Affirmed and Memorandum Opinion filed August 17, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00444-CR

XAVIER BERNARD JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 1441735

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

A jury convicted appellant Xavier Bernard Jones of capital murder committed during the course of a robbery. In four issues, appellant contends that (1) the trial court prevented appellant from asking proper voir dire questions; (2) appellant suffered egregious harm from a confusing application paragraph in the jury charge; (3) fundamental error occurred when the State attempted to shift the burden of proof to appellant; and (4) court costs for summoning witnesses violated appellant's rights to confrontation and to compulsory process. We affirm.

I. VOIR DIRE

In his first issue, appellant contends that the trial court abused its discretion by sustaining the State's objections to two of appellant's questions during voir dire. Appellant contends that the questions concerned "the veniremembers' thoughts on reasonable doubt." We hold that appellant has not preserved error.

A. The Objections

Appellant contends that the trial court erred by sustaining two of the State's objections during voir dire:

> DEFENSE: I do want to go back to one point though because we're going to talk about beyond a reasonable doubt and beyond a reasonable doubt in your mind could be all doubt as long as you're not saying—
>
> STATE: Objection, misstatement of law. It could not be beyond all doubt.
>
> COURT: Sustained.
>
> STATE: Instruct the jury disregard.
>
> DEFENSE: I'll rephrase that statement.
>
> COURT: Please, withdraw it.
>
> DEFENSE: If beyond all doubt means to you a high standard of evidence, that's your thoughts.
>
> STATE: That's still—objection, your Honor. Misstatement of the law.
>
> COURT: Sustain.[1]

[1] Defense counsel then discussed the "beyond a reasonable doubt" standard compared to the "clear and convincing" standard:

> DEFENSE: There's no definition for beyond a reasonable doubt. I don't think he can object to that.
>
> So what beyond a reasonable doubt is what you feel it is. We can't tell you if you say this is what reasonable doubt is to me that you're wrong. Does that make sense, folks? You just want enough evidence

B. No Error Preserved

A trial court abuses its discretion during voir dire if the court prohibits a proper question about a proper area of inquiry. *Fuller v. State*, 363 S.W.3d 583, 585 (Tex. Crim. App. 2012) (citing *Sells v. State*, 121 S.W.3d 748, 755–56 (Tex. Crim. App. 2003)). "A question is proper if it seeks to discover a juror's views on an issue applicable to the case." *Id.* (quoting *Sells*, 121 S.W.3d at 756). The Court of Criminal Appeals has held that "inquiry into a prospective juror's understanding of what proof beyond a reasonable doubt means constitutes a proper question." *Id.* at 587.

Accordingly, it is appropriate to question prospective jurors about varying standards of proof "to set the lawful parameters of reasonable doubt and thereby foster the selection of jurors who will not impose a standard of proof upon the State that they know for sure to be too lenient (preponderance or even clear and convincing) or too burdensome (*all* doubt)." *Id.* It is, therefore, "appropriate for the appellant to explain the contrast among the various standards of proof." *Id.* at 588. Such an explanation may be "a necessary lead-in" to a proper question about the standard of proof. *Id.*

> if I'm going to convict a human being, I want enough evidence that I'm comfortable with. Does that make more sense, folks?
>
> Let me tell you the example of what I mean. If the State of Texas—how many of you have children? Can I see your hands? If the State of Texas said we're going to take your children away from you, how much evidence should the State have? Anybody? Just tell me.
>
> VENIRE PERSON: All.
>
> DEFENSE: I heard somebody say a whole a lot. A whole lot. That standard is called clear and convincing. Some people say, I'm sorry, if you're going to take my children, I need a whole lot of evidence. I will tell you this, beyond a reasonable doubt is more than that; and they can't object to that. Beyond a reasonable doubt is more than a whole lot to some people. Does that make sense, folks? All right.

To preserve error, however, an appellant "must show that he was prevented from asking *particular* questions that were proper." *Sells*, 121 S.W.3d at 756. It is not enough to show that the trial court "generally disapproved of an area of inquiry from which proper questions could have been formulated." *Id.* Under these circumstances, a trial court might have allowed a proper question if a question had been submitted for the court's consideration. *Id.* An appellant does not preserve error by simply informing the trial court of the general subject matter on which the appellant wanted to question a prospective juror. *See Caldwell v. State*, 818 S.W.2d 790, 794 (Tex. Crim. App. 1991), *overruled on other grounds by Castillo v. State*, 913 S.W.2d 529, 534 (Tex. Crim. App. 1995); *see also Godine v. State*, 874 S.W.2d 197, 200–01 (Tex. App.—Houston [14th Dist.] 1994, no pet.) ("A trial court should not be expected to separate the wheat from the chaff, cull out potentially valid subject matters from overly broad topic descriptions, and anticipate the form in which a specific question emanating from a topic will be asked.").

In *Fuller*, the Court of Criminal Appeals held that the trial court abused its discretion by preventing the defendant from explaining the contrast among the various standards of proof and then asking the prospective jurors a particular question. *See* 363 S.W.3d at 588. The defendant told the trial court: "I would like to ask them if they understand that proof beyond a reasonable doubt is the highest burden that we have anywhere in our legal system." *Id.*

In *Saldinger v. State*, however, this court held that the defendant failed to preserve error regarding his complaint that the trial court "prevented him from addressing the standard of proof beyond a reasonable doubt." 474 S.W.3d 1, 6 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). The defendant objected to the trial court's ending voir dire before the defendant had "'covered' the standard of proof beyond a reasonable doubt." *Id.* The defendant told the trial court that he "wanted to

compare reasonable doubt to other standards of proof." *Id.* This court held that the defendant had not preserved error because the defendant's statement to the trial court "presented only a general topic for discussion." *Id.* The defendant "did not submit narrowly tailored questions, and the proposed topic could have encompassed proper and improper inquiries." *Id.*

In this case, the State objected to appellant's attempted explanation regarding "beyond all doubt." Maybe appellant mentioned the "all doubt" standard as a potential "lead-in" to discuss the difference between "all doubt" and "reasonable doubt." *See Fuller*, 363 S.W.3d at 588. But, appellant did not follow-up the attempted explanation with any specific questions that he wanted to ask of any prospective jurors, nor did appellant explain to the trial court why discussion of the "all doubt" standard would lead to proper questions of the prospective jurors. Under these circumstances, no error is preserved. *See Saldinger*, 747 S.W.3d at 6.

Appellant's first issue is overruled.

II. JURY CHARGE

In his second issue, appellant contends that he suffered egregious harm from one of the application paragraphs in the jury charge. He contends that the 274-word sentence is "confusing," "absolutely indecipherable," "unreadable," "word-soup," and "argle-bargle." He contends that the charge "failed to adequately explain to the jury how to apply the law." The State agrees that the application paragraph is "not a work of great literature," nor does the paragraph "exhibit syntax that an English teacher might praise." But, the State contends that the paragraph is legally correct and fully decipherable. We agree with the State.

Here is the complained-of sentence:

> Before you would be warranted in finding the defendant guilty of capital murder, you must find from the evidence beyond a reasonable

doubt not only that on the occasion in question the defendant was in the course of committing or attempting to commit the felony offense of robbery of Leonard Griggs, as alleged in this charge, but also that the defendant specifically intended to cause the death of Christopher McGrew, by shooting Christopher McGrew, with a deadly weapon, namely a firearm; or you must find from the evidence beyond a reasonable doubt that the defendant Xavier Bernard Jones, with the intent to promote or assist in the commission of the offense of robbery, if any, solicited, encouraged, directed, aided, or attempted to aid Dante Talbert in shooting Christopher McGrew, if he did, with the intention of thereby killing Christopher McGrew; or you must find from the evidence beyond a reasonable doubt that on the occasion in question the defendant, Xavier Bernard Jones, entered into an agreement with Dante Talbert to commit the felony offense of robbery of Leonard Griggs, as alleged in this charge, and pursuant to that agreement they did carry out their conspiracy, and while in the course of committing said conspiracy, Dante Talbert intentionally caused the death of Christopher McGrew by shooting Christopher McGrew with a deadly weapon, namely a firearm, and the murder of Christopher McGrew was committed in furtherance of the conspiracy and was an offense that should have been anticipated by the defendant as a result of carrying out the conspiracy, and unless you so find, then you cannot convict the defendant of capital murder.[2]

[2] Further, we note that immediately after this sentence, the charge contained another application sentence broken up into several paragraph as follows:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 17th day of September, 2013, in Harris County, Texas, the defendant, Xavier Bernard Jones, did then and there unlawfully, while in the course of committing or attempting to commit the robbery of Leonard Griggs, intentionally cause the death of Christopher McGrew by shooting Christopher McGrew with a deadly weapon, namely a firearm; or
>
> If you find from the evidence beyond a reasonable doubt that on or about the 17th day of September, 2013, in Harris County, Texas, Dante Talbert, did then and there unlawfully, while in the course of committing or attempting to commit the robbery of Leonard Griggs, intentionally cause the death of Christopher McGrew by shooting Christopher McGrew with a deadly weapon, namely a firearm, and that the defendant, Xavier Bernard Jones, with intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid Dante Talbert to commit the offense, if he did; or

Appellant relies on *Reeves v. State*, wherein the Court of Criminal Appeals held that the defendant suffered some harm from an erroneously submitted provocation instruction concerning the defendant's claim of self-defense. *See* 420 S.W.3d 812, 816–21 (Tex. Crim. App. 2013). Not only was the instruction erroneously submitted, but the application paragraphs for the instruction were incomprehensible. *See id.* at 818. The Court of Criminal Appeals considered this aspect of the jury charge when determining that the defendant suffered some harm. *See id.* The court also criticized the "six-page impenetrable forest of legal 'argle-bargle' that attempted to instruct the jury on the law of self-defense." *Id.* at 817 (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting)). The court noted that the self-defense application paragraph was a single sentence containing 204 words. *See id.* 817 n.29. But, the court concluded that the self-defense charge was accurate: "While one might take issue with the cumbersome (even obtuse) nature of the instruction, the information contained within it is accurate." *Id.* at 817.

The criticism in *Reeves* of the self-defense instruction could be levied against the application paragraph in this case.[3] After all, an application paragraph is the "heart and soul" of the jury charge. *Vasquez v. State*, 389 S.W.3d 361, 367 (Tex.

> If you find from the evidence beyond a reasonable doubt that the defendant, Xavier Bernard Jones, and Dante Talbert entered into an agreement to commit the felony offense of robbery of Leonard Griggs, and pursuant to that agreement, if any, they did carry out their conspiracy and that in Harris County, Texas, on or about the 17th day of September, 2013, while in the course of committing such robbery of Leonard Griggs, Dante Talbert intentionally caused the death of Christopher McGrew by shooting Christopher McGrew with a deadly weapon, namely a firearm, and the murder of Christopher McGrew was committed in furtherance of the conspiracy and was an offense that should have been anticipated by the defendant as a result of carrying out the conspiracy, then you will find the defendant guilty of capital murder, as charged in the indictment.

[3] The State agrees that "*Reeves* may be fairly read to condemn the use of poor syntax in jury instructions."

Crim. App. 2012). The application paragraph should specify all the conditions to be met before a conviction under a particular theory is authorized and "contain[] some logically consistent combination of such paragraphs." *Id.* (alteration in original) (quoting *Plata v. State*, 926 S.W.2d 300, 304 (Tex. Crim. App. 1996)). There might have been a clearer way of communicating to the jury the three theories under which appellant could have been found guilty—as a primary actor, party, or conspirator. *See* Comm. on Pattern Jury Charges–Criminal, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Crimes Against Persons* § C4.6, at 77–82 (2011) (providing examples of how to charge a jury on these three theories of criminal liability); *see also Gelinas v. State*, 398 S.W.3d 703, 711 (Tex. Crim. App. 2013) (Cochran, J., concurring) (suggesting that a trial court "should 'chunk' information and give it to the jury in . . . short, digestible pieces as shown in the Texas Criminal Pattern Jury Charges volumes published by the Texas State Bar").

But, the holding in *Reeves* is inapposite to the charge in this case. In *Reeves*, the defendant suffered some harm from an erroneously submitted provocation instruction. Appellant does not contend that the application paragraph in this case was erroneously submitted, but that the paragraph as submitted was too complex for the jurors to understand. In this case, the application paragraph correctly "applies the pertinent penal law, abstract definitions, and general legal principles to the particular facts and the indictment allegations." *Vasquez*, 389 S.W.3d at 366. The application paragraph applies the pertinent law to the particular facts under the three distinct theories by which the jury could have found appellant guilty—as the primary actor, as a party, or as a conspirator.

Appellant cites no authority suggesting that the charge in this case was legally incorrect. Although cumbersome, the charge was accurate. *See Reeves*, 420 S.W.3d at 817. We hold that the charge was not erroneous. *Cf. Gelinas*, 398 S.W.3d at 705

(majority op.) (noting that a charge was erroneous when it "stated the exact opposite of what the law provides").

Appellant's second issue is overruled.

III. BURDEN OF PROOF

In his third issue, appellant contends that the State's questioning of several witnesses amounted to an attempt to shift the burden of proof to the defendant. Appellant concedes that this issue is not preserved, but he contends that "the repeated nature of this issue subjects it to the fundamental error review."

At trial, appellant argued that the State's sole witness to identify appellant was mistaken. Appellant presented a defensive theory of alibi and a theory that one of appellant's friends was one of the robbers, rather than appellant, because the friend looked more like the sketch artist's drawing than appellant did. The trial court admitted a picture of the alternate suspect and the sketch artist's drawing. The State cross-examined several defense witnesses about the alternate-suspect theory, asking them questions such as whether they informed the police about the alternate suspect.

For purposes of this appeal, we assume without deciding that an improperly shifted burden of proof would be systemic error that could be raised for the first time on appeal. Our review of the relevant case law and the record shows, however, that the burden properly remained on the State to prove guilt beyond a reasonable doubt.

Initially, we note that this court has held that the State may cross-examine defense witnesses about "whether the witnesses had provided the police or district attorney's office with exculpatory information." *Abney v. State*, 1 S.W.3d 271, 275–76 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). The defendant in *Abney* argued that the State's questions, met with proper objections at trial, "improperly shifted the burden of proof to appellant to prove his innocence." *Id.* at 276. This

court rejected the claim, reasoning that the State merely "challenged the credibility of the testimony of the alibi witnesses." *Id.*

But, even if the State's questions might have implied a burden on appellant to produce evidence of his innocence, the remainder of the record rebuts the implication. The trial court told the venire during voir dire that the State's burden of proof was beyond a reasonable doubt and that appellant did not have to do anything in the case and could just "sit there and not offer any evidence at all." During closing arguments, the State questioned why the picture of the alternate suspect had not surfaced until trial. Appellant objected because "[t]he State has the burden of proof not [appellant]." The State responded, "[Defense Counsel] is exactly right the State has the burden of proof to prove this case beyond a reasonable doubt." The State clarified that its intent merely was to attack a defensive theory: "[I]f the Defense puts on an argument on in [sic] an alibi defense we have the right to attack it and that's what I'm doing here today." Finally, the jury charge fully informed the jury about the presumption of innocence and burden of proof.

Under these circumstances, the State's questions did not shift the burden of proof to appellant to prove his innocence. *See Fears v. State*, 479 S.W.3d 315, 339–40 (Tex. App.—Corpus Christi 2015, pet. ref'd) (holding that the State's comments during voir dire did not amount to fundamental error by shifting the burden of proof to the defendant because the trial court properly instructed the venire about the burden of proof during voir dire, and the jury charge similarly reflected the fundamental requirement).

Appellant's third issue is overruled.

IV. WITNESS FEES

In his fourth issue, appellant brings an as-applied constitutional challenge to the Code of Criminal Procedure's mandated "summoning witness fee," which was assessed after his conviction. Appellant contends that charging indigent defendants like him a fee for summoning witnesses violates his rights under the Confrontation Clause and Compulsory Process Clause of the United States Constitution.

This court recently considered a similar challenge to the fee for summoning witnesses. *See Merrit v. State*, No. 14-16-00426-CR, 2017 WL 3159861, at *5–7 (Tex. App.—Houston [14th Dist.] July 25, 2017, no pet. h.). Regarding the compulsory-process claim, this court noted that to exercise the right, a "defendant bears the burden to 'make a plausible showing to the trial court, by sworn evidence or agreed facts, that a witness' testimony would be both material and favorable to the defense.'" *Id.* at *7 (quoting *London v. State*, No. 01-13-00441-CR, 2017 WL 2779907, at *2 (Tex. App.—Houston [1st Dist.] June 27, 2017, no pet. h.)). This court reasoned that "[w]ithout a showing that other material, favorable witnesses were available but not called by appellant due to his constructive notice of the witness and mileage fees, we cannot conclude that the $5 witness fee operated to deny his right to have compulsory process for obtaining witnesses in his favor." *Id.* The same rationale applies here. Appellant called ten witnesses at trial, and he has not shown that other material and favorable witnesses were available but not called due to the witness fee. Appellant has not shown a violation of his right to compulsory process. *See id.*

This court also rejected the argument that the witness fee violates the right to confrontation. "Significantly, the statutory fees are assessed only if, and when, a defendant is convicted." *Id.* (citing Tex. Code Crim. Proc. art 102.011(a)). "Thus, appellant's inability to pay the postjudgment fees could not have prevented him from

confronting any witnesses at trial, before the fees were assessed." *Id.* (citing *London*, 2017 WL 2779907, at *4).

Appellant contends that requiring him to pay on the "back end" to confront witnesses against him is "unfair and unconstitutional." He contends that "[c]harging indigent people to defend against the State's power is unconstitutional." Appellant cites no authority for this contention. Appellant alludes to the right of indigent defendants to obtain appointed counsel, citing *Gideon v. Wainwright*, 372 U.S. 335 (1963). But appellant does not acknowledge the post-*Gideon* holding that an assessment of costs, after conviction, against indigent criminal defendants for court-appointed counsel does not violate the Constitution: "The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel." *Fuller v. Oregon*, 417 U.S. 40, 53 (1974). Likewise, an indigent defendant is not deprived of the ability to confront witnesses merely because the defendant knows that he or she might someday be required to pay the costs of summoning those witnesses after a conviction.

Appellant's fourth issue is overruled.

V. CONCLUSION

Having overruled all of appellant's issues, we affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Christopher, Brown, and Wise.
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