COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00352-CR

DAVID SHAWN MINZE — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM COUNTY CRIMINAL COURT NO. 5 OF TARRANT COUNTY
TRIAL COURT NO. 1415787

MEMORANDUM OPINION[1]

A jury convicted Appellant David Shawn Minze of the assault–bodily injury of a family member, and the trial court sentenced him to serve 180 days' confinement in Tarrant County Jail and to pay a $100 fine. In two points, Appellant complains that the trial court erred by denying his challenge for cause

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[1] *See* Tex. R. App. P. 47.4.

and by issuing an "unduly coercive *Allen* charge" over his objection.[2] Because we hold that the trial court did not reversibly err, we affirm the trial court's judgment.

Denial of Challenge for Cause

In his first point, Appellant complains of the denial of his challenge for cause of venireperson Holdridge. The trial court instructed the jury at the beginning of voir dire,

> In a misdemeanor criminal case, the State of Texas generally begins things by filing a piece of paper called an information. It is the charge, and it has three purposes.
>
> It . . . starts the case. It tells the defendant what he's charged with, and it tells the State what they must prove. *The fact that an information is on file in this case gives rise to no inference of guilt against the defendant.*
>
> The burden of proof in a criminal case is always on the State of Texas. They have to prove what we call each and every element of the alleged offense beyond a reasonable doubt. [Emphasis added.]
>
> In Appellant's voir dire, the following transpired,
>
> [Defense Counsel] . . . [T]here are folks who . . . say: Well, if the case has gotten this far, then I think it must be a legit case, and there must be some pretty good evidence that the person's guilty. Otherwise, the Government wouldn't come along and try to prosecute them.
>
> . . . .
>
> Okay. And you think that?

[2]*See Allen v. United States*, 164 U.S. 492, 501, 17 S. Ct. 154, 157 (1896).

> VENIREPERSON: I think there's a reason the State picked the case up.
>
> [Defense Counsel]: Okay. So—so for you, does that add some legitimacy to the State's case?
>
> VENIREPERSON: I'd have to see what they say, see their facts, see their evidence.

Later, the following occurred,

> [Defense Counsel]: Okay. And Ms. Holdridge?
>
> VENIREPERSON [Holdridge]: Yes.
>
> . . . .
>
> [Defense Counsel]: Okay. So thoughts, you don't . . . think the State should be able to proceed when they have knowledge that the case is no longer legit, do you?
>
> Or do you think they should be able to proceed? Well we've got a government, got to keep it going?
>
> Who here thinks that's true?
>
> VENIREPERSON [Holdridge]: *I said earlier, they get involved for a reason, so there's a reason why we're here.*
>
> [Defense Counsel]: Okay. So that's right. *And I think you said earlier the reason we're here, you think there's some legitimacy to the case.*
>
> VENIREPERSON: *Yes.* [Emphasis added.]

Holdridge's comments in this section of the voir dire make clear that she was the lone unidentified veniremember who spoke on the same issue earlier in Appellant's voir dire.

At the end of voir dire, Appellant challenged Holdridge,

> [Defense Counsel]: Okay. Judge, we challenge Juror No. 4, Ms. Holdridge, who stated on two different occasions that she

> believes he's here for a reason and that the process that brought him here is some evidence of his guilt.
>
> THE COURT: I'm going to—any response?
>
> [Prosecutor]: Judge, I would ask that she be called in. I couldn't agree to that.
>
> THE COURT: I'm going to deny that. I think she said she would wait and hear the evidence.

As relevant here, article 35.16 of the code of criminal procedure provides that a veniremember may be challenged for cause if she has a bias or prejudice against the defendant or "any of the law applicable to the case" or if "there is established in [her] mind . . . such a conclusion as to the guilt or innocence of the defendant as would influence [her] in finding a verdict."[3] The test for exclusion based on bias or prejudice is whether the challenged veniremember's personal beliefs "would substantially impair [her] ability to carry out [her] duties in accordance with" the trial court's instructions and the juror's oath.[4] The test for exclusion based on a conclusion of guilt is whether the veniremember could put aside that conclusion and reach a verdict based on the evidence admitted at trial.[5] The party bringing the challenge has the burden of proving that it is a

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[3]Tex. Code Crim. Proc. Ann. art. 35.16(a)(9)–(10), (c)(2) (West 2006); *see Barber v. State*, 737 S.W.2d 824, 829 (Tex. Crim. App. 1987).

[4]*Buntion v. State*, 482 S.W.3d 58, 84 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 2521 (2016).

[5]*Barber*, 737 S.W.2d at 829–30.

proper challenge.[6] To meet this burden, the proponent of the challenge must show that the veniremember understands what the law requires but cannot follow it.[7]

We review the trial court's denial of a challenge for cause for an abuse of discretion, considering the entire voir dire of the veniremember.[8] We accord the trial court's ruling on a challenge for cause considerable deference because the trial judge is best placed to judge a veniremember's demeanor and tone of voice.[9] We particularly defer to the trial court's decision when the veniremember's answers concerning the ability to follow the law are equivocal, unclear, or conflicting.[10] Here, we decide whether the record permits a reasonable conclusion that Holdridge's personal beliefs or predetermined conclusion of guilt would not hamper her ability to serve on a jury, to follow the

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[6]*Buntion*, 482 S.W.3d at 84; *see Drouillard v. State*, No. 02-04-00097-CR, 2005 WL 737019, at *1 (Tex. App.—Fort Worth Mar. 31, 2005, no pet.) (mem. op., not designated for publication) (stating challenging party is required to show veniremember has established conclusion in his mind that would influence his verdict).

[7]*Buntion*, 482 S.W.3d at 84; *Davis v. State*, 329 S.W.3d 798, 807 (Tex. Crim. App. 2010), *cert. denied*, 132 S. Ct. 128 (2011); *Threadgill v. State*, 146 S.W.3d 654, 667 (Tex. Crim. App. 2004).

[8]*Buntion*, 482 S.W.3d at 84.

[9]*Id.*

[10]*Id.*; *Gardner v. State*, 306 S.W.3d 274, 295–96 (Tex. Crim. App. 2009), *cert. denied*, 562 U.S. 850 (2010).

juror's oath, or to render a verdict based solely on the evidence admitted at trial.[11]

While Holdridge stated that she believed that "there[was] a reason the State picked the case up," she also said that she would "have to see what [the State] sa[id], see their facts, see their evidence." She did not unequivocally state that the fact that Appellant was charged was some evidence of his guilt, nor did she state that she would not rely solely on the evidence admitted at trial to reach her verdict. Accordingly, because her answers were equivocal, we defer to the trial court's decision.[12] Appellant has not shown that Holdridge had a bias that would substantially impact her ability to follow the juror's oath, nor has he shown that she would not determine guilt based solely on the admitted evidence.[13] We therefore conclude that the trial court did not abuse its discretion by denying Appellant's challenge for cause. We overrule Appellant's first point.

***Allen* Charge**

In his second point, Appellant complains that the *Allen* charge was unduly coercive. An *Allen* charge "reminds the jury that if it is unable to reach a verdict, a mistrial will result, the case will still be pending, and there is no guarantee that

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[11] *See Buntion*, 482 S.W.3d at 84; *Newbury v. State*, 135 S.W.3d 22, 39 (Tex. Crim. App.), *cert. denied*, 543 U.S. 990 (2004); *Watts v. State*, No. 14-12-00862-CR, 2014 WL 1516082, at *4 (Tex. App.—Houston [14th Dist.] Apr. 17, 2014, pet. ref'd) (mem. op., not designated for publication).

[12] *See Buntion*, 482 S.W.3d at 84; *Gardner*, 306 S.W.3d at 295–96.

[13] *See Buntion*, 482 S.W.3d at 84, 86.

a second jury would find the issue any easier to resolve."[14] When considering the propriety of an *Allen* charge on appeal, the main issue is whether it unduly coerced the jury, considering the context and all the circumstances.[15] An *Allen* charge is unduly coercive only if it influenced the jury to reach a certain verdict or improperly conveyed to the jury the trial court's opinion of the merits of the case.[16] The time that a jury spends deliberating after receiving the *Allen* charge can factor into the determination of coercion.[17]

The jury began deliberations at 4:48 p.m. At 6:25 p.m., the jury entered the courtroom at the trial judge's instruction. The trial court told them,

> Y'all have been deliberating for almost two hours. It's 6:30 at night. What I need you to do is to go back there and decide if you want to continue to deliberate tonight or if you wish to come back in the morning, okay?

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[14]*Barnett v. State*, 189 S.W.3d 272, 277 n.13 (Tex. Crim. App. 2006).

[15]*Lowenfield v. Phelps*, 484 U.S. 231, 237, 108 S. Ct. 546, 550 (1988); *Howard v. State*, 941 S.W.2d 102, 123 (Tex. Crim. App. 1996), *cert. denie*d, 535 U.S. 1065 (2002), *overruled on other grounds by Easley v. State*, 424 S.W.3d 535, 538 (Tex. Crim. App. 2014).

[16]*Johnson v. State*, No. 02-11-00516-CR, 2013 WL 43990, at *2 (Tex. App.—Fort Worth Jan. 4, 2013) (mem. op., not designated for publication), *pet. stricken*, No. PD-0128-13, 2013 WL 2112426, at *1 (Tex. Crim. App. May 15, 2013) (per curiam) (not designated for publication) (order); *see also Arrevalo v. State*, 489 S.W.2d 569, 571 (Tex. Crim. App. 1973).

[17]*See Golden v. State*, 232 S.W. 813, 814 (1921) (holding supplemental charge coercive when jury deliberated forty-two hours in case with "short and clear" evidence but returned verdict five minutes after receiving supplemental charge).

The presiding juror responded by asking the trial judge if she wanted him to give her the answer then in court. The trial judge told him that she believed he needed to take a poll first, after which he could write her a note. The jury then left the courtroom, and after a pause, the trial court said, "This note says: Okay. . . . [t]hey think they're hung. Come—let's go in the back for a second." After another pause, the trial judge stated,

> All right. I have received a note at 6:05 that says: Five guilty, one not guilty. Not likely to change. Signed by the presiding juror.
>
> The State has asked for an *Allen* charge.
>
> I believe the Defense wishes to put something on the record?

Defense counsel moved for a mistrial, stating,

> The jurors have told us that they cannot reach a unanimous verdict. Giving them an *Allen* charge would, at this point, be coercive to the lone—lone juror who stands in the minority.
>
> I'd like the record to reflect that the jurors have been deliberating in excess, I think, of two hours, and that—so I think the only question to ask the jurors is to ask if they think further deliberations will reach—will result in a verdict. And they've essentially kind of said that by telling us that not likely to change.
>
> So in view of that, I object to the giving of the *Allen* charge, and I request . . . a mistrial.

With no new note since the 6:05 p.m. note and the subsequent 6:25 p.m. verbal instruction to the jury, the trial court had the jury brought back into the courtroom at 6:42 p.m. and read them the *Allen* charge, which states,

> You are instructed that in a large proportion of cases absolute certainty cannot be expected. Although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the

> conclusion of other jurors, each juror should show a proper regard to the opinion of the other jurors.
>
> If this jury finds itself unable to arrive at a unanimous verdict, it will be necessary for the court to declare a mistrial and discharge the jury. The information will still be pending, and it is reasonable to assume that the case will be tried again before another jury at some future time. Any such future jury will be empaneled in the same way this jury has been empaneled and will likely hear the same evidence which has been presented to this jury. The questions to be determined by that jury will be the same questions confronting you and there is no reason to hope the next jury will find these questions any easier to decide than you have found them.
>
> With this additional information, you are instructed to continue deliberations in an effort to arrive at a verdict that is acceptable to all members of the jury, if you can do so without doing violence to your conscience. You will now retire and continue your deliberations.

The jury left the courtroom at 6:44 p.m. and reentered the courtroom at 7:03 p.m. with a unanimous guilty verdict. The jury was also polled. After adjudicating Appellant's guilt, the trial court stated for the record that the *Allen* charge was delivered at around 6:40 p.m. and that the time was then 7:04 p.m.

Appellant expressly does not complain of the text of the *Allen* charge, which contains language we have held not coercive in other cases challenging *Allen* charges.[18] Instead, relying on several federal cases from other circuits—*United States v. Bonam*,[19] *United States v. Robinson*,[20] *United States v. De*

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[18]*See Johnson*, 2013 WL 43990, at *2; *Ball v. State*, No. 02-06-00268-CR, 2007 WL 2744883, at *4 (Tex. App.—Fort Worth Sept. 17, 2007, pet. ref'd) (mem. op. on PDR, not designated for publication).

[19]772 F.2d 1449, 1451 (9th Cir. 1985).

[20]560 F.2d 507, 517–18 (2d Cir. 1977) (op. on reh'g en banc), *cert. denied*, 435 U.S. 905 (1978).

Stephano,[21] *United States v. Moore*,[22] and *United States v. Pope*,[23] he contends that the brief time period between the giving of the *Allen* charge and the rendition of the verdict and the fact that the jury did not ask to view any evidence during that period indicate coercion.

The *Bonam* court held that the verdict in that case, reached one and a half hours after the charge was given, was not "rendered in such a short period of time as to raise a suspicion of coercion."[24] The *Robinson* court provided that the facts that the jury deliberated three hours after the first supplemental charge in that case and four hours after the second one were "strong indications that the effect of the [second] charge was minimal."[25] The *De Stefano* court relied on the fact that the jury deliberated four additional hours after receiving the supplemental charge in the case before it to conclude "that instead of it having [a] coercive effect . . . , the supplemental charge caused the jury to take additional time to deliberate."[26] As evidence of no coercion, the *Moore* court relied on facts showing that after the jury received the supplemental instruction in that case, it

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[21]476 F.2d 324, 337 (7th Cir. 1973).

[22]429 F.2d 1305, 1307 (9th Cir. 1970).

[23]415 F.2d 685, 690–91 (8th Cir. 1969), *cert. denied*, 397 U.S. 950 (1970).

[24]*Bonam*, 772 F.2d at 1451.

[25]*Robinson*, 560 F.2d at 517–18.

[26]*De Stephano*, 476 F.2d at 337.

deliberated further, asked to hear and did hear all the testimony, retired again, and reached a verdict.[27] Finally, the *Pope* court stated that the fact that the jury deliberated almost four hours after receiving the supplemental charge combined with the supplemental charge's "moderate tone" "[wa]s indicative of the absence of a coercive effect" in that case.[28]

While it is true that the jury here took only fifteen to twenty minutes to reach a verdict after hearing the *Allen* charge and did not ask to see any evidence during that period, Appellant has not shown under all the circumstances that those two facts indicate coercion. The jury had deliberated less than one and a half hours on the misdemeanor before delivering its note indicating deadlock and less than two hours before receiving the *Allen* charge. Even though the jury did not request to review any evidence, nothing in the record indicates that the jury did not deliberate during the interval of fifteen to twenty minutes before rendering the verdict.[29] Given the relatively standard (at least in this jurisdiction), innocuous language of the charge and the short amount of time

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[27] *Moore*, 429 F.2d at 1307.

[28] *Pope*, 415 F.2d at 690–91.

[29] *See Miller v. State*, No. 05-01-00510-CR, 2002 WL 1752168, at *2, *3–4 (Tex. App.—Dallas July 30, 2002, pet. ref'd) (holding that timing of verdict in relation to *Allen* charge did not indicate coercion in fact in case in which *Allen* charge was delivered after about three hours of deliberations, jury sent out note regarding evidence about thirty minutes after receiving that charge, and jury delivered its verdict about forty-five minutes later). *But see Golden*, 232 S.W. at 814.

that expired between the time the jury originally retired and the time it delivered its verdict, we are not prepared to hold in this instance that approximately fifteen to twenty minutes of time unmixed with a review of evidence indicates coercion. We overrule Appellant's second point.

Conclusion

Having overruled Appellant's two points, we affirm the trial court's judgment.

/s/ Lee Ann Dauphinot
LEE ANN DAUPHINOT
JUSTICE

PANEL: DAUPHINOT, GARDNER, and WALKER, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: August 25, 2016