In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00239-CR

SHANE RICHARD TABOR, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 316th District Court
Hutchinson County, Texas
Trial Court No. 11,440, Honorable James M. Mosley, Presiding

March 30, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Appellant, Shane Richard Tabor, was indicted in a three-count indictment alleging three incidents of aggravated sexual assault.[1] Following a trial before a jury, appellant was convicted on each count and sentenced to serve 40 years in the Institutional Division of the Texas Department of Criminal Justice (ID-TDCJ) and fined $10,000 on each of the three counts. Appellant appeals, contending that the judgment should be reversed because (1) fundamental error occurred when (a) juror Davis was

[1] *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(A)(i), (ii). (West Supp. 2015).

seated on the jury, and (b) the State's Exhibits 18 and 19 were admitted; and (2) the trial court erred in overruling appellant's challenge for cause as to juror Kemp. We will affirm.

Factual and Procedural Background

Appellant does not contend that the evidence was insufficient to sustain the jury's verdict; therefore, we will only address the facts necessary to decide this matter. During voir dire examination, juror Davis voiced some strong sentiments regarding punishment for individuals convicted of rape. After being questioned by the State's attorney and the trial court, Davis agreed he could follow the trial court's instructions and require the State to prove its case beyond a reasonable doubt. Davis left no doubt that he leaned toward a maximum punishment. Davis was not challenged for cause and was not the subject of a peremptory challenge by trial counsel. Davis was eventually seated on the jury.

Regarding juror Kemp, at a bench conference, Kemp advised that he had a daughter and granddaughter who were raped. Further, Kemp advised that no one was ever charged and, in fact, he did not find out about the incidents for many years. Upon being questioned by the State's attorney, Kemp advised that he would base any decision in the current trial on the evidence and the law as given by the trial court. Kemp then stated that he thought he could be a fair juror even in light of his past experience. Trial counsel moved to challenge Kemp for cause and the trial court denied the challenge. Trial counsel did not use a peremptory challenge to strike Kemp, and Kemp was eventually seated on the jury.

During the State's case-in-chief, the State introduced Exhibits 18 and 19. State's Exhibit 18 was the report of the Sexual Assault Nurse Examiner (SANE). State's Exhibit 19 was the DNA examination laboratory report. When each report was offered into evidence, no objection was lodged to its admission.

After hearing the evidence, the jury convicted appellant on each count of aggravated sexual assault contained in the indictment. The same jury then assessed appellant's punishment at confinement in the ID-TDCJ for 40 years with a fine of $10,000 on each count. We will overrule appellant's contentions and affirm his conviction.

Jurors Davis and Kemp

Although appellant makes separate and different arguments as to each of the jurors mentioned, we will review the questions of these jurors in one issue.

Fundamental Error

Appellant contends that it was fundamental error to seat Davis on the jury. To support this proposition, appellant cites the Court to article 1.05 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 1.05 (West 2005).[2] The pertinent portion of article 1.05 cited by appellant simply guarantees a criminal defendant a right to a speedy public trial by an impartial jury. Art. 1.05. Appellant cites the Court to no cases holding that seating a juror such as Davis is a violation of article 1.05, nor could the Court find any such cases. Appellant then suggests that seating

[2] Further reference to the Texas Code of Criminal Procedure will be by reference to "article ____" or "art. ____."

Davis was a violation of article 35.16. Article 35.16 sets forth the reasons and mechanism for challenging a prospective juror for cause. *See* art. 35.16 (West 2006). Yet, the record before the Court affirmatively shows that Davis was not challenged for cause.

Appellant then says that the seating of Davis was the type of fundamental error that Rule 1.03(e)[3] of the Texas Rules of Evidence contemplated.[4] Rule 1.03 is the rule of evidence concerning a trial court's rulings on evidence and sets out the mechanism for preserving a claim of error in a ruling to admit or exclude evidence during a trial. *See* Rule 1.03(a). Rule 1.03(e) then states that "[i]n criminal cases, a court may take notice of a fundamental error affecting a substantial right, even if a claim of error was not properly preserved." We have not been directed to any cases applying Rule 1.03(e) to the seating of a juror, nor have we found any such cases. *See Peyronel v. State,* 465 S.W.3d 650, 652 (Tex. Crim. App. 2015) (holding that some rights are mandatorily enforced, there are rights subject to waiver, and rights subject to forfeiture). Finally, a review of the jurisprudence of the State of Texas convinces the Court that the seating of Davis on the jury was not error of a fundamental nature that would excuse appellant from following the accepted procedures for objecting to the proposed juror. *See* art. 35.16, *Peyronel,* 465 S.W.3d at 652.

---

[3] Appellant's brief actually says Rule 1.03(d); however, from reading the issue it is clear to the Court that appellant actually means Rule 1.03(e).

[4] Further reference to the Texas Rules of Evidence will be by reference to "Rule ____."

Standard of Review and Applicable Law

We review the trial court's granting or denying a challenge for cause under an abuse of discretion standard. *See Russeau v. State,* 171 S.W.3d 871, 879 (Tex. Crim. App. 2005). We afford the trial court great deference in reviewing its decision to grant or deny a challenge for cause because the trial court is in the best position to evaluate a prospective juror's demeanor and responses. *See id.* Such deference is especially important when faced with a prospective juror who is vacillating or equivocal in his answers. *See Ladd v. State,* 3 S.W.3d 547, 559 (Tex. Crim. App. 1999).

To properly preserve error for the trial court's erroneous denial of a challenge for cause, appellant must show the following: (1) he asserted a clear and specific challenge for cause; (2) he used a peremptory challenge on the complained of prospective juror; (3) appellant's peremptory challenges were exhausted; (4) his request for additional strikes were denied; and (5) an objectionable juror sat on the jury. *Davis v. State,* 329 S.W.3d 798, 807 (Tex. Crim. App. 2010).

Analysis

Because we have previously disposed of appellant's fundamental error argument regarding Davis, we note in passing that Davis was not the subject of a peremptory challenge. Further, the record demonstrates that appellant did not use all of his peremptory challenges before the required number of jurors was seated. When an appellant exercises peremptory challenges outside the strike zone, that is, after the first twelve who had not been struck would be seated, said appellant may not complain about harm concerning a juror within the strike zone who could have been removed

instead. *Comeaux v. State,* 445 S.W.3d 745, 750–51 (Tex. Crim. App. 2014). Such appears to be the situation in this particular case. From reviewing the jury list of appellant's strikes, the twelve jurors seated were on the first page of the jury list and, at that point in time, appellant had used only seven of his peremptory challenges. So, appellant either did not use all of his challenges or used the balance of his challenges outside the strike zone. In either situation, there is no error in seating juror Davis. *See id.*

As to Kemp, the record reflects that Kemp was a vacillating juror who gave equivocal answers during voir dire. *See Ladd,* 3 S.W.3d at 559. At the end of the questioning of Kemp, Kemp advised the trial court and the attorneys that he could and would follow the instructions of the court and make the State meet its burden of proof. We find that the denial of the challenge for cause was not an abuse of discretion. *See Russeau,* 171 S.W.3d at 879. Even if it was an abuse of discretion, appellant's error has not been properly preserved because no peremptory challenge was used on Kemp. *See Davis,* 329 S.W.3d at 807. Accordingly, we overrule appellant's issue regarding the seating of jurors Davis and Kemp.

Admission of Exhibits 18 and 19

Appellant next contends that the admission of Exhibits 18 and 19 was fundamental error and that the judgment must accordingly be reversed. In explaining his argument, appellant simply states that, because the admission of the stated exhibits was fundamentally wrong, the requirement of preservation would not apply. Appellant purports to support this proposition by referring the Court to *Grado v. State,* 445 S.W.3d

736, 739 (Tex. Crim. App. 2014). *Grado* discusses the three different rights that a criminal defendant has in connection with how the appellate courts treat them. *See id.* This discussion follows the case of *Marin v. State* in breaking these rights down to (1) absolute rights, also known as structural or fundamental rights; (2) rights that are waivable only where appellant affirmatively, knowingly, and freely waives the right; and (3) forfeitable rights, those where the appellant must request the right to preserve it. *See id.; Marin v. State,* 851 S.W.2d 275, 278–79 (Tex. Crim. App. 1993). We agree that the classification as set forth in *Grado* and *Marin* is the proper way to analyze the rights belonging to appellant. However, nowhere does appellant cite the Court to a case holding that a question of admission or denial of admission of evidence is of the nature of a right other than a forfeitable one. *See Grado*, 445 S.W.3d at 739. We have not found any such case. Therefore, we decline to hold that a question of admission of evidence is a fundamental right.

Standard of Review and Applicable Law

We review the question of the admission of evidence in a trial court under an abuse of discretion standard. *See Davis,* 329 S.W.3d at 813–14. However, before we may get to that question, we must first determine if error was properly preserved. *See* TEX. R. APP. P. 33.1(a)(1).

To properly preserve an issue for complaint on appeal, the record must reflect that a complaint was made to the trial court that set forth the party's objection to the exhibit with the specificity to allow the trial court to understand what the true complaint is

and pursue that objection to an adverse ruling. *See id.; Valle v. State,* 109 S.W.3d 500, 509 (Tex. Crim. App. 2003).

Analysis

Our review of the record convinces us that, at the time the State offered Exhibits 18 and 19, there was no objection voiced to their admission. Therefore, nothing has been preserved for complaint on appeal. *See Valle,* 109 S.W.3d at 509. Appellant's issue to the contrary is overruled.

Conclusion

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

Mackey K. Hancock
Justice

Do not publish.