Affirmed and Opinion filed January 10, 2002.

In The

Fourteenth Court of Appeals

NO. 14-99-01373-CR

WILLIAM REESE BRYANT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 801,106

O P I N I O N

Appellant, William Reese Bryant, was convicted by a jury of the offense of aggravated robbery and sentenced to a term of sixty years in the state penitentiary. In five points of error, appellant contends: (1) the trial court abused its discretion in refusing to disqualify a juror for cause or providing an additional peremptory challenge; (2) the trial court erred in both informing the jury during the punishment charge that appellant had pled "true" to the enhancement allegation and in instructing the jury to find the enhancement allegation true; (3) the trial court erred in instructing the jury about good conduct time; (4) the evidence was legally insufficient to support the enhancement allegation; and (5) the evidence was factually insufficient to support the enhancement allegation. We affirm.

Appellant does not challenge the sufficiency of the evidence of the underlying offense, and thus we dispense with a recitation of the facts.

In his first point of error, appellant avers that the trial court erred when it denied appellant's challenge for cause against venireperson Pete White or failed to provide appellant with an additional peremptory challenge.[1] Specifically, appellant contends that White was properly challengeable for cause because he was predisposed to give greater credibility to the testimony of police officers resulting in a bias against appellant. Appellant exercised a peremptory strike against White after the court refused his challenge for cause. The record reveals that appellant exercised all of his peremptory strikes, that his request for an additional peremptory strike was refused, and that had he been granted an additional strike he would have used it against a juror whom he found objectionable and who was seated on the jury. This was sufficient to preserve the issue of the denial of his challenge for cause for review, and to require reversal if it is shown the denial of the challenge for cause was error. *See Chambers v. State*, 866 S.W.2d 9, 23 (Tex. Crim. App. 1993); *Demouchette v. State*, 731 S.W.2d 75, 83 (Tex. Crim. App. 1986).

The trial court has discretion in ruling on challenges for cause, and its rulings will not be upset on appeal absent an abuse of that discretion. *Ladd v. State*, 3 S.W.3d 547, 559 (Tex. Crim. App. 1999); *Banda v. State*, 890 S.W.2d 42, 53–54 (Tex. Crim. App. 1994). We must examine the record as a whole to determine whether there is support for the trial court's rulings, and, in doing so, we must give deference to the trial court, which was in a position to actually see and hear the venireman. *Ladd*, 3 S.W.3d at 559; *see also Penry v. State*, 903 S.W.2d 715, 728 (Tex. Crim. App.1995) (stating that, where a denial or grant of a challenge for cause is concerned, great deference is given to the trial court due to its ability to consider

[1] The State contends we cannot review appellant's first point of error as we have been afforded a transcription of voir dire that omits the preliminary remarks of the trial court. Voir dire, however, "starts when the State is called upon by the trial court to commence voir dire examination and actually starts that examination." *Montez v. State*, 975 S.W.2d 370, 371 (Tex. App.—Dallas 1998, no pet.) (citing *Williams v. State*, 719 S.W.2d 573, 577 (Tex. Crim. App. 1986)). "A trial court's introductory remarks . . . are not considered part of the voir dire examination even if voir dire-type questions are interspersed among them." *Id.* We thus have an adequate record to consider appellant's first point of error.

factors such as demeanor and tone of voice, which are not readily gleaned from a cold record).

Here, the record indicates that during the State's voir dire, an unidentified member of the venire articulated his tendency to believe police officers, at least initially, over persons in other occupations:

> [Unidentified Juror]: I tend to give [police officers] more credibility. I wouldn't necessarily immediately believe what they said.
>
> [State's attorney]: You might give them credibility after listening to their experiences, their background, and what they might have to say?
>
> [Unidentified Juror]: Just walking in, I'm going to tend to believe them a little more than Joe Shmo, the person off the street.
>
> [State's attorney]: And that might be something you're inclined to do. But knowing what the law says, they're all considered to be equal until you get a chance to hear what they have to say, can you follow the law and consider everyone equal until I give them a chance to testify?
>
> [Unidentified Juror]: Yeah.

No other venireperson expressed a similar sentiment. Yet, when defense counsel commenced his examination of White, he did so by positively asserting that White would have "a tendency to lean towards police officers before [he] heard one word." Thus, it seems logical to assume that the unidentified juror questioned by the State's attorney is the same person later identified by defense counsel as Mr. White.

White agreed with counsel's characterization that he had "a tendency to lean toward police officers before [he] heard one word," and even concurred in counsel's representation that this tendency "would prejudice [him] in favor of police more than anyone else." However, it is apparent from the context that White was not professing that a police officer would always be believable simply by virtue of his position. *See Smith v. State*, 907 S.W.2d 522, 531 (Tex. Crim. App. 1995). Rather, it is apparent "that while he might tend to believe

people in certain professions over some other people he would still listen to both sides and make up his mind depending on the facts and circumstances presented." *Id.* The record before us fails to establish a bias as a matter of law, and thus it was within the trial judge's discretion to overrule the challenge for cause. *Id.*

Our holding is bolstered by the fact that White remained silent when the prosecutor asked whether any potential juror would favor the testimony of police officers before hearing both what they had to say and their background or experience, this silence may be construed as a negative response.[2] *See Oberg v. State*, 890 S.W.2d 539, 543 (Tex. App.—El Paso 1994, pet. ref'd). Accordingly, appellant's first point of error is overruled.

In his second point of error, appellant contends the trial court erred in both informing the jury during the punishment charge that appellant had pled "true" to an enhancement allegation and in instructing the jury to find the enhancement allegation true.

The indictment alleged that appellant had been previously convicted of burglary of a habitation "in the Cause No. 718796." The cause number, however, was incorrectly alleged in the indictment; the actual cause number was 718769. When it was discovered that the last two digits had been inadvertently transposed, the State's attorney declared his intention to "abandon" this portion of the enhancement paragraph. Appellant's counsel stated that he was aware of the abandonment. When the jury returned, the State arraigned appellant on the enhancement paragraph. Consistent with the abandonment, the State did

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[2] In pertinent part, the prosecutor asked the following:

> The law says all witnesses are to be considered equal when they walk through the door. Now, once you have a chance to listen to them and hear about their experiences, find out about their background, hear what their testimony is, then at that point then you can make a decision on whether or not you're going to believe their testimony. Now, just because that person may be a police officer walking in the door, is there anybody here that's already going to believe what they have to say before you even have a chance to hear about their background or experiences? . . . So, the law says, until they take the stand and testify, they're all going to be considered equally. Knowing that, is there anybody that's going to believe a police officer over another person before you have a chance to hear what they have to say? Anybody here that's going to?

not make reference to a cause number for the burglary offense. Appellant then pled true to the enhancement allegation, and the State introduced exhibits containing appellant's written stipulation and the judgment of the prior offense. In both exhibits, the cause number was correctly identified as being 718769. Subsequently, the jury charge instructed the jury that appellant pled true to the enhancement allegation regarding his prior conviction in cause number 718769. Neither the appellant nor the State objected to the inclusion of the correct cause number.

Appellant now argues, in effect, that (1) the trial court's charge eliminated the State's burden of proving that appellant had been previously convicted in cause number 718796 (an impossible burden in light of the clerical error); (2) the charge authorized enhancement on a conviction not pled in the indictment; and (3) the indictment failed to give appellant proper notice of his prior conviction in cause number 718769. We disagree.

The only purpose of an enhancement paragraph is to provide the accused with notice that the State will attempt to use a specific conviction for enhancement of punishment. *Coleman v. State*, 577 S.W.2d 486, 488 (Tex. Crim. App. 1979); *see also Williams v. State*, 33 S.W.3d 67, 67 (Tex. App.—Texarkana 2000, no pet.). An enhancement allegation, therefore, is merely a pleading. *Brooks v. State*, 921 S.W.2d 875, 878 (Tex. App.—Houston [14th Dist.] 1996), *aff'd*, 957 S.W.2d 30 (Tex. Crim. App. 1997). It contains no elements of the offense and does not convey jurisdiction upon the trial court. *Id.* Accordingly, an enhancement allegation need not be pled with the same degree of particularity as the primary offense. *Freda v. State*, 704 S.W.2d 41, 42 (Tex. Crim. App. 1986); *Cole v. State*, 611 S.W.2d 79, 80 (Tex. Crim. App. 1981); *Brooks*, 921 S.W.2d at 878.

Here, the State inadvertently transposed two digits of the cause number in the enhancement paragraph of the indictment. However, unless there is some showing that appellant was prejudiced by this mistake—that he could not discern which offense the State intended to use for enhancement—there is no error. The object of the doctrine of variance between allegations of an indictment is to avoid surprise, and for such variance to be material

it must be such as to mislead the party to his prejudice. *Plessinger v. State*, 536 S.W.2d 380, 381 (Tex. Crim. App. 1976). Thus, a variance between the cause number alleged in the enhancement paragraph and the cause number of the prior conviction proved in court is not fatal to the enhancement so long as the appellant was not prevented from identifying the conviction and preparing a defense thereto. *Barrett v. State*, 900 S.W.2d 748, 752 (Tex. App.—Tyler 1995, pet. ref'd). Accordingly, where the State proves up the correct court, county, date, and offense, a variance in cause numbers is not fatal. *Straughter v. State*, 801 S.W.2d 607, 611 (Tex. App.—Houston [1st Dist.] 1990, no pet.).

Appellant acknowledged at trial that he understood there was a variance between the indictment and the State's proof. Appellant nevertheless entered a plea of true to the enhancement paragraph and signed a stipulation of evidence admitting the fact that he had been previously convicted in cause number 718769. A defendant's plea of true to an enhancement paragraph of an indictment is a waiver of any subsequent complaint that defendant was injured by the admission of prior conviction evidence. *Stewart v. State*, 856 S.W.2d 567, 570 (Tex. App.—Beaumont 1993, no pet.).

Thus, (1) the State was not required to prove up the incorrect cause number; (2) it satisfied its burden of proof by introducing the penitentiary records, stipulation of evidence, and obtaining a plea of true to the enhancement; (3) the variance here was not prejudicial to the defendant; and (4) there is nothing in the record to suggest the defendant was misled by the clerical error. Accordingly, we overrule appellant's second point of error.

In his third point of error, appellant contends the trial judge erred by instructing the jurors about the award of good conduct time and its effect on sentencing because he was not eligible for good conduct time based on the "aggravated" status of his crime. We disagree.

The instruction given to the jury by the trial court is specifically mandated by the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07 § 4(a) (Vernon Supp. 2001); *Espinosa v. State*, 29 S.W.3d 257, 260 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). This charge is universally applicable to all non-capital felonies,

which includes aggravated offenses under article 42.12, section 3(g), and therefore it is applicable here. *See id.*; *Edwards v. State*, 10 S.W.3d 699, 702–03 (Tex. App.—Houston [14th Dist.] 1999, no pet.). The trial judge is required by state law to give this charge in the penalty phase of a felony case. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07 § 4(a) (Vernon Supp. 2001); *Edwards*, 10 S.W.3d at 703. We overrule appellant's third point of error.

In his fourth and fifth points of error, appellant contends the evidence was legally and factually insufficient to support the jury's finding of "true" to the enhancement paragraph. However, after pleading true, a defendant cannot claim the evidence is insufficient to support an affirmative finding to an enhancement allegation; in other words, he waives a challenge to the sufficiency of the evidence on appeal. *See Harvey v. State*, 611 S.W.2d 108, 110 (Tex. Crim. App. 1981); *Harrison v. State*, 950 S.W.2d 419, 422 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd). As aforementioned, appellant entered a plea of true to the enhancement paragraph and signed a stipulation of evidence admitting the fact that he had been previously convicted in cause number 718769. Thus, appellant is precluded from complaining about insufficient evidence supporting the enhancement paragraph. *See id.* Accordingly, we overrule appellant's fourth and fifth points of error.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed January 10, 2002.
Panel consists of Justices Anderson, Hudson, and Frost.
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