

NO. 12-11-00046-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

<i>ROBBIE ALONZO DUDLEY,</i> <i>APPELLANT</i>	§	<i>APPEAL FROM THE THIRD</i>
<i>V.</i>	§	<i>JUDICIAL DISTRICT COURT</i>
<i>THE STATE OF TEXAS,</i> <i>APPELLEE</i>	§	<i>ANDERSON COUNTY, TEXAS</i>

MEMORANDUM OPINION

Robbie Alonzo Dudley appeals his conviction for evading arrest, for which he was sentenced to imprisonment for five years. In three issues, Appellant argues that the trial court (1) erred in not granting a mistrial sua sponte based on juror misconduct, (2) abused its discretion in denying Appellants' motion for continuance after the State gave notice of its intent to obtain an affirmative deadly weapon finding, and (3) abused its discretion by instructing the jury to continue deliberations on the deadly weapon finding after it accepted the verdict, in part, on Appellant's guilt. We affirm.

BACKGROUND

Appellant was charged by indictment with evading arrest and pleaded "not guilty." The Friday before Appellant's jury trial was to commence, the trial court conducted a pretrial hearing. At the hearing, the State gave written notice to Appellant that it would seek a finding that Appellant used or exhibited a deadly weapon during the commission of the offense. In response, Appellant requested that the trial be continued.¹ The trial court denied Appellant's request.

¹ In the record of the hearing, Appellant does not specifically request a continuance. Nonetheless, from the record, it is apparent that the trial court interpreted Appellant's argument as a request for continuance.

The jury trial commenced the following Tuesday. After the first day of testimony, juror Sylvia Holmes requested to speak to the court. Holmes asked for clarification from the court concerning what the jurors could discuss. The court informed Holmes that the jurors were not permitted to discuss anything that occurs in the courtroom.² Holmes responded that there was discussion among the jurors concerning what the color green meant and that one juror talked about whether Appellant had been arrested or was in jail. The court determined that the only juror who had made comments about the color issue and whether Appellant was in custody was the alternate juror, Ricardo Rangel. Holmes stated that the only response from the rest of the jurors regarding the color issue was that there are many definitions of the color green. Holmes stated that she responded to Rangel's comments by saying that the jury should not be talking about this.

The next day, Rangel was brought before the court. The court asked Rangel if there had been any discussion by him or any other juror about the case. Rangel answered that there had not been any such discussion. When the trial court questioned him further about this topic, Rangel stated that there may have been some discussion about whether an officer who testified had read his testimony because he could not remember the facts. The trial court instructed Rangel not to discuss the case until it was time to deliberate. The trial court further instructed the jury that they should not have any discussion about the case until deliberation commenced.

Following the presentation of evidence, the jury found Appellant "guilty" of evading arrest. After the trial court asked the jury foreperson if the verdict read was, in fact, the jury's verdict, it noticed that the jury had not reached a decision on the deadly weapon special issue. Appellant's attorney asked to poll the jury. After the jury was polled, the trial court again noted the absence of a finding on the deadly weapon issue. In response to the questioning by the trial court, the jury foreperson stated that the jury had not deliberated on the deadly weapon issue. The trial court accepted the jury's verdict on Appellant's guilt. Thereafter, the trial court, Appellant, and the prosecuting attorney discussed how the lack of a finding on the deadly weapon issue should be resolved. Over Appellant's objection, the trial court ruled that it would ask the jury to complete its deliberations on the deadly weapon issue. After further deliberations, the jury made an affirmative finding on the deadly weapon issue. Over Appellant's objection, the trial court accepted the unanimous verdict of the jury. Appellant requested a judgment notwithstanding the

² The trial court had previously instructed the jury not to discuss the case.

on the deadly weapon issue, which the trial court denied.

Thereafter, the jury assessed Appellant's punishment at imprisonment for five years and a two thousand dollar fine. The trial court sentenced Appellant accordingly, and this appeal followed.

MISTRIAL

In his first issue, Appellant argues that the trial court erred in not declaring a mistrial on its own motion after questioning Holmes and Rangel regarding Rangel's violating the court's orders not to discuss the case with other jury members prior to deliberation. A trial judge may declare a mistrial sua sponte for "manifest necessity." See *Hill v. State*, 90 S.W.3d 308, 317 (Tex. Crim. App. 2002). However, Appellant has not cited to, nor are we aware of, any authority holding that a trial court's failure to declare a mistrial sua sponte is reversible error. Moreover, in order for us to consider Appellant's complaint on appeal, the record must show that Appellant preserved his complaint by a timely request, objection, or motion and obtained a ruling from the trial court. See TEX. R. APP. P. 33.1(a); *Hull v. State*, 67 S.W.3d 215, 217 (Tex. Crim. App. 2002). Since Appellant did not request a mistrial, he has not preserved that issue for appeal. See *Nanez v. State*, 179 S.W.3d 149, 151 (Tex. App.—Amarillo 2005, no pet.); *Dominguez v. State*, 125 S.W.3d 755, 763 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd); see also *Turner v. State*, No. 12-07-00416-CR, 2009 WL 2370699, at *1 (Tex. App.—Tyler July 31, 2009, pet. ref'd) (mem. op., not designated for publication). Appellant's first issue is overruled.

CONTINUANCE

In his second issue, Appellant argues that the trial court abused its discretion in not granting his request for a continuance after the State gave its notice of intent to seek an affirmative deadly weapon finding. Specifically, Appellant contends that he was entitled to a continuance because he was surprised by the State's notice and that the notice completely changed his trial strategy and the complexion of the case as it related to the calculation of punishment.

The Texas Legislature has set out the requirements for a motion for a continuance in Articles 29.03 and 29.08 of the Texas Code of Criminal Procedure. *Anderson v. State*, 301 S.W.3d 276, 278-79 (Tex. Crim. App. 2009). Article 29.03 states that "[a] criminal action may be continued on the written motion of the State or of the defendant, upon sufficient cause shown;

which cause shall be fully set forth in the motion.” TEX. CODE CRIM. PROC. ANN. 29.03 (West 2006); *Anderson*, 301 S.W.3d at 279. Article 29.08 provides that “[a]ll motions for continuance must be sworn to by a person having personal knowledge of the facts relied on for the continuance.” TEX. CODE CRIM. PROC. ANN. 29.08 (West 2006); *Anderson*, 301 S.W.3d at 279.

The court of criminal appeals has construed these statutes to require a sworn written motion to preserve appellate review from a trial court’s denial of a motion for a continuance. *See Anderson*, 301 S.W.3d at 279. Thus, if a party makes an unsworn oral motion for a continuance and the trial court denies it, the party forfeits the right to complain about the trial court’s ruling on appeal. *See id.* (the appellant’s right to meaningful opportunity to present complete defense was forfeited by failure to comply with procedural requirements of Articles 29.03 and 29.08).

In the case at hand, there is no record of a motion for continuance in compliance with Articles 29.03 and 29.08. As a result, we conclude that Appellant forfeited his appellate challenge to the trial court’s denial of his unsworn oral request for continuance. Appellant’s second issue is overruled.

CONTINUING DELIBERATIONS AFTER VERDICT ACCEPTED

In his third issue, Appellant argues that the trial court abused its discretion and made an unlawful comment on the evidence to the jury by instructing the jury to continue deliberations on the deadly weapon issue after it accepted the jury’s verdict.

A verdict must be certain, consistent, and definite. It may not be conditional, qualified, speculative, inconclusive, or ambiguous. *Reese v. State*, 773 S.W.2d 314, 317 (Tex. Crim. App. 1989); *Eads v. State*, 598 S.W.2d 304, 306 (Tex. Crim. App. [Panel Op.] 1980); *Cobbs v. State*, No. 05-99-01878-CR, 2000 WL 1618471, at *3 (Tex. App.–Dallas Oct. 31, 2000, no pet.) (not designated for publication). An incomplete or unresponsive verdict should not be received by the court. *Reese*, 773 S.W.2d at 317; *Eads*, 598 S.W.2d at 306. It is the trial judge’s duty to reject an informal or insufficient verdict, call to the attention of the jury the informality or insufficiency, and have the same corrected with their consent, or send them out again to consider their verdict. *Reese*, 773 S.W.2d at 317; *Eads*, 598 S.W.2d at 306. This procedure is particularly necessary where the defect or insufficiency in the verdict relates to the assessment of punishment in a criminal case. *Eads*, 598 S.W.2d at 306.

Appellant argues that the trial court erred in accepting the verdict on the issue of

Appellant's guilt, and then instructing the jury to continue its deliberations on the deadly weapon issue. Appellant contends that, instead, the trial court should have interpreted the jury's unresponsiveness on the deadly weapon issue as a negative finding on that issue.

It is apparent that the trial court should not have accepted the jury's verdict on the issue of Appellant's guilt when the jury had not made a finding on the deadly weapon issue. *See Reese*, 773 S.W.2d at 317; *but see* TEX. CODE CRIM. PROC. ANN. art. 37.05 (West 2006) (when polling jury indicates unanimous verdict, verdict shall be entered upon minutes). Indeed, without a finding on the deadly weapon issue, the verdict was incomplete. But Appellant's interpretation of the jury's failure to make a finding as a negative finding on the deadly weapon issue is untenable. *See Reese*, 773 S.W.2d at 317. Furthermore, this interpretation contradicts the jury foreperson's response to the trial court's question concerning the absence of a finding on the deadly weapon issue. Specifically, the foreperson told the trial court that the jury did not deliberate the issue.

Here, the trial court was mindful of the absence of a finding on the deadly weapon issue. And in saying that it was going to accept the jury's finding on guilt, there is no doubt but that the trial court was intent on resolving the absence of a deadly weapon finding. Moreover, the record reflects that Appellant requested that the jury be polled immediately after the trial court noted the absence of a finding on the deadly weapon issue. However, because the verdict was not complete, Appellant's request to poll the jury was premature. Nonetheless, the trial court granted Appellant's request and, as a result, was soon left with the seemingly conflicting mandates between the incomplete verdict rule set forth in *Reese* and Article 37.05's mandate concerning entry of a verdict after jury polling. We first note that Appellant should not be permitted to benefit on appeal from the confusion created by his premature request that the jury be polled. *Cf. Costilow v. State*, 318 S.W.3d 534, 540 (Tex. App.—Beaumont 2010, no pet.) (where party, by request, leads court into error, he should be precluded from claiming reversal of judgment by reason of error so committed). Even so, based on our reading of Article 37.05, we cannot conclude that it can be interpreted to require a trial court to enter an incomplete verdict. Article 37.01 defines a "verdict" as a written declaration by a jury of its decision of the issue submitted to it in the case. *See* TEX. CODE CRIM. PROC. ANN. art. 37.01 (West 2006). Because the jury had not decided all of the issues submitted to it in this case, there was no verdict. Accordingly, the mandate in Article 37.05 did not apply.

The trial court's instructing the jury to deliberate on the deadly weapon issue was not, as

Appellant contends, an improper comment on the evidence. Rather, this course of action was the trial court's duty. See *Reese*, 773 S.W.2d at 317. When the jury ultimately returned an affirmative deadly weapon finding, the trial court accepted the jury's verdict and ordered it filed.

Based on our review of the record, we conclude that the trial court acted in compliance with the law when it instructed the jury to continue its deliberation on the deadly weapon issue. When the jury returned a finding on that issue, the trial court accepted a verdict that was complete and definite and ordered it filed. Accordingly, we hold that there is no error in the trial court's ultimate acceptance of the verdict. Appellant's third issue is overruled.

DISPOSITION

Having overruled Appellant's first, second, and third issues, we *affirm* the trial court's judgment.

SAM GRIFFITH
Justice

Opinion delivered February 29, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)



**COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT**

FEBRUARY 29, 2012

NO. 12-11-00046-CR

ROBBIE ALONZO DUDLEY,

Appellant

V.

THE STATE OF TEXAS,

Appellee

Appeal from the 3rd Judicial District Court
of Anderson County, Texas. (Tr.Ct.No. C-15,173)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Sam Griffith, Justice.

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.