Affirmed and Memorandum Opinion filed May 28, 2009.

In The

Fourteenth Court of Appeals

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NO. 14-07-01071-CR

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GLEN ALLAN SHELTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 1081659

M E M O R A N D U M O P I N I O N

Appellant Glen Allan Shelton was charged with capital murder. A jury found him guilty and assessed punishment at life in prison. In five issues, he contends (1) the trial court erred in overruling his objection to the prosecutor's opening statement, (2) the evidence is legally insufficient to support his conviction, (3) the trial court erred in sustaining the State's objections to voir dire questions, and (4) the trial court erred in overruling Shelton's objections to voir dire questions. We affirm.

Background

On August 13, 2006, the complainant, Noemi Pham, was discovered burned to death in her home. Arson investigators detected a strong odor of gasoline in the home and determined the fire had been intentionally set. They determined the origin of the fire to be the master bedroom where Pham's body was found. Pham's family members identified Shelton as a potential suspect, and he voluntarily gave a statement to the Harris County Sheriff's Office. As he was leaving the sheriff's office, Shelton showed Sergeant M. D. Holtke a text message he had received from Pham at 12:55 the morning of the fire. The text message stated:

> We ain't got to understand each other. All that needs to be understood is that we are through. I'm through and we don't need to be communicating. Fuck the bullshit. You think you're attractive to me with all that's going on with you plus your bullshit? You gotta be kidding me. Let those bitches know and you'll see how many of them are down. You ain't even worth a damn. Fuck you and stop calling. Don't make me change my number.

Sergeant Holtke also retrieved mobile-phone records and voicemail messages from Pham's phone, and learned that she and Shelton exchanged several phone calls in the hours before she was killed and her house was set on fire.

Sergeant Breck McDaniel of the Houston Police Department specializes in mobile-phone records, and testified that reviewing such records he was able to track Shelton's movements the night Pham was killed. Sergeant McDaniel explained that "cell sites" are antenna panels, commonly referred to as "cell towers," which are used to process telephone calls, text messages, and other communication events sent from mobile phones. Cell-site records typically reveal the approximate location of a cellular telephone at the beginning and

end of a "communication event."[1] The records do not indicate where the phone was during the event, but logical assumptions can be made. "Cell sectors" used to locate a mobile phone are approximately two square blocks.

Following Shelton's movements through the use of his mobile phone, Sergeant McDaniel determined that between 11:37 p.m. and 11:46 p.m. on August 12, 2006, the night before the fire, Shelton was in a sector in the Galleria area of Houston. This was consistent with other witnesses who placed Shelton at a bar called the Buddha Lounge in the Galleria area. From the Galleria area, Shelton traveled to his home where he remained for about one hour and thirty-nine minutes. Shortly after receiving Pham's text message, Shelton called her to explain his behavior at a wedding they had both recently attended. Pham's friends testified that she had argued with Shelton about attention he had given to other women at the wedding. At 12:57 a.m., Shelton left a series of messages stating, "I went to Nicky's wedding. I didn't dance with nobody." "You're up there in my face in all the pictures with your arms around other dudes." "You're in pictures all over the . . . internet with other guys." "You're immortalized. Everybody sees those pictures." "Don't sit there and argue with me over a text." Shelton left another message at 1:10 a.m. stating, "I didn't even dance with any girls, but you go out and do this all the time." "If anybody has a right to be mad, it's got to be me." At 1:13 a.m., Shelton left a message stating, "And doing it in front of my face when I'm there with you on the cruise." At 2:48 a.m., Shelton stated, "Pick up the phone, I'm gonna call you, I'm gonna come over there."

Between 2:50 a.m. and 2:57 a.m., there were four communication events from Shelton's phone as it was moving north away from his residence toward Pham's residence. Between 2:57 a.m. and 2:58 a.m., there were three communication events as Shelton continued to travel north. Reviewing the cell sites on a map, Sergeant McDaniel determined that Shelton was traveling north on Highway 6, consistent with driving from his home to

[1] Sergeant McDaniel used the term "communication event" to refer to both telephone calls and text messages.

Pham's home. The last communication event prior to the fire was at 2:59 a.m. with Shelton still traveling north.

Officers responding to the fire found that the master bedroom was completely destroyed and the origin of the fire was the bed where Pham's body was found. Investigators also determined that gasoline had been poured throughout the house, but had not ignited in the other rooms because the door to the master bedroom had been closed. Gasoline had been poured on Pham's luggage, which she had taken on a recent cruise with her friends and Shelton. Gasoline had also been poured on several photographs from the cruise.

Morna Gonsoulin, an assistant medical examiner for Harris County, testified that the positioning of Pham's body was not typical of someone who dies in a house fire. Usually, when someone has suffered extensive burns, even in a vehicle while wearing a seatbelt, the muscles in the front of the body and the muscles that connect the torso to the arms and legs will get shorter as they lose moisture, causing the body to pull downward into an extreme fetal position. Pham's body, however, was found lying flat with the legs bent backward toward her back. This position strongly suggests that the body was bound during the fire. Pham also had smoke particles in her lungs, which means that she breathed for a short time after the fire was set. Gonsoulin testified that it is unlikely that an individual who is alive would lie in a burning house unless she were incapacitated in some manner. Toxicology screens showed that Pham had alcohol in her system, but her blood-alcohol level was below the legal limit and she had no narcotics or other drugs in her system that would cause her to be incapacitated. Gonsoulin classified the death as "homicidal violence" because the autopsy findings did not show how she was incapacitated, but the evidence was highly suggestive that she was incapacitated before the fire was set.

Shelton was convicted of capital murder and sentenced to life in prison.

Opening Statement

In his first issue, Shelton argues that the trial court erred in overruling his objection

to the prosecutor's reference to a polygraph examination during opening statement. The prosecutor explained to the jury what the evidence would show with regard to the investigation into Pham's death. In that regard, the prosecutor commented:

> The officers started looking at relationships, who she had relationships with, and they learned that she had been married and she has a child, [N. P.]. They looked at the ex-husband to determine whether or not he was, in fact, involved; questioned him. He agreed to cooperate fully with the officers, submitted to a polygraph. The officers ruled him out as a suspect.

Shelton objected to the prosecutor's comment, arguing that evidence that anyone took a polygraph examination is inadmissible. The trial court overruled the objection and denied Shelton's request for a mistrial.

Polygraph results are not admissible for any purpose in a criminal case. *Nethery v. State*, 692 S.W.2d 686, 700 (Tex. Crim. App. 1985). With respect to the prosecution's opening statement in a jury trial, Code of Criminal Procedure article 36.01(a)(3) provides that "[t]he State's attorney shall state to the jury the nature of the accusation and the facts which are expected to be proved by the State in support thereof." Tex. Code Crim. Proc. Ann. art. 36.01(a)(3) (Vernon 2007). The trial court erred in overruling appellant's objection to the State's assertion that the complainant's ex-husband submitted to a polygraph. *See id*.; *Nethery*, 692 S.W.2d at 700. This error is subject to a non-constitutional harm analysis. *See* Tex. R. App. P. 44.2(b); *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998). In analyzing whether this improper statement is so harmful that the case must be retried, we consider (1) the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks), (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge), and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *See Mosley*, 983 S.W.2d at 259.

As to the severity of the misconduct, the prosecutor could not reasonably have expected to prove that the complainant's ex-husband submitted to a polygraph. We cannot

determine from the record whether the prosecutor intentionally referred to the polygraph examination; however, we presume for the purposes of our analysis that she did. Regarding the magnitude of the prejudicial effect of the prosecutor's remarks, Shelton argues that the prosecutor's comment had the effect of impeaching his defensive theory and bolstering the State's case. The record reflects that the results of the polygraph test were not admitted before the jury. The prosecutor commented that the ex-husband had been eliminated as a suspect after full cooperation with authorities including submitting to a polygraph test. The peace officer who testified about the ex-husband's cooperation did not mention a polygraph, nor was he asked about a polygraph examination. The peace officer testified that he ruled out the ex-husband as a suspect. Though Shelton argues that the prosecutor's improper comment undermined his defensive theory that the complainant's ex-husband committed the offense in question, the record does not reflect that Shelton asserted this defensive theory at trial.[2] He did not argue at trial that the complainant's ex-husband may have committed the offense. A homicide investigator testified that, after talking to the ex-husband and investigating him as a potential suspect, the investigator no longer considered him a possible suspect. In his testimony, the officer made no statement or suggestion that Shelton had taken a polygraph examination.[3] On this record, we conclude that the prosecutor's remarks did not

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[2] Shelton's defensive theory was that the State's evidence did not prove his guilt beyond a reasonable doubt. As to the theory that the complainant's ex-husband committed the offense, Shelton's counsel did not mention this theory in opening statement or in closing argument. Appellant did not testify or call any witnesses during the guilt/innocence phase of the trial. On cross-examination of the arson investigator, Shelton's counsel elicited testimony that the complainant's next-door neighbor told the investigator that a "maroon Thunderbird" was parked in the complainant's driveway on the day before the fire occurred. When asked whether he determined who owned this vehicle, the investigator stated that he believed it was the complainant's "ex-boyfriend or ex-husband" and that the complainant's family said the vehicle was owned by the complainant's "ex." There was no other testimony at trial regarding who owned a "maroon Thunderbird" or as to whether the complainant's husband owned such a vehicle.

[3] Shelton argues that, by stating in its opening that the complainant's ex-husband submitted to a polygraph, the State implied that appellant must have taken and failed a polygraph because the State was prosecuting him. We disagree. Stating that the complainant's ex-husband submitted to a polygraph examination does not suggest that appellant submitted to a polygraph examination.

have a significant prejudicial effect.[4]

Unlike many cases involving reference to polygraph examinations, in the case at hand, the trial court did not specifically instruct the jury to disregard the prosecutor's statement. But in the charge, the trial court did instruct the jury not to consider, discuss, or relate any matters not in evidence. In the absence of evidence to the contrary, we presume that the jury followed this instruction. *See Miles v. State*, 204 S.W.3d 822, 827–28 (Tex. Crim. App. 2006).

As to the certainty of conviction absent the misconduct and the strength of the evidence supporting the conviction, as explained in more detail below, there was substantial circumstantial evidence of Shelton's guilt.

After weighing all of the relevant factors, we conclude that appellant's rights were not substantially affected by the prosecutor's mention of the polygraph examination during opening statement and that the trial court's error in overruling appellant's objection was harmless.[5] *See* Tex. R. App. P. 44.2(b); *Charles v. State*, 424 S.W.2d 909, 913 (Tex. Crim. App. 1967) (stating that reference to the taking of a polygraph test by people other than the defendant does not constitute reversible error); *Stewart v. State*, 705 S.W.2d 232, 234 (Tex. App.—Texarkana 1986, pet. ref'd) (concluding that testimony indicating that suspect other than defendant took a polygraph examination was harmless due to other evidence showing

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[4] Shelton asserts that the trial court exacerbated the prejudicial effect on the jury by overruling his objection and thus placing its stamp of judicial approval on the prosecutor's statement. But because the trial court overruled this objection at a bench conference outside the presence of the jury, this argument lacks merit. *See Zarco v. State*, 210 S.W.3d 816, 828, 831 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

[5] Shelton argues that this case is similar to *Wright v. State*, 154 S.W.3d 235 (Tex. App.—Texarkana 2005, pet. ref'd). In *Wright*, the State referred in opening statement to an investigator's offer to defendant Wright to take a polygraph examination, and the trial court overruled Wright's objection. *See id*. at 238. In *Wright*, however, there was trial testimony over Wright's objection that he had indeed taken a polygraph examination, and the error the *Wright* court found was the trial court's admission of evidence that the defendant took a polygraph examination. *See id*. at 239. There was no evidence in this case that Shelton took a polygraph examination, and the reference to complainant's ex-husband was in opening statement not in the trial evidence. Therefore, *Wright* is not on point. *See id*.

why that other person was cleared as a suspect). Shelton's first issue is overruled.

Sufficiency of the Evidence

In his second and third issues, Shelton claims the evidence is legally insufficient to support his conviction.

A. Standard of Review

In a legal-sufficiency review, we view all the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Bigon v. State*, 252 S.W.3d 360, 366 (Tex. Crim. App. 2008). The trier of fact is the exclusive judge of the credibility of witnesses and of the weight to be given to their testimony. *Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998). Likewise, reconciliation of conflicts in the evidence is within the exclusive province of the fact finder. *Id.* We must resolve any inconsistencies in the testimony in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). If any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

B. Intent to Commit Murder in the Course of Arson

In his second issue, Shelton argues that the State failed to prove beyond a reasonable doubt that the complainant was intentionally murdered in the course of an arson being committed. Shelton contends that rather than proving murder occurring in the course of committing arson, the State merely proved murder by arson.

A person commits capital murder if he intentionally or knowingly causes the death of an individual in the course of committing or attempting to commit arson. Tex. Penal Code Ann. § 19.03(a)(2) (Vernon 2003 & Supp. 2008). Shelton argues that because Pham died as a result of the fire, the State failed to prove that a murder occurred "separate and apart from

the arson." Capital murder by arson occurs only when the appropriate mens rea is satisfied: an intent to murder and an intent to destroy or damage the owner's building without the effective consent of the owner. *Hogue v. State*, 711 S.W.2d 9, 13 (Tex. Crim. App. 1986).

In this case, there is legally sufficient evidence of two intents—an intent to murder Pham and an intent to destroy or damage the house. The arson investigator testified that the "V" shaped burn pattern on the wall at the head of the bed along with the smoke pattern on the outside of the middle bedroom window indicated that the bed in the master bedroom was the area of the fire's origin. The investigator detected an overwhelming odor of gasoline in the living room emitting from the back wall, the couch, and near the television indicating that Shelton intended to burn the entire house. Because the bedroom door was closed, the fire did not travel from the bedroom to the rest of the house, and so the house did not completely burn. The investigator also found gasoline had been poured on Pham's luggage, which was stored in the dining room, and on photographs of Pham on the cruise vacation she had taken with Shelton.

The assistant medical examiner testified that the body was discovered, not in an extreme fetal position as is typical in a death by arson case, but flat with the feet bent backward, indicating that Pham had been restrained prior to the fire being set. The medical examiner further testified that there was no evidence that Pham attempted to escape such an intense fire, also indicating that she was restrained. Viewing the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found Shelton had the intent to murder the complainant and the intent to destroy or damage the house by fire. *See Hogue v. Johnson*, 131 F.3d 466, 507 (5th Cir. 1997) ("[W]e can see no reason that a state must treat [the defendant] more leniently because he intended to kill [the complainant] by burning her to death in the house fire, as she lay affixed to the bed to which he had firmly bound her, than if he had shot her just before the flames reached her."). Shelton's second issue is overruled.

C. Evidence Linking Shelton to the Offense

In his third issue, Shelton argues the evidence is legally insufficient to connect him with the commission of any offense that occurred at Pham's home on the date alleged. Shelton argues that the only evidence offered to support the capital-murder conviction was cell-phone records that purported to show his phone was not at his house during a time he said he was home, and a voicemail message in which he said he was going to Pham's house the morning of the fire.

Reviewing the evidence in the light most favorable to the verdict, the record reveals the following evidence identifying Shelton as the perpetrator: At 12:55 a.m., the morning of the fire, Pham sent a text message to Shelton asking him to leave her alone. About 15 minutes later, Shelton responded by phoning Pham at her home leaving angry messages about their relationship and expressing anger about her behavior toward other men while on the cruise and about photographs of her on the cruise. At 2:00 a.m., Pham left a bar, drove a friend home, and told the friend that she planned to go home. At 2:48 a.m., Shelton left a voicemail message for Pham telling her he was going to her home. Cell-phone records from Shelton's phone indicate that between 2:57 and 2:59 a.m., Shelton was traveling north from his home toward her home.

There were no signs of a forced entry at Pham's house, suggesting she knew her killer. Witnesses testified that Shelton had a key to Pham's home and it was common for her to demand the return of her key when she and Shelton argued. Although Shelton showed Sergeant Holtke the text message Pham sent him, he did not tell Holtke about the voicemail messages he left for her. Further, Shelton told Holtke he did not leave his home after 1:30 the morning of the fire, but Shelton's cell-phone records show that he left his home and traveled toward Pham's home while either phoning or sending text messages 29 times. Several witnesses testified that Shelton and Pham had an "on-again, off-again" romantic relationship. Some of those witnesses traveled with Shelton and Pham on a recent cruise

vacation. Luggage and photographs from the vacation were doused with gasoline on the night of the fire.

The identity of the perpetrator of an offense can be proved by direct or circumstantial evidence. *Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986). Here, the physical evidence indicates that Pham either opened the door to her killer, or he had a key. The evidence also shows that before the fire, Shelton contacted Pham via cell phone as he drove in a direction consistent with driving from his home to her home. Further, he left angry messages on her phone arguing with her and telling her he was coming to her home. Shelton lied about leaving his home prior to the fire, and failed to reveal communications he had with Pham shortly before her death. Viewing the evidence in the light most favorable to the verdict, a rational trier of fact could have found beyond a reasonable doubt that Shelton was the person who entered the complainant's home, bound her, and set fire to her and her home. Shelton's third issue is overruled.

Voir Dire

In his fourth and fifth issues, Shelton argues the trial court erred in sustaining the State's objections to improper commitment questions during voir dire and in overruling his objections to improper commitment questions.

A. Standard of Review

The trial court may impose reasonable restrictions on the exercise of voir dire examination. *Boyd v. State*, 811 S.W.2d 105, 115 (Tex. Crim. App. 1991). The trial court may limit voir dire when a question commits a venire member to a specific set of facts. *Standefer v. State*, 59 S.W.3d 177, 182–83 (Tex. Crim. App. 2001). A trial court may not, however, restrict proper questions that seek to discover a prospective juror's views on relevant issues. *McCarter v. State*, 837 S.W.2d 117, 121–22 (Tex. Crim. App. 1992). Although voir dire examination is largely within the sound discretion of the trial court, a trial court abuses its discretion when its denial of the right to ask a proper question prevents

determination of whether grounds exist to challenge for cause or denies intelligent use of peremptory challenges. *Mason v. State*, 116 S.W.3d 248, 253 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).

A commitment question is one that commits a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact. *Standefer*, 59 S.W.3d at 179. For a commitment question to be proper, it must contain only those facts necessary to test whether a prospective juror is challengeable for cause. *Id.* at 182. Two questions are relevant to determine whether an improper commitment question has been asked: (1) Is the question a commitment question, and (2) Does the question include facts—and only those facts—that lead to a valid challenge for cause? *Id.* If the question is a commitment question, but does not include only the facts that lead to a valid challenge for cause, the trial court should not permit the question. *Id.* at 182–83.

B. Shelton's Voir Dire Questions

During voir dire, Shelton's attorney asked the following two questions:

> If you have a scenario where somebody goes in somebody's house and kills them and then they later – and there's really no evidence as to when a fire was started or not, but you have evidence that the person was murdered in some fashion, and then they later make the decision to burn the house down to cover it up, do you think that's capital murder?
>
> [Prosecutor]: Objection, Your Honor. That's asking the jurors to commit to a specific set of facts.
>
> THE COURT: Sustained.
>
> [Defense Attorney]: Well, along the lines of what Ms. Barnett was talking about earlier in her examples. If you have a scenario where a house is burned, but there's no evidence as to whether the fire caused it and there's a possibility the fire was set after the death, is that necessarily a capital murder, in your view?

> [Prosecutor]: Objection, Your Honor. That's asking the jurors to commit to a specific set of facts.
>
> THE COURT: Sustained.
>
> [Defense Counsel]: All right. Well, let me submit to you – you're off the hook – that – let me submit to you that there's a question at that point as to whether the murder was committed while in the course of an arson or whether the arson was an afterthought, all right?

Shelton's questions were commitment questions in that they asked whether prospective jurors would resolve the issue of capital murder based on a particular set of facts. We now turn to whether the commitment questions were improper.

To determine whether the commitment questions were improper, we must determine whether the questions contained only those facts that would lead to a valid challenge for cause. A prospective juror may be challenged for cause if (1) he possesses a bias or prejudice in favor of or against the defendant; (2) he possesses a bias against a phase of the law upon which the State or the defendant is entitled to rely; or (3) he has already decided the defendant's guilt or punishment. *Barajas v. State*, 93 S.W.3d 36, 39 (Tex. Crim. App. 2002); *see also* Tex. Code Crim. Proc. Ann. art. 35.16 (Vernon 2006).

Shelton does not argue that the questions were designed to lead to a valid challenge, but argues they should have been permitted to educate the jury in response to the following remarks made by the prosecutor during voir dire:

> Let's say I go over to my brother's house and I know he's at home asleep at 9:00 o'clock [sic]. And I set his house on fire to kill him. That is a capital murder. Does that make sense?
>
> Okay. So, we've set a house on fire, nobody's in the house, not capital.
>
> We've set a house on fire, we don't know if anybody's in the house, not capital.
>
> We've set a house on fire, we know somebody's in the house and we kill them,

> that's capital. Does that make sense? Anybody have any questions?
>
> Let's say I set the house on fire by setting the body on fire. That's capital murder. Does that make sense?
>
> Now, let's say I kill the person and they're really not dead, but I don't know that. I'm trying to kill them. I think they're dead, but they're not really dead and I set the house on fire, that's capital. Does that make sense?

Shelton did not object to the prosecutor's statements at trial, but on appeal claims his improper commitment questions were necessary, not to lead to a valid challenge for cause, but to "correct the prosecutor's misleading statements on the relationship between arson and murder in proving a capital murder case." While it is impermissible to ask about a prospective juror's ability to convict an individual on a particular set of facts, it is permissible to use hypothetical situations to explain the application of the law. *Atkins v. State*, 951 S.W.2d 787, 789 (Tex. Crim. App. 1997). The prosecutor's hypothetical situations were not impermissible; therefore, it was not necessary for Shelton to correct the prosecutor's statements. Shelton has failed to show how the commitment questions were designed to lead to a valid challenge for cause. The trial court did not abuse its discretion in sustaining the State's objections. Shelton's fourth issue is overruled.

C. The State's Voir Dire Question

In his fifth issue, Shelton argues the trial court erred in overruling his objection to the prosecutor's question during voir dire because the prosecutor improperly committed the venire to finding Shelton guilty even if the State was unable to prove the manner and means of death. The prosecutor asked the following question:

> Is there anybody here who thinks, well, if you cannot show me exactly how this person died, I just don't think I could find the person guilty. I believe they did it, but if you can't prove to me exactly how they did it, I don't think I can find him guilty. Anybody feel that way?

The State concedes the question was a commitment question, but argues that the question contained only facts necessary to lead to a valid challenge for cause. The question asked the prospective jurors whether they would require the State to prove exactly how the accused murdered the victim, which is not an element of the offense. *See Garrett v. State*, 682 S.W.2d 301, 308 (Tex. Crim. App. 1984) (holding that an unknown manner and means is not an essential element of the offense of capital murder). The State may properly challenge a prospective juror for cause when the juror would hold the State to a higher standard than "beyond a reasonable doubt." *Coleman v. State*, 881 S.W.2d 344, 360 (Tex. Crim. App. 1994). The State's question was designed to identify potential jurors that would hold the State to a higher burden of proof, *i.e.*, proof not required as an element of the offense. Because the State's question only contained facts necessary to identify prospective jurors who might not be able to follow the law, the question was not improper. Shelton's fifth issue is overruled.

The judgment of the trial court is affirmed.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Frost, Brown, and Boyce.
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