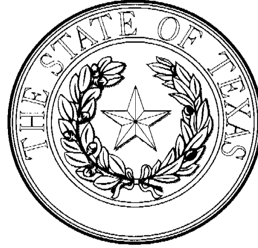
Opinion issued December 14, 2021



In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00062-CR

DANIEL RIVERA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Case No. 1569363

O P I N I O N

While operating a motor vehicle under the influence of alcohol, Daniel Rivera tried to evade the police. During the ensuing high-speed pursuit, Rivera struck a concrete highway pillar. One of his passengers was killed in the accident.

Rivera was later indicted and tried for felony murder. The jury found Rivera guilty and made an affirmative finding that he used a deadly weapon, a motor vehicle, in the commission of the offense. Rivera appeals from his conviction, arguing that the trial court abused its discretion by:

(1) refusing to allow him to exercise all ten of his peremptory challenges;

(2) granting the State's challenge for cause to potential juror number 24; and

(3) granting the State's challenge for cause to potential juror number 38.

We affirm.

JURY SELECTION

The parties selected a jury from a panel of sixty-five potential jurors. After the trial court and counsel questioned the panel, the trial court discharged several potential jurors from the panel based on various excuses, like financial inconvenience and work conflicts, with the parties' consent. *See* TEX. CODE CRIM. PROC. art. 35.03. Specifically, the court excused Numbers 7, 16, 44, 45, and 58.

The parties also challenged several potential jurors for cause. *See* TEX. CODE CRIM. PROC. art. 35.16. Rivera challenged Numbers 8 and 23. The State challenged Numbers 24, 32, 38, and 41. The trial court granted all the challenges for cause made by both sides. With respect to Numbers 24 and 38, the court did so over Rivera's objection. Rivera unsuccessfully argued that these two potential jurors had shown

that they could follow the law and participate in deliberations, notwithstanding their initial statements indicating they would be unable to assess punishment on Rivera.

With excuses and challenges for cause disposed of, the parties then exercised their peremptory challenges. *See* TEX. CODE CRIM. PROC. art. 35.14. Because it was a non-capital felony case, each side had ten. TEX. CODE CRIM. PROC. art. 35.15(b).

Fifty-four potential jurors remained before the parties exercised their peremptory challenges. Taking into account the potential jurors who had already been excused or stricken for cause, the allocation of ten peremptory challenges to each side, and the fact that the parties were selecting a jury of twelve, this meant that any potential juror up to and including Number 39 could end up on the jury. *See* TEX. CODE CRIM. PROC. arts. 33.01(a), 35.20 (respectively providing for jury of twelve in felony cases in district court and selection of jury from panel of potential jurors based on the order in which the potential jurors appear on the panel list).

The trial court also planned to select one alternate juror from the next three remaining potential jurors on the panel, who were Numbers 40, 42, and 43. *See* TEX. CODE CRIM. PROC. art. 33.011 (district court can impanel up to four alternate jurors). The court therefore gave each side one additional peremptory challenge to exercise as to the pool of potential alternates. *See* TEX. CODE CRIM. PROC. art. 35.15(d). Rivera's counsel immediately stated, "Put me down for [Number] 43 right now."

Both sides noted their ten peremptory challenges on strike lists, which the prosecutor and defense counsel then gave to the clerk. The clerk then began reading the names of those who would be on the jury. The third juror identified by the clerk was Number 15. At this point, a problem became apparent.

During jury selection, Number 15 had said she was self-employed and had an annual marketing meeting for a client that she had to attend when Rivera's trial was scheduled to take place. But the trial court and parties overlooked her work-related scheduling conflict when deciding which jurors should be excused. Number 15 reraised this conflict when the clerk called her name to serve on the jury.

The trial court and counsel then conferred at the bench. At the trial court's request, Rivera and the State both agreed to excuse Number 15 from serving.

As a result, the pool of potential jurors and alternate jurors each changed by one. With Number 15 excused, this meant that anyone up to and including Number 40 could now potentially end up on the jury, and the three potential alternate jurors now consisted of Numbers 42, 43, and 46. In response to this change, the trial court informed the parties that they could reassign their respective peremptory challenges as to the potential alternate jurors alone, if the parties wished to do so.

Rivera objected. His counsel argued that because the pool of potential jurors had expanded by one to include Number 40, he needed "to be able to change" all his peremptory challenges. The trial court denied Rivera's request to reconsider his

peremptory challenges, except as to the potential alternate jurors. Rivera's counsel then immediately stated that his peremptory challenge as to the potential alternate jurors remained "the same" as before—Number 43.

The clerk then resumed reading the names of those who would be on the jury. Number 40 was the last juror selected, and Number 42 was the alternate juror. When the trial court asked if the parties had any further objections, Rivera's counsel stated that if he had had the opportunity to exercise a peremptory challenge against Number 40, counsel would have done so to prevent Number 40 from serving on the jury.

DISCUSSION

I. Peremptory Challenges

Rivera asserts that he was denied the right to exercise all ten of his peremptory challenges. But he did exercise ten peremptory challenges, and the ten people he challenged were removed from the pool of potential jurors. Rivera's true complaint is that the trial court should have allowed him to retract and reassign one or more of his peremptory challenges when the trial court excused an additional potential juror after both sides had exercised their challenges. In other words, Rivera argues that he should have been allowed a do-over because the trial court had altered the pool of potential jurors by one after both sides had already made their peremptory challenges. In particular, Rivera argues that he would have exercised a peremptory challenge to exclude the one additional potential juror added to the jury pool.

A. Standard of review

As neither statute nor rule impose a particular procedure on a trial court when it alters the pool of potential jurors by excusing one or more of them after the parties have already exercised their peremptory challenges, we review Rivera's complaint about the trial court's refusal to allow him to retract and reassign his peremptory challenges for an abuse of discretion. *See Hughes v. State*, 24 S.W.3d 833, 841 (Tex. Crim. App. 2000) (trial court has discretion as to order in which sides are to make peremptory challenges and challenges for cause in death-penalty cases because Code of Criminal Procedure does not definitively answer that procedural question).

B. Applicable law

A peremptory challenge is one made without a stated reason. TEX. CODE CRIM. PROC. art. 35.14. Parties may use a peremptory challenge to strike a potential juror from the panel for any reason other than certain constitutionally prohibited ones, like ethnicity, race, or sex. *Comeaux v. State*, 445 S.W.3d 745, 749 (Tex. Crim. App. 2014). In a non-capital felony case, the State and the defendant are each entitled to ten peremptory challenges. TEX. CODE CRIM. PROC. art. 35.15(b). If the trial court is going to impanel one or two alternate jurors, the State and the defendant are entitled to one additional peremptory challenge, which they may only exercise against a potential alternate juror. TEX. CODE CRIM. PROC. art. 35.15(d).

C. Analysis

A trial court has the discretion to allow the parties to retract and reassign their peremptory challenges if the pool of potential jurors changes after the parties have already exercised their peremptory challenges. *See Saturday v. State*, No. 01-16-00887-CR, 2018 WL 2437124, at *6 (Tex. App.—Houston [1st Dist.] May 31, 2018, no pet.) (mem. op., not designated for publication) (noting that trial court allowed do-over with respect to peremptory challenges when potential juror was excused after parties had already exercised their challenges). The question presented by this appeal is whether the trial court abused its discretion in refusing to do so.

In general, a trial court abuses its discretion under two sets of circumstances. First, a trial court abuses its discretion when it makes a decision that is arbitrary, unreasonable, or without reference to guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). Second, because a trial court has no discretion to misinterpret or misapply the law, the trial court also abuses its discretion when it does not analyze the law correctly or apply the correct law to the facts. *State v. Ballard*, 987 S.W.2d 889, 893 (Tex. Crim. App. 1999).

Ordinarily, the trial court discharges any potential jurors who have a sufficient excuse for not serving as a juror, including an exemption or lack of qualification, before the parties exercise their peremptory challenges. *See* TEX. CODE CRIM. PROC. art. 35.02–.03 (court shall hear and determine excuses for not serving after pool of

potential jurors takes oath to answer questions about service and qualifications truthfully). But the trial court can, with the consent of the parties, excuse a potential juror any time before the juror is impaneled. TEX. CODE CRIM. PROC. art. 35.05. And, when circumstances require it, the trial court may excuse a juror even after jury selection is complete. *See Kemp v. State*, 846 S.W.2d 289, 294–95 & n.4 (Tex. Crim. App. 1992) (trial court has discretion to excuse juror when conflict with service emerges after he is selected but before jury as whole is sworn and seated).

Here, the trial court excused Number 15 immediately after she was named as the third juror selected and before the jury as a whole was sworn and seated. Both the State and Rivera consented to the excusal of Number 15 from serving.

Rivera does not complain of the excusal of Number 15. Rather, Rivera correctly notes that Number 15's excusal expanded the pool of potential jurors who could be impaneled on the jury by one to include Number 40, and Rivera argues that this expansion entitled him to retract and reassign one or more of his peremptory challenges. No statute or rule requires a trial court to allow the parties to retract and reassign their peremptory challenges when a juror is excused after the parties have exercised their challenges. Indeed, no statute or rule addresses this scenario.

Rivera does not cite any authority that stands for the proposition that a trial court abuses its discretion if it does not allow the parties to retract and reassign their

peremptory challenges if a potential juror is excused after the parties have exercised their challenges. Nor are we aware of authority that stands for this proposition.

Instead, Rivera relies on the general principle that a party is entitled to exercise his peremptory challenges as he sees fit. *See Comeaux*, 445 S.W.3d at 749 ("Peremptory strikes are given to each side to use as they see fit."). Rivera reasons that by refusing to allow him to retract and reassign his peremptory challenges after Number 15 was excused from serving and the pool of those who could be impaneled on the jury was expanded to include Number 40, the trial court denied Rivera the opportunity to use one of his peremptory challenges on Number 40. Thus, Rivera asserts, he was not allowed to exercise his peremptory challenges as he saw fit.

We disagree that the general principle Rivera invokes—the right to exercise peremptory challenges as one sees fit—barred the trial court from excusing Number 15 without also allowing the parties to retract and reassign their peremptory challenges. Like the State, Rivera consented to the excusal of Number 15. Once the parties consented, the pool of potential jurors who could be impaneled was expanded by one to include Number 40. This was a natural consequence of the parties' consent. Rivera did not ask to retract and reassign any of his peremptory challenges until after he had already consented to excuse Number 15. Given this sequence of events and the absence of an applicable statute or rule addressing how the trial court should

proceed under circumstances like these, the trial court was not required to allow Rivera to retract and reassign one or more of his peremptory challenges.

The Court of Criminal Appeals's decision in *Broussard v. State* is instructive. There, the trial court excused a juror "due to work pressures" after the jury and an alternate had been selected but before they were sworn. 910 S.W.2d 952, 957 (Tex. Crim. App. 1995). The trial court then replaced the excused juror with the alternate. *Id.* The defendant did not complain of the excusal of the juror, but he did object to substitution of the alternate for the excused juror. *Id.* The defendant maintained that the trial court should have selected a replacement juror from the original panel list, rather than using the alternate. *Id.* On appeal, the Court disagreed with the defendant and held that the trial court did not err. *Id.* at 957–58. In particular, the Court reasoned that the trial court did not err because it had to replace the excused juror, no statute specified a procedure for doing so under the circumstances, and the trial court chose an acceptable method by replacing the excused juror with the alternate, who had already been qualified and accepted by the parties. *Id.* at 958.

The case before us differs in its procedural posture but is materially similar to *Broussard*. Initially, before Number 15 was excused, the State and Rivera exercised their ten peremptory challenges. When they did so, Number 40 was the first of three from whom the trial court was going to select an alternate. Specifically, the three potential alternates were Numbers 40, 42, and 43. Both sides were allowed to

exercise an additional peremptory challenge with respect to these three potential alternates. The State used its peremptory challenge to strike Number 42,[1] and Rivera used his peremptory challenge to strike Number 43. Thus, Number 40 was originally slated to serve as the alternate juror in Rivera's prosecution, even though this fact had not yet been announced in open court when Number 15 was excused.

As in *Broussard*, Number 40 effectively had been qualified and accepted by the parties as an alternate. Had Number 15 or another juror become unable to serve after the jury was sworn instead of beforehand, Number 40 would have replaced this excused juror without further procedural ado. TEX. CODE CRIM. PROC. art. 33.011(b).

On this record, the trial court did not misinterpret or misapply the law. Nor did the trial court act arbitrarily, unreasonably, or without reference to guiding rules or principles in refusing to allow Rivera to revise his peremptory challenges when the trial court expanded the pool of potential jurors to include Number 40 by excusing Number 15 after the parties had already exercised their peremptory challenges. We therefore hold that the trial court did not abuse its discretion.

Moreover, even if the trial court's refusal had been erroneous, any error would be harmless. Rivera complains that he was harmed because Number 40 served on the jury against his wishes, but Rivera does not and cannot complain that Number

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[1] When the pool of potential alternate jurors was later changed to Numbers 42, 43, and 46 after Number 15 was excused from the panel, the State changed its peremptory challenge from Number 42 to Number 46.

40 was objectionable. Number 40 was not individually questioned during jury selection by the trial court or the parties. Neither side challenged him for cause or otherwise questioned his qualifications to serve on the jury. When the State and Rivera had the opportunity to exercise a peremptory challenge against Number 40 as one of three potential alternates, each side respectively challenged one of the other two potential alternates, both of whom had higher numbers than Number 40. Under these circumstances, Rivera was not harmed by Number 40's service on the jury. *See Brossette v. State*, 885 S.W.2d 841, 843 (Tex. App—Dallas 1994, pet. ref'd) (defendant not harmed by trial court's replacement of two jurors with next persons on panel list after parties exercised peremptory challenges given that neither replacement was objectionable and defendant used peremptory challenge against potential juror whose name appeared later on panel list than both replacements).

II. Challenges for Cause

Rivera contends the trial court erred in granting the State's challenges for cause with respect to Numbers 24 and 38. The State challenged these two potential jurors for cause after they indicated they would be unable to impose punishment on Rivera if he was guilty of the charged offense. Rivera argues that he rehabilitated Numbers 24 and 38 by establishing that they would obey the law given by the court. As to harm, Rivera argues that Number 40 would not have been seated on the jury if the trial court had not erroneously stricken Numbers 24 and 38 for cause.

A. Standard of review

We review Rivera's complaint about the trial court's granting of the State's challenges for cause for an abuse of discretion. *See Tracy v. State*, 597 S.W.3d 502, 512 (Tex. Crim. App. 2020) (trial court has discretion as to these challenges). As the trial court is in the best position to evaluate a potential juror's demeanor and responses, we give considerable deference to its ruling on a challenge for cause. *Hudson v. State*, 620 S.W.3d 726, 731 (Tex. Crim. App. 2021).

B. Applicable law

A challenge for cause is made on the ground that some fact makes a potential juror incapable of serving or unfit to serve on the jury. TEX. CODE CRIM. PROC. art 35.16(a). Among other things, the State may challenge a potential juror because "he has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment." TEX. CODE CRIM. PROC. art. 35.16(b)(3); *e.g.*, *Pierce v. State*, 696 S.W.2d 899, 901–03 (Tex. Crim. App. 1985) (holding that trial court erred in overruling challenge for cause to potential juror who said she could not consider full range of punishment applicable to lesser-included offense).

C. Analysis

When the State asked if anyone would not be capable of assessing punishment against Rivera, Number 24 responded, "I can't imagine doing it." He elaborated, "I would not be able to make that sentence." Number 24 generally indicated that he

would just approve whatever punishment the rest of the jury saw fit to assess. Similarly, Number 38 responded, "I could not make that decision." Like Number 24, Number 38 stated, "I would have to go with the group decision" on punishment.

Defense counsel asked Number 24 if he would abide by his fellow jurors' decision on punishment if they wanted to impose a life sentence even if the homicide was unintentional or whether Number 24 would say that's unfair. Number 24 answered, "I would say I don't think that's fair." Counsel responded, "You would say I don't think that's fair?" And Number 24 replied, "I think so." Defense counsel then asked Number 38 if she would "participate as well." Number 38 answered, "I would probably go with the flow but I don't want to have that responsibility."

At this point, the following exchange unfolded between defense counsel, Numbers 24 and 38, and the trial court:

> Counsel: Nobody does. Who wants to give somebody a bunch of time in prison, raise your hand, because I need to know that now. Trust me, if you want me to use my strikes to get you off this jury, say, I want to put someone in prison today.
>
> Good. Nobody wants to do that but sometimes you have to, right? I know somebody was talking about aggravated sexual assault of a child. Nobody wants to leave two kids without a father but guess what, sometimes you have to. Fair statement? And so I don't want you struck from this jury, I don't want anybody struck from this jury. I think all of you would make great jurors but you have to be willing to do your job. You may not want to but be willing to say, if somebody says, man, somebody's dead, give him life. Whoa, hold on a second. The other side of

the story. Because not everybody agrees. Does that make sense?

And so I don't want people who say, man, I really don't want that responsibility automatically kicked off and people who say, you know, oh, I'd love to, those are the only people we get as jurors. Sounds like a terrible idea. Does that make sense? So understanding that, would you be able to assess punishment should you be on the jury?

Number 24: Yes.

Counsel: Okay. And, Judge, his answer was yes. So I would ask the Court to reconsider that. We can take that up later.

Court: Sure.

Counsel: And Juror No. 38, do you understand what I am saying?

Number 38: Yes.

Counsel: Would you participate if you were selected, and that's a big if?

Number 38: Yes.

Based on the preceding exchange, Rivera argues that defense counsel rehabilitated Numbers 24 and 38 by showing that they would be able to assess punishment after all. But when, as here, potential jurors contradict themselves during jury selection, we must give particular deference to the trial court's ruling. *Colburn v. State*, 966 S.W.2d 511, 517 (Tex. Crim. App. 1998). Because the trial court was in a position to evaluate the demeanor of Numbers 24 and 38, and we are not, we cannot say that the trial court abused its discretion by striking them for cause, given the contradictory answers they gave as to their ability to assess punishment. *See*

Newbury v. State, 135 S.W.3d 22, 32 (Tex. Crim. App. 2004) (appellate court will reverse trial court's ruling on challenge for cause only when clear abuse of discretion is evident, given trial court's role in evaluating credibility and demeanor).

In addition, assuming for argument's sake that the trial court did abuse its discretion in striking Numbers 24 and 38 for cause, any error is harmless. When a trial court erroneously grants a challenge for cause, its ruling constitutes reversible error only if the record shows that the defendant was deprived of a lawfully constituted jury. *Jones v. State*, 982 S.W.2d 386, 392–94 (Tex. Crim. App. 1998). Rivera says he was harmed by the trial court's rulings as to Numbers 24 and 38 because their removal from the pool of potential jurors resulted in Number 40 being seated on the jury. As discussed, however, Number 40 was not objectionable. And even if Numbers 24 and 38 had likewise been unobjectionable, Rivera only had a right to a fair and impartial jury, not a right to have a particular juror or jurors seated. *See Colone v. State*, 573 S.W.3d 249, 261 (Tex. Crim. App. 2019) (defendant has right to qualified jurors but not right to have particular persons serve on jury).

CONCLUSION

We affirm the trial court's judgment.

Gordon Goodman
Justice

Panel consists of Justices Goodman, Landau, and Countiss.

Publish. TEX. R. APP. P. 47.2(b).