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

O P I N I O N

A jury convicted appellant Detone Lewayne Price of capital murder. The trial court sentenced appellant to life without parole. Appellant brings this appeal complaining of the trial court's failure to remove a juror and an in-court identification of him by an eyewitness. We affirm.

BACKGROUND

The complainant, Salim, accompanied his father, Saif al Mazrouei, from the United Arab Emirates to Houston, Texas, for Saif to receive cancer treatment. One night, two men broke into their apartment. One of the men pointed a gun at the complainant's head and he gave them his wallet and phone. The men left the apartment; Saif then ran out. As the complainant was going through the doorway, he was fatally shot. The men took Saif's car.

The stolen car was found the next morning approximately one block from appellant's house. Fingerprints in the car matched those of appellant and Corey Perry. Saif selected both men from a photographic lineup.

Appellant was charged with capital murder in that, while in the course of a robbery, he shot Salim with a firearm. As noted above, the jury found appellant guilty as charged and he was sentenced to life without the possibility of parole.

DISABLED JUROR

In his first issue, appellant claims one of the jurors ("L.W.") was disabled and should have been removed from the jury. *See* Tex. Code Crim. Proc. art. 36.29(a).[1] On the second day of trial, after testimony concluded, juror M.P. reported that another juror, whom she identified as the "younger" of two men with the same first name and wearing a plaid jacket, told the panel that he had seen news coverage of the case. According to M.P., "to be fair, we were not instructed not to watch the

[1] Article 36.29 is entitled "If a Juror Dies or Becomes Disabled" and provides, in pertinent part: "(a) Not less than twelve jurors can render and return a verdict in a felony case. . . . Except as provided in Subsection (b), however, *after the trial of any felony case begins and a juror dies or*, as determined by the judge, *becomes disabled* from sitting at any time before the charge of the court is read to the jury, the remainder of the jury shall have the power to render the verdict. . . ." Tex. Code Crim. Proc. art. 36.29 (emphasis added) (subsection (b) applies in a capital case in which the state seeks the death penalty).

news and it was on the local news." M.P. said L.W. did not disclose any details. M.P. stated that L.W. suggested "this case was far more important than we realized or there were a lot of factors that we didn't realize they talked about in the news report that hadn't come out." M.P. thought L.W. "peaked [sic] a lot of interest with the way he phrased it." L.W. did not express any opinion on appellant's guilt. According to M.P., later that same day L.W. revealed appellant was eighteen and she did not recall that information having been presented in court.

The next day, the trial court individually questioned each juror. Two of the jurors had not heard any other juror discussing news coverage. Six of the jurors said another juror revealed that he had seen the case on the news; they all agreed no details were given. None of them mentioned learning appellant's age at the time of the offense. Two of the jurors described the juror who saw the news coverage as the "younger" of two men with the same first name and described the clothing worn by the younger of the two. When questioned by the trial court, L.W. denied having seen any news coverage or hearing anyone else discussing it.

The trial court asked L.W. "is there anything that has tainted your view of the evidence in this case or this case, in general? And can you still follow the oath that you took at the beginning of the trial that you'll decide the case on the evidence you see and hear in the courtroom, along with the law that I give you in the case?" L.W. answered, "Yes, sir."

The trial court then discussed with the State and defense counsel what action to take. The record reflects that although the trial court thought L.W. was lying, the trial court was "not sure" article 36.29 was satisfied. Defense counsel asked for L.W. to be removed as disqualified[2] but refused to agree to proceed with eleven jurors,

[2] The defense did not clearly argue that L.W. was disabled under article 36.29, although counsel at one point said, "He has been disabled." Instead, counsel argued that L.W. was

asking instead for a mistrial. The State's position was that because L.W. was not disabled, he could remain on the jury unless the defense agreed to his disqualification and proceeded with eleven jurors. The trial court ultimately denied the defense's motion to disqualify L.W., on the basis that article 36.29 had not been satisfied. The trial court also denied the defense's motion for a mistrial.

Applicable Law

The Texas Constitution requires a jury in a felony criminal trial to be composed of twelve members. TEX. CONST. art. V, § 13; *Rivera v. State,* 12 S.W.3d 572, 578 (Tex. App.—San Antonio 2000, no pet.). Likewise, article 36.29(a) of the Texas Code of Criminal Procedure provides that no less than twelve jurors can render and return a verdict in a felony case. Tex. Code Crim. Proc. art. 36.29(a). However, both the Texas Constitution and article 36.29 provide that if a juror dies or becomes "disabled" from sitting, the remaining empaneled jury has the power to render the verdict. TEX. CONST. art. V, § 13; Tex. Code Crim. Proc. art. 36.29(a) (providing that if a juror dies or becomes disabled from sitting after the trial of a felony case begins, but before the court's charge is read to the jury, "the remainder of the jury shall have the power to render the verdict"). Another exception is provided by section 62.201 of the Texas Government Code: "The jury in a district court is composed of 12 persons, except that the parties may agree to try a particular case with fewer than 12 jurors." Tex. Gov't Code § 62.201. Thus a trial can proceed with eleven jurors when the parties consent, or, "regardless of the parties' consent, when a juror dies or becomes disabled under Art. 36.29(a)."[2] *Hill v. State*, 90 S.W.3d 308, 314 (Tex. Crim. App. 2002) (citing *Hatch v. State,* 958 S.W.2d 813, 816 n.4 (Tex. Crim. App. 1997)).

[2] "disqualified."

Disability is not limited to physical disease, but includes "any condition that inhibits a juror from fully and fairly performing the functions of a juror." *Reyes v. State,* 30 S.W.3d 409, 411 (Tex. Crim. App. 2000) (quoting *Griffin v. State,* 486 S.W.2d 948, 951 (Tex. Crim. App. 1972)); *see also Ponce v. State,* 68 S.W.3d 718, 721 (Tex. App.—Houston [14th Dist.] 2002, no pet.). The disabling condition may result from physical illness, mental condition, or emotional state. *Reyes,* 30 S.W.3d at 411; *Brooks v. State,* 990 S.W.2d 278, 286 (Tex. Crim. App. 1999). A juror's bias or prejudice for or against the defendant does not render a juror disabled. *Reyes,* 30 S.W.3d at 412; *Bass v. State,* 622 S.W.2d 101, 106 (Tex. Crim. App. 1981).

The determination as to whether a juror is disabled is within the discretion of the trial court. *Scales v. State,* 380 S.W.3d 780, 783 (Tex. Crim. App. 2012). Absent such an abuse of discretion, we will not find reversible error. *Id.* at 784. (citing *Brooks,* 990 S.W.2d at 286); *Ponce,* 68 S.W.3d at 721 (same)). Thus, the trial court must make a sufficiently supported finding that the juror was disqualified or unable to perform the duties of a juror. *Scales,* 380 S.W.3d at 784. When reviewing the trial court's ruling on a request to dismiss a juror, we do not substitute our own judgment for that of the trial court, but rather assess whether, after viewing the evidence in the light most favorable to the trial court's ruling, the ruling was arbitrary or unreasonable. *Id.* (citing *Lewis v. State,* 911 S.W.2d 1, 7 (Tex. Crim. App. 1995)). We must uphold the trial court's ruling if it falls within the zone of reasonable disagreement. *Id.* (citing *Ocon v. State,* 284 S.W.3d 880, 884 (Tex. Crim. App. 2009)).

Analysis

On appeal, appellant contends the trial court abused its discretion when it denied his motion to remove L.W. under article 36.29(a) because he lied after having

taken his oath as a juror.[3] The trial court's statements on the record reflect his belief that L.W. lied about having seen news coverage of the case. Because the trial court is the finder of fact, we limit our review to a determination of whether a juror who falsely denies having seen news coverage about the case during trial becomes "disabled" within the meaning of article 36.29.

We first clarify that only a venireperson (a prospective juror) is disqualified from sitting on a jury. This occurs in two instances: (1) the venireperson is "absolutely disqualified," or (2) the venireperson is subject to challenge for cause. *See Green v. State*, 764 S.W.2d 242, 246 (Tex. Crim. App. 1989). A venireperson is absolutely disqualified if he has been convicted of misdemeanor theft or a felony, is under indictment or other legal accusation for misdemeanor theft or a felony, or is insane. *See* Tex. Code Crim. Proc. arts. 35.19, 35.16(a). A juror, on the other hand, is dismissed from the jury after it is impaneled. This occurs only if the juror dies or becomes disabled from sitting. Tex. Code Crim. Proc. art. 36.29(a).

When a juror is guilty of misconduct, such as discussing the case with other jurors before deliberations, discussing the case with a non-juror, seeking information about the case on the internet, driving-by the crime scene, or watching/reading the news, the defendant is entitled to a new trial, if the misconduct prevented him from receiving a fair and impartial trial. Tex. R. App. P. 21.3(g). Because appellant does not assert the trial court erred in denying his motion for mistrial on the basis of jury misconduct, we do not decide that issue.[4] Rather, appellant seeks a holding from this

[3] Article 35.02 require the court to administer the following oath to jurors: "You, and each of you, solemnly swear that you will make true answers to such questions as may be propounded to you by the court, or under its directions, touching your service and qualifications as a juror, so help you God." Tex. Code Crim. Proc. art. 35.02.

[4] We note, however, that the record does not reflect what information was contained in the news story. There is evidence that L.W. knew appellant's age but does not identify from what source he learned it. All the jurors who were aware L.W. had seen the news agreed that he gave

court that a juror who allegedly lies to the court during trial is disabled, even though juror misconduct itself is not a matter of disability.[5]

As noted above, the issue before us is whether L.W. became disabled. L.W. clearly did not suffer from a physical illness. The fact that L.W. denied having seen the news could not qualify as a "mental condition" or "emotional state" unless it would inhibit him from fully and fairly performing the functions of a juror. *See Ponce,* 68 S.W.3d at 721; *see also Hill*, 90 S.W.3d at 315 (holding juror who was unable to perform her duties because of debilitating panic attacks was disabled); *Clark v. State*, 500 S.W.2d 107 (Tex. Crim. App. 1973) (holding juror was disabled where he was emotionally upset over the death of his father-in-law and needed to go out of the state to be with his wife and none of the parties objected to proceeding with the remaining jurors); *Griffin*, 486 S.W.2d at 951 (upholding discharge of juror as disabled because juror was arrested for driving under the influence of intoxicating liquors during a noon recess).

The arguments appellant makes in support of his claim that the trial court erred in failing to find L.W. was disabled are based upon (1) absolute disqualification in that L.W. committed aggravated perjury on the record, (2) L.W. was subject to a challenge for cause for lying to the trial court and (3) could not have been rehabilitated, and (4) the trial court agreed L.W. was disqualified. However, there is nothing in the record to indicate that, at the time of trial, L.W. was absolutely

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no details.

[5] We decline to expand the definition of disability to include juror misconduct. *See* Tex. R. App. P. 21.3(g) (providing a defendant is entitled to a new trial if a juror's misconduct prevented him from receiving a fair and impartial trial); *see also Thomas v. State*, 352 S.W.3d 95, 102 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) (holding that to demonstrate he is entitled to a new trial based upon jury misconduct, a defendant must show that the misconduct occurred and resulted in harm to the defendant).

disqualified from serving as a juror under Tex. Crim. Proc. Code Ann. arts. 35.19, 35.16(a), discussed *infra*. "Committing a felony on the record" is not addressed in the code as an absolute disqualification. *See Brooks*, 990 S.W.2d at 286 (concluding juror arrested for carrying a handgun to court was not disabled under article 36.29).

As to appellant's argument that L.W. was subject to a challenge for cause and could not have been rehabilitated for lying to the trial court, as noted above there is a distinction between a venireperson being disqualified and a juror being disabled from sitting. Article 36.29 is clear on its face. If the legislature had intended a trial court to remove a juror for any, or all, of the same reasons that a venireperson can be struck for cause, "it could have simply said so." *Hargrove v. State*, 40 S.W.3d 556, 559 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (construing a provision of the Texas Transportation Code). We decline to hold that a trial court errs in failing to remove a sitting juror because, as a venireperson, he or she would have been subject to a challenge for cause.

Finally, whether or not the trial court agreed that L.W. would have been subject to a challenge for cause is of no moment — it does not, nor can it, alter the plain meaning of article 36.29(a). The record before this court does not establish the trial court abused its discretion in failing to find L.W. was disabled pursuant to article 36.29. Accordingly, appellant's first issue is overruled.

Appellant's second issue asserts the failure to remove L.W. violated his right to a fair and impartial jury under the Texas Constitution. *See* Tex. Const. art. I, § 10. The record before this court reflects this issue was not presented to the trial court. *See* Tex. R. App. 33.1(a). State constitutional rights are subject to ordinary rules of waiver. *State v. Morales,* 253 S.W.3d 686, 697 (Tex. Crim. App. 2008). Accordingly, nothing is presented for our review and we overrule appellant's second issue.

IN-COURT IDENTIFICATION

In his final issue, appellant asserts the trial court erred in denying his motion to suppress an in-court identification by Saif of appellant and Perry. Appellant claims the pre-trial identification procedure was unduly suggestive, thus the in-court identification was tainted. In determining whether an in-court identification is admissible, we use a two-step analysis. *See Barley v. State*, 906 S.W.2d 27, 33 (Tex. Crim. App. 1995). First, we determine whether the pre-trial identification procedures were impermissibly suggestive and, second, whether the suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification. *Id.*

The record reflects that after appellant's and Perry's fingerprints were found in Saif's vehicle, Sergeant Miller assembled a photographic array of six men, including Perry. Sergeant Chandler also assembled a photographic array of six men, this one including appellant. Saif selected Perry's photo from Miller's array and appellant's photo from Chandler's array. Saif subsequently identified appellant and Perry during a video deposition that was played before the jury as Saif's health did not permit his return for trial.

Appellant points to statements by Saif that Miller showed him a single picture of appellant prior to presenting him with the entire array as evidence that the identification procedure was unnecessarily suggestive. *See Bond v. State,* 29 S.W.3d 169, 171-72 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). The trial court's written findings of fact and conclusions of law state as follows:

> I. FINDINGS OF FACT
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> . . .
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> 17. Saif Al Mazrouei about 14 months after the capital murder on August 7, 2011, testified and the Court finds that police officers stayed with him on the evening of August 7, 2011 to dawn on August 8, 2011.
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> 18. Saif Al Mazrouei met again with officers the second night or second

date with a set of photographs.

19. Mr. Al Mazrouei met with three or four officers, one of whom spoke Arabic.

20. The Arabic-speaking officer told Mr. Al Mazrouei that they "were about to show you a group of photos, if you're able to recognize any of the photos."

21. The officers showed him a group of photographs, he studied the photos and told the officers, "This is one of them, and this is one of them."

22. Mr. Al Mazrouei also testified a), one picture for each person, and b), also it was one group of people in one photograph, c), I don't recall.

24. The Court having seen and heard his testimony finds that a reasonable inference from Mr. Al [M]azrouei's testimony, considering the translation issues was that when he stated "one picture for each person," could literally mean one person was depicted in each photograph which is the case where there is a photo array with six pictures of six individual persons, or one picture for each of the six individual persons.

25. Also, the Court finds when he stated it was one group of people in one photograph could reasonably give rise to the inference that the "one photograph" was a sheet of photographs in a single "group" photo or photo spread comprised of a group of six individuals depicted on the typical photo spread presentation.

26. Then Mr. Al Mazrouei states "I don't recall."

27. The court finds from the credible testimony of Saif Al Mazrouei and Detective Mike Miller that he was shown group photos in photo spreads, not single individual photos one at a time and that he positively I.D.'d both suspects in each photo spread. He was never shown individual photographs before the photo spread. He was shown two sets of six photos in two separate photo spreads.

. . .

B. The Court finds further from the credible testimony of Detective Mike Miller and makes the following findings:

. . .

11. Two days after the capital murder, on August 9, 2011, H.P.P.

Homicide Detective Mike Miller, developed two suspects Corey Perry and Detone Price due to having obtained descriptions and fingerprint results as to both suspects.

. . .

15. Detective Miller prepared a photo spread with Corey Perry in it.

16. Sergeant Ryan Chandler created a photo spread on Detone Price.

. . .

18. Detective Miller took Officer Zaroorat to translate and they went to Saif Al Mazrouei's apartment at 8181 El Mundo and met with Mr. Al Mazrouei, Noora Saif Benhamed and some other family members.

19. Detective Miller, Officer Zaroorat and Mr. Al Mazrouei then sat at a breakfast table away from the other family members.

20. Detective Miller did not bring individual photos of either Corey Perry nor Detone Price.

. . .

24. Detective Miller showed Corey Perry's photo spread and Mr. Al Mazrouei almost instantly identified him positively and when he showed Mr. Al Mazrouei Detone Price's photo spread, he took 30, 40, 52 seconds to positively identify him. Mr. Mazrouei had placed his signature on each photo spreads to indicate his positive identifications.

. . .

28. At the motion for Suppression of the Identification of the Defendants' hearing held June 11, 2015, Detective Miller's testimony regarding the procedures used for producing the photo spreads and procedures used to conduct the photo spread presentations was credible and the Court finds that there was nothing suggestive in the photos selected or the photo spreads themselves, or the presentation procedures.

29. The Court finds that there is no credible evidence that Detective White showed Saif Al Mazrouei any photos in a one-by-one individual presentation. He showed Mr. Al Mazrouei two sets of photo spreads each containing six black males.

II. CONCLUSIONS OF LAW

> 1. Based upon the credible testimony of Saif Al Mazrouei and Detective Mike Miller, the Court finds that the procedures used by Detective Mike Miller and Sergeant Ryan Chandler in producing the photo spreads containing the photos of defendants Corey Perry and Detone Price and the procedures used by the officers and the manner in which the two photo spreads were conducted were done properly and in accordance with due process of law under the U.S. Constitution and with due course of law under the Texas Constitution.
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> 2. The Court further finds, based upon the credible testimony that said procedures and manner used of producing and of conducting the two photo spreads were both done basically in the same manner. Each had six black males, with similar features, complexions, age, arid haircut and color of hair, each photo spread had a target suspect; each photo spread was not suggestive as to any individual in the photo spread; the position in the photo spread of the photo of each individual depicted in the photo spread was done in the photo lab and the photo lab technician put in specific criteria, and the computer chose fill-ins by means of a random placement by the Houston Police Department's Data-Links system. Neither photo spread was suggestive.
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> 3. Detective Mike Miller admonished Saif Al Mazrouei, with the aid of the interpreter, Officer Zaroorat, before he viewed the two photo spreads . . . Detective Miller's manner of presenting the two photo spreads was not suggestive.
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> 5. Here the Court finds that Detective Mike Miller did not show Saif Al Mazrouei individual photos in either of the two photo spreads. . . .

The trial court then denied appellant's motion to suppress the in-court identification by written order.

When reviewing a trial court's ruling on a motion to suppress evidence, we give almost total deference to a trial court's determination of facts that are supported by the record, especially when those findings are based on an evaluation of credibility and demeanor. *Fienen v. State*, 390 S.W.3d 328, 335 (Tex. Crim. App. 2012). We review de novo questions of law and mixed questions of law and fact that do not turn on credibility and demeanor. *Id.*

Appellant does not challenge any of the trial court's findings of fact or conclusions of law. We have reviewed the record of the hearing conducted on appellant's motion to suppress as well as Saif's video deposition and conclude the record supports the trial court's determination that Saif was not shown a single picture of appellant before he was shown the six-picture photographic array containing appellant's photograph. *Compare Montanez v. State*, 195 S.W.3d 101, 109 (Tex. Crim. App. 2006) (to the extent the trier of fact's determination of historical facts is based on a videotape admitted into evidence, the trier of fact is entitled to deference, but only if those factual determinations are supported by the record), and *Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000) (declining to give that almost total deference to factfinder's determination of historical facts because "the videotape present[ed] indisputable visual evidence contradicting essential portions of [the officer's] testimony"); *see also Little v. State*, No. 14-13-00832-CR, 2014 WL 7172403, at *3 (Tex. App.—Houston [14th Dist.] Dec. 16, 2014, no pet.) (mem. op.) (not designated for publication); *State v. Houghton*, 384 S.W.3d 441, 446 (Tex. App.—Fort Worth 2012, no pet.) (the reviewing court is to give almost total deference to the trier of fact's factual determinations unless the video recording indisputably contradicts those findings). Accordingly we conclude the pre-trial identification procedure was not unduly suggestive. *See Carmouche*, 10 S.W.3d at 335. It is therefore unnecessary to conduct the second-step of our analysis — whether the pre-trial identification procedure gave rise to a very substantial likelihood of irreparable misidentification. *See Barley*, 906 S.W.2d at 33. We hold the trial court did not err in denying appellant's motion to suppress the in-court identification. Appellant's third issue is overruled.

CONCLUSION

Having overruled appellant's issues, the judgment of the trial court is affirmed.

/s/ John Donovan
Justice

Panel consists of Justices Christopher, Jamison and Donovan (J. Christopher concurring).

Publish — Tex. R. App. P. 47.2(b).