NO. 12-11-00156-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

JAMES WESLEY SHERRILL, APPELLANT	***§***	***APPEAL FROM THE THIRD***
V.	***§***	***JUDICIAL DISTRICT COURT OF***
THE STATE OF TEXAS, APPELLEE	***§***	***ANDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

A jury found Appellant James Wesley Sherrill guilty of aggravated sexual assault and aggravated kidnapping and assessed his punishment at imprisonment for ninety-nine years and a $10,000.00 fine for each offense. In one issue, Appellant contends that the trial court erred in asking the foreperson of a deadlocked jury the numerical division of the jurors because the question, in itself, was coercive and exercised an improper influence upon them. We affirm.

BACKGROUND

The jury began its deliberations at 11:15 a.m. At 4:50 p.m., the jury sent a note stating that they were deadlocked. The trial court then gave the jury an agreed upon "***Allen***" charge and had them return to the jury room to continue their deliberations at 5:01 p.m. At 5:55 p.m., the jury sent a note requesting that they "get a copy of the testimony of the SANE [sexual assault nurse examiner] made on the stand." The trial court replied, "All the evidence is before you; please continue to deliberate." At 6:45 p.m., the jury sent the court another note that said, "We, the jury, cannot come up with a verdict at this point in time." The trial court had the jury brought back into the courtroom where, without objection, the court asked the foreperson, "[W]ithout

telling me how the jury is deadlocked, can you give me the numbers of where they are?" The foreperson replied that the vote was eleven to one. The court then said, "11 [to] 1, I'm going to send you back to continue your deliberations."

The prosecutor then stated to the court, "Your honor, I'm going to have to – after inquiring, now that we know it's 11 [to] 1, and sending them back to deliberate, I don't know how this cannot be considered coercive if it comes back as a guilty verdict. It's going to be a very much appealed decision. I'm asking for a mistrial." The judge did not grant a mistrial.

The jury then sent a note at 7:10 p.m., asking to hear a specific part of the SANE nurse's testimony. Without objection, the court had the requested testimony read back to the jury at 7:48 p.m. The jury returned a guilty verdict at 8:45 p.m.

COERCION AND IMPROPER INFLUENCE

In his sole issue, Appellant contends that the trial court's asking the numerical split of the deadlocked jury was coercive, created an improper influence on the jury, and should be regarded as reversible error.

As support for his argument, Appellant relies on ***Brasfield v. United States***, 272 U.S. 448, 47 S. Ct. 135, 71 L. Ed. 345 (1926). In ***Brasfield***, the jury indicated it was deadlocked after some hours of deliberation. The trial judge inquired how it was divided numerically. The foreman told the court that it stood nine to three, without indicating which number favored conviction. The Supreme Court declared that the inquiry itself is generally coercive and should be regarded as a ground for reversal. ***Id***. at 450, 47 S. Ct. 135-36. The court concluded that "[s]uch a practice, which is never useful and is generally harmful, is not to be sanctioned." ***Id***. However, in ***Lowenfield v. Phelps***, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568, the Supreme Court stated that the decision in ***Brasfield*** was an exercise of its supervisory authority over the federal courts. ***Id***. at 239-40, 108 S. Ct. at 552. The court noted that the ***Brasfield*** decision made no mention of the Due Process Clause or any other constitutional provision, and that the Federal Courts of Appeals had uniformly rejected ***Brasfield***'s per se reversal approach when reviewing state proceedings on habeas corpus. ***Id***. at 240 n.3, 108 S. Ct. at 552 n.3. The Texas Court of Criminal Appeals has held that the rule in ***Brasfield*** forbidding the federal trial courts from

questioning juries regarding their numerical division has no application to state proceedings. ***Howard v. State***, 941 S.W.2d 102, 124 (Tex. Crim. App. 1996). In ***Melancon v. State***, 66 S.W.3d 375 (Tex. App.–Houston [14th Dist.] 2001, pet. ref'd), the trial court asked the jury how they were divided numerically. The jury foreman replied, "We were pretty well split down the middle." The court of appeals held that the trial court's inquiry, "even if inappropriate," was not reversible error. ***Id***. at 384.

To preserve an issue on appeal, the record must show that Appellant made a timely objection, motion, or request to the trial court specifically stating the grounds for the ruling sought. TEX. R. APP. P. 33.1; ***Rhoads v. State***, 934 S.W.2d 113, 121 (Tex. Crim. App. 1996).

Appellant did not object to the trial court's inquiry about how the jury was divided numerically, nor did he ask for a mistrial. Appellant argues that it would have been futile to object or request a mistrial since the State asked for a mistrial, which the trial court implicitly denied. Therefore, he maintains that it was unnecessary for him to object or move for a mistrial.

A party may not rely on an objection raised by another party to preserve error unless there is sufficient indication in the record of an intent to adopt the objection. *See* ***Martinez v. State***, 833 S.W.2d 188, 191 (Tex. App.–Dallas 1992, pet. ref'd). Appellant did not join or adopt the State's request for a mistrial. Therefore, no error is preserved for review. Appellant's issue is overruled.

DISPOSITION

The judgment of the trial court is ***affirmed***.

BILL BASS
Justice

Opinion delivered May 31, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Bass, Retired Justice, Twelfth Court of Appeals sitting by assignment.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MAY 31, 2012

NO. 12-11-00156-CR

JAMES WESLEY SHERRILL,
Appellant

V.

THE STATE OF TEXAS,
Appellee

Appeal from the 3rd Judicial District Court
of Anderson County, Texas. (Tr.Ct.No. 30046)

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.

Bill Bass, Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Bass, Retired Justice, Twelfth Court of Appeals, sitting by assignment.