



**In The  
Court of Appeals  
Sixth Appellate District of Texas at Texarkana**

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No. 06-17-00137-CR

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ALLAN RAY HAGGERTY, Appellant

V.

THE STATE OF TEXAS, Appellee

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On Appeal from the 6th District Court  
Lamar County, Texas  
Trial Court No. 26998

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Before Morriss, C.J., Moseley and Burgess, JJ.  
Memorandum Opinion by Chief Justice Morriss

## MEMORANDUM OPINION

A jury convicted Allan Ray Haggerty of possession of less than one gram of methamphetamine and assessed a sentence of twenty-four months' confinement in state jail, which the trial court imposed. In a single point of error on appeal, Haggerty argues that, in violation of Article 35.26(a) of the Texas Code of Criminal Procedure,<sup>1</sup> the clerk did not seat the first twelve eligible jury panelists. Because he has failed to preserve his point of error for our review, we affirm the trial court's judgment.

At trial, Haggerty made no mention of any Article 35.26 error. In fact, Haggerty affirmatively informed the trial court that he had no objection to the jury panel. "As a prerequisite to presenting a complaint for appellate review, the record must show that: (1) the complaint was made to the trial court by a timely request, objection, or motion . . . ." TEX. R. APP. P. 33.1(a)(1). Haggerty acknowledges that error was not preserved, but argues that the nature of the clerk's mistake constituted fundamental error.<sup>2</sup>

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<sup>1</sup>"When the parties have made or declined to make their peremptory challenges, they shall deliver their lists to the clerk. Except as provided in Subsection (b) of this section, the clerk shall, if the case be in the district court, call off the first twelve names on the lists that have not been stricken." TEX. CODE CRIM. PROC. ANN. art. 35.26(a) (West 2006).

<sup>2</sup>"All but the most fundamental rights are thought to be forfeited if not insisted upon by the party to whom they belong." *Saldano v. State*, 70 S.W.3d 873, 887 (Tex. Crim. App. 2002) (quoting *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997)). Even the right to a public trial is subject to forfeiture. *Peyronel v. State*, 465 S.W.3d 650, 651 (Tex. Crim. App. 2015). "[T]he rules that require a timely and specific objection, motion, or complaint do not apply to two relatively small categories of errors: violations of 'rights which are waivable only' and denials of 'absolute systemic requirements.'" *Saldano*, 70 S.W.3d at 888 (quoting *Marin*, 851 S.W.2d at 280). Waivable only rights include the right to the assistance of counsel and the right to trial by jury. *Id.* Absolute, systemic rights

include jurisdiction of the person, jurisdiction of the subject matter, . . . a penal statute's being in compliance with the Separation of Powers Section of the state constitution[,] . . . a constitutional requirement that a district court must conduct its proceedings at the county seat, the constitutional prohibition of ex post facto laws, and certain constitutional restraints on the comments of a judge.

*Id.* at 888–89. None of these situations are present here.

We disagree. Where a prospective juror accepted by both parties is left off the jury, a defendant cannot wait until after trial to raise the error for the first time. See *Bagwell v. State*, 657 S.W.2d 526, 527 (Tex. App.—Corpus Christi 1983, pet. ref'd) (discussing *Granger v. State*, 31 S.W. 671, 672 (Tex. Crim. App. 1895); see also *Miller v. State*, 692 S.W.2d 88, 93 n.10 (Tex. Crim. App. 1985) (citing *Pogue v. State*, 553 S.W.2d 368 (Tex. Crim. App. 1977), *superseded by statute on other grounds by Nelson v. State*, 129 S.W.3d 108 (Tex. Crim. App. 2004) (en banc)); *Holiday v. State*, 14 S.W.3d 784, 789 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd); *Truong v. State*, 782 S.W.2d 904, 905 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd) (finding that defendant must preserve violation of Article 35.26(a)). Haggerty has failed to preserve his point of error.

We affirm the trial court's judgment.

Josh R. Morriss, III  
Chief Justice

Date Submitted: November 6, 2017  
Date Decided: November 16, 2017

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