Affirmed and Majority and Concurring Memorandum Opinions filed August 25, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00672-CR

JACK MURENGA HARRIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Court Cause No. 08-04271

MAJORITY MEMORANDUM OPINION

Appellant, Jack Murenga Harris, was tried for two counts of aggravated assault. He was convicted of one count and acquitted on the second. The parties agreed to a punishment of imprisonment for fifteen years. Appellant brings forth three points of error on appeal of his conviction. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2007, appellant's wife Deborah Harris ("Deborah"), Tandalon Scypion ("Scypion"), and Scypion's cousin Paige Cormier ("Cormier") engaged in a physical fight

outside a nightclub named French Connection ("2007 Altercation"). The parties knew each other because Deborah taught Scypion and Cormier when they were students at Thomas Jefferson High School. Although Deborah and Cormier separately filed police reports about the incident, no charges were ever brought. Appellant was not present during the 2007 Altercation.

On July 6, 2008, appellant and Deborah went to French Connection. Scypion was also present at the club. The parties agree on the above facts, but disagree about almost all other events.

State's Account

Scypion testified she was present at French Connection but did not see appellant or Deborah until she left the building shortly before midnight. She stated she did not have any interactions with the Harrises inside the French Connection. As she left the nightclub, she met her distant cousin, Leroy Holmes, III ("Holmes"), outside the building. Scypion and Holmes conducted a conversation in front of Scypion's car, which was parked in front of the nightclub.

Scypion alleged that as the conversation continued, Deborah approached and faced her, but neither woman spoke. Holmes testified that he asked Deborah, "Hey, ma'am, how are you doing? Is there something you need?"

According to both Scypion and Holmes, Deborah never responded because appellant entered the conversation. Although Scypion and Holmes differ about whether appellant made any other remarks, they agree that appellant warned Holmes that he should not involve himself in the encounter because "this is between the two women." Holmes testified he did not know about the 2007 Altercation and responded to appellant that he did not understand the comment.

Holmes stated that appellant moved towards him and Holmes warned him to back away, calling appellant "Old School." Appellant and Deborah explained this is a

derogatory term. Scypion and another witness testified that appellant then placed a gun in his hand with which he punched Holmes' head. Holmes asserted that the blow felt "mighty hard . . . harder than a fist." Scypion stated that Holmes fell face first on the ground as a result of the punch. Scypion explained appellant then shot Holmes in the head. Holmes acknowledged that bullet fragments remain in his body.

Scypion testified Harris next tried to punch her. After that, he aimed the gun at her head, but Scypion moved and the bullet hit her left hand. Aaron Auzenne ("Auzenne"), another person present outside the nightclub, tried to remove Scypion from the scene after she was shot. According to both Scypion and Auzenne, appellant threatened Auzenne with the words, "Youngster, you don't want none of this." Appellant and Deborah then got into their maroon sport utility vehicle ("SUV") and drove away from the scene.

The Port Arthur Police Department arrived at the scene of the shootings. Detective Lakeisha Thomas was present at the French Connection when she heard Deborah Harris' name in connection with the incident. She testified she recognized the name and asked dispatch to relay Deborah's address. Detective Thomas stated she then went to Deborah's home, where nobody responded when police knocked on the door. Officer Matthew Bulls testified that when the police called Deborah Harris' home, nobody answered the telephone.

The police found the SUV in a neighbor's driveway. The SUV was obscured by bushes and Officer Bulls testified it would have been difficult to see from the street. Officer Bulls stated that the neighbor, Robin Bazille, told him he did not to know why the SUV was parked in his driveway. Bazille gave permission for the police department to impound the SUV.

Appellant's Account

Deborah testified she noticed Scypion when Scypion entered the club. Deborah indicated to appellant who Scypion was, noting she was one of the women involved in the

2007 Altercation. Deborah explained that later that night she was in the women's restroom talking with a third party when Scypion entered the restroom. Deborah testified Scypion did not speak, but "just looked at me," even after Deborah told her, "Not tonight. Not today — not tonight." Deborah explained that she meant she did not want to have another altercation with Scypion. Deborah said she left the restroom after making that statement.

Deborah testified she and appellant stayed in the nightclub for about another twenty minutes after she exited the restroom. When they walked outside, Deborah saw Scypion and Holmes in front of the nightclub. Deborah believed Scypion was waiting for them and wanted to "hurt" her. Deborah stated that she stopped walking while she figured out how to get to her car across the street. It was at this point appellant warned Holmes not to get involved because "what was going on was between me and [Scypion]."

Both Deborah and appellant asserted that Holmes then moved towards appellant and referred to him as "Old School." Appellant admitted he punched Holmes because he "stepped within what I call my comfort zone" without cause. After appellant hit Holmes, the Harrises testified they immediately left the scene in their SUV. Both of them stated appellant did not have a firearm in his possession and did not shoot anyone. They also testified they had no knowledge of how Holmes and Scypion were shot.

After leaving the scene, the Harrises went to Deborah's home.[1] Deborah testified that she routinely parked in the neighbor's driveway where the SUV was found. She also explained they did not respond when the police officers knocked on her door and telephoned her because she was afraid. Deborah stated she was afraid because she knew appellant had hit Holmes, which meant "there was going to be a deal if the police . . . got involved."

[1] Appellant testified that he and Deborah maintained separate residences even though they were legally married.

Appellant testified that Bazille called after the police left his home to inform him that the police officers wanted to speak with him. Officer Bulls acknowledged that appellant appeared at the police station sometime after daybreak the next morning and made a statement to Detective Brian Fanette. Detective Fanette did not arrest appellant at that time.

Trial Proceedings

During voir dire, defense counsel asked if any member of the venirepanel knew anyone in the district attorney's office. Venireperson No. 6 answered that he was a friend and hunting partner of a supervising attorney, Ed Shettle, at the district attorney's office. The following exchange then occurred:

> Defense Counsel: Now, occasionally, Mr. Shettle does come to the courtroom, all right, and he's the supervising attorney and he may make suggestions. You will never hear it, however; but you may see his face. If he came in and had something to do with this case, would that sway you one way or another?
>
> Venireperson: It possibly could.
>
> Defense Counsel: The question is, of course, at the end of everything that goes on in the courtroom, can you be fair and impartial knowing what you know, that Mr. Shettle is a hunting buddy of yours?
>
> …
>
> Venireperson: Yes.
>
> Defense Counsel: So, when you say it possibly could have an [effect] on you, you mean that it wouldn't have an [effect] on you?
>
> Venireperson: It possibly could.
>
> Defense Counsel: We have to be certain. Will it or won't it?
>
> Venireperson: I would say yes.

At the end of voir dire, appellant made a challenge to Venireperson No. 6 for cause. The trial court denied the motion, noting that he did not believe the venireperson to be expressing a belief that he could not be fair or impartial in the trial. The district attorney added that he could inform Mr. Shettle that he should refrain from entering the courtroom. The trial court then added, "[W]hat I heard was that if Mr. Shettle spoke and made some representations, that the jury could be influenced but that is moot if Mr. Shettle makes no statements and that would be the first time in three and a half years that he would have made a statement during the course of a trial here."

The trial court overruled the challenge.

Appellant then requested an extra preemptory strike, which was denied.

Venireperson No. 6 was not seated on the jury. Appellant stated on the record that he would have used a preemptory strike on Venireperson No. 26 but could not because he was denied his challenge for cause on Venireperson No. 6.

The jury found appellant guilty of aggravated assault of Holmes, but not guilty of aggravated assault of Scypion. The prosecution and appellant agreed to a sentence of fifteen years' imprisonment, which was imposed by the trial court.

DISCUSSION

Appellant asserts three points of error. We discuss each in turn.

I. Did the Trial Court Err By Denying Appellant's Challenge for Cause of a Veniremember?

Appellant contends that the trial court erred because it did not remove Venireperson No. 6 for cause.

A. Standard of Review

To preserve error when a trial court denies a challenge for cause, the record must show appellant: (1) asserted a clear and specific challenge for cause; (2) used a

preemptory challenge on the complained-of venireperson; (3) exhausted all preemptory challenges; (4) requested additional strikes, which the trial court denied; and (5) had an objectionable juror sit on his jury. *Sells v. State*, 121 S.W.3d 748, 758 (Tex. Crim. App. 2003). It is the appellant's burden to show the venireperson understood the requirements of the law and could not overcome his prejudice enough to follow it. *Id.* at 759.

The trial court is the proper authority to determine a venireperson's ability to serve. Code Crim. Proc. Ann. art. 35.21 (West 2010). We review a trial court's decision to deny a challenge for cause under an abuse of discretion standard. *Russeau v. State*, 171 S.W.3d 871, 879 (Tex. Crim. App. 2005); *Colburn v. State*, 966 S.W.2d 511, 517 (Tex. Crim. App. 1998). An appellate court has a duty to examine the record as a whole to determine whether there is support for the trial court's ruling. *Ladd v. State*, 3 S.W.3d 547, 559 (Tex. Crim. App. 1999). If there is support, we must defer to the trial court because the trial court actually witnessed the venireperson's demeanor. *Id.* "If a venireperson vacillated or equivocated with respect to his ability to follow the law, the appellate court must defer to the trial court's judgment." *Id.*

B. Discussion

We conclude appellant met his burden to preserve error. We therefore consider whether appellant met his burden to show the venireperson could not overcome a bias against him. *Sells*, 121 S.W.3d at 758. Appellant's questions centered on Venireperson No. 6's possible reaction if Mr. Shettle were to enter the courtroom and possibly give arguments. Specifically, he was asked, "If [Shettle] came in and had something to do with this case, would that sway you . . .?" The Venireperson answered that it "possibly could." Nonetheless, when the Venireperson was asked if he could be fair and impartial, he responded, "yes." Based upon the record, we conclude the Venireperson made vacillating statements that: (1) he could be fair and impartial; and, (2) the presence of Shettle in the courtroom might have an effect on him.

Under an abuse of discretion standard, we defer to the trial court's judgment if there is any support for the ruling in the record. *Ladd,* 3 S.W.3d at 559. The trial court stated on the record that "what I heard was that if Mr. Shettle spoke and made some representations, that the juror could be influenced but that is moot if Mr. Shettle makes no statements . . ."[2] Moreover, the district attorney stated on the record that Mr. Shettle could be ordered to stay out of the courtroom during the trial. The record includes support for the trial court's interpretation of the Venireperson's statements, so we defer to the trial court. *Id.*

We overrule appellant's first point of error.

II. Did the Trial Court Err By Admitting The Complainants' Medical Records (State's Exhibit 1) into Evidence?

Appellant contends the trial court erred by admitting the medical records of Scypion and Holmes over his objection. These records detailed both complainants' medical treatment after they received gunshot wounds.

A. Standard of Review

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Oprean v. State,* 201 S.W.3d 724, 726 (Tex. Crim. App. 2006). An appellate court must uphold the trial court's decision unless it falls outside the "zone of reasonable disagreement." *Id.* (citing *Montgomery v. State,* 810 S.W.2d 372, 391 (Tex. Crim. App. 1991).

B. Analysis

Appellant objected at trial to the admission of the medical records on the grounds that records were not produced in accordance with the trial court's discovery order. The order required the prosecutor to make "all physical evidence that could be offered at trial"

[2] The record does not indicate Shettle made any arguments in appellant's case and is silent about whether Shettle appeared in the courtroom.

available to the defense if it was in "the possession, custody or control of the state or any of its agencies, or otherwise reasonably available to the prosecution." The prosecution, upon defense written request, was to make those materials available within thirty days. Defense counsel requested the medical records months before trial, but received them on the day before the complainants were to testify about their injuries. The prosecution contended that the hospital waited to provide the records to it, so it could not produce them earlier.

The trial court overruled appellant's objection and the medical records were admitted into evidence.

Appellant contends on appeal that he did not have adequate notice to prepare a defense because the medical records were given to the defense so late. Nonetheless, Scypion testified that she was shot through the left hand. She stated that the bullet went through her hand, hit a bone, and "came back out." She explained that she continues to have numbness and has lost motor control and strength in that hand as a result of the shooting. Holmes testified that he remembered being shot, feeling blood, and a bullet remains in his head. He stated that he was only in the hospital overnight, but continues to be monitored by a neurologist. All of this testimony occurred without objection from appellant.

Even assuming *arguendo* that the trial court erred by admitting the medical records, we conclude the error was harmless. Improper admission of evidence is not reversible error if the same or similar evidence is admitted without objection. *Mayes v. State*, 816 S.W.2d 79, 88 (Tex. Crim. App. 1991); *Nino v. State*, 223 S.W.3d 749, 754 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Scypion and Holmes' testimony was the same or similar as the medical records. As a result, we overrule appellant's second point of error.

III. Did the Trial Court Allow Improper Cross Examination of Appellant's Wife?

Appellant contends the trial court erred by allowed the prosecution to ask Deborah, "Do you believe that the young man and young woman had someone else shoot them just to get your husband in trouble?"

A. Standard of Review

We utilize the same standard of review as in Part II above.

B. Analysis

Deborah explained on direct examination that appellant hit Holmes, but did not shoot anyone. On cross examination, the prosecutor asked, "Do you believe that the young man and the young woman had someone else shoot them just to get your husband in trouble?"

Appellant objected, stating, "That's not proper cross-examination . . . for her to speculate on what the other people would do to the extent to get Mr. Harris in trouble."

The trial court overruled the objection.

Deborah responded, "No, I don't think they would do that. I don't see why they would do that."

Appellant argues on appeal that the question: (1) required Deborah to respond based upon speculation; (2) is irrelevant; and, (3) required Deborah to have personal knowledge that she lacked. *See* Tex. R. Evid. 401; 402; 602. Appellant waived the second and third objections because he did not present them to the trial court. Tex. R. App. P. 33.1(a).

Lay witnesses may give opinion testimony only if they are: (1) rationally based on the perception of the witness; and, (b) "helpful to a clear understanding of the witness' testimony or the determination of a fact issue." Tex. R. Evid. 701. A lay witness cannot testify to what another person is thinking. *Fairow v. State*, 943 S.W.2d 895, 899 (Tex.

Crim. App. 1997). The lay witness may testify to an opinion if it is based upon the witness' objective perception of events. *Id.* It is the fact finder's province to determine what weight to give that opinion. *Id.*

In this case, Deborah had already testified that she knew Scypion as a student and had multiple interactions with her, including the 2007 Altercation. She testified that she interpreted Scypion's actions at the French Connection as threatening. Furthermore, she testified that she had an opinion that Scypion and Holmes were waiting for her outside the nightclub to "hurt" her. Throughout her testimony, Deborah speculated about the reasons for Scypion and Holmes' actions based upon her perception of events. *Id.*

Furthermore, the prosecution did not ask Deborah whether Scypion or Holmes had themselves shot. It asked whether she believed that theory of events, asking her to draw upon her own perceptions of Scypion's character, the nature of the dispute between herself and Scypion, and her objective understanding of the level of conflict between Holmes and appellant. Tex. R. Evid. 701.

We review the trial court's decision to permit Deborah to answer that question under an abuse of discretion standard. *Oprean*, 201 S.W.3d at 726. We conclude the trial court could have found that the question was grounded in Deborah's objective perceptions and not on speculation about the state of mind of Scypion or Holmes. The trial court could have further determined this opinion was helpful to the jury because it helped eliminate a possible alternative theory of the crime. *Id.*

As a result, we overrule appellant's third point of error.

IV. Did the Cumulative Effect of the Alleged Errors Lead to an Unfair Trial?

Appellant contends in his final point of error that all of the alleged errors combined deprived him of a fair trial. We have considered each point of error brought forward by the appellant and have concluded there was no error. Consequently, there is no

cumulative error to consider. *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999). As a result, we overrule appellant's final issue.

CONCLUSION

Having overruled each of appellant's points of error, we affirm the trial court's judgment.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Brown, and Christopher. (Christopher, J., Concurring).

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