

Affirmed and Opinion filed October 7, 1999.



In The

Fourteenth Court of Appeals

NO. 14-98-00316-CR

PAMELA LYNN HINSEY, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the County Criminal Court at Law No. 2
Harris County, Texas
Trial Court Cause No. 97-33414**

OPINION

Pamela Lynn Hinsey appeals her conviction by a jury for misdemeanor driving while intoxicated (DWI). The trial court assessed her punishment at fourteen months probation and a \$400.00 fine. In one issue, appellant contends a clerk's error in marking appellant's jury list deprived her of her right to intelligently exercise her peremptory challenges and denied her a fair trial. We affirm.

Because this case involves an alleged error in jury selection procedures, a recitation of the underlying facts is unnecessary. During the voir dire examination of the jury panel by the prosecutor, juror number 11, Ms. Wagon, indicated that her husband's aunt was killed in

an accident caused by alcohol. Ms. Wagnon was called to the bench for further questioning to determine if she was challengeable for cause. Appellant's trial counsel asked Ms. Wagnon if her husband was involved in an accident with a drunk driver. Ms. Wagnon responded that it was not her husband, but her husband's aunt that "was the drunk," and this fact would have no effect on her. Further questioning revealed that Ms. Wagnon had no reason why she could not be a juror in this case. Appellant's trial counsel made no challenge for cause, or other objection to Ms. Wagnon, and the trial court qualified her as a juror. Appellant's trial counsel exercised his peremptory challenges striking three jurors other than Ms. Wagnon. For reasons not indicated in the record, both jury lists show a line through Ms. Wagnon's name with the words "dont [sic] strike" written by some unknown person immediately to the right of Ms. Wagnon's name. After the panel was sworn and seated by the trial court, including Ms. Wagnon, appellant's trial counsel made an oral motion to quash the jury panel on the basis that there was a line through Ms. Wagnon's name and he "was under the assumption that she had been stricken for cause." Appellant's trial counsel stated he didn't notice the words "dont strike," and "assumed that she was already [stricken] for cause." The trial court overruled appellant's motion to quash and/or request for an additional strike.

Appellant did not object to Ms. Wagnon being seated as a juror before the panel was sworn. It is well settled that it is the responsibility of the parties to assure that the jury impaneled does not include a juror that has been struck. *Jackson v. State*, 826 S.W.2d 751, 752 (Tex.App.–Houston[14th Dist.] 1992, pet. ref'd). The party must object before the panel is sworn, or else show that the juror was otherwise disqualified because of prejudice toward the appellant *Id.* As was the case in *Jackson*, defense counsel's mere assertions that he made a mistake in failing to strike Ms. Wagnon because of the clerk's error, is not supported by the record. *Id.* The only reason given by defense counsel for failing to strike Ms. Wagnon was that he did not see the hand-written notation that clearly showed Ms. Wagnon was not stricken. The "mistake" was caused by oversight of appellant's trial counsel, not by the clerk. To allow appellant to change her peremptory strikes by merely making an unsupported claim of mistake, after learning which veniremembers were struck by the State, would be inequitable. *Id.* at 752.

See also Meador v. State, 941 S.W.2d 156, 161-62 (Tex.App.—Corpus Christi 1996, pet. ref'd). Therefore, we find the record does not support appellant's claim of loss of a peremptory challenge by mistake based on error by the clerk. We hold appellant was not denied of her right to intelligently exercise her peremptory challenges.

Furthermore, appellant has not claimed that Ms. Wagnon was biased or prejudiced towards her. The record shows the trial court found her to be impartial and qualified, without objection or challenge for cause from appellant's trial counsel. *See Meador*, 941 S.W.2d at 162. We hold that the trial court did not err in overruling appellant's motion to quash the jury panel. We overrule appellant's sole contention and affirm the judgment of the trial court.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed October 7, 1999.

Panel consists of Justices Sears, Cannon, and Lee.¹

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¹ Senior Justices Ross A. Sears, Bill Cannon, and Norman Lee, sitting by assignment.