Affirmed and Majority and Concurring Opinions filed July 11, 2017

In The

Fourteenth Court of Appeals

NO. 14-15-00987-CR

DETONE LEWAYNE PRICE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 1316155

CONCURRING OPINION

Lying Larry was instructed at the beginning of his jury service not to talk about the case with his fellow jurors. He was also told not to investigate anything about the case. But he watched a television news story about the case anyway.

The trial judge told Larry:

> Don't investigate anything about this case. If you've been watching television for the past couple of days, you'll see that some judge in some other state held a juror in contempt because that juror got on the

> Internet and was doing some independent research about the law and independent research about the facts. And she was held in contempt of court, and the judge fined her $500 and put her in jail for 5 days. Now, I'm not saying I will do this. Don't misunderstand me, but I'm saying to you that this is very important. It's a very important part of the instructions that you must follow.

Larry was also told why this is important:

> This goes along with what I said to you about listening to the evidence and deciding the case only on the evidence that you hear because that's the only way we can do it. It's the only way we can have a fair trial is for the evidence to be presented from sworn witnesses and you consider only that information from those witnesses, their testimony, and the evidence you hear in the courtroom.

He was told again why such an investigation would be unfair:

> Obviously, you could see how it wouldn't be fair if one or two of you would get on the Internet and find out more about this case or anything about any kinds of cases of this nature. It's just not proper, not following the rules. And as I say, the rules are very important because I could hold a juror in contempt, and I could declare a mistrial if you didn't follow the instructions. So, that would mean, we'd have to start this process all over again. You can see what a waste of time that would be for your time, other folks' time, and the expense it would cost the county to start another trial. That includes reading anything in any law books or looking up anything in any dictionaries.
>
> Everything that you get that you will need to decide this case will come from the witnesses in evidence and will come from the law that I give you at the conclusion of the case because that's what we'll do.

Despite these instructions, Larry watched the news and told the other jurors that he had done so. He cryptically said that there was more to the case than what they had been told. When brought up to the bench to discuss this, Larry lied, and said he did not watch the news and he did not say anything to the other jurors about the news. The trial judge found him to be a liar.

Despite this finding, the judge would not excuse Larry and would not grant a mistrial.

Unfortunately, although the defense and the State initially agreed that Larry was disabled, the State incorrectly told the judge that the defense must also agree to continuing the case with eleven jurors. That is not the law. *See Hill v. State*, 90 S.W.3d 308, 314 (Tex. Crim. App. 2002). Once a juror is disabled, the trial may proceed with eleven over the objection of the defense. But defense counsel told the judge that he would not agree to go with eleven and then the State backed off its agreement that Larry was disabled.

Larry ended up being the jury foreperson, and the jury deliberated for a little more than two hours before finding appellant guilty of capital murder. Thankfully, Larry never revealed any of the information that he saw on the news to the other jurors during deliberation.[1] Unfortunately, we do not have a video or a transcript of the news show. Therefore, we do not know what Larry actually saw on the show.

If Larry had told the truth, we would have known what he saw on television and the trial judge could have evaluated whether the news coverage did in fact make an impact on Larry. The judge would have asked Larry whether he could set that aside and base his verdict only on the evidence in court. But Larry lied. And although Larry repeated that he could be a fair juror, the trial judge did not really think much of Larry's answer: "He doesn't pay much attention to the oath." In fact the trial judge was "ticked" off because Larry lied.

But the trial judge ultimately concluded that Larry's lie did not disqualify him under article 36.29. And the judge refused to grant a mistrial even though the jury

[1] The jurors were questioned about this in a hearing on the motion for new trial.

had heard only two days of evidence, with four more days of evidence to go in the trial.

I agree that we must uphold the trial judge's determination that Larry was not disabled under article 36.29. I disagree, however, with the majority's analysis.

The majority opinion takes a very narrow view of disability. In my opinion, the trial judge could have concluded that Larry was disabled, because his lying and withholding evidence from the court (the contents of the news coverage) is a condition that potentially "inhibits a juror from fully and fairly performing the functions of a juror." *See Reyes v. State*, 30 S.W.3d 409, 411 (Tex. Crim. App. 2000) (quoting *Griffin v. State*, 486 S.W.2d 948 (Tex. Crim. App. 1972)). If the trial judge was convinced that Larry would continue to violate his oath, then Larry was surely disabled. However, under our standard of review, we must uphold the trial judge's determination unless it was an abuse of discretion.

For example, in *Reyes*, the Court of Criminal Appeals reversed our own court for not upholding a trial judge's determination that a juror who feared retaliation from the defendant was disabled. The *Reyes* Court also cited with approval three lower court cases that concluded (1) a juror was disabled because of her inability to find child care, *see Edwards v. State*, 981 S.W.2d 359, 366–67 (Tex. App.—Texarkana 1998, no pet.); (2) a juror was disabled due to deaths in the family, *see Allen v. State*, 867 S.W.2d 427, 429–30 (Tex. App.—Beaumont 1993, no pet.); and (3) a juror who was worried about losing money from his job and could not be attentive, *see Freeman v. State*, 838 S.W.2d 772 (Tex. App.—Corpus Christi 1992, pet. ref'd).

And while it is true that the *Reyes* Court also held that mere knowledge about the defendant (or even bias against a defendant) does not render a juror disabled, the Court did not foreclose a case where a trial judge could conclude that such

knowledge would inhibit the juror from fully and fairly performing his functions as a juror. *See Reyes*, 30 S.W.3d at 412.

Appellant asks us to consider a line of cases where the Court of Criminal Appeals has held that a defendant is entitled to a new trial when a potential juror lies in voir dire about a material matter, is not struck, and actually serves on the jury. *See Salazar v. State*, 562 S.W.2d 480 (Tex. Crim. App. [Panel Op.] 1978). Appellant argues that a potential juror who lies should be treated the same as a sitting juror who lies. Appellant made this argument to the trial judge. I do note that the remedy under these line of cases is usually a new trial—but if the lies were revealed during trial, is the only remedy a mistrial? *See Franklin v. State*, 138 S.W.3d 351, 354 (Tex. Crim. App. 2004) (discussing the only remedy as a mistrial). Or could this be a disabled juror? The majority categorically rejects the application of this standard as a basis for disability. In my opinion, there is no need to categorically reject this standard in this case because the result would be the same.

In any event, appellant also asked for a mistrial. I would consider this a subsidiary issue in appellant's brief. Assuming without deciding that this standard would apply here, I would again concur because we have no evidence in the record about the materiality of the television news story. In addition, appellant acquiesced in the trial judge's decision not to confront Larry more directly with other jurors' testimony—to allow him to purge himself of his perjury. The judge concluded that this would make Larry more and more suspicious, more and more irritated, as well as more biased.[2] Appellant has failed to provide proof of the materiality of Larry's lie and was not entitled to a mistrial.

[2] In hindsight, the court should have told Larry that he was not going to get in trouble but that the court understood that Larry had discussed a news show with some of the other jurors. Larry probably lied because he was afraid that he would get in trouble. Unfortunately, as it is often noted, it's often the cover-up more than the original bad act that causes problems.

Our system of justice depends on judges, lawyers, jurors, and witnesses taking oaths and following them.[3] When a judge fails to follow his oath, he can be sanctioned and removed from office. Sometimes his misconduct disqualifies him from sitting on the case and his rulings are void. *See Freedom Commc'ns, Inc. v. Coronado,* 372 S.W.3d 621 (Tex. 2012) (per curiam). Other misconduct, if probably prejudicial, can lead to a new trial. *See Erskine v. Baker*, 22 S.W.3d 537 (Tex. App.—El Paso 2000, pet. denied). When a prosecutor knowingly fails to correct a witness's perjured testimony, the defense is entitled to a new trial. *See Alcorta v. Texas*, 355 U.S. 28 (1957) (per curiam). When a prosecutor fails to disclose material evidence, the defense is entitled to a new trial. *See Brady v. Maryland*, 373 U.S. 83 (1963). In some cases prosecutor's bad conduct can even prevent a new prosecution after a mistrial. *See Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007) (double jeopardy prevents a new trial after mistrial caused by prosecution).

When a witness or juror fails to follow an oath and lies, our system is shaken. When a witness lies, new trials are granted if the lie was material. *See Ex parte Weinstein,* 421 S.W.3d 656 (Tex. Crim. App. 2014). When a potential juror lies about a material matter in voir dire, new trials are granted. *See Salazar*, 562 S.W.2d at 483. Surely a juror who lies about a material matter during trial should also shake our confidence and trust in the system, and should require removal of that juror, or a mistrial, or a new trial. *See Ford Motor Co. v. Castillo*, 444 S.W.3d 616 (Tex. 2014) (per curiam) (settlement agreement was found invalid because of the jury foreperson's lie about the state of deliberations).

[3] The State blithely told the judge that "if you are not a truth teller, that doesn't make you disabled." Then facetiously (I hope) said that "Lawyers are non-truth-tellers. I mean we are not disabled."

Under the facts of this case, Larry's lie did not disable him nor did it warrant a mistrial. I respectfully concur in the court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Jamison, and Donovan.
Publish — Tex. R. App. P. 47.2(b).