harleston's girlfriend. K.D. testified that on Thanksgiving 2004, she watched television with Sheila and Harleston while lying on their bed. After Sheila fell asleep, Harleston and K.D. continued talking and Harleston began rubbing K.D. on her arms and back. Harleston removed K.D.'s pants and underwear and placed his finger inside of her

vagina. K.D. went into the bathroom, started crying and cutting her arm, and then went into the living room. K.D. testified that Harleston followed her into the living room, removed her clothes again and had sex with her.

Harleston's attorney reserved his cross-examination of K.D. until the following day. At the end of the State's direct examination, the trial court stated:

> The Court: Would you all like to take your afternoon break now or wait until about 3:30? I notice we have at least one person asleep. I wonder if it might be a good time to get up and move around. Tell me.
>
> A Juror: 3:30 is fine.
>
> The Court: Okay. Or as close to that as we can get. It is important to stay awake during the testimony. In case you're wondering, this little computer captures the real time what she's entering into her machine so I can read the testimony. I bet you wish you had that too.

Defense counsel did not object to leaving an allegedly sleeping juror on the jury, nor did he move for a mistrial or attempt to make a record concerning the identity of the sleeping juror, whether the juror was actually asleep, and how much of K.D.'s testimony, if any, the juror missed. Harleston moved for a new trial, but only challenged the sufficiency of evidence—he did not claim juror misconduct.

Discussion

Harleston contends that he was denied his right to a jury trial when a juror allegedly slept through a portion of K.D.'s testimony, and absent any request, the trial court should have conducted its own hearing to determine (1) how much of K.D.'s testimony the sleeping juror missed and (2) how Harleston wished to proceed. To preserve a complaint for appellate review, the party must first present that complaint to the trial court by a timely request, objection, or motion. TEX. R. APP. P. 33.1(a); *Menard v. State*, 193 S.W.3d 55, 59 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) ("To be timely, an objection must be raised at the earliest opportunity or as soon as the ground of objection becomes apparent." (quoting *Penry v. State*, 903 S.W.2d 715, 763 (Tex. Crim. App. 1995))). To properly preserve error regarding juror misconduct, the defendant must move for a mistrial or a new trial. *See Menard*, 193 S.W.3d at 59 (citing *Thieleman v. State*, 187 S.W.3d 455, 456 (Tex. Crim. App. 2005)).

In *Menard*, defense counsel noticed a juror "nodding off" during the punishment phase of the trial, but did not bring this to the trial court's attention until the jury retired to determine punishment. *Id.* Menard "did not object to the service of the juror or request that the trial court remove the juror." *Id.* Menard also did not move for a mistrial, nor did he move for a

new trial and allege juror misconduct. *Id.* As a result, we held that he failed to preserve his complaint for appellate review. *Id.*; *see also Thieleman*, 187 S.W.3d at 458 (holding that defense counsel preserved error by informing trial court that juror had "continuously slept through" trial and moving for mistrial).

According to Harleston, the trial court should have conducted a hearing to determine how much of K.D.'s testimony the juror missed. Harleston cites no authority for the proposition that the trial court has a duty to conduct such a hearing absent a request from counsel or ask the defendant how he wishes to proceed if a juror appears to be sleeping during testimony. In *Menard*, we observed that "a court has considerable discretion in deciding how to handle a sleeping juror." *Id.* (quoting *United States v. Freitag*, 230 F.3d 1019, 1023 (7th Cir. 2000) (stating that trial court did not abuse its discretion by not conducting further inquiry into how much evidence sleeping juror missed when court had not noticed an "extensive sleeping problem")). Here, in the exercise of that discretion, the trial court made counsel and the jurors aware of the issue and scheduled a break.

No indication exists that the juror in this case (1) was actually asleep and unaware of the evidence presented, (2) missed a large portion of K.D.'s testimony, or (3) displayed a recurring problem of missing testimony due to

sleeping. Neither party brought any other instance of sleeping to the court's attention. After the trial court made its observation, Harleston requested no relief regarding the allegedly sleeping juror. We decline to hold that, upon noticing a juror who appears to be sleeping, the trial court has a duty to conduct a *sua sponte* hearing to determine whether the juror was sleeping, how much evidence the juror missed, and how the defendant wishes to proceed. *See Menard*, 193 S.W.3d at 60 (noting that trial court not required to remove sleeping juror and handling sleeping jurors is within trial court's "considerable discretion").

Although Harleston moved for a new trial, he raised only sufficiency of evidence points in the motion—he did not allege juror misconduct or attempt to develop a record concerning the sleeping juror. Because Harleston did not object to the presence of a sleeping juror on the jury, move for a mistrial, or allege juror misconduct in his motion for new trial, we hold that Harleston failed to preserve his complaint that the presence of an allegedly sleeping juror deprived him of his right to a jury trial.

Conclusion

Because Harleston did not object to the presence of an allegedly sleeping juror, did not move for a mistrial, and did not allege juror misconduct in his motion for new trial, we hold that he failed to preserve for

appeal his complaint that the presence of a sleeping juror denied him his right to a jury trial. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

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

Do Not Publish. TEX. R. APP. P. 47.2(b).