Affirmed and Memorandum Opinion filed May 5, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00404-CR

JAMES JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1387565

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

Appellant James Jones was convicted of aggravated robbery and sentenced to 60 years in prison. *See* Tex. Penal Code Ann. § 29.03 (West 2011). On appeal, appellant contends there is insufficient evidence to support his conviction. Because appellant's own statements place him at the scene of the crime, we conclude the evidence is sufficient. Appellant also asserts that the trial court erred in denying his motion to suppress two statements made to an FBI agent, which were admitted in both the guilt/innocence and punishment phases of trial. We

disagree because the record supports the trial court's determination that both statements were made voluntarily. Finally, appellant contends the trial court erred when it excused a venire member from jury service over appellant's objection. We need not decide whether any error occurred, however, because appellant has not shown that he was forced to accept an objectionable juror. We therefore affirm the trial court's judgment.

BACKGROUND

A. The robbery

On the morning of April 10, 2012, complainants Elvin Guzman, Priscilla Chacon, and Amanda Gonzalez went to work at a local Chase Bank branch in Harris County, Texas. Guzman and Chacon worked in the front of the bank, while Gonzalez worked the drive-thru in the back. While Guzman was with a customer that morning, she looked up and saw three masked men enter the bank. Two of the men ran to the back of the store and the third man, later identified as appellant, remained in the lobby area. Appellant had two firearms. Appellant pointed two guns at Guzman and told her to get down. Guzman testified that she feared for her life.

Chacon testified that she was assisting a customer when the customer suddenly dropped to the floor. She turned around and appellant pointed two guns at her face, making her fear for her life. While appellant kept his guns pointed at the people in the front of the bank, another assailant in the back of the bank grabbed Gonzalez by the neck and told her not to move. Gonzalez testified that she feared for her life when she saw that her assailant had a gun.

The assailants took the money from the cash drawers in the drive-thru and loaded over $18,000 into a trash can before running back through the front of the

bank. One of the packs of money contained a dye pack. Chacon saw the assailants jump into a dark-colored vehicle and drive away.

Just as the assailants were fleeing the robbery, Augustin Gomez drove up to the bank and observed two to three men wearing handkerchiefs in the parking lot. He watched the men get into the car, which left the parking lot and entered the feeder road. One of the men threw a bucket out of the car window, and money covered in red ink came out of the bucket onto the roadway.

Deputy John Palermo with the Harris County Sheriff's Office arrived at the bank and then drove in the direction the assailants had fled. The vehicle had gone east along the access road and was forced to make a U-turn under the freeway. Approximately one mile from the bank, Deputy Palermo found a dark-colored vehicle—which matched the description provided by the complainants—in the parking lot of a funeral home. The driver's and left rear passenger's doors were open and the car was still running without keys in the ignition. The steering column was damaged. Deputy Palermo found a bandana in the backseat of the vehicle, which was later recovered by the sheriff's crime scene unit.

Rebecca Mikulasovich, a DNA analyst with the Harris County Institute of Forensic Sciences, tested the bandana. She performed an analysis on two separate samples from the bandana and obtained DNA profiles for comparison. One sample contained a mixture of DNA profiles, and the other contained one male DNA profile. Appellant could not be excluded as a contributor to either sample.

Kevin Katz, a special agent with the FBI Bank Robbery Task Force, was assigned to investigate the robbery. He received information from responding officers, security cameras, and the abandoned car, as well as the results from the DNA testing on the bandana. Agent Katz received a Combined DNA Index System (CODIS) hit from the bandana that matched appellant.

B. Appellant's interviews

On January 23, 2013, Agent Katz interviewed appellant at the Harris County Jail—where appellant had been detained for an unrelated crime—regarding the bank robbery. Appellant was advised of his rights. Appellant waived his rights and agreed to speak with Agent Katz. During the interview, appellant identified himself in photographs taken from the surveillance video as the assailant in the front of the bank with two guns. Appellant also provided information about other bank robberies that he had committed.

On January 25, 2013, Agent Katz interviewed appellant again to obtain more information about the other bank robberies appellant confessed to committing. Appellant was again advised of his rights and chose to waive his rights. Appellant provided additional details about another bank robbery that occurred on January 17, 2012.

C. Appellant's trial

Appellant was charged with aggravated robbery. Appellant filed a pre-trial motion to suppress both his January 23 and January 25 statements to Agent Katz, alleging the statements were involuntary. Appellant asserted that his statements were made due to affirmative promises made by Agent Katz. Specifically, appellant claimed Agent Katz made affirmative promises that appellant would be tried in the federal system if he cooperated. Agent Katz testified that "at some point," although it was not recorded on the audio, he would have told appellant about the option of prosecuting the case in state or federal court.

In the course of trial, the trial court conducted two hearings on appellant's motion. During the guilt/innocence phase of trial, the State sought to introduce a redacted version of the January 23 statement, in which appellant admitted to the

robbery. During the punishment phase of trial, the State sought to introduce the full versions of the January 23 and January 25 statements, in which appellant admitted to, and provided details of, other robberies. At each hearing, the trial court ruled that the statements were voluntarily given, denied appellant's motion to suppress, and allowed the State to introduce the statements. The trial court later signed findings of fact and conclusions of law.

Appellant filed a timely notice of appeal, and the trial court certified his right to appeal.

ANALYSIS

Appellant presents four issues on appeal. We address appellant's fourth issue first because it challenges the sufficiency of the evidence and seeks rendition of a judgment of acquittal.

I. The evidence is sufficient to support appellant's aggravated robbery conviction.

In his fourth issue, appellant contends the evidence is insufficient to support his conviction for aggravated robbery. Specifically, appellant argues that, without appellant's statement in the January 23 interview, there was no evidence that appellant committed the crime. Because a reviewing court must look at all of the evidence presented at trial, whether properly or improperly admitted, we disagree.

A. Standard of review and applicable law

We review evidentiary sufficiency challenges under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). The reviewing court must consider 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 crime beyond a reasonable doubt.

Jackson, 443 U.S. at 319; *Anderson v. State*, 416 S.W.3d 884, 888 (Tex. Crim. App. 2013). The jury is the sole judge of the credibility of witnesses and the weight afforded testimony. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). The jury may reasonably infer facts from the evidence presented, credit the witnesses it chooses, disbelieve any or all of the evidence or testimony proffered, and weigh the evidence as it sees fit. *See Canfield v. State*, 429 S.W.3d 54, 65 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). When the record supports conflicting inferences, the reviewing court presumes that the trier of fact resolved the conflicts in favor of the State and defers to that determination. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Our role on appeal is simply to ensure that the evidence reasonably supports the jury's verdict. *Montgomery*, 369 S.W.3d at 192.

B. Appellant's own statement, DNA evidence, and other circumstantial evidence tie him to the robbery.

A person commits aggravated robbery if (1) in the course of committing theft, (2) with intent to obtain or maintain control of property, (3) he knowingly or intentionally, (4) threatens or places another in fear of imminent bodily injury or death, and (5) uses or exhibits a deadly weapon. *See* Tex. Penal Code Ann. § 29.02(a)(2), 29.03(a)(2) (West 2011). Appellant challenges the sufficiency of the evidence to support the finding that he was one of the three masked men committing the robbery. Specifically, appellant contends the evidence supporting the jury's verdict is insufficient because none of the witnesses identified appellant as one of the assailants.

We disagree that the evidence, when viewed under the appropriate standard of review, is insufficient to support appellant's aggravated robbery conviction. When reviewing sufficiency challenges, an appellate court must consider all of the

evidence presented, whether properly or improperly admitted. *Ervin v. State*, 333 S.W.3d 187, 200 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (citing *Fuller v. State*, 827 S.W.2d 919, 931 (Tex. Crim. App. 1992)). "Jurors do not act irrationally taking such evidence into account, since they are bound to receive the law from the trial judge. All evidence which the trial judge has ruled admissible may therefore be weighed and considered by the jury, and a reviewing court is obliged to assess the jury's factual findings from this perspective." *Thomas v. State*, 753 S.W.2d 688, 695 (Tex. Crim. App. 1988). We therefore consider appellant's January 23 statement when reviewing the sufficiency of the evidence.

We conclude there is sufficient evidence in the record supporting appellant's aggravated robbery conviction. Appellant admitted in his statement that he robbed the bank. He confessed that he was the assailant in the front of the bank who pointed two guns at Ms. Guzman. Appellant also identified himself as the assailant in the front of the bank by circling himself on a surveillance photograph. Appellant told Agent Katz that after he and the other two assailants fled the scene, the dye pack exploded and dark red ink turned everything red. Appellant also admitted the red ink burned his eyes and that is the reason he threw the dye pack out of the car window. Appellant's January 23 statement ties him directly to the robbery.

The record also includes additional evidence of appellant's participation in the robbery. Although the witnesses were unable to identify appellant during trial given the assailants' use of masks, DNA evidence coupled with reasonable inferences drawn from circumstantial evidence will support a conviction. *See Hinojosa v. State*, 4 S.W.3d 240, 245–46 (Tex. Crim. App. 1999).

Gomez testified he saw two to three men with bandanas fleeing the bank robbery in a dark-colored car. Deputy Palermo testified that he arrived on the

scene quickly and then drove the direction in which the assailants fled. Deputy Palermo found a car that matched the witnesses' description abandoned less than a mile from the robbery, and the bandana was found on the backseat of the vehicle.

Mikulasovich, a DNA analyst, tested the bandana found in the car. She analyzed two separate samples from the bandana, and she was able to obtain appellant's DNA profile for comparison. Mikulasovich testified that appellant's DNA was consistent with one sample, and that appellant could not be excluded as one of two contributors to the second sample. She also testified that the likelihood a different person of appellant's race had deposited the DNA found in the bandana samples was 1 in 4 sextillion, 553 quintillion, for the first sample, and 1 in 112 million, 100,000, for the second sample (which had two contributors). These DNA results are also sufficient to support the jury's verdict. *See Hinojosa*, 4 S.W.3d at 245–46 (Tex. Crim. App. 1999). We therefore overrule appellant's fourth issue.

II. The trial court did not abuse its discretion when it denied appellant's motion to suppress his January 23 and January 25 statements.

In his second and third issues, appellant contends the trial court abused its discretion when it denied his motion to suppress and admitted into evidence audio recordings of his January 23 and January 25 statements to Agent Katz. Appellant argues that the trial court should have excluded the statements under Texas Code of Criminal Procedure article 38.21 and the Due Process Clause of the United States Constitution because they were involuntary. Appellant asserts that before he made his recorded statement, Agent Katz promised appellant that he would be prosecuted in the federal system and receive a lighter sentence if he cooperated. Appellant argues that this promise rendered his statement involuntary, and the trial court was therefore required to grant his motion to suppress.

A. Standard of review and applicable law

We review a trial court's ruling on a motion to suppress for abuse of discretion and overturn the trial court's ruling only if it is outside the zone of reasonable disagreement. *Martinez v. State*, 348 S.W.3d 919, 922 (Tex. Crim. App. 2011). We must view the evidence in the light most favorable to the trial court's ruling. *Weide v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). At a suppression hearing, the trial judge is the sole trier of fact and assesses the witnesses' credibility and decides the weight to give to their testimony. *Id.* at 24–25. When, as here, the trial court makes explicit findings, we determine whether the evidence, when viewed in the light most favorable to the ruling, supports those fact findings. *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). We then review the trial court's legal rulings de novo unless its explicit fact findings that are supported by the record are also dispositive of the legal ruling. *Id.* We uphold the ruling if it is supported by the record and correct under any theory of the law applicable to the case. *Hereford v. State*, 339 S.W.3d 111, 117–18 (Tex. Crim. App. 2011).

B. The trial court did not abuse its discretion in admitting appellant's January 23 statement during the guilt/innocence phase because the record supports the court's finding that no promises were made to appellant in exchange for his cooperation.

Appellant contends that suppression is required under both state statutory and federal constitutional law because authorities induced or coerced appellant's confession with promises of leniency. Under federal due process, a statement is involuntary if the defendant was offered inducements of such a nature or coerced to such a degree that the inducements or coercion produced the statement. *See Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995). The burden of proof at the hearing on admissibility is on the State, which must prove by a

preponderance of the evidence that the defendant's statement was given voluntarily. *Id.*

Under Texas law, article 38.21 of the Code of Criminal Procedure requires that the statement be "freely and voluntarily made without compulsion or persuasion." Tex. Code Crim. Proc. Art. 38.21. In determining the question of voluntariness, a court should consider the totality of circumstances under which the statement was obtained. *Creager v. State*, 952 S.W.2d 852, 855 (Tex. Crim. App. 1997). The ultimate question is whether appellant's will was overborne. *Id.* at 856. Under both state and federal law, the answer is the same: the record supports the trial court's finding that Agent Katz did not make a promise to appellant that overbore his will or induced him to testify.

Article 38.21. Texas law uses a four-prong test when evaluating whether police made an improper inducement so as to render a confession inadmissible. *See Martinez v. State*, 127 S.W.3d 792, 794 (Tex. Crim. App. 2004) (Meyers, J., dissenting) (citing *Henderson v. State*, 962 S.W.2d 544, 564 (Tex. Crim. App. 1997), *cert denied*, 525 U.S. 978, 119 S.Ct. 437, 142 L.Ed.2d 357 (1998)). A statement is involuntary, and thus inadmissible, if there is (1) a promise of some benefit to the defendant; (2) that is positive; (3) that is made or sanctioned by someone in authority; (4) and that is of such an influential nature it would cause a defendant to speak untruthfully. *Id.* Here, appellant failed to show that his confession was induced by a positive promise from Agent Katz.

After the hearings on appellant's motion to suppress, the trial court signed findings of fact and conclusions of law that included the following: (1) that for both the January 23, 2013 and the January 25, 2013 statements, appellant was not in custody for purposes of analysis under section 38.22 of the Texas Code of Criminal Procedure or the requirements of *Miranda v. Arizona*; (2) appellant was

nevertheless advised of his rights; (3) appellant acknowledged his rights and waived those rights; (4) Agent Katz did not make any promises to appellant in exchange for his cooperation; (5) Agent Katz did not threaten or coerce appellant to make his statement; (6) the testimony of Agent Katz was credible; and (7) the testimony of appellant was not credible. Accordingly, the trial court concluded that appellant's statement was voluntary and admissible.

The record supports these findings. Both interviews occurred in the Harris County jail, where appellant was detained for a separate robbery case that had nothing to do with the April 10 bank robbery.[1] For each interview, appellant was brought by a bailiff to the interview room, where Agent Katz and his partner were waiting for him. The recordings reflect that Agent Katz provided appellant his statutory warnings, appellant was advised of his rights to have an attorney, advised that he could have an attorney provided to him, advised that he had the right to remain silent, and advised that anything he said could be used against him. Appellant indicated that he understood these rights and waived them.

Appellant points to Agent Katz's testimony during the first suppression hearing (at the guilt/innocence phase of trial) that he would have told appellant there was an option to prosecute him in state or federal court. This statement is not a promise, but merely a prediction as to a future event. *See Mason v. State*, 116 S.W.3d 248, 260 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).

[1] Appellant does not contend on appeal that this questioning was custodial. *See, e.g., Howes v. Fields*, 132 S. Ct. 1181, 1191–94 (2012) (holding inmate taken from his cell to prison conference room for questioning about unrelated offense was not in custody for *Miranda* purposes given circumstances of questioning); *Sloan v. State*, 418 S.W.3d 884, 889 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

The other evidence introduced at the first suppression hearing likewise does not indicate that Agent Katz made a promise to appellant.[2] In fact, the audio recording reveals it was appellant who first discussed the possibility of being transferred to the federal system. In the January 23 audio recording, after appellant confessed to the robbery, he asked Agent Katz if he was going to be transferred. Agent Katz responded that a determination had not been made. He explained that the federal government had not charged appellant yet for the bank robbery and the attorneys would "work all of that stuff out." Agent Katz's response was factual and not a promise to be performed if appellant confessed. *See Jacobs v. State*, 787 S.W.2d 397, 400 (Tex. Crim. App. 1990).

Appellant chose not to testify at the hearing on his motion to suppress during the guilt/innocence phase of trial. No record evidence from that hearing supports appellant's argument regarding a promise of prosecution in the federal system. To the contrary, the record supports the trial court's finding that Agent Katz did not make any promises to appellant in exchange for his cooperation. Therefore, the trial court did not violate Article 38.21 when it admitted the January 23 statement during the guilt/innocence phase of trial.

Due process. Under the federal constitutional standard, when determining whether a confession should have been excluded, courts decide whether the confession was voluntary or coerced. *Arizona v. Fulminante*, 499 U.S. 279, 285–86 (1991). Courts examine the totality of the circumstances to determine whether the defendant's will was overborne. *Drake v. State*, 123 S.W.3d 596, 602 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (citing *Creager*, 952 S.W.2d at 855).

[2] In determining whether a trial court's decision is supported by the record, we generally consider only evidence adduced at the suppression hearing because the ruling was based on that evidence rather than evidence introduced later. *Rachal v. State*, 917 S.W.2d 799, 809 (Tex. Crim. App. 1996).

It is immaterial whether appellant actually testified falsely; it matters only that the promise made was of such a character to overbear appellant's will or cause him to testify falsely. *Herrera v. State*, 194 S.W.3d 656, 659 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).

In determining the voluntariness of a confession, police falsehoods are relevant. *See Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *Green v. State*, 934 S.W.2d 92, 99 (Tex. Crim. App. 1996). But "[t]rickery or deception does not make a statement involuntary unless the method [is] calculated to produce an untruthful confession or was offensive to due process." *Creager*, 952 S.W.2d at 856. The effect of a lie must be analyzed in the context of all the circumstances of the interrogation. *Mason*, 116 S.W.3d at 257–58.

As noted above, appellant contends that Agent Katz promised appellant that he would be prosecuted in the federal system and receive a lighter sentence if he cooperated. No evidence of such a promise was introduced at the first hearing during the guilt-innocence phase, however. Even assuming Agent Katz made a promise of some benefit, there must be a causal relationship between the complained-of conduct and the defendant's confession. *See Colorado v. Connelly*, 479 U.S. 157, 164 (1986). Agent Katz never indicated he personally had any authority to transfer appellant to the federal system. Thus, the trial court could have concluded that Katz's alleged statement was not of such influential nature to cause a defendant to speak untruthfully. *See Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993) (holding officer's statement that leniency was sometimes shown to a defendant who confessed was not a promise).

Additionally, our evaluation of the totality of the circumstances is not limited to analysis of the statements of law enforcement. We must also consider the characteristics of appellant. *Mason*, 116 S.W.3d at 261. A suspect's ability to

resist pressure is very relevant to the issue of whether his confession is voluntary. *Id.* Here, appellant does not claim he was mentally unstable, physically ill, or intoxicated at the time of his confession. *See Greenwald v. Wisconsin*, 390 U.S. 519, 520, (1968) (physical illness); *Columbe v. Connecticut*, 367 U.S. 568, 620–21 (1961) (mental instability); *Jones v. State*, 944 S.W.2d 642, 651 (Tex. Crim. App. 1996) (intoxication). Further, the record indicates appellant had considerable prior experience dealing with the police. *See Haynes v. Washington*, 373 U.S. 503, 522 (1963). These facts, combined with appellant's attitude during the recorded confessions, indicate appellant's will was not overborne.

Based upon our review of the totality of the circumstances surrounding appellant's January 23 statement, we hold the record supports the trial court's findings that there was no promise which caused appellant to speak untruthfully. Therefore, the trial court did not abuse its discretion in denying appellant's motion to suppress that statement. Accordingly, we overrule appellant's second issue.

C. The trial court did not abuse its discretion in admitting both statements during the punishment phase because the record supports the trial court's findings and its conclusion that appellant's statements were voluntary.

A reviewing court defers to a trial court's determination of credibility. *See Hereford*, 339 S.W.3d at 118. Unlike the motion to suppress hearing during the guilt/innocence phase of trial, appellant testified at the motion to suppress hearing during the punishment phase. The only evidence in support of appellant's contention regarding a promise by Agent Katz is his own testimony during the hearing. Appellant testified that Agent Katz told him he would get less time in the federal system, that Katz would aid appellant in getting into the federal system, and that, "if I cooperate, then he will show up at the court and tell the Judge I cooperated with him." According to appellant, he would not have given the

statements if Agent Katz had not said these things. Appellant's testimony is contradicted by Agent Katz's testimony.

We have reviewed the reporter's record of each suppression hearing, the trial court's findings of fact and conclusions of law, and audio recordings of the first and second interviews. Examining these portions of the record, we conclude there is evidence to support the trial court's conclusion that appellant's will was not overborne and his confession was made voluntarily. We further conclude that when viewed in the light most favorable to the trial court's ruling, Agent Katz's testimony during the suppression hearing—summarized above—supports the trial court's findings that Agent Katz did not make any promises to appellant in exchange for his cooperation and did not coerce him to make his statement. The trial court was the sole judge of the credibility of the witnesses, and chose to believe the audio recording and Agent Katz and to disbelieve appellant. *See Hereford*, 339 S.W.3d at 118 (stating that, at a hearing on a motion to suppress, the trial judge is the exclusive judge of the credibility of witnesses, and may therefore choose to believe or disbelieve any or all of a witness's testimony).

Because the State met its burden to establish that appellant made his statements voluntarily, we hold the trial court did not abuse its discretion when it denied appellant's motion to suppress during the punishment phase. Accordingly, we overrule appellant's third issue.

III. Any error in excusing a prospective juror from jury service over appellant's objection was not harmful.

In appellant's first issue, he argues that the trial court abused its discretion in excusing a prospective juror after he was selected to be a juror, but before the jury was sworn. We conclude that appellant failed to demonstrate harm.

A trial court has broad discretion to excuse prospective jurors for good reason. Tex. Code. Crim. Proc. art 35.03; *Crutsinger v. State*, 206 S.W.3d 607, 608 (Tex. Crim. App. 2006). Under article 35.03, "the court shall . . . hear and determine excuses offered for not serving as a juror, and if the court deems the excuse sufficient, the court shall discharge the juror or postpone the juror's service." Tex. Code. Crim. Proc. art 35.03. A trial court retains the authority to excuse a venire member until the entire jury has been empaneled and sworn. *See Rousseau v. State*, 855 S.W.2d 666, 677 (Tex. Crim. App. 1993) (holding that when a venire member who had already been questioned and qualified to serve subsequently advised the court that she wished to claim a childcare exemption, the court retained authority under article 35.03 to dismiss her from jury service).

Under section 62.106(a)(2) of the Texas Government Code, a person may establish an exemption from jury service if that person is the primary caretaker for young children when service would require leaving children without adequate supervision. *See* Tex. Gov't Code Ann § 62.106(a)(2) (West 2013). This is a personal, optional exemption from jury service that may be invoked by a venire member, but the trial court is not required to excuse the member for this reason. *Burks v. State*, 876 S.W.2d 877, 891 (Tex. Crim. App. 1994).

Here, venire member 28 informed the trial court that he was the primary caretaker of two children, ages four and five, and that he did not have anyone to take care of them during jury service. The jury had not been sworn at the time the member wished to claim a childcare exemption. The trial court inquired if there was anyone else who cared for the children and the member testified there was not. Although he hoped his mother-in-law would watch his children during his previously scheduled training, it had not yet been arranged and was dependent on her schedule.

Outside the venire member's presence, the trial court asked both parties what they wanted to do. The State agreed to excuse the member, but appellant objected. The trial court excused the member and sat an alternate on the jury in his place. The jury was sworn, and trial commenced.

The State argues that the trial court acted within its discretion in excusing venire member 28 after voir dire was complete because he is the primary caretaker of his young children and his service would have left them without adequate supervision. We need not determine whether the trial court erred, however, because the record does not show appellant was harmed by being forced to accept an objectionable juror. *See Jackson v. State*, 745 S.W.2d 4, 17 (Tex. Crim. App. 1988); *Esquivel v. State*, 595 S.W.2d 516, 523 (Tex. Crim. App. 1980). "[T]he erroneous excusing of a [venire member] will call for reversal only if the record shows that the error deprived the defendant of a lawfully constituted jury." *Jones v. State*, 982 S.W.2d 386, 394 (Tex. Crim. App. 1998). "[A] defendant has no right to have any particular individual serve on the jury. The defendant's only substantial right is that the jurors who do serve be qualified." *Id.* at 393.

We presume that the alternate juror who took venire member 28's place was qualified absent some indication in the record to the contrary. *See Ford v. State*, 73 S.W.3d 923, 925 (Tex. Crim. App. 2002). Appellant does not contend the jurors who served in his case were unqualified, nor has he shown that he was forced to accept an objectionable juror. Therefore, we hold that the trial court's decision to excuse venire member 28, if error, was harmless. *See* Tex. R. App. P. 44.2(b). Accordingly, we overrule appellant's first issue.

CONCLUSION

Having overruled each of appellant's issues on appeal, we affirm the trial court's judgment.

/s/ J. Brett Busby
Justice

Panel consists of Justices Boyce, Busby, and Brown.
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