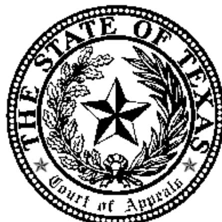
Affirmed and Memorandum Opinion filed December 14, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00946-CR

CHARLES JEROD BRYANT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1236664

MEMORANDUM OPINION

A jury convicted appellant Charles Jerod Bryant of murder and assessed punishment at life imprisonment and a $10,000 fine. Appellant challenges his conviction on the single ground that the jury "received other evidence" after retiring to deliberate, which would entitle him to a new trial under Rule 21.3(f) of the Texas Rules of Appellate Procedure. We affirm.

BACKGROUND

During appellant's trial, the State offered into evidence Exhibit 48, which is a photograph showing a gunshot wound to the victim's head. The photograph was taken

during the victim's autopsy and prior to the body being cleaned. Appellant objected on the ground that the prejudicial nature of the photograph outweighed its probative value. The trial court suggested that the photograph would be redundant because the court had already admitted a bloody photograph of the body and the State could offer a "cleaned up" autopsy photograph of the gunshot wound. Although the court did not explicitly rule on appellant's objection, the State said, "If that's your ruling, I understand. Let me get the cleaned up photo." On appeal, the State concedes that it "apparently withdrew Exhibit 48."

While the jury was deliberating during the guilt–innocence phase of appellant's trial, it requested "all admitted evidence." The court responded, "The evidence is attached," and apparently provided all admitted evidence to the jury. Appellant was convicted, and he did not file a motion for new trial.

Exhibit 48 was included in the appellate record, and appellant now argues that this fact "proves" that the jury received other evidence in violation of Rule 21.3(f) of the Texas Rules of Appellate Procedure.

ANALYSIS

Rule 21.3(f) requires that a criminal defendant be granted a new trial "when, after retiring to deliberate, the jury has received other evidence." TEX. R. APP. P. 21.3(f). For a defendant to obtain a new trial under this rule (1) the record must show that the jury actually received other evidence, and (2) the character of the evidence is such that it is detrimental or adverse to the defendant. *Bustamante v. State*, 106 S.W.3d 738, 743 (Tex. Crim. App. 2003); *Gibson v. State*, 29 S.W.3d 221, 224 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). The "receipt" prong of the test requires an initial factual determination. *See Woodall v. State*, 77 S.W.3d 388, 392–93 (Tex. App.—Fort Worth 2002, pet. ref'd); *Dixon v. State*, 64 S.W.3d 469, 475 (Tex. App.—Amarillo 2001, pet. ref'd). To show receipt, there "must be *something* in the record to indicate the jury viewed" the evidence. *Gibson*, 29 S.W.3d at 225. And even if the record shows that the

jury viewed the evidence, a new trial is not required if the jury was able to disregard the evidence. *See Bustamante*, 106 S.W.3d at 743 ("In determining whether evidence was 'received' by the jury, a court may consider how extensively the evidence was examined by the jury and whether the jury was given an instruction to disregard."); *Woodall*, 77 S.W.3d at 391–94 (affirming conviction despite six jurors testifying that they viewed photographs not in evidence because all jurors testified that they did not consider the photographs in reaching the verdict).

A defendant may adduce the facts necessary to show "receipt" during a hearing on a motion for new trial. *Dixon*, 64 S.W.3d at 474; *see* TEX. R. APP. P. 21.2 ("A motion for new trial is a prerequisite to presenting a point of error on appeal only when necessary to adduce facts not in the record."); *see also Carroll v. State*, 990 S.W.2d 761, 761–63 (Tex. App.—Austin 1999, no pet.) (reversing conviction after a juror testified at a hearing on a motion for new trial that all jurors viewed a mug shot of the defendant from a prior arrest). And if the record does not already show that the jury received other evidence, a motion for new trial is required to preserve error for our review. *See* TEX. R. APP. P. 21.2; *Trout v. State*, 702 S.W.2d 618, 620 (Tex. Crim. App. 1985); *see also Woodall*, 77 S.W.3d at 392 (addressing the merits of appellant's argument that the jury received other evidence because the record was adequate to address the issue even though the appellant failed to file a motion for new trial); *Dixon*, 64 S.W.3d at 474 ("Because he did not present his motion for new trial to the trial court, appellant did not preserve error for review, except to the extent that we may evaluate his assertions on the record before us." (citation omitted)).

Appellant did not move for a new trial, and the record does not otherwise show that the jury received other evidence. The inclusion of Exhibit 48 in the appellate record does not prove that the exhibit was sent to the jury when it requested all admitted evidence. *See Borunda v. State*, No. 05-00-00568-CR, 2001 WL 722151, at *2–4 (Tex. App.—Dallas June 28, 2001, no pet.) (not designated for publication) (affirming the trial

court's finding that a suppressed statement was not delivered to the jury during deliberations even though the statement was attached to the reporter's record as a trial exhibit). There was no testimony that Exhibit 48 was present in the jury room during deliberations, and there is no suggestion in the record that any juror actually viewed the photograph or considered it when reaching the verdict. Based on this record alone, we cannot hold that the jury "received other evidence" within the meaning of Rule 21.3(f).

Appellant's issue is overruled, and we affirm the trial court's judgment.

/s/ Leslie B. Yates
Justice

Panel consists of Chief Justice Hedges and Justices Yates and Price.*

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

* Senior Justice Frank C. Price sitting by assignment.