Affirmed and Opinion filed January 20, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00107-CR

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CHARLESETTA ROSEMON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 769,693

O P I N I O N

Appellant was charged by indictment with the state jail felony offense of forgery. A jury convicted appellant of the charged offense. The jury assessed punishment at two years confinement in a state jail felony facility and a fine of $10,000.00. The trial court suspended imposition of the sentence and placed appellant on community supervision for a period of five years. As a condition of that community supervision, the trial court ordered *inter alia* 180 days confinement in a state jail felony facility. Appellant raises five points of error. We affirm.

I. *Brady* Disclosure

The first point of error contends the State failed to disclose *Brady* material resulting from the comparison of hand writing exemplars supplied by appellant and the instrument alleged to have been forged by appellant.

On September 2, 1997, the State requested handwriting exemplars from appellant for a comparison with the alleged forged instrument. Appellant complied with the State's request. Immediately prior to trial, appellant requested any *Brady* material. The State responded:

> . . . Just to clarify, there are no tangible results of a handwriting analysis. There are no written conclusions of any expert. I have orally, prior to trial, informed [appellant's counsel] that the results of the handwriting analysis were inconclusive, not exculpatory. That's the extent of what I have.

Subsequently, appellant called Milton Ojeman, a document examiner with the Harris County District Attorney's Office. Ojeman testified that he compared the handwriting exemplar given by appellant with a copy of the endorsement signature on the alleged forged document. Ojeman testified several results can be reached when comparing a known writing to the questioned document. Those results are positive identification, highly probable, probable, inconclusive, and positive elimination. When comparing appellant's exemplars to the alleged forged document, Ojeman's comparison result was inconclusive.

A prosecutor has an affirmative duty to disclose exculpatory evidence that is material either to guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83, 86, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215, 218 (1963); *McFarland v. State*, 928 S.W.2d 482, 511 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1119, 117 S.Ct. 966, 136 L.Ed.2d 851 (1997). Exculpatory evidence is material if there is a reasonable probability that its disclosure would have led to a different outcome in the proceeding. *See McFarland*, 928 S.W.2d at 511. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the trial. *See id.*

In the instant case, the prosecutor stated in the record that he had "orally, prior to trial, informed [appellant's counsel] that the results of the handwriting analysis were inconclusive, not exculpatory." That statement was not contested or contradicted by appellant. Therefore, we find the State disclosed the

results of Ojeman's handwriting analysis. Consequently, we hold there was no violation of *Brady*. The first point of error is overruled.[1]

II. Dismissal of Jury

The second point of error contends the trial court erred in failing to dismiss the jury. During voir dire, veniremember 55 indicated she would find it difficult to be impartial because she was "getting all these subliminal messages from [appellant]." Immediately after this statement, the trial court said: "That's all right, ma'am. Next." After the jury was selected, appellant moved for dismissal of the jury:

> Your Honor, also, I would request that the jury panel here be dismissed based upon the prejudicial remarks that were made by, I believe, Juror No. 55 wherein she stated that the Defendant was sending subliminal messages to her. I think this possibly had a prejudicial effect on the Defendant's right to a fair trial, in that it possibly prejudiced some of the other jurors or bias toward the Defendant.
>
> So, we think this jury possibly has some prejudice as a result of these remarks. So, we will ask this jury be, you know, dismissed.
>
> TRIAL COURT: Okay. Well, for the purposes of the record, let the record show that Juror No. 55 let the bailiff know that she had ulcers that would interfere with her jury duty and that she was also stricken for cause because of her denial of the Defendant's right to the Fifth Amendment right.
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> Among numerous comments that Juror No. 55 made, that juror was stricken for cause and there is no proof or indication that juror's remarks influenced the remaining people who were actually seated on the jury in any way whatsoever.
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> Your motion is denied.

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[1] Additionally, appellant argues that had the exemplars been timely disclosed appellant would have had an opportunity to have her own expert comparison. However, we can find nothing in the appellate record to suggest there was any State's action that prevented appellant from having an independent comparison of her handwriting with the endorsement signature on the back of the alleged forged document.

We read appellant's brief as arguing that the remarks of veniremember 55 could have affected those who ultimately served as jurors. In this context, appellant asks: "How will we ever know, since no curative instruction was given and no inquiry made?"

Rule 33.1 of the Rules of Appellate Procedure provides that generally to present a complaint on appeal, the issue must have been raised in the trial court by a timely request, objection or motion and the trial court ruled on the request, objection or motion. In the instant case, appellant moved for dismissal of the jury. However, she did not ask the trial court to inquire of the jurors what effect, if any, the comments of veniremember 55 would have on their service, nor did appellant request a curative instruction from the trial court. We hold the failure to make either request in the trial court does not preserve this complaint for appellate review. *See* TEX. R. APP. P. 33.1(a). The second point of error is overruled.

III. Dismissal of Juror

The third point of error contends the trial court erred in failing to dismiss veniremember 3, whom appellant argues was biased. During voir dire, appellant asked the venire if they would want someone of their state of mind serving on a jury if they were on trial. Veniremember 3 answered, "No," because someone had stolen her checks in the past. Appellant's request to have the veniremember struck for cause was denied. Appellant did not peremptorily strike the veniremember and she eventually served as foreperson of the jury.

When the trial court errs in overruling a challenge for cause against a veniremember, the defendant is harmed only if he uses a peremptory strike to remove the veniremember and thereafter suffers a detriment from the loss of the strike. *See Demouchette v. State*, 731 S.W.2d 75, 83 (Tex. Crim. App. 1986), *cert. denied*, 482 U.S. 920, 107 S.Ct. 3197, 96 L.Ed.2d 685 (1987). Error is preserved only if appellant used all his peremptory strikes, asked for, and was refused additional peremptory strikes, and was then forced to take an identified objectionable juror whom appellant would not otherwise have accepted had the trial court granted his challenge for cause or granted him additional peremptory strikes so that he might strike the objectionable juror. *See Adanandus v. State*, 866 S.W.2d 210, 220 (Tex.

Crim. App. 1993). In the instant case, because appellant did not peremptorily strike veniremember 3, this complaint has not been preserved for appellate review. Point of error three is overruled.

IV. Denial of Speedy Trial

The fourth point of error contends appellant's right to a speedy trial was denied. Prior to trial, appellant moved to have the prosecution dismissed due to a violation of article 32A.02 of the Texas Code of Criminal Procedure. The trial court denied the motion.

As the State points out, this same point of error was raised in *Harris v. State*, 827 S.W.2d 949 (Tex. Crim. App. 1992), *cert. denied*, 506 U.S. 942, 113 S.Ct. 381, 121 L.Ed.2d 292 (1992). The *Harris* court overruled the point, stating:

> We have held before that the Texas Speedy Trial Act, Article 32A.02, is invalid because it conflicts with the Texas Constitution's separation of powers provision. *Meshell v. State*, 739 S.W.2d 246, 257 (Tex.Cr.App.1987). Because the Act is invalid, it cannot provide the basis for the relief sought by appellant. *Robinson v. State*, 739 S.W.2d 795, 797 (Tex.Cr.App.1987).

827 S.W.2d at 956.

Based upon *Harris*, appellant is not entitled to the relief she seeks. The fourth point of error is overruled.

V. Confinement as a Condition of Community Supervision

The fifth point of error contends the trial court exceeded its authority in ordering appellant confined in a state jail facility for a period of 180 days. Specifically relying on Texas Code of Criminal Procedure article 42.12, section 15(c), appellant argues the confinement cannot exceed 90 days. Subsection (c) provides:

> (c) A judge may impose any condition of community supervision on a defendant that the judge could impose on a defendant placed on supervision for an offense other than a state jail felony, except that the judge may impose on the defendant a condition that the defendant submit to a period of ***confinement in a county jail*** under Section 5 or 12 of this article only if the term does not exceed 90 days. (emphasis added)

The State responds that the confinement was permissible under subsection (d) of the same article, which provides:

> (d) A judge may impose as a condition of community supervision that a defendant submit at the beginning of the period of community supervision to a term of ***confinement in a state jail felony facility*** for a term of not less than 90 days or more than 180 days, or a term of not less than 90 days or more than one year if the defendant is convicted of an offense punishable as a state jail felony under Section 481.112, 481.1121, 481.113, or 481.120, Health and Safety Code. A judge may not require a defendant to submit to both the term of confinement authorized by this subsection and a term of confinement under Section 5 or 12 of this article. For the purposes of this subsection, a defendant previously has been convicted of a felony regardless of whether the sentence for the previous conviction was actually imposed or was probated and suspended. (emphasis added)

When assessing punishment, the trial court stated: "And as a further condition of your probation, you will serve 180 days confined *in the State Jail Facility*." From this statement, we find the trial court invoked subsection (d) to impose the complained of condition of community supervision. We hold that under subsection (d), because the confinement was in a state jail felony facility rather than the county jail, the trial court was authorized to impose this condition of community supervision. The fifth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed January 20, 2000.

Panel consists of Justices Fowler, Frost and Baird.[2]

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[2] Former Judge Charles F. Baird sitting by assignment.

Do Not Publish — TEX. R. APP. P. 47.3(b).