



IN THE
TENTH COURT OF APPEALS

No. 10-15-00079-CR

ROLANDO BARRAGAN,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 19th District Court
McLennan County, Texas
Trial Court No. 2011-1161-C1

MEMORANDUM OPINION

Rolando Barragan was convicted of two counts of indecency with a child by contact and sentenced to 13 years in prison for each count. *See* TEX. PENAL CODE ANN. § 21.11 (West 2011). The victim was Barragan's son. The trial court granted Barragan's motion for new trial; and after an appeal by the State, we reversed the trial court's order. *State v. Barragan*, 421 S.W.3d 16 (Tex. App.—Waco 2013, pet. ref'd). Barragan was resentenced and appeals his original convictions. Because the trial court's

limitation on Barragan's voir dire explanation of "beyond a reasonable doubt" was not harmful, the trial court did not err in allowing the State to impeach Barragan with collateral matters, error, if any, by the trial court in admitting therapy records was not preserved, and the trial court did not err in denying Barragan's motion for mistrial, the trial court's judgment is affirmed.

Because Barragan does not question the sufficiency of the evidence to support his convictions, we will not discuss the facts of the underlying case.

LIMITING VOIR DIRE

In his first issue, Barragan complains that the trial court erred in limiting Barragan's ability to explain the concept of "beyond a reasonable doubt" to the jury panel during voir dire and the limitation was harmful to Barragan. Prior to trial, Barragan filed a motion to allow him to attempt to define the term "reasonable doubt" on voir dire and filed a list of proposed statements for voir dire which defined the different levels of proof and compared those with proof beyond a reasonable doubt. The trial court denied Barragan's motion.

Barragan was tried in January of 2012, and in March of the same year, the Court of Criminal Appeals decided *Fuller v. State*, 363 S.W.3d 583 (Tex. Crim. App. 2012). In *Fuller*, the Court held that an inquiry into a prospective juror's understanding of what proof beyond a reasonable doubt means constitutes a proper question regardless of whether the law specifically defines that term and held that the jury's ability to apply

the correct standard of proof remains an issue in every criminal case. *Id.* at 587. The Court opined that it is appropriate to inquire as to whether a prospective juror understood that proof beyond a reasonable doubt at least constitutes a more onerous standard of proof than preponderance of the evidence and clear and convincing evidence and is appropriate to explain the contrast among the various standards of proof. *Id.* at 587, 588. The overruling of a request to make such an inquiry is error. *See id.* at 588. Accordingly, based on the holding in *Fuller*, the trial court erred when it did not allow Barragan to question the jury panel on the differences between the criminal and civil burdens of proof.

Harm Analysis

We next decide whether Barragan was harmed by trial court's error. Generally, the denial of appropriate questioning during voir dire constitutes non-constitutional error which is subject to a harm analysis. *See* TEX. R. APP. P. 44.2(b); *Easley v. State*, 424 S.W.3d 535, 541 (Tex. Crim. App. 2014). But the Court of Criminal Appeals has not foreclosed the possibility of instances where a trial court's limitation on voir dire is so substantial as to warrant labeling the error as constitutional error subject to a Rule 44.2(a) harm analysis. *Easley*, 424 S.W.3d at 541. However, error is non-constitutional when a party is not foreclosed from explaining the concept of beyond a reasonable doubt and exploring the panel's understanding and beliefs of reasonable doubt by other methods. *See id.*

Constitutional vs. Non-Constitutional Error Analysis

Barragan argues that because the trial court interrupted counsel's alternative explanations and gave its own "vague explanation," which, Barragan further argues, resulted in no explanation of beyond a reasonable doubt to the jury panel at all, the trial court's previous limitation on Barragan's explanation of beyond a reasonable doubt was so substantial that it warrants a constitutional error harm analysis. We disagree with Barragan.

Although precluded from comparing the different burdens of proof, the trial court made it clear to Barragan that he was free to discuss proof beyond a reasonable doubt and ask the jury panel members how they view proof beyond a reasonable doubt. When counsel attempted to explain reasonable doubt by stating it was a doubt by a reasonable person, the trial court interrupted and explained that "just because you're a reasonable person and you have a doubt doesn't mean the doubt is reasonable." Barragan does not assert that this was a proper characterization of reasonable doubt that the trial court erroneously limited. Further, we note that while reasonable doubt has been described as "the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs," see *Geesa v. State*, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991), *overruled in part by Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000), we have not found a case, and Barragan has not cited any, which describes reasonable doubt as a doubt of a reasonable person. Thereafter, Barragan

never tried another explanation of the term and never explored the panel's beliefs of what reasonable doubt meant. Simply because Barragan did not take full advantage of what the trial court would allow does not mean that the trial court's previous error should be reviewed under the constitutional error harm analysis.

Further, the trial court's description of reasonable doubt is not a part of the equation when determining whether to review harm by a constitutional analysis or a non-constitutional analysis. Rather, it is the magnitude of the court's limitation of voir dire that is the focus of determining which harm analysis to use. *See Easley v. State*, 424 S.W.3d 535, 541 (Tex. Crim. App. 2014). Accordingly, based on the record in this case, we determine the trial court's error to be non-constitutional error.

Non-Constitutional Error Harm Analysis

Under Rule 44.2(b), we disregard all non-constitutional errors that do not affect the appellant's substantial rights. TEX. R. APP. P. 44.2 (b); *Rich*, 160 S.W.3d at 577. A substantial right is affected when the error has a substantial and injurious effect or influence in determining the jury's verdict. *Rich*, 160 S.W.3d at 577; *Johnson v. State*, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001). In conducting the harm analysis, we consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case, the jury instructions, the State's theory and any defensive theories, closing

arguments, voir dire, and whether the State emphasized the error. *Id.*

Our review of the record shows that, although the trial court improperly limited Barragan's voir dire, the jury was repeatedly instructed that the State had the burden of proving Barragan's guilt beyond a reasonable doubt, and there is nothing in the record to show that any member of the jury was unable or unwilling to follow those instructions.¹ Barragan does not challenge the sufficiency of the evidence; and although Barragan's son and Barragan's wife were reluctant to testify, the evidence, including outcry testimony, supports the conviction. The trial court's verbal instructions to the jury, its written instructions contained in the Charge of the Court, the State's arguments, and even Barragan's arguments, all reinforced the fact that the State had the burden of proving Barragan's guilt beyond a reasonable doubt.

Conclusion

For the foregoing reasons, we hold the trial court's improper limiting of Barragan's voir dire regarding the differences between the criminal and civil burdens of proof did not, under the circumstances of this case, have a substantial and injurious effect or influence on the jury's verdict. Barragan's first issue is overruled.

EXTRANEOUS CONDUCT

Barragan next complains that the trial court erred in allowing the State to

¹ We acknowledge Barragan never tried another explanation of the term and never explored the panel's beliefs of what reasonable doubt meant. Nevertheless, Barragan's failure to take full advantage of what the trial court would allow does not mean that the trial court's previous error should be considered harmful.

question Barragan about his prior drug use and an arrest for assaulting Barragan's wife. In determining whether a trial court erred in admitting evidence, the standard for review is abuse of discretion. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005). A trial court abuses its discretion when its decision is so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *Id.* If the trial court's evidentiary ruling is correct under any applicable theory of law, it will not be disturbed even if the trial court gave a wrong or insufficient reason for the ruling. *Sewell v. State*, 629 S.W.2d 42, 45 (Tex. Crim. App. 1982).

At the conclusion of Barragan's testimony on direct examination, the State approached the bench and informed the trial court that the State wanted to cross-examine Barragan regarding Barragan's extraneous conduct of using drugs and committing family violence to rebut the false impression Barragan left with the jury concerning his good qualities as a parent and as a person. After hearing arguments and objections outside the presence of the jury, the trial court granted the State permission to question Barragan regarding the extraneous conduct. Not only did the trial court believe Barragan had "opened the door" pursuant to former Texas Rule of Evidence 405(b), it also believed that the State was entitled to rebut Barragan's testimony as permitted by former Texas Rule of Evidence 404(a)(1)(a).²

In a criminal case, the general rule is that evidence of a person's character is not

² Rules 404 and 405 were modified in 2015. Because this case was tried in 2012, we cite to the Rules as they existed in 2012.

admissible to prove conforming conduct. *Harrison v. State*, 241 S.W.3d 23, 25 (Tex. Crim. App. 2007); see TEX. R. EVID. 404 (amended, eff. April 1, 2015). However, such evidence may be admitted if it is offered to rebut a character trait offered by the accused or where the character trait is an essential element to a claim or defense. See *id.* 404(a)(1)(A); 405(b) (amended, eff. April 1, 2015). Further, where the witness creates a false impression of law abiding behavior, he "opens the door" on his otherwise irrelevant past criminal history and opposing counsel may expose the falsehood. *Delk v. State*, 855 S.W.2d 700, 704 (Tex. Crim. App. 1993). Testimony that might normally be inadmissible becomes admissible to correct the false impression the witness left with the jury. *Prescott v. State*, 744 S.W.2d 128, 131 (Tex. Crim. App. 1988). Testimony admitted into evidence about a specific "bad act" must also relate to the issue on which the door has been opened. *Turner v. State*, 4 S.W.3d 74, 79 (Tex. App.—Waco 1999, no pet.).

In his opening statement, made after the State rested its case, Barragan told the jurors, "Mr. Barragan is a good and loving father. He cares about his wife. He cares about his child. He's a good man." On direct examination, Barragan testified that he did not feel he was a bad person and that he loved his wife and his son.

Barragan's defense to the charged offenses was that he was a good father and like any good father, he was only applying medicine when he touched his son's penis. Thus, being good and not bad was an essential element to Barragan's defense. At the very least, the State could offer evidence of extraneous conduct to rebut Barragan's

claims of being good and not bad. A citation for family violence and the use of drugs relates to the issue of being good. Accordingly, the trial court did not abuse its discretion in allowing the State to rebut Barragan's defense, and Barragan's second issue is overruled.

THERAPY RECORDS

Barragan contends in his third issue the trial court erred in allowing the State to introduce therapy records which contained statements made by Barragan's son. During the punishment phase of the trial, the State called the executive director of the Advocacy Center for Crime Victims and Children to the stand to introduce an exhibit containing records kept by the Center, specifically, notes made during therapy sessions with Barragan's son. Barragan objected to the exhibit, stating the proper predicate had not been laid, the exhibit was not a true and correct copy because pages were incomplete, and the exhibit contained hearsay. The trial court allowed the State to replace the incomplete pages of the exhibit and overruled the remainder of Barragan's objections. On appeal, Barragan takes issue only with the trial court's ruling on the proper predicate objection.

To preserve error, an objection to the admission of evidence must state the specific grounds for the objection if the specific grounds are not apparent from the context. TEX. R. EVID. 103(a); TEX. R. APP. P. 33.1; *Bird v. State*, 692 S.W.2d 65, 70 (Tex. Crim. App. 1985). An objection to an improper predicate that fails to inform the trial

court exactly how the predicate is deficient will not preserve error. *Bird*, 692 S.W.2d at 70; *Scherl v. State*, 7 S.W.3d 650, 652 (Tex. App.—Texarkana 1999, pet. ref'd). Barragan did not inform the trial court exactly how the predicate was deficient. Accordingly, error, if any, has not been preserved, and Barragan's third issue is overruled.

JUROR WITHHOLDING MATERIAL INFORMATION

In his fourth issue, Barragan asserts the trial court erred in refusing to grant a mistrial after a juror disclosed that she knew one of the State's expert witnesses. Before the State's expert, Dr. William Lee Carter, testified, one juror informed the bailiff that she believed that she and another juror knew Dr. Carter from church. Neither of these jurors revealed this information during voir dire. The trial court gave Barragan an opportunity to call in the juror and ask questions regarding whether or not the juror's knowledge of Dr. Carter would influence the juror's decision-making. Barragan declined, explaining that Barragan believed it would unduly prejudice him by singling out that juror for questioning when the whole panel was asked during voir dire if they knew, or knew of, any of the possible witnesses. Barragan moved for a mistrial which was denied.

Law

A trial judge's denial of a motion for mistrial is reviewed under an abuse of discretion standard, and his ruling must be upheld if it was within the zone of reasonable disagreement. *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010).

The Sixth Amendment guarantees the right to a trial before an impartial jury. *Franklin v. State*, 138 S.W.3d 351, 354 (Tex. Crim. App. 2004). Part of the constitutional guarantee of the right to an impartial jury includes adequate voir dire to identify unqualified jurors. *Id.* Where a juror withholds material information during the voir dire process, the parties are denied the opportunity to exercise their challenges, thus hampering their selection of a disinterested and impartial jury. *Franklin v. State*, 138 S.W.3d 351, 354 (Tex. Crim. App. 2004); *Salazar v. State*, 562 S.W.2d 480, 482 (Tex. Crim. App. 1978).

To establish error, a defendant must show that the juror withheld material information during voir dire, and the information is withheld *despite* due diligence exercised by the defendant. *Franklin v. State*, 138 S.W.3d 351, 355-56 (Tex. Crim. App. 2004) (emphasis added). To determine materiality, we evaluate whether the withheld information would likely reveal the juror harbored a bias or prejudice to such a degree that the juror should have been excused from jury service. *Sypert v. State*, 196 S.W.3d 896, 900 (Tex. App.—Texarkana 2006, pet. ref'd). Mere familiarity with a witness is not necessarily material information. *Franklin v. State*, 12 S.W.3d 473, 478 (Tex. Crim. App. 2000). Further, counsel must ask follow-up questions after uncovering potential bias of a juror. *Gonzales v. State*, 3 S.W.3d 915, 917 (Tex. Crim. App. 1999). There is no error where counsel has not met that obligation. *Id.*

Application

Here, after discovering that at least one juror had withheld information that she “knew” Dr. Carter from church, Barragan’s counsel declined to investigate the “potential bias” further. Because counsel did not meet his obligation to ask follow-up questions as required when given the opportunity to do so, the trial court did not abuse its discretion in denying Barragan’s motion for mistrial. *See Scott v. State*, 419 S.W.3d 698, 705 (Tex. App.—Texarkana 2013, no pet.) (no error established when at hearing on motion for new trial, counsel failed to explore workplace acquaintance between juror and appellant’s mother). Barragan’s fourth issue is overruled.

CONCLUSION

Having overruled each issue on appeal, we affirm the trial court’s judgment.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins

Affirmed

Opinion delivered and filed March 31, 2016

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