Opinion issued December 4, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00646-CR

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LESLIE DEMOND WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 405th District Court
Galveston County, Texas
Trial Court Case Nos. 16CR3366, 16CR3367, 17CR0060

MEMORANDUM OPINION

A jury found appellant, Leslie Demond Williams, guilty of three separate offenses of aggravated robbery with a deadly weapon.[1] After finding true the allegation in an enhancement paragraph that he had previously been convicted of a felony offense, the jury assessed his punishment at confinement for ninety-nine years for each offense. The trial court entered judgment in accordance with the jury's verdict and ordered that the sentences run concurrently. In his sole issue, appellant contends that the trial court erred in sua sponte dismissing, over his objection, an otherwise qualified venire member during voir dire.

We affirm.

Background

During voir dire, as the State questioned venire members about the range of punishment for the offenses of which appellant stood accused, the following exchange occurred:

[THE STATE]: . . . .

> Now, I just want to go over -- the judge talked to you about punishment, about how if you do find the defendant guilty, then you also have to assess a punishment. He went through the range of punishment between minimum of 15 years up to 99 years or life.

[1] *See* TEX. PENAL CODE ANN. § 29.03(a)(2) (Vernon 2011); appellate cause no. 01-17-00646-CR, trial court cause no. 16CR3366 (Offense I); appellate cause no. 01-17-00647-CR, trial court cause no. 16CR3367 (Offense II); appellate cause no. 01-17-00648-CR, trial court cause no. 17CR0060 (Offense III).

There's also the option for a fine of up to $10,000.

And just, again, is there anybody after having heard what aggravated robbery is feels like they're not able to consider the minimum of 15? Does anybody feel that way? They feel that this is too serious, I could never give only 15 years?

Juror No. 5?

VENIREPERSON: It's or the fine?

[THE STATE]: The fine is in addition to. So it could be no fine --

VENIREPERSON: I was asking if the mandatory minimum was 15 or if it was the fine, also.

[THE STATE]: And, no, you couldn't sentence someone to just a fine. It would be a minimum of 15, and then the fine could be on top of that or not, but the minimum punishment includes a sentence of 15 years in prison.

And so my question is this, is there anybody that can't consider giving that minimum of 15?

Juror No. 5, how do you feel about that? You okay with that minimum?

VENIREPERSON: That's probably too harsh.

[THE STATE]: You think it's too harsh?

VENIREPERSON: Yeah.

[THE STATE]: Well, if you think 15 is too harsh, then you probably think 99 to life is too harsh.

VENIREPERSON: True.

[THE STATE]: So are you saying then that there's just no set of facts that would meet the definition of aggravated robbery where you could honestly consider ever giving someone, say, life? You said no?

VENIREPERSON: No, I'm not saying that.

[THE STATE]: Well I guess can you keep an open mind and consider potentially sentencing someone to anywhere in between that range of a minimum of 15 up to 99 years or life?

VENIREPERSON: There's a possibility, yeah.

After both sides had questioned the venire members, the trial court, sua sponte, dismissed several of them, and the following exchange occurred between the attorneys and the trial court:

THE COURT: Let me tell the people who I think have gotten themselves struck from the jury. If you disagree with me, tell me right away. Otherwise, I am striking the people who I'll bring up.

I will tell you No. 3 wants to talk to us. I don't have any problem with him. I'll let him come up and talk to us.

[APPELLANT]: I think 3, 10 and 42 all want to come up.

THE COURT: I'll get to 10 and 42, but I know 3. I can't remember why I struck 5.

[APPELLANT]: Probably talking about the 15 years being too harsh.

THE COURT: Range of punishment, I couldn't read my own notes. I put "rp" and couldn't remember. Yes, he couldn't consider the full range of punishment.

[APPELLANT]: I would object.

When asked by [the State], he said, you couldn't consider life, he said, yes, I could under the right facts.

THE COURT: That's under the right facts. Right now he has to have his mind open -- he has to be able to consider it right now, the entire range. So if it was the wrong facts, he couldn't consider the full range of punishment. 5 is struck over your objection . . . .

. . . .

THE COURT: Any objections to the jury?

[THE STATE]: No objection.

[APPELLANT]: Just renewing my objection to the strike for cause No. 5, but other than that, no further objection.

The trial court swore in the jury panel, and it ultimately found appellant guilty of the three separate offenses of aggravated robbery with a deadly weapon.[2]

[2] *See id.*

Standard of Review

The erroneous exclusion of a venire member is not constitutional in nature. *Jones v. State*, 982 S.W.2d 386, 391 (Tex. Crim. App. 1998). Thus, we must disregard it unless it affected a defendant's substantial rights. *Id.* at 391–92. Any error in excluding a venire member will be reversed "only if the record shows that the error deprived the defendant of a lawfully constituted jury." *Id.* at 394. A defendant has "no right that any particular individual serve on the jury," but only that "the jurors who do serve be qualified." *Id.* at 393. Thus, a "defendant's rights go to those who serve, not to those who are excused." *Id.* "And we presume that jurors are qualified absent some indication in the record to the contrary." *Ford v. State*, 73 S.W.3d 923, 925 (Tex. Crim. App. 2002).

Dismissal of Venire Member

In his sole issue, appellant argues that the trial court erred in sua sponte dismissing venire member 5 because he was "not subject to challenge for failure to consider the full range of punishment." He further argues that this violated his "right to an impartial and lawfully constituted jury" because venire member 5 was "qualified and willing to consider the full range of punishment for the offense of aggravated robbery."

Appellant's entire argument is based on his assertion that "[n]o one can say with assurance what might have transpired had the venire member not been

improperly excused."[3] However, appellant does not specifically allege how, or point to any evidence in the record demonstrating that, the trial court's alleged error deprived him of a fair and impartial jury comprised of qualified individuals. *See Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009) (overruling defendant's issue contesting trial court's excusal of potential juror for impartiality because nothing in record indicated jurors who served unqualified); *Leassear v. State*, 465 S.W.3d 293, 301 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (overruling issue contesting dismissal of juror where defendant did "not argue that the jurors who served in his case were unqualified or that the jury that convicted him was otherwise unlawfully constituted"). Nor does he assert that he had to accept a juror that was objectional to him. *See Gamboa*, 296 S.W.3d at 580 ("[T]he question is whether or not the jurors who actually sat were impartial."). Accordingly, we presume that the jurors empaneled by the trial court were qualified, and we hold that the trial court's error, if any, in dismissing venire member number 5 was harmless. *See Ford*, 73 S.W.3d at 925 ("[T]he record

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[3] Appellant initially recites the appropriate standard in his brief, but then, relying almost exclusively on the dissenting opinion in *Jones v. State*, he asserts that the alleged error at issue is constitutional in nature and any assessment of harm would be "unguided speculation." 982 S.W.2d 386, 395–398 (Tex. Crim. App. 1998) (Baird, J., dissenting). However, the reasoning of the majority in *Jones* has not been overturned, and, as an "intermediate court of appeals, we are bound by the decisions of our state's highest criminal court." *Purchase v. State*, 84 S.W.3d 696, 701 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). Thus, the dissent in *Jones*, and arguments made pursuant to it, do not control our analysis in the instant case.

shows that the defendant is not harmed by such an error when it contains no indication that those who served on the jury were unfit for duty.").

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Massengale.

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