Affirmed and Opinion filed August 24, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00155-CR

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ALVIN WILLIAM ALLEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 784,589

O P I N I O N

A jury convicted appellant, Alvin William Allen, of aggravated sexual assault and assessed punishment at fifteen years confinement. Appellant challenges his conviction in two points of error claiming the trial court erred in (1) granting the State's two challenges for cause and (2) overruling appellant's motion for mistrial. We affirm the judgment of the trial court.

The complainant, appellant's estranged wife, went to appellant's home to collect lunch money for their daughter. While there, appellant forced the complainant to submit to sexual

intercourse. Appellant claimed at trial that the complainant consented to having intercourse with him.

In his first point of error, appellant complains that the trial court abused its discretion by granting the State two challenges for cause during voir dire. Specifically, appellant complains that prospective jurors White and Rees were improperly excused.

During voir dire the prosecutor asked the venire if there was anyone who could not consider life imprisonment for someone found guilty of aggravated sexual assault. Jurors White and Rees indicated that they could not. At the completion of voir dire, the prosecutor moved to strike jurors White and Rees due to their inability to consider the full range of punishment, including life in prison. In response to the challenge to White, defense counsel stated, "I deny - will not agree" and indicated that he wanted to question juror White. The court, however, granted the State's challenge for cause without responding to defense counsel's request. When juror Rees was challenged for cause, defense counsel stated, "I would oppose that." The trial court granted the challenge for cause.

In order to preserve error on appeal when a trial court grants a challenge for cause, opposing counsel must make a timely and sufficiently specific objection. *See* TEX. R. APP. P. 33.1(a); *Fuller v. State*, 827 S.W.2d 919, 924-25 (Tex. Crim. App. 1992). While it is not necessary to use the words "I object," *see Taylor v. State*, 939 S.W.2d 148, 155 (Tex. Crim. App. 1996), an objection must inform the trial judge of the basis of the objection and afford him the opportunity to rule on it. *See Kemp v. State*, 846 S.W.2d 289, 302 (Tex. Crim. App. 1992). The objection should "afford opposing counsel the opportunity to address the merits of the objection in an attempt to remove it." *Id*. If an appellant does not object when a venire member is excused for cause, he may not challenge that ruling on appeal. *See id*.

While defense counsel did not lodge a specific objection to the challenge for cause to prospective jurors White and Rees, we find the comments made by defense counsel were sufficient to put the trial court on notice of his complaint. Having found defense counsel's

statements sufficient to preserve error, we now address the merits of appellant's claim that these jurors were improperly excused.

The State may challenge for cause any potential juror who appears biased or prejudiced against any phase of the law upon which the State is entitled to rely for conviction or punishment. *See* TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(3) (Vernon 1989 & Supp. 2000). Both the defendant and the State have the right to jurors who can consider the full range of punishment. *See Johnson v. State*, 982 S.W.2d 403, 405-06 (Tex. Crim. App. 1998); *Fuller v. State*, 829 S.W.2d 191, 200 (Tex. Crim. App. 1992). When there is a challenge for cause on that ground, the trial court should ascertain whether the prospective juror is willing to follow the applicable law, including fully and fairly considering the full range of punishment the law prescribes. *See Ortiz v. State*, 993 S.W.2d 892, 896 (Tex. App.—Fort Worth 1999, no pet.) (citing *Fuller*, 829 S.W.2d at 200). *See also Flores v. State*, 866 S.W.2d 682, 685 (Tex. App.—Houston [1st Dist.] 1993), *aff'd* 884 S.W.2d 784, 785 (Tex. Crim. App. 1994) (venire members are generally subject to challenges for cause if they cannot contemplate imposition of the most severe and least severe penalties prescribed by law for the offense in question). A prospective juror whose beliefs would prevent or substantially impair his or her ability to consider or apply relevant law in accordance with the trial court's instructions is biased within the meaning of article 35.16(b)(3). *See Cooks v. State*, 844 S.W.2d 697, 709 (Tex. Crim. App. 1992). Where it is clear from the responses that a juror is unable to consider the full range of punishment, he is deemed biased as a matter of law, and the trial court should grant a challenge for cause. *See id*.

Because the trial court is in the best position to evaluate the demeanor of a prospective juror, we review a trial court's ruling on a challenge for cause only for a clear abuse of discretion. *See Colburn v. State*, 966 S.W.2d 511, 517 (Tex. Crim. App. 1998); *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992). In reviewing a decision to sustain a challenge for cause, the standard is whether the totality of the voir dire testimony supports the trial judge's implied finding of fact that the prospective juror is unable to take the requisite oath and follow the law as given by the trial judge. *See id*.

Here, the State asked during voir dire whether there is "anybody who under no circumstances could you [sic] ever even consider a life sentence for someone you found guilty of aggravated sexual assault. . . . in the appropriate case?" In response, the record reflects jurors White and Rees responded affirmatively (both by raising their hands and responding "yes").

We find that White's and Rees's affirmative responses to the prosecutor's question were sufficient to make it clear that they could not consider the full range of punishment. Therefore, the trial court did not abuse its discretion by granting the State's two challenges for cause.

Appellant also asserts that because their responses were equivocal, he should have been granted the opportunity to question the challenged jurors further. However, it is not error for the trial court to terminate the voir dire examination when it is clear that the juror is conclusively biased. *See Whiting v. State*, 943 S.W.2d 102, 106 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (citing *Howard v. State*, 941 S.W.2d 102, 113 (Tex. Crim. App. 1996)). Because we have found that responses given by White and Reese clearly demonstrated bias, the trial court did not err in refusing to allow additional questioning. Appellant's first point of error is overruled.

In point of error two, appellant complains the trial court abused its discretion by not declaring a mistrial during the State's direct examination of the complainant. Appellant contends the complainant injected highly prejudicial testimony of prior bad acts by alleging past instances of abuse. While testifying to the events leading up to the sexual assault, the complainant said, "[a]nd because of my past abusive experiences with him I panicked." Defense counsel promptly objected. The court instructed the jury to disregard the comment but denied appellant's motion for mistrial.

Generally, it is error to admit evidence of an extraneous offense or bad act committed by the defendant during the guilt/innocence portion of the trial to show he acted in conformity therewith. *See* TEX. R. EVID. 404(b); *Abdnor v. State*, 871 S.W.2d 726, 738 (Tex. Crim. App.

1994). Whether a mistrial is necessary, due to the improper admission of evidence, depends on the particular facts of the case.[1] *See Hinojosa v. State*, 4 S.W.3d 240, 253 (Tex. Crim. App. 1999). A mistrial may be declared to halt trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile. *See Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). It is within the trial court's discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error. *See id*. A trial court's denial of a mistrial is reviewed under an abuse of discretion standard. *See id*. (citing *State v. Gonzalez*, 855 S.W.2d 692, 696 (Tex. Crim. App. 1993) (en banc)).

Usually an instruction to the jury to disregard the evidence will suffice to cure error in the admission of improper testimony. *See Richards v. State*, 912 S.W.2d 374, 377-78 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd) (citing *Coe v. State*, 683 S.W.2d 431, 436 (Tex. Crim. App. 1984). However, a mistrial is required when the improper evidence is "clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of withdrawing the impression produced on the minds of the jury." *See Hinojosa*, 4 S.W.3d at 253. Otherwise, the jury is presumed to follow the trial court's instruction to disregard improperly admitted evidence. *See id*.

In this case, the complainant's comment was brief and unembellished. Furthermore, the trial court instructed the jury to disregard the testimony regarding past abusive experiences with appellant. The complainant's comment was not clearly calculated to inflame the minds of the jury, nor was it of such a character as to suggest the impossibility of withdrawing the impression produced in the minds of the jury. Therefore, we hold the instruction given by the trial court cured any error in the admission of the testimony and the trial court did not abuse

[1] On appeal, the State argues that evidence of the past abusive and violent behavior of appellant toward the victim was admissible to prove appellant's motive, intent, opportunity, and state of mind at the time of the present offense. Because, as we explain below, we find that the error, if any, was cured by the court's instruction to disregard, we need not address whether the evidence was admissible.

its discretion in overruling appellant's motion for mistrial. Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed August 24, 2000.

Panel consists of Justices Yates, Fowler, and Edelman.

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