NO. 12-11-00090-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

THOMAS H. FIELDER, APPELLANT	*§*	***APPEAL FROM THE 159TH***
V.	*§*	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	*§*	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION

Thomas H. Fielder, Jr. appeals his conviction for murder. He raises two issues on appeal, contending that the trial court erred in denying his challenges for cause against two venire persons during voir dire. We affirm.

BACKGROUND

Gary Lynn Defratus, the victim, lived at his mother's home. Defratus's friend, Jay Hines, frequently visited Defratus to play guitars with him. In December 2009, Hines visited Defratus, and when he arrived, Appellant, his girlfriend (Mindy Wood), and their child were already at Defratus's residence. When they all left, Appellant told Hines that he was upset and that he was going to return and confront Defratus because he flirted with Wood. Hines later received several text messages from Wood stating that she was concerned that Appellant returned to Defratus's home to confront him. Hines then went back to Defratus's home after midnight and saw Appellant there. Appellant was frantic and told Hines that there had been an altercation and that he needed to leave before the police arrived. Hines believed there had been a simple fight and left. He thought Defratus had gone to call the police, and that, as a result, Appellant made a hasty escape. Hines did not realize that a more serious crime had occurred. Later, the police

discovered that Defratus had died from a vicious knife attack. After conducting an investigation, the police arrested Appellant. He claimed that what started out as a simple fistfight escalated and that Defratus struck him with a large metal flashlight and charged him with a knife. According to Appellant, he fought back in self-defense. Appellant was indicted and tried by a jury for murder. The jury found him guilty and sentenced him to life imprisonment. This appeal followed.

CHALLENGES FOR CAUSE

In his first and second issues, Appellant argues that the trial court erred when it denied his challenges for cause as to venire persons 28 and 30.

Standard of Review and Applicable Law

A defendant may challenge a venire person for cause whenever he or she has a bias or prejudice against any phase of the law applicable to the case upon which that defendant is entitled to rely. ***Cardenas v. State***, 325 S.W.3d 179, 184-85 (Tex. Crim. App. 2010). In such circumstances, the test is whether the bias or prejudice would prevent or substantially impair the venire person's ability to fully follow the law as set out in the trial court's instructions and as required by the juror's oath. ***Swearingen v. State***, 101 S.W.3d 89, 99 (Tex. Crim. App. 2003); ***Feldman v. State***, 71 S.W.3d 738, 744 (Tex. Crim. App. 2002). The laws pertaining to punishment are laws upon which a defendant is entitled to rely. TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2) (West 2006). Therefore, a defendant is entitled to jurors who can "consider" the entire range of punishment. ***Cardenas***, 325 S.W.3d at 184. Once a venire person admits an inability to consider the full range of punishment, a sufficient foundation has been laid to support a challenge for cause. ***Cumbo v. State***, 760 S.W.2d 251, 255-56 (Tex. Crim. App. 1988).

Appellate review of a trial court's decision to grant or deny a challenge for cause is deferential to the trial court due to its superior position in evaluating a venire person's demeanor and responses, as well as the context and tone in which questions were asked and answered. *See* ***Rachal v. State***, 917 S.W.2d 799, 810 (Tex. Crim. App. 1996). Likewise, when a venire person's answers are vacillating, unclear, or even contradictory, we accord great deference to the trial court, because it had the better opportunity to see and hear the venire person. ***Swearingen***, 101 S.W.3d at 99. Accordingly, a trial court's ruling on a challenge for cause will be reversed only if a clear abuse of discretion is evident, which occurs when the decision falls outside the zone of reasonable disagreement. ***Gardner v. State***, 306 S.W.3d 274, 296 (Tex. Crim. App. 2009); ***Russeau v. State***,

171 S.W.3d 871, 879 (Tex. Crim. App. 2005). We review the entire voir dire record to determine whether there is sufficient evidence to support the ruling. ***Feldman v. State***, 71 S.W.3d 738, 744 (Tex. Crim. App. 2002).

To preserve error with respect to a trial court's denial of a challenge for cause, an appellant must (1) assert a clear and specific challenge for cause; (2) use a peremptory strike on the complained-of venire person; (3) exhaust his peremptory strikes; (4) request additional peremptory strikes; (5) identify an objectionable juror; and (6) claim that he would have struck the objectionable juror with a peremptory strike if he had one to use. ***Allen v. State***, 108 S.W.3d 281, 282 (Tex. Crim. App. 2003). Further, an appellant challenging denials of challenges for cause is entitled to appellate review of denials only with respect to jurors he used statutory peremptory strikes to exclude. ***Busby v. State***, 253 S.W.3d 661, 671 (Tex. Crim. App. 2008).

Discussion

Appellant conceded at oral argument that trial counsel had not requested additional peremptory strikes or identified an objectionable juror that he would have struck had additional strikes been granted. He argued, however, that those two requirements should be dispensed with altogether as part of our jurisprudence. As an intermediate court of appeals, we are bound to follow the precedent of the Texas Court of Criminal Appeals. *See* ***Purchase v. State***, 84 S.W.3d 696, 701 (Tex. App.–Houston [1st Dist.] 2002, pet. ref'd); *see also* TEX. CONST. art. V, § 5(a) (declaring that court of criminal appeals is final authority for criminal law in Texas). These two steps are mandatory to preserve error relating to the trial court's denial of a challenge for cause. *See* ***Allen***, 108 S.W.3d at 282. Because Appellant did not comply with these requirements, he failed to preserve his complaint. But even if he had preserved his complaint, the result would not change.

Appellant argued at oral argument that once a venire person has shown bias, he or she cannot be rehabilitated. However, such a broad statement has been disapproved. ***Cortez ex rel. Estate of Puentes v. HCCI–San Antonio, Inc.***, 159 S.W.3d 87, 91-92 n.2 (Tex. 2005) ("Cortez next argues, citing several court of appeals opinions, that veniremembers cannot be 'rehabilitated'—that once a veniremember has expressed 'bias,' further questioning is not permitted and the veniremember must be excused. We disagree that there is such a rule, and to the extent these decisions conflict with our opinion here, we disapprove those cases."); *see* ***Woodall v.***

State, 350 S.W.3d 691, 696 n.9 (Tex. App.–Amarillo 2011, no pet.).[1] But bias may sometimes be shown as a matter of law, in which instance the venire person is not ordinarily subject to rehabilitation. *See* ***id.*** at 92. Bias is established as a matter of law when a venire person admits he is biased for or against the defendant. ***Anderson v. State***, 633 S.W.2d 851, 854 (Tex. Crim. App. 1982). When a venire person is shown to be biased as a matter of law, he must be excused when challenged, even if he states he can set aside his bias and provide a fair trial. ***Id.*** It is left to the discretion of the trial court, however, to initially determine whether such a bias exists, and the trial court's decision will be reviewed in light of all of the answers given. ***Id.*** Unless bias or prejudice is established as a matter of law, the appellate court will not overturn the trial court's ruling. ***Little v. State***, 758 S.W.2d 551, 556 (Tex. Crim. App. 1988).

Appellant argues in his brief that venire persons 28 and 30 could not consider the full range of punishment, which subjected them to a challenge for cause. During defense counsel's voir dire, when the panel was asked if they could consider the entire range of punishment, venire person 28 said, "I wouldn't say I'd go for 99, but I sure wouldn't go for the minimum." Similarly venire person 30 said, "I'm like [venire person 28]. If they prove that he did it, I wouldn't go for the whole term, but I wouldn't go for the 25 either." When venire person 28 was called to the bench, the following colloquy transpired:

> THE COURT: Both the State and the defendant are entitled to jurors who can consider the full possible range of punishment in any particular case, not just in this case, but in any case. You understand that?
>
> VENIRE PERSON 28: After my statement I think you noticed there was a lady who said if that was the charge of the court, that she would consider it. Basically, I would do the same thing.
>
> THE COURT: Well, let me—
>
> VENIRE PERSON 28: But let me say this: You know, if somebody's found guilty of murder, in my opinion, and he gets 25 years and he gets paroled in seven years, that leaves a little nasty taste in my mouth.
>
> STATE'S COUNSEL: We're not asking you to commit to that.

[1] Statutory standards for bias and prejudice in criminal cases mirror those applicable to civil trials. ***Hyundai Motor Co. v. Vasquez***, 189 S.W.3d 743, 753 & n.47 (Tex. 2006) (stating that State or defense may challenge for cause a juror who "has a bias or prejudice in favor of or against the defendant") (citing TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(9)); *see also* ***Cortez***, 159 S.W.3d at 91-94 (noting similar tests in criminal voir dire cases concerning rehabilitation of jurors, limitations on scope of questioning, and standards for preserving error in denial of challenges for cause).

VENIRE PERSON 28: Right. Right.

STATE'S COUNSEL: We're saying that's the beginning and then there's the other end of that range. We're asking whether or not you can consider both lowest number and highest number and everything in between.

THE COURT: Let me finish my statement and finish my question.

VENIRE PERSON 28: I'm sorry.

THE COURT: Both the State and defendant are entitled to jurors who can consider the full possible range of punishment, from the minimum to the maximum. In this case you've been informed it's 25 to 99 years.

VENIRE PERSON 28: Yes sir.

THE COURT: The question is whether there are any circumstances in which you could consider the full range of punishment, minimum to maximum.

VENIRE PERSON 28: Yes, sir.

THE COURT: You don't know the circumstances in this case because you haven't heard the evidence.

VENIRE PERSON 28: Right.

THE COURT: Can you conceive of circumstances where you could consider the full range?

VENIRE PERSON 28: Yes, sir, because there's something that may come up during the trial—

THE COURT: Okay.

VENIRE PERSON 28: —that could do that.

THE COURT: Any questions?

DEFENSE COUNSEL: [Y]ou said one of your concerns with 25 is the fact that he may parole in seven and whether that is, in fact, reality or not, that might make you render a higher sentence if you thought he was going to parole. Right?

VENIRE PERSON 28: I think the judge just hit on that[. If] something comes up during the course of the trial, that's going to change my opinion on the means and extremes all the way.

DEFENSE COUNSEL: The one thing that really got me is when you first said you couldn't consider 25.

VENIRE PERSON 28: I understand.

DEFENSE COUNSEL: You still believe that?

VENIRE PERSON 28: Based on just—outside of here. Yes.

DEFENSE COUNSEL: Okay.

VENIRE PERSON 28: But based on the trial, I would have to base it on what was presented to me during the course of the trial---

> DEFENSE COUNSEL: So you do—
>
> VENIRE PERSON 28: —which it could change my mind.
>
> DEFENSE COUNSEL: You do have predilection to go away from 25?
>
> VENIRE PERSON 28: I could based on the evidence that's presented by the prosecution.

When venire person 30 was called to the bench, the following discussion occurred:

> THE COURT: [B]oth the State and defendant are entitled to jurors who can consider the full range of punishment from the maximum to the minimum.
>
> . . . .
>
> My question for you is whether or not there are any circumstances in which you can consider the full range of punishment.
>
> VENIRE PERSON 30: I believe in punishment, you know. If you do the crime, you have to pay the time. But the problem was, when he asked that question was if they, give him 25 years, then he—for murdering a person and then he gets out, say, in 10 years for good behavior, are we showing him, "Okay. You can kill somebody and get out in 10 years?"
>
> You have a chance to redo it. That's a life you took, you know. So, I mean, . . . if they say, "Okay. He's guilty," and he gets 25 years, I agree he got his punishment. You know. But then I have that problem of—you know, you got that problem.
>
> THE COURT: All right. Well, can you consider—are there circumstances in which you would consider the full range of punishment, including the minimum, not knowing what circumstances are in this case?
>
> VENIRE PERSON 30: Yeah, I would consider the minimum.
>
> THE COURT: Counsel?
>
> DEFENSE COUNSEL: If you were able to consider the minimum, . . . why was your first answer that you didn't—
>
> VENIRE PERSON 30: That's what I explained to you, because when you asked your question, I figured if he got the 25 years—I know some people that they're way out of there, you know, and they have been in prison and folks that got 25 years for killing a person but then they got out early, you know. If they serve the time that they get, I'm all for it, you know.
>
> DEFENSE COUNSEL: Well, are you, in fact, basing your statement on the minimum on the fact that you're considering parole and you're concerned that somebody is not going to get what they deserve by –
>
> VENIRE PERSON 30: I'm not saying nobody deserves it.
>
> DEFENSE COUNSEL: Yeah.
>
> VENIRE PERSON 30: But I'm saying if you take another person's life, you have to,—you have to—for your punishment—you know, like she said, if your child broke a taillight, I would punish

> my child, you know. If it's—the maximum was 25 years, yeah, I would be for it.
>
> DEFENSE COUNSEL: Okay. But there is a minimum and maximum, that the law says you have to consider the entire range from the bottom—
>
> VENIRE PERSON 30: Yeah, I would consider it all.
>
> DEFENSE COUNSEL: But you didn't at first.
>
> VENIRE PERSON 30: Well, I asked that question, you know, about the parole, I didn't know that if that would be involved in it. You know. I didn't know how you-all break it down. But as far as your question, yeah, I would consider the minimum because he's done the crime.

Venire persons 28 and 30 initially stated that they could not consider the entire range of punishment. After the law was explained, they each generally stated that they would consider the range of punishment, albeit in a somewhat vacillating and contradictory manner. As we have stated, when a venire person's answers are vacillating, unclear or even contradictory, we accord great deference to the trial court, because it had the better opportunity to see and hear the venire person. ***Swearingen***, 101 S.W.3d at 99. Therefore, after considering the entire record and giving due deference to the trial court, we cannot say that the trial court's denial of Appellant's challenges for cause to venire persons 28 and 30 was error. Moreover, our review of the entire record does not persuade us that venire persons 28 and 30 were biased as a matter of law.

Finally, Appellant argues that both venire persons 28 and 30 showed bias against parole laws. Issues on appeal must correspond or comport with objections and arguments made at trial, and an objection stating one legal theory may not be used to support a different legal theory on appeal. ***Dixon v. State***, 2 S.W.3d 263, 273 (Tex. Crim. App. 1998); *see* TEX. R. APP. P. 33.1. Appellant did not argue at trial that venire persons 28 and 30 showed bias against the parole laws. Therefore, he has failed to preserve this theory for our review.

Appellant's first and second issues are overruled.

DISPOSITION

We ***affirm*** the judgment of the trial court.

SAM GRIFFITH
Justice

Opinion delivered March 14, 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

MARCH 14, 2012

NO. 12-11-00090-CR

THOMAS H. FIELDER,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 159th Judicial District Court
of Angelina County, Texas. (Tr.Ct.No. 29427)

THIS CAUSE came to be heard on the oral arguments, 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.

THE STATE OF TEXAS
M A N D A T E

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TO THE 159TH DISTRICT COURT of ANGELINA COUNTY, GREETING:

Before our Court of Appeals for the 12th Court of Appeals District of Texas, on the 14th day of March, 2012, the cause upon appeal to revise or reverse your judgment between

THOMAS H. FIELDER, Appellant

NO. 12-11-00090-CR; Trial Court No. 29427

Opinion by Sam Griffith, Justice.

THE STATE OF TEXAS, Appellee

was determined; and therein our said Court made its order in these words:

"THIS CAUSE came to be heard on the oral arguments, 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."

WHEREAS, WE COMMAND YOU to observe the order of our said Court of Appeals for the Twelfth Court of Appeals District of Texas in this behalf, and in all things have it duly recognized, obeyed, and executed.

WITNESS, THE HONORABLE JAMES T. WORTHEN, Chief Justice of our Court of Appeals for the Twelfth Court of Appeals District, with the Seal thereof affixed, at the City of Tyler, this the ______ day of __________________, 201____.

CATHY S. LUSK, CLERK

By:______________________________
Deputy Clerk